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1 [The R.M.C. 803 session was called to order at 1412, 4 August  
2 2017.]

3 MJ [Col SPATH]: These commissions are called to order.  
4 All of the parties who were present at our first session this  
5 week are again present.

6 Mr. Miller, are the proceedings being transmitted?

7 TC [MR. MILLER]: They are not, Your Honor.

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

9 First, let me just summarize a few 802s. Wednesday  
10 afternoon we had an 802 before we departed. And it was just  
11 to make sure that the view and all of that was going to happen  
12 that evening; and that there's a plan in place for one of the  
13 government counsel to be over there to facilitate the  
14 defense's entry into the facility; and that if there are any  
15 issues with that, to let me know. And the defense indicated  
16 that they were going to start at 6:30.

17 Next day, yesterday, we had an 802. The defense  
18 indicated qualitatively it went fine, that things went fine  
19 the night before and that they were going to engage in a  
20 second phase yesterday that included photographs, and that  
21 that had been worked out, apparently. And they were going to  
22 do that again at 6:30 last night; likely motion practice to  
23 follow after that second look.

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1           At that 802 I discussed I was going to have an  
2 ex parte session with the defense to talk about the session in  
3 November, which we had. I said I might have an ex parte  
4 discussion with the government related to a 120 filing. I'll  
5 talk about that in a minute. I covered that in a subsequent  
6 802 as well.

7           But yesterday I said I'd probably have an ex parte  
8 session related to 120LLLLLL. I mentioned we need to find a  
9 road ahead with regard to 513 and any claimed mental health  
10 privilege as best we can do that with any session while we're  
11 down here. And the government let me know that they may have  
12 an update in relation to discovery matters related to  
13 al Darbi.

14           Today after we finished the deposition, a very brief  
15 802 to figure out if we're going to go on the record briefly.  
16 Here we are. I'm not going to need an ex parte session in  
17 relation to 120LLLLLL that there would be an order  
18 forthcoming, that I am reviewing now. The defense let me know  
19 they have at least filed an ex parte filing in relation to the  
20 inspection view issue that we've been talking about on  
21 multiple occasions.

22           The government let me know they likely are going to  
23 have an objection to that filing that we'd talk about in here.

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1 The government said a portion of the al Darbi update might  
2 have to be in some type of classified session and the 513  
3 section may end up being closed as well, depending on what  
4 defense counsel knows from their client or may present during  
5 the hearing.

6           Those are the three 802s we had. First, we had --  
7 let me see if we want to add anything to the summaries of the  
8 802s. I didn't make any rulings or decisions administratively  
9 as promised. Trial Counsel, do you want to add anything to my  
10 summary to the 802s?

11       TC [MR. MILLER]: Nothing from the government, Your Honor.

12       MJ [Col SPATH]: Defense Counsel?

13       LDC [MR. KAMMEN]: No additions.

14       MJ [Col SPATH]: All right. And more formally let's just  
15 talk through, Defense Counsel, I know there's an ex parte  
16 classified filing. I will review it, one, to determine if I'm  
17 even going to accept it. I have to see it before I decide  
18 anything on it, obviously.

19       LDC [MR. KAMMEN]: If you conclude it should be served on  
20 the government, obviously we'll do that.

21       MJ [Col SPATH]: I understand.

22       LDC [MR. KAMMEN]: I hope when you read it, you'll  
23 understand why at this point we think it's appropriate to keep

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1 it one sided.

2 MJ [Col SPATH]: All right. And, Trial Counsel, your  
3 concerns, I think, are that you don't think it's appropriate  
4 for an ex parte filing but you trust that, after I review it,  
5 I will make that call one way or the other. Is that pretty  
6 fair?

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

8 MJ [Col SPATH]: Okay. I will let you know as soon as I  
9 can.

10 Major Pierson, to the extent you can give an  
11 unclassified update on discovery in the al Darbi issues, why  
12 don't you do that.

13 ATC [Maj PIERSON]: Your Honor, given where we're at in  
14 the deposition progress, I want an opportunity, and I  
15 appreciate the commission giving the opportunity for the  
16 government to provide an update to you and to the defense  
17 counsel, where we stand with discovery. And I think my  
18 purpose in doing so is to kind of give an insight into what I  
19 think is coming, what's left such that, you know, the caveat  
20 of not stepping on any mines in between now and the  
21 cross-examination as what occurred in May as the commission  
22 saw in some classified filings before the commission.

23 So just in terms of some reoccurring discovery that

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1 is part of our continuing obligations that the government has,  
2 and this is in relation to medical records, behavioral health  
3 records and DIMS records. Behavioral health records are being  
4 provided in camera at this time to the commission. The  
5 medical records, to the extent that they are relevant and  
6 material, are being turned over and produced to the defense.  
7 And the same is true with the DIMS records, to the extent that  
8 they're relevant and material, they're being turned over to  
9 the defense.

10 Just to update the commission to where the government  
11 is at in its review, so far up to March of 2017 has been  
12 turned over to the commission for in camera review of the  
13 behavioral health records. We anticipate next week making an  
14 additional in camera filing, should it be necessary, to the  
15 military judge of bringing those behavioral health records up  
16 into July is what we anticipate.

17 For medical records, I reviewed last evening up to 31  
18 July of 2017. There are some relevant and material pages out  
19 of that that I have asked to have an Executive Branch review  
20 done to then produce those to defense counsel subsequent to  
21 that review.

22 For the DIMS records, I have reviewed also up to the  
23 1st of August. And in that review, I do not anticipate any

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1 additional pages being produced to the defense.

2           Your Honor, in a -- subsequent to your order 369M,  
3 the defense filed or provided the government some additional  
4 specific discovery requests. One of those requests was  
5 incentive logs, certain incentive items provided to  
6 Mr. al Darbi pursuant to the socialization program run by the  
7 Federal Bureau of Investigation.

8           For those incentive logs, they're up to -- up to mid  
9 July is where we're at. And the most recent batch is  
10 undergoing Executive Branch review and we anticipate producing  
11 those soon to the defense counsel.

12           For video calls, we recently learned of some  
13 additional calls. What the defense counsel had asked for in  
14 that request was a log of number of times that Mr. al Darbi  
15 had been accorded calls. There's a separate issue which, if  
16 we need to go into detail, I need to take up in a classified  
17 setting. But just to the number of calls, we did learn of  
18 some additional calls last week, and I intend to produce those  
19 in an updated filing with the defense counsel as a discovery  
20 response. Those have been occurring outside of filings to the  
21 court, Your Honor. But -- and I would say I'm aware of calls  
22 up to 25 July. Mr. al Darbi had a call last week that took  
23 place.

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1           For D, it's logs of communications, mail received.  
2 I'm current there up to 31 July of 2017. I again have  
3 provided those outside of any formal filings with the  
4 commission through just notifying the defense counsel of  
5 those.

6           For E, E addressed visitor logs. For visitor logs,  
7 there's two separate types of visits that Mr. al Darbi has  
8 been receiving that the government has viewed as relevant as  
9 material. The first is times that the prosecution has been  
10 meeting with Mr. al Darbi prior to his direct testimony today.  
11 I have those meetings from JTF up through the end of July and  
12 so I'll be providing those to the defense counsel.

13           And then for FBI visits, we provided notes of those  
14 meetings through electronic communications, and those are  
15 current up to 28 April 2017. But I anticipate May and June,  
16 they're in the pipeline, and I do expect those to come soon to  
17 the defense counsel and will continue that with the July notes  
18 as well.

19           So, Your Honor, in addition to that, there is some  
20 discovery that is in the pipeline as well that is Form 40s  
21 that have been made subsequent to interviews. The same  
22 attorney visits that occur with Mr. al Darbi, there's a law  
23 enforcement agent in those meetings. Those we're working

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1 through Executive Branch review and I anticipate will be  
2 turned over to the defense counsel. One was actually turned  
3 over this week, a 302 from Mr. David Cudmore, but -- or Agent  
4 David Cudmore, but I anticipate that there will be more  
5 forthcoming from prior meetings as well.

6 And, Your Honor, I do believe that's the -- oh, I  
7 apologize, there's one additional PowerPoint that was actually  
8 turned over by Mr. al Darbi's defense counsel in the Darbi  
9 commission case that the government's deemed as should be  
10 produced to the defense that we're working through as well.

11 There are some additional audio material that is in  
12 the production pipeline. I cannot be more specific about  
13 that, Your Honor, in an open session.

14 MJ [Col SPATH]: I understand.

15 ATC [Maj PIERSON]: And that would be what I would ask the  
16 commission if possible to take up in a closed setting. But  
17 that is what the government anticipates producing to the  
18 defense over the course of the next month, at which time we  
19 believe they would be adequately prepared to conduct the  
20 cross-examination Mr. al Darbi.

21 Your Honor, those conclude my comments pending any  
22 questions from the commission.

23 MJ [Col SPATH]: Maybe. Let me just check with the

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1 defense, if you have any comments.

2 LDC [MR. KAMMEN]: I guess -- and this may be covered.  
3 They certainly did produce an FBI report dated July the 28th,  
4 2017, that's clearly relevant. And that report refers to  
5 other meetings on the same topic between the prosecution and  
6 Mr. al Darbi's defense and the various prosecution teams. And  
7 I presume that's -- those other reports are what Major  
8 Pierson's referring to when he says more will be forthcoming.  
9 And I'm hopeful we won't have to have a fight over those.

10 The only question I have, if it can be answered,  
11 which would help for our discussion, is can someone give us  
12 some idea of the volume of Darbi-related 120 material that  
13 we're going to be getting; is it ten pages? Is it 500 pages?  
14 It would be helpful for us to have some general idea of that  
15 volume.

16 MJ [Col SPATH]: And I think we can do that.

17 Major Pierson, are you comfortable talking about that  
18 a little bit?

19 Good.

20 ATC [Maj PIERSON]: Your Honor, just to address  
21 Mr. Kammen's first point, I do not anticipate that there will  
22 be a law enforcement report for every meeting that the  
23 prosecution has had with Mr. al Darbi. But for those that a

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1 law enforcement report was generated, we will be producing  
2 those to the defense.

3           For the 120-related material, I just couch it  
4 generally, Your Honor, as 505 material writ large or material  
5 produced in discovery that underwent the rules under 505. I  
6 would refer the defense -- I do not have the production  
7 number, I have all the Bates numbers for the 120-related  
8 material that was turned over.

9           MJ [Col SPATH]: And we can do that -- you all can do that  
10 off of here as long as you've got a chance to sit with the  
11 defense. Let them know. I will say this, Mr. Kammen, I did  
12 review all of the highlighted material. The government said  
13 look at these first. I did that. Returned them. And I  
14 believe -- I can't remember page numbers, but -- I would  
15 say -- do you have a ballpark number of pages?

16           ATC [Maj PIERSON]: I do not, Your Honor. What I would  
17 refer the defense to is production 150 ----

18           MJ [Col SPATH]: Major Pierson, I think General Martins  
19 might.

20           CP [BG MARTINS]: Your Honor, it's about a thousand.

21           MJ [Col SPATH]: Yeah.

22           CP [BG MARTINS]: That's assuming you approve what we  
23 requested, or in that neighborhood.

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1 ATC [Maj PIERSON]: Your Honor, what I can say is there  
2 was three separate orders. We requested -- filed three  
3 motions with the court.

4 MJ [Col SPATH]: Right.

5 ATC [Maj PIERSON]: And of those three motions that we  
6 filed, you have issued orders on those and those have been  
7 produced to the defense. And I do have the production and  
8 Bates numbers for those productions, should ----

9 MJ [Col SPATH]: Those are all the ones for al Darbi?

10 ATC [Maj PIERSON]: Yes, sir.

11 MJ [Col SPATH]: Okay. Just get with the defense and let  
12 them know and you'll have a good idea of page numbers.

13 LDC [MR. KAMMEN]: I was understanding that this thing  
14 they gave you earlier this week was stuff that you needed to  
15 review and then get to us.

16 MJ [Col SPATH]: Not for al Darbi, is my understanding.

17 ATC [Maj PIERSON]: No, Your Honor.

18 MJ [Col SPATH]: Mr. al Darbi. That's my understanding.  
19 That's what I thought. Okay.

20 Yeah, I think I have done -- I believe we have  
21 reviewed everything the prosecution gave us in the 505  
22 process, sent out protective orders, sent it back to the  
23 government, and it has apparently been produced.

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

2 MJ [Col SPATH]: Yeah, just get with the defense and let  
3 them know the Bates numbers and I think we've resolved that  
4 issue.

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

6 MJ [Col SPATH]: Thanks, Major Pierson.

7 All right. I received a filing -- oh, Mr. Kammen,  
8 sure.

9 LDC [MR. KAMMEN]: And apparently we've also been  
10 receiving -- I mean, we've received a lot of audio. I think I  
11 understand that we've received four additional hours, so I  
12 think that brings us up to 300 and some. I mean ----

13 MJ [Col SPATH]: I understand.

14 LDC [MR. KAMMEN]: ---- without going any further.

15 MJ [Col SPATH]: No, I know you have that and I know  
16 that's what you referenced. If you think you need to give me  
17 information about that, at least to update the court, just  
18 submit a classified filing with the defense copied and we'll  
19 just take it in the al Darbi series, deposition series, I  
20 think it's -- I don't want to guess.

21 ATC [Maj PIERSON]: Your Honor, we handled that in 369.

22 MJ [Col SPATH]: 369. So if you need to give an update or  
23 you want to give an update in a classified setting so we don't

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1 have to reconfigure everything, just submit a classified  
2 filing with the defense copied on that issue. That would be  
3 helpful.

4           Okay. Which this is a good place to talk about  
5 Appellate Exhibit 369SS. That was a third-party filing in  
6 relation to the 513 privilege that exists in the military  
7 commissions.

8           I don't want to talk about any specifics in the  
9 records, for obvious reasons. I'm trying to keep the hearing  
10 open if I can. Does either side have any objection to me  
11 hearing from a third-party person with limited interest at  
12 all? Do you mind, Major Pierson?

13          ATC [Maj PIERSON]: No objection from the government, Your  
14 Honor.

15          LDC [MR. KAMMEN]: No, no objection.

16          MJ [Col SPATH]: Good. Then I don't know who wants to  
17 talk from Mr. Al Darbi's team, come on in and introduce  
18 yourself.

19                 [Counsel away from podium; no audio.]

20          MJ [Col SPATH]: Thank you. And I assume you're Mr. --  
21 Kassem, okay. Thanks.

22                 Commander Young, if you would just go through your  
23 detailing, that would be helpful and we will then talk.

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1 ADC [LCDR YOUNG]: Thank you, Your Honor.

2 MJ [Col SPATH]: Sure.

3 ADC [LCDR YOUNG]: I am Lieutenant Commander Greg Young.  
4 I have been detailed to represent Mr. al Darbi as his  
5 assistant military defense counsel by the Chief Defense  
6 Counsel for Military Commissions. Present also for  
7 Mr. al Darbi are Mr. Ramzi Kassem, his civilian defense  
8 counsel, and our translator.

9 MJ [Col SPATH]: So I know you filed 369SS. I assume that  
10 is to assert the 513 privilege, is that --

11 ADC [LCDR YOUNG]: Correct, Your Honor. And to the extent  
12 that there's any question about the standard that should be  
13 applied in evaluating that privilege in disclosure, we want to  
14 make it clear that Klemick sets forth the appropriate  
15 standard.

16 MJ [Col SPATH]: And I saw that. So a couple questions.  
17 So the standard you think I should use is the appropriate  
18 amount of evidence from the defense that shows the necessity  
19 to pierce that privilege even before I do an in camera review.

20 ADC [LCDR YOUNG]: Correct, Your Honor.

21 MJ [Col SPATH]: And then, of course, carefully applying  
22 the privilege before I were to release any records.

23 ADC [LCDR YOUNG]: Correct, Your Honor.

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1 MJ [Col SPATH]: See, here's my question. I've looked  
2 through 513, at least in the commissions setting. And of  
3 course, we've got, I think it's (d)(8).

4 ADC [LCDR YOUNG]: Yes, Your Honor.

5 MJ [Col SPATH]: Which is a little broader than 513 in the  
6 Military Rules of Evidence. Do we agree on that, at least for  
7 kind of the exceptions to the rule?

8 ADC [LCDR YOUNG]: Your Honor, I think you could fairly  
9 characterize exception (d)(8) as wider than the  
10 constitutionally required exception that's in M.R.E. 513.

11 MJ [Col SPATH]: Even they though they did their best to  
12 write it out?

13 ADC [LCDR YOUNG]: They did, sir.

14 MJ [Col SPATH]: You haven't practiced in front of me, you  
15 don't recognize me from Adam. I recognize that. In this  
16 instance how the process unfolded, I have seen a portion of  
17 your client's behavioral health records, a good many of them,  
18 and I know you haven't seen them -- or it may be you've seen  
19 some, I don't know.

20 ADC [LCDR YOUNG]: We have not, Your Honor.

21 MJ [Col SPATH]: Okay. A good many of them would fall  
22 under the privilege necessarily. They're simply not  
23 communications with the psychotherapist. There are a lot of

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1 things you see in mental health records all the time that  
2 just -- there's nothing there that is -- would be privileged.

3 In my practice in the military, if you've heard  
4 anything or seen anything, you'll know that I rarely review  
5 mental health records, which was true even before Klemick; and  
6 then post-Klemick I'm even less likely to review them. And I  
7 release very little because I appreciate privilege and I think  
8 it's important.

9 Every time I see Bowser in here, one side gets  
10 nervous; I do not mean to suggest the remedy in Bowser has  
11 anything to do with this discussion. Bowser, that Air Force  
12 case that led to, of course, a dismissal with prejudice. I  
13 looked to the assertion that at least that service court, and  
14 I think federal courts as well, while trying to balance  
15 privilege, recognized that trial judges should be trusted to  
16 review privilege material in large part because they're not  
17 going to disclose it inappropriately and they're going to  
18 guard privilege where they can.

19 That's what I think that case stands for separate  
20 from the protection of a trial judge coming up with remedies  
21 for violations. Again, not here. I'm talking about that  
22 ex parte review issue.

23 Here's what I am saying to you all, probably poorly:

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1 I've seen the records. And I know that if I were to release  
2 anything out of the records, it would be exceptionally  
3 limited. It is a matter of two to three notes total. It  
4 might be one to two. I need to go back and look at my notes.  
5 But it was -- there is an area that I think I would release in  
6 any practice to assist in the necessity of cross-examination,  
7 particularly in the area of bias. But having seen them, that  
8 really is it. It's pretty minor.

9           Again, I'm not minimizing your client's desire to  
10 have privilege with his psychotherapist; what I am trying to  
11 say to you as openly as I can is, having seen them, and having  
12 had the submission from the defense in discovery, so having an  
13 opportunity to understand what the defense both was looking  
14 for and why they thought they would find it in these records,  
15 I have found a pretty limited discussion that I think is  
16 relevant to that cross-examination.

17           ADC [LCDR YOUNG]: Your Honor, we obviously don't want to  
18 abandon the Klemick standard. So as you probably gathered  
19 from our filing, our position is that the in camera review was  
20 premature because no party has followed the rule. Even though  
21 the exception is broader, no party has yet filed the written  
22 motion under 513 showing you specific factual basis and which  
23 exceptions they believe apply.

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1 MJ [Col SPATH]: Concur.

2 ADC [LCDR YOUNG]: So, you know, that's our starting  
3 position, is that should all have to happen. And then, of  
4 course, if you find whichever party seeks disclosure has made  
5 the appropriate showing, we don't object to the appropriate in  
6 camera review. But can I take one moment to refer with  
7 Mr. Kassem?

8 MJ [Col SPATH]: You can. Again what -- I think I am  
9 saying it poorly. Agreed probably there are some ways to do  
10 this without notice in the rule, I recognize that as do you.  
11 But in a perfect world, that notice would have been done and  
12 you all would have responded early. And what I am saying to  
13 you is, one, I think the defense had met their burden in the  
14 initial request because I knew what they were looking for,  
15 bias being one of the biggest focuses on their  
16 cross-examination.

17 And then the discussion we had in here that you  
18 weren't privy to as to what they were -- what they were after.  
19 So now that I have seen it, we can go through that process  
20 absolutely, or after some discussion if you think we can kind  
21 of get there. But again, you don't know it me from Adam, so  
22 me saying, hey, trust me, I'm not going to release very much,  
23 and trust me, I'm very cautious with privilege, is only

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1 helpful as it is if you've practiced in front of me a whole  
2 bunch. So I recognize that. So you can discuss.

3 ADC [LCDR YOUNG]: Thank you, sir.

4 MJ [Col SPATH]: Defense, that will frame what you need to  
5 file if you want to file anything else.

6 LDC [MR. KAMMEN]: We'll wait like everyone else.

7 ADC [LCDR YOUNG]: Your Honor, given what you've just told  
8 us, what we would suggest is, would you be willing to give us  
9 the records that you believe may be releasable? We'll review  
10 them promptly, consult with our client, and we may be able to  
11 obviate the need for litigation. And we will respond as  
12 promptly as we can to the Court.

13 MJ [Col SPATH]: Perfect. I am going to see -- I have no  
14 idea what response I'll hear from both sides.

15 ADC [LCDR YOUNG]: Yes, sir.

16 MJ [Col SPATH]: But yes, that seems like a rational,  
17 reasonable approach. Thank you.

18 ADC [LCDR YOUNG]: Thank you, sir.

19 MJ [Col SPATH]: You'll hear how we go in just a second, I  
20 bet. Defense counsel, I assume no objection from you; is that  
21 correct?

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

23 ATC [Maj PIERSON]: Your Honor, we'd just caveat on the

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1 position that the government does not necessarily ---- the  
2 government's position is that a 513 privilege may not apply to  
3 detainee health records. Not forfeiting that position ----

4 MJ [Col SPATH]: Sure.

5 ATC [Maj PIERSON]: ---- we have no objection to what  
6 the -- the resolution.

7 MJ [Col SPATH]: You've read both of my next couple  
8 questions and I didn't ask Mr. al Darbi's team that because I  
9 know their answer is it applies, of course, I hope. They have  
10 a duty over there to defend, I know. So I appreciate both  
11 that position and the resolution.

12 All I need to do is make sure I'm going to put it out  
13 under a protective order to Mr. al Darbi's defense team so  
14 they can see it and talk with their client. And it's only  
15 going to be what I planned to release, not all of the mental  
16 health records or all of the behavioral records. It's going  
17 to be the very few records, as I just indicated, that I  
18 believe I'd release using the Klemick standard.

19 I know you're not conceding it applies; I know you're  
20 not conceding there's a privilege. But I want to make clear  
21 to both sides, to Mr. al Darbi's lawyers, what I'm going to  
22 send your way, and I want to make clear to the government, I'm  
23 not suggesting I'm sending every single behavioral health --

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1 what was in a behavioral health file, I've already indicated  
2 most of it's not covered by psychotherapist privilege, but  
3 it's in that file. But there were a few things in there that  
4 I believe are responsive to what the defense was looking for.  
5 And so if that is a good solution, that's my plan.

6 Major Pierson?

7 ATC [Maj PIERSON]: Your Honor, just one additional. For  
8 the collateral proceeding, the government also does not waive  
9 its position in the PTA that further discovery would be  
10 provided in an al Darbi commission. But subject to those,  
11 Your Honor.

12 MJ [Col SPATH]: I understand, but yeah, that's two  
13 separate roles right now, I think. They are -- although  
14 you're not accepting, they're asserting privilege and they are  
15 guarding that privilege. We can either have that fight or, as  
16 you've indicated, we can maybe get some resolution without  
17 litigation here. And I am not engaging in discovery for  
18 Mr. al Darbi's team at this moment, I am trying to work  
19 through a cross-examination of Mr. al Darbi at a time that  
20 makes sense for everybody.

21 So I appreciate everybody's assistance with that.

22 All right, I think we're almost there.

23 So you know, I'm more nervous about ex parte

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1 communication and any ex parte issues. So I don't want to  
2 spend a lot of time. I've already, I think, spent enough time  
3 on 379. But here is the awkward place that I find myself, and  
4 so I want to make sure that we're all on the same page before  
5 tomorrow and then before September.

6 379 unfolded by, of course, in the commission's view,  
7 arbitrary acts that occurred quickly with no coordination with  
8 the judiciary related to transport and moving the trial  
9 judiciary. You all don't have to agree with that, I just --  
10 and, of course, we had the abatement order. The government  
11 filed a motion to reconsider, which clearly I reconsidered,  
12 because I lifted the abatement and here we are.

13 Outside of my engagement on this issue, Mr. Taylor,  
14 who is not part of my team that works on al Nashiri -- he, of  
15 course, is the director and has a separate role -- he's been  
16 working with the CLO, Mr. Imhof and company, to come up with a  
17 standard operating procedure to deal with the trial judiciary  
18 issues. He was socializing that special operating procedure  
19 and I haven't read it. In fact, I sent an e-mail and said  
20 it's a matter in litigation before me. I abated. And then I  
21 removed the abatement order to come down here this week, based  
22 on government representations about the process. But that  
23 doesn't mean it's not an issue pending. Many things could

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1 happen to cause the abatement order to go back into place or  
2 anything else.

3           And so my conversation with Mr. Taylor was I'm not  
4 necessarily reviewing the SOP. That's a different issue. My  
5 SOP is what the government has offered in 379A. The  
6 government requested I consider alternatives; I picked the  
7 third one, a U-boat. And then the other aspects of travel,  
8 how we have done the luggage and all of that, would basically  
9 go back to what it was before.

10           And so that is my plan when I depart here tomorrow.  
11 What -- I think, Colonel Wells, this goes to what we said the  
12 other day, there's no fun being a trial counsel, flashback to  
13 all those days as a captain or a major. In this case  
14 U.S. v. al Nashiri, your filing to me in 379A said here's what  
15 we offer, and so you all are responsible for what you offered  
16 as we go forward. I'm not dealing with the CLO, is what I'm  
17 saying, in this case.

18           MATC [COL WELLS]: Yes, sir.

19           MJ [Col SPATH]: So tomorrow, I assume -- and I'm not  
20 saying we won't do the paperwork. I guess there's paperwork  
21 that somebody has to file to request a U-boat, I'm not saying  
22 we're not doing the paperwork, I'm not saying we're not here  
23 to assist. But in this case, it is a matter pending before

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1 me. It is an issue that is open as we move forward, and I  
2 don't want to have communications with the CLO about a matter  
3 pending before me, because that sounds like ex parte  
4 communication to me.

5           So I have the government representation in 379A and  
6 the order where I lifted the abatement. And I said, all  
7 right, you all make it so, I'll be there. And so you all make  
8 it so, and I will depart tomorrow. And you all make it so,  
9 and I will come back in September. But I'm not going to deal  
10 with the CLO on transportation arrangements, communication, or  
11 anything like that. I don't want to have any conversations  
12 with them. I want you all to have those conversations.  
13 Hopefully this will all be resolved at some point in the  
14 future, but I wanted to make that pretty clear.

15           Colonel Wells, am I making any sense?

16           MATC [COL WELLS]: Perfectly, sir.

17           MJ [Col SPATH]: I know you don't necessarily agree with  
18 me, I've got that. But I hope I'm making sense as to my  
19 concerns. I don't want to get into a place where I'm having  
20 ex parte communications by the people who work on this  
21 al Nashiri team or myself about this issue, because it's still  
22 pending.

23           All right. I don't think there's anything else we

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1 can take up today.

2 Trial Counsel, anything else we can deal with on the  
3 record before our September session?

4 TC [MR. MILLER]: We have a September hearing date. Do we  
5 have any sort of generalized -- I was just wondering whether  
6 the court, Your Honor, would like to discuss at least the  
7 general notion of how we would move forward in September?  
8 Because either way it's going to involve, I think, a muscle  
9 movement for the government.

10 MJ [Col SPATH]: I think that's true. So help me as I  
11 work through it. And I hate thinking out loud, but here's --  
12 I think, Mr. Miller, here's where we're at. We're either  
13 going to have cross-examination, assuming that discovery has  
14 continued and -- I recognize continuing discovery, new medical  
15 records are created, that's a nonstop effort. I've got that.

16 But assuming we're at a place where either the  
17 defense concedes or I believe an adequate amount of discovery  
18 has occurred to conduct a cross-examination, cross-examination  
19 and then some aspects of Appellate Exhibit 207, the  
20 production -- or the preadmission of evidence that we were in  
21 the middle of -- or in the third of.

22 If for some reason in the next week or two it doesn't  
23 appear we're going to be able to do the cross-examination in

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1 September, and I will try to rule on those issues ahead of  
2 time so we know, then I would suggest 207 will take up our  
3 focus in September. Does that sound reasonable?

4 TC [MR. MILLER]: That sounds reasonable, Your Honor. And  
5 we appreciate any -- you know, as quick an order as you  
6 can ----

7 MJ [Col SPATH]: Yes.

8 TC [MR. MILLER]: ---- because that is going to take, as  
9 you are aware -- we very much appreciate it.

10 MJ [Col SPATH]: I will as best I can rule on the filings.  
11 Again, maybe we're at a place where we're going to be -- where  
12 discovery feels closer to closed or we can start a cross and  
13 then come back and finish a cross. So flexibility always  
14 being the key in the Air Force, we'll keep working it.

15 TC [MR. MILLER]: Major Pierson tells me every day, sir.

16 One other matter. Can I assume our four witnesses  
17 are not going to be required in September?

18 MJ [Col SPATH]: You can. I thought we had made that  
19 clear.

20 TC [MR. MILLER]: I just wanted to make sure.

21 MJ [Col SPATH]: Yeah, absolutely. They will not be  
22 testifying until at least the November session, depending on  
23 what happens with that.

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1 TC [MR. MILLER]: Other than that, thank you, Your Honor.  
2 Appreciate the opportunity.

3 MJ [Col SPATH]: Great. Thanks.

4 Mr. Kammen, anything else we can take up?

5 LDC [MR. KAMMEN]: Well, if there's a sticking point at  
6 all with respect to the cross-examination, it really is the  
7 audio tapes. I mean, the rest of it we understand from your  
8 staff that we'll be getting the transcript by August the 10th,  
9 the unauthenticated, whatever, transcript. That's certainly  
10 helpful.

11 I mean, I -- there are certain things that we  
12 understand Mr. al Darbi has said to people he was incarcerated  
13 with. Obviously if he confirms he said that, then these  
14 recordings probably become less important.

15 If he denies ever saying those things, then that's at  
16 the point where we may run into issues. So ----

17 MJ [Col SPATH]: And of course there, it could be other  
18 witness -- I mean, if it's a -- you know --

19 LDC [MR. KAMMEN]: Well, the witnesses are gone.

20 MJ [Col SPATH]: Of course they are.

21 LDC [MR. KAMMEN]: The government has let them disappear.  
22 So how likely we are to get the witnesses back here is  
23 probably -- I mean, I can tell you they're not coming back

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1 here. Six men and a wild monkey would not get them back here.  
2 Whether they would be available by VTC as impeachment  
3 witnesses is pretty hard to know, given the locations that  
4 they're at.

5 MJ [Col SPATH]: Sure. And again, as you highlighted, may  
6 well be Mr. al Darbi says yes.

7 LDC [MR. KAMMEN]: Mr. al Darbi says yeah, absolutely I  
8 said those things and I stand by them, and then -- and so, you  
9 know, I suppose because of the nature of it and it strikes me  
10 as perhaps more efficient to do the 207 in September and the  
11 cross later, but I can appreciate that people want to get the  
12 cross done. So whatever you think is the best way to proceed  
13 at this juncture, you know, we'll forge ahead as best we can.

14 MJ [Col SPATH]: That helps.

15 LDC [MR. KAMMEN]: You know, I mean, we did get  
16 approximately a thousand pages. I didn't realize that was  
17 Darbi material. I think I have a sense of what's in there  
18 based on the examination.

19 The other thing I will just point out is based on the  
20 examination, I'm unclear how much remains that's classified,  
21 to tell you the truth. And so we'll probably have to flesh  
22 that out, but that may -- that may be far more complicated now  
23 than I had thought.

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1           The only other thing I'll alert the commission to is  
2 we may ask to delay the start of the cross-examination by a  
3 day or two so that we can meet with Mr. al Nashiri here in the  
4 courtroom as opposed to the other location. And I think  
5 you'll see why when you have the chance to see the declaration  
6 that we filed.

7           MJ [Col SPATH]: All right, I'll look at that.

8           Mr. Miller -- so that helps. It's August 4th. I  
9 will do my best to give clear guidance about the September  
10 session earlier than later, recognizing the travel  
11 arrangements, easy, I think we're going to be here that period  
12 of time.

13          TC [MR. MILLER]: We will.

14          MJ [Col SPATH]: It's what's the substance. And so I will  
15 try to give you that. But I already have in large part, which  
16 is 207. Whatever isn't taken up in any cross-examination, I  
17 would start planning towards 207.

18          TC [MR. MILLER]: It is our hope obviously to do the  
19 cross-examination.

20          MJ [Col SPATH]: Yes.

21          TC [MR. MILLER]: It's just a number of 207 witnesses  
22 we're going to bring guidance.

23          MJ [Col SPATH]: I hope I can give you some guidance on

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1 that pretty quickly.

2 TC [MR. MILLER]: Appreciate that, Your Honor.

3 MJ [Col SPATH]: Recognizing, Mr. Kammen, that maybe  
4 outstanding issues with discovery, just maybe an estimate, you  
5 believe cross-examination is six to seven days, is that -- I  
6 know it's -- Mr. Miller didn't estimate it very well either,  
7 it's an estimate. It's all an estimate.

8 LDC [MR. KAMMEN]: He did, really.

9 MJ [Col SPATH]: He hit the number of days, I meant the  
10 hours.

11 LDC [MR. KAMMEN]: Right. Sitting here today I would say  
12 six to eight days, but it will get -- I would anticipate it  
13 could get shorter rather than longer, I think, but we'll have  
14 to sort of work through it.

15 MJ [Col SPATH]: Just an estimate and redirect I know how  
16 hard it is to estimate at this point but you were pretty close  
17 on three to four days, Mr. Miller. Redirect, less than three  
18 to four days; is that fair?

19 TC [MR. MILLER]: Much less, Your Honor. Much less.

20 MJ [Col SPATH]: There you go.

21 LDC [MR. KAMMEN]: You know, so, I mean, it sounds as  
22 though at least two weeks of September will be taken up with  
23 Mr. al Darbi. And I don't know where that leaves the

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1 government in terms of 207, but whatever.

2 MJ [Col SPATH]: I think it leaves them five days  
3 approximately. Okay. Good.

4 General Martins?

5 CP [BG MARTINS]: Your Honor, this is a different topic.  
6 I wanted to just make sure we're going to give good advice to  
7 the CLO. Because it's in litigation now, you don't want to be  
8 talking SOPs or things that might be a renegotiation, if you  
9 will, of what was in the government's motion to reconsider  
10 that you then ruled upon; is that correct?

11 MJ [Col SPATH]: Correct. What I took 379A as is here are  
12 your options, basically -- I mean, it wasn't that directive to  
13 me. But it was here are some options. When I lifted the  
14 abatement, I said that third option, that works. So that is  
15 what I expect we're going to have going forward.

16 CP [BG MARTINS]: Right, because I want to understand it,  
17 they'll be thinking, hey, we can't talk to anybody about  
18 anything anymore. That seems a bit too broad.

19 MJ [Col SPATH]: It is.

20 CP [BG MARTINS]: You have to have administrative things  
21 with the CLO.

22 MJ [Col SPATH]: Correct.

23 CP [BG MARTINS]: Bring your bags here, that kind of

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1 stuff.

2 MJ [Col SPATH]: Correct. Mr. Taylor is the perfect POC,  
3 and Mr. Sims isn't here but he is also a POC.

4 CP [BG MARTINS]: Will there be a time when the litigation  
5 on that issue, you'll consider it ending? Because right now  
6 we've got a rescission of an order, as it is not, if you will,  
7 really in litigation unless there is some -- something that  
8 triggers you to say ----

9 MJ [Col SPATH]: That's right. It was in reliance -- I  
10 relied not detrimentally on 379A, and so I lifted the  
11 abatement order and came down here. Had it gone really  
12 poorly, I don't know where we'd be right now, but it didn't.  
13 It went fine, I mean it went fine. I hope the departure goes  
14 the same way.

15 CP [BG MARTINS]: So if there's a U-boat, there are some  
16 issues -- I wound up learning more about this than I ever  
17 wanted to, but there were some issues related to your bags  
18 that are different on the way out, if you will.

19 MJ [Col SPATH]: They are. I mean, maybe not exactly as  
20 advertised in 379A; but you know what, sir? It's fine. It's  
21 fine.

22 CP [BG MARTINS]: Okay.

23 MJ [Col SPATH]: The co-mingling is as resolved as it's

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1 going to be and I can use my team members and some other --  
2 we're good.

3 CP [BG MARTINS]: Okay.

4 MJ [Col SPATH]: I just don't want to be dealing with --  
5 Mr. Imhof occasionally likes to approach me and say how's it  
6 going and now my answer to him is don't talk to me ----

7 CP [BG MARTINS]: Understand.

8 MJ [Col SPATH]: ---- in the same group as all the others,  
9 I say don't talk to me.

10 CP [BG MARTINS]: I'm going to be talking to him right  
11 after. If the bag arrangement going out is like it was coming  
12 in, so that they're with the other bags ----

13 MJ [Col SPATH]: That's fine.

14 CP [BG MARTINS]: That's okay?

15 MJ [Col SPATH]: That's okay. Works fine.

16 CP [BG MARTINS]: Okay. Thank you.

17 MJ [Col SPATH]: All right. I'm sure we'll have something  
18 unique by the time we get here in September.

19 LDC [MR. KAMMEN]: Pretty much guarantee if [counsel away  
20 from podium; no audio.]

21 MJ [Col SPATH]: All right, everyone. Thank you as always  
22 for your time. And honestly thank you for working together  
23 both sides. There were a lot of moving parts and there were

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1 frustrations but both sides did a marvelous job with some of  
2 the more complex issues. I appreciate it.

3 We're in recess.

4 [The R.M.C. 803 session recessed at 1500, 4 August 2017.]

5 [END OF PAGE]

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