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1 [The R.M.C. 803 session was called to order at 0904,
2 25 July 2022.]

3 MJ [COL ACOSTA]: This commission is called to order.

4 Trial Counsel, good morning. Please identify who's
5 here on behalf of the United States, that they have the
6 necessary clearance, and whether they are located here or
7 appearing remotely in the Remote Hearing Room in the National
8 Capital Region.

9 TC [MR. MILLER]: Good morning, Your Honor. Thank you.
10 These proceedings are being transmitted via CCTV to public
11 viewing locations in the United States pursuant to your order
12 in AE 028M.

13 Present for the United States here in Guantanamo, as
14 identified in detailing memorandum AE 3380, as in Oscar:
15 Myself, Mark Miller; Mr. John Wells; Major Michael Ross; Major
16 Stephen Romeo. Also assisting the government will be Forrest
17 Parker Smith, Mr. Pascual Tavaréz-Patine, and Staff Sergeant
18 Jaune Daniels.

19 Also present in the Remote Hearing Room in northern
20 Virginia for the prosecution, Your Honor: Lieutenant
21 Commander Cherie Jolly, Lieutenant Commander Keven Schreiber,
22 and Lieutenant Tess Schwartz, who will need to put her
23 qualifications on the record. And they are being assisted by

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1 Master Sergeant Laura Speranza.

2 With your permission, Your Honor, I would ask that
3 Lieutenant Schwartz be allowed to make her appearance at this
4 time and announce her qualifications to the commission.

5 MJ [COL ACOSTA]: Yes.

6 TC [MR. MILLER]: I would also add, Your Honor, that all
7 persons, present here or in the Remote Hearing Room, have the
8 necessary clearances and qualifications.

9 MJ [COL ACOSTA]: Thank you, Counsel.

10 Lieutenant Schwartz, if you could please put your
11 detailing qualifications on the record, please.

12 ATC [LCDR SCHREIBER]: Your Honor, this is Lieutenant
13 Commander Schreiber. Lieutenant Schwartz had a uniform
14 problem and her husband had to come support her. She's
15 literally on her way back up the elevator. We were
16 anticipating she would be able to get up before we came to
17 order, but unfortunately did not. If we could give her a
18 brief indulgence, sir.

19 MJ [COL ACOSTA]: I will grant that indulgence. What
20 we'll do, after I get information from defense counsel, we'll
21 have her put it on the record. And if I -- if I blast past
22 that, Government Counsel, just remind me.

23 TC [MR. MILLER]: Yes, Your Honor.

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1 MJ [COL ACOSTA]: Good morning, Defense Counsel. Good
2 morning.

3 LDC [MR. NATALE]: Good morning, Your Honor. Anthony
4 Natale on behalf of Mr. Nashiri, who is present in court.
5 Also present here at the ELC is Captain Mizer, Ms. Carmon,
6 Mr. Padilla, Ms. Morgan, Ms. Janes, and Mr. Dolphin.
7 Ms. Janes and Mr. Dolphin may need to come and go as needed.

8 In the RHR we have Commander Piette, Ms. Pinate,
9 Mr. Hoffmann, Ms. Brown, Mr. Roosevelt, and Staff Sergeant
10 McGuire. All of these individuals have the necessary
11 clearances and qualifications to be present.

12 MJ [COL ACOSTA]: Thank you, Defense Counsel. It appears
13 Commander Piette looks alone on his side. Are those other
14 individuals there or are they going to show up?

15 LDC [MR. NATALE]: They are -- they are supposed to show
16 up and be there. So maybe what I should say, Your Honor, is
17 that we expect them to be coming and sometimes maybe going
18 based on what evidence we need to have them do or things we
19 need them to do. I am assuming that Mr. Piette is there,
20 although from what I can see, I think I see his reflection,
21 but I'm not sure.

22 MJ [COL ACOSTA]: It's only his reflection behind him.
23 Commander Piette, are you there indeed alone? You can

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1 answer from counsel -- Commander Piette, can you hear me?

2 DDC [LCDR PIETTE]: Yes, Your Honor.

3 MJ [COL ACOSTA]: Are you there alone?

4 DDC [LCDR PIETTE]: Yes, Your Honor. The other people are
5 in the building and will come up and go as necessary, is my
6 understanding.

7 MJ [COL ACOSTA]: All right. Thank you.

8 Counsel, as a reminder -- I know I say this every
9 time -- the RHR is an extension of the well of this courtroom.
10 Only personnel that are authorized to be in this courtroom are
11 authorized to be in the RHR. It's not an observation point.
12 Please enforce that vigorously.

13 I'm looking at you, government, because you tend to
14 bring in the most extra people occasionally, so it's -- if
15 there -- if I wouldn't allow them in here, then I don't want
16 them up there. Thank you.

17 TC [MR. MILLER]: Understood, Your Honor.

18 MJ [COL ACOSTA]: All right. Trial Counsel, I think you
19 mentioned it, that we are being broadcast over closed-circuit
20 TV with the orders to that effect?

21 TC [MR. MILLER]: Yes, Your Honor.

22 MJ [COL ACOSTA]: Thank you.

23 All right. The accused is present today.

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1 Good morning, Mr. Nashiri. I'll now advise you of
2 your right to be present and to waive said presence. You have
3 the right to be present during all sessions of the commission.
4 If you request to absent yourself from any session, such
5 absence must be voluntary and of your own freewill. Your
6 voluntary absence from any session of the commission is an
7 equivocal waiver of the right to be present during the
8 session. Your absence from any session may negatively affect
9 the representation of your defense in this case. Your failure
10 to meet with and cooperate with your defense counsel may also
11 negatively affect the presentation of your case.

12 Under certain circumstances, your attendance at a
13 session can be compelled regardless of your personal desire to
14 not be present.

15 Regardless of your voluntary waiver to attend a
16 particular session of the commission, you have the right at
17 any time to decide to attend any subsequent session. If you
18 decide not to attend the morning session but wish to attend
19 the afternoon session, you must notify the guard force of your
20 desires. Assuming there's enough time to arrange
21 transportation, you will then be allowed to attend the
22 afternoon session.

23 You will be informed of the date and time of each

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1 commission session prior to the session to afford you the
2 opportunity to decide whether or not you wish to attend.

3 Do you understand what I've just explained to you?

4 ACC [MR. AL NASHIRI]: Yes. Yes.

5 MJ [COL ACOSTA]: All right. Since our session ended in
6 May, we conducted two R.M.C. 802 conferences. The first was
7 held on 26 May with counsel for both sides. The following
8 issues were discussed at the 26 May session:

9 The docket for this session, including which motions
10 the commission needs to receive evidence on and hear argument,
11 was the first topic, which there was uniform agreement on from
12 the parties as to which ones we were going to hear.

13 The bulk of the conference concerned the need to
14 litigate the admissibility of the -- I believe the number is
15 116 hearsay statements that the government plans on
16 introducing. I informed the party that it was and remains the
17 intent of the commission to decide the admissibility of each
18 statement on an individual basis and that the parties must be
19 prepared to litigate each statement on an individual basis.

20 The commission informed the parties that the proposed
21 plan to only litigate five of the statements during this
22 session of the commission was an insufficient and inefficient
23 use of our time, and informed the parties that they needed to

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1 be prepared to litigate more than the five proposed
2 statements.

3 The remainder of the 802 conference was the commission
4 again informing the parties of which other motions the
5 commission would hear during this session to which both
6 parties agreed. This plan was memorialized in the docketing
7 order for this session, and it supplements in AE 483, 483B,
8 and 483C.

9 Later in July of 2022, after receiving the proposed
10 litigation plan for this session which only included planning
11 on hearing about the five statements, the commission again
12 reminded the parties of its previous direction to be prepared
13 to argue and present evidence on more than the five hearsay
14 statements originally proposed.

15 A second 802 conference was held yesterday where we
16 discussed the order of the -- of the events for this session,
17 including our -- the 505(h) hearing which will be necessary
18 that we will get an update on 473, 474. The commission will
19 address 339X prior to the 505(h). That we will take
20 argument -- then I will take argument, pardon me, on 452D and
21 475.

22 I got an update on witness availability, including
23 that of Agent Gaudin.

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1 We discussed the argument for 461, that we will only
2 hear the legal -- a legal objection from the government on
3 that issue.

4 At the end of the session, I gave the government three
5 things to do which is, one, is to provide the corroborating
6 evidence for the -- for the hearsay statements to the defense;
7 that the government provide the list of the additional -- the
8 statements in addition -- the specific statements that they
9 intend to proffer at this session to the defense; and that the
10 parties confer regarding an issue regarding the defense's
11 marking and submission of exhibits that it intends to use
12 during this session.

13 Do counsel have anything they'd like to add or any
14 objections they would like to make to my summary of our 802
15 session?

16 Government?

17 TC [MR. MILLER]: No, Your Honor.

18 LDC [MR. NATALE]: No, Your Honor.

19 MJ [COL ACOSTA]: All right. All right.

20 First, the parties have agreed to at least begin
21 addressing and for the commission to begin its inquiry into
22 the issue of Captain Mizer and his motion to withdraw from
23 representation of Mr. al Nashiri presented in 339X. In 339X,

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1 filed on 17 June 2022 by Captain Mizer, again he filed a
2 motion to withdraw from the case based upon a conflict of
3 interest with a former client, Salim Ahmed Hamdan.

4 As background on this issue, Captain Mizer represented
5 Mr. Hamdan beginning in October 2007 until September 2009,
6 when Captain Mizer left active duty. However, Captain Mizer
7 asserts that he continued to assist with Mr. Hamdan's case
8 until the case was dismissed with prejudice on 16
9 October 2012.

10 Prior to Captain Mizer's initial detail to this case
11 against Mr. Nashiri, the government produced the statements of
12 Mr. Hamdan to the defense of Mr. Nashiri. This production
13 occurred in December 2011 and again in January 2012. Captain
14 Mizer began representing Mr. al Nashiri for the first time on
15 23 July 2013, when he was detailed to this case.

16 Not long after Captain Mizer was detailed to this
17 case, the government gave notice on 17 September 2013 of an
18 intent to introduce into evidence in this case the hearsay
19 statements of Mr. Hamdan. Captain Mizer continued to
20 represent Mr. Nashiri in this case until Captain Mizer's
21 release from this case in October of 2015.

22 Captain Mizer was later recalled to active duty in May
23 of 2018, and was once again detailed to represent the accused

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1 in this case. At that time, Captain Mizer was, for the second
2 time -- at the time that Captain Mizer was detailed again to
3 enter -- to this case, the government had not withdrawn its
4 intent to introduce Mr. Hamdan's hearsay statements in this
5 case. Altogether, Captain Mizer has represented the accused
6 for six years since the government provided notice of its
7 intent to rely in this case on the hearsay statements of
8 Mr. Hamdan.

9 On 19 May 2021, this commission published a litigation
10 schedule, AE 440, setting deadlines related to the litigation
11 of the admissibility of hearsay statements in this case. The
12 first deadline relating to hearing of the admissibility of
13 hearsay statements, such as the statements made by Mr. Hamdan,
14 was almost a year ago on 29 July 2021. In that litigation
15 schedule, the commission made it clear that we would be
16 litigating the admission of hearsay statements in the upcoming
17 sessions of the commission.

18 On 26 May 2022, the commission conducted an R.C. -- as
19 I stated before, we conducted an R.M.C. 802 conference with
20 the parties where the commission discussed litigating the
21 admissibility of hearsay statements. Captain Mizer was
22 present at that conference and he did not raise any concern
23 regarding the potential conflict related to the litigation of

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1 hearsay at that time.

2 On 9 June 2022, the commission published AE 483, the
3 docketing order for this session, which included litigation of
4 hearsay statements. On that same day, the defense moved to
5 suppress the hearsay statements by Mr. Hamdan.

6 On 17 June 2022, again Captain Mizer filed 339X,
7 seeking to withdraw from the representation, citing the
8 litigation related to the admissibility of Mr. Hamdan's
9 hearsay statements as the reason for the conflict of interest
10 and his need to withdraw.

11 The basis for Captain Mizer's request to withdraw is
12 essentially that he represented Mr. Hamdan and cannot reveal
13 information he learned from Mr. Hamdan, and that Mr. Hamdan
14 and Mr. al Nashiri have conflicting interests.

15 The defense has responded to Captain Mizer's motion in
16 AE 339AA, AA, stating that Mr. al Nashiri opposes Captain
17 Mizer's withdrawal and the defense alleges that the government
18 has created a conflict to manipulate the composition of
19 Mr. al Nashiri's defense team. The defense goes on to argue
20 that the defense can moot this -- that the -- pardon me, that
21 the government can eliminate this issue by not introducing
22 Mr. Hamdan's statements.

23 The defense suggests that Captain Mizer's withdrawal

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1 from the case would irreparably prejudice the defense.

2 Finally, in AE 485, filed on 15 July 2022, the defense
3 again moved to suppress Mr. Hamdan's hearsay statements. And
4 their argument seems to center on the prejudice to the accused
5 that would result from Captain Mizer's withdrawal from the
6 case. The defense argues that if the commission does not
7 suppress Mr. Hamdan's statements, the defense would require an
8 indefinite continuance so that another attorney can be
9 appointed to advise Mr. al Nashiri regarding Mr. -- pardon me,
10 regarding Captain Mizer's alleged conflict.

11 A potential conflict of interest is a serious concern
12 which requires inquiry by the commission. The accused has the
13 right to conflict-free counsel. The source of this alleged
14 conflict of the statements, again, made by Mr. Hamdan
15 regarding the accused.

16 Due to the importance of ensuring that Mr. al Nashiri
17 is not prejudiced by any potential conflicts of interest, the
18 commission agreed to initially take up Captain Mizer's motion
19 in this session. The government has concurred, but we're not
20 scheduled to take up the admissibility of Mr. Hamdan's
21 statements during this session.

22 All right. Captain Mizer, if you could come up to the
23 podium. I'm going to -- I'm going to begin an inquiry into

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1 this issue. Captain Mizer, is it safe to assume that you've
2 not shared any confidential client information regarding
3 Mr. Hamdan with the defense team?

4 DDC [CAPT MIZER]: Of course, Judge.

5 MJ [COL ACOSTA]: I know I'm asking some obvious
6 questions, but I just need to get it on the record as part of
7 the inquiry.

8 DDC [CAPT MIZER]: Sure.

9 MJ [COL ACOSTA]: Safe to say that you knew of this
10 potential conflict issue as early as your own detailing to
11 this case but no later than 17 September 2013, when the notice
12 of intent to introduce the statements was provided by the
13 government to the al Nashiri defense team?

14 DDC [CAPT MIZER]: Yes, Judge. And I could, not in this
15 setting, provide an explanation for decisions that were made,
16 but ----

17 MJ [COL ACOSTA]: No -- oh, I understand.

18 DDC [CAPT MIZER]: I was aware, Judge, and I raised it
19 with supervisory counsel at the time.

20 MJ [COL ACOSTA]: I understand. This is at the
21 beginning -- this is the -- the beginning of the inquiry. I'm
22 starting it today.

23 DDC [CAPT MIZER]: Okay.

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1 MJ [COL ACOSTA]: I don't know when I'm going to finish
2 this, but I'm starting it today.

3 So has this conflict existed since you were detailed
4 to this case back in 2013, in light of the government's
5 expressed intent to admit Mr. Hamdan's statements?

6 DDC [CAPT MIZER]: As I laid out in the application,
7 Judge, that was not the view at the time. I mean, this is --
8 this is different than an individual being put on a witness
9 list in, say, federal court as in the -- the number of cases
10 that we've signed -- or submitted to the -- to the commission.
11 I mean, there is this issue that still remains unresolved as
12 to whether or not this is a constitutional procedure. And so
13 in my mind ----

14 MJ [COL ACOSTA]: The admission of hearsay statements?

15 DDC [CAPT MIZER]: The admission of hearsay statements.

16 MJ [COL ACOSTA]: Well -- so -- but you were aware of at
17 least the potential of a conflict as early as 2013?

18 DDC [CAPT MIZER]: A potential conflict, yes, Judge. But
19 I'm not telling you anything that you don't know, Judge, that
20 this 116 testimonial hearsay statements aren't going to come
21 into any court-martial or any federal court. And until that
22 issue is resolved, it is a speculative conflict in my mind.

23 MJ [COL ACOSTA]: But yet you still -- I still haven't

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1 ruled on any of those as well, and you've still applied to
2 withdraw. So does the conflict exist as we sit here now or
3 not?

4 DDC [CAPT MIZER]: It does, Judge, and the reason --
5 you're exactly right that you haven't ruled, but you've also
6 been very clear that you want to start taking those
7 statements.

8 MJ [COL ACOSTA]: Uh-huh.

9 DDC [CAPT MIZER]: And so in my mind, even though there is
10 not perhaps that de jure ruling, we're proceeding with that
11 evidentiary foundation. And that trigger doesn't happen when
12 whatever agent, whether it's Barghouty or Ali Soufan sits in
13 that box. This team needs to prepare for that. And I am
14 actively withholding confidential, privileged, and even
15 classified information from this defense team that they need.

16 MJ [COL ACOSTA]: Right. But you knew about it at least,
17 then, a year ago when I put it on the litigation schedule
18 then?

19 DDC [CAPT MIZER]: Yes, Judge. And the ----

20 MJ [COL ACOSTA]: Okay. That's all I need. Because
21 that's when I -- that's when we put it on the schedule.

22 DDC [CAPT MIZER]: Yes, sir.

23 MJ [COL ACOSTA]: Why was there a delay until now to raise

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1 this issue?

2 DDC [CAPT MIZER]: Your Honor, I think I put it in the
3 application. There was a ruling on the Fourth Amendment which
4 signaled a pretty clear intent as to the Boumediene analysis,
5 which would govern not just the Fourth Amendment, the Fifth
6 Amendment, but also the Sixth Amendment, and the commission is
7 proceeding with that evidentiary hearing.

8 This is not something that I do lightly, Judge. I
9 have gone as far as I possibly think that I ethically can to
10 assist this defense team ----

11 MJ [COL ACOSTA]: Okay.

12 DDC [CAPT MIZER]: ---- with this litigation, but I'm up
13 against it now, Judge. And that was the issue.

14 MJ [COL ACOSTA]: In light of the fact that we're not
15 going to be litigating the admissibility of Mr. Hamdan's
16 hearsay statements at this session, is there a need to resolve
17 this conflict issue now?

18 DDC [CAPT MIZER]: I think that there is, Judge, because I
19 think you're either doing it this session, or if it's in the
20 October session, I have information that this team needs and
21 I ----

22 MJ [COL ACOSTA]: You can't ever provide it to them
23 anyway, though.

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1 DDC [CAPT MIZER]: I can't.

2 MJ [COL ACOSTA]: You can never provide it to them
3 regardless, correct?

4 DDC [CAPT MIZER]: That's absolutely right, unless
5 Mr. Hamdan waives, and he has no intention of doing that,
6 Judge.

7 MJ [COL ACOSTA]: Right. Oh, I understand. But -- I
8 understand. You cannot provide the information. That's not
9 going to change one way or the other, correct?

10 DDC [CAPT MIZER]: Yes, Judge.

11 MJ [COL ACOSTA]: Okay. That -- that's all I want to
12 hear. You haven't provided it, you haven't provided it to
13 Mr. Nashiri, and you haven't provided it to the defense team,
14 and you can never provide it, because of your duty of
15 confidentiality to your former client, correct?

16 DDC [CAPT MIZER]: That is right, Judge.

17 MJ [COL ACOSTA]: Okay.

18 DDC [CAPT MIZER]: But it is my view that we are now
19 proceeding with conflicted counsel and that I've carried the
20 ball as far as I can carry it, Judge. And I've thrown the
21 flag, not lightly, knowing what I know, where I can't do it
22 any longer.

23 MJ [COL ACOSTA]: If the issue is admissibility of a

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1 hearsay statement and there's no possibility that you'd be put
2 in the position of cross-examining a former client, does that
3 change the calculus in any way?

4 DDC [CAPT MIZER]: I doesn't, Judge. It doesn't. And
5 part of the calculus is, as I submitted in the application,
6 those five hearsay statements were selected -- the five
7 hearsay statements that we're going to litigate certainly were
8 selected for a variety of bases. With respect to the two
9 Yemeni witnesses, it's part of the defense's argument that
10 they're not available.

11 We would make the same argument -- I would submit that
12 Mr. Hamdan should be on that witness list and I can
13 potentially make that happen, but I ethically can't make that
14 happen for this defense team, Judge.

15 MJ [COL ACOSTA]: Understood.

16 DDC [CAPT MIZER]: That's part of the conflict.

17 MJ [COL ACOSTA]: One of the cases that you cited, and you
18 brought up that you brought up several cases, and one of them
19 was U.S. v. Williams, suggests the use of auxiliary counsel to
20 cross-examine a defense counsel's former client might, under
21 certain circumstances, be an appropriate remedy to the type of
22 conflict which your application is concerned. Would that
23 remedy be appropriate here?

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1 DDC [CAPT MIZER]: I don't believe that it would be,
2 Judge. I think, again, the statement doesn't even come in if
3 I could assist this team in producing Mr. Hamdan. I mean,
4 that's -- that's one of the -- the core issues at issue here
5 and I ethically can't do that because that is not in
6 Mr. Hamdan's interest, in the same way that it wasn't in
7 Mr. al Hilah's interest. Williams is a Fourth Circuit case,
8 Judge. Obviously, I'm interested in the Fourth Circuit as a
9 Virginia lawyer, but I also gave you two cases from the D.C.
10 District Courts where they rejected that. Even with -- with
11 both waivers, Judge.

12 MJ [COL ACOSTA]: Understood. I'm just -- like I said,
13 this is the beginning of an inquiry, not the end.

14 DDC [CAPT MIZER]: Yes, Judge.

15 MJ [COL ACOSTA]: The -- if the commission were to delay
16 litigation of Mr. Hamdan's statements until, say, closer to
17 the beginning of trial, could you not continue to represent
18 Mr. al Nashiri without conflict?

19 DDC [CAPT MIZER]: Judge ----

20 MJ [COL ACOSTA]: If we're not talking about Mr. Hamdan.
21 He's the only person to which your conflict applies, correct?

22 DDC [CAPT MIZER]: That is absolutely right.

23 MJ [COL ACOSTA]: Okay. And you've represented him for

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1 six years up until now, ably. And I would say if that is
2 delayed, just for time, for a particular period of time, could
3 you not continue to represent Mr. Nashiri on the remaining --
4 the remainder of the case to a point?

5 DDC [CAPT MIZER]: Judge, it is my view that now that
6 certain red lines have been tripped, that the confrontation
7 clause isn't going to prevent this from happening, and that he
8 is, in fact, going -- going to be a witness. I mean, I
9 submitted that application, the government could have come
10 back and said we're not even going to use the statement. I'm
11 not suggesting that's right or wrong. It's their case, but
12 their decisions trigger certain ethical obligations that I
13 have.

14 And so knowing that the confrontation clause isn't
15 going to bar testimonial hearsay and that we're going to start
16 hearing that at this session and knowing that he is, in fact,
17 going to be a witness, I think this is the cleanest way rather
18 than proceeding with conflicted counsel for ----

19 MJ [COL ACOSTA]: Well ----

20 DDC [CAPT MIZER]: ---- a number of months.

21 MJ [COL ACOSTA]: You've been proceeding for six years,
22 Counsel, that you say, in a conflicted way. That's why I
23 don't understand why it's a -- it's an emergent issue now.

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1 DDC [CAPT MIZER]: Judge, it is the same argument that was
2 made with respect to Mr. Paradis back in 2012 when this issue
3 came up with Mr. Bahlul. Mr. Paradis was there to write legal
4 motions. As you know, that legal motion deadline has come and
5 gone. I'm an appellate lawyer. I filled a certain role on
6 this team. But now we're getting down to brass tacks. We're
7 getting down to evidence. We're getting down to the actual
8 hearsay, and this team needs to prepare for it. It is my
9 responsibility to the commission, to Mr. Nashiri, to this
10 defense team and, frankly, to the prosecution, to throw the
11 flag once I think that the gator has gotten too close to the
12 boat, and that's all I've done, Judge.

13 MJ [COL ACOSTA]: All right. Thank you. I have no
14 further questions for you at this time.

15 DDC [CAPT MIZER]: Yes, Judge.

16 MJ [COL ACOSTA]: All right. Part of the -- Captain
17 Mizer's application and I think part of the defense response
18 was a request to grant a continuance to resolve this issue.
19 The commission denies the request for a continuance at this
20 time. As I stated before, Captain Mizer has ably represented
21 the accused in this case for several years -- yes, several
22 years -- never raising this potential conflict to the
23 commission.

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1 The conflict, if one exists, is isolated to the
2 statements of Mr. Hamdan and the potential admission of
3 those -- of that particular statement or those particular
4 statements. The admissibility of Mr. Hamdan's statements will
5 not be before the commission during this session.

6 As Captain Mizer has for several years provided
7 representation to Mr. al Nashiri while -- all while knowing of
8 this potential issue, there's no need to grant the continuance
9 while the commission considers this matter or conducts further
10 inquiry.

11 If the Military Commission's Defense Office desires,
12 it may appoint an independent counsel to advise the accused on
13 this issue. The Military Commissions Defense Office may also
14 seek appointment of alternate counsel to eventually assume
15 Captain Mizer's role should Captain Mizer's application for
16 withdrawal be granted. The commission will take up further
17 inquiry and arguments on 339X at a later date.

18 ADC [MS. MORGAN]: And, Your Honor, the defense would seek
19 to be heard to make a record as to Mr. al Nashiri's rights on
20 this matter.

21 MJ [COL ACOSTA]: You may proceed.

22 ADC [MS. MORGAN]: And Your Honor, to -- just as an
23 initial matter, Mr. al Nashiri has not been advised as to ----

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1 MJ [COL ACOSTA]: Why not? Why not? I'm looking at --
2 besides Captain Mizer, I'm looking at four other attorneys,
3 including capital-qualified attorney ----

4 ADC [MS. MORGAN]: Understood.

5 MJ [COL ACOSTA]: ---- who has not had this conversation
6 with him.

7 ADC [MS. MORGAN]: Understood. No attorneys on the team
8 have, and ----

9 MJ [COL ACOSTA]: Why?

10 ADC [MS. MORGAN]: If we want to get into a more
11 substantive conversation, Your Honor, we can do that in
12 ex parte. But the defense position is that this very well
13 maybe an imputed conflict. Now, the ----

14 MJ [COL ACOSTA]: How so?

15 ADC [MS. MORGAN]: Well, Your Honor, from a legal basis,
16 what is unique about military practice is that the effective
17 assistance of counsel, when a team is composed of civilian and
18 military lawyers, is that the effective assistance is judged
19 as a team -- by the team as a whole, and that comes most
20 recently from United States v. McCollum. I'm sorry. And that
21 draws on 60 years of military practice, both come in CAAF
22 cases going back, I believe, to 1972.

23 And so what's really unique, Your Honor, about the

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1 jurisdiction we're practicing in is -- you know, typically
2 you'd be in federal court. You'd have a law firm. One
3 counsel is conflicted, now the firm can't represent. You have
4 one PD's office, you have a PD who's conflicted, well, now
5 that PD's office can't represent. You're pulling from a CJA
6 panel.

7 We function in this really weird society where
8 military counsel have been allowed to often represent clients
9 that are somewhat closer -- you know, we touch conspiracy
10 cases within the same regional defense offices. But ----

11 MJ [COL ACOSTA]: That's why you haven't advised him,
12 right?

13 ADC [MS. MORGAN]: No, Your Honor. We haven't advised him
14 because what's unique about our team is this issue -- let's
15 assume Captain Mizer has an actual conflict. Let's assume
16 that going forward today, by doing anything in this case, that
17 he is now lumbering under an actual conflict. That means that
18 Mr. al Nashiri is receiving the ineffective assistance of
19 counsel.

20 MJ [COL ACOSTA]: If that -- if that conflict has existed,
21 then it's existed since 2013.

22 ADC [MS. MORGAN]: Respectfully, Your Honor, I would
23 disagree, and I'm happy to address the commission as to why.

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1 But ----

2 MJ [COL ACOSTA]: I don't -- again, I don't -- I'm not
3 prepared to hear entire -- the entire argument on this issue
4 today. I'm beginning the inquiry to -- to go forward.

5 ADC [MS. MORGAN]: Understood.

6 MJ [COL ACOSTA]: It sounds like you're suggesting that
7 you're -- that because of the beginning of the taking up of
8 other people's hearsay statements that are not Mr. Hamdan's,
9 that now there's a conflict that has materialized now.

10 ADC [MS. MORGAN]: Your Honor, the defense position is
11 that this must be handled now. And again, the need to make
12 the appellate record on this point, the defense position is
13 should we lumber forward today? And if there is an actual
14 conflict, which from an appellate perspective will be reviewed
15 on a de novo standard, if there is an actual conflict for
16 Captain Mizer and we proceed, that when that is analyzed, if
17 that conflict existed, it will mean that Mr. al Nashiri has
18 received ineffective assistance of counsel.

19 And what is unique about our jurisdiction is that you
20 cannot have ineffective assistance of just a single counsel.
21 If there is an ineffective assistance of counsel claim, it
22 will be against the entire team.

23 And so the question then is whether all of us -- and

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1 while Captain Mizer is correct that he has not shared any
2 confidential information, nor would he, there is information
3 that we do know that could potentially impute a conflict onto
4 members of the team.

5 So looking at this -- and I don't say this lightly,
6 Your Honor. We are playing with fire here. We are playing
7 with issues that won't maybe turn this case on appeal but will
8 turn this case on appeal. And so recognizing the need to
9 protect Mr. al Nashiri's rights to effective assistance of
10 counsel and recognizing his need to protect his rights to his
11 counsel of choice, the defense has, in our best ethical and
12 professional judgment, elected not to advise him as to the
13 potential consequences of continuing -- of waiving the
14 conflict that might exist -- or that we believe does exist
15 with Mr. Hamdan. We believe that ----

16 MJ [COL ACOSTA]: But it didn't exist -- it didn't exist
17 for the previous six years. It only began to exist in June.

18 ADC [MS. MORGAN]: Respectfully, Your Honor, I think that
19 there is -- there is a distinction. Conflicts are a term of
20 art. There is a speculative conflict, potential conflict, and
21 there's an actual conflict. And an attorney's ethical
22 obligations are triggered when an actual conflict arises.

23 In 2013, when Captain Mizer was assigned to this case,

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1 there was a speculative conflict. And as Captain Mizer said
2 when he came on this case, he came on as an appellate
3 attorney.

4 MJ [COL ACOSTA]: No, I understand.

5 ADC [MS. MORGAN]: Now, what I think -- point needs to be
6 made, Your Honor, and cannot be stressed enough, are the
7 unique circumstances in which Captain Mizer left and came back
8 to this case. Captain Mizer was demobilized in 2015. Captain
9 Mizer did not accept orders. He did not volunteer to come
10 back here. He was, you know, to use a naval term, impressed
11 into service. In 2017, Captain Mizer was ordered back onto
12 this case by the prior military judge.

13 Now, the government was aware of this. It is not a --
14 the obligation to bring things to the attention of the
15 commission is not an obligation that solely flows from the
16 defense. And I would point out, Captain Mizer does not have
17 the authority or the ability to waive this conflict and
18 unilaterally choose to continue ----

19 MJ [COL ACOSTA]: No, I understand that. But he has, as
20 all attorneys do, the obligation to raise conflicts.

21 ADC [MS. MORGAN]: And, Your Honor, you have heard ----

22 MJ [COL ACOSTA]: And it's been -- and he's been on since
23 2018, when this has continued -- he's been continuously on

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1 this case since 2018, that's four years now, since the
2 beginning of his second period of representation of
3 Mr. al Nashiri, while this conflict issue was there.

4 I don't -- I'm not sure that I buy your argument that
5 there was a triggering event that caused this conflict to
6 spring into -- into existence, and I don't know that the
7 rules, that the ethical rules that bind attorneys, both in the
8 military and in their individual jurisdictions, their state
9 bars, support such a finding.

10 I did not ask -- there is a -- to me, there's a
11 question of whether or not this existed from the beginning,
12 and that the -- and that the request for this -- this raising
13 of this issue now is -- is questionable as to why it's raised
14 now ----

15 ADC [MS. MORGAN]: And, Your Honor ----

16 MJ [COL ACOSTA]: ---- in my mind. That's -- that's what
17 springs to mind for me. An ungenerous of view of this would
18 be that there's a timing issue with this.

19 ADC [MS. MORGAN]: And, Your Honor, I think the defense
20 position would be it's questionable as to why it was raised
21 with Mr. Paradis in 2012 and six months later not raised with
22 Captain Mizer -- Commander Mizer.

23 MJ [COL ACOSTA]: Right. The government raised an issue

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1 as far as Mr. Paradis is concerned, correct?

2 ADC [MS. MORGAN]: But ----

3 MJ [COL ACOSTA]: And then this issue ----

4 ADC [MS. MORGAN]: And, Your Honor, again ----

5 MJ [COL ACOSTA]: ---- was known by Captain Mizer since
6 2013.

7 ADC [MS. MORGAN]: And in the event that the commission
8 has any concerns about Captain Mizer acting in any manner, or
9 the defense acting in any manner that is anything other than
10 completely above board, I would implore this commission to
11 then move into an ex parte session because we can happily
12 answer any questions.

13 MJ [COL ACOSTA]: That is -- that is the consideration
14 that I'm ----

15 ADC [MS. MORGAN]: But -- but I would just, again, walking
16 through -- and I apologize, Your Honor. I didn't mean to ----

17 MJ [COL ACOSTA]: Okay. No, I -- I know that that is a --
18 that is a tool that other courts have used, and I'm
19 considering that. But again, this was raised very late before
20 this came -- before this session began, okay? This issue.
21 And I'm not prepared to do that today.

22 So -- and this existence of representation -- the
23 representation of Captain Mizer has continued for at least the

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1 last four years, and at least the last -- and then short of
2 that, for the last year, knowing that I was -- that this
3 commission was going to take up the hearsay statements. I've
4 repeatedly brought up that we're going to take up the hearsay
5 statements, and nothing was said. Nothing was done. And now
6 it's a -- it's a -- we have the -- the specter of this
7 conflict of interest that's being raised.

8 ADC [MS. MORGAN]: So, Your Honor ----

9 MJ [COL ACOSTA]: And I hear your argument. I know you
10 have put on the record now that you believe that going forward
11 could -- is problematic from this point. But I don't think
12 that that argument holds weight, considering the fact that if
13 that -- if this issue existed, it existed for a long time
14 until now.

15 ADC [MS. MORGAN]: So, Your Honor ----

16 MJ [COL ACOSTA]: And if he was able to proceed from 2018
17 until now, then he's able -- as long as we don't talk about
18 the Hamdan statements, then he's able to continue until such
19 time as that is necessary, which is why I advised the MCDO
20 that they, the MCDO, can appoint an independent counsel to
21 advise the accused of his rights on this issue, that the MCDO
22 can then begin to onboard perhaps a replacement for Captain
23 Mizer until such time as this needs to be resolved.

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1 ADC [MS. MORGAN]: So, Your Honor, I would just like to
2 clarify the timeline somewhat, because I recognize the
3 commission's concern and the timing of this. But there is --
4 there is reason behind the timing. And so while this has been
5 discussed in abstract terms, this doesn't actually show up on
6 the docket until the first week of June, recognizing we had
7 had a -- a status conference in May. And we had had abstract
8 conversations prior to that. You know, I'm not disputing
9 that. Captain Mizer's withdrawal application follows a week
10 after that.

11 And then in the normal briefing schedule, the defense
12 files our reply. And our interests, while in some ways
13 closely align with Captain Mizer's, Mr. al Nashiri's interests
14 are distinct. We file our response which, quite earnestly,
15 Your Honor, were that this might be an oversight because they
16 wouldn't possibly have brought Captain Mizer back in 2017
17 knowing this was out there. So maybe this ----

18 MJ [COL ACOSTA]: I don't think that the government
19 brought him back. I believe it was the -- it was the -- it
20 was the then-military judge ----

21 ADC [MS. MORGAN]: No.

22 MJ [COL ACOSTA]: ---- sitting at the time, right,
23 that ----

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1 ADC [MS. MORGAN]: My understanding ----

2 MJ [COL ACOSTA]: I believe that he ordered, or heavily
3 requested, that the Secretary of Defense recall Captain Mizer.

4 ADC [MS. MORGAN]: I was certainly not in the room. My
5 understanding is that it -- the origin of that order was from
6 a government suggestion. And so regardless of who had the
7 power to do it, the government recognized that he was coming
8 on the case as learned counsel, and so this is going to be
9 problematic. The -- Captain Mizer is being recalled to be
10 learned counsel on this case.

11 If we let this happen, we know this conflict is out
12 there. This is going to blow up at some point.

13 And so on July 1st, when the defense filed their
14 reply, candidly, most of us having not had a ton of
15 institutional knowledge with the Hamdan piece, a very
16 reasonable response to that reply seemed to be that was an
17 oversight on our part. We're not going to use those
18 statements.

19 MJ [COL ACOSTA]: Which was the oversight? Bringing
20 Captain Mizer back or ----

21 ADC [MS. MORGAN]: No.

22 MJ [COL ACOSTA]: ---- using the statements?

23 ADC [MS. MORGAN]: The statements. There's 116 statements

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1 out there. In the course of the, I believe, nine years since
2 that notice was filed, it seemed reasonable to think the
3 government's response might be we're not using those anymore.

4 MJ [COL ACOSTA]: Another -- an alternate view would be
5 that this request to withdraw is an attempt to get the
6 government to not use those statements.

7 ADC [MS. MORGAN]: Well, Judge ----

8 MJ [COL ACOSTA]: I'm just ----

9 ADC [MS. MORGAN]: I mean, you ----

10 MJ [COL ACOSTA]: ---- asking. You put it into one
11 direction and I'm just looking at it from the other end of the
12 lens.

13 ADC [MS. MORGAN]: But, Judge, that's not nefarious. In
14 fact, that's entirely supported in the case law in every --
15 almost every circuit. And that comes out of the Gerhardt case
16 in the Seventh Circuit where they cite basic unanimity that,
17 you know, hey, this right to your counsel of choice is so
18 sacred that, in fact, if the government's going to choose to
19 admit evidence that is going to create a conflict issue, the
20 judge has the authority to prohibit the admission of that
21 evidence under 403. And that's from the federal rules that
22 mirror the rules that we play with.

23 So it's not maliciously, hey, I'm trying to bully you

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1 into keeping this evidence out. It's it seemed reasonable
2 that might be an oversight. And even if it's not, there is a
3 legal mechanism in place to keep it out, because the
4 government's interests in whatever this evidence is are not
5 going to outweigh Mr. al Nashiri's interest in his counsel of
6 choice and his right to conflict-free counsel.

7 MJ [COL ACOSTA]: I'm going to protect Mr. al Nashiri's
8 right to have conflict-free counsel and make sure that he has
9 appropriate representation. I'm going to protect that. I
10 appreciate your -- are you finished?

11 ADC [MS. MORGAN]: I would just make ----

12 MJ [COL ACOSTA]: It sounds like you're ----

13 ADC [MS. MORGAN]: One more point as to why this must be
14 done now, Your Honor. And that would come from the Grimes
15 case out of D.C. -- Grimes v. District of Columbia. The case
16 cite on that is 794 F.3d 83. And essentially what Grimes
17 says, and we read that in conjunction with 901 basically for
18 why we have to go right now; we don't think we can push this.
19 It -- everything dealing with conflicted counsel, once the --
20 once a credible concern of conflicted counsel is raised. And
21 whether you believe it's been existed before, it's never been
22 raised before, so now it's on your -- on your plate. Once
23 that has been raised, it impacts the fairness and impartiality

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1 of everything that flows from this.

2 A disqualification motion has the potential to change
3 the proceedings entirely, which means if there is a conflict
4 right now, it will infect everything going forward. And so we
5 believe that should we be put in a position to continue right
6 now, we believe there is an actual conflict with Captain Mizer
7 and we believe that in the event the defense is ordered to
8 proceed at this point, we will be doing so under no other
9 option but to provide Mr. al Nashiri the ineffective
10 assistance of counsel.

11 MJ [COL ACOSTA]: I understand that that's your argument.
12 I don't know how it's any different -- how proceeding today is
13 any different from proceeding for the last six years on this
14 case when that conflict was potentially there, and we're still
15 not going to get to Mr. Hamdan's statements during this
16 session. I don't know if we're going to get to Mr. Hamdan's
17 statements in October, okay? I don't know if we're going to
18 get to them in December. It certainly would be my hope to
19 have it complete by then. So I don't know how this conflict
20 would impact us at that point.

21 But I appreciate it. Your objection -- your points
22 are noted. I have them. This is not something to be quickly
23 resolved either, which is also why getting something very late

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1 as we're preparing to take on a multitude of other issues that
2 we're not going to take up -- that I'm not going to finish
3 today. I've taken it up. I've begun my inquiry into this.
4 There may be more to follow, including hearing from Captain
5 Mizer, perhaps, in an ex parte in camera proceeding with me,
6 okay?

7 I have to do more inquiry on this and I will do more
8 inquiry when I have had time to address this issue, okay?
9 Thank you. Right now, I'm going to hear from the government
10 briefly before I say anything more. Thank you.

11 ADC [MS. MORGAN]: And the defense would just then ask for
12 an explicit order from this court to go forward recognizing
13 our ----

14 MJ [COL ACOSTA]: I'm not issuing anything just yet. Hold
15 on one second, okay?

16 ADC [MS. MORGAN]: Understood, Your Honor.

17 MJ [COL ACOSTA]: Government. Government, one of the
18 positions of the -- of the defense team, apart from Captain
19 Mizer individually, is that there was some form of a creating
20 this to manipulate the composition of the defense team by
21 using these statements. What is your response?

22 MATC [MR. WELLS]: Your Honor, that was not the intent in
23 2011 and 2012, I believe, when the government provided the

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1 notice of these statements. We've been consistent ----

2 MJ [COL ACOSTA]: No, no. That's when you provided the
3 statements to them. You didn't provide notice of intent to
4 introduce them until 2013.

5 MATC [MR. WELLS]: 2012, sir, I think, I believe, and
6 shortly thereafter he was detailed ----

7 MJ [COL ACOSTA]: No, September of 2013 is when you
8 provided notice of intent to introduce them.

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

10 MJ [COL ACOSTA]: You provided them in discovery in 2012.

11 MATC [MR. WELLS]: Thank you.

12 Yes, sir. So we didn't have -- have the intent to
13 manipulate the defense team or create a conflict. I think
14 case law is clear that the attorney who represented the former
15 client is in the best position to recognize the conflict and
16 raise it.

17 At this point, and, you know, your focus is to say I
18 understand what happened in the past. We think that's
19 important because they've been effective to manage this
20 conflict and if they followed the procedures to advise the
21 accused of the potential that may develop into an actual,
22 that's a point of inquiry. But it's been effective.

23 And at this point going forward, now that it's been

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1 raised, we would add one additional fact that I think is
2 important, and I'm not certain if the commission hit this, but
3 on 25 May 2022, in AE 481, the defense filed a motion to
4 suppress the Hamdan statements in which Captain Mizer joined
5 and endorsed as counsel and the briefing has not completed
6 that. The commission has extended the government's response
7 until, I believe, 9 September. So there's still an
8 opportunity for the commission with the defense to address the
9 admissibility of the Hamdan statements in 481.

10 I would note that Captain Mizer indicated that his
11 contribution to the team might relate to the foundation of the
12 Hamdan statement. And that seems to me that in order to
13 suppress the statement, that necessarily would be required in
14 that motion so at that time he had some appreciation and
15 understanding when he signed that motion that that would be
16 required.

17 He also mentioned that if it were his choice in this
18 proceeding in AE 319KK, he would have added the Hamdan
19 statement, and I believe his words at the lectern were as it
20 relates to the availability of Hamdan and where he's located.
21 I think the government would ask the commission is that
22 confidential information that's been relayed to him or is that
23 not. If that's their objection to the hearsay statement,

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1 which we've been grappling with this time, what are the
2 defense's specific objection? That does not seem to involve
3 any confidential information ----

4 MJ [COL ACOSTA]: What, the location ----

5 MATC [MR. WELLS]: Correct, sir.

6 MJ [COL ACOSTA]: ---- potentially of his former client?

7 MATC [MR. WELLS]: Right. And just putting the government
8 to the legal proof of it's our obligation to prove that he's
9 unavailable, that's an area of inquiry, I think, the
10 commission should ask the defense and Captain Mizer.

11 So the government's position is we want to protect the
12 accused's statutory entitlement to detailed military
13 commission counsel. We certainly recognize the Supreme Court
14 has stated in Wheat and its other progeny that to be effective
15 counsel, the individual counsel needs to be conflict-free. We
16 have not raised an imputed liability or imputed conflict at
17 this time to the other defense team, and I think the
18 representations from defense counsel indicate that no
19 confidential information has been relayed to them, so they're
20 protected.

21 So moving forward, our position is the rules of
22 professional conduct in Virginia, which Captain Mizer says
23 he's bound by, provide a general rule and -- and exceptions.

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1 And we want to explore those exceptions to see if the --
2 truly, the confidential information is required or needed to
3 have effective challenge or cross-examination to Mr. Hamdan
4 and the sponsoring witness.

5 So with that, sir, what specific questions can I
6 address?

7 MJ [COL ACOSTA]: The defense's proposal to solve all of
8 this is not use -- not using the Hamdan statements in part of
9 the 116 hearsay statements that you intend to introduce.

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

11 MJ [COL ACOSTA]: Is that a consideration that is being
12 considered even in any way by the government?

13 MATC [MR. WELLS]: Sir ----

14 MJ [COL ACOSTA]: Because if you stood there and said
15 we're not going to introduce that, then this inquiry stops,
16 doesn't it? And I'm not suggesting ----

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

18 MJ [COL ACOSTA]: ---- I'm not telling you that that's
19 what you have to do. I'm asking you if that's a consideration
20 that you've even made.

21 MATC [MR. WELLS]: Your Honor, our response to 485 is due
22 and we would like to file that. We do not have ----

23 MJ [COL ACOSTA]: Yeah, but you're here. You're standing

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1 up right in front of me here, so is that a consideration that
2 you've thought about?

3 MATC [MR. WELLS]: Sir, we've looked at that consideration
4 and the answer is no at this point, and I would make some
5 observations. It's not the totality of hearsay statements but
6 it's ----

7 MJ [COL ACOSTA]: No, I understand. It's the ----

8 MATC [MR. WELLS]: The specific information relates to
9 only a few people saw Mr. Nashiri meet with Usama bin Laden.
10 And only a few people, during the actual conduct of the
11 conspiracy within the organization of al Qaeda, had contact
12 with Mr. Nashiri and heard him admit he was involved in the
13 COLE. Only a few people saw him use explosives to test. That
14 is more important than the balance of the other hearsay
15 statements ----

16 MJ [COL ACOSTA]: Oh, I understand, again ----

17 MATC [MR. WELLS]: Okay. So that's our thinking and the
18 answer is no.

19 MJ [COL ACOSTA]: Okay.

20 MATC [MR. WELLS]: We do not intend at this point to
21 withdraw the notice on the use of the Hamdan statement. We
22 would like to respond to 481. And if at some point the
23 commission believes that that should go before admission of

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1 the consideration of the other hearsay statements, we'd like
2 an opportunity to litigate 481, and then of course our
3 response to 485 laying out why we think an M.C.R.E. 403
4 balancing test should not be applied at this point.

5 MJ [COL ACOSTA]: Understood.

6 MATC [MR. WELLS]: And again, though, the government is
7 concerned that this conflict is not a genuine actual conflict
8 because there are exceptions recognized in the rule that you
9 can manage and mitigate even a potential conflict and an
10 actual conflict, and still protect the integrity of the
11 commission.

12 MJ [COL ACOSTA]: All right.

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

14 MJ [COL ACOSTA]: Thank you. I'm going to take a brief
15 recess. I anticipate taking about 20 minutes. So
16 anticipate -- maybe 25. So let's go back on the record at
17 10:20. The commission is in recess.

18 [The R.M.C. 803 session recessed at 0959, 25 July 2022.]

19 [The R.M.C. 803 session was called to order at 1102,
20 25 July 2022.]

21 MJ [COL ACOSTA]: The commission is called to order. All
22 parties present as before, Government?

23 TC [MR. MILLER]: Yes, Your Honor. We do need to put

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1 Lieutenant Schwartz's qualifications on the record.

2 MJ [COL ACOSTA]: Yes. Lieutenant Schwartz ----

3 Defense, are all parties present as before?

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

5 MJ [COL ACOSTA]: Lieutenant Schwartz, welcome. Please
6 come forward and put your detailing qualifications on the
7 record.

8 ATC [LT SCHWARTZ]: Good morning, Your Honor. Lieutenant
9 Tess Schwartz, JAG Corps, United States Navy. I've been
10 detailed by the chief prosecutor of the Office of Military
11 Commissions pursuant to R.M.C. 502 and 503. I have been
12 previously sworn and certified under R.M.C. 807, Article 27(b)
13 and Article 42(a). I have not acted in any manner that might
14 tend to disqualify me from this matter.

15 MJ [COL ACOSTA]: Thank you, Counsel.

16 ATC [LT SCHWARTZ]: Thank you.

17 MJ [COL ACOSTA]: All right.

18 TC [MR. MILLER]: Thank you, Your Honor.

19 MJ [COL ACOSTA]: The commission has begun its inquiry
20 into the alleged conflict of interest involving Captain
21 Mizer's representation of Mr. Nashiri and Captain Mizer's
22 former client, Mr. Hamdan. The potential conflict is isolated
23 to the single issue of the admissibility of Mr. Hamdan's

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1 statements alone. This issue was apparently known to Captain
2 Mizer as early as 2013 and not raised until June of 2022.

3 In the interim, Captain Mizer has continued to
4 represent Mr. Nashiri with apparently no reservation,
5 including being the signatory on the motion to suppress
6 Mr. Hamdan's statements.

7 The commission scheduled litigation on the
8 admissibility of the hearsay statements in general in
9 July 2021, because, as Captain Mizer admits, this potential
10 conflict is isolated to one issue. In the interest of the
11 accused and his continued representation, the commission will
12 proceed with this session and will not take up any issue
13 regarding Mr. Hamdan until this conflict is resolved.

14 The commission is not persuaded that this potential
15 conflict must be resolved before proceeding on other issues
16 as -- because, as this commission sits here today, the
17 potential conflict issue has not changed since Captain Mizer
18 was detailed to this case in 2018. The commission does not
19 accept the argument that its previous rulings have triggered a
20 shift from a potential to an actual conflict. Captain Mizer's
21 application states that the conflict is triggered by the
22 litigation of Mr. Hamdan's hearsay statements which will not
23 occur during this session.

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1 The commission recognizes that the potential for a
2 conflict in this case is real. The commission's decision not
3 to litigate the Hamdan statements is to prevent an actual
4 conflict from prejudicing the accused and to allow the case to
5 proceed on unrelated issues until such time as the accused has
6 been properly advised of this issue and then new detailed
7 counsel, military counsel, is arranged.

8 The commission does not accept that this potential
9 conflict is imputed to the remainder of the defense team.
10 Captain Mizer defers -- affirmed that he has not, as is to be
11 expected, shared any information from -- confidential client
12 information with the defense team. The commission does not
13 find that this potential conflict, which is not yet triggered
14 by Mr. Hamdan's statements, is imputed to the defense team.

15 The remainder of the defense team has failed to advise
16 their client on this issue and is ordered to take steps to
17 advise him on this issue. Considering the isolated nature of
18 the potential conflict, there's no conceivable reason for the
19 defense team to not advise Mr. Nashiri on this issue.

20 The commission finds that Captain Mizer and the
21 defense team are able to continue to effectively, and without
22 conflict, continue to represent the accused until such time as
23 the Hamdan statements are scheduled to be litigated. The

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1 issue of the admissibility of Mr. Hamdan's hearsay statements
2 will be litigated by this commission no earlier than February
3 of 2023.

4 Captain Mizer is ordered to submit an ex parte
5 affidavit for in camera review setting forth the specific
6 nature and scope of the conflict and what steps he has taken
7 to advise both his former and current client on these issues.
8 This will be submitted in person to the commission under seal
9 no later than one week from today.

10 The defense may also file an ex parte submission
11 through the normal filing process.

12 Mr. Nashiri, are you aware that Captain Mizer has
13 requested to withdraw from representing you?

14 ACC [MR. AL NASHIRI]: Yes.

15 MJ [COL ACOSTA]: Okay. The potential conflict raised by
16 Captain Mizer relates to statements made by a former client of
17 his that the government intends to use in the case against
18 you. Do you understand that?

19 ACC [MR. AL NASHIRI]: Lately, I just understood this
20 issue.

21 MJ [COL ACOSTA]: Okay. But you understand it now?

22 ACC [MR. AL NASHIRI]: Yes, yes.

23 MJ [COL ACOSTA]: I have found that there's no actual

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1 conflict until the admissibility of those statements is
2 litigated.

3 Do you understand that?

4 ACC [MR. AL NASHIRI]: That's your opinion. And the other
5 attorneys, they still say that there is a conflict.

6 MJ [COL ACOSTA]: I understand that. This will permit
7 Captain Mizer to continue to represent you, to the maximum
8 extent possible, until the commission takes up the
9 admissibility of those statements.

10 Do you understand that?

11 ACC [MR. AL NASHIRI]: That's your opinion as well.

12 MJ [COL ACOSTA]: I expect that you will be advised by
13 either your current defense team or separate counsel about
14 this conflict in the near future.

15 The commission ordered this proceeding in AE 440 and
16 in AE 483, and the commission and all parties will proceed as
17 so previously ordered.

18 ACC [MR. AL NASHIRI]: **[Speaking in English]** Excuse me.

19 MJ [COL ACOSTA]: Yes, Mr. Nashiri.

20 ACC [MR. AL NASHIRI]: **[Speaking in English]** Can I talk
21 something?

22 MJ [COL ACOSTA]: Yes.

23 ACC [MR. AL NASHIRI]: Based on my understanding, there is

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1 a conflict with Mr. Mizer. At the same time, I need this man
2 with me because he's been on the case for a very long time and
3 I think he's very important to the case. I don't know how can
4 this issue be resolved. However, I think I do have the right
5 to have a learned counsel, someone who is experienced whom I
6 can consult with because, you know, the other attorneys,
7 sometimes they cannot really fulfill this. I need a
8 specialist who is outside this team that can fulfill this. So
9 I don't know how this is going to get resolved, but I think
10 this is my approach.

11 MJ [COL ACOSTA]: Understood. And as I stated,
12 Mr. Nashiri, Captain Mizer and your defense team have
13 represented you continuously -- well, Captain Mizer has been
14 on the team since 2018, which was the second time that he came
15 onto the team, and he has continued to represent you with this
16 potential issue being out there that they're saying is now
17 triggered but it's -- even according to their own argument,
18 it's not triggered until we get to that particular one thing.
19 It's -- the conflict is about one issue.

20 Nothing has changed. We still have not taken up that
21 one potential conflict issue, and we're not going to take that
22 up until I've had more chance to hear from Captain Mizer or
23 his -- or the remainder of the defense team on this topic.

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1 But because we're not getting into the -- into the issue of
2 the conflict, nothing has changed in your situation, that
3 you'll be represented by the same individuals so that you
4 continue to have Captain Mizer on your defense team for the
5 longest period possible, if he should be replaced.

6 All right. Counsel, as we previously discussed the
7 need to enter into a closed M.C.R.E. 505(h) hearing to discuss
8 classified evidence related to the motions that we will be
9 taking up during this session of the commission to include AEs
10 166, 327, 467, and 471, do counsel have anything else that we
11 should take up before we move into the M.C.R.E. 505(h)?

12 Government?

13 TC [MR. MILLER]: No, Your Honor.

14 MJ [COL ACOSTA]: Defense?

15 DDC [CAPT MIZER]: Judge, just a clarification as to what
16 you mean by submitting a declaration to you in person.

17 MJ [COL ACOSTA]: You're going to hand it to me.

18 DDC [CAPT MIZER]: Aye, sir.

19 MJ [COL ACOSTA]: I'll have it marked myself. I'm not --
20 I don't want to go through -- we're not going through -- I'll
21 have it marked. The court reporters will mark it in my -- in
22 my chambers. This is for ex parte in camera review and I'm
23 going to ensure that it remains -- because it is dealing with

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1 a conflict issue, I'm going to make sure that it remains an
2 ex parte and in camera review.

3 DDC [CAPT MIZER]: Understood, Judge. Thank you.

4 MJ [COL ACOSTA]: Okay. So you've got until Monday to
5 bring that in to me.

6 Defense, you will file yours -- your ex parte
7 proceeding, just file it through the regular process. It will
8 go -- yours is -- you don't have any other confidential client
9 information to -- that is going to be shared with me, so
10 that's why you can file yours that way. And I expect yours to
11 be filed by Monday as well. Okay. I apologize. I know that
12 I left that deadline off on yours, so -- okay.

13 So if there's nothing else to take up, we know that it
14 takes 45 minutes for them to get the -- to do the shift to a
15 closed session, so what we'll do is we'll recess now for
16 lunch. And I apologize for the delay in me coming back on --
17 as you're aware, these issues are one that take some
18 consideration and I'm not coming out here and speaking off the
19 cuff on those issues. So I apologize for that in advance and
20 keeping you into these -- the current conditions of the
21 courtroom are a bit chilly, I understand.

22 So what we'll do is we'll recess until lunch -- until
23 lunch is over. We'll take a recess for lunch and I'll add an

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1 extra 45 minutes onto that to get it started. So we'll start
2 back up with a closed session at 1300, and that's when we will
3 take up the 505(h) hearing.

4 Until that time, this commission is in recess.

5 [The R.M.C. 803 session recessed at 1115, 25 July 2022.]

6 [The R.M.C. 803 session was called to order at 1352,
7 25 July 2022.]

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

9 Government, all parties present as before?

10 TC [MR. MILLER]: Yes, Your Honor.

11 MJ [COL ACOSTA]: Defense?

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

13 MJ [COL ACOSTA]: Except for Mr. Nashiri?

14 LDC [MR. NATALE]: Yes. May I put something on the
15 record?

16 MJ [COL ACOSTA]: You may.

17 LDC [MR. NATALE]: Your Honor, I have explained to my
18 client that he has the right to be here and he has expressed
19 to me that he does not want to attend the afternoon session.
20 I explained to him that if need be, we could have it broadcast
21 into there. He says that he does not want that either. He
22 understands that he can change that. However, he expressed to
23 me that he did not want to be here, nor to be remotely able to

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1 review what's going on.

2 I told him that at the end of the proceedings today, I
3 will go back and report to him regarding what happened at the
4 open sessions.

5 MJ [COL ACOSTA]: So this absence of his is voluntary and
6 knowing?

7 LDC [MR. NATALE]: Absolutely, Your Honor.

8 MJ [COL ACOSTA]: All right. Thank you.

9 Government, are you satisfied?

10 TC [MR. MILLER]: Yes, Your Honor.

11 MJ [COL ACOSTA]: All right. All right. He has
12 voluntarily absented himself. No -- and I will obviously take
13 Mr. Natale's word that he has communicated with his client. I
14 know that's what took him a couple of minutes to come in just
15 now regarding that.

16 Okay. So we're starting back up. I think I'm
17 supposed to get updated on 473, 474 update.

18 Government?

19 MATC [MR. WELLS]: Good afternoon, Your Honor. John Wells
20 here.

21 MJ [COL ACOSTA]: Good afternoon, Mr. Wells.

22 MATC [MR. WELLS]: I've coordinate with the defense, and I
23 think on AE 473, we're satisfied with that.

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1 On 474, based on their articulation of information
2 that has been produced in the 9/11 case, we're going to look
3 back and determine what relevant and material information
4 pertaining to the questions sent from the FBI to the CIA black
5 sites consistent with your order in 474, so we have a little
6 more work to do on that to satisfy the defense.

7 And that's the report, sir.

8 MJ [COL ACOSTA]: What's the anticipated timeline for
9 coming back with the -- with answering the remaining questions
10 from defense counsel regarding 474?

11 MATC [MR. WELLS]: Yes, sir. I think by Wednesday of this
12 week, we will have a good fix on the matters that we've
13 reviewed. We're going to look tonight and then assess
14 tomorrow.

15 MJ [COL ACOSTA]: Let me see if I can narrow that down.
16 You say a good fix. Does that mean you'll figure out where
17 the things are and what they are or you'll have them to the
18 defense by then?

19 MATC [MR. WELLS]: Well, we'll figure out if they're
20 relevant and material to disclose to the defense. Since
21 they've already been disclosed in the 9/11 case, maybe we'll
22 have an expedited review through the SC/DRT review process and
23 the other equity review holders. However ----

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1 MJ [COL ACOSTA]: If it's been reviewed and disclosed in
2 that case, is there an issue with the -- I mean ----

3 MATC [MR. WELLS]: Yes, sir. I mean, the process that we
4 have with our OCAs is it's a limited use for the particular
5 purpose related to those 9/11 accused. And when our first
6 review, sir, the information was requested from the FBI to the
7 CIA, please have all detainees in your custody respond to this
8 information, but no response back to the FBI.

9 So in that vein, I think we determined not relevant
10 and material. But we will go back through the information
11 that specifically has been disclosed in the 9/11 case and
12 determine if it's relevant to this commission and we'll work
13 with the OCAs on that.

14 MJ [COL ACOSTA]: I encourage you to interpret that
15 broadly ----

16 MATC [MR. WELLS]: Okay, sir.

17 MJ [COL ACOSTA]: ---- what could be relevant to the
18 defense.

19 MATC [MR. WELLS]: Well ----

20 MJ [COL ACOSTA]: And again ----

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

22 MJ [COL ACOSTA]: ---- I don't -- I understand that this
23 is classified information. It's being disclosed to cleared

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1 counsel, just to cleared counsel, in some form or fashion.
2 It's already been disclosed to cleared counsel. If it has --
3 if it's relevant, turn it over.

4 MATC [MR. WELLS]: Correct, sir.

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

6 MATC [MR. WELLS]: Thank you.

7 MJ [COL ACOSTA]: Did you have anything else?

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

9 MJ [COL ACOSTA]: All right.

10 Defense?

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

12 MJ [COL ACOSTA]: If you could hang on one second. I just
13 need to catch up with my notes. I interrupted ----

14 DC [MS. CARMON]: Sure. Go ahead.

15 [Pause.]

16 MJ [COL ACOSTA]: Ms. Carmon.

17 DC [MS. CARMON]: Thank you. The government's correct
18 with AE 473. We are satisfied that we've received everything
19 that we requested, and so I think we are good to go on 473.

20 And 474, we had originally sought any and all
21 questions received at overseas locations from the FBI to the
22 CIA black sites which may have been posed -- which may have
23 been posed to the accused, and your order reflects that exact

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1 language.

2 And so in reviewing the 9/11 transcript -- and
3 obviously, we don't have copies of these documents, but the
4 testifying agent is reviewing a requirements document and is
5 testifying, at least in two instances that I've found, about
6 an FBI cable to a CIA black site requesting that detainees be
7 asked 26 questions. One of those detainees that was requested
8 of is our client. Similarly, there's another requirement that
9 an agent was testifying to in 2019, looking at a cable asking
10 that client -- that HVDs review photographs. That also
11 includes our client.

12 And so I know these documents exist. And that's just
13 what we're asking for. We -- even if there was no response
14 given back, we want to see the questions that -- which may
15 have been posed to our client.

16 MJ [COL ACOSTA]: Right. Is your proffer that even if
17 there's no response, that they may have been posed -- that the
18 questions may have been posed to your client at some point?

19 DC [MS. CARMON]: And that's -- that's the testimony
20 consistent with these agents that testified in 2019 in the
21 9/11 case.

22 MJ [COL ACOSTA]: That they did ask the questions? Those
23 agents testified that they did ask the questions in those

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1 case?

2 DC [MS. CARMON]: This is the FBI agent testifying.

3 MJ [COL ACOSTA]: No, I understand. But was there -- the
4 agent testified that he submitted the questions through the
5 other agency ----

6 DC [MS. CARMON]: Correct.

7 MJ [COL ACOSTA]: ---- to be asked. Was there ----

8 DC [MS. CARMON]: And that some ----

9 MJ [COL ACOSTA]: Was there any evidence that those
10 questions were ever posed to any of the detainees?

11 DC [MS. CARMON]: Yes. In some instances, yes, and in
12 some instances the agent testified "I never got a response
13 back."

14 MJ [COL ACOSTA]: Okay.

15 DC [MS. CARMON]: But -- and I don't -- again, I don't
16 have the documents, but I think it's relevant no matter if a
17 response was received or not, because it shows collaboration
18 between the two agencies that we're interested in.

19 MJ [COL ACOSTA]: Understood.

20 DC [MS. CARMON]: And more to the point, your specific
21 order and what we had sought was questions ----

22 MJ [COL ACOSTA]: Questions that were ----

23 DC [MS. CARMON]: ---- sent.

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1 MJ [COL ACOSTA]: ---- sent, that were sent. Not whether
2 or not they were asked or not?

3 DC [MS. CARMON]: Correct.

4 MJ [COL ACOSTA]: Okay. Understood.

5 DC [MS. CARMON]: And so we -- since we know that those
6 exist, we're just requesting their production.

7 MJ [COL ACOSTA]: Thank you.

8 All right. Government, just update me. You say by
9 Wednesday. I'll ask you again on Wednesday if I -- or I'm
10 telling you to update me by Wednesday close of business if you
11 have the -- if you have these cables and ready to produce
12 them. Thank you.

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

14 MJ [COL ACOSTA]: All right. We're going to take up 452D,
15 defense motion in limine regarding the accused statements in
16 the long form.

17 Ms. Morgan, I see you standing. I assume this is you.
18 Good afternoon.

19 ADC [MS. MORGAN]: Good afternoon, Your Honor.

20 MJ [COL ACOSTA]: This is your renewed motion essentially
21 because the first one -- the -- I think 452 was -- itself was
22 the -- for the request to return the long form entirely ----

23 ADC [MS. MORGAN]: That's correct.

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1 MJ [COL ACOSTA]: ---- that had been previously ordered.
2 And just a summary of this, the defense original motion in 205
3 was to abate the proceedings until the accused received proper
4 care. And in the course of that, the then-military judge,
5 which is two before me ----

6 ADC [MS. MORGAN]: Correct, Judge.

7 MJ [COL ACOSTA]: ---- ordered the production of the long
8 form to the government because Dr. Crosby was relying upon the
9 statements of the accused in that motions hearing in forming
10 and presenting her opinion regarding the care he was
11 receiving, correct?

12 ADC [MS. MORGAN]: She was relying on the long form
13 itself, Your Honor. That's my understanding.

14 MJ [COL ACOSTA]: Whether or not -- not the statements
15 themselves?

16 ADC [MS. MORGAN]: My understanding is that she was --
17 because she had received the long form and was relying on the
18 long -- long form in the -- as the basis of her -- in part,
19 her opinions ----

20 MJ [COL ACOSTA]: Right.

21 ADC [MS. MORGAN]: ---- in the long form.

22 MJ [COL ACOSTA]: And the long form included the
23 statements made. Some of this includes some of the

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1 statements, correct?

2 ADC [MS. MORGAN]: The statements are included in the long
3 form.

4 MJ [COL ACOSTA]: Right.

5 ADC [MS. MORGAN]: I just don't know if that nuance was
6 nailed down at that time.

7 MJ [COL ACOSTA]: Yes, okay. All right. So now you filed
8 467, the defense motion to suppress the letterhead memorandum
9 from the accused. And let me ask you this: In 467, your
10 pleading, did you rely or use or refer to any statements of
11 the accused made during the 706?

12 ADC [MS. MORGAN]: If I could have just one moment?

13 MJ [COL ACOSTA]: You may.

14 ADC [MS. MORGAN]: And I appreciate the commission's
15 indulgence on that. I believe the answer is no. I believe
16 the pleading relies on statements made by Dr. Crosby, her
17 opinions.

18 MJ [COL ACOSTA]: Right. What are her opinions based --
19 are her opinions based upon the 706 and statements made within
20 it?

21 ADC [MS. MORGAN]: Her review of the -- her statements are
22 based on her review of the 706 ----

23 MJ [COL ACOSTA]: Does -- which includes the statements of

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1 the accused?

2 ADC [MS. MORGAN]: It includes the statements of the
3 accused. I don't know that it has ever been so nuanced -- and
4 again, Your Honor, this is a little bit of having not been
5 here ten years ago. I don't believe any of the opinions she
6 has given go as far as to say because he said this specific
7 thing during the 706, I believe -- I find this.

8 So -- so recognizing ----

9 MJ [COL ACOSTA]: Right, but ----

10 ADC [MS. MORGAN]: ---- this is a very ----

11 MJ [COL ACOSTA]: Oh, I understand. But she considered
12 it. The question is not whether or not -- the issue is that's
13 part of what her universe of documents she used to form her
14 opinion.

15 ADC [MS. MORGAN]: Yes.

16 MJ [COL ACOSTA]: Okay. And, Defense, I think I know the
17 answer to this, but -- I know I know the answer to this.
18 The -- but I want to ask you. Where in the government's
19 response in 467C does the government use the statements of the
20 accused from the 706? Because that's why you would have
21 to ----

22 ADC [MS. MORGAN]: Right.

23 MJ [COL ACOSTA]: ---- make the motion.

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1 ADC [MS. MORGAN]: It gets put back in as the attachment
2 to R.

3 MJ [COL ACOSTA]: Yes, it's an attachment and it's in
4 there, but where do they -- you know, you can attach a lot of
5 things to a motion. If they're not relevant, I'm not going to
6 consider it, right? The -- and these are -- this is an
7 attachment to the motion. I think they only refer to one
8 thing in one place.

9 ADC [MS. MORGAN]: And it's in the facts section.

10 MJ [COL ACOSTA]: In the facts section on page ----

11 ADC [MS. MORGAN]: And then rely on those facts in their
12 analysis.

13 MJ [COL ACOSTA]: I'm not going to -- I -- because of the
14 underlying document's classified, if you look at page 8 of
15 that, right, paragraph p. Do you see where I'm talking about?

16 ADC [MS. MORGAN]: And I do apologize, Your Honor. I
17 don't have 467 in front of me.

18 MJ [COL ACOSTA]: Okay. This is 467C.

19 ADC [MS. MORGAN]: Correct. I don't have 467C in front of
20 me. I'm working off 452D and I don't have ----

21 MJ [COL ACOSTA]: Right, but they're obviously the -- go
22 ahead.

23 ADC [MS. MORGAN]: Well, I recognize I just can't give you

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1 the paragraph.

2 MJ [COL ACOSTA]: Okay. So they make one reference to
3 those statements there, right?

4 ADC [MS. MORGAN]: That is correct.

5 MJ [COL ACOSTA]: Okay. All right. I'm almost done
6 interrupting your -- or precluding your argument.

7 ADC [MS. MORGAN]: I welcome questions, Your Honor.

8 MJ [COL ACOSTA]: All right. Go ahead. I have -- I just
9 wanted to clarify a couple of those issues before I got
10 started to see if I could set the ----

11 ADC [MS. MORGAN]: Sure.

12 MJ [COL ACOSTA]: ---- scene.

13 ADC [MS. MORGAN]: Your Honor, my argument is really
14 two-prong. One is very pragmatic and one is in essence
15 policy-based, and so I'll begin with my pragmatic argument.

16 Really, this rises and falls on the plain language of
17 302. And the seminal case for that is United States v. Clark,
18 62 M.J. 195. It's a CAAF case in 2005. And the beauty of
19 that CAAF case is it actually looks at how did we get to have
20 these 706 reports done in the first place? Why -- why do we
21 have them? You know, why does the government get to order
22 them? And then what sort of vulnerabilities does that give
23 rise to for an accused, and what do we do to protect those.

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1 And, you know, the court goes as far as to talk about
2 how when they drafted M.R.E., so our complimentary to
3 M.C.R.E. 302, that the drafters recognized these unique
4 military concerns because these military medical records don't
5 have the same kind of confidentiality that we would have in
6 civilian medical records.

7 And so instead, the way that they handled the 706
8 evaluations was to ensure that there was this additional level
9 of protection that the report itself would enjoy a level of
10 privilege. But recognizing how these evaluations come to
11 be -- and how it came to be in this case, right? -- the
12 government says we have concerns about competency. Hey,
13 court, can you order this evaluation? Which by its very
14 nature compels an accused to make a certain number of
15 statements which may or may not be inculpatory.

16 Because these statements may be inculpatory, because
17 an accused may be forced to make statements against those
18 interests, aside from the report, these statements enjoy a
19 separate level of privilege.

20 MJ [COL ACOSTA]: The statements separate from the long
21 form itself?

22 ADC [MS. MORGAN]: Correct. And Your Honor recognized
23 that in your ruling in 452C.

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1 MJ [COL ACOSTA]: Right. And that's what I'm going to get
2 with the government about, is 302 talks about even the
3 procedure for the disclosure when the disclosure is made
4 for -- when it comes -- when it comes -- and for reasons of
5 mental capacity or mental responsibility are brought up, that
6 when the 706 long form is turned over to the government, the
7 statements are excised, correct? That's the procedure
8 described in 302, correct?

9 ADC [MS. MORGAN]: I think that's the way it's supposed to
10 be done, Judge. I think a lot of times we've seen in military
11 commissions it doesn't happen in a perfect world, and so now
12 we are ----

13 MJ [COL ACOSTA]: Well, I'm just reading 302C.

14 ADC [MS. MORGAN]: Right. I think whether it's supposed
15 to actually be physically excised or whether it's supposed to
16 be prohibited from use, you don't get to bring the statements
17 in unless the defense has put the ----

18 MJ [COL ACOSTA]: Well, let's -- let's turn to our hymnals
19 together and -- where it says is, if the defense expert offers
20 the testimony concerning the mental condition of the accused,
21 the military judge, upon motion, shall order the release to
22 the prosecution of the full contents, other than the
23 statements of the accused.

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1 ADC [MS. MORGAN]: Understood. You're correct, Your
2 Honor.

3 MJ [COL ACOSTA]: Now, if something ----

4 ADC [MS. MORGAN]: Yeah.

5 MJ [COL ACOSTA]: ---- other than that is happening in
6 practice -- now, I think they have it, right?

7 ADC [MS. MORGAN]: They have it.

8 MJ [COL ACOSTA]: We know that they have it. So the issue
9 now is should it just be they have the 70 -- should it just be
10 down to a determination of whether or not this is used in
11 defense, or is this a matter of -- not presented on findings
12 of guilt or innocence but on an interlocutory issue?

13 ADC [MS. MORGAN]: Sure.

14 MJ [COL ACOSTA]: Can you address that?

15 ADC [MS. MORGAN]: Sure. You know, I think Your Honor's
16 analysis in 452C was accurate of it is a separate question of
17 okay, they've got it, can they use it. And so I think there's
18 a couple arguments for why they do not get to use it on
19 interlocutory.

20 I think the principal argument against it, and going
21 back to that, you know, there's two. There's the practical
22 and then there's also the policy, is the policy reason of this
23 is weaponizing 706, which when you ----

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1 MJ [COL ACOSTA]: Because he's order to do the statements.

2 ADC [MS. MORGAN]: Right.

3 MJ [COL ACOSTA]: There's issue -- there's ways to address
4 it but they don't, and now to use these statements which were
5 ordered to be made by the court ----

6 ADC [MS. MORGAN]: Correct, and ----

7 MJ [COL ACOSTA]: ---- is not fair.

8 ADC [MS. MORGAN]: ---- if he declined to participate in
9 the 706 because of the concern that his statements could be
10 used against him, even in interlocutory matters, then than
11 could have its own set of negative inferences.

12 MJ [COL ACOSTA]: Right.

13 ADC [MS. MORGAN]: And I don't think that's speculative.

14 And so going to, you know, the Clark analysis of how did 302
15 get written, this was definitely on the drafters' minds. And
16 so it -- it's in step with the spirit of 302 for this to not
17 be admissible on interlocutory matters. It certainly wouldn't
18 be admissible on guilt or innocence. I think that that's
19 fair ----

20 MJ [COL ACOSTA]: Right.

21 ADC [MS. MORGAN]: ---- and that's not where we are right
22 now.

23 MJ [COL ACOSTA]: Absolutely, unless of course -- and, of

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1 course, we're all getting to the point of unless you introduce
2 them.

3 ADC [MS. MORGAN]: Certainly.

4 MJ [COL ACOSTA]: Unless you open the door to these.

5 ADC [MS. MORGAN]: And even on interlocutory matters, Your
6 Honor, we do not intend to introduce those statements. We do
7 not intend to put -- put them at issue, those statements. You
8 know, perhaps if we were talking about -- I'm coming up with
9 an analogy on the fly, so bear with me a moment.

10 But, you know, if perhaps we were talking about a
11 Fourth Amendment violation and whether or not, you know,
12 the -- the facts and circumstances leading up to a purportedly
13 unlawful search, and that somehow becomes a relevant component
14 of a 706 evaluation and the client's recitation of those facts
15 the defense somehow feels the need to bring in when they put
16 their client on the stand to talk about the facts and
17 circumstances that did or did not lead up to what they
18 believed to be an unlawful search. The defense may, in an
19 interlocutory matter, now have made their client's statement
20 in a 706, put that at issue, and then perhaps that opens the
21 door in an interlocutory matter. That's not what's happening
22 here.

23 In 476, we are not using our client's statements. Nor

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1 do we intend to. And so without us triggering that switch,
2 the government doesn't get to either.

3 And one of the things that I think can't be lost
4 here -- and again, this is going back to a policy argument,
5 but there's a relevance issue in all of this. We are talking
6 about a 706 evaluation that is done in 2013. And this
7 commission is amply familiar with the purpose of a 706
8 evaluation and the questions that it is charged with asking.
9 And those questions do not deal with the voluntariness or
10 involuntariness ----

11 MJ [COL ACOSTA]: Of a statement made six years earlier.

12 ADC [MS. MORGAN]: ---- of a statement made at any time
13 prior. Certainly we would argue six years, but it is simply
14 different. And so one of the things that must be considered
15 when you look at 302 is there is an interest of justice
16 analysis, right? I think it's laden, you know, pretty much
17 everywhere we're looking today. But in 302, there is an
18 interest of justice and it doesn't further the interest of
19 justice to start being able to use what is designed truly to
20 understand if a criminal defendant is capable of participating
21 in their defense and understanding the charges against them to
22 subvert their ability to move to suppress involuntary
23 confessions, which is a completely separate legal analysis and

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1 legal question. There's just -- these are an apples and
2 oranges type of scenario.

3 MJ [COL ACOSTA]: But the interest of justice analysis is
4 the one in whether or not it's disclosed -- whether or not the
5 statements of the accused are disclosed to the government. I
6 don't think it goes the way that you're pointing with the
7 interest of justice side goes there. You control the -- for
8 statements of the accused made in the -- and as you control
9 the -- the door, right? You control the aperture.

10 ADC [MS. MORGAN]: Your Honor, I can't unring the bell of
11 what happened when that 706 was turned over. I think that
12 there is always an interest of justice consideration.

13 MJ [COL ACOSTA]: I understand. Yeah. Okay. Do you have
14 anything else? Let me ask you this one question.

15 ADC [MS. MORGAN]: Certainly.

16 MJ [COL ACOSTA]: Do you have any case law that supports
17 that 302 can't be -- that 302 prohibits consideration of the
18 accused's statements on an interlocutory matter, any -- other
19 than Clark?

20 ADC [MS. MORGAN]: There -- as far as I am aware, there is
21 no case law that says it applies one way or the other. So
22 there's no case law that has found that it does not apply on
23 interlocutory matters or that it does apply on interlocutory

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1 matters. But the reading that it would apply to interlocutory
2 matters, given the legislative history and the drafting of
3 302, would be more consistent.

4 MJ [COL ACOSTA]: All right. Thank you. Anything else?

5 ADC [MS. MORGAN]: Nothing, Your Honor.

6 MJ [COL ACOSTA]: Thank you. Thank you for your patience,
7 Commander Jolly. Go ahead. Oh, pardon me. Not Commander
8 Jolly. Forgive me.

9 ATC [LT SCHWARTZ]: Character switch. Yes, Your Honor.
10 Lieutenant Schwartz.

11 MJ [COL ACOSTA]: Sorry. All I saw was -- I -- forgive
12 me. I saw hair in a bun and I was looking out of the corner
13 of my eye. Please forgive me.

14 ATC [LT SCHWARTZ]: No problem, Your Honor.

15 MJ [COL ACOSTA]: Lieutenant Schwartz, go ahead.

16 ATC [LT SCHWARTZ]: Thank you. So just to clarify, I
17 guess, a couple things. So in the manner in which the
18 government received this information, the 706 which contained
19 the statements, to clarify, it was also submitted by the
20 defense to the Supreme Court which included the statements.
21 They did not excise those from the form that was submitted
22 with their filing. So to ----

23 MJ [COL ACOSTA]: What was that issue on? What was that

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1 submitted for? What was the purpose?

2 ATC [LT SCHWARTZ]: The defense submitted it with their
3 filing whenever they appealed and sent the case up to the
4 Supreme Court. In their attachment with the 706, they also
5 did not remove the statement ----

6 MJ [COL ACOSTA]: What was the underlying issue of that
7 appeal?

8 ATC [LT SCHWARTZ]: Habeas, Your Honor.

9 MJ [COL ACOSTA]: Okay.

10 ATC [LT SCHWARTZ]: And so that's how the government --
11 one of the ways in which the government was able to see it is
12 by the defense's actions of filing with the statements within
13 it. So I just wanted to put that on the record.

14 For 452C that the -- this commission found, it denied
15 the defense's request to return the long form. And it also
16 declined to make a finding on the issue of suppression because
17 the commission found that it wasn't ripe. And I believe the
18 commission's finding was it now appears that the government
19 only intends to introduce the accused's statements from the
20 706 for resolving a motion to suppress and not for a finding
21 of guilt or innocence.

22 MJ [COL ACOSTA]: Right.

23 ATC [LT SCHWARTZ]: And as the defense just stated in

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1 their argument, the pragmatic portion, was that we need to
2 stress the -- the language of the rule, which the rule says
3 302A, R.M.C. 706, the -- the accused has a privilege to
4 present -- prevent any statement made by the accused at the
5 mental examination ordered under R.M.C. 706 from being
6 received into evidence against the accused on the issue of
7 guilt or innocence or during sentencing proceedings.

8 MJ [COL ACOSTA]: Okay. Then let me ask you this. Does
9 the suppression or the admission of his statements go towards
10 his guilt or innocence?

11 ATC [LT SCHWARTZ]: At this time, it's not the reason in
12 which the government is seeking to use it. We're looking to
13 impeach the -- we're looking to impeach the defense's argument
14 about PTSD, which is the sole issue of 467. And so the
15 biggest issue that we're looking at here is we have the 706
16 long form statement ----

17 MJ [COL ACOSTA]: To impeach the diagnosis of PTSD? Is
18 there a question about whether or not the accused is diagnosed
19 with PTSD?

20 ATC [LT SCHWARTZ]: We're not questioning whether the
21 accused was diagnosed with PTSD, Your Honor.

22 MJ [COL ACOSTA]: Okay.

23 ATC [LT SCHWARTZ]: We're looking to essentially refute

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1 the diagnosis, I guess, as you would find it. But that's why
2 the government right now is looking at using this long form
3 with the statements, is not to on a finding of guilt or
4 innocence, not in sentencing, but to simply refute the
5 allegations that have been made by the defense in AE 467,
6 which that is the heart of the matter of 467, is PTSD. So
7 the ----

8 MJ [COL ACOSTA]: Okay.

9 ATC [LT SCHWARTZ]: ---- the government is having a hard
10 time understanding how the -- the defense is moving their
11 argument concerning the relevance of mental health ----

12 MJ [COL ACOSTA]: No, no.

13 ATC [LT SCHWARTZ]: ---- to the ----

14 MJ [COL ACOSTA]: Hold on. Remember, the rule states that
15 when the defense introduces the issue of the mental -- of, you
16 know, mental capacity or et cetera, that the government's only
17 supposed to have the long form without the statements. Isn't
18 that correct?

19 ATC [LT SCHWARTZ]: That is and that is what the rule says
20 and that's why ----

21 MJ [COL ACOSTA]: That's what the rule says.

22 ATC [LT SCHWARTZ]: Yes, Your Honor.

23 MJ [COL ACOSTA]: Now, for some reason you have the --

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1 this -- the long form that includes the statements.

2 ATC [LT SCHWARTZ]: As given by defense. Yes, Your Honor.

3 MJ [COL ACOSTA]: I know it was provided to you by the
4 defense by the order. However, does that mean that you still
5 get to use the statements that were ordered by the -- by the
6 commission that the accused essentially submit to and make
7 these statements? Is that -- that's not the purpose of the
8 statements. The purpose of the statements was to determine
9 his mental capacity, correct? To answer the questions of a
10 706, not -- not to -- to be used by the parties to refute his
11 statements about his guilt or innocence, correct?

12 ATC [LT SCHWARTZ]: Yes, Your Honor, and ----

13 MJ [COL ACOSTA]: So why would I allow you to use his
14 statements now?

15 ATC [LT SCHWARTZ]: Because as -- understanding that the
16 rule says that the statements should be precluded from the
17 R.C.M. -- sorry, R.M.C. 706 long form, the government has the
18 statements. We understand that that -- just because we had
19 the possession of them does not by, in fact, mean that we can
20 use them however we -- we intend to. The government's
21 position is, at this point, is we intend to use them, not for
22 the finding of guilt or innocence, but to simply refute the
23 allegations that the defense has put at issue, which is PTSD,

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1 mental health, the heart of 467, to refute the -- the evidence
2 that the defense has put forward.

3 MJ [COL ACOSTA]: Why do you need to use the statements
4 when you have the long form? You've got the long form and its
5 findings. That's the purpose of giving you the long form,
6 which is what you're permitted to use in such situations. Not
7 the statements of the accused, right?

8 ATC [LT SCHWARTZ]: To an extent, Your Honor, yes, you are
9 correct. The government is seeking to use the statements
10 because the statements don't admit the guilt or innocence of
11 the COLE. There is separate collateral issues that have
12 been -- that were brought up. The statements itself, why
13 they're important, is whenever the 706 was being conducted,
14 those who were conducting the 706 were looking for any signs
15 of anxiety disorder and -- and various other mental health
16 disorders. And by the statements that they were observing
17 from the accused, they were looking at things like narcissism
18 and essentially failing to find any hint of a diagnosis for
19 anxiety, ultimately finding a diagnosis for PTSD, which is,
20 again, the heart of 467 why it's necessary.

21 MJ [COL ACOSTA]: Right. But that's not in dispute,
22 right? We've got the finding -- I can get to that -- I can
23 get to that information without having his statements,

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1 correct? And, in fact, you do so in your pleading, don't you?
2 Isn't that correct? Because you only refer one time to
3 statements of the accused made in the -- in the long form,
4 correct?

5 ATC [LT SCHWARTZ]: Correct, Your Honor.

6 MJ [COL ACOSTA]: And it is a -- I won't say -- I'm not
7 going to say what the statement is, but it is -- I'll just say
8 it's a low-impact statement, correct?

9 ATC [LT SCHWARTZ]: Correct.

10 MJ [COL ACOSTA]: So ----

11 ATC [LT SCHWARTZ]: The -- another point ----

12 MJ [COL ACOSTA]: Why should I allow you to use otherwise
13 privileged statements, statements that he can prevent from
14 coming in, on an issue which you don't even need it?

15 ATC [LT SCHWARTZ]: The government wouldn't -- would not
16 concede that we do not need the statements. I believe that
17 the government does need the statements as, again, it goes to
18 the heart of the issue for the PTSD diagnosis and the events
19 and things that the accused has said which triggers said
20 diagnosis or condition.

21 And another point as well with the statements seeing
22 is -- so the 706 long form we have as well as the statements.
23 Within the long form, the accused statements, he is quoted

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1 directly within the long form ----

2 MJ [COL ACOSTA]: I'm aware.

3 ATC [LT SCHWARTZ]: ---- therefore -- so if we can use the
4 long form itself ----

5 MJ [COL ACOSTA]: Without the statements?

6 ATC [LT SCHWARTZ]: ---- without the statements ----

7 MJ [COL ACOSTA]: I don't know why you need the
8 statements.

9 ATC [LT SCHWARTZ]: I'm sorry, Your Honor?

10 MJ [COL ACOSTA]: Why do you need the statements if you've
11 got the entire -- if you have everything in the long form and
12 I allow you -- and, you know, I permit you to use the long
13 form, the long form itself, the conclusions about his mental
14 condition, isn't that sufficient to refute the -- the
15 allegations from the government in 467?

16 ATC [LT SCHWARTZ]: The government would disagree by the
17 way in which the defense has posed their argument for the
18 reliance on PTSD and other diagnosed and undiagnosed
19 disorders. The government believes that these are necessary
20 in order to refute allegations made in AE 467.

21 MJ [COL ACOSTA]: Okay. All right. Anything else?

22 ATC [LT SCHWARTZ]: If I can have a moment, Your Honor.

23 MJ [COL ACOSTA]: You may.

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1 Government ----

2 ATC [LT SCHWARTZ]: Your Honor, nothing -- oh, I
3 apologize.

4 MJ [COL ACOSTA]: Sorry. I was waiting on you and then I
5 interrupted you.

6 ATC [LT SCHWARTZ]: You're fine, Your Honor.

7 MJ [COL ACOSTA]: Go ahead.

8 ATC [LT SCHWARTZ]: I was going to say pending any
9 questions, Your Honor.

10 MJ [COL ACOSTA]: I have one.

11 ATC [LT SCHWARTZ]: Yes.

12 MJ [COL ACOSTA]: The question is: Is it fair for the
13 commission to assume that, based upon your pleading in which
14 you only refer to one statement, that that's the only one that
15 you wish to draw the commission's attention to? You say that
16 you need the statements to refute it, but you only point to
17 one.

18 ATC [LT SCHWARTZ]: If I could have one moment, Your
19 Honor.

20 MJ [COL ACOSTA]: Uh-huh.

21 ATC [LT SCHWARTZ]: Your Honor, there is one statement as
22 you noted that the government refers to, but the government
23 also wants to make the commission aware that we will be

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1 talking to Dr. Johnson who, in fact, conducted it about his
2 observations and things that he saw whenever he evaluated the
3 accused, which would, in fact, include other statements that
4 were made to Dr. Johnson. But correct that we only pointed to
5 one specific statement in our pleading, correct. But there is
6 a world of statements that was made to Dr. Johnson that we
7 would just want to discuss with him and get his observation
8 on, and whether certain statements would have led him to make
9 certain findings one way or another.

10 MJ [COL ACOSTA]: Okay. I understand.

11 ATC [LT SCHWARTZ]: Pending any other questions, Your
12 Honor.

13 MJ [COL ACOSTA]: I have none. Thank you.

14 ATC [LT SCHWARTZ]: Thank you.

15 MJ [COL ACOSTA]: Defense?

16 ADC [MS. MORGAN]: Just a few quick points, Your Honor.
17 It is a bit murky how this report got out. Unfortunately,
18 nobody on the defense -- and I do -- I recognize the
19 commission hears this quite a bit. No one on the defense when
20 this ----

21 MJ [COL ACOSTA]: I think Captain Mizer was on the defense
22 team.

23 ADC [MS. MORGAN]: He was, and I was about to say had been

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1 on the team for any period of time. When this happened, I
2 believe it was his first hearing. So it was a few weeks,
3 maybe a few months, at most, when he was here. There's just
4 not a lot of institutional knowledge of how this got turned
5 over, and perhaps -- and so when ----

6 MJ [COL ACOSTA]: Let me ----

7 ADC [MS. MORGAN]: ---- the government references that it
8 was attached to a Supreme Court petition for habeas, that was
9 actually different counsel, which was the basis for 452
10 originally is that it had gone to appellate counsel, not trial
11 counsel. And so there's some back and forth in those
12 pleadings when trial counsel points out, no, actually, you had
13 turned it over to us ----

14 MJ [COL ACOSTA]: Right.

15 ADC [MS. MORGAN]: ---- and had actually been a
16 long-forgotten fact. And so that's laid out in that whole
17 series.

18 MJ [COL ACOSTA]: I'm aware, yeah.

19 ADC [MS. MORGAN]: And so to the extent that this was an
20 inadvertent disclosure at that time, we don't in any way view
21 that as having waived. We are -- we are still asserting, and
22 I do think the commission's analysis in 452C is appropriate
23 and correct. But we are more than willing to reproduce a new

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1 copy of that report with statements redacted. Perhaps that is
2 an offer we should have made earlier. I apologize. I do want
3 to offer that at this point.

4 As far as other communications between our client and
5 Dr. Johnson, the rule in 302 does not contemplate that as far
6 as those statements. We would assert privilege as to other
7 communications outside of the report itself.

8 MJ [COL ACOSTA]: Say that one more time and clarify what
9 you mean.

10 ADC [MS. MORGAN]: At this point, everything that has been
11 briefed and has been put at issue is the report itself, the
12 statements contained within the report. What I just heard
13 from government counsel -- and if I misheard ----

14 MJ [COL ACOSTA]: Yeah. She stated that during their
15 direct examination of Dr. Johnson, they intend to get into
16 statements that your client made during the 706 and why they
17 reached their conclusions based upon that.

18 ADC [MS. MORGAN]: What I'm unclear on is are those
19 statements that are contained in the report or are those
20 statements ----

21 MJ [COL ACOSTA]: I believe they were the statements
22 contained in the report because, otherwise, I don't know how
23 they would know of them.

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1 ADC [MS. MORGAN]: And, Your Honor, I -- I believe there
2 might be clarification necessary there, to the extent that
3 there are statements that are outside of the report.

4 MJ [COL ACOSTA]: What about the statements in the report?
5 Can they ask him about the statements made during the 706 that
6 led him to his conclusions?

7 ADC [MS. MORGAN]: We would -- the defense position is no,
8 that the -- unless we trip that lever, those statements are
9 off the table.

10 MJ [COL ACOSTA]: All right.

11 Government, last -- Lieutenant Schwartz, just a
12 clarification question. Do the statements -- the statements
13 that you intend to discuss with Dr. Johnson, those only
14 include the ones that are included in long form 706; is that
15 correct?

16 ATC [LT SCHWARTZ]: That is correct, Your Honor.

17 MJ [COL ACOSTA]: Thank you.

18 All right. I'll take that up under consideration. I
19 will very likely address this before we have Dr. Johnson on
20 the stand. Okay.

21 That takes us to AE 475, the government motion to
22 compel disclosure of the accused's behavioral health records.
23 In this proceeding, the defense asserted privilege on behalf

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1 of their client. I believe I recall specifically Captain
2 Mizer asserting that privilege, at least in a -- in one of the
3 attachments in an e-mail; is that correct, Captain Mizer?
4 Isn't that correct?

5 DDC [CAPT MIZER]: That's correct, Judge.

6 MJ [COL ACOSTA]: 513 dictates that a session that -- that
7 the military judge must conduct a hearing before ordering the
8 production of any records. So I'm going to conduct that. And
9 then the rules also indicate that if any party wants the
10 session closed to the public, because it's going to discuss
11 mental health records, that such session should be closed.
12 Does either party desire this hearing to be closed to protect
13 privileges under 513? Defense?

14 ADC [MS. MORGAN]: I don't believe it's necessary, Your
15 Honor.

16 MJ [COL ACOSTA]: Okay. Does your client agree with that?

17 ADC [MS. MORGAN]: Your Honor, at this point we should not
18 be getting into the substance of any records, just the
19 existence, which would not necessitate disclosure.

20 MJ [COL ACOSTA]: Okay. Government, agreeing?

21 ATC [LT SCHWARTZ]: The government concurs, Your Honor.

22 MJ [COL ACOSTA]: Okay. All right. Lieutenant Schwartz,
23 is there a reason that I should not just provide -- conduct a

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1 regular 513 hearing and analysis -- and apply the analysis and
2 a large amount of case law regarding 513 disclosures to
3 this -- to this motion?

4 ATC [LT SCHWARTZ]: Your Honor, I think that this is a bit
5 of a unique situation under 513 ----

6 MJ [COL ACOSTA]: How so?

7 ATC [LT SCHWARTZ]: ---- and as exist. So right at this
8 point, there are numerous -- there are numerous facets of
9 mental and behavioral health records that have been -- that
10 have been either produced or created for the accused. At this
11 point, at -- right now, we have possession of the behavioral
12 health records but no permission to view the behavioral health
13 records. The government technically has possession of the
14 accused's behavioral health records. However, the trial team
15 has walled itself off from those records and, therefore, I
16 have not seen it. However ----

17 MJ [COL ACOSTA]: Right. That's the special trial counsel
18 has them, not you.

19 ATC [LT SCHWARTZ]: Correct.

20 MJ [COL ACOSTA]: Separate counsel. Walled off. Not you.

21 ATC [LT SCHWARTZ]: Yes, Your Honor.

22 MJ [COL ACOSTA]: This is the proceeding that I have
23 dictated or stated that is -- or confirmed is the correct

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1 procedure in order to prevent disclosure of those records to
2 you, but provided in full to the defense.

3 ATC [LT SCHWARTZ]: That is correct, Your Honor. And so
4 right now where we stand is that the defense has made numerous
5 arguments concerning motions to suppress and things as such
6 based on the mental health and issues of the accused, is
7 primarily in AE 467 as we stand for a diagnosis of PTSD and
8 allegations of learned helplessness saying that he is unable
9 to make voluntary statements. So at this time, the defense,
10 in the government's mind, has brought into issue the mental
11 health of the accused to include behavioral health, which is a
12 facet and subset of mental health, but we do not have those
13 records.

14 We have had testimony, and we're about to have more
15 testimony this week from Dr. Malone who created those
16 behavioral health records and I -- I'm not sure that she has,
17 from what I understand, has not reviewed them in anticipation
18 of her testimony. She's been called by the defense to testify
19 in support of AE 467, yet we are still not being granted
20 permission to view these records whenever she's about to
21 testify.

22 And then they're also bringing in Dr. Crosby, who is
23 another expert that defense is bringing in to discuss 467 and

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1 presumably has viewed -- and I'll allow defense to correct me
2 if I'm wrong -- presumably viewed these records as well. Yet
3 again, despite our numerous requests and filings, we have
4 still been denied access to these records.

5 And so the government is having difficulty in refuting
6 allegations and bringing its proper position before this
7 commission whenever we are unable to be completely informed as
8 to the background of these witnesses who are testifying and
9 given their opinions and positions.

10 MJ [COL ACOSTA]: Uh-huh. So I understand that you --
11 that -- let's go back to the question that I asked you.
12 Should I conduct a regular 513 hearing and apply the analysis
13 and rules and the case law that has come out of 513
14 litigation?

15 ATC [LT SCHWARTZ]: I believe that the government has
16 successfully and adequately put forth its position under 513
17 for the exception of (7) when an accused ----

18 MJ [COL ACOSTA]: Right, okay. Yes.

19 ATC [LT SCHWARTZ]: ---- offers statements or other
20 evidence concerning the accused's condition.

21 MJ [COL ACOSTA]: So should I go through the process of
22 applying 513 and should I apply M.C.R.E. 513 or should I be
23 further informed by M.R.E. 513 which is much more greatly

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1 developed?

2 ATC [LT SCHWARTZ]: The government does agree that
3 M.R.E. 513 is much -- is much more developed. And at this
4 point, I believe that an analysis under 513 would be
5 warranted, given the fact that the government is posing, as it
6 does in its filing, that under 513(7), the defense has put the
7 issue -- the mental health at issue of the accused and the
8 government is still -- the government is, therefore, given the
9 right to review all of the records either created by, which is
10 from Dr. Malone, or reviewed by Dr. Crosby, two witnesses just
11 this week that we're going to hear from from the defense that
12 we are, therefore, warranted to review these -- these ----

13 MJ [COL ACOSTA]: Okay.

14 ATC [LT SCHWARTZ]: ---- records.

15 MJ [COL ACOSTA]: So what's the test under 513 then,
16 Counsel? I've asked this question more times -- many more
17 times probably than you can imagine. What's the test under
18 513 for admissibility -- for your motion to be granted? What
19 would that be?

20 ATC [LT SCHWARTZ]: In determining whether or not there is
21 a privilege to be claimed and determining whether there is a
22 correct -- the person who has claimed the privilege is, in
23 fact, warranted to do so and whether that then exception has

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1 applied under 513(d), which we believe it has.

2 MJ [COL ACOSTA]: So a specific credible factual basis --
3 you must demonstrate a specific credible factual basis
4 demonstrating reasonable likelihood that the records or
5 communications would contain or lead to discovery of evidence
6 admissible, under an exception to the privilege, that the
7 requested information meets one of the enumerated
8 exceptions -- you're claiming seven -- that the information
9 sought is not merely cumulative of other information, and that
10 you, the government, has made reasonable efforts to obtain the
11 same or substantially similar information through
12 nonprivileged sources.

13 Talk me through how you meet that test.

14 ATC [LT SCHWARTZ]: For the first prong, Your Honor,
15 for under the factual -- the factual portion ----

16 MJ [COL ACOSTA]: Yes. Specific factual basis that it's
17 going to lead to evidence that is admissible.

18 ATC [LT SCHWARTZ]: So at this point, we believe that
19 there will be admissibility, especially given the litigation
20 that we, one, have already gone through and are currently
21 going through regarding motions that are seeking to suppress
22 statements determining voluntariness for statements made in
23 2007 by the accused. We do believe that there is a -- there

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1 is a reliable indication that there would be admissible
2 evidence from the accused in his behavioral health records.
3 He's been evaluated and has been claiming that he is unable to
4 make certain statements due to his inability to make voluntary
5 statements to law enforcement.

6 So the behavioral health records make an evaluation of
7 the mental state of the accused. And certain actions -- and
8 what they -- whether they rise to a certain mental health
9 condition, judging by his actions. The government's position
10 is those facts would be admissible and are necessary, and this
11 is all somewhat speculative, depending on what further
12 litigation comes at trial, that they would be admissible and
13 necessary in order to refute some of the allegations the
14 defense has made. Again, primarily set forth in AE 467.

15 MJ [COL ACOSTA]: Which -- which is it trying to refute?
16 Which are you refuting?

17 ATC [LT SCHWARTZ]: The PTSD. As would -- and I know
18 these are kind of conflated ----

19 MJ [COL ACOSTA]: Is it PTSD? Is the PTSD a refutable
20 issue, that he has PTSD?

21 ATC [LT SCHWARTZ]: It's more so the things that
22 trigger -- the -- the potential, or I guess the -- the given
23 diagnosis of PTSD. I think there's some disagreement between

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1 the government and defense as to what, in fact, is a
2 triggering point for his PTSD, and, therefore, may affect his
3 voluntariness to make statements. For example in 467, the
4 shaming instance.

5 MJ [COL ACOSTA]: You have the evidence that he's
6 diagnosed with PTSD and that all of the events that happened
7 to him from 2002 onward happened to him and you know that he
8 made his statements in 2007, and you know the defense is
9 alleging that the statements aren't voluntary because of some
10 behavior that occurred then. And my issue is, is it necessary
11 for you to have those records to refute that allegation ----

12 ATC [LT SCHWARTZ]: The government's position ----

13 MJ [COL ACOSTA]: ---- without the -- with the amount of
14 expert -- I would just say that I'm sure that the government
15 will have an expert called to discuss the voluntariness of the
16 statements and whether or not -- and the impacts of PTSD on
17 the ability to make a voluntary statement, correct?

18 ATC [LT SCHWARTZ]: Yes, Your Honor. And I do intend to
19 get into that in just one moment.

20 For why it's necessary, as you just requested from the
21 government, we do believe it's necessary because within
22 that -- we are presuming again, but within that, those reports
23 for behavioral health records, it's going to indicate any

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1 triggers that the accused might -- might suffer from regarding
2 his PTSD, whether it be shaving, showering, however -- however
3 he may be affected and what those triggers are, which would
4 therefore affect his ability, according to the defense, to
5 make a voluntary statement. And so it is necessary for the
6 government to see those, not to mention it's necessary for the
7 government to review those records in order to adequately
8 cross-examine the defense's witnesses. There are two this
9 week who have either reviewed or created, to the government's
10 understanding, behavioral health records and we have nothing
11 that we can cross-examine the details on for that.

12 We would like to know the underlying basis for
13 Dr. Malone of creating any behavioral health records, whether
14 there are specific instances, specific facts, actions that
15 would have arisen to cause a diagnosis ----

16 MJ [COL ACOSTA]: That's a different question then, right?
17 That's a different question. The defense, I believe, stated
18 in their response that their experts only looked at the
19 records that they included at H, R ----

20 ATC [LT SCHWARTZ]: Correct.

21 MJ [COL ACOSTA]: No, it's H. R is -- it's H. So
22 they've -- that's what they said that they relied upon and
23 will use in their testimony. I'm asking you for a specific

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1 factual basis -- a factual basis that demonstrates that
2 there's going to be -- that the records or communications have
3 admissible evidence in them.

4 ATC [LT SCHWARTZ]: One of the issues, as you just stated,
5 with the attachments the defense made to their -- to their
6 filing, H, is that there are only very specifically selected
7 records that have been given to defense whenever we aren't
8 getting the whole picture. And so understanding that the
9 defense says Dr. Crosby or Dr. Malone have reviewed X, Y, Z,
10 and that's what their testimony is going to be, whenever you
11 have the doctor testifying who created the behavioral health
12 records, understanding that maybe not for this session she's
13 reviewed those, but she created them whenever she was doing an
14 evaluation, which is exactly what we're talking about in this
15 session.

16 So understanding they can say, no, we only had her
17 review X, Y, Z, well, she created all of these documents that
18 are relevant and necessary for the government that she's going
19 to be speaking on. So the government, understanding that she
20 may only review certain documents, still believes that it's
21 going to affect her testimony, especially the substance of it
22 and we would like the opportunity and believe that we're
23 warranted to have the opportunity to discuss that with her

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1 whenever the basis of 467 are things that he has PTSD and
2 can't make a voluntary statement whenever there has been an
3 indication of nightmares or flashbacks as it relates to PTSD,
4 these are all small factors that have a heavy impact on the
5 government's position.

6 MJ [COL ACOSTA]: I'm going to try to crystallize what
7 your argument is there, because there wasn't -- you stated
8 that -- is it your argument that because the witness that will
9 testify on the selected documents created many more documents,
10 is your specific factual basis that there's more discoverable
11 and potentially admissible information on this topic?

12 ATC [LT SCHWARTZ]: Correct. As she -- as the witness who
13 created these behavioral health records is testifying to the
14 basis of the behavioral health records, his mental health,
15 PTSD, the defense uses learned helplessness as another basis
16 in 467. This is exactly the reason that she's coming to
17 testify. Yet there are all these records that she has created
18 concerning this exact topic that the government has not had
19 access to.

20 MJ [COL ACOSTA]: All right. The second part of the test
21 is that the requested information meets one of the enumerated
22 exceptions. And you cite (7), which is when an accused offers
23 statements or other evidence concerning their mental condition

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1 in defense, extenuation or mitigation, under circumstances
2 that are not covered, as we previously discussed, by 706 and
3 302.

4 ATC [LT SCHWARTZ]: Yes, Your Honor.

5 MJ [COL ACOSTA]: That's -- that's your -- that's your
6 position?

7 ATC [LT SCHWARTZ]: Yes, Your Honor.

8 MJ [COL ACOSTA]: Have they offered it in defense,
9 mitigation or extenuation?

10 ATC [LT SCHWARTZ]: At this point we believe that they've
11 been offered in -- essentially I guess it would be best
12 classified as -- well, it's the crux of their case. It's --
13 right now it is in defense. It's the crux of their case, is
14 that was unable to make voluntary statements whenever they
15 know that these statements are being admitted by the
16 government and they're saying that they need to be suppressed
17 because he was unable to make voluntary statements and,
18 therefore, didn't have the culpability to make those
19 statements to law enforcement.

20 So we do believe that because they're using his mental
21 health as a -- as a defense at this point, that the government
22 does trigger the exception under (7).

23 MJ [COL ACOSTA]: All right. And the next question is:

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1 Is this information not cumulative of things that are
2 otherwise available, such as the 706 long form, perhaps?

3 ATC [LT SCHWARTZ]: We do not -- I apologize. We do not
4 believe so, Your Honor. We believe that because these
5 documents were created by his treating psychiatrist at the
6 time, closer in time to the statements that were made, that
7 these are much more relevant to the time as -- I mean, defense
8 just stated, the evaluation in 2013, that by defense's own
9 words, had nothing to do and likely weren't -- weren't ----

10 MJ [COL ACOSTA]: Were the mental health ----

11 ATC [LT SCHWARTZ]: ---- constructive ----

12 MJ [COL ACOSTA]: Were the mental health records of the
13 accused not made available to the doctor who evaluated him in
14 2013 for the 706 board?

15 ATC [LT SCHWARTZ]: The government's understanding is --
16 is yes, they were made -- they were made available. However,
17 as I said earlier, there are numerous pieces of mental health
18 records that are being viewed. And while they reviewed it in
19 coming to their conclusion, that's also part of the reason by
20 which we want to see them. As we stated earlier, defense
21 leans heavily on a diagnosis of PTSD, but in their filing in
22 467 also makes notions of learned helplessness, which we have
23 not seen a diagnosis of.

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1 Therefore, we would like to be able to see behavioral
2 health records, if there was an evaluation done for learned
3 helplessness or any kind of observations made as to whether or
4 not the accused, in fact, suffers from learned helplessness,
5 as that has been raised by the defense in AE 467.

6 MJ [COL ACOSTA]: So you don't have enough in the 706
7 board, which was conducted afterwards. The long form 706 that
8 you have is insufficient even though it took into
9 consideration all of these other behavioral health records --
10 behavioral health records?

11 ATC [LT SCHWARTZ]: That is the government's position.
12 And primarily that would be the attenuation of when those
13 records were created. Understanding that the doctor was able
14 to review those records, we believe that they are still
15 necessary to get the actual behavioral health records that
16 were created by Dr. -- by Dr. Malone.

17 MJ [COL ACOSTA]: Okay.

18 ATC [LT SCHWARTZ]: Primarily, Your Honor, because
19 whenever they're doing a 706, there were certain questions, as
20 you know, certain things that they're required to look for in
21 answering. And there are -- there is a possibility, at least
22 in the government's mind, that in reviewing these documents
23 whenever they are looking at answering these certain questions

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1 and standards that there is certain information that may not
2 be included in an R.M.C. 706 form that would, in fact, still
3 be relevant and discoverable to the government.

4 MJ [COL ACOSTA]: And the last part of the -- the test
5 that generally applies to 513 -- and again, I'm relying upon
6 the procedures in M.R.E. 513 because I -- it has evolved
7 beyond that of M.C.R.E. 513, because there's much less
8 litigation regarding that in this format.

9 The last part of the test is the party, that's you,
10 have made a reasonable effort to obtain the same or
11 substantial information through nonprivileged sources.

12 ATC [LT SCHWARTZ]: Yes, Your Honor. And so we received
13 the 706 obviously, as we've heard a lot about today. And I
14 have already -- I will rest on what I just said. I won't
15 repeat it for the commission. We still do believe that it is
16 necessary apart from the 706. There have been numerous
17 efforts in order to review these records, numerous filings --
18 prior filings to review these records. And at this point ----

19 MJ [COL ACOSTA]: No, no, but that -- that's to get
20 privileged information.

21 ATC [LT SCHWARTZ]: Understood.

22 MJ [COL ACOSTA]: The information from a nonprivileged
23 source. That's -- that's what you're required to demonstrate

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1 as well.

2 ATC [LT SCHWARTZ]: Understood. And the government's
3 position is there -- at this point, the government is not
4 aware of another way in which we can get the information that
5 is held within those behavioral health records that would
6 satisfy the discovery that we believe that we are entitled to,
7 given the defense's position in AE 467, raising the mental
8 health of the accused.

9 MJ [COL ACOSTA]: Okay. Anything else?

10 ATC [LT SCHWARTZ]: Pending any further questions, Your
11 Honor, I believe that I will just rest on my filing.

12 MJ [COL ACOSTA]: All right. Thank you.

13 Defense?

14 ADC [MS. MORGAN]: Thank you, Your Honor. Defense
15 position is that Your Honor is correct in applying the
16 standard M.R.E. 513 analysis to this. This is a well-settled
17 area of military case law.

18 Just as an opening point, if the government didn't
19 know what records existed, there's kind of this question,
20 then, of how did they know that this was hand-selected? But
21 to the point that really kind of is the overarching thing ----

22 MJ [COL ACOSTA]: Well, they don't have the -- I mean, the
23 special trial counsel is segregated, does not -- it has not

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1 passed this information on. The -- they're asking for the
2 records so that they can have them. The -- I don't know -- it
3 is -- you -- there are -- it does appear to be what you have
4 submitted in support of 467, do appear to be select documents,
5 correct? I mean, it's not the entirety of the record.

6 ADC [MS. MORGAN]: Correct, Your Honor. It just does
7 raise some questions. And I won't belabor the point ----

8 MJ [COL ACOSTA]: Counsel ----

9 ADC [MS. MORGAN]: ---- but we did file an objection
10 to ----

11 MJ [COL ACOSTA]: ---- counsel makes this argument all the
12 time. They saw somebody. There must be a record of something
13 about it.

14 ADC [MS. MORGAN]: Sure.

15 MJ [COL ACOSTA]: And the argument generally fails. But
16 because nobody has produced any part of the record.

17 However here, where we go back to essentially the
18 origins of 513 with your case, which was -- which wasn't a
19 government requesting an accused's mental health records case,
20 the -- here you have provided some of the records. You have
21 provided some.

22 ADC [MS. MORGAN]: Fair. And don't intend to belabor it.
23 Just wanted to note that we did object to the -- the special

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1 trial counsel ----

2 MJ [COL ACOSTA]: Understood.

3 ADC [MS. MORGAN]: ---- and rest on the pleadings.

4 MJ [COL ACOSTA]: Noted and ruled upon -- or will be ruled
5 upon.

6 ADC [MS. MORGAN]: Understood. Again, M.R.E. 513 is the
7 appropriate legal paradigm as far as the defense is concerned.
8 What the government is asking for here is discovery. 513 is
9 not a rule of discovery, it's a rule of privilege. So going
10 through those just factors. As far as whether or not this is
11 intended to -- or likely to elicit admissible information, and
12 I think I can tie this pretty closely to the government's
13 initial pleadings here, it's not -- it's not likely to result
14 in admissible information.

15 And I say that for a couple reasons. One, what you
16 see in the defense's pleadings in 467 are numerous references
17 to undiagnosed mental conditions. I'm not sure what the
18 government thinks they're going to find, when the defense has
19 conceded that these are undiagnosed. If they're undiagnosed,
20 by their very nature they're not there.

21 Additionally, what we heard during the last set of
22 hearings from the senior medical officer, is that
23 Mr. al Nashiri was never evaluated for PTSD. There's no PTSD

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1 workup at any point in his history. And so if they're looking
2 for some type of evaluation, we've already had a fact witness
3 on the stand to say that doesn't exist.

4 To the extent that they're looking for evidence to
5 refute triggers, frankly, I just don't know that that's
6 medically sound. If I'm a rape victim, you don't get to tell
7 me that the perfume in the -- or the cologne in the BX is not
8 triggering my memory or my flashback of the rape. But still,
9 there's no reason to believe any of that evidence would be in
10 there because, again, we know it was never an evaluation.

11 They mentioned the information about learned
12 helplessness. There's no DSM diagnosis of learned
13 helplessness. We heard that from Mr. Mitchell. So very
14 specific facts that this commission already has before it that
15 what the government purports to be looking for would not
16 exist.

17 What's been offered here is not a defense and
18 extenuation or mitigation of the charged offense. We're
19 talking about a suppression motion and a state of mind. We
20 are not talking about an insanity defense. We're not talking
21 about defense is putting on a mitigation expert ----

22 MJ [COL ACOSTA]: This is about voluntariness of the
23 statement.

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1 ADC [MS. MORGAN]: Correct, but that is not -- the defense
2 has not put the mental health records to say that -- has not
3 put his mental health records in play in that manner. And so
4 what you're looking at, Judge, when you're looking at those is
5 you're not looking at the mental health condition from a
6 treating provider. You're looking at those really as fact
7 records. You're looking at records that talk about the
8 factual basis of what happened, and that's what you're going
9 to see in the testimony.

10 And, frankly, you have them before you. The defense
11 has attached every record that we intend to rely on. So when
12 the government stands up and says we have no idea what
13 Dr. Carr-Malone or Dr. Crosby are going to testify to this
14 week, that's not a fair statement.

15 MJ [COL ACOSTA]: Are they providing expert opinions?

16 ADC [MS. MORGAN]: Dr. Carr-Malone will not be. And
17 everything that she has seen, the government has. Dr.
18 Carr-Malone is a ----

19 MJ [COL ACOSTA]: Not necessarily true. If she created
20 more mental health -- behavioral health records than what you
21 included, she's seen the ones that she created. You only
22 attached the ones that you've provided her for review for this
23 hearing.

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1 ADC [MS. MORGAN]: And if I can just have one moment to
2 clarify, because I want to make sure before I say this to the
3 commission, but I believe I can represent something.

4 MJ [COL ACOSTA]: Okay.

5 [Pause.]

6 ADC [MS. MORGAN]: All right. And so just so I get the
7 nuance of this right. Recognizing that there are records that
8 we are provided with identities redacted.

9 MJ [COL ACOSTA]: Say that one more time. I apologize.

10 ADC [MS. MORGAN]: Recognizing that there are records that
11 are provided with identities redacted, we have -- we have
12 included everything that we are aware Dr. Carr-Malone has
13 produced. So to the extent the defense knows that she
14 produced a document, we have included it.

15 MJ [COL ACOSTA]: If it comes out in testimony that she
16 produced more ----

17 ADC [MS. MORGAN]: I don't believe we ----

18 MJ [COL ACOSTA]: ---- in which -- hold on.

19 If it does come out that she produced more, would that
20 be discoverable then?

21 ADC [MS. MORGAN]: No, I don't believe so, Your Honor.
22 And because this isn't a rule of completeness thing.

23 MJ [COL ACOSTA]: Hold on. We'll get to that in a second.

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1 It's not a rule of completeness. I think that's analogous but
2 not where I'm going with it, but go ahead.

3 ADC [MS. MORGAN]: No, I don't think so. Part of this,
4 Judge, is I mean we're playing this game with our arms tied
5 behind our back a little bit as the defense. I don't know
6 that we have all the records. I don't know what records have
7 Dr. Carr-Malone's name potentially redacted on them. There's
8 a little bit of I don't know what I don't know here. So doing
9 our level best here. We provided everything. But, Judge ----

10 MJ [COL ACOSTA]: Everything that you think that she
11 created?

12 ADC [MS. MORGAN]: Correct. And everything we've put at
13 issue. But everything that we intend to elicit has been
14 turned over. That fulfills our obligations under the rules.

15 MJ [COL ACOSTA]: But that's not all the records you have
16 obviously. Because you have all of the mental health records,
17 correct, and behavioral health records?

18 ADC [MS. MORGAN]: I will never concede that we have all
19 of them. We have what the government ----

20 MJ [COL ACOSTA]: You have more than what you provided in
21 this?

22 ADC [MS. MORGAN]: Yes.

23 MJ [COL ACOSTA]: Okay.

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1 ADC [MS. MORGAN]: But again, Judge, that's not the test
2 for 513. The 513 is are they admissible?

3 And then moving on to the, you know, are they
4 offered -- have they been offered in defense extenuation
5 mitigation, are they cumulative? They absolutely are.

6 And Your Honor had asked government counsel a number
7 of questions about the 706 report. That's one thing that they
8 may be cumulative with, yes. The 706 report is there, the
9 government has that. The government has the fact that the
10 mental health records were foundational documents to compiling
11 that.

12 But drawing your attention to the government's own
13 pleading, the government very quickly dismisses the defense's
14 allegations or the defense's assertions in 467 by saying
15 they're easily refuted in the more fulsome DIMS records.

16 MJ [COL ACOSTA]: The DIMS records.

17 ADC [MS. MORGAN]: So the government is able to quickly,
18 by their own words, dismiss everything that we have raised by
19 records that are already entirely within their possession in
20 unclassified way, which ties in very closely to the fourth
21 prong about are they able to do this with nonprivileged
22 sources? Yes, they are able. They already have the material
23 to do so. And they can.

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1 You know, and frankly, Your Honor, I really think
2 that's the point here. We recognize we have certain
3 obligations. If we are going to call an expert, we are going
4 to have to turn over what that expert has relied on. We are
5 not calling Dr. Carr-Malone as an expert. She is being called
6 as a fact witness. We do not ----

7 MJ [COL ACOSTA]: But you are calling Dr. Crosby as an
8 expert, correct?

9 ADC [MS. MORGAN]: Yes, and we have ----

10 MJ [COL ACOSTA]: What has she reviewed? Has she not
11 reviewed the entirety of the behavioral health records in the
12 formation of her opinion?

13 ADC [MS. MORGAN]: Over the course of her contact with our
14 case, she has reviewed all of -- most, if not all. However,
15 in the -- what she is testifying to is a discrete issue and
16 everything that she is testifying to, those records have been
17 disclosed. And she will not be -- and just to be clear, Your
18 Honor, just to be entirely clear about Dr. Crosby's testimony
19 this week, it actually has -- does not have to do
20 Mr. al Nashiri's mental health records.

21 Dr. Crosby's testimony this week is entirely limited
22 to her treatment as a internist, as a medical provider, not in
23 any way her review of his mental -- if I could have a moment.

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1 [Pause.]

2 ADC [MS. MORGAN]: It will not be -- it will not be
3 touching on his mental health records.

4 MJ [COL ACOSTA]: So none of her opinion will have
5 anything to do with her review -- but ----

6 ADC [MS. MORGAN]: This week.

7 MJ [COL ACOSTA]: Not does it have anything to do with it.
8 Did she review that in the formation of her opinions that
9 she's going to provide?

10 ADC [MS. MORGAN]: Not this week. She will not be
11 providing any opinions this week that have anything to do with
12 the review of her -- her prior review of any mental health
13 records. It is an entirely discrete issue that she will be
14 testifying as to this week.

15 And I'm not being coy with the commission. She'll be
16 testifying as to the validity of what the government
17 euphemistically calls rectal feeding.

18 MJ [COL ACOSTA]: Called what?

19 ADC [MS. MORGAN]: Rectal feeding.

20 MJ [COL ACOSTA]: Oh, okay.

21 ADC [MS. MORGAN]: So that has nothing to do with mental
22 health. So it will just be on ----

23 MJ [COL ACOSTA]: That's all she's talking about?

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1 ADC [MS. MORGAN]: That is all she's talking about, Your
2 Honor.

3 MJ [COL ACOSTA]: Have you not as the defense sent --
4 waived the privilege in this by providing portions of the
5 mental health record and saying this is what we need to
6 support this and then waive the privilege to the remainder of
7 the records by stating we're relying upon these mental health
8 records to make our point in defense mitigation? Because if
9 this isn't defense to try to keep out his -- his statement,
10 I'm not sure what it is.

11 And then if you -- have you not waived it, then, by
12 using portions of it and then picking your portions that you
13 want to use and saying, well, you can't use the rest because
14 it's privileged? Are you not trying to use 513 as the -- as
15 the shield and a little bit of a sword there?

16 ADC [MS. MORGAN]: Your Honor, it's not a balloon, right?
17 Privilege isn't a balloon. It doesn't pop. You know, we are
18 able to provide limited waiver as to certain records. We --
19 it is our position that any release of records is narrowly
20 tailored. We are not required to turn over his full mental
21 health history. It is ----

22 MJ [COL ACOSTA]: Well, they're not asking for the full.
23 They're asking until 2007, the same portion of which -- I

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1 mean, let's be clear. The defense is asking for 2007 and
2 no -- I mean, pardon me. The government is asking for up to
3 2007 and no further.

4 ADC [MS. MORGAN]: And again, Your Honor, the defense's
5 position is it still does not meet the criteria under 513.
6 There ----

7 MJ [COL ACOSTA]: Even you're using the same mental health
8 records to make your point doesn't permit them to have the
9 remainder of the mental health records which might contradict
10 your own positions that we can only assume -- I don't think
11 you went through his records and picked out the -- the stuff
12 that wasn't most helpful to your client, right?

13 ADC [MS. MORGAN]: Fair, Your Honor. But again, the
14 government still has a requirement to prove that there would
15 be admissible evidence within there.

16 MJ [COL ACOSTA]: Under ----

17 ADC [MS. MORGAN]: And ----

18 MJ [COL ACOSTA]: But you proved that there's admissible
19 evidence in there because you presented it. There's
20 admissible -- you said, hey, this is evidence that's
21 admissible on this topic. There's admissible evidence in
22 these records. Here's some of it.

23 ADC [MS. MORGAN]: Sure. Your Honor ----

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1 MJ [COL ACOSTA]: The rest of it, though, we don't want
2 you to look at.

3 ADC [MS. MORGAN]: Again, my client controls the
4 privilege.

5 MJ [COL ACOSTA]: Right. To the point to where it's
6 waived. I mean, there is no privilege when you're using it.
7 The rules simply state there is no privilege when you're
8 offering it in defense extenuation and mitigation.

9 ADC [MS. MORGAN]: And, Your Honor, the defense's position
10 would be that our obligation begins and ends with 705, that we
11 are required to provide anything our -- our -- our experts are
12 relying on.

13 MJ [COL ACOSTA]: Experts are relying upon.

14 ADC [MS. MORGAN]: And Dr. Carr-Malone is not an expert.
15 Dr. Carr-Malone is not opining as to the ultimate question of
16 our client -- she is not testifying to our client's defense
17 extenuation or mitigation. She is not opining on the ultimate
18 questions of his capacity to make a voluntary statement. She
19 is testifying as a fact witness. And so it does not fit
20 within the ambit of 513. It does not waive the privilege.

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

22 ADC [MS. MORGAN]: Thank you, Your Honor.

23 MJ [COL ACOSTA]: All right. I believe that covers

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1 everything that we had on the schedule today.

2 ATC [LT SCHWARTZ]: Your Honor, if I may just briefly.

3 I'm sorry.

4 MJ [COL ACOSTA]: Yeah, sorry. I just heard the voice and
5 I didn't know where you were. Go ahead.

6 ATC [LT SCHWARTZ]: Apologies. Just very briefly, Your
7 Honor.

8 For the documents that -- understanding that maybe
9 defense has limited what is being reviewed by these witnesses,
10 whenever -- whenever a witness is being called, though, as we
11 know with Dr. Malone here, she also created these documents.
12 Understanding, as you pointed out, she may not have reviewed
13 them, she created them. And, therefore, the government does
14 believe that that warrants the government's ability to review
15 these records just because the defense isn't having her review
16 them prior to her testimony in this session.

17 The defense counsel also just said that -- that they
18 are speculating that we are seeking the documents to be used
19 for fact, which we'll hear from witnesses this week. That is
20 the problem, is they are saying those documents include
21 certain facts which we can then rely on the testimony from
22 these individuals. But that is the problem, because now we
23 have them saying we're not having them review any of the

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1 records that happened, you know, ten years ago, but then we're
2 going to have them testify to the facts and just rely on that
3 when we have nothing else to look at. So that's another issue
4 that we see.

5 The other issue about they have given everything that
6 they're aware of, the government's position is it is their
7 client, it is their record, they have the ability -- if
8 they -- if they can say with certainty, listen, there are no
9 behavioral health records that were created by Dr. Malone,
10 okay. But at this point for them to say, well, we don't know
11 what's out there. Well, it's their client's records.

12 MJ [COL ACOSTA]: No, no, no. Their position -- I'll
13 clarify that for the defense. First of all, I -- I don't know
14 that the accused -- I'm not going to speculate about whether
15 or not he knows who created what records. When they say that
16 they've provided all of the records created by Dr. Malone,
17 that's because that's all -- and I'm going to take counsel at
18 her word, that that's what they have. Her -- her speculation
19 about other mental health records not being produced as a
20 result of litigation regarding the production -- other
21 production of records in the past. So that's why ----

22 ATC [LT SCHWARTZ]: And I was speaking -- yes, Your Honor,
23 I was speaking primarily ----

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1 MJ [COL ACOSTA]: Because if it ----

2 ATC [LT SCHWARTZ]: ---- to Dr. Malone.

3 MJ [COL ACOSTA]: Because if that special trial counsel
4 has other mental health records that haven't been produced to
5 the defense and that you then end up with after -- if I were
6 to order the production of those records, that would be highly
7 problematic. Do you understand that?

8 ATC [LT SCHWARTZ]: Agreed. Absolutely, agreed.

9 MJ [COL ACOSTA]: Okay.

10 ATC [LT SCHWARTZ]: The biggest thing that the government
11 just wanted to touch on was this -- the 706. So we've talked
12 about the 706 a lot today. Defense counsel just said -- and
13 we were informed, whenever they told us that Dr. Crosby was
14 testifying, we were informed she reviewed 467, the
15 attachments. One of the attachments to 467 is the 706.
16 Within the 706, as we just discussed and I think we all agreed
17 upon, one of the things relied upon in making that document
18 are behavioral health records, as noted in the enclosures to
19 the 706. You can see in the 706 ----

20 MJ [COL ACOSTA]: Who attached -- who attached it, though?
21 You attached it.

22 ATC [LT SCHWARTZ]: The government did. But the biggest
23 thing -- but they just said that they had the ----

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1 MJ [COL ACOSTA]: No.

2 ATC [LT SCHWARTZ]: ---- 706.

3 MJ [COL ACOSTA]: You don't get to create the -- the --
4 okay. I understand your argument but that's -- that's an
5 argument. I don't know if it's a circle that ----

6 ATC [LT SCHWARTZ]: Well, the defense is posing that we
7 have this other -- this other evidence as one of the -- is one
8 of the factors, that we have the 706; therefore, this is
9 cumulative and we don't need this.

10 Well, the 706, in part, is relied upon and includes
11 the review of, as we've discussed, these -- these records from
12 this time frame. And so while we have the blanket document,
13 it was created, and we have a witness who has reviewed it and
14 may have an opinion about it, but we don't have the underlying
15 basis of what the 706 was created on. And the government did
16 just want to -- just want to note that for the record.

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

18 ATC [LT SCHWARTZ]: Thank you.

19 MJ [COL ACOSTA]: All right. I think that covers what
20 we're going to cover today.

21 Tomorrow we're scheduled to take up argument on 461, a
22 legal issue, and then we'll take -- we have one witness, which
23 we anticipate is going to take two hours on direct in open

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1 session. Government, on cross, I know -- I'm going to
2 estimate that you'll probably take about an hour, hour and a
3 half, correct? Is this yours, Mr. Miller?

4 TC [MR. MILLER]: Yes, Your Honor.

5 MJ [COL ACOSTA]: Okay. About an hour, hour and a half;
6 is that correct?

7 TC [MR. MILLER]: That's fair, Your Honor.

8 MJ [COL ACOSTA]: Okay. And then because of the -- the
9 good questions that you always ask on cross, I'm sure that
10 that will elicit another hour or so from -- potentially
11 from -- from counsel on the defense.

12 So what I anticipate is doing the open session all in
13 the morning before lunch. And then the closed session when we
14 come back at -- after lunch, we'll do the closed session with
15 that witness, and then we'll get into the next set of issues.
16 Because I don't think any of the issues regarding the mental
17 health records comes up until Thursday; is that correct?

18 ATC [LCDR JOLLY]: Yes, sir.

19 MJ [COL ACOSTA]: Thank you, Counsel.

20 And defense, do you agree?

21 ADC [MS. MORGAN]: That's right, Judge.

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

23 Okay. Is there anything else to take up before I

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1 recess the commission for today until tomorrow at 09 when
2 we'll start with argument on 461 and then we'll take up our
3 witness, McFadden, immediately after that for open session
4 before lunch, go into closed session after lunch. And
5 obviously, if he goes long on the -- on the open session,
6 we'll take a break and then come back and -- and pick back up.
7 We're not going to -- we're not time limited with that. We
8 should have ample time to take that up.

9 Any other issues, Government?

10 TC [MR. MILLER]: No, Your Honor. He is here the week, so
11 if we have to go into Wednesday, that's fine too.

12 MJ [COL ACOSTA]: Perfect.

13 Defense?

14 LDC [MR. NATALE]: No, Your Honor.

15 MJ [COL ACOSTA]: All right. With nothing else that's
16 come up, the commission is in recess until 09 tomorrow.

17 [The R.M.C. 803 session recessed at 1513, 25 July 2022.]

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