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1 **[The R.M.C. 803 session was called to order at 0903, 25 April 2024.]**

2 MJ [Col McCALL]: Commission's called to order.

3 Good morning, Mr. Trivett. Could you please identify who's  
4 here on behalf of the United States in the courtroom and at the RHR?

5 MTC [MR. TRIVETT]: Yes, sir. Good morning.

6 Representing the United States today in the courtroom in  
7 Guantanamo is myself, Mr. Clay Trivett; Lieutenant Commander Robert  
8 Baxter; Mr. Christopher Dykstra. Paralegals present: Mr. Rudolph  
9 Gibbs, Ms. Karissa Grippando.

10 FBI personnel present: Ms. Katherine Eisenreich from the  
11 Office of General Counsel and Supervisory Special Agent Justin  
12 Zuccolotto.

13 Representing the United States from the Remote Hearing Room  
14 is Colonel Joshua Bearden, Major Neville Dastoor.

15 And, Your Honor, these proceedings are being broadcast to  
16 CCTV sites in the continental United States pursuant to the  
17 commission's orders.

18 MJ [Col McCALL]: All right. Thank you, Mr. Trivett.

19 Good morning, Mr. Sowards.

20 LDC [MR. SOWARDS]: Good morning, Your Honor.

21 Appearing on behalf of Mr. Mohammad are Gary Sowards;  
22 Kathleen Potter, Lieutenant Colonel, United States Air Force; Major  
23 Elspeth Theis, United States Air Force; William Xu, Lieutenant,

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1 United States Navy; and Michael Leahy, Captain, United States Air  
2 Force.

3 We have no counsel making use of the Remote Hearing Room.

4 MJ [Col McCALL]: All right. Thank you.

5 LDC [MR. SOWARDS]: Thank you, sir.

6 MJ [Col McCALL]: Good morning, Mr. Engle.

7 LDC [MR. ENGLE]: Good morning, Your Honor.

8 For Mr. Bin'Attash: Matthew Engle, William Montross,  
9 Captain Marian Messing, and Lieutenant Austin Ridgeway in the  
10 courtroom.

11 In the Remote Hearing Room we have Tasnim Motala, Chris  
12 Pipe, and Prax Kennedy.

13 MJ [Col McCALL]: All right. Good morning, Mr. Connell.

14 LDC [MR. CONNELL]: Good morning, sir.

15 Representing Mr. al Baluchi are myself, James Connell, and  
16 Alka Pradhan. Ms. Radostitz will be along shortly.

17 MJ [Col McCALL]: All right. Good morning, Mr. Ruiz.

18 LDC [MR. RUIZ]: Good morning, Judge.

19 I'm here on behalf of Mr. al Hawsawi, along with Ms. Suzanne  
20 Lachelier, Captain Kerry Mawn, Captain Patrick Tipton, and Mr. Sean  
21 Gleason.

22 MJ [Col McCALL]: All right. Thank you, Mr. Ruiz.

23 And it looks like we have Mr. Feeler in the RHR for

1 Mr. Binalshibh; is that correct?

2 DC [MR. FEELER]: Yes, Your Honor. Good morning.

3 Wyatt Feeler on behalf of Mr. Binalshibh.

4 MJ [Col McCALL]: All right. Thank you.

5 All right. I note that we do not have any of the accused  
6 present in the courtroom. Trial Counsel, do you have a witness to  
7 account for these absences?

8 DMTC [MR. DYKSTRA]: I do.

9 Before you have a seat, if you could stand and please raise  
10 your right hand.

11 **MAJOR, U.S. Army, was called as a witness for the prosecution, was**  
12 **sworn, and testified as follows:**

13 DMTC [MR. DYKSTRA]: Please have a seat.

14 **DIRECT EXAMINATION**

15 **Questions by the Deputy Managing Trial Counsel [MR. DYKSTRA]:**

16 Q. Now, you had previously testified in these proceedings,  
17 correct?

18 A. Yes, sir.

19 Q. But not during this session?

20 A. No, sir.

21 Q. And you are currently assigned to the litigation support  
22 section of the Joint Task Force-Guantanamo?

23 A. Yes, sir.

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1 Q. And what is your pseudonym for the purposes of the record?

2 A. Kimball.

3 Q. All right. Thank you.

4 Now, did you have the opportunity to advise the accused of  
5 their rights to attend this morning?

6 A. Yes, sir.

7 Q. And did you use any particular form when you did so?

8 A. I did, sir.

9 Q. And what was that form?

10 A. The Statement of Understanding.

11 DMTC [MR. DYKSTRA]: Your Honor, if I may approach the  
12 witness? I'm going to hand her what has been previously marked as  
13 Appellate Exhibit 943P (KSM), 9343Q (WBA), 943R (AAA), and 943S  
14 (MAH).

15 MJ [Col McCALL]: Go ahead.

16 WIT: Thank you.

17 Q. Now, are these the forms that you used to advise the  
18 accused this morning?

19 A. Yes.

20 Q. And approximately what time did you do so?

21 A. I started at approximately 0635 and I completed all of  
22 them at approximately 0707 or so.

23 Q. And in what language did you advise the accused?

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1 A. I advised them in English.

2 Q. And was there an interpreter present?

3 A. Yes, there was.

4 Q. And what was their response when you so advised them?

5 A. Each of them declined to attend commissions hearing today.

6 DMTC [MR. DYKSTRA]: Thank you, Your Honor. I have no further  
7 questions.

8 MJ [Col McCALL]: All right. Do any defense counsel desire to  
9 question this witness?

10 Apparently not.

11 All right. Thank you. You're excused.

12 **[The witness was excused and withdrew from the courtroom.]**

13 MJ [Col McCALL]: The commission finds that Mr. Mohammad,  
14 Mr. Bin'Attash, Mr. Ali, and Mr. al Hawsawi have knowingly and  
15 voluntarily waived their right to be present at today's session.

16 Okay. So a few administrative matters. Yesterday afternoon  
17 the commission conducted a brief ex parte hearing with counsel for  
18 Mr. Al Hawsawi, which was followed by a closed session, which we  
19 dealt with the classified cross-examination and the classified  
20 redirect of Supervisory Intelligence Analyst Waltz.

21 Today we should be in an open session for at least part of  
22 the day. I think today, again, it may be a little bit choppy trying  
23 to figure out what -- whether we need to go into any type of closed

1 setting. We'll try to put that to the end of the day, if possible.

2 But we should be at least in open session to conduct further  
3 questioning of Ms. Waltz. We'll hear some oral argument, and then to  
4 discuss the logistics for the site visit that is subject of the  
5 commission's ruling and order in AE 939B.

6 Additionally, the commission has decided that -- again,  
7 based on the discussions we've had on the witness availability, the  
8 commission has decided that it would be good use of the final week of  
9 this hearing session to allow the prosecution to conduct its direct  
10 examination of Special Agent McFadden. So let's look into getting  
11 that lined up for week five.

12 All right. Any other administrative matters or housekeeping  
13 to take up before we bring Ms. Waltz back in?

14 Mr. Trivett, Mr. Connell beat you to the punch.

15 LDC [MR. CONNELL]: That's all right. Mr. Trivett's is more  
16 important, I think. So he has key information.

17 MJ [Col McCALL]: Good morning, Mr. Trivett.

18 MTC [MR. TRIVETT]: Good morning, sir.

19 So as we were preparing a possible open redirect for  
20 Ms. Waltz last night, and reviewing the entirety of the record, which  
21 would include testimony from Special Agent Drucker, Special Agent  
22 Perkins, Special Agent Fitzgerald, certain issues, while I think  
23 there would be some benefit to clarifying some of her testimony on

1 redirect, I believe that this issue of recross, if it is, in fact,  
2 going to be granted as a matter of right going forward, would make  
3 it -- would sort of cancel out any benefits of the redirect.

4 MJ [Col McCALL]: All right.

5 MTC [MR. TRIVETT]: So we've decided not to do any redirect  
6 for Ms. Waltz. We understand that you still need to give the  
7 admonishment.

8 Obviously, she's in a completely different situation. We  
9 need to work with her and we're going to need to work with her on  
10 issues that touch all over her testimony, including developing  
11 demonstrative exhibits for the phone calls and working on UAE  
12 business records and all of those types of things.

13 So I just wanted to raise that to your attention. I know  
14 that she's available. She does know that I'm not going to ask her  
15 any questions. I did notify her of that, but that she still needed  
16 to come and, obviously, get the admonishment.

17 So that's where we're at. But from a -- so we understand  
18 going forward, is the -- is the prosecution going to have, as a  
19 matter of right, recross on the defense witnesses that are coming up  
20 not -- well, on any of the defense witnesses?

21 MJ [Col McCALL]: Sure. And, you know, I typically -- and,  
22 again, I'd have to look through the transcript to see where -- which  
23 witnesses. But typically if one counsel is seeking to ask additional

1 questions, my practice is I'm typically going to allow it as it  
2 narrows down whatever issues are covered in the, you know, redirect,  
3 recross.

4 So I typically do allow that. And I want to say we did that  
5 with Dr. Mitchell and, I believe, a few of the other witnesses.

6 But, again, just to make it very clear on the record, I  
7 allow that. And, yeah -- but I understand, as well, with Ms. Waltz,  
8 certainly areas you think need to be clarified, I think could  
9 probably be easily clarified in the submissions that the parties are  
10 going to put out, you know, the written briefings pointing me in the  
11 record what issues maybe got muddied by the testimony. And that  
12 certainly might be the most efficient method.

13 MTC [MR. TRIVETT]: Yes, sir.

14 MJ [Col McCALL]: So I'm fine with however counsel want to do  
15 that.

16 MTC [MR. TRIVETT]: Yes, sir. No, I appreciate that. And  
17 that was sort of the thought process is we're comfortable with where  
18 the record's at, as long as the military judge understands that we're  
19 going to have to go back to some other aspects of the record that  
20 Your Honor did not view in earlier testimony, then we're comfortable  
21 that we can make every argument we need to make.

22 So that's why we decided to finally release Ms. Waltz after,  
23 you know, many weeks of testimony.



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1 MJ [Col McCALL]: Perfect.

2 MTC [MR. TRIVETT]: All right. Thank you, sir.

3 MJ [Col McCALL]: And just for the parties'  
4 understanding -- again, so this is a bit of an unusual witness where  
5 she had fairly far-ranging testimony regarding sort of her duties as  
6 a supervisory intelligence analyst, her work with the prosecution  
7 team, knowledge of the case file.

8 And so it really doesn't work to give her the typical  
9 admonishment: Do not discuss the subject of your testimony with  
10 counsel. If she gets -- so I'm planning on telling her she can go  
11 back to her normal work with the prosecution.

12 If she's called back as a witness, it's fair game for  
13 defense counsel to ask her: Did you have conversations with the  
14 prosecutor? Did the -- you know, did you talk with the prosecutor?  
15 Why are you changing your testimony? And I think it will be covered  
16 at that point.

17 So that's my intention.

18 Mr. Ruiz, I see you up.

19 LDC [MR. RUIZ]: I figured I needed to get up to beat  
20 Mr. Connell.

21 MJ [Col McCALL]: Smart.

22 LDC [MR. RUIZ]: Judge, just with respect to Mr. Trivett's  
23 comments about moving forward, I just want to make sure I'm

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1 understanding what they envision.

2           The way I see it, Ms. Waltz was asked certain questions  
3 during testimony that referred back to portions of testimony from  
4 other agents, such as Agent Drucker, Agent Perkins. I did some of  
5 that questioning myself, and I was limited to specific areas of their  
6 testimony.

7           However, if what the government is envisioning doing is  
8 having wide range to anything outside the scope of what she was  
9 questioned on on the record and any time that it's ever been had in  
10 these hearings, I object to that, because I just do not think it's  
11 proper to scour the record to make their argument to support their  
12 case on issues that the witness has not testified to and has not been  
13 cross-examined on with pinpoint cites to the record.

14           So if they want to go back to the specific portions of the  
15 record that she was questioned on and highlight those, then I think  
16 that's proper because she was asked on the stand, under oath, subject  
17 to cross-examination, and the government has the opportunity to  
18 redirect her on that.

19           So I object to that type of far-ranging scope if that's what  
20 they're envisioning doing.

21           MJ [Col McCALL]: Well, I mean, at least what I'm hearing and  
22 as I suggested, was -- again, we're in motions practice. At some  
23 point, the government's going to file a response to the defense

1 motions to suppress the LHM statements. And as part of that  
2 response, they're going to marshal the evidence they have in support  
3 of the -- the fact that the LHM should not be suppressed.

4 In doing so, they may look at their witness, Ms. Waltz, and  
5 say Ms. Waltz said "X." But if you see it in the record, maybe she  
6 was unclear, and maybe there's these other pieces of either  
7 documentary evidence or pieces of evidence from other witnesses.

8 Now, the defense is certainly welcome to point out that it  
9 was a government witness who said "X." If that -- but --

10 So that's how I see this playing out, that I don't -- seems  
11 like the government doesn't desire to try to clarify some areas that  
12 perhaps they think they disagree with what came out on  
13 cross-examination. And that's how the process works, so I don't have  
14 a problem with that.

15 Go ahead, Mr. Connell.

16 Sure. Go ahead and crosstalk.

17 **[Counsel conferred.]**

18 MJ [Col McCALL]: Mr. Connell, what do you have?

19 LDC [MR. CONNELL]: Your Honor, two things. The first is  
20 before we -- before the military commission admonishes Ms. Waltz, I  
21 did want to let you know that I do have closed recross based solely  
22 on 885P, the new document that the government introduced  
23 yesterday -- it's not a new document, but the document that was

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1 covered on ----

2 MJ [Col McCALL]: Sure.

3 LDC [MR. CONNELL]: ---- closed redirect.

4 The military commission may recall that the government  
5 agreed to produce another version of that document following  
6 additional review ----

7 MJ [Col McCALL]: Correct.

8 LDC [MR. CONNELL]: ---- based on new items that may  
9 be -- have new relevance or perhaps shifting classification guidance,  
10 et cetera.

11 The thing I wanted to check with the government about that  
12 was their ETA on that document, because it doesn't make sense to do  
13 the closed recross until we have that document.

14 And they said that it has already been submitted to the FBI  
15 for their review and they don't think it will take too long, but, of  
16 course, they don't control that. So we do have -- I did want to make  
17 clear that we do request recross limited to that one document and  
18 that we are -- we think it would make most sense to do it after we  
19 get the revised redactions back from the government.

20 MJ [Col McCALL]: Okay. That makes sense.

21 Mr. Trivett?

22 MTC [MR. TRIVETT]: Yes, sir. So we're working through  
23 getting that document. We had agreed to unredact the -- the

1 distribution list.

2 MJ [Col McCALL]: That portion, I recall.

3 MTC [MR. TRIVETT]: Right.

4 But my understanding is that the scope of any recross at  
5 this point would simply be that new information.

6 MJ [Col McCALL]: Well, I mean, you had a brief closed  
7 redirect. So anything that was brought out in that closed  
8 redirect -- I mean, it was extremely limited, but ----

9 MTC [MR. TRIVETT]: I understand. Okay. I understand.

10 MJ [Col McCALL]: All right. And do other -- any other  
11 defense teams anticipate there's closed recross? Or open, I suppose  
12 it could be an open recross if...

13 Mr. Ruiz?

14 LDC [MR. RUIZ]: No, Judge, I do not have that. I just -- I  
15 do, when Mr. Connell's done, have one matter I want to put on the  
16 record.

17 MJ [Col McCALL]: Understood. All right.

18 LDC [MR. CONNELL]: The second matter, Your Honor, is I have  
19 been given a letter from the *New York Times*. And I spoke with  
20 members of the court staff, and I gave it -- made sure the  
21 prosecution had a copy, and I just wanted to bring up that issue.

22 I don't know what the process for -- whether that's already  
23 in the record or -- I don't know that process.

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1 MJ [Col McCALL]: Sure. We can ----

2 LDC [MR. CONNELL]: Should I place a copy in the record?

3 MJ [Col McCALL]: I don't believe there's a copy in the  
4 record. I believe -- I'm aware of it just through my staff that this  
5 letter has been submitted requesting access to -- media access to  
6 accompany us on the site visit.

7 LDC [MR. CONNELL]: Yes, sir.

8 MJ [Col McCALL]: I believe it's working its way through the  
9 wickets of the commission, not this commission, but the overall OMC,  
10 so the Office of Military Commissions.

11 But we can put -- make it part of the record just to make  
12 things clear. We'll just make it the next in line in the 939 series.

13 All right. So that's going to be 939C.

14 LDC [MR. CONNELL]: All right. And do I need to hand a copy  
15 to the court reporters, or you all have it through other channels? I  
16 did give a copy to your staff this morning.

17 MJ [Col McCALL]: Yeah, if you could hand a copy to the court  
18 reporter.

19 LDC [MR. CONNELL]: May I approach?

20 MJ [Col McCALL]: You can approach.

21 **[Pause.]**

22 LDC [MR. CONNELL]: So, Your Honor, as I read it, this letter  
23 makes two requests, and I just wanted to put our position of them on

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1 the record.

2 The first is -- the first request is essentially that any  
3 closure of discussions regarding the site visit be narrowly tailored  
4 to allow for maximum press access. And I want to be clear that I  
5 think that that's what we are doing.

6 MJ [Col McCALL]: And I agree.

7 LDC [MR. CONNELL]: Yeah.

8 The -- and I'll just say there's been enormous crosstalk  
9 between the defense and the prosecution on this to try to narrow the  
10 closed session as much as possible. I think that 95 percent of the  
11 discussion will be in open.

12 I understand from Ms. Pradhan that she expects the closed  
13 discussion to be something like five minutes, or at least her  
14 contribution to the closed discussion. So I think that  
15 we're -- we're doing that.

16 MJ [Col McCALL]: Perfect.

17 LDC [MR. CONNELL]: The second request, as I understand it,  
18 has been -- is -- the realistic part is that reporters should be  
19 allowed to accompany the group to and from the camp and wait outside  
20 as it conducts its visit of the facility.

21 And so I do understand there's a -- there's a request  
22 for -- to fully accompany the group. And that doesn't seem likely to  
23 me. We don't take any position on it.

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1           But the other part, the -- going and basically sitting in  
2 the parking lot while the -- while the group is inside Echo II, does  
3 seem realistic, supportable, and probably a good idea.

4           You know, the letter makes the point that that might seem  
5 trivial. But, in fact, this is a historic event, and that doesn't  
6 compromise national security in any way. You know, there's -- you  
7 can't see into Echo II, right? It is opaque, right?

8           MJ [Col McCALL]: Right. Yeah, I don't know.

9           LDC [MR. CONNELL]: I have spent many -- I can't even tell you  
10 how many days over the past -- wow -- 16 years that I have spent  
11 there. So I can tell you that it is opaque with a big sign saying  
12 "National Security Area" on it.

13           And, you know, what the military commission and the parties  
14 do inside would be entirely not able to be seen by the -- by the  
15 press, but if they think it's important to see the -- you know,  
16 people come in and go out. You know, it's a little bit like a grand  
17 jury, right? You know, the press gets to sit outside a grand jury.  
18 They don't get to see what happens inside, which is secret, but they  
19 get to see who comes and goes and how long they spend in there and,  
20 you know, those sorts of facts.

21           And, to me, that seems entirely supportable. And so we  
22 would -- I just want to be clear that we do support that element of  
23 the request.

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1 MJ [Col McCALL]: Okay. No, I appreciate you bringing that to  
2 my attention and putting your position on the record.

3 I tend to agree with you. I don't see any harm. But,  
4 again, at this point I'm going to wait and see what exactly comes  
5 back from the process of it being processed. So I'll make sure that  
6 we get some type of guidance from -- again, whether it's OMC, the  
7 JTF, on, you know, the ability to allow that type of access. But  
8 that certainly makes sense to me.

9 Again -- again, just to be very clear, I think the more  
10 public we can make any part of this proceeding, the better. I mean,  
11 that's what's required, and that's what we should be trying to do.  
12 So that makes sense.

13 LDC [MR. CONNELL]: Yes, sir. Thank you.

14 MJ [Col McCALL]: Any other parties desire to be heard on this  
15 issue before we move on to Mr. Ruiz's, I believe, another issue?

16 No?

17 All right. Go ahead, Mr. Ruiz.

18 LDC [MR. RUIZ]: Judge, it's not really another issue. It's  
19 related to the discussion just about mode and presentation of  
20 evidence.

21 And I understand and respect your ruling with respect to  
22 those matters. Obviously, the military judge controls the mode and  
23 order of presentation for efficiency purposes. I understand all of

1 that.

2           However, this kind of -- this originates from the closed  
3 session yesterday when I made an objection during testimony of the  
4 witness as to how the witness was being allowed to refresh her  
5 recollection.

6           MJ [Col McCALL]: Right.

7           LDC [MR. RUIZ]: And the reason I stand now -- and I  
8 thought -- we were in closed session, so I thought I will do this in  
9 open session prior to the witness testifying, because I think it not  
10 only impacts her, but also impacts witnesses moving forward in terms  
11 of how we perceive the process and we perceive the importance of the  
12 process that we're in right now.

13           And there have been a number of times, as you just recently  
14 alluded to, where you've made the comment that we are in a pretrial  
15 session, we're in motion practice. And I recognize and understand  
16 the procedural difference between that and being in front of a jury  
17 as a factfinder, where we have you as a factfinder, who is a military  
18 judge, experienced, and is able to see the facts and accept those  
19 facts as they come in. So I totally get all of that.

20           But the perspective I wanted to offer you is that, at least  
21 the way we see it, Mr. Al Hawsawi's defense, is that, yes, we are in  
22 a pretrial session, but we are in a critical stage of proceeding,  
23 which is a capital proceeding. We are in a stage where we're

1 cross-examining witnesses on far-ranging issues that are not just  
2 related to the issue that was raised in the motion of voluntariness  
3 and the Protective Order #4 impact.

4 But we actually spent, I would say, 98 percent of the time  
5 addressing the issue of laying foundation for a piece of evidence  
6 that the government seeks to introduce against my client and against  
7 all of the other defendants that has been described by Ms. Waltz as  
8 at least being the most damaging and the most inculpatory evidence  
9 against one of these defendants, as well as Mr. al Hawsawi. So that  
10 is a critical piece of evidence, that's a critical piece of  
11 foundation that we're laying.

12 So the way I see it, even though we are in a pretrial  
13 setting, any relaxation of the rules as to how the witness is allowed  
14 to refresh her memory inures to the benefit of the government and the  
15 witness. The witness' credibility is at issue. The witness' ability  
16 to recall, the witness' ability to testify, and reliability is very  
17 much at issue. And so, from our perspective, to the extent that you  
18 relax that process and allow the witness to have an easier path to  
19 testify, it does, I think, bring an imbalance to the way that the  
20 prosecution is able to elicit and to produce that information.

21 And while you may be able to filter the important facts, it  
22 nevertheless aids the witness in her testimony whereas she may not be  
23 able to otherwise recall a particular fact or may not be able to give

1 a particular fact based on her own experience if she's allowed to be  
2 led or allowed to be refreshed. That is a problem for us, especially  
3 because we do think that the heightened due process, the heightened  
4 reliability that must be -- govern these proceedings also has to  
5 impact these proceedings at a pretrial stage and during motions  
6 practice where we're not only dealing with those discrete motion  
7 issues, but we're also dealing with evidentiary matters because  
8 that's the scope that's been defined, right? I mean, we have made  
9 our effort to try and narrow that scope. That's not the scope.

10 So when I stand up and I make those objections, I wanted you  
11 to understand that it's not that I do not understand your perspective  
12 and your view and don't respect it, but that I do think that it  
13 is -- there is an impact to what I see is a gradual -- and I've seen  
14 this, I think, over time in hearings -- there's a gradual relaxation  
15 of some of the rules, the procedural rules, and the aspects of how we  
16 question the witnesses.

17 And I think part of that, honestly, is fatigue because I  
18 think -- you used the word "ad nauseam." You know, we didn't want to  
19 have Ms. Waltz ad nauseam. I didn't either, which is why I tried to  
20 narrow the scope to the issues at hand.

21 But when we get to that stage, I think that there maybe is a  
22 natural tendency to try and cut through for sake of efficiency. And  
23 I just wanted to sensitize the commission to the fact that, at least

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1 when I come up here, I try very hard to lay appropriate foundation  
2 and to hold the government's feet to the fire in the way they  
3 question their witness, because I think it is still very important at  
4 this stage of the proceeding in a pretrial stage. And I think these  
5 comments are also applicable and will be applicable to witnesses that  
6 we're going to be seeing in the next few weeks.

7 So I wanted to make that point now because it was fresh in  
8 my mind, and you made some comments that I thought made it relevant.  
9 So I appreciate you letting me put that on the record.

10 MJ [Col McCALL]: Not a problem, Mr. Ruiz. I understand your  
11 position, and I actually appreciate you raising those concerns. I  
12 think it is something that, as the judge, I need to be cognizant of.  
13 And I appreciate that, and I take that into account when I'm ruling  
14 on those type of objections.

15 LDC [MR. RUIZ]: Thank you, Judge.

16 MJ [Col McCALL]: Mr. Sowards.

17 LDC [MR. SOWARDS]: I'm actually just -- brief comments  
18 following up on Mr. Ruiz and that part of Mr. Connell's comments on  
19 that subject of Ms. Waltz, and then also something about the site  
20 visit. I just -- I know you wanted -- we sort of took them seriatim.

21 MJ [Col McCALL]: Okay.

22 LDC [MR. SOWARDS]: I would say I appreciate the military's  
23 premium that it puts on PT, but I think trying -- conditioning

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1 getting into the queue and physical agility puts some of us at a  
2 disadvantage, but that's all right. I'll get some younger people in  
3 here.

4 With regard to Ms. Waltz, I just wanted to clarify. When  
5 you were discussing the possibility that Ms. Waltz had said -- or any  
6 witness, actually, I don't want pick on her -- had said "X," and that  
7 conflicts with something else in the record that the prosecution is  
8 aware of, that is fair game for us to point out down the road, which  
9 probably the prosecution is anticipating.

10 And I wasn't sure, then, whether you were giving that as an  
11 example of something that, upon review, the prosecution -- you used  
12 the term that the government's position may be that perhaps she  
13 didn't quite understand the question and they want to -- they want to  
14 clarify that.

15 MJ [Col McCALL]: And that's complete guesswork on my part  
16 that -- I mean, that's -- typically if the government has redirect,  
17 they're trying to clarify something that came out on cross, whether  
18 to, like, refresh the witness' recollection that it's something  
19 different or to clarify something that came out muddled or to raise  
20 new issues that were raised by the cross.

21 So that's all I was -- I wasn't trying to imply anything.

22 LDC [MR. SOWARDS]: Oh, no, no.

23 MJ [Col McCALL]: Yeah.

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1 LDC [MR. SOWARDS]: I understand you were just  
2 illustrating the ----

3 MJ [Col McCALL]: An example.

4 LDC [MR. SOWARDS]: ---- possible scenarios.

5 MJ [Col McCALL]: Sure.

6 LDC [MR. SOWARDS]: And what I didn't quite understand, and I  
7 apologize, is whether then what the commission was anticipating -- or  
8 not anticipating, but at least contemplating, is if upon reflection  
9 the government spots matters like that that they want to clarify,  
10 there's the opportunity to recall Ms. Waltz to clarify that before  
11 such time as we are briefing the matter.

12 MJ [Col McCALL]: Well, I'm not going to lock myself in and  
13 say no. I -- they would need to demonstrate why the witness needs to  
14 be called.

15 I mean, typically the reason that we're recalling a witness  
16 is that there has been some new evidence that's come to light via  
17 discovery, something like that. So I'm not going to say no.

18 But I don't think just because they realized there was  
19 something that really needed to be clarified -- I mean, they  
20 understand that this is their chance on that if they wanted to  
21 clarify it with the witness. And I seemed to get that from  
22 Mr. Trivett.

23 LDC [MR. SOWARDS]: Okay. So that -- thank you. That

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1 clarifies that, Your Honor.

2           And then with respect to the site visit -- and I'm not  
3 trying to talk ourselves out of this, and I apologize, I wasn't on  
4 the *New York Times* mailing list, but the -- it also occurs to me when  
5 Mr. Connell was discussing the exterior of the area, that that area  
6 is actually fairly cheek by jowl with the site that has been the  
7 subject of much access by media in the past. And as these things  
8 often happen, it was something that JTF and perhaps folks up the  
9 chain thought was beneficial, and so there have been any number of  
10 people inside facilities that even house detainees.

11           And I note from following some of Ms. Rosenberg's coverage,  
12 as well as other journalists, that sometimes there are areas that  
13 ordinarily are off limits to photography. But depending upon the  
14 angle of the shot and whatnot, the, again, JTF, and I guess the  
15 requisite equity stake -- whatever -- holders they are, allow for  
16 certain limited photography to perhaps illustrate a little bit more  
17 what's going on.

18           And so that might be something else that can be considered  
19 in -- to the extent the press or the media are granted access.

20           MJ [Col McCALL]: That certainly sounds reasonable.

21           LDC [MR. SOWARDS]: Thank you, sir.

22           MJ [Col McCALL]: All right. Anything else?

23           Apparently not.



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1 All right. So I thought we were going to be going into open  
2 direct -- or redirect, but if we're not going to have that --

3 Mr. Trivett?

4 MTC [MR. TRIVETT]: Sir, I believe the witness is actually in  
5 the vestibule waiting.

6 MJ [Col McCALL]: So because we have the brief closed cross  
7 and we're waiting on that document anyways, I think, yeah, we're  
8 going to have to wait. So I can have the guard force step out and  
9 let Ms. Waltz know that she can leave and we will ----

10 MTC [MR. TRIVETT]: Thank you.

11 MJ [Col McCALL]: It will be -- we plan on getting her  
12 testimony probably at some point this afternoon. Maybe I'm being too  
13 optimistic, but we'll see. But you can let her know that.

14 And then if any of your other team needs to step out,  
15 just -- I'm not sure who takes care of the care and feeding of her  
16 right now, but -- all right.

17 All right. So, you know, one of the sayings that we have in  
18 the Air Force is flexibility is the key to air power, so we'll adjust  
19 fire.

20 And next on my list was AE 551P. Are we ready for that? Do  
21 we need to take a recess to get things set up?

22 All right. I see Ms. Pradhan is ready.

23 ADC [MS. PRADHAN]: Our -- good morning, sir.

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1 MJ [Col McCALL]: Good morning.

2 ADC [MS. PRADHAN]: Our former CDC Brigadier General Baker  
3 used to say, "Semper Gumby," which we have adopted.

4 All right. So 551. 551P is -- there's a bit of a history  
5 to it, so I'm going to go through a little bit of the procedural  
6 history, if that's all right.

7 MJ [Col McCALL]: That's useful for me.

8 ADC [MS. PRADHAN]: Great.

9 And then there are a lot of moving pieces to it, so I'll try  
10 to keep it as organized as possible.

11 551P is actually -- is our motion to reconsider 551I, which  
12 was our motion to dismiss for lack of a public trial. This is a  
13 very -- it's both an easy and a very, very difficult motion to argue.

14 It's easy because I think it is so clear in many ways how a  
15 public trial has been compromised. But it's difficult because  
16 it's -- it's really not possible to be exhaustive in the number of  
17 what we've identified as violations.

18 And also, as I think Mr. Connell has put on the record, they  
19 crop up -- new examples crop up every day. And so as this hearing  
20 and previous hearings have progressed, it's been a struggle to keep  
21 everything updated. And you'll see that when I get to 628.

22 So the briefing cycle for 551 was over the course of 2018,  
23 and we argued it that year, which resulted in then Judge Parrella's

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1 order in December 2018. And I'd like to start with what Judge  
2 Parrella actually ordered in 551I and what the state of affairs was  
3 in 2020 when we filed these -- these pleadings, the motion to  
4 reconsider. And then we'll get to sort of the current fact.

5 So in 551I Judge Parrella said: While the majority of  
6 unclassified filings and unofficial transcripts of open sessions have  
7 been posted to the OMC website -- at that point, in  
8 2018 -- compliance with the timelines established by the ----

9 MJ [Col McCALL]: Ms. Pradhan, just if you can try to go  
10 slower as you read. We all end up going too fast when we're reading  
11 something.

12 ADC [MS. PRADHAN]: Two minutes -- two minutes in and so far  
13 to go. All right.

14 Compliance with the timelines established by the R.T.M.C.,  
15 at least of filings, has, at least since 2017, been the exception  
16 rather than the rule. A significant number of filings remain  
17 unpublished. And as to classified filings, compliance with the  
18 requirement to publish redacted versions has been virtually  
19 nonexistent.

20 As to transcripts of closed hearings, although no rule  
21 requires they be published, compliance with the commission's orders  
22 that they be published in redacted form had also been virtually  
23 nonexistent until February 2018, when the commission began issuing

1 rulings requiring redacted transcripts of closed hearings to be made  
2 public within 30 days of the hearing.

3 So focusing on the part about -- of the ruling about  
4 classified filings, Judge Parrella said: For those filings requiring  
5 classification security review, the commission directs the chief  
6 clerk to promptly, upon acceptance, deliver such filings to the  
7 SC/DRT.

8 If the classification review cannot be completed within the  
9 R.T.M.C.'s timeline -- which is 15 days -- the appropriate non-DoD  
10 federal department or agency original classification authority or the  
11 OSC of the SC/DRT will submit an appropriate notification to the  
12 chief clerk in accordance with R.T.M.C. 19-4.

13 So that was what Judge Parrella said five and a half years  
14 ago, in December 2018.

15 And the last little bit is, he said: As requested by the  
16 parties, the commission will also provide guidance as to the priority  
17 of the -- for the filings requiring classification security review.

18 And the prioritization for the government was listed by  
19 Judge Parrella as, number one, docketing and scheduling orders;  
20 number two, other commission rulings and orders; number three,  
21 filings associated with an upcoming session of court; and, number  
22 four, other filings or transcripts as directed by the commission.

23 I want to just flag number three, which is filings

1 associated with an upcoming session of court. And as an example, as  
2 we'll get to in a little bit more detail in a few minutes, since  
3 September 2019, almost every session of court has been associated in  
4 some way with the motions to suppress. So even after 551I is issued,  
5 the government continues to struggle with these requirements.

6 In September 2019, under Judge Cohen, the government was  
7 asked by Judge Cohen why two specific -- well, I believe we probably  
8 asked it first, but then was asked by Judge Cohen -- why two specific  
9 items that should have been posted on the website still were not.  
10 And they came back in 551J and explained, sort of, that one of the  
11 filings had required 54 days from filing to posting and that the  
12 other had required 17 days. All right.

13 Then in November 2019, when we're really in the thick of  
14 witness testimony on suppression, we filed 551K, which was sort of  
15 raising an alarm that we're sitting here doing almost nothing but  
16 suppression. And at that point, even most of the unclassified  
17 pleadings hadn't been released to the public, with a much lower  
18 proportion of the Secret and Top Secret filings.

19 And the other note from 551K was that we had had Special  
20 Agent Perkins here to testify in September 2019. And Judge Cohen,  
21 who was by then a couple of months into his tenure, was already  
22 encountering the issues with retroactive redactions that I'm also  
23 going to get to in a few minutes, and at that point instructed the

1 government to provide him with an explanation during Special  
2 Agent Perkins' testimony that if a certain section of the questioning  
3 was later deemed by an OCA to be classified, that the -- that the  
4 government provide -- will provide him with an explanation. And so  
5 that section actually was redacted later.

6 And we see that echoed in, sort of, Colonel Jemmott's  
7 testimony and other open-session proceedings since then. I have a  
8 few specific examples when we get to that section.

9 Now, the government's explanation about the Perkins'  
10 redaction was in 551L, and it was essentially, look, Judge, it was  
11 classified, right? They have not had to account for such unexplained  
12 retroactive redactions since then.

13 Now, we do see in 551L shades of what seems to be the  
14 government's argument when forced to answer what is happening to the  
15 filings. And that's at footnote 3 of 551L. And they repeat it a bit  
16 in 551Q.

17 And that footnote says: The prosecution also provides  
18 notice that of the filings in the AE 628 series and the AE 666 to 676  
19 series -- those two series -- listed as not posted in 551K -- our  
20 motion -- the vast majority are nonsubstantive documents, such as  
21 M.C.R.E. 505 notices, notices of exhibits or of ex parte  
22 filings -- many of which are still classified -- or are merely  
23 in-court submissions.

1           Now, there are two versions of "not posted." The first is  
2 not posted at all -- right? -- which is what the government is  
3 addressing in this footnote. And how they're justifying not  
4 posted -- right? -- they're saying 505 notices, notices of exhibits,  
5 ex parte filings that are still classified or merely in-court  
6 submissions -- right? -- that's one version.

7           The second version of "not posted" is that only the  
8 unclassified notices are posted, not the actual filings pursuant to  
9 redactions, which does not fulfill R.T.M.C.'s requirements, right?  
10 The government doesn't address this squarely either in 551L or Q, but  
11 does comment on the defense not liking or agreeing with what's  
12 posted.

13           Now, you know, nobody enjoys the perception of  
14 overclassification. But the issue of whether something is posted or  
15 not or whether something is over or entirely redacted or not are two  
16 separate issues.

17           The government's responses just don't address the instances  
18 where only an unclassified notice is provided and not any of the  
19 underlying document. And a good example of that is AE 524 -- excuse  
20 me, backwards -- 425E. And that is our separate -- Mr. al Baluchi's  
21 separate position on Mr. Mohammad's motion to recuse the military  
22 judge and the prosecution team for their respective roles in the  
23 destruction of site A.

1           It's a long motion. It's overall classified, it was TS, but  
2 it was portion marked. It was filed in May 2016, and it contains  
3 numerous fully unclassified attachments. Fully unclassified.

4           It's not an unimportant pleading. It was the basis for two  
5 separate petitions for mandamus to the D.C. Circuit where we attached  
6 those declarations. And the motion series is still live today.

7           So seven -- it's been seven years since that was filed, and  
8 the only thing posted is the unclassified notice. And it just -- it  
9 is difficult to believe that it's the government's position that that  
10 upholds their obligation under R.T.M.C. 19-4 or 551I.

11           Then you have the fact that the government in that footnote,  
12 again, sets forth categories of filings that are not posted as sort  
13 of a -- almost like a gotcha, these aren't even substantive, right?  
14 But they're not necessarily nonsubstantive.

15           Notices of exhibits, as the military commission knows, have  
16 sometimes voluminous substance to them. I mean, I think you've seen  
17 enough of our in-court submissions as well to know that a vast  
18 majority of them are substantive. We've had expert reports submitted  
19 in court, depictions of torture submitted in court, and the  
20 government just dismissed them all as nonsubstantive in a single  
21 footnote.

22           So then we have 551P, which contains an audit of sorts of  
23 the three major substantive issues that we've dealt with between 2017



1 and 2020: Suppression, hostilities, and RDI discovery.

2 And in 551P, we provided a topical index of those filings,  
3 not cherry-picked as the government likes to say, because they're not  
4 random, and they don't only favor the defense.

5 The items in that index are actually, you know, as carefully  
6 chosen as possible to focus on the substantive filings between 2017  
7 and 2020 in those key areas. And I think the military commission  
8 might agree that those issues have continued to dominate our hearings  
9 since you arrived in September 2021.

10 While we -- I do just want to note that while we did focus  
11 on the big substantive motions in that index, that doesn't mean that  
12 the other smaller procedural motions aren't important for the public  
13 either. That's how people understand why issues were dropped or  
14 deferred. But, you know, to be frank, we all have limited time and  
15 we tried to be focused in that inquiry.

16 So at that time when we filed 551P, what was the  
17 government's explanation in 551Q?

18 So, first, the government confirmed that COVID-19 had  
19 hampered normal government functions and they suggested that  
20 Mr. al Baluchi should have used the channel for privileged  
21 classification review of defense work product to alert the Office of  
22 Special Security to excessive redactions and documents missing from a  
23 website that OSS doesn't control, and then explained that the

1 equity-holding agencies bear responsibility for many of the delays in  
2 the classification review. And they argued sort of strangely, as  
3 I'll get to in a minute, that we should be using the SC/DRT more.

4 In our reply in 551R, we acknowledge the difficulties of the  
5 pandemic, right? And said -- in fact, we said we fully concur with  
6 the government's assessment of the impact of the pandemic. And now  
7 that the government has articulated it, the military commission  
8 should allow a reasonable amount of time following the end of the  
9 national emergency for the government to come back -- and come back  
10 into compliance with its public trial  
11 requirements -- responsibilities.

12 And we said that the defense has, in fact, used the SC/DRT  
13 for the purpose that it was intended for, which is, as the military  
14 commission articulated in 551I, not for us to get filings  
15 declassified or posted to the website, but for us to submit defense  
16 work product requiring classification review.

17 And we continue to do so to this day, although we've noted  
18 before, I think, for the commission the relative ease with which the  
19 government, and sometimes the military commission, can get things  
20 back from SC/DRT while we -- our wait times tend to be a few weeks at  
21 a minimum. And I'll come back to the SC/DRT when we're discussing  
22 possible remedies for all of this.

23 So we restarted the filing of classification -- of

1 classified litigation in 2021, and we came back to hearings in  
2 September 2021 when Your Honor first came on board. And so we feel  
3 that the government's arguments with regard to the pandemic hampering  
4 security reviews have probably dissolved by this point. It's been a  
5 couple of years.

6 The government did something else in 551Q. As an  
7 alternative argument, they actually rejected Mr. al Baluchi's right  
8 to a public trial. As an alternative, the government rejects his  
9 right simply because they are unwilling or unable to uphold it.

10 And I want to just talk about that for a minute, because  
11 almost the entirety of the legal section of 551I, the order, is a  
12 granular examination by the military commission of the government's  
13 engagement with or violation of Mr. al Baluchi's right to a public  
14 trial.

15 Judge Parrella, at page 4, cites Waller v. Georgia, which,  
16 of course, says: Well established, the qualified right to open  
17 judicial proceedings is enjoyed by the public under both common law  
18 and the First Amendment and by criminal defendants under the  
19 Sixth Amendment.

20 And, of course, R.M.C. 806(a), as we've discussed many time,  
21 provides public trial rights coextensive with the Sixth Amendment.

22 551I included filings associated with an upcoming session of  
23 court among the priorities to be publicly posted precisely because

1 Judge Parrella understood that the withholding of those filings  
2 precludes public understanding of the proceedings.

3 And the government's response in 551Q just disregards that  
4 prioritization, and says, quote, the vast majority of the pretrial  
5 proceedings so far would not even trigger a citizen defendant's  
6 constitutional public trial rights to begin with.

7 Now, I would posit that the Supreme Court suggests  
8 otherwise, as was cited in 551, at page 4 again, where they were  
9 quoted as saying: In -- this is from Waller again -- in holding the  
10 public trial right pertained at the pretrial phase, in addition to  
11 ensuring that the judge and prosecutor carry out their duties  
12 responsibly, a public trial encourages witnesses to come forward and  
13 discourages perjury. These aims and interests are no less pressing  
14 in a hearing to suppress wrongfully seized evidence.

15 So this is how we left it, you know, 551R. We said, hey,  
16 Government, you know, we get it about COVID. We think under 551I you  
17 probably have an obligation to inform the military commission, at  
18 least, that the review is going to be severely delayed. But now that  
19 you've articulated it, we get it. We'll give you some time. We  
20 agree that the SC/DRT and everyone else should be able to safely  
21 conduct the review.

22 Number two, we said to the government, you say that notices  
23 have been provided to the military commission by SC/DRT about

1 pleadings that would take longer than 15 days. You don't -- we don't  
2 have visibility on the notices, but we take it on good faith that  
3 that has happened. And the military commission probably has more  
4 information than we do about that.

5 And, number three, you say, Government, that the  
6 equity-holding agencies are in a position to cure this -- some part  
7 of the damage by releasing pre-AE 551I documents that they've held  
8 for months or years.

9 So that's how we left it in January 2021. We asked the  
10 military commission, give it a bit more time, defer reconsideration,  
11 assess when we're all back whether the government has been able to  
12 recover that compliance with 551I, including the release, what we see  
13 as a requirement, which is the release by the agencies of pre-551I  
14 documents.

15 And so it's clear now, you know, well into 2024, that, in  
16 fact, they have not complied. And we believe further action from the  
17 military commission is necessary.

18 So that brings us to now. And I want to start by talking a  
19 little bit about the filings.

20 Government says, in 551Q, out of the 101 total filings in  
21 the defense's table attached to 551P -- excuse me -- the defense  
22 includes 50 filings that were filed prior to 551I taking effect and  
23 11 filings that were filed where the 15-day business-day window ran

1 in whole or in part while SC/DRT and the other applicable OCAs were  
2 either in complete or partial remote working status.

3 Only the remaining 40 filings, less than 40 percent in the  
4 table created by the defense, were subject to 551I and filed while  
5 other OCAs and SC/DRT were generally operating under normal manning.

6 Okay. So what's interesting here is the government's  
7 assertion that, in fact, pre-AE 551I filings are outside of any rules  
8 entirely.

9 We brought the motion, in large part, because of those  
10 big-issue motions. And here they essentially say, listen, 502, 534,  
11 562, nothing compels us to post even redacted versions of those,  
12 because they all came before AE 551I.

13 And it is our position that that's simply not acceptable.  
14 In a case spanning pretrial hearings -- pretrial proceedings spanning  
15 12 years in which the major topics today were briefed back in 2016,  
16 2017, 2018, and before the military judge issued a specific deadline  
17 to get them out, right?

18 So what happened to the filings that we  
19 noticed -- right? -- between 2020 and now? We do have an updated  
20 version of the 2020 topical spreadsheet that we can file, if that  
21 would be helpful for the military commission. It is not beautiful  
22 because we were updating it until basically, you know, 45 minutes  
23 ago. But we can clean it up and file, if that would be helpful.

1 MJ [Col McCALL]: That would be helpful.

2 ADC [MS. PRADHAN]: Okay.

3 So in 2020, there were 41 substantive filings that were just  
4 not posted at all. 21 of those have now been posted with redactions,  
5 and that is a net positive. I want to be very clear about that.

6 There are a couple of caveats, though.

7 Number one, that means half of the substantive filings that  
8 had not been posted in 2020, that we indicated of those three sets,  
9 still haven't been posted.

10 We have had about 16 unclassified notices posted. But as we  
11 noted before, that's not a substantive posting, and they cannot  
12 forever substitute for properly redacted versions of the pleadings.

13 Number two, the new total doesn't account for the motions  
14 that have been filed in that time and not posted.

15 Number three, as we said in our brief, the redactions in  
16 many cases, just like the ones in, you know, Colonel Jemmott's  
17 testimony all that, which I'll come to in a minute, appear to be  
18 arbitrary and unconnected to the classification guidance that we've  
19 received.

20 And if they're not being done in accordance with the  
21 strict -- you know, the strict and, you know, at least somewhat  
22 uniform guidelines about what is classified and what is not, then it  
23 is a struggle to understand how they can be legal, frankly.

1           And that's -- you know, it just seems to us to be classified  
2 information 101. I know that we're on the receiving end of all of  
3 these guidances, but we have a pretty good understanding at this  
4 point of where our redlines are. And when they don't match at all,  
5 it becomes very, very difficult. And I'll give you some examples for  
6 that.

7           I looked at some of the -- you know, we weren't able to  
8 do -- to update the spreadsheet with the substantive filings since  
9 December 2020, just because of -- you know, of the pace of how we've  
10 been going, but I did look at some of the key briefs we've filed.

11           So, for example, 819, the motion to preserve Camp VII.  
12 That's not posted. It would have been helpful, I believe, for the  
13 public before Colonel Jemmott's testimony.

14           821, the motion to compel defense access to Camp VII, it's  
15 not posted. It ended up being moot, of course, because the  
16 government facilitated access. But some of our reasons in that  
17 motion for trying to compel access are of public interest, including  
18 the historic destruction of evidence by the government in this case.

19           Many of these issues, as the military commission knows, are  
20 interdependent, and the public should be able to read at least parts  
21 of it. You look at the many, many, many notices of  
22 exhibits -- remember, the government categorized these as  
23 nonsubstantive -- that we filed in 628, and we refer to all the time



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1 with witnesses, you know, 628SSS, SSSS, WWW, GGGGG, RRRRR,  
2 right? These are -- these are thousands of pages of exhibits.  
3 Enormous proportion of them are unclassified. And they're not  
4 posted.

5 628GGGGG actually has 4,000 pages of exhibits. It was filed  
6 unclassified, it's composed of transcripts from other cases. And  
7 government documents, some of which were released through FOIA that  
8 are marked declassified, those are not on the website.

9 What's interesting when you go to the website today is that  
10 the little paperclip is there for a lot of these older important base  
11 motions -- again, 534, 562, et cetera. I tend to default to those  
12 because I wrote those, so I'm like, where is it?

13 And that's what the government is referring to in 551Q,  
14 again, when they say the defense just takes issue with what's been  
15 posted. And that's right. Because just like the example I gave of  
16 425E, the way they've gotten around it is by just posting the  
17 unclassified notice under that little paperclip and not doing any of  
18 the work in redacting the motions.

19 534 is the motion to compel all RDI  
20 discovery -- right? -- all the RDI documents. And that was filed in  
21 2018; it's portion marked. 562, motion to compel information about  
22 the black site personnel, it was filed in 2018; it's portion marked.  
23 And I know because it took a lot of time to make sure that we got the

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1 portion marking right as closely as possible. Still, there's nothing  
2 but the unclassified notices.

3 Moving past just the unclassified notices, I want to just  
4 look at 524 for a second. So we're here doing witnesses, in part, on  
5 litigation resulting from 524NN and the defense responses. Our  
6 response was at 524RR.

7 The entirety of the government's motion -- now, they say  
8 that, you know, the topical index favors us. Not in this case. The  
9 entirety of the government's motion to reconsider Judge Pohl's  
10 initial suppression of the LHM statements, which was filed in  
11 August 2018, is redacted. Every single line.

12 And I went back and double-checked this myself repeatedly  
13 because it was filed unclassified. There are no portion markings in  
14 the government's motion. It's not even FOUO; it's just straight  
15 unclassified.

16 And, yet, on the website, past the caption, it is 81 pages  
17 of block redactions. I wanted to print out the filed motion and the  
18 website version to show you, but, honestly, resources are scarce and  
19 our printer couldn't handle using that much black ink, but I did  
20 print the first pages of the motion as filed.

21 And I'd like to use the document camera just briefly ----

22 MJ [Col McCALL]: Go ahead.

23 ADC [MS. PRADHAN]: ---- if I could because I want to compare.

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1 And this is just for display to the parties and the military  
2 commission.

3 MJ [Col McCALL]: All right. It won't be displayed to the  
4 gallery.

5 ADC [MS. PRADHAN]: Yeah, I mean -- but this is the website  
6 version of 524NN. This is just the first page, but I can represent  
7 to you that every single page is entirely blacked out.

8 And I want to just call your attention to that first  
9 redaction here, which is the motion number that the government is  
10 seeking reconsideration on, which we all know to be 524LL, the  
11 ruling, Judge Pohl's suppression order. And that order, 524LL, if I  
12 can just switch out these documents ----

13 MJ [Col McCALL]: Go ahead.

14 ADC [MS. PRADHAN]: ---- just to display to the -- to the,  
15 excuse me, parties and the military commission.

16 MJ [Col McCALL]: Right.

17 ADC [MS. PRADHAN]: This is from the website. I'll show you  
18 the UNCLASSIFIED//FOR PUBLIC RELEASE header. That order is fully  
19 posted on the website and marked UNCLASSIFIED//FOR PUBLIC RELEASE.

20 But if you're a member of the public, looking at the  
21 government's motion to reconsider, you can't figure out what they're  
22 trying to get reconsideration on.

23 Now, leaving aside, you know, fair trial, public trial, due

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1 process concerns, there doesn't appear to be a lot of logic to this.  
2 And our response, 524RR -- I'm done with the document camera for now.  
3 Thank you.

4 MJ [Col McCALL]: All right.

5 ADC [MS. PRADHAN]: And I will represent to the military  
6 commission again that 524NN was filed entirely unclassified. There  
7 are no portion markings, there's no headings, there's no CUI.

8 So our response, 524RR, was filed entirely unclassified. In  
9 fact, we filed a separate classified addendum precisely so we could  
10 have our arguments publicly posted. There is absolutely nothing  
11 posted for 524RR, no paperclip, no unclassified notice, nothing, no  
12 redacted addendum.

13 And I want to be clear, again, whether it is the  
14 government's arguments or our own, we want them out there as much as  
15 possible. We want people to understand what our respective positions  
16 are, because these are really -- we think these are really big,  
17 historic issues that color everything we're doing now, including the  
18 220-page supplement that we just filed to our motion to suppress,  
19 which brings me to 628, actually.

20 628 was filed in 2019. And I'm smiling only because  
21 sometimes -- sometimes you -- often you see the churn in this  
22 courtroom of moving pieces in the minute, and sometimes it just all  
23 happens behind the scenes.

1           And so what I was going to say, up until about 4:00 p.m.  
2 yesterday, about 428 [sic] is that we have been in the sort of absurd  
3 position of having filed a lengthy follow-up motion to suppress  
4 incorporating new information, much of it unclassified, from the  
5 intervening five years before any of our original motion filed in  
6 May 2019 was declassified for the public.

7           And that was despite the fact that enormous chunks of the  
8 facts in that motion have been declassified or the fact that the  
9 government's stipulations of facts that were issued for all five of  
10 the -- formerly five, now four, of the defendants have been released  
11 in FOUO version.

12           And we're talking about years in which the public couldn't  
13 really follow along, unless you've been here for every hearing, as a  
14 couple of people have -- right? -- what we're doing or have a roadmap  
15 based on some unredacted part of our arguments. That was what I was  
16 going to say about 628.

17           About 4:00 p.m. yesterday -- and this illustrates yet  
18 another issue on the website -- and I have to express appreciation to  
19 Mr. Dykstra on this for double-checking -- I was informed by  
20 Mr. Dykstra that he had, in fact, found 628 on the website. That's  
21 great news, right? That's great news.

22           It's incredibly redacted, and I'm sure we'd contest some of  
23 those redactions, because, again, we believe a good chunk of the info

1 had been declassified.

2 But here's the problem, right? It's 1200 pages, including  
3 exhibits. It is up in six parts -- it was up in six parts. It was  
4 labeled as AE 628A and titled "Mr. al Baluchi's Notice of Discovery."  
5 It is -- it's hard to see how that mislabelling happened. Whether it  
6 was a mistake, you know, I don't know. And we have no idea how long  
7 it was up under that title.

8 Now, the addendum to that is that a spill was identified in  
9 what was posted, and so that is now no longer on the website. So  
10 that's the -- that's the situation with 628.

11 Now, the government's response brief at 551Q was  
12 supplemented by an affidavit by the OIC of the SC/DRT. And they said  
13 the following: Quote, many of the filings in the Mohammad commission  
14 are voluminous and often contain multiple attachments consisting of  
15 hundreds of pages of documents produced by several different  
16 originators and equity holders. This adds significant time to a  
17 classification review.

18 However, by providing notice that more time would be needed,  
19 where appropriate, SC/DRT has fully complied with 551I from the time  
20 it went into effect to the present.

21 And this brings me back to those notices, right? I don't  
22 know whether the military commission has been provided notice that  
23 filings may take longer than the 15 days for, for example, 819 and

1 821 -- right? -- which were filed after 551I, should be subject to  
2 551I.

3 I don't know if the military commission has been provided  
4 notice every day for the five years since 551I was noted -- was  
5 issued, that 534 is still undergoing review, right?

6 So I would posit that's for the military commission to look  
7 at and just leave that there.

8 But even if that is the case, at a certain point, our  
9 position is that the military commission has to say that's enough.  
10 We know how voluminous some of these pleadings are; we write them.  
11 But to say that the people who should have the rules in front of them  
12 need years and years and years and years to redact classified  
13 information from a long brief is, frankly, absurd.

14 I mean, we have fully unclassified, or CUI, defense notices  
15 of exhibits. And the most recent one, for example, 628TTTTTTT, which  
16 was filed on January 26th, has one paragraph of CUI and the rest is  
17 fully unclassified. It's all portion marked. And that has not been  
18 posted.

19 And that is Dr. Morgan's supplemental affidavit, which the  
20 prosecutor's displayed to the gallery in February, and we intend to  
21 in a couple of weeks as well, but as of right now, the public cannot  
22 go and read it on their own for completeness, right? We're going to  
23 pull out certain sections just as OCP did, but the public can't read

1 the whole thing. Those type of documents, notices of exhibits, et  
2 cetera, could at least provide some context even if the motion itself  
3 is not up.

4 It's -- you know, it's impossible, again, to get an  
5 exhaustive idea from the media and from observers that we've had  
6 since 551I was issued to ask how possible it is to follow the  
7 substance of what we've been doing in this phenomenally expensive,  
8 long-running 9/11 case. Because -- you know, the frustration we hear  
9 about anecdotally is very high.

10 And I do have something to show. I don't know -- I  
11 apologize. I didn't have a chance to check with Mr. Lavender about  
12 whether this was approved for display to the gallery or not. We sent  
13 it a couple of days ago.

14 All right. I'm getting a thumbs-up.

15 All right. If I may have use of the document camera? We  
16 actually -- this is an in-court submission, sir. So we'll need an  
17 AE number, and we have copies for the parties.

18 So this is for display to the gallery, the commission, and  
19 the parties.

20 MJ [Col McCALL]: This can be displayed to the gallery. And  
21 I'll give you that AE number once I have it.

22 And I see it's being passed out as well, hard copies to  
23 everyone. Just hold on while ----



1 ADC [MS. PRADHAN]: Sure.

2 MJ [Col McCALL]: ---- that's accomplished.

3 ADC [MS. PRADHAN]: I have been told by hostile actors that my  
4 glasses give me a little bit of an auntie vibe, so I apologize for  
5 that, sir. "Hostile actors" being members of my team.

6 MJ [Col McCALL]: So this would be next in line, 551.

7 All right. I think everyone has copies, but go ahead.

8 ADC [MS. PRADHAN]: Thank you, sir.

9 I'll just show you the date of this. This is a tweet by  
10 Ms. Rosenberg of the *New York Times*. And the date on that is  
11 April 22nd, 2024, which was three days ago.

12 And this pertains, I believe, to a -- this pertains to a  
13 pleading by the Hawsawi team. I believe it's 876, but Mr. Ruiz can  
14 correct me on that.

15 And she says, again: So frustratingly Guantanamo. In 2021,  
16 a 9/11 defense team filed a motion to suppress statements made to the  
17 FBI pertaining to Miranda.

18 Now, this is an issue that has come up continuously in  
19 witness testimony. And Ms. Rosenberg, who has been here for  
20 almost -- for every hearing, I believe, is trying to follow up on  
21 that and put the story together. And it is still -- this is what the  
22 public sees when you go and look for it on the website, right? And  
23 that is just all too common.

1 MJ [Col McCALL]: And that will be 551S.

2 ADC [MS. PRADHAN]: Thank you, sir. I'm done with the  
3 document camera.

4 876, I believe that's right. They can tell me.

5 All right. It's a super interesting topic. Let me just  
6 talk about 876 for a second, because it combines -- 876 actually is  
7 what we talked about yesterday. And I think that's a different  
8 motion series.

9 But 876 is the same situation, right? It's a  
10 super-interesting topic, combines international constitutional law,  
11 raised very prescient questions about the interplay, and, honestly,  
12 something that international legal scholars are constantly debating,  
13 which is how is the U.S. position on various aspects of international  
14 humanitarian law, law of war affecting the applicability of those  
15 norms to other conflicts, right?

16 There was an article just two days ago by a legal scholar by  
17 the name of Hathaway referring to -- sorry, sorry, sorry -- referring  
18 to our use and position that the government has expressed many times  
19 on the record about the U.S. Government's position on some of these  
20 issues.

21 Now, at one point yesterday Colonel Bearden said that he  
22 would rest on his brief, right? I think that was towards the end.

23 The government brief filed in November 2021 on that issue

1 isn't up on the website. So that doesn't help any member of the  
2 public, including law students and professors, who are watching, and  
3 there were a few yesterday. So that's about filings.

4 I'm going to talk a little bit about public sessions in  
5 transcripts.

6 MJ [Col McCALL]: All right.

7 ADC [MS. PRADHAN]: Every morning of an open session the  
8 government introduces their members present and says: Pursuant to  
9 the commission order, these proceedings are also being broadcast to  
10 sites in the continental United States. And that's in addition to  
11 media and observers being down here, which often varies widely, but  
12 always includes a couple of people who provide continuity, such as it  
13 is -- right? -- for the public-facing information coming out of the  
14 commissions.

15 There aren't a lot of people, I believe -- right? -- there  
16 aren't a lot of people 12 years in who are able to jump in and out of  
17 these proceedings or follow along with fidelity, just based on the  
18 length of time they've been going on.

19 But for those who do and who are then able to write and talk  
20 about the case with some understanding, it is critical that we keep  
21 information consistent as much as possible.

22 The commission has witnessed at almost every hearing how the  
23 classification authorities destabilize that objective. In fact,

1 inconsistency on classification might be the only consistency.

2 We had a big issue back in October with 697, and then we saw  
3 it again in February with the, you know, brand-new classification of  
4 information about UFIs that may or may not have been present [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 And to be clear, like, we've -- I'm not going to rehash  
9 those arguments, but we've previously discussed a lot of this in open  
10 session, a lot of these identifying factors. It's something we've  
11 done before. But that's not the reason why it's a problem we can't  
12 do it again.

13 The reason for consistency is that using UFIs, or names when  
14 possible -- right? -- when it won't pose a threat -- is one way of  
15 allowing the public to follow the story.

16 So Dr. Mitchell's testimony is a really good example of  
17 this. He talked in great detail about NX2 and NZ7 [REDACTED]

18 [REDACTED]

19 MJ [Col McCALL]: Right.

20 ADC [MS. PRADHAN]: Newspaper articles were written about  
21 those UFIs, putting into the public an important part of the story,  
22 we believe, about Mr. al Baluchi's torture and the structural issues  
23 with the U.S. Government's torture program.

1           And the connection between NX2 [REDACTED] and NZ7  
2 [REDACTED] is important, because that's how Dr. Mitchell  
3 identified them.

4           And we've described in open session the roles of UFIs, like  
5 SG1 and X3L in Mr. Al Baluchi's torture, along with other -- along  
6 with NX2 and NZ7.

7           So right now, I can show you and talk about the fact that on  
8 the RDI Index, [REDACTED] appears all over entries at Location Number 2, but  
9 I can't show you or the public UFIs of the first location that  
10 Mr. al Baluchi was held, which is CAPTURE.

11           On transcripts, we discussed during the last hearing the  
12 extraordinary delay -- and you understand, sir, that I was talking  
13 around the issue a little bit with the RDI Index. And if it's  
14 unclear, I'm happy to talk about it in closed session.

15           MJ [Col McCALL]: All right. I guess I don't have a good  
16 poker face, because, yeah, I was still trying to understand. If you  
17 could give me a little bit more on that ----

18           ADC [MS. PRADHAN]: Of course.

19           MJ [Col McCALL]: ---- I didn't quite follow that last piece.

20           ADC [MS. PRADHAN]: Okay. So the issue is that we  
21 have -- we've talked at length about UFIs, including the four that I  
22 mentioned, right?

23           MJ [Col McCALL]: Right.

1 ADC [MS. PRADHAN]: NX2, NZ7, SG1, X30.

2 MJ [Col McCALL]: Tracking.

3 ADC [MS. PRADHAN]: And Dr. Mitchell has associated,

4

5 et cetera.

6 MJ [Col McCALL]: Tracking.

7 ADC [MS. PRADHAN]: I was informed during the -- I believe it  
8 was the 697 argument -- it may have been the 809 argument, I  
9 apologize -- that the -- there is a section of the RDI Index that is  
10 listed as CAPTURE for the location. There are UFIs listed on the  
11 unclassified RDI Index at that location.

12 And I believe -- and the government can correct me if I'm  
13 wrong -- my understanding is that I can no longer in open session  
14 show you the first page of the RDI Index that identify the UFIs at  
15 that location.

16 MJ [Col McCALL]: All right. Understood.

17 ADC [MS. PRADHAN]: Okay. And Your Honor can connect that, as  
18 you will, with Dr. Mitchell's testimony.

19 All right. On transcripts, we discussed I think during the  
20 October hearing, the extraordinary delay in getting public  
21 transcripts up or even just getting transcripts for ourselves, and  
22 that has continued in a very kind of start/stop way.

23 I think we have a few transcripts for last week, last I

1 checked. And as we've mentioned before to the military commission,  
2 like, this is a problem when we're doing ongoing witness testimony  
3 and we need to refer back to something someone said and we're trying  
4 hard not to misrepresent anything.

5 We saw this during Agent Fitzsimmons' testimony, during  
6 Mitchell's testimony. We've seen it during Ms. Waltz's testimony.  
7 We're certainly going to see it during Mr. Kohlmann and Zebley's  
8 testimony. We'll want to draw out bits of their testimony and use it  
9 in other examinations, because they're all, you know,  
10 cross-referencing. And essentially we would be prevented from doing  
11 so because of this lag.

12 There's an interesting issue -- and, again, this is sort of  
13 anecdotal, because we can't be really exhaustive about it -- but  
14 there was an interesting issue where in the lead-up to this hearing,  
15 we were looking for -- for unclassified transcripts for Ms. Waltz's  
16 testimony on March 4th and 5th.

17 And as of the week before this hearing started, unclassified  
18 transcripts were not publicly posted. And so we e-mailed the  
19 prosecution to ask if they knew what the problem was.

20 March 4th was an unclassified session, open session. And  
21 March 5th was -- was -- March 4th was a fully unclassified session, I  
22 believe, an open session. March 5th was the unclassified testimony  
23 of Agent Waltz, which was clearly important to week one of this

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1 hearing.

2           The prosecution was very kindly able to send both days of  
3 the transcripts to us marked UNCLASSIFIED//FOR PUBLIC RELEASE, sent  
4 via SIPR, which I don't fully understand, but that's how it was done.  
5 And they did say -- and for which we are appreciative -- that they  
6 were trying to run down where the website posting process had fallen  
7 through.

8           Then on April 9th, the March 5th transcript of Ms. Waltz's  
9 testimony was posted apparently in response to -- maybe in response  
10 to the prosecution's flagging. But, you know, neither we, nor OCP,  
11 is in a position to flag every single thing that's missing from the  
12 website; although, you know, we're attempting here to highlight the  
13 broad themes.

14           And with regard to the March 4th unclassified session,  
15 something interesting actually happened. The transcript was  
16 posted -- was actually posted on March 5th, just a day later, and  
17 saved by the website by our crack analysts on that  
18 day -- right? -- because they're checking constantly.

19           At some point between March 5th and March 12th, the next  
20 time somebody went back and clicked on that particular link, the  
21 March 4th transcript was removed and replaced by a placeholder. So  
22 the little -- the little paperclip was still there, right? But this  
23 time it went to a placeholder.

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1           And that placeholder, I believe as of last night, remained  
2 there now. So we have a transcript for March 4th that was publicly  
3 posted with no redactions but is now not posted at all. And so what  
4 are we supposed to conclude from that? Do we use it? Do we not use  
5 it? Can we use it in open session? Should we be keeping it? You  
6 know, it raises all sorts of flags for us.

7           Just for the record, I believe, again, as of yesterday, open  
8 session oral argument from March 8th on 809 had still not been posted  
9 for anyone following that issue. And I can represent there are a lot  
10 of people following in the United States and around -- and  
11 internationally, following the issue of the U.S. Government  
12 withholding CIA black site information.

13           Now, 19-4 says the transcripts must be released, quote, as  
14 soon as practicable after the conclusion of any session, whether it's  
15 open, closed, or anything else.

16           And in a situation like this where we have hearings back to  
17 back with these four- or five-week hearings in which the public is  
18 hearing about related issues across several weeks, this -- it really  
19 puts everyone at an enormous disadvantage.

20           I'll represent to you that I also practice at the  
21 International Criminal Court where there is similar -- not identical,  
22 but similar concern about confidential or sensitive information that  
23 could cause enormous harm to both states and individuals if it were

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1 to be released.

2 And even in that situation, we have simultaneous translation  
3 into French and Arabic, and we have simultaneous transcripts  
4 generated immediately in front of me in English, French, and Arabic.  
5 It's complex, right? But there are ways to do this if resources are  
6 allocated.

7 And here, we're just -- we're not asking for simultaneous  
8 transcripts, although that would be lovely. We're asking for timely  
9 release of English transcripts at some reasonable point  
10 after -- after the session or in long sessions, during the session.

11 It keeps coming up, but it is -- it seems clear that as much  
12 as, you know, senior government officials for 20 years have insisted  
13 on these very expensive military commissions, the government is just  
14 not willing or has not been willing to commit the resources to  
15 getting it done in a way that comports with public trial and fair  
16 trial requirements. And we're at a point where I believe we need a  
17 sanction. And I'll get to that in one minute, because I do want to  
18 talk quickly about the redaction of transcripts.

19 And the example I'd like to -- first example I'd like to  
20 give you, sir, is the example of Mitchell's testimony from the 21st  
21 of February. And this is coming back -- this might help clarify,  
22 actually, the UFI issue.

23 MJ [Col McCALL]: You said it was Dr. Mitchell's?

1 ADC [MS. PRADHAN]: Yes.

2 MJ [Col McCALL]: Okay.

3 ADC [MS. PRADHAN]: Dr. Mitchell's testimony from the 21st of  
4 February of this year.

5 So we had discussion of the UFIs, obviously. And at  
6 page 41748 of the -- of the open transcript, there's a discussion  
7 about what can be said about the UFIs publicly. And that exchange is  
8 all redacted. Okay?

9

10

11

12 Information about, broadly, the construction of the black  
13 sites, which was all done in open pursuant the government's FOUO  
14 stipulations, that is now redacted. And an example of that is at  
15 page 41931 of the transcript.

16 Now, this is a pretty key issue in suppression. We're going  
17 to talk about it in a little bit with regards to Echo II. And as  
18 you'll know, again, from our 628AAA Sup, we talk a lot about the  
19 construction of the black sites.

20 But there are also just -- just meaningless redactions,  
21 right? Almost to show, like, hey, we're redacting things, which is  
22 obviously not a legal way to redact. And on example is at  
23 page 41768, where they redact a phrase that appears unredacted in

1 exactly the same context later on the same page.

2 Page 41747, there's a phrase redacted at line 12 that can  
3 easily be inferred from elsewhere, and the redaction itself makes no  
4 sense on its face.

5 There are several places where there's a reference to the  
6 word "chief" -- this is still in Mitchell's testimony -- and the word  
7 after that is redacted, which never happened in the 2020 testimony.  
8 And the word after that can be important to the context of what we're  
9 talking about.

10 There were no red lights during any of this. There's no  
11 explanation for these redactions. But it would make it really  
12 impossible for anyone coming at this from the outside to figure out  
13 what is being talked about and make those connections again.

14 The second example is Colonel Jemmott's testimony from  
15 October 5th. And what's interesting is that, with one exception,  
16 neither Mr. Trivett nor I set off the red light at all, and certainly  
17 the prosecution has access to immediate answers if we do step into  
18 gray areas of classification. That's been demonstrated repeatedly.

19 And if you recall, you saw me go over to Mr. Trivett a  
20 couple of times to ask if I could ask certain questions during  
21 Colonel Jemmott's testimony. And he and Mr. Dykstra may remember,  
22 actually, specifically that I approached them before the examination  
23 to let them know that I was going to reference a particular document

1 regarding access to Camp VII that had secret headers, but every  
2 single paragraph was portion marked UNCLASSIFIED.

3 And now you see this transcript where the observers in the  
4 gallery and the media present know what was said and referenced from  
5 that document. But the public, who may want to look back at it,  
6 including ICRC representatives, U.N. officials, and other people with  
7 interests in monitoring potential violations at Guantanamo, have no  
8 idea about large areas of content that were asked about by both side  
9 of the JTF commander regarding historic and current conditions of  
10 confinement.

11 Pages 38141 and 38149 are good examples, and I won't go into  
12 them. The redactions are there. As are 38180 and 38182. Again,  
13 that's from October 5th.

14 You have me asking at one point unredacted: Did you visit  
15 Camp VII during your previous tour here at Guantanamo? The answer is  
16 redacted. That's at 38124.

17 You have questions to Colonel Jemmott about a fully  
18 unclassified publicly available government accountability report from  
19 2012 that is on the Internet. I pulled it from the Internet. We had  
20 the CISO review it. Talking about the fact that Camp V was built for  
21 disciplinary purposes and other facts about Camp V, long  
22 unclassified, and the information from that report that I asked  
23 Colonel Jemmott about is redacted in the transcript. And that's at

1 pages 38151 and 38153, and all without an explanation.

2           And, you know, here's where it goes beyond just a public  
3 trial issue and becomes chilling. As -- you know, we try to be  
4 responsible custodians of classified information as far as humanly  
5 possible, and I generally know what I can do with a document that is  
6 portion marked UNCLASSIFIED or CLASSIFIED or that's been publicly  
7 released by the government in declassified form, but now much of our  
8 discussion about it has been redacted.

9           And so, you know, am I just to excise any argument I may  
10 make in the future that depends on that information because part of  
11 it now may be classified based on those redactions? I had to wrestle  
12 with that in this argument right now. How do I characterize, right  
13 now in this argument, from a fully unclassified government  
14 declassified document that came up during, you know, that hearing,  
15 what I can say about it? And I haven't had any red lights so far.  
16 I'm grateful for that.

17           But, honestly, I took stuff out because of that. And that's  
18 several steps further from the 697 issue that we encountered during  
19 October where the government sort of threw their collective hands in  
20 the air and said, look, we can't explain it, but we're telling you  
21 what the rule is now, right? At least we had a rule. We had a  
22 guideline. Like, you cannot say this with that.

23           Here we don't have anything, right? There's no guidance.

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1 There's just redactions.

2           And I have to say, the military commission's treatment of  
3 the 910 ruling was compromised by those redactions in the same way.  
4 You know, the military commission, in good faith, wrote a ruling  
5 that, according to all indicators we know of -- we know of, the  
6 defense -- should be unclassified. And yet, because of the  
7 unexplained redactions in the transcript -- I feel the need to put  
8 this on the record, sir -- the military commission felt it necessary  
9 to submit the ruling for classification review so that perhaps the  
10 same unexplained rules could be exercised on a document that, to our  
11 informed knowledge, didn't contain classified information.

12           You know, a lot of us have navigated this slightly  
13 incoherent system for the better part of a decade, and we understand  
14 why that happened or why it felt like it needed to happen. There's  
15 no other real choice.

16           But I don't believe that forcing us -- you know, the  
17 defense, the military commission, even the prosecution -- into that  
18 decision without a clear explanation, even if it's a classified  
19 explanation, of what is newly classified or why it's redacted  
20 comports with a public trial right. It doesn't allow us to figure  
21 out what can or can't be said.

22           And ultimately, you know, that ruling about whether the  
23 defense would be allowed to have an expert inspect Camp V was filed

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1 on SIPR, right?

2 Is there a redacted declassified version available on  
3 mc.mil? There is not. There isn't even a placeholder for 910Y,  
4 meaning that to the public the question of whether the defense can  
5 inspect Camp V has not been resolved. And, for the record, it has.

6 What should you do about this?

7 Yes.

8 MJ [Col McCALL]: Before you you go into remedies, let's go  
9 ahead and take a recess.

10 ADC [MS. PRADHAN]: Okay.

11 MJ [Col McCALL]: So let's take a 15-minute recess. It's  
12 1032. So let's be back on the record at 1047.

13 Commission is in recess.

14 **[The R.M.C. 803 session recessed at 1032, 25 April 2024.]**

15 **[The R.M.C. 803 session was called to order at 1046, 25 April 2024.]**

16 MJ [Col McCALL]: Commission is called to order.

17 Parties are present. The accused are absent.

18 Go ahead, Ms. Pradhan.

19 ADC [MS. PRADHAN]: Thank you, sir. So I'm almost done, I  
20 promise.

21 MJ [Col McCALL]: Take your time.

22 ADC [MS. PRADHAN]: But I want to say, I don't envy the  
23 military commission in sorting through these various strands, but



1 neither do I envy the public in trying to follow the biggest criminal  
2 proceeding in U.S. history.

3 So where does that leave us? Like, what are your options?

4 The first, of course, is reconsideration -- right? -- which  
5 is the actual motion. And so, look, the government's argument about  
6 SC/DRT is neither here nor there. There's simply no provision in any  
7 military commission order to use a privilege walled-off review  
8 channel to query public redactions and omissions of inherently  
9 unprivileged pleadings intended for public release on a website that  
10 neither OSS nor SC/DRT actually controls.

11 But the government's argument about the SC/DRT procedure  
12 does actually illustrate the ongoing nature of this sort of  
13 controversy and the tension in the term "reconsideration," right?

14 551I denied the motion to dismiss and ordered certain  
15 reforms. But it also, we believe, clearly contemplated that policy  
16 changes outside the military commission would occur in the future.

17 For example, 551I, at page 9 -- sorry ----

18 MJ [Col McCALL]: Ms. Pradhan, if you can go a little bit  
19 slower.

20 ADC [MS. PRADHAN]: Sure. Sorry.

21 MJ [Col McCALL]: No, that's fine.

22 ADC [MS. PRADHAN]: 551I, page 9, note 27, stated that the  
23 military commission -- stated the military commission intent to

1 change the review process; at page 10, note 28, allowed the  
2 government to suggest alternate points of contact. Right?

3 So it's clearly contemplated that something is going to  
4 happen. Changes are going to occur, and the government will be  
5 responsible for those.

6 I won't -- I won't go into the whole saga of the  
7 establishment of the SC/DRT and the government's issues with that.  
8 Those are in AE 118M and N and summarized, actually, in footnote 44  
9 of 551R, which is our reply.

10 But it's just an inapposite argument and avoids the actual  
11 issue, which is that remedy is not a matter of individual documents,  
12 but it's rather overall compliance with the right to a public trial,  
13 which, by definition, requires examination of cumulative government  
14 practices like the transcripts, like the six-year-old, seven-year-old  
15 filings that still aren't up.

16 So when Judge Parrella said in 2018, quote, consistent with  
17 R.T.M.C. 1.1, the failure to post a particular document to the OMC  
18 website within a given timeline, or to adhere with the other  
19 timelines set forth within R.T.M.C. 17-1 or 19-4, will not in itself  
20 constitute a basis for substantive relief.

21 I think the "in itself" is doing a lot work there in that  
22 line, because he's saying the defense can't be allowed to ask for a  
23 remedy if 534, or any particular document, doesn't make it up there.

1           But when you start to add up the volume of documents and the  
2 importance of the documents not making it out to the OMC website, we  
3 argue that it does constitute a basis for substantive relief.

4           And there has to be an ongoing inquiry by the government, as  
5 well as -- it can't be just us noticing this. It has to be an  
6 ongoing inquiry into whether Mr. al Baluchi's trial is public, and  
7 consistent with this understanding, we do ask for reconsideration  
8 because the cumulative record continues to be poor.

9           If the military commission reconsiders, then there are a  
10 number of options on the table. And I'll start with the most  
11 extreme, which is dismissal.

12           Judge Parrella found that the remedy of dismissal was  
13 disproportionate at the time in December 2018, but he noted that the  
14 rights of the accused were consideration motivating the R.T.M.C.  
15 requirements consistent with the interest of national security.

16           19-1 -- R.T.M.C. 19-1, aims to make military commissions  
17 accessible to the public to the maximum extent possible. And, again,  
18 among the priorities listed by Judge Parrella were  
19 classification -- for classification review and posting -- timely  
20 posting to the website, were files associated by an -- with an  
21 upcoming session of court.

22           The arbitrary posting and redacting of critical commission  
23 documents in the years since 551 order was issued, I, violates both

1 the rights of the defendants, and the interests of national security,  
2 and the public right.

3 The topical filing index attached to 551P pertaining to  
4 those key topics demonstrates that, contrary to 551I,  
5 documents -- you know, compliance with the timelines established by  
6 the R.T.M.C. for posting unclassified documents remains the exception  
7 rather than the rule.

8 And even worse, for many of the documents that have been  
9 posted, again, the redactions appear to have been done at random and  
10 at odds with classification guidance.

11 And so, you know, those kind of inconsistent redactions  
12 function as a bar to public understanding of the substantive issues,  
13 and they chill our arguments and they, frankly, cannot be in  
14 compliance with national security determinations about  
15 classification.

16 So it is our position that dismissal should still be on the  
17 table, not only because the government has failed in their  
18 obligation, but because, frankly, they've remained defiant about it,  
19 as demonstrated in 551Q.

20 In the alternative, the military commission should consider  
21 abatement until the backlog is cleared. The military commission  
22 tried issuing an order through 551I, and that didn't work. And  
23 subsequent breaches are recorded in the record at 551J, K, L,

1 M -- this is a real test for me -- N, and O. Nine years, it took me,  
2 just to do that.

3 All right. If we're looking at piecemeal  
4 remedies -- right? -- which we would caution the military commission  
5 about, but we put the government on notice in 2020 in as  
6 comprehensive a way as possible that, hey, even after the order,  
7 major pleadings and transcripts remain outstanding; the ones posted  
8 don't comply with the classification rules we know about.

9 And they said, look, there's a lot of pages; there's a  
10 pandemic on. We said we know there's a pandemic; you've got time to  
11 fix it. They also said no rules apply to pleadings that predate  
12 551I. We said that cannot be true; you need to fix it.

13 In 551R, we proposed that the military commission should  
14 allow a reasonable amount of time following the end of the national  
15 emergency. It's been -- what? -- three and a half years, more than  
16 that.

17 There was a year and a half in there when litigation was  
18 slowed because of plea negotiations. And here we are, middle of  
19 2024, with the consequences of random classification that no party  
20 here even understands, in order to comply with it, affecting the  
21 ongoing proceedings.

22 Now, particularly on motions, I don't know whether the  
23 government actually knows which -- which notices have been sent from

1 SC/DRT to the military commission or not for which motions, but they  
2 must know which agencies are the holdup on some of these, or they  
3 have the ability to find out. And, you know, we all have our  
4 guesses, but the prosecution are the knowers of that.

5 So in those cases where the equity-holding agencies have  
6 been slow walking these decisions for years, or perhaps not  
7 submitting those notices at all -- you're in the position to know,  
8 sir -- there should be a consequence. And, you know, they have the  
9 keys here, they always have, and they need to be held to account.  
10 And abatement may be the tool to do that, but the military commission  
11 has shown itself fairly creative in fashioning orders around this.

12 And then, look, for the transcripts, no one is singing from  
13 the same page of music here. It seems intuitive that what is said in  
14 court and is heard by the media and observers should then be  
15 available to the public unless the red light goes off.

16 If something genuinely crosses lines in the courtroom and is  
17 somehow missed in the 40-second delay, then we believe an explanation  
18 should be given to the parties. But this sort of piecemeal,  
19 retroactive, utterly opaque, shadow redaction that can result in huge  
20 swaths of transcript being cut after a public session is not tenable  
21 and is not consistent with a public trial.

22 That is all I have, sir, unless you have any questions.

23 MJ [Col McCALL]: I may have some -- I may have some questions

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1 after I talk to the government. So let me hear from them.

2 ADC [MS. PRADHAN]: Thank you.

3 MJ [Col McCALL]: Any other defense teams desire to be heard?

4 Good morning, Captain Leahy.

5 DC [Capt LEAHY]: Good morning, Your Honor.

6 First, I want to just say it's with genuine admiration for  
7 Team al Baluchi's thorough arguments that we adopt those and  
8 certainly support the comments that Ms. Pradhan made this morning.

9 Really, what I want to do is touch on a few points that deal  
10 with military case law and also to kind of give us a better sense of  
11 where are we in history and why is this trial, and a public trial in  
12 this case, so important.

13 And I'll tell you that the single biggest impediment to  
14 providing Mr. Mohammad a public trial is this place, Guantanamo Bay  
15 itself. My favorite part of Ms. Rosenberg's tweet that we now have  
16 in the record at AE 551S is the very first three words. She says:  
17 So frustratingly Guantanamo.

18 The government chose this forum. It created these military  
19 commissions, and it chose to hold our clients here on this island, in  
20 a foreign country, away from the protections that would be afforded  
21 to them in the continental United States.

22 MJ [Col McCALL]: And, Captain Leahy, if I could just caution  
23 you to go slow for not just the court reporters, but the

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1 stenographers who are also working behind the scenes.

2 DC [Capt LEAHY]: Yes, Your Honor. I'll do my best. It's  
3 that and staying stationary. In the military courtrooms, that is not  
4 how I -- how I practice.

5 MJ [Col McCALL]: Right.

6 DC [Capt LEAHY]: But, you know, the government, they built  
7 these courtrooms ostensibly to protect classified information. But  
8 the delay, the 45-second delay, the hockey light, those are just more  
9 ways in which the government controls what the public hears about  
10 this case.

11 Is it any wonder that we really only have two consistent  
12 reporters that come to the island, Ms. Rosenberg and Mr. Ryan?  
13 Because the cost and the administrative headache alone make it  
14 virtually impossible for the media or the public to attend these  
15 proceedings in any substantive way.

16 And we certainly appreciate their efforts, but this is  
17 apparently the case of the century -- right? -- the most important  
18 case in American jurisprudence. Certainly there would want to be  
19 more media outlets to see this and more public attention to it than  
20 just two folks who come consistently.

21 Your Honor, it's important to start there when looking at  
22 the fact that this is not a public trial. And that's despite your  
23 best efforts, because I've seen it, Your Honor. I know that you care



1 about this issue. In fact, you stopped the proceedings -- what was  
2 it, the first week? -- to make sure that the public could come  
3 between the two commissions that were happening.

4 So it's -- it's not for lack of your desire and your  
5 efforts, but it just simply is not tenable. And the large reason  
6 behind that is this place does not provide a public trial.

7 Well, I'm going to go over three more points to kind of make  
8 our argument here. The first is going to be that we should consider  
9 this case through the lens of military case law. The second is that  
10 we should be positioning this case within its historical context.  
11 And then, finally, how classification and privilege, in particular,  
12 affect the right of Mr. Mohammad to have a public trial.

13 So the first point is we're going to talk about military  
14 case law, because the prosecution -- and I haven't been here long,  
15 Your Honor, but I've been in this room, in this courtroom many times  
16 hearing the prosecution argue about whether the Constitution really  
17 applies.

18 I think Ms. Pradhan touched on this earlier, that, you know,  
19 we certainly agree the Constitution, the Sixth Amendment, the First  
20 Amendment should apply to this proceeding. But we've seen appellate  
21 courts kind of avoid that issue and not want to decide whether or not  
22 the Constitution applies to the commissions.

23 So because of that, let's -- you know, let's step away from

1 the Constitution for a second and let's just talk statute,  
2 regulation, and case law.

3 So we'll begin with Section 949d of the Military Commissions  
4 Act of 2009, statutory law. And it discusses your ability as the  
5 military judge to close sessions of this proceeding to protect  
6 national security.

7 That ability also implies that the inverse is true, that  
8 traditionally sessions of the military commission would be open or  
9 public unless you determine that it should be closed.

10 Then we go from statute down to regulation. Interpreting  
11 that statute, we get to Rule for Military Commissions 806, which does  
12 enshrine my client's right to a public trial. And those -- the 806  
13 is very similar; it's akin to the Sixth Amendment protections. But  
14 it states specifically: Except as otherwise provided, military  
15 commissions shall be publicly held. So we know, even between statute  
16 and regulation, that my client has a right to a public trial.

17 But it goes further, and that's really what we're talking  
18 about today, which is Rule 19-4 of the 2011 Regulation for Trial by  
19 Military Commissions.

20 If I may have use of the document camera, Your Honor, I'd  
21 like to display AE 551S again.

22 MJ [Col McCALL]: Go ahead.

23 DC [Capt LEAHY]: So, Your Honor, you don't have it ----

1 MJ [Col McCALL]: You're asking this to be published to the  
2 gallery as well?

3 DC [Capt LEAHY]: Yes, Your Honor.

4 MJ [Col McCALL]: Okay. That's fine.

5 DC [Capt LEAHY]: So earlier I told you my favorite part of  
6 this tweet was the first three -- the first three words. But when  
7 we're talking about the regulation itself, I'd like to point you  
8 straight to the wording that it gives. They cite to Chapter 19,  
9 Section 4.

10 So it's not as if the government doesn't know about this  
11 rule. It's not that it doesn't know its obligation. It just simply  
12 doesn't do it.

13 I'm done with the document camera for the moment, Your  
14 Honor.

15 MJ [Col McCALL]: All right.

16 DC [Capt LEAHY]: So looking at that rule, it discusses,  
17 again, the public release of transcripts, filings, rulings, orders,  
18 and other materials and explicitly lays out that 15-business-day  
19 security classification review period that we've been discussing this  
20 morning.

21 So right there, you know, taking -- you know, again, setting  
22 aside the Constitution, we have statutory and regulatory law that  
23 absolutely enshrines our client's rights to a public trial. And

1 those documents have been interpreted by appellate courts.

2 In fact, the United States Court of Military Commissions  
3 Review actually looked at a claim made several years ago by  
4 Mr. al Baluchi. That case was Ali v. United States. That's 398  
5 F.Supp.3d 1200. It was a 2019 case. And in that case the court did  
6 avoid the Sixth Amendment question of whether or not the Constitution  
7 applied, but it found that the only way that Mr. al Baluchi could  
8 have a -- could be provided a personal right to a public trial that  
9 is necessary was to comply with Hamdam v. Rumsfeld.

10 The only way to comply with the Supreme Court's ruling was  
11 to provide a personal right to a public trial. And in that ruling  
12 the court also found, as I've already mentioned, that R.M.C. 806  
13 applies and gives our clients that right.

14 Now, you and I are both military attorneys. So I do want to  
15 deal a little bit with military case law that I am certain, as an Air  
16 Force military judge, you have probably dealt with several times.

17 The first case I'm going to cite to you is United States v.  
18 Russo. It's at 1 M.J. 134. It's a 1975 case from the Court of  
19 Military Appeals.

20 In that case, there was a recruiter who essentially assisted  
21 a servicemember with fraudulent enlistment. So the servicemember had  
22 dyslexia and told the recruiter this. The recruiter said, hey, here  
23 are the answers you need to give so that I can get you enlisted,

1 because otherwise you wouldn't be able to enter because of  
2 this -- this condition that you have.

3 Later on, the servicemember is court-martialed. And at the  
4 court-martial, his defense counsel brought up this issue and said,  
5 look, the government failed to apply its own regulations when it  
6 allowed for our client to come into the military with this  
7 pre-existing condition.

8 The court in that case stated, and I quote: It is well  
9 settled that a government agency must abide by its own rules and  
10 regulations where the underlying purpose of such regulation is the  
11 protection of personal liberties or interests.

12 And in that case the court did reverse in favor of the  
13 servicemember and dismissed the charge.

14 Now, I'm certain that you have seen United States v. Russo  
15 several times, and it continued a line of cases that I have even  
16 dealt with in my own practice. I've had cases where the military  
17 judge has given -- has given credit for time spent in civilian  
18 facilities that did not comport with the Air Force regulations for  
19 pretrial confinement based off the Russo ruling.

20 I'll give you one more case just to kind of emphasize this  
21 point. I look at United States v. Dillard. This is 8 M.J. 213.  
22 It's a 1980 case, another Court of Military Appeals case.

23 In this one, it's the search of a private residence for

1 drugs. Drugs were found on the premises. But the search was  
2 undertaken by an oral search authorization. And at the time the Army  
3 regulation required that all search authorizations be reduced to  
4 writing.

5 So at trial the defense counsel challenged this and said,  
6 look, government's not following its own regulation. This search is  
7 improper. The appellate court overturned the conviction and  
8 dismissed the charges based on the Russo precedent.

9 So when we look at this commission, at this case, we know,  
10 as I've already laid out, that our clients have a personal interest,  
11 a liberty interest, in a right to a public trial, the same thing  
12 that's enshrined in the Sixth Amendment for our clients and the First  
13 Amendment for the public. This is an issue of personal liberty and  
14 personal interest, and the government has failed to follow its own  
15 regulations.

16 I'll tell you, I think Ms. Pradhan hit on this already, but  
17 I want to, in the Air Force parlance, foot-stomp this. AE 551I was a  
18 warning shot from the military judge. It was not a success story for  
19 the government. It was a warning to the government.

20 Judge Parrella looked at the government and said, hey, do  
21 your job, because you're not doing it right now. He didn't dismiss  
22 the case because it would be, quote, a windfall for the defense. And  
23 understandably, right? Dismissal is probably the most significant

1 tool that the military judge has.

2 So at the time Judge Parrella said, all right. I'm going to  
3 give you a chance, Government, to get this figured out, because they  
4 do -- our clients do have a public interest, a public right to a  
5 public trial.

6 But the government hasn't fixed itself. And Ms. Pradhan, I  
7 think, really, you know, hit that home earlier going through all the  
8 different findings. The government didn't heed its warning.

9 So I guess that leaves us with my last two points, which is:  
10 Why now? You know, why is the windfall appropriate?

11 So I want to talk about this case in its historical context  
12 next to give you a little bit of a reason as to why now might be  
13 appropriate.

14 So it's been said countless times that this is the largest  
15 investigation in FBI history. 9/11 is certainly one of the most  
16 significant and tragic events in American history.

17 Historical context matters when you're dealing with a case  
18 of this magnitude. We are a country that prides itself on our First  
19 Amendment rights to free speech and free press and our  
20 Sixth Amendment guarantee of a right to public trial. And there is  
21 no more significant trial than this one, yet the public barely hears  
22 any of it.

23 Given that, Your Honor, it's important to discuss history.

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1 How have these kinds of significant events been handled in the past?

2 The first example I'll give you is the Boston Massacre. In  
3 1770, five colonists were shot and killed by British soldiers. In  
4 the days that followed, eight British soldiers and their officer in  
5 charge were prosecuted for murder.

6 John Adams, who would become our second President of the  
7 United States, chose to defend all nine of them. Why would he do  
8 that? Well, John Adams believed in the right to a defense and to an  
9 attorney. That's a sentiment that I believe all the attorneys in  
10 this room, the defense attorneys in this room, can understand, that  
11 everyone has the right to an attorney.

12 But the Bostonians, they wanted all of the soldiers involved  
13 to be hanged. But through John Adams' advocacy at trial, the  
14 confusion in the crowd on the day was revealed.

15 Self-defense on the part of the soldiers became apparent.  
16 Of these soldiers charged, all but two were found not guilty. The  
17 two who were convicted were not convicted of murder, but of  
18 manslaughter, and, as a punishment, were branded on their thumbs,  
19 certainly not hanged.

20 You've likely heard that story, Your Honor, and I saw you  
21 nodding along. And I think the reason for that is probably because  
22 our previous judge advocate general, General Rockwell, often told  
23 that story.

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1           And he told it to prove a point, because there were no riots  
2 in Boston after that verdict. No act of retribution was taken on the  
3 part of the people of Boston. That was, in large part, because the  
4 media covered the trial and the transcripts were released to the  
5 public. The people of Boston were trusted with the truth that was  
6 revealed through a public trial of the facts.

7           Another historical example, or my second one, that I'd like  
8 to give you is to highlight the Truth and Reconciliation Commission  
9 of South Africa.

10           Between 1995 and 2003, the commission held open, public,  
11 televised hearings throughout South Africa about the horrors of the  
12 apartheid era and government.

13           Over 22,000 statements were taken from victims.  
14 Perpetrators were offered amnesty if they appeared before the  
15 commission to discuss their actions. Over 7,000 amnesty applications  
16 were received and over 25 amnesty hearings were held.

17           Now, I bring up this example not to question whether  
18 prosecution in our case is appropriate, but to highlight the public  
19 nature of South Africa's efforts to bring conclusion to the apartheid  
20 era. South Africa trusted itself and its people with the unvarnished  
21 truth of the horrors its own government perpetrated on its own  
22 people.

23           They weren't concerned with public -- with trials and

1 punishments. They were concerned with truth, however ugly that truth  
2 was.

3           Nothing could ever undo the violence that was done during  
4 apartheid, just like no verdict or sentence in this case will undo  
5 the loss of the victim family members of 9/11, that loss that they  
6 feel to this day.

7           But the truth, however ugly it might be, can provide some  
8 semblance of closure and catharsis. That's what South Africa gave to  
9 its people through the Truth and Reconciliation Commission and that  
10 is what this commission is denying everyone behind that glass back  
11 there and everyone back stateside in our country. That is what our  
12 clients are being denied, because the truth hardly ever escapes this  
13 courtroom.

14           Why have I taken the time to discuss historical events with  
15 you, Your Honor? Because this commission, whatever I might say or  
16 think about it as a forum, is significant.

17           Just like John Adams and the British soldiers, we will be  
18 talking about this case 50 or 100 years from now. If you do not  
19 dismiss this case and you allow things to continue as they have, the  
20 only thing anyone will say about this military commission is that the  
21 American government hid the truth from the American people.

22           Your Honor, the final point that I want to discuss is more  
23 factual in nature, and it's about how classification and privilege

1 have affected my client's right to a public trial.

2 In this case, the government frequently hides things. It  
3 hides relevant and necessary evidence from discovery for years. It  
4 hides evidentiary foundations behind classification and privilege,  
5 making it seemingly impossible for the defense to contest the  
6 authenticity of critical government evidence. That's basically been  
7 what we've dealt with for the last two and a half weeks with  
8 Ms. Waltz's testimony.

9 And, similarly, when the government makes quotes in their  
10 motions and arguments, they often hide significant parts of those  
11 quotes.

12 You see, Your Honor, the government is afraid, and nowhere  
13 is that clearer than in their original response to the base motion.  
14 So in AE 551A, the government quoted Justice Robert Jackson, the  
15 chief prosecutor of the Nuremberg war trials.

16 And so I'll quote their filing at page 10. They said  
17 Justice Robert Jackson acknowledged that an open and public trial of  
18 war criminals is, quote, of course bound to make a trial something of  
19 a sounding board for the defense.

20 The implication by that reference is that the government is  
21 afraid that our clients are going to walk into this courtroom and  
22 talk about how they were tortured at the hands of the American  
23 government. True, we have, many times over the course of a decade's

1 worth of litigation. But they were afraid of that. But that's not  
2 actually what Justice Jackson was saying.

3 If you follow the citation that the government gives you at  
4 page 10 of AE 551A, you'll get the full quote.

5 So starting at the next sentence, Justice Jackson actually  
6 said, quote: We all remember the war guilt trials which were begun  
7 by the Nazis and their collaborators in France. The court was at  
8 once put to the choice of suppressing the defense or of allowing the  
9 trial to become an instrument for disseminating the views of the  
10 accused. Any United Nations court who would try, say, Hitler or  
11 Goebbels, would face the same choice. That is one of the risks that  
12 are taken whenever trials are commenced, end quote.

13 The government has always feared what our clients would say  
14 in this forum, but that is a choice that they make when they brought  
15 us here.

16 Yesterday you heard Colonel Bearden tell us in a  
17 somewhat -- I'll try to put it appropriately, Your Honor -- a wild,  
18 speculative argument about how our clients have and always will be  
19 law of war prisoners until -- he said the word "forever." But that  
20 reflects the choice that the government made, right?

21 If the government had chosen not to prosecute our clients in  
22 this commission, they would still be here to this day. That's what  
23 he was telling you, is that they would be here forever, regardless.

1 So the government chose to bring us here. They assumed the risk of  
2 what might come out if this commission is truly a public trial.

3 Your Honor, we need look no further for proof that the  
4 government never intended for this to be a public trial than the  
5 classified evidence regime in the case. Why is it that the -- that  
6 the evidence that is helpful to the government continues to get  
7 declassified, downgraded or otherwise introduced publicly, while  
8 significant portions of what would make up the defense case remains  
9 highly classified.

10 Take, for example, the fact that I can now talk about phone  
11 calls that came before 9/11, when before that was incredibly -- that  
12 was incredibly classified. That's because the government now intends  
13 to use them.

14 Another example is a quote from Mr. Trivett from the 2nd  
15 **[sic]** of October in 2023. This is from the  
16 unofficial/unauthenticated transcript at page 38623.

17 He stated, quote: If we're intending to use classified  
18 information in the case in chief or at sentencing, that we -- well,  
19 they will be permitted to view that. We have certain instances. I  
20 can think of four or five documents where that might be the case.

21 Your Honor, amongst the tens of thousands of classified  
22 documents in this case, the government only intends to use four or  
23 five in their case at trial? Well, that's because all the evidence

1 that supports their case becomes declassified. The evidence that  
2 helps the defense does not.

3           How does this classified regime continue to cause damage?  
4 Well, not only does the government control what we see as the  
5 defense, but it controls what the folks behind the glass see. They  
6 control what narrative comes out of this courtroom. They control  
7 what the American public gets to know about this commission every  
8 day.

9           Your Honor, I am a security clearance holder, like all of us  
10 in this room. I have a duty to protect classified information, and I  
11 do. But I cannot deny -- and I'm sure that there are many others in  
12 this room that may feel the same way -- that I often contemplate  
13 whether or not the classified information in this case would truly  
14 cause grave harm to the United States if released or whether the  
15 classification of that information is just there to protect  
16 individuals and organizations within our government from  
17 embarrassment.

18           I often feel vindicated in having those concerns when  
19 witnesses are called and all of a sudden we enter the courtroom, the  
20 defense enters the courtroom, and the classified information that  
21 we've been preparing to use and 505'ing and all those things, well,  
22 suddenly if that evidence is helpful for the government, it's just  
23 magically been declassified overnight.

1           If the information was truly such a danger if publicly  
2 released, one night's difference would not change the classification.  
3 But we've seen that many times.

4           Your Honor, you'll recall at the last set of hearings in  
5 February and March of this year, my co-counsel, Lieutenant Xu,  
6 actually attempted to cut the feed when Mr. Trivett was questioning  
7 Ms. Waltz because he believed Mr. Trivett had revealed classified  
8 information. But the 45 seconds had already passed, and that, you  
9 know, really outstanding moment was just met with a shrug by the  
10 government.

11           Yet if we were to potentially stumble into such a thing, the  
12 hockey light's going off, the room's shutting down, we're having  
13 huddles over here. We're losing our minds because the defense might  
14 have let something slip. But Mr. Trivett does it and it's like, oh,  
15 well, okay, I guess that's declassified now.

16           I've sat in this courtroom and watched learned counsel for  
17 Mr. al Hawsawi, Mr. Ruiz, be stopped from discussing a legitimately  
18 unclassified piece of evidence in open court. On that occasion, I  
19 believe you, yourself, noted that you were frustrated, Your Honor.

20           I recall when Mr. Binalshibh was still attached to this  
21 case, that Mr. Bruck, his learned counsel, was talking about the  
22 medical conditions that plagued his client.

23           And if you look at the transcript from those proceedings,

1 the fact that his client had PTSD and that doctors had linked that  
2 PTSD to his treatment at the hands of our government, that's been  
3 redacted from the transcripts, Your Honor, but it was said in open  
4 court.

5 In closed hearings, we should purportedly be able to talk  
6 about classified information that has gone through the 505 process.  
7 Yet Your Honor knows, even there, we see invocation of privilege that  
8 stops us from discussing essential parts of this case.

9 Take this last week, for example, Your Honor. How many  
10 questions was Ms. Waltz actually able to answer in closed session?  
11 Because it wasn't about classification. It was about protective  
12 orders and privilege.

13 As it stands, this forum, with the government's assertions  
14 of classified evidence and privilege, provides a complete impediment  
15 to a public trial, despite your best efforts, Your Honor, to make it  
16 so.

17 Your Honor, I want to leave you with one final quote from  
18 Justice Jackson that the government did not give you. In the same  
19 speech that I quoted earlier, he said this, and I quote: I repeat  
20 that I am not saying there should be no trials. I merely say that  
21 our profession should see that it is understood that any trials to  
22 which lawyers worthy of their calling lend themselves will be trials  
23 in fact, not merely trials in name to ratify a predetermined result,



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1 end quote.

2 Your Honor, this military commission was never intended to  
3 be a trial in fact. It was created by the government for the  
4 explicit purpose of being a trial with a predetermined result, the  
5 death of our clients.

6 We have long since passed the ability for this to be a trial  
7 of facts. This is not a public trial, Your Honor. And you have the  
8 opportunity now to ensure that this case does not end in the  
9 government's predetermined result.

10 The government ignored the warning shot Judge Parrella gave  
11 them in AE 551I. Now is the time for the appropriate remedy, which  
12 is dismissal.

13 Subject to your questions, Your Honor.

14 MJ [Col McCALL]: No questions. Thank you, Captain Leahy.

15 DC [Capt LEAHY]: Thank you, Your Honor.

16 MJ [Col McCALL]: Any other defense teams?

17 Apparently not.

18 All right. Government, I'm not sure who is arguing this  
19 motion.

20 Mr. Dykstra?

21 DMTC [MR. DYKSTRA]: I've got lots of notes, Your Honor.

22 MJ [Col McCALL]: All right.

23 DMTC [MR. DYKSTRA]: And I'm not going to require a paralegal

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1 handing me documents, but I'll spread out a little bit here.

2 MJ [Col McCALL]: All right. Take your time.

3 DMTC [MR. DYKSTRA]: So there -- there's a lot to unpack, Your  
4 Honor, both from Ms. Pradhan and Captain Leahy. And I appreciate  
5 that Captain Leahy leaned on his Air Force JAG background a little  
6 bit, because it's something I'm familiar with as well, although it's  
7 been a while since I've practiced in a court-martial per se, although  
8 I'm trying to get back there.

9 We're here to try crimes that occurred on September 11,  
10 2001, to achieve justice for the 2,976 men, women, and children who  
11 died on that day. And that is often a lost thing in this hearing, in  
12 these proceedings. We often talk about these ancillary matters.  
13 We're talking about artwork someday, female guards, and so forth, and  
14 we're often talking about the accused treatment, rightfully.

15 But for us to be -- or for defense counsel to say that we're  
16 trying to cover up and that we're trying to hide from the public this  
17 kind of evidence, is just completely absurd.

18 This commission, and I point out the transcript at 32815,  
19 recognized that. And Captain Leahy wasn't around at that point in  
20 time, and he was probably off doing better things in our great Air  
21 Force.

22 But at that point in time, in response to Mr. Sowards'  
23 accusation that -- and I quote: This has everything to do with

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1 protecting people involved in the conspiracy to torture and to cover  
2 up the torture.

3 Judge Cohen said: Counsel, they did a really horrible job  
4 of covering it up when we had nine -- nine days of testimony on these  
5 allegations of torture, not to mention the hundreds and thousands of  
6 pages of these documents that you guys have on this issue.

7 We're not trying to hide from anything, Your Honor.  
8 The -- Mr. -- or Dr. Mitchell was on the stand for, I think, 14  
9 business days. And the public was all here. We had a couple hockey  
10 lights go off. But other than that, the public was here. The  
11 transcript's on the web, and -- but here we are.

12 Now, it's important to note that Colonel Cohen also  
13 recognized that we can have no spills. That -- that is our single  
14 number one goal. And that is the single number one goal motivating  
15 the people that are responsible for reviewing transcripts, for  
16 reviewing pleadings, and so forth. Do they make mistakes? Yes. But  
17 those are mistakes that they seek to remedy as quickly as possible.

18 Now, it's also important to note that federal courts do not  
19 have a policy of posting all filings to a publicly accessible website  
20 within a certain goal time frame. This is a goal that the Department  
21 of Defense put upon itself. And it's something that we take  
22 seriously and something that we are always trying -- striving to seek  
23 that goal.

1           Now, by the defense's own definition -- and, like I said,  
2 it's been a while since I've practiced in courts-martial -- but by  
3 their definition, no court-martial would be public.

4           For the longest time, at least when I was practicing as  
5 court-martial, we didn't post daily transcripts on the web. We  
6 didn't post -- or filings on the web. I think at some point in time  
7 the only way that the public could get access to a court proceeding  
8 was either get sponsored on the base or submitting a FOIA request for  
9 the record of trial. But those can't be public, according to  
10 defense's version.

11           So, Your Honor, what really brings us here? And I think,  
12 much like Ms. Pradhan did, I'm going to kind of take us back to the  
13 beginning a little bit, but I won't drag it out. I promise, Your  
14 Honor. You've heard a lot about the website. You're probably sick  
15 of hearing about the website at this point in time.

16           MJ [Col McCALL]: No, actually, I'm -- I mean, the reason I  
17 put this on the docket, not just that Mr. Connell was adamant about  
18 it, but it -- this is an issue I think that is somewhat unique to our  
19 commission.

20           So take your time. And I have reviewed the prior rulings,  
21 the prior pleadings, the transcript. So I think I'm pretty aware,  
22 but please take your time on this. I'm curious to see what you have  
23 to say.

1           DMTC [MR. DYKSTRA]: And I encourage you, if you have  
2 questions as I'm going through this, please feel free to interrupt  
3 me.

4           MJ [Col McCALL]: I will, but go ahead.

5           DMTC [MR. DYKSTRA]: So, Your Honor, what really brings us  
6 back is to February 2018. Defense counsel for Mr. Ali filed  
7 Appellate Exhibit 551A and, in doing so, requested basically what  
8 they're requesting now, that the commission dismiss the charges  
9 brought against him because the government has failed to provide a  
10 public trial.

11           And they advanced many of the same arguments that they've  
12 advanced now, that the general public continues to face logistical  
13 difficulties or near impossibility of traveling either to a single  
14 remote viewing site or to here to watch these proceedings, and that  
15 there were significant issues with the military commission website,  
16 specifically the postings of filings.

17           Now, Your Honor, when this motion was filed, we took it  
18 seriously. As much as the -- as much as the defense wants to cast  
19 aspersions against us, we took this website thing seriously, because  
20 ultimately, Your Honor, the government is committed to a public trial  
21 in this case that complies with the law while satisfying all the  
22 rights to an open proceeding and, importantly -- and I think this is  
23 lost sometimes -- safeguarding information vital to national

1 security.

2 Now, Your Honor referenced that he had read all the  
3 pleadings, and I won't recite all those pleadings and the history and  
4 stuff like that because, frankly, having read the pleadings last  
5 night, it's lengthy.

6 But I would just draw Your Honor's attention to our  
7 arguments in 551A, 551E, 551G, as well as the  
8 unofficial/unauthenticated transcript pages at 18947 through 18958,  
9 19948 through 19955, 19957 through 19959, 21414 through 21427, and  
10 21435 through 21436.

11 Now, that was a mouthful, but that demonstrates the amount  
12 of litigation that this issue has created and the amount of  
13 litigation the commission has already heard on this matter.

14 Now, Your Honor, ultimately, after hearing the  
15 commission's -- all the parties' arguments and weighing the law, the  
16 commission issued 551I on December 2018, about -- approximately two  
17 years before -- or approximately one year before the global pandemic  
18 hit us.

19 Now, I think there is a saying that if no party is happy  
20 with a ruling, you are doing your job, and that very might apply to  
21 Judge Parrella's ruling in 551I.

22 Within its ruling, the commission made a number of findings  
23 which consisted of what we view as valuable feedback on the

1 administrative process underlying these proceedings.

2           Notably, and as alluded to by defense counsel, the  
3 commission found that while a majority of the unclassified filings  
4 and unofficial transcripts of open proceedings have been posted to  
5 the OMC website, compliance with the timelines established by the  
6 R.T.M.C., at least as to filings, has since at least 2017 been the  
7 exception rather than the rule. Likewise, a significant number of  
8 filings remain unpublished.

9           As to unclassified filings, compliance with the requirement  
10 to publish redacted versions has been virtually nonexistent,  
11 notwithstanding a previous order from this commission directing the  
12 government to comply with its own regulations in this regard. And  
13 that is a quotation from 551I ruling at 3 and 4.

14           Now, obviously this was not something that was easy to hear,  
15 easy to read for the government. But it was also something that we  
16 couldn't deny. It was -- because it was true. We needed to put  
17 better places in process -- or processes in place to get information  
18 in this case efficiently provided to the public.

19           But even while providing this constructive feedback, the  
20 commission made some important findings that are relevant to the  
21 motion before Your Honor that brings us here and which I'll discuss  
22 in a moment. And these are quotations that the defense didn't bring  
23 up in their argument.

1 First, and contrary to what Ms. Pradhan may have alluded to  
2 before, the commission found that these proceedings have been, and I  
3 quote, sufficiently public to satisfactory the purposes set forth in  
4 Waller v. Georgia, 468 U.S. 39, 1984.

5 Second, applying the factors in United States v. McGraner,  
6 13 M.J. 408, a CMA case from 1982, it is clear that the request for  
7 remedy of dismissal is neither required nor advisable because, as  
8 Judge Parrella said at that point in time, it is clear that the  
9 regulation did not intend to invest day-to-day administration of  
10 R.T.M.C. in an ongoing commission.

11 He basically said people need to do their jobs. It's not  
12 for this commission to involve itself with it.

13 Dismissal was also not required or advisable, because it is  
14 clear that the regulation, the R.T.M.C., was drafted to serve  
15 primarily administrative purposes. And while the rights of the  
16 accused were a consideration, they were not the primary purpose  
17 motivating the provision.

18 He went on to say: It is clear that the accused requested  
19 remedy of dismissal is disproportionate and would result in a  
20 windfall and would deter the well-intentioned effort to promulgate a  
21 regulation aimed at achieving a laudable level of transparency.

22 Further, there is no indication that any accused have  
23 detrimentally relied on the regulation. And the R.T.M.C. provisions



1 are clearly a determination to provide greater transparency than that  
2 required by the MCA, an admirable undertaking for which the  
3 government should not be punished.

4           Went on to say: It is clear that the public access  
5 provisions of the R.T.M.C. were not intended to and do not create  
6 enforceable rights by any accused -- and I'll discuss that a little  
7 bit later, as that is a direct quote from the R.T.M.C.

8           They represent an administrative scheme for the handling of  
9 records and, as such, should generally be enforced by those assigned  
10 that responsibility per the regulation itself. And, importantly, the  
11 failure to post a particular document to the OMC website within a  
12 given timeline or to adhere with other timelines set forth within  
13 R.T.M.C. 17-1 or 19-4 will not in itself constitute a basis for  
14 substantive relief.

15           Now, Ms. Pradhan kind of drew attention to the "in itself"  
16 portion of it. And she said, well, when you look at -- look at the  
17 situation in total, that -- that creates a bigger issue, but that was  
18 the issue that was before the commission then. It's the same  
19 argument they are making now.

20           Now, having provided both its constructive feedback and  
21 praise in attempts to achieve a laudable goal of transparency, the  
22 commission implemented certain measures to make certain processes  
23 more efficient. And those are the processes that we've -- we have

1 taken on.

2 We have prioritized the classification security review and  
3 public posting of docket and scheduling orders, other commission  
4 rulings and orders, and filings associated with an upcoming session  
5 of court and other filings or transcripts as directed by the  
6 commission.

7 Now, earlier Ms. Pradhan referenced that one of my  
8 colleague's pleadings was not even posted on the website. I believe  
9 it was Appellate Exhibit 876. I confirmed -- and I did  
10 confirm -- that that entire series is, indeed, posted on the website.  
11 It was available for the public to review in advance of  
12 Colonel Bearden's argument.

13 Next, the commission ordered for those filings requiring  
14 classification review, the commission directs the chief clerk to  
15 promptly, upon acceptance, deliver such filings to the DoD SC/DRT.  
16 If the classification review cannot be completed within the  
17 R.T.M.C.'s timeline, the appropriate non-DoD federal department of  
18 agency original classification authority, or the OIC of the DoD  
19 SC/DRT, will submit an appropriate notification to the chief clerk in  
20 accordance with the R.T.M.C. 19-4.

21 So when we're talking about this 15-business-day review  
22 period, does every filing have to take place in that time period?  
23 No. But much like the commission issued in 551I, R.T.M.C. also

1 allows DoD SC/DRT to submit a notice to the chief clerk that a  
2 particular filing may take a little bit longer than the 15 business  
3 days.

4 Did you have a question, Your Honor?

5 MJ [Col McCALL]: No question.

6 DMTC [MR. DYKSTRA]: All right.

7 MJ [Col McCALL]: Continue on.

8 DMTC [MR. DYKSTRA]: So, Your Honor, you may be asking  
9 yourself what brings us here? How are we litigating the exact same  
10 motion that we were six years ago? And you need to look at the  
11 timeline a little bit, Your Honor.

12 The commission issues 551I in December of 2018. We  
13 then -- it -- it's a good order. It issues some good, constructive  
14 feedback, and it puts some processes in place. But those processes  
15 aren't going to change overnight. They're not going to change  
16 everything overnight, at least.

17 This is a huge record. We are now up to -- what? -- 950  
18 filings? And that's just appellate exhibit series, that's not all  
19 the underlying filings. And then the transcript itself is 30,000  
20 pages.

21 So it's not like something was going to change overnight.  
22 But the processes put in place steer the ship towards a different  
23 direction.

1           So that was issued in 2018, roughly around 20 -- beginning  
2 of 2020, pandemic hits in place. At the end of 2020, they file this  
3 motion highlighting both filings before and after 551I.

4           So what brings us here? Well, Your Honor, despite the  
5 commission's findings that dismissal of charges is inappropriate and  
6 the failure to post a document on the OMC website within a given  
7 timeline would not constitute a basis for substantive relief, Mr. Ali  
8 filed the exact same request two years after not getting what they  
9 wanted in 551I.

10           They do so, they did so, without raising any new law or any  
11 different facts to support it. Instead, and as referred to in our  
12 motion, they cherry-picked certain pleadings filed both before and  
13 after 551I to make their point, to argue that the circumstances were  
14 then somehow changed.

15           But what they do not acknowledge -- and perhaps they don't  
16 have the insight to know -- is that things have only gotten better  
17 with regards to posting things to the website.

18           In 2021, DoD SC/DRT reviewed approximately 371 filings in  
19 this commission, both in this commission and associated cases at the  
20 U.S. -- the U.S. Court of Military Commission Review.

21           Now, it is important to keep in mind that this was in the  
22 aftermath of a global pandemic, when there was still, at times,  
23 limited occupancy in U.S. Government spaces.

1           Now, when we forward to 2022, SC/DRT reviewed approximately  
2 489 filings, a 31 percent increase over the year prior. Last year, I  
3 can report, Your Honor, that they went above and beyond even that and  
4 reviewed 640 filings, another 31 percent increase year over year.

5           It is important to note, and consistent with this  
6 commission's prior order in 551I, as well as the R.T.M.C., that these  
7 numbers do not include filings that are now directly posted to the  
8 website. Some of them do not require security classification review  
9 and go directly to the webmaster from Your Honor's offices. So the  
10 number of filings that are actually being posted every year are  
11 growing exponentially.

12           Now, does this mean that all pleadings are being posted  
13 within 15 business days? As I said before, the simple answer is no.  
14 But that is also not required under the regulation.

15           As attested by the OIC of DoD SC/DRT back in December 2020,  
16 and this remains true today, SC/DRT either returns a filing to the  
17 chief clerk within the 15 business days or provides the chief clerk  
18 notice that more time will be needed for a particular pleading. It's  
19 consistent with the requirements established within R.T.M.C. 19-4.c.2  
20 and 551I. And, thus, the government is in compliance with both the  
21 regulation and Your Honor's orders.

22           Now, admittedly, DoD SC/DRT is focused on filings going  
23 forward. As all parties have experienced -- and I think either it

1 was Captain Leahy or Ms. Pradhan commented, we maintain a very  
2 vigorous litigation schedule. Pleadings are being filed every day,  
3 sometimes consisting of hundreds, if not thousands, of pages.  
4 There's notice of exhibits that are 3-, 4,000 pages. And we're  
5 continuing to take testimony every single day that only the  
6 transcripts grow and grow and grow and grow. That requires work.

7 Because those are the filings and the transcripts that are  
8 currently being litigated or discussed during proceedings, consistent  
9 with the priorities established by the commission, DoD SC/DRT reviews  
10 those items first.

11 As such, and what Ms. Pradhan will probably highlight when  
12 she submits her revised chart, there are probably a higher number of  
13 issues with websites posting before the commission issued 551I.

14 But, Your Honor, that does not mean that the prior 551I  
15 filings have been forgotten. Rather, as alluded to in the  
16 December 2020 OIC declaration, DoD SC/DRT was coordinating with the  
17 other agency OCAs that possess the 551 -- pre-551I filings to  
18 facilitate completion of their security review.

19 Further, in preparing for this argument, I have also learned  
20 that DoD SC/DRT has been working with either the trial judiciary or  
21 the Office of Court Administration on receiving filings that were  
22 created prior to the issuance of 551I; and that while not all filings  
23 have been sent, each new batch of filings that they receive from the

1 Office of Court Administration or Your Honor's offices  
2 can -- receives -- contains some filings prior to 551I for their  
3 review.

4 So work is being done, Your Honor, to correct any current  
5 shortcomings highlighted by Ms. Pradhan; hard work, very tedious  
6 work. But these shortcomings do not constitute a basis for  
7 substantive relief, as the commission has already determined.

8 And that is where my argument largely ends. Because while  
9 the defense seeks to conduct an audit regarding an administrative  
10 process unrelated to what brings us here, a fact that I think  
11 sometimes gets lost, the Regulation for Trial by Military Commission  
12 provides no enforceable rights for the accused.

13 Paragraph 1-1: This regulation is not intended to and does  
14 not create any substantive right enforceable by any party.

15 In the end, these proceedings are sufficiently open and  
16 transparent by any legal definition as recognized in 551I, and the  
17 government is in compliance with both the R.T.M.C. and 551I. Given  
18 this, the government requests that you deny the defense motion.

19 Now, Your Honor, I presume you have some questions as you  
20 alluded to Ms. Pradhan, and I'm happy to field those.

21 MJ [Col McCALL]: All right. Yeah, a few questions.

22 So I'll just put it out there. Yeah, I understand the  
23 position that you've presented as far as any, you know -- how the

1 R.T.M.C. is supposed to be viewed in any type of rights that might  
2 be, you know, created by that.

3 But the R.T.M.C. is there for a reason, right? To help us  
4 with our process. There's reasons that those standards were put out  
5 there.

6 DMTC [MR. DYKSTRA]: Uh-huh.

7 MJ [Col McCALL]: And when I review the redactions in the  
8 transcript and when I see the amount of time for the documents to get  
9 posted, it does trouble me.

10 So my question to you is: Is this a resource issue? Is  
11 this a -- I mean, where exactly is -- is the problem? Like, what is  
12 causing it? Is it manpower?

13 I understand COVID and that happened, and I understand the  
14 volume of what we put out, and I understand the pace that we're  
15 currently going. But those can't be proper responses.

16 And I feel like 551I was probably Judge Parrella's attempt  
17 to get a little bit more information flowing to understand what some  
18 of the delays were. It doesn't seem like it's maybe accomplished  
19 what it was looking to accomplish.

20 I mean, maybe things have improved. I don't know. It's  
21 hard for me to say from just looking at particular filings that are  
22 brought to my attention.

23 But what is the government's position? I mean, is this a



1 resource issue? Is this something that we need more oversight of?

2 Again, I'm trying to stay within my lane, but part of my  
3 lane is making sure that this is a public proceeding. And, again, I  
4 appreciate you raising the issue of how federal courts may do this in  
5 CONUS or how courts-martial might do -- handle pleadings and  
6 transcripts. But we're in such a unique position, again, because of  
7 the nature of having to do these cases down at GTMO.

8 So go ahead. So what do you -- and if you think there's  
9 nothing that can be improved with the process, all right, that's  
10 fine, but let me know what the government's position is on that.

11 DMTC [MR. DYKSTRA]: No. And, Your Honor, I'm glad you  
12 brought that up. It was a point that wasn't in my argument, but it  
13 was something certainly I was prepared for.

14 Let me just start off with the -- obviously, there is  
15 logistical difficulties getting down here at Guantanamo. But the  
16 government also facilitates closed circuit television sites that no  
17 other court in this country really does.

18 So whether or not somebody can get down here or get to a  
19 closed circuit television, that's consistent with federal courts in  
20 the country, as far as you have to go to the courthouse to hear  
21 proceedings. You have to go to the CCTV site or here to hear  
22 proceedings.

23 MJ [Col McCALL]: Sure.

1           DMTC [MR. DYKSTRA]: And so that aside, that minute very  
2 difference aside, what we're talking about is just either a  
3 difference between PACER and the mc.mil website. One you have to pay  
4 for and one is provided free of charge by the U.S. Government.

5           Now, that doesn't answer your question. What I will say is  
6 that, as I alluded to in my argument, the number of filings that are  
7 undergoing review and that are being processed for review is growing  
8 exponentially; 30 percent is not a small number.

9           What I can say is, and what I learned this morning is, that  
10 capacity to process filings is going to be growing. People are  
11 actually being hired to bring on more capacity. Because while this  
12 commission is going on, we also have other commissions going on that  
13 are also processing paperwork. So there is a recognition of the need  
14 to grow capacity, whether or not for this commission, just across the  
15 enterprise.

16           So what I will say is I expect that number to continue to  
17 grow.

18           Now, also in preparing for this argument, I  
19 understand -- well, and Ms. Pradhan highlighted -- one aspect of this  
20 process that I think is perhaps maybe overlooked a little bit and  
21 which may assist in limiting the delta between issues with the  
22 website and what's going through SC/DRT and that process, is that  
23 with regards to the transcript that she alluded to, SC/DRT processed

1 that within eight days.

2 It was then sent to somebody and sat in their inbox for  
3 maybe, I think, 20 days by the time I learned of it. As soon as we  
4 inquired, after they inquired with us, that's what we learned what  
5 happened.

6 Now, that -- in discussing with the OIC of DoD SC/DRT, I  
7 think that's a process. After it leaves their office, after it  
8 undergoes review, there is a blind spot, I think, from -- from the  
9 time that it goes from SC/DRT to the chief clerk to the webmaster.

10 So what I think would be helpful and what I spoke with the  
11 OIC and propositioned -- or not propositioned her, because that would  
12 be the incorrect word -- proposed to her -- strike that from the  
13 record. She will be very mad with me -- proposed to her is on maybe  
14 a quarterly basis for somebody from her office and somebody -- the  
15 webmaster and the chief clerk, to kind of run through the pending  
16 items that are currently outstanding on the website to kind of level  
17 the bubble of where -- where things are.

18 This will identify if things are lost in the process  
19 or -- or kind of create more continuity between -- between the review  
20 process and the posting process.

21 MJ [Col McCALL]: No. I mean, that's actually -- one of my  
22 next questions was: I mean, is there something like that? Again, I  
23 think those of us in the Air Force know stoplight charts and some of

1 the pain of that. But there is something to be said for how that  
2 forces accountability on things that should have timelines.

3 DMTC [MR. DYKSTRA]: I won't say -- like, I'm going to stay  
4 away from timelines, but at least I think it will eliminate things  
5 that fall through the cracks.

6 And a lot of the items I will -- I will -- I think this item  
7 with the transcript kind of highlighted for me that -- that the need  
8 to create more processes on the -- on the website posting process.  
9 Because all the equity-holders have a tracking mechanism to see where  
10 things are in their process, but after it goes out, they kind of lose  
11 track of it completely.

12 So I think it's that -- and I think this commission, I  
13 believe this commission established DoD SC/DRT is a central kind of  
14 hub for all the classification review. I think having a meeting on a  
15 quarterly basis where they -- they have a spreadsheet and they walk  
16 through what's going on and where things are -- pardon me -- and  
17 then -- I've already been commented that I use my hands too  
18 much -- and then chief clerk can all get together and kind of figure  
19 out where things are. I think that would be kind of a forcing  
20 mechanism for a lot of things.

21 MJ [Col McCALL]: All right. I'm going to continue to think  
22 about some of these potential remedies as far as, like, processes  
23 that, or at least review of the processes that could try to improve

1 how we're doing the transcript review and the document review.

2           So here's one question that I have: As I look at the  
3 transcripts -- and, again, so I rely on this. I mention all the time  
4 how I spend quite a bit of my time reviewing the transcript, prior  
5 transcripts, trying to deal -- figure out these issues that are still  
6 pending and how they've meandered their way through the commission.

7           But I have some of the same concerns that Ms. Pradhan  
8 raised, that I see certain redactions that don't make any sense to  
9 me. And, again, I'm not sure -- what's the problem going forward  
10 with having SC/DRT have a code, something that tells me why they're  
11 redacting? Is this classified? Are they saying this is CUI? Are  
12 they saying this is Privacy Act? Like what -- because, again, I look  
13 at some and I'm -- I'm just completely befuddled on why it's being  
14 redacted.

15           DMTC [MR. DYKSTRA]: Yes, sir. And I also appreciate you  
16 bringing it up -- that up as well.

17           As you said, we can't conflate unclassified with FOUO.  
18 Because this -- it's one thing if it's mentioned in the  
19 courtroom -- and this is mentioned in the DoD SC/DRT declaration as  
20 well. It's one thing if it's mentioned in this courtroom, whether it  
21 be LES or FOUO. It's another thing if it's posted on an enduring  
22 website that -- and I use this term loosely -- our adversaries can  
23 mine that particular information and try to link two pieces of FOUO

1 information and, all of a sudden you've got Secret classified  
2 information.

3 So that's -- that's part of the calculus. And it -- it was  
4 also brought up by Captain Leahy regarding redacting of the diagnosis  
5 of Mr. Binalshibh.

6 Well, after he signed a release of -- for his -- a Privacy  
7 Act release regarding HIPAA, we provided an updated copy of that  
8 transcript to Mr. Bruck with all the redactions removed. So when  
9 we're contacting -- when the processes are followed, that stuff is  
10 easily corrected.

11 Now ----

12 MJ [Col McCALL]: And the reason I raise it is it does seem  
13 like those of us who deal with CUI and FOUO know how maddeningly  
14 vague the guidance is for what falls under that.

15 And, again, not knowing who at SC/DRT are making some of  
16 these decisions, I think it would be helpful for the -- for me and  
17 the parties to be able to know the difference on why exactly  
18 is -- again, it kind of goes to Ms. Pradhan's point on -- you don't  
19 hear me complain too often about the changing classification  
20 guidance, because I understand why that is, I think.

21 But when you have classification guidance that is shifting a  
22 bit as the case develops, it's hard, then, to go back and try to  
23 figure out, well, something that was used in open court, now why is

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1 it behind a redaction without further guidance from SC/DRT.

2 DMTC [MR. DYKSTRA]: Absolutely.

3 MJ [Col McCALL]: And if they are making that determination  
4 when they are making the redaction, it doesn't seem hard to, then,  
5 say, you know, put in a code, something that says what the basis was.

6 DMTC [MR. DYKSTRA]: Your Honor, I think that's a great  
7 suggestion. If you would allow me to go speak with the  
8 equity-holders to see how in the realm of possibility that is. I  
9 think it's -- I think it's within the realm of possibility, but I  
10 just want to see if that's something that they would just voluntarily  
11 agree to do going forward, so...

12 MJ [Col McCALL]: Understood.

13 And I think that what I'm inclined to do -- don't hold me to  
14 it -- is I will probably put something out saying I want further  
15 information on certain matters. And I'll get some more briefings  
16 from the parties on it, and that will give you chance to go and get a  
17 little more data from SC/DRT.

18 DMTC [MR. DYKSTRA]: Thank you, Your Honor.

19 MJ [Col McCALL]: All right. I think that's all the questions  
20 I have.

21 Anything else from the questions I had that...

22 No? All right.

23 DMTC [MR. DYKSTRA]: No, Your Honor. Thank you.

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1 MJ [Col McCALL]: All right. Saved rounds, I'll let the  
2 defense respond. I know y'all know that I try to stick to the  
3 schedule on lunch and prayer time, but we'll go late a little bit.

4 ADC [MS. PRADHAN]: Yes, sir, and I'll try to keep this  
5 relatively short.

6 MJ [Col McCALL]: Take your time.

7 ADC [MS. PRADHAN]: I just have a few comments and then a  
8 couple of suggestions that I might cosign.

9 The first -- the first comment I just wanted to make is I  
10 think I heard Mr. Dykstra say, I think, that safeguarding information  
11 vital to national security is a priority that, quote, gets lost  
12 sometimes.

13 And I just want to be -- I just want to make our position  
14 very clear on the record that I -- I don't think that gets lost ever.  
15 I think that that is to -- certainly to the public, and it certainly  
16 seems sometimes in this courtroom, that that is the priority above  
17 everything else that is going on in this courtroom.

18 And I'm -- I don't want to diminish the importance of that  
19 goal. But at the same time, when we're looking at -- when everyone  
20 here is doing their best to abide by those rules, you know,  
21 submitting things ahead of time, conferring constantly, dealing with  
22 the shifting classification guidance, just seems manifestly unfair to  
23 say that safeguarding information vital to national security gets

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1 lost in any of these processes.

2 I could have moved forward with the Echo II orientation  
3 without consulting with the government based entirely on unclassified  
4 and FOUO information that has been turned over to us. We chose not  
5 to do that because we wanted to make sure that we weren't going to  
6 stray, that we could safeguard everything. It is still a site that  
7 is being used.

8 And, you know, as much as I disagree with some of the things  
9 that JTF says, we wanted to make sure that it was -- that what we are  
10 going to say was in compliance with the security considerations now  
11 that JTF has. So ----

12 MJ [Col McCALL]: The defense is very conscientious on the  
13 security classifications and safeguarding that information and  
14 working with the government to -- I'm actually pleasantly surprised  
15 how few red lights we end up getting as we're dealing with these  
16 matters.

17 But go ahead.

18 ADC [MS. PRADHAN]: Well, and your point about, sir, about how  
19 few red lights we get is actually interesting, because my second  
20 point was about the timeline that Mr. Dykstra highlighted.

21 Now, we went through some of Judge Parrella's findings, and  
22 one of the findings was that proceedings are sufficiently public,  
23 right? And that finding was made in 2018. And there was a reason

1 that we went through some of the timeline in my initial comments,  
2 because that was 2018.

3 These proceedings began in 2012. 2018 is now the halfway  
4 point in these proceedings. We are now double that distance from  
5 where we were at the beginning.

6 So to say that we are now making the same argument is not  
7 really accurate. It's a much weightier argument now because in the  
8 intersuing **[sic]** -- if that's a word -- the ensuing six years, we  
9 have been through five years of the motion to suppress, which is  
10 arguably the most important issue that we have ever litigated here.

11 To say 551I was not going to change things overnight, really  
12 no one asked for an overnight solution. Nobody thought anything was  
13 going to happen overnight; that's why it took us two years to file  
14 the follow-up motion to reconsider. And it's taken us another -- in  
15 the intervening four years, they were put sufficiently on notice, I  
16 think, about the continuing violations of 551I.

17 When I hear the government say we put forward new facts, all  
18 I did for an hour this morning is put forward new facts that have  
19 come forth since we filed 551P in 2020.

20 The -- and, you know, Mr. Dykstra said in 2023, the SC/DRT  
21 reviewed something like 600 filings, and that was up 30 percent from  
22 the year before. That is much appreciated.

23 I don't -- you know, again, I don't want to diminish the

1 hard work of people at the SC/DRT, but this -- it raises -- it echoes  
2 an argument that the government makes very often with regards to  
3 discovery, and that is throwing numbers at the military commission  
4 and at us to say look how much work we're doing.

5 The numbers are, frankly, not relevant. It's the quality of  
6 what is being made public that is relevant. It is the ability of the  
7 public to follow the proceedings that is relevant, not the number of  
8 things that are being posted up on the website.

9 So, yeah, you know, the number can be indicative of some  
10 things, but there's a reason we have to go through and look at what  
11 is being redacted, what is being -- what is -- what is still being  
12 withheld six, seven, eight years later.

13 And this -- you know, that also goes to the point about the  
14 CCTV thing, right? I mean, yes, of course we do have CCTV feeds to  
15 the United States, but that's because the United States chose to hold  
16 this proceeding at Guantanamo Bay instead of federal court, which  
17 they could have done. That was their choice.

18 So -- and it is incumbent on them. It is their  
19 responsibility to provide the public trial. It is the least they can  
20 do to have those feeds, and those feeds weren't put in place until  
21 just a few years ago.

22 So I don't think that's really indicative of anything, other  
23 than the fact that, what I highlighted, which is that there is still

1 this massive disconnect between what the media and observers here and  
2 the media and observers up there see live, or relatively live, in  
3 front of them and what the rest of the public then hears or sees  
4 pursuant to the redacted transcripts later.

5 We have had instances where people up north are in -- at  
6 Fort Meade or at the Pentagon watching, and they say, hey, this  
7 really interesting happened. We have interns, we have other people,  
8 family members who sometimes go to watch. Hey, this really  
9 interesting thing happened. You know, this was said or this comment  
10 was made. And they wait for the transcript, and it is entirely  
11 redacted. That's an issue.

12 So, you know, let me -- let me make a couple of suggestions  
13 that may overlap, I think, with what you talked about with  
14 Mr. Dykstra.

15 The first suggestion -- and with the understanding that, you  
16 know, I heard the government say the single number one goal is  
17 preventing spills, and that is perhaps a little bit more honest than  
18 the line about safeguarding information vital for national security  
19 gets lost sometimes.

20 It is true, I think, that the single number one goal is  
21 preventing spills, and we should all be united in that goal, whether  
22 it gets lost or not.

23 But with that in mind, I think there needs to be an

1 accounting for the resources that have been committed to both posting  
2 on the website and declassification of classified motions and the 806  
3 transcripts.

4 I don't know if we necessarily need to know, but there needs  
5 to be some sort of accounting of exactly how many people are doing  
6 this, exactly -- you know, and on what kind of timeline. And I was  
7 encouraged to hear that there are more people being hired for this;  
8 but, again, this is on several years' notice and we are still today  
9 having these issues. So it's not tremendously encouraging. I think  
10 there needs to be some sort of accounting on that.

11 There also needs to be accountability from the  
12 equity-holders with time limits. It should not be the case that the  
13 CIA can sit on a motion for seven years and, you know, without any  
14 sort of accounting for that, and perhaps -- you know, perhaps a  
15 conversation with the military commission about it.

16 I heard -- I heard that -- I heard Mr. Dykstra say that the  
17 equity-holders do have some sort of monitoring ability to where these  
18 are in their process, like where these filings are in their process.  
19 I took that to mean that they are able to monitor, like, whether it's  
20 been reviewed for the ability of posting. And he can certainly  
21 correct me if that's not the case.

22 But so then they should have perfect visibility on how long  
23 some of these have been in the pipeline, and somebody should be

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1 engaged with either the military commission or the government on when  
2 that can be -- these filings can be expected to be posted.

3 And I certainly cosign the suggestion that redactions of  
4 unclassified documents and 803 transcripts -- and even 806  
5 transcripts to a certain extent, but certainly 803  
6 transcripts -- should require explanations.

7 We -- apparently early postings on mc.mil before the second  
8 iteration of this case did include redaction codes, and there just  
9 seems to be no reason why that should not be the case now at least to  
10 us, to the clearance holders -- right? -- who have to then take that  
11 information and use it in the future, right? The redaction codes are  
12 not going to mean a whole lot to the general public, but they do to  
13 us.

14 And I will just say it is our position that that should not  
15 be voluntary. That should come from an order from the military  
16 commission because, I'm sorry to say, I think the overall evidence  
17 from -- or overall practice post-551I shows that without -- even with  
18 such an order, it has been extraordinarily difficult to see any proof  
19 of compliance. And so without an order, I do not believe it will  
20 happen.

21 The one last -- well, let me just say on that, in an ideal  
22 world -- and I recognize we do not live in one, nor are we sitting in  
23 one -- the only explanation for something missing from the website

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1 after a certain period of time of 15 days that the military  
2 commission has ordered, should be that someone has submitted a notice  
3 in compliance with the order and that the military commission has  
4 accepted that explanation.

5 Like, we should be able to trust that it's not sitting in  
6 someone's inbox for 20 days, it's not being redacted haphazardly out  
7 of compliance with other classification guidance. That really should  
8 be -- all parties should be able to understand that that is the only  
9 reason that something is missing.

10 You know, the issue of conflation of unclassified with FOUO,  
11 I just briefly want to hit that. I mean, that -- for example, with  
12 the examination of Colonel Jemmott, there was no conflation being  
13 made. I was asking about straight unclassified paragraphs, just the  
14 Us. There were no FOUOs. I understand the difference.

15 And that does -- as Your Honor mentioned, it does implicate  
16 an entire gray area for us. Sometimes FOUO stuff is unredacted;  
17 sometimes it is redacted. An explanation on that would be enormously  
18 helpful for us going forward. That it's not -- it's not that we  
19 can't use it in the future, it's not that it's necessarily now  
20 Secret, it's that it's FOUO. And I can bring it up again in open  
21 session if I need to.

22 All right. I think that is largely what I have, unless you  
23 have any questions.

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1 MJ [Col McCALL]: No questions. Thank you, Ms. Pradhan.

2 ADC [MS. PRADHAN]: Thank you.

3 MJ [Col McCALL]: Captain Leahy?

4 DC [Capt LEAHY]: I am painfully aware, Your Honor, that we  
5 are right before lunch. So I'm going to try to keep this ----

6 MJ [Col McCALL]: That's fine.

7 DC [Capt LEAHY]: ---- as concisely as I can.

8 I'm going to highlight a couple of things that Mr. Dykstra  
9 said that we would like to address. The first is that he said that  
10 the regulation, the 2011 regulation that promulgates this 15-day rule  
11 was a goal that the DoD put on itself.

12 And I absolutely agree that that is a goal that the DoD put  
13 on itself, just like any other regulation that the DoD puts on itself  
14 should be followed, and that's why the Russo line of cases that I  
15 highlighted exists. Because if the government creates these  
16 regulations for itself, it is expected to follow them, just as I, an  
17 officer in the Air Force, am expected to follow the UCMJ and the  
18 orders of my superior officers. If I don't, I am punished. That's  
19 the point.

20 And so if they didn't want to -- if they didn't want to have  
21 this rule, they shouldn't have created it. But now that it's there,  
22 we, as the defense, do get to look to that Russo line and say, Your  
23 Honor, they don't follow their own regulations.

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1           So I a hundred percent agree with Mr. Dykstra. It is a goal  
2 they put on themselves, and now they have to take the lumps with that  
3 as well.

4           He also mentioned, as the prosecution often does, Judge  
5 Cohen's statements about how poorly the government hid the evidence  
6 of torture. And they brought up specifically that Dr. Mitchell had  
7 testified for days and days, weeks.

8           That's true, but consider that in the vacuum that it is,  
9 Your Honor. The only RDI witnesses that they have offered up to us  
10 virtually is Dr. Mitchell and Dr. Jessen.

11           The entire purpose of classification in this case, the  
12 entire purpose of the prosecution in terms of what evidence they are  
13 putting forward, is to protect the CIA torturers and never bring them  
14 in this room.

15           You're never going to see them, Your Honor. [REDACTED]

16 [REDACTED] They're not  
17 going to be on that witness stand.

18           Dr. Mitchell and Dr. Jessen were essentially patsies, right?  
19 They made millions of dollars. They were protected by  
20 indemnification, as we've discussed in this court. And so now the  
21 government says, all right. For fear of having this case dismissed  
22 because the defense can't talk about what happened to their clients  
23 in the black sites, we'll give you Dr. Mitchell, we'll give you

1 Dr. Jessen, but we aren't giving you anyone else.

2 And Your Honor has heard a lot of evidence about the torture  
3 that our client, Mr. Mohammad, suffered through. And Dr. Mitchell  
4 and Dr. Jessen were not the only people in that room, or in those  
5 rooms.

6 You've also heard from our -- from the defense teams for our  
7 co-defendants that Dr. Mitchell and Dr. Jessen weren't the torturers  
8 for some of the other defendants. And yet we're supposed to bring  
9 all of the evidence about the RDI program and isolate it through  
10 these two people? That's it? That's the entirety of the RDI  
11 program, Your Honor?

12 No, it's not. But that's what the government wants you to  
13 believe, and that is their basis to try and avoid getting this case  
14 dismissed outright. They say: We gave you these two guys. Please  
15 don't make us bring anyone else in.

16 And you and I both know, Your Honor, if you ordered any of  
17 those UFIs, if you ordered any CIA personnel to come in this room,  
18 they would never appear. They just won't.

19 Mr. Dykstra has brought up several different types of  
20 improvements, but the reality is there is really no promise of it.  
21 It's a lot of ideas. It's a lot of pie in the sky. He says maybe  
22 we'll propose quarterly get-togethers with various agencies. What,  
23 once every 20 days? 90 days? A year? Who knows? We'll -- you

1 know, we'll try to stay away from timelines, though, as he said,  
2 because we wouldn't want to have any bright-line tests. You brought  
3 up yourself, Your Honor, you know, what about stoplight charts?

4 No. The government doesn't want that. The government wants  
5 to kick this can down the road and keep moving further and further  
6 away, just as it did when it received Judge Parrella's ruling in  
7 551I, the warning shot. But it didn't fix it.

8 This military commission has already encouraged the  
9 government to follow its own regulations. It just won't.

10 So these -- these ideas, these pie-in-the-sky ideas -- and I  
11 certainly commend Ms. Pradhan for bringing up more and possibly  
12 trying to move things forward, but the reality is history is the  
13 judge. The history of this case has proven we can't trust the  
14 government to fix this. They won't. They choose not to. These  
15 improvements are just promises that will never be fulfilled.

16 This case should be dismissed, Your Honor.

17 MJ [Col McCALL]: Thank you.

18 Mr. Engle?

19 LDC [MR. ENGLE]: I'm sorry to do this, and I will be brief,  
20 but I just want to respond to a couple of comments here.

21 Because I heard Mr. Dykstra say, you know, we can't -- and I  
22 think I wrote this down verbatim -- we cannot have spills; that is  
23 our single, number one goal. And maybe it's just that I'm still

1 relatively new here, but that shocks me. And I've heard it before in  
2 these proceedings.

3 This is not the first time that I've heard the prosecutor  
4 say that, various prosecutors in the case. It's not a one-off. It's  
5 not a rhetorical flourish. That is the government's position, is  
6 that their number one goal in these proceedings is to keep secrets.

7 And as a lawyer, I find that utterly shocking and  
8 unacceptable. And it has not been the number one goal in any  
9 courtroom that I've ever appeared in previously.

10 The number one goal, according to the prosecutor, is not  
11 securing convictions. It's not getting death sentences. It's not  
12 seeking justice, which is what a prosecutor's number one goal is  
13 always supposed to be. That's in the canons of ethics, that a  
14 prosecutor's goal shall be to seek justice, to ensure that justice  
15 shall be done. That's not the number one goal in these proceedings.

16 It's certainly not giving the defendants a fair trial. And  
17 it obviously isn't ensuring that the public is aware of what's  
18 happening here, because its number one goal is inconsistent with all  
19 of those other goals.

20 And I have to say I don't share that goal. Personally, I  
21 have yet to see a single fact in this case that I think if it became  
22 public would be a threat to national security. Maybe I haven't  
23 gotten to that part of the discovery yet, I don't know. But I've

1 seen nothing that, in my opinion, would cause a danger to the  
2 republic if it were to become known outside of this courtroom.

3 But I signed a contract and I am contractually obligated to  
4 protect those secrets, and I will live up to my word. I've tried to  
5 do that and will continue to do that. But the goals of this  
6 proceeding should be to seek justice. And on this side of the room,  
7 it needs to be to ensure that our clients are defended in accordance  
8 with our ethical and constitutional obligations. Those need to be  
9 the goals.

10 And if the government really wants to protect its number one  
11 goal of keeping secrets, the way they can do that is to dismiss these  
12 charges. They can keep all the secrets they want to keep, but what  
13 they can't do is have it both ways. They can't stand up here and  
14 claim that they're providing a fair, transparent, open trial while  
15 insisting that the number one goal is to keep secrets.

16 And I just want to make one other point because Mr. Dykstra  
17 said that -- or suggested, at least, that folks were getting up here  
18 and maligning the character of the prosecutors on this side of the  
19 room. I haven't heard that from what I heard from Captain Leahy and  
20 from Ms. Pradhan.

21 And from my perspective at all, I don't think the people who  
22 sit on this side of the room are malicious people, I don't. It's not  
23 them. It's the system that is corrupt here. It's the government

1 writ large that is preventing a fair trial from taking place in this  
2 courtroom.

3 Frankly, I'm sure Mr. Trivett's job would be a lot easier if  
4 his number one goal could be seeking that justice is done instead of  
5 protecting secrets. I think it's probably a really big headache for  
6 these folks and they'd rather not have to deal with it.

7 But I can't tell Your Honor the number of times that I've  
8 sat here, even in the limited number of hearings that I've attended,  
9 and watched the prosecutor stand up and say cut the feed and turn the  
10 red light on. And then they get on their headsets to find out why  
11 they cut the feed.

12 And they're not talking to people from OCP, they're talking  
13 to people from other parts of the government. And I -- again, it's  
14 another thing that just shocks me about this practice, is that we  
15 have other agencies of the government that are reaching into this  
16 courtroom and controlling these proceedings.

17 And those people are not governed by the ethical standards  
18 that apply to us. They're not governed by, apparently, the  
19 constitutional limitations that apply to us. And yet they have the  
20 ability to reach in and disrupt these proceedings in order to  
21 accomplish that number one goal of protecting secrets.

22 So there's a lot of consequences to the -- I mean, we've  
23 talked about Protective Order #4. We're going to talk more about

1 Protective Order #3. This all sort of manifests itself in many  
2 different ways that Your Honor has heard about and will continue to  
3 hear about.

4 But one of the consequences of this dynamic that I'm talking  
5 about is that the government is not holding a public trial in any  
6 truly meaningful sense of that phrase for all the reasons that my  
7 colleagues have already touched upon. And that is the reason that we  
8 join their motion.

9 MJ [Col McCALL]: Thank you, Mr. Engle.

10 Mr. Dykstra?

11 DMTC [MR. DYKSTRA]: If I could just respond to that point.

12 MJ [Col McCALL]: I'll allow that.

13 DMTC [MR. DYKSTRA]: I'm going to keep this very factual just  
14 to...

15 Judge Cohen recognized during a public proceeding in this  
16 case, and I quote: There cannot be any spills, that is the goal.  
17 Transcript 32781.

18 The only thing that is ever happening in any way, shape, or  
19 form is that people are working to avoid spills. Transcript at  
20 32783.

21 I also note that Ms. Pradhan mentioned that CCTV sites have  
22 been only the case in the last couple of years. I note that this  
23 commission has had a standing order since 2012 for CCTV sites.

1           So that's all I have, Your Honor.

2           MJ [Col McCALL]: All right. Thank you.

3           All right. So just for the roadmap forward, we will go  
4 ahead and recess. Let's be back at 1350. That will give everyone a  
5 chance to get lunch and do whatever prep they need to do. So 1350  
6 we'll be back on the record.

7           Let's start with the orientation discussion about the site  
8 visit, just to make sure we can get that in, and then we can move on  
9 into oral argument.

10          Well, I don't know if we'll even have time. We'll  
11 see -- we'll play it by ear, because we still have the closed  
12 questioning. We'll make time for that, even if we have to go a bit  
13 late. But I do want to open -- start in -- in open so we can get  
14 that orientation piece done. And, like I said, we'll play it by ear  
15 then at that point, depending on how long that takes.

16          All right. Any housekeeping before we recess?

17          Apparently not.

18          All right. So 1350.

19          Commission's in recess.

20         **[The R.M.C. 803 session recessed at 1220, 25 April 2024.]**

21         **[The R.M.C. 803 session was called to order at 1449, 25 April 2024.]**

22          MJ [Col McCALL]: Commission is called to order.

23          Parties are present. The accused are absent, although I



1 understand Mr. al Hawsawi is in the adjacent facility.

2 So I appreciate everybody's patience as we worked through  
3 some issues that came up over the lunch hour.

4 Mr. Ruiz?

5 LDC [MR. RUIZ]: Yes, sir. At this time I'd like to request  
6 an ex parte session with Mr. al Hawsawi. I would also like to  
7 request that you direct that the guard force utilize the chair, the  
8 larger chair that he's used before. It's more comfortable for him,  
9 given some of his conditions.

10 MJ [Col McCALL]: All right. That's fine.

11 All right. So we're going to have to adjust things a little  
12 bit. So we are going to go ahead and do this ex parte session. We  
13 needed to handle this before we move on.

14 So what we'll do is we're going to go ahead and have that  
15 ex parte today. I'm not sure how long it's going to take. It's  
16 impossible to say when we can come back on the record.

17 So we'll move the orientation about the site visit to  
18 tomorrow. We'll plan on being in open at 0900 to handle that  
19 orientation.

20 We'll then go into a closed to handle that small portion  
21 that may be closed dealing with the orientation, and then to wrap up  
22 Mr. Connell's recross on SIA Waltz and finish her up, and I'll give  
23 her admonishment.

