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1 **[The R.M.C. 803 session was called to order at 0907, 05 May 2025.]**

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

3 Trial Counsel, good morning.

4 Captain Stinson ----

5 TC [CAPT STINSON]: Good morning, Your Honor.

6 MJ [COL FITZGERALD]: ---- please identify who is here on  
7 behalf of the United States and indicate whether they are located  
8 here or appearing remotely from the Remote Hearing Room in the  
9 National Capital Region.

10 TC [CAPT STINSON]: Yes, Your Honor. And just before we  
11 begin, just to put on the record, that these proceedings are being  
12 transmitted via CCTV to public viewing locations in the United States  
13 pursuant to this commission's order AE 028M dated 22 November 2019.  
14 And we checked and understand there are no sunspots or anything  
15 scheduled for this week, so I think we'll be good to go on that  
16 front.

17 So representing the United States at Guantanamo Bay Naval  
18 Station are the following detailed counsel: myself, Captain Tim  
19 Stinson, United States Navy; Mr. John Wells; Major Jonathan  
20 Danielczyk, United States Air Force; Lieutenant Lauren Huston, United  
21 States Navy; and Captain Alfonso Perez-Diaz, United States Army.

22 Representing the United States from the Remote Hearing Room  
23 in Northern Virginia is Detailed Counsel Lieutenant Colonel James

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1 Garrett, United States Army. And Captain Kyle Lanning, United States  
2 Marine Corps, has been previously excused from these sessions to  
3 attend military training.

4 Additionally, Your Honor, we're assisted by intelligence  
5 analysts and paralegals, both here and in the RHR, who are  
6 appropriately cleared for presence in the courtroom. And there are  
7 no new members to the prosecution team for this session, Your Honor,  
8 and the qualifications and detailing of counsel have been previously  
9 placed on the record.

10 Thank you.

11 MJ [COL FITZGERALD]: Thank you, sir.

12 Defense Counsel, and I think in this case, Commander  
13 Bartholomaus, good morning.

14 DC [CDR BARTHOLOMAUS]: Good morning, sir.

15 MJ [COL FITZGERALD]: Please account for the members of the  
16 defense team and indicate whether they are located here or appearing  
17 remotely from the Remote Hearing Room. Are there any new counsel  
18 making their first appearance?

19 DC [CDR BARTHOLOMAUS]: No, sir.

20 MJ [COL FITZGERALD]: Okay.

21 DC [CDR BARTHOLOMAUS]: Representing Abd al Rahim, Mr. -- or  
22 Mr. Abd al Rahim al Nashiri is myself, Commander Matthew  
23 Bartholomaus, United States Navy; Lieutenant Benjamin Shaver, United

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1 States Navy; Ms. Katherine Carmon; Ms. Jessica Manuele. We also have  
2 resource counsel and additional support personnel here in Cuba. All  
3 appropriately cleared.

4 In the RHR in Northern Virginia, we have Ms. Allison Miller,  
5 learned counsel; we have Lieutenant Colonel Josh Nettinga, United  
6 States Air Force; also resource counsel and support personnel. All  
7 personnel appropriately cleared.

8 Mr. -- I'm sorry, Mr. Joaquin Padilla is excused because of  
9 a prior family member -- or a matter.

10 Thank you, Your Honor.

11 MJ [COL FITZGERALD]: Thank you.

12 So counsel is reminded my expectations regarding the use of  
13 the Remote Hearing Room is that the Remote Hearing Room is an  
14 extension of the well of this courtroom. Therefore, the only  
15 personnel authorized to be in the Remote Hearing Room during the  
16 hearings of this commission are those individuals that would be  
17 permitted to sit in the well of the courtroom. That would include  
18 members of each respective team, their consultants, as well as chiefs  
19 of OCP and MCDO.

20 Anyone who would not ordinarily be authorized to sit in the  
21 well of this courtroom are not authorized to view the proceedings  
22 from the Remote Hearing Room.

23 Do all the parties understand the guidance on the use of the

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1 Remote Hearing Room?

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

3 DC [CDR BARTHOLOMAUS]: Yes, sir.

4 MJ [COL FITZGERALD]: Thank you.

5 I note the accused is present today.

6 Good morning, Mr. Nashiri. First, I'd like to talk to you  
7 about you and about your counsel and their participation at this  
8 hearing.

9 First, your learned counsel, Ms. Miller, requested that the  
10 commission allow her to participate in this hearing remotely from the  
11 Remote Hearing Room this week. Were you aware that she would  
12 be -- not be here in person during this week's session?

13 ACC [MR. AL NASHIRI]: Yes, I know that.

14 MJ [COL FITZGERALD]: And were you able to discuss her  
15 appearance from the Remote Hearing Room with Ms. Miller or one of  
16 your other attorneys before today?

17 ACC [MR. AL NASHIRI]: Yes, I can do that.

18 MJ [COL FITZGERALD]: Do you have any objection to her  
19 appearing from the Remote Hearing Room this week?

20 ACC [MR. AL NASHIRI]: I have no objection.

21 MJ [COL FITZGERALD]: Thank you, Mr. Nashiri. If at any point  
22 you want to communicate directly with Ms. Miller during this week's  
23 sessions, please consult with one of your counsel with you at the

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1 table and the commission can make arrangements to recess, if  
2 necessary, to accommodate that communication.

3 ACC [MR. AL NASHIRI]: Yes, I understand that.

4 MJ [COL FITZGERALD]: Second, Mr. Padilla has requested to be  
5 excused from these proceedings today so that he could attend his  
6 son's college graduation. He's expected to participate in the  
7 proceedings the remainder of the week. Were you aware that  
8 Mr. Padilla would be absent from the proceedings today?

9 ACC [MR. AL NASHIRI]: Yes, yes. I was aware.

10 MJ [COL FITZGERALD]: Do you agree to Mr. Padilla's absence  
11 from today's proceedings?

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

13 MJ [COL FITZGERALD]: Do you have any questions about the  
14 participation of, or the presence of your attorneys, during this  
15 week's session?

16 ACC [MR. AL NASHIRI]: I have no questions.

17 MJ [COL FITZGERALD]: Thank you, Mr. Nashiri.

18 I will now advise you of your right to be present and to  
19 waive said presence. You have the right to be present during all  
20 sessions of the commission. If you request to absent yourself from  
21 any session, such absence must be voluntary and of your own free  
22 will. Your voluntary absence from any session of the commission is  
23 an unequivocal waiver of the right to be present during that session.

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1 Your absence from any session may negatively affect the presentation  
2 of the defense in your case. Your failure to meet with and cooperate  
3 with your defense counsel may also negatively affect the presentation  
4 of your case.

5 Under certain circumstances your attendance at a session may  
6 be required regardless of your personal desire not to be present.  
7 Regardless of your voluntary waiver to attend a particular session of  
8 the commission, you have the right at any time to decide to attend  
9 any subsequent session. If you do not -- decide not to attend the  
10 morning session but wish to attend the afternoon session, you must  
11 notify the guard force of your desires. Assuming there is enough  
12 time to arrange transportation, you will then be permitted to attend  
13 the afternoon session.

14 You will be informed of the time and date of each commission  
15 session prior to the session to afford the -- to afford you the  
16 opportunity to decide whether you wish to attend the session.

17 Mr. Nashiri, do you understand what I just explained to you?

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

19 MJ [COL FITZGERALD]: Thank you.

20 Now, to just summarize some procedural history first, and  
21 the parties can help me if they want to clarify anything, there were  
22 no 802 sessions since our last session, but I want to cover some  
23 e-mails. And those e-mails go to my staff, which I felt went beyond

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1 just administrative matters that can be -- sorry.

2           The e-mails that went to my staff, I felt, went beyond just  
3 administrative matters that can be addressed through e-mail with my  
4 staff. For example, on 7 April there was a lengthy exchange of  
5 e-mails with my staff, primarily from defense counsel, about this  
6 upcoming session. Some of the content of those e-mails could  
7 reasonably be construed as defense supplementing their argument on  
8 582A, which was the defense motion to continue this May session filed  
9 on 3 April.

10           My staff did discuss those e-mails with me and I did  
11 not -- and I did take note of that information in ruling on 582A.

12           I want to stress that e-mail communications with my staff,  
13 like 802 sessions, are meant only to address administrative matters.  
14 They are not a form for advocacy or supplementing the record on  
15 pending or potential issues. There is a formal briefing cycle  
16 designed to handle those situations.

17           Does everyone understand?

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

19           DC [CDR BARTHOLOMAUS]: Yes, sir.

20           MJ [COL FITZGERALD]: On 17 April there was another e-mail  
21 exchange with the parties and my staff regarding an issue involving  
22 Mr. Nashiri's legal mail. That is the sort of issue that can and  
23 should be addressed first between the parties to see if the issue can

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1 be resolved before bringing the matter to the commission. Despite  
2 the e-mail, I did not intervene as I am informed that the  
3 matter -- that the matter was handled by the government, and I  
4 believe to the defense's satisfaction.

5 Is that correct, Government?

6 TC [CAPT STINSON]: Yes, Your Honor. We were able to address  
7 that matter and I appreciate the defense, if they raised it to our  
8 attention. But yeah, I think that matter was effectively resolved.  
9 But I defer to Ms. Miller on that.

10 MJ [COL FITZGERALD]: Ms. Miller?

11 LDC [MS. MILLER]: The mail issue was resolved, sir.

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

13 There was another e-mail exchange on 24 April where defense  
14 counsel was addressing the draft calendar for this session put out by  
15 the government. Defense was requesting that the commission  
16 consolidate our in-court hearings to earlier in the week, which is  
17 ultimately what happened. And again, it appeared to the commission  
18 that this was an issue that the parties were in the middle of  
19 resolving at the time of the e-mail exchange.

20 So going forward, I do encourage the parties to engage via  
21 e-mail with my staff on strictly administrative matters. However,  
22 where there's a dispute over an issue that can be resolved by the  
23 parties, I would ask that you make every effort to do so and not



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1 request intervention by the commission, even by implication, until  
2 you have exhausted those efforts.

3 If you have attempted to resolve an issue and given those  
4 efforts reasonable time to work and are unable to do so, then you can  
5 reach out to my staff as necessary. Requests for relief should  
6 be -- that should be properly included in the motion should not be  
7 made via e-mail.

8 Finally, on an unrelated note, I do want to place on the  
9 record that the commission did receive a notice e-mail from the  
10 government on 31 March. That e-mail from Captain Stinson indicated  
11 that a transcript of a defense ex parte session had been  
12 inadvertently delivered to the government. Captain Stinson ensured  
13 that no one from the government looked at the transcript and they  
14 simply returned the disc that was inadvertently delivered to their  
15 office.

16 A member of the trial judiciary staff then coordinated with  
17 the court reporter's office to determine how the error occurred, in  
18 an effort to ensure no similar incidents occur. The commission  
19 considers that matter resolved.

20 Is that correct, Government, from your vantage point?

21 TC [CAPT STINSON]: That is correct, Your Honor.

22 MJ [COL FITZGERALD]: Defense?

23 DC [CDR BARTHOLOMAUS]: That's correct, sir.

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1 MJ [COL FITZGERALD]: Very well. Do counsel have anything  
2 they would like to add to my summary or any objections they would  
3 like to make?

4 Government first.

5 TC [CAPT STINSON]: No additions and no objections, Your  
6 Honor.

7 DC [CDR BARTHOLOMAUS]: We defer to Ms. Miller on that.

8 MJ [COL FITZGERALD]: Very well.

9 Ms. Miller?

10 LDC [MS. MILLER]: Sir, I certainly understand the  
11 commission's position. I would just like to make sure that the  
12 record is clear.

13 All of the e-mails that I sent to your staff were responsive  
14 to the government's. So when you speak about the scheduling for the  
15 May session, Captain Stinson -- excuse me -- lead trial counsel had  
16 sent an e-mail to Mr. Powell with a proposed schedule. So my e-mail  
17 was responsive to that.

18 So I understand the court's position, but being singled out,  
19 all of my e-mails were responsive to the government initiating  
20 contact with your office. I will heed your instructions moving  
21 forward.

22 MJ [COL FITZGERALD]: Thank you.

23 Moving on. On 14 March 2025, defense filed Appellate

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1 Exhibit 476B, which was a defense motion to preclude third-party  
2 interference in courtroom proceedings. This motion was effectively a  
3 request for reconsideration of a ruling issued by the commission in  
4 Appellate Exhibit 476A, which authorized the government to use a  
5 teletype device in the courtroom.

6 The defense motion in Appellate Exhibit 476B is denied.

7 After the motion was filed, the commission, in Appellate  
8 Exhibit 476A, ordered the government to file a new proposed operating  
9 procedure for the teletype device. The government complied with that  
10 order and filed its updated proposed procedures ex parte to the  
11 commission in Appellate Exhibit 476F.

12 The commission has reviewed the updated procedures submitted  
13 by the government and, with a few minor exceptions, is satisfied that  
14 those procedures are necessary to protect against the improper  
15 disclosure of classified information and designed so that they limit  
16 any disruption to the commission to the minimal amount necessary.

17 Government, what I'd like to do is at some point -- if you  
18 notice, I said I accept your proposal -- proposed procedures with  
19 some minor exceptions -- I'd like to have a discussion about where I  
20 would like some deviation from the procedures you proposed to me.  
21 And I can tell you that, and I'd like to have a discussion to make  
22 sure you would be satisfied with my proposed amendments. So wherever  
23 we can make that happen, I would like to do so.

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1 TC [CAPT STINSON]: Yes, Your Honor. We do have an ex parte  
2 update scheduled for Thursday, and so perhaps we can just tag that  
3 topic onto that update as well.

4 MJ [COL FITZGERALD]: Okay.

5 TC [CAPT STINSON]: Thank you.

6 LDC [MS. MILLER]: And, sir, we'd continue to object to the  
7 use of the teletype machine by the government. We'd also object to  
8 their procedure being proposed ex parte. We have no way to object to  
9 that procedure without knowing what it is.

10 MJ [COL FITZGERALD]: Thank you. Your objections are noted.

11 The commission will issue a written ruling shortly as well  
12 as an order to the government to make a few minor changes to the SOP.  
13 So you'll probably receive some further guidance in that ruling  
14 that -- that can be discussed outside an ex parte proceedings,  
15 Ms. Miller. I don't want to issue that ruling until I've gone over  
16 those proposed changes to the procedures with the government first.

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

18 MJ [COL FITZGERALD]: But I thought it was important to put it  
19 on the record at this moment so that the government -- what I'm  
20 essentially allowing is the government to continue with the  
21 procedures so long as the procedures they follow are consistent with  
22 what they submitted to the court until they receive those amendments.

23 The next thing I'd like to put on the record is a

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1 preliminary ruling on Appellate Exhibit 604B. And, again, this is  
2 just a preliminary ruling. A written ruling will be forthcoming.  
3 But 604E was a -- or 604B was a motion to continue. So I felt now  
4 would be the opportune moment to discuss at least the preliminary  
5 ruling in that sense.

6 And just so we can be clear before I begin, the defense  
7 motion set forth in AE 604B is granted in part and denied in part.

8 On 18 July 2024, the commission issued a scheduling order  
9 for calendar year 2025 which docketed trial on the merits to begin on  
10 6 October 2025. That is in Appellate Exhibit 582.

11 On 29 October 2024, in Appellate Exhibit 339ZZ, Ms. Miller  
12 gave notice of her appearance as learned counsel on behalf of the  
13 accused.

14 On 30 January 2025, in Appellate Exhibit 604, the commission  
15 ordered the defense to file any proposed transition plan or any  
16 motion to continue the trial based on the transition to new learned  
17 counsel, to include specific justification for any request for a new  
18 trial date.

19 On 26 February 2025, in Appellate Exhibit 604A, the defense  
20 filed a transition plan for learned counsel. Therein, defense  
21 estimated a need for approximately 18 to 24 months to prepare for  
22 trial.

23 On 27 February 2025, in Appellate Exhibit 604B, the defense

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1 moved to continue all hearings and deadlines in 2025, to include the  
2 6 October 2025 trial date. The defense requested that the trial be  
3 continued until 4 July 2028.

4 The government responded in Appellate Exhibit 604C on 12  
5 March 2025, requesting the commission deny the motion. And defense  
6 replied in Appellate Exhibit 604D on 19 March 2025.

7 It is the commission's duty to exercise reasonable control  
8 over the proceedings, including prescribing the manner and order in  
9 which proceedings may take place in accordance with and pursuant to  
10 Rule of Military Commission 801(a)(3) and its discussion.

11 The military judge and the military commission may, for  
12 reasonable cause, grant a continuance to any party for such time and  
13 as often as may appear to be just. R.M.C. 707(b)(4)(E).

14 The factors used to determine whether the military judge  
15 abused his discretion by denying a continuance includes surprise,  
16 nature of any evidence involved, timeliness of the request,  
17 substitute testimony or evidence, availability of witness or evidence  
18 requested, length of the continuance, prejudice to opponent, moving  
19 party receiving prior continuances, good faith of the moving party,  
20 use of reasonable diligence by a moving party, possible impact on the  
21 verdict, and prior notice.

22 What I cited to are commonly referred to as the Miller  
23 Factors. Applying the Military **[sic]** Factors to the defense

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1 requests, the commission finds the defense has raised concerns about  
2 their ability to represent the accused in this capital trial without  
3 further time to prepare.

4 The commission further finds, however, that it is possible  
5 to accommodate the defense's requests -- concerns without a full stop  
6 of proceedings.

7 Accordingly, the commission will in a separate order issue a  
8 final pretrial litigation schedule and will continue the 6  
9 October 2025 trial date until 1 June 2026.

10 The hearings previously scheduled for 14 July, 1 August, and  
11 8 through 19 September 2025, are continued.

12 Some other dates of import -- and again, you will receive a  
13 written pretrial litigation order which will lay this out in more  
14 detail. But for today's purposes, all government notices will be  
15 completed no later than 30 June 2025, whether those notices are new,  
16 supplements, amendments, or recertification of prior notices. The  
17 motions cycle will commence with all motions due no later than  
18 6 October 2025.

19 There will be hearings in November and December 2025 to  
20 address all motions filed on 6 October -- I'm sorry, filed no later  
21 than 6 October 2025.

22 And I know I've only given preliminary information, but are  
23 there any questions I can answer now for the parties in regards to

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1 that ruling, both in granting in part and denying in part the  
2 defense's motion in 604B?

3 TC [CAPT STINSON]: Thank you, Your Honor. The only question  
4 I have is in relation to the motion cycle that we'll address in  
5 November and December, because there had been deadlines regarding  
6 specific topics of law motions and the like, and we've gotten through  
7 a bunch of those motion cycles.

8 Are these motions that are specific to the government  
9 notices that sort of are our final list of experts and the like, is  
10 that what we're anticipating there, Your Honor?

11 MJ [COL FITZGERALD]: So the purpose of the defense notices so  
12 that -- I'm sorry. The purpose of the government notices due on 30  
13 June 2025 is to allow the defense an opportunity to meet the evidence  
14 on those notices. So the defense and the government will have all  
15 summer to prepare based on those notices so that the pleading cycle  
16 can begin on 6 October 2025 for any motion, evidentiary, based on the  
17 notices or otherwise.

18 TC [CAPT STINSON]: Understood. Thank you.

19 MJ [COL FITZGERALD]: Am I answering your question?

20 TC [CAPT STINSON]: I think so, Your Honor. There may be some  
21 that appear duplicative to us, but we can address that in the  
22 briefing and say it's a reconsideration or the like. So I  
23 understand, yes, Your Honor.



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1 MJ [COL FITZGERALD]: The other thing I will add, and I took a  
2 pause earlier trying to remember, is if you know you have motions  
3 coming up and you have witnesses you want to call, please make sure  
4 they're aware that the time to present evidence and witnesses is the  
5 November and December hearing, and they should make themselves  
6 available. If they don't make themselves available, you should  
7 consider alternate forms of testimony.

8 And just so I can also be clear, previous deadlines still  
9 apply.

10 TC [CAPT STINSON]: Understood. Thank you.

11 MJ [COL FITZGERALD]: Maybe that's part of your question,  
12 Captain Stinson. And before we conclude this week's session, we can  
13 certainly have either an 802 discussion or discuss on the record any  
14 other questions that may come up from that ruling.

15 Defense, do you have any questions at this time?  
16 Ms. Miller?

17 LDC [MS. MILLER]: I think you answered it. We have an  
18 upcoming deadline of 12 May to respond to the government's, I  
19 believe, eighth hearsay notice. That deadline still exists or is  
20 continued until 6 October?

21 MJ [COL FITZGERALD]: No, that deadline still exists. So  
22 anything that's currently due now still has its deadlines.

23 LDC [MS. MILLER]: Okay. I apologize. I'm sort of

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1 percolating and reacting in real time.

2 MJ [COL FITZGERALD]: That's fine. And we can -- if  
3 there's -- if you want to think about it, ponder it, and discuss it  
4 with your team, we can again have an on-the-record discussion later  
5 this week. I know it's hard because I haven't given you my written  
6 ruling where I give more substantive dates to other matters, and  
7 maybe there's matters I hadn't contemplated, but we can certainly  
8 have the discussion before we conclude this week.

9 LDC [MS. MILLER]: And do you have any idea of when in  
10 November and December? That is a challenging time for a lot of  
11 people who aren't beholden to this commission, and so I want to give  
12 as much advance notice as possible.

13 MJ [COL FITZGERALD]: I do not, but I -- I think, like any  
14 other judge, I disfavor interfering with people's holiday schedules.  
15 But I am also aware that there's not a single month on the calendar  
16 that doesn't present a challenging time for one reason or another. I  
17 don't have a month that isn't a challenging time for somebody or  
18 people generally.

19 So I will -- I'm endeavoring to respect the Thanksgiving  
20 holidays and the December holidays to the best of my ability. Well,  
21 I should not even characterize it that way. I don't intend to  
22 interfere with people having their holiday season.

23 LDC [MS. MILLER]: Understood, sir.

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1 MJ [COL FITZGERALD]: Anything further at this point or do you  
2 want to table that discussion for later this week?

3 LDC [MS. MILLER]: I'd suggest tabling it so we have an  
4 opportunity, since we're in Nashiri north and south, to have an  
5 opportunity for all of us to consult.

6 MJ [COL FITZGERALD]: Thank you. Okay. Just tell me when and  
7 certainly you can speak to the government as well, Ms. Miller. I'm  
8 open to any suggestions about November to December. I'm leaving it  
9 as broad as I can, letting you know my left/right limits, that I  
10 don't intend to interfere with holidays, but I do intend to keep this  
11 trial moving in a forward direction.

12 Moving on. In this docketing order for this session, I  
13 instructed the parties to coordinate regarding the need for any  
14 closed session to protect against the disclosure of classified  
15 information during this hearing.

16 In Appellate Exhibit 619K, the defense provided notice that  
17 the parties conferred and agreed that closure of the proceedings  
18 during a portion of the final argument on Appellate Exhibit 569 will  
19 be necessary to prevent the disclosure of classified information.

20 Is that correct?

21 TC [CAPT STINSON]: That's correct.

22 LDC [MS. MILLER]: I'd defer to Ms. Carmon.

23 MJ [COL FITZGERALD]: Ms. Carmon? I'm sorry. Captain

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1 Stinson, you're already standing.

2 TC [CAPT STINSON]: That's my understanding, yes, Your Honor.

3 MJ [COL FITZGERALD]: Ms. Carmon?

4 DC [MS. CARMON]: Yes, sir. Thank you.

5 MJ [COL FITZGERALD]: All right. Thank you. The government  
6 did not submit a request for an M.C.R.E. 505 hearing. Do both  
7 parties agree that there's no need to conduct a hearing pursuant to  
8 M.C.R.E. 505(h).

9 TC [CAPT STINSON]: That's correct, Your Honor. The  
10 one -- because we've added 599 to a discussion on Wednesday  
11 afternoon, there's at least a possibility that some of that may also,  
12 we just have to be mindful that that may have to be closed as well,  
13 just depending on the topic matter of the questions, Your Honor.

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

15 I do want to make it clear that I expect that closed  
16 sessions to be minimized to the greatest extent possible and to only  
17 be used to protect against improper disclosure of classified  
18 information. Any testimony or argument that can be taken up in open  
19 session without risking the disclosure of classified information will  
20 be done in open session.

21 The parties understand and agree to comply with this  
22 guidance?

23 TC [CAPT STINSON]: Understood, Your Honor.

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1 DC [CDR BARTHOLOMAUS]: Yes, Your Honor. Understood.

2 MJ [COL FITZGERALD]: Thank you.

3 Do either party have any questions or any other issues they  
4 want to raise before we move on?

5 **[Counsel conferred.]**

6 TC [CAPT STINSON]: The only other issue from a scheduling  
7 perspective, Your Honor, or administrative perspective, is we  
8 understand, we've spoken with the defense, that Mr. Nashiri may have  
9 a medical procedure on Thursday afternoon. And we just want everyone  
10 to be mindful of sort of the timing on that. We'll advise the  
11 commission if we learn additional information.

12 I think that's at 1800, so I don't expect that will  
13 interfere with proceedings on Thursday morning, but just wanted to  
14 make sure everybody's tracking the -- that medical procedure on  
15 Thursday evening. Over.

16 MJ [COL FITZGERALD]: Thank you.

17 Defense, I presume you're aware?

18 DC [CDR BARTHOLOMAUS]: Yes, Your Honor. And we agree with  
19 Captain Stinson's recitation of the facts. I just want to make one  
20 note that obviously those dates are subject to change. Should they  
21 change, we will inform the commission immediately.

22 MJ [COL FITZGERALD]: Okay. And you said that was programmed  
23 for 1800?

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1 TC [CAPT STINSON]: That's my understanding, Your Honor. So  
2 Thursday, 8 May at 1800. I think it was timing in relation to the  
3 medical staff.

4 MJ [COL FITZGERALD]: Okay.

5 TC [CAPT STINSON]: Yes, sir.

6 MJ [COL FITZGERALD]: All right. Please keep me updated if  
7 that changes in any way that may cause us to need to make a shift.  
8 It doesn't appear, looking at what we have planned for Thursday, that  
9 it will, but things are always subject to change.

10 DC [CDR BARTHOLOMAUS]: Yes, sir. We will -- we'll inform the  
11 commission and government immediately if there are any changes.

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

13 It appears -- are we ready to take up Appellate Exhibit 609?

14 TC [CAPT STINSON]: The government's ready, Your Honor.

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

16 MJ [COL FITZGERALD]: And who will I be hearing from? Is that  
17 you, Ms. Miller?

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

19 MJ [COL FITZGERALD]: I may have already said it, but good  
20 morning, Ms. Miller.

21 LDC [MS. MILLER]: **[microphone button not pushed; no**  
22 **audio.]** ---- the camera -- and I don't know if I'm asking you or if  
23 I should be asking someone here. The screen on the lectern in the

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1 RHR doesn't have the same visual. It's blank. I'm not able to see  
2 anyone.

3 Is it possible to change that or no? If not, it's fine. I  
4 really just need to see you, sir.

5 MJ [COL FITZGERALD]: No. If you had planned to have that  
6 available and it can be made available that -- I presume the tech  
7 people listening to us are seeing what they can do?

8 LDC [MS. MILLER]: It's fine.

9 MJ [COL FITZGERALD]: Does somebody appear to be responding to  
10 you in the RHR?

11 LDC [MS. MILLER]: No, sir. I can see you, sir. It's fine.  
12 I don't want to make -- this is Manice.

13 Okay. She corrects me. What I ask is not possible.

14 MJ [COL FITZGERALD]: Okay.

15 LDC [MS. MILLER]: I would like to begin by saying that we  
16 have addressed AE 609 on several different points. And so because  
17 we're here before the commission this morning, just to remind the  
18 commission that on Monday, 10 March of 2025, I argued 604B.

19 And I think I specifically indicated I was not arguing 609.  
20 However, there were aspects of AE 609 that certainly linked to 604B  
21 and were referenced in that argument. And so the commission  
22 obviously heard that argument at that time.

23 Additionally, the second week of the March session I argued

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1 a motion to compel six witnesses in support of AE 609, which this  
2 commission has denied. But in the course of arguing the motion to  
3 compel the witnesses, we had a much more substantive conversation  
4 about AE 609 generally. I think the commission would agree we sort  
5 of segued off into a conversation about AE 609 from the motion to  
6 compel the witnesses in support of AE 609.

7 I would also rely on the declaration that has been filed by  
8 Brigadier General Jackie Thompson. I'm not sure his status as chief  
9 defense counsel, frankly, sir, with the Military Commissions Defense  
10 Organization.

11 Beyond that, I am objecting to proceeding this morning.  
12 Brigadier General Jackie Thompson, whether he be the chief defense  
13 counsel or not at this point, his testimony is necessary for me to  
14 meet my burden in AE 609 and he is unavailable.

15 We did have an opportunity at the March session, myself and  
16 Lieutenant Colonel Nettinga, members of the government, as well as  
17 the commission and the commission staff, to have an 802, an  
18 R.M.C. 802 hearing wherein I informed the commission that  
19 General Thompson justifiably and reasonably so faced repercussion  
20 from his testimony.

21 It was my impression that the commission was trying to do  
22 General Thompson a favor by permitting him to testify during the  
23 March session prior to him entering terminal leave 1 April, and I



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1 wanted to disabuse the commission of that notion that  
2 General Thompson would very much prefer testify after his formal  
3 retirement, which is 1 June 2025.

4 I appreciate that what occurs in the R.M.C. 802 hearings is  
5 not intended to be advocacy. I didn't move the court, but I  
6 certainly told the commission that I intended to provide a  
7 declaration from General Thompson concurrently to the March hearing  
8 and that I also intended to supplement that declaration with  
9 General Thompson's live testimony after General Thompson retired.

10 And I believe the commission said something when I indicated  
11 that General Thompson had a reasonable fear -- and this was shortly  
12 after all of the TJAGs were fired, and so I think he had a concern  
13 that was even more so heightened after that took place -- I believe  
14 the commission said something to the extent of, "Ah, I was not  
15 tracking" and then inquired of Lieutenant Colonel Nettinga when the  
16 formal ----

17 TC [CAPT STINSON]: Your Honor, the government is going to  
18 object. I think we are straying off of argument and into testimony.  
19 The commission reflects all 802 sessions on the record. Both parties  
20 have an opportunity to correct or add. That is done every single  
21 time.

22 This is now -- appears to be recounting, and the government  
23 would object to what appears to be learned counsel testifying about

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1 her recollection of an 802 conference. When the parties had an  
2 opportunity that was placed on the record, that was the appropriate  
3 time if you have additions or edits to the content of an 802 session.

4 So the government is not objecting, we're not trying to  
5 interfere with Ms. Miller's argument. But we have strayed into her  
6 now recalling events in not an appropriate format.

7 Over.

8 MJ [COL FITZGERALD]: So I'll let you respond in a moment,  
9 Ms. Miller. But I want to point out that you referred to them as  
10 R.M.C. 802 hearings, and what they are is actually conferences. And  
11 R.M.C. 802 is pretty explicit about that point, that they're not  
12 hearings, not for the purpose of taking evidence, and the contents  
13 are summarized on the record.

14 Would you like to be heard on the government's objection?

15 LDC [MS. MILLER]: Sure. One, it's not a legal objection.  
16 Two, this is argument, and everything I am recounting is on the  
17 record, either affirmatively on the record or not on the record,  
18 which the commission can certainly take notice of things both on the  
19 record and the fact that things were not put on the record.

20 And what I mean by that is because they weren't discussed in  
21 the 802, right? I think the commission does a thorough job in  
22 recounting the 802 conferences. Excuse me, sir. I appreciate the  
23 correction.

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1           And so certainly what I am discussing is legal argument and  
2 is based on both a record -- a foundation from the record as to what  
3 occurred at the 802 and also what did not occur at the 802.

4           MJ [COL FITZGERALD]: And to be clear, R.M.C. 802 states  
5 specifically conferences need not be made part of the record, but  
6 matters agreed upon at a conference shall be included in the record  
7 orally or in writing. Failure of a party to object at trial to  
8 failure to comply with this section shall waive this requirement.

9           And I think the defense's -- the government's argument was  
10 you're testifying because you're bringing facts not in evidence for  
11 the purpose of this motion on things that were discussed at the 802  
12 conference.

13          LDC [MS. MILLER]: And, sir, I believe these things  
14 are -- were recounted by Your Honor in summarizing the 802. I am  
15 certainly not representing that these are direct quotes, but more of  
16 a paraphrase of the commission's recitation of what occurred during  
17 the 802 or what did not occur during the 802 conference.

18          And I think it's certainly proper argument for what I'm  
19 trying to put forth and that I cannot proceed absent  
20 General Thompson. And so we -- we need a record of the efforts to  
21 secure his presence before this commission. And what I'm trying to  
22 establish is why I did or did not do certain things based on my  
23 understanding from that 802 conference that was appropriately

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1 summarized at the -- at the March commission. Excuse me, sir.

2 MJ [COL FITZGERALD]: Government, do you wish to respond?

3 TC [CAPT STINSON]: Your Honor, I think citing to the record  
4 of what was summarized would be appropriate. I do think it's -- the  
5 reason the government objected is it was facts not in evidence and  
6 she was, from the government's perspective, making improper argument  
7 based on paraphrasing and recollections of things that aren't on the  
8 record. And I do think that is improper argument and based on facts  
9 not in evidence.

10 So, again, I'm not trying to interrupt her argument here. I  
11 know she's made this point in the briefs, that the defense's view was  
12 that it would be better for General Thompson to testify after his  
13 retirement. The government understands that. He's obviously still  
14 on active duty. He's not unavailable, and I'll make those arguments  
15 when it's my turn. But the government's objection was to her  
16 testifying about her recollection and paraphrasing of what occurred  
17 during an 802. And the government believes that's not appropriate.  
18 Over.

19 MJ [COL FITZGERALD]: So, Ms. Miller, I will say that there  
20 has been a summary of that 802 put on the record and the parties were  
21 given an opportunity to respond and amend, supplement what I put on  
22 as my summary. So if you could couch your argument in terms of what  
23 was in the summary. I'll give you some latitude, but I won't allow

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1 you to introduce new facts into evidence from those conferences,  
2 again, because they were not hearings.

3 But any reasonable inference you can make, I'll certainly  
4 allow you to. I would anticipate maybe the government will continue  
5 to object, but I will also review the transcript of that summary at a  
6 subsequent time. I don't want to stop these proceedings now, but  
7 I'll use those transcripts as an understanding of what -- what that  
8 summary entailed prior to making my ruling.

9 But you may proceed.

10 LDC [MS. MILLER]: What was -----

11 MJ [COL FITZGERALD]: So I'm -- well, let me make it clear.  
12 I'm going to take that objection under advisement. I've given you  
13 the caution I think you need, but it has not been sustained. But I  
14 will take it under advisement.

15 LDC [MS. MILLER]: Understood, sir.

16 What was summarized was that there was a conversation about  
17 General Thompson providing testimony via a declaration during the  
18 March session, and that I wished for him to testify after his formal  
19 retirement, which was to occur 1 June 2025.

20 What was not included in any conversation -- and, again,  
21 both an affirmative representation as well as a lack of record can be  
22 taken notice by this commission as part of argument, there was never  
23 conversation about, well, whoa, whoa, whoa, this abatement is

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1 something of the utmost urgency and we're going to need to address it  
2 either immediately at this March session or at the May session.

3 And frankly, sir, if I knew the commission's position was to  
4 have General Thompson appear this week while on terminal leave, I  
5 would have had him testify during the March session because he's in  
6 no less danger or threat of danger now than he was in March.

7 I will add that he is actually unavailable for this week's  
8 session. I feel ----

9 MJ [COL FITZGERALD]: Well, let me ask for clarity on that.  
10 Have I deemed him to be unavailable?

11 LDC [MS. MILLER]: You have not, sir, and I ----

12 MJ [COL FITZGERALD]: So that's just argument?

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

14 MJ [COL FITZGERALD]: Okay.

15 LDC [MS. MILLER]: He -- I feel incredibly uncomfortable and  
16 sought the -- sought the advice of a colleague on this team about  
17 disclosing medical information about a brigadier general, who is my  
18 boss, to this commission in moving to continue this AE 609's hearing  
19 for a later date. And I was advised that it wasn't necessary to  
20 include the just bevy of medical appointments that General Thompson  
21 has this week scheduled -- he's at the VA right now -- that it wasn't  
22 necessary for me to include that information because both the  
23 commission and the government would understand when I say

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1 General Thompson is on terminal leave, what that means, which is  
2 something new to me.

3 And I relied on that advice. And I don't regret that for a  
4 second, because there are things that I believe the commission  
5 expects of me in divulging private information of my own or of a  
6 brigadier general in the United States Army that is inappropriate and  
7 outside the scope of the commission's need for information.

8 MJ [COL FITZGERALD]: Let me -- let me address my concern,  
9 because you -- in one hand you tell me you don't want to release the  
10 information of a brigadier general, but you also tell me that this  
11 brigadier general can't testify while on active duty because of some  
12 unspecified and nonspecific threat that he's in danger of.

13 I mean, the whole purpose of a general and why you're citing  
14 to that rank and that position of authority is they're very aware of  
15 the risk they assume while they have the mantel of being a general  
16 officer. So it seems like you're wanting it both ways.

17 LDC [MS. MILLER]: Sir, General Thompson authored a  
18 declaration that detailed -- I think in great detail -- the fear that  
19 he is experiencing based on the transition in administration and the  
20 lack of statutory independence as the chief defense counsel. And so  
21 I think the commission can certainly rely on his testimony in the  
22 form of that declaration, and saying this man has a reasonable fear  
23 based on actions the government has taken against, I would suggest,

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1 similarly situated people is far different to me than disclosing  
2 medical information that's relevant to General Thompson, as well as  
3 how that medical information affects his children.

4 And because I have no choice at this point, given the  
5 court's rulings, I'm going to disclose that information. And so I'm  
6 not seeking to have it both ways. I'm going to tell the commission  
7 all of the information, but it makes me very uncomfortable sharing  
8 a -- anybody, whether he's a brigadier general or a civilian,  
9 anyone's medical information.

10 And I just want to be very clear. If I represent that I am  
11 unavailable or a witness is unavailable, it is because I am  
12 unavailable or the witness is unavailable. And if there is ever a  
13 suggestion that I have misrepresented someone's availability, I  
14 should be disbarred and I would hope the commission would lead that  
15 charge.

16 I am an officer of this court and I take the representations  
17 that I make to this court very seriously.

18 And so General Thompson is, if not 100 percent disabled, he  
19 is nearly 100 percent disabled. He has medical appointments  
20 throughout this week at the VA, which it is my understanding cannot  
21 be rescheduled because he is slated for retirement 1 June.

22 He is a man who pursues education. He has several degrees.  
23 And if 100 percent disabled, my understanding is the United States



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1 Army will pay for not only him to get another degree, and I believe  
2 he has an interest in the degree in theology, as well as his  
3 children.

4 And so these medical appointments are of the utmost  
5 importance both to his health, to his impending retirement, and to  
6 the future financial sanctity of his family.

7 And so I, yes, very much consider General Thompson  
8 unavailable to testify before the commission. I indicated to the  
9 commission in the 802, which was summarized, that I was going to  
10 provide a declaration so that we generally could understand what it  
11 was that General Thompson was going to testify to, but that I  
12 intended to supplement his testimony with live testimony after his  
13 retirement.

14 I am not limited to testimony being presented in declarative  
15 statements versus live testimony. Frankly, I don't understand the  
16 declarations. They're not subject to cross-examination, which I  
17 certainly think they should be, and I certainly think that live  
18 testimony is far more compelling.

19 The commission also indicated that I haven't proffered or  
20 the defense didn't proffer the necessity for additional testimony  
21 from General Thompson. And I don't know where it's appropriate to  
22 use the names of opposing counsel or not, but lead trial counsel in  
23 fact made an inquiry when we were arguing the motion to compel the

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1 witnesses reference, AE 609 -- again in paraphrase -- the lead trial  
2 prosecutor said something to the extent of he got one e-mail from  
3 Brent Harvey and just assumed his independence, his statutory  
4 independence as the chief defense counsel of the MCDO had been  
5 overborne.

6           It was, in fact, two e-mails from Mr. Harvey. But frankly,  
7 I would agree with that inquiry of Captain Stinson, and the only  
8 person who can answer that question as to his thought processes is  
9 Brigadier General Jackie Thompson.

10           And so what I was trying to do in the declaration is give  
11 the commission a preview or an outline of where we're at at the MCDO,  
12 which my position is certainly chief defense counsel-less at this  
13 point.

14           But in the declaration, my intention was only to give the  
15 commission a preview and sort of an understanding of at least why  
16 General Thompson wanted to wait until after his retirement to testify  
17 and things that he had done and said in abdicating his authority as  
18 chief defense counsel since President Trump was inaugurated 20  
19 January of 2025.

20           It was never intended to be the complete argument in support  
21 of AE 609. The machinations of someone's brain, their thought  
22 processes, they can only be explained by that person, and it's best  
23 done through live testimony.

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1           And so why General Thompson, after receiving a rather  
2   congenial e-mail from Brent Harvey, who was not in his chain of  
3   command, is not in his chain of command, felt that he was stripped of  
4   independent statutory judgment as chief defense counsel, only  
5   Brigadier General Jackie Thompson can answer that, and that needs to  
6   be done in live testimony.

7           I would further add, based on the court's -- excuse  
8   me -- the commission's ruling this morning, that there is no  
9   prejudice to continuing this hearing to the government to the  
10  November or December hearings at this point. But I -- I cannot  
11  proceed beyond the limited argument that you have heard in the  
12  sessions, in the pleadings that I have detailed without  
13  General Thompson's testimony, sir.

14          And so, respectfully, I object to proceeding any further.

15          MJ [COL FITZGERALD]: If we're talking about the chief of  
16  MCDO's acting in their official capacity in the operational  
17  requirements of the MCDO, isn't there somebody in that capacity who  
18  could testify now? Isn't there an acting chief?

19          LDC [MS. MILLER]: Yes, sir. The acting -- well, I disagree  
20  with the lawfulness of the designation of Captain Warren "Art" Record  
21  as acting chief defense counsel. But he certainly can't speak to the  
22  thought processes of General Thompson when General Thompson was  
23  making the decisions that he was in January, February, March, and

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1 April. I mean, again, only General Thompson knows why he did the  
2 things that he did. Right? And so Captain Record certainly  
3 couldn't ----

4 MJ [COL FITZGERALD]: But he did those things operationally.  
5 He did those things operationally. He did those in his capacity as  
6 the chief of MCDO. So ----

7 LDC [MS. MILLER]: Sure. But ----

8 MJ [COL FITZGERALD]: So that is ----

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

10 MJ [COL FITZGERALD]: ---- it's not just in his personal  
11 capacity. I mean, he was personally in the seat. But in his  
12 official capacity, acting only as the chief of MCDO, he made  
13 decisions. He could have either put those in those declarations or I  
14 could hear testimony from somebody who's been left with those  
15 decisions operationally.

16 I mean, this is not a concept unfamiliar to people in the  
17 military when people have to step into the role as an acting  
18 commander, an acting commanding general, even an acting platoon  
19 sergeant, certainly understand that they now carry the ruck of the  
20 person who last carried that ruck but the ruck remains the same.  
21 Sorry to use an infantry ----

22 LDC [MS. MILLER]: Understood.

23 MJ [COL FITZGERALD]: ---- metaphor.

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1 LDC [MS. MILLER]: I understood what you meant, sir.

2 MJ [COL FITZGERALD]: So I guess that's where I'm at a loss,  
3 is if these are operational decisions made or strategic decisions  
4 made in his official capacity, then those decisions can still be  
5 carried by the person in that role now.

6 LDC [MS. MILLER]: Well, one, I don't -- again, as I've  
7 already said, I don't believe Captain Record is lawfully in that role  
8 now.

9 But, two, Your Honor just said strategic decisions,  
10 operational or strategic decisions made by Jackie Thompson as chief  
11 defense counsel when he was chief defense counsel. How would anybody  
12 else, how would a substitute testify as to the strategic decisions  
13 and why someone made a strategic decision other than the person who  
14 made that decision?

15 And that's where I can only keep harping back on the example  
16 that the trial prosecutor I think laid out beautifully -- and, again,  
17 I say this in paraphrase, but something to the extent of he got one  
18 e-mail from Brent Harvey, and all of a sudden he no longer had, under  
19 the MCA, the statutory independence that he was supposed to have as  
20 chief defense counsel?

21 Captain Record certainly can't speak to why General Thompson  
22 interpreted that e-mail the way that General Thompson interpreted  
23 that e-mail. I mean, and there are things that are very specific to

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1 General Thompson. His direct supervisor is still, I believe,  
2 currently Ruth Vetter with the Office of General Counsel for the  
3 Department of Defense Policy and Personnel. My understanding is she  
4 has accepted the deferred retirement program and will be leaving.

5 I have been made aware since the filing of AE 609 that some  
6 sort of ethical conflict existed between Ms. Vetter and the MCDO, and  
7 perhaps that is why Brent Harvey was acting in the capacity that he  
8 was at the time; information known only to General Thompson.

9 I have directly asked General Thompson and he has declined  
10 to answer that. And so my intention would certainly be to ask him  
11 during his testimony before the commission what the situation and  
12 circumstances were when he made the decisions that he did, strategic  
13 decisions that, again, only he would know why he made those  
14 decisions.

15 MJ [COL FITZGERALD]: Did General Thompson have a deputy at  
16 that time?

17 LDC [MS. MILLER]: He did, and he has -- the same deputy is  
18 still the same deputy, Deputy Chief Defense Counsel Darren Wall. And  
19 my understanding is he was not privy to -- Mr. Wall does not know  
20 what the issue is between Ms. Vetter and General Thompson. I've also  
21 asked him that directly, but he was not privy.

22 And again, we were talking about why someone did something.  
23 General Thompson, why did you interpret this e-mail this way? How

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1 did you then move forward? Why were you fearful? There is no person  
2 who can answer those questions as a substitute other than  
3 General Thompson.

4 MJ [COL FITZGERALD]: Even though we're talking about how  
5 things are done operationally within the MCDO and the performance of  
6 people's duties within the MCDO, he -- the deputy can't speak to  
7 that?

8 LDC [MS. MILLER]: I mean, the deputy can speak to the  
9 operation of the MCDO, but I think the commission made a really  
10 important point in saying we're talking about operational and  
11 strategic decisions.

12 MJ [COL FITZGERALD]: But I mean strategic in an official  
13 capacity. Certainly every person in a similar situation as a chief  
14 or a commanding officer has to make decisions, but they understand  
15 the risks they bear in that position they hold. They understand that  
16 they are to operate without being concerned with fear or favor. I  
17 mean, they understand all those risks, and they make those strategic  
18 and operational decisions not for personal reasons, but for the  
19 execution of a mission.

20 So I guess that's why I'm at a loss. I know it may be in  
21 his head and nobody would be able to explain what's in his head  
22 better than him, but he is still talking about impact on the strategy  
23 and the operations of the organization. That information should be

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1 with the organization, not just with the individual.

2 LDC [MS. MILLER]: I respectfully disagree.

3 The motion is how the DOGE's interference has affected the  
4 MCDO. As the head of the MCDO, at least at the time, Brigadier  
5 General Jackie Thompson in his declaration -- and, again, and I say  
6 this in paraphrase -- basically said, "I'm out." He abdicated his  
7 power and authority as chief defense counsel. He did not designate  
8 Captain Record as his replacement, nor did he deputize -- well, he's  
9 already his deputy. He didn't make Deputy Chief Defense Counsel  
10 Darren Wall chief defense counsel in his stead. He said, "I am  
11 ethically conflicted and can no longer do what is in the best  
12 interest of our clients. I'm out."

13 And so I appreciate what the intention is that all of us, I  
14 would hope, acting in the defense of a human being's life would do  
15 things without worry of fear or favor, but everyone is a human being.  
16 And General Thompson in a moment of real vulnerability in that  
17 declaration said, "I acted because of personal concerns, not just for  
18 me, but for my family."

19 And I think that if we take a step back here, we can all  
20 appreciate he has two young children, how -- if his retirement were  
21 affected, how that potentially could affect his family. And he  
22 honestly said, "This is affecting my judgment making, judgment  
23 calling, and so I can't do this anymore."



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1 And so the only -- that's not an operational ----

2 MJ [COL FITZGERALD]: Wouldn't that ----

3 LDC [MS. MILLER]: That is the effect that DOGE had on the  
4 chief defense counsel, which ostensibly left the Military Commissions  
5 Defense Organization without a chief defense counsel. And so I  
6 just -- there is no way, as I've said before, to put what is in  
7 General Thompson's head before this commission for your  
8 consideration, which I think is appropriate, without the testimony of  
9 General Thompson.

10 MJ [COL FITZGERALD]: Well, let me ask you this and move on.  
11 I appreciate your words and comments and thoughts on that.

12 You filed this as a motion to abate, not a motion to  
13 continue, and we have some other motions to continue on the table.  
14 But you filed this as a motion to abate and you filed it in March.  
15 An abatement is a cessation of all proceedings. We're supposed to  
16 stop. Nobody can move forward on the case, as opposed to a  
17 continuance, which has more of a temporary nature.

18 And, you know, trying to understand where abatements work,  
19 you know, they work when there's no way of going forward on the case  
20 for any of the parties. Maybe it's jurisdictional, pursuant to  
21 personal jurisdiction, subject matter jurisdiction. Maybe it's an  
22 argument over venue or -- in civil litigation, it's a matter where  
23 you have concurrent litigation on the same matter being worked out in

1 another jurisdiction. And that's where an abatement would apply.

2 That's the remedy you sought, right? To abate these  
3 proceedings, not to continue them, not to stay them, which speaks to  
4 a sense of urgency. Yet at the same time, a March hearing and a May  
5 hearing, you tell me that the most critical and key witness serving  
6 in that capacity, speaking from an operational and strategic point of  
7 view about the organization, can't come testify before the  
8 commissions about his actions done on a professional basis -- not a  
9 personal basis, but a professional basis -- during either of those  
10 proceedings on your motion where you carry the burden to abate these  
11 proceedings. Would you like to speak to that?

12 LDC [MS. MILLER]: Sure. This has been a learning curve,  
13 assuming this position. One of the things that I learned is that the  
14 commission doesn't have contempt power. But one of the things the  
15 commission does have the power to do as sort of a analogous contempt  
16 remedy, is to abate proceedings.

17 I was trying to count through the docket how many motions  
18 for abatement have been filed on behalf of Mr. al Nashiri, and I lost  
19 count at a certain point, but it is not a small number.

20 And so abatement is the remedy that we seek because there is  
21 no other appropriate alternative remedy. And in AE 609, we really  
22 lay out two grounds. One, that what the DOGE is doing is affecting  
23 my effectiveness as learned counsel for Abd al Rahim, as well as the

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1 remainder of this team.

2           We also discuss that what the DOGE is doing is causing -- or  
3 is, in effect, having an unlawful command influence which, again, I  
4 think our conversation about the motion to compel sort of -- I'm  
5 trying to think of the right -- we went down that path towards a  
6 potential UCI-type motion based on these actions.

7           What I am telling the commission in AE 609 is that, again,  
8 the quality of representation that I am offering Mr. al Nashiri is  
9 currently below Strickland standards because I am dealing with  
10 DOGE-related activity more than I am dealing with the forward  
11 progress of his case.

12           Not having a chief defense counsel -- and so -- and the  
13 commission had said something to the extent of, well, how does this  
14 directly -- what the DOGE is doing, how does it directly impact the  
15 MCDO? Having a chief defense counsel who felt that he needed to  
16 abdicate -- that's the word I used -- the man has left the  
17 building -- because of DOGE's actions, I think certainly is ripe  
18 consideration for AE 609.

19           And so I wish the circumstances were different. I wish that  
20 people weren't being punished for speaking openly in opposition to  
21 this administration or to the DOGE, but that is not the circumstances  
22 in which we find ourselves. I never even asked General Thompson if  
23 he was available in May because I was of the impression that I would

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1 be allowed to submit the declaration from him in March and supplement  
2 his testimony with live testimony after his retirement 1 June.

3 And so I think that was probably a really circuitous answer.  
4 I'm not sure that I sufficiently did so.

5 MJ [COL FITZGERALD]: I understood that. Thank you.

6 Let me ask you this: The chief of MCDO does not have any  
7 clients himself, correct?

8 LDC [MS. MILLER]: That's correct.

9 MJ [COL FITZGERALD]: And Mr. Nashiri here today, that's not  
10 his client, correct?

11 LDC [MS. MILLER]: That's correct.

12 MJ [COL FITZGERALD]: I -- you made a comment, "best interest  
13 of our clients," and I took it for what you meant ----

14 LDC [MS. MILLER]: Okay.

15 MJ [COL FITZGERALD]: ---- and I just wanted to -- I wanted to  
16 clarify it for myself. So not to be any confused, he has no client  
17 representation in his capacity as the chief of MCDO?

18 LDC [MS. MILLER]: Correct.

19 MJ [COL FITZGERALD]: Okay.

20 LDC [MS. MILLER]: But because of his representation that he  
21 was no longer making decisions that were in the best interest of our  
22 clients, and I don't mean General Thompson's clients, I mean the  
23 clients of the MCDO, that he really shouldn't be acting in that

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1 authority.

2           Myself and fellow learned counsel on capital cases  
3 ostensibly said, "You no longer speak for us because," he said, "I  
4 cannot make the decisions necessary that would be in the best  
5 interest of the" -- perhaps I should have said defendants or  
6 detainees that the MCDO is representing, because of fear of  
7 retribution.

8           And, again, I would just emphasize I think it is a  
9 reasonable fear given what has transpired since 20 January until  
10 today.

11           MJ [COL FITZGERALD]: Let me ask you this -- and I understand  
12 you're not well-versed in military structures, organizations, how  
13 things are carried out, so you can certainly lean on one of your  
14 military folks. But you used the phrase that, too -- and if I  
15 misphrase, please correct me -- but you said, one, that he had  
16 abdicated his responsibilities as the chief of MCDO. And two, you  
17 used the paraphrase "he has left the building." In military  
18 parlance, if that ever happens with a chief or a command, I can only  
19 speak to the Army, I know the regulations, they are Army Regulation  
20 600-20. I'm sure all the services have something similar in that it  
21 addresses assumptions of command when somebody abdicates their role  
22 as a leader, somebody else assumes that.

23           Is there a date certain to this date of abdication or

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1 General Thompson having left the building?

2 LDC [MS. MILLER]: No. And I would say I used those words.

3 General Thompson went on terminal leave 1 April 2025. The  
4 purported acting chief defense counsel was here prior -- was  
5 physically in the building prior to 1 April 2024 **[sic]** with no legal  
6 authority. His flawed appointing memorandum -- or designation  
7 memorandum, I suppose, was not done until 24 April with a backdate to  
8 1 April 2025.

9 And so General Thompson in that interim between 1 April and  
10 24 April continued to sign things as the chief defense counsel  
11 despite the fact that he was physically not in the building.

12 Again, and I don't want to use "abdicate" in a way that you  
13 understand it as a military officer that I don't intend. I'm  
14 referencing, again in paraphrase, General Thompson's declaration  
15 wherein he said, "I am ethically conflicted and no longer making  
16 decisions that are in the best interest of the clients of the MCDO."

17 And so to me, I interpret that as, well, if you as the chief  
18 defense counsel can't make decisions because of an ethical conflict  
19 that are in the best interest of the people the organization  
20 represents, then you have abdicated. And so that's how I use that  
21 term. If there's a different parlance in military, that's not how I  
22 intended.

23 MJ [COL FITZGERALD]: No, ma'am. That's why we have these

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1 discussions. So I understand. You're not using it in the military  
2 sense, so ----

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

4 MJ [COL FITZGERALD]: The other question I have for you,  
5 you -- again, I had mentioned earlier that -- and a motion to abate  
6 is seeking very different relief than a motion to continue, a motion  
7 to stay. It's a full stop, shut off the engine, we sit here not in  
8 idle. Sorry. I do like metaphors, right? So ----

9 LDC [MS. MILLER]: I do, too, sir.

10 MJ [COL FITZGERALD]: And the whole purpose of a motion to  
11 abate generally, again, as I looked at the case law, it's for  
12 resolving things like concurrent litigation, personal jurisdiction,  
13 subject matter jurisdiction, changes in the venues, things that  
14 there's a finite resolution to.

15 The title of your motion was a motion to abate until DOGE  
16 completes dismantling the Department of Defense. What would be the  
17 date certain of that? How would I know when we've hit a benchmark?

18 Because you said you wanted -- I can't remember now the date  
19 without looking it up. But, again, the title of it was until  
20 defense -- until DOGE completes dismantling the Department of  
21 Defense. That seems like a rather vague restart date where we can  
22 turn back -- turn on the engine again, pull the emergency brake, and  
23 start driving.

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1           So help me understand how you both seek an absolute remedy  
2 with a vague and nebulous terminus.

3           LDC [MS. MILLER]: The DOGE made reference to 4 July 2026. If  
4 I can have just a moment, I can reference where that is in AE 609,  
5 which is why -- oh, excuse me. The relief requested, "the defense  
6 respectfully requests an abatement of all proceedings until 4  
7 July 2026." And that was based on the representation from the DOGE  
8 that these things would be accomplished by 4 July 2026, which is why  
9 I believe I need 18 to 24 months to prepare for trial, assuming DOGE  
10 stops interfering or dismantling the Department of Defense with great  
11 effect on the Military Commissions Defense Organization.

12           But that is why in 604B I asked for a continuance till 4  
13 July 2028, because it was 24 months after the DOGE representation  
14 that DOGE would be done with whatever their endgame is by 4  
15 July 2026.

16           MJ [COL FITZGERALD]: And I guess to that point is, you know,  
17 as anybody who's served in the United States military during 20 years  
18 of persistent conflict with at least three, if not four, changes of  
19 administration, how is this any different than -- we've had changes  
20 of administration with the Department of Defense, and it serves  
21 as -- are expected to just continue on with their mission?

22           Again, your title was until DOGE dismantles the DoD. That's  
23 a rather vague term. So how is this any different than any other



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1 time where we've had a change in administration, you know, a forced  
2 restructuring, revisited the defense budget?

3 These are all normal processes. We've had reductions in  
4 forces. We've had stand-downs. We've had transformations. All  
5 those terms that are very common to the military.

6 And you use a lot of very extreme language with this  
7 particular administration change. And I'm not saying they're not  
8 warranted, but anybody in the military who's gone through these  
9 transformations just understand that we continue to do the nation's  
10 defense work and homeland security work and national security work  
11 through those transformations.

12 So how is this any different? Because I would note that  
13 it's not just the defense that's gone through this transformation and  
14 this administrative change, but the -- also the military commissions  
15 as a whole, including the prosecution, the judiciary, the OCA.

16 There's a lot of folks who are paying attention to the  
17 various aspects of this administration change. So how is the defense  
18 not similarly situated to everybody having to adjust to an  
19 administration change?

20 LDC [MS. MILLER]: Sure. And I sort of anticipated this  
21 question and, wanting to further understand it myself, have spoken to  
22 some of the learned counsel who have been here through it all.  
23 Right?

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1           And we've gone from Bush to Obama to Trump. I mean, we've  
2   had a number of transitions that affected a partisan change, to Biden  
3   back to Trump -- right? -- and the commissions have sort of just  
4   continued to persist.

5           And as the commission asks me that question and indicates  
6   that it's also affected the commission staff, I think to a certain  
7   extent you could probably answer that question a little bit yourself.

8           My understanding at this point is that President Trump has  
9   signed a -- upwards of a hundred-plus executive orders. I don't  
10   believe that that's ever been done in the course of history in any  
11   presidential administration overriding congressional authority.

12          And I think when I argued -- not "I think." When I argued  
13   the motion to compel the witnesses related to AE 609, there are  
14   things that DOGE has done that are having a tremendously detrimental  
15   effect on the MCDO in particular.

16          And what I said to the commission at the time was: Is that  
17   the intention? Is that the feature? Or is it a bug? And I made  
18   reference to Secretary Hegseth's seeming disdain for JAG officers by  
19   calling them "JAG-offs."

20          And so I have, I think, a reasonable concern that perhaps  
21   the Department of Defense, with DOGE direction, is targeting the  
22   lawyers. And that's where things are happening at the MCDO that are  
23   more detrimental to our practice than other places. The government

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1 is just simply not similarly situated.

2           And I think I indicated this to the commission before.  
3 Every one of the civilians on Team al Nashiri, on the defense team  
4 for al Nashiri, are term employees. Part of the OPM memo by  
5 Mr. Vought about the reduction in work force detailed that one way to  
6 do so, a tool to reducing the work force, would be to not renew the  
7 terms of term employees at the end of their terms. Every one -- and  
8 I said to the commission then -- every one of the civilians on this  
9 team's term expires before that former 6 October trial date, with the  
10 exception of Mr. Roy, our DISO, whose term expires during that, what  
11 would have been the 6 October trial date.

12           And so every employee whose term comes up for  
13 expiration -- we've had two now -- we have to justify why that person  
14 is mission critical, and we wait with breath that is baited to see if  
15 their term is extended.

16           The next one is Ms. Katie Carmon, whose term I believe  
17 expires 24 May 2025. I'm certain she can correct me. But we will  
18 learn the day prior if Ms. Carmon will remain employed as a member of  
19 this defense team.

20           And so I believe, with the exception of Mr. Wells -- and I'm  
21 certain they can correct me if I'm wrong -- all detailed counsel on  
22 the government's team are military. And so even if these commissions  
23 ceased to exist, if you're in the Navy, you're still going to be in

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1 the Navy. But the civilian employees are at a real risk. I mean,  
2 it's not a secret that the administration as a whole wants to reduce  
3 the federal work force. It is not a secret the Department of Defense  
4 has adopted that mentality and has adopted the tools suggested by  
5 Russell Vought, who I quoted Mr. Vought as saying that he wanted to  
6 put federal employees in trauma, and that's what they've done.

7 I mean, that's -- that's the reality of the circumstances  
8 that we're in, is that the DOGE has crushed the morale, not just of  
9 the MCDO I would concede, to incentivize people to leave. And that  
10 has worked. Members of our team applied for the deferred retirement  
11 program. They were denied acceptance into the deferred retirement  
12 program by the purported acting chief defense counsel, Art Record,  
13 but the plan is working. But so to say that we are similarly  
14 situated to the government is not an accurate reflection. And  
15 there's nothing the commission can do.

16 So if Ms. Carmon's term is not extended, what do we do after  
17 the fact? I mean, the only thing we can do is to ask the commission  
18 to abate now and hope that someone recognizes the effects that these  
19 actions are having on the MCDO.

20 And I think I also laid out in great detail, we have lost  
21 one remote worker and one on-boarding remote worker, and why I would  
22 say that the President's return to in-person work policy mandate has  
23 a greater effect on the MCDO is that we work in spaces that are

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1 designed to protect national security. We cannot have foreign  
2 nationals come into certain parts of our office space. We cannot  
3 engage in Zooms or Teams meetings with a camera or a microphone  
4 inside certain areas of our office space. And now we are not  
5 permitted to work remotely.

6 And so reconciling how we're supposed to communicate, for  
7 instance, with Mr. al Nashiri's family has become an even greater  
8 challenge. And so there are -- that's what I respectfully disagree  
9 with the commission denying the request to compel the witnesses that  
10 we asked for because, again, I think only they can answer if I am  
11 telling the commission that the MCDO is being specifically targeted.  
12 Only those witnesses can answer if that's the intent, if that's the  
13 feature, or if that's just happenstance to what is occurring.

14 MJ [COL FITZGERALD]: Thank you, Ms. Miller. I think you've  
15 spoken to some unrealized risk, and I'll just use Ms. Carmon as an  
16 example. Again, I also don't know the date of her end of term.

17 But one question I would ask is: Do you know percent-wise  
18 or numbers-wise the number of total members of term hiring to  
19 complete Office of Military Commissions? I know you spoke to the  
20 prosecution having mostly uniformed people, but this whole operation  
21 relies heavily on a civilian support and resources staff, including  
22 the judiciary and the court administration. Do you know how many of  
23 them are also term hires?

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1 LDC [MS. MILLER]: I don't. I'm certain I could easily find  
2 that out, but my suspicion is that probably most everyone is a term  
3 employee. I think the intent was this wasn't going to last this  
4 long, and so it was unnecessary. That's my assumption. But I don't  
5 have that figure at my fingertips, but I can certainly find that out  
6 I think readily easily.

7 MJ [COL FITZGERALD]: That's fine. And you also -- again,  
8 going back to Ms. Carmon's point is that seems like an unrealized  
9 risk at this point. We don't know.

10 So has there been any realized loss besides the one that  
11 you've already mentioned or adverse impact on the team in U.S. v.  
12 al Nashiri?

13 LDC [MS. MILLER]: Yes. I mean -- and, again, I don't want to  
14 reiterate the points that I've already made if this is what the  
15 commission was referring to, but Dr. Michel Paradis' last day is, in  
16 fact, today. He's quitting today. He has the longest standing  
17 attorney-client relationship with Mr. al Nashiri of any of the team  
18 members by a decade.

19 MJ [COL FITZGERALD]: And to be clear, he has an  
20 attorney-client relationship outside of being a member of this  
21 current defense team here in the commissions, correct?

22 LDC [MS. MILLER]: I would disagree with that representation.  
23 Our resource counsel aren't any less critical.

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1 MJ [COL FITZGERALD]: I'm just clarifying. He's not a  
2 detailed member of the defense team ----

3 LDC [MS. MILLER]: That's true.

4 MJ [COL FITZGERALD]: ---- in the commissions. I don't doubt  
5 his hard work and his efforts. But I just -- he's never appeared on  
6 the record here.

7 LDC [MS. MILLER]: He has appeared on the record not  
8 before ----

9 MJ [COL FITZGERALD]: As a member of Mr. al Nashiri's defense  
10 team before the commission?

11 LDC [MS. MILLER]: Yes, sir. I couldn't tell you the last  
12 time. It was when Rick Kammen was learned counsel. It has been  
13 certainly some time. But at one point, yes, he was detailed counsel  
14 to this.

15 MJ [COL FITZGERALD]: Okay.

16 LDC [MS. MILLER]: And then was undetailed because of an issue  
17 with his representation of Mr. al Bahlul.

18 MJ [COL FITZGERALD]: Okay. And so his -- when you talk about  
19 his representation, it's in other matters besides the matter in front  
20 of this commission?

21 LDC [MS. MILLER]: No, sir. I guess maybe I'm not  
22 understanding the commission's question. But ----

23 MJ [COL FITZGERALD]: All right. I just want the record to be

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1 clear. He is not -- when we announce the members who are here for  
2 the defense team ----

3 LDC [MS. MILLER]: Sure.

4 MJ [COL FITZGERALD]: ---- in every session that I have  
5 conducted in the six sessions I've conducted, he has never been  
6 announced as a member of this defense team, either here or in the  
7 Remote Hearing Room?

8 LDC [MS. MILLER]: Sure. But, I mean, Ms. Hensler is sitting  
9 right in front of you as resource counsel, Major Ken Hynes ----

10 MJ [COL FITZGERALD]: Not -- and won't appear on the record on  
11 behalf of Mr. al Nashiri?

12 LDC [MS. MILLER]: Correct.

13 MJ [COL FITZGERALD]: Okay.

14 LDC [MS. MILLER]: And so I would agree with you to the extent  
15 that Dr. Paradis is not detailed counsel and has not appeared before  
16 this military judge presiding over this commission, that has not  
17 always been the status of his role on this case.

18 MJ [COL FITZGERALD]: Okay. Okay, and he was released from  
19 representation in these commissions in some fashion?

20 LDC [MS. MILLER]: No, sir. He was undetailed because ----

21 MJ [COL FITZGERALD]: And that was approved by the commission?  
22 I don't know. I'd have to go back and look at the record.

23 LDC [MS. MILLER]: Yes. And those were the pleadings that we



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1 gave the court the last time we were before Your Honor. I believe it  
2 was AE 051, if I recall correctly, but I could be off.

3 Yes, the government actually raised the issue because Dr.  
4 Paradis was also representing Mr. Bahlul who is potentially, I  
5 suppose, a witness against Mr. al Nashiri. And so Dr. Paradis agreed  
6 to withdraw as detailed trial counsel, but he remained in an  
7 appellate habeas or resource counsel capacity.

8 And so, frankly, for me he has been one of the most  
9 helpful -- I mean, he knows everything there is to know about the  
10 commissions. He's been here forever. And so in getting me up to  
11 speed, he has been one of the most helpful people. He has  
12 participated in drafting the pleadings that we have filed before this  
13 commission.

14 And so I don't want to minimize his role to this team. I  
15 mean, he traveled with us to GTMO April 15th through the 18th, and  
16 met with Mr. al Nashiri while he was there, of course. I don't want  
17 to minimize his role on this team because he's not detailed trial  
18 counsel. Our resource counsel often contribute more than our  
19 detailed counsel do -- with no slight intended to the detailed  
20 counsel, we just have outstanding resource counsel.

21 MJ [COL FITZGERALD]: I understand. I just wanted to make  
22 sure I was clear about the distinction. But thank you.

23 I've had you up there a long time, Ms. Miller. I have one

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1 last question. So the second part of your brief, and I know you've  
2 called it UCI here, but it's not a command issue, it's an unlawful  
3 influence pursuant to the Military Commissions Act. And you've cited  
4 that the motion to abate should take into consideration this unlawful  
5 influence.

6 Is there any case law authority -- and you probably would  
7 have to look at military case law. I don't think the situation would  
8 apply in most civilian courts -- where abatement is the remedy if  
9 there is unlawful influence in a commissions proceeding?

10 Because I will tell you, ordinarily what I would say in an  
11 unlawful command influence, it would be considering dismissal with or  
12 without prejudice or some other remedy because you're saying the  
13 entire process is tainted. So it's peculiar that I'm looking at  
14 unlawful influence but the remedy being sought is abatement.

15 Would you like to address that?

16 LDC [MS. MILLER]: I'm not aware of any case law. I could  
17 certainly look into it. I think abatement is the appropriate remedy  
18 because this could be remedied. I hope -- again, what we're asking  
19 for is not abatement in perpetuity. We're asking for abatement until  
20 the DOGE stops dismantling or interfering with the Department of  
21 Defense, which is having a specifically negative effect on the  
22 Military Commissions Defense Organization.

23 And I think we had this conversation, too, during the motion

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1 to compel that we intend to do -- I think it might have actually been  
2 at the commission's suggestion that counsel, with military counsel,  
3 and file a more specific UCI motion related to the DOGE interference.

4 But why I see abatement as the appropriate remedy right now  
5 is because I can't do my job effectively right now. That at some  
6 point, hopefully in the very near future, if we rely on DOGE, it's 4  
7 July 2026, but that will hopefully come to an end, and then we'll be  
8 left to pick up the pieces where they are.

9 And so I appreciate the commission saying that, like,  
10 Ms. Carmon's potential termination is an unrealized threat. But,  
11 again, there's nothing the commission can do if that were to happen.  
12 If her term was not to be extended and she was no longer a member of  
13 this team, we're just out of luck.

14 And so that's why recognizing one of the few tools that you  
15 have in your toolbox is abatement, that's why I filed this motion,  
16 because abatement is the appropriate remedy to put a stop to this  
17 while all of this is going on.

18 MJ [COL FITZGERALD]: And if that were true, then, that would  
19 be true of every term hire regardless of the current situation with  
20 DOGE's intent or the SECDEF's intent, wouldn't it? I mean, if ----

21 LDC [MS. MILLER]: No.

22 MJ [COL FITZGERALD]: ---- everybody's a term hire, it's  
23 essentially saying nobody has a guaranteed job beyond the terminus

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1 date of their contract.

2 LDC [MS. MILLER]: Sure.

3 MJ [COL FITZGERALD]: That would be true every time every  
4 administration change, every -- if the last president had won the  
5 reelection, it would still be true because the contract terminates on  
6 a certain date.

7 So that's what I mean by unrealized risk, unrealized threat.  
8 We would always have that with every term hire.

9 LDC [MS. MILLER]: Right. But I respectfully disagree that  
10 it's been the same. I mean, acting like this change in  
11 administration as the same as the transition from Trump to Biden I  
12 think would be disingenuous.

13 We have never had a transitional change -- a presidential  
14 transition change where the stated goal of the president was the  
15 reduction in workforce to the extent that the President has indicated  
16 that the work -- federal workforce is going to be reduced.

17 And the person who wrote the memo, Mr. Russell Vought,  
18 indicated that he wanted to put federal civilian employees in trauma,  
19 which is what they have succeeded in doing. The morale has been  
20 crushed. That has never been the goal, to my knowledge, of any prior  
21 presidential transition.

22 And so, again, the deferred retirement program, the  
23 term -- and in that memorandum that I continue to cite, one of the

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1 tools for reduction in workforce is to not extend term employees at  
2 the expiration. To my knowledge, that has never been something that  
3 any prior president has said as a stated goal of the administration  
4 in a transition.

5 MJ [COL FITZGERALD]: And to be clear, Mr. Vought's statements  
6 were made prior to 20 January of this year?

7 LDC [MS. MILLER]: Correct.

8 MJ [COL FITZGERALD]: And ----

9 LDC [MS. MILLER]: His -- but his memo that he wrote where he  
10 discussed the reduction in workforce and tools available to reduce  
11 the workforce were in an acting capacity under this administration  
12 after 20 January of 2025.

13 MJ [COL FITZGERALD]: And has the Secretary of Defense enacted  
14 anything akin to those words as policy of the Department of Defense?  
15 Meaning, "Hold my personnel in trauma while we do this reduction in  
16 force." Has there been anything like that from the Secretary of  
17 Defense?

18 LDC [MS. MILLER]: I don't believe that the Secretary of  
19 Defense has used that exact verbiage that he wanted to put his  
20 federal civilian employees in trauma, but I believe the indication is  
21 that the federal workforce is going to be reduced by 5 percent over  
22 five years.

23 I mean, he's certainly adopted -- and that's where -- and I

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1 think that what the commission should consider is what Secretary  
2 Hegseth has done is distinguishable from what other cabinet members  
3 have done.

4 Secretary Rubio heard what DOGE had to stay and has not  
5 adopted the same policies and procedures for the State Department,  
6 which isn't to say that there's not a reduction in workforce at the  
7 State Department. There is.

8 But Secretary Rubio did not -- for instance, when we first  
9 got the "Please send us your five bullet points of what you've been  
10 doing at work this week," the State Department said no.

11 The Department of Defense adopted a version of that OPM  
12 directive, and now we are under a Department of Defense directive to  
13 provide five bullet points to some nebulous e-mail as to what we've  
14 done that week.

15 But -- so I would say that Secretary Hegseth has  
16 demonstrated an alignment with the DOGE that is not consistent with  
17 all of the cabinet members.

18 MJ [COL FITZGERALD]: Thank you, Ms. Miller.

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

20 MJ [COL FITZGERALD]: I guess my last point, I think I meant  
21 to get back to it and I didn't, regarding -- I know we -- poor  
22 Ms. Carmon keeps being the target because I think she has the most  
23 current date.

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1 LDC [MS. MILLER]: She's just next.

2 MJ [COL FITZGERALD]: Has there -- any term employees had  
3 their terms renewed since you have filed this motion?

4 LDC [MS. MILLER]: Yes, sir. One of our analysts -- actually,  
5 two of our analysts, Rachel Pinate and James Anderson, who functions  
6 in kind of a dual role as an analyst and also providing support as a  
7 DISO.

8 MJ [COL FITZGERALD]: And those -- were those renewals  
9 automatic, or was there a process where they had to justify extension  
10 of the term or renewal of a term?

11 LDC [MS. MILLER]: Part of the process was what I understand  
12 to be the automatic process -- right? -- where their supervisors are  
13 contacted directly to say, "Do you wish to extend this person's  
14 term?"

15 We provided justifications, extensive justifications, for  
16 both of those employees because of a fear of losing them because of  
17 Mr. Vought's memo.

18 MJ [COL FITZGERALD]: Thank you. I have no further questions  
19 for you, Ms. Miller. I appreciate your time and all your responses  
20 today. I'm ----

21 LDC [MS. MILLER]: Can I have just one moment, sir, to confer  
22 to make sure I didn't miss anything?

23 MJ [COL FITZGERALD]: What I was about to say, would you like

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1 a moment to confer with your team and give me your final thoughts?

2 Are you fine with ----

3 LDC [MS. MILLER]: Yes, sir. I would.

4 MJ [COL FITZGERALD]: ---- that?

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

6 **[Counsel conferred.]**

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

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

9 Government, I know you may be chomping at the bit, but I  
10 think a recess is warranted at this point.

11 TC [CAPT STINSON]: Sounds good, Your Honor.

12 MJ [COL FITZGERALD]: I'm going to take a little longer  
13 recess, because I know I put a lot of information out there. We just  
14 had a discussion. Would 1120, so 30 minutes be sufficient?

15 TC [CAPT STINSON]: That works for the government, Your Honor.

16 DC [CDR BARTHOLOMAUS]: I concur, Your Honor.

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

18 Commission is in recess for 30 minutes.

19 **[The R.M.C. 803 session recessed at 1049, 05 May 2025.]**

20 **[The R.M.C. 803 session was called to order at 1123, 05 May 2025.]**

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

22 All parties present before the last recess are again  
23 present.



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1 Government, do you have argument?

2 TC [CAPT STINSON]: Yes, Your Honor. And I do intend to be  
3 brief. I agree with Ms. Miller that some of the arguments from the  
4 last session in March covered much of the substance here, and the  
5 government would incorporate its prior arguments in relation to 604B.

6 In relation to AE 609, the commission should deny the  
7 defense's motion to abate the proceedings based on the impact of the  
8 Department of Governmental Efficiency, DOGE or "Doggie," or however  
9 people say that.

10 The defense argues that the impact from DOGE on the defense  
11 team requires that the commission cease all activity until July 4,  
12 2026, until -- or until DOGE has finished dismantling the Department  
13 of Defense. That relief is completely unsupported by the record and  
14 the commission should deny the motion at this time.

15 Much of counsel's argument amounted to, in effect, a motion  
16 for reconsideration to this commission's ruling regarding the motion  
17 to compel the witnesses. The defense has had ample opportunity after  
18 filing a motion to abate which, as the commission has correctly  
19 noted, is an emergency. It's an urgent motion to cease all  
20 proceedings. And they have had ample opportunity to provide  
21 testimony or evidence that would support their burden in abating the  
22 proceedings, and they have failed to do so.

23 They have submitted an 11-page declaration from Brigadier

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1 General Thompson. And we would note, as we have indicated in the  
2 pleadings, Brigadier General Thompson is still on active duty. He  
3 does not effectively retire until 1 June.

4 I understand he may be going through his checkout with the  
5 Department of Veteran Affairs. That does not mean he is unavailable  
6 and this commission has not found him to be unavailable. And the  
7 government's position is that he was available and could have  
8 testified had he wanted to.

9 And in any event, as the commission has noted, the impact is  
10 really what matters here, what has been the impact to the defense  
11 team. And for a number of reasons, there's been almost no impact to  
12 the defense team. It's certainly not an impact to justify either an  
13 abatement or a motion for a continuance.

14 The defense is effectively requesting that we call Brigadier  
15 General Thompson to testify now in either November or December, and  
16 the prosecution's view is it would be completely irrelevant in  
17 November or December. He would be out of the Military Commission  
18 Defense's Organization.

19 He would have no role in relation to the defense's team,  
20 ability to prepare for trial. He would not have any information that  
21 would be relevant, material, or necessary for this commission, and  
22 certainly nothing beyond what the commission already has in the form  
23 of his affidavit.

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1           So addressing the reasons for an abatement, the defense  
2 points to the efforts of DOGE and Brigadier General Thompson's  
3 affidavit, but there's nothing in relation to DOGE or in the  
4 affidavit that would justify an abatement.

5           And the rules talk about an abatement in addition to the  
6 matters that Your Honor has talked about in relation to witness  
7 availability. And if a witness is unavailable and that  
8 unavailability has been caused by the government, the commission may  
9 abate the proceedings until that witness availability is addressed.

10          But even granting the commission's inherent authority in  
11 relation to the conduct of the proceedings, there's simply nothing in  
12 any of these pleadings that would justify the drastic remedy of an  
13 abatement. And the defense's proffered marker of July 4th, 2026, or  
14 when the Department of Governmental Efficiency has finished  
15 dismantling the Department of Defense, is just not supported by  
16 anything in the record. It is amorphous. It is hyperbolic. There's  
17 nothing in the record that would support ceasing these proceedings.

18          If the commission interprets the defense motion as a request  
19 for a continuance, the defense has not carried their burden in that  
20 regard either.

21          While the defense has described areas of possible concern  
22 regarding what the Department of Defense does in relation to their  
23 review, there really has been no significant impact to the defense

1 team at this point of the proceedings despite, again, the hyperbolic  
2 nature of the pleadings.

3 And with the change in the administration, some change must  
4 be anticipated and impacts everyone: the trial judiciary, the  
5 government, and the defense counsel. But there's been no indication  
6 that, for example, federal criminal trials have had to come to a  
7 crashing stop because of the Department of Government Efficiency, nor  
8 courts-martials.

9 If the defense has a specific area of impact or if they  
10 require commission intervention to remedy a particular deficiency in  
11 their team, they certainly know how to and they have moved for  
12 relief.

13 And we would point Your Honor to the record in this case.  
14 Since the inauguration of the new administration of President Trump,  
15 the defense has filed dozens of pleadings in this case, including  
16 multiple motions to compel, motion to compel witnesses, motion to  
17 relief, motions to dismiss, two motions to abate. So there's  
18 not -- demonstrably there's not been any impact on the defense team  
19 that would justify an abatement and a further delay of the trial date  
20 here.

21 And we note that despite the time between the filing of this  
22 motion to abate and this argument, which has been several months, the  
23 defense has not been able to point to any additional impact to their

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1 team beyond an investigator who was in the process of onboarding and  
2 decided he didn't want to relocate from Florida and an appellate  
3 counsel who apparently had for some period of time been doing his  
4 work through telework or remote work agreement and decided to take  
5 another position in New York when the ability to work remotely was  
6 rescinded and, again, subject to request for waivers or exemptions.  
7 And there's no indication whether or not that was even sought here.

8 But even if those personnel decisions were related to  
9 DOGE -- and I think there are some questions about that connection  
10 here -- that type of personnel movement on a trial team is simply not  
11 sufficient to carry the burden for the drastic remedy of abatement or  
12 again to further delay the trial of this matter, which the government  
13 would note -- I know we've said this over and over again -- has been  
14 pending since 2011, so 14 years for the family and the victims of the  
15 attack on the USS COLE.

16 The defense relies heavily on the affidavit of Brigadier  
17 General Thompson, who recently retired, and they indicate that he was  
18 concerned about retaliation and his ability to exercise independent  
19 from government-wide directives regarding remote and telework  
20 requirements for federal employees.

21 The government notes that the Department of Defense -- and  
22 Ms. Miller noted this as well -- has now named Captain Warren "Art"  
23 Record as the chief defense counsel effective 1 April 2025.

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1           The defense has recently filed an additional motion to  
2   abate. And Ms. Miller talked about she lost count of exactly how  
3   many motions to abate have been filed in this case, and we think it's  
4   around 23 or so motions to abate over the history of these  
5   proceedings, in addition to multiple motions to continue or motions  
6   for additional delay by the defense team over time.

7           But they filed an additional motion to abate the proceedings  
8   at AE 622, challenging the appointment of Captain Record as chief  
9   defense counsel and arguing that the appointment violated the  
10   provisions of the Military Commissions Act that required the  
11   appointment to be by the Secretary of Defense and for the chief  
12   defense counsel and the chief prosecutor to have the same grade.

13           Your Honor, we'd cite to that at 10 U.S.C. 948k. There's a  
14   note that comes out of the 2014 National Defense Authorization Act,  
15   1037. So the note is just reflecting that provision.

16           It says, hey, typically, unless waived, the chief defense  
17   counsel and the chief prosecutor should have the same grade. The  
18   prosecution is still in the briefing cycle, so we'll respond to that.  
19   We do note -- and we shared this with defense counsel -- that the  
20   Secretary of Defense on 23 April did waive the in-the-same-grade  
21   requirement and notified the relevant congressional committees of  
22   that waiver, and we will file those documents with our response.

23           And again, as it relates to that appointment, I think the

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1 defense has also challenged the authority of the general counsel to  
2 make that appointment. And the prosecution's walled off, obviously,  
3 from the selection and appointment of the chief defense counsel.

4 But we would note -- and just so that we have it  
5 here -- that the Department of Defense Directive 5145.01, which is  
6 from January -- the current version is January 17th, 2025, Section 4  
7 of that directive contains a very broad and explicit delegation of  
8 authority from the secretary to the general counsel that on its face  
9 would appear to permit the general counsel's appointment of the chief  
10 defense counsel, and again, subject to the secretary's waiver of the  
11 in-grade requirement.

12 So again, we'll cite to that. But this appears to be a  
13 transition period. You know, they are moving through that. We  
14 understand that. But there does not appear to be anything in the  
15 record or that's been submitted that would cause concern from the  
16 normal transition from Brigadier General Thompson to the next chief  
17 defense counsel.

18 And Your Honor pointed to some of those issues. That, hey,  
19 these are organizational decisions. This wasn't Brigadier General  
20 Thompson as an individual making decisions about remote or telework.  
21 It was an organizational decision: Hey, I've gotten this directive  
22 from above. I want to exercise some personal authority about who can  
23 remote and do telework. The defense put in the e-mail from

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1 Mr. Harvey. And they've indicated now there's two e-mails that says,  
2 well, you've got to follow the general rules. You know, the waiver  
3 has to go up to the secretary. That's not your call. That is, you  
4 know, under the new policy, if you want a waiver from the telework  
5 requirements, follow the procedures to get a waiver.

6 That seems administrative and trivial, but also  
7 organizational. So what Brigadier General Thompson thinks about  
8 that, what he thinks about that e-mail is completely irrelevant to  
9 this commission. The question is: What is the impact on the defense  
10 team? What is the impact on Mr. Nashiri's representation? Does he  
11 have effective representation?

12 There's nothing that Brigadier General Thompson is going to  
13 say in six months that would impact this defense team's availability  
14 and ability to represent Mr. Nashiri. And again, if they have  
15 specific relief that they need, they can come to the commission and  
16 ask for it.

17 Your Honor asked them about unrealized risks. And  
18 Ms. Miller indicated, I think frankly, that that's correct, that  
19 these term employees, just as they would at any time, at the end they  
20 may have to justify the renewal of that contract. But again, to your  
21 question, Your Honor, the two that have come up, they justified them  
22 and they were renewed.

23 So again, this is concerns about unrealized impacts, not



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1 real and true impacts to the defense team.

2 And Your Honor offered at the last session the ability of  
3 the -- for the defense to file an unlawful influence motion if they'd  
4 felt they had a basis to claim unlawful influence, to file something  
5 specific to that, and the defense has not filed an unlawful influence  
6 motion. Mostly because there's no unlawful influence, even assuming  
7 that that affidavit from Brigadier General Thompson was truthful and  
8 accurate -- no reason to think that it wasn't -- that he felt, "Hey,  
9 I'm concerned about my personal issue."

10 He's not representing Mr. Nashiri here. There's no unlawful  
11 influence on that individual. There's no unlawful influence on  
12 Ms. Miller or unlawful influence that impacts this team's ability to  
13 effectively represent Mr. Nashiri.

14 That's not to say there haven't been impacts from the  
15 Department of Governmental Efficiency, generally there are. There  
16 are impacts anytime there's been a change in administration. If  
17 there's a reduction in force for this department or that department,  
18 it's been very public that some departments are going to get an  
19 increase in funding. Some departments are going to get a reduction  
20 in funding. That doesn't mean we stop trial. That doesn't mean the  
21 victims and the family members of the COLE attack have to wait for  
22 effectively two years again before we can even start up. Those type  
23 of generalized grievances about the new administration generally or

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1 about DOGE in particular do not justify these proceedings being  
2 halted or any further delay in the trial date.

3 We should move forward with the new trial date of 1  
4 June 2026, and then move that trial forward until the case is  
5 completed.

6 If I may have a moment, Your Honor?

7 MJ [COL FITZGERALD]: You may.

8 TC [CAPT STINSON]: Okay.

9 **[Counsel conferred.]**

10 TC [CAPT STINSON]: Nothing further from the government, Your  
11 Honor.

12 MJ [COL FITZGERALD]: I posed the question to Ms. Miller, I'll  
13 pose it to you as well. Are you familiar with percentage-wise or  
14 numbers-wise how many people in the framework of the Office of  
15 Military Commissions are term hire?

16 TC [CAPT STINSON]: So I don't want to shoot from the hip on  
17 that, Your Honor. My understanding anecdotally is that either all or  
18 almost all of the civilian employees in that construct are on term  
19 contracts. But that was an anecdotal sort of discussion, yes, sir.

20 MJ [COL FITZGERALD]: Have there -- is the government also  
21 required to complete the -- the five-bullet-point weekly response?

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

23 MJ [COL FITZGERALD]: Is the remote work requirements

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1 applicable to the OCP as well?

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

3 MJ [COL FITZGERALD]: Has that had an adverse impact? Or has  
4 it had an impact -- has it happened? Have you had to rescind that  
5 and ----

6 TC [CAPT STINSON]: They changed the policy. I think most of  
7 the Office of the Chief Prosecutor folks were in the office normally.  
8 I think there's been a change in the policy regarding situational  
9 telework versus, you know, every -- like a particular day that  
10 somebody may have had it.

11 So I do think the policy changed and the approval level  
12 changed. I don't think that our office -- at least the Nashiri  
13 team -- was leveraging telework that frequently in any event. But  
14 the policy and the approval levels regarding the ability to use  
15 telework have changed since the new administration for sure.

16 MJ [COL FITZGERALD]: Regarding unlawful influence, and I've  
17 read the pleadings and the suggestion in that, or the -- well, the  
18 statement of it from the government is that that was written in there  
19 by a Colonel Larry Morris at the time to ensure there was no  
20 politicization of the government function and the prosecutorial  
21 function. Am I phrasing that accurately, the response from the  
22 government?

23 TC [CAPT STINSON]: I think that's right, yes, Your Honor.

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1 MJ [COL FITZGERALD]: Do you see that the unlawful influence  
2 applies broadly both to the government and the defense, that nobody  
3 can influence these proceedings for either counsel?

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

5 MJ [COL FITZGERALD]: I'm thinking in military terms because  
6 it's a -- probably the closest thing we have is unlawful command  
7 influence. And we're obviously not dealing with commands, but we're  
8 dealing with unlawful influence in the same vein, right? So does the  
9 prosecution have an obligation to ensure that the process is not  
10 influenced illegally or unlawfully as a general concept?

11 TC [CAPT STINSON]: As a general concept, yes, Your Honor.

12 MJ [COL FITZGERALD]: So if you were a prosecutor in a  
13 court-martial, for example, you would have that independent  
14 obligation to ensure that there was no influencing, unlawful  
15 influencing of any part of the proceeding, correct?

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

17 MJ [COL FITZGERALD]: Including to the uniformed defense  
18 attorneys or civilian defense counsel who may come on board to  
19 represent a servicemember?

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

21 MJ [COL FITZGERALD]: And so I'm asking that in the vein that  
22 you've now seen that the defense has, although not filed an unlawful  
23 influence brief, they made a part of their argument for a motion to

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1   abate. Having seen that, did that cause any concern for the  
2   government in its sua sponte obligation to ensure there's no unlawful  
3   influence in these proceedings by the United States? Did you see any  
4   pause that you would think something looked like unlawful influence?

5           TC [CAPT STINSON]: So it caused pause in relation to two  
6   things. One, I do think there was some inference. I don't think it  
7   was properly raised in the pleadings, but certainly in the last  
8   sessions Your Honor raised, hey, this kind of looks in that vein. So  
9   it did cause the government to review the materials with an eye  
10   towards whether or not we saw independently anything that would rise  
11   to the level of unlawful influence.

12           And again, we just didn't see anything that came close to  
13   that -- what we would view as unlawful influence impinging the  
14   defense's ability under the statute to effectively represent Mr.  
15   Nashiri.

16           MJ [COL FITZGERALD]: All right. Bear with me one moment.

17           TC [CAPT STINSON]: Yes, sir.

18   **[Pause.]**

19           MJ [COL FITZGERALD]: I have no further questions, Captain  
20   Stinson. I appreciate ----

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

22           MJ [COL FITZGERALD]: ---- your responses and answers to my  
23   questions. Thank you.

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1 TC [CAPT STINSON]: Thank you.

2 MJ [COL FITZGERALD]: Ms. Miller, any rebuttal?

3 LDC [MS. MILLER]: Could I have just a moment to speak with  
4 Ms. Hensler?

5 MJ [COL FITZGERALD]: You may.

6 **[Counsel conferred.]**

7 LDC [MS. MILLER]: Just brief rebuttal, sir.

8 I want to be clear that my intention was to draw attention  
9 to the things that are already on the record for this commission's  
10 consideration and then to object with proceeding any further absent  
11 the testimony of General Thompson.

12 The commission had a number of questions. I'm, of course,  
13 always going to answer a direct question from Your Honor. And so I  
14 don't want the fact that we engaged in this question-and-answer  
15 session almost like an oral argument to be seen as some sort of  
16 concession that I've waived my objection to proceeding on AE 609  
17 without the testimony of General Thompson.

18 So I just wanted to clarify that we did have this  
19 conversation, but it was not intended to -- as a substitution for the  
20 argument I believe I would be able to make if I had the testimony of  
21 General Thompson in addition to his declaration.

22 Additionally, just to clarify, the lead trial prosecutor  
23 just made representation to the fact that the defense has not filed

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1 an unlawful influence motion and suggesting -- or at least this is  
2 how I interpreted it -- suggesting that the commission should draw  
3 inference from the fact that we haven't filed that motion to mean  
4 that unlawful influence doesn't exist. That is not an inference the  
5 commission should or can make.

6 Any pleading we think appropriate, I can assure you, we're  
7 going to file, and I anticipate that being a motion that we are in  
8 the process of researching and filing. And so the government's  
9 suggestion that you should read something into the fact that that  
10 hasn't been filed at this point is not legally well-founded.

11 That's all, sir.

12 MJ [COL FITZGERALD]: Thank you. But you would agree that as  
13 part of your motion to abate, your secondary argument was unlawful  
14 influence under the statute?

15 LDC [MS. MILLER]: Oh, yes, sir.

16 MJ [COL FITZGERALD]: Okay.

17 LDC [MS. MILLER]: And that is exactly what we talked about  
18 during the motion to compel. Because I think Your Honor said  
19 something like this is kind of a thinly veiled abatement based on  
20 unlawful influence, and that's when we had a conversation about there  
21 being a separate pleading. And I think I represented then that we  
22 intended to pursue that.

23 But in trying to be as fulsome in my representations to this

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1 commission as to how DOGE has affected the MCDO and the al Nashiri  
2 defense team specifically, that was part of our argument in AE 609.  
3 Yes, sir.

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

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

6 **[Pause.]**

7 MJ [COL FITZGERALD]: I think that concludes the matters for  
8 today's session related to Appellate Exhibit 609.

9 The next thing we have is Appellate Exhibit 612, but I think  
10 now would be a good time to recess for lunch.

11 Do the parties agree?

12 TC [CAPT STINSON]: That works for the government, Your Honor.  
13 I would note that I think 612 may be relatively short, but no  
14 objection to recessing for lunch if ----

15 MJ [COL FITZGERALD]: Well, let me -- tell you what, Captain  
16 Stinson, I'm going to allow the parties to confer real quick, decide  
17 what you want to do. I have no druthers either way. I will stay  
18 here if you want, but I want there to be some kind of consensus. So  
19 if you wouldn't mind speaking to Captain Bartholomaus, and he'll  
20 relay the information to Ms. Miller.

21 So tell you what, recess in place.

22 DC [CDR BARTHOLOMAUS]: Thank you, Your Honor.

23 **[The R.M.C. 803 session recessed at 1150, 05 May 2025.]**



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1 **[The R.M.C. 803 session was called to order at 1152, 05 May 2025.]**

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

3 All parties present before the last recess are again  
4 present.

5 During the recess we briefly discussed whether to take a  
6 lunch recess or continue on with Appellate Exhibit 612. The parties  
7 informed me that it will be short and no need to take a long lunch  
8 recess to come back on the record.

9 So the Appellate Exhibit 612 argument will be presented by  
10 the government. Colonel Nettinga says he's ready to answer any  
11 questions by the commission, and that will conclude today's session.

12 Is that an accurate summary of what we just discussed?

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

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

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

16 Government, you may proceed.

17 TC [CAPT STINSON]: **[microphone button not pushed; no**

18 **audio.]** ---- brief argument in relation to AE 612A, AE 612, the  
19 defense motion to suppress the statements of Mr. Sanad al Kazimi as a  
20 sanction for the government. The government notes in its responsive  
21 pleading suppression of those statements would not be appropriate  
22 here.

23 Two clarifications: One, the defense motion included the

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1 notice statements from 2004 and the notice statements from a proffer  
2 session in 2012.

3 The government has in its AE 166 pleadings withdrawn the  
4 notice of the 2004 statements. So the only matter is the 2012  
5 proffer session statements made by Mr. Kazimi.

6 The defense does not cite to any prejudice in relation to  
7 those statements that would warrant the remedy of suppression here.  
8 The commission has ordered the deposition of Mr. Kazimi and an  
9 additional detainee, Mr. Abdu Ali al Hajj Sharqawi.

10 Both of those individuals were transferred to Oman, and the  
11 convening authority has appointed a deposition officer, and we are  
12 working on the logistics to see whether or not it's feasible to  
13 conduct those depositions.

14 That's ongoing. We are pursuing the depositions, but  
15 suppression of the notice statements at this time and in this posture  
16 would not be appropriate. Suppression is a drastic remedy. It takes  
17 critical and valuable information away from the factfinders. And  
18 from the government's perspective, there's no basis for the  
19 suppression of the notice statements at issue here.

20 And pending your questions, Your Honor, that's all the  
21 argument that I have.

22 MJ [COL FITZGERALD]: I have a couple of questions for you,  
23 Government.

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

2 MJ [COL FITZGERALD]: In looking at Appellate Exhibit 612, I  
3 don't know if you have it in front of you.

4 TC [CAPT STINSON]: I do, Your Honor.

5 MJ [COL FITZGERALD]: And if you turn to page 7. And in  
6 there, starting on the second line down it says: There are two areas  
7 with respect to Mr. Kazimi where the government failed to  
8 affirmatively provide Brady or Giglio discovery about a witness'  
9 statements they intend to use.

10 So my question is about the first one, a series of  
11 statements from Mr. Kazimi wherein he denies any knowledge of  
12 Mr. al Nashiri, reports he was repeatedly tortured, and states that  
13 he fabricated information about Mr. al Nashiri to get the torture to  
14 stop. Has discovery been completed on that?

15 TC [CAPT STINSON]: Yes, Your Honor. All of the statements,  
16 and the government would dispute the representation there, the  
17 statements of Mr. Kazimi, the entirety of those statements have now  
18 been provided, including through the 505 process for some statements.  
19 And that was accomplished several months ago. But all of the  
20 statements of Mr. Kazimi have been provided to the defense.

21 MJ [COL FITZGERALD]: And then again, just -- that was about a  
22 very particular thing. But the last sentence on page 7 says: Almost  
23 two years later the government has still failed to complete discovery

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1 with respect to the 2012 proffer session.

2 Has -- do you want to respond to that?

3 TC [CAPT STINSON]: Yes, Your Honor. The -- because these  
4 proffer sessions were taking place in the context of the review of  
5 the detainees, there -- I believe we've provided all of the discovery  
6 related to the proffer sessions. The draft documents that were going  
7 back and forth between the -- you know, the counsel for the detainee  
8 and the government, I think all of that's been provided.

9 We are making sure that -- because this was a -- not  
10 specifically an Office of the Chief Prosecutor. This was also under  
11 the Executive Order Task Force, a review of whether or not these  
12 individuals should be prosecuted in District Court back when in the  
13 Obama Administration they were considering taking some folks to  
14 District Court. So we are also coordinating with the relevant U.S.  
15 Attorney's Office to make sure there's not documents in those other  
16 areas that we were missing. I believe all information related to  
17 those proffer sessions have been provided.

18 Certainly the proffer statements themselves were provided  
19 in, I think it was 2011 or 2012. The statements that we've noticed,  
20 that discovery was provided early on to Mr. Nashiri.

21 The back and forth about how the proffer sessions came to  
22 be, communications between their counsel and the prosecution, that's  
23 come later in time. And I don't think that's atypical for situations

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1 where you may have a co-conspirator, someone that was involved in the  
2 plot that may either testify or there may be statements from that  
3 individual provided against the defendant.

4 I think there's -- that's not atypical that there's some  
5 caution in relation to sharing that because of safety concerns,  
6 frankly, where you have a potential informant or someone that was in  
7 the gang who may provide testimony against another member of that  
8 organization.

9 MJ [COL FITZGERALD]: Thank you. And can you clarify your  
10 update? You said that the deposition is still pending. Is -- it was  
11 requested quite awhile ago, was ordered quite awhile ago. Just can  
12 you give me a status update? What do you mean by it's still pending?

13 TC [CAPT STINSON]: Yes, Your Honor. The convening authority  
14 appointed Colonel Lance Smith out of the Air Force as the deposition  
15 officer. We had just recently, this past week we had a conference  
16 call with the defense and the deposition officer. We're routing  
17 requests to those individuals in Oman just to see whether or not they  
18 are willing and the timing for sitting for a deposition.

19 They also, obviously, have had counsel previously. So we've  
20 been in contact with counsel for both individuals to let them know  
21 that we're going through this process to work on their depositions.

22 MJ [COL FITZGERALD]: Knowing that earlier I had ruled that,  
23 as part of my ruling, I canceled all the summer sessions, does that

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1 increase the likelihood that it will be completed potentially by the  
2 end of the summer?

3 TC [CAPT STINSON]: So Colonel Smith indicated he's available  
4 through the summer and we'll move this expeditiously. He's one  
5 of -- he's a military judge, Your Honor, but he looked at his docket  
6 and said, "Hey, I will work on this."

7 So I don't think the canceling of the sessions will -- I  
8 don't think there's anything in there that will increase or decrease  
9 it. If they're willing to sit for a deposition, we're going to  
10 schedule that as expeditiously as possible and get out there to  
11 comply with the commission's order and get that -- those depositions  
12 done.

13 MJ [COL FITZGERALD]: It frees up calendar time, though,  
14 right?

15 TC [CAPT STINSON]: It certainly does. Yes, Your Honor.

16 MJ [COL FITZGERALD]: So it seems it increases likelihood, but  
17 I would hope it wouldn't decrease the likelihood.

18 TC [CAPT STINSON]: That's fair, Your Honor. That's fair.

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

20 I don't have any further questions at this time for the  
21 government.

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

23 MJ [COL FITZGERALD]: Thank you.

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1           Colonel Nettinga, I know you said you were available to  
2 answer questions, but would you like to give a response to the  
3 government's argument? And also if you would like to respond to any  
4 of the questions that I had, I can ask them again, but ----

5           DDC [Lt Col NETTINGA]: Yes, Your Honor, generally to all of  
6 those questions you asked.

7           I'd like to make a couple of points of clarification and/or  
8 response to things said by the prosecution there.

9           First of all, with respect to the relief requested in AE 612  
10 and with respect to the proffer session that was conducted in 2012  
11 and statements that the government had initially said that they  
12 wanted to introduce from 2004. We are still seeking the suppression  
13 of both of those categories of statements, understanding the  
14 prosecution has now said in a reverse of position that at this point  
15 they are no longer seeking to introduce the 2004 statements.  
16 Certainly in the event that they decide to change their mind again  
17 and they do want those statements, potentially depending on what  
18 happens with respect to the ruling on the 2012 statements, we believe  
19 that that remedy is still something that's available to the  
20 commission and something that we are still seeking. So we are still  
21 seeking the suppression of the 2004 statements.

22           With respect to the outstanding discovery on the 2012  
23 proffer statements, I do want to be clear that the representation we

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1 made on page 3 of 612B, where we talk about the government failing to  
2 turn over the full documentation as to how the proffer sessions  
3 originated, any notes from those proffer sessions or any  
4 documentation as to why those proffer sessions ultimately did not  
5 result in an agreement with Mr. Kazimi, those things are still  
6 outstanding.

7           And so it's great that we finally do have the representation  
8 from the government that all of the statements from Mr. Kazimi have  
9 been turned over, which I believe was completed in March of this  
10 year. We still don't have vital and certainly very relevant  
11 documents related to these statements that the government now seeks  
12 to introduce.

13           Again, this was a decision made in 2024 that they wanted to  
14 use these 2012 statements from an unconsummated proffer session at  
15 trial. And I think it's worth noting -- and I know we made this  
16 clear in 612, but when the government says that they turned over  
17 these notes or these -- the FBI 302 from the 2012 proffer sessions in  
18 2013, that is partially accurate. However, what they failed to  
19 disclose, both just now and in 612A, is that original production in  
20 2013 they redacted, blacked out the word "proffer." They hid that  
21 information from the defense. Not because for a relevancy issue, not  
22 because it went through the 505 process, they just blacked it out.

23           And so it is concerning, not only in the instant case, but



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1 with all of the discovery that we received initially in the 2012-2013  
2 time frame that we know did not go through the 505 process, and I  
3 know that there has been previous litigation in this case about that  
4 generally. But it is concerning that they willy-nilly decided to  
5 hide information that would later become relevant even if they did  
6 not believe it was relevant at the time. And certainly it gives us  
7 pause when we are trying to rely on discovery that we received in  
8 that early time frame, and we've got to go back and be looking  
9 through that to see what else those black bars might contain.

10 So for all of these reasons, sir, the discovery  
11 violations -- and I know we talked about it in 535, and some of that  
12 is historical but some of that continues, specifically with respect  
13 to the 2012 proffer sessions, and with the fact that we had an  
14 ordered deposition at a time when we were much likelier to be able to  
15 accomplish a deposition in quick order, with that order from the  
16 commission to conduct a deposition pending, the government  
17 transferred Mr. Kazimi back to -- or to Oman -- not "back" to Oman,  
18 but to Oman, and now we don't know whether a deposition will occur.

19 What I'd say is regardless, and I know we talked about this  
20 in 612 ----

21 MJ [COL FITZGERALD]: Let me ask you about that, Colonel  
22 Nettinga.

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

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1 MJ [COL FITZGERALD]: At least I just asked the government, I  
2 was, like, you know, give me an update on the deposition. And  
3 there's a deposition officer appointed.

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

5 MJ [COL FITZGERALD]: There's now more time available to even  
6 complete it this summer. But I didn't seem to get any indication  
7 that there's some other impediment to completing this deposition, but  
8 you appear to be intimating that now. Can I understand that?

9 DDC [Lt Col NETTINGA]: Just that the logistical  
10 considerations with respect to the deposition are higher or more  
11 difficult than they would have been when these individuals were at  
12 Guantanamo. That's the only thing that I meant by that, sir, because  
13 potentially we're sending a bunch of people to Oman. It is unclear  
14 whether or not these individuals are still in some sort of custody,  
15 and so we may not have a great handle on even where they are when  
16 before we certainly knew where they were.

17 All of these things certainly will be borne out as time goes  
18 on in this deposition process. But my only point in stating that,  
19 sir, was that it is logistically more complicated now based on the  
20 government's actions than it would have been at the time that the  
21 deposition was ordered when these men were in custody.

22 MJ [COL FITZGERALD]: Okay. But we've been past that point  
23 for awhile, that's correct. I think in your pleading you said the

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1 release happened in January?

2 DDC [Lt Col NETTINGA]: Yes, sir. That's right.

3 MJ [COL FITZGERALD]: And I ordered the deposition in  
4 December?

5 DDC [Lt Col NETTINGA]: Yes, sir. I believe that's right.

6 MJ [COL FITZGERALD]: And so here we are in May, and you're  
7 telling me you don't know whether or not you can do this deposition  
8 or if it's logistically challenging or impossible. I don't  
9 understand that. What has been done thus far to coordinate and  
10 arrange to get this done?

11 DDC [Lt Col NETTINGA]: Sir, we are imminently available.  
12 I'll go to Oman today, tomorrow if that's what it takes. We are  
13 standing by to get this done.

14 It is on the government, certainly, to comply with the  
15 commission's order. And my only point in bringing that up was that  
16 it's more challenging now because they decided to move them to a  
17 foreign country where they may or may not have -- well, certainly  
18 don't have the same kind of positive control over these individuals  
19 that they once did.

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

21 DDC [Lt Col NETTINGA]: And then, finally, sir, even when the  
22 deposition goes through, that's the proper vehicle for the testimony  
23 of Mr. Kazimi, not statements that were given while seeking a benefit

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1 from the government in 2012 that were not subject to  
2 cross-examination and that were compiled in a law enforcement summary  
3 of those purported statements.

4 So that's why we're seeking the relief in 612 and that's why  
5 it's still appropriate.

6 Pending your questions, sir.

7 MJ [COL FITZGERALD]: So based on what you just said, should I  
8 keep this under advisement until completion of the deposition or ----

9 DDC [Lt Col NETTINGA]: No, sir. I don't -- I don't think so.  
10 I think if the deposition occurs, then that's certainly the proper  
11 way to get Mr. Kazimi's testimony in front of the court but -- in  
12 front of the commission. But I believe that the -- the remedy, the  
13 sanction that we are seeking for the discovery violation and for the  
14 government's conduct is still applicable to the 2012 statements and  
15 the 2004 statements. And so we are still seeking that, and we  
16 believe that that sanction is appropriate irrespective of what  
17 ultimately ends up happening with the deposition.

18 MJ [COL FITZGERALD]: All right. Thank you, Colonel Nettinga.

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

20 MJ [COL FITZGERALD]: Government, I know you had stated  
21 earlier in your argument that you don't intend to offer the 2004  
22 statement, but you'd heard the defense say they still want a ruling  
23 on that. Do you -- would you like to address that?

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1 TC [CAPT STINSON]: Just briefly, Your Honor. I think a  
2 ruling on the 2004 statements where the government has withdrawn  
3 notice would not be appropriate or a necessary exercise of the  
4 commission's authority to suppress evidence.

5 It's a drastic remedy. We've heard the Supreme Court  
6 admonish on multiple occasions that suppression is a last resort.  
7 It's never our first impulse. It takes away information from the  
8 members.

9 The government was just trying to be up front. 2004  
10 statements normally would be more appropriate because they're closer  
11 in time to the events. That's why I'm confident those were initially  
12 noticed by the prosecution team.

13 We just took stock of where we were at in relation to 2004  
14 and the location based on various rulings of this commission and  
15 thought that a proffer session statement where the individual is  
16 represented by counsel would be a better vehicle for the statements  
17 to come in if Mr. Kazimi does not testify at trial.

18 I agree with Lieutenant Colonel Nettinga. If he gets  
19 deposed, that's the proper vehicle, and we will certainly seek to use  
20 that deposition in trial against Mr. Nashiri. The reason that it may  
21 make more sense to hold this under advisement is we don't know if  
22 Mr. Kazimi will be willing to sit for a deposition.

23 We know the contents of those statements, both in 2004 and

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1 2012, were very incriminating against Mr. Nashiri and they were very  
2 incriminating against Mr. Kazimi. It was about moving explosives,  
3 moving explosives at the direction of Mr. Nashiri from Yemen into UAE  
4 as part of the Boats Operation. So we know that those statements  
5 incriminated both Mr. Nashiri but also Mr. Kazimi.

6 So it's possible that Mr. Kazimi, or through his counsel,  
7 will say, "Hey, thanks, but no thanks. I do not want to sit for a  
8 deposition." And that was possible whether or not he was in our  
9 custody here or if he's in Oman, and we'll find that out.

10 I don't know that answer. It's possible that Mr. Kazimi  
11 will say, "Hey, I was in custody for 20 years. I've got a lot to  
12 say. I do want to say my piece. I do want to answer and respond to  
13 a deposition."

14 And we'll find that out in short order. But it would not  
15 make sense for the commission now to suppress evidence that may be  
16 important for the members to know. But we will -- we should know  
17 that in a relatively short amount of time.

18 We sent -- after discussions with the deposition officer,  
19 we've gone through the process and requested that officials in Oman  
20 approach Mr. Kazimi and Mr. Sharqawi. And we've notified their  
21 counsel here, their former counsel, their habeas counsel, that we  
22 were making that approach and we were going to ask them if they're  
23 willing to sit for a deposition. And we'll obviously -- there's

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1   been -- you know, we've been communicating with the defense about  
2   that.

3               To Your Honor's suggestion, I think the fact that we have  
4   some time in the summer would make -- it's good to know that  
5   Lieutenant Colonel Nettinga's available on a minute's notice. And  
6   we'll go out there, and if they're willing to speak to us, we'll  
7   depose them, and that would be perfectly acceptable for the  
8   government for that to be the vehicle in which their statements come  
9   before the members when they're seated in the box, Your Honor.

10            MJ [COL FITZGERALD]: Thank you, Government.

11            Defense, any final word?

12            DDC [Lt Col NETTINGA]: Again, sir, in light of what the  
13   prosecutor just said about what Mr. Kazimi mentioned in the 2004  
14   statements, which the government admitted are problematic -- and  
15   they're problematic because of the torture that Mr. Kazimi endured.  
16   But in light of that and in light of the 2012 statements and what the  
17   prosecutor said Mr. Kazimi stated during those proffer sessions when  
18   he was seeking the benefit of a government that held him for 20-plus  
19   years without charges, it is certainly worth noting that, again, in  
20   discovery produced well after the fact of the time that the  
21   statements the government wants to use were noticed by the government  
22   and certainly not with respect to any kind of affirmative duty of  
23   Brady or Giglio, but in response to repeated litigation over

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1 discovery issues, Mr. Kazimi stated that he did not know Mr. Nashiri  
2 and that the information he provided about Mr. Nashiri was provided  
3 to get the torture to stop.

4 MJ [COL FITZGERALD]: Thank you.

5 Oh, I'm sorry. Were you pausing?

6 DDC [Lt Col NETTINGA]: Well, and that's the reason why we  
7 need a fulsome discussion with Mr. Kazimi and why the self-selected  
8 statements as written in a law enforcement summary from 2012 proffer  
9 sessions are not a sufficient substitute for testimony, and certainly  
10 we stand by the relief that we've requested for those reasons, Your  
11 Honor.

12 MJ [COL FITZGERALD]: Thank you, Colonel Nettinga.

13 Any other matters we need to take up today on the record?

14 TC [CAPT STINSON]: Nothing from the government, Your Honor.

15 DC [CDR BARTHOLOMAUS]: No, sir.

16 MJ [COL FITZGERALD]: So if I understand the schedule right,  
17 we're going to take up Appellate Exhibit 569, both in an open and  
18 closed session, and 599 on Wednesday.

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

20 MJ [COL FITZGERALD]: Very well. Any need to hold sessions  
21 tomorrow, Tuesday, 6 May?

22 TC [CAPT STINSON]: I think with the schedule we have, Your  
23 Honor, tomorrow as an open day still works. We can get 569 and 599



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1 knocked out on Wednesday. I -- we have a trial logistics discussion,  
2 that may be the opportunity for the parties to discuss the verbal  
3 ruling this morning to make sure we're understanding the timelines on  
4 that before we depart, and then the ex parte update. I think that  
5 schedule still works.

6 So tomorrow as clear is good with the government, Your  
7 Honor.

8 MJ [COL FITZGERALD]: Defense?

9 DC [CDR BARTHOLOMAUS]: Concur, sir.

10 MJ [COL FITZGERALD]: Very well.

11 Then the commission is in recess until Wednesday, 7 May,  
12 0900 hours.

13 **[The R.M.C. 803 session recessed at 1217, 05 May 2025.]**

14 **[END OF PAGE]**