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1 [The R.M.C. 803 session was called to order at 1254, 31 July  
2 2017.]

3 MJ [Col SPATH]: These commissions are called to order.  
4 All the parties who were present before the recess are again  
5 present.

6 All right. Let me get back to where we were and see  
7 if we can come to some resolution. I think we are in  
8 agreement -- maybe I'm just slow. I feel that way sometimes.  
9 You are all smarter than I am, probably more well read, but I  
10 think we are saying almost the same thing, so I am going to  
11 try it again and then we will go from there and we will talk  
12 about Abu Ali. I had to go refresh my memory. It takes me a  
13 little while to catch up.

14 All right. Let's start just with the deposition  
15 process. Have we had any discussion about camera placement?

16 LDC [MR. KAMMEN]: We have. We have, Your Honor. And  
17 here is our feeling: Our belief is that if there is going to  
18 be a camera, it should be solely trained on the deponent.  
19 That's whose testimony is being preserved.

20 If we are going to go beyond the deponent, and this  
21 whole notion of trying to recreate the courtroom seems  
22 somewhat pointless, but that's for other people to decide.  
23 But if we are going to go beyond the deponent, they do have

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1 the technology where everyone is on camera, where there is a  
2 camera on you, a camera on the deponent, a camera on the  
3 prosecution table, and a camera on the defense table, not  
4 honed in on anybody.

5           And if we want -- and I assume then if the deposition  
6 is subsequently deemed to be admissible, what the jurors would  
7 see would be all four. They wouldn't just see the deponent,  
8 they would be seeing all four. I am hearing a no from behind.  
9 And if they are not going to see all four, why are we doing  
10 it?

11           MJ [Col SPATH]: Why film it? You all can be more  
12 comfortable.

13           LDC [MR. KAMMEN]: Right. But if we are going to film  
14 beyond the deponent, then we all should get to play. Because  
15 in the same way, Your Honor, that we think -- they think, oh,  
16 Mr. al Nashiri's behavior may create evidence. Quite  
17 candidly, I have seen evidence where the prosecutors' behavior  
18 creates evidence and not -- you know, if the witness is  
19 overtly looking to the prosecution for signals or the  
20 prosecution is signaling the witness, that is also evidence.

21           So as I told them, our view is one camera on the  
22 deponent or everybody is on camera and -- so that's where we  
23 are on our side.

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1 MJ [Col SPATH]: For the cameras. And we will come back  
2 to the presence issue in a minute.

3 Trial Counsel.

4 ATC [Maj PIERSON]: Your Honor, the government's intent at  
5 this time would be to admit -- if we were going to admit a  
6 version of recording, would be solely the deponent. However,  
7 the government is happy to do the quad version as the second  
8 recording. Should anything come of that from any viewpoint,  
9 then it will be preserved for any of the parties to use.

10 MJ [Col SPATH]: I guess the why. I understand -- look, I  
11 went and looked at Abu Ali. General Martins, if you want to  
12 talk about it, or Major Pierson, whoever wants to talk about  
13 it.

14 If I have it right, and I hadn't read it in probably  
15 four years, it appears to me that they were deposing people in  
16 Saudi Arabia and Abu Ali didn't want to go back to Saudi  
17 Arabia and it wasn't logistically reasonable for him to go  
18 back to Saudi Arabia for various reasons, marshals didn't want  
19 to keep control of him and he didn't want to be there since  
20 they likely would charge him with a crime. And so to best  
21 deal with the confrontation clause issue, they filmed them  
22 both, so that the accused was able to confront, over a long  
23 distance, the people testifying against him.

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1           And the district court said that's a good plan since  
2 it is impracticable for Abu Ali to go to Saudi Arabia. And so  
3 they set up this live two-way link so they could see each  
4 other as this process went under way.

5           This one seems factually different. One, it seems  
6 interesting to me, it tells me we can depose somebody in Saudi  
7 Arabia. So Abu Ali is good for that too, so maybe we can have  
8 remote testimony from Saudi Arabia as we deal with the  
9 deposition issues. So I am glad I got to read this.

10           The other piece it tells me is they are concerned  
11 with the accused's ability to confront who is testifying. We  
12 don't have an issue like that if Mr. al Nashiri is here.  
13 Problem solved. Because the confrontation is to protect  
14 Mr. al Nashiri in that case, that he can look at his accuser,  
15 look him in the eye while the accuser says things that he may  
16 or may not agree with. And so, just factually, our case looks  
17 different. We are going to have them in the same room at this  
18 point.

19           Does everyone agree with that so far? I mean, does  
20 that -- Major Pierson?

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

22           MJ [Col SPATH]: Okay. I was looking in Abu Ali for some  
23 type of holding that required this recapturing of the

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1 courtroom, and it seems very much focused on a unique  
2 situation where the witness is in Saudi, a difficult Saudi  
3 government to deal with to get testimony or to bring Abu Ali  
4 to Saudi, and this is how they dealt with it. Mr. Kammen, I  
5 assume on board so far?

6 LDC [MR. KAMMEN]: Absolutely.

7 MJ [Col SPATH]: Okay.

8 LDC [MR. KAMMEN]: And, of course, this is why we opposed  
9 the deposition, because it's always been our feeling that  
10 Mr. al Darbi will be available even if he is repatriated to  
11 Saudi Arabia.

12 MJ [Col SPATH]: And that will feed into whether or not  
13 admissible at trial and whether or not admissible in a capital  
14 case. I understand. All right.

15 So since the first area of agreement seems to be  
16 camera focused on the accused -- sorry, not the accused, my  
17 mistake -- on the deponent while he testifies against the  
18 accused, that's what we are going to do. Camera on the  
19 deponent. You all wear what you think is appropriate. I am  
20 still wearing the blues, likely with a sweater because of the  
21 temperature in this room. And that's okay. Cool is better.

22 Okay. Then we have presentation -- or appearance  
23 here at the deposition, and this is where we got off track. I

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1 was trying to figure out, I thought I had carefully been  
2 through what I had ruled on, and I had. But at one point, the  
3 defense counsel had asked me if their client could attend.  
4 There was never a suggestion their client wasn't going to  
5 attend. There was never a suggestion -- there was never a  
6 request to order him to attend.

7 In 369II, the defense said closed or open -- they  
8 wanted clarification, closed or open, and may our client  
9 attend. And in JJ I ruled more firmly than I needed to,  
10 although that is not resolving the issue. Whether or not he  
11 must attend or not we discussed. But if I was just ruling on  
12 the motion before me, closed, I clarified closed, and then I  
13 said we will be here on -- for the deposition. But it was in  
14 response to a filing by the defense simply asking may the  
15 client be there. So I get a little ahead of what needed to be  
16 ruled on because it wasn't an issue at that point.

17 So this is where I think we went a little off track.  
18 So General Martins, work with me, and I want to make sure, I  
19 think we agree, Mr. Kammen, I think we agree, just work with  
20 me through the hypotheticals and hopefully make sure I have  
21 got it.

22 Both parties agree the accused should be here  
23 tomorrow, must, absent exigent circumstances, like he is

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1 actually physically ill and cannot attend, and I will go  
2 through -- and I am not saying we will move forward, I am just  
3 saying can't go forward. With me so far? And I will go  
4 through the inquiry, similar what I did today, any ability to  
5 unambiguously waive his right to be present at future sessions  
6 of the deposition. Do we agree with that?

7 CP [BG MARTINS]: Your Honor, I would love to say yes but  
8 I have been in this situation a number of times, including  
9 this commission, and that -- that gives an ability for a  
10 detainee -- I'm trying to stick up here for guard force people  
11 who have to interpret what's going on in the situation where  
12 it takes hours to just get them here and to consult with you,  
13 and you will want facts.

14 MJ [Col SPATH]: Concur.

15 CP [BG MARTINS]: So you will want people present, you  
16 will want to hear from the accused to determine if his waiver  
17 is knowing, voluntary, and intelligent. I presume you won't  
18 cancel proceedings because the accused says to the guard I am  
19 not feeling well.

20 MJ [Col SPATH]: And that wasn't my hypothetical. So  
21 first, if the accused shows up tomorrow, as Mr. Kammen says is  
22 the plan -- let's start there. Tomorrow morning we arrive,  
23 Mr. al Nashiri is here, we move into the deposition, I am

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1 going to do a very similar announcement of rights that I did  
2 this morning. I assume he is going to say he understands  
3 them. And then he can unambiguously, in the same kind of  
4 process we have used in the past, waive his right to be  
5 present at future parts of the deposition. We agree with  
6 that?

7 CP [BG MARTINS]: We do, Your Honor.

8 MJ [Col SPATH]: Okay. Hypothetical two, there is an  
9 averment in the morning, I don't feel well, but no signed --  
10 there can't be a signature yet of an unambiguous waiver  
11 because we haven't gone through that rights advisement. I  
12 don't feel well, we have to resolve what we are going to do in  
13 that case. Bring him here -- I am not saying move forward.  
14 Bring him here and go through the advisement and the ability  
15 to unambiguously waive, or pause to have members of whatever  
16 witnesses we have come over here to tell me we don't think he  
17 is sick, we want to drag him here, or he has got 103 degree  
18 fever and we really don't think it's a good idea.

19 CP [BG MARTINS]: Your Honor, that's fine. He is here at  
20 this point and you are sorting it out. I agree with that.

21 MJ [Col SPATH]: Okay. I think we are on the same page.  
22 I think we are on the same page.

23 And so, Mr. Kammen, at least right now, the plan is

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1 tomorrow morning your client indicated he wants to be here to  
2 hear the beginning of or some portion of the deposition, if we  
3 do it, of Mr. al Darbi; is that right?

4 LDC [MR. KAMMEN]: Yes.

5 MJ [Col SPATH]: Okay. I'm glad we took some time. It  
6 gave me a chance to read another case and catch up again.

7 LDC [MR. KAMMEN]: I am understanding, then, that there is  
8 only going to be one camera.

9 MJ [Col SPATH]: You are correct.

10 LDC [MR. KAMMEN]: Okay.

11 MJ [Col SPATH]: On the deponent. Two cameras on the  
12 deponent. I got you. There is the camcorder camera on the  
13 deponent and there is the other camera on the deponent, but on  
14 the deponent. So any -- that's where the cameras are focused.

15 LDC [MR. KAMMEN]: And I'm, well, perhaps wrongly,  
16 assuming that while we will capture our objections and your  
17 notation, the camera won't be swivelling.

18 MJ [Col SPATH]: And I see nods by the prosecution,  
19 correct.

20 ATC [Maj PIERSON]: Yes, Your Honor, that is correct.

21 LDC [MR. KAMMEN]: Then ----

22 MJ [Col SPATH]: Okay. We got there.

23 While we are here in open session, let me just get --

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1 and see if we have any updates on a couple of things. Give me  
2 just a second.

3 [Pause.]

4 MJ [Col SPATH]: And it's okay if there is no significant  
5 update. For 319F, it was a defense motion to compel discovery  
6 related to a series of 166 filings. Have there been any  
7 developments?

8 MATC [COL WELLS]: Your Honor, good afternoon.

9 MJ [Col SPATH]: Colonel Wells.

10 MATC [COL WELLS]: No, sir. I think the situation remains  
11 constant, static. 319F implicates redactions on FBI 302s. We  
12 have consulted with the FBI about the redactions. Most of  
13 those redactions are for relevancy. The few that have been  
14 redacted for privilege claim are subject to AE 337.

15 MJ [Col SPATH]: Okay. Thank you.

16 MATC [COL WELLS]: Yes, sir.

17 MJ [Col SPATH]: Defense counsel, any comments on that?

18 LDC [MR. KAMMEN]: Not at this point, without waiving any  
19 future ----

20 MJ [Col SPATH]: No waiver. I am just trying to see if we  
21 had any developments to make sure that I am working in the  
22 right direction with some of these.

23 LDC [MR. KAMMEN]: They didn't give us the information

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1 before and we still don't have it.

2 MJ [Col SPATH]: 319G, I know it's outstanding, it's a  
3 defense motion to compel witnesses. I'm trying to resolve  
4 kind of 166 and 319. I know it's the hearsay statements, and  
5 I think they are going to end up being resolved together in  
6 some evidentiary hearings, but any updates? Colonel Wells?

7 MATC [COL WELLS]: Sir, on this one we maintain our same  
8 position. We believe that these witnesses, although present,  
9 would not be relevant and material to the information that the  
10 defense seeks. The other witnesses that will describe the  
11 conversations that the government will proffer, we believe  
12 these additional witnesses will be cumulative with that. So  
13 we would assert that for the commission to make a decision at  
14 this time, it's not ripe.

15 MJ [Col SPATH]: I agree. I agree with that last part. I  
16 don't think it's ripe. I think I am in the same spot, which  
17 is the initial burden to demonstrate admissibility of the  
18 hearsay statements on you.

19 MATC [COL WELLS]: Yes, sir.

20 MJ [Col SPATH]: And then after that effort, I think we  
21 are all in agreement, the defense gets to then make an effort  
22 to undermine that. Now, if it's cumulative, okay, that -- got  
23 it. If it's not relevant, easy. But they do have an

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1 opportunity to present evidence to undermine the reliability  
2 of the hearsay statements. We agree with that, don't we?

3 MATC [COL WELLS]: Well, sir, just to comment on that,  
4 they will have the witnesses to cross-examine.

5 MJ [Co1 SPATH]: Absolutely.

6 MATC [COL WELLS]: So that is evidence that they can seek.

7 MJ [Co1 SPATH]: Yes.

8 MATC [COL WELLS]: But the requirement to produce the  
9 witnesses, they require a synopsis, so they need to tell the  
10 commission what information is either going to ----

11 LDC [MR. KAMMEN]: Excuse me. The translation thing ----

12 MJ [Co1 SPATH]: Is working.

13 LDC [MR. KAMMEN]: Okay.

14 MJ [Co1 SPATH]: Thank you. We are back.

15 MATC [COL WELLS]: And so the commission understands the  
16 rule that they are required for production purposes to  
17 establish a synopsis to show the relevance and the  
18 materiality. It's the materiality piece that seems to fail.  
19 Relevance cannot be abstract, it cannot be remote. It has to  
20 be real and meaningful. And again, that's not ripe. And I  
21 think after their cross-examination, that will come into more  
22 clarity.

23 MJ [Co1 SPATH]: I think -- true. And, in fact, we have

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1 seen some of that in the past after the opportunity to  
2 cross-examine, the defense has indicated that they didn't need  
3 some of the witnesses they had requested because of the  
4 comments made during cross. So we will see where we are at if  
5 we get there.

6 MATC [COL WELLS]: Yes, sir.

7 MJ [Col SPATH]: We have 327C. Those are the statements  
8 by Mr. Al-Badawi or Mr. Badawi. Defense counsel.

9 MATC [COL WELLS]: Yes, sir. We are in the same position  
10 as 319G on 327C. For the same reasons that I just  
11 articulated, we believe those witnesses are not relevant. If  
12 they were called, they would be cumulative.

13 MJ [Col SPATH]: Give me just a moment, because we have  
14 had some of this discussion. And again, it's not a ruling,  
15 it's just as we work forward.

16 So at least in M.C.R.E. 304, I think we can agree we  
17 are down in Section (a)(5), that's the derivative evidence.  
18 Agreed so far?

19 MATC [COL WELLS]: Sir, that applies to the accused's  
20 statement; is that correct?

21 MJ [Col SPATH]: Well, it's derivative evidence. Evidence  
22 derived from a statement that would be excluded under Section  
23 (a)(1) of the rule.

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1 MATC [COL WELLS]: The accused?

2 MJ [Col SPATH]: That would be excluded under Section  
3 (a)(1), right? Those are no statement -- it's Confessions,  
4 Admissions, and Other Statements. "No statement obtained by  
5 the use of torture, cruel, inhumane, or degrading treatment  
6 shall be admissible except against a person accused of  
7 torture."

8 Then you have (2), Other Statements of the Accused;  
9 (3), Statements From Persons Other Than the Accused. So it  
10 seems to apply to -- if you were to coerce through torture,  
11 degrading treatment, inhumane treatment statements by  
12 somebody, this seems to cover that. 304 is different than  
13 M.R.E. 304.

14 MATC [COL WELLS]: Yes, sir. So we are talking about a  
15 witness who is not available in a court and the context is  
16 that the prosecution ----

17 MJ [Col SPATH]: It doesn't say not available in court. I  
18 mean, general rules, and maybe I am just reading it wrong. No  
19 statement obtained by the use of torture, cruel, inhumane, or  
20 degrading treatment, whether or not under the color of law,  
21 shall be admissible in a trial by military commission. And  
22 then it has got statements of the accused, and then it has got  
23 statements from persons other than the accused -- other than

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1 the accused -- allegedly produced by coercion.

2           What am I missing there? I am not saying his  
3 statements were obtained that way, Mr. Miller -- I'm saying,  
4 do we even have agreement that it's not statements by the  
5 accused?

6           TC [MR. MILLER]: No, we do have a disagreement. Because  
7 if we read (5)(a), it says, "Evidence derived from a statement  
8 that would be excluded under Section (a)(1) of this rule may  
9 not be received in evidence against an accused who made the  
10 statement."

11          MJ [Col SPATH]: But that's (5)(a).

12          TC [MR. MILLER]: Right.

13          MJ [Col SPATH]: Let's back up. Correctly, correctly, as  
14 Colonel Wells pointed out, so then I went back and I looked at  
15 304(a), no statement, no statement. And then I went with to  
16 other statements of the accused, easy.

17          TC [MR. MILLER]: Correct.

18          MJ [Col SPATH]: And then I go to (3), statements from  
19 persons other than the accused.

20          TC [MR. MILLER]: Correct. First off, what's going to  
21 happen here tomorrow is not a statement, it's testimony. So  
22 this doesn't even apply, the deposition.

23          MJ [Col SPATH]: I'm talking about Mr. Badawi.

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1 TC [MR. MILLER]: Okay.

2 MJ [Col SPATH]: 327C is witnesses related to the  
3 extraction of or the reception of statements from Mr. Badawi,  
4 or Badawi. I don't know how he says his name.

5 So what I'm trying to figure out is if I read -- if I  
6 read 304(a)(3), it seems to apply to people other than the  
7 accused.

8 TC [MR. MILLER]: Yes.

9 MJ [Col SPATH]: We agree to that?

10 TC [MR. MILLER]: Yes, we do.

11 MJ [Col SPATH]: Okay. And it says when the degree of  
12 coercion inherent in the production of a statement from a  
13 person other than the accused is disputed, I have to make some  
14 findings. The totality of the circumstances renders the  
15 statement reliable, the interests of justice would best be  
16 served by admission, and (c) -- and (c), the statement was not  
17 obtained through the use of torture, cruel and humane or  
18 degrading treatment. We agree with that?

19 TC [MR. MILLER]: Correct.

20 MJ [Col SPATH]: Okay. Again, this is not a comment on  
21 whether I agree with it or not. I think what the defense is  
22 saying is, early statements of Mr. Badawi were obtained  
23 through the use of inhumane, degrading, or tortuous behavior.

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1 And they believe they can demonstrate not just the first  
2 statement, but later statements. Not the testimony in the  
3 courtroom. We haven't gotten there yet, whether or not he  
4 shows up or not. I'm talking about statements later in time  
5 are the result of, are derivative of, right ----

6 TC [MR. MILLER]: Right.

7 MJ [Col SPATH]: ---- that treatment. That's all they are  
8 saying. They can show the totality of the circumstances,  
9 i.e., if you are tortured early, two months later you still  
10 might be afraid of being tortured and that statement might be  
11 unreliable.

12 Tell me if I have got it wrong, Mr. Kammen. I feel  
13 like -- again, I am not suggesting I agree with it, I'm just  
14 trying to make sure I am understanding the defense arguments  
15 and where we are going. Is that ----

16 LDC [MR. KAMMEN]: Yes. I mean, it's more than two  
17 months, but ----

18 MJ [Col SPATH]: I understand.

19 LDC [MR. KAMMEN]: Yes.

20 MJ [Col SPATH]: Okay. So what they are saying, lots of  
21 behavior early that makes your statements involuntary or  
22 compelled through this "torture, inhumane treatment, or  
23 degrading treatment" renders future statements unreliable.

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1 And so they just want the ability to put that on.

2 TC [MR. MILLER]: Correct. And I don't think that's what  
3 this rule says. Rule 3 is temporal. In a sense what they are  
4 talking about there is torture, statement, torture, statement.  
5 All right? He was tortured today, he made the statement  
6 today; he was tortured today, he made the statement today.  
7 That's what that particular statement is dealing with.

8 (5)(a) ----

9 MJ [Col SPATH]: Do you have any authority, legal  
10 authority? Because here we have a rule: Statements, when the  
11 degree of coercion inherent in the production of a statement  
12 is disputed ----

13 TC [MR. MILLER]: Uh-huh.

14 MJ [Col SPATH]: So we have the dispute. The defense has  
15 said we dispute it. I have to make three findings.

16 TC [MR. MILLER]: Right.

17 MJ [Col SPATH]: The totality of the circumstances. Does  
18 that mean just the totality of the circumstances on the very  
19 day you give the statement?

20 TC [MR. MILLER]: Yes.

21 MJ [Col SPATH]: Okay.

22 TC [MR. MILLER]: (5)(a), the way it's written, evidence  
23 derived from a statement that would be excluded on

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1 Section (1)(a) of this rule may not be received in evidence  
2 against an accused, an accused who made the statement. So  
3 thereby, its terms is limiting the derivative use exception to  
4 statements of the accused only.

5           What then happens is if someone makes a statement --  
6 now, I would agree if ----

7           MJ [Col SPATH]: Go down to (b).

8           TC [MR. MILLER]: Right.

9           MJ [Col SPATH]: (5)(b). Evidence derived from other  
10 excluded statements of the accused.

11          TC [MR. MILLER]: Of the accused. Again, limited by that  
12 of the accused.

13          MJ [Col SPATH]: Okay. So I have a feeling we are going  
14 to have some more litigation on this issue, but at least I  
15 understand -- that's what I am trying to make sure, I  
16 understand, because I have tried to issue some rulings at  
17 least to give you all some guidance. So for the statements of  
18 Mr. Badawi, are you all planning on presenting any evidence to  
19 demonstrate voluntariness or a lack of receiving them through  
20 torture, inhumane treatment, degrading treatment?

21          TC [MR. MILLER]: We anticipate putting on evidence, yes.

22          MJ [Col SPATH]: Okay. Any updates on ----

23          LDC [MR. KAMMEN]: May I be heard?

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1 MJ [Col SPATH]: Of course.

2 LDC [MR. KAMMEN]: I thought we had had this discussion,  
3 but when you read the Military Commissions Act of 2009 or  
4 2010, it's very clear that Congress, in resurrecting the  
5 military commissions, wanted the military commissions to be a  
6 torture-free zone.

7 Now, if I am hearing the prosecution right,  
8 correctly, they say, okay, we tortured Mr. al Nashiri, so we  
9 are somewhat limited in the use of his statements, although it  
10 does seem to be that they are morphing to well, if we tortured  
11 him on Tuesday and then we questioned him on Thursday, the  
12 Thursday statement is still good because we weren't beating  
13 him up on Thursday. Well, that's a different argument.

14 But if we are going to say that -- you know, limit  
15 that, then the military commissions are anything but a  
16 torture-free zone. Then they are a torture-rampant zone,  
17 because, for example, some of the statements the prosecution  
18 says it is going to offer from, we'll call them  
19 coconspirators, are people that they acknowledge were tortured  
20 in the black sites.

21 Obviously there is a dispute, but we believe that  
22 every witness who was questioned in Yemen -- well, we know  
23 that every witness who was -- virtually every witness who was

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1 questioned in Yemen had been held by the Yemenis for months.  
2 And what the government -- part of the argument on -- I don't  
3 know the numbers, they are saying you can't have this certain  
4 information, is to keep from the commission the knowledge of  
5 what became of those witnesses, what happened to those  
6 witnesses before the FBI ever got to them.

7           If it is the position of the government that, well,  
8 okay, yeah, we -- we or the Yemenis or the Yemenis and us, the  
9 Yemenis working for us subjected Mr. Badawi to cruel and  
10 inhumane and degrading treatment, but that doesn't make any  
11 difference because two weeks later, three weeks later they --  
12 you know, everyone was nice to him, well, then, frankly, Your  
13 Honor, I think we have absolutely stood what Congress had in  
14 mind on its head and this thing then becomes far, far worse.

15           I mean, we have always -- as you know, we have always  
16 thought that this whole thing -- process is a sham. But if it  
17 is a sham where most of the evidence is based on statements  
18 that are produced by torture, then it really rises to a whole  
19 different level of grotesqueness, quite candidly. And  
20 frankly, I thought that you had previously -- because we had  
21 this discussion with respect to al Darbi, and, you know,  
22 certainly any -- let me just speak generically.

23           Certainly any witness who was tortured who physically

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1 appears in court, what happened to him is subject to  
2 cross-examination. I assume we all agree on that. I assume  
3 we are not keeping that bit of truth from the trier of fact.  
4 But you are looking askance and maybe we are ----

5 MJ [Col SPATH]: I am looking to see. Maybe we have  
6 agreement there.

7 LDC [MR. KAMMEN]: Well ----

8 MJ [Col SPATH]: Maybe we don't. I'm sorry. I thought we  
9 might. Here is what I am going to say on this ----

10 LDC [MR. KAMMEN]: When the government's case is  
11 predicated, and look, let's be honest, 95 percent of their  
12 case is hearsay. And if the government's case is predicated  
13 on hearsay derived from torture and we can't get into the  
14 torture and the torture is something that's just overlooked,  
15 then we have moved far beyond what was ever envisioned, and I  
16 think far beyond what is -- it ceases to be any -- words fail  
17 me because it is such grotesque proceeding, if that's really  
18 where we are at.

19 MJ [Col SPATH]: Thank you. Colonel Wells, you indicated,  
20 we don't necessarily have agreement.

21 MATC [COL WELLS]: Sir, I think this goes back to the  
22 situation isn't ripe. You need to hear the testimony.

23 MJ [Col SPATH]: Concur.

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1           MATC [COL WELLS]: I would say this, though: I am  
2 troubled by the suggestion that prolonged protective custody  
3 of these witnesses is somehow equating to what we define as  
4 torture, cruel and degrading. So the defense ----

5           MJ [Col SPATH]: And I haven't said it is. Look ----

6           MATC [COL WELLS]: Right.

7           MJ [Col SPATH]: I keep saying I am not suggesting I  
8 agree. What I frequently suggest, and it has led to a  
9 protraction of time, is it is difficult to rule without  
10 evidence, and I end up ordering witnesses and getting  
11 evidence, and then I rule. And I don't know how you all feel.  
12 This is a fascinating process.

13                   I feel if I -- I haven't gone back and looked. My  
14 guess is in the 370 or '80 motions, the government has been  
15 the beneficiary of a ruling in their favor multiple times.  
16 Even after an evidentiary hearing.

17           MATC [COL WELLS]: Yes.

18           MJ [Col SPATH]: But I need the evidence. I mean, I  
19 assume the defense probably feels that way too. Although I  
20 feel you folks may feel I am ruling against you, but I am not.  
21 But all I am saying is I would need 304A, B and C. It has  
22 three parts under it. A, B and C. The totality of the  
23 circumstances, typically read as totality of the

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1 circumstances; the interest of justice, that's a new one.  
2 What does that mean I listen to? And then the statement was  
3 not obtained through the use of torture, cruel, inhumane, or  
4 degrading treatment.

5           From what I have gathered from going back through the  
6 transcript before I got on the case, the defense is going to  
7 suggest through Dr. Crosby that statements obtained later in  
8 time, not derivative, they are the product of -- I'm not  
9 saying I agree with it or disagree with it. I'm just  
10 telegraphing for you all what is in the record right now and  
11 the defense is going to point to to say we need witnesses,  
12 because we have an expert who is going to say they are the  
13 product of. They were obtained through.

14           Obtained through means that's how we got them. It  
15 seems pretty straightforward. And if you tortured them or  
16 treated them poorly for a long period of time, future  
17 statements are still being obtained because of that earlier  
18 conduct. Probably grossly oversimplifying what she will say,  
19 because, again, she is smarter than I am. I am just -- I am  
20 just highlighting to you that I believe we are going to have  
21 some significant evidentiary hurdles to get through. I agree  
22 with you, not ripe though, until you all offer the statement  
23 and we start to work through what statements you are

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1 particularly offering and we go from there. I think we are.

2 MATC [COL WELLS]: I like how you stake it out. Agree  
3 with you it's incumbent on the defense for bring out the  
4 facts.

5 MJ [Col SPATH]: I agree with you, Colonel Wells, but I am  
6 not sure until I got here that you have said yes to witnesses  
7 defense has asked for. Honestly, they try to bring facts to  
8 me and then I rule against them. It is not as if they come to  
9 me with their witnesses and I say you win, defense counsel.  
10 Frequently you all say no to the witnesses, I order the  
11 witnesses, and I still rule in your favor.

12 MATC [COL WELLS]: Sir, tough job. You have to make this  
13 decision based on the rules on what is the product, what is  
14 the statement. It's an 803 analysis anyway on hearsay. We  
15 want to get to the facts.

16 MJ [Col SPATH]: It is, but I can't ignore 304.

17 MATC [COL WELLS]: Correct, sir. If you look at the  
18 language, though, it almost mirrors what you have to do in an  
19 803 anyway. So it means that voluntariness has been wrapped  
20 into a 304.

21 MJ [Col SPATH]: Yes.

22 MATC [COL WELLS]: And we will have further discussion on  
23 that. I would ask in this discussion, I know we are talking

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1 about 166 in these discreet statements, but the pacing of this  
2 and planning for the time that we have in 2017 and 2018 are  
3 important to us, and there is various aspects of the defense  
4 asking to cancel whole sessions, like in November. We are  
5 still struggling with the 207 material. We have more than 65  
6 witnesses to come through through that. Then we look at the  
7 various locations in and around Aden Harbor. We want to get  
8 through that.

9 I believe that the prosecution also would probably  
10 give you an additional notice under 166. We also have perhaps  
11 foreign documents for you to consider. So this is not  
12 something we need to rush into with a conclusion that torture  
13 has occurred by Yemeni authorities. Additionally, I  
14 understand ----

15 MJ [Col SPATH]: I have no opinion on that yet.

16 MATC [COL WELLS]: Yes, sir.

17 MJ [Col SPATH]: Until we get through -- again.

18 MATC [COL WELLS]: The backdrop for this, too, is foreign  
19 witnesses. They are well beyond the subpoena power of this  
20 United States and this commission, so we will have to grapple  
21 with that. Sir, I think we are in agreement and I will step  
22 down.

23 MJ [Col SPATH]: Thanks, Colonel Wells.

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1 MATC [COL WELLS]: Thank you.

2 MJ [Col SPATH]: For the November issue, I know it's an ex  
3 parte presentation. We will try to get that this afternoon or  
4 this week maybe after one of the deposition sessions. I know  
5 I wanted a couple from the government as well. So we will try  
6 to work through this.

7 Major Pierson.

8 ATC [Maj PIERSON]: On the November ex parte session we,  
9 the government, would object to that filing being done ex  
10 parte.

11 MJ [Col SPATH]: I understand.

12 While we are here in open session, maybe we should  
13 talk scheduling for a little while. I am not going to talk  
14 about November. We will deal with that. 11 through 29  
15 September, have we all given any thought to maybe we are going  
16 to have the cross-examination, of course, of al Darbi for some  
17 number of days maybe?

18 What other things are we looking towards? 207?  
19 Government, is that your plan for that time?

20 TC [MR. MILLER]: It is, Your Honor.

21 MJ [Col SPATH]: All right. And do you have any idea how  
22 many days that will encompass if we were ----

23 TC [MR. MILLER]: A couple of weeks.

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1 MJ [Col SPATH]: Okay. November we will deal with  
2 separately. Okay.

3 LDC [MR. KAMMEN]: It sounds to me, Your Honor -- may I?

4 MJ [Col SPATH]: You may.

5 LDC [MR. KAMMEN]: Obviously we can't know for sure where  
6 we are with respect to al Darbi's cross until we hear the  
7 direct, but it does seem to me that if the cross goes -- if  
8 their direct is four days, I would expect that the cross would  
9 be at least as long and probably longer, because there is a  
10 great deal of material they seem to be skipping, at least in  
11 our view.

12 So let's say that our cross is seven or eight days.  
13 I don't know, do they want to start 207 and not finish it, or  
14 might it be wise to just reduce that to a two-week block,  
15 either the two weeks for 207 or the two weeks for Darbi? And  
16 I just throw that out. I mean, the one thing we don't want to  
17 be doing is spending unproductive time here.

18 MJ [Col SPATH]: I understand.

19 LDC [MR. KAMMEN]: Because our time when we are not here  
20 can be used far, far more efficiently. And so I just throw  
21 that out, because I know you added the week because of other  
22 circumstances, but if it is really just going to be two weeks,  
23 either two weeks on Darbi, two weeks on 207, we can -- it just

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1 seems to me that makes the most sense, but ----

2 MJ [Col SPATH]: Mr. Miller.

3 TC [MR. MILLER]: What makes more sense to the government  
4 that we get this thing moving forward, and every time we take  
5 a week off, that's a week longer that justice isn't done.

6 Our preference would be, Your Honor, to have  
7 Mr. Kammen -- and I anticipated that his cross-examination  
8 would be extensive and would take probably five to eight days.  
9 Assuming that we would be ready then to go right into the 207,  
10 we will have our witnesses available and we can get started on  
11 that process. That would be our -- the government's wish in  
12 this.

13 MJ [Col SPATH]: I understand. And we will also, I  
14 assume, have some redirect in the deposition.

15 TC [MR. MILLER]: Depending upon -- we will.

16 MJ [Col SPATH]: Some period.

17 TC [MR. MILLER]: It will be a two-week process, so we  
18 will still have the additional time the court has set aside.  
19 We would just as soon go ahead with that other evidence on the  
20 motion.

21 MJ [Col SPATH]: I know we have a lot of 207 evidence to  
22 continue to work through.

23 TC [MR. MILLER]: We do. Thank you, Your Honor.

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1 MJ [Col SPATH]: I won't even ask -- I was going to say,  
2 depending upon what happens in the ex parte hearing, maybe  
3 there's an opportunity to find a couple weeks in November and  
4 December to come down here. I don't know what will happen in  
5 the ex parte hearing so we will wait and see. We won't talk  
6 about that yet.

7 Let's look at 018. I think there were some specific  
8 concerns. Have you all talked together about whether or not  
9 you have any agreement on those concerns? And maybe there  
10 aren't any.

11 LDC [MR. KAMMEN]: Well, let me -- we have sent two  
12 e-mails to the prosecution, one e-mail twice. Neither has  
13 been responded to, and both of those e-mails ask the same  
14 question -- the same three questions: Can they tell us  
15 approximately when we will get -- we will have received all of  
16 the 120 materials? Question number two was can they tell us  
17 approximate number of pages we will be receiving. Because you  
18 guys have all talked about multiple thousands, but that -- and  
19 question number three is what is the procedure in place to  
20 ensure that what they are giving us is what you are approving.  
21 Because what is happening is, as we read it, is you  
22 are approving material, it goes off somewhere to be vetted by  
23 somebody, and then some -- then it dribbles to us. We have

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1 absolutely no confidence that what you are approving is what  
2 we are getting, and so we asked them on two occasions those  
3 three questions, and they didn't even dignify us with a  
4 response. It was complete crickets. And those e-mails were  
5 sent to the same e-mail addresses that always get a response.

6 So frankly, Your Honor, without that information,  
7 there is just nothing to discuss because that's the starting  
8 point for us. You know, until we know where we are on 120,  
9 all of this is, is really speculative from our perspective.

10 The other issue for us -- I mean, there are two other  
11 issues for us, and frankly, what we were hopeful is simply get  
12 a sense from you, is in your mind are those dates etched in  
13 stone or are they flexible. They want it to be yes. I'm  
14 going to tell you right now, we can't comply with that. And  
15 we can't comply with that because we don't have the resources  
16 to comply with that litigation schedule. So if it is etched  
17 in stone, then we are going to need to make an ex parte  
18 presentation to you about the realities of that situation.

19 If there is flexibility -- we understand the need to  
20 keep the thing moving. But again, we are not going to agree  
21 to a litigation schedule that we can't possibly comply with.

22 The second issue that affects us, all of us, is  
23 something we don't know, and that is whether or not the U.S.

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1 Supreme Court is going to accept cert in al Nashiri or Bahlul.  
2 Now, Bahlul is more -- well, we will wait and see what  
3 happens. al Nashiri, if the Supreme Court grants cert, is  
4 going to take a tremendous amount of defense resources to  
5 brief that and to prepare for the argument. And so that will  
6 certainly affect the beginning portion of next year.

7           So I understand, you know, they want to spend all of  
8 next year here. We are not in a position to do that. If it  
9 is your feeling that that is a schedule that is etched in  
10 stone, whether we do it now, whether we do it in September, we  
11 do need to make an ex parte presentation to you about the  
12 realities of our position. And frankly, we will also flesh  
13 that out in a rather lengthy motion, you know, so that the  
14 appellate record is clear about where we stand.

15           But I don't know how far we can get. I mean, you  
16 know, obviously depending upon what you do regarding our  
17 request about November -- and we understand you may well deny  
18 our request. We understand that. And if you do, then that  
19 work has to be moved into the beginning of the year, and  
20 that's work that has to be done. And so you may well say to  
21 us well, November is scheduled, we need to do, that you guys  
22 have to move that, that's fine, but that affects -- you know,  
23 it's dominos. You can't do one without the other.

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1           And, you know, we obviously -- we don't know what the  
2 Supreme Court is going to do. They may deny either or both  
3 cases and then it doesn't make any difference.

4           And so there is a number of multiple moving pieces  
5 here.

6           MJ [Col SPATH]: Right.

7           LDC [MR. KAMMEN]: So that's where we are. But the  
8 starting point, Your Honor, quite candidly, is the 120  
9 discussion. We still don't have any clarity on that. In the  
10 absence of clarity on that, we really -- it's very, very  
11 difficult for us to have any sense of how -- how to proceed,  
12 how to utilize our resources, and really what to do about next  
13 year.

14          MATC [COL WELLS]: Your Honor, from the prosecution's  
15 standpoint, I think we agree with Mr. Kammen that the 120  
16 information is important, but it takes care for the commission  
17 to go through each piece. As it relates to page count, I  
18 think that is really misleading and not helpful, because you  
19 can take a multipage document, say 20 pages, and reduce it  
20 down to two sentences, so it is not helpful. The hard thing  
21 is to do the work.

22           The other suggestion is that the government does not  
23 follow your orders. When you issued an order on 120, we

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1 faithfully adhere to it. In fact, we have had to come back  
2 when we asked questions on edits or changes, et cetera, and we  
3 have caught an error and a mistake. They all become part of  
4 the appellate record. So the defense should have confidence  
5 that that information is there for the appellate courts to  
6 look at if there was some type of mistake.

7           So what we really need from the defense is to  
8 identify those particular dates on the 2018 calendar where  
9 they say we have a conflict. We do object to the defense  
10 making ex parte presentations about scheduling conflicts. I  
11 realize that their preparation, their investigation, that it  
12 relates to strategy, but certainly they could be able to tell  
13 us which dates that they have a conflict and not leave it  
14 amorphous of we need to go through information that really is  
15 only relevant for sentencing.

16           MJ [Col SPATH]: So the ex parte, without saying anything  
17 about what's been filed, that was focused on a particular  
18 hearing.

19           MATC [COL WELLS]: Yes, sir.

20           MJ [Col SPATH]: A particular period of time, nothing to  
21 do with 018. And I think you agree, if it comes to  
22 investigation prep, strategy, how else do they give me the  
23 information if they don't want to disclose it to you? And I

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1 know you all have objected to the presentation. I'm just  
2 trying to figure out: How do I do that?

3 MATC [COL WELLS]: Well, it should be a filing that's open  
4 to both parties and express we have a conflict with these  
5 dates. We still don't know what dates in 2018 the defense  
6 objects to.

7 MJ [Col SPATH]: They have not -- no ex parte filing to me  
8 on 2018 dates. I haven't seen anything ex parte, okay? The  
9 only one I've seen is focused on the dates, and that is a  
10 hearing in November that they have concerns about sharing the  
11 reason with you all, as it will disclose their investigative  
12 strategy or prep.

13 MATC [COL WELLS]: Okay.

14 MJ [Col SPATH]: That's my impression.

15 LDC [MR. KAMMEN]: That's correct.

16 MJ [Col SPATH]: Okay. So I am trying to figure out what  
17 to do when they have identified a particular hearing that they  
18 are not comfortable disclosing the reason. And in the past  
19 they have certainly disclosed, as have you all, the reason for  
20 the issue. I mean, we've done it in here, be it personal or  
21 professional, why we need to cancel a session. I mean, this  
22 was -- the one focused in November is unique in that that has  
23 not been the vehicle to which I have received information in

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1 the past.

2 MATC [COL WELLS]: Sir, in your ex parte consideration of  
3 this, I think speaking for the team personally, primary is to  
4 conduct the cross-examination of Mr. Darbi. We need to clear  
5 away all obstacles to that to equip the defense to do that  
6 competently, with the accused present, too. That would be  
7 preferable.

8 MJ [Col SPATH]: Agreed.

9 MATC [COL WELLS]: So he participates with that group. So  
10 that is our main concern, if you have any discussions with  
11 defense counsel in that case.

12 MJ [Col SPATH]: I think my only question with al Darbi  
13 has to do with outstanding discovery. I know we have got the  
14 513 issue. We had some filings that directed me in 120 where  
15 to look specifically to get through those, which I did. Have  
16 we gotten all of that to the defense?

17 MATC [COL WELLS]: Yes, sir. I think there are some  
18 outstanding matters, though, that relate to Jencks material  
19 that we are producing, and we can discuss that in more detail  
20 as needed, in particular, and I will leave it at that at this  
21 session.

22 MJ [Col SPATH]: Okay. We will cover that separately.

23 MATC [COL WELLS]: Yes, sir.

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1 MJ [Col SPATH]: All right. I have to go back and look at  
2 the 120 that's with me. We have made great strides in  
3 returning it to you all, but I have to go look. I honestly  
4 don't know what I have left to review, but I'll talk here and  
5 figure it out. And it does take time.

6 Talking scheduling, there's going to be hurdles at  
7 every step to move this forward. I mean, we have established  
8 so many as we have gone forward, and I haven't even dealt with  
9 a number of motions to abate and some other issues that are  
10 coming.

11 So we'll talk more. No good to think up here out  
12 loud. I chastise many a judge who does it, so I will  
13 withhold.

14 I will say this: They are not etched in stone, the  
15 dates. They are etched in something more than sand.  
16 Somewhere in between. We need to -- there is a lot of  
17 preadmission stuff. The 166 and the hearsay statements are  
18 going to take time. Some of those are wrapped up in 120, I  
19 know that, so we can't deal with those until you have all --  
20 but the problem is you may have all the information.

21 I just -- it's a lot to make sure you have. And part  
22 of this drive to discovery is it might be helpful for the  
23 government to provide, and I need to order it, their witness

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1 list. Wouldn't that be helpful? Who are you going to call  
2 during your case-in-chief? How many witnesses? They said  
3 it's all unclassified. Here is the witness list. Because  
4 that will drive some of where you are going in your prep in  
5 cross-examination and in witnesses in contravention to that,  
6 and it might help kind of resolve some of these hurdles as we  
7 look forward; but I know we have got important motions we have  
8 still got to work through.

9 LDC [MR. KAMMEN]: You know, I mean, and again, we are  
10 going to put this all in writing. There is not going to be  
11 any secret. But I mean, you know, we are in the process of a  
12 huge turnover in the defense team. That slows things down.  
13 People don't have clearances. When they have clearances, it  
14 takes a year to get up to speed. I mean, this is not, you  
15 know, a one-binder case. And so, you know, you can set a  
16 hearing, but if the only two people -- if I am essentially the  
17 only person who has any idea what the hearing is about and  
18 everyone else has to get up to speed and you set three  
19 hearings in a row and they are all of that, we simply can't be  
20 prepared.

21 Now, that's what they want. That is what they want.  
22 They want a show trial. They want a trial with people in  
23 suits and uniforms who can't do the work so that they can get

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1 their conviction, get whatever sentence they get, and they can  
2 walk out and say, Wasn't this great? They will say they don't  
3 want that, but that's how they act.

4 I hope that's -- I don't think that's what you want.  
5 I think you want a trial where the lawyers are prepared. And  
6 unfortunately, you know, you ordered, just -- you ordered  
7 discovery by April 15 on Darbi, and we were getting the last  
8 bit of discovery Friday. And somewhere along the way we get  
9 300 hours of recordings. And they say, oh, well, we need to  
10 move right ahead, as though we somehow magically have the  
11 resources to listen to 300 hours of recording and do this  
12 other work and prepare for 166 and review 120 materials and do  
13 all this other stuff, and there just aren't enough bodies to  
14 do all this work.

15 And so we will set this out for you. And we have  
16 spent a lot of time looking, and we have what we believe is a  
17 reasonable schedule, that will absolutely not be satisfactory  
18 to them, that we can comply with. But what we are not going  
19 to do, Your Honor -- I mean, we don't want to be in a position  
20 where what we are doing is sitting there making a record of  
21 why we are ineffective. That doesn't do anybody any good.

22 And you know, when you have a hearing and then if we  
23 are down here for two weeks and then we are in another major

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1 hearing two weeks later, all that happens is people get burned  
2 out, people quit, people become ineffective. That doesn't  
3 advance this process at all. And again, we don't know what's  
4 going to happen with the Supreme Court, we don't know what's  
5 going to happen with 120.

6           You know, if you will allow me to vent, when they say  
7 oh, okay, 20 pages might be reduced to two sentences, that  
8 might be, but then that's going to result in additional  
9 litigation, additional requests for discovery, because that's  
10 not the test, is what can you do that passes the straight-face  
11 test. It has got to leave us in a position to present the  
12 evidence as best we can. But we can't do any of this until we  
13 have it.

14           The same thing with 166. They say, oh, we want to  
15 move ahead with 166. But the impediment with 166 is the  
16 secrecy they have imposed regarding information that we  
17 believe is relevant to whether the witnesses were tortured.  
18 And so they say oh, yeah, we want to present that, but you  
19 don't get this other information. And so the whole thing is  
20 incredibly frustrating because for all of the talk about how  
21 they want to move it forward, all we get is impediments,  
22 roadblocks, and delay.

23           Now, we said to you way back when if you impose a

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1 deadline on discovery, you have got to mean it. You imposed a  
2 deadline, but it had no impact, it had no meaning, and we are  
3 getting stuff that the government has had in its possession  
4 for ten years. So, I mean, it's not like, you know, Darbi  
5 makes some new statement. And again, you know, I'll assume  
6 it's all over the government. That's fine.

7           But it's not like this case was filed yesterday and  
8 it's not like -- I mean, he has been in -- Mr. Nashiri has  
9 been in Guantanamo since 2006. You know, they announced in  
10 2008 they were going to bring this case. And so none of this  
11 is, you know, our doing. But, you know, I think the way to  
12 proceed is we do have serious concerns. We will have a better  
13 feel for what next year looks like in October, quite candidly,  
14 when we know where cert is. We will file in September a  
15 proposed schedule, and it will be public so they can  
16 understand our concerns.

17           There is probably a matter relating to that that  
18 simply is appropriate to be discussed ex parte, but we can  
19 come to that in September. And, you know -- but that's where  
20 we are. I know I've been saying this over and over again, but  
21 that's the reality -- in an Article III court, judges say give  
22 them the discovery; if you don't give him the discovery, there  
23 is going to be consequences. I can't imagine any federal

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1 judge anywhere in the United States, and I'm not suggesting  
2 you are at fault, saying to the government here is an order,  
3 I'm directing you to produce a raft of classified information.  
4 Go ahead and take five years do it. I mean, that simply just  
5 wouldn't happen. And we are in our fifth year on 120. We are  
6 now into -- it has been over four years since Judge Pohl  
7 entered the order on 120 and we are still sitting here without  
8 any clear idea of when we are going to get it.

9 MJ [Col SPATH]: Anything, Trial Counsel?

10 TC [MR. MILLER]: Just a couple of things. First, Your  
11 Honor, nobody at this table wants a show trial. All right?  
12 Where I come from, the judge decides when cases are tried, not  
13 defense counsel. The judge sets a schedule and then the  
14 parties meet it. Lawyers -- children need fences, lawyers  
15 need deadlines. All right? And without deadlines, without  
16 dates set, this is never going to move forward. Lawyers  
17 always -- defense lawyers always want more time. They always  
18 want more time.

19 The government is in favor of the schedule that has  
20 been set. We are doing everything we can to ensure that they  
21 get things in a timely manner. As the court is aware, and we  
22 will discuss I'm sure some more today, later on, some of the  
23 things that have come up are things just beyond our control.

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1 But we have marshalled whatever assets we have at our disposal  
2 to make sure that that gets to them timely.

3 And I would also point out I often hear people talk  
4 about the government, the government has all this, we don't  
5 get our clearances. I have had lawyers assigned to my team  
6 who for a year have not gotten clearances. So the same sort  
7 of frustration that counsel on that side faces, so do we.

8 But long and short of it, Your Honor, is we are in  
9 concurrence with your schedule and would like to see it move  
10 forward in that manner. Thank you.

11 MJ [Col SPATH]: All right. So we have got a couple, I  
12 don't think there is any doubt, we have to deal with in a  
13 classified setting, 369RR and 369PP. There doesn't seem to be  
14 any objection about that. I think everybody agrees, to have  
15 any discussion that's meaningful, we will have to do it in a  
16 classified session.

17 Trial Counsel, you concur?

18 TC [MR. MILLER]: The government does, Your Honor, yes.

19 MJ [Col SPATH]: Defense counsel, you seem to concur as  
20 well.

21 LDC [MR. KAMMEN]: Yes.

22 MJ [Col SPATH]: All right. I am doing this just for  
23 notice, not because I have made any decisions. If we are

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1 going to start tomorrow, we are going to start at 9:30 for a  
2 deposition. That will give us time to get organized in here,  
3 set it up the way it's going to be set up, get the other  
4 lawyers in here and everything else. That's just so your  
5 client knows what time, you all know what time to meet with  
6 him, all of that. Assuming all goes well, we will be here  
7 tomorrow at 9:30. We will just get moving. If something  
8 happens because of these classified motions, you will be able  
9 to let your client know, or the facility will, so he doesn't  
10 have to travel here tomorrow.

11           So for the open session, that's it. We may do more  
12 at the end of the week. I just don't know. For everybody  
13 else, just plan to be here at 9:30 for a deposition that's  
14 closed. And for you all, I know it takes about a half an hour  
15 to get everything ready to do a classified session in here, so  
16 we will break, come back in about a half an hour, and we will  
17 take up 369RR and PP.

18           Anything else for the open session, Trial Counsel?

19           TC [MR. MILLER]: Nothing further from the government.

20           Thank you, Your Honor.

21           MJ [Co1 SPATH]: Defense counsel?

22           LDC [MR. KAMMEN]: No.

23           MJ [Co1 SPATH]: Okay. Then we will let everyone get set

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1 up. We will see you in about a half an hour. We are in  
2 recess. Thank you.

3 [The R.M.C. 803 session recessed at 1404, 31 July 2017.]

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