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1 [The R.M.C. 803 session was called to order at 1348,
2 17 November 2017.]

3 MJ [Col SPATH]: These commissions are called to order.
4 All the parties who were present yesterday during our last
5 open session are again present. Mr. al Nashiri is present as
6 well. Thank you.

7 Colonel Aaron, a couple quick questions. You can
8 come up here if you want to.

9 I know it's been an eventful few weeks. Really all I
10 want is an update on where the defense community is in
11 securing additional -- and I recognize we probably disagree on
12 the word I'm using -- but additional learned counsel for
13 Mr. al Nashiri.

14 DCDC [COL AARON]: Judge, I'm not sure how to answer that.
15 I am not -- have not made an appearance here, do not represent
16 any parties. I haven't been called as a witness, so I'm not
17 sure what my standing is and what the purpose is for my being
18 here.

19 I understand Lieutenant Piette attempted to file an
20 update with the court yesterday and that was rejected, so I
21 guess I'm at a loss to understand ----

22 MJ [Col SPATH]: You are the acting chief defense counsel
23 for this proceeding according to General Baker.

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1 DCDC [COL AARON]: I understand that, Judge.

2 MJ [Col SPATH]: He sent an e-mail. He said "I recuse
3 myself," and he said that you were taking on defense
4 counsel -- chief defense counsel responsibilities. And so
5 then I went and looked at what the chief defense counsel
6 responsibilities are, and you're supposed to resource this
7 team. And General Baker said he was securing learned counsel
8 because he had let one go. Again, I disagree with that,
9 obviously.

10 So I just want to know, are you securing additional
11 legal counsel -- learned counsel for Mr. al Nashiri? Are you
12 in the process of doing that?

13 DCDC [COL AARON]: First of all, Judge, I feel compelled
14 to at least put on the record my objection to the court
15 issuing an order for me to be here. I strenuously object to
16 the concept ----

17 MJ [Col SPATH]: Feel free.

18 DCDC [COL AARON]: ---- that this court has the authority
19 to order any members of an independent organization who have
20 not entered an appearance in this case to appear in this
21 courtroom.

22 MJ [Col SPATH]: Well, I certainly can order witnesses.
23 We've determined that, right?

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1 DCDC [COL AARON]: No doubt, Your Honor.

2 MJ [Col SPATH]: And I am very comfortable that I can have
3 you as the chief defense counsel tell me if you're in the
4 midst of securing additional learned counsel. I more than
5 recognize that the defense community feels like they can
6 ignore every order I give. I got that. And you are the same.

7 DCDC [COL AARON]: Your Honor, I do not speak for the
8 defense community ----

9 MJ [Col SPATH]: Well, you do on this case. You are the
10 acting chief defense counsel.

11 DCDC [COL AARON]: I'm Acting chief defense counsel ----

12 MJ [Col SPATH]: This seems like a pretty straightforward
13 question.

14 DCDC [COL AARON]: I'm sorry, Your Honor, I am the Acting
15 chief defense counsel ----

16 MJ [Col SPATH]: Yep.

17 DCDC [COL AARON]: ---- for this case for the Military
18 Commissions Defense Organization.

19 MJ [Col SPATH]: Correct.

20 DCDC [COL AARON]: I am not -- I'm not sure what you're --
21 Your Honor understands the defense community to be and I'm not
22 going to profess to speak for the defense community.

23 MJ [Col SPATH]: I'm speaking for your role as the Acting

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1 chief defense counsel. You've read it, right?

2 DCDC [COL AARON]: Yes, Your Honor.

3 MJ [Col SPATH]: You know what your responsibilities are,
4 right?

5 DCDC [COL AARON]: Absolutely, Your Honor.

6 MJ [Col SPATH]: The guy who was in your job last said
7 that he was going to secure additional -- no, he said "learned
8 counsel," because he purported to release the last one. I
9 obviously don't agree with that. I'm not asking you about
10 that.

11 Alls I'm asking is are you in the process of securing
12 learned counsel for Mr. al Nashiri? That's all.

13 DCDC [COL AARON]: And, Your Honor, I will confirm exactly
14 what was in Lieutenant Piette's attempt to file yesterday ----

15 MJ [Col SPATH]: I didn't know ----

16 DCDC [COL AARON]: ---- and that is we are proceeding in
17 an attempt to secure learned counsel. Yes, Your Honor.

18 MJ [Col SPATH]: Seems -- that's it. That's all I want to
19 know.

20 On Tuesday and on Friday of next week, I expect a
21 written update from the counsel who is representing
22 Mr. al Nashiri. I just want to know what you're doing.

23 Have you at this point identified any?

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1 DCDC [COL AARON]: No, Your Honor.

2 MJ [Col SPATH]: Okay. Have you made efforts to identify
3 them?

4 DCDC [COL AARON]: Absolutely, Your Honor.

5 MJ [Col SPATH]: Are any of the ones you've identified, if
6 you know -- do they currently have a security clearance?

7 DCDC [COL AARON]: Your Honor, you're now getting into the
8 details that I do not feel comfortable getting into in a
9 public forum.

10 MJ [Col SPATH]: Okay. Whether or not they have a
11 security clearance?

12 DCDC [COL AARON]: Yes, Your Honor.

13 MJ [Col SPATH]: That's fine. I've gotten what I need
14 from you. Thank you so much. Sorry that that seemed to be
15 difficult as well. I really don't understand at this point.

16 DCDC [COL AARON]: Again, Your Honor, the most difficult
17 part of this is -- is the commission's belief that it can
18 order members of this independent organization to appear in
19 this courtroom when they have not entered -- they're not a
20 party, they have not entered an appearance for a party, and
21 they haven't been properly called as a witness.

22 MJ [Col SPATH]: The last time I tried to call one of
23 y'all as a witness, it didn't go very well, did it?

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1 DCDC [COL AARON]: No, Your Honor, it didn't.

2 MJ [Col SPATH]: I'd like not to have to do that again.

3 DCDC [COL AARON]: I understand that.

4 MJ [Col SPATH]: So really that's what I'm trying to do.

5 And again -- I know you disagree with my orders -- it seems to
6 be a pattern.

7 All right. Thanks.

8 DCDC [COL AARON]: Yes, sir.

9 MJ [Col SPATH]: Lieutenant Piette, Tuesdays and Fridays
10 as we move forward, an update on where we are in the process
11 of identifying learned counsel for Mr. al Nashiri, okay?

12 DDC [LT PIETTE]: Yes, Your Honor.

13 MJ [Col SPATH]: Okay. Why don't we call our witness, get
14 her sworn in, and then I will ask questions. I assume
15 Ms. Yaroshefsky is available, yes?

16 MATC [COL WELLS]: Yes, Your Honor.

17 MJ [Col SPATH]: All right. Then hopefully they'll know
18 they're coming up. All right. There we go. Can you all see
19 us?

20 WIT: Yes.

21 MJ [Col SPATH]: Okay. Good. I assume then you can hear
22 us. I don't know what you see when I talk. I don't know
23 where I'm looking, so bear with me. If I'm not making eye

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1 contact, it's not personal, it's because I'm not sure what
2 screen to look at. Okay.

3 Ms. Yaroshefsky, alls I'm going to do, I'm going to
4 have trial counsel swear you in as a witness. I've got some
5 questions for you, and then I'll let the parties, if they have
6 questions ask questions, and really hopefully get you on your
7 way pretty quickly. Okay?

8 WIT: Thank you.

9 MJ [Col SPATH]: All right. Colonel Wells, are you going
10 to take care of the witness, or Mr. Miller?

11 TC [MR. MILLER]: I'm just going to simply swear the
12 witness, Your Honor.

13 MJ [Col SPATH]: Okay. If you would.

14 TC [MR. MILLER]: Thank you. Please stand. Thank you.
15 Raise your right hand.

16 ELLEN YAROSHEFSKY, civilian, was called as a witness for the
17 military commission, was sworn, and testified as follows:

18 **DIRECT EXAMINATION**

19 Questions by the Trial Counsel [MR. MILLER]:

20 Q. Would you state your name for the record, please.

21 A. Ellen Yaroshefsky.

22 Q. And where is your present location, ma'am?

23 A. Right now?

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1 Q. Yes.

2 [MR. LUGER]: Virginia.

3 A. Virginia. I don't know the address here.

4 MJ [Col SPATH]: No worries. I think you're at the Mark
5 Center, just based on the video feed. Thanks, Mr. Miller.

6 Ma'am, I am going to ask you -- not that you have
7 spoken fast ----

8 TC [MR. MILLER]: Your Honor, before we begin can we
9 account for the other parties in the room? I believe there's
10 actually two lawyers and then I think there's one off camera.

11 MJ [Col SPATH]: That works. We can account for them if
12 you'd like to.

13 **Questions by the Military Judge [Col SPATH]:**

14 Q. Ms. Yaroshefsky, you have a couple attorneys with
15 you?

16 A. I do.

17 Q. Okay. Are there two or three?

18 A. There are two attorneys. There's Mr. Asbill and
19 Mr. Luger.

20 Q. Okay. Perfect. And then the third person or the
21 party that's there? They're not an attorney?

22 SPEAKER: Escort.

23 A. I assume they're a military escort.

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1 Q. All right. Thanks.

2 So I'm not suggesting that you've spoken fast;
3 however, it's easy to start talking fast, and we have to
4 interpret everything for Mr. al Nashiri. So just try to
5 remember to speak at a reasonably measured pace. I'll remind
6 you if I have to, okay?

7 A. I will try my best.

8 Q. All right. Can you tell me your current occupation?

9 A. Yes. I'm a law professor.

10 Q. Where?

11 A. Hofstra Law School.

12 Q. And how long have you been in that position?

13 A. Since last year.

14 Q. 2016?

15 A. That's correct.

16 Q. All right. And prior to that?

17 A. Prior to that I was a professor at Cardozo Law School
18 for 28 years.

19 Q. At Hofstra, what subjects do you teach?

20 A. I currently teach legal ethics, ethics in criminal
21 advocacy and criminal procedure, and I direct the Freedman
22 Justice Program.

23 Q. Have you served as an ethics consultant in -- other

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1 than this case -- other cases, other criminal cases?

2 A. Yes.

3 Q. In general, no exact number needed, but do you have
4 any idea how many times?

5 A. That I have been a consultant or that I've testified?

6 Q. Consultant first.

7 A. Boy, I -- in criminal cases, I would say -- in
8 criminal cases only or in all cases?

9 Q. Criminal cases.

10 A. I consulted -- in criminal cases? Several hundred
11 probably.

12 Q. And then in all cases?

13 A. Oh, hundreds.

14 Q. Okay. I think you've already started to answer the
15 next part. You've testified before as an expert?

16 A. I have.

17 Q. Across the board, criminal and otherwise, about how
18 many times?

19 A. Maybe three or four.

20 Q. Were they all in criminal cases or were they
21 again ----

22 A. No.

23 Q. ---- a variety?

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1 [MR. LUGER]: Let him finish the question.

2 WIT: Sorry.

3 MJ [Col SPATH]: Oh, no worry.

4 A. A variety.

5 Q. Okay. Were any of them in criminal cases?

6 A. Yes.

7 Q. How many of those, about?

8 A. One or two.

9 Q. Have you served as an ethics consultant or expert in
10 a case under CIPA, the Classified Information Protection Act?

11 A. Testified?

12 Q. Let's -- let's start with that, sure.

13 A. No.

14 Q. How about as a consultant?

15 A. I think so. I'm not certain.

16 Q. In general, are you familiar with the -- the military
17 commissions?

18 A. I don't -- I'm not sure I know what that means, "in
19 general."

20 Q. Are you familiar with the Military Commissions Act?

21 A. I wouldn't call myself an expert on the Military
22 Commissions Act.

23 Q. All right. I want to talk now just about your

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1 involvement in the current case. I assume at some point you
2 were contacted by the defense community about this case; is it
3 true?

4 A. I'm not certain what you mean by "the defense
5 community."

6 Q. Did one of the attorneys representing Mr. al Nashiri
7 contact you?

8 A. I was contacted by Mr. Kammen.

9 Q. Do you remember approximately the time frame?

10 A. Yes. It was July of this year.

11 Q. When he reached out to you, what did he ask you or
12 what did he tell you was his purpose?

13 A. He contacted me to ask whether or not I would be
14 willing to be ethics -- provide ethics advice in a case he was
15 handling at Guantanamo, and he asked whether or not, one, was
16 I willing to do it; and secondly, would I be willing to get a
17 security clearance in order for him to provide me with facts
18 from which I could render an opinion.

19 Q. Prior to him reaching out in July of '17, did you
20 know him?

21 A. I had met him once, but I had forgotten, actually,
22 that I had met him. I met him some years before that.

23 Q. Had you acted as a consultant or a witness in any

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1 case that he was involved in?

2 A. No.

3 Q. After that initial contact -- I'm guessing the
4 security clearance piece didn't happen, is my guess.

5 A. That's correct.

6 Q. Okay. Did he come back to you to get some kind of
7 ethics opinion?

8 A. Yes.

9 Q. When he came back to you, what did he explain kind of
10 were the circumstances getting him to reach out to you?

11 A. He explained that there were intrusions into the
12 attorney-client communications, that he was unable to
13 communicate with his client, and that he was unable to explain
14 to his client why he couldn't communicate with him. But he
15 was circumspect about providing any information to me because
16 of the concern that it might be classified.

17 Q. And I think I've seen what he -- what he sent to you.
18 It appears that he sent you a timeline, not classified, where
19 he kind of gave at least his belief of what the intrusions had
20 been; is that fair?

21 A. I suppose. What happened was I asked him to provide
22 me with facts from which I could opine. Given the fact that I
23 was not privy to classified information, it was not even clear

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1 that I could provide an opinion, but I asked him to provide me
2 with the facts upon which he asked me to rely.

3 Q. And then, I know you don't have it in front of you,
4 but it appears to me he sent you basically a timeline from
5 late 2008 through June of 2017.

6 A. Judge, I was provided with my report as well as some
7 documents. Would you like me to refer to those?

8 Q. Yes, that would be fine. Thanks.

9 A. All right. On -- in my letter opinion on page 3, I
10 note the factual basis upon which I rely, and those were the
11 facts provided to me by -- by Mr. Kammen. Also -- I'm sorry,
12 excuse me, they are also on page 4 -- page 3 and 4.

13 Q. Three and 4, okay. Outside of the -- kind of the
14 timeline that he provided, did he give you other -- any other
15 information?

16 A. In addition to the timeline, he provided Exhibit A
17 which is attached to my opinion, which was called
18 government -- "Governmental Interference with Attorney-Client
19 Communications, Intrusions into Attorney-Client Relationships,
20 Undisclosed Monitoring and Infiltration of Defense Teams."

21 Q. All right. I think we have the same exhibit here.
22 For the record it's Appellate Exhibit 339L.

23 And I know you will. If I make a misstatement,

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1 please correct me. I really, I am -- some days it feels like
2 I speak into the wind. I think we all know how that feels. I
3 really am trying to figure out the right answers in all this.

4 Is it fair to say that your opinion, the one that you
5 gave, the ethics opinion, is based on a presumption that the
6 information that Mr. Kammen gave you is true?

7 A. Yes.

8 Q. Fair to say that the information he gave you -- I
9 mean, if it is different, if those facts aren't true -- and
10 I'm not going to go through them all -- but if those facts
11 aren't true, your opinion might be different?

12 A. Might be. I would have to look at whatever facts --
13 whatever other facts might exist.

14 Q. I know in his -- in your opinion, I know that
15 Mr. Kammen assessed the risk of intrusions to be substantial
16 and ongoing. Is that a fact that you accepted as correct?

17 A. I thought that that actually was given to him by --
18 by the chief defense counsel. I thought he had received that
19 information. Perhaps if you could refer me to a specific
20 paragraph, it would be helpful.

21 Q. Okay. I will. Just give me a minute to work through
22 this.

23 So I've got Exhibit A in front of me.

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1 [MR. LUGER]: He's only referring to that [indicating].

2 Q. In Exhibit A, again, we have kind of the timeline,
3 for lack of a better term for it. How much weight would you
4 say that Exhibit A -- how much weight did you give it in
5 coming to your opinion?

6 A. I looked at all of the facts together. I can't weigh
7 one particular fact or one particular set of facts. The way
8 that -- the way that Exhibit A is referenced in my opinion is
9 in the second bullet on page 3. It says, "The attached
10 Exhibit A," and then I give its name, "established that prior
11 to 2017 there was a significant history of actual and
12 attempted governmental intrusion into the attorney-client
13 relationships, including the placement of listening devices in
14 attorney-client meeting rooms."

15 That was a statement provided to me by Mr. Kammen as
16 a result of Exhibit A.

17 Q. And fair to say that the information provided in
18 Exhibit A from Mr. Kammen, you assume all of those facts are
19 true and accurate?

20 A. I relied upon those facts.

21 Q. Did you visit -- did you attempt to visit the website
22 links that were in there?

23 A. No, I did not.

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1 Q. My -- and again, I know you'll help me. My guess is
2 if I were to say to you hypothetically, hypothetical, if you
3 look on page 1 of Exhibit A, down to the third entry, 2011, if
4 that were not true -- and that is actually -- I will tell you,
5 based on my knowledge of this case, that's an accurate version
6 of events.

7 A. It is or is not?

8 Q. It is. That is an accurate version of events.

9 A. Okay.

10 Q. But hypothetically -- just work with me on a
11 hypothetical. If that is not accurate -- right? Let's say
12 that is not true. Would that fact alone change your opinion,
13 or you wouldn't be able to answer that question?

14 A. I don't think I could -- I probably would not,
15 because the -- what I was relying upon was my bullet point,
16 which was Mr. Kammen's assessment of Exhibit A. I couldn't
17 assess Exhibit A on my own.

18 And so when it said that "There was a significant
19 history of actual and attempted governmental intrusion into
20 the attorney-client relationships, including the placement of
21 listening devices in attorney-client meetings," I relied on
22 that composite statement about Exhibit A.

23 So I don't know, sitting here, whether that alone

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1 would change my opinion. I suspect it would not.

2 Q. And is it fair to say that in large part that the big
3 concern would be, of course, if there is an actual intrusion
4 by the government in an effort to listen to or get information
5 from attorney-client meetings?

6 A. I'm sorry. I don't understand. Was that a question?

7 Q. It is. I mean, is it fair -- I mean, I hate to make
8 it sound simplistic, but it sounds to me like a big concern
9 would be -- frankly, hopefully for anybody, right? Judges,
10 ethics professors, everybody -- an actual intrusion into
11 attorney-client meetings by the prosecution or the government,
12 where they're listening and gathering information, that would
13 be a significant concern for you?

14 A. Well, certainly. Lawyers have an obligation to
15 protect client communications.

16 Q. So also is -- I mean, again, is it fair that if there
17 is not and has not been or haven't been this intrusion, this
18 listening-in or recording of attorney-client meetings, your
19 opinion might be different?

20 A. It might be. There are various ways one can intrude
21 upon the attorney-client relationship, and listening is one of
22 them. There are other mechanisms.

23 Q. And everyone was kind of using the word "intrusion."

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1 Let me ask you: When you use it, what do you mean?

2 A. I mean, any -- any way in which there is a violation
3 of the sanctity of the attorney-client relationship.

4 Q. And I more than recognize -- probably true for any
5 expert, right? You kind of rely on the facts provided to you
6 as you kind of work through your opinion, fair?

7 A. Absolutely. I'm not a fact-finder.

8 Q. And so again, this is a hypothetical, right? Maybe I
9 have it wrong. These days, I wonder myself. But if there is
10 no evidence of intrusion into this accused, Mr. al Nashiri,
11 and his lawyer -- if there is no evidence of intrusion into
12 those meetings, would that affect your opinion?

13 A. I'm certain it would affect my opinion. I'd want to
14 see the facts, yes.

15 Q. Sure. If the evidence -- again if -- hypothetically,
16 if the evidence is there was no intrusion and nobody had
17 listened in on these meetings or recorded them or intruded, I
18 mean, as broadly as you want to define that term, fair to say
19 that would impact your opinion?

20 A. It would have an impact. I suppose that -- when you
21 say "is" -- "was," I also would add "is," because my
22 understanding of the facts that I relied upon was that there
23 currently -- there currently was such an intrusion.

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1 Q. So maybe that -- and that helps. I think probably
2 fair. Hypothetically, if there is no ongoing or current
3 intrusion, that might have an effect on your opinion?

4 A. Well, certainly additional facts would affect my
5 opinion.

6 Q. And I will tell you, I -- one of the orders I've
7 issued, and I am attempting to get -- declassification is
8 important. It helps with transparency. I think everybody
9 hopefully in this room agrees with that. I am making an
10 effort, but I am not, of course, the classification authority,
11 so I am -- I am kind of at their mercy in some regard as we
12 try to go through this. I'm able to see it, which is helpful.
13 But I do -- it is important for the public to see it.

14 Now let's assume the intrusions occurred, everything
15 in Exhibit A is true and relate to this case and it happened.
16 So we get your opinion. As somebody who is an expert in
17 ethics, can you talk me through, then, the process for a
18 lawyer to get out of that attorney-client relationship?

19 A. A lawyer has an obligation to maintain that client
20 confidentiality, and when, in fact, the lawyer has
21 information, as I assume here, that they cannot -- they cannot
22 provide that level of confidentiality to the client, one, they
23 have an obligation to let the client know. They have a duty

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1 of communication to the client, to tell the client what the
2 situation is, and then they have an obligation to attempt to
3 remedy the situation.

4 And so the lawyer would go through the necessary
5 steps which, from what I'm provided here, I assume the lawyers
6 did. They came to you, I believe -- I don't know if it was
7 you or someone else -- with the allegations of the intrusions.
8 They sought to have hearings. They sought to get to the
9 bottom, if you will, of the problem. And those motions were
10 denied. And so they went through all the available legal
11 remedies in trying to rectify the situation.

12 And at the time when they got to the point where,
13 unfortunately, the government intrusion was continuing and
14 they could not guarantee a client the fundamental -- it's
15 fundamental, as you understand.

16 Q. Absolutely.

17 A. It's a bedrock principle that you can't communicate
18 with a client to represent them if you can't promise them
19 confidentiality. When that happens, then the lawyer has no
20 choice but to withdraw. They are mandated under the ethics
21 rules of every jurisdiction to withdraw when their conduct
22 would thereby violate the rules of professional conduct.

23 Q. And so that withdrawal -- again, let's --

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1 hypothetically, let's assume I have it wrong. Hypothetically,
2 I order the attorney to continue with representation in the
3 face of this. Again, hypothetically I've got it wrong; there
4 were these intrusions. I order the lawyer to maintain that
5 attorney-client relationship.

6 At least my reading of the Model Rule is that even if
7 you have good cause to withdraw -- right? They're listening
8 in, or whatever -- even if you have good cause to withdraw, if
9 a tribunal orders you to maintain the relationship, you have
10 to, or do I not -- what am I missing?

11 A. All right. I would refer -- it's not in my report,
12 but I would refer you to Model Rule and the rule of every
13 jurisdiction 3.4(c), which is a rule that says lawyers may not
14 disobey, essentially a lawful order of a tribunal. However, a
15 lawyer who believes that the order is not lawful has the
16 obligation to challenge that order and they must do so openly.
17 They can't just walk -- walk away and do nothing, right?

18 And so a lawyer is required to go through whatever
19 open legal process there is to challenge that.

20 Q. And so, I mean, here we do have an appellate process.
21 We do have abilities to reach out to other courts. I think we
22 all know that. I mean, we can either go to the -- our
23 commission, military review process, or off to district

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1 courts. I mean, there is a process. I assume that's what the
2 rule envisions, is ----

3 A. Yes, and ----

4 Q. Oh, sorry.

5 A. No, I'm sorry. I said yes, it's exactly what is
6 envisioned, and it's my understanding that's exactly what
7 occurred here; that at the time Mr. Kammen was ordered to
8 appear, he filed or his lawyers filed in the Northern
9 District -- one of the districts of Indiana, and they filed a
10 habeas petition and obtained an order. That's exactly what a
11 lawyer is required to do. That's what we want lawyers to do,
12 which is to use the legal process to challenge orders that
13 they do not believe to be lawful.

14 Q. Are you familiar with any jurisdictions where a
15 counsel can withdraw without making a motion to the court
16 before whom he is appearing?

17 A. Well, federal courts are certainly different than
18 this court. And so in the federal court, you certainly would
19 go to a judge and make -- make a motion. But that's not my
20 understanding, although that's beyond my expertise. I will
21 just tell you ----

22 Q. Sure.

23 A. ---- it's not my understanding of the law here.

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1 Q. And then am I right, the Model Rule -- and it appears
2 to be the same in Indiana, 1.16(c), but 1.16 does say that if
3 ordered, the lawyer will continue representation,
4 notwithstanding good cause for termination. I assume that
5 means until this, whatever the appellate process is, plays
6 out.

7 A. It does say that. But as I've explained, the lawyer
8 here, Mr. Kammen, went through the legal process. So even if
9 ordered, it has to be -- it has to be interpreted in light of
10 3.4(c), which is to say if the lawyer believes it's not a
11 lawful order, then they have an obligation to take action,
12 which is to say to go through some process, which is what --
13 what happened here.

14 Q. Here, I mean, there is -- there seems to be some
15 communication with Mr. al Nashiri about kind of the facts
16 surrounding this. He's in the courtroom, and Exhibit A is
17 nonclassified and provided to him.

18 Is that something -- so let's assume, then, that
19 Mr. al Nashiri has some idea, right? I mean, everyone has a
20 guess as to what the worry is here, that somebody is listening
21 in on these conversations or intruding on these conversations.
22 Can the client waive that conflict?

23 A. A client can waive it with informed consent, but the

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1 language of informed consent means that there actually has to
2 be a relatively robust way in which you can inform the client.
3 And apparently here, because the information was classified,
4 Mr. Kammen could not even inform his client of the reasons and
5 the underlying intrusion; therefore, he couldn't obtain
6 informed consent.

7 Q. So at least for -- in this case, where we are in the
8 process, if the underlying facts are declassified and
9 Mr. Kammen can talk with his client, that is something I
10 assume the client can waive if this informed consent occurs?

11 A. I'm not sure I can opine about that without looking
12 at the nature of the information. One would -- it would be
13 very difficult to determine whether there was sufficient
14 information that Mr. Kammen could provide to his client in
15 order to obtain his informed consent.

16 Q. And then for CIPA cases, when you sign on to do one,
17 part of that is an understanding that there is going to be
18 information you can't share with your client, fair?

19 A. Correct.

20 Q. I'm not saying this is what happened here, but in
21 general, have you ever advised an attorney to simply
22 voluntarily abandon a client and refuse to appear in court
23 proceedings?

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1 A. Well, no. But I've told lawyers that they may be
2 required to withdraw, which is what I had to advise Mr. Kammen
3 here. There was no choice. He was mandated to withdraw.

4 Q. Based on the facts that he gave you?

5 A. Correct.

6 MJ [Col SPATH]: Let me see what the parties have, and
7 then I'll see if I have other questions.

8 Thank you very much. Let me check with the defense
9 first.

10 WIT: Thank you.

11 MJ [Col SPATH]: Defense Counsel?

12 DDC [LT PIETTE]: No questions, Your Honor.

13 MJ [Col SPATH]: All right. Trial Counsel, any questions?

14 MATC [COL WELLS]: Sir, I do have questions. Can I have
15 the ELMO turned on, sir?

16 MJ [Col SPATH]: Absolutely.

17 **CROSS-EXAMINATION**

18 **Questions by the Managing Assistant Trial Counsel [COL WELLS]:**

19 Q. Good morning, Professor. Or good afternoon. Pardon
20 me.

21 A. Good afternoon. Good afternoon.

22 Q. My name is Colonel John Wells. I'm assigned to the
23 prosecution here. I have looked over your curriculum vitae,

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1 and I want to express my appreciation for your years of
2 service as a criminal defense attorney and also as an educator
3 in our profession.

4 We're struggling here because, I think, Mr. Kammen
5 knows more about this case than anybody. The many years that
6 he has represented Mr. Nashiri probably will pay off benefit
7 at trial. Have you had a chance to talk to Mr. Kammen after
8 he submitted his request for withdrawal?

9 A. No. After he submitted his request -- request? I
10 may have had a brief conversation, very brief. I'm trying to
11 remember. I don't -- I don't recall. If it was, it was very
12 brief.

13 Q. Are you in contact with him now by e-mail in any
14 regard?

15 A. No.

16 Q. Okay.

17 A. No.

18 Q. You provided your opinion to him. Was that as a
19 consultant, or did you provide it to him as a testifying
20 expert with the expectation that you would be called to
21 testify?

22 A. Only as a consultant.

23 Q. Okay. Ma'am, are you surprised to learn that he

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1 submitted your opinion in a filing before this commission as
2 the basis for his withdrawal from representing Mr. Nashiri?

3 A. No.

4 Q. I'm sorry, you're not aware or you're not surprised?

5 A. No, I'm not surprised.

6 Q. Okay. If you provided the opinion just as a
7 consultant, did you expect your opinion to be relied upon by
8 this commission as the basis for Mr. Kammen to withdraw?

9 A. I understood that it could be -- he could submit it.
10 I knew that once I provided my opinion to him, that he would
11 file a motion to withdraw. I did not know whether he would
12 actually provide the opinion or -- or not.

13 Q. Yes, ma'am.

14 A. But I assumed that he could.

15 Q. Yes. And by providing that opinion, did you expect
16 to be called as a witness?

17 A. No.

18 Q. Ma'am, I direct your attention to the first page of
19 the document.

20 A. You're referring to my report?

21 Q. Yes, ma'am.

22 A. Yes.

23 Q. And also the second page, second full paragraph.

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1 A. Of which page?

2 Q. Second page, second paragraph.

3 A. Okay.

4 Q. Where you say, "My qualifications to serve as an
5 expert witness on legal ethics are set forth below," and you
6 included your curriculum vitae?

7 A. That is correct.

8 Q. And -- but you still didn't expect to be called as a
9 witness on this matter; is that right?

10 A. That's correct.

11 Q. Okay. Ma'am, this opinion that you provided was just
12 to Mr. Kammen, because on the front page it's just addressed
13 to Mr. Kammen, correct?

14 A. Correct.

15 Q. Are you aware that two other civilian attorneys
16 representing Mr. al Nashiri also submitted your opinion to
17 this commission as reasons for their withdrawal?

18 A. I subsequently became aware, I think only in the last
19 week or so, that my opinion was submitted by other counsel.

20 Q. Did you give permission to Mr. Kammen to share your
21 opinion with those other counsel?

22 A. I gave an opinion to Mr. Kammen for him to do with it
23 what he chose to do.

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1 Q. And if those other counsel contacted you, could you
2 have provided them a personal opinion, also?

3 A. I'm not sure what you're asking. If they had asked
4 me to render ethics advice to them, would I have written a
5 letter for them? Is that the question?

6 Q. Yes, ma'am.

7 A. You know, if it was not a conflict of interest, I
8 might have done so, but I would consider it.

9 Q. And you would have spoken with them just like you did
10 with Mr. Kammen, correct?

11 A. Well, I didn't actually speak with Mr. Kammen very
12 much. I was provided with facts by Mr. Kammen.

13 Q. I want to turn to page 3 of your opinion, the bullet
14 points. You've covered point 1 and point 2, I believe. But
15 point 3 is a reference to a Supreme Court opinion. Do you see
16 that?

17 A. I'm sorry, I don't know what you're referring to.
18 Page 3 of my opinion, the third paragraph says "on June." Is
19 it that one, on June 14th, 2017?

20 Q. Next one down, I apologize. The next one down.

21 A. Oh, yes. "As reflected in pleadings filed with the
22 U.S. Supreme Court, defense counsel obtained information 'then
23 [REDACTED] contradicting the prosecution's assurances.'"

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1 Q. Yes, ma'am. Was that provided to you or did you
2 obtain that independently?

3 A. No, all of these facts were provided to me. I didn't
4 obtain anything independently.

5 Q. Okay. Did you review all of that pleading to the
6 Supreme Court?

7 A. I didn't review any pleadings. The only thing I
8 reviewed were the facts that are before you.

9 Q. Yes. And on that bullet, there was a sentence after
10 that statement but it's not included in your bullet. So what
11 I'm asking is: Did you just get this sentence, or did you
12 pluck it from the Supreme Court opinion?

13 A. No, this was provided to me by Mr. Kammen.

14 Q. And only that sentence?

15 A. I don't know what you mean by "only that sentence."
16 Every single fact contained in these bullet points came from
17 Mr. Kammen. I did not review any documents independently.

18 Q. Thank you, ma'am.

19 Also, the next bullet down, it talks about a
20 statement from the chief defense counsel. Only those words
21 that appear in your opinion were provided to you; is that
22 correct?

23 A. I'm -- once again, I'm not certain what -- what you

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1 are indicating. That statement as well was provided to me by
2 Mr. Kammen.

3 Q. But you did not review all of the chief defense
4 counsel's comments that are referenced there, correct?

5 A. The only information upon which I relied is that
6 which is contained on page 3 and 4, the facts.

7 Q. And then at the bottom there you outline a number of
8 actions that the defense team and Mr. Kammen have taken, a
9 series of motions to discovery, an evidentiary hearing, and
10 permission to inform the client; is that correct?

11 A. That's what it says.

12 Q. Yes, ma'am. Are those the only actions that you
13 believe Mr. Kammen took to remedy this situation?

14 A. The only information I have is the information
15 contained in this document.

16 Q. Yes, ma'am. In your years of representing clients --
17 and I see that in the early '70s you worked in Seattle and the
18 West Coast there -- did you have an opportunity to meet with
19 clients in a jail setting?

20 A. Yes.

21 Q. And did you meet with them out in the recreation
22 yard?

23 A. No.

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1 Q. And did you meet with them in a common area in a
2 cellblock? No would be the answer?

3 A. In --

4 Q. No would be the answer, correct?

5 A. Are you answering for me or are you asking me a
6 question?

7 Q. I am asking a question. Is the answer no?

8 A. Did I meet with them in a common area? I had
9 meetings with clients, not in the jail, but in prisons, not
10 meetings, but I talked to them; and then I had private
11 meetings with them as well.

12 Q. Yes, ma'am. And then did you ever meet with them in
13 their cell, holding area?

14 A. In any case that I've ever handled?

15 Q. Yes, ma'am.

16 A. At arraignments, certainly.

17 Q. Okay. In those circumstances it was the lawyer's
18 obligation to make sure that the circumstances provided
19 private or confidential communication; is that correct?

20 A. Yes.

21 Q. And if you saw anything that -- in those
22 circumstances that was an intrusion into that relationship,
23 wouldn't you have an obligation to address that problem?

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1 A. Generally, yes. I'm not sure what you're
2 specifically referring to. And the reason I say that is there
3 are times in holding cells when you are arraigning a person
4 and you have no choice but to speak to them in that
5 environment. And so what you do in that environment is
6 attempt to get as little confidential information as possible
7 at that moment in order, for instance, to assure that they can
8 be released on bail.

9 But other than that, yes, you must do what you can.
10 You can go to systems. You can go to chief judges and try to
11 change that policy or that practice, but that oftentimes is
12 not successful.

13 Q. Yes, ma'am. And if the lawyer chooses to meet with
14 the client, say, in a recreation yard or a cellblock or the
15 cell itself, the lawyer is taking on the obligation to protect
16 those confidences, correct?

17 A. If what they're doing is securing confidential
18 information that's necessary for representation, certainly.

19 Q. And would those circumstances, in your estimation, be
20 less secure of the confidentiality?

21 A. Which -- you mean if you're in a common yard? I
22 don't understand the question, so maybe you could rephrase it.

23 Q. Exactly. Would those circumstances in a common

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1 yard ----

2 A. Which ----

3 Q. ---- in a cellblock or in a cell, be less secure than
4 in a dedicated attorney-client meeting area?

5 A. Well, assuming the dedicated attorney-client meeting
6 area was not one in which there was intrusions, the answer
7 would be yes. But it would totally depend upon the facts.

8 Q. Yes, ma'am. If the jail pointed you to a room that
9 was an interview room, and in that interview room it had a
10 glass-pane wall, one-way mirror, it had conduits, it had a
11 camera in the corner, would you believe that that is a secure
12 environment to have a confidential communication with your
13 client?

14 A. It would depend where it is.

15 Q. What do you mean by "where it is"?

16 A. Well, what system you're operating in. Is it a
17 federal system? Is it a state system? Is it a military
18 commission? What are the history -- what's the history in
19 that environment of intrusions? There are a variety of
20 factors that would influence whether or not one would think
21 that was a secure environment.

22 Q. Okay. Absolutely. Let's assume that it was a
23 federal system and you were in there and you had all of the

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1 matters, say, in Exhibit A that Mr. Kammen provided to you.
2 And that would be part and parcel of your thinking about
3 protecting confidentiality; isn't that correct?

4 A. I'm not sure I understand the question.

5 Q. Yes, ma'am. Let's just break it down then.

6 With the hypothetical that I provided to you about an
7 interview room with the camera in the room, conduit, and a
8 one-way mirror, would it be reasonable for the lawyer to say,
9 I don't feel comfortable meeting with my client here to
10 exchange sensitive information. I want this wall with the
11 one-way mirror blocked off. I want the camera removed. I
12 want sound-deadening material?

13 I hope that you will agree with me that those would
14 be reasonable steps that the lawyer could take to protect
15 confidential information, correct?

16 A. It would depend on the circumstances. In some
17 circumstances, yes, in others no. I really can't answer that
18 question without knowing the more precise detail ----

19 Q. Okay.

20 A. ---- of the circumstances.

21 Q. But the lawyer could say, I don't want to meet in
22 this room with the client. I'm not going to accept what the
23 government is offering me. I just will not meet here. Isn't

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1 that an acceptable option?

2 A. It depends on the circumstances. I'm not really
3 certain why it is you're asking me these questions. I'm
4 testifying about ethics rules, not about jail procedures. And
5 what circumstances would give rise to assurances of
6 confidentiality, that's really not within my expertise.

7 Q. Yes, ma'am. Thank you.

8 Ma'am, in your opinion you cite ABA Model Rules of
9 Professional Responsibility 1.6, Confidentiality of
10 Information. I am going to place this on the overhead. This
11 is marked as Appellate Exhibit 389S, I believe, page 1 of 10.
12 Ma'am, can you -- can you see this up on your monitor?

13 A. I can see it.

14 Q. Okay. And, ma'am, I think you did in your opinion
15 cite 1.6(a) there, "A lawyer shall not reveal information
16 relating to the representation of a client unless the client
17 gives informed consent." Is that one of those bedrock
18 principles that you noted in your opinion?

19 A. It is. I'm a little concerned, though, what this
20 document is, because they're no longer called the ABA Model
21 Rules of Professional Responsibility; they're the Model Rules
22 of Professional Conduct. So this looks like an extremely old
23 version of these rules.

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1 Q. Okay. Is it substantially different today?

2 A. No, but I'm just -- I'm just pointing that out to
3 you.

4 Q. Okay. Thank you. (c) there, that statement, is that
5 an accurate statement of the Rules for Professional
6 Responsibility?

7 A. "A lawyer shall make reasonable efforts to prevent
8 the inadvertent or unauthorized disclosure of, or unauthorized
9 access to, information relating to the representation of a
10 client." Absolutely correct.

11 Q. Yes, ma'am.

12 [MR. LUGER]: When you're reading, we all tend to speak
13 quickly when we read ----

14 WIT: Right. I know. Thank you.

15 [MR. LUGER]: Just for the court reporter.

16 MJ [Col SPATH]: Thank you. They'll -- they'll give me a
17 sign, I promise. I'm watching the screen.

18 [MR. LUGER]: Thank you.

19 Q. In your opinion, Mr. Kammen described to you and you
20 recite that he had taken three actions: He had filed a motion
21 for discovery -- I think this is on page 2 -- or page 3,
22 pardon me.

23 A. It's on page 3, yes.

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1 Q. And he had asked for an evidentiary hearing, and he
2 asked for permission to inform his client. But did he also
3 tell you that he had requested from the court to use the
4 courtroom as a meeting space instead of the other meeting
5 space that the detention command had provided to him?

6 A. I do not believe that information was contained
7 within the facts that I was provided.

8 Q. Okay.

9 A. But I will say -- let me just add that when I'm
10 looking at page 4, apparently he received advice from the
11 chief defense counsel not to utilize attorney-client meeting
12 spaces in Guantanamo.

13 Q. Yes, ma'am. And that was in June, correct?

14 A. Yes.

15 Q. All right. And then he filed a series of motions
16 after that, correct?

17 A. If it says that here, that's correct.

18 [MR. LUGER]: It's on page 3.

19 WIT: That's afterwards.

20 A. Yes, it's the last paragraph on page 3, correct.

21 Q. And so those three motions on page 3 that were
22 provided to you, that's what he communicated to you that he
23 had done to act reasonably to secure a confidential meeting

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1 area, correct?

2 A. Those are -- those are facts contained within this,
3 yes.

4 Q. Yes. I want to draw your attention again to the
5 screen. Can you see this document? This is Appellate Exhibit
6 369AAA; it's page 1 of 16. And then do you see the caption?

7 A. I do.

8 Q. "Motion by the Defense to Allow Mr. al Nashiri to
9 Meet with His Counsel in the Courtroom and Enforce
10 Mr. al Nashiri's Right to Counsel and Privileged
11 Attorney-Client Communications." Do you see that?

12 A. I do.

13 Q. And the date?

14 A. August 14th, 2017.

15 Q. And then what is the date of your opinion, ma'am?

16 A. October 5th, 2017.

17 Q. Do you know if that motion had been ruled upon before
18 you provided your opinion?

19 A. I do not.

20 Q. All right. I'm going to put back on the screen --
21 here's a motion, Appellate Exhibit 3690000, page 1 of 2. It's
22 a ruling by the commission on the motion, 369AAA. Have you
23 seen this ruling before?

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1 A. I have not.

2 Q. In this ruling the commission says there's no need to
3 make a decision on the motion, correct?

4 A. I can't read it. I'm sorry. Perhaps you could make
5 it larger.

6 Q. Sure. How is the focus on your end?

7 A. That -- that's much better.

8 Q. I'll give you a moment just to read it, please.

9 [Pause.]

10 [Conferred with counsel.]

11 Q. All right. That's the first page. Let me turn to
12 the second page. Hang on, ma'am.

13 [Pause.]

14 Q. Yes, I know, a little curious. Stay with me, please.

15 A. I don't understand this.

16 Q. But this is a motion -- all right. Hold on.

17 [MR. LUGER]: Let him ask the question. Let him ask the
18 question.

19 Q. Sure. The commission has ruled that his motion to
20 use the courtroom as an alternate location has been mooted by
21 other rulings. Is this what this opinion says to you? It's
22 a fairly ----

23 A. I have no idea. I have no idea what this opinion

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1 says. You know better than I do.

2 Q. Thank you, ma'am. In the footnote portion, and I
3 draw your attention to the third footnote, it says that "The
4 commission has no objection to the defense coordinating with
5 the guard force to obtain use of the ELC courtroom to meet
6 with the accused during such times in which the commission is
7 not in session."

8 And this ruling seems to provide an additional
9 location for Mr. Kammen to meet with his client. Isn't that a
10 fair assessment?

11 A. I -- I can only read what it says. I don't know
12 that -- what it means.

13 Q. And while this motion was outstanding and yet to be
14 ruled on by the court, if you had been provided that
15 information, would you have come to the conclusion that
16 Mr. Kammen must withdraw from representing Mr. al Nashiri if
17 he had not exhausted this motion yet?

18 A. I would have to look at this motion. I'm not sure I
19 understand it. I'm not sure I understand the ruling, and I'd
20 have to look at that and consider it carefully before I would
21 render an opinion.

22 Q. Yes, ma'am. Questions about your opinion: You
23 provided your opinion only in your personal capacity; do I

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1 have that correct?

2 A. Yes.

3 Q. You were not a representative of Hofstra University?

4 A. Not at all.

5 Q. Nor were you representing the American Bar

6 Association?

7 A. No, I was not.

8 Q. I'm smiling with you, because I just have to go

9 through this.

10 You were not an official with any other federal

11 agency or government?

12 A. No.

13 Q. Or the State of Indiana or ----

14 A. No.

15 Q. ---- or Illinois?

16 A. No.

17 Q. Nor did you represent the National Association of

18 Criminal Defense Lawyers; is that correct?

19 A. Correct.

20 Q. All right. I am troubled by why we do not have an

21 opinion on ethics from Mr. Kammen's state bar. Can you shed

22 any light on that fact?

23 A. I don't know. It's not required. I mean, one -- I

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1 render ethics opinions in various jurisdictions. One doesn't
2 need a state bar person to render an opinion under Indiana
3 law, under Indiana ethics rules as to a lawyer's obligation in
4 Indiana.

5 And frankly, it's the same around the country. I
6 mean, the ethics rules on confidentiality, communication, and
7 necessary withdrawal are the same in almost every
8 jurisdiction, including the military commissions around the
9 country.

10 Q. So it seems that it would have been no problem to
11 obtain an ethics opinion from the State of Indiana or from the
12 State of Illinois.

13 A. I have no idea. It's not required.

14 Q. I understand it's not required. Is it advisable?

15 A. Not necessarily, no. People go to lawyers to get
16 opinions, and I've been consulted by a wide range of people in
17 a wide range of matters in various jurisdictions.

18 MATC [COL WELLS]: Sir, I have no further questions.

19 MJ [Col SPATH]: Defense Counsel, do you have any
20 questions?

21 DDC [LT PIETTE]: No, Your Honor.

22 MJ [Col SPATH]: All right.

23

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1 REDIRECT EXAMINATION

2 Questions by the Military Judge [Col SPATH]:

3 Q. Ma'am, let me ask in kind of the world of ethics --
4 that's certainly why I wanted you to come testify. I don't
5 know if you're familiar with it or not, there's a case
6 Rusinow, R-U-S-I-N-O-W, v. Kamara, 920 Federal Supplement 69.
7 I don't know if you're familiar with it or not. It relates to
8 1.16(a), and again, this -- and (c), this withdrawal.

9 A. I'm not familiar with it.

10 Q. Okay.

11 A. It relates to mandatory withdrawal?

12 Q. It does. And here -- here's the -- I want to read
13 you the language and then just talk to you about it. Again,
14 understanding you didn't review it before you came in.

15 It recognizes the notion -- and again, it's a
16 hypothetical, so assume what I tell you is accurate, right?
17 "Even if withdrawal is otherwise appropriate, other
18 considerations must sometimes take precedence such as
19 maintaining fairness to litigants, preserving courts'
20 resources and efficiency."

21 Any quarrel with kind of that language? Any concerns
22 with that?

23 A. Yes. I'd have to look at the facts of that case.

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1 That -- that does not sound like a mandatory withdrawal
2 provision. There's another provision of 1.16 that talks about
3 permissive withdrawal, and that sounds to me like it refers to
4 permissive withdrawal as opposed to mandatory.

5 Q. And here your advice, of course -- again, your
6 opinion, probably better -- better framed -- your opinion was
7 based on the representations to you that there had been and
8 there were ongoing intrusions; that's what made this a
9 mandatory withdrawal issue. Is that ----

10 A. That's relatively accurate. The only thing I -- I
11 would caution is that I'm relying very specifically on the
12 language of what was presented to me, and because it was
13 mostly redacted. It was just that the chief defense counsel,
14 who's aware of the redacted facts described, recently stated
15 publicly "nothing has changed to cause me to change my advice.
16 Indeed, the more I learn, the more resolute I have become in
17 my position."

18 And that refers to the fact that there was ongoing
19 intrusion into the attorney-client relationship.

20 Q. All right. And it seems -- I mean, it seems
21 reasonably evident to me, I just want to make sure I've got
22 it. If there was not an intrusion, if the facts that were
23 given to you were not accurate and there was no intrusion,

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1 either past or ongoing in this case -- and I'm really focused
2 on this one specifically -- I assume your advice would be
3 different?

4 A. I'd have to take a look at that. I assume it would
5 but I would have to take a look at that, because it could be
6 intrusions in other cases that could have an impact upon this
7 particular case.

8 So I don't know. I don't render opinions lightly. I
9 look very carefully at the facts provided to me, and I'd have
10 to have a series of facts from which I could opine.

11 Q. All right. And again, you have to rely on the facts
12 that you're given.

13 A. Correct.

14 Q. And so if they're inaccurate or different, it could
15 lead to a different outcome?

16 A. It could. It would depend upon what the facts are.

17 Q. I don't think it will surprise you, in getting ready
18 to talk to you -- and I do appreciate you taking the time. I
19 do. I know there was a lot of movement as we got here, but I
20 really do want to thank you for taking the time.

21 Probably doesn't surprise you that I went and looked
22 into kind of who you were, of course, and what you've written.

23 A. Yes. I assume you would have.

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1 Q. I hope so. I'm not a litigant anymore, so it's --
2 it's -- I don't often get time to go out and kind of prepare
3 to ask questions.

4 I guess my question: There's a couple articles that
5 certainly appeared to be critical of the commission process,
6 but they also seemed to be pre-2009 when we got the new
7 Military Commissions Act from President Obama after the
8 Supreme Court clearly disagreed with the first set of rules.

9 A. That's correct. All my articles -- or the articles I
10 wrote were prior to the Military Commission Act of 2009.

11 Q. Have you -- have you reviewed -- from an ethical
12 standpoint, from your background as you look at ethics, have
13 you looked at the Military Commissions Act of 2009?

14 A. I have not.

15 Q. Okay. When people -- I'm probably -- you're probably
16 conflicted from me reaching out to you for an ethics opinion,
17 but in general do trial judges -- have trial judges used you
18 in that role?

19 A. Yes. You're welcome to, just not in this case.

20 Q. Yeah, my day job is Chief Judge of the Air Force.
21 I'm anxious to go back to it.

22 A. I imagine.

23 Q. I am.

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1 MJ [Col SPATH]: I think that's it. Let's me just check,
2 make sure I didn't spark any other questions.

3 Defense Counsel, anything?

4 DDC [LT PIETTE]: Nothing from the defense, Your Honor.

5 MJ [Col SPATH]: Trial Counsel, anything?

6 MATC [COL WELLS]: No, sir.

7 MJ [Col SPATH]: I really do mean it, I appreciate the
8 work you did. I enjoyed reading things about the old act and
9 learning who you were. I'm sorry that it took kind of the
10 effort to get you here and all, and I hope it was at least
11 more pleasant than anticipated.

12 WIT: Thank you, Judge. I appreciate it.

13 MJ [Col SPATH]: All right. They will disconnect there.
14 Thank you so much.

15 WIT: Thank you.

16 **[The witness was excused and the VTC was terminated.]**

17 MJ [Col SPATH]: I've got some additional findings of fact
18 I'm going to give you. There aren't terribly many yet. There
19 will be a lot more.

20 What I plan to do is issue kind of a complete ruling
21 on 389 and close that series out. All of the findings of fact
22 that I put into the record on 31 October of 2017 are certainly
23 going to be part of it, and so these kind of developed as

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1 we -- the week went forward.

2 In relation to Ms. Olson-Gault, she's a credible
3 witness. She's been employed in her current job in the ABA
4 for the last two years, and she's been with the ABA for quite
5 a while, obviously. She made clear the ABA guidelines for the
6 appointment and performance of defense counsel in death
7 penalty cases, revised edition, are best practices. They're
8 guidelines.

9 She referred to them as best practices. The Supreme
10 Court has made clear, and she agreed with this when she
11 testified, they're not some kind of talismanic requirement;
12 they're guidelines, and they have not been adopted in every
13 jurisdiction.

14 We've talked about one that stands out to me, of
15 course, the military, but there are others that have not
16 adopted them. And here in the commissions, they were adopted,
17 kind of, and I appreciated her testimony on this, and that's
18 why it's in my findings of fact.

19 She understands that in the context of military
20 commissions the ABA guidelines carry slightly more weight, in
21 her opinion, than in cases handled under the UCMJ. And she
22 based that on DoD referencing them and Congress referencing
23 them as these commissions came into being. And of course the

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1 language in there that's critical for us is "learned counsel
2 to the greatest extent practicable."

3 I've already talked a lot about the absence of
4 learned counsel here. All those findings went in the record
5 already. So from the 30th, just to be clear, I know we've had
6 a change-out in people who have been watching, but I'm not
7 going to go back through all of those.

8 But I would point out that we learned, of course,
9 that Mr. Kammen wasn't traveling down here on the 29th of
10 October, despite clearly the defense community knowing it for
11 quite some time before that. We were already on the airplane,
12 in fact, when the commission found out. Learned counsel has
13 failed to appear on 30 October as ordered, on 31 October, on 1
14 November.

15 On 1 November I issued an additional order for
16 learned counsel to appear, at least at the Mark Center. It
17 wasn't to tele-litigate or anything like that. It was because
18 he refused to come to Guantanamo Bay, Cuba to represent his
19 client, despite the fact that he is required to be here and
20 has signed a contract of employment to be here and has not
21 been properly released yet.

22 And, of course, in response to that, he got a stay
23 for that order and voluntarily determined he wasn't going to

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1 come help his client. I made clear in the order it could lead
2 to a contempt proceeding. We'll see where we go with that.

3 On 31 October the chief defense counsel at the time,
4 General Baker, refused to testify under oath or explain how he
5 found good cause shown on the record for approving the release
6 of learned counsel, or about any matter, despite his activity
7 in the case. He also refused to rescind what I determined was
8 an unlawful order in releasing learned counsel, who aren't
9 detailed, and the two detailed civilian counsel. And he
10 refused an order to facilitate the travel of the learned
11 counsel to GTMO for what has been a long-scheduled hearing.

12 From 1 November until now, learned counsel has
13 remained absent from the commission hearings.

14 Learned counsel's request that he meets in the
15 courtroom has been granted by the behavior of the confinement
16 facility, over and over and over. They've also offered up a
17 meeting place in AV-34, where I work, and the defense counsel
18 has been able to take advantage of those, as I've asked about
19 on the record, and I will follow up on about in a little
20 while. And yet learned counsel still refuses to appear.

21 Mr. Kammen submitted his notice of appearance in this
22 case, and his agreement, and noticeably, unlike notice of
23 every other counsel who's been detailed -- if you go look

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1 through the filings, there's no memo from the chief defense
2 counsel. He made his own appearance -- all the others come
3 through the chief defense counsel because learned counsel are
4 different -- on 23 December 2008.

5 And he signed his affidavit and terms of agreement,
6 including statements, most importantly, "Learned counsel will
7 work cooperatively with detailed defense counsel to ensure
8 coordination of efforts and to ensure each counsel is capable
9 of conducting the defense independently, if necessary,"
10 suggesting, yet again, learned counsel to the greatest extent
11 practicable, right there in his employment contract.

12 Nothing in the agreement allows him to disregard
13 laws, rules, regulations, or instructions regarding the
14 handling of classified information or any protected
15 information.

16 After executing this affidavit and entering a notice
17 of appearance, Mr. Kammen, according to him, has spent
18 10,000 hours representing Mr. al Nashiri over nine years.
19 And, of course, his bar rules state that even if good cause is
20 shown, if a tribunal orders your continued representation,
21 you're required to continue, even if good cause has been shown
22 on a record or on the record.

23 In the ruling -- in the discussion of the law I will

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1 make clear -- there seems to be some confusion out there --
2 I'm not suggesting the Rules of Court trump the Rules of
3 Military Commissions or the Manual. I never said that in the
4 ruling. I never cited the Rules of Court.

5 What I said -- and again, it feels to me to be basic,
6 basic statutory interpretation. The statute is ambiguous for
7 many reasons. When a statute is ambiguous, it's up to the
8 court to interpret it, right? This is law school 101. What's
9 the first place you look?

10 Any principles, right, set out by the people who
11 drafted the statute. Well, there aren't many from Congress on
12 that.

13 What they said, of course, is, well, look to the
14 Manual for Courts-Martial for areas where there's confusion.
15 That should be your guiding principle. So that's what I did.
16 And you know what it says about release of counsel? Of course
17 it's trial judge, the same as it is in every jurisdiction
18 across America.

19 There is no order from any judge severing the
20 relationship. The order in Indiana is that he doesn't have to
21 travel to represent his client on a writ for habeas for
22 someone to whom no -- no effort has been made to detain him,
23 apprehend him, arrest him or anything else.

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1 So that's where we're at at this point. I still find
2 learned counsel is available to the greatest extent
3 practicable. He's detailed to the -- or I'm sorry, he's
4 appointed to the case. He hasn't been severed from his
5 relationship with Mr. al Nashiri yet.

6 And there's no suggestion yet about how
7 Mr. al Nashiri feels about any of this, because nobody put his
8 agreement to this in the record, unlike every other defense
9 counsel who has been severed, save one, we'll talk about in a
10 minute, Commander Mizer.

11 Every other time Mr. al Nashiri severed the
12 relationship by signing something consenting to it.

13 If you believe General Baker's interpretation on the
14 eve of findings in a commissions case after ten years before a
15 jury comes in or the members come in and announce a verdict,
16 he could sever an attorney-client relationship. And if you
17 read it, he could do it without good cause shown because on
18 its face it doesn't make sense, hence the reason it's
19 ambiguous.

20 But again, that's where we're at. And the defense
21 community, frankly, refuses still to bring other attorneys in
22 to meet with their client.

23 Lieutenant Piette, on Wednesday we were not in

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1 session. Did you have an opportunity to meet with your
2 client?

3 DDC [LT PIETTE]: Yes, Your Honor.

4 MJ [Col SPATH]: And I don't know where the meeting was.
5 Was the meeting in a suitable location?

6 DDC [LT PIETTE]: Considering the purposes of that
7 meeting, yes.

8 MJ [Col SPATH]: Did you -- did they offer up AV-34 to
9 you?

10 DDC [LT PIETTE]: Yes, Your Honor.

11 MJ [Col SPATH]: Did you take advantage of that?

12 DDC [LT PIETTE]: No, Your Honor.

13 MJ [Col SPATH]: Okay. Today were you able to meet with
14 your client before we started? I don't know if you even
15 needed to or wanted to, I ----

16 DDC [LT PIETTE]: Yes, Your Honor, we had that
17 opportunity.

18 MJ [Col SPATH]: And was that here in the courtroom?

19 DDC [LT PIETTE]: Yes. And additionally in the holding
20 cell outside.

21 MJ [Col SPATH]: We don't need to discuss it today. Just
22 so we're tracking, AE 337, I know it was mentioned at some
23 point. I just -- what I need to know is what protective

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1 orders you all are still seeking, if any. AE 353 was the
2 strike package discovery. At some point we need to get an
3 update on if discovery has been completed. And then AE 369,
4 there was some discovery issues in there. Alls I need to know
5 is if there are any left and where we're at.

6 Come January, my understanding is Mr. al Darbi will
7 still be here. I will yet again offer the defense an
8 opportunity to cross-examine him. What you do with that
9 opportunity is up to you, but it gives you another couple
10 months to prepare on top of the many, many months you've
11 already had.

12 The other thing I need from the government is what
13 preadmission we're going to start working through that week,
14 more 207 or 324, 325, or 326. We will stay in preadmission
15 except for Mr. al Darbi, who again, since he will be available
16 by all accounts, We'll see if we have any questions.

17 Before I ask Mr. al Nashiri anything, let me just
18 check. Trial Counsel, are there any other matters from you so
19 far?

20 TC [MR. MILLER]: No, other -- excuse me, no, other than
21 Your Honor, we will provide the court in early December a list
22 I think, of what is remaining on 207 for planning purposes so
23 that the court knows, you know, how we're going to proceed.

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1 But we will do ----

2 MJ [Col SPATH]: Right now it's a two-week session ----

3 TC [MR. MILLER]: Yes.

4 MJ [Col SPATH]: ---- and that is my plan. I mentioned
5 maybe December, that is still on the table, the week of
6 December 11th if the other case that I think was going to be
7 here isn't, so the courtroom will be empty. I would have come
8 anyway, but if it's empty it's even easier for us. We still
9 might come down here.

10 I am waiting to see what the convening authority does
11 in relation to the contempt finding with General Baker and if
12 the federal judge does anything additional. That will help me
13 figure out the road ahead likely in relation to the two
14 civilians who are different than learned counsel. But just
15 keep your calendars open.

16 TC [MR. MILLER]: For planning purposes however, we
17 wouldn't be putting on any 207 or similar-type witnesses. It
18 would be just to handle those matters?

19 MJ [Col SPATH]: That would be it. It would be a very
20 short session, probably.

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

22 MJ [Col SPATH]: Thanks.

23 Defense Counsel, you know what I am going to chat

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1 with your client very quickly here, but anything else?

2 DDC [LT PIETTE]: Your Honor, I would like to be able to
3 make a record based some on the findings of fact that you
4 stated. Should I do that now or wait until after you talk to
5 Mr. al Nashiri?

6 MJ [Col SPATH]: You can do it after or in a pleading.

7 DDC [LT PIETTE]: Thank you, Your Honor.

8 MJ [Col SPATH]: I'll double check. Mr. al Nashiri,
9 here's my question. It has to do with Mr. Kammen. Clearly he
10 hasn't been here for the three weeks. You know that. I know
11 you know that.

12 Do you want him released from representing you or
13 not? And I'll let you chat with your counsel.

14 [Conferred with counsel.]

15 ACC [MR. AL NASHIRI]: I believe he chose to leave this
16 case, and I support him.

17 MJ [Col SPATH]: What about Ms. Eliades? Do you want her
18 to remain on your case?

19 [Conferred with counsel.]

20 ACC [MR. AL NASHIRI]: All the attorneys are free to have
21 their own opinion, and I support them. In other words, I
22 cannot force anyone to come here.

23 MJ [Col SPATH]: Clearly neither can I.

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1 All right. That does not end the inquiry, as we
2 know. I'm going to work through 389, because even if somebody
3 wants their lawyers to be released, which that was not a
4 statement quite as clear as that, that doesn't end the inquiry
5 after nine years and 10,000 hours of effort, as we enter into
6 preadmission of evidence and have moved well past motions of
7 law.

8 I'm going to put -- would you do me a favor? Would
9 you hand this to somebody to put up on the display? It's been
10 cleared. It's from 389 -- or I'm sorry, 348. It's from 348.
11 348, page 14.

12 So 348L was a motion for me to sever an
13 attorney-client relationship, and I granted it. And I granted
14 it based on what the facts were, and that is that Mr. Kammen
15 would represent his client as learned counsel. When facts
16 change, I can reconsider.

17 The benefit of Commander Mizer is that Mr. al Nashiri
18 didn't want him released, and he's learned. He said as much
19 over and over again when he testified. I don't know what
20 authority I have, but we're going to test it.

21 The convening authority is ordered to work to bring
22 him on orders, at which point he can represent his client
23 again. He's learned, he knows the case, he's got a security

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1 clearance.

2 At this point I'm not severing the relationship
3 between Mr. Kammen and Mr. al Nashiri. We'll see how that
4 order goes.

5 When I got this I took it very seriously, but again,
6 with Mr. Kammen sitting there, after spending at that point
7 almost eight years on the case, I couldn't envision he would
8 just walk away from a client. That seems like a significant
9 factual change underlying that motion. A reservist certainly
10 can be brought back on active duty. And again, we have the
11 testimony in the record demonstrating his expertise, his
12 knowledge, his skill set, and his relationship with his
13 client. So that's the order to work with the convening
14 authority on.

15 I'm sure we'll get a fight. I'm sure there will be
16 motions filed. But it would be nice if the defense community
17 would work with Mr. al Nashiri to get him representation,
18 instead of sitting here with lawyers detailed and appointed
19 and cleared, having Lieutenant Piette sit by himself. So
20 communicate that to the convening authority.

21 We're about done. Colonel Wells.

22 TC [MR. MILLER]: Nothing from the government. Thank you,
23 Your Honor.

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1 MJ [Col SPATH]: Thank you. Lieutenant Piette?

2 DDC [LT PIETTE]: Thank you, Your Honor. If I could just
3 have the brief opportunity to respond to a couple things that
4 I haven't yet had a chance to respond to.

5 On the first, regarding the findings of fact that you
6 just read, as far as Ms. Olson-Gault's testimony, as I heard
7 it, and I'm sure you'll review this before you issue your
8 written findings of fact, but she didn't say that they were --
9 she explicitly didn't say that the ABA guidelines were best
10 practices. She called them the floor or the minimum standards
11 and not best practices, just so that is clear; essentially
12 stating that the minimum, not the best practice, but the
13 absolute minimum is that learned counsel be available at all
14 stages of the proceedings.

15 The other thing is you mentioned that every other
16 time that an attorney has been severed, besides the Commander
17 Mizer situation, was with Mr. al Nashiri's approval. However,
18 I would turn Your Honor's attention to AE 083 in which -- this
19 was brought up a little bit I think earlier this week or maybe
20 last week about Michel Paradis. It appears there the chief
21 defense counsel unilaterally undetailed Michel Paradis from
22 the case without Mr. al Nashiri's input.

23 MJ [Col SPATH]: Without comment.

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1 DDC [LT PIETTE]: As far as over the course of the last
2 few weeks, you've talked about defense strategy and the risk
3 of that strategy. And I want, at least, the record to be
4 clear that, again, defense, our position is that this is not a
5 strategy; that we had no choice. Particularly the defense
6 team as it is constituted now truly had no choice, and that we
7 do understand, are fully aware of the risk of not
8 participating.

9 And frankly, just so the record is aware, it is a
10 terrifying risk. We can read the cases, too. It's scary,
11 because Mr. al Nashiri's life is on the line, and, frankly,
12 right now it's in our hands, my hands and the three other
13 attorneys who are working diligently in support. But because
14 of our adherence to those minimum standards of the ABA
15 guidelines ----

16 MJ [Col SPATH]: In the face of a ruling from the court
17 that you're not guaranteed learned counsel at every stage. I
18 know you understand that. And the opportunity to continue to
19 attack foundational evidence; there's not a court member in
20 sight. I just -- the record is clear what we're doing
21 currently.

22 DDC [LT PIETTE]: Yes.

23 MJ [Col SPATH]: I've said it and I'm going to say it

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1 again. "Greatest extent practicable" means what it says. My
2 intention is not to seat a panel without you having learned
3 counsel, unless -- not you. I recognize that while we may
4 disagree about it being a strategy, I recognize the position
5 you're in. I've said it. I have great empathy.

6 My frustration is a defense community that supports
7 you that really has been quite dismissive of my authority. We
8 heard it again today. I can't even ask a simple question
9 without pushback from the people that are there to support
10 you. Even that's difficult.

11 DDC [LT PIETTE]: Right. Your Honor, I understand.

12 MJ [Col SPATH]: So I'm doing what I can. Like I said, I
13 debated asking questions of the foundational witnesses. My
14 goal -- look, she was pretty honest about her writings about
15 the commission, right?

16 My personal opinion about commissions doesn't matter.
17 My feelings about it don't matter. Congress and the President
18 and DoD gave it to us. Right?

19 DDC [LT PIETTE]: Understood.

20 MJ [Col SPATH]: My job is to follow the law. No one out
21 there will ever know my personal opinions about any of this
22 because none of it matters.

23 I -- my goal is that your client gets a trial that is

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1 fair and impartial, because that's what the law says, in this
2 process. If our country thinks that's the process, that's the
3 process. And I'm doing what I can.

4 But I am frustrated, and I think that shows in the
5 lack of support you're getting, and, frankly, the lack of
6 ability for the defense community to even be civil to the
7 commission. It's reasonably shocking. But I don't know if I
8 have full contempt authority yet, so we're going to wait.
9 We'll figure it out.

10 I appreciate the position you're in, though. I do.
11 And that's why we are going to go through the basic blocking
12 and tackling of evidence admission, real evidence, until we
13 get somebody up to speed. And I'm hoping who we get up to
14 speed is somebody who told me what a great relationship they
15 had with Mr. al Nashiri and somebody who recognizes the
16 process and has a clearance.

17 DDC [LT PIETTE]: Yes.

18 MJ [Col SPATH]: And frankly, I couldn't even get an
19 answer on that, right?

20 Are you looking for people with security clearances?
21 Oh, I'm not comfortable telling you that. Really? That?
22 You're not comfortable telling me that? What, is that
23 privileged, too? Confidential?

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1 I mean, this is craziness. I haven't seen anything
2 like it. In my entire professional life, I haven't been
3 treated that way and I haven't treated others that way in a
4 courtroom. But we are where we're at.

5 I -- absolutely, if you all want to submit any
6 additional findings. The government did obviously in 389
7 brief with at least a proposed road ahead. And you are more
8 than welcome to put any findings you want to in writing in the
9 record, absolutely, in response to the government's brief. I
10 encourage you to.

11 DDC [LT PIETTE]: Understood, Your Honor. And again, I
12 can't speak for the chief defense counsel or the acting chief
13 defense counsel, but only for Mr. al Nashiri in this limited
14 scope that I think I can right now. And I understand that by
15 not participating we are running that risk that a higher court
16 is going to view this as strategy. But by participating, we
17 are guaranteeing to be providing representation, if you could
18 even call it that, that is below the floor, the minimum
19 standards for representation in a capital case set by the
20 American Bar Association.

21 So our only hope, Mr. al Nashiri's only hope is that
22 a higher court will recognize and understand the basic
23 blocking and tackling are exactly where the assistance of

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1 learned counsel is necessary. Our only hope will be that a
2 higher court will recognize that no counsel would withdraw and
3 disregard court orders, putting their livelihood and perhaps
4 their freedom on the line all to avoid a cross-examination or
5 to affect some far-flung strategy.

6 We agree with this court. We think declassification
7 of the underlying issue will be very helpful. I think we
8 disagree on how it will be helpful, but I think if a higher
9 court can see that, that ----

10 MJ [Col SPATH]: They can.

11 DDC [LT PIETTE]: ---- that is Mr. Nashiri's hope.

12 And I think, you know, our only hope,
13 Mr. al Nashiri's only hope is that a higher court will
14 recognize that Congress directed the Secretary of Defense to
15 apply the ABA guidelines and he did so by removing the
16 "whenever practicable" language. And that is why we have
17 taken the position that we're not taking a position or did not
18 take a position during these proceedings.

19 I just want that on the record. Thank you.

20 MJ [Col SPATH]: No, I appreciate it. It is critical that
21 sooner than later some people, your client included, by the
22 way, and everybody who has an interest in this gets some
23 closure one way or the other. It is an ongoing, long, painful

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1 process for everybody who is a part of it. And that is not
2 efficient administration of justice. We know that.

3 And so I am doing the best I can to guard your
4 client's rights, safeguard what I think is a process that
5 clearly has due process in it if anybody is honest about it,
6 given the amount of money, time, effort, et cetera, to
7 resource a defense team.

8 I was reading last night. It costs approximately
9 \$500,000 for a capital defense case outside of the
10 commissions. We're well past that in resourcing the defense
11 community. That's a good thing. But people seem to ignore
12 it. And now we have a learned counsel again in the face of a
13 court order to represent his client, refuses to.

14 And so I know you recognize I'm -- we will never
15 agree, I know, on the ultimate ruling. I've got that. But I
16 know you know this. I am trying to navigate these waters in a
17 way that preserves this process, preserves your client's
18 rights and gives the other side their day here. So we'll see
19 where we're at.

20 I know I'll see you in January. Maybe we'll see you
21 before. These commissions are closed.

22 [The R.M.C. 803 session recessed at 1528, 17 November 2017.]

23 [END OF PAGE]

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