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1 [The R.M.C. 803 session was called to order at 1101, 31 July
2 2017.]

3 MJ [Col SPATH]: The commission is called to order.
4 Mr. Miller, if you would, account for the prosecution team and
5 state the status regarding transmission of the proceedings.

6 TC [MR. MILLER]: Good morning, Your Honor. All members
7 detailed by General Martins' Detailing Memo AE 338H dated
8 February 22, 2017, are present for the government and have
9 previously stated their credentials and status as to the oath
10 for the record.

11 Present for the United States are Brigadier General
12 Mark Martins; myself, Mark Miller; Colonel John Wells; and
13 Major Michael Pierson. Also present is Master Sergeant
14 Vanessa Pichon, who is our paralegal; and our analyst, Forrest
15 Parker Smith. Also present in the back of the courtroom are
16 Supervisory Special Agent Mary Boese, Supervisory Special
17 Agent Stephanie Shark, and Mr. Joseph Castellano of the
18 Federal Bureau of Investigation.

19 It is my understanding, Your Honor, that these
20 proceedings are not being transmitted via CCTV or to any
21 remote locations as a result of a decision that was made
22 earlier in the week ----

23 MJ [Col SPATH]: Just slow down, Mr. Miller, a little bit

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1 if you could.

2 TC [MR. MILLER]: I'm sorry. It is my understanding that
3 earlier -- late last week, that the convening authority made
4 the decision, based on information that they received as to
5 the number of open sessions versus the number of closed
6 sessions, that it would be better to save, I think they were
7 going to save some \$60,000 by not transmitting these
8 proceedings. So they made the decision, I believe, on
9 Thursday or Friday of last week.

10 MJ [Col SPATH]: All right. Thank you.

11 Mr. Kammen first, if you would, if you would go
12 through who is present for the defense and then I will cover
13 some of the administration there.

14 LDC [MR. KAMMEN]: Good morning, Your Honor. Present for
15 the defense, myself, Richard Kammen, learned counsel; Ms. Rosa
16 Eliades; Lieutenant Alaric Piette; Ms. Mary Spears. We are
17 all, of course, lawyers. Also present is Mr. Marc Dolphin,
18 Ms. Brandi Janes, Ms. Kristina Hon, Ms. Jyothi Pocha, and
19 Captain Brent Filbert, who is the Acting Assistant Defense --
20 Chief Defense Counsel.

21 MJ [Col SPATH]: All right. Thank you. I already
22 granted -- I don't know if you have seen it yet, I did grant
23 the excusal for Lieutenant Commander Pollio.

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1 LDC [MR. KAMMEN]: Yes.

2 MJ [Col SPATH]: It should be published -- Okay. Good.

3 And then Lieutenant Commander -- how do I say your last name,
4 Piette?

5 DDC [LT PIETTE]: Piette.

6 MJ [Col SPATH]: Lieutenant Piette, and do I have the last
7 name correct?

8 DDC [LT PIETTE]: Yes, sir.

9 MJ [Col SPATH]: Make sure you push the microphone button
10 to talk. No worries. It takes a little while to get used to.
11 It is my understanding you have been cleared and read on; is
12 that correct?

13 DDC [LT PIETTE]: Yes, sir.

14 MJ [Col SPATH]: And you have all the appropriate
15 clearances?

16 DDC [LT PIETTE]: Yes, sir.

17 MJ [Col SPATH]: Then if you would you can go through your
18 legal qualifications status regarding your oath and detailing.

19 DDC [LT PIETTE]: Yes, sir. My name is Lieutenant Alaric
20 Piette, JAG Corps, United States Navy. I have been detailed
21 to the military commissions by the Chief Defense Counsel of
22 the MCD0. I am qualified under Rule for Military Commission
23 502(d). I have been previously sworn pursuant to Rule 807 and

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1 I have not acted in any way that would tend to disqualify me
2 from these proceedings.

3 MJ [Col SPATH]: Thank you. Thank you, Mr. Kammen.

4 Mr. al Nashiri, do you want Lieutenant Piette as part
5 of your defense team?

6 ACC [MR. AL NASHIRI]: Yes, of course.

7 MJ [Col SPATH]: All right. Thank you. I'm going to go
8 through your right to be present and waive your right to
9 presence at each session. You have the right to be present
10 during all sessions of the commission. If you request to
11 absent yourself from any session, such absence must be
12 voluntary and of your own free will. Your voluntary absence
13 from any session of the commission is an unequivocal waiver of
14 the right to be present during that session.

15 Your absence from any session may negatively affect
16 the presentation of the defense of your case. Your failure to
17 meet with and cooperate with your defense counsel may also
18 negatively affect the presentation of your case. Under
19 certain circumstances your attendance at a session can be
20 compelled regardless of your personal desire not to be
21 present.

22 Regardless of your voluntary waiver to attend a
23 particular session of the commission, you have the right at

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1 any time to decide to attend any subsequent session. If you
2 decide not to attend the morning session but wish to attend
3 the afternoon session, you must notify the guard force of your
4 desires. And assuming there is enough time to arrange
5 transportation, you will be allowed to attend the afternoon
6 session.

7 You will be informed of the time and date of each
8 commission session prior to the session to afford you the
9 opportunity to decide whether you wish to attend that session.

10 Do you understand the rights that I have explained to you?

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

12 MJ [Col SPATH]: Thank you. And I am just going to talk
13 about your prayer time preferences. In the past you have
14 indicated that you do not desire the commission to schedule
15 breaks to accommodate prayer times. Is it still your
16 preference that we not take regularly scheduled prayer breaks?

17 Yes? Okay. Thank you again.

18 Yesterday we had an 802 session. For anyone
19 watching, an 802 session is simply a rule for military
20 commissions session off the record but parties for both sides
21 attended. I didn't make any rulings during the session, but
22 we did discuss some general administrative matters that I am
23 going to cover now.

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1 I was informed that the direct portion of the
2 scheduled deposition, if it occurs, would last approximately
3 three to four days and would take up most of the week. I
4 reiterated again to the parties that although I am the
5 military judge for this commission, when we move into the
6 deposition, I am the deposition officer; it's a much different
7 role and it's a much different atmosphere as well.

8 I notified the parties I intended to spend the first
9 day of the week in an open session to address any issues we
10 can related to the taking of the deposition. And then if
11 those issues are disposed of and we are in a place that's
12 appropriate, we will move into the deposition tomorrow
13 morning.

14 If either something occurs where we are not having
15 the deposition or we move ahead promptly today, we may take up
16 some other matters while we are here today, as much as we can
17 in this open session. The defense indicated a strong
18 preference that some issues related to the deposition be taken
19 up early in the process, particularly 369RR, that's the
20 abatement motion, and 369PP, that's the motion for discovery.

21 And so what I will do is -- I would take those up
22 first, but since Mr. al Nashiri is here I will do all of the
23 unclassified matters that we can and then we will break for a

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1 classified session at some point today and deal with those,
2 and that way we don't have Mr. al Nashiri in and out of the
3 room and he can go back or go to the waiting room.

4 I also informed the parties that I am prepared to
5 receive ex parte presentations on Appellate Exhibit 337, a
6 protective order; Appellate Exhibit 353, a discovery issue;
7 and Appellate Exhibit 356C, a motion that affects our November
8 session potentially.

9 I also discussed the fact that any M.C.R.E. 513
10 hearing may need to be conducted in the near future to address
11 potentially privileged materials related to Mr. al Darbi. In
12 that regard, we didn't discuss this yesterday, but a filing
13 had come in to the commission from Mr. al Darbi's defense
14 counsel. It is a third-party filing. It is Mr. al Darbi's
15 response to Appellate Exhibit 369FF. It's tentatively marked
16 as Appellate Exhibit 369SS. And I told the administration
17 within the trial judiciary to accept the filing, mark it and
18 get it out to the parties if you haven't already seen it, and
19 so we can discuss that as we move into any 513 hearing.

20 When I turned to the parties to see what issues they
21 had, the prosecutors let me know that in relation to Appellate
22 Exhibits 377B, which relate to a series of Appellate Exhibits
23 in 354, which are the witnesses that I had directed be made

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1 available for testimony, you all wanted an opportunity to talk
2 about availability and I said I would do that.

3 And then when I asked the defense what they wanted to
4 discuss, they asked if they could talk to their client here in
5 the courtroom this morning. I indicated that if the parties
6 could work that out, great; if there are any issues, let me
7 know. I didn't hear anything, so I assume there weren't any
8 issues.

9 And then the defense indicated just as a discussion
10 point, one we will have on the record, they will have some
11 concerns about kind of the flow of the deposition,
12 specifically issues about whether it's discovery or trial and
13 what it's being used for. And the conversation stopped
14 quickly as we decided we would deal with it on the record.
15 And some comments about the time they needed to review
16 approximately 300 hours of audio discovery. The government
17 didn't agree necessarily with the assertions, they were quiet
18 in the discussion. It was just a discussion topic again that
19 I said we will cover on the record, so we stopped talking
20 about that.

21 We also discussed, hopefully we will have time to
22 talk about the trial schedule in both September, November and
23 then 2018, and here are some concerns that you all have on

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1 that.

2 And that takes care of at least the issues in the 802
3 before we start talking here, but let me check. Trial
4 Counsel, do you want to add anything to my summary of our 802
5 session?

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

8 MJ [Col SPATH]: Defense counsel?

9 LDC [MR. KAMMEN]: No, nothing.

10 MJ [Col SPATH]: All right. Separate from the 802, just
11 so you all know what discussions I have, since it is important
12 to keep -- not that they are ex parte, but any discussions
13 that go on on the record. At some point today, this morning,
14 a couple of calls came to me through the judiciary staff -- in
15 this case, the CSO -- and it had to do with the long-standing
16 discussion of coffee in the courtroom.

17 And so what it had to do specifically -- fortunately
18 there was no debate about the parties or the people in the
19 courtroom having coffee, because I hope I ended that last
20 time. Absent a security concern, you all can have coffee.
21 The discussion came to me regarding whether or not the
22 detainee could have coffee in the courtroom. And through the
23 CSO, the indication was that the guards do have a security

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1 concern if he has coffee in the courtroom. They don't have
2 concerns if he has coffee in the waiting room or in the
3 meeting room with the defense counsel, but in the courtroom
4 with the guard force present they do.

5 And I said, as is my long-standing policy, I am
6 unlikely getting in the way of security matters regarding
7 running the facility unless there is a reason to or the law
8 requires me to. But I did just -- that was communicated to me
9 and that was what I said. I assume if the parties have a
10 concern they will come to me. And I wanted you to know of
11 that discussion.

12 All right. Again, Mr. Kammen, I would take up the
13 classified issues first, but you are okay with us moving into
14 the unclassified ones?

15 LDC [MR. KAMMEN]: Not -- okay or not, we understand the
16 practicalities.

17 MJ [Col SPATH]: Based on your request I am going to deal
18 with unclassified issues first and then we will deal with the
19 other ones later.

20 So let's turn to the ones impacting the deposition.
21 One is there was some motion practice. I have closed the
22 deposition. And so, I guess, any questions about that from
23 the prosecution first? It's a closed proceeding so it's not

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1 going to be transmitted, is my understanding, but it is going
2 to be recorded. Do I ----

3 TC [MR. MILLER]: That is my understanding, Your Honor.
4 It is my understanding, however, that it is going to be
5 transmitted to the ELC, to the two trailers; but other than
6 that, it is our understanding that it is a closed proceeding.
7 That's it.

8 MJ [Col SPATH]: Okay. Mr. Kammen, is that your
9 understanding?

10 LDC [MR. KAMMEN]: Yes. Our understanding, it is closed;
11 that we will be provided with a transcript; that we will be
12 allowed to share the transcript with our client; and that we
13 can use the transcript as necessary for future investigations.

14 MJ [Col SPATH]: And let me -- a couple of things. Your
15 client is allowed to be -- yes, I think as to part I think
16 there will be some discussion, your client is allowed to be
17 present ----

18 LDC [MR. KAMMEN]: Yes.

19 MJ [Col SPATH]: ---- for the direct certainly, because it
20 is an unclassified direct, is the representations. So no
21 issues with that.

22 LDC [MR. KAMMEN]: Yes.

23 MJ [Col SPATH]: I can see issues arising if the

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1 cross-examination moves into classified matters since we are
2 not at trial yet. We can cross that bridge when we get there,
3 but let me just deal with that issue that you have just
4 addressed.

5 Trial Counsel on board with, at least in relation to
6 the direct, a transcript is going to be produced, it can
7 certainly be shared with the detainee, and the defense can use
8 it as they prepare for trial?

9 TC [MR. MILLER]: Yes.

10 MJ [Col SPATH]: No issues. Good. That's a good start.

11 Trial Counsel, who do you plan to have present during
12 the deposition?

13 TC [MR. MILLER]: Your Honor, in addition to our regular
14 team members who are here today, we anticipate that Vaughn
15 Spencer from the Hadi team will be present during -- Kevin
16 Flynn from the Hadi team will be present; Chuck Zelnis of
17 the -- of our management team will be here present. And I
18 believe those will be the individuals we anticipate will be
19 present. In addition, Adam Fleshman of the Hadi team will be
20 present and Tim Keeton of the Darbi team will be present. We
21 will probably also have a linguist also, our own linguist.
22 Thank you.

23 MJ [Col SPATH]: Defense counsel, any concerns about that?

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1 And then we will talk about your ----

2 LDC [MR. KAMMEN]: Well, I don't think I have a concern.
3 I can't speak for any of the other defense teams, but I do
4 know from informal conversations that some or all of them
5 wanted to be here, but were under the impression that, because
6 this was closed, they would not be allowed. So they didn't
7 want to come down to Guantanamo Bay for five days and
8 essentially be doing nothing.

9 So I guess the question I have then is: Given the
10 fact that these other teams from the prosecution can be here,
11 may we share the transcript of the direct with other defense
12 teams who will be questioning Mr. al Darbi?

13 MJ [Col SPATH]: I will ask. I am hoping it is an easy
14 answer and we will move forward. Let me check. Again, we are
15 just talking about direct at this point. I know the cross may
16 well get into classified -- a whole different issue. Any
17 issues about that?

18 TC [MR. MILLER]: No.

19 MJ [Col SPATH]: Okay.

20 LDC [MR. KAMMEN]: I guess one other issue will be here,
21 and I don't think this will be an issue, I assume since we can
22 provide a transcript, we can translate that to Arabic since it
23 will be conducted in Arabic. I can't imagine there will be an

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1 objection, but I just wanted to confirm that.

2 MJ [Col SPATH]: I will check. I bet there won't. Any
3 issues?

4 TC [MR. MILLER]: No.

5 MJ [Col SPATH]: All right. Thank you. And again, you
6 all can ask these questions amongst yourselves. I am always
7 happy to stay out of this, but it helps me so I know where we
8 are at.

9 For the defense teams who did not travel down, I
10 would just highlight to them there is lots of litigation about
11 third-party interventions in courts, not just in the military.
12 This is just for them. I know you are not their spokesperson.
13 They are always welcome to file, they are always welcome to
14 file, as al Darbi did in the 513 area, and we will figure out
15 if we are going to accept it or not.

16 Now let's talk about the presence and role of
17 Mr. al Darbi's defense counsel. It seems to me he would like
18 to be here and have representation in the courtroom. The
19 first question: Government, any objection to him being in the
20 courtroom?

21 TC [MR. MILLER]: No. We would ask that he be in the
22 courtroom, Your Honor.

23 MJ [Col SPATH]: Okay. Good.

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1 Defense counsel, with respect to him being in the
2 courtroom, we will talk more about that role, but ----

3 LDC [MR. KAMMEN]: No, I'm torn. I mean, as a
4 professional, I can understand that. It does seem though that
5 this closed session is getting awfully -- the only people who
6 are really being excluded are the people who have the most
7 interest, and that's the public. And, of course, that's the
8 troubling part of it. You have ruled. We understand that.

9 I will note for the record that another judge has
10 ruled differently, but that's -- it is what it is.

11 MJ [Col SPATH]: I will explain. Not that it was in my
12 written ruling, but I will be totally candid. I am treating
13 this like a normal deposition, and I recognize this is
14 anything but normal in the world in which we have lived down
15 here. I got it. But I am treating this like a process I
16 would always go through; and, that is, I would close it
17 because, one, it's going to be an appellate exhibit so it is
18 going to go through the same review it is going to go through
19 every time and then largely, in large part, be published and
20 everybody will get to read it.

21 I mean, that is the process that we see so often with
22 appellate exhibits. Not my role. That's what all these
23 people involved with the court reporting function and the

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1 administrative function do. And so everybody will see it and
2 can read it. And everybody in the world will see it, in large
3 part, if it is shown in a courtroom. If. And that's the key.

4 LDC [MR. KAMMEN]: Of course. And again, I don't want to
5 belabor it, that "if" may be in five years, and the public has
6 a contemporaneous right to see what is occurring in their name
7 because, at least if the government has its way, Mr. al Darbi
8 will be free and loose in Saudi Arabia or wherever in five
9 years, and so the public should have a contemporaneous right
10 to make its own judgment on whether or not the actions of the
11 government are consistent with the interests of the United
12 States by hearing Mr. al Darbi contemporaneously and not
13 waiting five, or however many years it's going to be, to read
14 a transcript or see a videotape.

15 And so that is -- this is a different world and we do
16 think that the commission would have been well advised to have
17 respected those differences, but we understand your ruling.

18 MJ [Col SPATH]: All right. So then separate, his defense
19 counsel being in the room.

20 LDC [MR. KAMMEN]: If you say they can be in the room,
21 fine. I mean, that's -- two more, it won't make any
22 difference given the crowd we are already attracting.

23 MJ [Col SPATH]: All right. Thank you. In that regard,

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1 here is where I am at, and I will take any comments. His role
2 here is to be here for his client, I understand that. His
3 role is not to be lodging objections or doing anything. He is
4 not a party in this instance. He can sit in here, and in fact
5 I will probably -- I am just working through this as I look
6 through things.

7 I'll probably put them over in the jury box over
8 here, which is in proximity to the client by, what, 20 feet.
9 That way I know who they are. I'm not looking around the room
10 trying to find three sets of people; it's easy for me to look
11 left and right to see you all. They will be right there. I
12 know who they are, and they are close enough to their client
13 that they will come up with a signal if they need some break,
14 but we can talk to them about that when they are here.

15 What I don't want, and this is what I do with special
16 victims counsel and any third-party interloper who shows up,
17 they are not to be involved in the process once the process is
18 underway. They have a right to be heard on issues that they
19 have standing on, i.e., 513, right, jumps right to mind, but
20 Mr. al Darbi, from my understanding, has been -- this is part
21 of his PTA to come in here and provide this testimony and
22 answer these questions. And so their role is to advise him
23 ahead of time. And then if he wants his lawyers in here,

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1 that's fine, but they need to sit there.

2 Trial Counsel, any concerns so far?

3 TC [MR. MILLER]: No. I mean, that's what I sort of
4 envision, that if an issue comes up, the witness asks for
5 counsel. It is not my understanding that they would be
6 allowed to make objections or inject themselves into the
7 proceedings.

8 MJ [Col SPATH]: Good.

9 TC [MR. MILLER]: They may, I imagine, talk to him during
10 breaks or something like that, but I do not anticipate them
11 being active participants in this. I would, however, clarify,
12 he has a -- as every accused in this case has, he has more
13 than one attorney. And I think they -- each of them would
14 like to be here with their interpreter, that would be Ramzi
15 Kassem, Scott Medlyn, and Greg Young, but they would all be
16 sitting in that area. They have an interpreter who has worked
17 with Mr. Darbi also. But I think the limited -- or the
18 primers put on by the court are reasonable and the ones the
19 government anticipated.

20 MJ [Col SPATH]: I assume his counsel have, too. I mean,
21 hopefully, if I were you all, whoever wants to, his lawyer
22 should know this, and I will mention it to him tomorrow if we
23 get there. If Mr. al Darbi says I want to talk to my lawyers,

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1 that's easy, I am going to stop and let him go talk to his
2 lawyers. Maybe that's cross-examination later. That is
3 totally up to you all to figure out. I just want to make sure
4 they know their role and, that is, they are here to hear it
5 and be available for consultation. All right. Thank you.

6 TC [MR. MILLER]: Thank you.

7 MJ [Col SPATH]: Mr. Kammen, any other comments? I know
8 we added another person, that's three as opposed to two.

9 LDC [MR. KAMMEN]: No. The only other question I suppose
10 is this, and that is given the unusual nature of this, I would
11 assume at breaks there is no prohibition on the parties
12 consulting with their witnesses during recesses. Is that ----

13 MJ [Col SPATH]: That's consistent, yes.

14 LDC [MR. KAMMEN]: Okay. Really, Your Honor, I think,
15 though, that when the witness is on the stand, he is
16 essentially the government's witness. And it does seem to me
17 that the interests of the government, if the government wants
18 to talk to their client, that's fine. It seems to me that at
19 that point his lawyers, unless he specifically requests --
20 unless his interests and the government's interests somehow
21 diverge, it would seem to me that the lawyers become observers
22 and unless there is a dispute between the two, they stay out
23 of it.

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1 And I guess what we are concerned about, how can I
2 put this politely, is essentially everybody -- so many people
3 coaching the witness beyond what has already occurred during
4 the testimony. I mean, the number of people whispering in his
5 ear has already been pretty outlandish. And adding to
6 that ----

7 MJ [Col SPATH]: I understand, and -- so here is two
8 things. Agree with you, his role here is as a witness to
9 answer their questions, the prosecution this time, and then he
10 will be a witness being cross-examined at some point in the
11 future.

12 LDC [MR. KAMMEN]: Right.

13 MJ [Col SPATH]: Assuming all of that occurs ----

14 LDC [MR. KAMMEN]: ---- right.

15 MJ [Col SPATH]: ---- his lawyers' role is here to
16 observe.

17 LDC [MR. KAMMEN]: Fine.

18 MJ [Col SPATH]: As it moves forward and if he says I want
19 to talk to my lawyers, easy, you certainly can talk to your
20 lawyers. I mean, that is ----

21 LDC [MR. KAMMEN]: Sure.

22 MJ [Col SPATH]: Got it. All of that is good fodder for
23 your cross-examination to include any alleged witness coaching

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1 or prep or things like that.

2 LDC [MR. KAMMEN]: Okay. And I just want to -- I'm
3 probably -- who knows, I can see circumstances arising during
4 the direct examination where the lawyers may become potential
5 witnesses, and at that point we may ask that they be excused.

6 MJ [Col SPATH]: Absolutely.

7 TC [MR. MILLER]: May I be heard, Your Honor?

8 MJ [Col SPATH]: Of course.

9 TC [MR. MILLER]: I am not quite sure what the court's
10 intention here is. I think a lawyer representing a party can
11 talk to that party at any time. He doesn't need anybody's
12 permission. I mean, that's what lawyers do. I mean, if they
13 think that Mr. al Darbi is not being forthcoming, they should
14 be able to approach him, if they think he is doing a good
15 job ----

16 MJ [Col SPATH]: They are not going to get up and approach
17 him.

18 TC [MR. MILLER]: No.

19 MJ [Col SPATH]: Yes.

20 TC [MR. MILLER]: During breaks they should be able to
21 approach him without asking for it.

22 MJ [Col SPATH]: They can talk on breaks. This is no
23 different than any witness. I am going to give him the same

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1 instructions I typically give witnesses as we go through it.
2 I don't want him talking about his testimony in the midst of
3 it.

4 TC [MR. MILLER]: Correct.

5 MJ [Col SPATH]: His testimony. But I want him to be able
6 to talk to his lawyers.

7 TC [MR. MILLER]: Him talking about his testimony to whom?

8 MJ [Col SPATH]: What I want him to do is answer your
9 questions ----

10 TC [MR. MILLER]: Correct.

11 MJ [Col SPATH]: ---- and not get any -- he doesn't need
12 advice from his attorneys on how to answer questions once we
13 get under way with this deposition.

14 TC [MR. MILLER]: Absolutely. That's what lawyers do.
15 They are there to protect him.

16 MJ [Col SPATH]: Not during his direct and
17 cross-examination.

18 TC [MR. MILLER]: I have never heard of a lawyer being
19 denied access to their client. If he has a plea agreement
20 with the government, their job is to ensure his interests are
21 protected and that he fulfill those -- those provisions.

22 MJ [Col SPATH]: Reading that plea agreement, I think it's
23 to tell the truth ----

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1 TC [MR. MILLER]: That is ----

2 MJ [Col SPATH]: ---- under oath.

3 TC [MR. MILLER]: That's correct.

4 MJ [Col SPATH]: And answer your questions.

5 TC [MR. MILLER]: That is correct.

6 MJ [Col SPATH]: I will tell you, SVCs are a pretty good
7 example. Frequently they tell me they want to interject and
8 help their clients and I tell them frequently go sit down.
9 They represent their alleged victims fully, but they are not a
10 party to this.

11 TC [MR. MILLER]: No, but they have a duty to the person
12 who is on the witness stand.

13 MJ [Col SPATH]: They absolutely do.

14 TC [MR. MILLER]: And I don't think courts should be
15 interfering with that duty.

16 MJ [Col SPATH]: We will see how it unfolds, I think. We
17 need to be cautious that when they are in here they are
18 observing. If during the course of this -- for example, if
19 they have an objection to a question you ask, I don't care.

20 TC [MR. MILLER]: I don't think they have a right to do
21 that. That I get.

22 MJ [Col SPATH]: And vice versa. The same over here. If
23 they have an objection to a cross-examination question, I

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1 don't care. That is for you to lodge as the prosecution ----

2 TC [MR. MILLER]: Right.

3 MJ [Col SPATH]: ---- and you to lodge as the defense.

4 They are not a party to this. They are there to assist their

5 client, but their client, his pretrial agreement is he has

6 agreed to sit for a deposition.

7 TC [MR. MILLER]: Correct.

8 MJ [Col SPATH]: So we will see how it unfolds.

9 Hopefully -- all right. These are great hypotheticals as we

10 dance through these issues, and he is simply going to answer

11 all your questions and we are not going to have these things

12 unfold.

13 TC [MR. MILLER]: Hopefully not.

14 MJ [Col SPATH]: And on breaks I am not suggesting he

15 can't confer with and talk with his lawyers.

16 TC [MR. MILLER]: That's what I am talking about.

17 MJ [Col SPATH]: I think his lawyers, I think they know

18 their ethical obligations. I haven't met them yet but I'm

19 going to assume they do.

20 TC [MR. MILLER]: They are good lawyers.

21 MJ [Col SPATH]: They're not going to coach him; they're

22 going to engage in the normal witness prep, one would assume:

23 Be direct, listen to the question.

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1 TC [MR. MILLER]: That's what I anticipate too, sir.

2 MJ [Col SPATH]: I think we are saying the same things.

3 All right. Now, do Mr. Al Darbi's lawyers, just anticipating
4 issues that may arise, do they have a TS/SCI?

5 ATC [Maj PIERSON]: Your Honor, one of their counsel does
6 not have a TS/SCI. Two of their counsel have TS/SCIs, but one
7 of the counsel is not read into the special access program.

8 MJ [Col SPATH]: Okay. So this issue we dealt with last
9 time. We dealt with it as we were doing the admission of
10 exhibits last time and it was one that I was comfortable with;
11 and, that is, I recognize that people around the courtroom who
12 deal with security, in the classification sense as opposed to
13 the physical security, believe this to be a TS facility, which
14 certainly it can be and is, but we also have witnesses
15 frequently testify who don't have that clearance. And we have
16 parties come in, as we showed last time, who don't have that
17 clearance.

18 I think knowing what I heard last time, I know the
19 concern, all of a sudden someone in here will start talking
20 about classified information and there will be a spill. Well,
21 we deal with that the same way we deal with everything else:
22 we stop and we will resolve. So I have no concerns with them
23 being in here at all, especially given the nonclassified

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1 nature of the direct that is about to occur, if it occurs. So
2 we will have them present and hopefully there won't be any
3 issues. If that becomes an issue, I know you will all let me
4 know.

5 I now there is an exhibit binder. I have seen a copy
6 of it. I haven't gone through it yet, but I have seen a copy
7 for the deposition. I know the government knows this. All of
8 that, whether or not it's admitted and whether or not those
9 exhibits are admitted, are separate issues. But certainly
10 during the deposition you can show the deponent exhibits and
11 we will make them part of the deposition appellate exhibit.

12 Mr. Kammen, if we move forward tomorrow with any kind
13 of deposition -- I'm not holding you to it, more for curiosity
14 and planning -- does your client plan to be here?

15 LDC [MR. KAMMEN]: Yes.

16 MJ [Co1 SPATH]: Okay. So we moved through those
17 reasonably quickly, but what I want to do while we are here,
18 we can take up some other outstanding issues before we deal
19 with the 369 ----

20 LDC [MR. KAMMEN]: May I be heard on one other?

21 MJ [Co1 SPATH]: Of course.

22 LDC [MR. KAMMEN]: This may not be terribly relevant, but
23 rather than wait, and to put things into context, we requested

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1 the opportunity to interview Mr. al Darbi, and that was
2 denied.

3 MJ [Col SPATH]: By?

4 LDC [MR. KAMMEN]: His lawyers. And by his lawyers, I
5 mean his, the other lawyers, not the prosecution. I presume
6 they consulted and -- but in any event, that was denied.

7 The rules seem to indicate that this deposition is
8 entirely to preserve trial testimony. And I just want to make
9 sure, you know, that -- and so that the standard of relevance
10 for what would be addressed in this deposition is that which
11 would be admissible at trial, which is much narrower than what
12 would typically be admissible in a discovery deposition.

13 But I'm really getting to this piece of it: Since we
14 have been denied the opportunity to interview him, prior to
15 the cross-examination we may request, and I suspect will
16 request, the opportunity to do a limited discovery deposition
17 so that the cross-examination piece of it flows smoothly,
18 without getting off into subjects that clearly would not be
19 appropriate for trial.

20 And so I just -- since the rules talk about
21 preserving testimony for trial, we are working -- you know,
22 the government has been sort of vague in its pleadings. It
23 was a trial deposition, but then they talk about it for

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1 discovery and those purposes, but the rule doesn't seem to
2 talk about a pure discovery deposition.

3 MJ [Col SPATH]: Correct.

4 LDC [MR. KAMMEN]: And so since this is for preserving for
5 trial -- which, of course, to our mind implicates public
6 access, but that's a different issue -- we do believe that --
7 and we will file, if a motion is required, the opportunity to
8 do a limited discovery deposition in lieu of the interview
9 that was denied.

10 MJ [Col SPATH]: I know you recognize, right, in 702 it
11 doesn't really distinguish between those.

12 LDC [MR. KAMMEN]: Well, it doesn't, but given the overall
13 purpose of ----

14 MJ [Col SPATH]: Concur. I think you are going to be
15 happy with where we go from there.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [Col SPATH]: In the rules for court and then in the
18 military commission rules, right, in 702 there really isn't a
19 difference between the two ----

20 LDC [MR. KAMMEN]: Right.

21 MJ [Col SPATH]: ---- there is this deposition that
22 exists ----

23 LDC [MR. KAMMEN]: Yes. Yes.

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1 MJ [Col SPATH]: ---- to preserve testimony.

2 LDC [MR. KAMMEN]: Right.

3 MJ [Col SPATH]: Whether or not it's admissible at trial
4 then becomes a whole separate issue.

5 LDC [MR. KAMMEN]: But that really seems to be predicated
6 on if the witness is actually unavailable.

7 MJ [Col SPATH]: Correct.

8 LDC [MR. KAMMEN]: Certainly if Mr. Darbi's -- if the
9 government recognizes that he is a committed jihadist and
10 shouldn't be returned and shouldn't be released to the
11 battlefield, if the government recognizes that, presumably he
12 will be here. If the government says -- is satisfied that he
13 is -- if he has satisfied the government that he is going to
14 go straight and they let him go, then presumably the
15 deposition would become admissible.

16 MJ [Col SPATH]: So let me ask first, Mr. Miller: To your
17 knowledge, Mr. al Darbi declined to be interviewed by the
18 defense?

19 TC [MR. MILLER]: Yes.

20 MJ [Col SPATH]: Okay.

21 TC [MR. MILLER]: The rule is fairly clear and
22 straightforward, that the testimony of a prospective witness
23 will be taken and preserved for use in a military commission.

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1 It's not a -- a discovery deposition, and trying to make it
2 into one or to sidestep a witness' right to decline to be
3 interviewed and only answer questions in open court, I don't
4 think this is the vehicle for doing this.

5 I intend -- or the government intends to treat this
6 as if it was a witness at trial. My questioning and the
7 questioning of the government, the presentation of evidence
8 will be consistent with how we would do it at a trial and that
9 is how we are approaching it. We are not approaching it that
10 it is a discovery, a wide-open discovery deposition in this
11 particular case.

12 MJ [Col SPATH]: All right. I understand. So let me --
13 this is not a ruling. I don't do previews.

14 At this point -- Major Pierson, you may have been in
15 a court where I have done this, I don't know. I am trying to
16 be consistent in what is an inconsistent world. We have
17 witnesses frequently who don't want to be interviewed by the
18 other side. Typically it's in a court as opposed to a
19 deposition, but regardless -- because many times the
20 deposition is kind of an agreed-to event by both sides; not
21 always, but frequently.

22 Frequently I have then asked both sides: Can you
23 give me any authority to order a witness to sit for an

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1 interview? And of course the answer is no. There is no
2 authority to do that. There is nothing I can do. Again,
3 whether I like it or not, that's the rule.

4 What I have said to witnesses who refuse to sit for
5 an interview, though, is in the fairness of making sure the
6 truth comes out, they may open themselves up to a broader
7 cross-examination than normal. That's just one of the risks
8 you take. If the other side has the disadvantage, whatever
9 side that is, of not being able to interview, come time for
10 cross, whoever is doing the cross, they get a little more
11 latitude. What that is depends on the question, depends on a
12 lot of things.

13 Here in the deposition, switching gears, deposition
14 officer, I am not going to rule on them, I am going to note
15 them. We are going to rule on them if it comes into trial
16 where we decide what's coming in and not coming in.

17 Those witnesses frequently decide that it might be
18 easier to sit for the pretrial interview prior to the
19 cross-examination or before the direct examination. I have no
20 guess that that will happen here, no belief it will. That's
21 okay. I'm just trying to be consistent. My advice is the
22 same: that come trial, the cross-examination is going to be a
23 little less fettered, of course. And one of the many

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1 questions that's going to be able to be asked is did you sit
2 down for an interview? Would you sit down for an interview?
3 And were you available for an interview? That's biased,
4 pretty straightforward. And then some more broader ability on
5 cross.

6 The other issue again is, as a deposition officer,
7 frankly, Mr. Kammen or you all can ask what you want to
8 almost, given my ability to rule on things, which is pretty
9 nonexistent, except for privileges, pretty nonexistent.

10 So I think that makes sense to all sides? You all
11 understand the lanes? It has -- again, we will deal with when
12 we get to trial then what that pool of testimony is then
13 limited to for presentation to the members. I would preserve
14 your objections during the course of the presentation. So
15 during the course of the direct, I know you won't hesitate, I
16 would object. During the course of the cross, if we get
17 there, I wouldn't hesitate to object. I think we are, again,
18 pretty much on the same page.

19 All right. Let's see if we have any updates on some
20 of these, just to kind of see where we are going.

21 TC [MR. MILLER]: Your Honor, may I raise one issue before
22 we do?

23 MJ [Col SPATH]: Sure.

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1 TC [MR. MILLER]: Is it my understanding that as to
2 substantive objections, you will not rule on them during the
3 course of the deposition?

4 MJ [Col SPATH]: Correct.

5 TC [MR. MILLER]: That you will make rulings as to the
6 form of the question?

7 MJ [Col SPATH]: Correct.

8 TC [MR. MILLER]: I just wanted to clarify. Thank you,
9 sir.

10 MJ [Col SPATH]: They will help me, so I don't have to ask
11 each time regarding what your objection is, if it's relevance,
12 hearsay, all of those, just make the objection so I can note
13 them.

14 TC [MR. MILLER]: Yes.

15 MJ [Col SPATH]: If it is compound, if it is a form of the
16 question, make that clear so I know. Hopefully I will know
17 anyway, but it helps.

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

19 MJ [Col SPATH]: And let's remember to go as -- not as
20 slowly, but let's keep it reasonably slow because of the need
21 for translation back and forth throughout the process of the
22 deposition.

23 Trial Counsel.

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1 ATC [Maj PIERSON]: Your Honor, just one more
2 administrative issue with respect to the deposition, it really
3 goes more to your role as the deposition officer than the
4 military judge. If I may just brief you on the videotaping of
5 the deposition so that the defense counsel can know that as
6 well, and then also talk about getting the video to the
7 parties.

8 MJ [Col SPATH]: Yes.

9 ATC [Maj PIERSON]: Your Honor, to address the videotaping
10 of the deposition, we worked with the courtroom IT personnel.
11 And our intent for the deposition is to have two streams of
12 video running through the courtroom technology system. One
13 stream will be focused from the back of the courtroom on the
14 deponent. It will then modify and enlarge, or zoom out, to
15 capture the TV such that exhibits that are placed on the ELMO
16 can be captured by the video streaming as well.

17 There will be a second video stream that is being
18 recorded separately from that stream that will have a split
19 screen with one camera that is placed on the witness and then
20 one camera that is in the same generic position that it is
21 when it is transmitted that is focused on the defense counsel
22 table.

23 There will also be a third video camcorder that is

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1 separated from the courtroom technology system that will be
2 placed near the jury box and solely focused on the deponent
3 during the deposition. For the two streams that are through
4 the courtroom technology, they are recorded to SD cards. Our
5 intent would be to get those from the SD cards onto a medium,
6 either a DVD or whatever technological means that is easily
7 usable, and provide those to the parties as soon as possible
8 that that can be done and then also provide a copy of the
9 hand-held camcorder recording as well to the parties after the
10 deposition. Again, as soon as we can work with the convening
11 authority's office who owns that personnel to get the SD cards
12 to us and then get them onto a medium that we can transfer
13 them over to the parties for use.

14 Pending any questions, Your Honor, that's all on that
15 issue.

16 MJ [Col SPATH]: I don't think I have any. Just when
17 we -- referring to me again, as best you can, Colonel Spath is
18 fine; Mr. Deposition Officer is obnoxious but doable. But
19 anyway, try to get through those two. Colonel Spath is
20 probably the easiest as we do that. Okay.

21 ATC [Maj PIERSON]: Thank you, Your Honor.

22 MJ [Col SPATH]: Let me check with the defense. I'm sure
23 they have a question.

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1 LDC [MR. KAMMEN]: I understand about the SD card and how
2 we will get copies of it.

3 MJ [Col SPATH]: Sure.

4 LDC [MR. KAMMEN]: I'm just curious, if we make an
5 objection, I know that will be transcribed, is that going --
6 is then the video going to be focused on us? And I'm just
7 thinking mainly in terms of what clothing to be wearing,
8 because you had indicated you were not going to be in a
9 robe ----

10 MJ [Col SPATH]: Correct.

11 LDC [MR. KAMMEN]: ---- there was a more relaxed
12 atmosphere. Frankly, if we are not going to be on camera, I
13 don't know that there is any particular reason to be in a
14 suit, to tell you the truth. But if we are going to be on
15 camera, that's a different situation.

16 MJ [Col SPATH]: My plan is to be in my blues, long-sleeve
17 blues, tie, and probably my sweater because of the
18 temperature.

19 LDC [MR. KAMMEN]: Right. I was unclear about this whole
20 streaming and all of that.

21 MJ [Col SPATH]: Let me check, because I have a feeling --
22 Major Pierson, do I have it correct, so when we switch to
23 cross-examination ----

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1 LDC [MR. KAMMEN]: Sure.

2 MJ [Col SPATH]: ---- the cameras would be similar but
3 they would be focused on you all for any objections, is
4 that ----

5 ATC [Maj PIERSON]: Your Honor, the intent of the
6 government would be should there be any evidence created
7 during the deposition by the accused, that the government
8 would want to preserve that. We don't anticipate that that
9 will happen, but should that occur we would want to preserve
10 that evidence. And so that would be the intent, to have one
11 of the streams have a view of the defense counsel table and
12 particularly the accused.

13 LDC [MR. KAMMEN]: We do object to that. If the
14 accused -- if Mr. al Nashiri is disruptive, we would expect
15 the prosecutors to note that, and we know Your Honor would
16 note that.

17 MJ [Col SPATH]: I think it would be noted by the reaction
18 to it.

19 LDC [MR. KAMMEN]: Absolutely. Creation of evidence is in
20 the eye of the beholder, especially in a situation like this,
21 where presumably Mr. al Darbi is going to come in and say
22 things that we contend are monstrous lies. And, you know, the
23 notion that somehow the people who own the courtroom now get

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1 to select one person to focus the cameras on, that's not
2 appropriate. That's why -- this is why this whole thing is --
3 we understand they -- you know, they have made this agreement.
4 They made this agreement years ago, and this is -- you
5 know ----

6 MJ [Col SPATH]: And again, look, I am following 702 as to
7 whether or not you can do a deposition.

8 LDC [MR. KAMMEN]: That's right.

9 MJ [Col SPATH]: Got there. That has nothing to do with
10 admissibility at trial.

11 LDC [MR. KAMMEN]: Right.

12 MJ [Col SPATH]: That has everything to do with can you do
13 the deposition.

14 LDC [MR. KAMMEN]: Right.

15 MJ [Col SPATH]: Question one answered.

16 Now, process of the deposition. Trial Counsel, do
17 you have any authority -- first off, frequently an accused
18 isn't even present for a deposition, but here the accused has
19 indicated they are probably going to be here, since we have
20 all come to Guantanamo, at no small cost. Any authority for
21 focussing a camera on Mr. al Nashiri throughout the taking of
22 the deposition on the off chance you catch him rolling his
23 eyes, whispering to his defense counsel or anything like that

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1 that you can then show the jury later? During trial, a whole
2 different issue. I got it. Anything he does in here is
3 public display.

4 And again, if there is something outlandish, it's
5 easy. All of a sudden, after three years of not misbehaving
6 he decides this is the moment he is going to attack
7 Mr. al Darbi, we are all going to see it and I am confident we
8 will discuss why that's admissible in evidence. But I am just
9 curious about the right to focus a camera on the accused and
10 not you, or anybody else, to create evidence hopefully.

11 ATC [Maj PIERSON]: Your Honor, it would be to preserve
12 evidence, certainly not to create evidence.

13 MJ [Col SPATH]: Can't you preserve it and have the guards
14 watch him?

15 ATC [Maj PIERSON]: Your Honor, it would certainly --
16 there is a reason why videotaping is done in a deposition
17 to ----

18 MJ [Col SPATH]: Of the deponent.

19 ATC [Maj PIERSON]: Yes, Your Honor.

20 MJ [Col SPATH]: Of the deponent. They don't even have to
21 be videotaped. You have chosen to videotape the deponent. I
22 am trying to figure out why you are going to focus the camera
23 on Mr. al Nashiri. You can preserve the evidence. Tell the

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1 people in the back to watch. Have her, the bailiff watch,
2 she's pretty close. Or have the CSO watch. I am curious on
3 focusing so they are uncomfortable even leaning over to talk
4 to their lawyer. I would be nervous. If I talk to my lawyer,
5 you are going to think I am hiding something, answering
6 something. You all can watch him. Have your paralegals watch
7 him.

8 CP [BG MARTINS]: Your Honor, since I argued before this
9 commission the presence-of-the-accused issues ----

10 MJ [Col SPATH]: Sure.

11 CP [BG MARTINS]: ---- one of the aspects going on here in
12 terms of preservation, in the event that it's necessary, I
13 mean, later on there will be a need to establish
14 unavailability, it's ----

15 MJ [Col SPATH]: Concur.

16 CP [BG MARTINS]: So in order to do that and to have a
17 body of testimony that has been preserved that is amenable to
18 then being admissible, you know, we have looked to precedents
19 such as Abu Ali, the leading case in the Fourth Circuit on
20 this with respect to confrontation rights and to -- also to
21 compulsory process issues that arise. Because later on, of
22 course, the objection will be didn't have a chance to truly
23 confront, and that's going to be needed in order ----

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1 MJ [Col SPATH]: Well, you have got a chance to confront.

2 CP [BG MARTINS]: Your Honor, if I may, I mean ----

3 MJ [Col SPATH]: Who is going to argue that he wasn't here
4 to confront? Or who is going to argue he wasn't in the
5 courtroom if he is here?

6 CP [BG MARTINS]: This is one of the things I wanted to
7 establish too, is your deposition order correctly, we believe,
8 states the accused will be here, and your admonishment early
9 about rights to presence dealt with sessions. Rule for
10 Military Commission 803, sessions such as this one, you are in
11 a robe, you are the presiding officer.

12 The deposition, we envision, being something that
13 re-creates as much as possible the conditions of the
14 courtroom. There is no intent -- there is no intent to try to
15 create evidence, to be looking at eye rolling. It ----

16 MJ [Col SPATH]: To be fair, that's what your cocounsel
17 said.

18 CP [BG MARTINS]: If I may, he said preserve. He said
19 preserve.

20 MJ [Col SPATH]: What he said is create or preserve.
21 That's what he said.

22 CP [BG MARTINS]: No. He said if evidence is created, we
23 want to have preserved it.

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1 MJ [Col SPATH]: Oh, good.

2 CP [BG MARTINS]: If you are sitting in the witness box, I
3 mean, if we are going to have something that is amenable to
4 being admitted and not taking some second-best preservation,
5 which is some witness who may have seen it, may not have seen
6 it, then the thing to do would be to ensure we use the camera
7 technology to try to capture what was going on in this setting
8 where full confrontation was occurring, the person had to
9 be -- you know, had to be confronting this individual he was
10 testifying against.

11 And the Abu Ali precedent we believe is very
12 important in this one because it is one where later, in
13 anticipating objections to its admissibility, we have done all
14 that you might reasonably do to recreate -- to preserve, to
15 recreate the confrontation, the crucible across, as you have
16 said before, the things that are going on in the courtroom and
17 that allow a panel member, the fact finder, to see what was
18 going on. Again, not to try to create evidence, to preserve.

19 And again, whether or not that video stream is even
20 shown to the panel is something you have the ability to gate
21 keep later.

22 MJ [Col SPATH]: I understand. No doubt about it. But I
23 don't even have to let it be recorded. I mean, I'm looking at

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1 702.

2 CP [BG MARTINS]: And Your Honor, in the way we have
3 litigated this, again, anticipating, and we have cited to Abu
4 Ali in our materials, is if you don't record it, you are
5 decreasing potentially the ability to later on enable us to
6 argue, and we would like to have some control over the
7 presentation of our case, the ability to get it admitted.
8 So ----

9 MJ [Col SPATH]: General Martins, I agree with 90 percent
10 of what you have said. That's why I said you can take a
11 deposition. That's why I asked if Mr. al Nashiri will be
12 here, because he doesn't have to be. He has chosen to be.
13 Also in the rule. I mean, he has the right to attend, which
14 indicates a right not to attend. It's a capital case. It's a
15 deposition.

16 CP [BG MARTINS]: Correct, a capital case.

17 MJ [Col SPATH]: It's a deposition. He is going to be
18 here. Good.

19 CP [BG MARTINS]: And we believe that's because you have
20 ordered him.

21 MJ [Col SPATH]: I think it's important for sure.

22 LDC [MR. KAMMEN]: If I may, we need to clarify that,
23 because we need to ----

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1 MJ [Col SPATH]: We will talk through it. I mean, I
2 thought what I had was a request to be here from the defense
3 and I said sure, please do. We haven't had to deal with
4 whether or not he is not going to be here yet because the
5 defense counsel asked if he could be, and I said yes. We
6 agree with that, don't we?

7 LDC [MR. KAMMEN]: Absolutely he is planning on being here
8 tomorrow. As we have expressed repeatedly, the notion of
9 being here day after day after day is quite taxing, and ----

10 MJ [Col SPATH]: I understand.

11 LDC [MR. KAMMEN]: ---- and we have no, we are not
12 necessarily guaranteeing that -- he may well say at the close
13 of the day tomorrow I don't want to be here Wednesday,
14 Thursday and Friday.

15 MJ [Col SPATH]: We are apparently going to have to cross
16 a bridge I didn't know is coming from the government.

17 LDC [MR. KAMMEN]: Yes, I didn't know this was coming
18 either.

19 MJ [Col SPATH]: General Martins, I agree completely on --
20 I think my -- I am trying to figure out where the authority
21 comes from to focus a camera on the accused.

22 CP [BG MARTINS]: We weren't talking focus. It's a
23 generic picture, not unlike the distance from the panel --

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1 from what the panel members would see.

2 MJ [Col SPATH]: But the deposition is not meant -- the
3 deposition is not meant to recreate what this looks like. If
4 I had my way, I would be sitting at a conference table so it
5 looked a lot different because it is different. That's why
6 702 exists. It is a manner to preserve testimony if you can
7 demonstrate unavailability later. And you are given, in this
8 case you, the defense, are given a chance to cross-examine, we
9 are all in agreement on that, and I am there.

10 But 702 here looks pretty similar to what it looks
11 like in the Rules for Courts-Martial.

12 CP [BG MARTINS]: Your Honor, we anticipate challenges to
13 the admissibility. You are also aware, and this is in the
14 litigation, in Article 49 of the UCMJ, you can't use
15 depositions in a capital case. So we are mindful of the
16 concerns in the law, big law ----

17 MJ [Col SPATH]: Absolutely.

18 CP [BG MARTINS]: ---- about confrontation, about
19 compulsory process, about the kinds of protections that come
20 when you bring a witness into open court and they have to
21 confront -- they have to have the eyes of the jury on them,
22 they have to have -- so having these protections is something
23 we are trying to hue to the Abu Ali standards, which overcame

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1 very similar confrontation challenges. So I am looking at the
2 rule, but I am looking at the rule in the context of the
3 broader spectrum of challenges and want to preserve the
4 confrontation right. It's statutory now in 949a. I am not
5 making constitutional claims at this point here, but -- so
6 that's the way in which we have sought to preserve this, and
7 there is no intent to focus in and zoom in on -- it's not a
8 zoom depiction, it's a generic depiction ----

9 MJ [Col SPATH]: I understand.

10 CP [BG MARTINS]: ---- that would allow -- that would
11 capture and preserve the state of affairs outside of the
12 picture of the deponent.

13 MJ [Col SPATH]: I'm sure you can appreciate where the
14 concern comes from when Major Pierson says to preserve any
15 evidence created. We can debate what that means, but you can
16 appreciate what that sounds like to a detainee, an accused, a
17 defense counsel, or anyone else. No?

18 CP [BG MARTINS]: I'm aware of concerns -- I mean, the
19 behavior of a defendant is not evidence. What ----

20 MJ [Col SPATH]: Of course it is. Of course it is. If he
21 stands up and says everything you just said is a lie, that is
22 clearly -- the behavior of a detainee is absolutely
23 potentially evidence. Absolutely.

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1 CP [BG MARTINS]: I'm actually trying to agree with you
2 here.

3 MJ [Co1 SPATH]: Okay.

4 CP [BG MARTINS]: What we don't want to do is focus on the
5 detainee.

6 MJ [Co1 SPATH]: Good.

7 CP [BG MARTINS]: What we are seeking to do is preserve
8 the environment of this court, of the circumstances under
9 which the individual is questioned, and which you have agreed
10 would have some level of formality. There is going to be a
11 presiding deposing officer which you ----

12 MJ [Co1 SPATH]: There has to be.

13 CP [BG MARTINS]: Exactly.

14 MJ [Co1 SPATH]: There has to be. I didn't agree to it;
15 702 tells me that's how it has to be.

16 CP [BG MARTINS]: But not everything is in 702 and that's
17 why we are talking here. Your Honor, I think we are in
18 agreement ----

19 MJ [Co1 SPATH]: I do, too, almost. Is there a way to put
20 a camera back here that looks out at the courtroom like it
21 does every day?

22 CP [BG MARTINS]: Your Honor, I think that -- I am not
23 exactly sure which angle is going to be capturing the generic

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1 one, but that is basically the intent, is to get the courtroom
2 preserved.

3 MJ [Col SPATH]: That's where I think we are close.
4 That's where I think we are 98 percent of the way there. The
5 way it sounded was a camera focused on the defense team.
6 That's what was said. Focused on the defense team.

7 CP [BG MARTINS]: The defense table, yes. Your Honor, you
8 are going to rule. May I talk about ----

9 MJ [Col SPATH]: I am not going to rule. We are
10 quibbling. I just heard it and I am looking at my notes.
11 Focused, you are right, on the defense table. My mistake. So
12 I assume that means the front table.

13 CP [BG MARTINS]: Yes.

14 MJ [Col SPATH]: So that's the one Mr. al Nashiri is
15 sitting at.

16 CP [BG MARTINS]: Yes.

17 MJ [Col SPATH]: And to preserve any evidence created,
18 those are the words.

19 CP [BG MARTINS]: Yes.

20 MJ [Col SPATH]: Okay. I just want to make sure we are
21 saying the same things. I don't want it focused on the
22 defense table. I want it focused on the courtroom. So why
23 don't you all take some time and look at the camera angles

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1 before we waste an hour.

2 CP [BG MARTINS]: Your Honor, may I have a moment?

3 MJ [Col SPATH]: You may.

4 [Pause.]

5 CP [BG MARTINS]: Your Honor, the concern is noted. It
6 sounds like to me we are in agreement on the one that takes
7 the deponent.

8 MJ [Col SPATH]: Absolutely that's clear. Certainly the
9 questioner makes total sense if you want that; and again, the
10 courtroom makes sense, too. Just can you work with the
11 defense? It was probably not stated in a manner that was --
12 you know what happened and I understand it, given the history
13 here. The defense heard focused on the defense table,
14 focused, and then heard to preserve evidence created, and
15 those brought to mind hoping to get behavior from the detainee
16 that could be used against him later. That's all. And so we
17 just want to resolve those if we can without debating them.

18 CP [BG MARTINS]: Your Honor, may I move to the issue of
19 presence?

20 MJ [Col SPATH]: Yes.

21 CP [BG MARTINS]: So the presence of the accused tomorrow
22 obviously sounds in accordance with your order. We would --
23 in light of it sounds like potential that he would not be

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1 present or would seek to not be present or would seek to waive
2 whatever right he has to presence later. Because of your
3 admonishment of him in this session is sort of distinct from
4 the deposition process, we would submit probably the best way
5 to proceed would be to give him a very similar admonishment at
6 the start of the deposition about his presence at, you know,
7 sessions of the deposition so that the waiver process is just
8 as formal and has to be just as unambiguous so that we are not
9 putting the guards in a difficult spot about whether to bring
10 him or not.

11 It has to be he has one way to stay in the camp, and
12 that is to unequivocally sign that. And then we will
13 establish that in the record of the deposition, much the way
14 we would in the session or perhaps do it in a later R.M.C. 803
15 session, but we would not object to a very carefully expressed
16 waiver after you have warned -- you have given him an
17 admonishment in open and he has acknowledged that he
18 understands that.

19 MJ [Col SPATH]: Let me check. I don't think there will
20 be any dispute about that.

21 Defense counsel, any concerns if I go through the
22 same, similar, different, because it's a deposition, just the
23 same discussion about waiver and ability to be there at the

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1 start of the deposition session tomorrow, since your client
2 has indicated he will be here? Any concerns?

3 LDC [MR. KAMMEN]: No. I do, however -- well, no. If he
4 is not coming because he doesn't want to come, fine. If he is
5 not coming because he is ill or because there is
6 transportation issues, at that point in the normal sessions we
7 would forge ahead.

8 MJ [Col SPATH]: You all would forge ahead.

9 LDC [MR. KAMMEN]: Right.

10 MJ [Col SPATH]: You, defense team, would say it was a
11 voluntary waiver ----

12 LDC [MR. KAMMEN]: Yes.

13 MJ [Col SPATH]: ---- because you have had a chance to
14 talk with your client and he has agreed, he is waiving his
15 presence, whatever the reason, be it he is sick, he doesn't
16 want to ride on the shuttle, he's out. You are saying in this
17 case ----

18 LDC [MR. KAMMEN]: That may change that calculus.

19 MJ [Col SPATH]: I understand.

20 LDC [MR. KAMMEN]: We are not there. This is all
21 hypothetical.

22 MJ [Col SPATH]: I think we are on the same page, and it
23 goes in line with what we discussed in relation to the entire

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1 whether or not someone can stay here at the facility, and that
2 is our presentation may be interrupted if your client says I
3 don't want -- I want to be there; I am not physically well
4 enough to be there. We may be all stop, may be all stop until
5 your client is physically well enough to be here to continue
6 with the deposition. We might have to have some evidentiary
7 discussions.

8 CP [BG MARTINS]: Exactly. We are not giving him the
9 opportunity to decide not to come. I mean, this is again a
10 capital proceeding. Capital proceeding.

11 MJ [Col SPATH]: No, I am not ----

12 CP [BG MARTINS]: Right.

13 MJ [Col SPATH]: In line with a process already set up, if
14 there is an unambiguous waiver.

15 CP [BG MARTINS]: Waiver.

16 MJ [Col SPATH]: We -- a prior judge and you all came to
17 this process through litigation and I haven't changed it.

18 So, hypothetical one, we start tomorrow, I go through
19 the same rights to be here and not be here. Mr. al Nashiri
20 says I understand. Wednesday morning we show up and we have
21 an unambiguous signed waiver like we have always had, we are
22 where we are each time that has occurred.

23 CP [BG MARTINS]: Yes, Your Honor. And tomorrow morning

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1 we envision he is here ----

2 MJ [Col SPATH]: That is my ----

3 CP [BG MARTINS]: ---- because we don't have a waiver
4 process. It is like the first day of proceedings.

5 MJ [Col SPATH]: Correct.

6 CP [BG MARTINS]: So he comes tomorrow and then he gets
7 the admonishment, that's how we would see it. And then we
8 would have no objection to subsequent waivers.

9 MJ [Col SPATH]: Hypothetical two is Mr. Kammen shows up
10 and says he is waiving his presence, but only because he is
11 sick and has not signed the unambiguous I don't want to be
12 there. Then we are stopped to figure out where to go from
13 there because that is a different issue.

14 CP [BG MARTINS]: Your Honor ----

15 MJ [Col SPATH]: And it may well be -- I am not saying we
16 go forward, I am saying we stop.

17 CP [BG MARTINS]: I'm saying he comes and then he waives
18 in court because he hasn't done the one unambiguous -- this is
19 for them.

20 MJ [Col SPATH]: I understand.

21 CP [BG MARTINS]: There is a lot of case law that these
22 guys can't be absent at all.

23 MJ [Col SPATH]: I understand. If he wakes up tomorrow

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1 morning and says the ride makes me sick, I can't be there, we
2 have a moment to decide we can drag him here.

3 CP [BG MARTINS]: That is what the guard force is told to
4 do because of the ability ----

5 MJ [Col SPATH]: Or we can come together and pause to
6 figure out if he really is sick and delay the deposition for
7 four hours.

8 CP [BG MARTINS]: I mean, they have ----

9 MJ [Col SPATH]: We would never do that. Maybe he wakes
10 up a with a 103 ----

11 CP [BG MARTINS]: Your Honor, either he comes, and this is
12 the standing rule ----

13 MJ [Col SPATH]: This is what we are going to do: We will
14 address tomorrow morning when tomorrow morning gets here if he
15 is here. We are wasting time right now.

16 CP [BG MARTINS]: No.

17 MJ [Col SPATH]: Why are we not wasting time?

18 CP [BG MARTINS]: I have sat through hours ----

19 MJ [Col SPATH]: Here is what we are going to do: We will
20 take a break. We are in recess.

21 [The R.M.C. 803 session recessed at 1223, 31 July 2017.]

22 [END OF PAGE]

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