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1 **[The R.M.C. 803 session was called to order at 0923, 30 May 2024.]**

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

3 All parties present before the last recess are again
4 present. Mr. Nashiri was not physically present in any sessions
5 yesterday, so I will ask the defense if Mr. Nashiri intends to be
6 physically present or if he has waived his personal appearance and
7 intends to participate in these proceedings from the remote site.

8 LDC [MR. NATALE]: Good morning, Your Honor ----

9 MJ [COL FITZGERALD]: Good morning.

10 LDC [MR. NATALE]: ---- Anthony Natale on behalf of
11 Mr. Nashiri.

12 He intends to participate and observe from the remote
13 location. I have explained to him in detail, as I have every
14 morning, that he obviously has the right to be here physically
15 present and that anytime if he did, that that could be arranged.
16 However, he has asked me to convey to the court that for him it is
17 a -- it's easier for him to participate and listen in the remote
18 location than it is if he's -- has to sit down constantly here.

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

20 Very well. Then the commission finds that Mr. Nashiri,
21 knowing well his rights to be present and his right to waive that
22 presence, has waived his presence again today, but is attending
23 remotely. And it appears from his vantage point it's easier for him

1 to focus, concentrate, and participate and hear things from the
2 remote hearing room. So I accept that.

3 And the other matter I want to bring up is we had an 802
4 session where I had wanted to get a -- at least a readout on where we
5 were in the current state of the motion we've been hearing over the
6 last couple of days. There was one last witness.

7 And so I'd asked the parties to discuss overnight if they
8 intended to call that witness, based on how the testimony of the
9 previous four witnesses have gone. I was informed this morning that
10 the defense did not intend to call that witness. So I say, if you do
11 not intend to call any witnesses, do you have any evidence to offer?

12 We took a brief pause and defense informed me that they may
13 still have some other evidence that they want to present, which
14 raises concerns, I imagine, for the prosecution as well. But at
15 least for the commission, is that the purposes of this hearing is so
16 that the non-moving party can meet the evidence of the moving party,
17 and it's hard to meet that evidence if I don't close out the taking
18 of the evidence from the moving party. So that's where I have some
19 consternation.

20 We had some discussion. It became very lively and
21 substantive before we realized we should stop while we're not on the
22 record. So I had asked the parties, since we were recording the 802
23 session, if the parties had any objection to taking that recording

1 and placing it in the record in lieu of restating all the positions
2 and argument and perhaps missing some of their arguments and
3 positions.

4 The defense initially was in -- I think -- don't -- I don't
5 want to put words in their mouths. I think they said they were
6 indifferent, if I remember right, Colonel Nettinga. "Indifferent"
7 can have a lot of connotations.

8 Is that the words that you used, you were indifferent,
9 meaning you didn't have ----

10 DDC [Lt Col NETTINGA]: That's the precise word I used, Your
11 Honor.

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

13 And the government said that they didn't oppose taking the
14 802 recording. So I intend to -- since neither party seemed to
15 object to accepting the 802 as the positions of the party, I intend
16 to do that.

17 So I would just ask again. I know you said you were
18 indifferent, but did you object to that adoption of the 802
19 conversation as the defense's position, knowing that you're still
20 going to be able to make closing -- make your closing points on that
21 issue?

22 DDC [Lt Col NETTINGA]: No objection, Your Honor.

23 MJ [COL FITZGERALD]: Very well.

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1 And Government, you didn't oppose. So do you also not
2 object?

3 TC [CAPT STINSON]: Yeah. No objection from the government,
4 Your Honor.

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

6 And just a moment, please.

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

8 MJ [COL FITZGERALD]: So now that we've resolved, I think, the
9 legal aspect of it, there's always that technology piece that we have
10 to fight through. And the court reporter's telling me there's just
11 some challenges taking an 802 recording and putting it into the
12 record.

13 So in an abundance of caution, I'm going to summarize what I
14 understood the points to be. And certainly Colonel Nettinga and
15 Captain Stinson can supplement, amend, modify anything. Or if I
16 completely got it wrong, certainly tell me. That's more important.

17 The defense essentially wanted to leave the opportunity
18 open, believing that Mr. Stafford Smith and Ms. Davis, who were
19 witnesses already, may have some matters to submit based on
20 discussions that were made during the testimony. I believe that's
21 the only other evidence. They were going to ask the court maybe to
22 contemplate holding open the taking of evidence for that purpose.

23 The government opposed that, that Mr. Stafford Smith and

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1 Ms. Davis were well aware of this court date. And after 18 months of
2 pre-litigation preparation for their testimony and for their
3 evidence, that if they had anything to offer, now would have been the
4 time to do that.

5 That was briefly the summary.

6 But Colonel Nettinga, did you want to add anything to that
7 that I may have missed?

8 DDC [Lt Col NETTINGA]: Not to that summary, Your Honor. But
9 I obviously, as you noted, do have additional argument.

10 MJ [COL FITZGERALD]: I will grant that.

11 And Captain Stinson, does that summarize the government's
12 position?

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

14 MJ [COL FITZGERALD]: Okay. So that's where we left.

15 And the last thing I said is, you know, Defense, you have
16 the burden, you know, for asking me to continue to hold evidence at a
17 proceeding in which the nonmoving party was intending to meet the
18 evidence. And now that goal line has essentially shifted on them.

19 So I will let you have another opportunity to advise the
20 court.

21 DDC [Lt Col NETTINGA]: Thank you, Your Honor.

22 The goal line, as the commission has stated it, I'm asking
23 for essentially that to be extended by a matter of hours, to the end

1 of the day, to ensure that there isn't anything additional that we
2 may want to present that we believe would be helpful to the
3 resolution of this matter for the commission.

4 And there's a couple of points I want to make, sir. First
5 of all is, again, without the prior opportunity to interview Agent
6 Boese, without knowing exactly what she was going to say, there was
7 some limitation in -- in the evidence that we -- that we had prior to
8 her testimony and the development of the evidence through her
9 testimony.

10 Certainly in talking with our witnesses, Ms. Davis and
11 Mr. Smith, about the testimony of Agent Boese -- and the court can
12 see this as well, and anybody watching can see this, that there is a
13 vast difference between Ms. Davis' recollection of that interview,
14 those proffer sessions, and Agent Boese's.

15 And so part of the issue -- not the entire issue, but part
16 of the issue of 535 is indeed this proffer session. And so the idea
17 of trying to get as much fidelity as possible as to what happened
18 during that proffer session we believe is in the interest of justice,
19 in the interest of the court's resolution of this matter in an
20 appropriate way.

21 And so that is essentially what I am asking for, sir.
22 Again, there is an additional document that I intend to use in
23 argument tomorrow where there -- and that's something that we would

1 likely provide to the parties this evening. I don't know that that's
2 additional evidence, but it is certainly things that we want you to
3 consider.

4 And part of the problem here, sir, is that, you know, as
5 Captain Stinson pointed out, this issue has been going on for a long
6 time. We submitted a discovery request in October, which was
7 ignored, and then we didn't actually start getting discovery from the
8 prosecution on this matter until about six or seven months later.

9 And as we were starting to try to litigate this issue, we
10 had a pause with the retirement of a military judge, with the
11 assignment of a new military judge who canceled some hearings, and we
12 did not have hearings in the interim.

13 So this idea this has been going on for 18 months, there's a
14 lot of missing context in that.

15 I'm not asking to extend this for a week, for a month, for
16 the next -- until the next hearing. I'm not asking for the things
17 that the prosecution is asking for in AE 480 where evidence has
18 already been closed and they want to present additional evidence,
19 additional testimony that they had the opportunity to develop.

20 They want to introduce a transcript from a witness that they
21 called in our case, but a transcript that that witness gave in a
22 different case, to now supplement the closed discussion of AE 480.
23 And they are asking not to present that here, but to present that at

1 a future hearing, to extend that until August and September.

2 And I know my colleague will soon be arguing about 480, and
3 that's not what I'm here to do. But I find the position flummoxing
4 of the prosecution with respect to our request to wait until the
5 close of business today to determine whether or not we have any
6 additional evidence to present.

7 And that is simply what I'm asking for. The answer may well
8 be no. But certainly there is consternation both
9 on -- understandably on the part of the prosecution and on the part
10 of the defense with respect to we know that there were 298 pages of
11 notes taken by Ms. Davis, plus the additional pages of notes that are
12 currently in the possession of the commission, again, what had been
13 designed perhaps for an *in camera* review.

14 Those notes would seem to give us the best possible view and
15 insight as to what happened during that -- those proffer sessions.
16 And there have been representations, both on the record and to
17 defense counsel off the record, from both of these individuals that
18 there is additional exculpatory materials contained in there.

19 And so obviously if it was up to me and I had the possession
20 of these notes, I would make sure that everybody had the notes so
21 that we could go through it and have a full accounting of what
22 happened there.

23 I do not control those notes. They are controlled by the

1 defense team for Mr. Rabbani, and there are certain privileges
2 involved in that. And certainly that is something that we respect,
3 that we understand, that there may be reasons they don't want all 298
4 pages to be presented.

5 But we are still attempting to work through that issue. We
6 have a little bit more understanding.

7 And now that evidence has been taken, now that the
8 commission's position has been discussed or ruled upon in terms of
9 the granting of that limited waiver for the turning over of the
10 exculpatory material in those notes and the commission's denial of
11 the ability to do that -- again, I understand the commission's
12 position and that that wasn't asking for an advisory position, but
13 that is new information that we then had to talk with our folks, talk
14 with our witnesses to see, okay, does this change anything? Is there
15 something else that you are willing to do now that you have
16 testified, now that you have heard the commission's position, now
17 that Ms. Davis has testified, and now that Agent Boese has testified?

18 And all I'm asking for is till the end of the day to
19 determine whether or not there is anything else we can present to
20 this commission.

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

22 DDC [Lt Col NETTINGA]: No, Your Honor.

23 MJ [COL FITZGERALD]: Very well.

1 So I think I understand the position, but I think axiomatic
2 with conducting pretrial litigation and motion session is the
3 hearings prior to trial are designed so, again, the party can present
4 the evidence and opposing party can meet the evidence.

5 This has been litigated for awhile. And while I understand
6 the -- some of the source of the frustration, it appears to me that
7 Mr. Stafford Smith and Ms. Davis -- both seasoned attorneys, one a
8 partner in a law firm, one a longtime litigant in representing
9 counsel -- they understand motions practice as well.

10 And it appears they may be taking a position to vex the
11 administration of justice, which is not their role to do and to do so
12 as third parties and not parties to this case. So I don't
13 necessarily find that the defense is attempting to vex the
14 administration of justice or vex the prosecution in their ability to
15 meet the evidence.

16 So based on that, if the defense has nothing further, there
17 is no more evidence to take. This was the opportunity to do so.

18 And certainly Mr. Stafford Smith, not a stranger to
19 courtrooms, and Ms. Davis, also not a stranger to courtrooms,
20 understands that process as well as anybody. So the off-the-record
21 representations they made to you are not in evidence. The things
22 they were able to put on the record are in evidence, and that's where
23 we stand.

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1 And the court continues to take the position we don't issue
2 advisory opinions. And certainly I don't issue an advisory opinion
3 to an esteemed lawyer like Mr. Stafford Smith. He has -- he can
4 speak to his bar, he can speak to other attorneys, but it's not for
5 the court to tell him how to represent his client and how to
6 represent his client if he wants to testify on behalf of his client
7 in a court of law.

8 So the court, it appears, is done taking evidence from the
9 defense and is shifting this matter to the government and their
10 opportunity to meet the evidence. This doesn't foreclose, obviously,
11 the opportunity for the defense if they want to submit a request for
12 reconsideration or a request to amend or supplement their pleadings.
13 But as far as taking evidence, that is foreclosed.

14 So with that said, if there is no further evidence,
15 Government, do you have any evidence or testimony you intend to
16 present on Appellate Exhibit 535?

17 TC [CAPT STINSON]: Your Honor, we do not have any testimony
18 to present or witnesses to call. We do have some items that are
19 currently in the record that we would like to draw the court's
20 attention to in consideration of the motion.

21 MJ [COL FITZGERALD]: Wait. When you say "on the record,"
22 things that are not part of this -- these hearings that -- or -- what
23 I want to make sure is you're not presenting your argument now.

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1 TC [CAPT STINSON]: I'm not presenting the argument now, Your
2 Honor. I was just drawing your attention to matters that are in the
3 record, but in a different motion series ----

4 MJ [COL FITZGERALD]: Okay.

5 TC [CAPT STINSON]: ---- that are before the commission just
6 so that you have those citations for consideration as you're
7 reviewing 535, Your Honor.

8 MJ [COL FITZGERALD]: Thank you, Captain Stinson. Stand by
9 real quick.

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

11 MJ [COL FITZGERALD]: So, Captain Stinson, I'm going to allow
12 you to do that. I just again wanted to make sure that I understood
13 your position.

14 But here's what I would ask you to do, is if you could also
15 supplement it in writing.

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

17 MJ [COL FITZGERALD]: Several people are going to be trying to
18 write down as quickly as you're stating them. So, one, if you
19 wouldn't mind slowing down; and, two, if you could follow it up with
20 a written submission.

21 But you may proceed.

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

23 So this is in the AE 480E filing. It's pages 104 to 105 of

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1 782, 199 of 782, and 415 of 782. They all address Khallad's
2 identification of Khalid al Juhani, which we've heard a lot about in
3 the testimony.

4 And then from that same series, pages 649 to 650 of 782 and
5 665 of 782. And generally they recount conversations that Khallad
6 describes from Khalid al Juhani, or Mu'awiya.

7 The first one, 649 to 650, discusses an apartment explosion
8 in Sana'a and a significant amount of explosives that were contained
9 in that apartment. And then 665 discusses the upcoming attacks in
10 Riyadh of May of 2003.

11 So those are the record items, Your Honor.

12 The government also intends just to submit -- for the
13 court's attention, there were references to articles -- newspaper
14 articles during some of the testimony. We intend to submit those
15 articles for your consideration. And then also photographs of the
16 explosives and the crates that are referenced in AE 480, 649 to 650,
17 just so you have those photographs for your awareness as well, Your
18 Honor.

19 MJ [COL FITZGERALD]: Thank you.

20 TC [CAPT STINSON]: No further evidence from the government,
21 Your Honor.

22 MJ [COL FITZGERALD]: Very well. I'm just looking over my own
23 notes. One thing I would like to add in regards to the ruling I made

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1 was, one of the things we do in a hearing is we ask the parties when
2 they call a witness at the end of their testimony whether they
3 permanently excuse the witness or temporarily excuse them.

4 In both cases, when asked about Mr. Stafford Smith and
5 Ms. Davis, they were permanently excused.

6 So that -- they had an opportunity to be temporarily
7 excused, maybe to be recalled following other testimony. That
8 opportunity was granted and not accepted -- or that opportunity was
9 afforded, but not taken up. So I just want to note that that was
10 also this commission's consideration, that the moving party
11 permanently excused the witnesses at issue.

12 All right. Anything else?

13 I take it you have something else, Colonel Nettinga?

14 DDC [Lt Col NETTINGA]: Yes, Your Honor. I'd like to
15 articulate the defense's position on the evidence that the government
16 would ask you to consider in this motion series.

17 MJ [COL FITZGERALD]: You want to do what? I apologize.

18 DDC [Lt Col NETTINGA]: Yeah. That's okay, sir.

19 I would like to articulate the defense's position on the
20 evidence that the government is asking you -- has just asked you to
21 consider for this motion series. I would like to note our objection
22 for the record and explain.

23 MJ [COL FITZGERALD]: Ah, very well.

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1 DDC [Lt Col NETTINGA]: So, sir, the defense objects to the
2 consideration of this evidence for this motion series, frankly
3 because it is not relevant to the issue of whether or not the
4 government turned over exculpatory evidence or withheld exculpatory
5 evidence that they had a duty to turn over. That is the heart of
6 535.

7 And, again, as we'll talk about more tomorrow, 535 started
8 with this concept of the proffer session, but it has ballooned
9 farther than that. It is about the discovery practices of the
10 prosecution, and this limited window with respect to Mr. Rabbani and
11 Mr. al Kazimi and the practices employed by the government with
12 respect to discovery for those two individuals, particularly with
13 respect to exculpatory information.

14 And so it's not just about the proffer sessions. It's about
15 other statements and other items in the possession of the United
16 States that they did not turn over affirmatively to the defense.
17 What the ----

18 MJ [COL FITZGERALD]: So, Counsel, you're either making a
19 speaking objection or a -- an argument. I understand your objection
20 is relevance. I let you state your basis. You have. But you're
21 objecting to me considering things that are already in evidence in
22 these hearings, not necessarily in this particular hearing, but the
23 government has asked me to consider.

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1 You raised the objection as to relevance. So I will allow
2 you to briefly state it, but what I won't let you do is to make an
3 argument or a speaking objection.

4 Anything besides relevance?

5 DDC [Lt Col NETTINGA]: This all does go to the relevance,
6 Your Honor. Speaking objection, generally my understanding is
7 that's -- that's a consideration or a concern if that's done in front
8 of the members. We're here talking ----

9 MJ [COL FITZGERALD]: Well, Counsel, so I'm trying to politely
10 give you instruction.

11 DDC [Lt Col NETTINGA]: Yes, Your Honor.

12 MJ [COL FITZGERALD]: I'm taking evidence. You can raise your
13 objection. I don't need a speaking objection. Your objection is
14 relevance ----

15 DDC [Lt Col NETTINGA]: Yes, Your Honor.

16 MJ [COL FITZGERALD]: ---- correct?

17 DDC [Lt Col NETTINGA]: Yes, Your Honor.

18 MJ [COL FITZGERALD]: I don't need to hear argument at this
19 time. You're going to have all the opportunity you want to make
20 argument. So I'm going to turn to the government and ask them why
21 they believe it's relevant.

22 DDC [Lt Col NETTINGA]: Yes, Your Honor.

23 MJ [COL FITZGERALD]: That's where we're at. Thank you.

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

2 And just briefly, this goes directly to the testimony that
3 we've had over the last two days about Mr. Rabbani during the proffer
4 session describing the defendant, al Nashiri, directing him to Dubai
5 on two occasions to help mediate between Mr. al Darbi and Mr. Juhani.
6 And it's a context for what was going on in Dubai.

7 So information regarding Mu'awiya, Khalid al Juhani,
8 contacting Khallad and saying, "Hey, guess what? There's an
9 apartment explosion in Sana'a, and two individuals were killed and
10 there's a lot of explosives in that apartment," is directly relevant
11 to what was happening at that time.

12 When we get to trial in front of the members, the government
13 intends to show that the plan for the Rahhal, the Rahhal was to load
14 a significant amount of explosives on that boat and to then launch
15 multiple small boats to attack either merchant ships, cruise ships,
16 or the like. That was the Boats Operation. That is the -- that was
17 the modus operandi for the Boats Operation that was led by the
18 defendant, al Nashiri.

19 So the context of Rabbani saying, "Hey, I was instructed by
20 Nashiri to go to Dubai and help work out a conflict between Mr. Darbi
21 and Mr. al Juhani," is directly relevant to the question of, hey, was
22 Mr. Rabbani providing exculpatory information for Mr. Nashiri? He
23 was not.

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1 He was -- and I think it's clear from the two days of
2 testimony and it's clear from the notes of Special Agent Boese, he
3 was trying to minimize his responsibility, but he was providing
4 inculpatory information regarding Mr. Nashiri and other individuals
5 within al Qaeda. Didn't lead to a cooperation agreement, for the
6 reasons that have been expressed over the two days of testimony, but
7 it is particularly relevant for the commission's consideration that
8 there is evidence regarding what Mr. Juhani was doing during the
9 relevant times.

10 And he was speaking to another co-conspirator, Khallad,
11 about explosives in an apartment in Sana'a that was directly relevant
12 to the -- the terrorist operation that they were intending to commit.

13 So that provides important context. It is directly relevant
14 to AE 535 because it gives context to what Mr. Rabbani was saying
15 about his trips to Dubai. He was trying to minimize his role in: "I
16 didn't have any involvement in Boats. I don't know anything about
17 the explosives," you know, those things that led Special Agent Boese
18 to doubt that he was complying with the terms of his proffer letter
19 and being fully forthcoming. But it is important and critical
20 context, in the context of AE 535, what the activities of
21 Mr. al Juhani were around that time.

22 And as the commission has noted, this information is
23 already -- already in the record for the commission's consideration,

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1 and the government thinks it's directly relevant to 535 as well.

2 Thank you, Your Honor.

3 MJ [COL FITZGERALD]: Thank you.

4 Defense, any other objection other than relevance?

5 DDC [Lt Col NETTINGA]: My only request is to respond to why
6 it is not relevant, but -- and to explain the objection that we have
7 for relevance, if the commission will allow that. If not, then I
8 don't have another objection.

9 MJ [COL FITZGERALD]: Well, I'll let you briefly ----

10 DDC [Lt Col NETTINGA]: Sure.

11 MJ [COL FITZGERALD]: ---- explain.

12 DDC [Lt Col NETTINGA]: Yes, Your Honor.

13 The government, in response to saying -- in response to the
14 purpose of this motion series and the allegation that they refused
15 to, or withheld exculpatory information, their response is, well,
16 look at all this inculpatory stuff. And that is what this is
17 all -- all of this information that they have is asking you to look
18 at. Look at what Khallad said.

19 They asked you to consider things from 480, which is the
20 motion series related to Khallad. What Khallad said doesn't have any
21 bearing as to whether or not Mr. Rabbani made exculpatory statements
22 during those proffer sessions which the government failed to turn
23 over.

1 Both things can certainly be true, sir, that Mr. Rabbani
2 made inculpatory statements about Mr. al Nashiri and made exculpatory
3 statements about Mr. al Nashiri. The issue is whether the government
4 failed to turn over exculpatory information. Again, that's one of
5 the issues in the 535 series. But that is the issue that this
6 objection is based on.

7 So the fact that they want you to look at other inculpatory
8 information and the idea that that might fit in with a context in
9 some argument that they eventually want to make at trial,
10 that's -- that's something for a different time. That is not the
11 purpose of this motion series, this issue within this motion series.

12 MJ [COL FITZGERALD]: Thank you.

13 Just addressing the objection as to relevance, that
14 objection is overruled. That does not discount the other positions
15 the parties are taking. I'm only ruling on whether it was relevant
16 for the government to ask the commission to consider the appellate
17 exhibits that it raised.

18 And before I forget, Captain Stinson, to that effect,
19 we -- the commission and the folks on my staff trying to take notes,
20 they presumed a longer list. So they're informing me that they don't
21 need you to follow that up in writing. So I think we were all able
22 to capture all the appellate exhibits you referenced without you
23 having to submit anything in writing. So I'm taking that task off

1 your plate.

2 Government, do you have anything else? You said you had no
3 witnesses, you had no other evidence, but you wanted to reference
4 other matters that were in the commission's record. But anything
5 else?

6 TC [CAPT STINSON]: It was just the articles and the -- and
7 the photos that were related to those appellate exhibits, Your Honor.
8 And we'll mark those for the court reporter. We may just to -- just
9 to put a bow on it, also just cite those pages for the record so it's
10 clear. I know we don't -- we're not required to but, just as a
11 matter of completeness, we may put it in one ----

12 MJ [COL FITZGERALD]: Very well.

13 TC [CAPT STINSON]: ---- filing. Mr. Wells might get mad at
14 me if I don't promise to do that.

15 So we'll -- yeah, that's -- other than that, nothing else
16 from the government, Your Honor.

17 MJ [COL FITZGERALD]: All right. Thank you, sir.

18 Our plan was to take up argument on this tomorrow; is that
19 accurate? I think.

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

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

22 So having resolved all we can today for Appellate
23 Exhibit 535, where do the parties intend to go next?

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1 TC [CAPT STINSON]: On the list, we had the 505(h) open
2 argument, Your Honor, just to talk about whether or not we could do
3 the 563 and 558 arguments in open or closed.

4 MJ [COL FITZGERALD]: Okay. And, Defense, it was my
5 understanding you believed your argument could be done open?

6 DC [MS. CARMON]: Yes, sir. That's correct.

7 MJ [COL FITZGERALD]: And, Government, did you believe you
8 could do your parts of the argument open?

9 TC [CAPT STINSON]: Your Honor, we can -- we think we can do
10 563 open.

11 We think in relation to 558, in speaking with the original
12 classification authorities, that one should be in closed session.
13 So it would -- and we can -- I think we can discuss sort of just
14 generally why there's a concern there in open.

15 But I think in 563, there obviously -- in both there's been
16 a lot of classified submissions, there's been classified testimony.
17 So I think for both there's a concern, but we can do 563 in open.
18 But I think 558 is of concern, Your Honor.

19 MJ [COL FITZGERALD]: All right. And I can -- I understand.
20 I think the parties can present 563 in open, if that's where they
21 intend to go. I think 558 raises some -- at least some furrowed
22 brows from the appropriate parties as to what are the assurances that
23 we won't cross the line. And knowing we have a 40-second buffer --

1 But, Defense, do you want to be heard on that first? Do
2 you ----

3 DC [MS. CARMON]: Yes, sir. Good morning.

4 MJ [COL FITZGERALD]: And I'll start with that. I think the
5 intent and the interest is always to have an open session. So
6 it's -- I'm not trying to move us to a closed session. I'm just
7 trying to make sure I -- I don't end up having to deal with hockey
8 lights and long recesses to discuss whether -- and the security
9 officers have got to do their jobs, and then we end up having a long,
10 protracted day of did that or did that not, can we or can we not.

11 So again, just keeping an idea that we're going to try to do
12 this open because the public has an interest, help me understand that
13 we won't cross that line and create any concerns.

14 DC [MS. CARMON]: Yes, sir. And certainly the public has an
15 interest, and so does Mr. al Nashiri, in being able to be present and
16 at least remotely hearing and listening to these sessions.

17 So in AE 558, there have been no classified submissions and
18 there have been no classified testimony. This was a pleading that
19 was long hung up in classification review, as the commission will
20 remember. And the commission invited the defense at some point to
21 move for relief because we were not getting any movement on the
22 walled-off security review to tell us what in our pleading is the
23 problem.

1 We did get that advice. We followed that advice. We
2 submitted it unclassified. It was accepted. The government's
3 response is unclassified, and our reply is unclassified.

4 And what AE 558 is about is a legal argument as to whether
5 or not we are entitled to a crosswalk of identities and a UFI list of
6 identities. That does not include naming anyone. It does not
7 include talking about three-letter agencies that might get concerned.
8 It does not involve force protection measures. It does not involve
9 anything that touches classified information other than if the
10 government were to be ordered to provide it, because you have found
11 that it is legally required that they do so, that product would be
12 classified.

13 And so we don't intend to argue anything outside of our
14 briefing. And I think it's important that we be able to do this,
15 because this is ultimately about transparency. What we are asking
16 for is a peek behind the government's curtain so that we may develop
17 our mitigation evidence and our investigation appropriately.

18 And so to close that just because there is a concern is not
19 following Grunden where the CAAF says you've got to use a
20 constitutionally mandated scalpel when you're talking about closure.
21 You can't just wholesale use an ax.

22 And so I certainly have been doing this a while. I know my
23 left and my right. Mr. Flynn will correct me if I'm wrong. I know

1 that. But I am comfortable that I can argue to the commission why I
2 am legally entitled to what I'm asking for without getting close to
3 classified information.

4 MJ [COL FITZGERALD]: I take it you're the one representing
5 the defense on this one?

6 DC [MS. CARMON]: Yes, sir.

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

8 DC [MS. CARMON]: Thank you.

9 MJ [COL FITZGERALD]: Government, Captain Stinson, is this
10 your matter?

11 TC [CAPT STINSON]: The 505(h), Your Honor, the underlying
12 matter is actually Lieutenant Huston. But the discussions regarding
13 the general concerns about 558 and 505(h) was something that I was
14 prepared to address with Your Honor.

15 And the government shares the desire of Ms. Carmon and the
16 defense to do as much as possible in open session, understands the
17 chaos admonition in Grunden to use a scalpel, not an ax.

18 But the underlying materials that the defense is asking for
19 touch on classified information. There's just no way around that in
20 relation to 558. And there's nothing in the rules that require this
21 commission and the parties to dance on the edge of a cliff.

22 We do want to be as open as possible. But where the subject
23 matter of the request, where the subject matter of a preliminary, you

1 know, discovery-type issue, the actual subject of that is classified
2 information, the government believes that we are walking too close to
3 the line, that we are putting the CISOs and others in a very
4 difficult position in relation to arguments and hockey lights and
5 turning things off.

6 Mr. Nashiri's right to a public trial is sacrosanct. And
7 the government joins with the desire to have as much as open as
8 possible, and that is particularly critical on the merits and others.

9 We are here talking about a very sensitive and classified
10 subject matter. We understand that Ms. Carmon's not going to do
11 anything intentional and that she's been practicing before the
12 commission for awhile and understands, as best she can, the
13 left/right limits.

14 But classified information is nuanced. There are things
15 like the mosaic effect where, even though not by itself classified,
16 the compilation of information together will result in classified
17 information that may be spilled.

18 And so when we see a motion like 558 where the underlying
19 information at issue is classified, the government believes that the
20 rule counsels caution and allows the commission to exercise its
21 discretion to appropriately close the sessions for those arguments.

22 563, we had also made that issue. There has been classified
23 testimony in declarations in 563, but we can commit to doing that in

1 open, Your Honor. But I think 558 is too close to the line, and the
2 government respectfully recommends that the argument there be
3 conducted in closed session.

4 Thank you.

5 MJ [COL FITZGERALD]: Thank you. Either one -- side want to
6 be heard on that? I understand where the reservations come from and
7 the concerns about dancing on the edge of the cliff. I always
8 appreciate a good metaphor.

9 But I'm also dealing with argument, not merits witnesses on
10 the stand. I'm more concerned about, you know, nonlawyers not
11 familiar with our process, not familiar with the classification
12 proceedings. That's ones we worry about dancing on the edge of the
13 cliff.

14 But does either side want to be heard regarding how argument
15 may be different than the taking of evidence?

16 DC [MS. CARMON]: I think the source is different, which is
17 maybe less concerning when it is lawyers who are practicing before
18 this commission.

19 And what I'm not hearing from Captain Stinson is specifics,
20 right? This is a general concern that we are getting close to
21 something that may be classified. That is not enough to exclude the
22 public and the accused from a session.

23 And the point is this is a motion to compel discovery,

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1 essentially. That is a legal argument.

2 And, again, if this commission orders the government to turn
3 over what we are asking for, that product itself may be classified.
4 But that product need not be discussed in whether or not the defense
5 is legally entitled to what we are asking for.

6 And so this is essentially a legal argument. We are not
7 discussing underlying classified facts.

8 And, again, this is -- this is not new. This is something
9 we deal with for each session, and we do our very best to make sure
10 that we're staying within the parameters. Each of these pleadings is
11 completely unclassified. Each of these pleadings was accepted as
12 unclassified. And so when we stay within the pleadings, there should
13 be no concern that we're going to get into classified information.

14 And just general concern without specific "this fact is
15 classified and I intend to say it," I don't think is enough for this
16 commission to make the specific findings necessary for an R.M.C. 806
17 closure.

18 And so I think Mr. al Nashiri and the public are entitled to
19 hear this very basic legal argument as to whether or not we are
20 entitled for the product that we're asking for.

21 MJ [COL FITZGERALD]: Very well.

22 DC [MS. CARMON]: Thank you.

23 MJ [COL FITZGERALD]: Thank you.

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1 **[Counsel conferred.]**

2 MJ [COL FITZGERALD]: Captain Stinson, did you want to be
3 heard further?

4 TC [CAPT STINSON]: Just briefly, Your Honor.

5 MJ [COL FITZGERALD]: Sure.

6 TC [CAPT STINSON]: So I do think that -- to your question
7 that the source is different. So I understand the defense counsel's
8 point. It is probably more concerning if there's a witness on the
9 stand. But Ms. Carmon said, "Hey, we try to do our best." And I
10 think the commission's been around long enough to see the secure
11 light goes on, the hockey lights go on, it disrupts the commission's
12 proceedings.

13 And it's not as ----

14 MJ [COL FITZGERALD]: Slow down a little bit, Captain Stinson.

15 TC [CAPT STINSON]: I'm sorry, Your Honor.

16 It's not an aspersion on defense counsel. These are complex
17 areas. Classification is a complex area. Ms. Carmon's asking for:
18 Give me the one specific single fact that we want to talk about.

19 The underlying nature of that motion is about classified
20 information. It's going to be extremely difficult, the government
21 submits, to make an argument that does not touch upon classified
22 information. And that's not to say that that was intentional, but
23 it's going to disrupt the proceedings. It's going to require a

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1 pause. We're going to have the hockey lights and the secure lights
2 come on.

3 The purpose for closing the arguments is to resolve those
4 type of issues, to have the closed sessions. That's what CIFA's
5 about, to avoid graymail, sure, but also for the commission and the
6 parties to understand, hey, here are the left and right limits, and
7 then come out with, hey, this is what we can say in unclassified
8 settings.

9 So to make arguments on what is effectively underlying
10 classified information from the government's perspective is going to
11 be a bridge too far in relation to 558. And that's all.

12 And again, this is not to say that the source doesn't
13 matter. It certainly does. This is not to say that defense counsel
14 isn't going to do everything they can to stay away and stay in those
15 left and right limits. But, again, I think that puts the Court
16 Information Security Officer and others in a difficult spot because
17 it is not as simple as saying, hey, here's one particular fact, stay
18 away from that. There are nuances to the classification. That's the
19 government's position.

20 Thank you, Your Honor.

21 MJ [COL FITZGERALD]: Thank you, Captain Stinson.

22 To shift gears a little bit -- actually, the same gears,
23 different party. Lieutenant Colonel Nettinga, regarding the 535

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1 issue, are you requesting any portion of your argument on that to be
2 closed -- in a closed session? Maybe we can take that up now if you
3 are. I understand maybe notice was given?

4 DDC [Lt Col NETTINGA]: Yes, Your Honor.

5 We advised the parties this morning that we intended to have
6 part of that argument conducted in a closed session because there
7 will be classified documents that I'd like to walk through with the
8 commission. So there's certainly no way to do that, because I -- we
9 need to talk about the substance of them. There's no way to do that
10 in open session.

11 MJ [COL FITZGERALD]: So you're requesting a closed session?

12 DDC [Lt Col NETTINGA]: That's correct, Your Honor.

13 MJ [COL FITZGERALD]: Very well.

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

15 MJ [COL FITZGERALD]: And again, just for part of your
16 argument? So you're going to do a bifurcated argument?

17 DDC [Lt Col NETTINGA]: Yes, Your Honor.

18 MJ [COL FITZGERALD]: Okay.

19 DDC [Lt Col NETTINGA]: I believe the vast majority of the
20 argument will be open and, you know, preferably we take that up
21 first.

22 And I will refer in the open argument to the general nature
23 of what will happen or what I expect to happen if there is a closed

1 session. But obviously there's a line that I can't cross there.

2 MJ [COL FITZGERALD]: Very well.

3 Government, do you wish to be heard on that? Captain
4 Stinson?

5 TC [CAPT STINSON]: No objection to that request, Your Honor.

6 MJ [COL FITZGERALD]: Okay. So the intent is you start with
7 an open session on 535 tomorrow. And then we'll take a brief recess,
8 reset all the appropriate people, and then we'll take the rest of
9 that up in closed session. Am I right, Colonel Nettinga?

10 DDC [Lt Col NETTINGA]: Yes, Your Honor. That's my
11 understanding, depending on whenever we take up 535 tomorrow.

12 MJ [COL FITZGERALD]: Okay.

13 TC [CAPT STINSON]: Your Honor, may I just be heard for that
14 for a brief moment? Just because of the logistics associated with
15 opening and closing, the government wouldn't object if we wanted to
16 do the closed first, that -- if that was, you know, depending on if
17 we're doing other things in closed, it just -- I know it's difficult
18 for the court reporters and others to open and close. I know it
19 takes a little bit of time to work that. So oftentimes they either
20 do that very first thing or at the end of the day, is my
21 understanding.

22 MJ [COL FITZGERALD]: Well, I don't want to tell defense how
23 to do their argument, but I will -- I may have implied: Here's how I

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1 expect you to do it.

2 So Colonel Nettinga, how would you prefer to do your closing
3 argument?

4 DDC [Lt Col NETTINGA]: Yes, Your Honor. I appreciate the
5 commission's consideration.

6 We would prefer to do the open session first and then the
7 closed session. And once again, I'll say I'm indifferent as to what
8 time of the day that we do this. If it makes more sense to have this
9 be the last thing that we do so that we can do the argument on 535,
10 recess, and then come back in a closed session for the last portion,
11 that's certainly fine with me. Although I'm certainly open to
12 whatever ----

13 MJ [COL FITZGERALD]: Okay.

14 DDC [Lt Col NETTINGA]: ---- the commission decides.

15 MJ [COL FITZGERALD]: Well, I know I have to issue a ruling on
16 the two other matters. So if you could be flexible until I issue
17 that ruling, then we'll have an understanding of how potentially
18 upwards of three sessions may be in closed sessions, right?
19 Not -- I'm not trying to help anybody forecast. Upwards of three
20 may. One we know for certain, the other two we don't.

21 So if you can just be a little more -- continue to be
22 flexible or indifferent, using your word, for a little longer, once I
23 have that ruling, it -- as part of incorporating that ruling, you

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1 will have more guidance. But we will try to meet your desires to do
2 open before closed.

3 DDC [Lt Col NETTINGA]: Thank you, Your Honor.

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

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

6 MJ [COL FITZGERALD]: So we've been here for an hour. So I'm
7 anticipating a recess. So I wanted to check with some folks about
8 that.

9 But I think the first thing we're going to take up when we
10 come out is arguments on 563; is that accurate?

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

12 MJ [COL FITZGERALD]: Okay. And then after that, arguments on
13 551?

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

15 MJ [COL FITZGERALD]: Thank you. And then argument on 319?
16 Who's handling 319?

17 ATC [Capt DANIELCZYK]: I am. Major Danielczyk, Your Honor.

18 MJ [COL FITZGERALD]: Okay. And for the defense?

19 DDC [Lt Col NETTINGA]: Lieutenant Colonel Nettinga.

20 MJ [COL FITZGERALD]: Thank you.

21 Very well. Ten minutes sufficient for everybody?

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

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

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1 MATC [MR. WELLS]: Your Honor, just a little bit longer. I
2 understand at the RHR they're having SIPR connectivity issues, and
3 the defense had passed to us some information relative to 551 on
4 SIPR.

5 I haven't talked with them yet about some way to transfer
6 that information to the folks at the RHR of the prosecution team. So
7 can you give us an extra five, maybe 15 minutes?

8 MJ [COL FITZGERALD]: How about -- we'll be in recess until
9 1030, roughly 18 minutes. If you need longer, you're working through
10 connectivity issues, just have somebody let me know.

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

12 MJ [COL FITZGERALD]: Very well.

13 The commission is in recess until 1030.

14 **[The R.M.C. 803 session recessed at 1014, 30 May 2024.]**

15 **[The R.M.C. 803 session was called to order at 1043, 30 May 2024.]**

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

17 All parties present before the last recess are again
18 present.

19 Mr. Nashiri waives his -- continues to waive his right to be
20 present and is attending through the remote means.

21 Is that accurate, Mr. Natale?

22 LDC [MR. NATALE]: That is correct. He's not physically
23 present, but he is attending remotely.

1 MJ [COL FITZGERALD]: Thank you.

2 At least for preliminary purposes, I intend to take argument
3 on 563. The parties agreed that can be done in open session. So
4 nothing to resolve there.

5 Regarding the Appellate Exhibit 558, I'm going to allow that
6 to be in open session. I believe the safeguards we have in place are
7 designed to protect the government's concerns, which were essentially
8 generalized concerns because of the nature of the matter being
9 discussed.

10 It's argument versus calling layperson witnesses where we
11 may have some hesitation because we don't know what words will come
12 out of their mouth. The attorneys have had plenty of time to prepare
13 that argument and ensure that they -- they protect the safeguards
14 that are in place.

15 So we will use the safeguards in place that we have, the
16 40-second delay. If it becomes a problem during arguments, we can
17 certainly take up the issue whether we continue to stay in open
18 session or need to move it to closed session and we will do so at
19 that time.

20 And the defense, with respect to 535, wants to do a
21 bifurcated closing argument. I'm going to allow that. I will -- as
22 required for the closed session, I will put my findings in writing,
23 but it's the defense request to do so, so that they can introduce

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1 information that needs to be done in closed session.

2 So I just want to give the parties that advance notice.

3 Either party want to be heard on that?

4 Government?

5 TC [CAPT STINSON]: Nothing further from the government, Your
6 Honor.

7 MJ [COL FITZGERALD]: Defense?

8 DC [MS. CARMON]: No, sir. Thank you.

9 MJ [COL FITZGERALD]: All right. I wanted to tell you so that
10 if you had time and you wanted to ask any questions about how we are
11 going to proceed, that you would have plenty of time to do so.

12 So the next thing we are going to take up, unless the
13 parties tell me otherwise, is the argument on Appellate Exhibit 563,
14 correct?

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

16 MJ [COL FITZGERALD]: Very well.

17 Defense, are you ready to proceed?

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

19 **[Pause.]**

20 DDC [LCDR PIETTE]: All right. Good morning, Your Honor.

21 MJ [COL FITZGERALD]: Good morning.

22 DDC [LCDR PIETTE]: All right. Your Honor, it appears that
23 this motion series, AE 563, has now come full circle, or at least

1 we're kind of back where we began.

2 And this motion series began because the commander on our
3 Joint Task Force made a decision to change the policy relating to
4 Mr. al Nashiri's restraint level in AO Patriot during our
5 attorney-client meetings. And that policy change was arbitrary. It
6 was, at best, an exaggerated response to a penological interest, and,
7 at worst, it was punishment. And the more we see, the more evidence
8 is taken, and the more this motion series evolves, the more it tends
9 to look like punishment.

10 As such, this commission should order JTF to reinstate the
11 policy that had been in place from 2019 to 2023 in AO Patriot and
12 allow Mr. al Nashiri to meet with us, to meet with his lawyers
13 unshackled, as he had for those four years.

14 And to be clear, Your Honor, Mr. al Nashiri being unshackled
15 in AO Patriot during those four year and some change was a policy.
16 It was not a deviation from policy. It was itself a policy decision
17 made by JTF or his -- or their designees. And I bring that up
18 because we tried to -- in the last iteration of this, when we argued
19 this in the last hearings and Your Honor made a decision, we were
20 trying to work within the SOPs.

21 As Your Honor recalls, when we first filed this motion,
22 it -- we filed it because there had been that arbitrary change. That
23 arbitrary change that felt and looked, and the evidence showed, was

1 punishment that caused Mr. al Nashiri to suffer. And that suffering
2 then affected his ability to interact with us, his lawyers, thus
3 affecting our ability to effectively represent him.

4 And this is kind of part and parcel of the way JTF has been.
5 And, you know, we have to get used to it. Mr. Abd al Rahim -- excuse
6 me, Mr. al Nashiri has been here for a number of years.

7 As you know, there's turnover. So there's going to be
8 little differences, little changes that occur that he has had to
9 learn to deal with over the years. Sometimes they are big changes,
10 and those get addressed. Your Honor, this is a big change, but this
11 is part and parcel of this JTF commander's seeming policy decisions
12 to make arbitrary changes.

13 And as Your Honor has seen from the record, when you're
14 reviewing the broader record in this case and you look back at the
15 torture that Mr. al Nashiri was subject to by the United States
16 Government, over the course of his four years in black sites, you've
17 learned that the policy there, the policy in that torture, one of the
18 big ones was arbitrary changes. Keep them on edge. Keep
19 them -- keep these guys reliant. Teach them dependence. And keep
20 them on edge. And that's what arbitrary changes do. Arbitrary
21 changes equal uncertainty.

22 In this instance, in this particular commission that was
23 created to deal with these cases that involve torture, that

1 uncertainty equals torture. And we can see it in the things like
2 now -- you know, we used to bring a coffee pot in when we would meet
3 with Mr. al Nashiri so we could share coffee together. Suddenly
4 we're not allowed to do that anymore.

5 I go back into meetings after hearings and they tell me I
6 can't come in because I'm in my uniform and Mr. al Nashiri might rip
7 my Navy Seal trident from my chest and try to stab me with it,
8 apparently, is their reasons.

9 Suddenly protein powder isn't allowed one day and then
10 it's ----

11 ATC [Capt LANNING]: Objection, Your Honor.

12 DDC [LCDR PIETTE]: ---- next week.

13 MJ [COL FITZGERALD]: Say it again.

14 ATC [Capt LANNING]: Objection. The basis being that this is
15 a discrete action by the JTF commander, and Lieutenant
16 Commander Piette is now bringing in all other kinds of issues that
17 are unrelated to the issue before the court, which is specifically
18 the restraint-during-legal-meetings policy.

19 MJ [COL FITZGERALD]: First of all, it's hard to tell if
20 you're standing or seated when you're addressing me.

21 ATC [Capt LANNING]: Apologies, Your Honor.

22 MJ [COL FITZGERALD]: This is argument. So I'm not going to
23 have the defense orient their argument in a way that they don't want

1 to. So I imagine he's going to make that nexus, and so I'm going to
2 allow him to do so.

3 So your objection is overruled.

4 DDC [LCDR PIETTE]: Thank you, Your Honor.

5 And the nexus here is the purposeful suffering to
6 Mr. al Nashiri that is being caused by the decisions, the policy
7 decisions of commander, Joint Task Force-GTMO.

8 You know, there's multiple examples. I'm obviously not
9 going to go through all of them because this is -- this motion is
10 about -- we are asking you to use your authority under the law to
11 rule that Mr. al Nashiri should be -- will be unshackled during all
12 attorney-client meetings with Abdul -- or Mr. Al Nashiri in AO
13 Patriot, which is the only place we meet.

14 We're not asking at this point -- I mean, you might see
15 motions in the future dealing with how he used to be able to bring in
16 DVDs with him so he could watch stuff while he waits for us. Now
17 that's not allowed anymore, or maybe it is now, I'm not sure, because
18 we don't know.

19 When they go and they search his room and they take his
20 personal hygiene tools and replace it with another one without
21 telling him -- again, more arbitrary changes, but this is part and
22 parcel of -- but this one, Your Honor, is something we can do
23 something about, again, because this was an arbitrary change.

1 And as I mentioned before -- well, as Your Honor sees, in, I
2 believe it was AE 563K, the government noticed this commission that
3 the SOP that we had been attempting to work under during the last
4 hearing was changed.

5 And, Your Honor, that's another example. An arbitrary
6 change that was made for no other reason than to essentially usurp
7 your authority. But the truth is, Your Honor, your authority to act
8 here does not come from the SOPs or any policy promulgated by JTF.
9 It comes from the law. You absolutely have the authority to review
10 JTF's policy decisions when they affect the rights of Mr. al Nashiri.
11 And you can see in the filings, especially with the case Turner v.
12 Safley
13 and Bell v. Wolfish. But that's all in the pleadings.

14 It's become abundantly clear that the government, and
15 especially JTF commander, want -- do not want you to use your
16 authority, and they've taken steps to ensure that.

17 Number one, what I just talked about, changing the SOPs to
18 usurp your authority. On 20 May 2024, JTF changed the policy that we
19 were trying to work in. That's 3-14-H sub -- or 8, subparagraph H.

20 I want to make clear that this -- on 20 May 2024, that was
21 immediately after five weeks of 9/11 hearings during the time that
22 those defendants in that case -- as everybody knows, the 9/11 case
23 deals with the murder of some 3,000 Americans, and those people

1 accused of those murders were allowed to meet unshackled.

2 Now, that policy that we were working under used to
3 say -- and this is -- again, it's in the pleadings but I'm just
4 reciting it again here: When the detainee is in the holding cell
5 with any non-detainee, his lawyers, for example, they are to be
6 secured by [REDACTED] restraints [REDACTED] in the cell or otherwise
7 authorized by the judge.

8 All right. We're good?

9 Now, the new one, as Your Honor saw, which was noticed by
10 the government, commander, Joint Task Force, rewrote that, clearly in
11 response to your rulings and this motion series, us raising an issue,
12 and now says: The CJTF, or their designee, is the sole authority on
13 restraint level at the ELC when the judge is not on island, and it
14 took out the "or otherwise authorized by the judge" language.

15 In other words, it purports to remove authority to determine
16 the restraint level -- your authority to determine restraint level,
17 while on island, and it purports that the judge has no authority to
18 determine restraint level when not on the island.

19 Again, putting a pin in this, but that is a policy change.
20 And again, I'm using the word "policy" here as kind of a catchall.
21 An SOP is a policy. So is the decision that JTF made for four years
22 to allow Mr. al Nashiri to meet unshackled. That was a policy. And
23 this is a policy change.

1 And we had to look at it. What is the reason? Is this
2 policy change rationally related to any penological interest?

3 Clearly it's not. The only reason for this change, Your
4 Honor, was that you had issued an order stating that JTF needs to go
5 back to its policy, at least in meetings when hearings are in
6 session, that in AO Patriot, Mr. al Nashiri is to meet unshackled.

7 So this policy change where the commander, Joint Task Force,
8 is trying to remove your authority, trying to usurp your authority
9 there, that's not in accordance with the law. JTF does not have the
10 authority to usurp your authority. They do not have the authority to
11 say that the military judge -- and by that, to be clear, they mean
12 the law -- has no authority to determine restraint levels.

13 It's clear that commander, Joint Task Force, would like to
14 be able to operate outside the law and to say that the law has no
15 authority. But the truth, this is still an American court system,
16 you know, despite it being done in Guantanamo Bay and despite the
17 amount of secrecy surrounding it, despite the fact that the
18 government's trying to get hearsay evidence derived from -- well, I
19 won't go there.

20 Again, it's clear, again, by the timing of this policy
21 change that it was, you know, not only targeting Mr. al Nashiri,
22 who -- again, we use this legal language saying is it rationally
23 related to any valid penological interest? Really, it's just there's

1 no reason that Mr. al Nashiri needs to be shackled after four years
2 of being unshackled, without incident, under JTF's policy. So this
3 is targeting Mr. al Nashiri in an arbitrary manner.

4 Honestly, Your Honor, it's also targeting you. It's
5 targeting this commission. It's targeting a military judge. And
6 it's part and parcel of all those changes, those arbitrary changes
7 that I was illustrating earlier.

8 Another step they're taking, you're going to hear about this
9 in a different motion series, but there's some potential that private
10 mental health records have been inappropriately disclosed.

11 We got a notice through discovery that on 24 April 2024, the
12 commander, Joint Task Force, requested Mr. al Nashiri's medical
13 record, mental health diagnoses, presumably to further their kind of
14 ad -- or post hoc justifications for making this policy change that
15 was, in fact, arbitrary.

16 ATC [Capt LANNING]: Objection, Your Honor.

17 MJ [COL FITZGERALD]: Basis?

18 ATC [Capt LANNING]: None of this is in the record. He's
19 talking about evidence that you may see later in the record in an
20 argument about a totally separate motion series. It's inappropriate.

21 MJ [COL FITZGERALD]: Defense?

22 DDC [LCDR PIETTE]: Your Honor, again, this is another thing
23 that has to do with that arbitrary change. And I was -- I think some

1 of that's fair. I was going to tie it up real quick, just giving
2 Your Honor a heads-up that there was this other issue forthcoming.

3 But I wanted to bring it out there because it goes to what
4 I'm going to talk about next, is the commander, Joint Task Force, and
5 the government's kind of post hoc rationalizations for this. And we
6 can see when they're digging into and trying to inappropriately get
7 mental health records that they're not supposed to look at in order
8 to provide that post hoc justification, that that's yet another
9 example.

10 MJ [COL FITZGERALD]: So I will sustain the objection as to
11 any part of your argument presentation that is not facts in the
12 record.

13 DDC [LCDR PIETTE]: Understood, Your Honor.

14 In that case, I will move on to the -- again, the next thing
15 we see is the post hoc rationalizations. And I'm not going to spend
16 too much time on this. I argued this when we argued the motion the
17 first time around, although at that point we had -- and I think we
18 were all trying to work within the -- within the SOPs.

19 Now that commander, Joint Task Force, has removed those
20 SOPs, we have -- we can only rely on the law. And what the law
21 states, again, is that if they're going to make a policy change that
22 affects Mr. al Nashiri's rights, that has to be rationally related to
23 a valid penological interest.

1 It can't be an exaggerated response. And if it is an
2 exaggerated response, if it's not rationally related, we treat it as
3 punishment. And this is improper pretrial punishment.

4 We dealt with this last time, so I'm not going to go over
5 all the post hoc rationalizations that commander, Joint Task Force,
6 put in his affidavit, or I should say the lawyers presented to him to
7 put in his affidavit, and then that he got up and testified about.

8 And -- but most recently we saw in the government's
9 filing -- and I addressed this in the reply -- the most recent post
10 hoc rationalizations, probably the most egregious of all, where a
11 Middle Eastern -- they searched the record -- and again, as Your
12 Honor knows, you know, they had from the beginning of this
13 motion -- presumably when commander, Joint Task Force, made that
14 decision, there should have been some reasons. So they should have
15 had those reasons on standby.

16 But after all this time -- we're in, I believe, Kilo now, so
17 11 motions and responses -- all that evidence that they had the
18 chance to bring in, we're kind of arguing this thing for the second
19 time in the second set of hearings, and this is the best they can
20 come up with.

21 Again, as Your Honor will remember from last time, two
22 instances of post hoc rationalization that have to do with other
23 detainees, a number of instances that had to do with things -- minor

1 issues that occurred after the change in policy was made, and a few
2 instances that the lawyers for commander, Joint Task Force, were able
3 to dig up through the records and find, you know, some instances that
4 maybe would have justified something, but certainly didn't at the
5 time because that change was never made until years later.

6 But now, in addition to all of that, they come up
7 with -- they really scoured the record and went back to the year 2000
8 in a completely jurisdiction -- excuse me -- a completely different
9 jurisdiction up in New York. I don't know how far it is. Say, a
10 couple thousand miles away, maybe. But in a completely different
11 case, a different detainee.

12 The only real similarities being that this is a Middle
13 Eastern man charged with terrorism who attacked a guard in a
14 completely different correctional facility in a completely different
15 situation.

16 Here we have Mr. al Nashiri, a Middle Eastern man who has
17 been charged with terrorism. That's the only thing that they have
18 that can pin these two together.

19 This is 2000 -- this happened in 2023 when this policy
20 change was made. It's in Guantanamo Bay. There are no other
21 similarities.

22 Your Honor, I didn't bring them up here. You know, they
23 wanted to put in the record in their filing some pictures that show

1 the horrors of what happened back in 2000 in the correctional
2 facility in New York City to show just how bad it could be. Again,
3 showing the emptiness of their argument. Going back to commander,
4 Joint Task Force, argument, well, I'm thinking about what
5 could -- I'm imagining what could happen.

6 Again, part and parcel of their argument, which is
7 that Mr. Abd al Rahim -- or Mr. al Nashiri hasn't given us any reason
8 to change the policy, but he could. This other guy did, who kind of
9 looks like him and has the same skin tone, did something really bad.
10 So, therefore, he could do something because, you know, he has the
11 same skin tone. It's a shocking and unacceptable argument, honestly.

12 And there was some thought as to maybe bringing in some
13 pictures here of lawyers -- or clients hugging their lawyers, because
14 that's another thing that could happen. We have, you know, pictures
15 of people in confinement holding babies, smiling happily. Like, that
16 has the same amount of relevance.

17 So when Your Honor is looking at that, I think you've got to
18 understand how it just exposes the emptiness of the argument and the
19 fact that everything -- all the rationalizations that the government
20 is relying upon to say that you should defer to the authority of
21 this -- of the commander of Joint Task Force-GTMO and his arbitrary
22 changes and his arbitrary -- and his desire to work outside the law.
23 Understand that those are empty arguments.

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1 Again, Your Honor, at the end of the day, there is no reason
2 for Mr. al Nashiri to be shackled. The policy from 2019 to 2023 was
3 working. There was no reason to change it. There was also no reason
4 for commander, Joint Task Force, to change the SOP in 3-14-H -- or 8,
5 excuse me, paragraph H.

6 And that's why we're requesting that Your Honor rule that
7 Mr. al Nashiri be unshackled during his attorney-client meetings in
8 AO Patriot, both during hearing sessions and outside of hearing
9 sessions. Again, to be clear, that's the only place we meet with
10 him. We don't meet over in the other places where the other
11 detainees meet when their hearings aren't in session.

12 We only meet with him here in AO Patriot, which is I believe
13 why he had a different policy than the other detainees outside of
14 hearing sessions and was able to meet with us unshackled. And that
15 policy decision was made. That policy decision worked. And that
16 policy decision was arbitrarily changed. And that arbitrary change
17 has amounted to punishment that has caused actual, real suffering to
18 a human being.

19 And whatever accusations the government has brought against
20 him, he is presumed innocent and he is always a human being -- that
21 is a human being sitting there in the courtroom or watching
22 this -- who still has the capacity to suffer and still was tortured
23 for years by this government. That torture itself being a crime that

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1 nobody is being held accountable for, but Mr. al Nashiri still
2 suffers from every day.

3 And it's upon us to ensure that these proceedings
4 are -- continue in accordance with our human values. And for those
5 reasons, Your Honor, we ask that you allow him to meet with us
6 unshackled.

7 Pending any questions, that's all I have.

8 MJ [COL FITZGERALD]: I don't at this time, but I may. I'll
9 allow the government to present its argument first. Thank you.

10 DDC [LCDR PIETTE]: Thank you, Your Honor.

11 Thank you, Your Honor.

12 MJ [COL FITZGERALD]: Good morning, Captain Lanning.
13 You've ----

14 ATC [Capt LANNING]: Good morning, Your Honor.

15 I apologize. I was just shuffling with my papers here for a
16 moment getting myself prepared.

17 MJ [COL FITZGERALD]: I don't need an apology. You're fine.
18 You're taking your time. I'm just asking you if you're prepared, in
19 case you're waiting for me.

20 ATC [Capt LANNING]: Oh, yes, sir.

21 MJ [COL FITZGERALD]: I'm ready when you are. But if you need
22 more time, please feel free to take it.

23 ATC [Capt LANNING]: Yes, Your Honor.

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1 And I think that one of the statements the defense counsel
2 just made is important here, that -- he said, "We generally rely on
3 the law." Well, the government argued in April about the legal
4 standards applicable here. And again, the burden is on the defense
5 to disprove the validity of this regulation, and they have failed to
6 do that. There's a clear, logical relationship between personnel
7 safety and the minimal restraints that are used during legal meetings
8 in AO Patriot.

9 It's of no consequence, and the defense highlights that it
10 is -- although it's not according to the law -- that nothing violent
11 happened during that brief period of time, those four years and some
12 change, that the restraint policy was not enforced, because that's
13 just simply not the legal standard.

14 The government cited some case law in its brief about that.
15 The Lep v. Biden case specifically holds that a regulation at GTMO
16 does not have to relate specifically to something that a detainee has
17 done.

18 MJ [COL FITZGERALD]: Captain Lanning, if you wouldn't mind
19 slowing down just a little bit.

20 ATC [Capt LANNING]: Yes, sir. I apologize.

21 MJ [COL FITZGERALD]: Thank you.

22 Please continue.

23 ATC [Capt LANNING]: Yes, Your Honor.

1 The JTF commander should not need some incident to trigger a
2 change in a policy. It shouldn't have to be reactionary. It
3 shouldn't have to wait for something terrible to happen in order to
4 change a policy to ensure that there's personnel safety in AO Patriot
5 or anywhere else on the installation, for that matter.

6 Essentially what the -- what the defense is asking for is
7 for this commission to require complacency on the part of the
8 commander of the Joint Task Force-Guantanamo.

9 Imagine a situation, and it can happen in any -- it can
10 happen in any organization. There's a rule that was in place for a
11 good reason. And then that rule over time, maybe some people stop
12 observing it. Maybe there's a reason -- maybe there's some reason
13 unrelated to an actual, you know, intentional policy change.

14 The defense said in their argument that they think it's
15 because they only meet in AO Patriot; that's why Mr. Nashiri was
16 allowed to be unrestrained during those legal meetings.

17 So imagine that it was a mistake, because it very well could
18 have been, that this -- there was this lapse in this policy. Over
19 time, nothing bad happens. Everything goes okay for a period of
20 time. So that becomes essentially the new ad hoc rule. It just
21 becomes adopted as the rule because nobody's coming down and saying,
22 "Actually, this is the rule. We're supposed to be doing it this way.
23 There's a good reason for why we were doing it this way. We should

1 go back to that way before something bad happens."

2 So there shouldn't have to be some critical failure that
3 results from the un-enforcement of that policy so that the
4 group -- and in this case the Joint Task Force-Guantanamo -- has to
5 look back and say, "Oh, well, you know what? If we had just enforced
6 the policy from the very beginning, then this terrible incident would
7 not have occurred." We shouldn't have to wait for that.

8 And it's telling that in the defense's brief they even say
9 that had this been the policy from the beginning, had the policy
10 never changed, then they would not have even filed this motion. So
11 that's telling.

12 And it also demonstrates that the defense recognizes that
13 there is a legitimate government interest here and that the minimal
14 level of restraints that are used during legal meetings is one extra
15 piece of this sort of safety puzzle that the Joint Task Force
16 commander has to utilize to prevent harm to the personnel under his
17 authority.

18 I want to address some of the points in the defense's brief.
19 And I think it's important because now the defense has brought it up
20 in their -- in their oral argument as well, an allegation -- it's
21 just inappropriate and unnecessary and outlandish, really, that the
22 only reason that the government cited to the Mamdouh Salim case from
23 New York is that these are two Middle Eastern men with a similar skin

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1 tone.

2 Well, of course that's not the reason, and there were
3 significant similarities between that case and what's happening in
4 Guantanamo and the situation in Guantanamo.

5 There with the Salim case, you had a member of al Qaeda who
6 was detained pretrial with other members of al Qaeda in the same
7 facility. You had a plot to harm and murder, potentially kidnap
8 lawyers and other personnel during a legal meeting. And that was the
9 plot there.

10 And as a matter of fact, if you sort of dig into the facts
11 there, when the corrections officer -- who was ultimately stabbed
12 through the eye into the brain, resulting in substantial brain
13 injury, permanent brain injury -- there was some nonobservance of the
14 rule that was supposed to be in place during that time.

15 There were supposed to be two guards. I believe he was
16 supposed to be handcuffed at the time. And what happened was, there
17 was this legal meeting going on. Mr. Salim said, "You know, I need
18 to go back and get some legal paperwork from my cell to use in this
19 legal meeting." So the corrections officer, only himself -- there
20 were supposed to be two. The corrections officer walks him back to
21 his cell.

22 While he's walking him back to his cell, Mr. Salim starts to
23 whistle, which apparently ended up being the signal to his roommate,

1 who was also an al Qaeda pretrial detainee, that, "Hey, we're coming.
2 Get ready."

3 So when they go into the cell, the corrections officer then
4 is attacked and the -- he's stabbed through the eye. And more guard
5 members have to come and quell the situation and, you know,
6 essentially save the corrections officer's life.

7 They also stole the guard's keys. Because the ultimate plan
8 was to go back to that legal meeting and -- and finally do what they
9 planned to do, which was harm those lawyers and take them hostage.

10 There was also some evidence in that case that the actions
11 of Mr. Salim were directly related to issues that were going on in
12 his criminal case, because he was unhappy with the representation of
13 his defense counsel and he wanted to essentially make that judge -- I
14 think it was Judge Sands -- make that judge give him new counsel.

15 So it's directly relevant to this issue here because we're
16 talking about restraint policies during legal meetings in litigation
17 that can often be emotional, litigation that can also result in, you
18 know, unhappiness by the detainees as they're watching the litigation
19 unfold.

20 So it's directly on point. And it's, frankly, inappropriate
21 for the defense to imply that the government only brought that case
22 up because these are two Middle Eastern men.

23 Second, I want to address the defense's misapprehension of

1 the district court's -- the D.C. District Court's opinion in
2 Lep v. Biden. The defense couches the court's holding as mere dicta,
3 but it's not dicta. It's a holding from a D.C. District Court that a
4 designation need not be based on something the detainee has done in
5 order to be reasonably related to a government objective.

6 And that holding should apply here. The restraint policy
7 need not be based on anything that any specific detainee, including
8 the accused, has done. Although you have heard testimony in this
9 case that Colonel Kane considered, when he looked at this policy,
10 some misconduct by the accused.

11 But that shouldn't have to be the case because, again, he
12 shouldn't have to wait for something to happen and respond to it in
13 order to prevent harm from happening again in the future.

14 What the defense is proposing is just simply not the rule,
15 and this court should follow the courts in the D.C. Circuit when
16 addressing this policy.

17 The defense also spent a lot of time talking about Colonel
18 Kane engaging in a post hoc rationalization of the policy once it was
19 challenged here in the commission. But the commission heard from
20 Colonel Kane about his reasons for upholding that policy, and it also
21 heard that Colonel Kane arrived in GTMO in February of 2024 to
22 essentially practice -- oh, at that point, actually, to the policy
23 having been re-implemented of restraints during legal meetings.

1 Colonel Kane testified that he assessed each and every JTF
2 SOP because that was his practice that he was familiar with. He came
3 in and looked at every single policy, thought about it, and decided
4 whether or not that was his policy that he would adopt. He found
5 that policy of the restraints during legal meetings to be appropriate
6 for personnel safety when he took command.

7 The fact that this motion made him sign a declaration
8 showing his work is inapposite to Your Honor's decision today. Your
9 Honor should again follow the law which mandates deference to his
10 decision, as long as it's rationally related to some legitimate
11 government interest, which here it is.

12 And, Your Honor, the SOPs undergo a periodic review anyway.
13 So the defense -- the point that the defense brought this up and
14 that's what caused Colonel Kane to reassess his policy, to look at
15 his policy, is also inapposite.

16 And as a matter of fact, you heard testimony from Colonel
17 Kane that when the defense makes requests, he does consider them on
18 an individual basis and he does sometimes grant them.

19 The example was, you know, the number of personnel that were
20 permitted to be in legal meetings, because he found that the right to
21 have access to counsel and the ability for them to work together and
22 for them to bring in other staff members rather than have to keep
23 relaying information back and forth, the number of people in the room

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1 didn't necessarily relate to or heighten the level of risk because
2 there was still the restraint procedure in place.

3 So at the end of the day, if a detainee, including the
4 accused, were to decide to take some kind of violent or disruptive
5 action, that the restraint would prevent at least some of that harm
6 or create space in time so that the guard force could come in and
7 respond to whatever was going on.

8 And finally, the defense cites some other reason, and they
9 try to -- they attempt to walk back the implication in their brief
10 that the commission should grant the defense's motion, because if it
11 doesn't, then the accused will continue to engage in disruptive
12 behavior.

13 They cite some other reason, that there was a meeting going
14 on and there was some misunderstanding with the guard force. But, in
15 fact, Mr. Natale actually felt the need to go to the podium and
16 provide additional comments on Appellate Exhibit 563 after the motion
17 was closed because of his client's dissatisfaction.

18 Here's what the defense says in 563D, its motion. In its
19 fact section, it says: On 4 April 2024, Mr. al Nashiri demanded to
20 speak to the commission. Through his attorneys, he communicated that
21 he was upset about still being shackled when the defendants in the
22 9/11 case, and involving the detainee who assaulted his lawyer in
23 court, remained unshackled while in AO Patriot during hearings.

1 This court session was delayed for over an hour. Then over
2 half an hour was spent on the record with the parties arguing over
3 the appropriate course of action.

4 Then in their argument section, the defense says:
5 Mr. al Nashiri and his defense, this commission, and presumably the
6 government, all have an interest in these proceedings moving forward
7 towards a final resolution.

8 The defense also says in their argument: Additionally, it
9 has resulted in the commission wasting valuable time and resources on
10 issues unrelated to the resolution of Mr. al Nashiri's case.

11 The implications here -- or the implication here is clear
12 and it's improper. It was appropriate for the government to argue
13 against the commission making any kind of ruling because the accused
14 may be disruptive if the ruling does not -- does not go his way.

15 And I will -- the court's indulgence for just a moment.

16 **[Pause.]**

17 ATC [Capt LANNING]: As a matter of fact, Your Honor, in the
18 transcript, on -- it's page 27249, that's 27249 of the transcript,
19 and this is Mr. Natale: And in this particular case, the reason why
20 I brought this to the attention of the court is because the only
21 reason why Mr. Nashiri came here today ----

22 MJ [COL FITZGERALD]: Captain Lanning, sorry to interrupt you.
23 But again, it happens when I think we all read. So just remember

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1 when you're reading, please slow down.

2 ATC [Capt LANNING]: Yes, sir. I apologize.

3 MJ [COL FITZGERALD]: You may continue.

4 ATC [Capt LANNING]: Yes, sir.

5 So he says: And in this particular case, the reason why I
6 brought this to the attention of the court is because the only reason
7 why Mr. Nashiri came here today, knowing he would be shackled, is
8 because he wanted to say -- and then there's an objection from the
9 government, and Your Honor notes the objection -- and this had to do
10 with Mr. Nashiri demanding to speak to the commission.

11 Mr. Natale says he feels he's confronted -- or: He is
12 confronted with the situation where he feels that he is being treated
13 so unfairly when all other people are not suffering the same and that
14 this -- and the reason why I stand is this affects my ability and my
15 team's ability to provide the effective representation.

16 So that's exactly what the defense was talking about in
17 their motion or in their -- when they brought up this disruption on
18 April 4th, is essentially that if we would just do what the accused
19 wants us to do, then it would make all of our lives easier.

20 But that's not the law, sir, and that's not what this court
21 should do. This court should follow the law, give deference to the
22 commander of the Joint Task -- of Joint Task Force-Guantanamo and
23 uphold the restraint policy.

1 And there are just a few more points, Your Honor. One is
2 just the practicality of this. When Your Honor made your ruling in
3 563C, Your Honor did give deference to the commander and looked at
4 the SOPs, interpreted those SOPs, and didn't go beyond that, didn't
5 go outside of the authority that was just granted to the commission
6 by the JTF commander.

7 Here, the defense is asking you to wholly override the
8 commander's authority. And when we discussed the -- what ended up
9 being the ruling in Appellate Exhibit 563C, Your Honor had questions
10 about: Well, who do I rely on, you know, when I'm making these
11 decisions? You know, the commander testified about who he relies on,
12 which is he has subject matter experts that inform his
13 decisionmaking.

14 When Your Honor is on island, the situation is different.
15 There's -- the atmosphere is different. Your Honor is in charge of
16 these proceedings. And there's, frankly, more focus on a particular
17 detainee when there's a case going on, when there's active
18 commissions for that particular detainee. There's a lot of movement.
19 There's a lot of back and forth. And Your Honor is, when on island,
20 specifically attuned to what's going on in that case.

21 When Your Honor is not on island, Your Honor may not be
22 easily accessible. There may need to be quick decisions that the
23 commander is then going to have to think, well, do I need to contact

1 the commission before I make this decision? You know, my subject
2 matter experts are telling me that I should do this right now.

3 And then there's also just the fact that other commissions
4 could be going on at the same time. This one detainee -- and again,
5 this applies across the board. It's not just to Mr. al Nashiri. And
6 it's the commanders -- the commander has to manage all of these
7 detainees in all of these commission cases, you know, or facilitate
8 them, moving people back and forth and so on.

9 So when one detainee doesn't have commission sessions going
10 on, effectively there's some back-burner there, right? Like there's
11 a lot of focus on the commission that's currently in session, and
12 then there's still a lot of other detainees that need to be taken
13 care of. So there's a resource issue there. There's an attention
14 issue there.

15 So Your Honor was appropriately -- appropriately limited
16 563C to only apply when Your Honor -- essentially, when Your Honor's
17 on island.

18 And then the new -- or I'd say the updated SOP that recently
19 was -- came out is in line with Your Honor's ruling. It's in line
20 with what Your Honor identified to be the commission's authority.
21 And it -- it does not -- it does not overrule or attempt to overrule
22 the commission.

23 It essentially says that in the absence of an order, a

1 specific order specific to that detainee for that specific
2 commission, there will be restraints during the legal meetings. In
3 this case, there is an order regarding restraints during legal
4 meetings, so that order would apply.

5 And then it says: But when that judge is off island, then
6 the commander of the Joint Task Force has essentially plenary
7 authority, which Your Honor recognized. And you can find it in the
8 transcript, but I'll try to wrap up soon here. But the commander
9 does have plenary authority, especially when the commission's not in
10 session.

11 So, Your Honor, there's no ambiguity here. The law is
12 clear. In this circumstance, the commission must give deference to
13 the commander of the Joint Task Force. It's bound by the
14 D.C. Circuit's ruling in Hatim v. Obama and the Supreme Court's case
15 law on this issue. To rule otherwise wouldn't comport with the law.

16 It would be practically untenable, and it would force the
17 Joint Task Force commander to assume an unreasonable level of risk to
18 the lives and well-being of the servicemembers under his charge, the
19 detainees in his care, and the attorneys who come here to zealously
20 advocate for them. This commission should deny the defense motion.

21 And pending any questions, Your Honor, that's all I have.

22 MJ [COL FITZGERALD]: I do have some questions, Counsel, and I
23 appreciate your summation.

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1 ATC [Capt LANNING]: Yes, sir.

2 MJ [COL FITZGERALD]: You recall at the last hearing, you had
3 made a comment to me that my ruling may cause you to go back to the
4 JTF commander to have him address it in future SOPs or something to
5 that effect. Do you remember telling me that?

6 ATC [Capt LANNING]: I'm not sure I recall that I would go
7 back to the JTF commander ----

8 MJ [COL FITZGERALD]: Well, the government.

9 ATC [Capt LANNING]: ---- and ask ----

10 MJ [COL FITZGERALD]: I should say the government. And I
11 remember it because I ----

12 ATC [Capt LANNING]: I understand -- yes. I remember an
13 exchange ----

14 MJ [COL FITZGERALD]: I remember it because I was a little
15 stunned that you said that.

16 Do you remember that exchange?

17 ATC [Capt LANNING]: I do generally, yes, sir.

18 MJ [COL FITZGERALD]: And you informed me that, that the
19 government may have to go back to the JTF commander to have him
20 address anything I say in future SOPs or something to that effect?

21 ATC [Capt LANNING]: And I don't -- I don't mean to argue with
22 the commission or disagree with the commission. I don't recall
23 saying that the government would go to the JTF commander and

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1 essentially effectuate some change in the SOPs.

2 MJ [COL FITZGERALD]: Okay.

3 ATC [Capt LANNING]: I think the commander has the authority
4 to look at what's going on in the litigation and react based off of
5 that.

6 MJ [COL FITZGERALD]: Sure.

7 ATC [Capt LANNING]: And I'm not -- I'm not arguing with Your
8 Honor or disagreeing with Your Honor. I very well may have said
9 that. I don't recall saying it in that way.

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

11 Do you remember the JTF commander telling me when he was on
12 the stand that -- and he has a revolving process. He has a lot of
13 SOPs he has to review, take guidance and advice and make those
14 changes?

15 ATC [Capt LANNING]: Yes, sir.

16 MJ [COL FITZGERALD]: And any -- he mentioned multiple SOPs.
17 And he has them all on a rotation.

18 ATC [Capt LANNING]: Yes, sir. He does.

19 And I think actually at the top usually of the SOP he
20 generally has a date that -- I think it's like a review date that he
21 will put at the top of them. Yes, sir.

22 MJ [COL FITZGERALD]: Essentially, if I remember right, it was
23 roughly around an annual review, correct?

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1 ATC [Capt LANNING]: That sounds right. Yes, sir.

2 MJ [COL FITZGERALD]: And as I understood it, he arrived in
3 February 2024?

4 ATC [Capt LANNING]: Yes, sir.

5 MJ [COL FITZGERALD]: And around that time he conducted his
6 review of this SOP that's in question?

7 ATC [Capt LANNING]: He did, sir. Yes, Your Honor.

8 MJ [COL FITZGERALD]: Yet in May he amended his own SOP?

9 ATC [Capt LANNING]: That is true. Yes, Your Honor.

10 MJ [COL FITZGERALD]: Shortly after this commission conducted
11 a hearing here?

12 ATC [Capt LANNING]: That is true. Yes, Your Honor.

13 MJ [COL FITZGERALD]: Seemingly out of his own rotation, as he
14 stated, during the hearing?

15 ATC [Capt LANNING]: Yes, Your Honor, he did. And I don't
16 think that he's limited by his own ----

17 MJ [COL FITZGERALD]: I -- I'm sorry, sir.

18 He's certainly not limited. But he told me his procedures.
19 And his procedures was roughly an annual review of ----

20 ATC [Capt LANNING]: Yes.

21 MJ [COL FITZGERALD]: ---- the existing JTF standing
22 operating -- standard operating procedures.

23 ATC [Capt LANNING]: Yes, sir.

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1 MJ [COL FITZGERALD]: And he had done so in this case roughly
2 when he arrived in February or March.

3 ATC [Capt LANNING]: Yes, Your Honor.

4 MJ [COL FITZGERALD]: We held a hearing in April going into
5 May.

6 ATC [Capt LANNING]: Yes, sir.

7 MJ [COL FITZGERALD]: And shortly thereafter he reviewed his
8 SOP and amended his SOP.

9 ATC [Capt LANNING]: Yes, sir.

10 MJ [COL FITZGERALD]: Outside of what he stated was his review
11 policy, correct?

12 ATC [Capt LANNING]: Yes, sir.

13 MJ [COL FITZGERALD]: And inside of 30 days of this court
14 addressing his SOP?

15 ATC [Capt LANNING]: Yes, Your Honor.

16 MJ [COL FITZGERALD]: How do you reconcile that that doesn't
17 appear to be arbitrary or directed at this commission?

18 ATC [Capt LANNING]: Understood, Your Honor.

19 So I would say that the updated SOP recognizes this court's
20 ruling. And it doesn't -- it doesn't circumvent that ruling. It
21 doesn't even -- it doesn't directly abut that ruling. It recognizes
22 and incorporates that ruling.

23 And again, I would -- I would argue that the JTF commander

1 can react based off of what's going on in the commissions to look at
2 his policies again. And every time he looks at his policies, he has
3 to go back to that: Is this related to some legitimate government
4 interest?

5 And I think -- and that's -- that is the issue, is
6 reasonably related to some legitimate government interest, or some
7 legitimate penological interest. It doesn't have to be in response
8 to some specific act or some specific incident that occurs.

9 And that's the arbitrariness issue, is what does arbitrary
10 mean in this context? And arbitrary in this context would mean that
11 the policy doesn't relate to some reasonable -- or to some legitimate
12 government interest. There is no logical nexus between the two
13 things. Or that it's an exaggerated response, like the defense
14 argues, to some legitimate government interest, the legitimate
15 interest being personnel safety during legal meetings.

16 So, you know, for example, in our -- I would say that if
17 Mr. Nashiri or any of the other detainees, absent any, you know,
18 additional information -- I mean, if they were restrained to, you
19 know, say, a -- you know, a bed or a cot, like, completely, they
20 could not move, the only thing they could do is move their head left
21 to right, I think that that would probably be an exaggerated response
22 to a legitimate government interest.

23 But I think here what the restraint level is, is reasonably

1 and rationally related to personnel safety. And that's -- that's the
2 inquiry. It's not whether it was in reaction to anything in
3 specific. It's whether there's some reasonable nexus.

4 And that's what the -- the Lep case talked about that. And
5 that case talked about the HVD designation, but it had to do with how
6 the detainees -- how their conditions of confinement, essentially,
7 related to the HVD designation. And the court there found that there
8 was a legitimate government interest that these detainees may know
9 things that are classified that the government has to essentially
10 protect from disclosure.

11 I see the -- I apologize to the -- to the interpreters
12 there.

13 That that was a legitimate government interest. It didn't
14 have to be based off of, for example, a spill, right? Like, a spill
15 didn't have to occur for the Joint Task Force commander to say, "Oh,
16 do you know what? Now we need to designate these people as
17 high-value detainees and that means that there have to be these sort
18 of additional restrictions on, you know, certain communications."

19 And it's the same here, sir. There shouldn't have to be
20 some triggering event that requires him to react. Here, the
21 arbitrary analysis is whether or not there is some legitimate
22 interest and whether the government action relates to that interest.

23 If it doesn't, then like the defense said -- and I'll agree

1 with them here -- if there is no nexus between those two things,
2 there's no logical relationship between whatever those two
3 policy -- the policy and the interest, then that does look like
4 punishment. You know, why would the government be doing this?

5 But here in this case, there is a -- there's a clear,
6 logical connection. And I think we all can agree that a single point
7 of restraint during a legal meeting is logically related to the
8 safety of the people in that meeting.

9 MJ [COL FITZGERALD]: Do you believe the new SOP -- I think
10 you said it -- it doesn't contravene this court's previous ruling in
11 any way?

12 ATC [Capt LANNING]: It does not, Your Honor. Because it
13 recognizes Your Honor's ruling. So Your Honor made an order that
14 during commission sessions, they -- the accused will be unrestrained
15 during legal meetings at AO Patriot, in the adjacent holding cells.

16 Sorry, sir.

17 MJ [COL FITZGERALD]: And it provides that I can exercise that
18 authority when I arrive on island until I leave island? Is that your
19 understanding?

20 ATC [Capt LANNING]: That is, but I think it -- and if you
21 could give me -- if I could have one moment, Your Honor, just to sort
22 of refresh my recollection.

23 MJ [COL FITZGERALD]: You may.

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1 **[Pause.]**

2 ATC [Capt LANNING]: Yes, Your Honor. It says -- and

3 I -- well, I'm cautious of quoting the language here ----

4 MJ [COL FITZGERALD]: You don't have to quote.

5 ATC [Capt LANNING]: ---- sir, but it does. I mean, it
6 says when -- because it talks specifically about when the judge is
7 not on island ----

8 MJ [COL FITZGERALD]: Right.

9 ATC [Capt LANNING]: ---- that the commander has the authority
10 at that time.

11 MJ [COL FITZGERALD]: Okay. So would you agree "on island"
12 means when wheels down on island?

13 ATC [Capt LANNING]: Yes, sir. So I would say -- and I think
14 Your Honor mentioned in your ruling it was the Saturday to the
15 Saturday. So I think that those two things are not incompatible.

16 So, you know, when -- we all generally come down to island
17 at the same time. We all generally come on the Saturday before the
18 session begins. We leave on the Saturday after the session ends.
19 You know, absent a situation where that's not true, then there is
20 no -- there's no issue here.

21 And I -- you know, I don't want to get into legislative
22 intent, I guess, and try to divine what the commander was thinking,
23 but I don't believe that there was any kind of idea of the commission

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1 is -- you know, "the commission's coming close to my authority. I
2 need to act to circumvent that or to prevent that."

3 It's a looking back at the policies, thinking, you know,
4 what -- does this policy make sense? Is there some cross-issues here
5 that maybe weren't discussed?

6 And that this -- this is really to clarify. I mean, clarify
7 is essentially what the policy was and what it sort of ended up being
8 in reaction to this commission's ruling.

9 Because as I'll note -- and I thank you to my
10 colleagues -- that there really is no -- there's no written ruling
11 from another commission. This was the first written ruling that we
12 have about this restraints -- about this restraint issue. So the JTF
13 commander needed to essentially incorporate that into the SOPs.

14 In the 9/11 case, there was some -- I think the judge made a
15 statement on the record. But it's sort of unclear from that language
16 whether, you know, is this a ruling that applies just now or is this
17 a ruling that applies forever?

18 So again, it goes to clarity, right? Like when a judge
19 issues a written ruling, it's sort of hard to disagree with what that
20 says. You know, that's the ruling. It's -- there are four corners
21 to that document. There's explanation and usually an exposition as
22 to, like, why the decision is being made the way it's being made.

23 You know, sometimes on the record there are rulings that are

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1 made. And looking back at the transcript, there may be questions
2 about what did that ruling actually mean?

3 So it makes sense to have a written ruling or to require a
4 written ruling in order to essentially give the commander
5 some -- some understanding and some notice of what exactly is
6 expected of him.

7 And I think Your Honor even recognized that last sessions
8 when talking about the deference being given to the commander. And
9 Your Honor took a lot of -- a good amount of time really, you know,
10 reasoning through the language of the SOP and understanding what the
11 SOP meant before issuing the ruling.

12 MJ [COL FITZGERALD]: So I can be clear, just going back to my
13 point, if the SOP talks about "on island" and "off island," would it
14 be fair to say that "on island" means -- because I think people might
15 be interested in what does it mean when we say the commission is on
16 island -- that it means wheels down on island? That's when I am on
17 island.

18 ATC [Capt LANNING]: I think that's right, sir.

19 MJ [COL FITZGERALD]: Okay.

20 ATC [Capt LANNING]: When Your Honor is on island ----

21 MJ [COL FITZGERALD]: Okay.

22 ATC [Capt LANNING]: ---- and the commission ----

23 MJ [COL FITZGERALD]: I don't think I'm going to -- I don't

1 think I'm going to leave by any other means. So that's why I just
2 use that phrase, but ----

3 ATC [Capt LANNING]: Yes, sir.

4 MJ [COL FITZGERALD]: And I am off island when we are wheels
5 up?

6 ATC [Capt LANNING]: Yes, sir.

7 MJ [COL FITZGERALD]: Okay. So again, you're not speaking for
8 the commander. He's got his own legal advisors. But do we agree
9 that's what "on island" and "off island" mean ----

10 ATC [Capt LANNING]: Yes, sir.

11 MJ [COL FITZGERALD]: ---- your understanding? Okay.

12 ATC [Capt LANNING]: Yes, sir.

13 MJ [COL FITZGERALD]: And to my next point, you know, we have
14 holdings and case law that says I have to comply with them. I
15 understand that that's the law, when we have a holding.

16 And the holding is it mandates deference, and you've said it
17 multiple times, so I want to make sure we have a clear understanding.
18 Do you believe "mandates deference" means it mandates the
19 commission's compliance to the SOP or just deference to the SOP?

20 ATC [Capt LANNING]: The way the cases generally have gone is
21 there's a challenge to a policy. The court reviews it and determines
22 whether or not there's that rational connection. And if there's that
23 rational connection, then the court does not overturn or overrule

1 that policy.

2 So that, in my view, is what the courts mean when they say
3 "deference." It's that as long as there is that nexus, then the
4 courts will permit that -- essentially that regulation to continue
5 and not find that it's, you know, unlawful or, you know, in generally
6 those circumstances unconstitutional. That's my interpretation, sir.

7 MJ [COL FITZGERALD]: And looking at the SOP -- and you can
8 certainly take a look -- going to the last paragraph in that SOP, it
9 says that if I should issue an order, that somebody from the
10 commander's legal team will brief him on that order?

11 ATC [Capt LANNING]: Yes, sir.

12 MJ [COL FITZGERALD]: And if it applies, any deviation from
13 the SOP, does it say that?

14 ATC [Capt LANNING]: It says, "and an explanation of the
15 departure from this SOP," sir.

16 MJ [COL FITZGERALD]: So the JTF commander contemplates a
17 commission departing from the SOP despite the mandate to give
18 deference to the SOP? Even the JTF commander contemplates the
19 commission may depart from them, correct?

20 ATC [Capt LANNING]: It may have to be read in the context of
21 that last paragraph, I think, as well.

22 I don't think that that means a departure from the total
23 framework, meaning, you know, a departure saying, you know, I'm

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1 not -- I don't think he's adopting a policy in this SOP that says,
2 "Whatever the commission rules, I'm going to follow it, but I just
3 need an explanation from my SJA about what that -- why, or an
4 explanation about what that means."

5 I think what that means is the SJA advises the commander on
6 what the commission's ruling means regarding -- within these SOPs.

7 So when -- like, Your Honor issued 563C. That would
8 contemplate the SJA explaining to the commander what that ruling
9 means, and then -- so that he can implement it, I think is what that
10 language is meant to be.

11 MJ [COL FITZGERALD]: Including if -- and very expressly, if a
12 ruling departs from the SOP? That's what that last phrase says,
13 correct? It's a dependent clause, dependent on if I issue a ruling,
14 you will get a brief as to that ruling and any departure from his
15 SOP.

16 ATC [Capt LANNING]: But it also doesn't really -- it doesn't
17 discuss the contents of any particular ruling.

18 MJ [COL FITZGERALD]: I understand that. I'm keeping it very
19 broad terms.

20 Even the JTF commander knows a ruling may come down that
21 departs from his SOP?

22 ATC [Capt LANNING]: That, of course, could happen, yes, sir.

23 MJ [COL FITZGERALD]: Okay. So it seems to me the JTF

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1 commander understands the difference between the law mandates I defer
2 but does not mandate the commission complies, if -- does that make
3 sense? They're not the same. It doesn't mandate my compliance with
4 an SOP.

5 ATC [Capt LANNING]: Of course not.

6 MJ [COL FITZGERALD]: It mandates that I run through a
7 deferential analysis.

8 ATC [Capt LANNING]: Of course, sir. And I think -- I mean,
9 this commission is not under the command of Colonel Kane. You know,
10 Your Honor is not under his command.

11 What it is, is Your Honor -- Your Honor addresses and
12 analyzes regulations that are imposed by a commander, and then
13 applies the law to what that regulation is and essentially makes a
14 decision on whether to uphold or to overrule what that regulation is
15 within the framework of, you know, the legal analysis that's come
16 down from the Supreme Court through the D.C. Circuit to here.

17 So it contemplates a ruling within those -- that legal
18 framework.

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

20 ATC [Capt LANNING]: Yes, sir.

21 MJ [COL FITZGERALD]: Anything further?

22 ATC [Capt LANNING]: No, sir.

23 MJ [COL FITZGERALD]: Very well. That's all the questions I

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1 have for you. Thank you.

2 ATC [Capt LANNING]: Thank you, Your Honor.

3 MJ [COL FITZGERALD]: Defense, I didn't have any questions for
4 you to begin with, but I -- I will -- and I don't now, but I
5 certainly will allow you, if you would like, to respond to any of the
6 questions that I posed to the government.

7 DDC [LCDR PIETTE]: Yes, Your Honor. But can I have maybe a
8 five-minute recess to confer with counsel down on island?

9 MJ [COL FITZGERALD]: How about we take ten minutes?

10 DDC [LCDR PIETTE]: That would be great. Thank you, sir.

11 MJ [COL FITZGERALD]: Very well.

12 Commission's is in recess for ten minutes.

13 **[The R.M.C. 803 session recessed at 1147, 30 May 2024.]**

14 **[The R.M.C. 803 session was called to order at 1335, 30 May 2024.]**

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

16 All parties present before the last recess are again
17 present.

18 Defense, are you prepared? Am I right? Defense, you have
19 the first word and the last, correct?

20 DC [MS. CARMON]: Yes, sir. And this is AE 551.

21 MJ [COL FITZGERALD]: Very well. You may proceed.

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

23 In AE 551, the defense requests relief due to the late

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1 discovery given to the defense after Agent Gaudin testified in August
2 of 2022.

3 And if I may, sir, just set the stage for sort of the state
4 of the law here. And then what I want to move to is describing for
5 the commission who Agent Gaudin is, his import in a multitude of
6 appellate exhibits that were litigated, and then walk you through,
7 sir, places where I would have used the documents that we got
8 subsequent to his testimony had I had them in August of 2022.

9 And so the nature of the evidence here, Your Honor, is
10 Giglio evidence; that is, allegations of misconduct, bias,
11 information that affects Agent Gaudin's credibility, prior
12 inconsistent statements.

13 And I think it's -- you know, we cite Giglio a lot. And
14 it's been a long time actually since I've gone back to read the facts
15 of Giglio, and that's 405 U.S. 150, 1972.

16 And what I had not remembered, obviously Giglio stands for
17 the proposition that when the government does not give over evidence
18 that bears on the credibility of a particular witness, and there is
19 no intent required on the part of the government. This is not
20 allegations of misconduct or mal-intent.

21 But what I had forgotten about Giglio is that the
22 government's case relied almost entirely on the witness at issue.
23 And so the credibility of that particular witness was of extra import

1 in Giglio, which resulted in the -- obviously the overturning of
2 Mr. Giglio's case because the government had suppressed evidence that
3 went to that very important witness's bias and credibility.

4 And so with that in mind, sir, turning to the rules,
5 R.M.C. 701 obviously governs discovery here, (a)(3) gives you the
6 discretion and the authority to specify the time, the manner, and the
7 place of discovery. 701(e)(2) tells us when impeachment evidence
8 should be turned over. And I'll quote: As soon as practicable after
9 the referral of charges. And that refers to discovery that, again
10 quoting: Reasonably tends to impeach the credibility of a witness.

11 And in further, sir, (k)(1)(3) addresses sanctions available
12 to Your Honor in the event that the government fails to comply with
13 their discovery obligations. And one of those sanctions available is
14 to prohibit the party from introducing evidence or calling a witness.

15 And so ultimately what I'm going to ask the commission to do
16 is exclude Agent Gaudin as a witness. And that impacts four
17 appellate exhibits. One is AE 467. Obviously, that was a motion to
18 suppress Mr. al Nashiri's letterhead memorandum statement given to
19 FBI agents in January 2007. That was granted in the defense's favor
20 and is currently the -- obviously the object of the government's
21 interlocutory appeal in front of this C.M.C.R.

22 R.M.C. -- or excuse me, AE 482, which is the defense's
23 motion to suppress the statement of Mr. Al Owhali. That is currently

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1 pending before Your Honor. We've completed evidence and final
2 argument there.

3 AE 327, which was the defense's request to suppress the 2007
4 statement of Jamal al Badawi. That has been denied. So that was
5 decided in the government's favor.

6 And finally, sir, AE 480, which is the defense's motion to
7 suppress Mr. Bin'Attash's -- or Khallad as he is colloquially
8 known -- Khallad's statement which -- and I'm sure we'll get to later
9 this afternoon, but it's the defense's position that evidence is
10 closed there pending final argument.

11 And the reason I bring up those four sources of litigation
12 is because Agent Gaudin served as the government's sole sponsoring
13 witness in each of those for the statement at issue. And so if the
14 commission is to grant the defense's relief, essentially what that
15 means is that those -- those statements obviously would be out
16 because there would be no sponsoring witness that the government put
17 forth.

18 In AE 467, the government called three witnesses. Only one
19 to sponsor the actual letterhead memorandum statement, and that was
20 Agent Gaudin.

21 In AE 482, the government called three witnesses. Again,
22 only one to actually sponsor the statement at issue. And that was
23 Agent Gaudin.

1 In AE 327, I believe the government only called one witness.
2 Again, Agent Gaudin.

3 And in AE 480, the government called Agent Gaudin as the
4 sole sponsoring witness of Khallad's statement.

5 And so ultimately what we're going to ask you to do, sir, is
6 to exclude Agent Gaudin as a witness based on the government's
7 failure to turn over critical Giglio evidence as mandated by the
8 Constitution, as mandated by the rules. And we are asking for a
9 remedy that is well within your authority.

10 And I will just remind the court -- I don't think this is at
11 issue; I know it often gets discussed -- that Brady is a trial right,
12 Giglio is a trial right. Multiple courts have found obviously that
13 Brady/Giglio evidence applies to pretrial suppression issues as well,
14 and that's well cited in our brief.

15 And so Agent Gaudin is, as I said, a very important witness
16 here. He's the government's sole statement-sponsoring witnesses in
17 four big pieces of litigation.

18 And I'm going to place now on the document camera AE 551C,
19 page 1. This is a timeline that has been cleared to be shown to the
20 public.

21 And, sir, do you need a hard copy of 551C? I have one for
22 you if you need.

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

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1 MJ [COL FITZGERALD]: Bear with me.

2 DC [MS. CARMON]: Sure.

3 MJ [COL FITZGERALD]: I wouldn't mind your courtesy copy, if
4 you would indulge the commission. Thank you.

5 DC [MS. CARMON]: Thank you, sir. And if I may have access to
6 the ELMO. And again, this has been cleared through our SC/DRT
7 process as displayable to the public.

8 And Your Honor, so here's the timeline of Agent Gaudin's
9 testimony ----

10 MJ [COL FITZGERALD]: Briefly, mine doesn't have the
11 arrow ----

12 DC [MS. CARMON]: They got faded as they continued to get
13 copied. And so you will see my beautiful hand notation on here.

14 MJ [COL FITZGERALD]: All right. So you're aware I don't have
15 it?

16 DC [MS. CARMON]: Yes. In all of the copies, unfortunately
17 the color faded, so...

18 MJ [COL FITZGERALD]: I understand. Thank you.

19 DC [MS. CARMON]: Sure. So please don't mind my drawing the
20 arrow back.

21 MJ [COL FITZGERALD]: I believe I see it faintly.

22 DC [MS. CARMON]: And so what this timeline shows is the
23 agent's testimony, and he testified over a three-day period. The

1 first two days were on direct, open. Cross-examination occurred the
2 last, I would say, four hours of the second day. And then on 12
3 August both the defense and the government had closed testimony
4 sessions.

5 And so that is the bulk -- or that is all of Agent Gaudin's
6 testimony on 10 to 12 August 2022. And again, that was sponsoring
7 the statements in AE 467, AE 480, AE 482, and AE 327.

8 And so prior to Agent Gaudin testifying, we had asked for
9 discovery based on our belief that the FBI and the CIA were sharing
10 information. And that has been a subject of our motions to suppress
11 here, obviously motions to suppress in 9/11. But what we were
12 looking for was information that we believe showed that the FBI and
13 the CIA were sharing information.

14 And what we believe that further showed is that any
15 insistence that the law enforcement officers who showed up in January
16 of 2007 to take Mr. Nashiri's statement or to take Khallad's
17 statement, could not have been, and I quote, a clean team, because
18 their interrogations would have been either informed by or tainted by
19 torture-derived evidence because of the information sharing that was
20 happening between the two agencies.

21 And what we know about some of the shared products were
22 these things called "requirements." And this has been testified to
23 ad nauseam, so forgive me for going over it one more time. But

1 requirements were from the CIA to the FBI and back from the FBI to
2 the CIA. FBI would send to the CIA black site: "Hi, I know you've
3 got X person in custody. I want you to ask some questions of them."

4 And sometimes they would get responses and the CIA would
5 send back to the FBI answers to those questions. Those are what we
6 have been calling "requirements" through this litigation.

7 And so you'll see that on 9 November 2022, the government
8 produces to us a tranche of FBI CIA requirements involving
9 Mr. al Nashiri specifically.

10 You'll see further that several months later, 21
11 February 2023, there were documents that I used in my
12 cross-examination in a closed session. They are a certain type of
13 request for documents or photographs that could be made between the
14 agencies that are separate from these requirements.

15 I used those documents in my cross-examination. I received
16 updated documents on 21 February 2023 that were directly related to
17 the questions I was asking on cross-examination in August of 2022.

18 In 23 March 2023, we get another tranche of FBI/CIA
19 requirements again relating to Mr. al Nashiri and Khallad. And so,
20 again, these are questions and sometimes answers going between the
21 two agencies from the FBI to a CIA black site, and sometimes the CIA
22 would respond.

23 On 26 April 2023 we learn of personnel actions. And what we

1 knew on 10 to 12 August 2022 is that Agent Gaudin was involved in an
2 FBI administrative inquiry into his failure to disclose foreign bank
3 accounts.

4 What we learn in April is that that did not end with the
5 FBI. It was referred to the DoJ. And so we learned that there was a
6 bigger and broader and potentially more serious accounting of his
7 actions as it related to foreign bank accounts and the failure to
8 disclose them.

9 And so 11 June 2023, we get a transcript of a 2005 interview
10 of Agent Gaudin. He was involved in the Department of Justice Office
11 of the Inspector General interview into the FBI's role in the CIA
12 program. There was a report that we have both a classified and
13 unclassified version of, but what we never had was the actual
14 transcript of the interviews that he gave -- or interview, rather.

15 Certainly the report relied on some of his interview. But
16 as I'll show you later, sir, I think there are -- there's nothing
17 like impeaching a witness with his own words. And had I had that
18 transcript, there would have been a very important to be -- a moment
19 to be able to do that.

20 And so, again, we started in August 2022. We're now 23
21 June 2023. We get what seems like his entire personnel record. And
22 within that record there are multiple allegations of misconduct, to
23 include a search outside the bounds of his clearance and allowance

1 into a computer system, misuse of his government credit card, misuse
2 of government vehicles.

3 There's a litany of misconduct, and this is what drove the
4 motion series. And so we filed this motion after receiving this
5 large tranche of personnel records.

6 And then just last month, 26 April 2024 -- I know the
7 commission is familiar with this because it was pursuant to the
8 Protective Order #3 -- this is the -- these are the polygraph
9 documents that we received. And so over a two-year period after this
10 witness has testified, we have received critical discovery we could
11 have used the entire time.

12 And so now, sir, what I'd like to do is walk you through.
13 Because part of the government's argument is, well, what's your
14 prejudice, right? You got it now. Could you have even done anything
15 with it?

16 As Your Honor knows, the material -- or excuse me -- the
17 definition and the scope of discoverable is very different than
18 admissible. And discoverable is material to the preparation of the
19 defense. That is the language of the rule in this forum as well as
20 the Federal Rule of Criminal Procedure.

21 And what is always material and always going to be allowed
22 on cross-examination is an exploration of someone's bias, motive,
23 impeachment of their credibility, and impeachment using prior

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1 inconsistent statements.

2 And so I have five instances for the commission of where I
3 would have used these items had I been allowed to have them at the
4 appropriate time. And some of these documents are classified. And
5 so what I'm going to ask that the commission do, I'll direct you to a
6 paragraph. I just want you to read for your own edification.

7 All of this is the record already, so I'll give you the
8 citation of where it is or the transcript page. But I have
9 highlighted the important -- what I want you to take away from it.
10 But I wanted to be able to do this in an open session and have you
11 look at these documents as well.

12 So what I will not be doing is reading from them, but I'll
13 alert you as to when that is happening.

14 MJ [COL FITZGERALD]: Thank you.

15 DC [MS. CARMON]: And so I'm going to remove AE 551C.

16 And so here are just some of the ways in which I certainly
17 would have used these documents.

18 In AE 46700, we filed -- prior to Judge Acosta's
19 consideration and ruling in AE 467, we filed all of the FBI/CIA
20 requirements that dealt with Mr. al Nashiri. We filed them just in a
21 pleading, because what we had not been able to do is use them with
22 Agent Gaudin.

23 And I think what's important to remember here is that the

1 witnesses who took his -- and "his" being Mr. al Nashiri's -- his
2 statement in January 2007, there was one FBI agent. The other was an
3 NCIS agent and the other one was an Air Force OSI agent.

4 And in Mr. Bin'Attash and Khallad's LHM, there was one FBI
5 agent. It was also another NCIS agent and a second NCIS agent in
6 that interview.

7 And so when you've got these requirements that are in the
8 pass line FBI to CIA, there's only one person who could have either
9 authenticated them, looked at them and said, "Yeah, I've seen those
10 before" or maybe "No, I haven't," "Yes, that is information I would
11 have received" or "No, it's not."

12 And so we filed in 46700 all of those requirements that we
13 had not been able to use with a witness.

14 And I'm going to show Your Honor one in particular, and I'm
15 going to point you to the language that I think would have been
16 certainly helpful to use with a witness.

17 And I'll also remind the commission that during the
18 testimony of Agent McFadden, who is an NCIS agent who took the law
19 enforcement statements of both Khallad and Mr. al Nashiri, I asked
20 him -- because I was hoping to be able to use this in some way. I
21 said, "If I were to show you a requirement that the FBI sent to a CIA
22 black site asking for information, would you even know what you were
23 looking at? Would you be able to authenticate it? Would you be able

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1 to say, 'I've seen those before'?"

2 And his answer was, "No, you'd have to show it to an FBI
3 agent." And unfortunately that FBI agent had testified months prior.

4 And so what I'm going to direct Your Honor's attention to is
5 AE 46700 Attachment K. And just for the parties.

6 If I may have access to the ELMO, I'm going to place that
7 particular requirement, and I'm going to ask that Your Honor read the
8 highlighted language here. And it's just a couple of sentences.

9 **[The military judge reviewed the evidence.]**

10 DC [MS. CARMON]: And so, Your Honor -- and I'll remove the
11 document now.

12 And so Your Honor can see how that might have been helpful
13 to use with an FBI agent. And certainly this is just one of many
14 requirements that we have that we could have placed in front of Agent
15 Gaudin and asked him to go through, and asked him, "Did you receive
16 this information? Were you a part of this?"

17 And certainly we were prevented from doing that because we
18 did not have them at the time.

19 One of our arguments in AE 467 and 480, as the commission
20 can see through the briefing, is, again, the information-sharing loop
21 that was happening between the FBI and the CIA.

22 And the agents, be them -- be they NCIS, FBI, or DoD agents,
23 that were assigned to take these, quote, clean team statements in

1 Guantanamo were part of the High-Value Detainee Prosecution Task
2 Force. And as part of their detailing to that task force, they all
3 had access to systems that did contain intelligence reporting from
4 CIA black sites.

5 And so it was a question of great import as to who accessed
6 those systems, who reviewed what. Because again, if you are having
7 an agent who is supposed to be -- and I quote -- a clean team agent
8 going in to question Mr. al Nashiri or Khallad who has been reviewing
9 in the prior weeks or months intelligence tainted by torture, that
10 would certainly mitigate against a finding that that interrogation
11 was in any way not tainted or attenuated from the torture.

12 And so what we were prevented from doing is, again, using
13 some of the discovery that we got to impeach Agent Gaudin when he
14 denied needing to do that.

15 And so when Agent McFadden testified in both support of AE
16 480 and AE 467, he admitted, "Yes, I looked through the systems.
17 Yes, I had access to intelligence reporting. Yes, I did that."
18 Fine.

19 What Agent Gaudin said was, "No, no. I had no reason to do
20 that. I relied on Robert McFadden because he was the subject matter
21 expert."

22 And so this is relevant in two places, Judge. And what I'm
23 going to do is -- again, just for the parties -- all of that

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1 testimony occurred in open session on 11 August 2022. However,
2 whoever holds the redaction pen for the website decided to redact all
3 of that testimony so that you can't make heads or tails of it. And
4 so what I have is the OFFICIAL/UNAUTHENTICATED, but CLASSIFIED,
5 transcripts so that you can make heads or tails of it. Because if I
6 show you the public one, it's blacked out except for a few words here
7 and there.

8 And so I just want to show you a couple of pages of Agent
9 Gaudin's answers to those questions about, "Did you access this
10 system? Were you able to use intelligence? Did you read it?" to
11 show you what his answer was in August of 2022. And then I have two
12 items that I'd like to show you that I would have used to impeach him
13 in August of 2022 if I had had it.

14 And so again, just for the parties, this is
15 transcript -- CLASSIFIED transcript page 19292, and I've got a couple
16 of highlighted pages there for you.

17 **[The military judge reviewed the evidence.]**

18 MJ [COL FITZGERALD]: Thank you.

19 DC [MS. CARMON]: And I'm going to place transcript
20 page 19255. There again, there are just a couple of question and
21 answer that are highlighted for you there.

22 And so the commission has his exact words there -- and I'll
23 remove the document here.

1 But what I feel comfortable saying to you, because it
2 happened in open session, is that he generally denied needing to
3 access those systems or needing to rely on that reporting in any way.
4 And in later testimony he brings in Mr. McFadden as sort of the
5 person he's leaning on in these interviews.

6 And so what we did not have are two things: We did not have
7 Agent Gaudin's administrative inquiry into the fact that just two
8 years after 2007 he accessed spaces and folders in his automated
9 system that he did not have the authority to. And this had to deal
10 with interviewing a high-value detainee. And so just two years later
11 he's accessing places he doesn't have the right to go.

12 And during that investigation, this is what one of Agent
13 Gaudin's supervisors said about him. And this is AE 551A
14 Attachment E. This is an UNCLASSIFIED document. This is what his
15 supervisor says: A great deal of Gaudin's interviewing success in
16 eliciting confessions and obtaining important admission against
17 interest and in developing actionable leads and intelligence over his
18 18-year career has been his remarkable attention to detail and his
19 unparalleled preparation.

20 It was due to his desire to build the strongest possible
21 prosecutive **[sic]** case and his insatiable desire to glean any
22 information that may provide even a slight edge in his effort to
23 break this HVD, which is high-value detainee, from his false cover

1 story that led to Gaudin's deep searches through ACS, which is the
2 computer system.

3 He pursued every angle with even a remote chance of gaining
4 one more connection, one more association of a known terrorist to the
5 high-value detainee.

6 And so again, this is the man who said in open court in
7 August 2022, "Sure, I had access to this thing that had all kinds of
8 intelligence reporting on these high-value detainees when I was
9 detailed to the High-Value Detainee Prosecution Task Force. But, no,
10 I wouldn't have needed to look through that, and I would not have
11 taken advantage of that."

12 And so this belies that statement, and it certainly would
13 have been, I think, critical and important to confront him: "Well,
14 this is what your supervisor says about you. What do you have to say
15 about that? So it's just in this instance that you didn't need to do
16 a deep dive? It was just for this? Is it because you were worried
17 about where this intelligence was coming from?"

18 I mean, the questions write themselves. But unfortunately
19 we did not have that opportunity because the government did not turn
20 this over until June of 2023.

21 And again, related to that point, as I said earlier, there's
22 nothing like impeaching a witness with his own words. And so even
23 though we had the ultimate conclusions from the DoJ OIG report, what

1 we did not have is Agent Gaudin's own words and the transcript of his
2 testimony and the interview that he did.

3 And so in the vein of the questions that I just went through
4 with Your Honor, what I'd like to show you now is Appellate
5 Exhibit 551C. I'm going to show you pages 12 -- or excuse me, 11 and
6 12. 11 is simply the cover page so that Your Honor can see what this
7 transcript is from. And then I will show you the quotation that I'm
8 most interested in. But this is, again, just for the parties, as
9 this is a classified document.

10 And so page 1 here, Your Honor can see that this is the
11 transcript that I -- that I just mentioned. It's dated 17
12 August 2005. And page 12 is the quotation that I would have used had
13 I had access to this in August of 2022.

14 And what's relevant here is that, again, Agent Gaudin
15 testified multiple times that he was relying on Robert McFadden as
16 the subject matter expert in those -- in those interviews, which is
17 the exact opposite of what he says here about his experience on the
18 High-Value Detainee Prosecution Task Force.

19 **[The military judge reviewed the evidence.]**

20 MJ [COL FITZGERALD]: Thank you.

21 DC [MS. CARMON]: Thank you, sir. I'll remove the document.

22 One of the other places where this impeaching information is
23 critical is not just using the documents themselves, but using them

1 to find other discoverable and potentially admissible material.

2 And what I mean there is when the government turned over
3 that large tranche of information in June of 2023, which precipitated
4 the filing of AE 551 which was the 141 pages of the personnel
5 record -- and if I may just have the ELMO again, and this is
6 displayable. This is the timeline.

7 Thank you.

8 So here I'm talking about the 141 pages of the personnel
9 record of 23 June 2023. Again, almost a year after he testified.
10 One of the important things that we were able to glean from those 141
11 pages is the names of potential witnesses to Agent Gaudin's character
12 for truthfulness, which is absolutely admissible pursuant to
13 M.C.R.E. 608.

14 And we have since -- and I'm not going to divulge names, but
15 we have since interviewed some of those supervisors who definitely
16 had information and I think admissible testimony on Agent Gaudin's
17 character for truthfulness, which is of utmost importance if he is
18 the government's sole sponsoring witness for four statements.

19 And as Your Honor is aware, M.C.R.E. 608(a) allows for
20 evidence on credibility. It allows for evidence on someone's
21 character for truthfulness. And certainly there were a couple of
22 supervisors who would have had pertinent information for the
23 commission's credibility determinations about this ultimately

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1 important witness.

2 And so one of the last places -- and certainly not the only,
3 but I didn't want to overwhelm the commission, so I'm giving you five
4 sort of concrete examples of places where I would use the information
5 had it been available before the witness testified -- one of those
6 places involves the updated documents that I received 21
7 February 2023.

8 And so in session I was discussing with Agent Gaudin his
9 ability to use a separate system to make requests of other government
10 agencies to use pictures or documents or items of discovery that
11 might be relevant to use in the law enforcement interrogations of
12 2007. So, you know, in colloquial parlance, for the clean team to
13 use.

14 There was a particular request. I will show it to the
15 commission here. This is AE 488. And again, this is just for the
16 parties.

17 **[The military judge reviewed the evidence.]**

18 DC [MS. CARMON]: So what I'll point the commission to there
19 is the language in the justification. And my cross-examination dealt
20 with the source of that information and where that information would
21 have come from, because it appears to be a first-person source or
22 sourced from a prior interview which could only have come from one
23 place.

1 MJ [COL FITZGERALD]: Thank you.

2 DC [MS. CARMON]: And so that's what I had received prior to
3 Agent Gaudin testifying.

4 And so I'll remove AE 488.

5 The line of questioning included, again, wondering about the
6 source of that information and where it came from, particularly
7 because it seemed to intimate that someone had read reporting of
8 Mr. Nashiri's prior interrogations. Which, again, we're talking
9 about the FBI/CIA information-sharing circle, would have certainly
10 been pertinent for the commission to know.

11 And so after Agent Gaudin testifies, what I received is AE
12 551C, page 5, 6 -- pages 5 through 10. I'll place again, just for
13 the parties, on the ELMO.

14 I received this updated document. And what you'll see is
15 different is the TD number here. It's replaced with a Bates number.

16 Because what we did not have is the corresponding report
17 which would have answered the questions and would have probably
18 caused me to ask many different questions based on the source of the
19 language in the justification.

20 And I'll show Your Honor -- and it's in the record. I won't
21 read it here for you, obviously. But pages 6 through 10 are the
22 report referenced in that TD number.

23 And so this is the source of the information, which, again,

1 was not disclosed until after the cross-examination of Agent Gaudin
2 and would certainly have been pertinent information to know.

3 And so that's in the record for Your Honor to read the whole
4 thing. I won't belabor the point here.

5 And so the point here, Judge, is that there has to be some
6 sanction for late discovery. This is not a witness who hasn't
7 testified. This is not a speculative "it may happen sometime in the
8 future."

9 This is a witness who testified as the government's most
10 important witness in big blocks of litigation dealing with the
11 admissibility of statements made by Mr. al Nashiri, Khallad, Mr. Al
12 Owhali, and Mr. al Badawi, major, major players in this potential
13 boats plot, in the conspiracy charge, in the referral sheet.

14 And so these are big-name folks with big pieces of evidence
15 at stake. And the government's sole sponsoring witness is Agent
16 Gaudin for all of those.

17 And there has got to be some sort of sanction for all of
18 this evidence that was turned over that was absolutely usable, and
19 should have been able to use, during that cross-examination.

20 The admissibility of those statements hinges on not only the
21 legal determinations by the commission about voluntariness,
22 et cetera, but on the credibility of Agent Gaudin because he is the
23 person looking the commission in the face and saying, "No, it seemed

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1 voluntary. No, I definitely didn't look in any of those places where
2 I would have come across torture-tainted evidence. No, we had a good
3 time. We smiled and laughed."

4 He is the person who the government is using to convince the
5 commission that these statements were voluntary and should be
6 admitted in this capital prosecution against Mr. al Nashiri.

7 And again, this is not -- we don't have to allege
8 misconduct. We don't have to allege malice. What Giglio says is it
9 can be negligence. It doesn't matter. The fact is it was not turned
10 over. It should have been. And because of that, there are
11 sanctions. And in that case, obviously Mr. Giglio's conviction was
12 overturned.

13 But the commission has a sanction available to it in black
14 and white, and that is R.M.C. 701(k)(1)(3)(C), which is to prohibit
15 the party from introducing evidence or calling a witness.

16 And so what the commission can do is belatedly strike Agent
17 Gaudin as a witness. And I ask the commission to do that because of
18 where we find ourselves procedurally at this point.

19 In AE 551, we had -- there were multiple avenues of relief
20 that we suggested that the commission could take. A continuance
21 doesn't do us any good because the evidence is closed, I believe, in
22 all of these matters, and two of them have already been ruled on.

23 Calling Agent Gaudin back in, again, doesn't make a whole

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1 lot of sense and doesn't really operate as a sanction given the
2 procedural posture that we're in.

3 But what does make sense as a sanction for dilatory
4 discovery is to exclude the witness, which in turn strikes those
5 statements.

6 And so pending any questions from the commission, I think
7 what we've demonstrated here -- and I think it's -- you know, it's
8 not controversial that this witness testified in August 2022, and the
9 bulk of discovery on this witness has been remitted after that date.
10 I don't think that's controversial.

11 The evidence and the character of that evidence is what
12 makes it important, because it is absolutely impeachment evidence.
13 It was evidence that could go to his credibility, his bias. It was
14 evidence that could have led to the discovery of other admissible
15 evidence.

16 And all of those pieces would have made for, I think, a very
17 compelling cross-examination of Agent Gaudin's bias, his motive. And
18 it would have been a compelling attack on his credibility, which is,
19 I think, of incredible import given the fact that he was their sole
20 sponsoring witness in four of these large motions.

21 And so we would ask the commission to take the
22 black-and-white available sanction before it and to exclude Agent
23 Gaudin as a witness, which ultimately strikes those statements and

1 makes them inadmissible, as the government offered no other witness
2 to propose those statements.

3 MJ [COL FITZGERALD]: Thank you, Counsel. And to make it
4 clear, I was not the presiding judge at the time of those
5 commissions. So I invite anybody to help me with things that I
6 wasn't present for that -- I'm getting everything, obviously,
7 secondhand, thirdhand, trying to review all the records.

8 But were there not other witnesses who testified about the
9 circumstances of the interviews Special Agent Gaudin participated in?
10 I know you used the phrase "he was a sole sponsoring witness"
11 but -----

12 DC [MS. CARMON]: Right. So those were defense witnesses.
13 And so if there is no statement to offer, there would have been no
14 defense witnesses called.

15 And so I don't think the defense's witnesses -- excuse
16 me -- can serve as a sponsoring statement for the government if as a
17 sanction they lose the person they chose to sponsor that statement.

18 MJ [COL FITZGERALD]: Thank you, Counsel.

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

20 MJ [COL FITZGERALD]: And just one more question ----

21 DC [MS. CARMON]: Yes.

22 MJ [COL FITZGERALD]: ---- if you'd like to address it.

23 In the discussion under the rule, it talked about factors

1 considering whether to grant an exception to -- grant exception to
2 exclusion under (3)(C) includes one, in particular, the reason for
3 the failure to disclose. And you had stated that no intent is
4 required, but the discussion that -- does it ask the commission to
5 contemplate reasons? What's the distinction I can draw from that,
6 from your vantage point?

7 DC [MS. CARMON]: Yes, sir. Giglio, which is the obviously
8 controlling case on this point, does not require a finding of ill
9 will or malice. Negligence is sufficient under Giglio.

10 And so I think this is just another factor for Your Honor to
11 take into consideration. And I don't -- I don't know why these
12 things weren't turned over in a timely fashion. Because, as you can
13 see in some of these, they bear what's called a trigram. And in some
14 of the discovery that we get, if they bear a particular numerical
15 value, we know that they were turned over previously in the 9/11
16 case.

17 And so a lot of this discovery has that particular trigram
18 on it which signals to us that it was compiled at some point and
19 turned over in the other commission, and I don't know why it wasn't
20 turned over to us in the same timely manner.

21 But what 9/11 has going ----

22 MJ [COL FITZGERALD]: Can you help me understand what you mean
23 a trigram is ----

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1 DC [MS. CARMON]: Yes, sir.

2 MJ [COL FITZGERALD]: Do you have a ----

3 DC [MS. CARMON]: Let me show you one example.

4 MJ [COL FITZGERALD]: I'm not doubting you. I just -- I don't
5 know if I have familiarity with the term you're using, so I just want
6 to make sure.

7 DC [MS. CARMON]: Okay. This is an unclassified document.
8 This is from AE 551A, and I will just use Attachment C. And so I'll
9 show you -- you're looking for the bottom right, Your Honor.

10 MJ [COL FITZGERALD]: The very bottom right?

11 DC [MS. CARMON]: Yes, sir. Here it says MEA-GAUDIN. So this
12 is the 9/11's Bates stamping, for lack of a better word. But it is
13 the way that they classify -- not classify as in classification, but
14 keep things that are alike and go together together.

15 And so anything that's been turned over to 9/11 about Agent
16 Gaudin bears this trigram.

17 MJ [COL FITZGERALD]: Now I understand. Thank you.

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

19 And so to fully answer your question, sir, I don't
20 think -- I don't think Your Honor has to find that this was a
21 purposeful, "I didn't want her to be able to ask these questions and
22 so I hid it to a later date." I think negligence is quite enough.

23 And the fact that some of this discovery, if not a, I would

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1 say, large portion of it was previously turned over to another
2 commission -- who has yet to question Agent Gaudin, I will note to
3 the commission. So they are getting this -- even though it's been
4 stretched out over years, they are going to have it prior to him
5 taking the stand in their case. And I believe he is set to testify
6 in their next hearing.

7 And so there must be some reckoning for two years passing
8 between, again, a critically important witness for the government and
9 critically important information for the defense to have that is not
10 complete. If it is for now, I do not know, because I do not know
11 what I do not know is out there. But I hope that we're getting
12 there. But it's been two years. And frankly, there's nothing I can
13 do with this information other than hold it in my pocket, which is
14 not particularly helpful.

15 And so I think the sanction that we suggest, again within
16 the letter of the rules, is particularly appropriate here because I
17 think it sends a message, "Look, you know, we cannot engage in these
18 discovery practices." And the fact that a witness of this import was
19 allowed to testify without any of this information being available to
20 the defense, I think is a real constitutional and rule-based problem
21 that impaired Mr. al Nashiri's counsel from being able to do the most
22 effective job they could.

23 MJ [COL FITZGERALD]: Thank you, Counsel.

1 DC [MS. CARMON]: Thank you.

2 MJ [COL FITZGERALD]: This is Captain Stinson's? Captain
3 Stinson, is this yours, or are you ----

4 TC [CAPT STINSON]: It's Captain Lanning arguing this one,
5 Your Honor.

6 MJ [COL FITZGERALD]: Very well. Go ahead and set your
7 notebook down. I'm going to take a brief recess. We've been on
8 about 50 minutes, so I think now would be a good time to take a
9 comfort break before we begin again.

10 Is ten minutes sufficient, Captain Lanning?

11 ATC [Capt LANNING]: Yes, sir.

12 MJ [COL FITZGERALD]: Very well.

13 The commission is in recess until 1430.

14 **[The R.M.C. 803 session recessed at 1423, 30 May 2024.]**

15 **[The R.M.C. 803 session was called to order at 1436, 30 May 2024.]**

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

17 All parties present before the last recess are again
18 present.

19 Captain Lanning, are you ready to proceed?

20 ATC [Capt LANNING]: Yes, Your Honor.

21 MJ [COL FITZGERALD]: You may proceed.

22 Lieutenant Colonel Nettinga, would you mind having a seat?
23 Thank you.

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1 ATC [Capt LANNING]: Good afternoon, Your Honor.

2 MJ [COL FITZGERALD]: Good afternoon.

3 ATC [Capt LANNING]: Your Honor, I'd like to start by
4 highlighting that before Special Agent Gaudin's testimony in 2022,
5 the government produced substantial discovery regarding Special Agent
6 Gaudin and a sufficient amount of discovery for the defense to engage
7 in their cross-examination of him.

8 The defense asked him a lot about the categories that
9 Ms. Carmon talked about. And I'd like to walk just briefly
10 through -- or walk through her timeline with the commission.

11 So if I could use the projector here -- and this is just for
12 the parties.

13 I'll start with the prod, it says there: Production 446,
14 462, and 446A. Well, Your Honor, Ms. Carmon mentioned that she was
15 able to ask Special Agent Gaudin questions about the -- those
16 requirements and the systems that he ----

17 MJ [COL FITZGERALD]: Counsel, if you wouldn't mind, if you
18 could it turn one degree or whatever you call ----

19 ATC [Capt LANNING]: Oh ----

20 MJ [COL FITZGERALD]: ---- one-quarter counterclockwise.
21 Thank you.

22 ATC [Capt LANNING]: I apologize, Your Honor. This is the
23 first time I'm using this ----

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1 MJ [COL FITZGERALD]: Very well. Appreciate it.

2 ATC [Capt LANNING]: ---- in the commissions.

3 MJ [COL FITZGERALD]: Sorry to interrupt you. You may
4 proceed.

5 ATC [Capt LANNING]: That was -- that was a lot about -- those
6 additional materials that we produced had to do with the FBI and the
7 CIA's relationship. Well, of course it did. This was a
8 counterterrorism investigation. Of course the FBI and the CIA were
9 working together. There's no -- no real question there. So the
10 relevance and materiality of these materials that the government
11 produced later in time is insignificant.

12 Additionally, what was -- what we did here is the government
13 saw Ms. Carmon's line of questioning and we went back -- we went back
14 through the underlying materials here. And we were only able to
15 find, I believe it was, two documents that were even -- even
16 potentially relevant, and neither of them had to do with Special
17 Agent Gaudin.

18 In particular, they had to do with investigations from
19 around -- or requirements around the year 2000, and nothing to do
20 with Mr. Nashiri's LHM or the -- or the LHM interviews of the other
21 individuals.

22 So then I'll move on to 26 April of 2023: Personnel
23 actions, including DoJ referral of failure to report foreign bank

1 accounts in production 481.

2 So first -- first, Your Honor, that had to -- that failure
3 to report foreign bank accounts allegation was essentially that
4 Special Agent Gaudin was retiring in 2019. When you retire, you fill
5 out a final security form. And on that form, which we all generally
6 know about, it asks you whether you have any foreign financial
7 interests, or, you know, a significant other has a foreign financial
8 interest.

9 On Special Agent Gaudin's form, he didn't put that his wife
10 had some foreign bank accounts related to her employment. But it was
11 found to be essentially he didn't mean to do it. It was
12 unintentional, an unintentional omission. And Ms. Carmon was able to
13 question -- was able to question Special Agent Gaudin about that
14 allegation during his 2022 testimony.

15 What we produced was this DoJ's -- the referral of that to
16 DoJ, whether or not the Department of Justice was going to do
17 something about that.

18 Well, first, the FBI closed that allegation, whatever they
19 were -- they were looking into that, because Special Agent Gaudin
20 retired. So they sent it over to DoJ. You know, "DoJ, is there
21 anything you want to do about this?" DoJ declined.

22 So the relevance of that -- there's really not. And it's
23 certainly not material, and it wouldn't be proper impeachment

1 evidence. They couldn't ask him, you know, "Special Agent Gaudin,
2 isn't it a fact that that was -- that that investigation was referred
3 to the Department of Justice?" That would be an improper question
4 under 608 to impeach his credibility.

5 It was found that it was an unintentional omission, and
6 there's really nothing else to be said about that. It's not
7 material, relevant, or helpful to the defense.

8 The next -- the transcript of the 2005 DoJ OIG interview,
9 that's -- this is the 11 June production. Again, not -- it was more
10 information that they already had. So they already had the DoJ OIG
11 investigation from a long time ago.

12 As a matter of fact, the unclassified version was released
13 publicly in, I think it was -- I think it was 2009. It may have been
14 2007. It was 2009, Your Honor. I apologize, I had to consult. I
15 wasn't sure if it was -- I knew it was one of those dates. But
16 regardless, long before Special Agent Gaudin testified.

17 And we later produced, and it's in the government's filing,
18 that we produced a table here, Your Honor, that I could reference,
19 that we produced the classified version of the DoJ OIG report to the
20 defense on 22 April of 2022. So obviously before his testimony.

21 So they already had those allegations. And again, what the
22 relevant question would have been regarding any allegations of
23 misconduct would have been, "Did you do this thing?" Not, "Who

1 investigated this thing? Isn't it true that, you know, the FBI
2 investigated this or the DoJ investigated this?" That's not a
3 relevant question for impeachment. It's, "Did you do this thing, X,
4 that relates to your credibility?"

5 And that's another piece to this whole problem here, is that
6 these items that Ms. Carmon brings up that she says I think were -- I
7 think she says, "These are critical." She uses the words
8 "critical" -- had to do with things that did not relate to Special
9 Agent Gaudin's credibility. We're talking about mishandling
10 classified information or putting sensitive information on a -- on a
11 computer. Doesn't have to do with his credibility.

12 This is a -- you know, we've got a -- a 35-year veteran of
13 the FBI, dedicated public servant. And essentially what Ms. Carmon
14 would ask to do is to get a laundry list of every little infraction,
15 or allegation of an infraction, that Special Agent Gaudin ever was
16 accused of during his 35 years of faithful service in the FBI.

17 So that's not how impeachment works, Your Honor. There are
18 rules. And Ms. Carmon actually outlined them for you. And they
19 specifically, with regards to misconduct, has to relate to
20 credibility. It must relate to credibility; otherwise, they can't
21 ask about it on impeachment for that witness. Unless it's a felony
22 conviction, of course. But even like a misdemeanor has to deal with
23 a crime involving dishonesty.

1 So these productions that came after the fact really don't
2 go to Special Agent Gaudin's credibility. The only one potentially
3 that could go to that would maybe be the foreign bank accounts, but I
4 already discussed that.

5 Your Honor, Ms. Carmon, again, she talked a lot about the
6 requirements cables. Again, they already had the opportunity, his
7 access to these systems. They already had the opportunity to ask him
8 about those.

9 And then they went on and talked a lot about the disclosures
10 in the 9/11 case and whether or not the government is -- you know,
11 they're producing it in that case, so therefore, they should be
12 producing it in this case.

13 But first, that's a different case with different evidence
14 and different facts. And second, the bulk, if not all, of this
15 evidence that we produced was produced sort of around the same time
16 as the 9/11 case or shortly thereafter. If I'm looking through, I
17 think there are some that were even produced before the 9/11 case.

18 So again, Your Honor, certainly not a basis to strike the
19 testimony of this important witness for this case, for -- really, for
20 the jury, for the members, for the truth, which is what this
21 commission is stood up to find, is the truth.

22 So to strike the testimony of this very important witness
23 robs the jury of an individual that they should hear from, that the

1 jury should have the opportunity to hear from. He was significantly
2 involved in these investigations, and it's important for the jury to
3 get to hear him.

4 And, of course, during trial Ms. Carmon will be able to
5 cross Special Agent Gaudin as long as she would like on these
6 materials that she's now saying is tardy produced.

7 The government knows its discovery obligation. It
8 takes -- the government takes a broad -- generally a broad view in
9 disclosing information to the defense, even if there's tenuous or
10 probably no real relevance, but maybe it's related, right? Or maybe
11 it comes from questions that the defense asked during the examination
12 of a witness. The government goes back and looks for more evidence.

13 As this case continues -- we don't have a trial date. As
14 this case continues, the government will keep looking through its
15 materials. And when and if we find something that is relevant,
16 material, and helpful to the defense, whether for exculpatory
17 information or impeachment information, the government will provide
18 that to the defense.

19 Certainly not appropriate situation for this commission to
20 strike Special Agent Gaudin's testimony and -- or not permit him to
21 testify at trial.

22 And originally, Your Honor, in AE 551, the original motion,
23 the defense actually says they'd welcome a continuance or for -- they

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1 have some alternatives there. They said for the commission to, you
2 know, consider these items against Special -- and I'm paraphrasing; I
3 don't have it right in front of me -- but essentially to take adverse
4 observation of Special Agent Gaudin's character for truthfulness.

5 None of those things are appropriate here, Your Honor. Or
6 potentially I think another -- they said to recall Special Agent
7 Gaudin, which, again, unnecessary to cross-examine him on these
8 things that the defense had the substantial ability to cross him on
9 already during August of 2022. Unnecessary, Your Honor.

10 And pending Your Honor's questions, that's all I have.

11 MJ [COL FITZGERALD]: Counsel, the first thing I want to ask
12 you about is you said that the matters don't go to credibility and
13 that's what's important, correct? Is that your 608C analysis?

14 ATC [Capt LANNING]: Yes. Yes, sir, that essentially
15 misconduct -- allegations of misconduct would have to go -- of course
16 there are others there, Your Honor. There's bias. There's
17 impeachment of credibility. I don't have the rule right in front of
18 me. But ----

19 MJ [COL FITZGERALD]: Would it ----

20 ATC [Capt LANNING]: ---- for allegations of -- I'm sorry,
21 sir.

22 MJ [COL FITZGERALD]: Would it surprise you to know that
23 credibility's not even used in 608C? It's evidence of bias,

1 prejudice, or any motive to misrepresent.

2 ATC [Capt LANNING]: Motive to misrepresent, sir, I think
3 would maybe go to credibility or is he telling the truth.

4 MJ [COL FITZGERALD]: Potentially it's encompassed in it, but
5 you seem to stand on the ground that they can't have it because these
6 matters don't go to credibility.

7 ATC [Capt LANNING]: Well, they certainly don't fall under a
8 Giglio analysis, Your Honor. And that was the -- that was
9 chiefly what ----

10 MJ [COL FITZGERALD]: That's why I asked you about 608C. You
11 didn't say it under Giglio.

12 ATC [Capt LANNING]: Yes, sir.

13 MJ [COL FITZGERALD]: You said they were entitled to matters
14 related to credibility.

15 ATC [Capt LANNING]: Right. So here's what I'm talking about,
16 Your Honor. So these specific instances of conduct is what I'm
17 specifically referring to, which says that they may. However -- so
18 it says: Specific instances of the conduct of a witness for the
19 purpose of attacking or supporting the witness' character for
20 truthfulness other than the conviction of a crime may not be proved
21 by extrinsic evidence.

22 They may, however, at the discretion of the military judge,
23 if probative of truthfulness or untruthfulness, be inquired into on

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1 cross-examination of the witness concerning character of the witness
2 for truthfulness or untruthfulness or concerning the character for
3 truthfulness or untruthfulness of another witness.

4 MJ [COL FITZGERALD]: All right. Are you reading from 608B?

5 ATC [Capt LANNING]: I am, sir. So not C. And I apologize
6 for missing ----

7 MJ [COL FITZGERALD]: That was the call of the question of the
8 commission.

9 ATC [Capt LANNING]: Yes, sir. I understand. But when I talk
10 about ----

11 MJ [COL FITZGERALD]: I understand 608B. My question was, you
12 seemed to limit 608C to matters of credibility ----

13 ATC [Capt LANNING]: No, sir.

14 MJ [COL FITZGERALD]: ---- not to bias, prejudice, or any
15 motive to misrepresent, which could include credibility.

16 ATC [Capt LANNING]: Sure. Of course, Your Honor.

17 MJ [COL FITZGERALD]: And the overarching goal may be to
18 reduce or minimize somebody's credibility. But certainly bias,
19 prejudice, or motive to misrepresent could be found in the matters
20 sought by the defense, correct?

21 ATC [Capt LANNING]: No, Your Honor. The government
22 would -- we would disagree, that it goes to a motive or prejudice or
23 a bias, motive to misrepresent.

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1 I mean, Ms. Carmon talked a lot about the ----

2 MJ [COL FITZGERALD]: You're telling me that failure to
3 accurately complete information on a government form would not go to
4 somebody's motive to misrepresent or bias or prejudices?

5 ATC [Capt LANNING]: So again, Your Honor, Ms. Carmon was able
6 to ask him questions about that in August of 2022. And I think I
7 have got the transcripts on my laptop back there, but -- and on the
8 public-facing website, it is heavily redacted, the exchange.

9 And there was actually an objection by the government. And
10 Judge Acosta at the time told Ms. Carmon -- essentially told her what
11 she would be allowed to ask, which is, "Did you do this thing? Did
12 you do the conduct?" Which is, "Did you fail to report or did you
13 not put your wife's bank account on the SF 86?"

14 And Ms. Carmon asked those questions, and Special Agent
15 Gaudin said it was an unintentional omission. That was his answer.

16 So she -- whatever we -- the information that we gave her
17 after the fact about the referral to DoJ would not go to his motive
18 to misrepresent. And besides the fact that DoJ came to the same
19 conclusion, that it was unintentional and decided not to go
20 forward ----

21 MJ [COL FITZGERALD]: Are you here to ----

22 ATC [Capt LANNING]: ---- with any kind of additional ----

23 MJ [COL FITZGERALD]: Are you here to speak on behalf of the

1 Department of Justice?

2 ATC [Capt LANNING]: It's in the evidence, Your Honor. And
3 I'd have to -- I would locate the -- go look through that production
4 to provide it.

5 But, I mean, Special Agent Gaudin -- again, she had the
6 opportunity to cross him on it, which is what we're talking about
7 here. Did she have adequate opportunity to cross him? And she did
8 on that issue.

9 I mean, she couldn't have asked him what the DoJ OIG did.
10 That wouldn't have been appropriate cross-examination.

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

12 ATC [Capt LANNING]: Yes, sir.

13 And just for the record, I removed the exhibit from the
14 ELMO.

15 MJ [COL FITZGERALD]: Please do. Thank you.

16 Defense, do you have something you would like to add?

17 DC [MS. CARMON]: Just a couple of brief comments, sir.

18 When we're talking about the systems and requirements, I
19 just want the commission to be clear that I think Captain Lanning may
20 have been conflating a couple of things.

21 So the requirements that came in two productions after Agent
22 Gaudin testified, those are during the time that Mr. al Nashiri and
23 Khallad were held in CIA custody. So between 2002 and 2006, those

1 are the products that are coming from the FBI to CIA black sites
2 asking, "Can you ask these questions or obtain this information?"
3 Those are the requirements.

4 The system that we're talking about Agent Gaudin being able
5 to access when he says, "Ah, I didn't really need to," that occurs in
6 2006, late 2006, when he is detailed to the High-Value Detainee
7 Prosecution Task Force and has available to him intelligence
8 collected from the CIA black sites that he can review in preparation
9 for his, and I quote, clean team interrogations in January and
10 February 2007.

11 The request that I showed Your Honor on the ELMO, whose name
12 is classified, that is a separate system that the High-Value Detainee
13 Prosecution Task Force had available to it to be able to request use
14 of certain documents and photographs from the CIA.

15 So those are three different things. And I just want to
16 make sure that we're all clear.

17 When the government notes that I was able to ask Agent
18 Gaudin about the administrative closure of the FBI inquiry into his
19 failure to report foreign bank accounts, his answer was also that he
20 denied knowing anything about it before he retired.

21 And so when we learned ten months later that it had been
22 referred to the Department of Justice -- and we learned that because
23 we received correspondence from his lawyer to the Department of

1 Justice, back and forth, in 2021 -- what concerned us greatly is that
2 in 2022, Mr. Miller, who you met yesterday, who was trial counsel,
3 who is a DoJ lawyer, was questioning Agent Gaudin as the
4 representative of the government.

5 And so when we later learned that the DoJ had picked up that
6 investigation into failure to report foreign bank accounts, you can
7 imagine it was concerning to us because at the time that a DoJ lawyer
8 is questioning Agent Gaudin, we did not have that information. And
9 so Captain Lanning is right, I could not have asked about the DoJ and
10 the investigation because I did not know that it existed at the time.

11 And I want to be clear about our ask here. Our ask is not
12 in the future that Agent Gaudin not be allowed to testify at trial.
13 Our ask is that you exclude him as a witness where he's already
14 testified. And I think that's important because if we wait until
15 trial to be able to use this vast amount of information that we have,
16 the statements are already in. That bell can't be unrung.

17 And so I think if there is going to be a sanction, it has to
18 be about what has already happened. The damage is done by the time
19 we get to trial if there is no sanction prior to that.

20 And so, you know, there's a big difference here between
21 discoverability and admissibility. And the government should
22 discover to us anything that could be material in the preparation of
23 the defense. That's the language in the federal rule and this rule

1 in this forum.

2 We can fight about admissibility later, but the point is the
3 defense should have the information in order to be able to make
4 strategic decisions about how to question and what to question, how
5 to use certain information, how to use that information to perhaps
6 investigate further.

7 And so, yes, absolutely, we can fight about whether this is
8 appropriate under 608(a) or under 608(c), but we can't have a fair
9 fight if we don't have the actual information.

10 And so the last point that I would make to Your Honor is you
11 had asked about the discussion under Rule 701(k) about exclusion of a
12 witness and considerations therein that lie in the discussion. And
13 thanks to my colleagues for this, for reminding me that those are
14 obviously advisory comments meant to help practitioners and help
15 jurists. And so I would say that Giglio here is what reigns supreme.

16 And pending any questions from the commission.

17 MJ [COL FITZGERALD]: I have no further questions. Thank you
18 very much.

19 DC [MS. CARMON]: Thank you.

20 **[Pause.]**

21 MJ [COL FITZGERALD]: That concludes the portion of the
22 hearing related to Appellate Exhibit 551.

23 Defense, do you agree?

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1 DC [MS. CARMON]: Yes, sir. Thank you.

2 MJ [COL FITZGERALD]: Government, do you agree?

3 ATC [Capt LANNING]: Yes, Your Honor.

4 MJ [COL FITZGERALD]: Thank you.

5 Are the parties ready to move on? I believe the next one we

6 are going to take up is Appellate Exhibit 319.

7 ATC [Capt DANIELCZYK]: Yes, Your Honor. The government is

8 ready.

9 MJ [COL FITZGERALD]: And Defense, I think this is Lieutenant

10 Colonel Nettinga, correct?

11 Are you ready?

12 DDC [Lt Col NETTINGA]: Yes, Your Honor.

13 MJ [COL FITZGERALD]: Very well. We may proceed.

14 No rush. Take your time. You have a lot of things in your

15 hands.

16 ATC [Capt DANIELCZYK]: Thank you, Your Honor. I may just

17 take a second to get situated up here.

18 MJ [COL FITZGERALD]: Please do.

19 **[Pause.]**

20 ATC [Capt DANIELCZYK]: All right. Thank you, Your Honor, and

21 good afternoon.

22 MJ [COL FITZGERALD]: Good afternoon.

23 ATC [Capt DANIELCZYK]: So in -- for 319 here, I'd like to

1 provide just a brief roadmap/overview of what I plan to discuss.

2 First I'd like to touch on M.C.R.E. 803(b) in the applicable
3 case law. Next I'll move on to address some of the defense's claims
4 in its written argument, and then I would like to wrap up by briefly
5 discussing the eight declarants and how they are important here.

6 So first I'd like to provide some important framework for
7 M.C.R.E. 803(b) and military commissions in general. Military
8 commissions differ in significant ways from domestic courts in four
9 important reasons: The very nature of military commissions, there's
10 often ongoing hostilities or conflict, variations in where offenses
11 are committed. And those require different rules and procedures.

12 Those different rules and those differences between military
13 commissions and domestic courts were recognized in the 1942 case,
14 Supreme Court case of Ex Parte Quirin. And that's 317 U.S. 1.

15 And in there the Supreme Court held that violations of the
16 law of war are not ordinary crimes and military commissions are not
17 criminal prosecutions within the meaning of the Fifth and
18 Sixth Amendments.

19 And because of these differences, Section 949a(b)(3)(D) of
20 the Military Commissions Act, which is the underlying statute for
21 M.C.R.E. 803(b), was included and was intended to have a broader
22 reach.

23 In looking -- getting to that conclusion, we look at the

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1 discussion under R.M.C. 703(b) .

2 And it says there that: Congress provided for the broad
3 admissibility of hearsay precisely to allow for the introduction of
4 evidence where the witnesses are not subject to the jurisdiction of
5 the military commission or are otherwise unavailable.

6 And while that's included in R.M.C. 703, which deals
7 primarily with witness and evidence production, it illustrates the
8 very intentional difference between commissions and even
9 courts-martial.

10 Now, this commission, under Judge Acosta, acknowledged this
11 very point in AE 319EEEE, and that, of course, is the ruling
12 regarding the hearsay of lay witnesses that was also analyzed under
13 R.M.C. -- M.C.R.E., excuse me, 803(b) .

14 In that ruling the commission found that it was the intent
15 of Congress to allow for the admissibility of hearsay evidence that
16 would not normally be admissible at trial in a traditional Article
17 III or state court where the full protections of the confrontation
18 clause of the Sixth Amendment apply.

19 And that's important here for two reasons: First, it
20 confirms that we're operating in a broader hearsay context than even
21 residual hearsay. And second, it provides that we're operating under
22 an alternative process to the confrontation clause. Excuse me.

23 Now, regarding the confrontation clause, in 2014 Judge Pohl

1 in this commission found that M.C.R.E. 803(b) -- really the
2 underlying statute to that -- provides a suitable alternative process
3 to prevent the admission of unreliable evidence, and that
4 is -- that's in AE 109F. And that was echoed by Judge Acosta's AE
5 319EEEE ruling last summer.

6 And to the extent the defense again argues that hearsay in
7 this commission violates the confrontation clause, the commission
8 should not be persuaded as it has been the law of the case for nearly
9 ten years.

10 The defense, in its written argument, correctly identifies
11 that AE 109 is a defense motion requesting that the commission take
12 broad judicial notice that the Fifth and Sixth Amendments applied in
13 the commission.

14 The defense was also correct in noting that AE 109C, the
15 commission denied that request and stated that it would make legal
16 findings as to discrete constitutional issues.

17 However, the defense failed to include that it also filed AE
18 109D, and that was a renewed request to the commission that the
19 commission hold that the confrontation clause of the Sixth Amendment
20 applied.

21 Now, that renewed request was specifically after receiving
22 two of the government's hearsay notices in the AE 166 series. Of
23 course, those notices provide notice to the defense that the

1 government intends to offer evidence under M.C.R.E. 803(b). That is
2 the very issue we're litigating here.

3 With that, the commission ruled in AE 109F, as I stated,
4 finding that the statute provided that suitable alternative process.
5 And to the extent the defense's motion is now a motion for
6 reconsideration of that, again, it should be denied.

7 Now, the commission's ruling regarding the applicable of
8 the -- the applicability of the confrontation clause is also
9 supported by case law.

10 And first looking at Khadr v. Obama -- that is a 2010 D.C.
11 District Court case, and that's at 724 F.Supp.2d 61 -- and although
12 that's a habeas case, the court there found that the constitution
13 does not require that every protection available in criminal trials
14 must apply in military commissions proceedings for Guantanamo
15 detainees.

16 And that is citing back to the Supreme Court case
17 Hamdan v. Rumsfeld, a 2006 case where the Supreme Court acknowledged
18 that the president here -- talking about of course the Hamdan
19 commission -- the president here has determined that it is
20 impracticable to apply the rules and principles of law that govern
21 the trial of criminal cases in the United States district courts to
22 Hamdan's commission. And the Supreme Court there continued that we
23 assumed that complete deference is owed that determination.

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1 And those same considerations exist here. In fact, no court
2 has ever extended constitutional protections in their entirety, and
3 certainly not the Sixth Amendment in its entirety, to military
4 commissions.

5 In fact, just less than two weeks ago in the commission in
6 the Nurjaman case, in deciding a defense motion regarding speedy
7 trial rights under the Sixth Amendment, the commission there refused
8 to extend those rights to the detainee, citing the D.C. Circuit
9 habeas case of bin Lep v. Trump, which was a 2020 -- excuse me -- a
10 2020 Circuit case, D.C. Circuit case, where the court acknowledged
11 that no court has extended Sixth Amendment speedy trial rights, and
12 the Supreme Court has determined long ago that rights to trial by
13 jury could not be invoked in military commissions proceedings.

14 Now, the commission there in the Nurjaman case finished that
15 ruling by stating that it does not have the authority to apply the
16 Fifth and Sixth Amendment to this commission. And that, of course,
17 that backdrop of case law supports Judge Pohl's finding in AE 109F
18 that M.C.R.E. 803(b) is a suitable alternative process.

19 Now, defense's argument, written argument, relies almost
20 exclusively on case law that applies to the confrontation clause.
21 But as discussed, we have a suitable alternative process here. So it
22 wouldn't really make sense to apply the case law, all of which seeks
23 to satisfy confrontation, when we have that alternative process.

1 Applying that case law effectively renders M.C.R.E. 803(b)
2 meaningless.

3 Likewise, defense also cites case law regarding the residual
4 hearsay exception. And as stated, M.C.R.E. 803(b) is beyond that.
5 So similarly, we shouldn't be constrained by the narrower case law
6 cited by defense. Applying that law, again, renders M.C.R.E. 803(b)
7 meaningless.

8 Congress is presumed to know the law. Inclusion of the
9 hearsay exception is evidence of Congress' understanding of the
10 differences between military commission and Article III in state
11 courts. And Congress did not intend the full protections of the
12 Sixth Amendment to apply to an alien unprivileged enemy belligerent
13 in a military commission.

14 Now, next I'd like to turn to the language of
15 M.C.R.E. 803(b). Now, much of the disagreement between the parties
16 seems to be around the corroboration factor. And in defense's
17 written argument, it claims that that factor, which reads the degree
18 to which the statement is corroborated, is restricted to the
19 circumstances surrounding the taking of the statement. But that
20 interpretation doesn't make sense. Corroboration, by its very
21 meaning, is outside evidence.

22 An example, an investigator corroborates a witness'
23 statement that the light was green with a photograph that the light

1 was green. That photograph is independent evidence that corroborates
2 the witness' statement. It verifies it.

3 And that is exactly what Congress tells us to do here, the
4 degree to which the statement is corroborated.

5 Now, under defense's interpretation, the government would be
6 required to corroborate the statement with the circumstances of the
7 statement. That defies logic and leads to an absurd result.

8 And defense's interpretation would also make the very next
9 line in the rule, which reads: Indicia of reliability within the
10 statement itself, makes that superfluous and unnecessary. And that,
11 of course, violates rules of statutory interpretation.

12 Rather, the proper logical interpretation is to look outside
13 the statement, look to independent evidence to verify what the
14 declarants were telling the investigators.

15 Now, also in defense's written argument, it cites to a line
16 of cases that suggests that all co-conspirator statements are
17 inherently unreliable. But again, those are confrontation clause in
18 residual hearsay cases. 803(b) is broader than residual hearsay and
19 outside -- or we have an adequate substitute for cross-examination
20 and confrontation.

21 But to the extent the commission looks to those cases, those
22 courts express concern over a co-conspirator's motivation to either
23 implicate the defendant in order to exonerate him or herself or

1 attempt to curry favor with law enforcement by implicating an
2 accomplice. And we don't have those concerns here.

3 First, the alleged co-conspirators do not shift the blame to
4 the accused in an attempt to exonerate themselves. For example, in
5 Mr. Jamal al Badawi's 2001 statement, Mr. al Badawi describes how the
6 accused told him about an attack that was planned in Aden harbor. He
7 also describes, in great detail, his own actions in purchasing a
8 boat, purchasing vehicles, and assisting with a move to the deeper
9 waters of Al-Burayqah.

10 Now, certainly at the time that Mr. Al Badawi was speaking
11 to U.S. law enforcement, he knew that he purchased the boat that was
12 used for the USS COLE attack, but he still provided that information
13 and inculpated himself, and he clearly did so because he was later
14 indicted in the Southern District of New York.

15 And when looking at this, I think we need to look through
16 the appropriate lens, and that lens is that al Qaeda terrorists may
17 not have the same motivations when it comes to exculpating
18 themselves.

19 And at least one court has recognized this. And that's
20 the -- it's a district -- D.C. District Court case of Gilmore v.
21 Palestinian Interim Self-Government Authority. It's a civil case at
22 53 F.Supp.3d 191.

23 And that court recognized that while admitting to a violent

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1 attack on innocents typically is detrimental to a declarant's
2 interests, the interests and motives of terrorists are far from
3 typical.

4 Now, there was also no indication that Mr. Al Badawi was
5 attempting to curry favor with law enforcement. After all, he was in
6 the custody of the Yemenis, not the United States. And was Mr. Al
7 Badawi's threat to murder Special Agent Reuwer and his family an
8 attempt to curry favor? Certainly not.

9 These declarants were unlikely to attempt to curry favor
10 because, as Special Agent Soufan explained, under the Yemeni
11 constitution, they could not be extradited to the United States to be
12 prosecuted.

13 Now, additionally, many of these alleged co-conspirators had
14 no motive to inculcate the accused here. For example, Mr. Hamdan.

15 Mr. Hamdan was not directly involved in the USS COLE attack,
16 so he would not be exonerating himself by naming Mr. al Nashiri. In
17 other words, he has no motive, nothing to gain. And this is unlike
18 some of the case law presented where law enforcement officials are
19 leveraging one codefendant against another in order to obtain a
20 confession.

21 Now, in its written brief, the government provides a full
22 analysis of how these 12 statements are admissible under
23 M.C.R.E. 803(b). So I won't go through all of them. But in

1 reviewing the statements, the government believes that corroboration,
2 while not dispositive under the rule, should weigh heavily. And I'd
3 like to provide an example why.

4 In, again, looking at Mr. Al Badawi's 2001 statement, Mr. Al
5 Badawi describes a 1978 Toyota Helix white pickup truck that was
6 owned by the accused. Mr. Al Badawi goes on to explain that that was
7 the truck that he drove -- that Mr. al Badawi drove to Saudi Arabia
8 to purchase the attack boat. And finally, Mr. Al Badawi explains
9 that he later purchased that car from Mr. al Nashiri.

10 Now, when looking at the admissibility of those statements,
11 the rule says to take into account the degree to which the statement
12 is corroborated.

13 Now, Mr. Al Badawi's references to that 1978 Toyota pickup
14 truck are corroborated by several things, one of which are Yemeni
15 documents.

16 During the investigation, investigators collected a
17 registration booklet issued to an Abdu Husayn Muhammad Nashir, an
18 alias for Mr. al Nashiri, and that registration booklet is for a
19 white 1978 Helix pickup truck. Investigators also discovered a
20 vehicle sales contract for a 1978 Toyota Helix pickup truck between
21 Mr. Al Badawi and the accused. Investigators also discovered a
22 driver's license application in the name of Mr. Al Badawi for a 1978
23 Helix pickup truck.

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1 Now, again, this is the pickup truck Mr. Al Badawi says he
2 drove to Saudi Arabia when purchasing the boat. Well, investigators
3 also discovered a Saudi customs permit for entry and exit into
4 Saudi Arabia listing a Helix pickup truck during the relevant time
5 period.

6 In addition to the documentary evidence, Mr. al Badawi's
7 reference to this pickup truck are corroborated by statements of lay
8 witnesses, many of whom this commission has already found to be
9 reliable.

10 These witnesses observed this truck around the known
11 locations of the Boats Operation, and some of these witnesses
12 identified the accused driving this 1978 Toyota Helix at the failed
13 launch site for the failed attack on the USS THE SULLIVANS.

14 Now finally, and importantly here, Mr. Al Badawi's
15 statements are also corroborated by forensic evidence. In fact, the
16 accused's fingerprint was found on the vehicle sales contract between
17 him and Mr. Al Badawi for that 1978 Helix pickup truck.

18 Now, although corroboration is not a dispositive factor, it
19 should weigh heavily in Your Honor's consideration. These statements
20 can be independently corroborated and they are exactly what Congress
21 intended to be admissible under this rule and the type of evidence
22 that the members should be allowed to hear.

23 Now, I'd like to talk just briefly about the eight

1 declarants and why they're important here. And, again, the
2 government's argument certainly has -- their written argument
3 certainly has more detail, so I won't repeat, but I do think it's
4 important to give some context.

5 First, Mr. Jamal al Badawi, and he provided two interviews
6 with law enforcement. First I'll note that that 2007 interview was
7 the subject of litigation -- I believe Ms. Carmon noted it just a few
8 moments ago. And that is AE 327N, I believe was the ruling on that.
9 But in that ruling the commission found that Mr. Al Badawi
10 voluntarily participated in those -- in those interviews. So, of
11 course, that checks a box for us for M.C.R.E. 803(b) purposes.

12 But moving back to just Mr. Al Badawi and his importance,
13 again, as stated, he purchased a boat and several vehicles. He
14 resided in Aden. And so because the accused was unfamiliar with
15 Aden, unfamiliar with the geography and the people, Mr. Al Badawi
16 helped to facilitate that Boats Operation.

17 Second is Mr. Abdul al Aziz Mohammed Saleh Bin'Attash. He
18 was an al Qaeda member and brother of Khallad Bin'Attash. And he
19 makes critical connections to the Boats Operation. He makes
20 connections to the accused. He's familiar with Mr. al Nashiri's
21 training in explosives, and he makes critical connections to a
22 Mr. Hassan al Khamri, one of the suicide bombers for the USS COLE
23 attack.

1 Third is Mr. Nasser Ahmad Nasser al Bahri, also known as Abu
2 Jandal. Mr. al Bahri makes many connections to al Qaeda that are
3 important to show the al Qaeda as an -- al Qaeda as an organization.
4 And part of this trial is necessarily going to be educating the
5 members on al Qaeda as an organization.

6 For example, al Qaeda are notorious for using aliases.
7 Mr. al Bahri provides numerous identifications, oftentimes with
8 several of those aliases, for individuals involved in that
9 organization. And Mr. al Bahri also identifies Nibras and Khamri as
10 the suicide bombers for the USS COLE attack.

11 Fourth is Mr. Ahmad Mohammed Ali al Hada. And Special Agent
12 Soufan called al Hada's house the unofficial headquarters for the
13 al Qaeda in Yemen.

14 And Mr. al Hada, his phone number actually, number 200578,
15 was used by al Qaeda to communicate with one another. And
16 Mr. al Hada also provides connections to Mr. al Darbi who was
17 involved in the bombing of the MV Limburg.

18 Next is Mr. Salim Hamdan. He was a driver and bodyguard for
19 Usama bin Laden. And of course, his statement is subject to
20 litigation in the AE 481. But Mr. Hamdan identifies a photo of the
21 accused. He states that he observed the accused with Usama bin Laden
22 and other senior al Qaeda leadership. And the accused actually
23 admitted to him that he was the mastermind of the COLE attack and

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1 provided details surrounding the failed attempt on USS THE SULLIVANS.

2 Sixth is Mr. Fahd Mohammed Ahmad al Quso. Like
3 Mr. al Badawi, Mr. al Quso was a local to Aden. He was asked by
4 Mr. Al Badawi to film the attack. He was taken to the Tawahi
5 apartment that was used by -- by Mr. al Nashiri and his
6 co-conspirators as a lookout house or a staging house. And after the
7 attack, Mr. al Quso was asked to move that truck and trailer that
8 were left at the launch site and ultimately discovered by law
9 enforcement at the launch site.

10 Seventh is Mr. Muhammad Rashid Daoud al Owhali,
11 who was involved in the 1998 U.S. Embassy bombing in Nairobi. And of
12 course his statement is subject to litigation in AE 482 as well. But
13 Mr. al Owhali links the accused to al Qaeda and that 1998 embassy
14 bombing. And Mr. al Owhali identifies and refers to the accused as
15 Bilal, like many other declarants and like Mr. al Nashiri admitted to
16 using that alias during his CSRT in March of 2007.

17 And eighth, and finally, for our declarants here, we have
18 Mohammed Samir. And Mr. Samir was involved in the training at the
19 Khaldan camp in Afghanistan. He identifies various al Qaeda members,
20 including the accused and one of the COLE suicide bombers.

21 So each of these declarants provide meaningful information
22 to investigators. The members would benefit from these statements in
23 their search for truth during trial. Ultimately that's what they're

1 tasked to do here.

2 The issues raised by the defense do not render them
3 inadmissible. Rather, those considerations should be left to the
4 members when they determine the appropriate weight to give those
5 statements.

6 Each of the notice statements meets the criteria under
7 M.C.R.E. 803(b), and the government should not be prevented from
8 presenting that evidence to the members.

9 Subject to your questions, Your Honor, that's what I have
10 prepared.

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

13 ATC [Capt DANIELCZYK]: Thank you, Your Honor.

14 MJ [COL FITZGERALD]: Lieutenant Colonel Nettinga, I believe
15 you're going to present the defense? Would you like a recess before
16 we begin? I don't know how long you're going to be, so ----

17 DDC [Lt Col NETTINGA]: Yes, Your Honor. It may be a minute
18 that I'm up there, a minute or two.

19 MJ [COL FITZGERALD]: Okay.

20 DDC [Lt Col NETTINGA]: So yeah, a comfort break ----

21 MJ [COL FITZGERALD]: All right.

22 DDC [Lt Col NETTINGA]: ---- would be appreciated.

23 MJ [COL FITZGERALD]: The commission is in recess for ten

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1 minutes until 1535.

2 **[The R.M.C. 803 session recessed at 1527, 30 May 2024.]**

3 **[The R.M.C. 803 session was called to order at 1541, 30 May 2024.]**

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

5 All parties present before the last recess are again
6 present.

7 Lieutenant Colonel Nettinga, I believe you were speaking for
8 the defense on defense's argument on Appellate Exhibit 319.

9 DDC [Lt Col NETTINGA]: Yes, Your Honor. That's correct.

10 MJ [COL FITZGERALD]: You may proceed.

11 DDC [Lt Col NETTINGA]: Thank you, Your Honor. Good
12 afternoon.

13 MJ [COL FITZGERALD]: Good afternoon.

14 DDC [Lt Col NETTINGA]: Sir, when the United States arrested
15 Mr. al Nashiri in 2002, they had some decisions to make. And perhaps
16 paramount amongst those decisions, they had the decision to choose
17 justice or to choose violence.

18 Justice, what does that look like? Perhaps turning
19 Mr. al Nashiri over to the Yemeni authorities, the location where the
20 alleged crime with the COLE was to have taken place. Perhaps working
21 with the newly established International Criminal Court to bring
22 charges. Perhaps the creation of an international tribunal for
23 members of al Qaeda. Again, a newish concept in the venue of

1 international criminal law and criminal responsibility, but one that
2 had seen success with the ICTY, with the ICTR.

3 They could have sought to do something like that to deal
4 with what, to be fair, was some unprecedented criminal activity. But
5 then, of course, there's always the option in the United States to
6 deal with criminal activity, even that which is committed abroad.

7 And so another choice they had, if they sought to seek
8 justice, was to bring Mr. al Nashiri to the United States and
9 prosecute him in federal court. Certainly, they were aware that this
10 was an option because that's what they did with, among many others,
11 Mr. Al Owhali in 1998. And had they done that, perhaps this whole
12 thing would have been wrapped up maybe two decades ago.

13 But instead the United States chose violence. They chose
14 black sites. They chose renditions. They chose torture. And
15 perhaps for some that may have been a form of justice, certainly not
16 justice with a capital J, certainly not justice under the law.

17 But here we are 22 years later in these military
18 commissions. And the question you have, amongst others, that are
19 involved in the rule that we're talking about here today is what is
20 in the interest of justice?

21 Now, the United States in their briefing and in the
22 prosecutor's comments earlier essentially made the argument that,
23 well, you know, commissions are different. And in commissions we get

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1 to do pretty much whatever we want. And that's a little glib, but
2 that's what they're essentially saying. These are different. There
3 are different rules. And so we get to introduce evidence that would
4 never be cognizable in a United States courtroom.

5 They start off by citing you to U.S. v. Quirin, or In Re
6 Quirin. And of course, that was a saboteur case during World War II,
7 a case that has been described by Justice Scalia as "not the court's
8 finest hour," and a case that had strikingly different rules than the
9 ones at issue before this commission, which is what we're here to
10 talk about.

11 And I know it's included in our motion, in our filing at
12 Appellate Exhibit 319KKKK. But essentially the Rules of Evidence in
13 the Quirin case: Where evidence shall be admitted if, in the opinion
14 of the president of the commission, it would have probative value to
15 a reasonable man.

16 That is a very, very broad standard. And under that
17 standard, in the 1940s, perhaps the evidence at issue in this motion
18 would have been admissible. But we are a far cry from the 1940s and
19 from that case, those rules, the development of international law,
20 the development of domestic criminal law.

21 When the United States decided to employ military
22 commissions in this instance, post the events of September 11th,
23 2001, they had a history of commissions to draw from. They had a

1 history of constructs to draw from as they were determining what
2 rules would apply. And ultimately they came up with a set of rules
3 that is unlike any other commission in history. And so while the
4 name "commission" -- "military commission" may be the same, we're
5 talking about very different rules.

6 And so that's why we spent so much time in the -- and I
7 apologize, 113 pages of that argument to lay out the development of
8 the law, the history of the law with respect to this commission, and
9 the analysis of this law that we'd ask this commission to undertake.

10 But because they created essentially a new system -- and to
11 be clear, the 2009 Act which is what we are operating under, the
12 Military Commissions Act of 2009, was the third attempt at figuring
13 out how to do commissions. And that's important, as we'll talk about
14 in a moment.

15 But by creating this new system, they ensured that
16 evidentiary questions, procedural questions, many questions that
17 arose before these commissions would be issues of first impression.
18 And the issue that you have before you today is an issue of first
19 impression, before military commissions in general, certainly before
20 this commission.

21 Now, the prosecution directed you to 319EEEE, which was an
22 earlier ruling dealing with hearsay statements of -- we've been
23 calling them Yemeni lay witnesses. But the category of folks

1 available -- who are at issue today, those are co-conspirators. And
2 while this is an issue of first impression under these rules, the
3 underlying issue is well settled. It is not dependent on the
4 Constitution for enforcement.

5 In fact, this is so well settled that it dates back to
6 England, the common law, well before this country was founded, in the
7 ex parte affidavits to the Sir Walter Raleigh case in the 1600s. And
8 what has been a consistent line is that prior statements of a
9 co-conspirator made after the course of the conspiracy -- especially
10 ones to law enforcement -- are inadmissible against a criminal
11 accused when that co-conspirator does not testify.

12 Now, the prosecution urges you not to apply the case law,
13 because that case law is based on the Sixth Amendment, which they
14 argue doesn't apply, which they argue is settled law of the case
15 here.

16 Firstly, this case law is important because it talks about
17 fundamental notions of justice which is what Congress directs the
18 commission to consider as part of this rule, the Rules of Evidence,
19 the interests of justice. And so certainly the way in which American
20 jurisprudence has developed and the cases that -- that discuss those
21 issues, that are relevant to the issues facing this court, are
22 important for this court to consider, this commission. I would say
23 are binding for this commission to consider.

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1 Because if not, then -- then what are we doing? This is
2 truly a standardless, lawless environment. If you don't have
3 anywhere that you can turn, Your Honor, to look for how did a
4 previous commission under the 2009 Act handle this type of evidence,
5 which you don't, then what are we -- what are we doing here?
6 Certainly that law is instructive, is important and, again, I would
7 say is binding.

8 They say that applying that case law would render the rule
9 that Congress developed for these military commissions meaningless,
10 but that's just not accurate.

11 Congress is presumed to know the law, as the prosecutor
12 stated, and they were very deliberate in the way that they crafted
13 M.C.R.E. 803(b) on the third attempt of the United States to figure
14 out how to do these military commissions. And, again, I know it's
15 cited a lot in the written pleading, and we'll talk about that a
16 little bit more.

17 But one thing at the outset that I'd ask you to keep in mind
18 is that all of this case law, all of the rules -- the rule of 803 and
19 all of its different components, they're dealing with and referring
20 to statements of a witness or statements of a co-conspirator.

21 The case law, the common law, everything discussed in these
22 pleadings, they're based on authenticated, written or otherwise,
23 actual words of the co-conspirator or another witness. So they're

1 talking about evidence that is all more reliable than the evidence at
2 issue in this case.

3 And I don't mean reliable necessarily with respect to the
4 content of those statements, but to the fact that the commission, the
5 finder of fact, can know that the words at issue were actually made
6 by the individual. That is not the circumstance that we have here
7 with respect to these 12 statements because they are not statements.

8 I know that has been a colloquial way to refer to those in
9 the prosecution's briefing, in their arguments. But these are law
10 enforcement summaries. They were prepared by law enforcement agents
11 of custodial interrogations of alleged co-conspirators, often
12 conducted in a foreign language, which were not under oath, which
13 were not video-recorded, not audio-recorded, where there are no
14 verbatim notes and scant quotations as to words that the individual
15 actually said, where there is no written product from the individual
16 himself, where nothing was shown in terms of a summary of the
17 interrogations, nothing was shown to the individual to review for
18 accuracy, and where these statements are completely unauthenticated
19 by the individual who's purported to have made them.

20 These are law enforcement summaries that the government
21 intends to present or ask for the ability to present through the
22 testimony of law enforcement agents who participated in these
23 interrogations and whose memory, after 20-plus years, is generally

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1 reliant on those summaries that either they drafted themselves or had
2 a hand in drafting.

3 All of the testimony concerning those 302s makes clear that
4 these are nowhere near verbatim notes, that this was a summary to
5 help understand and relay what was going on in the investigation.

6 But as you heard the prosecutors talk about, this is a large
7 chunk of the prosecution's evidence in this case. This is how they
8 hope or intend to try to prove Mr. al Nashiri's guilt.

9 And when we're talking about the content of these
10 statements, you cannot accurately determine the reliability of any of
11 these statements because of the way that the agents constructed them,
12 because they don't include questions, they don't include the direct
13 answers. They include a sanitized version written up, often in
14 chronological order, to tell a story.

15 We know from common sense, and certainly even from the
16 testimony of these agents who talked about the interrogations, that
17 that's not the way that these interrogations went. They didn't say,
18 "Tell me everything you know" and then let the individual just go and
19 talk.

20 And so there is an enormous amount of context missing.
21 There's an enormous amount of fidelity as to what this person
22 actually said that is missing. But this is the house of cards that
23 the prosecution wants to use, not the testimony of Mr. al Nashiri's

1 accusers that he has the right to confront, again, under common law
2 all the way through the Sixth Amendment and beyond, but, instead, of
3 these law enforcement agents who were developing a case.

4 Now, sir, I know that there was a lot of litigation on this
5 motion series before you became the military judge here. And
6 certainly I understand that you'll review whatever transcripts you
7 feel you need to review.

8 And that gives you some indication as to how the
9 presentation of this evidence would potentially go. It gives you
10 some flavor of it.

11 But you did get to see a little bit of what that looks like
12 in the testimony of Agent Boese yesterday. And, of course, those
13 were different circumstances. This was not a -- not necessarily a
14 custodial interrogation, right? It was proffer sessions. These were
15 interviews. There were -- there's different motivations and
16 different things going on.

17 But you saw -- and certainly just the presentation of her
18 testimony was different because of the nature of -- because of the
19 nature of why she was called. The defense had the direct examination
20 and the prosecution had the cross-examination. And so it is
21 different in that respect in terms of how this would actually be
22 presented.

23 But what you see is that she remembers generalities. She

1 remembers impressions. She doesn't remember actual words. And she
2 doesn't necessarily, you know, have great fidelity for things that
3 she didn't write down.

4 She certainly has memory about it. And that's not to say
5 that she doesn't know what happened during those interviews, to some
6 degree. But remember, in this case we're talking about something
7 that happened four or five years ago as opposed to something that
8 happened 20 years ago.

9 But what is clear, and certainly what we'll talk about more
10 tomorrow with the 535 series, is that he said -- Mr. Rabbani, in
11 those proffer sessions, said different things than he had said
12 previously.

13 And although Agent Boese may not have recognized that at the
14 time, because of her preparation or the way in which she chose to
15 prepare for that case and not reviewing his previous statements, the
16 fact that somebody who is interviewed another time or gives testimony
17 may say something different than what they have said previously is
18 just a fact known to any practitioner.

19 But because of the way that these witnesses -- the evidence
20 that the government wants to present, we will never have the
21 opportunity to have that cross-examination to hear what those
22 witnesses would say today. And because of that impossibility to
23 cross-examine the accuser -- which, again, is what justice

1 requires -- the best substitute, if these were to be allowed in, is a
2 cross-examination of the agent, which is a far cry from an adequate
3 substitute.

4 And I don't mean that in the context of Boumediene v. Bush,
5 which again we'll talk about in a minute, because there is no
6 adequate substitute for confrontation.

7 But what can you cross-examine an agent on? Only what the
8 agent remembers, not -- certainly not on everything that the
9 individual said. You cannot adequately determine the context for how
10 the questions were asked or how the answers were given.

11 And you have to remember that all of the testimony, both
12 informed by the law enforcement interrogation summary and otherwise,
13 is filtered through the perspective of an agent, what the agent found
14 significant, not what the individual may have been wanting to
15 express, certainly not what a defense counsel may find significant or
16 what a finder of fact might find significant.

17 And there's no ability to ask about previous inconsistent
18 statements if the agent hadn't happened to review them and remembered
19 reviewing them to the level of fidelity that they could say, "Yes, I
20 do know that he said something differently."

21 But that's where any impeachment would end. Well, why did
22 he say something different previously? Well, I have no idea, right?
23 I wasn't in that interrogation. I'm not the individual themselves.

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1 There is no ability to ask that individual, "Is this
2 actually what you said? What the agent put in the summary, what the
3 agent testified to, is that actually the words that you said? Is her
4 characterization of what you said, is that what you meant?"

5 "If that is an accurate characterization, when you said it,
6 was that true? Was there a reason that you may have been
7 giving -- given an untrue answer? Was it a result of torture that
8 you had endured?"

9 There's no ability to probe bias, motive, again, prior
10 inconsistent statements. No ability to get these witnesses under
11 oath ever. And there's no ability to evaluate their testimony given
12 here in court under oath against other statements that they may have
13 made.

14 And so when we talk generally about what justice requires
15 and the interest of justice, certainly we have -- we have to turn to
16 the rule. Are these statements admissible? And there are two ways,
17 as annotated in our written filing, that these statements are
18 inadmissible.

19 And the first one certainly is the Sixth Amendment. The
20 Sixth Amendment prohibits this type of evidence. It requires
21 confrontation. These are testimonial statements. There is no
22 question about that. There is no reasonable argument that the
23 Sixth Amendment would not bar these statements. And it would seem

1 axiomatic that a United States -- not an international commission,
2 but a United States-controlled commission, which is prosecuted at
3 least in part up here in the United States, that the Sixth Amendment
4 would apply.

5 Certainly Mr. Al Owhali, the Sixth Amendment applied to him
6 in federal district court. Mr. Al Badawi, who was indicted in the
7 Southern District of New York, would have had Sixth Amendment rights.
8 He did not end up actually going to trial there, as I'm sure you know
9 at this point.

10 But the point is, is that we give rights to noncitizens, to
11 individuals similarly situated to Mr. al Nashiri. And so that is not
12 a novel concept. That is not a new concept. And so the idea that
13 they may be using military commissions for the purpose of getting a
14 lower standard does not seem right in the interest of justice, does
15 not seem right in the spirit of what this country stands for.

16 The previous military judge -- one of the previous military
17 judges, Judge Pohl, in the 109 series, which we talked about -- the
18 government said we left something out; I think we included it all in
19 there. But it doesn't matter. But Judge Pohl made the initial kind
20 of finding here, and then Judge Acosta just essentially used
21 Judge Pohl's finding.

22 And what I'd say up front, sir, is I believe that it is
23 imperative that the correct law is applied to this case. And to the

1 extent that you review the law and you determine that a military -- a
2 previous military judge in this commission made an incorrect analysis
3 of that law, then that is something that you have the remedy to
4 change.

5 And the idea that the Boumediene case which was, again, not
6 a criminal case, which was a habeas case, which is a civil matter,
7 the general holding in that case was that the right of habeas corpus,
8 the constitutional right, applied to detainees at Guantanamo Bay.
9 That was the general -- there's a lot in there, as I'm sure you know.

10 But the idea that that civil habeas opinion which granted
11 constitutional rights to Guantanamo Bay detainees can be used by a
12 military judge in this commission to say that constitutional rights
13 do not apply in a criminal case, it does not follow. It does not
14 make sense.

15 And, certainly, this is not to -- none of us were here in
16 2014, and as these things were getting off the ground and things were
17 starting, it -- it was hard to know where to look for guidance. And
18 in that aspect, one of the few cases -- I think the only case at that
19 point in time that had dealt with -- extensively with issues related
20 to the Constitution, related to individuals here in Guantanamo Bay,
21 was this Boumediene case. And so it makes sense that Judge Pohl
22 might look to that.

23 But again, there's a couple of passages in Boumediene that I

1 would direct you to, sir. And the first one is 553 U.S. 779. And
2 what that says is that: Indeed, common law habeas corpus was, above
3 all, an adaptable remedy. Its precise application and scope changed
4 depending on the circumstances.

5 And that makes sense, right? It is different. It's not
6 just stuff from the Constitution. It comes from common law. That's
7 how it made it into the Constitution. But it's adaptable. So there
8 may be suitable alternative processes to the right of habeas corpus.

9 That same interpretation cannot be said to extend to the
10 right to confrontation. That is not adaptable. That is not an
11 adaptable remedy. That is a black-letter law, again, before this
12 country was founded. And so, again, Boumediene is not the proper
13 lens to -- to analyze this case under.

14 One other quote that I'll share from the Boumediene case.
15 And again, this is 553 U.S. 795: The suspension clause does not
16 resist innovation in the field of habeas corpus. Certain
17 accommodations can be made to reduce the burden habeas corpus
18 proceedings will place on the military without impermissibly diluting
19 the protections of the writ.

20 Again, Congress is saying you can do different things than
21 maybe we would do in U.S. federal court. You can do different
22 things. But that's because this is an adaptable remedy. That does
23 not follow that that also applies to confrontation.

1 So even if this commission decides, well, you know what, I
2 don't have to address the Sixth Amendment issue because I can just
3 focus on the rule, or I'm just going to go with law of the case,
4 again, I would not say that's settled or I would not concede to that.
5 But in the event that we just want to focus on the rule, I'd love to
6 talk about the rule.

7 And ultimately what we're talking about here is a rule
8 regarding the admission of hearsay. And I certainly do not take
9 issue with the government's proposition that Congress intended
10 M.C.R.E. 803(b) to be a more expansive rule for the admission of
11 hearsay than was permissible under the Military Rules of Evidence. I
12 think that is quite clear from the language of the rule itself and
13 from the history of the rule.

14 But that does not mean that it's a free-for-all. More
15 leniency in that regard does not mean that you can introduce these
16 types -- this type of evidence, these unauthenticated summaries of
17 interrogations.

18 And so I want to talk briefly about hearsay generally.
19 Because, again, the court has been very clear about this -- and when
20 I say "the court," of course I'm talking about the Supreme Court
21 generally -- very clear about this.

22 And with Congress being presumed to know what the law is
23 when they incorporate concepts and language from Supreme Court cases

1 that are the seminal cases in the field of hearsay, certainly we can
2 divine Congress' intent that they intended for this case law to
3 govern.

4 And I'm not necessarily in the habit, as perhaps the
5 prosecution and the military judge in 319EEEE is, of just saying I'm
6 going to presume to know what Congress' intent is. I'm going to
7 actually show you what Congress' intent is through their own words,
8 something that the government did not engage in, something that
9 319EEEE does not engage in.

10 Because we don't have to guess. We don't have to divine.
11 There is a wealth of documentation in the Congressional Record where
12 these things are debated, discussed, where there are committee
13 reports that are published, and where Congress makes abundantly
14 clearly what they are trying to do with the Military Commission Act
15 of 2009.

16 And I will get to that in just a moment, but it's important
17 to talk about hearsay generally.

18 With respect to co-conspirator statements, Supreme Court in
19 Lilly v. Virginia, 527 U.S. 116, 1999 case, the court evaluated its
20 long history of the necessity of confrontation in cases involving
21 prior statements of a co-conspirator.

22 And at 137, the court states: The sweep of our prior
23 confrontation cases offers one cogent reminder. It is highly

1 unlikely that the presumptive unreliability that attaches to
2 accomplices' confessions that shift or spread blame, which these
3 statements clearly do, can be effectively rebutted when the
4 statements are given under conditions that implicate the core
5 concerns of the old ex parte affidavit practice; that is, when the
6 government is involved in the statements' production and when the
7 statements describe past events and have not been subject to
8 adversarial testing.

9 Statements given to law enforcement generally, even before
10 the Crawford case in 2004, are treated with suspicion. In United
11 States v. Guaglione -- that's 27 M.J. 268, that's a Court of Military
12 Appeals case from 1986 -- in reversing a conviction in that case,
13 that court found that the military judge and the service appellate
14 court had erred in allowing statements given by co-conspirators to
15 law enforcement personnel to be entered into evidence.

16 In the first place, the court says, the pretrial statements
17 were made to criminal investigators who often are not merely
18 observing -- I see it, thank you -- and who are not merely observing
19 and evaluating, but are seeking to build a case to prove guilt, and
20 that in the view of the technique of the interrogation, the statement
21 obtained is in some respects the product of the investigator rather
22 than of the purported declarant.

23 And that's exactly the issue that I was attempting to

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1 describe in other language in the way in which the law enforcement
2 agent prepared these investigative summaries, which, again, are not
3 statements.

4 And the interesting piece about this Guaglione case is that
5 in that instance -- again, in 1986 -- the co-conspirators at issue
6 had written and sworn statements and they actually testified at
7 trial. But those written and sworn statements were still deemed to
8 be inadmissible for the reasons that the court articulated.

9 So even with much stronger fidelity to what an individual
10 actually said, even with actual statements at issue, when we're
11 talking about co-conspirators, when we're talking about statements
12 made to law enforcement, courts throughout the United States have
13 said that does not work, that is not admissible.

14 And then, of course, you have the residual hearsay
15 exception. And this is a statutorily developed exception to the
16 hearsay rule. So unlike common law hearsay exceptions, this is
17 something that was debated and developed and ultimately passed in the
18 Federal Rules of Evidence in the 1970s.

19 And there is -- the seminal case that we direct you to, and
20 do in the court, is the Idaho v. Wright case, and we'll talk about
21 that in a minute. And that's important because there is language
22 from that and concepts from that that the United States Congress
23 specifically adopted in M.C.R.E. 803(b).

1 But the residual hearsay exception essentially says that if
2 it doesn't fall under any other type of exception, then maybe it can
3 be admissible under this if certain requirements are made -- are met.

4 But I want to talk first -- before we get into the actual
5 rule itself, we need to talk about how we got to this rule.

6 Now, the first iteration -- we talked about three different
7 iterations of Rules for Military Commissions. The first iteration
8 came from Military Commission Order No. 1, and that was issued by the
9 Secretary of Defense Donald Rumsfeld on 21 March 2002.

10 And this was establishing a military commission to deal
11 with -- or military commissions to deal with the aftermath of 9/11
12 and issues that arose surrounding al Qaeda. And this essentially is
13 taken straight from the Quirin case and President Roosevelt's
14 declaration in the 1940s, in 1942, I believe.

15 And the standard for evidence under the Military Commission
16 Order No. 1 is that evidence shall be admitted if the evidence would
17 have probative value to a reasonable person. Again, very, very broad
18 standard.

19 Now, no case has proceeded to verdict under Military
20 Commission Order No. 1. And then in Hamdan v. Rumsfeld, which is 548
21 U.S. 557, that's a 2006 case, the Supreme Court said that the
22 President could not unilaterally authorize military commissions of
23 this type. Essentially, they needed to work with Congress.

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1 But there's some interesting language in Hamdan as well that
2 I -- I'd ask the court to consider, because the court comments on the
3 incredibly lax standard with respect to the admission of hearsay
4 evidence that I just quoted to you in MCO, Military Commission Order,
5 No. 1.

6 And they say essentially that it's deficient in its
7 evidentiary standards because, quote, the procedures governing trials
8 by military commission historically have been the same as those
9 governing courts-martial. And that's at 617 in that Hamdan case.

10 And that even though this is a 2006 case and Congress takes
11 a crack at the Military Commissions Act of 2006, this language is
12 going to prove prescient for the Military Commissions Act of 2009,
13 that historically military commissions have had the same types of
14 rules for evidentiary standards as those governing courts-martial.

15 And so in 2006, Congress gets involved and creates the
16 Military Commissions Act of 2006. And under that framework, again,
17 there's another attempt at defining and describing the evidentiary
18 rules related to the admission of hearsay evidence. And it's pretty
19 general, pretty broad, but what you see is that the aperture is being
20 narrowed. So we are getting stricter with respect to the admission
21 of hearsay evidence.

22 And what essentially that says -- and this is on page 30 of
23 Appellate Exhibit 319KKKK -- is that hearsay evidence is admissible

1 unless the military judge finds that the circumstances render it
2 unreliable or lacking in probative value, or the probative value is
3 substantially outweighed by the danger of unfair prejudice, confusion
4 of the issues, misleading the members of the commission.

5 And I apologize. I -- I know I cited to page 30. That
6 was -- that was the President's draft that they gave -- the
7 Administration's draft that they gave to Congress to kick off the
8 Military Commissions Act of 2006. Congress' eventual rule that they
9 passed with respect to hearsay evidence is -- is strikingly similar
10 to that, but it does put the burden on the adverse party, as opposed
11 to the party seeking to admit evidence. And so that was one of
12 the -- the factors there in 2006.

13 And so after the Military Commissions Act of 2006, the
14 Supreme Court decided Boumediene. And Boumediene talked about the
15 Detainee Treatment Act. It found one portion of the Military
16 Commissions Act of 2006 unconstitutional. But rather than just
17 rewriting that one section, Congress went back and developed the
18 Military Commissions Act of 2009.

19 And in doing so, instead of these rules that were kind of
20 vague and not necessarily tied to anything in general, they heeded
21 the Supreme Court's guidance in the Hamdan case where it said that
22 military commissions are generally reliant on and similar to the
23 evidentiary standards for Military Rules of Evidence.

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1 And so that's what the Military Commissions Act of 2009
2 does, is it adopts the Military Rules of Evidence almost in their
3 entirety. There's a few changes. And one of those changes is what I
4 have called in the -- in the written pleading here, the double
5 residual hearsay exception.

6 Because by adopting the Military Rules of Evidence, Congress
7 includes within the rules applicable to this military commission
8 Military Rule of Evidence -- so that's M.R.E. -- 807, which is the
9 residual exception in the military applicable to courts-martial. But
10 then they go a step further and they create this double residual
11 exception in M.R.C. -- M.C.R.E. 803(b), which is obviously at issue
12 here.

13 And I'm about to put up a chart that puts those two rules
14 side by side, because I think it's important to show the similarities
15 between them and the very -- you know, specific places where they
16 depart. But before I do that, I know I said that we were going to
17 talk about not what I believe or what the prosecution believes or
18 what anybody else believes Congress' intent might have been in
19 allowing for more evidence to be admissible in military commissions,
20 but rather to talk about what Congress' stated intent was.

21 And so certainly in the drafting and the congressional
22 process, how a bill becomes a law, as we talked about, there's a
23 number of sources of information that give an idea as to what

1 Congress' intent was. And perhaps the most paramount among those is
2 the Senate and the House conference reports on what would ultimately
3 become the NDAA of 2010, the Military Commissions Act of 2009.

4 And what the House conference report says -- and this was
5 published on the 8th of October 2009, just a little bit before MCA
6 2009 was adopted by Congress generally. It says that: The bill
7 provides the accused with the enhanced ability to select his own
8 counsel and to make hearsay evidence harder to use in court.

9 So again, we're going from Military Commissions Order No. 1,
10 which is a broad standard. We're going then to the Military
11 Commissions Act of 2006, which narrows the guardrails a little bit in
12 terms of what can come in. And now we're coming to make it even
13 harder to admit hearsay evidence as a congressional design.

14 And that was the House report I just read to you. The
15 Senate report also comments -- again, this is a massive piece of
16 legislation, the NDAA, the Military Commissions Act of 2009. They
17 don't comment on every provision. They don't comment on everything
18 that they've done or everything that they change. They comment on
19 the things that are important. And you see that both branches of
20 Congress talk about this idea of hearsay.

21 And Senate goes a little bit further and it says that: The
22 Military Commissions Act of 2006 created a cloud over the use of
23 military commissions because it failed to live up to the standard.

1 The conference report -- so, again, what would become the Military
2 Commissions Act of 2009 -- would address this problem by, one,
3 precluding the use of coerced testimony, and, two, by limiting the
4 use of hearsay testimony.

5 Congress' intent was to make hearsay evidence harder to use.
6 And so in doing that, they ultimately came up with what became
7 Military Commissions Rule of Evidence 803(b).

8 And at this point I'd ask for access to the ELMO to display
9 to the public. This has been cleared and this is page -- I don't
10 have the actual copy that was marked by the court reporter, so I -- I
11 don't know what page this is, but I know this is Appellate
12 Exhibit 319LLLL.

13 If I could ask for that to be zoomed out if possible, if I
14 can do that.

15 So this, Your Honor, this breaks up -- or this puts side by
16 side M.R.E. 807 and M.C.R.E. 803(b). And you can see that there are
17 striking similarities between these rules. There are places where
18 the language is identical.

19 And I'd like to direct your attention first to part
20 (C) -- so M.C.R.E. 803(b)(2)(C) -- that talks about direct testimony
21 from the witness is not available as a practical matter. And this
22 is -- this is the one instance that you see where there's no
23 corollary in the Military Rule of Evidence.

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1 So this speaks to essentially the biggest change that was
2 envisioned by Congress in this rule. And that's the direct testimony
3 from the witnesses not available as a practical matter, taking into
4 consideration the physical location of the witness, military
5 intelligence operations, and the adverse impacts that could result.

6 And so what Congress seems to be trying to do here is to say
7 that understanding the prosecutions that arose out of a battlefield
8 where there is an ongoing conflict where witnesses may not be
9 available or witnesses may be forward deployed, may have other
10 war-fighting responsibilities, if that is not available, then this
11 rule could allow, under the right circumstances, for statements of
12 these individuals to come in.

13 And so what this rule does is it attempts to bypass the
14 holding in Crawford. It attempts to bypass the confrontation
15 inherent in the Sixth Amendment. And so, again, that is, can
16 Congress create a rule that is unconstitutional?

17 That's part of the issue here, but that certainly seems to
18 be their intent, that you don't need to have that confrontation if
19 all of these other things are met. And that's why it's so important
20 to focus on all of the additional pieces here.

21 And what I'd direct you to next is M.C.R.E. 803(b)(1), and
22 that's down at the bottom. And what that -- what that instructs the
23 proponent of the evidence to do is that they need to provide to the

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1 opposing party any information that they have about the facts and
2 circumstances surrounding the taking of the statement, including
3 information on the circumstances under which the evidence was
4 obtained.

5 And that's important, and that is -- that's different
6 from -- slightly, from the rule in M.R.E. 807, because the focus on
7 the circumstances under which it was obtained is what the court is
8 focusing on -- or, excuse me -- what the -- what Congress is focusing
9 on in M.C.R.E. 803(b) (2), where they direct the commission, the
10 military judge, to take into account all of the circumstances
11 surrounding the taking of the statement.

12 And when you look at M.C.R.E. (b) (2) **[sic]**, which again I
13 think is the crux of the matter here before you, you see in that
14 first part -- you see two prepositional phrases, right? If you take
15 those out, it says the military judge determines that. And then you
16 have the subordinate, the (A), (B), (C), and (D).

17 But you have those two prepositional clauses that impact how
18 the military judge can determine the statements that follow, or the
19 subordinate portions that follow.

20 And the first is that the military judge must take into
21 account all the circumstances surrounding the taking of the
22 statement.

23 And then you have that second prepositional phrase which is

1 subordinate to the one before it, and that is -- that's crucial.
2 That is key. And I think that is where the primary difference is in
3 terms of the analysis, or at least a primary difference, a difference
4 between what the defense is asking you to consider and how they're
5 asking you to view this rule, and the prosecution is.

6 Because the prosecution wants you to admit these statements
7 because they are corroborated by outside sources, by other evidence
8 adduced at trial.

9 And what the case law is clear on -- and that's
10 Idaho v. Wright, amongst many others -- is that you cannot do that.
11 And when we're talking about corroboration, you have to look at the
12 circumstances surrounding the taking of the statement itself.

13 And that is true generally for hearsay exceptions. If you
14 are seeking to get a piece of hearsay evidence in under excited
15 utterance, you look at the circumstances surrounding the statement
16 and how it was made. You look for present sense impression. You
17 look at the circumstances surrounding the way in which the statement
18 was made to see if it qualifies.

19 You do not look at the other evidence at trial to see
20 whether or not that makes that statement reliable. It's the
21 circumstances surrounding the taking of the statement. And that is
22 consistent and clear from Idaho v. Wright even before that, but
23 certainly after it.

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1 And the way that you know that, not only does Congress use
2 that language of the circumstances surrounding the taking of the
3 statement, which is essentially directly from Wright, but it's the
4 use of that second prepositional phrase, which says that of the
5 circumstances surrounding the taking of the statement, the military
6 judge essentially can look at, including the degree to which the
7 statement is corroborated, the indicia of reliability within the
8 statement itself, and whether the will of the declarant is overborne.

9 Now, the prosecutor said, well, hey, if you apply the
10 analysis the defense wants you to apply, then the interpretation
11 doesn't make sense. Then the second portion of that second
12 prepositional phrase is obviated, it's superfluous, that the
13 defense's interpretation defies logic, that it leads to an absurd
14 result.

15 But, again, I -- this isn't my interpretation that I'm
16 asking you to apply, sir. This is the Supreme Court consistently
17 talking about the circumstances surrounding the taking of the
18 statement.

19 MJ [COL FITZGERALD]: Counsel, if I might ask, you're talking
20 about the Supreme Court in Idaho v. Wright?

21 DDC [Lt Col NETTINGA]: Yes, Your Honor.

22 MJ [COL FITZGERALD]: All right. If you're going to cite to
23 the Supreme Court, at least tell me the case you're citing to

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1 so -- Idaho v. Wright was decided on the confrontation clause,
2 correct?

3 DDC [Lt Col NETTINGA]: Yes, Your Honor.

4 MJ [COL FITZGERALD]: So are we doing a confrontation clause
5 analysis? Because you sound like you're blending what the Supreme
6 Court said regarding Sixth Amendment and Congress' creation of
7 803(b).

8 DDC [Lt Col NETTINGA]: Sir, the Idaho v. Wright talks about
9 the residual exception. That's an 807 case. It's an Idaho -- Idaho
10 equivalent of the residual exception, which is what we have here.
11 And it's the cleanest or the clearest analogy that we can make in
12 this particular case.

13 Certainly, as the court is well aware, any of the cases upon
14 which the Supreme Court decided are going to be based on the
15 confrontation -- the confrontation clause undergirds all of that. It
16 undergirds the Military Rules of Evidence which Congress incorporated
17 into these rules.

18 And so really, if you go and you look at the Military Rules
19 of Evidence and you try to read them as if the Constitution does not
20 apply, they don't make sense because they are written with the
21 implicit understanding that the Constitution applies.

22 And so Congress has certainly done -- they've incorporated
23 things that are based on the Constitution. We all swear an oath to

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1 protect and defend the Constitution.

2 The only cases that we have to be able to tell us what the
3 interests of justice mean are based on the Constitution, although
4 certainly we can talk about -- and I know that I do extensively in
5 the written pleading -- international law as well, which also would
6 not cognize the ability of these statements to be admitted into
7 evidence.

8 But I suppose that was a very long-winded answer to Your
9 Honor's question, and so I'm happy to stop talking at this moment if
10 you have other things.

11 MJ [COL FITZGERALD]: All right. I guess I'm a little
12 confused because a lot of the issues regarding hearsay about its
13 indicia of reliability are the declarant's statements that were made
14 out of court while that person may be on the stand testifying. So
15 there doesn't seem to be a confrontation issue in a lot of our
16 analysis of excited utterance or present sense impression.

17 If the witness is on the stand and offering something out of
18 court, confrontation is satisfied by the fact they're on the stand
19 testifying, but what they're testifying to is an out-of-court
20 statement.

21 DDC [Lt Col NETTINGA]: Sir ----

22 MJ [COL FITZGERALD]: That's why they look to the indicia of
23 reliability.

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1 So I'm not sure I understand the overlay of the
2 Sixth Amendment. I don't know of any case law that says that, that
3 clearly, implicitly, or otherwise the Sixth Amendment has been
4 applied to our hearsay analysis. But maybe you can help me
5 understand that.

6 DDC [Lt Col NETTINGA]: Well, certainly, sir. What I'm
7 talking about -- again, I'm giving analogies because that's the best
8 that we can do. But really, I don't -- I don't have to.

9 And the analogies that I'm -- that I'm drawing from, they
10 come from -- bear with me a moment, sir. They come from
11 State v. Ryan, which is cited in the brief. That's 103 Wn.2d 165.
12 That's a Washington state case from 1984. And certainly I understand
13 and I acknowledge in the footnote that, yes, this is a state case,
14 but it's cited approvingly by the U.S. Supreme Court in Idaho v.
15 Wright. And ----

16 MJ [COL FITZGERALD]: So again, Idaho v. Wright is a
17 confrontation analysis.

18 DDC [Lt Col NETTINGA]: It's a ----

19 MJ [COL FITZGERALD]: I'm wondering why we're revisiting the
20 confrontation analysis, just in general, and how you're applying it
21 to 803(b).

22 DDC [Lt Col NETTINGA]: Well, I think that we're addressing
23 this, sir, because, again, Idaho v. Wright was about whether the

1 statement of a nontestifying individual could be admitted under the
2 residual hearsay exception. That's what it was -- it was based on.

3 Certainly, again, the Supreme Court -- or the confrontation
4 clause underlies all of that. I can't give you a Supreme Court case
5 that doesn't talk about the Constitution where something was decided
6 solely on statutory grounds, because the Constitution is always
7 there, and the court knows how to -- how to use it, and they're there
8 to interpret it.

9 And maybe I'm -- I'm misunderstanding what the commission is
10 asking, but I think it is significant that Congress, in crafting
11 803(b), again, after incorporating the M.R.E.s -- Military Rules of
12 Evidence -- which are based on the Constitution, it is interesting
13 and informative that when they craft 803(b), they use the language of
14 Wright, taking into account all of the circumstances surrounding the
15 taking of the statement.

16 And what they don't ----

17 MJ [COL FITZGERALD]: In Idaho v. Wright they were talking
18 about the circumstances around the making of the
19 statement -- correct? -- not the taking of the statement.

20 DDC [Lt Col NETTINGA]: Yes, Your Honor.

21 MJ [COL FITZGERALD]: Is that a word of distinction?

22 DDC [Lt Col NETTINGA]: I don't believe that it is.

23 MJ [COL FITZGERALD]: Do you think Congress did that by error?

1 Or that -- somebody making a statement is declarant-centric; somebody
2 taking a statement doesn't seem to be declarant-centric. So it seems
3 like Congress was looking beyond the declarant's words when they said
4 the taking of a statement. The declarant doesn't take a statement,
5 they make one.

6 DDC [Lt Col NETTINGA]: Yes, Your Honor.

7 MJ [COL FITZGERALD]: So it seems Congress had a design in
8 mind.

9 And before we get to that, the issue of the Sixth Amendment
10 and how it applies here has already been resolved before this court,
11 correct?

12 DDC [Lt Col NETTINGA]: Again, Your Honor, I don't believe
13 that it -- that it has been. Certainly not with respect to this
14 issue. And to the extent that the commission has -- believes that it
15 has, then certainly the defense's position is that that was
16 incorrectly decided based on the -- the incorrect analysis of the
17 Boumediene case, which does not apply.

18 MJ [COL FITZGERALD]: So your position is -- it seems like
19 you're requesting reconsideration of that ruling, then?

20 DDC [Lt Col NETTINGA]: Your Honor, I do believe that you can
21 reach the proper conclusion in this -- in this instance to exclude
22 the statements just by relying on the rule. But to the extent that
23 the Sixth -- that that's something that is at issue here, then yes.

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1 To the -- again, to the extent that the commission believes
2 that this is settled in this particular case, we believe that it is
3 incorrectly settled. We believe that that is demonstrated by
4 evidence that has been discovered and put on analysis and
5 congressional intent and all of those things that are -- were
6 included in the written briefing.

7 MJ [COL FITZGERALD]: What did you think Congress meant when
8 they said "the taking of a statement"?

9 DDC [Lt Col NETTINGA]: Well, sir, I think -- I understand the
10 court's -- I understand the court's analysis there. What I think
11 is ----

12 MJ [COL FITZGERALD]: I don't know if I have analysis.
13 I'm -- you -- I'm just focused on the word "taking" which seems to be
14 a broader construct than "making," again being more of a
15 declarant-centric word. Taking seems to be broader than that.

16 DDC [Lt Col NETTINGA]: Sure.

17 MJ [COL FITZGERALD]: And Congress certainly understood
18 they -- I don't think it was a typo, not a scrivener's error. They
19 chose that word purposefully. And one of the rules of statutory
20 construction, we have to believe they knew the law at the time they
21 wrote this. Crawford had been decided. Idaho v. Wright had been
22 decided. So they were well aware of those.

23 DDC [Lt Col NETTINGA]: Yes, Your Honor.

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1 MJ [COL FITZGERALD]: Yet they chose to create this -- this
2 new rule beyond even the residual hearsay rule to reach to other
3 evidence that was available in the military commissions. So it seems
4 they understood that the Sixth Amendment wouldn't apply ----

5 DDC [Lt Col NETTINGA]: Well ----

6 MJ [COL FITZGERALD]: ---- as it does in
7 Crawford v. Washington or Idaho v. Wright.

8 DDC [Lt Col NETTINGA]: And I can understand that position,
9 Your Honor.

10 What I will say -- two things on that. Number one, I think
11 as we go through additionally the analysis of M.C.R.E. 803(b)(2), I
12 think whether it was "taking" or "making," I don't think is
13 dispositive for your analysis of the rule itself and the admission of
14 these statements under that rule. I think you reach the same
15 conclusion whether it is "taking" or "making," and we can talk about
16 that, you know, as we go along here.

17 But I do think it is clear, again to my earlier point, that
18 Congress intended to write this rule to get around the Sixth -- to
19 overcome the Sixth Amendment, and I think that there is -- I mean,
20 that's----

21 MJ [COL FITZGERALD]: Or an alternative, they wrote it in such
22 a way because they didn't believe the Sixth Amendment applied, so
23 they had nothing to go around, right?

1 DDC [Lt Col NETTINGA]: And ----

2 MJ [COL FITZGERALD]: I mean, if -- as I stated earlier,
3 Congress has presumed, under Rules of Statutory Construction, to know
4 the words they're using mean what they mean, and that they are
5 presumed to know the law, as to the state of the law at the time they
6 create a new law, right? So they ----

7 DDC [Lt Col NETTINGA]: Yes, Your Honor.

8 MJ [COL FITZGERALD]: Unless you found something in the record
9 that says we're trying to avoid or circumvent or hurdle the
10 Sixth Amendment, I'm not aware of that in the legislative record. It
11 would seem to me they understood the Sixth Amendment underpinnings
12 outside of the commissions. But they are now crafting a rule inside
13 the commissions.

14 They didn't seek to modify any other Rules of Evidence.
15 They didn't change the Military Rules of Evidence. They sought only
16 to create this rule within the military commission framework.

17 DDC [Lt Col NETTINGA]: Yes, Your Honor, that's accurate. And
18 I think, you know, conversely to -- to your point, there's certainly
19 nothing in the record that says the Constitution does not apply here.

20 The rule -- I mean, we have to take the rules as they are.
21 So whether they believed, and underlying the entire MCA of 2009,
22 their belief that the Constitution does not apply, certainly that's
23 not explicitly stated. And I think it would be inconsistent with the

1 entire adoption of the M.R.E., the Military Rules of Evidence, in
2 their entirety, again, which are based on the Constitution. Because
3 those rules, which we have to apply in other instances in this
4 commission, if it doesn't fall under this double residual hearsay
5 exception, those rules are all based on the Constitution.

6 And so that's what makes it tricky, is there are certainly
7 constitutional elements that Congress incorporated into the Military
8 Commissions Act of 2009. But here, in this one instance, they are
9 saying something that obviously they would know does not comport with
10 the Constitution.

11 And there is no statement as to "we're trying to go around"
12 or "we can do this because the Constitution just, bar none, does not
13 apply." That is an open question. And I think what we have to rely
14 on is Congress' stated intent, which is to make hearsay evidence
15 harder to use in these commissions.

16 MJ [COL FITZGERALD]: In reading Appellate Exhibit 319EEEE,
17 doesn't that ruling articulate that the Sixth Amendment doesn't
18 apply?

19 DDC [Lt Col NETTINGA]: It essentially says that the law -- it
20 says that the law of the case is what Judge Pohl decided in -- in AE
21 109, in that series.

22 MJ [COL FITZGERALD]: And so the law of the case is the
23 Sixth Amendment confrontation does not apply, correct?

1 DDC [Lt Col NETTINGA]: That -- that is the position that was
2 taken by this commission. I think that ----

3 MJ [COL FITZGERALD]: Well, that's the law -- is that the law
4 of the case?

5 DDC [Lt Col NETTINGA]: I don't have anything contrary to
6 that, Your Honor.

7 MJ [COL FITZGERALD]: I believe that is the law of the case.

8 So it seems that you're asking for reconsideration, but you
9 never stated you're requesting reconsideration of that ruling.
10 You've simply just gone into this argument as if it was not the law
11 of this case.

12 DDC [Lt Col NETTINGA]: I know that in the written pleading I
13 talk about that this is not necessarily -- I know there's some
14 discussion of reconsideration in the briefing. But yes, I -- I will
15 state that we are asking for reconsideration of the applicability of
16 the Sixth Amendment.

17 Again, I don't think that whether or not the Sixth Amendment
18 applies is dispositive to this issue, because I think the rule that
19 Congress wrote specifically to apply to this instance of military
20 commissions still prohibits this type of evidence. And so that's why
21 I did not -- I did not spend a ton of time on that portion of the
22 analysis, understanding what previous military judges had found in
23 this commission.

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1 But yes, we believe it was wrongly decided that the
2 Sixth Amendment does not apply. We believe that it does. And we are
3 asking for reconsideration.

4 But the purpose of this motion, obviously, is to deal with
5 the issues that the government is seeking to introduce and which I
6 think can fairly be precluded from admission under the rule itself.

7 MJ [COL FITZGERALD]: All right. So your request for
8 reconsideration, are there new facts in evidence that would cause you
9 to request reconsideration?

10 DDC [Lt Col NETTINGA]: The only thing that I can point to,
11 sir, is I think there is -- there's been substantial development in
12 the law, in the understanding ----

13 MJ [COL FITZGERALD]: I didn't ask about the law. I said were
14 there any new facts?

15 DDC [Lt Col NETTINGA]: I don't believe that there's any new
16 facts other than ----

17 MJ [COL FITZGERALD]: Has there been a change in the law?

18 DDC [Lt Col NETTINGA]: No, Your Honor.

19 MJ [COL FITZGERALD]: So we're left with, then, that you just
20 believe that 319EEEE and 109 were just wrongly decided?

21 DDC [Lt Col NETTINGA]: Correct, Your Honor.

22 MJ [COL FITZGERALD]: Okay. Are you able to bifurcate your
23 position, then? I mean, you can certainly talk about how the

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1 Sixth Amendment applies, but you're blurring that with the argument
2 you have before you generally, and I think you're clouding some of
3 the issues when I didn't necessarily grant reconsideration. That's
4 part of requesting reconsideration, is you have to wait until it's
5 granted. That's my concern, that you're blurring this.

6 But here's what I'd like to do. I'd like to take a
7 recess ----

8 DDC [Lt Col NETTINGA]: Yes, Your Honor.

9 MJ [COL FITZGERALD]: ---- for everybody's comfort break and
10 give you some time to think about it, but -- and then we'll come back
11 to this discussion. Okay?

12 DDC [Lt Col NETTINGA]: Yes, Your Honor.

13 MJ [COL FITZGERALD]: Is ten minutes sufficient? Ten minutes
14 sufficient?

15 DDC [Lt Col NETTINGA]: Yes, Your Honor.

16 MJ [COL FITZGERALD]: Very well.

17 The commission is in recess.

18 **[The R.M.C. 803 session recessed at 1654, 30 May 2024.]**

19 **[The R.M.C. 803 session was called to order at 1712, 30 May 2024.]**

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

21 All parties present before the last recess are again
22 present.

23 So I have Lieutenant Colonel Nettinga up at the podium so he

1 can finish his argument, but here's where I'd like to direct
2 your direction.

3 I understand your Sixth Amendment analysis. I would
4 have required, if you're requesting reconsideration, to tell me so,
5 and then I would decide if I was going to grant it. And then I would
6 have said if I granted it, I'll allow you to make your
7 Sixth Amendment presentation, importantly so you can preserve that
8 issue for the record.

9 But I would have also asked you to separate it or bifurcate
10 it in such a way that your Sixth Amendment analysis could be
11 distinguished from your -- the rest of your analysis as to the
12 application of Rule 803(b)(2) in a separate fashion. But by
13 combining the two, it becomes difficult to understand which position
14 you're taking.

15 The law this court is required to comply with is the law of
16 the land, and Ex Parte Quirin comes to mind as still the law
17 regarding the application of the Fifth and Sixth Amendment rights to
18 circumstances such as this.

19 The UCMJ has addressed the issue that not all
20 Sixth Amendment rights are provided to military servicemembers, and
21 CAAF has recently decided on that issue as well.

22 So I accept your Sixth Amendment position. I think you've
23 preserved it for the record. And this court, by allowing you to go

1 on with it, will certainly revisit the Sixth Amendment analysis done
2 in Appellate Exhibit 109 ruling, as well as previously by this
3 commission in Appellate Exhibit 319EEEE.

4 I believe you preserved the issues for the record. I
5 believe you stated very clearly and articulated very well you believe
6 the Sixth Amendment applies. But what I would like you to do is
7 focus your -- the rest of your argument to the commission on your
8 non-Sixth Amendment argument regarding the hearsay statements.

9 DDC [Lt Col NETTINGA]: And, Your Honor, I am certainly happy
10 to do that. Before the break you asked me to think about the
11 position on the Sixth Amendment, and certainly I've done so.

12 And while I certainly will be prepared to move on to the
13 analysis of the rule -- which, again, is the primary focus of the
14 argument in AE 319KKK. And I think, you know, what I started this
15 argument was, was based on the interest of justice and talking
16 generally about the interest of justice, which is all coming from the
17 rule itself for you to consider.

18 But I do have some additional facts, and I'm happy to
19 bifurcate and to say, hey, now I'm -- let me -- or may I talk about
20 the Sixth Amendment issues and then signal quite clearly when I'm
21 transitioning to the rule.

22 But because Your Honor gave me that opportunity and asked me
23 to consider the Sixth Amendment issue over those ten or so minutes,

1 I do have some additional things that I'd like to at least put on the
2 record.

3 MJ [COL FITZGERALD]: I will allow you to give your final
4 summations regarding the Sixth Amendment and how you believe it
5 applies, conclude that, and then tell me you've concluded it, like
6 you said, and present your argument on the rest of your presentation
7 outside the Sixth Amendment, whatever that may be.

8 DDC [Lt Col NETTINGA]: Yes, Your Honor.

9 MJ [COL FITZGERALD]: All right. And I'm also well aware
10 you've presented those matters well in your written brief as well.
11 So I will have those to reference, so -- okay?

12 DDC [Lt Col NETTINGA]: Understood, Your Honor. Thank you.

13 MJ [COL FITZGERALD]: You may proceed.

14 DDC [Lt Col NETTINGA]: So I'd start again in my final
15 comments on the Sixth Amendment for the purpose of this argument by
16 stating that I don't believe Quirin is still good law.

17 And I'd certainly ask the court to consider that, you know,
18 with Hamdan and talking about how the rules are supposed to be
19 similar to those applicable to military courts-martial. And, you
20 know, in the 1940s, we didn't have the Uniform Code of Military
21 Justice.

22 And I do think with Justice Scalia calling it not the
23 court's finest hour, I think there's real reason to question the

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1 legitimacy of relying upon that case.

2 But there -- the court asked if there were new facts to
3 consider. And I do believe that there are. And the first of that is
4 109 was decided, I believe -- I don't have it in front of me. I
5 believe it was ten years ago. I believe it was 2014 that that was
6 decided.

7 And it was talking a lot about generalities with not a lot
8 of specific facts in front of the commission at that time. And so a
9 general ruling without reference to specific facts, without the
10 ability to apply the law to specific facts and how that might play
11 out, I think that that's something that is worth considering.

12 And what we have now are a significant amount of facts and
13 testimony as to what these, quote/unquote, statements which are
14 unauthenticated summaries of co-conspirator interrogations, we have a
15 lot of testimony and a lot of facts that were presented on that, not
16 the least of which 109 does not deal with the class of
17 co-conspirators, neither does 319EEEE. This is a different class of
18 folks.

19 And the final new fact that I'd ask the court to consider is
20 that every single one of the law enforcement agents who testified
21 about the interrogations and the summaries that they provided and
22 prepared from these co-conspirator custodial interrogations, they all
23 testified right up here in the United States of America on firm U.S.

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1 soil.

2 And if the Constitution doesn't apply here, sir, it's -- and
3 I understand this is hypothetically or, you know, the construct is
4 that this is an extension of the well down in Guantanamo Bay, but
5 this is the United States. And I think that's part of the problem
6 here without any definitive ruling from the Supreme Court that the
7 Constitution does not apply, that the confrontation does not apply to
8 these commissions. Without any firm position from Congress as to
9 whether or not the Constitution applies, I think we have to assume
10 that the Constitution does apply.

11 Again, we've all taken that oath. The Constitution is the
12 foundation of all our legal precedents. And if the Constitution
13 doesn't apply, then -- then what are we basing any of this? Because
14 you can look at a rule and we can think about what that rule might
15 mean in a vacuum, but without the case law -- which, again, is going
16 to be based on and referencing to the Constitution -- how can we
17 evaluate that case law and try to parse out what might apply to this
18 rule, which, again, has never been tested? How can the -- how can
19 this commission base any legal decision if the Constitution doesn't
20 apply?

21 The mere fact that Congress wrote this rule does not mean
22 that it is -- that it is constitutionally permissible, and we know
23 that because the MCA of 2006 got struck down by the

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1 Constitution -- or by the Supreme Court. It's taken two
2 different -- took two different times of the military commission
3 construction to try and come up with something that works.

4 Both of the first attempts, as we talked about, were struck
5 down by the Supreme Court. And the fact that there has not been a
6 case, a litigated case that proceeded to a verdict and a sentence and
7 an appeal under the Military Commissions Act of 2009 is unfortunate
8 in that we do not have something instructive. But certainly I -- I
9 want to make sure that we are protecting the record here. And I
10 think a ruling in this commission that the Sixth Amendment, the right
11 to confrontation, does not apply, is something that -- that certainly
12 will be -- cause this case, in the event that it does go to trial one
13 day, to be kicked back.

14 So I would ask ----

15 MJ [COL FITZGERALD]: Counsel, you don't need to be a
16 prognosticator. You can make your argument on what the law is.

17 DDC [Lt Col NETTINGA]: Yes, Your Honor.

18 So, again, the issue of the Sixth Amendment was not the
19 primary focus of the brief, because I believe this can be decided
20 based on the rule itself. But we would be -- and I guess at this
21 point I will request that we be allowed to file, in a separate
22 pleading, a formal motion for reconsideration of the court's ruling
23 in 109 that says that the Sixth Amendment does not apply.

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1 I certainly understand the court -- if the commission wishes
2 to entertain that based on what has been articulated here,
3 that's -- that's fine. But we are happy to provide a full written
4 brief on that -- on that. Again, that was not the focus of this,
5 because I do not believe that the question of whether the
6 Sixth Amendment applies is dispositive for the resolution of this
7 motion.

8 MJ [COL FITZGERALD]: Very well.

9 DDC [Lt Col NETTINGA]: That concludes my Sixth Amendment
10 argument, and I will attempt to focus here now on the rule itself.

11 And I guess the good thing about all of this is that the
12 rule itself makes the answer to the question of whether these
13 statements are admissible so obvious that we do not need the
14 Constitution as a backstop. It is clear, and it is clear because of
15 the way the Congress crafted that rule.

16 Again, the commission is right to note the difference
17 between "making" and "taking." But because of the way that this was
18 crafted, it was for the purpose of allowing for statements to be
19 admissible if the person was not available.

20 So the 807 generally, Wright, Idaho v. Wright, there -- 807
21 is not necessarily dependent on whether the witness testifies or
22 doesn't testify. And here, because 807 already -- M.R.E. 807 already
23 applies, Congress intended to craft a rule where we are not going to

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1 have the declarant on the stand.

2 So I think that certainly accounts for the difference
3 between "taking" and "making." The statement would have
4 been -- would have to have been necessarily, in order to be
5 considered under this rule, "taking," somebody took that statement.
6 But the focus is still rightly on the circumstances surrounding the
7 taking of that statement.

8 And, again, that language comes directly from
9 Idaho v. Wright and has been relied on extensively when conducting an
10 analysis under the residual hearsay exception.

11 And Congress, again, they know how to make things more
12 expansive if they want, right? Again, they're presumed to know the
13 law. And I would -- I would contrast what is written in
14 M.C.R.E. 803(b), again with the express congressional intent to make
15 hearsay harder to use in court, with what Congress did in 948r.

16 And in 948r -- that's 10 U.S.C. 948r -- they use broad
17 language with respect to the admission of evidence under that rule.
18 And they talked about if the totality of the circumstances renders
19 the statement reliable and possessing sufficient probative value.

20 And so they know how to make something more expansive. And
21 certainly the United States Government knew how to make rules related
22 to evidence more expansive, as they tried to do in Military
23 Commission Order No. 1, as they tried to do Military Commissions Act

1 of 2006. They chose not to go that route.

2 They chose not to use the language of previous military
3 commissions, of international commissions at Nuremberg or in the Far
4 East, of international tribunals in Yugoslavia, The Hague. They
5 chose not to do that. They chose this rule for a reason, and they
6 used the language they did for a reason.

7 And Idaho v. Wright should answer the question as to what
8 the limitations are with respect to how the judge can determine
9 the -- whether these statements are admissible. And so that's where
10 I'd like to go next, because the focus is rightly on the
11 circumstances surrounding the taking of this statement.

12 And so everything else here follows on from that. So when
13 considering the circumstances surrounding the taking of the
14 statement, the military judge can look at: One, the degree to which
15 the statement is corroborated; two, the indicia of reliability within
16 the statement itself; and three, whether the will of the declarant
17 was overborne.

18 Now, the word "including" means that certainly the military
19 judge can look at other factors. And there is some case law with
20 respect to the residual hearsay exception which may be informative
21 and can talk about the circumstances under which the statement was
22 given, was taken, was made, which the military judge may be able to
23 consider.

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1 But the focus there, again, is on those circumstances
2 surrounding the taking, not on external corroboration, which is the
3 government's entire argument.

4 And the reason that you know that that is what this rule
5 says in M.C.R.E. 803(b)(2) is not just from the plain language of the
6 rule with the prepositional phrases within there where it's clear
7 that those three elements -- the degree of which it's corroborated,
8 indicia of reliability, whether the will of the declarant was
9 overborne -- are subordinate to the circumstances surrounding the
10 taking of the statement as opposed to looking elsewhere.

11 But the legislative history of how that rule developed makes
12 it abundantly clear what Congress intended to do. And so that's
13 where I'd like to go next.

14 I'm going to retrieve this document from the ELMO at this
15 point.

16 And so sticking with 319LLLL, I'd like to show the first
17 page. And this is just to show this is the Senate version of what
18 would ultimately become the Military Commissions Act of 2009.

19 So, again, certainly as a bill becomes a law, there's
20 a -- something that comes out of the House, or maybe it comes out of
21 the Senate. They swap. They look at what the other chamber
22 provided. They make any -- they come up with their own or they
23 provide comment or however they want to do it as the process gets

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1 made. So this is the version that came out of the Senate.

2 And then -- and I'm going to get to the -- and I'm
3 retrieving that document. I'm going to get to a more digestible
4 format in a minute.

5 But then you have here -- and this is just the first page of
6 Public Law 111-84 from the 111th Congress, and this is what became
7 the Military Commissions Act of 2009.

8 So those are the two pieces of legislation that we're
9 talking about, but I'd like to put up a side-by-side comparison. And
10 what you can see here is the Senate version that was in July, that's
11 on the left. The final version is on the right.

12 And the differences between the two, you can see the
13 underlined language in the final version. And so it's pretty close,
14 right? They are pretty close in what the Senate produced and what
15 ultimately got passed.

16 But with respect to what ultimately would become
17 M.C.R.E. 803(b)(2), there's a very important distinction.

18 And so I'll remove this side by side of the entire rule, and
19 I'll focus just on what, under the legislation, was (d)(2) and what
20 would become M.C.R.E. 803(b)(2).

21 But the issue there is that you see in the Senate version
22 the reading of that portion says that the military judge has to take
23 account of all the circumstances surrounding the taking of the

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1 statement -- right? -- the degree to which the statement is
2 corroborated, and the indicia of reliability within the statement
3 itself.

4 So it appears from that construction that the military judge
5 can look at all three of those things independently, that those are
6 three things.

7 After taking into account all the circumstances surrounding
8 the statement, number one.

9 Number two, the degree to which the statement is
10 corroborated, and that is untethered to any other limitation.

11 And then three, the indicia of reliability within the
12 statement itself.

13 But the final version inserts the word "including." And
14 what that word "including" does is create a second prepositional
15 phrase which is directly tied to the circumstances surrounding the
16 taking of the statement.

17 And, again, this is important because it was certainly an
18 intentional act that Congress took. It speaks to the intent that
19 they had. And the intent that they had was consistent with the way
20 that U.S. courts had evaluated evidence for admission under the
21 residual hearsay rule.

22 And so what it does not say is that you can look to outside
23 evidence for corroboration. The language that they used, the meaning

1 of that language, as well established again with Idaho v. Wright and
2 its progeny, says that it has to be about the circumstances
3 surrounding the taking of the statement.

4 Idaho v. Wright, the state court had allowed a statement to
5 come in of a nontestifying witness. And the state court's analysis
6 was based on the idea that it was -- that statement was corroborated
7 by external evidence, other evidence at trial.

8 And the Supreme Court said, no, you can't do that. You have
9 to look at the circumstances surrounding the taking of the statement.
10 And that's what Congress is telling us all that we have to do here.

11 And so ----

12 MJ [COL FITZGERALD]: Counsel, am I right, though, that they
13 required it under a confrontation analysis?

14 DDC [Lt Col NETTINGA]: Your Honor, they're ----

15 MJ [COL FITZGERALD]: I'm wondering if we're going back to
16 that. That was the question presented to the Supreme Court, is it
17 frustrates the confrontation clause in the manner in which they used
18 external corroboration in that particular case.

19 But again, we're back to a confrontation analysis, not an
20 802 analysis. So if you're citing back to Crawford, it was not
21 making a residual hearsay rule analysis. It was making a
22 Crawford -- I mean a confrontation analysis.

23 DDC [Lt Col NETTINGA]: I think you said Crawford. Maybe you

1 meant Idaho ----

2 MJ [COL FITZGERALD]: I meant confrontation.

3 But the crux of the Supreme Court's position is it did not
4 survive a confrontation analysis, not a residual hearsay analysis.

5 DDC [Lt Col NETTINGA]: It was analyzed under that rule, sir,
6 and what that rule required. And I will say that in that line of
7 cases from Idaho down -- and they're -- they are extensive citations
8 within this document -- there are instances where courts evaluate
9 statements for admissibility under the residual hearsay exception
10 where the individual has testified and has -- there has been an
11 ability for cross-examination.

12 And so the applicability of the analysis that started with
13 Idaho v. Wright -- or at least that -- I don't even think it started
14 there, but certainly that is the Supreme Court, you know, standard
15 for the analysis under the residual hearsay exception, it is not tied
16 directly to nontestifying individuals. And so it is not dependent on
17 whether confrontation was met or confrontation wasn't met.

18 But, you know, to my earlier point ----

19 MJ [COL FITZGERALD]: Are you certain about that? I believe
20 the question presented to them was about the confrontation clause
21 analysis.

22 DDC [Lt Col NETTINGA]: Your Honor, again, without having
23 Wright in front of me right now, I can't say that.

1 What I can say is whether -- I know in Wright the individual
2 whose statements were at issue -- and again, these were words of that
3 individual, not an unauthenticated summary of an interrogation of a
4 co-conspirator. They were the statements of the individual.

5 I know in Wright that individual did not testify, but there
6 are plenty of cases that I have cited in this written argument where
7 the individual -- and I think I read a quote from -- from one of
8 them, a pre-Wright case, where they talk about the analysis of
9 statements under residual hearsay exception where the individual
10 testified, where confrontation was satisfied.

11 And so it is an analysis, whether it's Wright or the cases
12 that have utilized Wright along the way, the issue there -- I mean,
13 that is a residual hearsay analysis, and that analysis has been
14 applied consistently whether or not the individual has testified.

15 MJ [COL FITZGERALD]: Okay. So if it's not a confrontation
16 clause analysis, the residual hearsay analysis. This is not being
17 offered by the government under residual hearsay. It's being offered
18 under 803(b) (2) .

19 DDC [Lt Col NETTINGA]: Which is a residual hearsay exception,
20 Your Honor. It's a -- I know I coined the phrase "double residual
21 hearsay," but that's what it is. I mean, it is -- it is a rule
22 designed to admit evidence that would not otherwise be admissible
23 under the rules.

1 The language is identical in that prefatory point, or at
2 least substantially similar in that prefatory phrase, to M.R.E. 807.

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

4 You may continue.

5 DDC [Lt Col NETTINGA]: And so, you know, I -- this is the
6 problem. And the trickiness of this entire issue is the cases at
7 issue were all decided by the Supreme Court or other courts within
8 the United States where the Constitution applies.

9 And so saying that we can't look to that because the
10 Constitution applies -- and the court may have cited to the
11 Constitution in there -- I think makes this a lawless, standardless
12 place. And I don't see how that can be consistent with the interests
13 of justice that Congress has developed the Military Commissions Act
14 of 2009 to focus on generally, but also specifically in this rule.

15 But I think that it's important when we're talking about the
16 interests of justice. And the prosecution spent a lot of time
17 talking about international courts. And I didn't hear -- I don't
18 know if I heard anything about it in their oral argument here today,
19 but certainly they -- I think that's how they started their argument
20 in their written submission. And we spent a lot of time talking
21 about that in our argument.

22 And the military judge in 319EEEE cited generally to, well,
23 the ICTY has looser standards, without going through and analyzing

1 what the actual rules for the ICTY are, which is -- again, it
2 is -- it is essentially using the myth of international war courts,
3 international tribunals have laxer standards, so, therefore, we can
4 also have laxer standards. But that is not what the rules actually
5 say.

6 And so there has been, I think certainly, a mythology, a
7 falsehood surrounding these military commissions, that it's a
8 free-for-all, and it's not. The rules are written in a way, again
9 consistent with congressional intent, to limit the use of hearsay
10 evidence.

11 And when we're talking about the right to confrontation,
12 this is not, again, a -- something that the United States created.
13 This existed well before the United States was in existence. And it
14 exists well after in other systems around the world, in international
15 bodies around the world.

16 And I know you've seen it in the written pleading. We cite
17 to the actual rules and decisions of the ICTY where they talk about
18 the preference for live testimony, where they talk about the ability
19 to confront one's accusers, where they talk about if there is going
20 to be written statements of an individual introduced -- and again,
21 not law enforcement summaries. If there's going to be written
22 statements, then they cannot be about matters which implicate the
23 accused, and that they have to be available for confrontation.

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1 And so in any court that we've talked about in here that the
2 military judge relied upon previously in 319EEEE, it appears that
3 even under those laxer standards in international tribunals, again
4 when we're talking about the interest of justice, this stuff does not
5 come in.

6 And if Congress -- when they say the interests of justice,
7 they don't -- they didn't direct us to American interests of justice,
8 international interests of justice. But if we can't look to American
9 interests of justice because the American interests of justice are
10 reliant upon the Constitution and we can't talk about the
11 Constitution, then we have to talk generally about the interests of
12 justice in the civilized world.

13 And so the prior military judge, again, relied upon the
14 Nuremberg tribunal for support that these -- that the statements at
15 issue in 319EEEE could come in. But you're talking about a system
16 there with very different rules which -- with much more lax rules for
17 the admission of evidence, with a panel of judges sitting as the
18 factfinders, not juries. And so the analysis there is not
19 appropriate.

20 And again, I've cited you to some points in there as well
21 where even under those lax standards, in the Nuremberg cases, sworn
22 affidavits of individuals were sometimes rejected, especially if
23 those witnesses had -- you know, were dead, had been killed. So,

1 again, it is hard to see what the United States can rely upon from a
2 legal perspective to allow these statements in other than, well, we
3 want them to come in.

4 If you look at the International Covenant on Civil and
5 Political Rights, which was ratified by the United States in 1992, it
6 talks about in the determination of any criminal charge against him,
7 everyone shall be entitled to the minimum guarantees, which include:
8 To examine or have examined the witnesses against him. This is not a
9 Sixth Amendment-derived right. This is a fundamental
10 internationally-recognized human right.

11 MJ [COL FITZGERALD]: So, Counsel, I'm tracking that argument.
12 I'd like you to go ahead and return to your argument under
13 Rule 803(b)(2).

14 DDC [Lt Col NETTINGA]: Yes, Your Honor.

15 So certainly we can talk about M.R.E.
16 803 -- M.C.R.E. 803(b)(2). And if you have specific questions, I
17 mean, I think the points that I have about how this rule -- how this
18 rule reads from a statutory construction perspective, from a
19 legislative history perspective, from a -- I don't know, former
20 English teacher perspective, I -- you know, it seems very clear how
21 this rule is read. And certainly there is case law to -- to back
22 that up as well.

23 And so then you have to turn -- after you look at

1 M.C.R.E. 803(b)(2), you have to look at (a) through (d), and is the
2 corroboration piece -- again, you've got to look at the circumstances
3 surrounding the taking of the statement.

4 And what we know about the circumstances surrounding the
5 taking of the statement is that all of these individuals were in
6 custody. You had folks like Mr. Badawi, who had been in Yemeni
7 custody where U.S. law enforcement who had reviewed reports from the
8 Yemeni interrogations were not allowed to participate in the U.S.
9 interrogations because of concerns over the methods employed to
10 extract things from Mr. Badawi in those interrogations by the
11 Yemenis.

12 But we know that -- again as indicated previously, we know
13 that all of these men were in custody. We know that none of them
14 were sworn. We know that -- we don't know a lot about the
15 circumstances of their custody unless they were in U.S. custody. And
16 I know there's been a lot of testimony about that.

17 But if they were in Yemeni custody, which several of these
18 folks were, there's no way to develop what the circumstances of that
19 confinement may have been that surrounded the taking of the
20 statement.

21 We know that there were local law enforcement folks in the
22 room. We know that sometimes those local law enforcement folks gave
23 hugs or kisses on the cheek to some of these folks prior to their

1 interrogations by the United States law enforcement officials.

2 But we don't have a ton of information because we're not
3 able to call or get further information about the -- from Yemeni
4 officials as to what the conditions were of confinement, or certainly
5 from the individuals themselves. "Tell me about when you were
6 arrested, how you were treated, what you were subjected to." We
7 cannot do any of that.

8 There are so many holes in this because of the way that
9 these statements were obtained that it is literally impossible to
10 determine with any reliability the things that you need to determine
11 under M.C.R.E. 803(b)(2). And that's in (A) through (C).

12 Not to mention the fact that, again, these are all
13 statements which were -- they were given in a foreign language. They
14 passed through a translator. And there certainly was no verbatim
15 transcript taken. We have a sanitized summary that was written by a
16 law enforcement officer.

17 One of the things that you were asked to look at is the
18 indicia of reliability within the statement itself. And again,
19 M.C.R.E. 803(b)(2) talks about a statement. None of these can
20 reasonably be said to qualify as statements.

21 And M.C.R.E. 914 has a definition of statement. I'm not
22 suggesting -- I think that definition is specific to M.C.R.E. 914
23 itself, but certainly "statement" does not -- would not seem to

1 include the type of evidence at issue here, because we don't know
2 what was actually said.

3 Everything that the agents testified to is paraphrasing, at
4 best. And that is very problematic because it presents
5 something -- if it were allowed to be presented to a panel of
6 members, it's presented in a way -- in a cohesive way that makes
7 sense by a law enforcement agent who has sat through five, six,
8 seven, ten -- depending on the individual -- days of interrogations
9 20 years ago, written up a report that makes sense where any of those
10 inconsistencies oftentimes would have been reconciled either through
11 discussion with the individual themselves during the interrogation or
12 just through the agent's knowledge, other things that they may know
13 about the case from other sources.

14 And so we can't tell about the indicia of reliability within
15 the statement itself because we don't know what the actual statement
16 was and we can never know. And so, I mean, those are some of the
17 issues with trying to utilize this rule to deal with the type of
18 evidence at issue here.

19 If we were talking about the government had sworn affidavits
20 of law enforcement personnel talking about something the law
21 enforcement personnel or military member witnessed and they want to
22 introduce that sworn statement because that witness is in the fight
23 somewhere and cannot be produced in front of this commission, then

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1 this would be a much different analysis. You'd have the actual
2 words. It will be -- it would have been sworn. It would have been
3 signed.

4 And I believe, and I think there's justification in the
5 Congressional Record, that that's the type of evidence that Congress
6 had contemplated when they wrote M.C.R.E. 803(b)(2), or what would
7 become that rule.

8 It was actual statements of people, not this summarized,
9 unauthenticated, you know, smuggling in of things that aren't
10 statements. It just -- this is so far away from anything that you
11 can be -- that you can consider reliable or undergo the analysis of
12 corroboration or whether or not the will of the declarant was
13 overborne.

14 You cannot make those determinations, because as we heard
15 from these agents, some of them, as they testified with respect to
16 this motion, from Agent Boese yesterday, that, you know, sometimes
17 they weren't interested in talking about, you know, things like
18 torture, because, hey, that's -- we'll save that for another day.

19 I mean, you had the letterhead memorandum statements that
20 were prepared for Mr. al Nashiri, for Khallad, that -- that one which
21 is at issue here. The law enforcement agents kept two separate LHMs
22 that they prepared, one of which was one that did not include any
23 allegations of torture, and any allegations of torture went into a

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1 separate statement.

2 And so, again, trying to make these determinations from
3 where you sit 20 years later without access to the actual words these
4 people said, the context in which they made them, is a futile and
5 impossible task to do with any degree of fidelity.

6 You have some information that you can try to parse through,
7 but there is no way that that is comporting with the interests of
8 justice to allow these types of statements in when there is so much
9 more.

10 And, you know, maybe this would be different if this was an
11 international tribunal. Again, I've cited the rules in there for
12 you. I've -- you know, we've gone through different case law from
13 the ICTY.

14 But in a system where you have a panel of trained judges who
15 can sift through evidence, it's a lot different than the system that
16 Congress designed here, which was for a panel of military officers.

17 And there is a distinction, again, that the Supreme Court
18 has talked about with respect to juries, to jury instructions,
19 especially in co-conspirator statements.

20 And in Lee v. Illinois -- and this is on page 44 of
21 AE 319KKKK -- they talk about the Bruten case, and this was a -- this
22 was a big case.

23 MJ [COL FITZGERALD]: Counsel, I have your brief. I don't

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1 need a recitation of your brief.

2 Do you have anything else you would like to present that is
3 not in your brief?

4 DDC [Lt Col NETTINGA]: Yes, Your Honor.

5 MJ [COL FITZGERALD]: Let me ask you this: You believe
6 there's a limitation built into 803(b)(2) regarding that they can
7 look for extrinsic corroboration -- and I realize you cite to
8 Idaho v. Wright, which is a confrontation clause issue -- but can you
9 envision what Congress meant if they could not consider extrinsic
10 corroboration when they put the word "corroboration" into the rule?
11 What corroboration would they have been contemplating?

12 DDC [Lt Col NETTINGA]: They're talking about corroboration
13 based on the circumstances surrounding the taking of the statement.
14 Which again, if Idaho v. Wright talked about confrontation, sure.
15 Again, there are other cases which use that analysis where
16 corroboration -- or excuse me -- where confrontation has been
17 satisfied. Idaho v. Wright talks about what can be considered to
18 corroborate a statement ----

19 MJ [COL FITZGERALD]: But you're not answering my question,
20 Lieutenant Colonel Nettinga.

21 My question was: What do you contemplate Congress
22 envisioned under your analysis that they couldn't use extrinsic
23 corroboration when they used the word "corroboration" into the Rule

1 of Evidence? What corroboration are you talking about under your
2 analysis?

3 DDC [Lt Col NETTINGA]: I'm talking about exactly the
4 corroboration that the courts have discussed from Idaho v. Wright on.
5 And again, I mean, that's where that language ----

6 MJ [COL FITZGERALD]: No. I ----

7 DDC [Lt Col NETTINGA]: ---- comes from.

8 MJ [COL FITZGERALD]: But here's what I remember from
9 Idaho v. Wright. They were concerned about extrinsic corroboration
10 because a doctor who had conducted the physical examination asked
11 leading questions of a very young child -- I think under five -- and
12 so they got yes/no answers, so that witness clammed up.

13 So what the court -- or what the prosecution then relied on
14 was other people essentially had evidence that verified the yes-or-no
15 answers and the clamming up of the child witness. So they said you
16 can't use that external corroboration.

17 DDC [Lt Col NETTINGA]: Yes, Your Honor.

18 MJ [COL FITZGERALD]: In 803(b)(2), Congress wrote in that one
19 of the things that could be considered in that analysis was
20 corroboration.

21 So my question to you is: If it can't be extrinsic
22 corroboration outside the taking of the statement, what corroboration
23 would exist under this analysis?

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1 DDC [Lt Col NETTINGA]: Your Honor, again, I would direct you
2 to what's on the ELMO in front of you and ----

3 MJ [COL FITZGERALD]: Well, I'm not asking to read something.
4 I'm asking you to tell me what you envision "corroboration" means if
5 it does not mean "extrinsic corroboration."

6 DDC [Lt Col NETTINGA]: It means ----

7 MJ [COL FITZGERALD]: What would be the intrinsic
8 corroboration?

9 DDC [Lt Col NETTINGA]: It means that it has to come from the
10 circumstances surrounding the statement. So, you know, again, that
11 can ----

12 MJ [COL FITZGERALD]: So how is that not already incorporated
13 into the concept of indicia of reliability within the statement
14 itself? What's the -- what's the distinction that can be drawn from
15 that? Because Congress wrote it in the conjunctive, that there are
16 three things that can be contemplated: Corroboration, indicia of
17 reliability within the statement ----

18 DDC [Lt Col NETTINGA]: Yes, Your Honor.

19 MJ [COL FITZGERALD]: ---- and whether the will of the
20 declarant was overborne.

21 So they looked at the person making the statement, they
22 looked at the statement itself. So my question is: What do you
23 think Congress meant when they said, "The third thing you can

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1 consider are matters that corroborate" ----

2 DDC [Lt Col NETTINGA]: Again ----

3 MJ [COL FITZGERALD]: ---- "statement"?

4 DDC [Lt Col NETTINGA]: ---- I believe that this gave a
5 nonexhaustive list of things that the judge could consider. I
6 believe that this rule is taken from ----

7 MJ [COL FITZGERALD]: You're the one here proffering to the
8 court that they can't use external corroboration.

9 DDC [Lt Col NETTINGA]: Yes, Your Honor.

10 MJ [COL FITZGERALD]: Again, I'm just trying to understand
11 your position. If it can't be extrinsic corroboration, what would be
12 the intrinsic corroboration surrounding the taking of the statement
13 that would not be incorporated into the second part of that test,
14 which is the indicia of reliability within the statement itself?

15 DDC [Lt Col NETTINGA]: Sure.

16 So if we're talking about the second part, which is
17 the -- and I'll take that first. And I plan on answering your
18 question, I believe. The indicia of reliability, talking about
19 whether or not the statement is internally consistent.

20 And I think a good example of ----

21 MJ [COL FITZGERALD]: They didn't use that phrase. They
22 didn't say it was internally consistent. They said indicia of
23 reliability, which is used in hearsay constructs -- right? -- to look

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1 beyond that the statement itself is internally consistent. They
2 could have said that.

3 DDC [Lt Col NETTINGA]: Well, it says within the statement
4 itself, sir.

5 MJ [COL FITZGERALD]: Indicia of reliability within the
6 statement itself.

7 DDC [Lt Col NETTINGA]: Correct. Correct.

8 So I'm saying an example of that would be, is the statement
9 itself internally consistent? That would be one indicia of
10 reliability potentially if you were able to determine that the person
11 had been consistent throughout the statement and not made multiple
12 statements -- like Mr. Badawi did -- about things ----

13 MJ [COL FITZGERALD]: Okay.

14 DDC [Lt Col NETTINGA]: ---- that happened.

15 MJ [COL FITZGERALD]: I accept that.

16 DDC [Lt Col NETTINGA]: Yeah. So ----

17 MJ [COL FITZGERALD]: And where would the intrinsic
18 corroboration -- what else then, outside of that, would be
19 encompassed in the congressional construct of corroboration?

20 DDC [Lt Col NETTINGA]: Yes, sir. Sure.

21 So I think you'd be looking at, again, around the
22 circumstances surrounding the taking of the statement, who was the
23 statement taken by, under what circumstances was that -- that -- was

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1 that statement taken?

2 I mean, I -- I think it is clear where Congress got this
3 language from, this idea of corroboration. And I believe had they
4 wanted it to refer to extrinsic corroboration, they certainly could
5 have and would have said so, because they knew how to do that in
6 948r. And they knew that the language that they used, and putting
7 the word "including" where they did to make that subordinate issue
8 there to the circumstances surrounding the taking of the statement,
9 is instructive.

10 And so, sir, you know, I think there's a lot of things that
11 could be considered there in terms of things that may lend
12 corroboration to the statement.

13 Is this something where it is -- that the person is
14 describing something that is close in time to when it happened, you
15 know, that that can be corroborated? Is it -- and again, that's an
16 example. I'm sure that the cases that have been cited in here talk
17 about other instances in there, which I won't read.

18 But I think that the courts have wrestled with and discussed
19 that issue consistently over the years since 1990 and before. And
20 they've consistently looked at that with respect to the circumstances
21 surrounding the taking of the statement, or the making of the
22 statement.

23 MJ [COL FITZGERALD]: Well, that brings up my next point. It

1 seems Congress was very clear to use the word "taking" of the
2 statement, which would seem to me the circumstances would encompass
3 much more than the making of a statement. The making of a statement
4 would be a finite point in time. But the taking of a statement in a
5 circumstance surrounding -- the circumstances surrounding the taking
6 of the statement seems to encompass a larger period of time and
7 larger set of circumstances that may offer corroboration.

8 Do you agree or disagree?

9 DDC [Lt Col NETTINGA]: I think I would disagree with that,
10 sir.

11 I mean, you know, if the taking of the statement occurred
12 over one afternoon or ten days -- you know, some of the statements at
13 issue here occurred over many, many days. You know, I think it is
14 limited to -- to those circumstances surrounding the taking.

15 You know, if agents asked some questions one day, came back
16 the next day and challenged and talk about -- talked about some
17 different things, if the circumstances surrounding that -- the taking
18 of that statement had changed, if there was additional information
19 introduced during those different days, I mean, I don't think that
20 these circumstances surrounding the taking of the statement means the
21 entire law enforcement investigation and those circumstances are what
22 are applicable to determine the circumstances surrounding the taking
23 of the statement.

1 Again, Congress very intentionally did not say, "You can
2 look at the totality of the circumstances." If they did, this would
3 be a much different analysis. But they did say -- they used language
4 that was similar to ----

5 MJ [COL FITZGERALD]: Is another way of saying "totality of
6 the circumstances," "all of the circumstances"? Because that is the
7 language of 803(b) .

8 DDC [Lt Col NETTINGA]: Surrounding the -- again, 948r is
9 totality of the circumstances, generally. All of the circumstances
10 here is limited by surrounding the taking of the statement. So yes,
11 it is much more cabined.

12 MJ [COL FITZGERALD]: Thank you.

13 I will allow you an opportunity to conclude your argument.

14 DDC [Lt Col NETTINGA]: Thank you, Your Honor.

15 MJ [COL FITZGERALD]: And by that I mean uninterrupted so ----

16 DDC [Lt Col NETTINGA]: Thank you, Your Honor. That's fine,
17 Your Honor.

18 MJ [COL FITZGERALD]: So take your opportunity to conclude.

19 DDC [Lt Col NETTINGA]: I'm always happy to take -- to take
20 questions.

21 So really what it comes down to, sir, is -- again, and I'll
22 retrieve this document from the ELMO -- I think Congress said what
23 they meant. They intentionally chose language in this rule. They

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1 amended the rule from the Senate version to make sure it accurately
2 reflected the subordination of those three elements to the
3 circumstances surrounding the taking of the statement.

4 And the fact that they used the word "statement" itself I
5 think is certainly significant. If you look at the legislative
6 history, if you look at the Congressional Record, they're talking
7 about things like affidavits. When they're -- when they're talking
8 about the types of hearsay that might be admissible, they are
9 certainly not talking about things like this.

10 And one issue that -- and I'll just -- I'll just bring it up
11 briefly -- is the unavailability piece, which is something that the
12 court has to consider under M.C.R.E. 803(b) (2).

13 In some of these instances the United States has caused the
14 unavailability of these witnesses, and the idea that they may be able
15 to benefit through the introduction of this -- you know, like
16 unauthenticated summary in lieu of testimony because they have made
17 that person unavailable either through killing that person or through
18 releasing them out of custody, thereby changing what would have been
19 only impeachment-type evidence from prior statements into substantive
20 evidence by the fact that they can introduce it for the truth of the
21 matter ----

22 MJ [COL FITZGERALD]: Just -- and I said I wasn't going to
23 interrupt you, but I do want to on this point, because you mentioned

1 that they made them unavailable by killing them. Do you believe they
2 killed them in an effort to keep them from testifying in proceedings
3 before this commission? Or are you saying other actions led to the
4 demise of that particular person, potentially under engagement in
5 either lawful or unlawful hostilities?

6 I just want to make that distinction that you're not
7 claiming that the government ----

8 DDC [Lt Col NETTINGA]: Yeah.

9 MJ [COL FITZGERALD]: ---- is -- you know, there's a body of
10 law that talks about if you purposely make somebody unavailable, you
11 don't get the benefit of their unavailability.

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

13 MJ [COL FITZGERALD]: You're not saying that, are you?

14 DDC [Lt Col NETTINGA]: What I'm saying is they did
15 purposely make them unavailable by -- and I'm talking about Badawi
16 and Quso. And I will get there, sir. I see your face. I will get
17 there.

18 They made them unavailable by killing them in drone strikes.
19 Did they do that for the purpose so that they would not be able to
20 testify in this commission? That is not my argument. However, the
21 actions ----

22 MJ [COL FITZGERALD]: Okay. I just wanted to make sure.

23 DDC [Lt Col NETTINGA]: ---- taken by the United States

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1 Government have consequences and there are things that -- you know,
2 any decisionmaker has to be able to weigh what are the
3 consequences ----

4 MJ [COL FITZGERALD]: Okay.

5 DDC [Lt Col NETTINGA]: ---- for a number of different
6 reasons.

7 MJ [COL FITZGERALD]: I just didn't want the government to
8 have to take the -- take the stand and tell me they didn't ----

9 DDC [Lt Col NETTINGA]: I ----

10 MJ [COL FITZGERALD]: ---- they didn't take action to keep
11 them from testifying.

12 DDC [Lt Col NETTINGA]: I don't believe that that was the
13 case.

14 MJ [COL FITZGERALD]: Okay.

15 DDC [Lt Col NETTINGA]: I'm sure there were other reasons,
16 Your Honor.

17 MJ [COL FITZGERALD]: Okay.

18 DDC [Lt Col NETTINGA]: But again, I mean, we're talking
19 about -- we're talking about the word "statement," and these things
20 are nowhere near statements. And so when you have to look ----

21 MJ [COL FITZGERALD]: I'm sorry. I will take that up with the
22 government, but ----

23 DDC [Lt Col NETTINGA]: Okay. When you have to look

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1 at whether or not the admission of this type of evidence
2 is consistent with the interests of justice, it just -- it simply
3 isn't.

4 The issue is not, as the prosecutor alluded to,
5 that -- whether the members would find this information helpful. The
6 issue is whether or not this is consistent with the interests of
7 justice.

8 This may be the best evidence that they have, but it isn't
9 nearly enough. It isn't nearly close to being admissible because of
10 the state of this evidence.

11 And, again, we just talked about actions have consequences.
12 The United States chose violence over justice in 2002 with what they
13 did to Mr. al Nashiri. And now they are asking this commission to do
14 irreparable violence to the justice system by admitting testimony
15 about these unauthenticated summaries.

16 That's all I have, Your Honor.

17 MJ [COL FITZGERALD]: Thank you. I'm very appreciative of
18 your argument and your discourse with the commission. Thank you.

19 DDC [Lt Col NETTINGA]: Yes, Your Honor.

20 MJ [COL FITZGERALD]: Government, do you need a recess before
21 we allow you to present your rebuttal?

22 ATC [Capt DANIELCZYK]: Sir, excuse me. My rebuttal's fairly
23 brief. So -- and if Your Honor would like to recess now, I don't

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1 think I have ----

2 MJ [COL FITZGERALD]: I'm going to take your word for it that
3 you'll be fairly brief. I believe I have a question, and I may have
4 forecasted it for you already.

5 So I will let you start, then, and we'll see where we get to
6 if we need to take a brief -- I don't recall how long we've been on
7 the record, but ----

8 ATC [Capt DANIELCZYK]: Yes, Your Honor. And I believe it's
9 been some time, so certainly if it starts to go long, I'm happy to
10 stop for a recess.

11 So first, Your Honor, I'd like to start with -- and,
12 actually, I think this may be what Your Honor was
13 forecasting -- defense's kind of repeated characterization of these
14 statements as unauthenticated summaries.

15 But under the government's view, they are statements under
16 M.C.R.E. 801. That provides the definition of a statement is: One,
17 either an oral or written assertion; or two, nonverbal conduct of a
18 person if it is intended by the person as an assertion.

19 So certainly the government believes they are statements.
20 They're oral assertions given to investigators during the course of
21 the investigation.

22 MJ [COL FITZGERALD]: So just to be clear, then, for example,
23 we hear a lot about 302s. 302s is a statement, right? If somebody

1 were to say, "Well, what is this I'm handing you?"

2 "Oh, that's a 302."

3 "What's a 302?"

4 "It's a statement."

5 Would that meet the definition of a statement under R.C.M.
6 801 and for the purposes of what you intend to offer under 803(b)(2)?

7 ATC [Capt DANIELCZYK]: Your Honor, here we don't intend to
8 offer the 302s.

9 MJ [COL FITZGERALD]: Or something akin to it. All right?
10 Statements have to be assertions of a witness. So the concern I
11 think is that a lot of these documents are words of other people,
12 mostly the author of the document, obviously, if it's not the
13 declarant making the statement.

14 So are there going to be redactions of things, or is it
15 going to be we're going to extract them? Or how is it you're going
16 to present it, for example, if these are contained in memorialized
17 statements written by a party that is not the declarant?

18 Because I presume you don't have official statements signed
19 and notarized. That seems to be what the defense is saying by
20 there's no authentication or ability to do so. That they're
21 summaries, I think is a word that the defense used.

22 So how do you articulate and how do you intend to present to
23 the factfinder the assertions of the declarant in the format in which

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1 you have the statements?

2 ATC [Capt DANIELCZYK]: Yes, Your Honor. I think the
3 intention there is through the investigators. They were providing
4 testimony that these individuals, these declarants, gave them -- made
5 these assertions to the investigators.

6 MJ [COL FITZGERALD]: Are they going to be summarizations of
7 assertions? Are they going to be assertions?

8 ATC [Capt DANIELCZYK]: Well, I think "assertions" is a term
9 that necessarily includes some less than verbatim. I don't believe
10 the rule talks about the need for verbatim, but I'm not aware of
11 any case law for hearsay that requires a verbatim transcription,
12 anything of that like.

13 MJ [COL FITZGERALD]: Well, so -- but an assertion implicitly
14 says there's a declarant who asserted it. So the concern is if
15 there's a summary that -- how does the defense -- and they're
16 concerned as to these indicias of reliability that this person said
17 it, if years later down the road based on summaries somebody's going
18 to say person X said the following, and that's all they're going to
19 say? So how is that going to be presented to the court if ----

20 ATC [Capt DANIELCZYK]: Yes, sir.

21 MJ [COL FITZGERALD]: ---- they're going to present
22 assertions?

23 ATC [Capt DANIELCZYK]: These were highly trained law

1 enforcement officials. I believe testimony was given that on many
2 occasions the 302s were worked on immediately after the individual
3 days of the interviews, if they were multiple days. So they are
4 accurate in capturing those assertions.

5 For example, if Mr. Al Badawi -- a 302 says Mr. al Badawi
6 bought the boat, it might not be verbatim, but that assertion is
7 accurate in that Mr. Al Badawi purchased the boat.

8 MJ [COL FITZGERALD]: And that's the assertion that would be
9 presented to the factfinder, just that?

10 ATC [Capt DANIELCZYK]: Well, in my example, yes, sir.

11 MJ [COL FITZGERALD]: Okay. So not whole 302s or other
12 memorializations from -- you're not trying to enter any of those into
13 the record as assertions or statements of the declarant?

14 ATC [Capt DANIELCZYK]: No, Your Honor. I don't believe
15 there's any intention to submit the entire 302, or everything
16 contained in those, as assertions necessarily of those declarants.

17 MJ [COL FITZGERALD]: Are you expecting the defense to just be
18 able to read the memorializations, the notes, the summarizations and
19 estimate what are going to be assertions? Or are you going to
20 provide to them: These are the assertions?

21 And I'm using that word specifically because that's how
22 "statement" is defined in R.C.M. 801 like you -- or M.C.R.E. 801,
23 like you said. So that's why I'm using that word.

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1 So are you going to say, "Hey, here's the assertions we
2 intend to offer regarding person X, person Y," so they at least can
3 surmise where the challenges may be? If they're not able to confront
4 the declarant, they've at least got to be able to confront the
5 assertion.

6 ATC [Capt DANIELCZYK]: Yes, Your Honor. And just
7 for clarity ----

8 MJ [COL FITZGERALD]: I'm thinking almost like Section III
9 disclosures, very similar in fashion to Section III disclosures. I
10 don't know how else to analogize it to something.

11 But I guess if we're all agreeing that assertions are
12 statements and it's statements you intend to enter, can you help me
13 understand that?

14 And if you don't have an answer now, that's fine. If you
15 haven't thought all that far in advance, it probably would be helpful
16 for the commission to understand it based on Colonel Nettinga's
17 argument that: How do we test this?

18 ATC [Capt DANIELCZYK]: Sir, Your Honor, I think under the
19 mechanics of 803(b), we provided the notice. Defense has the notice
20 to prepare.

21 And one point of clarification, I think -- I just want to
22 make sure that I was clear. Excuse me. When I said "assertions,"
23 we're talking those 302s, I believe -- I don't know that I can think

1 of anything in particular in those right now that is not an assertion
2 of the declarants.

3 So the 302s are drafted in such a way that they tell a
4 story, but they are exclusively what was said in that interview room,
5 what those declarants told the investigators.

6 And like I said, I don't know that there is a specific
7 instance that comes to mind where something else from outside is
8 being brought into those statements captured in the 302.

9 MJ [COL FITZGERALD]: Okay. I don't have them before me, so I
10 don't necessarily know. I'm just trying to figure out how we're
11 going to resolve this issue with this uniquely crafted rule of
12 evidence. Even under your -- when you presented your earlier
13 argument, that Congress intended to capture something beyond the
14 regular rules of evidence on hearsay, beyond residual -- residual
15 hearsay.

16 And as defense has argued that this is arguably hearsay
17 within hearsay or residual hearsay within residual hearsay, because
18 they're out-of-court statements written by somebody other than the
19 declarant of the assertion. So I understand their position on that.

20 So what I'm trying to do is get to a point that come time
21 for trial, we're not having this argument then, right? So if I were
22 to accept the government's position and I was attempting to move from
23 the theoretical to the practical -- right? -- how the evidence would

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1 be presented in court.

2 And so I'm concerned it's not enough to say, well, we've
3 turned over all the statements that we intend to offer based on this
4 conversation we're having now about, okay, but are they -- every word
5 that you intend to offer, are they assertions, or are they going to
6 be editorializing, or are they going to be summarizing?

7 So, for example, using your boat analogy. You know,
8 he -- person X bought a boat versus "we had a lot of conversations
9 about buying boats," right? One would be an assertion; one would not
10 be an assertion.

11 So I'm just trying to make sure without having those
12 documents before me, not sure what defense has before them, that
13 we're not at trial walking through, okay, what's the assertion I'm
14 going to allow in? What's the assertion I'm not going to let in
15 because I don't find it to be an assertion of the declarant? Does
16 that make sense? So...

17 ATC [Capt DANIELCZYK]: I think so, Your Honor. And for the
18 mechanics here, the idea -- and just to expand a little bit. The
19 idea is we call the investigator to the stand and they testify about
20 those out-of-court statements. So the 302s are simply to provide the
21 notice that this is what occurred during the interview.

22 And again, I do believe that most, if not all, of the words
23 in the 302 are meant to be assertions or were assertions by the

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1 declarants during those interviews.

2 MJ [COL FITZGERALD]: So again, I'm going to use the analogy
3 of Section III disclosures, right? When we turn over Section III
4 disclosures in courts-martial practice, the words of the declarant,
5 the accused -- right? -- specifically. They're not summarizations.
6 They're not editorializations. They are the words of the accused
7 under whatever circumstances, right? You can say the accused talked
8 a long time about robbing a bank, right? That would not be his
9 assertion.

10 So that's what I want you to think about. If I were to
11 agree with the government and allow you to allow this evidence in
12 through this legislatively crafted but untested rule, what is the
13 practical import of that, of how that would actually occur and what
14 would be the pretrial litigation that we would need to take up,
15 potentially, as we move closer to trial?

16 And you already prevailed on this particular motion. I'm
17 going to let you bring in these statements. What is that going to
18 look like? Do you see where I'm trying to get to?

19 ATC [Capt DANIELCZYK]: Yes, Your Honor. I understand.

20 MJ [COL FITZGERALD]: So I don't want an answer from you now.
21 I think you've talked about it long enough and I've caught you on the
22 spot, I think, a little bit.

23 But you have answered my question. You only intend to

1 introduce the assertions of the declarant through a third party under
2 803(b)(2). I think we all agree it's a common definition of
3 statement, who it's from, and what would not be permitted.

4 So unless you have something else you'd like to add, I think
5 you understand at least where the commission is coming from and wants
6 to seek high confidence. We can get there, if, again, the government
7 were to prevail on this particular motion, so...

8 ATC [Capt DANIELCZYK]: Yes, Your Honor.

9 MJ [COL FITZGERALD]: Anything else you'd like to add?

10 ATC [Capt DANIELCZYK]: Just one more point.

11 In defense's oral argument here, there was some discussion
12 about the transition of Rules of Military Commissions from maybe just
13 a probative standard and the Congress' intent moving through the 2009
14 iteration of the Military Commissions Act, for their intention to
15 make hearsay, I guess, more difficult to get -- to get into evidence.

16 And I think that's what we have. I think that's the result.
17 Certainly, even just by the plain words, it's not just what's
18 probative and determined to be admissible. I think we have a
19 seven-or-more-factor test that the commission must consider.

20 So I think Congress' intent is clear that it moved in that
21 direction, and I think they accomplished that with the underlying
22 statute of 803(b). So I just wanted to make that clear.

23 And give me just one moment, Your Honor, please.

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1 MJ [COL FITZGERALD]: Well, just to be clear, I don't think
2 they have a seven-factor test. I think they have seven -- maybe
3 prongs would be -- they wrote it in the conjunctive, right?

4 ATC [Capt DANIELCZYK]: Yes, Your Honor, and ----

5 MJ [COL FITZGERALD]: They didn't skip any of them.

6 ATC [Capt DANIELCZYK]: ---- apologies for that.

7 It's "at least," right? It's three -- at least three
8 considerations and then four prongs to the admissibility.

9 MJ [COL FITZGERALD]: Okay.

10 DDC [Lt Col NETTINGA]: Yes, Your Honor.

11 MJ [COL FITZGERALD]: Thank you.

12 Anything else?

13 ATC [Capt DANIELCZYK]: No, Your Honor. Thank you.

14 MJ [COL FITZGERALD]: Very well.

15 Let me check with my staff briefly.

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

17 MJ [COL FITZGERALD]: We can never predict how long these
18 things are going to take, and we've been on the record two days for a
19 long time. So I know we still have one thing that is on the ledger,
20 AE 480.

21 I am proposing in light of where I think 480's going to play
22 out that I'm not going to conclude 480, Appellate Exhibit 480
23 tomorrow. We're not -- I'm not going to take up the way ahead

1 tonight. I realize I've handed some homework out to Major Danielczyk
2 and some other folks, as well as the defense, I suppose, regarding
3 reconsideration. That's a lot on everybody's plate.

4 Anybody have any objections to not going forward on the way
5 ahead on Appellate Exhibit 480?

6 DC [MS. CARMON]: I'll speak for the defense. I was waiting
7 on Captain Stinson.

8 No. No objection to that, Your Honor. But can we be
9 confident then that we are not going to argue ----

10 MJ [COL FITZGERALD]: Correct. I'm ----

11 DC [MS. CARMON]: Okay.

12 MJ [COL FITZGERALD]: I ----

13 DC [MS. CARMON]: We can talk about that later.

14 MJ [COL FITZGERALD]: That was a little ambiguous.

15 If anything, we'll talk about the way ahead, but I'm not
16 going to expect argument on it. I think that there are some weighty
17 issues to be discussed.

18 And I'll just be clear. I was not the judge who heard
19 original Appellate Exhibit 480. And what I'm very concerned about is
20 when we talk about way ahead, I may be caught off guard. I've done
21 all the homework and reading that I can think of, but having not been
22 the judge, I don't get to go into the recesses of the mind and recall
23 anything.

1 So I'm just knowing that -- I just know that may be a
2 significant issue, which would cause -- so I think better to tell you
3 that now and say, "Don't prepare for it. Take the time to focus on
4 other things," knowing that that's the likelihood that we would not
5 be able to take it up tomorrow. So now you know we're not going to.

6 Captain Stinson, do you -- I didn't give you a chance to
7 before I said all that, but do you wish to be heard?

8 TC [CAPT STINSON]: No, Your Honor, with the understanding
9 that we're not doing the argument tomorrow, no problem with pushing
10 the way ahead until tomorrow.

11 Just one question. There is a -- on the calendar AE 547
12 with the defense ex parte. At least on the calendar that's listed in
13 the morning. I didn't know if that was -- maybe we're going to
14 discuss that plan of action for tomorrow.

15 MJ [COL FITZGERALD]: We are. And, again, coming in
16 midstream, I think as the presiding judge now, I want to make sure I
17 understand everything, and I want to have that ex parte communication
18 to make sure I've interpreted things accurately and then I have a
19 couple of questions in regard to how I can make a ruling on that that
20 I think the defense can help me with, again, having not been the
21 judge on the bench taking all those matters in contemporaneously.

22 So we will take that thing -- take up that first thing in
23 the morning. I don't think it will take longer than 30 minutes. So

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1 what I'd like to do is maybe we'll start at 0900.

2 So, Government, if you can be ready to go -- how about we'll
3 just say 1000 hours? Because if I say anything less, then the
4 defense won't get an opportunity to rest and recalibrate and reset,
5 so...

6 And it would be probably good for me to say that to the
7 public who are attending that there will not be a public session
8 until 1000 hours.

9 So unless there's anything else to take up, the court will
10 stand in recess until 1000 hours tomorrow for the public. But I will
11 have an ex parte session at 0900 with the defense.

12 Hearing nothing, we are in recess.

13 **[The R.M.C. 803 session recessed at 1828, 30 May 2024.]**

14 **[END OF PAGE]**

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