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1 **[The R.M.C. 803 session was called to order at 0904, 23 April 2026.]**

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

3 All parties present before the last recess are again
4 present. Colonel Garrett for the prosecution, who had been
5 previously excused, has returned and joined the team.

6 Mr. Nashiri, who attended from the alternate site at the
7 last open session, is present in court today.

8 Parties ready to proceed?

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

10 MJ [COL FITZGERALD]: So this is where I don't know who has
11 the matter for each particular motion, but you're telling me
12 Ms. Manuele has this one? Very well. Are you ready to proceed?

13 DC [MS. MANUELE]: Yes, sir.

14 MJ [COL FITZGERALD]: You may proceed.

15 DC [MS. MANUELE]: Good morning.

16 MJ [COL FITZGERALD]: Good morning.

17 DC [MS. MANUELE]: In AE 692, the defense requested a Daubert
18 hearing and requested that the commission order additional discovery
19 provided to the defense prior to conducting that hearing.

20 The government has asked the commission to forego holding a
21 Daubert admissibility hearing and make -- and make -- make the
22 determination on the pleadings alone that Mr. Kohlmann qualifies to
23 provide expert opinions.

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1 That issue, whether he is qualified to provide opinions has
2 not been briefed. And certainly if the commission is inclined to
3 make any such finding, we would ask for leave to file supplemental
4 briefing challenging his specific qualifications.

5 The issue -- specifically, the motion the defense filed was
6 based on the commission's order at AE 679, which set a deadline of
7 March 6th and was extended, at defense request, but to submit any
8 motion to conduct a Daubert hearing. And so based on the order
9 alone, the request was -- or I'm sorry, the deadline was to indicate
10 and request Daubert hearings for those expert witnesses that the
11 defense foresaw possible issues or challenges to their testimony.

12 The government listed 24 expert witnesses in their final
13 witness list. Only ten of those did the defense request hearing.
14 And the defense has requested that the commission hold a hearing
15 pretrial to see if the government is able to satisfy the requirements
16 under M.C.R.E. 702 prior to admitting any expert opinions that they
17 have indicated they intend to.

18 And in large part, as to why specific opinions could not be
19 challenged at this part -- at this time in regard to Mr. Kohlmann is
20 the fact that the government has not yet provided the opinions
21 Mr. Kohlmann intends to offer.

22 Without knowing what those opinions are, the defense can't
23 say that he's not qualified to offer that specific opinion or that

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1 the methodology used in reaching that specific opinion is faulty or
2 that the opinion is based on insufficient facts or data or that the
3 opinion is less probative than it is prejudicial under a 403
4 analysis.

5 What the government indicated was broad ranges of things
6 they expect to have Mr. Kohlmann testify about. And so, as an
7 example, they have indicated that they want -- they intend to call
8 him to testify about al Qaeda, its organization, and its stated
9 purposes in waging war against the United States.

10 What about al Qaeda? We don't know. What are the stated
11 purposes with which Mr. Kohlmann believes -- what does he intend to
12 testify about as far as their stated opinions?

13 Another time they said that we'll provide -- and looking at
14 page 14 of 692A, they indicate -- the government indicates that his
15 testimony is legally relevant because he will provide his expert
16 opinion on the al Qaeda organization and how it was organized before
17 and at the time of the USS COLE/MV Limburg attacks and the propaganda
18 significance of al Qaeda taking responsibility for various terrorist
19 attacks between 1998 and 2002.

20 What they haven't provided us is what Mr. -- how
21 Mr. Kohlmann believes al Qaeda was organized before or after the
22 COLE. So they said he's going to talk about these general topics,
23 but we don't have the actual opinions, the substance of his

1 testimony, in order to form an adequate challenge. And so we can
2 just say, you know -- I mean, I think it would be disingenuous to say
3 he's not qualified to offer this opinion without knowing what his
4 opinion is or that we should be challenging his opinion.

5 He might have opinions that are very favorable to
6 Mr. al Nashiri's case, but we don't know that because the substance
7 of his opinions have not been provided. And so certainly if -- if
8 the commission in any way believes that we should be challenging the
9 substance of his opinions without knowing what they are, then we
10 would ask for leave and additional time to conduct that briefing.

11 The government essentially rests on the fact that they
12 have -- and they have provided his CV now at this point. I believe
13 when we filed our initial motion we didn't have his CV yet. The
14 government has provided his CV. They have provided a list of
15 documents that he is relying on, but we don't know what he's relying
16 on those documents for. We don't know what conclusions or opinions
17 he is going to be offering.

18 And so the -- the government specifically states that his
19 expertise with -- I'm sorry -- I just lost my page again -- that his
20 extensive understanding of al Qaeda's history, organizational
21 strategy, leadership structure, and propaganda efforts demonstrate
22 his expertise over the subject matter. But that's not where the
23 analysis ends. That is but one part of what -- of the analysis and

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1 the gatekeeping function the commission is to determine prior to
2 allowing this evidence before the jury.

3 The defense, and more importantly Your Honor, need to hear
4 what his testimony entails to know if it will even assist the members
5 of the jury in understanding the evidence or in determining a fact in
6 issue. Because looking at 702, expert testimony only comes in if
7 it's going to help understand the evidence or assist the members to
8 understand a fact in issue.

9 If he's just going to come in and say al Qaeda existed and
10 this is when it was created, that's -- may very well not be a fact in
11 issue. I can't tell you that for sure because I don't know what his
12 views are on if al Qaeda existed or when it was created or the
13 structure of it. But certainly, when we have that information,
14 we -- that might not be a fact in issue. That might be something we
15 can all agree to.

16 And Mr. Kohlmann's testimony has previously been excluded
17 for that purpose, specifically because al Qaeda -- whether al Qaeda
18 existed wasn't an issue in the case.

19 So just -- I'm sorry?

20 MJ [COL FITZGERALD]: Have you interviewed Mr. Kohlmann?

21 DC [MS. MANUELE]: No, and we would like to. We would like to
22 know what his opinions are. And that is one thing the government
23 stated in their response, that we declined to interview him.

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1 And to be clear, I believe the e-mail correspondence was
2 attached to our reply with Lieutenant Colonel Nettinga from -- and
3 Captain Stinson on March 17th. And Captain Stinson said: Would it
4 help to interview this witness?

5 And Lieutenant Colonel Nettinga said -- did not say no, no.
6 We would like -- we don't want to. We said in order to have an
7 appropriate interview, we would like to be prepared -- or he said we
8 would like the information that we've requested in advance.

9 Certainly, if we arrange an interview, we need to know what
10 we're going in to talk to him about. And so if he has opinions ----

11 MJ [COL FITZGERALD]: But you told me you were provided his CV
12 and the materials for which he would rely on to give his opinion?

13 DC [MS. MANUELE]: The material -- the CV just recently, I
14 believe after this motion was filed. I think it was attached to the
15 government's response, if I'm not mistaken.

16 MJ [COL FITZGERALD]: So you had the CV and then you also got
17 materials after your response?

18 DC [MS. MANUELE]: I don't know for sure the timing of the
19 materials. There was -- I know they had indicated there was a
20 consultation packet, but it didn't have the materials at first, and
21 then the materials came later. And I don't want to misspeak. The
22 government may have the exact dates. I can ----

23 MJ [COL FITZGERALD]: I'm not worried about the dates. I'm

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1 just trying to make sure I'm reconciling your information. At the
2 time that I received your written response or your written motion,
3 the reply responses, you didn't have this information is what I
4 understand. You've now since received a CV and some materials?

5 DC [MS. MANUELE]: Yes.

6 MJ [COL FITZGERALD]: I'm aware you -- I'm not trying to use
7 the government's word or your words. I'm aware an interview did not
8 happen because you didn't have the materials.

9 DC [MS. MANUELE]: Right.

10 MJ [COL FITZGERALD]: So that's what I'm asking. Have you
11 interviewed him now that you have the materials?

12 DC [MS. MANUELE]: No. We have not interviewed him since we
13 have the materials.

14 MJ [COL FITZGERALD]: All right.

15 DC [MS. MANUELE]: Certainly that is something that we're
16 agreeable to doing, but the issue is that -- I mean, an
17 interview -- if we don't know what information he's intending to ask,
18 I guess I don't see the fruitfulness of an interview. And that's not
19 to say -- and certainly if the commission says, you know, that's all
20 you're going to get is an interview, then, you know, we will
21 absolutely interview him.

22 But the -- and that is why we are saying that nothing -- no
23 ultimate determination on the admissibility of any of his testimony

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1 should be made at this point because we -- the defense does not have
2 the information with which he intends to testify.

3 As the proponent of expert testimony, the government carries
4 the burden of proving admissibility under 702. And ----

5 MJ [COL FITZGERALD]: Prior to them being qualified as an
6 expert and rendering an opinion as an expert?

7 DC [MS. MANUELE]: Correct.

8 MJ [COL FITZGERALD]: Okay.

9 DC [MS. MANUELE]: And so they haven't listed him as anything
10 other than an expert opinion. He's not listed as a lay witness on
11 their witness list.

12 MJ [COL FITZGERALD]: Okay.

13 DC [MS. MANUELE]: He doesn't have any firsthand knowledge is
14 my understanding.

15 MJ [COL FITZGERALD]: Is that accurate, Government? Who is
16 speaking with respect to -- is it Mr. Kohlmann?

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

18 MJ [COL FITZGERALD]: Okay. You're not -- he's not being
19 called as a percipient witness or a fact witness?

20 ATC [LTC GARRETT]: Correct, sir.

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

22 Now you have that understanding.

23 DC [MS. MANUELE]: The -- and so the government seems to rest

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1 on his experience alone and then saying -- and so he's just going to
2 get up and discuss these general topics based on his experience. But
3 that's not where the analysis ends. That is but ----

4 MJ [COL FITZGERALD]: I understand I think his
5 experience -- his expertise is derived from that experience.

6 DC [MS. MANUELE]: I'm saying that ----

7 MJ [COL FITZGERALD]: He's not an experiential witness, right?
8 He's, "Hey, I've had some experiences." He's -- I think you're
9 trying -- I'm making sure I understand what you're saying. They're
10 not going to call him about his experiences. I'm assuming they're
11 going to have to lay some foundation that those experiences is how he
12 derived his qualifications to give an expert opinion.

13 DC [MS. MANUELE]: Absolutely.

14 MJ [COL FITZGERALD]: Okay. We're saying the same thing.

15 DC [MS. MANUELE]: Right. And so 702, "a witness qualified,"
16 and that can be through knowledge, experience. We understand.

17 And then it says: May testify about opinions. And if they
18 will assist the trier of fact in understanding the evidence or
19 determining an issue -- or a fact in issue. If the opinions are
20 based upon sufficient facts and data, the testimony is based on -- is
21 the product of reliable principles and methods, and if the witness
22 has applied these principles and methods to the facts of the case.

23 And so his qualifications -- and, again, certainly the

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1 opinions he would be able to offer -- just he may be wildly
2 qualified. But I think everybody would agree that doesn't mean he
3 gets to take the stand and offer any opinion he wants.

4 He would still be bound by the other limitations on his
5 opinions insofar as the relevance of the case: They're not
6 outweighed by prejudice; they're created using reliable methodology;
7 and that is applied to the facts of the case.

8 And so specifically, this witness, Mr. Kohlmann, he
9 was -- submitted -- he had a declaration that was submitted in the
10 military commissions in the case of Hadi al Iraqi that Judge
11 Pritchard excluded. And Judge Pritchard ----

12 MJ [COL FITZGERALD]: I'm not as familiar with that matter, so
13 I just want to make sure. He excluded the declaration or he excluded
14 him as an expert witness or both?

15 DC [MS. MANUELE]: The declaration -- the declaration was
16 offered in lieu of his testimony -- this was for presentencing. And
17 the declaration was offered and was filled with what the government
18 indicated would be expert testimony, and specifically ----

19 MJ [COL FITZGERALD]: In presentencing?

20 DC [MS. MANUELE]: Yes, sir. And in excluding that
21 declaration. That Judge Pritchard found -- and this is at AE 278E.
22 The -- the -- and Mr. Al-Iraqi was a plea, so it was just the
23 sentencing hearing, just to be clear. I wanted to make sure that

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1 was ----

2 MJ [COL FITZGERALD]: No, that part I do understand.

3 DC [MS. MANUELE]: Oh, okay. Okay.

4 MJ [COL FITZGERALD]: I'm just -- and I'm not trying to
5 confuse you, and you're doing fine. I'm trying to make sure I
6 understand because that seems contextually it could be different and
7 that's why I was asking. You said the judge in that particular
8 military commissions excluded a declaration, which is why I'm trying
9 to understand if there's any differentiation between two things.

10 One, it was a presentencing hearing, so relevancy is
11 different than a merits expert.

12 Two, is he excluding the declaration or did he exclude him
13 saying he's an unqualified expert or his expert opinion is not
14 relevant in these presentencing proceedings? That's the granularity
15 I'm looking for because ----

16 DC [MS. MANUELE]: Absolutely.

17 MJ [COL FITZGERALD]: ---- it seems like potentially it's
18 different, and I can't ----

19 DC [MS. MANUELE]: So what he actually -- all of the above
20 essentially.

21 So what Judge Pritchard said is that he is not an expert
22 pursuant to M.C.R.E. 702 -- I'm sorry. If he is not an expert
23 pursuant to M.C.R.E. 702, the declaration would be inadmissible

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1 because it is almost entirely comprised of hearsay without sufficient
2 indicia of reliability, and then puts in parentheses, "even under
3 relaxed rules," and his opinions exceed that which are allowed for a
4 lay witness.

5 So he then goes on to say -- and, again, as this witness is
6 only offered as an expert witness and it appears, based on what has
7 been provided thus far, that his testimony would be based on hearsay,
8 him reviewing works of other people or him reviewing interviews of
9 other people. So similarly, his -- without knowing anything
10 additionally, we would be in a similar situation as whether he
11 testified.

12 The -- Judge Pritchard went on to say that: A preponderance
13 of the evidence does not establish that Mr. Kohlmann possesses
14 knowledge, skill, experience, training, or education which would
15 allow him to employ an accepted social science methodology and
16 communicate a reliable and relevant expert opinion to the panel.

17 He was offered as an expert in international terrorism,
18 tracking al Qaeda, and other contemporary terrorist movements.

19 And Judge Pritchard specifically indicated: But to be
20 recognized as an expert in any field, an individual must do more than
21 possess a large quantity of information. And not -- an expert must,
22 based on their own knowledge, skill, experience, training, or
23 education, employ a methodology to reliably communicate information

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1 to the fact-finder to render an opinion that will assist the trier of
2 fact.

3 And in the declaration, Mr. Kohlmann, in reviewing his
4 experience, then went on to say that his methodology is based in
5 social science. And so one thing that Judge Pritchard picked up on
6 and indicated was that there's nothing to suggest that he has any
7 experience, training, or education in social science to properly
8 understand and implement that methodology.

9 He -- he then said: Even if he was an expert, in order for
10 him to render an expert opinion, he must have used reliable
11 methodology applied to the facts of the case to arrive at that
12 opinion, which is exactly what 702 says and all of the case law
13 regarding M.C.R.E. 702 and Federal Rule 702.

14 And he says: Mr. Kohlmann professes to have used a
15 case-oriented comparative analysis methodology. And he gives some
16 examples that he says, you know, when he -- he ranks the information
17 he's reviewing as either primary evidence, secondary evidence, or
18 tertiary evidence.

19 And then he says, and you have to necessarily look at
20 whether that evidence has any bias in assessing the weight to be
21 given that evidence.

22 Judge Pritchard found that declaration, which is
23 lengthy -- and I can provide a copy or have it marked, I think.

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1 **[Counsel conferred.]**

2 DC [MS. MANUELE]: I can certainly do that, Your Honor.

3 MJ [COL FITZGERALD]: You can mark the declaration as an
4 exhibit? Is that what you're ----

5 DC [MS. MANUELE]: Yes. Or provide -- I can just give it to
6 you as a courtesy copy as well. It is in the record of Mr. al-Iraqi
7 at ----

8 MJ [COL FITZGERALD]: Do you want me to consider it? I don't
9 mind if you want to mark it as an appellate exhibit.

10 DC [MS. MANUELE]: Yes, sir. If I may approach?

11 MJ [COL FITZGERALD]: You may.

12 **[Pause.]**

13 MJ [COL FITZGERALD]: If you would like to continue, I'll
14 indicate on the record the marking of that declaration of
15 Mr. Kohlmann from a different commission.

16 DC [MS. MANUELE]: Okay. And so he said that even if the
17 comparative -- oh, as another example, I'm sorry. I think I was
18 giving an example, the reason of bias. And then he ultimately
19 doesn't actually use any of that methodology in reaching his
20 findings.

21 Judge Pritchard explains: Even if the comparative analysis
22 is methodology that meets the rigors of M.C.R.E. 702 and Supreme
23 Court case law, interpreting the Federal Rules of Evidence -- Federal

1 Rule of Evidence 702, Mr. Kohlmann's declaration does not reflect
2 that he employed that methodology.

3 And the examples he uses are the labeling the source,
4 primary, secondary, and tertiary, and assigning specific weight. And
5 Judge Pritchard points out that after explaining that methodology at
6 the beginning, he never once then used the words "primary, secondary,
7 or tertiary." He never indicated that any of the information that he
8 was relying on, where it fell amongst those categories.

9 Further, that he didn't assign any weight to the source
10 based on that triage.

11 He goes on to say: He merely made factual assertions and
12 footnoted the source of the information.

13 He said: There is no evidence that he analyzed his sources
14 for potential issues of bias, which is something that he said his
15 methodology required.

16 And essentially he said: Without properly employing the
17 methodology, Mr. Kohlmann has become the mouthpiece of volumes of
18 hearsay whose reliability has not been vetted by any methodology at
19 all. The Rules of Evidence would permit him to communicate hearsay
20 only if he relied on it to form an expert opinion and determined its
21 reliability based on a recognized methodology.

22 And that has not happened.

23 He then goes further and says even if Mr. Kohlmann was

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1 designated an expert, and even if he had supplied -- or employed
2 sufficient methodology, he would still have found the declaration
3 inadmissible because it would not assist the panel in determining an
4 appropriate sentence, which was the ultimate issue in that case.

5 And so a thorough analysis, going through all of -- all of
6 his expertise, the methodology, and whether it's relevant to the case
7 at hand is something Your Honor needs to do also regarding
8 Mr. Kohlmann before he is admitted.

9 And certainly if we had a lengthy declaration that the
10 government had provided in advance of his testimony, then that may be
11 sufficient, because not every case requires a Daubert hearing. We
12 would certainly agree with that. But the commission does need to
13 have enough facts before it in order to make that determination.

14 And so Judge Pritchard also said then it would be
15 inadmissible because it wasn't relevant to the issues and that the
16 minimal probative value is substantially outweighed by the danger of
17 confusion, misleading the members, and inviting members to rely on
18 unreliable information because it comes from a, quote/unquote,
19 "expert."

20 This order was issued in May of 2024. And so the government
21 in its response does indicate some additional times that Mr. Kohlmann
22 has been either excluded or allowed as an expert witness, but an
23 analysis has to be done. And the burden is on the government.

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1 And so we need to know what his testimony is. And I would
2 submit in the form of a proffer of testimony before Your Honor. But
3 at a minimum, a declaration, or a report or detailed statement of his
4 testimony, not just general topics that he is going to testify about.

5 And I would submit and ask Your Honor to order the
6 government to provide that information, to provide detailed
7 information about the opinions that they seek to offer and allow the
8 defense if ----

9 MJ [COL FITZGERALD]: Detailed information seems like a broad
10 concept. You said a proffer -- a declaration or a proffer of
11 expected testimony.

12 DC [MS. MANUELE]: Yes, sir.

13 MJ [COL FITZGERALD]: Which seems different than the
14 government should be required in order to give detailed information.
15 Would the proffer of expected testimony or the declaration be that
16 detailed information?

17 DC [MS. MANUELE]: Yes, sir.

18 MJ [COL FITZGERALD]: I'm just trying to make sure I
19 understand what your ask is.

20 DC [MS. MANUELE]: Yes. I'm asking for the specifics of what
21 he's going to testify to. Not just that he's going to testify about
22 al Qaeda as an organization, but what about al Qaeda as an
23 organization. Does he intend to say that it was created at a certain

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1 time and place?

2 Does he intend to say -- they say "the structure of
3 al Qaeda." What is his understanding of what the structure of
4 al Qaeda is? What are the facts that he is relying -- like, what are
5 his opinions that he wants to offer?

6 And specifically we believe that this is required under the
7 law. Section 949j(a)(1) of the Military Commission Act of 2009 ----

8 MJ [COL FITZGERALD]: 949j ----

9 DC [MS. MANUELE]: j(a)(1).

10 MJ [COL FITZGERALD]: Thank you.

11 DC [MS. MANUELE]: Provides that the accused's opportunity to
12 obtain witnesses and evidence, quote, shall be comparable to the
13 opportunity available to a criminal defendant in a court of the
14 United States under Article III of the Constitution, end quote.

15 And so the government in their response says this is normal
16 military practice. We just give you, you know, a general idea. And
17 to be honest, I don't know if that's general military practice, but
18 what the law says is that they're supposed to be doing what
19 Article III courts do. And so the ----

20 MJ [COL FITZGERALD]: That's not true. It says they should be
21 doing something comparable.

22 DC [MS. MANUELE]: Comparable, yes. You're right.

23 And so the plain language says that we should be getting

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1 discovery comparable to defendants in federal courts. And the
2 federal rules ----

3 MJ [COL FITZGERALD]: 949j deals with opportunity to obtain.
4 So that's not a discovery rule, that's a production rule. Do you
5 agree with that?

6 DC [MS. MANUELE]: I don't necessarily agree with that.

7 MJ [COL FITZGERALD]: Well, it says, "opportunity to obtain
8 witnesses and other evidence." That sounds like production.

9 DC [MS. MANUELE]: Right. Well, we need to -- this evidence
10 in order to make additional challenges and be put on notice.

11 MJ [COL FITZGERALD]: Okay.

12 DC [MS. MANUELE]: And so Federal Rule of Criminal Procedure
13 16 is what governs disclosure requirements regarding expert witnesses
14 in federal court.

15 MJ [COL FITZGERALD]: So your ask is that I apply that Federal
16 Rule of Criminal Procedure to these proceedings?

17 DC [MS. MANUELE]: Or something comparable. And
18 specifically -- most importantly, with regard to expert witnesses and
19 the duty to disclose, the government -- at the defendant's request,
20 the government is to disclose in writing for any testimony that the
21 government intends to use at trial, any expert testimony that the
22 government intends to use at trial, a complete statement of all
23 opinions that the government will elicit from the witness either in

1 its case in chief or as rebuttal to defense witnesses that they are
2 noticed of, the bases and reasons for them and the witness'
3 qualifications.

4 And so what we are missing -- there is additional
5 information, publications authored in the last ten years, testimony
6 in the last four years, but the -- I would submit -- and certainly if
7 we can have it all, that's great. They have provided a testimony log
8 since -- since the motion was filed. And I believe it does go back
9 at least four years. They have provided a list of his publications.

10 But the most important aspect and what we don't have is a
11 complete statement of all of the opinions.

12 And the -- if I -- if I may use the ELMO for demonstrative,
13 then we can have marked.

14 MJ [COL FITZGERALD]: You may.

15 **[Pause.]**

16 DC [MS. MANUELE]: And so in comparing the disclosure
17 requirements, R.M.C. 701 is insufficient. It doesn't provide
18 comparable information to what a defendant in an Article III court
19 would be provided.

20 As to a complete statement of all opinions, an Article III
21 court requires that -- of all expert opinions, I'm sorry, whereas
22 R.M.C. 701 does not. The bases and reasons for each opinion an
23 Article III court requires, but R.M.C. 701 does not.

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1 Expert qualifications and publications of ten years,
2 Article III court requires and R.M.C. 701 does not.

3 Prior testimony list of four years, Article III court
4 requires. R.M.C. 701 does not.

5 And the disclosure being signed by the expert, Article III
6 court requires and R.M.C. 701 does not.

7 Lab reports and test results, Article III court requires.
8 R.M.C. 701 does require that.

9 But certainly Your Honor can see that this isn't comparable.
10 701 is insufficient. And so the defense submits that that
11 is -- certainly if the commission were to impose the requirements of
12 Federal Rule of Criminal Procedure 16, that would be comparable. But
13 right now, we -- the disparity is great between what the R.M.C.
14 provides for despite Section 949j.

15 And the reason this -- this Federal Rule of Criminal
16 Procedure ----

17 MJ [COL FITZGERALD]: Can I ask you this?

18 DC [MS. MANUELE]: Sure.

19 MJ [COL FITZGERALD]: Do you think the Manual for
20 Courts-Martial is not comparable to Article III rules?

21 DC [MS. MANUELE]: The -- I think the statute specifically
22 says it has to be comparable to an Article III court. And so ----

23 MJ [COL FITZGERALD]: I probably just said that wrong.

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1 So what about the Manual for Courts-Martial and Military
2 Rules of Evidence, Rules for Courts-Martial? Are they not comparable
3 to an Article III court?

4 DC [MS. MANUELE]: I think if -- that I couldn't -- I don't
5 know, and I can certainly review it if you would like to give me an
6 opportunity.

7 MJ [COL FITZGERALD]: I ask, and I'll probably ask Colonel
8 Garrett the same question, because you averred that the government in
9 your discussion said, well, we do what we do in military practice.
10 That's why I'm asking the question.

11 If they do what we do in military practice, is that -- is
12 that or is that not comparable to an Article III court?

13 DC [MS. MANUELE]: And my position would be that the plain
14 language of the law -- if the plain language said comparable to a
15 courts-martial, then certainly if it is comparable -- I would have
16 reviewed that, but unfortunately the plain language of the law
17 specifically says that it is to be comparable to an Article III
18 court. And so they had the choice of language in creating that
19 language. And in often places they do say that the rules of
20 courts-martial apply unless.

21 And this is one of those unlessees because they specifically
22 say in this requirement, as to the disclosure, that -- Article III
23 courts.

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1 MJ [COL FITZGERALD]: But, again, that's the rule of
2 production, so ----

3 DC [MS. MANUELE]: And that's what we're asking. I mean ----

4 MJ [COL FITZGERALD]: ---- production of witnesses and
5 evidence.

6 DC [MS. MANUELE]: Right. But in order ----

7 MJ [COL FITZGERALD]: You're not asking for production of
8 witness evidence, you're asking for production of discovery to assist
9 you in interviewing and analyzing the government's expert and
10 determining your course of action from there.

11 DC [MS. MANUELE]: Well, if it's something that they would
12 have to produce for testimony alone, it seems that it would be more
13 prudent to order it in advance so that litigation can be conducted in
14 advance without wasting the members' time, without causing a
15 potential mistrial once the witness starts testifying to information
16 that would be impermissible. And so whether it's ----

17 MJ [COL FITZGERALD]: Well, and that's going to happen
18 regardless of a Daubert hearing, right? They've got to qualify their
19 expert and you get an opportunity to voir dire that expert and
20 challenge their expert qualifications. So we're not going to do that
21 absent -- then he just gets to take the stand and be deemed an expert
22 the minute he takes the stand. Would you agree?

23 DC [MS. MANUELE]: Certainly.

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1 MJ [COL FITZGERALD]: Okay.

2 DC [MS. MANUELE]: And we're just asking to have that
3 opportunity prior to trial ----

4 MJ [COL FITZGERALD]: Sure.

5 DC [MS. MANUELE]: ---- because certainly the government
6 shouldn't be allowed to get up and say, "And then you're going to
7 hear from expert witness Mr. Evan Kohlmann, and he's going to tell
8 you da-da-da-da-da-da."

9 And then when we actually proffer it mid-trial, well guess
10 what? Maybe they don't get to hear any of that information because
11 Your Honor says, "Well, what methodology is he relying on? How is
12 that relevant to his opinion?" And you can't put the toothpaste back
13 in the tube.

14 And so at that point, certainly if we're trying to run a
15 timely, efficient, and error-free trial, it would be prudent to have
16 a hearing in advance.

17 And that's all we're asking for. We are not asking at this
18 point to exclude his testimony because we don't know what his
19 testimony is. That's all we're saying ----

20 MJ [COL FITZGERALD]: Okay.

21 DC [MS. MANUELE]: ---- is that we should have that hearing in
22 advance.

23 And if Your Honor doesn't want to, you know, order any

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1 discovery ahead of time, well, let's just call in Mr. Kohlmann and we
2 can get his testimony and we can challenge his testimony then for
3 Your Honor to make the appropriate analysis that is required.

4 MJ [COL FITZGERALD]: Okay. Would you agree, also, when they
5 put in this -- in 949j "comparable to an Article III," they could
6 have just said the commissions will adopt the Federal Rules of
7 Criminal Procedure but they didn't do that either, correct?

8 DC [MS. MANUELE]: Correct.

9 MJ [COL FITZGERALD]: Okay. But you're asking me to adopt in
10 this particular instance the standards laid out in -- can you tell me
11 the FRCP again?

12 DC [MS. MANUELE]: Yes. 16(a)(1). It's Rule 16 and then the
13 (a)(1)(G) ----

14 MJ [COL FITZGERALD]: Thank you.

15 DC [MS. MANUELE]: ---- details the ----

16 MJ [COL FITZGERALD]: FRCP 16?

17 DC [MS. MANUELE]: Yes.

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

19 DC [MS. MANUELE]: And so the -- and this was -- this rule as
20 stands now, the federal rule, was -- as it stands now was adopted in
21 2022. And specifically, the advisory commission -- the reason that
22 it was adopted as is is because basically by providing -- that the
23 old written summary -- because previously it was just provide a

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1 summary of what the witness is going to say. We don't even have that
2 here. We have a summary of topics. We don't even have a summary of
3 expected testimony.

4 And so -- or opinions. And so even that old federal rule
5 that said provide a summary of the testimony, the witness didn't
6 necessarily have to sign off on it. The -- all -- a complete
7 statement wasn't required. And the practitioners told the committee
8 that basically Daubert hearings had devolved into live expert
9 depositions because the defense counsel was provided insufficient
10 notice.

11 And they were just relying on usually vague summaries
12 drafted by the prosecution. And so we submit that this language
13 fixed that problem and is -- would work appropriately so for this
14 commission.

15 I do have the advisory committee notes if -- as a courtesy
16 copy.

17 MJ [COL FITZGERALD]: For the provision in FRCP ----

18 DC [MS. MANUELE]: Yes, sir.

19 MJ [COL FITZGERALD]: ---- 16? You can mark it if you want.

20 And returning back to your last document, the declaration of
21 Mr. Kohlmann in a previous proceeding of the military commissions,
22 it's marked as Appellate Exhibit 692C. So the advisory notes you're
23 submitting will be marked as Appellate Exhibit 692D.

1 **[Pause.]**

2 DC [MS. MANUELE]: Certainly if there is a process that is
3 already in place that this commission could say, you know,
4 that's -- seemingly would ease the defense's concerns, would give
5 everybody an adequate opportunity to challenge this information, and
6 to ensure that only reliable information goes before the commission,
7 especially in a capital case, the commission should make that
8 decision.

9 This case will likely be reviewed one day by the
10 D.C. Circuit in some capacity, the Supreme Court potentially. And so
11 it seems that the ask is not too great. If the -- to have him come
12 in and proffer his testimony or to have the government submit a
13 detailed statement, that is not an ask when they are seeking to
14 execute -- that is not too big an ask when they are seeking to
15 execute Mr. al Nashiri.

16 While a formal Daubert hearing isn't required, Your Honor
17 does need to have the appropriate information before you. And just
18 saying broad statements or broad areas that the government might seek
19 to have him testify about doesn't allow Your Honor to perform your
20 gatekeeping function.

21 They said he knows a lot of stuff. He's reviewed a lot of
22 stuff. And he's going to testify about the structure of al Qaeda,
23 about the membership, about their use of propaganda videos. What

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1 about? Without that information, without you having before you what
2 methodology he's relying on, what facts he's relying on, there's no
3 way for you to perform the gatekeeping function.

4 And interestingly enough, you know, because the government
5 says, oh, well, he cited these things. There have been -- actually
6 Dr. -- or Judge Pritchard points out an example in his -- in that
7 order where he says -- you know, he talks about the -- when you're
8 citing to evidence where you find specific evidence that Mr. Kohlmann
9 indicates that is something you should verify, he says -- he asserts
10 that the National Institute of Justice has singled out accurate
11 citations as a critical factor in determining the overall credibility
12 of expert witnesses.

13 He goes on to say: Yet the footnote right after that
14 sentence leads to a website that does not exist.

15 And so Judge Pritchard had the benefit of being able to comb
16 through and actually peer behind the curtain. There's no reason the
17 government shouldn't want to provide this information in advance.
18 They should say this is an expert opinion and if we believe it's
19 well-founded and based on solid ground, of course we want to meet
20 that burden before Your Honor. We shouldn't wait until the jury is
21 sworn.

22 And the government also included in their response just -- I
23 believe it was in a footnote, but made reference to he's been allowed

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1 to testify in the 9/11 Commission, Mr. Kohlmann.

2 And I just want to make clear to Your Honor that that was in
3 a motion hearing. That was regarding admissibility of the LHM
4 statements. There was no mention in the ultimate order that was
5 filed in that ruling that his testimony was relied on. It's just not
6 touched on at all. But the difference is is that's not before the
7 member panel. That was before a judge who has an opportunity to
8 weigh all of this information prior to this going before the jury.

9 And so certainly the risk of prejudice and the risk of error
10 is far less if his testimony is admitted for a pretrial hearing for a
11 very specific area versus if he is called before the members to just
12 talk generally about areas that have not even been narrowed without
13 any notice of what his opinions are.

14 MJ [COL FITZGERALD]: Thank you.

15 DC [MS. MANUELE]: May I have a moment? Unless you have
16 questions.

17 MJ [COL FITZGERALD]: I just have one question. So if you
18 were to receive a declaration or proffer of expected testimony in
19 conjunction with the curriculum vitae you've already received and
20 documents you already received, you could then interview? Because I
21 think that's some of the holdup, too, right? You haven't -- the
22 government has suggested why don't you just interview him, and you've
23 said, "We don't have sufficient information to do that interview."

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1 Is that what you're looking for, then? Because at the time
2 you said you didn't interview him, you had -- you didn't have the CV,
3 you didn't have the documents relied upon, and you didn't have a
4 declaration.

5 DC [MS. MANUELE]: Right.

6 MJ [COL FITZGERALD]: Is there anything else you would
7 need -- because I won't be involved in that part -- right? -- whether
8 you want to do an interview.

9 DC [MS. MANUELE]: Correct.

10 MJ [COL FITZGERALD]: So I'm asking, would that be sufficient
11 for you to conduct here at least an initial interview with
12 Mr. Kohlmann?

13 DC [MS. MANUELE]: If we were -- did you say if we were also
14 provided a summary of his expected testimony?

15 MJ [COL FITZGERALD]: Proffer expected testimony or a
16 declaration. So it's -- I think what you're asking is discrete and
17 finite information as to what he will render an opinion to.

18 DC [MS. MANUELE]: Yes.

19 MJ [COL FITZGERALD]: However that comes to you ----

20 DC [MS. MANUELE]: Right. So long ----

21 MJ [COL FITZGERALD]: ---- that nebulous, large topical areas
22 which you're concerned, I imagine that you'll do an interview and he
23 says, "Well, I'm going to talk about the organization and how they're

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1 funded and format and organized and how they conduct business
2 generally."

3 That's the interview you don't want to have.

4 DC [MS. MANUELE]: Correct.

5 MJ [COL FITZGERALD]: Okay. I think understand. All I'm
6 asking if that's the large missing component you have is his finite
7 and discrete intended opinion testimony?

8 DC [MS. MANUELE]: Yes, sir.

9 MJ [COL FITZGERALD]: Okay.

10 DC [MS. MANUELE]: May I have a moment?

11 MJ [COL FITZGERALD]: You may.

12 **[Counsel conferred.]**

13 DC [MS. MANUELE]: And -- oh, I'm sorry.

14 MJ [COL FITZGERALD]: You may proceed.

15 DC [MS. MANUELE]: And just one point of clarification.

16 Certainly -- I guess I just want to make clear our interview wouldn't
17 substitute for a Daubert hearing, but ----

18 MJ [COL FITZGERALD]: Oh, I'm not asking ----

19 DC [MS. MANUELE]: Oh, okay. And I thought we were on the
20 same page.

21 MJ [COL FITZGERALD]: It seems to me if you wanted to have a
22 Daubert hearing, I would like to think you had done your due
23 diligence and interviewed him and said, you know, based on the

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1 interview -- based on the things we had discovered to us, we still
2 need a Daubert hearing.

3 DC [MS. MANUELE]: Yes, absolutely.

4 MJ [COL FITZGERALD]: That's ----

5 DC [MS. MANUELE]: That is what I'm saying, is because we
6 don't ----

7 MJ [COL FITZGERALD]: Or maybe you come back and say we don't
8 need it, we understand his opinion.

9 DC [MS. MANUELE]: Absolutely.

10 MJ [COL FITZGERALD]: Okay.

11 DC [MS. MANUELE]: Yes.

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

13 DC [MS. MANUELE]: No, unless you have any questions.

14 MJ [COL FITZGERALD]: Yeah. So I'm making it clear, I'm not
15 saying do those things because I'm not doing a Daubert hearing.

16 That's not what I'm suggesting.

17 DC [MS. MANUELE]: Understood.

18 MJ [COL FITZGERALD]: Okay. Very well. Thank you.

19 DC [MS. MANUELE]: Thank you.

20 MJ [COL FITZGERALD]: Did we mark that chart? I think you
21 just did it for demonstrative purposes, but I don't ----

22 DC [MS. MANUELE]: **[Counsel away from podium; no audio.]**

23 MJ [COL FITZGERALD]: Will you mind if we marked it since I

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1 think even I referred to it at least once? And we'll mark that as
2 692E.

3 Colonel Garrett for the prosecution?

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

5 MJ [COL FITZGERALD]: Good morning.

6 ATC [LTC GARRETT]: Good morning.

7 **[Pause.]**

8 ATC [LTC GARRETT]: Your Honor, I'd like to respond to several
9 of the points made by defense counsel, starting with one of her first
10 ones, which is that the government's stance is that the commission
11 can rely on the pleadings alone. And that is correct. But she went
12 further to say that our pleadings have not been briefed, which the
13 government would argue is not an accurate description considering
14 that of the ten challenged by the defense, the commission has already
15 approved six of those as experts.

16 Defense counsel also mentioned that we have not provided the
17 opinions, and referenced our first disclosure. And the government's
18 been trying to refine and facilitate defense's knowledge on
19 this -- on all of our experts to include a supplemental discovery
20 response regarding this witness.

21 And we gave four very specific items that we proffered that
22 he will testify to in his expert opinion.

23 **[Counsel conferred.]**

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1 ATC [LTC GARRETT]: First being that al Qaeda used
2 mass-casualty attacks, like the USS COLE attack, to recruit
3 additional members to their organization.

4 Second, that at the time of the USS COLE video, that was and
5 remained for some time the most successful recruiting video for
6 al Qaeda, and that the making and distribution of the COLE video was
7 a claim of responsibility for the USS COLE attack.

8 The third opinion, the five letters that were noticed by the
9 government as having been recovered from the Abbottabad compound are
10 consistent with letters authored by Usama bin Laden.

11 Mr. Kohlmann will also provide testimony to provide context
12 and meaning to the contents of those letters, including but not
13 limited to the letter that references Mr. Nashiri.

14 And lastly, that Mr. Nashiri is referring to Ibn al Khattab,
15 a well-known mujahideen commander in Chechnya when he discusses Habib
16 during the CSRT. That's very specific. So when defense says that we
17 haven't told them ----

18 MJ [COL FITZGERALD]: But it also seems peculiar to say those
19 are expert opinions.

20 ATC [LTC GARRETT]: Say again? I'm sorry.

21 MJ [COL FITZGERALD]: It also seems peculiar to say those
22 things, which sound very factual, are matters for somebody giving an
23 expert opinion.

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1 ATC [LTC GARRETT]: Well, Your Honor, I think this goes to the
2 colloquy that you had with both the defense and the government when
3 we -- during the expert qualification of Special Agent McFadden where
4 you focused in on the rule which talks about specialized knowledge.
5 And I think that the government has taken that colloquy as guidance
6 from the commission when specialized knowledge is at play that that
7 is an expert opinion and not a lay opinion.

8 So this type of concept, this al Qaeda knowledge and
9 organization, and -- it's complex. It's one of the reasons -- I'm
10 sorry. Were you going to ----

11 MJ [COL FITZGERALD]: But I think that's the point. When
12 you're talking about Agent McFadden, you're talking about somebody
13 who demonstrated significant qualification, experiences as a law
14 enforcement agent, and somebody who spoke the language and
15 investigated this field.

16 They're looking for the same information in this person
17 because he seems to be in the -- in a field not generally recognized,
18 right? I think if you put a law enforcement agent, the reasonable
19 person, the members of the panel could say, "I understand what he's
20 going to tell me from a law enforcement agent's perspective."

21 Where is the analog in this particular witness, based on
22 what I understand about Mr. Kohlmann, and as an example, the
23 challenges that another commission had with his purported expertise?

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1 ATC [LTC GARRETT]: Well, Your Honor, the analog has to deal
2 with his specific knowledge gained through extensive study and
3 education. That is the methodology as described in our brief. That
4 this is not a hard science. This is -- I know we're ----

5 MJ [COL FITZGERALD]: And I guess that is the point.
6 Agent McFadden, I'm going to use him as an example.

7 ATC [LTC GARRETT]: Yeah.

8 MJ [COL FITZGERALD]: I doubt if he would act contrary to
9 other law enforcement agents, right? He went to some type of law
10 enforcement training, academy, or something similar to it. I don't
11 recall if I ever learned that specifically about what he did, but to
12 be a -- trained and certified as the agent that he was, went through
13 a probationary period, was peer reviewed obviously, probably went
14 through a probationary status, all those type of things that don't
15 seem to lend itself to this particular expert. Didn't go through a
16 specific school or training that I'm aware of. Has not been subject
17 to probationary analysis or a peer-review publication of his work,
18 scrutiny by other people who may practice in this or a similar field.

19 I think that's the challenge here at least with this
20 particular purported expert. Can you help me understand that?

21 ATC [LTC GARRETT]: Well, yes, Your Honor. I think he has had
22 extensive scrutiny.

23 MJ [COL FITZGERALD]: By whom?

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1 ATC [LTC GARRETT]: To be qualified as an expert.

2 MJ [COL FITZGERALD]: Peer-review scrutiny, what peers exist
3 for him?

4 ATC [LTC GARRETT]: Again, but peer review does not exist for
5 Agent McFadden nor this type of expert ----

6 MJ [COL FITZGERALD]: No, I just gave you an example how he
7 was probably peer reviewed, unique knowledge and common sense. If
8 he's a rogue agent, he's probably not going to be long in that
9 agency. He went through a probationary period supervised by other
10 people, gets evaluated, I imagine, on an annual basis. Those are
11 forms of peer review -- right? -- that, you know, somebody is looking
12 at him as he's growing and maturing in the field to see if he's also
13 meeting their standards.

14 That's why I'm asking what's the analog for this particular
15 person. I haven't heard that he's been in the employ of other
16 people, that he's subjected himself to anybody saying you're doing a
17 good job or you're not doing a good job, tighten up your work,
18 tighten up your analyses or you're not long for this work. So that's
19 what I'm asking.

20 ATC [LTC GARRETT]: Yes, Your Honor. And ----

21 MJ [COL FITZGERALD]: It seems very different.

22 ATC [LTC GARRETT]: It is different in that sense of law
23 enforcement versus his expertise that he has gained as a terrorism

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1 expert in al Qaeda. But it is the same because of specialized
2 knowledge.

3 And not to quibble with the peer-review aspect of it but the
4 examples you gave, Your Honor, I do not think would apply to his
5 expert opinion. Those were all reviews as he advanced in his career.

6 And you asked about employment with regards to Mr. Kohlmann.
7 He's contracted by the Canadian government for the Kanishka Project
8 using his expertise in the origin, structure, and organization of
9 terrorism movement such as al Qaeda to provide research on terrorists
10 online communications and to preventing and countering violent
11 extremism.

12 He's offered books specifically on al Qaeda's organization
13 and development in Europe. He's published extensively on terrorism
14 movement, organization and development, including al Qaeda.

15 His expertise in the terrorism organization and movement is
16 recognized and respected by major news media and foreign governments.
17 The CV provided, Your Honor, is much more extensive than these few
18 examples that I'm giving you, and that's one of the reasons he has
19 been qualified so many times.

20 The defense referenced a few times that it didn't happen.
21 And I just would like to highlight for you that for your -- if you'd
22 like more information on that -- on those instances, they are
23 described in footnote 38 of our brief, AE 692A.

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1 But Mr. Kohlmann has been an expert consultant in 79 cases
2 and provided expert testimony in 48 of those cases. So he certainly
3 had the scrutiny required to be an expert in his field.

4 Defense, in preparation for today, long before today, they
5 could have interviewed Mr. Kohlmann. They have -- they've asked that
6 for other witnesses. They have not asked that until today at the
7 podium, saying how much they would like to interview him.

8 Defense pointed out accurately that he did recently testify
9 in another commission. And that's also referenced in our brief on
10 page 10. And that was on April 29th, 2024. He didn't just testify;
11 again, qualified as an expert.

12 Defense talked about getting this CV so late in the game,
13 and that's just simply not true. The government has given extensive
14 discovery over the years, Your Honor. The first time the prosecution
15 provided Mr. Kohlmann's CV to the defense was December 17th, 2015.
16 And I'd like to have that marked and put into the record.

17 MJ [COL FITZGERALD]: What are you having marked? I'm sorry.

18 ATC [LTC GARRETT]: The first CV that was provided to the
19 defense of Mr. Kohlmann.

20 MJ [COL FITZGERALD]: Does the document you are providing
21 indicate that they received it in December of 2015?

22 ATC [LTC GARRETT]: Yes, it does.

23 MJ [COL FITZGERALD]: Okay. We'll mark that as 692F.

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1 ATC [LTC GARRETT]: And before I hand it to your court
2 reporters, we also provided an updated CV a year ago. It was
3 actually almost exactly a year ago, April 10th, 2025. And I'd like
4 to also have that marked and put into the record.

5 MJ [COL FITZGERALD]: That will be marked as 692G.

6 ATC [LTC GARRETT]: May I approach?

7 MJ [COL FITZGERALD]: You may.

8 **[Pause.]**

9 ATC [LTC GARRETT]: And, Your Honor, as evidenced by that
10 first CV, Mr. Kohlmann has been a part of the military commissions,
11 and this case in particular, for a very long time. And, again, the
12 government has given extensive discovery on Mr. Kohlmann over the
13 years, to include his movie, the al Qaeda -- *The Al Qaida Plan*, which
14 is, in many respects what -- how he became known all those years ago.

15 So the CV provided with -- recently is at least the third CV
16 the prosecution has provided in 11 years.

17 Defense mentioned that Mr. Kohlmann could give any opinion
18 that he wants, but that's simply not true. If he strays from the
19 expertise that he's qualified as, the defense can object at that time
20 and the commission can shut it down.

21 The defense wants a report. The report is not required
22 under our rules. And we are happy to facilitate an interview, and
23 have been all along.

1 And to answer your question, Your Honor, we did look -- you
2 forecast that you would like to ask me regarding whether the
3 Article III provision is referenced in the Manual for Courts-Martial
4 and it is not.

5 MJ [COL FITZGERALD]: Thank you.

6 **[Pause.]**

7 ATC [LTC GARRETT]: Your Honor, in a terrorism case such as
8 this, specialized knowledge is going to be common in our experts.
9 It's not the traditional Daubert analysis. It isn't science based.
10 It's experience based, knowledge based.

11 Mr. Kohlmann acquired specialized knowledge through many
12 years of personal experience and study. He acquired information and
13 knowledge and accumulated knowledge and experience. That accumulated
14 knowledge and experiences forms the basis of his specialty.

15 Here, Mr. Kohlmann has been proffered as an expert in the
16 origin, structure, and leadership of al Qaeda. And our Rule 702
17 identifies that the expert's knowledge needs to be based on
18 scientific, technical, or other specialized knowledge. And that is
19 what Mr. Kohlmann's expertise is. It's specialized.

20 It's specialized based over 28 years of studying,
21 publishing, and working as an international terrorism expert. His
22 extensive knowledge, education, training, and experience in the field
23 qualifies him to provide the expert opinions noticed by the

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1 prosecution.

2 And the commission was provided his CV. The commission now
3 has three CVs of Mr. Kohlmann to review when looking at his
4 qualifications.

5 And I referenced his work for the Canadian government and
6 the Kanishka Project and other items. It's because of the depths of
7 Mr. Kohlmann's past studies and the information he's acquired over
8 the years, including the personal knowledge that he accumulated
9 throughout his close to three decades of studies on the subject is
10 why he has been called so many times as an expert on this matter.

11 MJ [COL FITZGERALD]: Maybe that's the sticking point. You
12 said "this matter." What is "this matter"?

13 I think the defense has said multiple times they're looking
14 either for a proffer of expected testimony or a declaration, which
15 would serve essentially as a proffer of expected testimony. Have you
16 provided something akin to that or those two documents?

17 ATC [LTC GARRETT]: We've provided the initial disclosure as
18 well as the supplement, which -- may I have just a moment?

19 MJ [COL FITZGERALD]: You may.

20 **[Counsel conferred.]**

21 ATC [LTC GARRETT]: In addition, we have provided the synopsis
22 of his testimony, and that's at 440JJ (Amend).

23 And to answer your question about what is the matter, Your

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1 Honor, the matter is al Qaeda. And we've been even more specific by
2 saying we want him to discuss the origins, structure, and leadership
3 of al Qaeda.

4 MJ [COL FITZGERALD]: Does he have an expertise in the area of
5 al Qaeda in the time frame for the alleged offenses?

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

7 MJ [COL FITZGERALD]: Because I think that's why they're
8 looking for, potentially, the proffer of expected testimony. It's
9 one thing to say in 2026 I'm an expert in al Qaeda over a quarter
10 century versus I have a sufficient expertise and knowledge of
11 al Qaeda at the time of the alleged offenses, and to not confuse the
12 members of the panel about that.

13 ATC [LTC GARRETT]: Well, I think baked into the cake of what
14 we've noticed with the origins of al Qaeda, it's taking us back to
15 the applicable time frame, Your Honor ----

16 MJ [COL FITZGERALD]: All right.

17 ATC [LTC GARRETT]: ---- and the structure and leadership of
18 al Qaeda at that time. We're not asking him to talk about al Qaeda
19 today, Your Honor.

20 We intend to call Mr. Kohlmann to testify about al Qaeda,
21 it's organization and its stated purposes in waging war against the
22 United States, which would be relevant to the terminal element of
23 each charge, that the actions were taken in the context of and

1 associated with hostilities, as well as the conspiracy charge.

2 And given Mr. Kohlmann's extensive background in this area,
3 the proffered opinions do not exceed the scope of the witness'
4 expertise.

5 Under M.C.R.E. 703, an expert's opinion may be based upon
6 personal knowledge, assumed facts, documents supplied by other
7 experts, or even listening to the testimony at trial.

8 Mr. Kohlmann's testimony is legally relevant to the case
9 because he will provide his expert opinion on the al Qaeda
10 organization and how it was organized before and at the time of the
11 USS COLE and MV Limburg attacks and the propaganda significance of
12 al Qaeda taking responsibility for various terrorist attacks between
13 1998 and 2002.

14 An expert -- an expert's testimony, Your Honor, can be
15 relevant because it helps to identify, gauge the reliability of, and
16 interpret evidence that would otherwise elude, mislead or remain
17 opaque to a layperson. It helps to synthesize dense or voluminous
18 historical texts, or it offers background knowledge or context that
19 illuminates, or places in perspective, past events.

20 Moreover, expert testimony on al Qaeda's origin, leadership,
21 and operational structure has been found relevant when such testimony
22 could aid the jury in understanding how al Qaeda came to be and the
23 manner in which it functions.

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1 The prosecution is required to prove that all charged
2 offenses occurred in the context of and associated with hostilities
3 and that the accused was engaged in a conspiracy with other al Qaeda
4 members to commit other charged offenses.

5 Mr. Kohlmann's testimony will provide essential context to
6 interpret the other evidence as it relates to the existence of
7 hostilities and the existence of a conspiracy.

8 Your Honor, al Qaeda is not just another criminal
9 organization. It is a transnational armed terrorist group that
10 adopted a non-Western ideology that has unique culture, historical
11 and regional significance that a person born in a Western country may
12 not fully understand or comprehend. The origin, how the al Qaeda
13 organization evolves and its development, is certainly not a subject
14 that a Western audience would be familiar with.

15 Panel members, as part of the U.S. military, when presented
16 facts of military operations, may understand the strategic
17 significance and tactical value of such evidence, but they certainly
18 require assistance in deciphering practices, origin, leadership, and
19 operational structure of a terrorist organization such as al Qaeda.

20 Your Honor, Mr. Kohlmann's expertise and opinion not only
21 bring context to the facts to which the prosecution will present, his
22 testimony brings logic and rationale. His testimony offers how and
23 why. His testimony explains that al Qaeda's operational practice and

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1 organizations, while differing greatly from the Western military
2 practices, how it makes sense to them.

3 He provided -- he provides much needed context so the panel
4 members can put the evidence that they receive in the correct
5 context.

6 The primary issues, Your Honor, are reliability and
7 relevancy for the commission's determination of expert qualifications
8 per Supreme Court case law established in Kumho Tire Company
9 v. Carmichael.

10 The commission currently has sufficient evidence to make a
11 reliability and relevancy determination without holding an additional
12 hearing because the sufficient foundation of Mr. Kohlmann's expertise
13 has been submitted to the commission.

14 For these reasons, the government requests that the
15 commission deny the relief requested in AE 692 to schedule a Daubert
16 hearing and to order more information regarding the basis of the
17 expert opinion.

18 Pending any further questions, Your Honor.

19 MJ [COL FITZGERALD]: So the defense has asked me to
20 essentially adopt the Federal Rules of Criminal Procedure
21 16(a)(1)(G). Is that accurate, Ms. Manuele? 16(a)(1)(G)?

22 DC [MS. MANUELE]: Yes.

23 MJ [COL FITZGERALD]: They've asked me to adopt that since we

1 don't necessarily have something similar. What are your thoughts on
2 whether I should adopt that, whether in total or at least for
3 particular experts that they are seeking further information and
4 inquiry on?

5 ATC [LTC GARRETT]: May I have a moment?

6 MJ [COL FITZGERALD]: You may.

7 **[Counsel conferred.]**

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

9 No. The prosecution's position is that you should not adopt
10 this federal rule. We have our own rule, and Rule 705 discusses and
11 dictates what -- how these proceedings should be carried out, and
12 that's regarding disclosure of facts or data underlying an expert
13 opinion.

14 And I'd also like to highlight that Rule 703 from the Manual
15 for Courts-Martial, similarly to our system, provides that a written
16 summary of expected testimony will be provided for expert witnesses,
17 and we have done that. We've gone above and beyond what the rule
18 requires and the commission should not adopt anything else.

19 MJ [COL FITZGERALD]: And I don't know specifically. The
20 defense's position is they've not received a -- and correct me if I'm
21 wrong, Ms. Manuele -- a summary of expected testimony. They've
22 received a summary of the areas of expertise the witness will testify
23 to, but I think there's a distinction to be drawn there.

1 And the defense cites to a case, Machado-Erazo. Am I saying
2 it right? Do you recall -- it's in a footnote, but it talks about
3 they found the judge abused his discretion because what the court
4 received and what the defense received was a summary that required
5 that court and the defense to presume the testimony, and that was
6 inadequate.

7 So, again, having not read whatever you turned over to the
8 defense, have you turned over a summary of expected testimony and not
9 just something they can presume what his testimony will be?

10 ATC [LTC GARRETT]: May I have another moment?

11 MJ [COL FITZGERALD]: You may.

12 **[Counsel conferred.]**

13 MJ [COL FITZGERALD]: The other thing I will note is that the
14 case, the Machado case I just referred to, if I understood right from
15 Ms. Manuele, the new rule was adopted in 2022?

16 I'm getting affirmative nods yes.

17 DC [MS. MANUELE]: Yes, sir.

18 MJ [COL FITZGERALD]: Thanks. But the Machado decision was in
19 2018. So it was found insufficient not regarding the new rules. It
20 was just and -- but I think the point of inflexion on that is have
21 you given something that doesn't require them to presume what his
22 testimony will be versus they know what his testimony will be?

23 ATC [LTC GARRETT]: Your Honor, we have provided a synopsis

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1 which, per the rule, is what is required. And, you know, I don't
2 think synopsis requires the exact -- verbatim exactly what he's going
3 to say. It's a synopsis. And we have been -- I think with our
4 supplemental response, went beyond a synopsis and got very specific.
5 But otherwise, I do not think that we are required to go beyond a
6 synopsis, which is what we have done.

7 MJ [COL FITZGERALD]: But you are required to provide a
8 proffer of expected testimony. And in my experience, I have seen
9 both sides hedge in an unsafe manner, providing a synopsis but not a
10 synopsis of expected testimony. They get to large swath, I'm going
11 to cover this area, I'm going to talk about this, but not what their
12 opinion testimony is going to be.

13 You don't have to answer that question, but I would at least
14 hope I am suggesting, through the case law provided by the defense,
15 what that synopsis, what that declaration, what that proffer should
16 be is expected testimony. Not verbatim. You don't have a write a
17 script for him. He's an expert. He's going to say what he's going
18 to say. But he's going to say, "My opinion is X," not, "My opinion
19 is in the realm of this area."

20 ATC [LTC GARRETT]: Your Honor, I believe that the supplement
21 does achieve that.

22 MJ [COL FITZGERALD]: Okay. All right.

23 ATC [LTC GARRETT]: May I have one other moment, though?

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1 MJ [COL FITZGERALD]: You may. And I think the danger you run
2 into, if I were inclined to agree with the defense that you hadn't,
3 is you're in a sense forcing that Daubert hearing where we will put
4 him on the stand or I make you tell me what the expected testimony
5 is. That's the risk you run.

6 So I'm asking you to work with the defense and this
7 particular witness at least, because I think we're talking about a
8 nuanced area. And probably the finer point of at least one other
9 commission has determined him not to be appropriate to give expert
10 opinion testimony.

11 I don't know the specifics of that ruling or how it was
12 applied, but it should give the government pause knowing that a
13 commission didn't feel he satisfied the requirements. And that's
14 certainly given pause to the defense.

15 So that's what I would ask, that you go back and look and
16 ensure that the defense has enough information when they interview
17 him, they know what his opinion is going to be. That's what we mean
18 by expected testimony, the proffer of expected testimony of an
19 expert.

20 They shouldn't be left to presume his testimony as part of
21 the interview. The idea is not to do a trial by ambush and
22 especially with expert opinions on nuanced areas. Nuanced areas that
23 are significant, I think, to the government's case, and the

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1 government's -- and the government's case and the defense's
2 opportunity to challenge that either with their own expert or
3 impeachment or other means. That's what I'm trying to assure is
4 happening.

5 ATC [LTC GARRETT]: Yes, Your Honor. And the government will
6 absolutely work with defense and facilitate an interview, give more
7 clarification where need be. It's just for this argument here today,
8 the defense characterization that we've given nothing, the hyperbole
9 I think was a little over the top with regards to what we have or
10 haven't done, and we have followed the rule.

11 But may I have one other moment?

12 MJ [COL FITZGERALD]: You may.

13 **[Counsel conferred.]**

14 ATC [LTC GARRETT]: Thank you, Your Honor. I have nothing
15 else.

16 MJ [COL FITZGERALD]: Thank you.

17 Defense, do you want to respond to any of the matters raised
18 by the government or the questions I've asked?

19 DC [MS. MANUELE]: May I ----

20 MJ [COL FITZGERALD]: Take a moment.

21 DC [MS. MANUELE]: ---- have one moment? Thank you.

22 **[Counsel conferred.]**

23 MJ [COL FITZGERALD]: I tell you what, Ms. Manuele. I know

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1 you're still conferring. If I could just interrupt briefly.

2 We're on the record, so I just -- we can take a recess now,
3 and then the parties can confer before you give your response. There
4 was some weighty issues that you may want to take to your team about.
5 Why don't we do that in recess? Will that work?

6 DC [MS. MANUELE]: Yes, sir. Thank you.

7 MJ [COL FITZGERALD]: Okay. Court is in recess until 1050.

8 **[The R.M.C. 803 session recessed at 1036, 23 April 2026.]**

9 **[The R.M.C. 803 session was called to order at 1056, 23 April 2026.]**

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

11 All parties present before the last recess are again
12 present.

13 Mr. Nashiri has elected to attend from the alternate site
14 and is no longer in the courtroom.

15 And Colonel Garrett is standing, wishing to be heard.

16 ATC [LTC GARRETT]: Sir, I spoke with the defense counsel
17 during the break. I'd just like to put one thing in the record for
18 your consideration if that's all right.

19 MJ [COL FITZGERALD]: Well, I turned it over to the defense.
20 But if you've conferred, is it all right he makes his point?

21 DC [MS. MANUELE]: I don't know what the point is but I have
22 no objection if he ----

23 MJ [COL FITZGERALD]: Okay. But that makes it easy for you to

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1 respond to it, then.

2 ATC [LTC GARRETT]: Sir, during the discussion about whether
3 to adopt a Federal Rule of Procedure, I just wanted to highlight for
4 you that defense has made a similar argument in the past about
5 adopting some of the federal rules. And there is, at AE 114C from 26
6 July 2013, an order from the commission that may have some analysis
7 that you would find helpful. And I just wanted to point the court to
8 that.

9 MJ [COL FITZGERALD]: You said AE 114C?

10 ATC [LTC GARRETT]: Yes, sir.

11 MJ [COL FITZGERALD]: Thank you.

12 **[Pause.]**

13 MJ [COL FITZGERALD]: Ms. Manuele, are you ready to proceed in
14 response to the government in 692?

15 DC [MS. MANUELE]: Just briefly.

16 The prosecutor may not hide and the defendant must not
17 seek -- the prosecution -- prosecutor may hide and the defendant must
18 seek is not a tenable system in a constitutionally bound -- when a
19 system -- hold on. I'm trying to read Ms. Miller's handwriting. She
20 wants to give me a quote.

21 The prosecutor may hide and the defendant must seek is not
22 tenable in a system constitutionally bound to accord a defendant due
23 process rights.

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1 And that comes from Banks v. Dretke at 40 U.S. 668, **[sic]**
2 U.S. Supreme Court from 2008.

3 MJ [COL FITZGERALD]: If you give me that page cite, 486
4 U.S. ----

5 DC [MS. MANUELE]: 540 U.S. 668 from 2004.

6 MJ [COL FITZGERALD]: Thank you.

7 DC [MS. MANUELE]: And just want -- cases never get overturned
8 because the government provided too much discovery. And so I
9 just -- what we're asking for is not unheard of. It's not
10 unacceptable.

11 We're asking for what is this gentleman going to come in and
12 say in front of this member panel so we can prepare accordingly and
13 make appropriate challenges.

14 And just based on the limited information as far as the
15 opinions he's going to offer, one of the things they indicated was
16 that letters -- five letters noticed by the government recovered from
17 the Abbottabad compound are consistent with letters authored by Usama
18 bin Laden. We don't know where he's forming this opinion.

19 Again, we don't know the methodology used but we do know
20 that Mr. Kohlmann doesn't read or speak Arabic. And so it certainly
21 seems like that's an issue that should be explored by the commission.

22 That Mr. al Nashiri is referring to Ibn al Khattab when he
23 discusses an Habib in his CSRT. As far as I'm aware, the only place

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1 that comes from is a black site statement. And, again, we don't know
2 where these opinions are coming from because we haven't been provided
3 that information. But certainly if that's the only methodology that
4 I've read something from a black site, that's an issue that should be
5 addressed in advance by Your Honor.

6 MJ [COL FITZGERALD]: But some of that is part of your due
7 diligence as well in interviewing the person who's going to rely on
8 that. So wouldn't that answer some of those questions?

9 DC [MS. MANUELE]: Right. And those are the only -- and
10 that's why I say, when we have, like, a specific opinion -- like,
11 there was a notice, and I'm trying to get the cite because it was
12 attached. It was an attachment to one of the Daubert motions that
13 was filed, but it was a discovery production that was sent over, the
14 most recent discovery production regarding the expert witness
15 testimony. And it's dated March 25th of twenty -- of this year,
16 2026.

17 That was sent over after hours. Our deadline was
18 March 27th, and so that information -- that one includes those
19 specific opinions. But it also says in addition to the issues
20 previous -- the origins -- the broad statements, the origin,
21 structure, and leadership of al Qaeda, but there are -- they're
22 to -- like, more specific opinions. But we don't know where that
23 methodology comes from.

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1 And so I just wanted to point out that there are certainly
2 issues with that. And so I don't think that -- I think the motion
3 dealing with Mr. Kohlmann was already prepared and with the staff by
4 the time we got that notice, so it's not -- that language isn't
5 included. But the government had said these are opinions that he is
6 going to offer in addition to the sweeping statements, the broad
7 categories of -- about al Qaeda, about the structure, without telling
8 us what about the structure, what about the opinions.

9 And so certainly, yes, these issues all need to be explored.

10 MJ [COL FITZGERALD]: Here's my concern, is you're making
11 perfect the enemy of good. At some point you need to do your due
12 diligence and interview this person. And so delaying an interview
13 because you think the government hasn't perfected discovery related
14 to this based on a standard not adopted by this commission, FRCP 16,
15 that seems like a failure to launch on the defense part.

16 At some point you just have to interview the government's
17 expert who apparently, they're telling me, you were noticed of as
18 early as 11 years ago. And so there's been plenty of time for you to
19 seek further discovery but there's been 11 years worth of time you've
20 had the opportunity to interview him and conduct multiple interviews.
21 Because I haven't heard that he's not amenable to discussing with you
22 his opinion.

23 DC [MS. MANUELE]: And so as to the -- my understanding -- and

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1 I stand corrected on the CVs if that was provided in 2015 or 2024. I
2 was not aware of that information. I was certainly relying on
3 information given to me that I apparently should not have. But he
4 was not listed as a witness. He was listed as an expert in November
5 of 2023 with no indication of what he would be testifying to.

6 And then in August of 2025, the description they provide is
7 included in the motion. And that says that he is expected to testify
8 as to the origins, structure, and leadership of al Qaeda. Will
9 testify to the use of operational security practices regarding
10 operational matters, including terrorist attacks, like the attacks
11 against USS COLE and MV Limburg. May also testify as to al Qaeda's
12 recruitment activities, including the use of propaganda videos and
13 public statements to recruit individuals to attend al Qaeda camps.
14 And may testify as a sponsoring witness to statements regarding
15 al Qaeda.

16 So we don't know what he's going to testify to. Like, just
17 to say he's going to come in and talk about the structure, certainly
18 we need to know what about the structure? How is he saying that it
19 is structured? And so that is ----

20 MJ [COL FITZGERALD]: Again, this is ----

21 DC [MS. MANUELE]: ---- the information we don't have.

22 MJ [COL FITZGERALD]: And so I've spoken to both parties at
23 large that, based on the case law you cited in your footnote, that

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1 you should not be left to presume his testimony, you should know his
2 testimony. You heard me say that.

3 DC [MS. MANUELE]: Uh-huh.

4 MJ [COL FITZGERALD]: So I don't know if the government's
5 given you enough that you can do more than presume his testimony, and
6 this seems to be what you're articulating you're still at a
7 presumptive state as to his testimony.

8 DC [MS. MANUELE]: Yes, sir.

9 MJ [COL FITZGERALD]: I don't know if that's true or accurate.
10 The government's been advised that, at least with that case law, that
11 this commission would take a jaundiced eye if you're left to presume,
12 because that means the commission would be left to presume his
13 testimony. So I'm hoping they will review whatever they're going to
14 turn over to you quickly so that you can conduct your interview. But
15 at some point you do need to conduct your interview and not wait for
16 perfected discovery on that particular issue.

17 So I understand your point. But I think -- and maybe we do
18 need a Daubert hearing after you do that interview, but it seems like
19 there's a lot of information I'm lacking to make that determination.
20 And I've certainly raised and highlighted my concerns that this is a
21 peculiar type of expert.

22 Maybe he's helpful to the finder of fact on a particular
23 issue but I don't know yet because I don't know what he's going to

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1 say is his expert opinion. Neither do you.

2 So it doesn't even seem to be -- it would be ripe for a
3 Daubert hearing that you want because I don't know what the missing
4 pieces are. But we can't know the missing pieces until you at least
5 conduct your interview and say here's the gaps and why a Daubert
6 hearing would cause him to fail as a qualified expert.

7 So that's -- I've asked the government to take care of the
8 pieces they can take care of what they owe you as the deliverable.
9 And I've -- I'm asking you to not wait for a perfected discovery but
10 conduct an interview, something that you've had time to do, but you
11 should act with all deliberate speed to do that as soon as you have
12 what you believe to be his known, expected testimony.

13 DC [MS. MANUELE]: Understood, sir.

14 MJ [COL FITZGERALD]: Anything else?

15 DC [MS. MANUELE]: I have nothing further unless you have
16 anything ----

17 MJ [COL FITZGERALD]: I'm not foreclosing a Daubert hearing, I
18 just feel like it's unripe at this point because I can't answer the
19 gaps. But an interview may help me answer those gaps.

20 DC [MS. MANUELE]: Understood.

21 MJ [COL FITZGERALD]: And for the government, same thing. I
22 don't know, for the last time, if you have something that presumes
23 his testimony versus something that is his testimony. And I'm trying

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1 to make it very clear, I expect you to receive something that is his
2 proffered testimony.

3 DC [MS. MANUELE]: Thank you, sir.

4 MJ [COL FITZGERALD]: Fair enough?

5 DC [MS. MANUELE]: Yes, sir.

6 MJ [COL FITZGERALD]: Anything else in your ask?

7 DC [MS. MANUELE]: I have nothing else. There is also -- we
8 have reason to believe that he also has an NDA with an
9 unnameable ----

10 MJ [COL FITZGERALD]: When you say "NDA" ----

11 DC [MS. MANUELE]: Nondisclosure agreement ----

12 MJ [COL FITZGERALD]: Okay.

13 DC [MS. MANUELE]: ---- with a government agency. And so we
14 would ask that that information be provided from the government as
15 well to the defense.

16 MJ [COL FITZGERALD]: So I won't ask the government to address
17 that because I don't believe that was briefed to the commission,
18 correct?

19 DC [MS. MANUELE]: No, this is something I just learned this
20 morning.

21 MJ [COL FITZGERALD]: Okay. So the defense has information to
22 believe that a nondisclosure agreement may be at issue.

23 Government, I will hope you will reconcile and resolve that

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1 if you intend to call this person as an expert, and I'll leave it at
2 that. If you want to respond, you can, but it doesn't seem like you
3 can wholly respond to that. But it would seem to be that that's an
4 issue that needs to be reconciled.

5 Do you believe it needs to be reconciled before you can even
6 interview him or is that the concern?

7 DC [MS. MANUELE]: I'm not sure. I don't know the extent of
8 it. I just -- I haven't had an opportunity to explore. This is
9 something I heard very shortly before coming into court. But
10 certainly ----

11 MJ [COL FITZGERALD]: Okay.

12 DC [MS. MANUELE]: ---- I would hope that if the
13 government -- that the government would get that information and make
14 us aware if that's something that ----

15 MJ [COL FITZGERALD]: Thank you. And maybe the government is
16 not aware but they certainly know you can't interview him if he's
17 subject to a nondisclosure agreement and they certainly couldn't put
18 him on the stand for the same reason. So I'll let the parties confer
19 on that and let me know if we need to take up that matter.

20 DC [MS. MANUELE]: Thank you, sir.

21 MJ [COL FITZGERALD]: Thank you.

22 I don't know who for the defense has the next expert.
23 Who ----

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1 DDC [Lt Col NETTINGA]: That's me, sir.

2 LDC [MS. MILLER]: Lieutenant Colonel Nettinga.

3 MJ [COL FITZGERALD]: Oh, good morning, Colonel Nettinga, from
4 the RHR.

5 DDC [Lt Col NETTINGA]: Good morning, sir.

6 MJ [COL FITZGERALD]: Are you ready?

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

8 Sir, good morning again. I'm here to address AE 696, which
9 is the defense motion for a Daubert hearing and motion to compel
10 pertinent discovery and disclosures for Mr. Aimen Dean.

11 I would like to start by adopting the legal arguments made
12 by Ms. Manuele during the last briefing. I don't seek to belabor or
13 rehash those arguments as we are dealing with a similar scenario
14 here. But I would like to highlight for the commission the
15 differences with respect to -- or the uniqueness to this particular
16 proposed expert witness from the government and to highlight how much
17 we are all still lacking in terms of evidence related to what this
18 individual will say, despite the government having the burden to show
19 that this evidence is relevant and admissible under the rules.

20 And so essentially what we are asking for here, sir, is for
21 the commission to perform its gatekeeping function. Expert testimony
22 is incredibly valuable. It's important. It can be very impactful
23 for the members, which is certainly why both sides have asked for and

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1 have employed expert consultants and potential expert witnesses in
2 this case. It's why the government seemingly has a stable of
3 individuals they want declared as expert witnesses to provide
4 information specifically about al Qaeda, to include Agent McFadden,
5 Agent Soufan, Mr. Dean, Evan Kohlmann, and Flagg Miller, and the list
6 goes on.

7 And at some point, not knowing exactly how these folks are
8 going to testify or what opinions they are going to potentially
9 offer, you get into a potential 403 issue as well if you have people
10 getting up to say the same thing.

11 And so what I'd like to address for the commission is
12 essentially the evolution of the government's position as represented
13 to the defense as to what Mr. Dean will potentially testify to. And,
14 again, we're talking about very broad subjects.

15 Now, Mr. Dean is not an academic. His experience, as
16 relayed by the government, is more practical in nature. Again,
17 purportedly, Mr. Dean was a member of al Qaeda as early as 1994 and
18 at some point defected from the group.

19 And in a law enforcement interrogation, interview, he told
20 officials that he was willing to essentially work as a spy. And he
21 did that for British intelligence for the next eight years or so,
22 again, according to this story, the book he has published, the brand
23 he has made of himself, his podcast, and his consulting work in the

1 years after.

2 And so while he may have some factual matters to be able to
3 offer the commission and the panel that may be relevant -- for
4 instance, I'll pick one example. He says that he overlapped in a
5 training camp in Afghanistan and saw Mr. al Nashiri, somebody that he
6 did not know by name but recognized as a cousin of somebody that he
7 knew more intimately. And that was Azzam that was Mr. al Nashiri's
8 cousin.

9 And so that may be a fact of consequence that may be
10 relevant for him to testify about. But when it comes to whether or
11 not he is an expert witness -- and this is someone who has never
12 testified as an expert before in any court, to the defense's
13 knowledge. He did apparently offer a deposition in a case in
14 Saudi Arabia, if I'm not mistaken. We don't have that deposition,
15 but I don't have any indication that he was offered as an expert
16 witness, per se, under that system or those rules. I simply don't
17 have enough information about that.

18 And so what I will note is that Mr. Dean, I believe, was
19 first identified as an expert witness on the 14th of August, 2025,
20 with the filing of Appellate Exhibit 440JJ (Amend). So the initial
21 witness list from the government filed in November of 2023 did not
22 list Mr. Dean as an expert witness, but their supplementary or
23 amended one did.

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1 And I would like to display -- this is page 3 of Appellate
2 Exhibit 696. I'd like to display what the government relayed that
3 this expert witness would testify to. So certainly this is no more
4 than a -- I'm sorry? This is no more than a bare synopsis. This is
5 certainly not a proposal of his expected testimony.

6 And so you see there are some relevant topics that the
7 government seeks to ask him questions about that is very broad. And
8 that's -- there's nothing about what the expert opinions are. It
9 doesn't even say "expert" in that synopsis, although he is listed
10 under the potential expert witnesses in that exhibit list.

11 And so that's our initial introduction to Mr. Dean as a
12 potential witness for the government. Based on that disclosure and
13 that witness list that was filed, the defense did contact Mr. Dean
14 via e-mail to attempt to set up an interview. To the best of my
15 knowledge, he never responded to our request. I can't say with any
16 certainty whether we followed up with that at any point, but we did
17 make that initial attempt to interview him based on this very limited
18 understanding that we had at the time.

19 But what I want to show you, sir, here is how that position
20 has evolved and how the government has continued to give differing
21 versions of what Mr. Dean will testify to. And certainly the
22 concern -- one of the concerns that the defense has is at what point
23 does this moving goalpost stop? At what point does this target that

1 we're trying to figure out how to address and how to deal with and
2 what objections to make and when to make them, at what point does
3 that get solidified into a cognizable expert-proffered testimony that
4 we can actually have a full, engaged discussion on, again, for an
5 issue where the government bears the burden.

6 And so based on that initial disclosure in 14 August 2025,
7 Appellate Exhibit 440JJ (Amend), the defense asked for a -- or filed
8 a discovery request in November. And I believe -- I'm on page 3 of
9 Appellate Exhibit 696. I believe it says on 16 November 2023, I
10 think that we are -- well, I was going to say I think that should be
11 2025. I'm actually not certain if that was particular -- that may
12 have been particular to the first 440JJ in which Mr. Dean was not
13 listed.

14 But suffice it to say, at some point after we learned that
15 he may be an expert witness in this case, the defense filed a
16 discovery request seeking additional information as to the subject of
17 his expertise.

18 And so what we got back in -- on the 27th of February, 2026,
19 is somewhat of an updated position. Again, not a synopsis -- not a
20 proffer of expected testimony, but -- there. So I'm on page 4 of
21 Appellate Exhibit 696. And Mr. Dean's expertise is defined as
22 "al Qaeda and AQ's religious ideology, financial terrorism, and bomb
23 making."

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1 And then you see a little bit more of a robust explanation
2 of what Mr. Dean may testify to. And you see opinion testimony. And
3 so here we are looking at, well, is his opinion testimony about the
4 MO, the modus operandi of al Qaeda, is that something that is
5 relevant? Is that something that is helpful to the panel? These are
6 considerations for whether or not to admit this type of testimony.

7 Mr. Dean will provide an opinion about al Qaeda's outlook,
8 capabilities, and methods at the time, the different methods of
9 attacks, an opinion on the hostilities between the U.S. and al Qaeda
10 during the applicable time frame.

11 And so, again, we have to marry up whether this individual
12 has the relevant training and the expertise and the qualifications,
13 and then how those qualifications and that expertise that may exist
14 is applied to the facts of the case.

15 So it's well settled -- I mean, this comes from the Kumho
16 case that bare qualifications alone cannot establish admissibility of
17 expert testimony.

18 But we continue to evolve here. And on the 25th of March,
19 2026, we get an additional refinement. And I don't -- "refinement"
20 may not be the right word. We're just getting additional information
21 here about what the scope of that testimony may be.

22 And if you look at the attachments to Appellate
23 Exhibit 696A, you can see that Mr. Dean is continually being

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1 interviewed by the government over this time frame, potentially for
2 them to try to understand what this individual may actually have
3 expertise on and what this individual may be able to offer expert
4 opinion on.

5 And that is, again, the subject of the e-mail that we
6 attached to our response that was not able to be evaluated by the
7 commission before the commission's ruling in six of the ten Daubert
8 motions that we filed, where the -- where the government
9 misrepresented that we denied the opportunity or we said no, we don't
10 want to talk to these witnesses.

11 What we said is we'd like to make sure that the witnesses
12 know what they are going to be testifying about before we interview
13 them.

14 And I think certainly for me, this is standard practice. In
15 any court-martial that I've ever done, if there's an expert witness,
16 I want to ensure that the witness knows from the opposing party what
17 that individual is going to testify about and what the expert
18 opinions are going to be that are offered so that we can have a
19 fruitful and productive interview and/or a request for a Daubert
20 hearing for the military judge to get involved in exercising that
21 gatekeeping function.

22 And that's what we sought. And, again, as you see in the
23 attachments that the government provided as to the timing of the

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1 interviews they are having specifically with Mr. Dean, it appears
2 that they are still trying to figure it out in real time as we are
3 going through this.

4 So here's what you've got here. There are some more
5 distinct opinions that apparently he's going to offer an opinion that
6 hostilities existed, that the accused was a high-ranking member
7 within al Qaeda's leadership, and some things about suicide boats and
8 rigging of explosives.

9 And so this is what we get on the 25th of March, 2026. And
10 then we get a different version in Appellate Exhibit 696A. And
11 that's what I'd like to take you to next. That's page 13 I would
12 like to take you to.

13 And for the record, what I've been displaying here, this is
14 page 5 of Appellate Exhibit 696.

15 So turning to the government's response, now we have even
16 more of a -- of an articulated, but a different synopsis of what this
17 individual may be providing expert opinion on.

18 And so now he is going to provide his expert opinion that
19 the accused was a high-ranking member within al Qaeda's leadership
20 before and after the USS COLE attack.

21 And the information that the defense has at this time,
22 coming from the attachments that the government provided, is that
23 Mr. Dean overlapped with Mr. al Nashiri in the camps for three weeks.

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1 That's from the initial interview that Mr. Dean gives.

2 And then in February of 2026, Lieutenant Colonel Garrett of
3 the prosecution leads the interview. And in this interview, this
4 summary that we were provided, he says, no, no. It was actually
5 three months.

6 But regardless, this is an individual that does not know
7 Mr. al Nashiri by name, that is not familiar with his kunya, that did
8 not know until he was writing his book with two other co-authors well
9 after the attack on the USS COLE that Mr. al Nashiri was the -- a
10 suspect who was at Guantanamo Bay and had been captured based on the
11 accusation that he was responsible for or in charge of the bombing
12 and the attack on the USS COLE.

13 And so this is somebody who clearly -- the statements that
14 he is providing do not seem to match up, just in the little bit that
15 we know right now, do not seem to match up with his ability to
16 identify Mr. al Nashiri as a high-ranking member. He talks about
17 five different tiers and perhaps Mr. al Nashiri was in the second
18 tier, the one right below the top tier of leadership. But this is
19 somebody who does not appear, by his own words, to very -- to know
20 him very well.

21 And so what we have, again, in those summaries of the
22 interviews that were conducted with Mr. Dean is the bare assertion
23 that Mr. Dean has said, yes, I can identify him this way. Not how,

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1 not why, not what gave him that information, not how he was able to
2 make this determination despite not knowing this individual's name or
3 anything seemingly about him.

4 And so what we are left with to deal with now is it's the
5 ipse dixit, that Mr. Dean said it so, so that's why he can testify to
6 it. And that's certainly the case law. We've gone well over this.
7 That's not sufficient.

8 The other -- and I've marked them out. I see six different
9 opinions that Mr. Dean is apparently now being sought to offer as not
10 just a fact witness and providing testimony and things from his
11 experience, but somehow an expert, an additional sanctification of
12 the information that he will provide, that he's going to testify
13 about the manner of money movement, the purchasing of materials and
14 how that comports with what was done in the attack on the USS COLE.

15 Again, there's no indication of what information he has been
16 provided or that he is aware of with respect to what was done in
17 preparation for the attack on the USS COLE.

18 And frankly, Your Honor is fairly aware of this at this
19 point, I would assume. There's not -- there's not a lot of evidence
20 with regard to how money is moving and how cover businesses are used
21 with respect to this particular attack.

22 The creation and rigging of explosive devices for the
23 suicide boats, that he can offer the opinion this comports with the

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1 methods utilized by Usama bin Laden and al Qaeda. And certainly what
2 we have, the bare assertion, is that he was trained in bomb making at
3 an al Qaeda camp.

4 But how does that translate? How does that give him the
5 ability to offer opinion on what was done in this case? What
6 information has he been provided? The government has expert
7 explosives individuals. Is his testimony consistent with that? Is
8 it cumulative to that? These are all questions that we don't know
9 and we haven't been provided any information on.

10 And so you have this scenario here where perhaps there is
11 relevancy. I'm not conceding it. But perhaps there is some
12 relevancy in Mr. Dean talking about what he learned at the camps.
13 And then the government could argue in closing, well, you heard
14 Mr. Dean talk about how this was done. You heard our explosives
15 expert talk about how it was done in the attack on the USS COLE, and
16 that shows that there was some sort of a pattern.

17 I could certainly understand and see that potential type of
18 argument being made. But what gives Mr. Dean the knowledge and the
19 experience and the training, and what methods has he applied? We
20 don't know any of that or what he's been exposed to.

21 We know that information is given to Mr. Dean by the
22 prosecution in these interviews. That's documented. But we don't
23 know anything about where these opinions are coming from.

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1 Hostilities existed between al Qaeda and the United States.
2 The government proffers that he can be an expert to provide that
3 testimony. I've seen nothing or heard nothing in any of the
4 materials provided relating to Mr. Dean's qualifications as an
5 international law expert, as an expert in the law of war, or any of
6 that.

7 And, again, this individual may be able to provide evidence
8 that the government can then argue, but that doesn't -- there's
9 nothing in what they have provided that indicates that he is able to
10 offer this opinion as an expert given that additional mantle.

11 And then why and how members of al Qaeda rationalize suicide
12 attacks, now we're looking at why is this relevant and necessary for
13 the members to have this information. Mr. Dean purports himself to
14 be an expert in Islamic law and teachings. Maybe not Islamic law but
15 certainly in theology or in the way in which certain things may be
16 justified. But, again, why is that relevant? How does that impact
17 or add value to a fact at issue that the members have to decide?

18 And so really what we're talking about here, sir, and what
19 we are asking for through this process is a determination in that
20 gatekeeping function by the commission as to what and how far these
21 experts are going to be able to go. And obviously I'm focused on
22 Mr. Dean here, but there is a consistent theme and concern amongst
23 the defense as to all ten of the motions that we filed.

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1 And I think that concern is well founded, not only because
2 we are talking about expertise, specifically with these ten, that is
3 not your traditional scientific expertise. That doesn't mean it
4 can't be admitted. But it means that we've got to do some additional
5 analysis and understanding and gatekeeping, again, by the commission
6 to determine whether or not this meets the requirements of the rules.

7 And the one example in recent memory that comes up, and the
8 prosecutor alluded to this in his argument that you just heard, is
9 Agent McFadden. And what you saw in that testimony of Agent McFadden
10 was somebody who had not been noticed as an expert witness by the
11 prosecution, who they attempted to offer expert opinion from on the
12 spur of the moment without providing any information to the defense
13 about that that was coming, what that was based on.

14 We actually took a break. And it may have been that we
15 didn't address it until the next set of hearings. My memory is a
16 little fuzzy on that. And then we came back. There was some
17 additional -- there was cross-examination where the defense counsel
18 was attempting to kind of cross-examine or voir dire the witness
19 based on, really, just kind of guessing because we hadn't been
20 provided any information. And then that witness started to give
21 expert testimony and expert opinion once he was qualified, again,
22 without anyone really understanding where that was going to go.

23 Now, I understand that was -- sir?

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1 MJ [COL FITZGERALD]: Continue. I didn't have anything.

2 DDC [Lt Col NETTINGA]: Oh, I'm sorry. I'm having -- I can't
3 see you and so I thought I heard something.

4 So -- but the concern that we have is that that is what is
5 going to happen at trial if there is not some sort of a pretrial
6 determination as to how far these experts and what -- how far they
7 can go and what opinions they're going to be allowed to offer.

8 You see, again, just through what we've gone through with
9 Mr. Dean, the way that that seems to shift and the additional
10 opinions and now seem to be brought under the umbrella of Mr. Dean,
11 even if he's not the proper one to testify about that.

12 And what we can't have is that happening at trial in front
13 of the members because of the potential prejudice that that creates.
14 And so that's really what we're seeking here is some sort of a cabin
15 on what the government experts are going to be allowed to testify to,
16 what is permissible under the rules, so that we don't have a trial by
17 surprise, so that we don't have a trial by ambush.

18 And so that as these potential opinions from the experts
19 continue to expand and grow, we can ensure that we have the proper
20 and requisite experts to meet whatever this moving target of
21 these -- of the expertise of these purported experts is going to be.

22 And so that's what we're seeking here, sir, and that's why
23 we're seeking it under 703, 702, and the case law that we have cited,

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1 sir.

2 And barring your questions, that's all I have.

3 MJ [COL FITZGERALD]: So I understand it -- and you heard the
4 earlier discussion that you have not received either a declaration or
5 a proffer of expected testimony specifically with Mr. Dean?

6 DDC [Lt Col NETTINGA]: That's accurate, sir. What we have is
7 what I showed you, those different iterations. That's all.

8 MJ [COL FITZGERALD]: And I understood you -- did you receive
9 some pages of the interview reports as well?

10 DDC [Lt Col NETTINGA]: Yes, sir. So those are attached to
11 Appellate Exhibit 696A, the government's response.

12 I can't assert to you, just as I'm standing up here, whether
13 we had either of those documents beforehand. One is a 302 that was
14 created on June 17th, 2025, and the other one is a record of
15 investigative activity that was conducted on the 19th of February,
16 2026.

17 So I can't say that the first time we had them was in
18 Appellate Exhibit 696A. That's -- again, we've all got a lot going
19 on and those are the -- that's the source that I'm familiar with, but
20 I can't say whether we had it before. But it is -- it is limited to
21 those documents and potentially the numerous podcasts that Mr. Dean
22 has published or aired.

23 MJ [COL FITZGERALD]: Earlier in one of the documents you put

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1 up for display, it said -- from the government -- CV forthcoming, the
2 25 March 2026, notice. Do you have the CV?

3 DDC [Lt Col NETTINGA]: I'll show you what we have for the CV,
4 sir, if I could have a moment.

5 MJ [COL FITZGERALD]: You may.

6 **[Pause.]**

7 DDC [Lt Col NETTINGA]: And so, yeah, sir, this is -- I wanted
8 to make sure -- it is attached to Appellate Exhibit 696A. It's
9 Attachment B. So that's the government's response. So you do have
10 it. I will display the first page of that at least.

11 It is, perhaps unsurprisingly, not -- somewhat of an
12 atypical CV from what we would see from an academic or even, you
13 know, a career law enforcement officer. I know that Mr. McFadden had
14 a pretty extensive CV, if I recall correctly.

15 And so you've got somewhat of a summary of what he has done.
16 And so you see that he's involved in a consulting group there.
17 That's on the first page of the CV. And that he has done a lot with
18 finance and corporate money transactions and he's worked for a bank.
19 Again, he's providing analysis intelligence. He's consulting based
20 on the experience that he has had as a member of al Qaeda and a
21 purported spy for the British intelligence.

22 And I'll show you that third page. So there's some
23 indication of the things that he has done. But in terms of

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1 additional training outside of whatever practical experience he had,
2 again, as a purported member of al Qaeda, I think that's kind of what
3 we're limited to at least as we see it in the CV.

4 I'll show you page 4 of that as well. So he's, you know,
5 again, lauding the skills that he purports to have and the seminars
6 and workshops that he offers through his consulting business.

7 And then the final page, sir. Again, I won't belabor the
8 point since I know you have this attachment. But this is essentially
9 what he's provided to the government that has then been provided to
10 us in terms of a curriculum vitae.

11 MJ [COL FITZGERALD]: Thank you. I have no further questions
12 at this time. I appreciate that.

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

14 MJ [COL FITZGERALD]: I'm going to ask the government to
15 respond. Is this you, again, Colonel Garrett?

16 ATC [LTC GARRETT]: Yes, Your Honor. At a minimum I would
17 request a comfort break. And secondly, of all of these expert
18 witnesses, this will be my longest response. So I don't ----

19 MJ [COL FITZGERALD]: Perhaps a lunch break early?

20 ATC [LTC GARRETT]: Yes, sir.

21 MJ [COL FITZGERALD]: Any objection from you, Colonel
22 Nettinga, if we take a lunch recess?

23 DDC [Lt Col NETTINGA]: No, sir.

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1 MJ [COL FITZGERALD]: I think you are going to be present
2 after lunch, correct? So...

3 DDC [Lt Col NETTINGA]: I'll be here all day, sir.

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

5 Very well. The commission is in recess until 1300.

6 **[The R.M.C. 803 session recessed at 1139, 23 April 2026.]**

7 **[The R.M.C. 803 session was called to order at 1302, 23 April 2026.]**

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

9 All parties present before the last recess are again
10 present. Mr. Nashiri's still attending from the alternate site as he
11 did last session.

12 Colonel Nettinga, I believe you were done, and we were at
13 Colonel Garrett. But is that your understanding as well?

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

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

16 And, Colonel Garrett, are you ready to proceed?

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

18 Good afternoon, sir.

19 MJ [COL FITZGERALD]: Good afternoon, Colonel Garrett.

20 Before you begin, just one thing. I didn't want to
21 interrupt you when you had said it the first time, but you said
22 something to the effect that on some of these I'd already approved
23 the experts, the ones I didn't say I needed this hearing for. Do you

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1 remember saying that?

2 ATC [LTC GARRETT]: Yes, sir. Yes, Your Honor.

3 MJ [COL FITZGERALD]: Do you believe I've approved them as
4 experts or did you believe I just said I didn't need to take those up
5 as to the issue of whether I needed a Daubert hearing on them?

6 ATC [LTC GARRETT]: I may have misspoken on that, clearly, by
7 your reaction at this moment.

8 MJ [COL FITZGERALD]: Well, did you misspeak or do you have a
9 misunderstanding? Because I've not approved anybody as an expert.

10 ATC [LTC GARRETT]: I think at the time I made the argument I
11 had a misunderstanding.

12 MJ [COL FITZGERALD]: Okay.

13 ATC [LTC GARRETT]: I no longer have that misunderstanding.

14 MJ [COL FITZGERALD]: Okay. All right. And I think probably
15 because I didn't address that at the time, maybe the defense had some
16 concerns. I can't remember specifically what Colonel Nettinga said.

17 You still have to qualify these experts. I just said I
18 don't know if I necessarily ----

19 ATC [LTC GARRETT]: Absolutely.

20 MJ [COL FITZGERALD]: ---- necessarily need a separate Daubert
21 hearing to take up those matters. You would certainly have to
22 qualify them and there may be questions and native objection, and
23 we'd take up the Daubert matters or the Kumho matters at that time.

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1 But I just want to make sure now everybody has a common
2 understanding.

3 Does that help you, Colonel Nettinga, understand at
4 least -- you may have had some concerns because I didn't address the
5 government's position on that.

6 DDC [Lt Col NETTINGA]: What you articulated, sir, is how I
7 understood the rulings.

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

9 So now that we have that out of the way. So remember, this
10 hearing is only about whether I should conduct a Daubert hearing,
11 so ----

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

13 MJ [COL FITZGERALD]: ---- no witnesses have been
14 qualified -- I shouldn't say "approved." No witnesses have been
15 qualified as an expert, so nobody can take the stand ----

16 ATC [LTC GARRETT]: Understood.

17 MJ [COL FITZGERALD]: ---- having been pre-qualified, and
18 nobody hasn't -- it hasn't been determined that they are an expert
19 because I didn't believe I needed necessarily a Daubert hearing
20 before trial. Certainly, we may be heard outside the presence of any
21 members regarding their qualifications.

22 And, also, I say that because I think you had said that
23 I -- you based some of your interpretation on how I handled

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1 Agent McFadden at a preliminary hearing on -- and so I also don't
2 want any misapprehension.

3 A preliminary hearing, the Rules of Evidence are a bit
4 different. So how I applied the issue to Agent McFadden at a
5 preliminary hearing may not -- is most likely not how I'll apply it
6 at trial in front of the members.

7 Does that make sense?

8 ATC [LTC GARRETT]: Yes, Your Honor. And with regards to
9 Agent McFadden, I only wanted to highlight a couple of points you
10 made that I do think would be relevant ----

11 MJ [COL FITZGERALD]: Sure.

12 ATC [LTC GARRETT]: ---- regardless of the type of hearing.
13 Not, you know, the entire transcript of that exchange.

14 MJ [COL FITZGERALD]: Okay. Now that we've got that out of
15 the way, I will let you proceed.

16 ATC [LTC GARRETT]: One admin note. I printed some cases off
17 that I'm going to be referencing. I didn't know Colonel Nettinga was
18 handling this until he made his argument. I've given a hard copy to
19 defense. The paralegals are e-mailing them to him.

20 MJ [COL FITZGERALD]: Okay.

21 ATC [LTC GARRETT]: And I have a copy for the commission.

22 May I approach?

23 MJ [COL FITZGERALD]: You may.

1 **[Pause.]**

2 ATC [LTC GARRETT]: Your Honor, the defense brought up the
3 Kumho Tire Company case and that case actually supports the
4 government's position. Per the Supreme Court's decision in Kumho
5 Tire Company v. Carmichael, found at 526 U.S. 137, the commission is
6 not required to hold an evidentiary hearing regarding the
7 admissibility of expert testimony.

8 And secondly, per the Supreme Court in Kumho Tire, the
9 commission is not required to strictly follow the Daubert or Houser
10 lines of questions regarding qualifications.

11 Here, Mr. Aimen Dean has been proffered as an expert in
12 al Qaeda operations and tactics, ideology, financial terrorism and
13 bomb-making. Rule 702 identifies the expert's knowledge as needing
14 to be based on scientific, technical, or other specialized knowledge.
15 For Mr. Dean, all of his areas of expertise fall into the category of
16 specialized knowledge based on his over 30 years of experience in
17 terrorism, first as a bona fide member of al Qaeda for several years,
18 and then as a British spy within al Qaeda for several more years,
19 during the applicable time frame of this case, as well as his work in
20 counterterrorism over the last 20 years.

21 Here the commission currently has the CV, biography, and
22 three interviews of Mr. Dean, as well as publicly available
23 information identified in our brief, including Mr. Dean's affiliation

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1 with the program on extremism at George Washington University, the
2 Institute for Counterterrorism at Reichman University, and the
3 transcript of Mr. Dean's testimony before the House of Commons in the
4 United Kingdom where he was asked to testify about terrorism. Those
5 are referenced in footnotes 43, 44, and 46 in AE 696A.

6 With regard to Mr. Dean's expertise in al Qaeda ideology,
7 bomb-making, and operations and tactics, Mr. Dean lived it for 12
8 years as a member and spy, joining al Qaeda in 1994 and serving as a
9 bona fide member until 1998. He was initially trained as a
10 bomb-maker within al Qaeda and continued to have a role with
11 bomb-making throughout his time in al Qaeda.

12 While training as a bomb-maker, Mr. Dean also became a
13 teacher and mentor to new recruits who lacked education and
14 discipline. He specifically taught theology in support of al Qaeda
15 as referenced in AE 696 Attachment B.

16 Mr. Dean pledged bayat or allegiance to Usama bin Laden in
17 1997 and privately renounced it in 1998, when the embassy bombings in
18 Africa inspired him to leave al Qaeda. Ultimately, Mr. Dean never
19 actually left al Qaeda because he was persuaded to work against
20 al Qaeda from within as a spy until his undercover status was
21 revealed in 2006.

22 Mr. Dean actively worked in al Qaeda ideology, operations
23 and tactics, and actively thwarted al Qaeda's operations for 12

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1 years.

2 With regard to financial terrorism, not only did Mr. Dean
3 move money and have cover business while in al Qaeda, but his
4 subsequent career endeavors have furthered his expertise in this
5 area.

6 This information is expounded further in Attachments B
7 through E in AE 696A.

8 Mr. Dean's knowledge, based on his life experiences, is the
9 epitome of specialized knowledge.

10 As to my second point, the commission is not required to
11 strictly follow the Daubert or Houser lines of questions regarding
12 qualifications per the Supreme Court in Kumho Tire where it says
13 Rule 702 does not create, quote, a schematism that segregates
14 expertise by type while mapping certain kinds of questions to certain
15 kinds of experts, unquote.

16 It goes on to say, quote, life and the legal cases that it
17 generates are too complex to warrant so definitive a match, unquote.

18 Mr. Aimen Dean is the perfect example of an expert that does
19 not fit neatly into a traditional bucket. His life has certainly
20 been complex and the commission should be able to recognize his
21 expertise based on his personal experiences.

22 Your Honor, while discussing Mr. Kohlmann, I referenced the
23 colloquy the commission had when qualifying Special Agent McFadden as

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1 an expert and several of those specialized knowledge principles apply
2 to Aimen Dean as well. And I will not repeat from the transcript
3 here. However, in a terrorism case such as this, specialized
4 knowledge is going to be common.

5 Again, terrorism isn't science-based. It's
6 experience-based, knowledge-based. And as an undercover agent
7 reporting on al Qaeda from within to stop further attacks and provide
8 evidence to help arrest terrorists, Aimen Dean is very similar to an
9 investigative agent. He did it for eight years in addition to his
10 four years as an active member of al Qaeda.

11 The commission was right to qualify Special Agent McFadden
12 as an expert, and case law supports it. Law enforcement officers
13 regularly testify as experts using their experience and expertise
14 gained in the course of their duties in areas that the average
15 layperson lacks.

16 Numerous cases, including United States v. Harris at
17 46 M.J. 221, it's a CAAF case from 1997; the Hankey case cited by the
18 defense in AE 696B; and United States v. Davis at 397 F.3d 173, and
19 pages 178 through '79. It's a Third Circuit case from 2005. It's a
20 case affirming admissibility of 14-year-old veteran of the
21 Philadelphia police force with 12 years of experience in narcotics to
22 testify regarding the methods of operation for drug traffickers in
23 the south Philadelphia area.

1 Methods of operation are exactly the kind of expertise
2 Mr. Dean has as an undercover agent. Additionally, United States v.
3 Mejia, 545 F.3d 179, page 194, it's a Second Circuit case, 2008
4 finds, quote, it is well established that experienced government
5 agents may testify to the meaning of coded drug language under
6 Federal Rules of Evidence 702, unquote.

7 Government agents understanding the meaning of coded drug
8 language is akin to understanding other clandestine means of criminal
9 operations, such as the use of cover businesses in the manner of
10 money movement.

11 In United States v. Flesher, that's at 73 M.J. 303 CAAF 2014
12 case, it says, quote, in cases involving narcotics trafficking,
13 courts have admitted a broad range of expert testimony concerning the
14 modus operandi of the drug trade, unquote.

15 In this terrorism case, the prosecution also plans to use a
16 broad range of expert testimony appropriately tailored to each expert
17 based on their relevant experience.

18 Defense counsel complains that the expert list goes on and
19 on. Well, there is a broad range of narcotics cases, and there is a
20 broad range in terrorism cases. That is the case for Aimen Dean.

21 Additionally, the street value of drugs, the methods to
22 courier drugs, the qualities of drugs in certain forms, the amount of
23 information couriers are typically given about the scope of the

1 enterprise, how couriers are paid and how blind mules operates are
2 areas of expertise from government agents. And that's from United
3 States v. Jeri, 869 F.3d 1247, page 1266. Eleventh Circuit case of
4 2017.

5 The methods of couriers is akin to the money movement by
6 couriers that Mr. Dean knows all about because he has done it
7 himself. United States v. Garcia, 447 F.3d, 1327 on page 1335,
8 Eleventh Circuit case in 2006, acknowledges the well-established rule
9 that an experienced narcotics agent may testify as an expert to help
10 a jury understand the significance of certain conduct or methods of
11 operation unique to the drug distribution business.

12 United States v. Chastain, 198 F.3d, 1338, page 1349,
13 Eleventh Circuit case in 1999 allowing expert testimony about, quote,
14 general techniques of drug smugglers, unquote, and modifications to
15 an airplane that made it more suitable for drug smuggling.

16 MJ [COL FITZGERALD]: Counsel, let me ask you this. You're
17 citing to a lot of case law about government agents, undercover
18 agents. Are you suggesting that Mr. Dean is an undercover agent or a
19 government agent?

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

21 MJ [COL FITZGERALD]: So is he a law enforcement agent?

22 ATC [LTC GARRETT]: He is not a, per se, law enforcement
23 agent, but his duties are akin and his work led to arrests, which is

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1 a law enforcement function. So I think this is ----

2 MJ [COL FITZGERALD]: As I understand, do we know how he came
3 into the employ? I mean, was -- if he's not a government agent or a
4 law enforcement agent, how do he come into this role?

5 ATC [LTC GARRETT]: Your Honor, when he -- after the '98
6 embassy bombings, Mr. Dean questioned the theology and rationale of
7 al Qaeda because of how many civilian Africans were killed and not
8 just Americans. So he researched and asked leadership: What's the
9 rationale? What's the religious rationale for this?

10 And he was given a hadith that he went and looked up
11 himself. He went to the library that they had, looked up the
12 specific hadith, and he determined that hadith had nothing to do with
13 what happened, did not support the terrorism and death and mayhem of
14 the '98 embassy bombings.

15 And at that point, he decided he's got to get out of this
16 organization. He had some health problems. That was a good cover
17 for him to have an excuse to leave, and he flew to a different
18 country. I want to say Dubai, but don't hold me to that. And when
19 he was in Dubai, he was rolled up because he was ----

20 MJ [COL FITZGERALD]: What do you mean by "rolled up"?

21 ATC [LTC GARRETT]: Sorry. He was taken into custody. And he
22 was interrogated and he was forthcoming. He told them he was
23 leaving. He wasn't holding back, unlike as you've seen in this

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1 commission, so many al Qaeda co-conspirators withholding information,
2 misleading, playing games. He was completely forthright.

3 And that intelligence service realized that he was serious
4 and he could be helpful. But they also determined that, based off of
5 that location and their capabilities, he would be better served
6 serving another country.

7 And so he was given the option of working -- if he was
8 willing to, working for the British, the United States, or the
9 French. And due to familial connections to Britain, I believe it was
10 his grandfather had served with them many years before, he chose
11 Britain.

12 And under the guise of his continued health problems, and
13 this is in the interview that's attached to our motion, he went to
14 England for continued health care. And that cover worked well
15 because other al Qaeda members had done so as well.

16 So while he was there, that's when he was debriefed and
17 brought into that system and ultimately integrated back into al Qaeda
18 as an agent of the ----

19 MJ [COL FITZGERALD]: What you're suggesting is it sounds like
20 Mr. Dean is more of a confidential informant than he is a government
21 agent or a law enforcement agent. Do you find any case law that
22 makes that distinction or where the confidential informant would be
23 qualified as an expert?

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1 ATC [LTC GARRETT]: I have not found that and nor have I
2 looked for it, frankly, yet.

3 MJ [COL FITZGERALD]: And you're free to -- it's my
4 supposition that what you've described to me is somebody more akin to
5 a confidential informant than a law enforcement agent. And so his
6 agency to a law enforcement body is -- seems different.

7 And I'm just wondering if that's a distinction that could be
8 made with respect to somebody's qualifications as an expert, again,
9 because you're relying on what we discussed with Agent McFadden and
10 the case law about law enforcement agents. But can you apply that
11 same standard to people who were members of a criminal enterprise
12 and, by your words, rolled up for that involvement in that criminal
13 enterprise, then agree to work with the government in an undercover
14 capacity? Again, I would probably qualify him more as a confidential
15 informant because I haven't heard that he received any law
16 enforcement training and went in as law enforcement agent.

17 So I think there's a distinction to be made as to whether
18 the same analysis you would use with a law enforcement agent would
19 apply to a confidential informant. I also don't know how he was paid
20 or remunerated for his services.

21 ATC [LTC GARRETT]: Right.

22 MJ [COL FITZGERALD]: Am I making sense what I'm asking?

23 ATC [LTC GARRETT]: I am. And the distinction from the

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1 government's position is in name only, that -- and you give it the
2 weight that it deserves. I think that the facts of what they're
3 doing, what a law enforcement agent does and what he's doing at this
4 point, are extremely similar. And unlike a confidential informant
5 who may be coerced to cooperate when they're rolled up ----

6 MJ [COL FITZGERALD]: A bit of a Hobson's choice for him,
7 right?

8 ATC [LTC GARRETT]: Say again?

9 MJ [COL FITZGERALD]: A bit of a Hobson's choice for that
10 person. He didn't go seeking employment as a member of law
11 enforcement. By your words, he was rolled up and given a choice of
12 which country he would like to be an informant for and
13 work -- essentially double-cross his own former organization ----

14 ATC [LTC GARRETT]: Right.

15 MJ [COL FITZGERALD]: ----- to his benefit against ----

16 ATC [LTC GARRETT]: Well, at his great risk.

17 MJ [COL FITZGERALD]: ----- his liberty interests -- well,
18 certainly risk, but also against his own -- or in favor of his own
19 penal interests, not wanting to go to jail, not wanting to be
20 subjected to criminal prosecution.

21 That seems -- because remember, the standard we're looking
22 at under Daubert or Kumho is the reliability of that person's
23 expertise. And so I'm not sure how in this particular circumstance

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1 with Mr. Dean we can rely on a law enforcement expertise when we know
2 he comes with different motivations.

3 And I'm questioning how that's going to be reliable and
4 what -- how do we review that reliability? Because he's not a law
5 enforcement agent, as I understand it.

6 ATC [LTC GARRETT]: Right. The one distinguishing aspect from
7 the scenario that I would want to point out is that he left al Qaeda.
8 He was -- he had left. And when he was brought in, it wasn't that he
9 was brought in actively al Qaeda. He was -- had left, had planned to
10 become a schoolteacher. He wanted out.

11 And so for this -- for him to do this at great peril for
12 eight years, I think -- and the significant contributions he made to
13 stop terrorism and for numerous people to be arrested is worthy of
14 consideration when you're talking about law enforcement agents
15 fighting counterterrorism and this agent, a government agent of
16 Britain, also fighting counterterrorism.

17 And I would just ask -- and I'm almost done with that line
18 of argument, that you give it the weight that you deem appropriate,
19 Your Honor.

20 MJ [COL FITZGERALD]: Well, so it appears you've not given me
21 any case law support involving a confidential informant, not a member
22 of the law enforcement body. So it would seem that a Daubert hearing
23 would be appropriate.

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1 ATC [LTC GARRETT]: I would just -- my last point on this, and
2 then I can move on, is simply if law enforcement agents who are
3 not -- were never a part of this organization and are trying to learn
4 about it from the outside are given such great latitude under this
5 standard, then a former member, who is also now serving in the
6 capacity of a government agent, to investigate and provide
7 information to stop terrorism and for people to be captured and
8 arrested is analogous.

9 For someone who wasn't a part of that organization to be
10 given such latitude with their expert testimony, it stands to reason
11 that someone who with even better knowledge and access of information
12 would also be allowed to give the expert opinion on similar matters.

13 Your Honor, I mentioned the Hankey case a moment ago, which
14 was referenced by the defense in its 696B response. The defense laid
15 out for the commission from that case the following information from
16 the officer provided for the court's consideration. That he had been
17 in law enforcement for 21 years. That he had worked undercover with
18 thousands of gang members. He had received formal training in gang
19 organization and structure. He taught classes about gangs. He had
20 extensive personal knowledge regarding the relevant affiliated gangs.
21 He personally knows the defendant and the witness at issue. He was
22 told by the relevant witness that the witness was part of a gang. He
23 had personal knowledge that when one leaves a gang, they move out of

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1 the neighborhood. The relevant members remained in the neighborhood
2 and continued to affiliate with other gang members.

3 And his opinion was also based on the defendant's criminal
4 activity and observations that the officer made in the field.

5 You could take almost every criteria referenced by the
6 defense and apply it to Aimen Dean's experience with al Qaeda, all of
7 which is in the record.

8 MJ [COL FITZGERALD]: Except training in law enforcement.

9 ATC [LTC GARRETT]: I'm using these factors, these ----

10 MJ [COL FITZGERALD]: One of them you said was training in law
11 enforcement.

12 ATC [LTC GARRETT]: Training in gang organization and
13 structure.

14 MJ [COL FITZGERALD]: I condensed it, but that's some law
15 enforcement training he had, correct?

16 ATC [LTC GARRETT]: Presumably.

17 MJ [COL FITZGERALD]: I mean, he wasn't trained to be a gang
18 member. He was trained in how gangs operate, organize, fund,
19 resource, and carry out their gang activities. That sounds like
20 training in a law enforcement capacity. Mr. Dean doesn't seem to
21 have that that I'm aware of.

22 ATC [LTC GARRETT]: His is even better. He worked in al Qaeda
23 for 12 years. He worked undercover with many al Qaeda members in

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1 several different countries. He received formal training within
2 al Qaeda. He taught classes within al Qaeda. He had extensive
3 personal knowledge regarding the relevant affiliated terror groups.
4 He personally knows the defendant. He had personal knowledge about
5 leaving al Qaeda and moving out. And his opinion is based on
6 criminal activity and observations Mr. Dean made in the field.

7 Your Honor ----

8 MJ [COL FITZGERALD]: Isn't it a little peculiar that he left
9 this organization concerned about the activities, the bombings in
10 1998? He was involved in a criminal enterprise, by your account.
11 But in 1998, the bombings happened which caused him to question
12 it ----

13 ATC [LTC GARRETT]: Sure.

14 MJ [COL FITZGERALD]: ----- which suggests he's outside the
15 body of knowledge of the criminal enterprise, the very thing he
16 proclaims to be an expert in.

17 How can he have a change of heart if they're doing a
18 criminal thing? They do the criminal thing and he says, "I don't
19 want anything to do with these criminals. I shouldn't belong to this
20 organization." That seems to be an internal contradiction.

21 ATC [LTC GARRETT]: It seems to be a change of heart, Your
22 Honor, based off of the atrocity that occurred in 1998, and then he
23 was willing to go back to try and help stop them.

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1 MJ [COL FITZGERALD]: Okay.

2 ATC [LTC GARRETT]: Your Honor, as Aristotle said: Those who
3 know, do. Those that understand, teach. And both are valuable and
4 both may be qualified as experts. But Aimen Dean knows because he
5 did it. He knows and the standard is specialized knowledge. That is
6 exactly what he brings as an expert in this case.

7 The commission can learn about an expert's qualifications in
8 multiple ways. It could be through testimony in a hearing, but it
9 can also be through evidence in the record.

10 The prosecution thinks the information provided is
11 sufficient for the commission to qualify Mr. Dean as an expert
12 without holding a Daubert hearing.

13 I'd like to take a moment to address some of the points that
14 defense counsel made.

15 Defense counsel asserted that they had evidently tried to
16 e-mail Mr. Dean and did not get a response. I don't know what e-mail
17 they tried. They never requested information from us. They never
18 asked us if we would facilitate getting in touch with him, and the
19 government is certainly willing to do so, Your Honor.

20 Defense counsel noted that our proffer, our synopsis, kept
21 changing. He called it moving the goalpost. Complained it was not
22 specific enough. And then when we try to refine it, they complain
23 that we changed it. He showed multiple examples of how it changed

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1 as -- what this comes down to is our understanding of synopsis and
2 when they -- when the defense wanted more specificity, we tried to do
3 it. We tried to provide that.

4 And then the last example that defense counsel provided
5 claimed that our supplemental -- our supplemental discovery that we
6 gave was somehow different from what we provided in the filing to the
7 commission at 696A.

8 May I use the ELMO?

9 MJ [COL FITZGERALD]: You may.

10 ATC [LTC GARRETT]: If you do a side-by-side comparison of
11 what we submitted in discovery, as well as what we provided to the
12 commission, the highlighted portion ending that sentence, "before and
13 after the USS COLE attack," is the only difference in language.

14 Removing from the ELMO.

15 May I have a moment, Your Honor?

16 MJ [COL FITZGERALD]: You may.

17 **[Pause.]**

18 ATC [LTC GARRETT]: In our discovery, our supplemental
19 discovery, I believe defense counsel referenced this information.
20 But the information continued. Again, all of that on the first page
21 is identical to what was filed with the commission. And it
22 also -- subparagraph e. was an additional bullet for Mr. Aimen Dean.
23 And I've highlighted the only portion that was not submitted to the

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1 commission.

2 So -- and understanding ----

3 DDC [Lt Col NETTINGA]: Excuse me. Sorry. I'm not seeing it
4 up here. If I could just get the -- if I could get that displayed
5 somewhere in this room?

6 **[Pause.]**

7 MJ [COL FITZGERALD]: Still not seeing it?

8 DDC [Lt Col NETTINGA]: I've got it. Oh, then it went away.
9 There it is, sir. Thank you.

10 MJ [COL FITZGERALD]: Okay.

11 ATC [LTC GARRETT]: So in our filing with the commission, we
12 removed the "as reflected in his book *Nine Lives*," obviously his book
13 is not in the record. Did not think that was appropriate to
14 reference his book in a filing.

15 The bottom line, Your Honor, these changes over time are our
16 attempts to provide a better synopsis. And certainly those last two
17 were not substantively different.

18 **[Pause.]**

19 ATC [LTC GARRETT]: Defense counsel highlighted numerous areas
20 of things that Mr. Dean didn't know. And all of those would go
21 toward cross-examination, not to the weight of his expert testimony.

22 And with regards to the CV submitted to the government by
23 Mr. Dean, defense counsel described it as atypical and not academic

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1 law enforcement, not what you see. Admittedly, Mr. Dean did not have
2 a CV when we -- when I asked him, and he endeavored to create one and
3 provided that to us. But I would note, too, that Special Agent
4 Soufan didn't have a CV either, and a biography was submitted for
5 him.

6 So a CV is not dispositive about someone's expertise. It's
7 information to be utilized to understand their background and
8 education and experience.

9 May I have a moment?

10 MJ [COL FITZGERALD]: You may.

11 **[Counsel conferred.]**

12 ATC [LTC GARRETT]: Nothing further, Your Honor. Thank you.

13 MJ [COL FITZGERALD]: Just a couple questions.

14 ATC [LTC GARRETT]: Sir?

15 MJ [COL FITZGERALD]: Going back to my original point of how
16 he's in the employment of this British governmental agency, is he a
17 salaried employee? Is he -- do you know how he's compensated in this
18 role? Is he -- do you know?

19 ATC [LTC GARRETT]: I don't know how much he was compensated,
20 but I do believe he was compensated in that role.

21 MJ [COL FITZGERALD]: Again, I'm looking at, is there a
22 distinction to be made because he appears to be working as more of a
23 confidential informant? And they get paid differently than somebody

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1 who is a salaried law enforcement agent.

2 So -- and why that seems important is to understand what his
3 role is to this agency, because you would agree with me under Kumho,
4 I've got to assess his methodology. And I'm not sure the methodology
5 is the same for an informant as it is for an agent. And
6 under -- because you used the case law about undercover agents, and
7 their methodology seems to be, I would imagine, based on law
8 enforcement training and then more specific training in the group
9 they're trying to infiltrate and coexist with, but all at the same
10 time gathering evidence to be used in the way that law enforcement
11 agents are trained.

12 I don't know if I can say the same for Mr. Dean because I
13 don't know how he's in the employment of these British governmental
14 agencies. But that would seem to go to the question of methodology
15 in assessing the reliability of Mr. Dean as an expert for the
16 government.

17 Am I making my point clear?

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

19 MJ [COL FITZGERALD]: Because he's not an engineer like Kumho.
20 That seems pretty easy to follow. But if you read Kumho, they
21 determined that the expert wasn't reliable and the question was about
22 his methodology. I seem to have the same problem here, at least in
23 trying to be informed in my gatekeeping obligation.

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1 So with that, I -- if you don't have any information now, I
2 look forward to -- if there's more factual information, I think the
3 defense would like that, too. And if there's any case law, you could
4 help me understand. And I'm not trying to throw a red herring out
5 there, but I'm trying to understand ----

6 ATC [LTC GARRETT]: Absolutely.

7 MJ [COL FITZGERALD]: ----- methodology based on what type of
8 employment he had with this foreign governmental agency.

9 ATC [LTC GARRETT]: Yes, Your Honor. And if I may, I went to
10 my notes prematurely -- not prematurely, but I forgot to come back
11 just to wrap up something.

12 MJ [COL FITZGERALD]: Oh, you may.

13 ATC [LTC GARRETT]: And that goes to your last point regarding
14 providing more information to the commission and to the defense. And
15 although the prosecution thinks we've provided sufficient information
16 for the basis of his expert opinions proffered based off of his
17 personal experiences, a plethora of information also exists in the
18 public sphere. We are in the process of producing more information
19 in fulfillment of our discovery obligations.

20 MJ [COL FITZGERALD]: You have to hurry. Because if you
21 recall when I continued this case, and what I've said several times,
22 is discovery is closed. We are in a pretrial ----

23 ATC [LTC GARRETT]: Well ----

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1 MJ [COL FITZGERALD]: ----- we are in a pretrial mode. I
2 believe the phrase I used, to borrow Navy parlance, is we are
3 underway. And I've said that several times. So I'm not sure why
4 there's still discovery going on ----

5 ATC [LTC GARRETT]: Right.

6 MJ [COL FITZGERALD]: ----- when we have a trial date that,
7 up until Monday, was 1 June 2026, and the government told me they
8 were ready, so...

9 ATC [LTC GARRETT]: Well, the suspense for some of it is
10 May 4th. We're not there yet.

11 MJ [COL FITZGERALD]: Sure. Okay.

12 ATC [LTC GARRETT]: And so may I have a moment?

13 MJ [COL FITZGERALD]: You may.

14 **[Counsel conferred.]**

15 ATC [LTC GARRETT]: So, Your Honor, your colloquy with us,
16 with both parties the other day, we heard that to mean there would be
17 no -- nothing new that's not already in the pipeline. We've had ----

18 MJ [COL FITZGERALD]: That's true. No. My point to what I
19 said on Monday was, as of Monday we had a trial date for 1 June 2026.
20 So it's surprising to me to see there's still discovery going on. I
21 said going forward you have to request permission for anything that
22 is not part of ongoing discovery.

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

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1 MJ [COL FITZGERALD]: But here I am trying to take up a
2 Daubert hearing, which seems of critical importance to the parties,
3 and I don't know how we would have resolved that prior to 1 June 2026
4 based on the questions I posed to you about I'm concerned -- that I
5 needed to perform a gatekeeping function as to the methodology of
6 Mr. Dean to determine if he is reliable enough to be an expert at
7 trial.

8 So -- but I understand your point. You still have time to
9 do the things that are outstanding.

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

11 MJ [COL FITZGERALD]: This is not a new discovery request, so
12 it doesn't fit into that category.

13 ATC [LTC GARRETT]: Right.

14 MJ [COL FITZGERALD]: Please fulfill that obligation. And I
15 remind you what I said earlier in regards to Mr. Kohlmann.
16 Mr. Kohlmann is -- my expectation is that you delivered to the
17 parties a stipulation of -- I'm sorry -- a proffer of expected
18 testimony or a declaration. Not that they presume what his testimony
19 is, but that they know what his testimony will be.

20 So I don't know if they have that. I don't think Colonel
21 Nettinga made that a central focus point of his presentation other
22 than they're still seeking some information. And I'm certain they'll
23 work with you to get better contact information if they've run into a

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1 dead end there. But that is one thing I would expect is they have
2 that, because I'm inclined to believe I probably don't have enough
3 information to determine if his methodology is reliable enough
4 without a hearing.

5 That's not my ruling, but if I'm forecasting a ruling ----

6 ATC [LTC GARRETT]: Understood.

7 MJ [COL FITZGERALD]: I think I'm forecasting it pretty loud
8 and clear.

9 ATC [LTC GARRETT]: I hear you loud and clear, sir.

10 MJ [COL FITZGERALD]: Okay.

11 ATC [LTC GARRETT]: But just to forecast, based off of this
12 discussion, and due to the nature of his work in intelligence, we
13 will likely be submitting things through the 505 process for the
14 commission's review that ultimately may be helpful for this process.
15 Again, already -----

16 MJ [COL FITZGERALD]: I think you're alarming the defense. I
17 just ask that you ----

18 ATC [LTC GARRETT]: They want more information.

19 MJ [COL FITZGERALD]: ----- proceed with caution as the
20 likelihood of a Daubert hearing as to the methodology of Mr. Dean and
21 how he arrives at his expert opinion.

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

23 MJ [COL FITZGERALD]: All right.

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1 ATC [LTC GARRETT]: Thank you.

2 MJ [COL FITZGERALD]: Thank you.

3 Defense, would you like to respond?

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

5 Sir, good afternoon.

6 MJ [COL FITZGERALD]: Good afternoon.

7 DDC [Lt Col NETTINGA]: Sir, just understanding the
8 commission's questions put to the prosecution, I don't want to
9 belabor the point here. But I do think it's worth noting that even
10 when the prosecutor began his remarks and started talking about what
11 the areas of expertise were for Mr. Dean here, I didn't hear anything
12 about he's going to testify as an expert about hostilities or the
13 existence of hostilities.

14 I didn't hear him say that this Mr. Dean would give an
15 opinion as to Mr. al Nashiri's senior role in al Qaeda. And so I'm
16 wondering if we've changed -- the recognition has been, hey, those
17 aren't appropriate for Mr. Dean and those points are being conceded
18 or if they were just omitted for some other reason.

19 But I -- certainly we don't have enough
20 information -- right? -- as the court -- commission, I think, is well
21 aware. But just even trying to figure out what this person is going
22 to be an expert in is an initial step that I think is lacking and
23 continues to change.

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1 I do think, just to hammer home the point a little bit more
2 in terms of what we don't have for this particular witness and this
3 particular individual who is problematic for a number of different
4 ways, we have -- I understand the prosecution's admiration and
5 vouching for this witness and the life story that he portrays in his
6 book. This is an individual that, based on the logic and the
7 rationale and the charging decisions of the United States Government,
8 could well have been charged with a crime in these military
9 commissions based on his involvement with al Qaeda leading up to and
10 after the embassy bombings.

11 And so you have somebody who is, again, in the eyes of the
12 United States, ostensibly involved in, guilty of conspiracy and/or
13 murder, war crimes with respect to the embassy attacks. And, again,
14 that's, I think, the government's position.

15 And you have this individual going and traveling to the UAE.
16 While he is at the UAE, he is arrested. We don't have any
17 information about why he is arrested or what he is arrested for, only
18 that the person he's traveling with gets a call and says, hey, can
19 you bring in Mr. Dean, and Mr. Dean agrees to go.

20 We don't know if there were charges. We don't have any
21 indication of what the evidence was that they had against him. We
22 don't have any information about how that relationship was formed or
23 developed for him to apparently get his choice of which agency he

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1 wanted to participate with or which country he wanted to work for.

2 Again, this is all from Mr. Dean himself. We have no
3 corroboration of any of this stuff other than ultimately, again,
4 according to Mr. Dean, he goes and he works for the intelligence
5 service, MI6, in Britain.

6 And I know -- again, I know the commission is well tracking
7 the issue of whether Mr. Dean is a law enforcement agent or not.
8 It's an interesting pivot from the prosecution here in preparing for
9 this oral argument that certainly was not briefed. But even setting
10 aside the fact that he's far more a confidential informant, or
11 something even less than that, than he is a law enforcement agent, he
12 is working for intelligence.

13 And I know we've talked about throughout these hearings the
14 difference between law enforcement and intelligence and whether the
15 CIA is a law enforcement branch. And so I just -- there's a lot that
16 we still don't have and we still don't know. And for a witness like
17 this, I think the gatekeeping role of the commission is even more
18 paramount than it would be in a closer call like a law enforcement
19 agent who certainly can be qualified in certain circumstances.

20 But it's always fact specific, and I think we just -- we
21 need a lot more facts before the commission can make any
22 determination. And ultimately we will be asking for a Daubert
23 hearing, I assume, depending on what information we get from the

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1 prosecution.

2 MJ [COL FITZGERALD]: You've asked for the Daubert hearing.
3 This hearing is to determine if we are going to conduct one, so ----

4 DDC [Lt Col NETTINGA]: What I should say, sir, is I
5 anticipate us maintaining our request for a Daubert hearing even
6 with -- it sounds like -- and I don't want to put words in the
7 commission's mouth, but it sounds like the commission may be inclined
8 to defer the ruling on the Daubert hearing until the government
9 provides additional information. And I'm -- what I guess what I'm
10 saying is in a case like this with this particular type of an
11 individual, I anticipate that we're going to feel like a Daubert
12 hearing is required regardless of what information we get, just
13 because of the unique status of this individual.

14 MJ [COL FITZGERALD]: I understand where you're coming from.
15 I don't like to rule from the bench. I'd like to think through
16 things, but I'm trying to signal or foot-stomp, whatever words you
17 want to use. This sounds like a person for which a Daubert hearing
18 is required because, even based on what you said but even before
19 then, I have a need to inquire as to the methodology of this
20 particular person's expertise and what they relied on, what they were
21 motivated by, how they were remunerated, and whether they had a
22 choice to engage in this activity or whether it was a Hobson's
23 choice.

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

2 MJ [COL FITZGERALD]: And you bring up a good point, whether
3 it was a law enforcement arrangement versus a central
4 intelligence -- or an intelligence relationship, I don't know.
5 There's a lot. So I ----

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

7 MJ [COL FITZGERALD]: What I don't know is what the government
8 will provide to you and maybe you come back and said -- and tell me
9 you don't want a Daubert hearing. Maybe the government comes back
10 and says we're no longer qualifying them as an expert which would
11 also forego the need for a Daubert.

12 So I'm just telling you I'm inclined to grant it as best I
13 can. And I'm trying to be very specific to the thing I
14 am -- experience discomfort with, and that's I don't understand the
15 methodology for this particular expert.

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

17 MJ [COL FITZGERALD]: There may be more. That's why I'm not
18 issuing a full ruling but that should be a signal to enough of why I
19 believe a Daubert hearing is appropriate.

20 DDC [Lt Col NETTINGA]: Thank you, sir. I have nothing
21 further.

22 MJ [COL FITZGERALD]: Thank you.

23 Take a brief recess before we move on to the next expert? I

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1 don't know who has this. Can I at least be informed of that before
2 we take a recess?

3 SDC [MS. CARMON]: I have it for the defense, sir.

4 MJ [COL FITZGERALD]: Ms. Carmon for the defense.

5 And who for the government, Colonel Garrett again?

6 ATC [LTC GARRETT]: Yes, sir.

7 MJ [COL FITZGERALD]: Very well. The commission's in recess
8 until 1410.

9 **[The R.M.C. 803 session recessed at 1356, 23 April 2026.]**

10 **[The R.M.C. 803 session was called to order at 1413, 23 April 2026.]**

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

12 All parties present before the last recess are again present
13 with the exception of Major Krzemien; is that right?

14 TC [CAPT STINSON]: That's correct, Your Honor.

15 MJ [COL FITZGERALD]: Thank you. Who was excused from these
16 proceedings. And Mr. Nashiri is still attending from the alternate
17 site.

18 Ms. Carmon for the defense?

19 SDC [MS. CARMON]: Yes, sir. Good afternoon.

20 MJ [COL FITZGERALD]: Good afternoon.

21 SDC [MS. CARMON]: In AE 697, the defense has requested a
22 Daubert hearing for Dr. Flagg. And I have one correction to make to
23 the brief and then I would like to take Your Honor through the

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1 various information that we have about Dr. Flagg's proposed testimony
2 and the discrete opinion that he has been proffered to give.

3 And so if I'm looking at AE 697 at our fact section, this is
4 page 3 of the marked exhibit, sub a., we noted that he was previously
5 listed as an expert in the government's first iteration of its
6 witness list. That is incorrect. There is a Mr. Miller who is
7 listed as an expert witness, but it is not Flagg Miller. And so the
8 government first listed Flagg Miller, Dr. Miller in its 14
9 August 2025, witness list.

10 MJ [COL FITZGERALD]: Thank you.

11 SDC [MS. CARMON]: And if I may have use of the ELMO, this is
12 going to be AE 697.

13 This is the first information that the defense got about
14 what Dr. Flagg would testify to. And so Your Honor can see there
15 several topics and it looks like he is going to be used to
16 authenticate a piece of evidence. No specific opinion there given as
17 it relates to any opinion that he would testify to.

18 Removing page 3.

19 And then in response to our request for some more
20 information on 10 February 2026, the government responded that Mr.
21 Miller was, quote -- or Dr. Miller was, quote, an expert in the
22 culture of modern Muslim reform in the Middle East and especially
23 Yemen.

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1 And they further noted that: Mr. Miller will assist the
2 members in understanding the cultural relevance and context of the
3 recording that the government intends to offer into evidence, which
4 was then provided in discovery. And that is a cassette that was
5 recovered that -- it's a compilation of things.

6 One of the items I think pertinent to the government's case
7 in chief is recordings at a wedding where Usama bin Laden mentions
8 the COLE operation.

9 And so this is the final -- I'm sorry. In that written
10 response, the government also goes on to say that: Dr. Miller will
11 base his opinions on his years of experience and study of Muslim
12 culture and that he will primarily rely on the content of the
13 recording located -- and this is the discovery production I just
14 described -- and his knowledge of the al Qaeda tapes as described in
15 his book, *The Audacious Ascetic*.

16 And so that's sort of the first piece of information we get
17 about his proposed testimony. And then I'll place on the ELMO
18 because it's lengthier.

19 We get in response to our request for more information, the
20 government does remit on 25 March 2026 a vignette that encompasses
21 much of what I've already discussed but does identify a discrete
22 opinion to be given by Dr. Miller. And this is AE 697, page 5.

23 And I'll just draw Your Honor's attention to the very last

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1 sentence, which is: He would testify that in his expert opinion,
2 Usama bin Laden's discussion of the bombing of the USS COLE was
3 consistent with Usama bin Laden admitting al Qaeda's responsibility
4 for the attack.

5 Removing that from the ELMO.

6 And so it appears that Dr. Miller will be used to
7 authenticate the particular cassette tape that he's listened to. And
8 that is the subject of a very dense book he has written. And we
9 don't see -- so long as the tape is otherwise admissible as an
10 exception to hearsay or via M.C.R.E. 803(b), that's not an issue as
11 far as the authentication of that being the tape that he listened to,
12 has researched, written about, et cetera.

13 Where we think Your Honor's gatekeeping function is
14 necessary is about the opinion highlighted in the last piece of
15 information that we got on the ELMO, which is equating the mention of
16 the USS COLE bombing to admitting guilt or admitting -- let me get
17 the language exactly right -- admitting responsibility for the
18 attack.

19 And so the issue here, I think, is the analytical gap
20 between his experience -- and I will say his résumé, his curriculum
21 vitae, is extensive. He is well published. He has a Ph.D. He
22 teaches in these topics. He is certainly well qualified to offer an
23 opinion on all of the things contained in his résumé.

1 The question that the defense has regarding the methodology
2 and how we get there is the opinion that mentioning the USS COLE
3 bombing is equated to taking responsibility for the USS COLE bombing.

4 And I'll cite to Your Honor the United States v. Hermanek,
5 289 F.3d 1076. That is a Ninth Circuit 2002 opinion that is cited
6 within our briefing in 697. And I think the details here are
7 analogous.

8 In Hermanek, one of the detectives that is going to testify
9 as an expert witness is ostensibly being offered to interpret
10 language that he's overhearing on a wiretap.

11 And, of course, the court notes that the proffered expert
12 must establish that the reliable principles and methods underlie the
13 particular conclusions offered. And they note that, specifically in
14 this case, it's the interpretation of particular words as referring
15 to cocaine.

16 And with the information available to the court, the
17 reviewing court finds that there is too much missing between the
18 experience that he has and the opinion that he offers.

19 And the court notes that: Without a link between
20 Broderick's knowledge and the particular matter he interpreted, there
21 is simply too great an analytical gap between the data and the
22 opinion offered.

23 And so this is certainly not a discipline which lends itself

1 to a laboratory report or statistics or math. We understand that
2 this is sociology, anthropology, those types of science, particularly
3 linguistics here.

4 I think the issue is we do not know how we get from
5 mentioning the COLE bombing in a wedding video to admitting
6 responsibility for a COLE bombing in the wedding video. And it's
7 that interpretation of language that we lack the methodology. We
8 lack information that would bridge that analytical gap, much like
9 happened in United States v. Hermanek.

10 And so it's certainly not that Dr. Miller isn't qualified.
11 His résumé is quite impressive. The problem, I think, and where we
12 need Your Honor and the gatekeeping function that you sit as in a
13 Daubert hearing, we need that analytical gap filled. And if it can't
14 be filled, then it is sort of the ipse dixit of the expert that
15 cannot be allowed to be placed in front of the members.

16 And so that's really the very discrete issue that we have
17 identified. Unless we do not possess other opinions that Dr. Flagg
18 intends to give, that one discrete opinion, as identified by the
19 government, I think we lack information to be able to say he can give
20 that opinion.

21 And pending any questions from Your Honor, that is why we
22 asked for a Daubert hearing as to Dr. Flagg.

23 MJ [COL FITZGERALD]: Thank you very much. I have no

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1 questions for the defense at this time.

2 SDC [MS. CARMON]: Thank you.

3 MJ [COL FITZGERALD]: Colonel Garrett?

4 SDC [MS. CARMON]: And I apologize. Dr. Flagg equals
5 Dr. Miller. I think I kept calling him Dr. Flagg. Same person.
6 Sorry.

7 MJ [COL FITZGERALD]: I didn't want to interrupt you because I
8 think I understood what you were doing. Thank you.

9 ATC [LTC GARRETT]: Your Honor, in the interest of brevity, I
10 incorporate by reference my remarks on M.C.R.E. 702, the applicable
11 standards from Houser and Kumho Tire in the AE 697A brief.

12 In sum, Mr. Miller is primarily a fact witness that is
13 necessary for the recordings of Usama bin Laden to be entered into
14 evidence. Because he is the foremost expert on social and cultural
15 anthropology in the Mid East, especially the study of al Qaeda and
16 extremist movement in the context of anthropology, he has studied
17 those recordings and written about them in the context of his
18 professed expertise extensively. His specialized knowledge qualifies
19 him as an expert; thus, we ask the commission to qualify him as an
20 expert in al Qaeda and Islamic culture.

21 Mr. Miller's expert testimony will be very focused about
22 those tapes. In particular, the recording where bin Laden discusses
23 the bombing of the USS COLE and how the language and terms bin Laden

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1 used, the significance of the occasion, the arrangement of words, the
2 use of poems, the interpretation of the cultural significance of that
3 event.

4 Al Qaeda's involvement in the USS COLE attack is certainly
5 relevant, and the foundation for Mr. Miller's expert opinion is
6 extremely reliable.

7 It seems as though defense really isn't questioning the
8 foundation of his background. It's that the -- they're not
9 questioning his qualifications. They're questioning that
10 methodology, despite his background of the cultural awareness of
11 poetry, weddings, bin Laden talking about heroic action, bin Laden
12 answering questions from the audience about the COLE bombing, that
13 his understanding listening and studying -- listening to over 1500
14 tapes to include this one, I think he certainly is qualified as an
15 expert to speak to that meaning culturally. But, also, I think any
16 issue with defense misunderstanding could be solved with a defense
17 interview, which the government's certainly willing to assist.

18 Pending your questions, Your Honor.

19 MJ [COL FITZGERALD]: Looking at the -- that last sentence:
20 He will testify in his expert opinion UBL's discussion of the bombing
21 of the USS COLE was consistent with UBL admitting al Qaeda's
22 responsibility for the attack.

23 How he's -- how is -- one, how is that helpful to the trier

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1 of fact to even hear that opinion? And is that a matter within his
2 expertise, to take a conversation and apply essentially a mens rea
3 from that?

4 Isn't that for the fact-finder to do? And if it is, why do
5 you believe this particular expert is helpful to them in determining
6 something that I'm not sure they need an expert to determine if they
7 can just look at evidence themselves?

8 So why is his opinion necessary? Let's start there.

9 ATC [LTC GARRETT]: Certainly the panel will be able to make
10 that determination themselves regardless of the expert opinion. But
11 because of his qualifications and experience and understanding, which
12 is beyond anyone in this room, to include a future panel, I think his
13 expert opinion would be helpful to them that, in his opinion, that
14 he's taken responsibility. They can disagree.

15 MJ [COL FITZGERALD]: But where does that expertise come from,
16 then?

17 ATC [LTC GARRETT]: It comes from -- I would invite the
18 commission to look at his CV. As defense counsel noted, it
19 is -- what was the phrasing? Extensive? He's also lived in Yemen.
20 He's fluent in the language. He's a foremost expert in the culture.

21 So, again, these -- the importance of this event, of this
22 wedding, and importance and significance of poetry of the comments by
23 bin Laden regarding the heroic action -- and maybe most of all,

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1 answering questions from the audience about the event is -- that
2 significance -- I think he's in a position after his studies and
3 listening to all of these tapes, to include this one, to make that
4 opinion if -- if there isn't a literal, "we take responsibility"
5 sentence in there, his expertise is, well, they are taking
6 responsibility due to these cultural factors. And that could be
7 helpful to the panel.

8 Additionally, he can speak to the propaganda aspect of
9 this -- obviously, this was recorded -- and the bragging aspect of
10 this event in order to take responsibility, because he's culturally
11 aware of how they communicate.

12 **[Counsel conferred.]**

13 MJ [COL FITZGERALD]: Does he have examples in his portfolio
14 of expertise where he's done this before? Is interpret words of
15 somebody and says, well, that person's admitting he did something or
16 denying he did something or taking responsibility? Where does that
17 happen in his field of expertise?

18 ATC [LTC GARRETT]: Well, I think part of being a cultural
19 anthropologist in -- for that region, is taking into context what
20 people mean when they say something. And whether there's a specific
21 example of someone taking responsibility, I'm not aware at this
22 moment.

23 But that falls into the category of expertise of Dr. Miller

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1 being able to talk about the meaning when people say things, again,
2 because he is an expert in culture and anthropology with a particular
3 focus on this region.

4 And if I may add to the point about propaganda, certainly
5 the COLE is an important aspect of al Qaeda propaganda. We know that
6 from the COLE video. This is yet another aspect of that.

7 MJ [COL FITZGERALD]: Not all propaganda is true, so isn't
8 that part of the problem? I think we hear in similar -- in my
9 lifetime multiple people take responsibility for a terrorist attack.

10 ATC [LTC GARRETT]: Uh-huh.

11 MJ [COL FITZGERALD]: So -- and that's part of propaganda.
12 It's, like, well, maybe we didn't do it. We're going to take credit
13 for it. We're going to claim responsibility. Or maybe you divert
14 attention.

15 So isn't that part of propaganda, is to confuse the issue,
16 place blame elsewhere, place investigative resources elsewhere?
17 So -- and that, I guess, goes to what's the reliability of that
18 opinion as well as the methodology?

19 ATC [LTC GARRETT]: Well, yes. To answer your question,
20 propaganda can be used to mislead. But it can also be used to tell
21 the truth. And I -- again, I think that goes toward his expertise of
22 listening to over 1500 cassette tapes and the studying of this
23 culture and these people and al Qaeda that he could speak to that.

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1 But certainly defense is capable to cross-examine him with
2 that line of questioning. But I think, again, that goes -- doesn't
3 necessarily go toward the analysis here.

4 MJ [COL FITZGERALD]: Has he testified in that fashion in
5 other proceedings?

6 ATC [LTC GARRETT]: He's never testified before, Your Honor.

7 MJ [COL FITZGERALD]: Is he published in this area of -- I
8 don't know if it's psychology, sociology, linguistics, or maybe just
9 a combination of all? Has he published in those fields.

10 ATC [LTC GARRETT]: I'm sorry, could you say that again?

11 MJ [COL FITZGERALD]: Has he published in the fields -- this
12 appears to be maybe an interplay of sociology, psychology, and
13 linguistics, as well as cultural. Has he published in those areas?

14 ATC [LTC GARRETT]: May I have just a moment?

15 MJ [COL FITZGERALD]: Sure.

16 **[Counsel conferred.]**

17 MJ [COL FITZGERALD]: Colonel Gallagher **[sic]**?

18 ATC [LTC GARRETT]: Your Honor, I wanted a moment just to
19 confirm your specific question about sociology, psychology, and so
20 forth, those specific disciplines. The answer is no to those.

21 But he has a doctorate in linguistic anthropology, which
22 deals with the culture, but also language in particular. He has a
23 focus on poetry and what that means in that culture and can speak to

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1 that culturally and to -- and to give such a speech at a wedding, the
2 significance of that as well as opposed to just some other
3 conversation that's being occurred. He chose a big event, a
4 celebration to hold this talk, to answer questions on it in front of
5 an audience. That clearly had purpose.

6 And to your point about propaganda can be used to mislead
7 and my retort that it can also be used to tell the truth, Bahlul was
8 convicted of the USS COLE video which was certainly a tool -- a
9 propaganda tool for recruitment. This audio can be viewed in a
10 similar light.

11 MJ [COL FITZGERALD]: Thank you.

12 Defense, would you like to respond?

13 SDC [MS. CARMON]: Yes, sir. Thank you.

14 Just to respond to the issue of propaganda and particularly
15 any propaganda value of this cassette. I've gone over and over
16 Dr. Miller's CV, and I don't see anything -- any publications about
17 propaganda or the propagandic value. Most of his publications are
18 about poetry and sociolinguistics, that sort of thing. And I think
19 any opinion he would offer about the propaganda value of this, I'm
20 not sure he's got the expertise or the background to offer that.

21 And the other thing I'd like to direct Your Honor's
22 attention to is the Mejia case that the government mentioned. This
23 is 545 F.3d 179. It is a Second Circuit case from 2008. And the

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1 issue here was the law enforcement officer, as expert, and whether or
2 not the opinions he was allowed to give strayed too far outside the
3 narrow piece that he was qualified as an expert in.

4 And what the court notes is that expert opinion testimony is
5 carefully circumscribed to occasions where, quote, the subject matter
6 of the testimony is beyond the ken of the average juror.

7 And in thinking about the discrete opinion that we have been
8 given notice of regarding a claim of responsibility and then some of
9 the pieces the government talked about, about a wedding being a large
10 celebration and important, and speeches that might be given there, I
11 don't know that any of that is beyond the ken of the jury.

12 And an expert opinion with the imprimatur that it
13 brings -- and it does, particularly somebody with Dr. Miller's
14 extensively published and well-credentialed background, that opinion
15 is not necessary to help the jurors understand anything. I don't
16 think those types of facts or that inference is beyond their ken such
17 that an expert is needed to opine on it.

18 Certainly it seems like an argument to be made, but I don't
19 know that we need an expert on the stand coming in with that
20 imprimatur of an expert to give that opinion. It's not beyond the
21 ken of the panel.

22 MJ [COL FITZGERALD]: Thank you. Ready -- I think we're on
23 our last expert, 701?

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1 Is that you, Lieutenant Shaver?

2 DC [LT SHAVER]: Yes, sir, I believe so.

3 MJ [COL FITZGERALD]: Are you ready to proceed? You believe
4 so?

5 DC [LT SHAVER]: I believe that's where we are, yes, sir.

6 MJ [COL FITZGERALD]: All right. Who has -- for the
7 prosecution, who has -- is this you again, Colonel Garrett?

8 ATC [LTC GARRETT]: Yes, sir.

9 MJ [COL FITZGERALD]: Okay. Good afternoon, Lieutenant
10 Shaver.

11 DC [LT SHAVER]: Good afternoon, sir.

12 And this is AE 701, which concerns Dr. Aaron Zelin. I have
13 conferred with the prosecution, and we've landed on Zelin as we're
14 fairly sure that's the correct pronunciation. We will check with him
15 when we get a chance, but that's what we've agreed on for now, sir.

16 MJ [COL FITZGERALD]: Okay.

17 DC [LT SHAVER]: So here, as the last of four of these
18 motions, I'll try not to rehash any of the arguments that we've
19 already had.

20 In some ways, this witness is more straightforward. Similar
21 to Dr. Miller, the defense is not necessarily disputing his
22 qualifications, which are well established in his CV. He is also an
23 academic. He has published widely on a range of different subjects

1 and appears to be very well trained and experienced.

2 This is largely a procedural objection in terms of the
3 information that we've been given, when we've been given it, and
4 whether or not that allows us to meet our burdens in this process.

5 And so we've moved to compel expanded disclosures, and then
6 ultimately to have a Daubert hearing so we can really meet our
7 responsibilities as defense counsel.

8 Along those lines, the broad question today has been what
9 process is required or should be required to test expert opinions
10 against their demonstrated expertise. And the point, to go back to
11 where Ms. Manuele started this morning, in talking about the federal
12 rules and the committee's decisions underlying those rules, is to
13 avoid surprise or ambush in order to be consistent with due process.

14 So here the defense needs information about those witnesses
15 for a range of different reasons. We need information about the
16 opinions that the government tends to elicit from their
17 expert -- intends to elicit from their experts so we can, if
18 necessary, find our own experts to counter them.

19 We need to know what those opinions are so we can examine
20 the methods that they're using in-depth and potentially go and
21 interview them and question them to get more of those details so then
22 we can participate in a robust Daubert process.

23 Here some of those disclosures, the disclosures that we've

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1 received, and there are essentially three, and it's similar to what
2 Lieutenant Colonel Nettinga was talking about with the issue of sort
3 of moving the goalpost of this moving target.

4 We have an initial disclosure or the first in this
5 series -- I'm not sure if this is all of them, but on 14 August 2025
6 at the deadline in AE 440J, there is some broad language about
7 Dr. Zelin's expertise with respect to al Qaeda, some statements from
8 Usama bin Laden, operational security practices and operational
9 matters, and al Qaeda's use of propaganda is sort of the broad
10 parameters of Dr. Zelin's expertise.

11 And we would not contest that he has, you know, some
12 experience in those fields. It doesn't give us a great deal of
13 information about the testimony that would actually be offered at
14 trial.

15 That gets expanded -- or some more detail is provided on 27
16 February 2026, long after the deadline for notice, that the
17 government also intends to use Dr. Zelin to discuss radicalization
18 strategies, some more on recruitment. And then there's an addition
19 here that is really significant, talking about a connection with Ibn
20 al Khattab.

21 So Ibn al Khattab is a mujahideen leader in Chechnya. This
22 is somewhat afield from Dr. Zelin's expertise as it's listed in his
23 CV. Chechnya is, you know, certainly related to Arab mujahideen

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1 movements, but the sort of central caucus is a slightly different
2 issue, and it hasn't been a primary focus of Dr. Zelin's research or
3 publishing.

4 The name Ibn al Khattab does not appear in his résumé.
5 There is not much there. I've kind of scrubbed through it a little
6 bit, but there isn't really anything there on Chechnya or any of the
7 caucus' conflicts in the '90s.

8 That addition is particularly significant in the context of
9 this case because it raises a number of other legal issues. So
10 there's certainly this notice problem in the sense that because we
11 were not aware of this, we did not know that we might need our own
12 expert on Chechnya and the conflicts that were occurring there in the
13 1990s.

14 It certainly may be relevant to this case, because we know
15 from the CSRT, however admissible that may be, there is a -- there is
16 a portion of that where Mr. al Nashiri talks about going to Chechnya.

17 What is in the CSRT -- which, again, may or may not be
18 admissible -- is that he went to Chechnya with an aid group and he
19 mentions that the aid group was started by a man in Saudi Arabia
20 named Habib.

21 Habib is a relatively common first name. It appears that
22 the government believes that that is sufficient to make a connection
23 to Ibn al Khattab in Chechnya.

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1 So beyond the notice problem, there are potentially
2 relevance arguments that we would make, and certainly that may be an
3 issue that is better handled at trial when the government has the
4 opportunity to lay that foundation.

5 There is also another problem in that there may be a 948r
6 issue there. And the sort of first layer of that is whether or not
7 there is a 948r issue in the CSRT members' question, if that is based
8 on that.

9 The connection -- so drawing that connection to Ibn
10 al Khattab from a common first name of someone in Saudi Arabia is a
11 thin reed, but there are also statements coming out of the black
12 sites that do appear to make that connection. And so from the
13 perspective of the defense, and we've started doing this, but we
14 would need more time to flesh out what that connection may or may not
15 be and what it is based on.

16 And some of this could have been resolved by a complete
17 disclosure. Because if Dr. Zelin is offering that opinion based on
18 information that has been provided by the government, and we had the
19 full disclosure of the type that we're looking for where we get a
20 complete opinion and the underlying bases, we would be better able to
21 interrogate that.

22 The other issues that we see in the disclosures that we
23 ultimately get, there's a set of opinions that we get less than 24

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1 hours before our motions are due. And these overlap. I think it may
2 be -- may be verbatim with the opinions that the government has
3 indicated Mr. Kohlmann would offer.

4 And so it's three different things. One of them is -- and
5 I'll read here. And this is from the disclosure they provided on 25
6 March 2026. And the opinion is that: At the time of the USS COLE
7 video, that was and remained for some time the most successful
8 recruiting video for al Qaeda, and that the making and distribution
9 of the COLE video was a claim of responsibility for the
10 USS COLE -- USS COLE attack.

11 Here we see a very -- a clear claim that the USS COLE video
12 was the most successful recruiting video for al Qaeda. And so when
13 we talk about opinions that are rooted in social science, while that
14 is not necessarily as linear or clearly bounded as more traditional
15 scientific testimony, for example, related to DNA or ballistics, that
16 doesn't mean that it's a completely black box that we cannot
17 interrogate.

18 That is an opinion that presumably is rooted in some kind of
19 social science methodology that Dr. Zelin, as an academic with a
20 Ph.D., you know, would likely be familiar with. But we don't know
21 what that methodology is.

22 When you're talking about something being the most
23 successful propaganda video, there are a range of different ways that

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1 you could come to that conclusion. It might be an economic analysis
2 that for whatever it cost to produce that video, it yielded a certain
3 result. It might be based on interviews of former al Qaeda members
4 who said, you know, that -- or say Dr. Zelin had interviewed 15
5 people and ten of them said that they saw that video and it was
6 important to them.

7 Those are the kinds of things that would allow us to meet
8 our burdens and to challenge this evidence as we find it.

9 One of the last things that the government notes that he
10 would testify to is very similar to Dr. Miller as we've just talked
11 about. And it's this sort of idea that Dr. Zelin will be able to
12 authenticate and argue that letters that are recovered from the
13 Abbottabad compound are consistent with other letters authored by
14 Usama bin Laden.

15 And, again, this is a linguistic analysis. And it is likely
16 that there is a methodological answer there, that Dr. Zelin would say
17 "I have read these other letters. I have read them in Arabic." He
18 does have experience and training in Arabic. And that these are the
19 things linguistically, grammatically, in terms of the citations that
20 are used, whatever the case may be, that tells him that he knows that
21 these things may or may not be authored by Usama bin Laden.

22 Again, without that information, it's very difficult for the
23 defense to know how we would challenge that expert testimony.

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1 And ultimately because we only got this the day before our
2 own motions were due, it doesn't really give us enough information
3 with enough time to go and interview Dr. Zelin and ask him these
4 sorts of questions, to which I suspect he very well may have good
5 answers.

6 I think that's all I've got, sir. Just let me -- if I could
7 have a moment to consult with my team.

8 MJ [COL FITZGERALD]: You may.

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

10 **[Counsel conferred.]**

11 DC [LT SHAVER]: As always, sir, my team is very helpful. I
12 had had this in my notes and forgot to mention it.

13 The other issue with the Ibn al Khattab Chechnya connection
14 is that it is outside the scope of the alleged conspiracy and we may
15 also have a 404(b) issue there, sir.

16 MJ [COL FITZGERALD]: Well, that was my question. You didn't
17 raise it but now you have, so thank you.

18 DC [LT SHAVER]: Yes, sir.

19 MJ [COL FITZGERALD]: 404(b) issue.

20 DC [LT SHAVER]: Yes, sir. Any questions, sir?

21 MJ [COL FITZGERALD]: None. I think that was the only one I
22 had at this particular time. Thank you.

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

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1 MJ [COL FITZGERALD]: Government?

2 **[Pause.]**

3 ATC [LTC GARRETT]: Your Honor, again I incorporate by
4 reference my remarks on M.C.R.E. 702, the applicable standards from
5 Houser and Kumho Tire in the AE 697A brief. The government requested
6 the commission deny the relief requested in AE 701 to schedule a
7 trial ----

8 MJ [COL FITZGERALD]: Colonel Garrett, I'm just going to ask
9 you to go a little slower before the yellow light comes on.

10 ATC [LTC GARRETT]: Gotcha.

11 MJ [COL FITZGERALD]: Thank you.

12 ATC [LTC GARRETT]: The government requests to deny the relief
13 requested in 701.

14 Here Dr. Zelin has been proffered as an expert in the
15 origins, structure, and leadership of al Qaeda. Dr. Zelin approached
16 the origins, structure, and leadership of al Qaeda from a different
17 perspective and discipline, which is the adoption of jihadism. And
18 he has been qualified as an expert in -- 18 times in analogous areas,
19 for example, being an expert in jihadist groups, terrorism, and
20 foreign fighters.

21 Rule 702 is the standard. And, again, this would fall under
22 specialized knowledge. For Dr. Zelin, his areas of expertise are on
23 jihadism. And jihadism is a unique concept within Islamic culture

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1 that is often misunderstood and misinterpreted. Most importantly, it
2 is often the central piece of some extremist ideology.

3 While jihadism was often associated with terrorism movement
4 in the West due to the adoption of organizations such as al Qaeda,
5 the prosecution wants to make sure that the panel members can
6 properly put the facts before them in the correct context.

7 This is a unique and complex case, so much -- so much so
8 that the commission has previously approved several experts to the
9 defense and to the prosecution in this area. And if the prosecution
10 and defense needs expert assistance, the prosecution would expect the
11 panel members to find experts helpful as well.

12 The commission currently has Dr. Zelin's lengthy CV. It
13 shows his rich academic background as highlighted by defense counsel.
14 He's had multiple fellowships, two of which specifically deal with
15 extremism and radicalization as it relates to terrorism. He has
16 conducted field research in many areas including the ISKP in
17 Afghanistan, an affiliate of ISIS, Syrian jihadism, Tunisian
18 jihadism, and the Islamic State in Turkey and Iraq.

19 And, of course, field research by definition involves
20 on-the-ground often-dangerous investigations to collect firsthand
21 data on extremist groups, ideologies and behaviors. It goes beyond
22 the literature reviews to gain tacit knowledge and crucial insights
23 into the why and how of violent extremism.

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1 Defense counsel referenced Chechnya and not being
2 specifically referenced in the CV. However, under "Fellowships,"
3 he's an associate fellow for the Global Network on Extremism as well
4 as the CV is -- throughout the CV there's a lot of -- shows a lot of
5 expertise on publications, on how people move from country to country
6 to fight jihad. So I think that when you review his comprehensive
7 CV, his expertise in there -- in this area will not be a question.

8 MJ [COL FITZGERALD]: How ----

9 ATC [LTC GARRETT]: Yes, sir.

10 MJ [COL FITZGERALD]: ---- is the opinion related to the group
11 in Chechnya led by Ibn al Khattab, how was that an opinion that's
12 relevant to these proceedings?

13 ATC [LTC GARRETT]: May I have a moment?

14 MJ [COL FITZGERALD]: You may.

15 **[Counsel conferred.]**

16 ATC [LTC GARRETT]: It's relevant, Your Honor, because
17 specifically -- he was specifically referenced by the accused in the
18 CSRT that we, you know, hopefully will be able to use at trial. And
19 the panel members, it will be helpful for them to know who that is.

20 MJ [COL FITZGERALD]: Again, how is it relevant to a charged
21 offense?

22 ATC [LTC GARRETT]: May I have a moment?

23 **[Counsel conferred.]**

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1 ATC [LTC GARRETT]: Your Honor, this all goes towards the
2 context of the accused himself and his journey, how he left
3 Saudi Arabia, went to Chechnya, went to the Northern Group, and
4 ultimately landed with al Qaeda.

5 So this is relevant because it's directly related to the
6 accused and his journey in jihad to al Qaeda.

7 MJ [COL FITZGERALD]: Do you believe 404(b) notice is required
8 of his -- any connection to Ibn al Khattab and the group in Chechnya?

9 **[Counsel conferred.]**

10 MJ [COL FITZGERALD]: And I apologize Adam Shaver -- or Adam
11 Shaver. Lieutenant Shaver, how do you pronounce that name again?

12 DC [LT SHAVER]: This is where the interpreters will get their
13 revenge on me. I would say Ibn al Khattab.

14 MJ [COL FITZGERALD]: Okay.

15 DC [LT SHAVER]: But I'm not 100 percent sure on that one,
16 sir.

17 MJ [COL FITZGERALD]: Thank you.

18 **[Counsel conferred.]**

19 ATC [LTC GARRETT]: No, Your Honor. We do not -- the
20 government does not think this is a 404(b) notice because it's
21 intrinsic to Nashiri and his charged offenses.

22 MJ [COL FITZGERALD]: Okay. I'm not going to litigate that
23 today. The defense raised it. I understand your position on it.

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1 Very well. Anything else?

2 ATC [LTC GARRETT]: No, Your Honor.

3 MJ [COL FITZGERALD]: Lieutenant Shaver, anything else for the
4 government -- defense?

5 DC [LT SHAVER]: Yes, sir. Just very briefly.

6 MJ [COL FITZGERALD]: You may.

7 DC [LT SHAVER]: Sir, the government mentioned that Dr. Zelin
8 has been qualified as an expert ----

9 LDC [MS. MILLER]: We lost the RHR. I apologize.

10 DC [LT SHAVER]: Oh.

11 **[Pause.]**

12 DC [LT SHAVER]: No worries.

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

14 DC [LT SHAVER]: Lieutenant Colonel Nettinga, how is the
15 audio? Can you hear me?

16 DDC [Lt Col NETTINGA]: I've had you the whole time.

17 **[Pause.]**

18 MJ [COL FITZGERALD]: And I know you did check, Lieutenant
19 Shaver, and just for the record, we lost feed to the Remote Hearing
20 Room, and then it appeared to come back up.

21 Colonel Nettinga, can you hear me okay?

22 DDC [Lt Col NETTINGA]: Yes, sir, I can. Can you see me and
23 hear me?

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1 MJ [COL FITZGERALD]: I can. So we have good audiovisual,
2 but...

3 Defense, can you check with your headsets to make sure
4 you've got good connections with your folks?

5 **[Counsel conferred.]**

6 DDC [Lt Col NETTINGA]: It doesn't appear like we're getting
7 anything up here through the headsets, sir.

8 MJ [COL FITZGERALD]: I'm being asked to direct you to the
9 front. It looks like they're moving that way.

10 **[Pause.]**

11 MJ [COL FITZGERALD]: Okay.

12 DDC [Lt Col NETTINGA]: We're good, sir.

13 MJ [COL FITZGERALD]: All right. Thank you. I think we're
14 okay to proceed.

15 Just to be clear on the record, the defense uses a headset
16 to communicate with their consultants and resource counsel in the
17 Remote Hearing Room, and they've advised me that with one set of
18 headsets they have that capability. So unless there's an objection,
19 I'm going to proceed.

20 Very well. No objections.

21 Lieutenant Shaver, if you remember where you were.

22 DC [LT SHAVER]: Yes, sir. Thank you.

23 So the government, in their response, noted that Dr. Zelin

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1 had been qualified as an expert witness 18 times. I briefly checked
2 the CV that we have, and it appears that nearly all of those 18 times
3 were in federal courts, presumably following the federal rules and
4 including the types of disclosures that we've asked for here. And so
5 I would just note that.

6 Government also -- I'm not sure if they were testifying.
7 There was this sort of discussion of jihadism as a unique concept.
8 And that's certainly something that -- that may be the methodology.
9 That's something that would be useful to have and to be able to
10 discuss with Dr. Zelin, but I don't know that any of that is in the
11 disclosure.

12 And then, finally, this concept of Dr. Zelin being a global
13 expert. I think that it is inherent to the nature of expertise that
14 you are a master of some things and not all. While certainly
15 Dr. Zelin appears to have experience in a range of different, you
16 know, militant movements around the world, I don't think he would
17 claim to be a global expert based on what we can see in his CV and
18 what we know about academic expertise and sort of just the ways of
19 the world, sir.

20 And so within the federal rules, there is also this
21 requirement that the expert themselves would have to sign the
22 disclosure. And I think that that's one of the issues here is the
23 government is proffering an expertise that the expert themselves

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1 might not agree with. And so I would just end with that concern.

2 I have nothing else, sir.

3 MJ [COL FITZGERALD]: Thank you.

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

5 MJ [COL FITZGERALD]: So, Government, I think the same issue
6 may apply here is the expectation for all the experts is that at
7 least the ones that are in contest in these four particular appellate
8 exhibits is providing the defense a proffer of expected testimony.

9 To Lieutenant Shaver's point -- I can only tell you my own
10 practice. My practice is in that proffer of expected testimony, I
11 rely on attorneys displaying candor to the court. I don't know how
12 you can proffer somebody's expected testimony without conferring with
13 them. So I believe that's probably why you don't see a signature
14 requirement in military courts-martial practice.

15 So I'm not going to -- I just want to be clear why I'm
16 saying this. I'm not requiring a signature, but I do expect the
17 candor to the court is you've assured that your expert can testify to
18 the opinion you are proffering on their behalf. That is it.

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

20 MJ [COL FITZGERALD]: And that should satisfy that, at least
21 for the purpose of conducting your interview. And in the event the
22 person says, no, I can't testify to that, then we can certainly take
23 it up, how that proffer came to be now that I've explained my

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1 expectations.

2 But, again, I -- my expectation and my guidance to the
3 government is review what you've turned over, and is it, in fact, a
4 proffer of expected testimony so the defense doesn't have to presume
5 the testimony going forward. And that's whether I grant the Daubert
6 hearing or not. That's what is their presumed testimony when they
7 come testify.

8 Expect a short deadline for those proffers to be -- if you
9 are going to do those, expect a short deadline forthwith regarding
10 turning those over to the defense.

11 Anything else on the series of motions regarding Daubert
12 hearings?

13 From the government?

14 TC [CAPT STINSON]: Nothing from the government, Your Honor.
15 And just to clarify for the record ----

16 MJ [COL FITZGERALD]: Well, let me ask -- I should have asked
17 the defense since they actually had the burden on those.

18 Anything further from the defense?

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

20 MJ [COL FITZGERALD]: Okay. And nothing from the government.
21 But now you want to be heard on the separate matter?

22 TC [CAPT STINSON]: So it's not a separate matter. And,
23 obviously, I understand the colloquy and we'll go about that.

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1 We, obviously, did share the synopsis of expected testimony
2 with the experts before we submitted those. So I didn't understand
3 Lieutenant Shaver to be saying something different from that
4 necessarily.

5 MJ [COL FITZGERALD]: No, he's -- I took it what he was saying
6 in federal court, which I don't practice in, they require a signature
7 from the person as a form of verification.

8 TC [CAPT STINSON]: Understood. Thank you.

9 MJ [COL FITZGERALD]: I was explaining the explanation that I
10 rely on, which doesn't require the signature. And I think I could
11 talk to my colleagues on the bench in the Army and they would tell
12 you the same thing because of this expectation of candor to the
13 court.

14 So -- and I think also just not to delay the trial and your
15 own proffer doesn't agree with your own expert, that's probably not a
16 wise and prudent move going forward either just practically speaking.
17 So not accusing anybody of anything ----

18 TC [CAPT STINSON]: Understood, thank you, Your Honor.

19 MJ [COL FITZGERALD]: Okay. If nothing else, I know we still
20 have 680.

21 But, Ms. Miller?

22 LDC [MS. MILLER]: We talked about 679DD, the motion to compel
23 the presentencing witnesses which Your Honor is ----

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1 MJ [COL FITZGERALD]: I'm sorry. Yep.

2 LDC [MS. MILLER]: ---- tends to call 680 but is not 680. We
3 did discuss that yesterday. I wanted to propose for the commission's
4 consideration an alternative way forward this afternoon.

5 MJ [COL FITZGERALD]: I'm not sure what it's an alternative to
6 at this point but I'll hear you.

7 LDC [MS. MILLER]: Just to make sure everybody on the defense
8 team gets a chance to participate today, I did speak with Commander
9 Bartholomaus, as well as Mr. Wells, about the possibility of taking
10 up AE 599L if the commission was amenable.

11 I am also prepared to argue AE 690C, which is the motion to
12 compel the discovery related to 690. Having reviewed the
13 government's response, it is as I expected and not as your optimism
14 hoped.

15 So I -- just two other motions that I think the defense
16 would prefer we take up before resuming 679DD, if the commission is
17 at all receptive. If not, Ms. Manuele is prepared to proceed with
18 679DD.

19 MJ [COL FITZGERALD]: Thank you.

20 Government, your thoughts?

21 TC [CAPT STINSON]: We're amenable to either 599L or the 690C
22 or get back into the presentencing.

23 One, the 680 closed, I think, is the only one that was Major

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1 Krzemien for us, so I'd rather not take that one up this afternoon if
2 we can avoid it.

3 MJ [COL FITZGERALD]: Well, that answered my question on that,
4 what Major Krzemien had. She has 680, 679 closed was hers?

5 TC [CAPT STINSON]: Well, it's -- it really is 680.

6 MJ [COL FITZGERALD]: Really is 680 this time, okay.

7 TC [CAPT STINSON]: The CSRT argument.

8 MJ [COL FITZGERALD]: Right.

9 TC [CAPT STINSON]: Ms. Manuele had that and had just one
10 small portion in closed but Major Krzemien had it for us, yes, sir.

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

12 TC [CAPT STINSON]: Thank you.

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

14 MJ [COL FITZGERALD]: I know it's Commander Bartholomaus for
15 the defense. Who has 599L for the government?

16 LDC [MS. MILLER]: Mr. Wells, who I just talked to.

17 TC [CAPT STINSON]: Mr. Wells.

18 MJ [COL FITZGERALD]: Mr. Wells. Thank you. And you probably
19 told me that before, I just forgot.

20 How about we take a short recess and we'll come back and do
21 599L. But let me ask -- I shouldn't have said "recess" yet. Noting
22 the time is 3:15, is this something we can conclude today and can we
23 do it all in open session?

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1 DC [CDR BARTHOLOMAUS]: I see no reason not to, sir. I expect
2 to be quite short.

3 MJ [COL FITZGERALD]: Okay. And same with you, Mr. Wells?

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

5 MJ [COL FITZGERALD]: And so nothing else in closed session?

6 MATC [MR. WELLS]: Correct, sir.

7 DC [CDR BARTHOLOMAUS]: That's correct, sir.

8 MJ [COL FITZGERALD]: I didn't think so, but I just wanted to
9 verify. How about we take a recess until 1525 and then come back and
10 begin with 599L.

11 The commission's in recess.

12 **[The R.M.C. 803 session recessed at 1513, 23 April 2026.]**

13 **[The R.M.C. 803 session was called to order at 1538, 23 April 2026.]**

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

15 All parties present before the last recess are again
16 present.

17 I was informed that there's an issue with the HVAC
18 where -- at the alternate site where Mr. Nashiri is. We took an
19 extended recess to determine if he wanted to return to the courtroom,
20 which is still climate controlled for now. And I understand he's
21 elected to remain in the alternate site?

22 DC [MS. MANUELE]: Yes, sir, that's correct.

23 MJ [COL FITZGERALD]: Okay. Thank you. And then with that we

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1 are going to take up 599L.

2 Defense, your burden.

3 DC [CDR BARTHOLOMAUS]: Yes, sir. One moment, please.

4 Sir, I know a number of my colleagues on both sides come to
5 the lectern and they say they'll be brief. In that regard, I promise
6 to be brief.

7 First and foremost, I just want to note that I believe on
8 the record but definitely on the schedule you had identified this as
9 a discussion about 599L. I am wondering if you are wishing to
10 proceed in our normal fashion with regards to motions or there was
11 something else that you had in mind.

12 MJ [COL FITZGERALD]: No. I think some of this I'm trying
13 to -- I got the sense the parties may have been talking past each
14 other. Maybe you're not. So discussion, argument, however you want
15 to proceed. But I want to see if I can reconcile where the parties
16 are at, because they seem to be farther apart than the commission
17 would like to see. But I could be wrong as well. So however you
18 would like to proceed.

19 DC [CDR BARTHOLOMAUS]: Yes, sir, I understand.

20 I think, just to cut to the point, I feel that -- or we feel
21 that our pleadings were definitive with regard to this. We asked for
22 nine specific documents that were covered in your order in AE 599K.
23 And they met specifically with regards to information that you had

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1 provided the parties within the meat of that order.

2 And I'm citing specifically 3.g., the last sentence of that,
3 which reads: However, if there is evidence in the government's
4 possession which might tend to suggest an absence of hostilities,
5 such evidence would be material to the preparation of the defense.

6 As noted in our filing in 599L, I cannot go into more
7 details here; however, seven of the documents that we requested would
8 be a place which might include such an absence of hostilities.

9 In regards to this, I'm going to move further on into your
10 order of 599K to 3.h. Again, it's the last sentence of that
11 paragraph, which reads: Further, the government is directed to
12 expand its search to include any of the types of orders within the
13 first three categories which would reasonably be expected to include
14 reference to hostilities between the United States and al Qaeda or
15 Usama bin Laden's organization if such hostilities were ongoing but
16 which do not include such information.

17 Now, taking those two sentences together, I'm pointing
18 specifically at the first seven documents that we're requesting,
19 which deal with information provided by Central Command to its units
20 before 9/11.

21 Those documents specifically dealt with specific information
22 which would identify whether there were hostilities, and specifically
23 what sort of rules of engagement that could be used in the event of

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1 certain contingencies. And I'll put it at that.

2 That's exactly where you would find a designation of
3 hostilities. And we've shown that with regards to the attachment
4 that we provided in 599L at Attachment C. That attachment is a
5 perfect example of such a designation of hostilities.

6 I think since the requests that we sent to our colleagues on
7 the other side, as well as what was requested in 599L, the best way
8 to look at that -- this is that there are two sets of documents. And
9 it might be best right now to just talk about those pre-9/11
10 documents if you have any questions, because the second set of
11 documents are a touch different.

12 MJ [COL FITZGERALD]: I have no questions at this point.

13 DC [CDR BARTHOLOMAUS]: Okay. Moving on, sir.

14 The other two documents are specifically orders that were
15 given by the Joint Chiefs of Staff immediately after
16 11 September 2001, as well as the first part, or I should say the
17 first version. I think that would probably be the best way to
18 characterize it in this setting, this first version of Operation
19 Enduring Freedom.

20 Now, with regards to AE 599K, the government has provided
21 discovery as we discussed. And specifically I counted -- and this
22 count could be off -- I believe about 44 items. It's in a production
23 called Production 685. I could be incorrect about that number. I

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1 think I may have written it as 40 items in 599L, but that might have
2 been incorrect.

3 Seven of those documents -- I'm sorry. There are 44 items
4 total. One document came from before 9/11, which dealt with
5 noncombatant evacuation operations. That was issued -- and I believe
6 it's only an annex of that operation, which was issued around about
7 15 December 2000. And there's no mention of hostilities in that
8 document. That's the only one that we got pre-9/11.

9 The other 43 documents all come after 9/11. I believe one
10 is dated 6 October with the rest all being -- having been issued by
11 either the Joint Chiefs or Central Command on or after 1
12 November 2001. So that's one document that was provided to us before
13 9/11; one document that was provided to us within the, roughly, 20
14 days following 9/11; and the rest having occurred about two months
15 later, after bombs were already dropping in Afghanistan.

16 As discussed in 599L, as well as in AE 599, our replies, the
17 two times I've been before Your Honor discussing this, I don't think
18 it's a secret that when it comes to the hostilities element, the
19 defense is going to demonstrate a lack of hostilities before 9/11
20 between the United States and al Qaeda and after -- and then after
21 9/11, an assumption of hostilities.

22 And these documents from the Department of Defense are
23 absolutely critical to that.

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1 So when I talk about that second set of documents, those two
2 orders that are issued within 20 days of 9/11, one of which was
3 issued approximately within 72 hours of 9/11, that is the -- those
4 are the two documents that you are most likely going to see the
5 earliest initiation of any designation of hostilities.

6 Now, I understand that in AE 599K, sir, you identified four
7 specific sets of documents that were discoverable. And we're not
8 going to be talking about the fourth set today. It's just about the
9 first, second, and third.

10 All of these documents are orders. All of these documents
11 in one form or fashion fall into one of these three categories. All
12 of these documents are material to the preparation of the defense,
13 and we believe are relevant to our case in chief.

14 Now, I had mentioned Production 685 before, sir. Seven of
15 those documents we put before you during our 505 session that we
16 received in Production 685. You found all seven of those documents
17 relevant to our case in chief.

18 I believe once these documents are produced to us, because I
19 think this is a meritorious motion before you, I think you're
20 probably going to see additional documents along those lines with
21 regards to our theory in the case in chief.

22 With that, sir, I'm -- pending any questions.

23 MJ [COL FITZGERALD]: So as part of -- and thank you for that.

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1 DC [CDR BARTHOLOMAUS]: Yes, sir.

2 MJ [COL FITZGERALD]: As far as your presentation, you said
3 what you're trying to demonstrate is an absence of hostilities.

4 DC [CDR BARTHOLOMAUS]: Before 9/11, yes, sir.

5 MJ [COL FITZGERALD]: Before 9/11, and then an assumption of
6 hostilities.

7 DC [CDR BARTHOLOMAUS]: Yes, sir, assumption. I almost
8 misspoke but I think I corrected myself but I may have corrected
9 myself too quickly.

10 MJ [COL FITZGERALD]: You said it right. How are you defining
11 "hostilities" when you say "an absence of" and "an assumption of
12 hostilities"?

13 DC [CDR BARTHOLOMAUS]: Well, sir, I appreciate that question.
14 For the most part, we don't have members' instructions with regards
15 to hostilities yet. I know there was discussion with Lieutenant
16 Colonel Nettinga last week with regards to it.

17 The best way that we have been able to move forward on this
18 is utilizing the Hamdan instruction. And I note in that instruction,
19 it specifically states whether and how the United States decides to
20 use its -- use its armed forces is something the members need to take
21 into consideration.

22 I also look at international law with regard to that, which
23 is incorporated into the law of war. And I'm citing specifically the

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1 DoD Law of War Manual on that, which I believe I have already cited a
2 number of times in this series. But specifically, the law of war,
3 when looked at in the international perspective -- and we have -- you
4 know, we've already identified a witness that we intend to have talk
5 along these lines to the members, that's what AE 648 was about with
6 regards to Professor Geoffrey Corn.

7 I guess what I'm trying to say with regards to this is that
8 the definition of hostilities under international humanitarian law is
9 the protracted intensity of engagements between, in this specific
10 case, a state and a non-state actor, and then the organized nature of
11 that non-state actor.

12 As Lieutenant Colonel Nettinga much more eloquently than I
13 stated last week, what we have based on the historical record with
14 regards to those engagements, specifically with regards to the United
15 States, is an action on August 20th, 1998, and then nothing as far as
16 usage of the U.S. Armed Forces in engagements until after 9/11.

17 So I hope that explains -- and if you wouldn't mind one
18 moment, sir?

19 **[Pause.]**

20 DC [CDR BARTHOLOMAUS]: Okay. I hope that explains the
21 answer -- or at least answers the question that you brought forward,
22 sir.

23 I would also note that with regard to the first set of

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1 documents, the first seven documents, those are specifically
2 incorporated by Attachment C that we provided you in AE 599L. So
3 these documents provide a full picture of what was going on in
4 Central Command both before and after 9/11.

5 And secondly, the second set of documents do the same thing
6 because they're specifically cited and they would include information
7 with regards to designation of hostilities and what was going on with
8 regards to Operation Enduring Freedom.

9 Sir?

10 MJ [COL FITZGERALD]: So I know I had this discussion you were
11 present for with Colonel Nettinga about in the Hamdan court-martial
12 was in 2008, so they would have applied the MCA of 2006, correct?

13 DC [CDR BARTHOLOMAUS]: Yes, sir.

14 MJ [COL FITZGERALD]: Did they use the same definition for
15 hostilities as the MCA 2009 that we're using today?

16 DC [CDR BARTHOLOMAUS]: No, sir, because they did not define
17 it.

18 MJ [COL FITZGERALD]: Okay. So how do we address the fact
19 that Congress has now given a definition to hostilities that seems to
20 vary differently from the Hamdan decision? That's probably a poor
21 choice of words. It varies.

22 DC [CDR BARTHOLOMAUS]: It varies, sir. I mean, that's one of
23 the reasons why we've provided, you know, such a significant

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1 background in AE 599. It's also -- I mean, this is an issue that
2 we're going to taking up with regards to jury instructions, which I
3 know is also on the schedule.

4 With regard to the Hamdan instruction, the best I can say
5 with regards to that answer, sir, is that it is the only guide point
6 that we had at this time, because we haven't identified those jury
7 instructions.

8 I know I'm a little out of practice with regards to my own
9 experience in court, but I do remember my trial advocacy, sir, and
10 the first thing that I was always taught to start with is a jury
11 instruction.

12 And with regards to the Hamdan instruction, it's the only
13 guide point we have, at least that's been used in a U.S. court in the
14 past or a U.S. courtroom in the past. And then the other guideline
15 we have is international humanitarian law, which is why we cite it.

16 MJ [COL FITZGERALD]: How do you envision a jury instruction
17 that different -- is different than the definition given to us by
18 Congress?

19 DC [CDR BARTHOLOMAUS]: I am certainly not attempting to
20 quibble with the commission with regards to that question. Congress
21 defined it as hostilities are any conflict subject to the law of
22 war -- laws of war.

23 That could be a very big area, or it has to be defined in

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1 some sort of way, I would imagine, for members to be able to
2 understand it. It's one of the reasons why I cited heavily in
3 AE 599 -- or we cited heavily to AE 599 about the opinion paper
4 issued by the ICRC in 2 May of 2024, because that provides a good
5 guideline of what is a conflict subject to the laws of war and
6 specifically the two types of conflicts.

7 So with regards to your question, sir, I don't know if I can
8 answer that right now, but that is definitely the road I would travel
9 down. And I know, for example, Lieutenant Colonel Nettinga and I are
10 going to talk -- we were planning on talking about this later, but I
11 know maybe -- how do I say this? I know there's a time on the
12 schedule for that, sir, and I don't know if I'm prepared necessarily
13 to answer that question ----

14 MJ [COL FITZGERALD]: That's fine.

15 DC [CDR BARTHOLOMAUS]: ---- right now.

16 MJ [COL FITZGERALD]: And I'm trying to understand it for the
17 purposes of -- and I appreciate -- we can put a pin on that because
18 you had said ----

19 DC [CDR BARTHOLOMAUS]: Yes, sir.

20 MJ [COL FITZGERALD]: ---- "the absence of hostilities and the
21 assumption of hostilities." And so I understand the concept you're
22 asking for discovery.

23 DC [CDR BARTHOLOMAUS]: Yes, sir.

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1 MJ [COL FITZGERALD]: And so I'm just trying to tie it to the
2 relevant definition that I have which is the one provided in the MCA.

3 DC [CDR BARTHOLOMAUS]: Uh-huh.

4 MJ [COL FITZGERALD]: But I appreciate you articulating your
5 position on how the commission should view hostilities, and your
6 co-counsel would like to confer with you.

7 DC [CDR BARTHOLOMAUS]: Thank you, sir.

8 **[Counsel conferred.]**

9 DC [CDR BARTHOLOMAUS]: If I could just elaborate one second
10 longer on that, sir, with regards to jury instruction and what
11 Congress has defined for us.

12 I think probably the words I was searching for with regards
13 to 10 U.S.C. 948a(9), which is the definition of "hostilities," is
14 that it's one line of text. And I think -- I know we forecasted that
15 that was going to require a lot more elaboration.

16 And in that regard, that's clearly what the judge did in
17 Hamdan, though now we're operating under a different rubric.

18 I think, though, since conceptually -- and I don't want to
19 get out too over my skis -- but conceptually the 2006 MCA and
20 2009 MCA are both designed to utilize the law of war. I think it was
21 just finally defined by Congress in 10 U.S.C. 2009 -- or sorry
22 10 -- in the MCA of 2009.

23 But even in defining it, they left it up to international

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1 humanitarian law, which is why we've been citing so often to ICRC and
2 the Law of War Manual.

3 Does that clarify more?

4 MJ [COL FITZGERALD]: I think it does. And I don't think I
5 need any further because it was a discussion 599L, not a discussion
6 of instruction. So I ----

7 DC [CDR BARTHOLOMAUS]: Yes, sir. I appreciate that.

8 MJ [COL FITZGERALD]: I appreciate your assistance. That's
9 all I have.

10 DC [CDR BARTHOLOMAUS]: Okay.

11 MJ [COL FITZGERALD]: Thank you very much. And you were
12 brief.

13 DC [CDR BARTHOLOMAUS]: Thank you so much, sir. I appreciate
14 it. It was a pleasure to present in front of you again.

15 MJ [COL FITZGERALD]: Thank you.

16 Mr. Wells, for the government. Good afternoon.

17 MATC [MR. WELLS]: Good afternoon, sir.

18 I'm also prepared to answer questions you may have about the
19 discovery request. I will say first that the defense in 599L has
20 provided a draft order, which I think kind of focuses our
21 responsibilities here and it can help us -- you know, we started with
22 599 and the tone was -- I hope the commission can help us navigate
23 this discovery request and what the defense is seeking. And we've

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1 explored with them information that they think they need to show that
2 military action, and perhaps political action before 9/11 and after
3 9/11 was significantly different.

4 And I just have to say that that's part of our national
5 anguish on why we couldn't have prevented 9/11. But in the MCA,
6 Congress said that hostilities on or before 9/11 is the standard and
7 it's an element of the offense. The commission has observed that
8 it's a mixed question of law and fact for the panel to consider.

9 I believe that I hear from the defense that the '98 embassy
10 bombing and the actions -- military action after that establishes
11 hostilities. And apparently there is a belief that there was a lull
12 and no hostilities until the COLE. And then perhaps after the COLE
13 there was another lull until the Limburg in this case.

14 And in between that we have 9/11, of course. And before the
15 COLE the investigation borne out, which is a charge in this case
16 involving Mr. Nashiri, is THE SULLIVANS, an attempt.

17 So from our perspective, the government's perspective,
18 there's no question when you have an organized group that attacks a
19 warship and attempts to attack a warship, that is a hostile action
20 against the military. And I think Congress recognizes that, as the
21 commission has touched on ----

22 DC [CDR BARTHOLOMAUS]: I'm going to object if that's okay.

23 MJ [COL FITZGERALD]: To a discussion?

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1 DC [CDR BARTHOLOMAUS]: Oh, it's discussion only? No
2 objection, sir?

3 MJ [COL FITZGERALD]: Would you mind if he objects?

4 MATC [MR. WELLS]: Well, sir, generally during argument you
5 hold your objection and comment until later, but yes ----

6 DC [CDR BARTHOLOMAUS]: Okay.

7 MATC [MR. WELLS]: ---- I'm happy to address ----

8 MJ [COL FITZGERALD]: Can you tell me the basis of your
9 objection?

10 DC [CDR BARTHOLOMAUS]: He's arguing something that hasn't
11 been briefed, sir.

12 MJ [COL FITZGERALD]: Arguing something that hasn't -- facts
13 not in evidence or I'm not sure what you mean.

14 DC [CDR BARTHOLOMAUS]: He hasn't briefed this and he did not
15 provide it in the response, sir.

16 MJ [COL FITZGERALD]: Oh, again, I think I'm -- it's more of a
17 discussion than argument, because I'm trying to help the parties ----

18 DC [CDR BARTHOLOMAUS]: Understood, sir.

19 MJ [COL FITZGERALD]: ----- resolve a discovery impasse.
20 So -- but your objection is noted.

21 I think what you were talking about Mr. Wells, there are
22 certainly facts in evidence, we've discussed this in length on other
23 issues, and so I have some familiarity with it.

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

2 So guiding our discovery responsibilities from the
3 government to provide the defense information on their theory of the
4 case is helpful to understand how the government attempts to prove
5 that there was hostilities that existed for the '98 embassy bombings,
6 THE SULLIVANS, the COLE, and the MV Limburg.

7 With that understanding, though, the commission gave us a
8 direct order in 599K, which was very helpful. Orders that give us
9 direction and are clear are helpful to the prosecution in dealing
10 with the Department of War, other agencies like the Department of
11 State to say we're looking for this information.

12 Here, the commission told us relevant JCS executive orders,
13 relevant fragmentary orders; number 2, relevant CENTCOM operation
14 orders and subsequent FRAGOs -- I just got the yellow.

15 Relevant for us was the name of Usama bin Laden, UBL,
16 derivatives, al Qaeda, Taliban. That is what we understood was
17 relevant. We included those in PSRs, and we did get returns, which
18 we culled through. And prior to 2001, we had already provided some
19 information to the defense about Usama bin Laden and al Qaeda. And
20 that's Lieutenant General Wagner.

21 And his testimony, coupled with his warning orders and
22 standing orders, to be ready for a theater-level weapons system to be
23 prepared if we were able to fix Usama bin Laden or other al Qaeda

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1 members, and we had valid intelligence that could be actionable.
2 There's a timeline for that. He's prepared to explain what military
3 action would have been taken if the National Command Authority
4 thought it was prudent under the laws of war to launch that weapon
5 system.

6 So with that, as we've explored all of this, you're not
7 going to see operation orders below that level down to other
8 operational units like we did after 9/11, when the President and the
9 National Command Authority said attack on the streets of New York
10 City in the territory of the United States is unacceptable. We have
11 to take more aggressive action. And I think that just explains on
12 the spectrum of intensity of military action.

13 So those were the two categories that we sought additional
14 discovery on in 599 under your ruling.

15 Also, number 3, you had instructed us any joint chairman
16 service, EXORDs, CENTCOM OPORDs, or FRAGOs designating al Qaeda and
17 Taliban as a hostile force, and there was a time period. August '96
18 to January 2003. So we did specify that in the PSR and we got
19 returns.

20 Looking at the nine documents which the defense has
21 identified in the draft order, none of these particular documents had
22 the search terms that we were looking for and were produced. They
23 were included in other operational orders after 9/11 explaining that

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1 those ROE, those operation orders and those messages were still in
2 effect, but they themselves were not returned independently with that
3 information.

4 So we did not receive those actual documents. However, if
5 you would look at the titles in the operation -- or excuse me, the
6 draft order, 599L, paragraph 2.a., it talks about Operation Southern
7 Watch, also 2.b., 2.c. Operation Southern Watch, of course, is the
8 aftermath of the actions of Saddam Hussein and Iraq invading Kuwait
9 and our conflict there with Desert Shield/Storm and our
10 implementation of a no-fly zone in Iraq. So that is the main focus
11 of those orders and messages.

12 The next document that's identified is in paragraph 2.d., is
13 regional -- or excuse me, Region Maritime Interception Operations and
14 that's in 2.d. and 2.e., and that's also in 2.f. Those, again, would
15 not have returned and did not return Usama bin Laden, Taliban, or
16 al Qaeda. And it's not likely that it would have that information in
17 there, talking about that terrorist activity.

18 2.g. talks about USCENTCOM, 7 October 1999; Operation Desert
19 Spring, containing operation Desert Spring ROE. That also was not
20 returned to us and that is pre-2000. That's after '98.

21 So that comes down to the last two documents which are after
22 2001, Operation Order Infinite Justice and Freedom Operations Order.

23 Those would be after 9/11. They were included as references

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1 in the documents we did provide to the -- in a supplemental discovery
2 request. But, again, those were not returned to us as separate,
3 independent documents.

4 Having said all of that and perused this, this is a very
5 tight order. If the commission were to issue and tell us to go get
6 these documents, I feel confident that CENTCOM and the Joint Chiefs
7 could search for these particular documents. I'm not confident,
8 though, that we would actually find the documents and exist, I cannot
9 answer that question, sir, because we haven't looked at these
10 particular documents to confirm that.

11 We are concerned, though, if we get additional
12 documents -- I heard counsel say, well, upon review of those
13 documents, additional documents may be requested. That's always the
14 case, I think, with discovery. Expect your opponent to review it and
15 if they think something is helpful, they'll request it.

16 And I would just say that in our response -- and you can see
17 the back-and-forth with the defense -- we were able to fulfill the
18 State Department request, and that is not complained of. There were
19 additional documents that the defense requested and we pointed to
20 them, we've discovered this matter, so you should have that.

21 There were additional requests that they asked in their
22 e-mail requests which they have not included in their 599L request.

23 So it does boil down to these nine documents here. And that

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1 is our position. When we're reviewing this, it did not return
2 pursuant to the search terms that we thought were relevant. It did
3 not have the designation of al Qaeda or the Taliban.

4 So with that, sir, do you have any questions for me or how
5 can I help further?

6 MJ [COL FITZGERALD]: The search terms you used, are those the
7 search terms you have used consistently when you've done your PSRs?
8 You gave me some examples, so I'm just curious, that have been
9 fruitful in the past?

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

11 MJ [COL FITZGERALD]: All right.

12 MATC [MR. WELLS]: But -- yes, sir.

13 MJ [COL FITZGERALD]: Okay. I have no further questions. Do
14 you want to confer with counsel?

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

16 **[Counsel conferred.]**

17 MATC [MR. WELLS]: Sir, I think we're okay. Thank You.

18 MJ [COL FITZGERALD]: All right. Thank you, Mr. Wells.

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

20 MJ [COL FITZGERALD]: Defense, do you have anything else you'd
21 like to add?

22 DC [CDR BARTHOLOMAUS]: Yes, sir. One moment.

23 MJ [COL FITZGERALD]: Okay.

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1 **[Pause.]**

2 DC [CDR BARTHOLOMAUS]: I believe I owe you an apology, sir.
3 I looked at the clock and it was about 35 minutes on my watch. So I
4 guess I wasn't as brief as I expected.

5 MJ [COL FITZGERALD]: I made inquiry. That's ----

6 DC [CDR BARTHOLOMAUS]: Just with -- just a few points. I
7 think first and foremost, I paid very close attention to my fellow
8 counsel's comments with regards to the search terms. As you recall,
9 I opened with 3 -- paragraph 3.h. of your order in AE 599K.

10 And when I heard those search terms which included, I
11 believe -- I could be mistaken because it was a lot at once, but
12 "al Qaeda," "designation of hostilities," or words along those lines,
13 those search terms didn't seem to comply with what you directed them
14 to look for in that paragraph 3.h., which is the entire reason why we
15 brought this motion. So I just wanted to highlight that for you,
16 sir.

17 Secondly, I noted that opposing counsel mentioned ----

18 MJ [COL FITZGERALD]: Let me ask you this. I'm looking ----

19 DC [CDR BARTHOLOMAUS]: Sorry, sir.

20 MJ [COL FITZGERALD]: ---- you said ----

21 DC [CDR BARTHOLOMAUS]: That's page 5.

22 MJ [COL FITZGERALD]: You said 3.g.?

23 DC [CDR BARTHOLOMAUS]: That is -- maybe it's paragraph 2.g.

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1 Nope. It's paragraph 3.g. Sorry, 3.h.

2 MJ [COL FITZGERALD]: What part of 3.g. do you think they did
3 not comply with?

4 DC [CDR BARTHOLOMAUS]: It's 3.h., sir. Apologize.

5 MJ [COL FITZGERALD]: Oh, 3.h. Okay.

6 DC [CDR BARTHOLOMAUS]: That was my mistake. I've got them
7 both highlighted, sir, so -- I'm getting a little flighty in my old
8 age.

9 MJ [COL FITZGERALD]: So how do you believe they didn't comply
10 with 3.h.?

11 DC [CDR BARTHOLOMAUS]: Because their search terms appeared to
12 be directly with regards to if there -- if they sent out a search
13 term that said "al Qaeda," for example, what we're looking for here
14 is an absence of hostilities. And that direction specifically has
15 that final clause that says -- which do not include that "such
16 information." "Such information" being the types of orders within
17 the first three categories, which would be reasonably expected to
18 include reference to hostilities. And rules of engagement fit that
19 bill precisely.

20 **[Pause.]**

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

22 DC [CDR BARTHOLOMAUS]: Thank you, sir.

23 The second point I'd like to make is I really appreciate

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1 that counsel mentioned the importance of the National Command
2 Authority and -- which we have requested to be compelled as
3 witnesses.

4 I know that is not the first time that senior-ranking people
5 have been identified as the best possible witnesses. I cite
6 specifically the May -- I'm sorry -- March 4th and 5th sessions of
7 the 505 that we did. And such a senior person would be perfectly
8 positioned to be able to comment on that. So we're definitely in
9 agreement with regards to that.

10 The third thing, third and final -- I promised short, sir,
11 so I'm going to do it right now -- is I note that during my
12 colleague's motion to continue presentation on Tuesday, government
13 counsel mentioned words along the lines of -- and this may not be a
14 word for word -- a word for word -- because I am doing it from
15 memory -- but that the databases in CENTCOM may not contain that
16 information.

17 Well, first and foremost, the order was for JTS and CENTCOM.

18 Secondly, before we had such, you know, digital libraries
19 that we do now, there was a method to contain and keep such
20 paperwork, and I believe that those methods and that paper still
21 exist within the Department of Defense.

22 If those documents are not -- if the commission were to
23 grant our motion -- I apologize. I got ahead of myself for a moment.

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1 If our motion was to be granted, we would expect that in
2 such a situation some sort of affidavit or notice would be provided,
3 indicating that those databases no longer -- or don't contain
4 information from, for example, 1999.

5 So pending your questions, sir.

6 MJ [COL FITZGERALD]: Thank you. No further questions.

7 DC [CDR BARTHOLOMAUS]: Thank you, sir.

8 MJ [COL FITZGERALD]: Stand by. Mr. Wells is approaching and
9 would like to respond.

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

11 MJ [COL FITZGERALD]: Yes, sir.

12 MATC [MR. WELLS]: Regarding your order -- and I hope I'm
13 satisfying your concerns and also of your staff and also the defense.

14 We did take your order of 599K, and particularly those two
15 paragraphs, g. and h. You know, g. you advised us: Commission
16 recognizes that searching for evidence of a negative may be more
17 challenging than finding evidence that supports the government's
18 theory. However, if there is evidence in the government's possession
19 which might tend to suggest an absence of hostilities, such evidence
20 would be material to the preparation of the defense.

21 And then in h., you gave us a definition of what you thought
22 would be relevant orders. And that's the second sentence there:
23 Relevant orders would include any orders designating Taliban,

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1 al Qaeda, or any Usama bin Laden-led terrorist organization as a
2 hostile force. Any orders related to the planning or execution of
3 hostile acts directed by the United States against such
4 organizations, or any orders which reflect actual or anticipated
5 hostile acts by such organizations directed towards the United
6 States.

7 We took that, put that into a PSR. There was much debate
8 and review of the second clause and the second thought.

9 Further, the government was directed to expand its search to
10 include any types of orders within the first three categories of the
11 defense request, which would reasonably expect it to include
12 reference to hostilities between the United States and al Qaeda and
13 Usama bin Laden's organization if such hostilities were ongoing but
14 which do not include that information.

15 I know from the prosecution side, we were -- talked about
16 exactly what does that mean and how do we operationalize a PSR to the
17 Chairman of the Joint Chiefs of Staff, which we did; to CENTCOM,
18 which we did; to NAVCENT, which we did; and also to the State
19 Department, which we did, to comply with this.

20 But those parties that we work with directed us back to,
21 also, your ruling, paragraph 4.b., which gave us very specific one,
22 two, three, four guidance that was concrete and direct which we could
23 operationalize in a PSR.

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1 So that was our methodology, sir. And through this whole
2 process, though, the defense now just asked for nine specific
3 documents in their order. I've gone through why I do not believe
4 that these particular documents would indicate relevant information
5 that would help them in their case.

6 Nevertheless, this is a specific draft order for the
7 commission to consider. Prosecution does not oppose. If the
8 commission wanted to issue that order, we would take that order and
9 ask the relevant components: Do you have that information?

10 My only hesitation was just to assert that because these
11 were not returned the first time, I believe, and was speculating,
12 that it did not have the relevant terms. I do not know the database
13 does or does not contain the information. And I do not know if those
14 still exist in their possession. I would certainly hope they would.
15 But typically, we do not ask for a certification of documents that
16 are the database do not exist and we're not required to provide
17 interrogatories or those type of certifications to the defense.

18 If they do not have a document from those military
19 organizations that identify Usama bin Laden, the Taliban, or other
20 terrorist organizations like that, then they are right to assume that
21 evidence is not before the commission and would not be presented to
22 the commission.

23 So one question...

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1 **[Counsel conferred.]**

2 MATC [MR. WELLS]: Sir, with that, I stand by for any
3 questions, if needed.

4 MJ [COL FITZGERALD]: I have no further questions. Thank you
5 very much.

6 MATC [MR. WELLS]: Thank you, sir. All right.

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

8 MJ [COL FITZGERALD]: Anything further in 599L?

9 DC [CDR BARTHOLOMAUS]: I will go ahead and not have the last
10 word, sir. Thank you.

11 MATC [MR. WELLS]: Nothing further, sir. Thank you.

12 MJ [COL FITZGERALD]: Thank you.

13 So I'm going to address 679V and then I'm going to release
14 you. So I am now the last thing standing between you and recess.

15 In 679V, the government moved to exclude hearsay statements
16 offered by the defense under 803(b). The defense opposed the
17 government motion to exclude and moved to compel the testimony of 11
18 witnesses to testify in opposition to the government's motion to
19 exclude the noticed hearsay statements.

20 The government opposed production of all but three of those
21 witnesses for the hearing on their motion to exclude. A motion to
22 compel witnesses was argued on 20 April 2026.

23 Prior to argument, the parties indicated that they had

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1 reached some sort of agreement on all but two of the witnesses, with
2 either the government agreeing to provide a witness or the defense
3 withdrawing their request.

4 Accordingly, the commission heard argument only on Dina
5 Corsi, who would serve as a sponsoring witness for a statement taken
6 by another agent who is no longer available, and an interrogator at
7 NSGB, who took a statement from a detainee named Adayfi about
8 Sharqawi al Hajj while both were detained at NSGB.

9 Based upon the evidence and argument presented, the
10 commission finds that the production of the witness -- witnesses is
11 unnecessary to the commission's determination of the ultimate issue
12 regarding the defense hearsay statement. Both witnesses requested by
13 the defense would merely sponsor hearsay statements from declarants
14 who made their declaration under circumstances that do not suggest
15 coercion.

16 To that end, the government concedes that neither witness
17 was coerced in any way, nor does the government challenge the
18 reliability of the hearsay declarants' statements as transcribed by
19 the requested witness -- witnesses.

20 The commission further finds there is no evidence that
21 either declarant was coerced to speak with the requested witnesses or
22 that the transcription of their statements was unreliable.

23 The remaining issues to be resolved under M.C.R.E. 803(b) do

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1 not require the testimony of the witnesses requested by the defense
2 because those witnesses are not positioned to offer meaningful
3 insight on matters such as whether the declarants' statements are
4 corroborated or reliable.

5 Accordingly, the defense's request to produce Ms. Corsi and
6 Adayfi's interrogator is denied.

7 Anything else before we recess?

8 TC [CAPT STINSON]: Nothing -- the only thing from the
9 government, Your Honor, is I think we're kicking off tomorrow with
10 the discussion of the request for judicial notice? Is that -- I know
11 we've slid a couple things around. I just want to make sure we have
12 the right folks prepared for tomorrow. I think it's the 702/702A
13 first thing tomorrow morning.

14 MJ [COL FITZGERALD]: That sounds correct.

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

16 MJ [COL FITZGERALD]: Have the parties taken the opportunity
17 to confer as to which things that are truly in contest and which
18 things maybe the parties are willing to agree that judicial notice is
19 appropriate? I'm not sure how long the discussion is going to be
20 regarding judicial notice.

21 DC [CDR BARTHOLOMAUS]: Not a complete one, but we do have a
22 plan to confer, sir. So I will be better able to report on
23 that -- or we will be better able to report on that in the morning,

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1 sir.

2 TC [CAPT STINSON]: That's right, Your Honor. We've had some
3 brief discussions. We're just going over it. I'm not certain that
4 it's going to last very, very long, I guess is the ----

5 MJ [COL FITZGERALD]: I don't think so, either. But I'll tell
6 you what -- I know you have some time tonight, but -- I'm not telling
7 you how to run your calendar, but I'm going to grant a late start
8 tomorrow, 0930. So use that time if it's helpful to you. I know
9 it's not a lot of time, but take that time to figure out which things
10 are not in dispute regarding judicial notice, and we'll go from
11 there.

12 But how about we start at 0930 tomorrow?

13 DC [CDR BARTHOLOMAUS]: Yes, sir, that sounds great. That
14 actually ----

15 MJ [COL FITZGERALD]: Is this you, as well?

16 DC [CDR BARTHOLOMAUS]: Yes, sir.

17 MJ [COL FITZGERALD]: Okay, and who for the government?

18 TC [CAPT STINSON]: It's Captain Lanning, Your Honor.

19 MJ [COL FITZGERALD]: All right. Is that okay for you, 0930?

20 ATC [Capt LANNING]: Yes, sir.

21 MJ [COL FITZGERALD]: All right. And then I would like to
22 take up the matter that Major Krzemien is responsible for if she's
23 back. I don't want her rushing back, but I'd like to know if we can

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1 proceed with that tomorrow.

2 TC [CAPT STINSON]: Yes, Your Honor. We'll confer with Major
3 Krzemien and alert Ms. Manuele as well.

4 MJ [COL FITZGERALD]: Part of getting well soon is not the
5 judge told you you have to be well at 0930. Okay? So tell her to
6 take care of her health.

7 And with that, the commission is recessed until tomorrow at
8 0930.

9 **[The R.M.C. 803 session recessed at 1631, 23 April 2026.]**

10 **[END OF PAGE]**