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1 **[The R.M.C. 803 session was called to order at 0905, 28 April 2026.]**

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

3 All parties present before the last recess are again
4 present. Mr. Nashiri is attending these proceedings from the
5 courtroom.

6 One thing I want to put on the record, yesterday the defense
7 requested to voir dire me based on a conversation I had regarding
8 logistics. I wasn't prepared for that conversation, so a lot of the
9 information I didn't have in my head and hadn't thought -- hadn't had
10 time to process it. But the person I spoke to -- I kept saying WHS.
11 I've never seen a wire diagram or an organizational chart to how
12 everybody is laid out.

13 So the person I spoke to was Mr. Apostol, the Director of
14 OMC, so not just somebody at WHS. Obviously a very important person
15 being the director. That's who I spoke to. And my staff attorney
16 was present and my staff director were present.

17 Also, I said, you know, they -- all the information we
18 shared, I had already discussed. But I was given a one-page
19 information -- two-page information slide. Very common thing in the
20 military to brief by PowerPoint. I have that and I'm going to mark
21 it as the next appellate exhibit in 679. But it is CUI.

22 And for the record, I have redacted certain information, and
23 it will make sense when you see it. I said yesterday that I'm being

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1 cautious about what I disclose because we're trying to practice good
2 OPSEC. So the information I've redacted is things related to OPSEC,
3 locations and times of movements, if that makes sense. And that is
4 it.

5 The two-page slide was -- essentially the brief could have
6 been summarized on those two-point slides, but it was just explaining
7 that to me. And I was given a wire diagram of who those people would
8 be.

9 So I think that fills out some things I had not been able to
10 answer wholly yesterday.

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

12 MJ [COL FITZGERALD]: And the slide deck is called "Panel
13 Member Management and Daily Schedule," and it's marked as Appellate
14 Exhibit 679MMM. And I'd just remind everybody that it is marked CUI.
15 I'm going to hand that to the court reporter now.

16 Thank you.

17 If there is nothing else, Ms. Miller, the podium -- I'm
18 sorry.

19 Colonel Garrett?

20 ATC [LTC GARRETT]: Sir, briefly I just wanted to put on the
21 record the CCTV sites are good to go.

22 MJ [COL FITZGERALD]: Thank you. I appreciate that.

23 Ms. Miller, you are free to take the podium and continue.

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1 LDC [MS. MILLER]: Thank you, sir. And good morning again.

2 MJ [COL FITZGERALD]: Good morning.

3 LDC [MS. MILLER]: The next set of witnesses I'm going to be
4 discussing are guard force members 2, 3, 4, 5 -- and I apologize and
5 I hope Mr. Wells is able to adjust, but if not, I will understand we
6 can take it up on a later date. I have guard force member number 6.
7 It should be number 1.

8 All of these guard force members were involved in what's
9 been unclassified at this point, the drill/gun incident. The
10 specificity in the documents I'm going to direct the commission to
11 that that event was investigated and is unclassified.

12 And I think this is a perfect example of -- or Ms. Manuele
13 gave the example. This is a perfect illustration of the example.
14 When Ms. Manuele said if there was a car crash and four observers,
15 certainly you would want the perspective of all four observers, and
16 not all four people may have observed the exact same things even
17 though they were present for the exact same car accident, right?

18 And so I think as you read through these -- they were
19 largely investigatory reports related to the guard force members in
20 this incident, as you read through them, it is very clear that some
21 of them have different recollections. For instance, some -- or one
22 says the gun was never racked. It is very clear the gun was racked a
23 number of times. Again, that was publicly disclosed in the

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1 investigation.

2 And so these folks have also been described as
3 noncumulative, relevant, and helpful, and Mr. Wells described that
4 yesterday as a discovery standard. I would disagree. Certainly we
5 get cumulative discovery. Sometimes we get the same thing over and
6 over -- over and over and over again. I would very much assert that
7 that standard of noncumulative, relevant, and helpful is a standard
8 for the commission to consider as far as trial and these witnesses
9 not falling into a cumulative, irrelevant, or unhelpful posture.

10 And there's just one last thing I wanted to draw the
11 commission's attention to before I begin with guard force member
12 number 2. I interviewed in person Medical Doctor No. 1. And why we
13 need live witnesses generally and why it would be tremendously
14 helpful to interview these folks -- and I actually think that if we
15 were able to interview these folks, we might be able to cull the list
16 down as to the folks we need, but we are relying on the information
17 we've been provided in paper because so many of these people will not
18 respond to our e-mails. And by that I mean almost all of them.

19 But Medical Doctor No. 1 in the course of the interview
20 cried, got angry, was defensive of what he did, was skeptical of what
21 he was reading. And also, there was a specific notation in one of
22 the reports about Medical Doctor No. 1 that he was okay with
23 something that was taking place at the location that he was at, which

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1 was 4. And that is at one point when he cried because he said, "I'm
2 absolutely not okay with what is being represented in that document
3 as being asserted that I was okay with that. I'm not okay with that,
4 and that detainee did not deserve that," were his exact words.

5 And so trying to reduce any of that to a statement admitting
6 relevant facts is impossible. It violates fundamental fairness, and
7 it violates Mr. al Nashiri's right to due process. And so I just
8 wanted to mention that to the commission, having sat in that
9 interview.

10 And lastly, doctor -- Medical Doctor No. 1 said to me,
11 because I said: Sir, as you can imagine, we've asked for these
12 interviews in quite a few cases.

13 And he kind of laughed and said: I suspect you didn't get a
14 lot of yeses.

15 And I said: Yes, that's correct. Why are you here, sir?

16 And he said: It's my duty. If I was going to participate
17 in this program, it is my duty to answer the questions of the defense
18 team.

19 And so I would suggest similarly that beyond the need to
20 ensure fundamental fairness and due process for Mr. al Nashiri, it is
21 the duty of these people that we're going to be discussing to appear
22 before this commission and this member panel to discuss their
23 actions.

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1 Turning to guard force member number 2, there's a couple
2 things. He was the -- he is the particular guard force member that
3 didn't believe the gun was racked. Referring to 3208 of AE 679DD,
4 both this section of the first full paragraph as well as this section
5 of the last full paragraph I'd ask the commission to read.

6 **[Pause.]**

7 LDC [MS. MILLER]: This one is smaller font I note.

8 MJ [COL FITZGERALD]: Thank you. I've read the first full
9 paragraph and the last full paragraph. Can you tell me that page
10 number again?

11 LDC [MS. MILLER]: Yes, sir. It is 3208.

12 MJ [COL FITZGERALD]: Thank you.

13 LDC [MS. MILLER]: Also, this guard force member -- this is
14 from 3207, just this last sentence in this second full paragraph
15 where he discusses the differences -- or I guess it's the full
16 paragraph where he discusses the differences between Location 3 and
17 4.

18 **[Pause.]**

19 MJ [COL FITZGERALD]: Thank you. I've read that full
20 paragraph.

21 LDC [MS. MILLER]: I think that's all, sir. But given the
22 evocative language that this guard force member used to describe both
23 what he did and observed as it relates to Mr. al Nashiri, there is no

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1 way a statement admitting regular -- statement admitting relevant
2 facts could encompass that, and we move to compel guard force member
3 number 2, sir.

4 MJ [COL FITZGERALD]: Anything further or do you wish to ----

5 LDC [MS. MILLER]: Oh, no. Nothing further at this time, sir.

6 MJ [COL FITZGERALD]: Mr. Wells, good morning.

7 MATC [MR. WELLS]: Yes, sir, good morning. Thank you.

8 As it relates to guard force number 2, the representation of
9 counsel is that he was mistaken as to whether or not the gun was
10 racked. The words of counsel were "it clearly was racked." The
11 prosecution on behalf of the government would agree and, therefore,
12 that's not a disputed fact for which we need to call this witness.

13 The other matters that counsel describes as evocative are
14 gleaned from a written statement, which would be the equivalent of a
15 statement admitting relevant facts verbatim as taken from this
16 report. I think the powerful effect and the emotions that it's
17 inspired in counsel would have the same effect with the counsel -- or
18 the panel -- regardless if you have a witness.

19 To the extent that counsel has interviewed any of these
20 potential witnesses, I think the prosecution and the commission would
21 benefit from having a record of that report so that we can determine,
22 and the commission can determine, whether or not that individual
23 should be produced. For example, Medical Doctor 1. We have been

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1 presented no information other than what's in their filings as to the
2 relevant and necessity for production.

3 But counsel continues to represent information to the
4 commission and to the prosecution that is really not of record.

5 Thank you, Your Honor.

6 MJ [COL FITZGERALD]: Ms. Miller?

7 LDC [MS. MILLER]: One, I would say the government has far
8 more access to these witnesses than we do. And so if Mr. Wells has a
9 question -- the only person on this list that I have personally
10 interviewed is Medical Doctor No. 1, which was referenced to by
11 Ms. Carmon as well as Ms. Manuele. Any notes that were generated as
12 a product of that certainly fall under attorney-client work product.

13 If Mr. Wells would like to speak to Medical Doctor No. 1, I
14 suggest he reach out to him. He was incredibly receptive and has met
15 with other teams -- defense teams.

16 MATC [MR. WELLS]: Your Honor, we do have an objection to
17 withholding that information but using it as an advocate in the
18 commission and not disclosing it. I believe the privilege has been
19 waived. And we would move for the commission to direct
20 the -- counsel to deliver that document or stop speaking about it
21 when it's not of record.

22 Thank you, Your Honor.

23 MJ [COL FITZGERALD]: Defense?

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1 LDC [MS. MILLER]: I won't talk about it again.

2 MJ [COL FITZGERALD]: All right. You would agree, you have
3 not provided a declaration or an affidavit from doctor -- Medical
4 Doctor 1 with these -- with the things you averred that he has or she
5 has said? I don't have that anywhere in ----

6 LDC [MS. MILLER]: It's a he.

7 MJ [COL FITZGERALD]: ---- the record. It's a he? Okay. I
8 apologize.

9 You haven't given me anything in the record that he made
10 those comments that you spoke to, correct?

11 LDC [MS. MILLER]: No, sir. I also think, though, that I have
12 a duty of candor to this tribunal that I take very seriously and so I
13 wouldn't represent something that was untrue.

14 I appreciate the government's perspective. It's just
15 frustrating when I'm quite confident that this gentleman would speak
16 with Mr. Wells. And so to suggest that I have to turn over
17 attorney-client work product when the government seems to have not
18 made effort to contact these people who are going to be far more
19 receptive to that side than they are to our side is a little
20 frustrating.

21 MJ [COL FITZGERALD]: All right. And I understand your
22 frustration. I think my point is that the commission can only
23 operate on matters submitted for consideration. I don't have those.

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1 So I want to make sure I'm being transparent that I've heard what
2 you've said, but those are just assertions of counsel and not
3 assertions of a witness in a form that I have received.

4 LDC [MS. MILLER]: That's correct. It's argument, sir.

5 MJ [COL FITZGERALD]: Okay. So I --

6 Mr. Wells, I understand your point about that. You can
7 certainly brief me if you believe you're entitled to relief, but what
8 has become clear is Ms. Miller understands that I'm not -- those are
9 not facts in evidence, so I'm not to give it any weight as evidence.

10 MATC [MR. WELLS]: Yes, sir. And I would also object to the
11 assertion that it's argument. Argument should be based on the facts
12 submitted to the commission or through the written filings. And
13 counsel often objects to counsel testifying, so we just object.

14 Thank you, Your Honor.

15 MJ [COL FITZGERALD]: Thank you. I will give it the weight
16 it's due. Thank you.

17 You may continue.

18 LDC [MS. MILLER]: I move on to guard force member number 3.

19 And so it would benefit the commission if you have our
20 synopsis. It addresses specifically what the guard force members
21 were instructed to do by Interrogator Number 4 to Mr. al Nashiri.

22 I'm going to direct the commission to page 3210 of AE 679DD.
23 This particular paragraph and the sentence, as well as the last

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1 paragraph of that page, sir, I'd direct your attention to.

2 **[Pause.]**

3 MJ [COL FITZGERALD]: Thank you. I've read the second-to-last
4 and last paragraphs on that page.

5 LDC [MS. MILLER]: And so as I understand it -- and guard
6 force member number 3 is the only one in the course of his interview
7 that described other guard force members that just happened to be on
8 duty, took the chance -- or took the opportunity to harm
9 Mr. al Nashiri.

10 And obviously, guard force member number 3 does discuss the
11 weapon being racked. Directing ----

12 MATC [MR. WELLS]: Your Honor, as to guard force number 3, we
13 would not dispute any of the written report in that matter, and that
14 would be included in the statement admitting relevant facts.

15 Thank you, Your Honor.

16 LDC [MS. MILLER]: If I could please finish?

17 MJ [COL FITZGERALD]: I don't think she was done, Mr. Wells,
18 but understood.

19 MATC [MR. WELLS]: Apologies.

20 LDC [MS. MILLER]: And, again, never -- so I appreciate that
21 Mr. Wells' opinion is that this kind of mistreatment of my client
22 could be summarized in a way on a piece of paper that would carry the
23 same evocative nature as a witness testifying to it. That is the

1 opinion that the government has espoused.

2 However -- and I can certainly provide the commission and
3 the government the research -- every databased study done by the
4 Capital Jury Project or the Death Penalty Information Center, as well
5 as anecdotal evidence suggests the opposite. So the government keeps
6 saying, "We can create a SARF that's going to be as evocative as the
7 language we're looking at." And that is nonsense.

8 And I think we all know that there is no way that a piece of
9 paper will carry this -- I mean, it's hard to read this stuff on
10 paper. I'm not going to dispute that. But it is far different than
11 hearing it from a live witness, especially the person who did it to
12 Mr. al Nashiri.

13 It is the first full paragraph on this page I direct the
14 commission to related to how Mr. al Nashiri responded.

15 **[Pause.]**

16 LDC [MS. MILLER]: And then the last sentence of that summary
17 details videotapes, obviously, that this guard force member observed.
18 And I would just note as well that as far as a statement admitting
19 relevant facts that the government seems to rely on R.M.C. 1001 -- I
20 believe it's 2(e) -- no, (e) (2) (C) that a stipulation by the other
21 party would suffice, and I just want to remind the commission that
22 the rule specifically says "except in an extraordinary case."

23 So in no circumstance do I believe that any of this

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1 information would comply with R.M.C. 1001 as proposed by the
2 government in a stipulation of written fact from the government.

3 That's all I have, sir. We're moving to compel guard force
4 number 3.

5 MJ [COL FITZGERALD]: Thank you.

6 Now, Mr. Wells, you wish to be heard?

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

8 Again, the information in the report would be included in a
9 statement admitting relevant facts. As to the defense's right to
10 evidence, obviously 703(f) governs also the production of those
11 witnesses for relevant, necessary, noncumulative, and a matter is not
12 at issue when it is stipulated as fact.

13 The government stipulates to the specific written report.
14 Therefore, we do not think that a witness is needed to be produced in
15 this matter.

16 Thank you, Your Honor.

17 MJ [COL FITZGERALD]: Thank you.

18 Defense, do you have a response or next witness?

19 LDC [MS. MILLER]: Nope. Next witness. Guard force member
20 number 4, please.

21 Again, I think this really demonstrates how each participant
22 in this same incident has different recollection as far as the
23 racking of the weapon. Referring the commission to page 3279 of

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1 AE 679DD, it is the fourth paragraph down that describes guard force
2 member number 4's personal actions.

3 **[Pause.]**

4 LDC [MS. MILLER]: I am going to ask the commission to kind of
5 keep reading this page because there is some discrepancy, again,
6 about how many times the gun was racked and by whom. And so I would
7 disagree with the government as far as there's no dispute.

8 Guard force member also discusses Interrogator Number 4, who
9 was referenced in guard force member number 3's summary. And
10 then -- that is paragraph 8 of that page.

11 Paragraph 10 and 11 I'd also direct the commission's
12 attention to. And I find paragraph 11 interesting, because it's the
13 first time in reviewing these guard force members' interviews that an
14 opinion about the appropriateness of what they were doing was
15 offered.

16 MJ [COL FITZGERALD]: And what paragraph is that? Sorry.

17 LDC [MS. MILLER]: I think it's paragraph 11. They're all
18 little kind of ----

19 DC [MS. MANUELE]: I'm sorry to object -- oh, I'm sorry. I
20 misunderstood. I thought the headset wasn't working. I'm sorry.

21 MJ [COL FITZGERALD]: Thank you.

22 LDC [MS. MILLER]: So I'm going to -- I'm going to go from the
23 bottom.

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1 MJ [COL FITZGERALD]: Okay.

2 MDTC [LTC MILLER]: On the third paragraph from the
3 bottom ----

4 MJ [COL FITZGERALD]: Ah, Okay.

5 MDTC [LTC MILLER]: ---- the second sentence of that
6 paragraph. And I believe that that guard force member is making
7 reference to the paragraph above that's one sentence.

8 **[Pause.]**

9 MJ [COL FITZGERALD]: Thank you.

10 LDC [MS. MILLER]: And then this next page is a little longer.
11 3217 of AE 679DD, the fourth full, lengthy paragraph describes the
12 attitude. Words like "jovial."

13 **[Pause.]**

14 MJ [COL FITZGERALD]: Thank you. I've read the whole
15 paragraph.

16 LDC [MS. MILLER]: I would argue this also corroborates. And
17 so to a certain extent, one could consider it cumulative or it's
18 converging validity or corroborative that these things happened, that
19 guard force members not on duty were encouraged to partake in the
20 fun.

21 And then the last sentence -- I'm sorry -- specifically
22 discusses how many times this guard force member racked the weapon in
23 Mr. Al Nashiri's presence, which is, again, different from guard

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1 force member number 2's recollection and different from guard force
2 member number 3's recollection.

3 **[Pause.]**

4 MJ [COL FITZGERALD]: Thank you.

5 LDC [MS. MILLER]: Referring to page 3218, it follows from
6 that last sentence, the top paragraph as to how Mr. al Nashiri
7 responded to what guard force member number 5 and others were doing
8 to him.

9 MJ [COL FITZGERALD]: Thank you.

10 LDC [MS. MILLER]: And then lastly, there was a change of
11 command at Location Number 4 while guard force member number 5 was
12 still there, referring to page 3223. I think this is extremely
13 interesting. And why this witness should be called live is that he
14 did some of the same things he did under the old command under the
15 new command, and the reaction was very different. There's only one
16 partial paragraph on this -- whoops -- one partial paragraph on this
17 page that I'd refer the commission to. And if I didn't say it, it's
18 3223.

19 **[Pause.]**

20 MJ [COL FITZGERALD]: Thank you.

21 LDC [MS. MILLER]: That is all of the argument. We move to
22 compel guard force member number 5, sir, in person.

23 MJ [COL FITZGERALD]: Mr. Wells?

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

2 Counsel, can we have just the first page up of the
3 summaries? Thank you.

4 LDC [MS. MILLER]: Just one moment. Of guard force member
5 number 5, correct?

6 MATC [MR. WELLS]: Yes, ma'am. Thank you.

7 LDC [MS. MILLER]: Tell me if this is the correct one. It's
8 3217?

9 MATC [MR. WELLS]: No, I'm sorry. Maybe it's the second page.
10 It has multiple paragraphs there.

11 LDC [MS. MILLER]: Guard force member number 4.

12 MATC [MR. WELLS]: Yes. Thank you.

13 LDC [MS. MILLER]: This? This page?

14 MATC [MR. WELLS]: All right. I'm sorry. I'll make the
15 point.

16 Your Honor, you can tell that counsel has presented to you
17 with a document with highlights. I think the commission took the
18 opportunity to review the whole document or the paragraph in full in
19 addition to the highlights. We would certainly be willing to work
20 with counsel to put into a SARF anything from this written report
21 that is relevant and material to sentencing to show how Mr. Nashiri
22 was treated.

23 There were additional matters that I think that counsel

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1 wanted the commission to see past the highlights. But it's unclear
2 whether or not counsel just wanted you to look at the highlights, and
3 that is what is important to elicit from the witness, or there's
4 additional facts.

5 The point is not that among the witnesses there was a
6 disagreement as to how many times the weapon was racked. All of
7 those viewpoints would be expressed in the SARF for the panel to
8 consider.

9 The main point that counsel would want to be presented to
10 the panel is not a dispute on how many times the gun was racked, but
11 the fact that the gun was racked in Mr. Nashiri's presence and/or
12 viewing. Each one of those could be presented authoritatively,
13 clearly as the words appear on this paper and not get into a vagary
14 of a dispute among the witnesses before the commission.

15 So, again, the -- in sentencing, as it relates to production
16 of witnesses, when a party particularly says that a statement is not
17 in dispute, that militates towards not calling that particular
18 witness.

19 That's all we have, Your Honor. Thank you.

20 MJ [COL FITZGERALD]: I'm not sure I understand that. If it's
21 not in dispute, a presentencing witness isn't necessary?

22 MATC [MR. WELLS]: As to a fact that would be of substantial
23 significance. The substantial significance here is that an

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1 unauthorized ----

2 MJ [COL FITZGERALD]: What do you think would be in dispute in
3 a presentencing hearing generally? I guess I don't understand it.
4 It's -- what do you think is in contest in a presentencing portion of
5 a trial?

6 MATC [MR. WELLS]: Sir, whether or not Mr. Nashiri was
7 mistreated. The 1001 mitigation evidence talks about treatment
8 during detention. Here we have witnesses that are putatively
9 requested to be produced to talk about an incident with a racking of
10 the weapon, also cuffing Mr. Nashiri, and other mistreatment. Each
11 one of their particular viewpoints can be reduced to a statement
12 admitting relevant facts and presented in that manner.

13 The prosecution does not dispute the written record that is
14 produced here and would be willing to present that to the panel.
15 Therefore, it would not require the commission to produce an actual
16 witness.

17 MJ [COL FITZGERALD]: Thank you.

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

19 LDC [MS. MILLER]: The government just said that the
20 dispute -- to answer the commission's question of what is in dispute
21 in sentencing was whether or not Mr. al Nashiri has been mistreated.

22 And frankly, sir, I think he just made our argument for
23 production of all of these witnesses better than either myself or

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1 Ms. Manuele. If the government is disputing that Mr. al Nashiri was
2 mistreated, we absolutely need these live witnesses and not a piece
3 of paper that the government agrees are the words that were written
4 on the paper but seems to disagree may or may not have actually
5 happened, as I understand the comment.

6 And what I've highlighted are the reasons why, in an effort
7 to do this in an open session, why I believe we need this witness as
8 a live, in-person witness.

9 I would thoroughly encourage the commission to read all of
10 any of these guard force members or any of the summaries, et cetera,
11 that have been provided.

12 But this guard force member in particular, it's horrifying.
13 I mean ----

14 MJ [COL FITZGERALD]: I'm sorry. Just -- guard force
15 number 5?

16 LDC [MS. MILLER]: Yes, guard force number 5.

17 I mean, again, full agreement the commission should read the
18 absolute entirety of guard force number 5's summary as far as his
19 interview. I tried to draw the commission's attention to specific
20 things that I thought necessitated his live, in-person testimony.
21 Things like "fun" or "jovial," "everybody getting in on the action."
22 How many times the gun was racked.

23 But, I mean, just looking at this page that's in front of

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1 me, something that wasn't ----

2 MJ [COL FITZGERALD]: Can you tell me what you have on the
3 screen?

4 LDC [MS. MILLER]: Yes, sir. 3218 of AE 679DD.

5 MJ [COL FITZGERALD]: Thank you.

6 LDC [MS. MILLER]: Continuing the theme of "You have to tell
7 us what we want to hear or you're going to be harmed." The last
8 sentence of the first full paragraph reiterates that same thing, just
9 with a gun to his face.

10 MJ [COL FITZGERALD]: Thank you.

11 MATC [MR. WELLS]: Your Honor?

12 LDC [MS. MILLER]: And I'm objecting to surreply unless the
13 commission is granting that.

14 MJ [COL FITZGERALD]: I will grant it.

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

16 MJ [COL FITZGERALD]: You're objection is noted, but I will
17 grant it.

18 MATC [MR. WELLS]: Counsel has presented to the commission an
19 argument that we are disputing the mistreatment Mr. Nashiri suffered.
20 The government is not disputing the mistreatment that Mr. Nashiri
21 suffered in the RDI Program.

22 We are willing to stipulate as a matter of fact that he was
23 mistreated as detailed in these written reports, the -- and all other

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1 views that may say as to the details of how the mistreatment
2 occurred. We're willing to agree to that in a statement admitting
3 relevant facts.

4 So it is not, as counsel is representing our argument, that
5 we dispute that.

6 Thank you, Your Honor.

7 MJ [COL FITZGERALD]: And I guess I just go back to my
8 original point. We're talking about a motion to compel presentencing
9 witnesses. Oftentimes the matters are not in dispute in a
10 presentencing arena. So I don't -- I don't know if you're making the
11 argument if it's not in dispute it's not relevant for sentencing or
12 some other argument.

13 But certainly if they want to call a family member, for
14 example, to say he had a good childhood or a rough childhood, you may
15 not dispute it but we call that witness because the fact-finder needs
16 to hear those type of things if they're relevant. So I guess I'm
17 just confused what weight I give to matters that you're not disputing
18 that the defense believes they need to have some testimony to based
19 on their themes and how they relate to either extenuation or
20 mitigation.

21 So that's where I'm lost on what you mean, "it's not in
22 dispute; therefore, we don't need the witness."

23 MATC [MR. WELLS]: Yes, sir. Here counsel is making the case

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1 that we need to call multiple witnesses because there are factual
2 discrepancies between them, which I don't think is, under 1001, a
3 substantial significance to determine.

4 This is 1001(e) (2) (B), also (A).

5 MJ [COL FITZGERALD]: So it sounds like, then, you're raising
6 that it's not a matter in dispute goes to cumulative, not relevance.
7 So a 403 problem.

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

9 MJ [COL FITZGERALD]: Okay. I just wanted to make sure I
10 understood how it was framed.

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

12 MJ [COL FITZGERALD]: And you had the final word on guard
13 force number 5, Ms. Miller.

14 LDC [MS. MILLER]: Right. And, again, I think what one could
15 characterize as cumulative could also be characterized as
16 corroborative. But I think to Ms. Manuele's point is that why we
17 don't just want Drs. Mitchell and Jessen, which at least the
18 government didn't suggest that here, is because four people can have
19 very dissimilar reactions to the same event.

20 And we are limited because we're not able to interview them.
21 So you could have a guard force member that's very proud of what he
22 did in this event. You could have a guard force member who feels
23 great sorrow. I think there's any range of emotions, but I

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1 don't -- I don't know that.

2 And so that cannot be captured on a piece of paper. If I
3 was able to interview these people, if the government wants to
4 facilitate me being able to interview all of them, I am happy to take
5 that opportunity and see if we can vitiate the need for all of them.

6 But absent that, I think we do need all of these witnesses
7 live. And this particular incident, the drill/gun incident, was
8 subject to an entirely separate investigation. So to ask for four
9 witnesses related to this particular incident that warranted
10 additional investigation because of how bad it was I don't think is
11 too much to ask.

12 And to the commission's point on family members, we often
13 call family members who -- you know, you have a sister who might have
14 a slightly different relationship with a brother, a brother who's
15 close in age who might have a different relationship with
16 Mr. al Nashiri than a brother who's not as close in age. But they
17 may say similar facts about their childhood and how they grew up.
18 But that wouldn't make them inadmissible -- or it wouldn't make them
19 inadmissible because it was cumulative because they had similar
20 factual childhoods.

21 MJ [COL FITZGERALD]: Thank you.

22 MATC [MR. WELLS]: Your Honor, I do rise ----

23 LDC [MS. MILLER]: Again, I object.

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1 MJ [COL FITZGERALD]: I'm going to cut it off. I think I've
2 heard from everybody enough on guard force number 5.

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

4 MJ [COL FITZGERALD]: So I'm not going to allow a
5 sur-surreponse.

6 MATC [MR. WELLS]: May I make a record of my objection?

7 MJ [COL FITZGERALD]: Your objection is noted. No, your ----

8 MATC [MR. WELLS]: The basis of my objection, Your Honor?

9 MJ [COL FITZGERALD]: At some point I get to tell you when
10 we're done.

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

12 MJ [COL FITZGERALD]: And I'm done on guard force number 5.

13 MATC [MR. WELLS]: Yes, sir. I'm done on guard force
14 number 5. There's a larger issue that counsel has presented. I'd
15 like to make an objection. Please, would you hear my objection, sir?

16 MJ [COL FITZGERALD]: So separate from ----

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

18 MJ [COL FITZGERALD]: ---- the matter before us? Briefly.

19 MATC [MR. WELLS]: Yes, sir, briefly.

20 The argument that we need witnesses here to show a
21 emotion ----

22 MJ [COL FITZGERALD]: Well, now you are responding to her,
23 so...

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1 MATC [MR. WELLS]: Okay. That -- I'm sorry.

2 MJ [COL FITZGERALD]: So ----

3 MATC [MR. WELLS]: That's the nature of my objection.

4 MJ [COL FITZGERALD]: ---- objection sustained on that. I
5 don't need you to make a record. You're responding.

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

7 MJ [COL FITZGERALD]: But you're telling me you weren't going
8 to respond, but you are clearly responding to her words. So you're
9 not raising a new objection. So you can raise it at some other time.

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

11 MJ [COL FITZGERALD]: I'd like to move to the next witness.

12 LDC [MS. MILLER]: Judge, the next witness I----

13 MJ [COL FITZGERALD]: And to be clear to both parties, I'm
14 going to give the information you give me and the evidence you give
15 me the weight they're due. I understand my task here. But thank
16 you.

17 LDC [MS. MILLER]: Understand, sir.

18 The next witness I have listed is guard force member
19 number 6. I intended for that to be guard force member number 1. I
20 apologize.

21 And I can tell the government and the commission it's very
22 limited what I would seek from guard force member number 1. But if
23 the government would like to handle that at a later date or needs

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1 more time, but I think Mr. Wells could probably handle responding to
2 the limited nature of what I'm seeking from this witness.

3 MJ [COL FITZGERALD]: I'll let you present it. And,
4 Mr. Wells, if you tell me you're unprepared, I can take up your
5 position later. But I'm pretty sure you will be able to, but you are
6 free to tell me you are not able to respond and I'll let you reserve
7 that.

8 But go ahead, present it.

9 LDC [MS. MILLER]: It's pretty short.

10 MJ [COL FITZGERALD]: Okay. Go ahead, Ms. Miller.

11 LDC [MS. MILLER]: It's page 3280 of AE 679DD. It appears
12 that guard force member number 1 was responsible for interviewing the
13 other guard force members' reference, the drill/gun incident.

14 And the last sentence of the second full paragraph I want to
15 draw the commission's attention to.

16 **[Pause.]**

17 LDC [MS. MILLER]: And so ----

18 MJ [COL FITZGERALD]: Thank you.

19 LDC [MS. MILLER]: ---- my position is obviously the summaries
20 we have from guard force members 2, 3, 4, and 5 are different than
21 the initial report that was given to guard force member number 1.
22 And anything that goes to a witness' bias or credibility I would say
23 is admissible for the member panel's consideration.

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1 And how a witness appears on the stand as it relates to
2 emotion is absolutely something that jurors in a -- in an Article III
3 court are often instructed to consider. How did the witness behave
4 himself or herself on the stand? How did the witness appear
5 answering the attorney's questions? Those are things that oftentimes
6 pattern jury instructions instruct civilian jurors to consider when
7 weighing a witness' credibility.

8 And that's large -- in large part why we talk about live
9 witnesses is the credibility of all of these witnesses that
10 participated in the CIA's torture program is in question, because
11 even the reports that are as horrifying as they are about what the
12 CIA did to Mr. al Nashiri, I suspect undersell it.

13 And that's very clear in why I am requesting guard force
14 member number 1, that the initial report he received is different,
15 ultimately, than what is reported in a summary that I've been
16 provided from guard force members 2, 3, 4, and 5. And that's why
17 we're moving to compel guard force member number 1, sir.

18 MJ [COL FITZGERALD]: Thank you.

19 Mr. Wells, would you -- do you have enough information to
20 respond or do you wish to reserve?

21 MATC [MR. WELLS]: No, sir. I'll respond. Thank you.

22 MJ [COL FITZGERALD]: Thank you.

23 MATC [MR. WELLS]: I do not believe in the other guard force

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1 members on this incident that counsel has presented mention guard
2 force number 1's participation. So I do not think that the basis
3 that counsel proffers to the commission that we need to call this
4 witness to resolve a factual dispute or attack that witness'
5 credibility is genuinely at issue here.

6 And would also point out that in 1001(e), as it relates to
7 production of witnesses, subparagraph (2), it talks about the
8 limitations. And it says a witness may be produced to testify during
9 presentencing proceedings only if -- and then it lists 5 factors, A,
10 B, C, D, E, and that each one of those factors must be satisfied.

11 Here for guard force number 1, do not believe that there's a
12 dispute whether or not the racking of the gun to Mr. Nashiri's head
13 and the mistreatment committed by the other guard force members or
14 the interrogators is in factual dispute. So there's no substantial
15 significance to calling guard force number 1 on that matter.

16 And, also, I would point out that subparagraph (C) says that
17 in an extraordinary case, when a stipulation of fact would be
18 insufficient as a substitute for the testimony, the commission can
19 consider as a factor to call the witness.

20 But here we have a written record interview establishing the
21 facts that are necessary to present to the panel as to the
22 mistreatment. Subsequent opinions, feelings of the witness about the
23 matter, observations about their own personal viewpoints are not

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1 relevant to the fact to be presented to the panel that he was
2 mistreated.

3 Again, the government argues that a statement admitting
4 relevant facts could be satisfied to present these matters to the
5 panel.

6 Thank you, Your Honor.

7 MJ [COL FITZGERALD]: Thank you.

8 Defense, would you like to respond? Or next witness?

9 LDC [MS. MILLER]: Just very briefly.

10 I agree that in an extraordinary case the commission can
11 compel live witnesses, which is what we're here asking the court to
12 do in this extraordinary case. The government both said there was a
13 dispute and not a dispute in the same argument.

14 Obviously, what the guard force members initially reported
15 is different than what the reality is. And even seeing the
16 progression from guard force member 2 to 5, guard force member
17 number 2 said he never saw the gun being racked. And so to guard
18 force member number 5 talking about personally racking the gun, I
19 absolutely think there is a matter in dispute of really just how -- I
20 mean, as bad as we know it was, really how bad it was.

21 And I think the real dispute is that the government keeps
22 calling this mistreatment of Mr. al Nashiri. The Government tortured
23 Mr. al Nashiri. And where I think the dispute is is they'll agree

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1 that Mr. al Nashiri was mistreated as part of a program to collect
2 intelligence. But our position is he was tortured for punishment's
3 sake alone, well past any intelligence gathering.

4 I have nothing further on this witness, sir.

5 MJ [COL FITZGERALD]: Thank you.

6 LDC [MS. MILLER]: The next witness is SPO, Sierra Papa Oscar.
7 I don't have much on SPO, just that he was present -- so NX2 has been
8 discussed as one of the particularly aggressive interrogators and one
9 of the interrogators that Mr. al Nashiri was, like, threatened with
10 that NX2 would be back.

11 He's deceased. Otherwise, love to have him on the witness
12 stand.

13 But SPO was present for some of the events with -- that
14 involved NX2. So if I can refer the commission to page 3219 from
15 AE 679DD, I just highlighted that SPO was present for this and that
16 Mr. al Nashiri basically said he would sign anything.

17 **[Pause.]**

18 MJ [COL FITZGERALD]: Thank you.

19 LDC [MS. MILLER]: I have nothing further, sir.

20 MJ [COL FITZGERALD]: Government?

21 MATC [MR. WELLS]: Yes, Your Honor. Here we would object as
22 it relates to the defense presenting this through a witness as a
23 matter of hearsay, the accused. However, if there's other

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1 information in this document that demonstrates Mr. Nashiri's reaction
2 or questioning that relates to his treatment and mistreatment, abuse,
3 torture, cruel, inhuman, degrading treatment, we would include that
4 in a statement admitting relevant facts.

5 Nothing further, Your Honor. Thank you.

6 MJ [COL FITZGERALD]: Any response, Defense, or next witness?

7 LDC [MS. MILLER]: I'm glad Mr. Wells drew me -- my attention
8 to that point. I neglected -- and ----

9 MJ [COL FITZGERALD]: To what point?

10 LDC [MS. MILLER]: Mr. al Nashiri's response ----

11 MJ [COL FITZGERALD]: Oh.

12 LDC [MS. MILLER]: ---- from page 3221. Just the top of the
13 first full paragraph, sir, if I could direct your attention. This is
14 the same interview that SPO was present for.

15 MJ [COL FITZGERALD]: This is 3221?

16 LDC [MS. MILLER]: Yes, sir. 3221.

17 **[Pause.]**

18 MJ [COL FITZGERALD]: Thank you.

19 LDC [MS. MILLER]: I have nothing further on SPO, sir.

20 MJ [COL FITZGERALD]: Mr. Wells, she put up a secondary
21 document in response to you, 3221. Do you have anything to add based
22 on that?

23 MATC [MR. WELLS]: No, sir, other than if there's other

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1 matters in that document that were not highlighted, we'd be willing
2 to include that information to demonstrate the abuse that Mr. Nashiri
3 suffered.

4 Thank you, Your Honor.

5 MJ [COL FITZGERALD]: Thank you.

6 Can we take a recess?

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

8 MJ [COL FITZGERALD]: I think it's been about an hour.

9 Court is in recess until 1011.

10 **[The R.M.C. 803 session recessed at 1000, 28 April 2026.]**

11 **[The R.M.C. 803 session was called to order at 1010, 28 April 2026.]**

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

13 All parties present before the last recess are again
14 present. Mr. Nashiri is attending this session from the alternate
15 site.

16 Ms. Miller?

17 LDC [MS. MILLER]: I just wanted to posit one thing to put on
18 your radar. I know we were talking about doing a closed session this
19 afternoon. Perhaps if -- a request would be to do everything open,
20 if the commission is amenable, and have a full day closed tomorrow so
21 that Mr. al Nashiri doesn't have to be transported for both days.
22 And so I just wanted to -- something to think about. Doesn't need to
23 be addressed right now.

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1 MJ [COL FITZGERALD]: I will take it under advisement. We'll
2 see where we get. Ut I'm not averse to it, but I'll see where we
3 get.

4 LDC [MS. MILLER]: Just trying to reduce his transportation.

5 MJ [COL FITZGERALD]: I understand.

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

7 The next witness on my list is CIA officer. She's referred
8 to as "interviewee" in -- it's a summary of a 302. It appears that
9 she was interviewed by the FBI and the CIA.

10 MATC [MR. WELLS]: Your Honor, on this matter, I just remind
11 everyone that this is likely classified information. So just be
12 careful about reading from the document.

13 Thank you, Your Honor.

14 MJ [COL FITZGERALD]: Wait.

15 LDC [MS. MILLER]: It's definitely classified. I'm not going
16 to read from the document.

17 MJ [COL FITZGERALD]: So, Ms. Miller, you're telling -- you're
18 advising through me, Ms. Miller, please don't read from the document.
19 What we've been doing is just point to what you want me to read.

20 LDC [MS. MILLER]: Yes.

21 MJ [COL FITZGERALD]: Okay.

22 LDC [MS. MILLER]: From page 3224, AE 679DD, the fourth
23 paragraph down -- and I've highlighted the last sentence for the

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1 commission's attention, but I direct the commission to that full
2 paragraph.

3 **[Pause.]**

4 MJ [COL FITZGERALD]: Thank you.

5 LDC [MS. MILLER]: And I think generally, I'm not speaking
6 about this document, it is understood that there were medical
7 providers as well as high-ranking officials that had the authority to
8 stop either the EITs, unauthorized techniques, or even things that
9 the government would consider fell below EITs that I would still
10 characterize as torture. And at times, it was necessary for certain
11 witnesses to do so.

12 I would direct the commission to -- I'm going to go from the
13 bottom, the third full paragraph from the bottom.

14 **[Pause.]**

15 MJ [COL FITZGERALD]: Thank you.

16 LDC [MS. MILLER]: And then the last paragraph, sir, if I
17 could direct your attention, particularly to the first sentence.

18 MJ [COL FITZGERALD]: Thank you.

19 LDC [MS. MILLER]: Page 3225 of AE 679DD, same interview,
20 first full paragraph. Much has been made mention of Abu Zubaydah.

21 And so just wanting to point out our involvement relates to

22 Mr. al Nashiri.

23 **[Pause.]**

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1 MJ [COL FITZGERALD]: Thank you.

2 LDC [MS. MILLER]: Then the third paragraph, really just the
3 last sentence I wanted to draw the commission's attention to.

4 MJ [COL FITZGERALD]: Thank you.

5 LDC [MS. MILLER]: And I would wholeheartedly disagree with
6 Mr. Wells and his assertion that how people feel about their
7 participation in this program, the CIA's torture program, is
8 irrelevant because I suspect, again, having not had the benefit to
9 interview these witnesses, that some of these witnesses will take the
10 stand and say "I'm proud of what I did. We were trying to prevent
11 the next 9/11 and I would do it again. It was part of an
12 intelligence-gathering effort, and how far would you go to stop the
13 next 9/11?"

14 Versus there are witnesses such as the one we're addressing.
15 And I said I would never mention it again, that I suspect deeply
16 regret their involvement in this, which goes to our argument, right?
17 The overall theme is this was not an intelligence-gathering effort.

18 If it was an intelligence-gathering effort in 2002, it was
19 certainly not in 2006. I would argue it wasn't even in 2003.

20 And part of the SSCI Report, there is a cable that has been
21 unclassified. And I'm certainly paraphrasing because I do not have
22 it in front of me, but ostensibly says: Torturing Mr. al Nashiri is
23 having diminishing returns. He has told us everything that he knows.

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1 And now if we torture him, it doesn't signify whether telling the
2 truth or telling a lie makes a difference if the result is him being
3 tortured at the end of it.

4 And that cable was sent to the CIA Headquarters, who
5 responded, "Keep doing it."

6 And so our argument is certainly that this is punishment for
7 punishment's sake alone. And some people, I suspect, particularly
8 what I will characterize as being anally sodomized or raped, would
9 prefer death to that.

10 And so how people who participated in this program feel
11 about it goes to support our argument, particularly those that are
12 regretful or don't want their families to know about what they did,
13 goes to our argument that that's because this wasn't a legitimate
14 intelligence-gathering operation. If it started that way, it
15 certainly didn't end up that way.

16 And so that is why we are moving to compel live witnesses
17 generally, but certainly this CIA officer, or interviewee, detailed
18 in 3224 and 3225, sir.

19 MJ [COL FITZGERALD]: Mr. Wells?

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

21 The purpose of evidence in presentencing for the panel to
22 consider is to determine what punishment the offender, and in this
23 case, Mr. Nashiri, should suffer for the offense. This is the matter

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1 in 1001(c). It describes subpart (1)(B), matters in mitigation of
2 the offense to lessen the punishment.

3 Panel members make decisions on facts, not on opinions,
4 viewpoints, regrets, revisioned opinions. But at the time, the
5 mitigation, and the rule directs us to the discussion, the nature and
6 length of the pretrial detention, that is what is the focus.

7 The government is not disputing the facts of the
8 mistreatment. Whether or not a particular witness has an opinion
9 about it, the government would object as to relevance on that matter.

10 And as it relates to production of a witness, in 1001(e),
11 all of the five factors conjunctive must be considered. The
12 government has offered a statement admitting relevant facts to the
13 panel to consider as to the treatment of Mr. Nashiri in the RDI
14 Program. And it's not the purpose to call the witnesses to pillory
15 them, to embarrass them. We're not here to put the purpose and the
16 motive of the RDI Program on trial.

17 MJ [COL FITZGERALD]: Why not?

18 MATC [MR. WELLS]: Yes, sir. What we're here to do for the
19 panel is ----

20 MJ [COL FITZGERALD]: I'm talking about as applied. Not the
21 RDI Program, but as applied.

22 MATC [MR. WELLS]: Correct, sir. The facts of the matter as
23 applied to Mr. Nashiri and the abuse he suffered, limited to that.

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1 If we get into a debate as to the efficacy of the program, whether or
2 not Mr. Nashiri was able to provide information to prevent future
3 attacks, that is a trial within a trial, and that is not appropriate
4 or relevant for the panel members to consider.

5 We do know that after Mr. Nashiri was captured, additional
6 al Qaeda attacks occurred. And if he had ----

7 LDC [MS. MILLER]: Object to facts not in evidence, sir.

8 MATC [MR. WELLS]: ---- information, that would have been
9 relevant to consider. But in this matter, the government is not
10 going to raise that matter. And it's not relevant for the defense to
11 raise that matter. It's just the facts of how Mr. Nashiri was
12 treated, black and white.

13 The focus of this case, and for sentencing purposes, as to a
14 matter of mitigation relates to the offense and the offense that
15 occurred here was an anvil that fell on those sailors that took their
16 lives forever, and those that suffered the punishment of that
17 explosion throughout their lives.

18 Thank you, Your Honor.

19 MJ [COL FITZGERALD]: Thank you. And during your
20 presentation, the defense objected to facts not in evidence. Your
21 objection is noted.

22 LDC [MS. MILLER]: The constant characterization of
23 mistreatment or abuse of Mr. al Nashiri versus the torture of

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1 Mr. al Nashiri, I would -- I think underscores that this is going to
2 be a perpetual debate. And I don't think the government understands
3 what we are attempting to do in sentencing.

4 It is -- I've said this before. Our sentencing is not
5 limited to what the CIA did to Mr. al Nashiri. It is certainly a
6 part of it. And I think the commission certainly can expect that the
7 government or one of these witnesses would potentially argue the
8 legitimacy of the torture program because it was an
9 intelligence-gathering program because we were trying to stop the
10 efforts of future terrorist attacks. That's what Mr. Wells just
11 said.

12 And our argument is Mr. al Nashiri has already been
13 punished. The member panel can consider that when determining how
14 much additional punishment he deserves. No one -- that's what I
15 said. No one is going to argue that the death of these 17 sailors
16 was anything short of awful.

17 That -- and the government just brought that up in their
18 response to a motion to compel a presentencing witness. And I think
19 that is something that is lost, and I wish that victim family members
20 were better informed frequently that the sentencing largely becomes
21 about Mr. al Nashiri. It's about what sentence Mr. al Nashiri
22 deserves if the government is able to convince this member panel to
23 convict him with proof beyond a reasonable doubt.

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1 But, so the sentencing is about sentencing the whole man
2 from zero to 61, and sometimes even before zero.

3 And it is absolutely relevant to our position that this was
4 punishment for punishment's sake alone when you have witnesses who
5 say, "We shouldn't have done this. I regret it. I don't want my
6 family to know about it," versus witnesses that say -- or the
7 government's going to argue -- I mean, clearly they posited
8 throughout the course of this that this was necessary to prevent
9 future terror -- excuse me -- future terrorist attacks.

10 MJ [COL FITZGERALD]: Thank you.

11 LDC [MS. MILLER]: The next is WU4, Whiskey Uniform 4. I
12 don't have a ton on WU4. And I don't -- they don't appear to be
13 paginated associated with the -- what was submitted to the trial
14 judiciary. I can certainly -- I think they were, but I don't see the
15 page number.

16 The pagination is on the list that was provided to the
17 commission, the 1000 -- or excuse me -- 10015-00245662-4. I'm
18 directing the commission to that page. And if it's not part of
19 679DD, I will double-check, but I believe it was.

20 This person is a psychologist. And I'm directing the
21 commission to sort of the last couple sentences with recommending
22 socialization among the detainees.

23 And then I have one other page to show the court. I'm

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1 sorry. Again, I don't have the trial judiciary marking, but it's
2 10015-00245663 from a discovery production. The last paragraph there
3 also from WU4.

4 I'm -- he -- again, not reading directly from this document,
5 which remains classified, although I don't understand why -- but
6 generally I think we can speak that anyone would do better in better
7 living conditions. And I think that last sentence that's highlighted
8 refers to Mr. al Nashiri in particular. The last four words of what
9 is highlighted.

10 **[Pause.]**

11 LDC [MS. MILLER]: And why WU4 felt it appropriate to have
12 this correspondence with, it appears, Interrogator F4C, Foxtrot 4
13 Charlie. That's all I have, sir.

14 Hold -- just one moment, actually. I think I have another
15 page. Oh, I do.

16 This is paginated, and I think they're all in order. But
17 this is 3227 from Appellate Exhibit 679DD. And I highlighted this in
18 particular for the commission's consideration for how many times the
19 government has suggested substituting Mitchell and Jessen, who we are
20 seeking as witnesses, but in addition to other witnesses.

21 WU4 characterizes the rapport that Mitchell and Jessen have
22 with the detainees. And so certainly given that, I think it's
23 prudent to have witnesses who had either a better or worse rapport.

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1 But I think the commission can see the adjective in the highlighted
2 sentence before "rapport."

3 MJ [COL FITZGERALD]: Thank you.

4 LDC [MS. MILLER]: I have nothing further on that witness,
5 sir, WU4. But we are moving to compel that person's in-person
6 testimony.

7 MJ [COL FITZGERALD]: Thank you.

8 Government, WU4?

9 MATC [MR. WELLS]: Yes, Your Honor. This is a prime example
10 of the facts could be reduced in a statement admitting relevant
11 facts. Witness is not needed to be called in this proceeding to
12 explain those facts.

13 Again, we would cite to 1001(e) and the five factors that
14 are -- the commission should consider. Would argue that there's not
15 a substantial issue or matter in dispute. The observation of this
16 person as to Mitchell and Jessen, their relationship to the detainees
17 is not relevant for the panel to consider in sentencing. It's only
18 how Mr. Nashiri was treated, how he was treated, those observations,
19 and his reactions.

20 Thank you, Your Honor.

21 MJ [COL FITZGERALD]: Thank you.

22 LDC [MS. MILLER]: The government is just wrong. Wrong. I
23 don't know how else to say it. I can certainly provide a litany of

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1 case law on what the purpose of a sentencing phase is in mitigation.
2 Mitigation is never offered to justify, excuse, or defend the crime.
3 It's offered to lessen the moral culpability of the defendant who at
4 that point has been convicted of the crime.

5 Loosely, Lockett and Eddings say it can be pretty much
6 anything. I think Ms. Manuele listed out probably 20 different
7 themes beyond Mr. al Nashiri's treatment in the CIA's torture program
8 as to what our themes in mitigation are. And so if the commission or
9 the government requires -- and that's what I made reference to the
10 commission in a footnote -- and I had it, what order that was in,
11 referred to Eddings and Lockett specifically and so certainly is well
12 familiar that mitigation is to be given extraordinarily wide
13 latitude.

14 And we've tried to narrow it as much for the commission's
15 consideration, because this is a new process for me, having to move
16 to compel witnesses to support our mitigation theory, that in an
17 Article III court would be available to me and I would have
18 compulsory process over.

19 Moving on. W87 we have previously addressed -- I have
20 previously addressed. This is in duplicate.

21 I saw the sign. I will slow down.

22 So I'm not withdrawing W87, but I don't need to readdress
23 W87.

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1 The Deputy Chief of Alec Station, I neglected to bring that
2 portion of the SSCI Report. It's page 67 of 499. It's unclassified.
3 As the Deputy Chief of Alec Station, there is a conversation about
4 whether Mr. al Nashiri is cooperating or not and how to assess that.
5 And so I certainly think having someone like the Deputy Chief of Alec
6 Station talk about how cooperation by a detainee was assessed and
7 whether or not Mr. al Nashiri did cooperate would go to one of our
8 themes of mitigation. And we're moving to compel that witness, sir.

9 MJ [COL FITZGERALD]: Government, Deputy Chief of Alec
10 Station?

11 MATC [MR. WELLS]: Yes, Your Honor. Although the information
12 cited in the SSCI Report is unclassified and the government would not
13 oppose that information being presented to the panel, to call this
14 witness, though, where it's not clear that they had direct
15 observation of Mr. Nashiri and how he was treated.

16 And we know that Alec Station is the Headquarters element.
17 And the assessment of cooperation or noncooperation is not relevant
18 in this matter. It's how Mr. Nashiri was treated or not treated.
19 Not the motives, reasons why that the panel needs to consider on
20 whether or not ----

21 MJ [COL FITZGERALD]: How did you come to that determination?
22 The word is "may raise the nature and length of pretrial detention."
23 You cited to that.

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

2 MJ [COL FITZGERALD]: How are you -- how are you putting
3 limitations on nature? Are you citing to case law to support that?

4 MATC [MR. WELLS]: Sir, just a commonsense analysis, but we
5 can also look deeper in the case law that talks about the reasons why
6 and the program and the goals and the objectives and the information
7 that was taken in or not are not relevant to how the program was
8 applied to Mr. Nashiri.

9 If we go down that road during sentencing or otherwise in
10 this case, it seems to be unfruitful for the panel to consider ----

11 MJ [COL FITZGERALD]: I understand that. But the thing is
12 we're trying to determine what witnesses to call ----

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

14 MJ [COL FITZGERALD]: ---- not determine how we're going to
15 limit their testimony. That would happen while they're giving
16 testimony by arguing that it's not relevant under 401, 402, or
17 somehow 403 applies.

18 But, again, and I've said it several times, this is a motion
19 to compel presentencing witnesses. And that the only definition I've
20 given, which is not found in the Manual for Courts-Martial is, may
21 raise the nature and length of pretrial detention. "Nature" seems to
22 be a broad encompassing word that includes everything except length.

23 MATC [MR. WELLS]: If this witness has direct evidence of the

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1 conditions of Mr. Nashiri's treatment, that would relate to the
2 nature.

3 MJ [COL FITZGERALD]: Is that a requirement, that he has to
4 have direct observation?

5 MATC [MR. WELLS]: Well, sir, I'm making a relevance argument,
6 401, 403. Counsel talked about that she would have free will or free
7 authority within Article III to subpoena anybody to make the
8 presentencing case. However, in those circumstances, the opponent,
9 the government, would still make an objection whether or not the
10 testimony is relevant and material ----

11 MJ [COL FITZGERALD]: Once they take the stand. That's my
12 point. We're talking about compelling witnesses. That's the whole
13 purpose of this motion, not to dissect what they may or may not say
14 on the stand, what the defense may or may not ask in questioning, or
15 how to limit your cross-examination. It's just whether this witness
16 should come and speak to the nature and length of what occurred in
17 pretrial detention. It seems broad and encompassing.

18 MATC [MR. WELLS]: Sir, I would say that more precision is
19 necessary to compel that witness to appear and the government to
20 produce that witness. Here it's akin to a motion in limine ----

21 MJ [COL FITZGERALD]: Where do they get that precision that
22 you seek? You've provided them the summary. And now you say you
23 want more precision. Why didn't you provide them more precision in

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1 your summary?

2 MATC [MR. WELLS]: Sir, the summary is verbatim oftentimes and
3 in the summaries that have been approved ----

4 MJ [COL FITZGERALD]: Oftentimes.

5 MATC [MR. WELLS]: Yes, sir. At the end it also says whether
6 or not relevant information has been removed. Oftentimes in these
7 summaries we're talking about, say zero relevant information.

8 The point is, as to production under 703, the witness must
9 be relevant and necessary and noncumulative. When we're talking
10 about classified information, which this witness would be providing,
11 it is only -- the witness would only be produced ----

12 MJ [COL FITZGERALD]: I understand it is unclassified
13 information from the SSCI Report.

14 MATC [MR. WELLS]: Well, she also wanted to talk broader. So
15 if it was just limited to the SSCI Report, that information could be
16 provided through this witness. And I don't think we'd have an
17 objection in that point.

18 But to go further, as counsel wants to argue, that we want
19 to attack the program, whether or not it was an appropriate program,
20 raising political decisions, programmatic decisions, policy decisions,
21 those are not relevant for the panel to consider ----

22 MJ [COL FITZGERALD]: Again, that we would take up when the
23 witness is on the stand. We're only taking up whether this witness

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1 is relevant to take the stand.

2 MATC [MR. WELLS]: Yes, Your Honor. And I would ask that for
3 every time that counsel argues that point, that witness is not
4 relevant to take the stand to provide that testimony. And you should
5 not produce that witness to provide that type of evidence.

6 Thank you, Your Honor.

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

8 Defense, any response to the government's position or any
9 question that I presented to the government?

10 LDC [MS. MILLER]: No.

11 MJ [COL FITZGERALD]: Very well. Next witness.

12 LDC [MS. MILLER]: Interrogator Number 1 is Dr. Jessen, which
13 has been granted. I did not know that at the time I wrote this.

14 MJ [COL FITZGERALD]: Oh. Very well.

15 That's your understanding as well, Mr. Wells? You've
16 granted Interrogator Number 1 ----

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

18 MJ [COL FITZGERALD]: ---- because it is Dr. Jessen?

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

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

21 Next witness?

22 LDC [MS. MILLER]: It's Medical Provider TU2. If I can just
23 have one moment please, sir.

1 **[Pause.]**

2 LDC [MS. MILLER]: I'm going to refer the commission to
3 several pages from 679DD. The first is 3228. This appears to be,
4 like, a witnessing -- or excuse me, witnessing -- messaging app
5 that's going back and forth between B7F and TU2, seeking guidance as
6 medical providers.

7 And so there was a reference previously by the government
8 that these medical providers weren't treating the detainees as
9 patients. And I would agree that's probably true of some and
10 probably not true of others. In particular, TU2, referring the
11 commission to kind of the middle of the page, 6 December 2006,
12 talking specifically about the information that that medical provider
13 can provide.

14 And then also on page 3229, there are some medical providers
15 or personnel that participated in the rendition program -- I'm sorry.
16 It's the next thing. Hold on one sec.

17 This -- I apologize. I'm already skipping ahead to the next
18 page. But this goes to, again, the purpose that the medical
19 providers either saw themselves there as, or as others saw
20 themselves -- or as others saw the medical providers who were at the
21 black sites.

22 I believe -- not "I believe." Ms. Manuele definitely
23 mentioned as part of one of the themes of mitigation is that

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1 Mr. al Nashiri continues to suffer from a number of physical and
2 mental ailments, that he often -- more often than not does not seek
3 medical treatment for.

4 And I think it's consistent with the medical providers'
5 participation in the torture program that he might have some
6 distrust. And so I expect a government argument of if he's this
7 sick -- right? -- as we're going to posit through some of our experts
8 and some of the experts that we've moved to compel that we hope the
9 court grants -- if he's this sick, why doesn't he see a doctor?

10 And so to rebut that argument, we are going to be routinely
11 saying, because he has a well-founded distrust in the government
12 generally and the medical providers provided by the government.

13 And then the last page I was already talking about is 3232
14 of AE 679DD. This is the one I was talking about. There are
15 participants in the rendition process, as well as medical providers,
16 that will testify that rectal exams were necessary. And it would
17 suggest that there are medical providers that have a difference of
18 opinion. Directing the commission to what's been highlighted on this
19 page, sir.

20 **[Pause.]**

21 MJ [COL FITZGERALD]: Thank you.

22 LDC [MS. MILLER]: I have no further argument moving to compel
23 TU2.

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1 MJ [COL FITZGERALD]: Government?

2 MATC [MR. WELLS]: Yes, Your Honor. As to this witness,
3 again, the purpose to call this witness would be to observe how
4 Mr. Nashiri was treated, not to elicit opinions about the program on
5 what was needed or not, but just the medical opinions.

6 To the extent that counsel would like additional information
7 presented in a statement admitting facts, relevant facts, the
8 government would do that. Those are not in dispute on how
9 Mr. Nashiri was treated. Therefore, the witness is not needed to be
10 called to -- on those matters.

11 Thank you, Your Honor.

12 MJ [COL FITZGERALD]: Thank you.

13 Any response or next witness?

14 LDC [MS. MILLER]: No response. I've given up.

15 MJ [COL FITZGERALD]: I'm not sure if that's a response to me.

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

17 MJ [COL FITZGERALD]: I'm happy to take any information you
18 want to give me, but ----

19 LDC [MS. MILLER]: Not at all, sir. It seems like the
20 government and I are completely talking past one another.

21 MJ [COL FITZGERALD]: And that's fine. Are you done?

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

23 MJ [COL FITZGERALD]: Any other witnesses?

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1 LDC [MS. MILLER]: Oh, yes. I have a couple -- just one other
2 witness, sir.

3 MJ [COL FITZGERALD]: Okay. I'm concerned that you think I'm
4 cutting you short. I understand that there's an impasse between you
5 and the government. That's why you file motions. But I'm here to
6 take any information you want to share, and you're doing a fine job.

7 So is there anything else you would like me to hear?

8 LDC [MS. MILLER]: No. My response would be the same as it
9 has been to other witnesses.

10 MJ [COL FITZGERALD]: Okay. Next witness.

11 LDC [MS. MILLER]: The next witness is J5P, Juliet 5 Papa.
12 This person also served as the chief of base as Location Number 4,
13 from page 3281 from AE 679DD.

14 MJ [COL FITZGERALD]: Can you give me that page number again?
15 I apologize.

16 LDC [MS. MILLER]: No, no. 3281.

17 **[Pause.]**

18 LDC [MS. MILLER]: If I could direct -- it's really the first
19 paragraph under sort of the -- what this is information. If I could
20 direct the commission to that information, please.

21 It goes along with general theme of Mr. al Nashiri's being
22 conditioned to tell these people what they want to hear. Also,
23 describes Mr. al Nashiri's demeanor.

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1 **[Pause.]**

2 MJ [COL FITZGERALD]: Thank you.

3 LDC [MS. MILLER]: Similarly, this chief of base officer, J5P,
4 was present for some of the interrogations with NX2 -- as we've
5 discussed, is deceased -- from page 3284, just making reference to
6 the fact that this officer was present during this interrogation done
7 by Interrogator Number 6 and NX2.

8 And then lastly, if I can direct the commission to the last
9 substantive paragraph before the welcome, referring to Location
10 Number 4 and the fact that we know medical personnel were involved in
11 the torture program to step in if necessary, and on occasions we've
12 seen times where they did step in when it became necessary.

13 And so to know that a determination was made, absent medical
14 advice, about how long enhanced sessions would have to last, again
15 absent any sort of medical intervention, I certainly think is
16 relevant to the finder of fact who's deciding what sentence is
17 appropriate after hearing, in part, what Mr. al Nashiri has gone
18 through in the CIA's torture program, which is why we are moving to
19 compel Officer J5P, sir.

20 MJ [COL FITZGERALD]: Thank you.

21 Government?

22 MATC [MR. WELLS]: Yes, Your Honor. Those particular
23 documents, which counsel has shown you, describe a plan and not an

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1 actual application of the program to Mr. Nashiri. Don't think that
2 that is relevant.

3 To the extent that J5P had actual contact with Mr. Nashiri
4 and -- that would be relevant as the program was applied. However,
5 this is classified information, and one of the factors to consider is
6 the impact and effect on classified intelligence activities. And for
7 that reason, the witness should not be produced. And we would offer
8 a statement admitting relevant facts as to the abuse and mistreatment
9 that Mr. Nashiri endured.

10 Thank you, Your Honor.

11 MJ [COL FITZGERALD]: Defense, any response?

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

13 MJ [COL FITZGERALD]: Next witness? Or I think you may have
14 told me that was your last witness.

15 LDC [MS. MILLER]: The last witness listed is chief of base,
16 Interrogator Number 5. We are moving to compel that witness. That
17 witness was addressed thoroughly in the merits portion. And so I
18 believe what that officer -- excuse me -- what that interrogator
19 would offer in merits is relevant to both merits and presentencing.
20 But I don't have any additional argument beyond what was previously
21 argued, sir.

22 MJ [COL FITZGERALD]: Very well. Anything else?

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

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1 MJ [COL FITZGERALD]: Mr. Wells, any response with respect
2 to -- she didn't add anything else, but she believed it was covered.
3 What they want on the merits, what they would also want this witness
4 for in sentencing. Not necessarily, I don't think, to come back and
5 testify to the same things, but...

6 MATC [MR. WELLS]: Yes, sir. We would argue the same
7 arguments and again emphasize that a statement admitting relevant
8 facts is the best authoritative evidence on -- and record of what
9 occurred. And if we need commentary, it would be Mitchell and Jessen
10 as the witnesses that the government would offer.

11 Thank you, Your Honor.

12 MJ [COL FITZGERALD]: Do you have case law that supports that
13 concept that best evidence is a statement of relevant facts over a
14 witness testifying?

15 MATC [MR. WELLS]: Sir, I believe that in classified
16 discovery, maybe the Moussaoui case and maybe Mejia, too. I could
17 brief -- present that information to the commission. In classified
18 information where a statement admitting relevant facts assures the
19 commission that noncumulative, relevant, and helpful information is
20 being presented.

21 So in that circumstance, we believe that witnesses would not
22 be needed to be called to present those same facts in an open
23 session, an unclassified session.

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1 MJ [COL FITZGERALD]: Were those best evidence rulings?

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

3 MJ [COL FITZGERALD]: That was your assertion.

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

5 MJ [COL FITZGERALD]: You said it's the best evidence, and I
6 don't know if you're referring to the best evidence rule, but ----

7 MATC [MR. WELLS]: Sir, part of the struggle that I personally
8 have here is understanding how witnesses, with the passage of time,
9 are going to take the stand and present with as much clarity as the
10 written record presents to the panel exactly how Mr. Nashiri was
11 treated.

12 It seems that without a statement admitting relevant facts
13 for them to refer to and understand to the detail, apparently, that
14 counsel wants to present at every location, at every time, every day,
15 we're going to call all witnesses and perhaps line them up in a
16 chronological sequence here and testify about each incident. The
17 best evidence, the best record of that, are the cables that were
18 reported contemporaneous with that.

19 Having the witness come and in a direct fashion testify
20 about that seems awkward, a recipe for inaccuracy, and difficulty.
21 And we would have to have multiple refresh memory events with the
22 witness just to present what was already recorded in the written
23 record.

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1 At sentencing, for efficiency purposes, the commission can
2 consider that alternatives to calling a witness to present that
3 evidence is better than calling the witness, according to the factors
4 that are balanced in 1001(e).

5 MJ [COL FITZGERALD]: Thank you.

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

7 MJ [COL FITZGERALD]: Defense, would you like to respond?

8 LDC [MS. MILLER]: I would.

9 I disagree that those cases stand for the best evidence is a
10 statement admitting -- a statement admitting relevant facts. Those
11 cases stand for that a substitution for a live witness in certain
12 circumstances was permissible and did not violate the defendant's due
13 process rights in that -- in those cases. It does not in any way say
14 this is the best evidence.

15 The government is purely speculating that these witnesses
16 are not going to recall, particularly the ones that participated in
17 the torture program, what they did or what they observed to
18 Mr. al Nashiri. And I -- again, I think this could all be resolved
19 if we were able to interview these witnesses.

20 But my speculation, based on my limited interaction with
21 these witnesses is they're going to remember exactly what they did.
22 And I don't know, but we won't know until we put them on the stand.
23 And if we need to refresh their recollection, there's certainly a

1 posture and means of doing so.

2 But I disagree with the government's assertion, which mine
3 is as speculative as theirs except for I have a little bit more
4 information that I've promised I won't bring up. But I have a
5 feeling that a lot of these people may remember this very well,
6 despite the passage of time.

7 The government made reference to recalling all witnesses
8 from every day at all location. I think the court certainly can
9 recognize that hyperbole for what it is. We tried to curate a list
10 of witnesses that we thought were representative from many of the
11 locations, but it's certainly not an exhaustive list of everyone who
12 had some involvement with Mr. al Nashiri.

13 Many of the witnesses are the ones that the government
14 identified as having direct and substantial contact with
15 Mr. al Nashiri, and that their testimony would be relevant,
16 noncumulative, and helpful.

17 And I have heard the government argue about, I don't know,
18 six different subject matters that if we were to be able to pursue a
19 theory of defense, that it would be a trial within a trial. The
20 presentencing or sentencing phase, quite literally, is a trial within
21 a trial.

22 Oftentimes it's explained to civilian jurors as there's
23 really two trials. The first trial is where you decide if the

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1 government has proved the allegations beyond a reasonable doubt to
2 convict the accused of the crimes.

3 The second part of the trial is kind of like a whole
4 separate trial where if, and only if, in a civilian court the
5 defendant is convicted of a death-eligible crime, such as murder in
6 the first degree, will you, as a member of the jury, be asked to
7 determine the sentence. If the defendant is convicted of anything
8 less than that death-eligible crime, I, the court, will determine the
9 sentence.

10 And so as to that argument, it really is two trials. The
11 first trial is deciding what Mr. al Nashiri is legally culpable for,
12 or responsible for, based on the government's evidence. And the
13 second trial is deciding, based on his character, his life, his
14 experiences, and the circumstances of the crime -- which is also a
15 definition used to describe mitigation -- anything from the
16 defendant's character, background, or life -- or the circumstances of
17 the offense that would lead a fact-finder to reasonably believe a
18 sentence less than death is appropriate.

19 And so we are asking for fundamental fairness. The
20 government certainly doesn't have any limitations on the witnesses
21 they're able to call to put on the case they'd like. They've cited
22 Old Chief I don't know how many times. And we're asking for the due
23 process that Mr. al Nashiri is entitled to when the government seeks

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1 to execute someone.

2 And I have nothing further, sir.

3 MJ [COL FITZGERALD]: Thank you.

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

5 MJ [COL FITZGERALD]: So I'll note the time. It's 1102. And
6 I think I had built in a little more cushion that we would probably
7 be doing open session, presentencing witnesses until noon, if not
8 later. And I know some -- I owe some other folks information, so I
9 think here's what I would like to do.

10 I need to take up argument in 690C, the motion to compel
11 discovery for Appellate Exhibit 690. So just 690C is left in open
12 session today. And I think it's probably good use of our time to
13 just do all the closed session tomorrow.

14 So tell Colonel Kane tomorrow.

15 ATC [Capt LANNING]: Yes, sir.

16 MJ [COL FITZGERALD]: I didn't have a time set for him
17 tomorrow, did I? Would he be available first thing in the morning?

18 ATC [Capt LANNING]: I'll double-check with him, Your Honor.

19 MJ [COL FITZGERALD]: Okay.

20 ATC [Capt LANNING]: I'd just remind that the government is
21 requesting for that to be in a closed session, given just ----

22 MJ [COL FITZGERALD]: Tomorrow's the closed session.

23 ATC [Capt LANNING]: All day. Gotcha, sir. I just wanted to

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1 make sure.

2 MJ [COL FITZGERALD]: Yeah. So he's in closed session. I
3 would like to do -- I owe the public information, too. So I want to
4 inform the public we have one open session left today to cover a
5 motion to compel discovery, 690C. I don't think I can take up 690
6 today until I respond to 690C, which will be also in open session,
7 but not today.

8 And I don't have anything else to take up in open session.
9 That's, I guess, my biggest point. Those two things, 690C and 690.
10 So everything else is in closed session. But what I -- so Colonel
11 Kane, closed session tomorrow.

12 So I'd like to see if he could be here at 0900. And we can
13 adjust. If he tells me no, then we will adjust because we have other
14 matters we can take up.

15 Who's handling the questioning of -- Ms. Miller?

16 LDC [MS. MILLER]: I jumped the gun.

17 MJ [COL FITZGERALD]: Okay. So just be prepared, either
18 Ms. Manuele, we'll take up her closed session presentencing
19 witnesses, but be prepared both of you to start at 0900 is what I
20 ask.

21 And who is responding? Is this you, Captain Lanning?

22 ATC [Capt LANNING]: Yes, sir.

23 MJ [COL FITZGERALD]: Okay. So just be prepared you may be at

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1 0900. But if Colonel Kane -- and you'll know before all of us it
2 seems. If he's not able to come at 0900, just tell me what time he
3 is available, and we'll adjust fire from there.

4 ATC [Capt LANNING]: Yes, Your Honor. Would you like us to
5 send an e-mail to your staff after the session concludes today if
6 we're able to get an answer earlier?

7 MJ [COL FITZGERALD]: Repeat the question?

8 ATC [Capt LANNING]: Sorry, sir. Just so everybody is
9 tracking, before 0900, it's not just in the morning he'll show up and
10 we'll say he's ready. We'll tonight say ----

11 MJ [COL FITZGERALD]: We still have an open session, so please
12 ask him now.

13 ATC [Capt LANNING]: Okay.

14 MJ [COL FITZGERALD]: We still have -- when we come back to
15 take up -- because what I'm going to do is recess you for lunch, come
16 back at 1300 to take up 690C, because I think that's your argument,
17 Ms. Miller. I don't want to ----

18 LDC [MS. MILLER]: I'm ready, sir.

19 MJ [COL FITZGERALD]: Okay. Who has 690C for the government?
20 It's ----

21 TC [CAPT STINSON]: I have that one, Your Honor.

22 MJ [COL FITZGERALD]: I have 54 minutes. It seems like
23 something we could probably do argument, but I was giving a courtesy

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1 to you not to have to pivot too quickly.

2 TC [CAPT STINSON]: I'm good either way, Your Honor. Over.

3 LDC [MS. MILLER]: If the commission's intention is to recess,
4 I'd rather just address it before lunch.

5 MJ [COL FITZGERALD]: Okay. I'm prepared. And you -- Captain
6 Stinson, are you prepared, then?

7 TC [CAPT STINSON]: I can argue it, yes, Your Honor.

8 MJ [COL FITZGERALD]: Okay. Well, you didn't answer my
9 question. You are prepared? I know you can argue it, but I ----

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

11 MJ [COL FITZGERALD]: Okay. I don't want to rush you.

12 Can I excuse Captain Lanning, or have you put a paralegal to
13 the task of getting the information to Colonel Kane?

14 ATC [Capt LANNING]: I just did, sir.

15 MJ [COL FITZGERALD]: Okay. So we hopefully will have that
16 information before recess. So I think what the parties are doing is
17 they've done their own math, and rather than come back from lunch
18 they just want to recess for the day so they can use that time
19 advantageously. I understand.

20 Okay. Colonel Garrett.

21 ATC [LTC GARRETT]: Sir, would it be all right if we had a
22 brief comfort break, then, if we're going to drive on?

23 MJ [COL FITZGERALD]: That was going to be my next question.

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1 How about we take a brief comfort break? I'm coming back, I'm
2 hearing argument on 690C.

3 Very well. Court is in recess until 1120.

4 **[The R.M.C. 803 session recessed at 1106, 28 April 2026.]**

5 **[The R.M.C. 803 session was called to order at 1124, 28 April 2026.]**

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

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

10 During an 802, we established the order of march for the
11 remainder of this week with what we still have to discuss. Today
12 we're taking up in open session 690C.

13 The next day, Wednesday, will be all closed session related
14 to 359RR and the testimony of the JTF commander, as well as argument
15 on the 359RR.

16 Tomorrow we'll also take up closed session presentencing
17 witness, the defense's motion to compel.

18 And then Thursday, we will be back to open session at 0900.
19 I should mention, closed session 0900 will be the testimony of
20 Colonel Kane.

21 0900 Thursday, the only thing remaining is, if we take it
22 up, will be Appellate Exhibit 690. And then that would conclude
23 our -- the week for every session.

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1 LDC [MS. MILLER]: You just missed closed session 680 argument
2 tomorrow. So we have 679DD, the closed session presentencing
3 witnesses, as well as Ms. Manuele's culmination of her argument
4 closed session.

5 MJ [COL FITZGERALD]: Correct, thank you. 680 argument in
6 closed session tomorrow. Thank you for reminding of that.

7 I think that summarizes the 802 and summarizes what we have
8 remaining in this week.

9 Government, anything further from you?

10 ATC [LTC GARRETT]: No, Your Honor.

11 MJ [COL FITZGERALD]: Very well.

12 Defense?

13 LDC [MS. MILLER]: Nothing, sir.

14 MJ [COL FITZGERALD]: Very well.

15 Then, Defense, you have the burden on your motion to compel
16 discovery in 690C. You may have the podium.

17 LDC [MS. MILLER]: Thank you, sir. Good afternoon. Long time
18 no see.

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

20 MJ [COL FITZGERALD]: I apologize, Ms. Miller.

21 LDC [MS. MILLER]: No apology.

22 MJ [COL FITZGERALD]: Short time no see. Good to see you
23 again, and you may proceed.

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1 LDC [MS. MILLER]: So the government responded to 690C and
2 690D. And I think I told the commission that, as expected, kind of a
3 blanket objection, nothing directive or illustrative as far as what
4 the government's objection is, which was what I was anticipating. I
5 was wrong on one point.

6 In the summary section from 690D, the government writes:
7 The defense seeks extensive and largely irrelevant discovery into the
8 process that the services use to obtain nominees, et cetera, et
9 cetera.

10 What I'm drawing the commission to is the fact the
11 government said "largely irrelevant," which I've interpreted as at
12 least some of this the government is conceding is relevant.

13 And the government has also agreed that we can rely on the
14 numbers that myself and one of my analysts -- or all of our analyst
15 team tabulated, for the purpose of this motion as well as litigating
16 AE 690. And so I am going to display some of those charts for the
17 commission's benefit.

18 But just so the timeline is clear, we have General Escallier
19 acting as the convening authority on 10 April of 2025, requesting 75
20 officers of grades O-6 down to warrant officer from each of the
21 services.

22 That memorandum went to the Deputy Secretary of War. The
23 Deputy Secretary of War on 24 April 2025 disseminated that request to

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1 the secretaries for the Army, Air Force, and Navy, accepting all of
2 General Escallier's recommendations as written.

3 I would draw the commission to General Escallier's testimony
4 wherein she testified that routinely in past commissions, she had
5 requested 50 officers from each grade from each service, but in this
6 case she requested 75 officers from each grade from each service.

7 On direct examination when I was asking her, it was just
8 because of the length of the case. When she was being questioned by
9 Captain Stinson on cross-examination, General Escallier indicated in
10 responsive to a leading question, which was appropriate, that the 75
11 was to secure a broad and diverse panel.

12 On redirect, she somewhat parsed with me whether that was
13 her intention in requesting 75 officers from each grade, but conceded
14 that in her declaration that she prepared referenced the litigation
15 in AE 690. She indicated she requested 75 officers of each grade for
16 each service to ensure a broad and large enough venire for a case
17 such as this one.

18 So I would call into question the credibility of her answer
19 as to it being only related to the length of this case, because she
20 has provided declaration -- she has provided a declaration under
21 oath, and in questioning by Captain Stinson, indicated that she
22 expanded the amount of officers she requested for each grade from
23 each service to secure a broad, diverse, large enough venire for this

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1 particular case, the United States of America v. Abd al Rahim
2 al Nashiri.

3 That would, in total -- so 75 from each grade from O-6 to
4 warrant officer would be 525 from each service, and in total 1,575
5 officers from the three services.

6 After the Deputy Secretary sent the memorandum to the
7 secretaries of each service branch on 24 April 2025, the next
8 correspondence we are provided is from 10 September 2025 from one of
9 the legal advisors for General Escallier at the time, Colonel Andrea
10 Hall, recommending that the prior MCCO be -- I can't think of the
11 right word -- dismissed and a new convening order issued with 12
12 primary panel members as well as 350 alternate members.

13 That recommendation was accepted by the convening authority.
14 And General Escallier issued the MCCO on 10 October -- or excuse me.
15 I believe it was 24 October. Let me just make sure I get the correct
16 date. 14 October 2025, the convening order accepted all of Colonel
17 Hall's recommendations, excusing the previously detailed members
18 convened by MCCO 11-02 and convening a new 12 primary and 350
19 alternate members in the venire for this case.

20 What happened between April 24th and September 10th is
21 largely a black hole for the defense. Obviously, based on the
22 numbers, the services, the Army, the Navy, and the Air Force, did
23 their own process of preselection that I have no information

1 regarding.

2 And what I'm -- excuse me. Just one second, sir.

3 **[Pause.]**

4 MDTC [LTC MILLER]: Obviously, as this is my first military
5 commission, I sought guidance from some of my colleagues who had
6 tried capital cases in courts-martial. And that's why I provided the
7 portion of the transcript that I did to the commission, as well as
8 the government, from the United States of America v. Walker, which is
9 a Marine Corps court-martial, capital court-martial.

10 And I spoke to counsel for Mr. Walker, who also suggested
11 speaking to General Vaughn, our current chief defense counsel,
12 because Walker was tried in 2010, that Mr. Vaughn had tried -- excuse
13 me -- General Vaughn had tried cases more recently and would perhaps
14 have more illuminating information. And he had very similar
15 information, if not more extensive.

16 But in the Walker case, the portion of the transcript that I
17 provided the commission begins on page 3515 and was referenced in
18 690C, as well as AE 690. But it discusses e-mails that the defense
19 received in discovery from the government that suggested that -- did
20 not suggest. They openly stated that volunteers were solicited for
21 service as members of the panel in the Walker case, despite explicit
22 instructions not to seek volunteers. And so counsel for Mr. Walker
23 became aware of the fact that that had occurred because they received

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1 discovery from the government of these e-mails.

2 I am under no pretense that the secretary for the Navy, the
3 secretary for the Army, or the secretary for the Air Force selected
4 the nominees to provide to the convening authority for selection for
5 this panel or alternate membership of the panel.

6 I am quite certain they designated that responsibility to
7 subordinates, who delegated that responsibility to subordinates, who
8 delegated that responsibility to subordinates. And so specifically
9 what discovery was requested in the Walker case was any e-mail
10 communication from the base commanders to the units. And so we are
11 talking the very bottom of the totem pole and then working its way
12 back up.

13 And so I don't believe I'm requesting any discovery. The
14 discovery request that I initially sent the government and then what
15 is in 690C is shaped on what I believe is typical of what is
16 requested in a capital court-martial. And I think the government's
17 argument is largely: This is a lot. It's overly burdensome. It's
18 largely irrelevant.

19 And, frankly, I don't care. If they are -- if the
20 government is seeking, as I've stated many times today, the execution
21 of my client, it should be hard.

22 And so, again, I believe what I am requesting is consistent
23 with what is typical for a capital court-martial. I understand that

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1 none of us here have participated in a capital court-martial, which
2 is why I tried to endeavor to learn what would be typically provided
3 in discovery before I requested it, recognizing that we have CA to
4 DEPSEC of War, huge black hole, legal advisor for the CA, and then
5 the CA issuing a new convening authority.

6 And what happens in the middle, again, is sort of a mystery.
7 But the CA tacitly endorsed whatever it was that happened in the
8 middle, because she certainly didn't go back to the DEPSEC of War or
9 any of the secretaries and say, "You didn't follow my instructions.
10 Do it again."

11 And they didn't follow her instructions. And so that's why
12 I say the service branches obviously did some preselection of their
13 own, which is impermissible and not part of the process before
14 providing their nominees to the CA for selection.

15 So I'm referring to AE 690. It's page 6. This is under
16 seal, but I believe it's only under seal because it also included an
17 attachment of all of the Officer Record Briefs. So I don't believe
18 anything from the actual motion itself is classified. And so I would
19 suggest it's available for public viewing.

20 If everybody's more comfortable with parties only, I'm not
21 going to throw a hissy fit. But it is under seal because it
22 contained the Officer Record Briefs as an attachment, which I am not
23 going to make reference to and are not made reference to at all

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1 in -- I mean, they're made reference to. None of the names of the
2 officers or their information are made reference to in the motion
3 itself.

4 MJ [COL FITZGERALD]: Government, do you wish to be heard?

5 TC [CAPT STINSON]: No, Your Honor. I think that
6 representation's right, as long as it doesn't have personal
7 information. That was why it was filed under seal. So I haven't
8 seen the document.

9 I'm not exactly sure what counsel's referring to there. But
10 if it doesn't have the information tied to the Officer Record Briefs
11 or the individual nominees or members of the convening order, then I
12 think they could show it to the public. But it may make sense to
13 first show it to the parties so then we're all on the same sheet of
14 music and then go from there. Over.

15 LDC [MS. MILLER]: Captain Stinson, it's AE 690. It's the
16 pleading itself, the motion, which I'm certain you've seen.

17 TC [CAPT STINSON]: No, understood. I just didn't know what
18 page you were on. I'm sorry. I apologize.

19 LDC [MS. MILLER]: 6. I'm sorry. Page 6.

20 TC [CAPT STINSON]: Page 6. No worries. Okay.

21 No objection, Your Honor.

22 MJ [COL FITZGERALD]: I'm looking at page 6. It's ----

23 LDC [MS. MILLER]: Government said "no objection." I don't

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1 know if you heard that.

2 MJ [COL FITZGERALD]: I did hear "no objection," and I'm
3 looking at page 6 myself, and I don't see any of the information that
4 was the basis for the commission to have sealed it on page 6.

5 But just a reminder, if you want to show things that are
6 under seal or not available to the public, you've got to run that
7 through the CISO first. But we're going to go forward because I
8 understand this is a judicial order for it to be sealed to protect
9 certain information.

10 LDC [MS. MILLER]: And I apologize to you and your CISO. I
11 will do so.

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

13 You may publish it to the public.

14 LDC [MS. MILLER]: So in this top chart, it's the total venire
15 consolidated. So in total -- and, again, between myself and one of
16 my analysts, we've counted these several times. There were a total
17 of 1,623 Officer Record Briefs or officers submitted for
18 consideration to the convening authority. Which, in theory, you
19 think, okay, she was asking for 1,575, she got more than she asked
20 for. Why is that a problem?

21 Because the service branches are not in charge of this
22 process. She is. It's a nondelegable authority. And they did not
23 follow her instructions at all with one exception. The United States

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1 Navy did submit 75 O-1s. Other than that, neither the Army, Navy, or
2 Air Force submitted 75 of any grade other than the Navy submitting 75
3 O-1s. And none of the branches submitted 575 people -- or excuse me,
4 525 people, as was requested from the order from the Deputy Secretary
5 of War to the -- excuse me, the service secretaries.

6 And why that's important is, as the commission can see and
7 what I've highlighted in red is where the services were well under
8 what the convening order requested.

9 And so, obviously, the Air Force apparently lacks warrant
10 officers. The request still said 75. The Air Force didn't come back
11 and say "we can't possibly comply with that request given our amount
12 of warrant officers," but the Air Force submitted eight warrant
13 officers.

14 The United States Army, which I would suggest does not have
15 the same problem, submitted 57 warrant officers, 45 O-1s, and 68
16 O-2s. It is also referenced in this motion that United States Army
17 is the largest service branch, which I think is well known. And O-1s
18 and O-2s, General Escallier actually agreed with me, are the largest
19 grades -- are the largest -- or there are the largest number of
20 officers in those grades in all three services.

21 And so in both the Army and the Air Force -- the Air Force,
22 again, submitting eight warrant officers and 62 O-1s, they're well
23 under what the CA requested. And in the O-1, O-2 category, they're

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1 well under what is available. Again, General Escallier agreeing to
2 that question, that the largest number of officers in each service
3 serve in the O-1 or O-2 grade.

4 I think what's also significant from this chart is in total,
5 then, the Air Force only submitted 487 people of the 525 that
6 were -- that were requested.

7 The Navy submitted 595. So that is more than 120
8 people -- nope. I'm trying to do math in my head right now. It's
9 certainly more than a hundred people -- 108 people, that the Navy
10 submitted more than the Air Force did.

11 And I think that's of particular significance in a case that
12 involves the death of 17 sailors.

13 And then what's interesting from that is you would expect,
14 then, that there would be far more sailors on either the panel or the
15 alternates, and it is quite the opposite.

16 So despite the fact that General Escallier had more than a
17 hundred people in addition from the Navy than the Air Force -- so she
18 should have had 525. She had 70 more than she requested from the
19 Navy. But the number between the Air Force and the Navy is more than
20 a hundred more sailors than airmen, the Army being the closest to
21 what she asked for but, again, not what she asked for. You would
22 expect more sailors, presumably, on this panel or alternate members.
23 And that is not the case.

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1 The CA deselected far more sailors than airmen or soldiers,
2 which is also noted in that paragraph. So that the -- the percentage
3 is the Navy has the largest portion of the total venire that was
4 submitted, 36.67 percent, but of the nominees selected to be panel
5 members or alternate members, only 77 came from the Navy, which
6 includes the Marine Corps as well, versus 173 and 112 people who were
7 selected as panel or alternate members from the Army and Air Force
8 respectively.

9 And so, obviously, in 690 we're arguing there's a problem
10 that the convening authority asked for a certain amount of people for
11 a certain reason, did not get that number, and did nothing to ensure
12 that suggests -- her testimony suggested she never counted and had no
13 idea that she didn't get the number that she asked for. But I would
14 certainly suggest that's an impermissible delegation to the services,
15 because the services just did whatever they wanted and she didn't
16 correct them.

17 Beyond that, referring to page 9 -- again, I apologize to
18 the commission and the CISO. This, I believe, is perfectly capable
19 to be shown to the public. It does not make any reference to any
20 member.

21 Of the 362 people selected, the Army submitted no chaplains
22 and no one from the legal personnel. And when we counted legal
23 personnel -- I mean, this took our analysts obviously looking up some

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1 of the job assignments -- we included paralegals -- sorry. Is there
2 a problem, sir?

3 **[Pause.]**

4 MJ [COL FITZGERALD]: Have we -- you're showing it to the
5 public, but my CISO is wondering if it is being shown to the public.
6 That's what he's trying to confirm.

7 LDC [MS. MILLER]: Oh.

8 MJ [COL FITZGERALD]: But I didn't want to interrupt you.

9 LDC [MS. MILLER]: You can always interrupt me.

10 MJ [COL FITZGERALD]: The tech folks give me a thumbs-up if
11 this is available for viewing to the public and I've gotten a
12 thumbs-up from the tech folks that it is viewable by the public. I
13 apologize. I was trying not to interrupt you.

14 LDC [MS. MILLER]: You're fine. You make a face and do stuff.

15 MJ [COL FITZGERALD]: I was making the face -- just to be
16 clear, I was making my face at my CISO, not at counsel. But you're
17 right, we were trying to resolve that issue quietly and we failed.

18 So you may continue.

19 LDC [MS. MILLER]: Totally fine, sir. I just was making sure
20 it wasn't an error on my part.

21 So the Army submitted no chaplains, no legal personnel, and
22 four folks from the medical field.

23 The Navy submitted zero chaplains, zero people from the

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1 legal field, and four folks from the medical field.

2 The Air Force -- or the Space Force submitted zero
3 chaplains, one member from the legal field, and 19 -- or excuse me,
4 nine -- I can read -- members from the medical field. And that total
5 is 17.

6 And I apologize. I misstated. This is what was actually
7 selected. Let me do a different chart first.

8 **[Pause.]**

9 LDC [MS. MILLER]: Also viewable to the public from page 5,
10 this is what was submitted. The other chart I was showing was the
11 362 that was actually selected. This is what was submitted by the
12 Army, Navy, and Air Force. So much of it is consistent with what I
13 just said.

14 The Army and the Navy did not submit any chaplains or anyone
15 from the legal field.

16 The Air Force submitted three chaplains, six people from the
17 legal field.

18 Each of the branches submitted between 44 and 71 folks from
19 the medical field for a total of 175 people from the medical field.

20 And General Escallier did certainly agree with me on direct
21 examination that there would be far more people in each of those
22 fields, which is detailed in AE 690C, than was supplied to her in the
23 1,623.

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1 Of the 362 that she selected -- that's what I was showing
2 the commission before -- I apologize for the confusion -- no
3 chaplains were submitted -- or excuse me. No chaplains were selected
4 as primary or alternate members from any branch. One
5 legal -- someone in the legal field from the Air Force was selected,
6 and 17 from the medical field.

7 And just briefly, I discussed this in AE 690, but just
8 talking about medical professionals. And I was just looking at
9 physicians to try to keep it simple, but certainly the commission has
10 personal knowledge that there are far more people other than just
11 doctors in the medical field, nurses, nurse practitioners. We saw a
12 note for an OB/GYN on one of the Officer Record Briefs, which would
13 count as a physician, corpsmen, et cetera.

14 And so just looking at the amount of physicians that each of
15 these service branches -- and I got all of this information from the
16 publicly available information that the Army, Navy, and Air Force
17 provide -- the Army Medical Corps alone has 4400 active duty
18 physicians.

19 The Navy medical field consists of over 4300 active duty and
20 reserve physicians in the Medical Corps, along with approximately
21 2600 commissioned officers in the Medical Service Corps.

22 The Air Force Medical Service includes nearly 60,000 total
23 personnel, but the officer-specific count is composed of several

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1 different core key components include over 2300 biomedical science
2 corps officers, approximately 1,000 medical service corps officers,
3 plus thousands more in the medical corps, physicians and nurse corps.

4 And I use that as example. I also in AE 69 -- 690, excuse
5 me -- talk about how many chaplains are in each service branch, which
6 is in the hundreds to thousands, and how many in the legal field,
7 which is certainly in the thousands in each service branch.

8 And so, again, to have the Army and the Navy not submit any,
9 zero, folks who serve as chaplains or who serve in the legal field,
10 it is quite clear that the military did some preselecting of their
11 own before they submitted their nominees for selection to the
12 convening authority.

13 And so I believe in AE 690 that we have well established the
14 convening authority allowed the improper selection or deselection of
15 this panel by not correcting the errors from the service branches.

16 We also discussed this systematic exclusion of a particular
17 rank or grade. She did not request of the Deputy Secretary of War
18 any O-7s to O-10s, which apparently is acronymed as GOFOs which,
19 according to her declaration, is just because we don't ask them
20 because it's probably inconvenient for people that important. And,
21 again, to that, I don't care. They should be a member or at least
22 eligible for selection as members of this panel.

23 But I think we've demonstrated and met our burden in AE 690C

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1 that the government -- excuse me -- that the military service
2 branches played a role in not only not following the instructions
3 that they were explicitly given by the Deputy Secretary of War to
4 provide 75 members of each grade from each service, which none of
5 them complied with, absent the Navy providing 75 O-1s; and then even
6 amongst that, that two of the largest -- the two largest branches,
7 the Navy and the Marine Corps and the Army did not provide any
8 chaplains or any members of the legal field, that there was obviously
9 some preselection process done by the military, which is
10 impermissible, before their 1,623 nominees were presented to the
11 commission -- excuse me -- presented to the convening authority for
12 selection for membership on this panel.

13 And then beyond that, I've tried to demonstrate that we go
14 from April to September/October with very little information about
15 what is happening. Some of the Officer Record Briefs, in candor, do
16 indicate when they were printed, and it's usually June or July. But
17 General Escallier's testimony was -- and I have requested the
18 transcript of her testimony, which we used to be able to get
19 expeditiously. I do not have it at this point. But I wanted to
20 quote for the commission how many times she said on direct
21 examination, "I don't know," or "I don't recall."

22 But specifically when I asked her, "How did you get the
23 Officer Record Briefs?"

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1 "I don't know."

2 "Who compiled the Officer Record Briefs?"

3 "I don't know."

4 "Who put them in the binders for you?"

5 "I don't know."

6 "The Navy's Officer Record Briefs don't include the age or
7 date of birth of the sailor. How did you get that information?"

8 "A spreadsheet."

9 "Who prepared the spreadsheet?"

10 "I don't know."

11 And so when, at best, we have a bunch of information being
12 compiled by the military service branches for the convening authority
13 and she has no idea how it was compiled or who it was compiled by,
14 and it doesn't follow her instructions, it would seem prudent for the
15 commission to discover -- to compel the government to discover that
16 information to the defense.

17 And lastly, I would just say I don't believe we are asking
18 for anything that is outside the norm of a capital court-martial,
19 which I don't think this is, but I would concede it's probably the
20 most analogous.

21 If I can have one moment, sir?

22 MJ [COL FITZGERALD]: You may.

23 **[Counsel conferred.]**

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1 LDC [MS. MILLER]: I have nothing further at this moment, sir.

2 MJ [COL FITZGERALD]: Thank you.

3 Captain Stinson, good afternoon.

4 TC [CAPT STINSON]: Good afternoon, Your Honor.

5 Government believes the commission should deny the defense
6 motion to compel additional discovery related to the selection of the
7 panel members. And I'd like to start sort of where Ms. Miller left
8 off with whether or not this is beyond what is the normal practice in
9 relation to a court-martial or a capital court-martial and just take
10 a step back and think about what information has been provided to the
11 defense.

12 The defense requested and the commission directed, the
13 government has provided, the Officer Record Briefs for the entire
14 nominated pool, all 1,623 members that the service secretaries
15 forwarded to the convening authority.

16 In addition, the convening authority has submitted a sworn
17 declaration under penalty of perjury, and she testified before the
18 commission extensively regarding her personal review and selection of
19 the venire, a venire consisting of 12 primary and 350 alternate
20 members, who will be subject to extensive voir dire. Both parties
21 have submitted proposed voir dire. The commission is now working on
22 a second questionnaire for those members all in order to obtain a
23 fair and impartial panel for Mr. Nashiri to determine his guilt or

1 innocence.

2 And really what the defense has come up with is they're not
3 sure what happened between April 25th and September 10th when we have
4 the extensive legal advice from Colonel Hall that Ms. Miller has
5 referenced. And, obviously, that was the process by which the
6 service secretaries, again, through their staff, got those
7 nominations and forwarded them.

8 And we cite to in our brief in 690D, the case of United
9 States v. Saunders. That's at 6 M.J. 731. It's a 1978 Court of
10 Military Appeals case, Your Honor, for the presumption of regularity
11 for those positions.

12 And I think it goes beyond the presumption of regularity
13 here. The defense pointed to, I think it was, eight Officer Record
14 Briefs with some sort of a sticky note on there. We spent a lot of
15 time with General Escallier walking through those and obtaining the
16 information.

17 Again, I think General Escallier's declaration and her
18 testimony was candid, forthright. It was very, very clear. She did
19 not delegate her responsibility to select the venire. She reviewed
20 all 1,623 officer briefs, knowing the criteria under the Military
21 Commissions Act, which is consistent with Article 25, to select the
22 best candidates based on the criteria in that article. And she
23 testified at length.

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1 The defense counsel points to, well, she's not sure who put
2 the binders together. And we need additional discovery. And it is
3 onerous discovery. We're talking about the defense requesting
4 internal e-mails and communications. And who put binders together,
5 that is not relevant.

6 This case has been going on, I think we've talked about this
7 extensively, for a very, very long time. We are now to the part
8 where we can see the starting line. We have a venire of 362. The
9 convening authority spent a long time going through those 1,623
10 officer briefs, and there is no indication the defense filed this 690
11 based on unlawful influence or improper nominations under 912. And
12 there's just been no indication from the defense of any influence,
13 any improper influence on the convening authority's selection of that
14 venire.

15 The defense points to some -- what they consider to be
16 anomalies and, hey, you know, it was slightly under or over this
17 particular number. But the venire ends up, as the defense has
18 conceded, to be larger than what the convening authority has
19 requested in her instructions to -- or her request to the Deputy
20 Secretary of War. And we can see that just in the numbers, that she
21 requested a nominating pool of 1,575, and the services provided 1,623
22 total nominated officers.

23 And, again, the defense has been unable to point to anything

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1 in the record that would lead to the commission to order further
2 discovery, other than we're just going on a fishing expedition. What
3 happened between April and September? You know, who put these
4 binders together? And that is not, from the government's
5 perspective, relevant for this commission.

6 The relevant part is do we end up with a well-considered
7 process and a broad venire? And the answer to that question from
8 providing all of the records to the defense, to the testimony and the
9 declaration of the convening authority, is that we certainly did. We
10 have a very broad panel.

11 The defense is upset because the Navy nominated more than
12 the Air Force, but somehow the convening authority selected less Navy
13 members than the Air Force. You're never going to be able to please
14 the defense in this case. They're just going to ask to do more and
15 more discovery, and the government does not believe they've met their
16 burden to overcome the presumption of regularity.

17 In this process, the convening authority, General Escallier,
18 testified that she was requesting 75 per rank from the various
19 services for a number of different reasons. It is a long trial.
20 We're not sure how long it's going to take, but the commission set it
21 for June 1st to December 11th. So we knew that was on the calendars,
22 that that was the trial date, roughly six months for trial. And that
23 she wanted a broad and diverse venire because it is a contested case.

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1 This was not a sentencing case.

2 But she also testified she was not intending to be
3 prescriptive. She's requesting nominations. She's not making
4 quotas. She's not telling people, hey, it's got to be in this branch
5 or that branch or this thing. That's improper under Article 25. And
6 there's no indication that the convening authority or the service
7 secretaries did anything other than follow the instructions to the
8 best of their ability and provide a large and broad pool of
9 nominating officers for the convening authority to review.

10 And she was very, very clear. While the staff helped with
11 the binders and those kind of things, she personally reviewed each
12 and every one of those folders and made the decisions that are
13 required from the convening authority. No indication that she
14 delegated any of those responsibilities, and absolutely no indication
15 that she was influenced in any manner, let alone improperly
16 influenced, in coming up with what we have now, which is a venire of
17 12 primary and 350 alternates, subject, obviously, to the excusal
18 process that's going on.

19 So for those reasons, Your Honor, and subject to any
20 questions, the government believes that the defense has not met their
21 burden to compel additional discovery.

22 And I would say, I think the Walker case that Ms. Miller
23 gave us a transcript is somewhat instructive. It's one case. It's

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1 from 2010. But there were issues in relating, as the government
2 reads the transcript, with one of the members. And so there was
3 a -- there were questions about, you know, why that person wasn't
4 showing up and we were trying to find out what happened in sort of
5 a -- I apologize for speaking too fast -- you know, that led to that
6 discovery.

7 Again, there was an issue that arose during that process
8 that led to sort of the additional discovery in that case.

9 And, again, the government believes the request for internal
10 e-mails and those kind of communications is a fishing expedition at
11 this point and not justified under the rules.

12 And pending any questions, Your Honor.

13 MJ [COL FITZGERALD]: I have no questions. Thank you, Captain
14 Stinson.

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

16 MJ [COL FITZGERALD]: Defense, your motion, your burden. You
17 have the final word.

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

19 I don't care who put the information in the binders. I use
20 that by way of example. I was hoping to have the transcripts to tell
21 you every time that General Escallier said "I don't know" or "I don't
22 recall." I know from memory that that was one of the answers.

23 What I want to know is how each service selected their

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1 nominees. We do not have that information. The government has lost
2 the presumption of regularity when you have the convening authority
3 saying, "I need this many people to do my job." The Deputy Secretary
4 of War's ratifying wholeheartedly her suggestion of how many
5 servicemembers or how many officers from each grade she needed to do
6 her job, and the service branches ignoring -- just completely
7 ignoring the instructions from the Deputy Secretary of War.

8 And so there is no longer a presumption of regularity when
9 you have a convening authority asking the Deputy Secretary of War for
10 something that he ratified wholeheartedly, and the service branches
11 ignored. I would say that is the definition of a presumption of
12 irregularity for service secretaries to ignore the instruction of the
13 Deputy Secretary of War.

14 And the government likes to throw out ad hominem attacks:
15 The defense is never going to be satisfied. There were more people
16 from the Navy provided by the Navy, and then there were more people
17 deselected from the Navy, the defense is never going to be satisfied.

18 And I would suggest that when a party has to respond with an
19 ad hominem attack, it's because the law is not on its side.

20 The government suggests that General Escallier
21 reviewed -- personally reviewed 1,623 Officer Record Briefs.

22 In reality, General Escallier has no idea how many Officer
23 Record Briefs she reviewed. She testified that she reviewed all of

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1 them, I will concede to that point. But as to the number, that was
2 supplied by the government in its cross-examination and she
3 acquiesced to their leading question.

4 And I think it's super interesting that the government
5 brought up the sticky notes because that's something I neglected to
6 mention. General Escallier's testimony was that she did not recall
7 reviewing -- and it's seven Officer Record Briefs, all from airmen,
8 that had sticky notes on them. Her testimony was that she did not
9 recall reviewing any Officer Record Briefs with sticky notes on them,
10 which suggests that somebody puts -- put the sticky notes on the
11 Officer Record Briefs after she selected those people to be members
12 or alternates. She conceded two of those Post-it Notes were in her
13 handwriting.

14 So it defies logic that somebody, after she selected 12
15 panel members and 350 alternates, went back and put the Post-it Notes
16 for seven airmen on those Officer Record Briefs, including the ones
17 that the convening authority authored herself.

18 So the suggestion is, what? She wrote Post-it Notes that
19 were someplace else, put the Officer Record Briefs down, and then
20 somebody went back through and put her sticky notes on the Officer
21 Record Briefs? That doesn't make any sense.

22 And that's why I call into question the credibility of that
23 testimony.

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1 And we talked about those seven airmen where she obviously
2 got additional information beyond what was provided to the defense,
3 which is why I'm here standing before the commission asking for how
4 the service branches selected their nominees. And she couldn't
5 answer if she got more information on any of the officers beyond
6 those seven.

7 And so she acknowledged that she got additional information.
8 From whom? We're best guessing, Tech Sergeant Hammonds, who was in
9 the Air Force -- who is in the Air Force. She acknowledged, though,
10 that she did not recall reviewing the Officer Record Briefs with
11 those sticky notes on there. So when they got on there, I don't
12 know. Nor does she.

13 She does not recall what additional information she got
14 about those seven airmen. She does not know if she got additional
15 information about other airmen. She does not know if she got
16 additional information about sailors, about soldiers. She doesn't
17 know.

18 She said she spoke with her staff daily about this process.
19 What those conversations entailed, what information she was provided,
20 she doesn't know or she doesn't recall.

21 The "I don't know" and the "I don't recall" overwhelms the
22 information that she was able to affirmatively provide this
23 commission in the commission's fact-finding role.

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1 And so I am asking, to be clear, how the military branches
2 selected their nominees. It seems to me that that probably happened
3 at the lowest levels of the military. Again, I'm making assumptions,
4 but I am assuming the secretary of the Navy handed the memo from the
5 Deputy Secretary of War to his military assistant and said, "Please
6 take care of this," and it went down the chain.

7 That's why I think Walker is instructive in that they were
8 able to get e-mails from the base commanders to the units, because
9 that's where the actual selection of the members -- or excuse
10 me -- the selection of the nominees was happening that was then
11 provided to the convening authority.

12 And as far as influence, obviously the military influenced
13 this panel impermissibly because of the 525 requested airmen, General
14 Escallier got 487. So the Air Force necessarily influenced the
15 selection of this panel by not providing the amount of people she
16 requested for her to select from.

17 The Navy necessarily influenced the selection of this panel
18 by providing 595 members, which is 70 more than she asked for. And
19 so to suggest that the military didn't have influence in the
20 selection of this panel belies the numbers and the job assignments.

21 General Escallier did agree with me -- and obviously this is
22 probably common knowledge -- the largest chunk of military job
23 assignments would fall in the field of logisticians. By far, the

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1 majority of people that were provided for -- that were nominated for
2 selection by her fall in the logistician category.

3 And so knowing that the Army and the Navy didn't consider
4 this important enough to provide any of their chaplains or legal
5 personnel and very, very few of their medical personnel.

6 May I have just one moment to consult with the Remote
7 Hearing Room?

8 MJ [COL FITZGERALD]: You may.

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

10 **[Counsel conferred.]**

11 LDC [MS. MILLER]: I have been corrected on my vernacular as a
12 civilian.

13 The Deputy Secretary of War in this role kind of -- not
14 "kind of" -- wore two hats. He was both the superior convening
15 authority to General Escallier and also what he directed of the
16 service secretaries, I believe I've referred to as an instruction. I
17 have been corrected that when the Deputy Secretary of War gives an
18 instruction to the secretaries of the Army, Air Force, and Navy, it
19 is an order.

20 And so we have -- the record is replete with information
21 that these service secretaries ignored an order from the Deputy
22 Secretary of War.

23 And so I want to know if they can do it better than she

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1 suggested, how did they do it? And the particular reason why we
2 mentioned Walker was, like the Walker case, which is from 2010 -- I
3 believe the case that the government cites in its briefing at 690D is
4 from 1978 -- is that there was a problem with a particular member of
5 that panel. But they were provided in discovery e-mails. And what
6 the e-mails showed was that volunteers were solicited for membership
7 of that panel, despite explicit instruction that volunteers not be
8 solicited.

9 Similarly, here volunteers were not to be solicited for
10 service as a member of the panel or an alternate. And I have no idea
11 if that happened. I don't think the convening authority -- not "I
12 don't think." There's no way the convening authority would have any
13 information as to whether that happened, because she didn't do any
14 back-checking of whether her instructions were followed and,
15 recognizing they were not, any corrective measures.

16 And so we are requesting -- again, I don't need a name for
17 how the binders were provided. I am asking the court -- and I think
18 we've laid it out pretty clearly in 690C -- the information that
19 we're looking for, but largely I would summarize it as how the
20 services selected their nominee for the convening authority to
21 consider for selection.

22 Thank you, sir.

23 MJ [COL FITZGERALD]: Thank you.

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1 **[Pause.]**

2 MJ [COL FITZGERALD]: So, again, just to make sure there's a
3 good meeting of the minds, this concludes the session for today.
4 I'll recess us overnight.

5 Tomorrow we open in closed session at 0900 for the testimony
6 of the JTF commander.

7 And Colonel -- Captain Lanning, I'm still tracking that,
8 0900?

9 ATC [Capt LANNING]: Yes, sir.

10 MJ [COL FITZGERALD]: Okay. No open session tomorrow. Open
11 session at 0900, if necessary, on Thursday. But I may not know that
12 until 0900 on Thursday. So I just want to be clear that will be the
13 next available open session, because I'd like to reserve Friday for
14 no session, if necessary. So -- again, so the parties can have a day
15 to do wind-down and maybe confer with each other on things. I've
16 been assured that the parties wish to confer on multiple matters. So
17 please take that opportunity.

18 Captain Stinson, I don't know if I ever got a formal request
19 about Friday.

20 TC [CAPT STINSON]: Yes, Your Honor. So that's good timing.
21 So if Friday's looking like a wind-down day, that is my -- the day of
22 the wedding. So I would ask to be excused, if there is going to be a
23 session on Friday, for a family wedding down in North Carolina.

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1 Over.

2 MJ [COL FITZGERALD]: Understood. Unless overcome by events,
3 that request is granted.

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

5 MJ [COL FITZGERALD]: Okay.

6 Anything else?

7 LDC [MS. MILLER]: Nothing from the defense, sir.

8 ATC [LTC GARRETT]: Nothing from the government.

9 LDC [MS. MILLER]: I lied. I'm sorry.

10 Could we ask that the commission order that Mr. al Nashiri
11 be held until 5:00 p.m.? We're going to take lunch and then visit
12 with him and so I know he's typically only held an hour, but we'd
13 like until 5:00, please.

14 MJ [COL FITZGERALD]: Sometimes I have the idea in my head and
15 I don't say it out loud.

16 My intent was, when I said there will be no more sessions
17 today is, so if the guard force can pass it on, the defense should be
18 able to meet with their client until 1700. Well, I'm ordering that,
19 that he be available to them until 1700 as if court was in session
20 until 1700.

21 Anything else?

22 LDC [MS. MILLER]: Now nothing further, sir.

23 MJ [COL FITZGERALD]: It appears not.

