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1 [The R.M.C. 803 session was called to order at 0900,  
2 10 January 2018.]

3 MJ [COL POHL]: Commission is called to order.  
4 Mr. Bin'Attash is present. The rest of the accused are  
5 absent.

6 General Martins, is there any change in the trial  
7 counsel since we recessed on Monday?

8 CP [BG MARTINS]: Good morning, Your Honor. No.

9 MJ [COL POHL]: Mr. Nevin?

10 LDC [MR. NEVIN]: Your Honor, no, except that  
11 Ms. Radostitz has joined us.

12 MJ [COL POHL]: Thank you. Ms. Bormann?

13 LDC [MS. BORMANN]: No changes, Judge.

14 MJ [COL POHL]: Mr. Harrington?

15 LDC [MR. HARRINGTON]: No change, Judge.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: No change, sir.

18 MJ [COL POHL]: And Mr. Ruiz?

19 LDC [MR. RUIZ]: No changes.

20 MJ [COL POHL]: Okay. Thank you.

21 CP [BG MARTINS]: Could you please raise your right hand  
22 for the oath.

23

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1 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
2 was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the Chief Prosecutor [BG MARTINS]:

5 Q. Could you please be seated. And you are the  
6 assistant SJA with the Joint Task Force?

7 A. That is correct.

8 CP [BG MARTINS]: Thank you.

9 Questions by the Trial Counsel [MR. SWANN]:

10 Q. Major, you've testified previously a number of times  
11 regarding the statement of understanding?

12 A. That is correct.

13 Q. You have in front of you what's been marked as  
14 Appellate Exhibit 546 and then 546A, B, and C. Am I correct?

15 A. That's correct.

16 Q. All right. Let's take the 546 first. This is Khalid  
17 Shaikh Mohammad. Did you have occasion to advise Mr. Mohammad  
18 of his right to attend these proceedings?

19 A. I did meet with Mr. Mohammad and advised him of his  
20 right to ask him if he was going to come to the commission  
21 this morning.

22 Q. All right. You did that at 6:49 this morning?

23 A. I asked him when I first got to camp if he was going

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1 to come to the commission; he indicated that he would come.  
2 And then he later asked if he would be searched, and I advised  
3 it would be the same procedure. And he said, "Then I don't  
4 want to go."

5 And I asked him is this a voluntary decision on  
6 your -- is this a voluntary refusal. He indicated that it  
7 was. I asked him if he wanted me to read the document in  
8 English and then have it translated. He said he was fine just  
9 having it read to him in English, so I read him the document  
10 in English.

11 Q. All right. This is a three-page document. It's two  
12 pages in English. Did you read the document as set forth in  
13 the document itself?

14 A. I did. I read both pages of the document, asked him  
15 if he had any questions. He indicated he didn't. I handed  
16 him all three pages, and then he signed the document in my  
17 presence, and then I signed it at 6:51.

18 Q. All right. Do you believe that his waiver this  
19 morning was voluntary?

20 A. Yes. Because when I asked him if it was a voluntary  
21 waiver, he said that it was.

22 Q. Let's take Ramzi Binalshibh next. It's 546A  
23 consisting, again, of three pages. Did you do this in English

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1 or did you do it in Arabic?

2 A. I read this in English, and it was the same  
3 procedure. When I first met with him this morning, he said he  
4 wanted to come, and then he asked, "Are they going to do the  
5 search?" And I said they would. He said, "Then I don't want  
6 to come." And I, again, asked him is this a voluntary  
7 decision or a voluntary refusal. He said, "Yes, yes, SJA,  
8 it's voluntary."

9 And then asked him if he wanted me to read this in  
10 English or Arabic. He said English is fine. So I read him  
11 the entire document, both pages, asked him if he had any  
12 questions. He said no. He asked for all three documents, so  
13 I handed him all three documents, and he signed it in my  
14 presence.

15 Q. All right. His signature on the second page?

16 A. His signature is on the second page of the document.

17 Q. All right. Do you believe that his waiver this  
18 morning was voluntary?

19 A. Yes. Because when I asked him if this was a  
20 voluntary refusal to appear, he said it was voluntary.

21 Q. Ali Abdul Aziz Ali, again, 546. In this case, it's  
22 B, three pages. Did you follow the procedure?

23 A. I did. So when I met with Mr. Ali this morning, I

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1 asked him if he would come to the commission. He said he only  
2 wanted to come in the afternoon, he didn't want to come this  
3 morning. That's why at the top of this waiver, I put "A.M."  
4 meaning it was a waiver for this morning's session. And asked  
5 him if he had any questions. He said no. I asked if he  
6 wanted me to read it in English and to have it translated. He  
7 said he was fine having it read in English, so I read both  
8 pages to him. Again asked him if he had any questions about  
9 the document. He said no. And then he signed it in my  
10 presence, and then I signed it at 6:19.

11 Q. All right. Do you have any question about the  
12 voluntariness of his waiver?

13 A. Not at all.

14 Q. All right. With respect to his waiver this morning,  
15 do you intend or have someone reapproach him sometime later  
16 this morning to see if he wants to come in the afternoon?

17 A. Yes. So we're going to contact my office and contact  
18 camp to let them know when the afternoon break is going to  
19 occur. So as soon as we know that kind of time frame, we'll  
20 let him know, and we'll go through the same procedure with him  
21 once again.

22 MJ [COL POHL]: I'll tell you right now, it's 1200 hours.

23 WIT: Thanks, Judge.

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1 Q. All right. Mustafa al Hawsawi, 6:24 this morning on  
2 the document 546C. Did you follow the same procedure?

3 A. I did. So I met with Mr. al Hawsawi this morning,  
4 introduced myself, asked him if he wanted to come to the  
5 commission. He advised he did not want to come to the  
6 commission. I asked him if he wanted me to read the document  
7 in English and have it translated. He said yes, he wanted to  
8 have it translated. He asked for the Arabic version. So he  
9 followed along as I read the English version to him.

10 And then the translator who was with me read the  
11 Arabic version to him. Mr. al Hawsawi filled out in Arabic  
12 the Arabic form and signed the Arabic form, and then I signed  
13 the Arabic form after he handed it back to me.

14 Q. Any question about his -- the voluntariness of his  
15 waiver this morning?

16 A. Not at all.

17 TC [MR. SWANN]: Your Honor, I have no further questions.

18 MJ [COL POHL]: Okay. Mr. Nevin, do you have any  
19 questions of this witness?

20 LDC [MR. NEVIN]: Yes, I do, Your Honor. Thank you.

21 **CROSS-EXAMINATION**

22 Questions by the Learned Defense Counsel [MR. NEVIN]:

23 Q. Sir, I'll represent to you yesterday that -- that

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1 yesterday there was a discussion of groin searches here in the  
2 courtroom. Were you present for that? Do you know what I'm  
3 referring to?

4 A. I was not here yesterday. It was in classified  
5 session.

6 Q. Okay. So you -- excuse me, yes, correct. This  
7 discussion occurred on Monday, not yesterday.

8 A. Okay.

9 Q. Same answer, though, from you?  
10 Were you present on Monday when this discussion  
11 occurred?

12 A. I was here in the commission when you guys were  
13 discussing that before we had the lunch break, if that's what  
14 you're referring to.

15 Q. Yeah. Okay. So if I understand correctly, you  
16 referred to a search procedure occurring this morning. Was  
17 that the groin search that was under discussion on Monday?

18 A. It's what's been referred to as a groin search.  
19 There hasn't been a groin search. There's been a search  
20 that -- the thigh down to the ankle, the thigh down to the  
21 ankle. Nothing above that which would -- from my  
22 understanding would be the groin area.

23 Q. Right. So the search that is referred to is that

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1 search which we have been calling a groin search, correct?

2 A. You've been calling it a groin search, correct.

3 Q. Okay. And is it your understanding -- and it's  
4 correct, isn't it, that you have been present here at  
5 Guantanamo in the role you're occupying now at an earlier  
6 time, correct?

7 A. I was here in 2016.

8 Q. And --

9 A. Same capacity.

10 Q. Okay. So this, the search procedure that's under  
11 discussion is ----

12 MJ [COL POHL]: Mr. Nevin, we are not -- this is simply to  
13 address the voluntariness of the waiver. We're going to get  
14 to 5 -- the groin search or leg search is 544. This witness  
15 is not being called for that purpose. It's strictly for  
16 the -- whether or not you're challenging the voluntariness of  
17 the waiver. We're going to get to this, but ----

18 LDC [MR. NEVIN]: That's what I'm trying to determine is  
19 whether ----

20 MJ [COL POHL]: What's it got to do with him in 2016 or  
21 what search procedures we did back then?

22 LDC [MR. NEVIN]: Because it's different today.

23 MJ [COL POHL]: Okay. But that's not the question. The

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1 question is was -- we're not here to talk about 544. We're  
2 here right now simply to talk about whether or not his waiver  
3 to come was voluntary. That's it. We're going to get to 544  
4 next, but ----

5 LDC [MR. NEVIN]: But, Your Honor, the question of whether  
6 it's voluntary could possibly turn on what procedure was  
7 applied and whether that procedure is new and relatively  
8 recent. And I'm -- I wasn't there this morning. I simply  
9 want to inquire ----

10 MJ [COL POHL]: But there wasn't -- there wasn't any  
11 search this morning. He said there wasn't any search of your  
12 client this morning.

13 LDC [MR. NEVIN]: Right.

14 MJ [COL POHL]: Okay. So he says is there going -- what  
15 we have now, what's before me is a voluntariness of the  
16 waiver, and what you want to do is litigate the search issue.

17 LDC [MR. NEVIN]: No, I -- yes, I want to litigate the  
18 search procedure at a separate time, but I'm just trying to  
19 inquire sufficiently to determine whether it's a voluntary  
20 waiver or not. And since I wasn't there, I have to ask. I  
21 mean, if the ----

22 MJ [COL POHL]: No, I understand what you're saying. I  
23 have no problem with you asking about the circumstances of his

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1 interaction today, whether it's voluntary or not.

2 LDC [MR. NEVIN]: Right.

3 MJ [COL POHL]: I fail to see how that has anything to do  
4 with what the search procedures were back in 2016 or 2004 or  
5 2006. That's why ----

6 LDC [MR. NEVIN]: Only because -- only because the absence  
7 of this kind of a procedure previously might bear on whether  
8 or not the refusal was voluntary. That's all.

9 MJ [COL POHL]: Okay. Okay.

10 LDC [MR. NEVIN]: And I ----

11 MJ [COL POHL]: But when we left the other day, since --  
12 the AE number on the search issue is 544.

13 LDC [MR. NEVIN]: Yes, sir.

14 MJ [COL POHL]: Just so we all know what we're referring  
15 to. I said because that's unresolved, that the status quo  
16 will be. And so until ----

17 LDC [MR. NEVIN]: No, I'm not questioning the military  
18 commission's ability to make this ruling or anything else.

19 MJ [COL POHL]: No, no, my point being ----

20 LDC [MR. NEVIN]: I'm just trying to establish a fact for  
21 the record.

22 MJ [COL POHL]: ---- is your client was on notice of  
23 that ----

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1 LDC [MR. NEVIN]: Yes.

2 MJ [COL POHL]: ---- before we left.

3 LDC [MR. NEVIN]: I understand.

4 MJ [COL POHL]: And if you're questioning his  
5 voluntariness -- and I've done this -- and again, this is a  
6 slightly different issue because I'm not sure it's necessarily  
7 involuntary under these circumstances, but if you're  
8 questioning the voluntariness of your client's waiver, you  
9 know what the answer is.

10 LDC [MR. NEVIN]: I'm not questioning anything. I'm  
11 asking -- I'm making a record for my own purposes and for  
12 purposes of the record. That's all I'm doing.

13 MJ [COL POHL]: Okay. If you want to address the  
14 interactions of today as it relates to voluntariness, I'm with  
15 you. Where you lost me was when you were starting going down  
16 the historical background of the searches.

17 LDC [MR. NEVIN]: Okay. And I guess, Your Honor, all I  
18 can say is that the fact -- and I believe it is a fact -- that  
19 this type of search had not been performed previously until  
20 just very recently, like the last few days, could bear on  
21 voluntariness. And I simply am asking him that. But if ----

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: I understand the military commission is

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1 directing me not to, so ----

2 MJ [COL POHL]: Not at this time.

3 LDC [MR. NEVIN]: Okay. Fine.

4 Questions by the Learned Defense Counsel [MR. NEVIN]:

5 Q. So, sir, did Mr. Mohammad ask you about the search,  
6 whether that search was going to be performed today?

7 A. He did ask if the same search procedure would be  
8 used.

9 Q. Okay. And he asked you that as opposed to someone  
10 else in your presence?

11 A. He did. He did ask me to explain what search would  
12 occur, and I showed him on my leg in terms of where my cargo  
13 pocket is.

14 Q. Right.

15 A. Where the hands would start and that they would go  
16 down to the ankle and that would be the -- would be the  
17 search, nothing above that. Advised him the guard force  
18 didn't want to do anything else, and he said, "Okay, I -- I  
19 don't want to come to the commission." And that's when I  
20 asked him, "Is this a voluntary decision on your part?" And  
21 he said, "Yes, it's voluntary."

22 Q. Okay. And is that the point at which you read the  
23 form to him?

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1           A.    That's the point when we then went to the form.

2           Q.    Okay.  Now, were members of the guard force -- were  
3 the members of the gourd force who would conduct the search  
4 present at the time you made that demonstration?

5           A.    There were -- the guard force was there on the tier.  
6 I don't know how -- I was focused on your client, so I -- they  
7 were there, I don't know what they heard.  But I discussed  
8 with them before we went over what the search would be.

9           MJ [COL POHL]:  Have you -- on Monday did you -- did you  
10 physically observe the search as it's actually done?

11          WIT:  I observed all the searches on Monday, Judge.

12          MJ [COL POHL]:  Okay.  Did you observe the search today of  
13 Mr. Bin'Attash?

14          WIT:  I did observe the search of ----

15          MJ [COL POHL]:  Were they all done the same way as you  
16 just described them?

17          WIT:  On Monday, when the searches started, they went from  
18 the bottom of the ankle and then up and ----

19          MJ [COL POHL]:  How far up?

20          WIT:  They went up to the thigh.

21          MJ [COL POHL]:  Okay.

22          WIT:  Nothing above that.  And then -- which I understand  
23 why they were concerned about that.  So instead of starting at

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1 the bottom and moving up, we started at the top ----  
2 MJ [COL POHL]: But the scope ----  
3 WIT: ---- and down. But the scope of ----  
4 MJ [COL POHL]: ---- was ----  
5 WIT: ---- the search ----  
6 MJ [COL POHL]: When you say the thigh, somewhere  
7 between ----  
8 WIT: My cargo pocket.  
9 MJ [COL POHL]: Above the knee, but ----  
10 WIT: Above the knee, but nothing that would approach the  
11 groin area.  
12 MJ [COL POHL]: Okay. Thank you. Mr. Nevin.  
13 LDC [MR. NEVIN]: All right. That's all I have. Thank  
14 you.  
15 MJ [COL POHL]: Thank you. Mr. Harrington, do you wish to  
16 inquire?  
17 LDC [MR. HARRINGTON]: Just briefly, Judge.  
18 **Questions by the Learned Defense Counsel [MR. HARRINGTON]:**  
19 Q. Good morning.  
20 A. Good morning, sir.  
21 Q. Was the same procedure followed with Mr. Binalshibh?  
22 A. The exact same procedure, yes.  
23 Q. Okay. And the same inquiry was made of him; is that

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 right?

2 A. The same inquiry. Once he told me he didn't want to  
3 come because of the search procedure, I then asked him, "So is  
4 this a voluntary waiver on your part?" And he said it was  
5 voluntary, that he didn't want to come to the commission.

6 LDC [MR. HARRINGTON]: That's all I have, Judge. Thanks.

7 ACC [MR. BIN'ATTASH]: Only one sentence for explanation.

8 MJ [COL POHL]: I'm sorry, Mr. Bin'Attash ----

9 ACC [MR. BIN'ATTASH]: **[Speaking in Arabic. No**  
10 **translation.]**

11 **[Speaking in English]** The search happened today  
12 different, with me different than Monday.

13 MJ [COL POHL]: Okay.

14 ACC [MR. BIN'ATTASH]: **[Speaking in English]** That's all.

15 MJ [COL POHL]: Okay. Thank you.

16 Mr. Connell, do you wish to inquire?

17 LDC [MR. CONNELL]: No, sir. I do maintain my continuing  
18 objection to anonymous testimony based on Smith v. Illinois  
19 and it's D.C. Circuit progeny.

20 MJ [COL POHL]: Your objection is noted and overruled.

21 Mr. Ruiz, do you want to be heard? Do you wish to  
22 inquire?

23

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1 Questions by the Learned Defense Counsel [MR. RUIZ]:

2 Q. Good morning.

3 A. Good morning, sir.

4 Q. My question is did Mr. al Hawsawi inquire as to what  
5 search would be performed if he were to attend today?

6 A. He did not. He had no questions about the search.  
7 Once I asked him if he wanted to come to the commission, he  
8 indicated he did not want to come.

9 Q. Thank you.

10 A. You're welcome.

11 MJ [COL POHL]: The only two detainees who asked about the  
12 search were Mr. Mohammad and Mr. Binalshibh?

13 WIT: Mr. Bin'Attash asked if he was going to be searched,  
14 but yes.

15 MJ [COL POHL]: Oh, okay. No, but I'm talking about  
16 the -- of the two that didn't come.

17 WIT: Those that are absent? Yes.

18 MJ [COL POHL]: But Mr. Ali and Mr. Hawsawi didn't ask  
19 about the search?

20 WIT: I don't recall Mr. Ali asking about the search  
21 procedure.

22 MJ [COL POHL]: Okay.

23 WIT: I know that Mr. Hawsawi did not have any questions

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1 at all about the process.

2 MJ [COL POHL]: Okay. Mr. Nevin or Mr. Harrington, do you  
3 have any challenge to the voluntariness of the waiver of your  
4 client?

5 LDC [MR. NEVIN]: Could I just inquire, Your Honor? If I  
6 argue that it was involuntary, you'll cause him to be brought  
7 here forcibly, is that still ----

8 MJ [COL POHL]: No, not necessarily. What I'm saying is,  
9 as I've explained on numerous occasions ----

10 LDC [MR. NEVIN]: Yes.

11 MJ [COL POHL]: ---- any waiver must be voluntary. If  
12 it's not voluntary, then they come. It doesn't necessarily  
13 have to be a forced cell extraction. They just go to them and  
14 say judge has ordered you to show up and then they can come up  
15 and ----

16 LDC [MR. NEVIN]: I see your point. Yes.

17 MJ [COL POHL]: But the waiver of their presence will not  
18 be ----

19 LDC [MR. NEVIN]: Yes, sir.

20 MJ [COL POHL]: So ----

21 LDC [MR. NEVIN]: I understand. I do not make the  
22 argument that his absence is involuntary.

23 MJ [COL POHL]: Okay. Thank you.

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1 LDC [MR. NEVIN]: Thank you.

2 MJ [COL POHL]: Mr. Harrington?

3 LDC [MR. HARRINGTON]: Judge, actually, I received a  
4 letter from my client this morning confirming that his absence  
5 was voluntary.

6 MJ [COL POHL]: Okay. Thank you.

7 Trial Counsel, do you see any further issues on this?

8 TC [MR. SWANN]: No, Your Honor.

9 MJ [COL POHL]: Okay. Thank you for your testimony.

10 WIT: Thanks, Judge.

11 [The witness was excused.]

12 MJ [COL POHL]: For today, I specifically find that the  
13 waivers of Mr. Mohammad and Mr. Binalshibh are knowing and  
14 voluntary and that inquiries about the search procedures did  
15 not necessarily vitiate the voluntariness of their -- the  
16 knowing and voluntary waiver of their right to be present.

17 With -- as far as Mr. Ali is concerned, the record is  
18 unclear whether he even asked about the searches. But even  
19 operating from the assumption that he did, assuming it was  
20 similar to the other two, I make the same ruling. And as far  
21 as Mr. Hawsawi, since there is no search issue at all, I find  
22 that he just knowingly and voluntarily waived his right to be  
23 present today.

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           And that brings us to the way ahead on 544. I would  
2 like to resolve this issue expeditiously; however, there's  
3 also a normal process that goes through here.

4           And I'm looking at the defense counsel now.  
5 Mr. Connell yesterday had mentioned at the 802 that perhaps we  
6 should follow the normal briefing cycle and discovery and  
7 whatever and approach it from that perspective which, as a  
8 process guy, I like. Okay. But I'm also aware of what that  
9 means.

10           So my proposal would be that we have a very truncated  
11 briefing schedule and resolve this before we leave next week.  
12 And my -- my thoughts would be -- and now this is a defense  
13 motion, so understand I'm -- if you want this to move to  
14 March, I'm not going to say you can't. But my thought would  
15 be to file the pleadings not later than COB Friday; government  
16 response not later than COB Sunday; and then on Tuesday, we  
17 take any evidence and have a hearing on this, and so we can at  
18 least get the whole thing resolved this week.

19           Alternatively -- okay, I'll start with you,  
20 Mr. Connell, because you're the one that mentioned it. If you  
21 think you need more time or more discovery or whatever, that  
22 that is an unrealistic schedule, let me know.

23           Mr. Connell?

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1 LDC [MR. CONNELL]: Sir, I had the opportunity to discuss  
2 this issue with Mr. al Baluchi yesterday. We do not intend to  
3 raise any issue either on Friday or, at this time, at any  
4 other point about this search.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: And, frankly, the testimony that we  
7 heard this morning just confirms me in that view. So we do  
8 not intend to raise any additional issue about it.

9 MJ [COL POHL]: Okay. Thank you.

10 LDC [MR. CONNELL]: If we can have a few moments, I can  
11 consult with other defense counsel and ----

12 MJ [COL POHL]: The landscape may have changed slightly  
13 given the testimony of this witness, so let's go ahead and  
14 we'll take a 15-minute recess, consult, and see the way  
15 forward.

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: Commission is in recess.

18 [The R.M.C. 803 session recessed at 0920, 10 January 2018.]

19 [The R.M.C. 803 session was called to order at 0941,

20 10 January 2018.]

21 MJ [COL POHL]: Commission is called to order. All  
22 parties are again present. Mr. Nevin?

23 LDC [MR. NEVIN]: Thanks, Your Honor. First, let me say

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1 we will not be in a position to litigate this come Tuesday  
2 because -- and here's why. I can explain this briefly.

3 The wrinkle that's present in this case that has not  
4 been present in many other cases that I know have -- some of  
5 which have been referred to in open court previously, is that  
6 we have our clients having been subjected to a regime of  
7 torture over a period of three and a half years that changes  
8 the impact that these kinds of procedures have on them.

9 And if we present this issue to you, we need to be --  
10 and we know this from past experience in the 254 litigation,  
11 that your -- part of the way the military commission ruled in  
12 that was that we had not presented -- made an appropriate  
13 demonstration of the specific circumstances of this case and  
14 how they change, perhaps, the -- what might be the mode of  
15 analysis in another kind of case.

16 And that's going to mean witnesses, including  
17 expert -- one or more expert witnesses. That's not something  
18 realistically we're going to be able to present to you by  
19 Friday. And we don't want to be back in the same box that we  
20 were in before of not -- of having the litigation go forward  
21 in such a way that we are not able to present you what  
22 you need.

23 MJ [COL POHL]: Yeah, and I understand, Mr. Nevin. That

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1 was just to plan the way ahead.

2 LDC [MR. NEVIN]: I understand.

3 MJ [COL POHL]: When we did 254, and I'm just -- I had an  
4 interim order saying we won't use female guards until this  
5 issue is resolved, and 13 months later the issue was resolved,  
6 okay? Okay.

7 On this particular issue, I don't intend to issue any  
8 interim order prohibiting them from doing their current  
9 procedure. And so if you need time to prepare your pleadings  
10 or discovery, whatever it is, as I said earlier, it's your  
11 motion. I'm not going to -- you know, you can do it. But in  
12 the interim, that means the current procedure will remain in  
13 place.

14 LDC [MR. NEVIN]: Well, I ----

15 MJ [COL POHL]: In the interim, until there's an order to  
16 the contrary, okay?

17 LDC [MR. NEVIN]: Yes, sir. I understand what you just  
18 said. And one of the things that we might well do, and I -- I  
19 mean, I would point out that in the nine years, coming up on  
20 ten years that I've been coming here, we have not followed  
21 this kind of a procedure. And so I'm not moving you for an  
22 interim order now.

23 But I can't imagine that an interim order to say go

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1 back to the status quo ante of about a week ago until we can  
2 sort this out, I can't believe that would be very earth  
3 shattering. But I'm not asking you for that now.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: I'm asking you maybe only would you  
6 kindly keep on open mind about that.

7 MJ [COL POHL]: I ----

8 LDC [MR. NEVIN]: I know you will.

9 But second ----

10 MJ [COL POHL]: Yeah. Of course, what else am I going to  
11 say? But the answer is yes, I'll keep an open mind on it.

12 LDC [MR. NEVIN]: Yes.

13 MJ [COL POHL]: And depending what's presented to me,  
14 the -- because you remember, even on the 254, the pleading,  
15 the initial pleading was this is a change in policy for the  
16 last 10, 15 years or whatever it is ----

17 LDC [MR. NEVIN]: Yeah.

18 MJ [COL POHL]: ---- let's keep the old policy in place  
19 until we resolve this one.

20 LDC [MR. NEVIN]: Yeah.

21 MJ [COL POHL]: And under that circumstance, I issued the  
22 interim order. Currently ----

23 LDC [MR. NEVIN]: We're in the same circumstance here.

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1 MJ [COL POHL]: Well, we'll see.

2 LDC [MR. NEVIN]: Yeah.

3 MJ [COL POHL]: We'll see if we are or not. But what I'm  
4 saying is ----

5 LDC [MR. NEVIN]: I promised, I promised not to argue it.

6 MJ [COL POHL]: I know, but ----

7 LDC [MR. NEVIN]: So ----

8 MJ [COL POHL]: My point being is simply that I offered  
9 this expedited briefing schedule in order to hopefully resolve  
10 it this time so when we come back in March, it's a resolved  
11 issue.

12 LDC [MR. NEVIN]: Yes, sir.

13 MJ [COL POHL]: But if you want -- like I said, it's your  
14 pleading. If you think you need more time than that, then I'm  
15 not going to force you ----

16 LDC [MR. NEVIN]: Okay.

17 MJ [COL POHL]: ---- to litigate something you're not  
18 prepared to litigate.

19 LDC [MR. NEVIN]: That's the first part of my report.

20 The second part is that the -- there's another --  
21 there's a separate aspect to this that is apart from the --  
22 just the question of where these men are touched, and that has  
23 to do, as I told you on Monday, with the CCR, with the

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1 constantly changing rules.

2           And that is part of what -- that is part of the  
3 demonstration that we would need to make to you as well, which  
4 also accounts for the time. Because that was part of the  
5 disruption that was at the heart of the torture program, and  
6 the constantly changing nature of the rules has this  
7 disruptive effect in a way on these men that it would not have  
8 on, let's say, an ordinary prisoner.

9           And then here's the last thing. I asked counsel to  
10 request a temporary accommodation to allow us to have an  
11 attorney-client visit with Mr. Mohammad this afternoon at  
12 Echo II. And I understand that he has kindly made that  
13 request of the appropriate powers that be. And if we can have  
14 a conversation of that type, I think it will go a long way  
15 toward possibly coming to a point of resolution of this.

16       MJ [COL POHL]: Okay.

17       LDC [MR. NEVIN]: So anyway ----

18       MJ [COL POHL]: But that would be not you. It would be  
19 part of your team?

20       LDC [MR. NEVIN]: That's correct.

21       MJ [COL POHL]: Okay.

22       LDC [MR. NEVIN]: And ----

23       MJ [COL POHL]: You're not asking for me not to hold a

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1 session this afternoon?

2 LDC [MR. NEVIN]: I'm not asking ----

3 MJ [COL POHL]: Just so I'm clear on that. I'm with you.

4 LDC [MR. NEVIN]: I'm not asking that at the present time,  
5 although I think actually it probably would be a good idea.

6 But anyway, setting that aside, that is a request  
7 that I made to counsel and that counsel made to the guard  
8 force. I don't know what the -- I understand it's been --  
9 it's going to be presented to the deciders, and I understand  
10 there has not been a decision yet.

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: So that's my status report.

13 MJ [COL POHL]: Thank you. And, of course, if -- assuming  
14 it's not resolved and there are pleadings filed, although,  
15 Mr. Connell, you said you don't have any issue with this now,  
16 we'll follow the normal nonjoinder rules if you wish to  
17 nonjoin. Otherwise, everybody is assumed to be part of the  
18 same motion. Okay.

19 That brings us to 373. Go ahead.

20 LDC [MR. CONNELL]: Your Honor, the issue which is before  
21 the military commission is 373N, which is a motion to compel  
22 witnesses regarding the base motion, AE 373.

23 The issue in 373 is the seizure of Mr. al Baluchi's

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1 attorney-client-marked and privileged DVDs. The best  
2 articulation of the underlying argument, which is factually  
3 intense, much of which is classified and I won't repeat  
4 here -- but just because it's been a while, the best  
5 articulation of that argument is found in 373F. The reason --  
6 that's a little out of order, but the reason is that the  
7 government produced discovery after the filing of 373 and --  
8 which shed more light on what actually happened, although --  
9 even though that discovery was in a redacted form.

10 In brief, on 18 June 2015, the guards seized three  
11 DVDs from Mr. al Baluchi's legal storage. All three DVDs were  
12 properly marked, two lawyer-client privileged communication  
13 and one OCRM, and all had -- bore markings that they had been  
14 reviewed by the privilege team.

15 There's no evidence that Mr. al Baluchi had ever  
16 taken those three discs to DSMP or showed them to anyone. On  
17 a previous argument on 373A, the military commission  
18 authorized the use of slides. I'd just like to show you  
19 AE 373, slide 2. I'd request the feed from Table 4. And just  
20 to be a hundred percent clear, these slides are already in the  
21 record.

22 MJ [COL POHL]: I can't see them. Just a second. Okay.  
23 You're just going to show it; you're not going to play it?

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1 LDC [MR. CONNELL]: Correct.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: Just going to show it.

4 MJ [COL POHL]: You may publish.

5 LDC [MR. CONNELL]: Thank you.

6 LDC [MS. BORMANN]: Judge, there are -- the monitors at  
7 the back table aren't working. Just the monitor in front of  
8 me isn't working.

9 MJ [COL POHL]: I'm not going to ask, is it turned on?

10 LDC [MR. CONNELL]: Yes, I've had that particular  
11 technical failure.

12 LDC [MS. BORMANN]: It's been repaired.

13 LDC [MR. CONNELL]: Excellent.

14 Your Honor, using slide 2 from AE 373J, I just wanted  
15 to show you what the markings are, you know, what the guard  
16 force sees when they look at these discs. These are marked  
17 under the procedure which you laid out in 018U. They include  
18 markings of attorney-client privileged communication; they  
19 include a reference to Military Commission Rule of Evidence  
20 502; they have to say "Delivery for Detainee" on them; they  
21 have to have the name and the ISN number of the -- of  
22 Mr. al Baluchi; and they have to have my name on them to show  
23 that they come from an attorney. They separately -- and all

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1 that is shown in black.

2 In red are markings placed by the privilege team,  
3 which show the number of the -- the ISN number of the person  
4 who is involved, an identifier for PT8. That means  
5 Privilege Team 8. Each of the privilege team members have a  
6 number which they use to identify the things that they marked.  
7 And then everybody has a slightly different abbreviation for  
8 lawyer-client, or LCPC or ACP, but the one that the privilege  
9 team, at least PT8 uses, LCM, lawyer-client material. You can  
10 close the feed, please.

11 So one of those slides, the one which is on the  
12 right, is -- contains video of my mitigation investigation  
13 disc to Kuwait -- mitigation investigation trip to Kuwait, and  
14 the other contains video of my mitigation investigation trip  
15 to the UAE.

16 The government's materials that I believed that they  
17 provided to the government in the 365 series and the 373  
18 series contain some claims about those discs which are not  
19 actually true. And on a previous occasion I showed one short  
20 clip of that to the military commission to demonstrate that.  
21 That was -- that video that I played previously was AE 373FF  
22 and showed incidental video of the Burj Khalifa, the tallest  
23 building in the world, but I won't go into any more detail

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1 about that.

2 The materials that are before the military commission  
3 show no justification whatsoever for an intelligence  
4 exploitation review of attorney-client privileged information.

5 Now, the procedural posture is that the government  
6 produced some discovery, which I referred to earlier, and that  
7 discovery is attached to 365I. The government hid a number of  
8 facts through redactions, including the witnesses -- most of  
9 the witnesses, and the chain of custody of that Dubai disc  
10 after July 2nd, 2015. We moved for that discovery in 375 --  
11 373A. We asked for four items in discovery: The identities of  
12 witnesses; unredacted versions of the redacted documents that  
13 the government produced; information about the Detainee  
14 Socialization Management Program, or DSMP; and the  
15 communications regarding those discs.

16 In AE 373L, issued on 7 August 2017, you partially  
17 granted and partially denied that motion to compel discovery.  
18 You mostly denied it, but you ordered production of  
19 information about the witnesses if PII was the basis for  
20 withholding those witnesses from the defense. Perhaps  
21 predictably, the government produced no further discovery or  
22 explanation other than saying that they did not intend to  
23 produce any other information because PII was not the basis

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1 for their withholding.

2           On 11 October 2017 we filed the instant motion, 373N,  
3 a motion to compel witnesses, four witnesses. The declarant,  
4 whose pseudonym has been claimed by the government to be  
5 classified, so I'll just call him the declarant; S00 1464, who  
6 is a watch commander; Special Agent Aaron A. Arguello; and the  
7 courier who picked up the discs from trial judiciary on 2 July  
8 2015 when the chain of custody stops.

9           At this point, I will withdraw -- we've now  
10 interviewed Special Agent Arguello, and I will withdraw the  
11 request for his -- for him to be produced. But the other  
12 three witnesses remain important.

13           The declarant is important because he makes claims  
14 that, at least with respect to those discs that were seized,  
15 are not true. I suspect he will testify to his claims, and I  
16 would expect cross-examination to expose the problems -- the  
17 falsity of some of his claims. I haven't interviewed him, of  
18 course, because I don't know who he is.

19           With respect to S00 1464, 1464's sworn statement  
20 is -- I think demonstrates the lack of validity of the  
21 declarant's claims. And the courier will testify to what  
22 happened to that Dubai disc after 2 July 2015 when it  
23 disappears from the chain of custody. And I suspect that it

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1 will show -- that that person would testify that they  
2 delivered that disc to some intelligence agency for review and  
3 exploitation. They may not have known what it was for, but  
4 they will know where they took it.

5 That's our request in AE 373N.

6 MJ [COL POHL]: Now, the government in their response says  
7 this issue has already been decided.

8 LDC [MR. CONNELL]: Sir, you denied our motion for further  
9 discovery, and that's what the government relies on for "it  
10 was decided." I acknowledge that your reasoning in denying  
11 our discovery was that you just weren't going to -- that the  
12 military commission had no further interest in dealing with  
13 this issue. Not "interest." Let me say it a different way.

14 MJ [COL POHL]: I'm not sure that's my words.

15 LDC [MR. CONNELL]: Yeah, that's not what you said. What  
16 you said was 365 -- the 365 pleadings are ex parte and there's  
17 nothing further that the defense can argue that's going to  
18 make any difference.

19 The -- I acknowledge that there is a -- there is a --  
20 depending on what you meant when -- in your ruling on the  
21 discovery portion, and that's something only the military  
22 commission knows, that may affect the base motion, 373. And,  
23 in fact, when we received the motion -- the filing -- the

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1 ruling on discovery, I was -- I was a little bit surprised  
2 that we didn't receive a ruling on the base motion as well.

3 But the military commission has never ruled on the  
4 base motion, and I'm -- my point that I'm bringing you here  
5 today is that I don't believe that you have sufficient  
6 evidence yet to rule on the base motion. You have received  
7 ex parte pleadings which, with respect to these seized discs,  
8 the parts that we have seen of it are simply not true. And I  
9 know that the government would like me to just give up on this  
10 373 issue because, like the 425 issue, it is a place in which  
11 the government has misled, perhaps not intentionally, but at  
12 some point in this chain, someone has misled the military  
13 commission about the operative facts. And the reason why I'm  
14 here arguing this 373N to you ----

15 MJ [COL POHL]: Which is ----

16 LDC [MR. CONNELL]: ---- is that I think the military  
17 commission should have the real facts about what's on these  
18 discs and what they seized and what happened to them  
19 afterward.

20 So I -- I see to slow down.

21 The question of the military commission is what  
22 operative fact, and that is that whatever it is that the  
23 declarant is talking about, is not -- does not match up with

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1 the reality of what's on these discs. And all you have to do  
2 is look at 373FF that -- the Dubai disc, and read it in  
3 comparison with the declarant's declaration to come to  
4 understand.

5 I don't know what happened here. So many of the  
6 facts are shielded from us, I don't know. But the facts that  
7 I -- that I have been -- have been revealed to the defense are  
8 not consistent with the actual facts on the ground.

9 MJ [COL POHL]: Just so I'm clear, 365 -- this only is a  
10 373 motion?

11 LDC [MR. CONNELL]: Yes, but it became clear to me later  
12 in the litigation that 365 and 373 are linked.

13 MJ [COL POHL]: Are linked. Okay.

14 And your -- because the pleadings are -- some of them  
15 are classified, so I ----

16 LDC [MR. CONNELL]: Some of the pleadings are classified,  
17 some of the pleadings are ex parte.

18 MJ [COL POHL]: On the 373 series, ultimately, what is  
19 your ultimate relief that you seek?

20 LDC [MR. CONNELL]: Witherspoon relief, dismissal for  
21 intrusion into the defense camp.

22 MJ [COL POHL]: Okay. Anything further?

23 LDC [MR. CONNELL]: No, thank you, sir.

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1 MJ [COL POHL]: Okay. Trial Counsel, do you wish to be  
2 heard?

3 TC [MR. RYAN]: You know, on this matter we rely on our  
4 pleadings in both the 373 and 365 series as well as the  
5 commission's order in both.

6 MJ [COL POHL]: Okay. Thank you. That brings us to 375.

7 DC [MAJ WILKINSON]: Good morning, sir.

8 MJ [COL POHL]: Good morning.

9 DC [MAJ WILKINSON]: 375M and T are, of course, classified  
10 motions, so there's only so much that I can talk about in the  
11 unclassified session. But I can talk at least a bit about how  
12 we got here.

13 The issue in 375 when it comes to CIA statements of  
14 the accused has always been about originals. The government  
15 gives you some kind of written report -- I assume it's a  
16 cable, I'll call them cables -- and you then approve a summary  
17 of that which is what we get. But that only works if these  
18 cables they give you are, in fact, originals.

19 This is something that you brought up in 308PPP on a  
20 different issue -- I think it was a different one -- where the  
21 government tried to give you a summary and then a summary of  
22 the summary, and you said, "Under Rule 505, I don't think I  
23 can do that. You have to give me the original."

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1           So in the original discovery request on which 375 is  
2 based, we asked the government: Tell us about any original  
3 recordings, any original transcripts, if it's stenographic, if  
4 it's digital, analogue, whatever. Either give us the  
5 originals or tell us if they were lost or destroyed and give  
6 us some details about loss/destruction.

7           For about three years, their answer to us was the  
8 prosecution has no knowledge. The prosecution does not know  
9 if anything was recorded. It doesn't know if anything was  
10 transcribed. So the prosecution team, whatever else, had no  
11 personal knowledge of that.

12           Last May we had a hearing, and they came in, and  
13 finally they made some positive assertions. They said to you  
14 there never were any tapes. They said to you there was no  
15 practice of recording.

16           And you then issued 375L a couple of months later,  
17 and you explicitly relied on what the prosecutors had told you  
18 as officers of the court. They said there was nothing but  
19 these written reports, and that was what you relied on in  
20 saying the current procedure is good enough. Give me the  
21 cables, I approve the summaries, and that is that.

22           MJ [COL POHL]: Let me back up a question because  
23 it's ----

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1 DC [MAJ WILKINSON]: Yes, sir.

2 MJ [COL POHL]: No, I'm good. I'm sorry. Go ahead.

3 DC [MAJ WILKINSON]: Yes, sir.

4 The problem is, and the reason that we've got in  
5 front of you a motion to reconsider and a motion to compel  
6 witnesses, is that shortly before and shortly after you issued  
7 that order, we got some classified discovery from them that  
8 calls their statements into question. In fact, we were just  
9 about to supplement the 375 series when you issued 375L. If  
10 you look at Attachment K to 375M, that is our motion for leave  
11 to supplement, I believe, that we had -- that we had got the  
12 AE number for when you issued that. So anyway, based on that  
13 information, we asked you to reconsider.

14 The government responded with 3750, which is  
15 unclassified, and they said this information isn't new. They  
16 said the information isn't new because the prosecution knew  
17 about it when they came in here and they made their assertions  
18 to you that there were no recordings and no transcripts or  
19 anything else.

20 Now, that's not what newly discovered means. It  
21 can't be. Because if it were, the prosecution could give  
22 itself a large procedural advantage just by withholding  
23 information from the defense until after you ruled, then

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1 handing it over and saying now we can't use it. It doesn't  
2 work that way.

3 That response, though, in combination with the things  
4 we can talk about in the classified session, showed us that we  
5 can't get a satisfactory answer, a real answer on the question  
6 of originals just by you issuing orders to the prosecution.  
7 We need some witnesses and witnesses who have personal  
8 knowledge.

9 From those first three years of responses from the  
10 government, we know that the prosecution didn't have personal  
11 knowledge of what was there and what was not. They're getting  
12 it from somebody else; and how truthful the somebody else is  
13 we can talk about in classified session. But as I say, to go  
14 further into details, I have to talk about the classified  
15 things in an 806.

16 MJ [COL POHL]: Okay. Thank you.

17 DC [MAJ WILKINSON]: Sir.

18 MJ [COL POHL]: Any other defense counsel wish to be heard  
19 on this particular motion?

20 LDC [MR. CONNELL]: Sir, I have no unclassified argument.  
21 I will have classified argument.

22 MJ [COL POHL]: Okay. Trial Counsel? Mr. Swann.

23 TC [MR. SWANN]: Your Honor, our responses are found at

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1 3750. It was filed on 22 August 2017. We filed another  
2 response at 375U on 14 November 2017. That's the government's  
3 position.

4 There are no tapes. I don't know how many times I've  
5 said this. And having been involved in this case for well  
6 over 12 years now, there are no tapes of their client and  
7 there are no notes, so to speak. The Major underestimates the  
8 505 process and the kind of work that you do and the kind of  
9 work that you have seen and the kind of material that we have  
10 provided you. They have everything on this issue.

11 Subject to your questions, I have nothing.

12 MJ [COL POHL]: I have none. Thank you.

13 Anything further?

14 DC [MAJ WILKINSON]: Only for the classified session, sir.

15 MJ [COL POHL]: Okay. Thank you.

16 That brings us to 44 -- yeah, let me -- just a  
17 second, please. Yeah, 445. Ms. Bormann?

18 LDC [MS. BORMANN]: Judge, this deals with a matter we  
19 spoke about in the 505(h) ----

20 MJ [COL POHL]: Yeah.

21 LDC [MS. BORMANN]: ---- hearing yesterday.

22 MJ [COL POHL]: And we indicated it only could be done in  
23 a classified ----

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1 LDC [MS. BORMANN]: This, unfortunately, because it's  
2 classified, can only be discussed in a classified setting.

3 MJ [COL POHL]: Okay. No problem.

4 LDC [MS. BORMANN]: That is also the case with 498, so I  
5 save myself a trip up here.

6 MJ [COL POHL]: It's all classified?

7 LDC [MS. BORMANN]: Yes.

8 MJ [COL POHL]: Okay. Thank you.

9 502J.

10 LDC [MR. CONNELL]: May I have the court's indulgence for  
11 a moment?

12 MJ [COL POHL]: Sure.

13 [Pause.]

14 LDC [MR. CONNELL]: Your Honor, I have a copy of --  
15 preliminarily, I have a copy of pages 2 through 6 of  
16 AE 502J (AAA Sup). I think it might be useful for the  
17 military commission to have a hard copy in its hand. I've  
18 shown this to the ----

19 MJ [COL POHL]: Is that the ----

20 LDC [MR. CONNELL]: ---- prosecution.

21 MJ [COL POHL]: ---- secret filing?

22 LDC [MR. CONNELL]: It's the secret filing.

23 MJ [COL POHL]: Dated 21 December 2017?

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

2 MJ [COL POHL]: Got it sitting in my lap.

3 LDC [MR. CONNELL]: All right. Very good. Very good.

4 MJ [COL POHL]: Thank you for the offer.

5 LDC [MR. CONNELL]: Your Honor, this argument is the  
6 culmination of a long series of pleadings, which I will not  
7 review them all, on the issue of what witnesses will testify  
8 in the statements basket, in the hostilities basket of the  
9 personal jurisdiction litigation.

10 The key document is 502J (AAA Sup) which we just  
11 talked about. I want to give just a little bit of history,  
12 although I won't go complete, but the -- in 502J, we initially  
13 identified 131 witnesses that were relevant to this situation.  
14 The government objected to 34 of those witnesses on synopsis  
15 grounds.

16 In 502Y, which is a mammoth of a pleading, we  
17 withdrew six witnesses and gave additional detail for 25  
18 others. In 502Y, we provided a 105-page drafted -- not  
19 attachment, but drafted description of the theory of defense,  
20 and provided 111 additional pages of synopsis, in addition to  
21 the 79 pages of synopsis we had initially provided, and the  
22 several hundred pages of report and photographs from Camp VII,  
23 which are found in the record at 502W.

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1           We have provided over 400 pages of detailed drafted  
2 support explaining what each of these witnesses will testify  
3 to, plus over 6,000 pages of discovery and other documents  
4 supporting our position.

5           In October 2017 I defended these witnesses on an  
6 individual and group basis for over two hours in this military  
7 commission. That slide deck is found in -- at AE 502FF.  
8 The -- shortly thereafter, you divided the witnesses into two  
9 baskets, which I fully understood, a statements basket and a  
10 hostilities basket.

11           In December 2017, after we heard a version of the  
12 government's presentation with respect to Mr. al Hawsawi, you  
13 asked me to review that witness list to determine what I could  
14 present using paper instead of live witnesses. I took your  
15 directive to heart, and, in fact, I took it one step further.

16           I analyzed -- in addition to figuring out who I could  
17 present on paper or by stipulation with the government, I  
18 analyzed each of the witnesses for duplication among the  
19 witnesses to see what witnesses I could forgo if another  
20 witness was authorized to testify. That is significant,  
21 because when I initially made this presentation in 502J, I did  
22 not know which of the witnesses the government was going -- I  
23 mean, the military commission would authorize, so there was

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1 necessarily some duplication among them.

2           The result of that intense study is 502J (AAA Sup).  
3 In that, we indicate that we are willing to withdraw  
4 designation of a total of 69 witnesses if the remaining  
5 witnesses in the two baskets of statements on hostilities are  
6 presented for testimony.

7           In addition, the military commission asked us to  
8 coordinate with the witnesses and find out whether they, for  
9 either classification reasons or other reasons, could testify  
10 via VTC or would need to be at Guantanamo. We were not a  
11 hundred percent successful in that effort. There are some  
12 reasons that we can't talk to some witnesses, even -- or even  
13 to find out which they prefer. Sometimes we requested it and  
14 didn't get an answer, but those -- that's all found in  
15 502J (AAA Sup).

16           The final -- I believe what the final resolution of  
17 this situation should be is that the military commission  
18 should order the production of the witnesses listed in  
19 502J (AAA Sup), the witnesses, either in the statements  
20 basket, which the military commission has said that it wants  
21 to do first, or later in the hostilities basket. After the  
22 military commission issues that order, I will coordinate with  
23 the witnesses and propose a schedule to the military

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1 commission as to -- because we obviously don't want, you know,  
2 dozens of witnesses waiting around doing nothing, but neither  
3 do we want dead time.

4           So what I propose to do is, after the military  
5 commission issues its order, I will propose a schedule in  
6 coordination with the witnesses, I will send it to the  
7 prosecution, get their take on it, and then file it with the  
8 military commission.

9           I want to answer any questions that the military  
10 commission has, but I feel that we have presented a  
11 compelling, detailed justification for these witnesses, and I  
12 feel that we have been more than reasonable in our  
13 accommodation of the military commission's request that we  
14 tighten our witness list.

15           So that's all I have to say about this topic.

16       MJ [COL POHL]: Hold on.

17       LDC [MR. CONNELL]: Yes, sir.

18       MJ [COL POHL]: I'm operating from three separate charts  
19 here, so please bear with me.

20       LDC [MR. CONNELL]: I understand, sir.

21       MJ [COL POHL]: On the statements basket ----

22       LDC [MR. CONNELL]: Yes, sir.

23       MJ [COL POHL]: ---- maybe it's just easier to ask you.

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1 Those in the statements basket, and probably it's -- some of  
2 these are -- names are -- may be classified, so we don't  
3 necessarily need to ----

4 LDC [MR. CONNELL]: Right.

5 MJ [COL POHL]: ---- go into the names. And again,  
6 correct me if I'm wrong here. Well, let me do -- which  
7 specific witnesses on this statements basket has the  
8 government agreed to provide?

9 LDC [MR. CONNELL]: You have the hard copy in front of  
10 you, sir?

11 MJ [COL POHL]: Yeah.

12 LDC [MR. CONNELL]: I highlighted in yellow the ones that  
13 the government has agreed to provide.

14 MJ [COL POHL]: Okay. I thought those were the classified  
15 part, but okay. I got you.

16 Now, of those -- just as an approach, it appears from  
17 your statement list that some of these are policy people and  
18 some are, for want of a better term, operatives. I'm not  
19 using that term in any type of technical sense, but people  
20 that were there actually during the interrogations. Would  
21 that be a fair characterization?

22 LDC [MR. CONNELL]: Yes, although it is about ten to one  
23 in favor of operative over policy. I cut almost every policy

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1 witness.

2 MJ [COL POHL]: Okay. So the -- I'm assuming all these  
3 people will then testify as to what was done on a particular  
4 day to your client? The operative -- I mean, the sub-basket  
5 of the operatives, is that the purpose of their testimony?

6 LDC [MR. CONNELL]: Yes, but that's not all.

7 MJ [COL POHL]: Okay. What in addition would it be?

8 LDC [MR. CONNELL]: Okay. The -- there's -- that is  
9 the -- that is true, like a number of these witnesses will  
10 testify to what was done on a particular day. A number of the  
11 witnesses will testify about the conditions of confinement  
12 over time -- the relevant time, but over time -- not on any  
13 particular day.

14 A number -- some of the people will testify about the  
15 intended result. So take Lieutenant Colonel Baumgartner, for  
16 example. It is possible to call Lieutenant Colonel  
17 Baumgartner a policy person because he was involved in the  
18 adaptation of the reverse engineering of the SERE program to  
19 be applied against the detainees, against the defendants and  
20 others. But he is also going to testify as to the expected  
21 result, what the interrogation compliance state that they  
22 intended to induce, which then lasted through the January 2007  
23 statements that the government is attempting to introduce.

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1           A number of these -- some of these witnesses will  
2 testify about the cooperation or collaboration between the FBI  
3 and the CIA to dispel the sort of myth that the FBI team was  
4 in some way clean, that is, operating independently of the CIA  
5 and black site interrogations.

6           So it is not simply just what happened on a  
7 particular day. It is what happened on particular days to  
8 Mr. al Baluchi in a context -- in an overall context of a  
9 United States Government-wide program to elicit interrogation  
10 compliance or learned helplessness from these men which the  
11 government then exploited, partially knowingly, partially  
12 unknowingly in January 2007 to obtain the statements that the  
13 government wants to introduce.

14          MJ [COL POHL]: And the statements are the -- for want of  
15 a better term, the clean team statements? What about the CSRT  
16 statements, if any?

17          LDC [MR. CONNELL]: The -- we don't have a separate claim  
18 here. None of these witnesses address the CSRT.

19          MJ [COL POHL]: Okay.

20          LDC [MR. CONNELL]: The government will be  
21 introducing ----

22          MJ [COL POHL]: The only reason I mentioned that because  
23 it was in Mr. al Hawsawi's, and I know they exist. So for

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1 want of a better term.

2 LDC [MR. CONNELL]: Right. But Mr. al Baluchi did not  
3 make any inculpatory statements in his CSRT, so again ----

4 MJ [COL POHL]: I don't know what was said there, okay.

5 LDC [MR. CONNELL]: Right. So the government, as far as I  
6 know, they're -- they're -- the government's -- what the  
7 government is introducing with respect to Mr. al Baluchi is  
8 the January 2007 FBI/DoD statements; the so-called Islamic  
9 response, D-101; and the proof that he is not a U.S. citizen.

10 MJ [COL POHL]: Okay. While you're on that subject, just  
11 so there's no confusion, you're challenging all personal  
12 jurisdiction for Mr. Ali?

13 LDC [MR. CONNELL]: Correct, sir. No confusion.

14 MJ [COL POHL]: Just so there's no confusion, Government,  
15 we're talking about all elements of ----

16 LDC [MR. CONNELL]: That's right.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: Now, to be -- to be -- just to give a  
19 complete answer to that, the government has not claimed  
20 948a(7)(A), Direct Participation in Hostilities, as a basis  
21 for jurisdiction over Mr. al Baluchi. When the -- when the  
22 military commission asked them that question, they said that  
23 they were only proceeding under subsections (B) and (C),

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1 Material Support and Part of al Qaeda.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. CONNELL]: Which we -- which we challenge. But  
4 we assert that the military commission has no personal  
5 jurisdiction over ----

6 MJ [COL POHL]: Uh-huh.

7 LDC [MR. CONNELL]: ---- Mr. al Baluchi. The government  
8 may choose whatever basis to assert whatever basis it wants  
9 and may muster whatever evidence it can of personal  
10 jurisdiction.

11 MJ [COL POHL]: Okay. And this issue, I think -- well, I  
12 know it's going to come up again and again and again.

13 From '03 to '06, I'm not ----

14 LDC [MR. CONNELL]: I understand, sir.

15 MJ [COL POHL]: I don't know what day Mr. Ali was first  
16 captured, but ----

17 LDC [MR. CONNELL]: 29 April 2003.

18 MJ [COL POHL]: Okay. So from '03 to '06 -- and this  
19 permeates everybody -- he was in CIA custody?

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

21 MJ [COL POHL]: Well, rephrase that. He was not in DoD  
22 custody, whether ----

23 LDC [MR. CONNELL]: Right.

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1 MJ [COL POHL]: ---- he was in CIA custody or somebody  
2 else ----

3 LDC [MR. CONNELL]: There was a time when he was in  
4 foreign government custody.

5 MJ [COL POHL]: Okay. And the issue that has come up  
6 again and again in this case is how they were treated.

7 LDC [MR. CONNELL]: Fair enough.

8 MJ [COL POHL]: Depending what term you want, torture on  
9 one side, enhanced interrogation technique.

10 But it seems to me that we have -- rephrase that.  
11 There should not be difficulty in establishing a timeline --  
12 I'm not looking necessarily for you to do this, Mr. -- of when  
13 he was in custody and whether, day by day, each time an EIT  
14 was applied, each time whatever was applied. Or am I  
15 mistaken?

16 LDC [MR. CONNELL]: Sir ----

17 MJ [COL POHL]: We're going to see this over and over  
18 again. We've tap-danced around how they were treated, and  
19 it's all classified. I got that. But it's -- you know, we're  
20 going to get there, so let's get there. That's my point ----

21 LDC [MR. CONNELL]: Sure.

22 MJ [COL POHL]: ---- is why are we ----

23 LDC [MR. CONNELL]: That's AE 530 ----

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1 MJ [COL POHL]: Yeah.

2 LDC [MR. CONNELL]: ---- which is the motion for dates.

3 The reason why you do not have a timeline in your hand right  
4 now produced by us is that the government has blurred every  
5 date in every document.

6 MJ [COL POHL]: Well, not -- and again, I'm not looking at  
7 you for the resolution of this, necessarily. But what I'm  
8 saying is ----

9 LDC [MR. CONNELL]: But I'm bringing it to you, sir.  
10 That's 530.

11 MJ [COL POHL]: I got it. I know what 530 says, and I  
12 know why the dates are as they are.

13 LDC [MR. CONNELL]: Oh, I'm sorry. 525. My mistake.

14 MJ [COL POHL]: 525.

15 LDC [MR. CONNELL]: 525. My mistake.

16 MJ [COL POHL]: I know why the dates are what they -- why  
17 they are, okay, that's a separate issue. But what I'm simply  
18 saying is the treatment of each of these accused in  
19 confinement is the big -- is one major issue in this case.

20 LDC [MR. CONNELL]: Absolutely.

21 MJ [COL POHL]: And we tap-dance around it and we give a  
22 little bit here, a little bit there, and it just seems to me  
23 as we could -- we could just say, okay, Mr. Ali was captured

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1 on this date -- or was captured, and we'll talk about the  
2 dates separately -- and he was treated on some day this way,  
3 this way, this way, this way, this way. And the factual  
4 predicate for the entire EIT program is all -- for each client  
5 is established instead of piecemealing it to death and  
6 tap-dancing around it and finding out who was there at a  
7 particular time.

8           It just it strikes to me is we're going to get there.  
9 It's just a question of which road we're going to take.

10       LDC [MR. CONNELL]: Yes, sir.

11       MJ [COL POHL]: Okay.

12       LDC [MR. CONNELL]: I could not agree more.

13       The -- if ----

14       MJ [COL POHL]: Because I'm gathering on your operative --  
15 that's a lot of what those people will come in, on this day, I  
16 did this to him; on this date, I did this to him.

17       LDC [MR. CONNELL]: And this is how I reacted, and this is  
18 what it meant ----

19       MJ [COL POHL]: Yeah.

20       LDC [MR. CONNELL]: ---- and this is who was involved.

21       MJ [COL POHL]: Yeah.

22       LDC [MR. CONNELL]: Yes. Yes. Facts are important. And  
23 many of these things are facts of record somewhere, but the

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1 government has gone to exceptional lengths to blur them.

2           And what I can say here on this topic is, I  
3 understand this 505 process. I get it. But the facts which  
4 were -- I mean the relevance and the significance of all this,  
5 which may not have appeared two years ago when some person  
6 somewhere was working very hard to take actual CIA documents  
7 and convert them and water them down and summarize them and  
8 blur them, that -- two years ago it may not have been clear to  
9 everyone involved that the day was going to come when we had  
10 to have that timeline.

11           And the reason why I say that is that at that time  
12 when this initial, you know, work was being done by a great  
13 number of people, the government's position was still that  
14 treatment prior to 2006 wasn't even relevant, much less the  
15 details of treatment and who did what to whom on what day.

16           But now it has become clear that we're going to get  
17 there eventually. And the discovery that the government has  
18 produced to us is not adequate to get to that -- to answer  
19 that question: Who did what to whom on what day? And we're  
20 working very, very hard, including by litigation in front of  
21 the military commission, to get to that answer, because  
22 there's nothing I would like you -- like more than to present  
23 you with an -- with a comprehensive timeline. And we just

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1 can't do it using the existing assets.

2 MJ [COL POHL]: Got it. Okay. Thank you.

3 Trial Counsel?

4 MTC [MR. TRIVETT]: Good morning, Your Honor.

5 MJ [COL POHL]: Good morning.

6 MTC [MR. TRIVETT]: So the worst thing someone can do in a  
7 negotiation is to overestimate their own leverage. And  
8 Mr. Connell has done just that, because he has no leverage on  
9 120 of the witnesses that he's requested, at least not with  
10 where the current litigation on jurisdiction stands.

11 The prosecution agreed to provide ten witnesses. And  
12 I want to give a little bit of insight to the commission on  
13 why we felt they were at least arguably relevant to what we're  
14 litigating before you, which is simply a question of, does  
15 this court have jurisdiction over Mr. Hawsawi? That's where  
16 we're at right now.

17 We don't have a motion to suppress the statements in  
18 front of us. All we have is a challenge to jurisdiction and a  
19 proffer by the government as to what evidence it is that we're  
20 going to use to establish jurisdiction over Mr. Ali.

21 MJ [COL POHL]: So if there's no motion to suppress in  
22 front of me, I should ignore the part of his pleading  
23 attacking the voluntariness?

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1 MTC [MR. TRIVETT]: I'm not asking you to -- we're not  
2 asking you to ignore that part of it. We're saying if there's  
3 not a motion to suppress, then you're making a legal argument  
4 on attenuation and voluntariness. Of the ten witnesses we  
5 gave, we agreed to provide everyone who was in that meeting at  
6 that day in January of 2007 who can testify about how  
7 voluntary the statement was.

8 If he wants to talk about how it's not attenuated  
9 from other treatment, that's fine, but that's a motion to  
10 suppress. And he chose not to file one. We suggested he file  
11 it. We suggested the proper way to do this is file your  
12 motion to suppress, file your motions to compel additional  
13 discovery for that purpose; we'll litigate that up front.  
14 Afterwards we'll know if we can use the LHMs or we'll know if  
15 we can't.

16 MJ [COL POHL]: So you're telling me then -- the part of  
17 his motion -- and we've had this discussion with Mr. Connell,  
18 too, and I'm not saying it's not -- your point about the  
19 motion to suppress is in there. I'm reading this as it's  
20 embedded in his pleading. But you're telling me to ignore  
21 that part of it.

22 What I'm saying is he's attacking the voluntariness  
23 of the statement. When I went to law school -- I know it was

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1 a long time ago -- that's a motion to suppress, okay? He's  
2 choosing -- I believe his term is objection to evidence,  
3 whatever. But he's attacking the voluntariness of a  
4 statement. I'm treating it as an attack on voluntariness of  
5 the statement, which is a motion to suppress. And that's  
6 embedded in his pleading. But you don't think it is?

7 MTC [MR. TRIVETT]: No, sir, because I think he's  
8 specifically gone out of his way to say that it's not, and  
9 that he intends to provide another motion to suppress later.  
10 So we're going to give him two bites at the apple, according  
11 to his own pleadings. And that can't happen.

12 We can't give a full dress rehearsal for the  
13 admissibility of a statement which is important evidence in  
14 this case and then have him come back and do it again. That  
15 can't happen. And I read the pleadings to suggest that that's  
16 what -- that's the very thing that he's hoping to happen.

17 MJ [COL POHL]: Oh, I don't necessarily disagree with what  
18 his hopes may be. What he's going to get may be something  
19 different. But we'll -- we'll go from there. Okay.

20 MTC [MR. TRIVETT]: So ----

21 MJ [COL POHL]: Let's operate from this assumption.

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

23 MJ [COL POHL]: And we'll -- Mr. Connell is going to

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1 address this issue, your issue.

2 If voluntariness of the statement is at issue, does  
3 the government see -- maintain its same position that any  
4 prior-2007 evidence is irrelevant?

5 MTC [MR. TRIVETT]: Yes. We -- because ultimately, we  
6 believe that if there is a right motion to suppress in front  
7 of you based on a failure to attenuate, like that would be the  
8 basis for the motion ----

9 MJ [COL POHL]: Uh-huh.

10 MTC [MR. TRIVETT]: ---- right, then we establish the  
11 attenuation aspect and that you ----

12 MJ [COL POHL]: What if it's that it's a continuation of  
13 the same interrogation, not an attenuation argument?

14 MTC [MR. TRIVETT]: Right.

15 MJ [COL POHL]: Does that make a difference?

16 MTC [MR. TRIVETT]: It could. We have not briefed this  
17 issue, but there is case law directly on point as to what  
18 constitutes the same interrogation and when -- when there's a  
19 sufficient break. It's a factual determination that you can  
20 make. But there is case law on that.

21 So this concept that their last statement could be in  
22 August of 2006 to the CIA while they're in CIA custody, and  
23 then give an LHM statement to the FBI in January of 2007, more

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1 than five months with intervening events, having moved to a  
2 new confinement facility, having been in the custody of the  
3 Department of Defense ----

4 MJ [COL POHL]: You're just making an attenuation  
5 argument.

6 MTC [MR. TRIVETT]: Say that again, sir?

7 MJ [COL POHL]: You're just making an attenuation  
8 argument.

9 MTC [MR. TRIVETT]: No. We're saying it's a completely --  
10 it's obviously a separate interrogation. The identities of  
11 the questioners changed, the identity of the people who were  
12 in custody changed.

13 MJ [COL POHL]: Now you're arguing the merits of your  
14 point.

15 MTC [MR. TRIVETT]: Exactly. But what I'm saying, sir, is  
16 that you can concede all of the conduct beforehand. We're  
17 relying -- and again, we would like the opportunity to  
18 actually brief this, because we don't believe that we've had  
19 the opportunity to properly brief an actual suppression  
20 motion; that ultimately you can -- we would concede that  
21 everything that happened to them happened to them. We're not  
22 going to -- we're not going to challenge whatever happened to  
23 them before.

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1           And this came up in, you know, what constitutes a  
2 verifiable fact. And what I can tell you standing here as a  
3 member of the prosecution team, it's very wide, right? If  
4 someone were to get up and say, and then they cut my hand off,  
5 and we look over and he's still got his hand, we might oppose  
6 that. But absent something that can be easily verified, we'll  
7 concede what they're alleging occurred to them during that  
8 period of time.

9           MJ [COL POHL]: This goes back to the other issue I was  
10 talking about, and it's kind of a collateral issue here. But  
11 whether it's on this motion or another motion, okay, I  
12 suspect -- and unlike Mr. Connell, I kind of thought the RDI  
13 program was going to be part of this case since May of 2012.

14           But be that as it may, is -- when they want to raise  
15 RDI issues related to -- okay, for which there is no dispute  
16 of what was done to them, okay, they can do it two ways. They  
17 can call -- and I don't know -- and the number makes no  
18 difference to me. If a person was mistreated on one day and  
19 they want to present evidence of mistreatment of one day, they  
20 can. If the same person was mistreated for 200 days and they  
21 want to call 200 witnesses, they have that option. Okay.

22           But that's my whole point is -- is that if there is  
23 no dispute what was done to them, why don't we -- why doesn't

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1 the government just say here, we will give you a complete  
2 timeline of what was done, when it was done to them? And I'm  
3 not talking about the policy stuff. I'm talking about the  
4 tactical-level stuff. On this day -- and I won't get too much  
5 into dates yet -- you know, Mr. -- I'm not going to use  
6 these -- Mr. X was subject to this EIT for this period of time  
7 at this location, and on this day there were -- and just lay  
8 out the whole RDI program in a -- in one thing, and then we  
9 don't have to call 200 witnesses.

10 MTC [MR. TRIVETT]: Yes, sir. We've done that. We  
11 believe we have absolutely done that. We've provided the  
12 information in a way where they -- have we created the  
13 timeline ourselves between the statements and the treatment?  
14 We have certainly provided them charts to say that this  
15 statement involves this treatment, and we've provided all of  
16 the treatment.

17 MJ [COL POHL]: Have you given them particularity of --  
18 of -- okay. So your position is that you want them to call  
19 the 200 witnesses?

20 MTC [MR. TRIVETT]: No, sir. That's not at all our  
21 position.

22 MJ [COL POHL]: What is your position?

23 MTC [MR. TRIVETT]: Our position is that we will concede

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1 through the documentary evidence that we have provided to them  
2 that everything in those documents occurred for purposes of  
3 the -- for purposes of a properly filed suppression motion  
4 challenging the voluntariness of a statement of ----

5 MJ [COL POHL]: No, but understand, this is bigger than  
6 the suppression motion, because the issue is going to come up  
7 again and again and again.

8 MTC [MR. TRIVETT]: Yes, sir. And we believe we've  
9 provided exactly what it is he's asking for.

10 MJ [COL POHL]: Okay.

11 MTC [MR. TRIVETT]: Now, what we did do is we provided it  
12 in an early/mid/late context under a 505 filing.

13 MJ [COL POHL]: I understand that. I -- since I saw that,  
14 I understand that. I just wanted to get the government's  
15 position on -- on perhaps a way to approach this differently  
16 than calling, as I said, 200 witnesses. But apparently you  
17 don't, so that's fine.

18 I mean, it won't be just this one issue. This isn't  
19 the only time I suspect the RDI program may come up, whether  
20 it be before me or before the members. Okay.

21 MTC [MR. TRIVETT]: I'm concerned, sir, that I'm talking  
22 past you at this point. It is not the government's position  
23 that they should be able to call 200 witnesses.

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1 MJ [COL POHL]: Oh, I'm not saying -- I'm not asking you  
2 to concede that, but I'm simply saying is the current posture  
3 of the case to me indicates that that's a possibility, that if  
4 they want to start describing the RDI program and the  
5 government will -- the government will take whatever position  
6 you take. But one option they will have will be to say, okay,  
7 on this day I'm calling this witness to say this was done with  
8 them.

9 Now, there may be workarounds, there may be  
10 substitutes; I've got all that. But it just strikes to me is  
11 that -- and again, I don't care whether it's one or it's 200.  
12 If it's required for a fair trial, it's required for a fair  
13 trial. That's all.

14 Let's go back to the issue before us. I just raise  
15 this because, again, it's going to be a common issue that's  
16 going to come up, I'm sure, in the future.

17 MTC [MR. TRIVETT]: Okay. So ----

18 MJ [COL POHL]: Yeah.

19 MTC [MR. TRIVETT]: ---- getting back to the ten witnesses  
20 that we believe are at least arguably relevant, it includes  
21 the individuals who were in the LHM statement in January of  
22 2007, Special Agent Fitzgerald, Special Agent Perkins, Special  
23 Agent McClain.

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1           There were three doctors they requested that were at  
2   least temporally potentially relevant. I believe they've --  
3   they've withdrawn one of those, but one of them is a dentist.  
4   We said fine, if you think that there's someone at that time  
5   that can talk about dental problems possibly that somehow went  
6   to the voluntariness of that statement in January, have at it.

7           So we have not been unreasonable, but we have limited  
8   it to where we think the pleadings are. And we think  
9   ultimately that the pleadings suggest that the voluntariness  
10   of the statement as currently filed goes strictly to the  
11   voluntariness of that statement at the time it was given.

12           The testimony will be remarkably similar to what you  
13   heard Special Agent Perkins testify regarding Mr. Hawsawi.  
14   The same process was followed. The same admonishment forms  
15   were followed. The length of it will, again, establish the  
16   voluntariness of it on its own. But we believe, absent a  
17   motion to suppress, that that's the only relevant portion of  
18   the testimony that they should be allowed to present in a  
19   jurisdictional hearing.

20           We do suggest strongly that you accept certain  
21   government concessions, and this isn't necessarily just in the  
22   statement basket, but certainly in the hostilities basket. We  
23   had conceded in an earlier litigation about the genuine

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1 religious belief of the female guard issue, and you held us to  
2 it when you thought we were asking questions that was  
3 inconsistent with our concession.

4           For purposes of jurisdiction, you're certainly  
5 entitled to take concessions from the government in deciding  
6 your issue before you, which is simply: Did hostilities exist  
7 on September 11th, 2001, such that you would have  
8 jurisdiction?

9           I do agree with Mr. Connell that we're relying on the  
10 material support aspect of it and the part of al Qaeda aspect  
11 of it. Although we do believe that is a principle in the  
12 attack, we could also rely on that first prong. We're not  
13 going to do it for purposes of the jurisdiction. We certainly  
14 don't want to be foreclosed from arguing that they're a  
15 principle in the crime for the 9/11 attacks.

16           We'll certainly go back and look at everything we  
17 have provided to them in regard to the RDI program, which as  
18 you know, because most of it had to go through your desk for  
19 approval, is a voluminous amount of information. We'll help  
20 them understand how they can put it together because we did  
21 provide it chronologically, how we think the timeline is --  
22 can be created very simply. If not and if it's appropriate,  
23 we'll consider assisting in putting that timeline together for

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1 them in a more concise manner than we did.

2 I don't -- I need to look in the details a little bit  
3 more, and this has been Mr. Groharing's main part of the  
4 litigation so I'm going to defer to him on that, but we'll see  
5 what we can do about that.

6 But we agree with the judge. I don't want for a  
7 second for the judge to think that it is our preference to  
8 call 200 witnesses on what occurred to them between 2003 and  
9 2006. That is not our position at all. And we think that  
10 there are workarounds, certainly pretrial and as well at  
11 trial, to allow for that to occur.

12 I just wanted to address a couple specific issues  
13 that Mr. Connell brought up. We are not going to use the  
14 Combatant Status Review Tribunal statement against Mr. Ali,  
15 but we will be filing a notice of exhibit similar to how we  
16 filed an updated notice of exhibit, similar to how we filed  
17 for Mr. al Hawsawi.

18 MJ [COL POHL]: For the jurisdictional motion or for ----

19 MTC [MR. TRIVETT]: Correct.

20 MJ [COL POHL]: Okay, and when would you file those?

21 MTC [MR. TRIVETT]: I think we're working to file them by  
22 the end of the month. It's substantially similar to that  
23 which we already filed, but we had reserved our right. This

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1 is not unlike how we did it for Mr. Hawsawi.

2 MJ [COL POHL]: Okay. I'm not going to come back in March  
3 and Mr. Connell is telling me, "Oh, I got all this new stuff.  
4 I need more time"?

5 MTC [MR. TRIVETT]: It shouldn't be new. I mean, we're  
6 going to clean up a little bit on business record declarations  
7 and certifications and those types of things. It's going to  
8 be substantially similar to what we filed, but we're going to  
9 clean it up and make it easy for the court, hopefully, how  
10 Special Agent Perkins' testimony went with -- with the  
11 newly-filed notice of exhibits in that.

12 MJ [COL POHL]: Okay.

13 MTC [MR. TRIVETT]: I did want to touch upon the  
14 deposition issue. We obviously -- I think that the court  
15 needs to first decide the relevance of those two individuals  
16 he seeks to depose, and then if for some reason the court  
17 finds that they're relevant, we would request that a separate  
18 motion for deposition be filed articulating the reasons.

19 We thought we had some very strong reasons with  
20 health concerns for 9/11 victims who we thought were pretty  
21 sick, and that didn't meet the standard. We're certainly not  
22 going to agree to a lower standard than we're being held to  
23 for depositions, and we don't have the information that we

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1 need to be able to agree to a deposition of those individuals.  
2 Obviously, it's only an issue if you find that they're  
3 relevant for the hearing.

4 MJ [COL POHL]: Okay.

5 MTC [MR. TRIVETT]: Okay. But again, we would -- also in  
6 regard to the hostilities information, Mr. Connell himself  
7 filed Staff Statement 6, which is a 9/11 Commission document  
8 that details very well and summarizes very well what the  
9 government did and didn't do in regard to Operation Infinite  
10 Reach and Operation Infinite Resolve. I'll talk a little more  
11 detail about that in the next motion that we're scheduled to  
12 argue, which is the Operation Infinite Reach and additional  
13 information for that.

14 But what we will say is that he filed  
15 Staff Statement 6. We believe that that would be all that  
16 would be required for the jurisdictional hearing. It neatly  
17 condenses all of the action or inaction of the United States  
18 Government to the extent that he's arguing that that's  
19 relevant. We still don't think it's relevant but to the  
20 extent it is relevant -- you find it's relevant, that  
21 Staff Statement 6 satisfies any of those obligations.

22 So other than the three doctors and the individuals  
23 who were in there during the interview of Mr. Ali in January,

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1 we've also agreed to produce Lieutenant General Newbold and  
2 Vice Admiral Fry because they had actual operational  
3 involvement, by all accounts, in the planning of Operation  
4 Infinite Reach and the operation of Infinite Resolve. The  
5 government plans on calling a similar witness not in the  
6 jurisdictional hearing but certainly in our case in chief. We  
7 didn't feel it would be right to deny them those individuals,  
8 although ultimately we feel like their testimony will be  
9 favorable to us.

10           So I did want you to understand that we did pro --  
11 that the reasons behind the 10 we gave can be held against an  
12 actual legal standard and found to be relevant. We do not  
13 believe that the other 120 or these additional two ambassadors  
14 that Mr. Connell has requested fits the legal standard of  
15 Hamdan at all. With all due respect to the ambassadors, we  
16 don't believe that their statements regarding the existence of  
17 a hostility matter to the standard that we think that this  
18 court is bound to apply based on the C.M.C.R. decision in  
19 Hamdan.

20           Subject to your questions, sir.

21           MJ [COL POHL]: I have none. Thank you. Mr. Connell?

22           LDC [MR. CONNELL]: Sir, I'm willing to answer any  
23 questions, but I don't have anything further. There's nothing

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1 new there.

2 MJ [COL POHL]: Just give me -- I've heard it before,  
3 but as an older fellow, sometimes I need to hear things more  
4 than once.

5 Is this a motion to suppress or isn't it?

6 LDC [MR. CONNELL]: No, sir. Military Commission Rule  
7 of -- Military Commission Rule of Evidence 304 is very  
8 specific on this topic. The -- it provides two different ways  
9 to raise a claim of involuntariness. One of those is by  
10 motion to suppress and one of those is by objection.

11 The reason why that's significant here is that the  
12 government chooses, as is its right, to introduce statements  
13 taken under interrogation by Mr. al Baluchi. That brings the  
14 304 into play. And when 304 comes into play -- 304 is a rule  
15 of admissibility. 304(a)(1) is a statement of admissibility.  
16 It is written, "No statement obtained by the use of torture,  
17 or by cruel, inhuman or degrading treatment, whether or not  
18 under color of law, shall be admissible in a trial by military  
19 commission," with one exception not applicable here.

20 The -- all of Rule 304 is written in a -- I mean,  
21 there's a reason why Rule 304 is in the Military Commission  
22 Rules of Evidence, and there's no equivalent to it in the  
23 Federal Rules of Evidence. In the military commission,

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1 statements are matters of admissibility. The -- and so our  
2 argument is that the statements are inadmissible, because in  
3 order to admit a statement, the military commission has to  
4 proceed under Military Commission Rule 304(a)(4) regarding  
5 determination of voluntariness which is, in fact,  
6 interestingly the standard that the government was arguing  
7 from, even though they -- they didn't mention it. Those all  
8 deal with questions of admissibility. And Rule 304  
9 specifically talks about objections and motions to suppress as  
10 the two ways to bring that into play.

11 The -- and I cite specifically to 304(c)(2), which is  
12 the procedural section of how does one on the defense litigate  
13 the admissibility of a statement. And it provides two  
14 separate mechanisms. In fact, (c)(2), the name of it is  
15 "Motions and Objections" and then it proceeds in  
16 subsection (A), "Motions to suppress or objections under this  
17 rule to statements that have been disclosed shall be made by  
18 the defense prior to submission of a plea."

19 It then goes on to provide a specificity element in  
20 subsection (3), and provides the burden of proof in  
21 subsection (D). And then the -- interestingly, there is  
22 specifically in 304(e) a claim that admissibility is not  
23 simply based on the testimony of the declarant who took the

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1 statement, but rather, opposing admissibility and objection  
2 triggers a right to present defense evidence, stating that  
3 "the defense may present matters relevant to the admissibility  
4 of any statement as to which there has been an objection or  
5 motion to suppress under this rule."

6           So this whole motion to suppress concept, I  
7 understand that we normally think of motions to suppress. I  
8 myself have used "motion to suppress" as a shorthand for the  
9 inadmissibility of statement on voluntariness or Miranda  
10 grounds, you know, probably an infinity of times in my life.  
11 But the -- but the Military Commission Rule of Evidence on  
12 this is very clear. If the government chooses to introduce  
13 statements, it must prove their voluntariness. And we get to  
14 object to that voluntariness and present evidence on that.

15           So we're proceeding strictly under M.C.R.E. 304 there  
16 which lays out the whole process.

17       MJ [COL POHL]: Okay. But let's operate from the -- okay.  
18 So you treat this as an objection to evidence.

19       LDC [MR. CONNELL]: Yes, sir.

20       MJ [COL POHL]: And, of course, the military rules have  
21 the same disjunctive.

22       LDC [MR. CONNELL]: Yes, sir.

23       MJ [COL POHL]: It talks about motions or objections.

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

2 MJ [COL POHL]: Okay. And then you -- we litigate this as  
3 an objection, and then later on you can litigate it again as a  
4 motion? Is that what you're telling me?

5 LDC [MR. CONNELL]: The short answer is yes, but the long  
6 answer is that we are litigating the admissibility of two  
7 separate things. Those are not actually the same thing.

8 The government in this personal jurisdiction motion  
9 chooses to litigate the -- chooses to attempt to admit  
10 Mr. al Baluchi's statements. We object. We might object on  
11 relevance grounds. We might object on foundation grounds. We  
12 might object on voluntariness grounds. We have chosen to  
13 object on voluntariness grounds.

14 MJ [COL POHL]: Which brings you ----

15 LDC [MR. CONNELL]: We are calling ----

16 MJ [COL POHL]: ---- under 304.

17 LDC [MR. CONNELL]: I'm sorry?

18 MJ [COL POHL]: Which brings you under 304. Relevance  
19 would be something else.

20 LDC [MR. CONNELL]: Yes. That's exactly right. My point  
21 exactly. We could object under a different rule of --  
22 Military Commission Rule of Evidence. We have chosen to  
23 object under 304. The -- when you say motion to suppress

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1 later, what you actually mean is litigating the admissibility  
2 of statements at the -- before the members.

3 That is typically, as a matter of procedure, the  
4 question of whether statements are admissible before the  
5 members is litigated pretrial using a motion to suppress.  
6 It's not the only way to do it. You know, there's Crane v.  
7 Kentucky, which establishes a right for a defendant to contest  
8 the admissibility -- the voluntariness of statements before  
9 the jury or the members. But typically what is done is  
10 the ----

11 MJ [COL POHL]: No, I understand.

12 LDC [MR. CONNELL]: ---- motion to suppress gets handled  
13 in that manner.

14 MJ [COL POHL]: I understand. You make a motion to  
15 suppress on voluntariness, and if it's overruled, you can  
16 still raise the voluntariness issue.

17 LDC [MR. CONNELL]: That's right.

18 MJ [COL POHL]: That's not what I'm talking about.

19 LDC [MR. CONNELL]: That motion to suppress, which  
20 everybody keeps referring to, is litigating the admissibility  
21 of statements to the members. What the government has chosen  
22 here in an unusual hearing, I admit, a personal jurisdiction  
23 hearing, has chosen to attempt to admit statements, and we get

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1 to object on that. That objection is based on voluntariness  
2 grounds under M.C.R.E. 304.

3 MJ [COL POHL]: Okay. But back to my other question,  
4 though, is: You present evidence on this now. The government  
5 presents evidence on -- an objection on voluntariness grounds.  
6 Okay. Is there any legal distinction of whether it's a motion  
7 to suppress or an objection as to the standards, burdens, and  
8 everything else?

9 LDC [MR. CONNELL]: No, because they are treated  
10 equivalently under 304.

11 MJ [COL POHL]: Okay. So if I ----

12 LDC [MR. CONNELL]: The difference is ----

13 MJ [COL POHL]: Okay. Go ahead.

14 LDC [MR. CONNELL]: The difference is where we are in this  
15 process. And I just want to remind the military commission of  
16 a little bit of the procedural history, all right?

17 When 488 was filed, we said this issue is not ripe.  
18 Then our -- the military commission, over Mr. al Hawsawi's  
19 objection and over government -- Mr. al Hawsawi objected and  
20 the government objected and said, nope, we're doing this. We  
21 said fine.

22 The military commission tells us to proceed with this  
23 litigation, we are proceeding with the litigation. And thus,

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1 we did. That's when we filed 502J. That's when we rallied  
2 our 6,000 pages of discovery for 502Y. And we are ready to  
3 proceed. We are pressing forward on this.

4           So the different -- the -- yes, there is a  
5 significant difference with respect to what the admissibility  
6 of what -- in what proceeding, but we keep saying we're not  
7 asking to wait for the government to complete its discovery,  
8 we're not asking for the -- on torture. We're not asking the  
9 government to wait -- or to wait for the government to  
10 complete its -- its discovery on hostilities, which it keeps  
11 promising to us.

12           We are ready to proceed. If the government chooses  
13 to attempt to prove personal jurisdiction and to do so using  
14 statements of Mr. al Baluchi, we oppose their admissibility on  
15 voluntariness grounds.

16       MJ [COL POHL]: Okay. So we litigate it on voluntariness  
17 grounds.

18       LDC [MR. CONNELL]: The admissibility -- I just want to  
19 define what "it" is. The admissibility of Mr. al Baluchi's  
20 January 2007 statement in a personal jurisdiction hearing,  
21 yes.

22       MJ [COL POHL]: Got it. Okay. So the government presents  
23 its evidence; you present your evidence, if you choose to; we

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1 argue; and then I rule.

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

3 MJ [COL POHL]: And my first question is: Would there be  
4 any different legal analysis as an objection to evidence, as  
5 a -- to a motion to suppress?

6 LDC [MR. CONNELL]: There is no different legal analysis.  
7 I expect there will be different factual analysis because  
8 additional information is continually being produced by the  
9 government in discovery. So ----

10 MJ [COL POHL]: No, that's not my question.

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

12 MJ [COL POHL]: My question is, is that ----

13 LDC [MR. CONNELL]: Is the legal analysis different? No.

14 MJ [COL POHL]: ---- some day in March is you present all  
15 this to me, is there any difference in the legal analysis,  
16 based on the record before me, of a motion to suppress or an  
17 objection to evidence?

18 LDC [MR. CONNELL]: No, sir.

19 MJ [COL POHL]: Okay. Burdens ----

20 LDC [MR. CONNELL]: Burdens are the same.

21 MJ [COL POHL]: Burdens, burdens of the proof ---

22 LDC [MR. CONNELL]: Burdens are the same.

23 MJ [COL POHL]: The burdens of proof, everything, and

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1 burdens of persuasion. Okay.

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: Now, so we do this, optimistically, in  
4 March.

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

6 MJ [COL POHL]: And then do you have an option then to  
7 raise this as a motion to suppress later on?

8 LDC [MR. CONNELL]: "This" being the admissibility of ----

9 MJ [COL POHL]: Of the statements.

10 LDC [MR. CONNELL]: ---- the statements in the personal  
11 jurisdiction hearing? No.

12 MJ [COL POHL]: No. No. You keep adding all those  
13 qualifiers.

14 LDC [MR. CONNELL]: That's because we are in a particular  
15 context, Judge.

16 MJ [COL POHL]: No. But what I'm trying to say here is --  
17 well, I am saying here is, is that you moved to object to the  
18 evidence that looks just like a motion to suppress but it's --  
19 it's labeled an objection to evidence -- and I know how the  
20 rule reads. I can read it too. I got it. Okay. We litigate  
21 it there, do the analysis. Was it voluntary or not voluntary?  
22 Whoever had the burden, did they satisfy, they didn't satisfy  
23 it, and you get a ruling. Okay. And then later on, you could

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1 raise the same issue as a motion to suppress.

2 LDC [MR. CONNELL]: It's -- the place where we part  
3 company -- I understand what you're asking me: Are there  
4 going to be three different times at which the voluntariness  
5 of Mr. al Baluchi's statement is -- is discussed ----

6 MJ [COL POHL]: I know there can be two.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: It's the third one I'm asking about.

9 LDC [MR. CONNELL]: Right. Are there going to be three  
10 different times and the answer to that is yes. It will be  
11 discussed in personal jurisdiction as to admissibility in a  
12 personal jurisdiction hearing. It will be discussed in a  
13 motion to suppress as to its admissibility before the members.  
14 And it will be discussed before the members as to its weight  
15 and reliability.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: So, yes, it will be discussed three  
18 times.

19 MJ [COL POHL]: Let me ask you this: Because the  
20 government, I think, is operating from the premise that if I  
21 deny your objection, overrule your objection, that then later  
22 on down the road you'll be able to relitigate it as a motion  
23 to suppress.

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1 LDC [MR. CONNELL]: Yes, that's their articulation, Judge.

2 MJ [COL POHL]: Let me go -- let's turn that around. What  
3 if I grant your objection, okay? Is it just limited to  
4 granting it for the personal jurisdiction motion and it's  
5 still alive for anything else?

6 LDC [MR. CONNELL]: Yes. In the same way that they may be  
7 able to rally additional evidence for -- before ----

8 MJ [COL POHL]: Well, would it have any type -- would  
9 there be any legal significance over -- because what I'm  
10 hearing you tell me is this is a -- this is an objection to  
11 evidence for this type of hearing only.

12 LDC [MR. CONNELL]: Yes, sir. That's all we've briefed;  
13 that's all the government has briefed, yes, sir.

14 MJ [COL POHL]: It's a box now, not a basket.

15 LDC [MR. CONNELL]: Yes, sir, box and basket. Got it.

16 MJ [COL POHL]: Okay, so based on the evidence and the  
17 law, while I'm in this box ----

18 LDC [MR. CONNELL]: Right.

19 MJ [COL POHL]: ---- I say, okay, Mr. Connell, you're  
20 right. That was involuntary, therefore the government cannot  
21 use it in the personal jurisdiction motion.

22 LDC [MR. CONNELL]: Correct.

23 MJ [COL POHL]: Down the road ----

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1 LDC [MR. CONNELL]: But let's assume for purposes of this  
2 that you find some other evidence and you go ahead and find  
3 that there's personal jurisdiction. Because otherwise there  
4 is no ----

5 MJ [COL POHL]: Yeah, yeah. Well, yeah, that's true.  
6 I'm -- but I'm just narrowing it ----

7 LDC [MR. CONNELL]: Sure.

8 MJ [COL POHL]: ---- trying to narrow down.

9 Down the road, we still have this statement out  
10 there.

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

12 MJ [COL POHL]: So it means it's inculpatory.

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

14 MJ [COL POHL]: I don't know why the government would want  
15 to admit it otherwise.

16 LDC [MR. CONNELL]: Sure.

17 MJ [COL POHL]: But who knows.

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

19 MJ [COL POHL]: Okay. Does box -- the first box I'm in,  
20 does it have any legal significance whatsoever factually on  
21 box -- when I do it the second time?

22 LDC [MR. CONNELL]: Right. It has some. And the reason  
23 for that is that you may make -- reach legal conclusions in

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1 that -- in that all the parties are held to as a matter of  
2 stare decisis. You were very clear when the front three  
3 tables opted out of this motion that they may be stuck with  
4 some results from it.

5 And so the reason why I say yes, that there is --  
6 because you have articulated that there may be legal  
7 conclusions reached in the course of this hostilities  
8 litigation ----

9 MJ [COL POHL]: No, just the ----

10 LDC [MR. CONNELL]: ---- that bind everybody down the  
11 road.

12 MJ [COL POHL]: Okay. But that's a different -- I'm  
13 talking about -- okay. You introduced -- let's just go down  
14 the ----

15 LDC [MR. CONNELL]: No, no, no. I'm answering your actual  
16 question. I know what you want to know, and I'm trying -- and  
17 I'm getting there to the answer.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: I'm not dodging the question.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: The -- are you saying if the -- if our  
22 objection to the admissibility of this statement in the  
23 personal jurisdiction hearing is sustained ----

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1 MJ [COL POHL]: Uh-huh.

2 LDC [MR. CONNELL]: ---- can the government still -- does  
3 that bind the government from introducing that statement at  
4 trial? And the answer to that is no, it doesn't, any more  
5 than any other preliminary ruling about the admissibility of  
6 a -- of government evidence in the personal jurisdiction  
7 hearing binds them from doing anything affirmative or negative  
8 down the road.

9 They -- there might be principles. There might be  
10 hints. I mean, we dealt with this earlier in the 373 issue  
11 which is -- the reasoning on which you denied discovery in 373  
12 would tend to suggest that, if you followed that same  
13 reasoning on the base motion, that you might deny the base --  
14 the base motion, but you didn't deny the base motion. I mean,  
15 it's the same concept.

16 There are -- there are principles which are  
17 articulated by the military commission, some of which are  
18 binding and you put them in an order; some of which are merely  
19 principles, which the parties would be wise to treat as  
20 persuasive.

21 MJ [COL POHL]: But ----

22 LDC [MR. CONNELL]: But the admissibility of -- the  
23 admissibility or inadmissibility of the January 2007 statement

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1 at the personal jurisdiction hearing does not control the  
2 outcome later for the admissibility before members.

3 MJ [COL POHL]: So we go through the whole same drill  
4 again?

5 LDC [MR. CONNELL]: To be perfectly honest, sir, we go  
6 through a much bigger drill. I expect the government to have  
7 produced substantially more evidence by then. I expect them  
8 to call more witnesses. They have treated this personal  
9 jurisdiction hearing as a mere annoyance and, you know,  
10 they're not -- they don't intend to call their hostilities  
11 witness. They don't -- they didn't contradict  
12 Professor Watts. They're only calling two witnesses. That is  
13 their litigation choice. I doubt that they will make that  
14 same litigation choice again.

15 So, yes, there is another hearing. There are three  
16 times, as I said before, at which the voluntariness of  
17 Mr. al Baluchi's statements will be discussed.

18 MJ [COL POHL]: Am I required to give you two hearings?

19 LDC [MR. CONNELL]: The ----

20 MJ [COL POHL]: You're reading -- the -- no, the third one  
21 I'm ----

22 LDC [MR. CONNELL]: Right. So I ----

23 MJ [COL POHL]: I know you do it before the members, so

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1 let's put that aside. Let's just talk about two. I'm talking  
2 about for me.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: Okay. You say in the way it is worded and  
5 again, it's the same thing the Military Rule of Evidence, it  
6 says "motion or objection," so it's in the disjunctive. Okay,  
7 you want to raise an objection later on as a motion when you  
8 get more discovery or whatever or not be precluded. Let me  
9 just put it that way.

10 LDC [MR. CONNELL]: Yeah.

11 MJ [COL POHL]: Okay.

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

13 MJ [COL POHL]: And you believe the rule can be read that  
14 way.

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

16 MJ [COL POHL]: My other question is: Am I required to  
17 treat it that way or can I, under 611, decide I want to --  
18 there's a more efficient way to do this one time as a motion  
19 to suppress?

20 LDC [MR. CONNELL]: There are a few different pieces to  
21 that, so don't think that I'm dodging your question. In fact,  
22 if you want me to start with 611, I will. You cannot compel  
23 either party to enter stipulations under 611. I couldn't

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1 compel the government to enter my proposed stipulation.

2 MJ [COL POHL]: I'm talking about a stipulation, I'm  
3 talking about modes and how the trial runs.

4 LDC [MR. CONNELL]: All right. Let's say that part.

5 MJ [COL POHL]: But the basic question is, whether it's  
6 611 or not, I don't want use that -- get too hung up on that.

7 LDC [MR. CONNELL]: Okay.

8 MJ [COL POHL]: Simple question is: Am I required to give  
9 you two bites?

10 LDC [MR. CONNELL]: There are two constitutional  
11 principles which require hearings. One of those is  
12 Jackson v. Denno, which there is a constitutionally required  
13 pretrial hearing on the voluntariness of statements. The  
14 second is Crane, which we already talked about, which says  
15 that a defendant cannot be precluded from litigating the  
16 voluntariness and reliability of their statements before a  
17 panel.

18 There is nothing about those two principles which, on  
19 their own, require a certain number, whether that be 37 or  
20 three or two -- I guess it is two -- you know, any number  
21 higher than two are constitutionally required.

22 One of the core points that I keep making is we are  
23 in the situation that we are in because of the way in which

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1 the government has chosen to litigate the personal  
2 jurisdiction motion. They could choose to litigate personal  
3 jurisdiction in ways other than introducing Mr. al Baluchi's  
4 statements. They could do it by CSRT statements. They could  
5 do it by D-101. They could do it by other statements which  
6 might exist in the universe which took place outside of the  
7 custodial interrogation setting.

8           The -- choosing to proceed by introducing statements  
9 which are obtained in a custodial interrogation has certain  
10 consequences. One of those consequences is that under  
11 M.C.R.E. 304, the defense can object on voluntariness grounds  
12 and present evidence of involuntariness, and that's the  
13 situation in which we find ourselves [sic].

14           Now, does that mean that you could not have decided,  
15 as the government asked you to -- remember earlier in the 502  
16 litigation? The government asked you to decide that there  
17 should be no hearing on personal jurisdiction whatsoever. I  
18 think that the military commission would have been incorrect  
19 to reach that decision that there should be no hearing  
20 whatsoever, but that's not the decision that the military  
21 commission made.

22           And so we're proceeding in that framework. And in  
23 the framework in which we currently find ourselves, the

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1 procedural posture is the government, for whatever strategic  
2 reasons they perceive, chooses to introduce custodial  
3 interrogation statements and we choose to oppose them on  
4 voluntariness ground. In that framework, yes, three hearings  
5 are required. But does that mean that in some other military  
6 commission case three hearings will always be required? No.  
7 It's because of ----

8 MJ [COL POHL]: Actually, it would be two hearings.

9 LDC [MR. CONNELL]: Two pretrial hearings.

10 MJ [COL POHL]: Yes, otherwise it's not really a hearing,  
11 it's -- because you're presenting evidence. I got you.

12 LDC [MR. CONNELL]: It's a discussion of the voluntariness  
13 of Mr. al Baluchi's statements.

14 So yes, is it unique situation? Yes. Is it a  
15 situation that in this unique circumstances we find ourselves  
16 there will be two different pretrial occasions on which we  
17 discuss the voluntariness of Mr. al Baluchi's statements?  
18 Yes.

19 MJ [COL POHL]: Okay. Let me ask you this: But I asked  
20 you is it required, you said yes. Is there any ----

21 LDC [MR. CONNELL]: That's my ----

22 MJ [COL POHL]: Is there any authority for that?

23 LDC [MR. CONNELL]: You know how I like to give long

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1 answers, Judge? I gave a long answer, but the short answer  
2 comes down to is yes.

3 MJ [COL POHL]: Yeah. And I say do you have any authority  
4 for that position, other than the readings of the rule as  
5 you've already given it?

6 LDC [MR. CONNELL]: I have explained in detail why I  
7 believe that the government cannot introduce evidence of  
8 custodial interrogation without having an adjudication of the  
9 voluntariness of the statement. That is 948r and that is 304.  
10 So, yes, there is substantial authority for that.

11 Could the government choose to not introduce the  
12 statements from -- they could still -- let's -- we're not  
13 committed to this. The government could still choose to --  
14 not to introduce those statements; in which case, two-thirds  
15 of the witnesses that we -- that we put on become irrelevant,  
16 but -- that we -- that even in our reduced witness list become  
17 irrelevant.

18 But if the government chooses to use those statements  
19 in the way that they did for Mr. al Hawsawi, then the Military  
20 Commissions Act, not to mention the Fifth and Sixth  
21 Amendments, but the Military Commissions Act and the M.C.R.E.s  
22 require us to have -- to have the right to present evidence,  
23 and that's M.C.R.E. 304(e).

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1 MJ [COL POHL]: But so you -- do you believe that

2 801A(c)(3) [sic] ----

3 LDC [MR. CONNELL]: All right. Let me get caught up with  
4 you there, sir.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: Just one moment before I give you my  
7 deeply held beliefs about 801(c)(A) [sic].

8 MJ [COL POHL]: I'm sorry. 801(a)(3).

9 LDC [MR. CONNELL]: 801 -- one more time, sir. 801?

10 MJ [COL POHL]: (a).

11 LDC [MR. CONNELL]: (a).

12 MJ [COL POHL]: (3). Discussion ----

13 LDC [MR. CONNELL]: Are you in the M.C.R.E. or the ----

14 MJ [COL POHL]: Oh, no. I'm in the rules. I'm sorry.

15 The R.M.C.

16 LDC [MR. CONNELL]: All right. Then just one moment,  
17 please.

18 MJ [COL POHL]: All right.

19 LDC [MR. CONNELL]: I was afraid I'd missed another  
20 update. All right. I'm with you now. 801 ----

21 MJ [COL POHL]: (a)(3). And I'm looking at the  
22 discussion.

23 LDC [MR. CONNELL]: Discussion.

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1 MJ [COL POHL]: I'm looking at the line that says, "The  
2 military judge may determine when and in what order motions  
3 will be litigated."

4 LDC [MR. CONNELL]: Yes. Certainly that's true.

5 MJ [COL POHL]: But under this circumstance, are you  
6 saying that because of the posture of this issue, is that I  
7 cannot -- I don't have the authority to tell you that you've  
8 got to make it a motion to suppress or not at all?

9 LDC [MR. CONNELL]: The general principle that the  
10 military commission controls the conduct of proceedings, you  
11 tell us when to be here and what to argue, and that's  
12 certainly true.

13 MJ [COL POHL]: But this talks about the motions itself.  
14 That's what I'm coming down to.

15 LDC [MR. CONNELL]: Yes. I don't mean just the  
16 ministerial docket part of it. I mean, yes, you could tell us  
17 you have to order -- litigate things in a certain order. That  
18 happens. It's not just here. It's everywhere. That  
19 certainly happens.

20 What I -- and are you saying -- am I saying that  
21 there is no situation in which you could say you have to do  
22 this motion before you have to -- certainly not. I'm saying  
23 that ----

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1 MJ [COL POHL]: I'm saying in the context of this  
2 motion ----

3 LDC [MR. CONNELL]: Okay.

4 MJ [COL POHL]: ---- of this objection.

5 LDC [MR. CONNELL]: Yes. In the context of this  
6 objection, if we are going to have a personal jurisdiction  
7 hearing, and if the government elects to introduce evidence of  
8 Mr. al Baluchi's January 2007 statement, no, you cannot  
9 separately say under 304 -- because that also constrains the  
10 military commission -- you cannot say the defendant does not  
11 have the right to object on voluntariness grounds and does not  
12 have the right to introduce evidence.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: I am not here to make proclamations  
15 about the -- everything that has ever happened or may ever  
16 happen in any kind of military commission. I'm saying that  
17 after a good nine months of litigation on this topic, we are  
18 in a certain procedural posture. And that procedural posture  
19 is that there is going to be a personal jurisdiction hearing,  
20 and that procedural posture is that the government has given  
21 notice that they intend to introduce custodial statements.

22 In that procedural posture, we have the right to  
23 object to voluntariness and we have the right to introduce

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1 evidence thereon.

2 MJ [COL POHL]: Okay. Thank you, Mr. Connell.

3 LDC [MR. CONNELL]: Thank you.

4 MJ [COL POHL]: Okay. Mr. Trivett, do you wish to be  
5 heard again?

6 MTC [MR. TRIVETT]: Briefly.

7 MJ [COL POHL]: Okay.

8 MTC [MR. TRIVETT]: Okay. So specifically in regard to  
9 the issue of the timeline that was brought up, when Your Honor  
10 ordered the ten-paragraph construct on information regarding  
11 the CIA's former Rendition, Detention & Interrogation program,  
12 you listed it out in paragraphs.

13 And paragraph c. was the conditions of confinement  
14 that the accused experienced. And we've provided those and  
15 we've provided those in chronological order. Paragraph e. is  
16 the standard operating procedures, and we also provided all of  
17 those, and we did that in chronological order as well. h. was  
18 for the statements. We've provided those statements in  
19 chronological order. i. was any requests for EITs. And j.  
20 was any approval or denial of those requests. We also  
21 provided those in chronological order.

22 Then we provided to the defense only -- and so this  
23 helps me understand a little bit more why the judge was asking

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1 this question. We provided them a chart that links all of our  
2 direct and substantial personnel, that which was ordered under  
3 paragraphs d., f., and g. with all of that discovery.

4 So they do have a chart that the military judge has  
5 not seen, and which we can certainly supplement the record,  
6 that helps establish -- helps the defense establish what  
7 direct and substantial personnel were involved at the times of  
8 the relevant conditions of confinement, statements, or SOPs.

9 So I was not -- it was not my understanding that you  
10 had not seen that. That was something that we decided to do  
11 after your approvals as additional information to the -- to  
12 the defense, because we do realize that they had a need to put  
13 it in chronological order and understand who those personnel  
14 were.

15 So I do want to make that very clear, that we have  
16 provided that. We'll provide that to the judge, so you have  
17 an understanding of exactly what was provided. But my  
18 apologies for not being able to articulate that clearly the  
19 first time I argued it.

20 MJ [COL POHL]: Okay. Thank you.

21 MTC [MR. TRIVETT]: The second issue, I'm certainly not  
22 aware of any right that the defense has to provide extrinsic  
23 evidence on objections. I think objections are handled on the

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1 record that they're handled on, and I think that was the point  
2 we tried to make in December. If they want to present  
3 extrinsic evidence on voluntariness of anything other than  
4 that statement, then I think they do need to file an actual  
5 motion to suppress and not have it called an objection.

6           So again, based on Mr. Connell's belief in that  
7 argument that he's going to get three bites at the apple, we  
8 would -- we would suggest to the military judge once again  
9 that the proper way to do this is after a motion to -- to just  
10 push the jurisdictional hearing off until after a motion to  
11 suppress is filed, so we only do it once pretrial, and then  
12 the defense is going to have the opportunity to challenge what  
13 they are going to challenge if there's anything admitted into  
14 the case in chief.

15           But I cannot envision a less efficient process than  
16 the one that is envisioned by Mr. Connell, and I do not  
17 believe that it's supported by the law.

18           That's all from the government, sir.

19           MJ [COL POHL]: One moment, please.

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

21           MJ [COL POHL]: I have nothing further. Thank you,  
22 Mr. Trivett.

23           MTC [MR. TRIVETT]: Thank you, sir.

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1 LDC [MR. CONNELL]: Sir?

2 MJ [COL POHL]: Mr. Connell, you want a third bite?

3 LDC [MR. CONNELL]: Two points. Three is the magic  
4 number, sir. Two points.

5 The first one is that the government is completely  
6 wrong that our motion to suppress or an objection that there  
7 is no right to present extrinsic evidence about the  
8 voluntariness of the statement. That is 304(e). 304(e) says  
9 the defense may present matters relevant to the admissibility  
10 of any statement as to which there has been an objection or  
11 motion to suppress under this rule.

12 Take this big situation and think about just the  
13 ordinary run-of-the-mill court-martial where the police  
14 officer testifies that I was perfectly nice to the  
15 servicemember and the servicemember testifies no, I was  
16 intimidated and my statement was involuntary. That is  
17 extrinsic evidence on the voluntariness of a statement. That  
18 is the ordinary process for -- in a motion to suppress  
19 context.

20 Now, the second point that I want to make is ----

21 MJ [COL POHL]: No, but when you make a -- I think the  
22 point he was trying to make is that if there's an objection,  
23 it's based on the record up to that point; but we're normally

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1 talking about evidentiary objections -- excuse me,  
2 irrelevance, hearsay, whatever.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: You don't stop the trial and go call some  
5 other people in.

6 LDC [MR. CONNELL]: Well, there's conditional admissions.  
7 Sometimes, you know, I ----

8 MJ [COL POHL]: But I'm not talking about that. I'm  
9 talking about the normal objections in a preliminary --  
10 whether it's a preliminary hearing, normal witness objections.

11 LDC [MR. CONNELL]: Right. Yes, that's certainly true.  
12 But there's not usually a rule which gives the defendant the  
13 right to introduce evidence about it.

14 But the second point I want to make is that one of my  
15 military colleagues reminds me -- and I tread lightly here,  
16 sir, because you can hang me out to dry on this, I bet. But I  
17 am reminded that, like my home jurisdiction of Virginia, that  
18 the court-martial system has preliminary hearings, Article 32  
19 hearings. And that at some times, albeit in a less -- usually  
20 a less formal way, the government will try to introduce  
21 statements of a defendant in that kind of hearing and the  
22 admissibility of those statements is contested.

23 I will tell you that in my home state of Virginia,

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1 that's very common. We have evidentiary preliminary hearings  
2 there like a court-martial, and if the defendant tries to -- I  
3 mean the government tries to introduce things that were  
4 seized, there could be a Fourth Amendment objection which just  
5 gets litigated on a somewhat informal basis right there or a  
6 statement usually gets litigated on an informal Miranda basis  
7 right there.

8           So although a personal -- we don't have Article 32,  
9 you know, specifically excluded from MCA. But there is a  
10 similar gatekeeping function to a personal jurisdiction  
11 hearing to an Article 32 hearing, and so it's not -- it's not  
12 unheard of that there would be three different times in even a  
13 court-martial at which the ----

14       MJ [COL POHL]: Yeah, but the ----

15       LDC [MR. CONNELL]: ---- the voluntariness of the ----

16       MJ [COL POHL]: And we don't need to get too down this  
17 road, is ----

18       LDC [MR. CONNELL]: That's good because I can't go too far  
19 down that road.

20       MJ [COL POHL]: No, I'm just saying is whether it's your  
21 experience with preliminary hearings in your jurisdiction or  
22 the preliminary hearings -- well, I can't speak to your  
23 jurisdiction.

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1 LDC [MR. CONNELL]: Yeah, of course, but you've got the  
2 right idea.

3 MJ [COL POHL]: I'll just speak for the military. You  
4 have a preliminary hearing officer there, and then later on --  
5 say you object on whatever basis, and then you have a judge to  
6 rule on it. So you've got two decision-makers, arguably, and  
7 two opportunities to present evidence.

8 Here, you want two opportunities to present evidence  
9 to the same decision-maker.

10 LDC [MR. CONNELL]: Yes, sir. On different legal  
11 questions.

12 MJ [COL POHL]: I understand. But I think that's where  
13 your analogy may fail, but go ahead.

14 LDC [MR. CONNELL]: So I don't think it's the  
15 decision-maker that -- there may be flaws in my analogy, don't  
16 get me wrong -- but the -- but I don't think it's the  
17 decision-maker that's key. Because the decision-maker -- I  
18 mean, it's a neutral decision-maker either way, whether it's a  
19 hearing officer in an Article 32 or whether it's a general  
20 district court judge in Virginia, you have a neutral  
21 decision-maker who is making a decision about the  
22 admissibility for a particular hearing, for that Article 32  
23 hearing.

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1           And if this actually goes to your example: If the  
2 hearing officer decided that he or she was not going to admit  
3 particular information in an Article 32 hearing, that doesn't  
4 necessarily bind the ultimate decision as to the admissibility  
5 at trial. I know that is certainly true in preliminary  
6 hearing context in state court.

7           But there's a -- there is a fairly good analogy  
8 there.

9           MJ [COL POHL]: Go ahead. I'm listening.

10          LDC [MR. CONNELL]: I thought I just gave my fairly good  
11 analogy, but perhaps it wasn't that persuasive.

12          MJ [COL POHL]: Oh, okay. No, I hear what you're saying.  
13 Do you have anything else -- I thought you said you had two  
14 points.

15          LDC [MR. CONNELL]: So my first point was 304(e) ----

16          MJ [COL POHL]: Okay.

17          LDC [MR. CONNELL]: ---- gives a right to present  
18 extrinsic evidence on an objection on voluntariness.

19          MJ [COL POHL]: Okay, and then the ----

20          LDC [MR. CONNELL]: And the second point was ----

21          MJ [COL POHL]: ---- was your analogy.

22          LDC [MR. CONNELL]: In fact, there is, you know, there is  
23 a situation even in courts-martial in which the voluntariness

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1 of statements may be discussed at three different points in  
2 the litigation.

3 MJ [COL POHL]: Okay. Thank you.

4 LDC [MR. CONNELL]: Thank you.

5 MJ [COL POHL]: Mr. Trivett, since I gave him a third  
6 bite, I'll give you a third bite if you want one.

7 MTC [MR. TRIVETT]: Nothing further, sir.

8 MJ [COL POHL]: Okay. Thank you.

9 LDC [MR. RUIZ]: Judge, may I have one thing?

10 MJ [COL POHL]: Sure.

11 LDC [MR. RUIZ]: Just I flagged this for you in the past.  
12 I want to flag it for you again. In relation to your  
13 determination on the production of these witnesses, there is  
14 one pleading from Mr. al Hawsawi which is AE 502N (MAH)  
15 and specifically Attachment B that we have asked you to  
16 consider. We flagged that for you in the past. We do so  
17 again here.

18 MJ [COL POHL]: Okay. Thank you.

19 LDC [MR. RUIZ]: That's still in play for us.

20 MJ [COL POHL]: I've got it on my notes ----

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

22 MJ [COL POHL]: ---- again down there.

23 Okay. That brings us to 512.

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1 LDC [MR. NEVIN]: Your Honor, any chance of a recess?

2 MJ [COL POHL]: In 37 minutes.

3 LDC [MR. NEVIN]: Oh.

4 MJ [COL POHL]: Is that good enough?

5 LDC [MR. NEVIN]: No.

6 MJ [COL POHL]: I'll tell you what. We've been going  
7 quite a while. We are making a lot of progress. I'll recess  
8 for lunch early. We'll recess now for lunch, and of course  
9 this throws off the schedule I just told the guards, but if it  
10 takes a while to get Mr. Mohammad here -- we'll recess now for  
11 lunch until 1300 hours. Commission is in recess.

12 [The R.M.C. 803 session recessed at 1123, 10 January 2018.]

13 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1302,  
2 10 January 2018.]

3 MJ [COL POHL]: The commission is called to order. I note  
4 that Mr. Ali has joined us.

5 Trial Counsel, any changes? I see Mr. Ryan coming in  
6 now, but any changes since when we recessed?

7 CP [BG MARTINS]: That was all that it was. He is now  
8 here.

9 MJ [COL POHL]: Okay. Mr. Nevin?

10 LDC [MR. NEVIN]: Ms. Radostitz is temporarily absent.

11 MJ [COL POHL]: Okay. Mr. Harrington?

12 LDC [MR. HARRINGTON]: Same, Judge.

13 MJ [COL POHL]: Mr. Connell?

14 LDC [MR. CONNELL]: No changes, sir.

15 MJ [COL POHL]: Mr. Ruiz?

16 LDC [MR. RUIZ]: No changes.

17 MJ [COL POHL]: And Ms. Bormann?

18 LDC [MS. BORMANN]: No changes, Judge.

19 MJ [COL POHL]: Okay. That brings us to 512.

20 Mr. Connell?

21 LDC [MR. CONNELL]: Sir, AE 512 is one of a series of five  
22 motions seeking information about the hostilities or lack  
23 thereof between the United States and al Qaeda between 1996

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1 and 7 October 2001.

2 This particular one, 512, relates to the documents  
3 regarding Infinite -- Operation Infinite Resolve. And you can  
4 be forgiven if you have not heard much about Operation  
5 Infinite Resolve because Operation Infinite Resolve is really  
6 the war that wasn't. It was the proposal for hostilities  
7 against al Qaeda which, for various reasons, never came into  
8 existence.

9 On 20 August 2008 [sic], President Clinton declared  
10 the military operation, Operation Infinite Reach, the strikes  
11 in Sudan and Afghanistan, complete and additional planning  
12 began. The time period is illustrated in AE 502FF, slide 7, a  
13 slide which is already in the record of the military  
14 commission. I would ask permission to have the feed from  
15 Table 4 just so that I can illustrate what time period we're  
16 talking about.

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. CONNELL]: Thank you.

19 MJ [COL POHL]: We've seen this slide before, have we?

20 LDC [MR. CONNELL]: That's right, sir. It's AE 502FF,  
21 slide 7.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: And so the time period that we are

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1 talking about runs from the East Africa Embassy bombings on  
2 August 8th -- excuse me, August 7th, really -- I have it wrong  
3 here -- of 1998 through the period of the attacks of 9/11.  
4 And there was a series of military planning. The public  
5 reporting is unclear what elements of this were denominated  
6 Infinite Reach and what elements were denominated Political  
7 Military Plan Delenda. I suspect that the difference, though  
8 I don't actually know, the discovery is so sketchy on this  
9 topic, but I believe that the difference is that Infinite  
10 Resolve was DoD labelling and Delenda was White House National  
11 Security Council labelling.

12 I'm done with the slide. Thank you.

13 The government presentation in December demonstrated  
14 the importance of this evidence. Special Agent Perkins  
15 testified about the East Africa Embassy bombings and the  
16 retaliation and the period after those East Africa Embassy  
17 bombings, including the attack on the USS COLE testified about  
18 by Special Agent Fitzgerald.

19 The government earlier mentioned Staff Statement  
20 Number 6, which we attached to AE 512 and Staff Statement  
21 Number 6, rather than being the end of the story is really the  
22 beginning of the story. But Staff Statement Number 6 provides  
23 a valuable roadmap to a defense, an absolute defense in the

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1 case on -- because it shows the existence of documents which  
2 are important to the question of hostilities and without  
3 actually providing those documents themselves.

4 Just a brief review of that: The -- as of May 1998,  
5 U.S. counterterrorism policy envisioned only a -- the only  
6 role for Department of Defense was in the force protection  
7 role. After -- on -- after the East Africa -- excuse me.  
8 After the strikes in -- using cruise missiles in Sudan and  
9 Afghanistan on 20 August 2008, the chair of the Joint Chiefs  
10 of Staff, General Shelton, issued a planning order for  
11 follow-on strikes.

12 National Security Council Counterterrorism  
13 Coordinator, Richard Clarke, who is one of the key witnesses  
14 for our hostilities presentation, was intimately involved, and  
15 Under Secretary Slocombe raised the DoD's objections to that  
16 plan, the difficulties of conducting a contained -- excuse me,  
17 a continuous cruise missile offensive against al Qaeda.

18 Addressing those difficulties, Mr. Clarke prepared  
19 Political Military Plan Delenda, which is the subject of  
20 AE 514, and a number of the principals including Secretary  
21 Cohen, National Security Advisor Berger, and Deputy National  
22 Security Advisor Steinberg counseled against using military  
23 options.

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1           The DoD counterterrorism officials, including a  
2 Secretary of Defense Allen Holmes, proposed a military role,  
3 but it never made it very far up the DoD chain. That  
4 position, a nonmilitary position toward al Qaeda, which was  
5 considered and rejected by the political branches, continued  
6 through the early Bush administration.

7           These documents that we are seeking here are not just  
8 important on their own but also as support for the witnesses  
9 that the government has agreed to. The government has agreed  
10 to the testimony of Lieutenant General Newbold, Vice Admiral  
11 Fry, both -- and Lieutenant General Newbold, of course, is  
12 featured in Staff Statement Number 6. Withholding the -- in  
13 addition to denying the defense access to the documents  
14 necessary to build their defense, withholding documents by the  
15 government robs Lieutenant General Newbold's testimony of the  
16 detail and evidentiary support that it would otherwise have.

17           Like the other four motions in this series, the  
18 military commission should grant AE 512 and compel the  
19 government to produce the evidence of the lack of hostilities  
20 which is exculpatory in its purest sense.

21           MJ [COL POHL]: In your pleading you indicate the  
22 government takes the position that the planning for Infinite  
23 Resolve is evidence of hostilities?

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1 LDC [MR. CONNELL]: So there -- the government has  
2 articulated that position, that planning itself was  
3 hostilities, to which we respond with, you know, a U.S./Soviet  
4 example. You know, there's lots of warfighting planning that  
5 is not hostilities. I do not believe that is the government's  
6 primary position, but at one -- at one of the hearings on one  
7 of the earlier series of this, they articulated the idea that  
8 planning for hostilities was itself hostilities. So, yes, we  
9 responded to that idea.

10 MJ [COL POHL]: If planning for hostilities -- assume one  
11 agrees with you, that the government -- the U.S. military  
12 plans for all sorts of things ----

13 LDC [MR. CONNELL]: Of course.

14 MJ [COL POHL]: ---- and, therefore, planning in and of  
15 itself is not evidence of hostilities, do you ----

16 LDC [MR. CONNELL]: True.

17 MJ [COL POHL]: ---- need any of this discovery?

18 LDC [MR. CONNELL]: Sir, I'm sorry. I can't hear you very  
19 well.

20 MJ [COL POHL]: Okay. I'm sorry.

21 LDC [MR. CONNELL]: I got up to "assuming they plan for  
22 all sorts of things."

23 MJ [COL POHL]: No. Assume that one were to agree with

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1 your position that merely planning for conflict with Country A  
2 or ----

3 LDC [MR. CONNELL]: Is not ----

4 MJ [COL POHL]: ---- or any number, A, is not -- not a  
5 conflict, not hostilities, just what DoD does in their spare  
6 time. I don't mean to minimize it, but, I mean, what DoD does  
7 as a regular basis.

8 LDC [MR. CONNELL]: Yes, sir, of course.

9 MJ [COL POHL]: There are many historical examples of  
10 different plans, things like that. Okay.

11 LDC [MR. CONNELL]: Of course.

12 MJ [COL POHL]: Assuming one agrees with that position  
13 that planning is indicative of nothing ----

14 LDC [MR. CONNELL]: Not that it is indicative of nothing.  
15 That's not our position whatsoever.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: What I'm saying is armed conflict has  
18 a precise definition, which includes the -- as we've heard  
19 evidence, which includes actual hostilities between,  
20 generally, two state parties, but sometimes between a state  
21 party and a recognized nonstate actor. So it is not that  
22 planning is irrelevant. Planning is actually quite relevant.

23 MJ [COL POHL]: No, no. I didn't mean that. What I'm

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1 saying is planning in this context, your position is -- isn't  
2 evidence of hostilities, absent something more, for want of a  
3 better term, where they actually executed the plans.

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

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: That's right.

7 MJ [COL POHL]: So if one were to take the position -- to  
8 agree with you that planning, without execution or without  
9 something more, is not indicative of hostilities ----

10 LDC [MR. CONNELL]: I see where you're going.

11 MJ [COL POHL]: ---- do you need all of this discovery?

12 LDC [MR. CONNELL]: Right. So while planning without  
13 execution is not evidence of hostilities, it is, in fact,  
14 evidence of the lack of hostilities, because the government  
15 has come forward with ----

16 MJ [COL POHL]: What's the evidence of the lack of  
17 hostilities? The lack of execution?

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: The fact that there was planning. So  
21 it was not incapacity, for example. It was the -- it was  
22 this -- that the United States made a considered decision in  
23 its political branches not to engage in hostilities with

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1 al Qaeda.

2 Now, that is a much more persuasive articulation of  
3 the lack of hostilities than simply the government's bare, you  
4 know, timeline that I put up earlier, which is that you have  
5 attack, attack, attack, attack, attack over the course of a  
6 certain number of years.

7 In that case, if you're only looking at, well, there  
8 are five attacks from one side or another in three years, sort  
9 of a dry legal analysis of is that sporadic or not. But it's  
10 a much more -- especially to a military panel, it's a much  
11 more significant and fulsome presentation of the defense to  
12 say, look, the United States considered using Special  
13 Operations; the United States considered cruise -- additional  
14 cruise missile attacks; the United States considered other  
15 courses of action which would have been hostilities, and made  
16 an intentional decision not to pursue those.

17 MJ [COL POHL]: But you already have that ----

18 LDC [MR. CONNELL]: I ----

19 MJ [COL POHL]: ---- you've told me.

20 LDC [MR. CONNELL]: No, sir. All we have is a pre --  
21 we're not even talking about the 9/11 Commission Report. When  
22 we say Staff Statement Number 6, that is from an independent,  
23 quasi-governmental body, and not even the Commission, the 9/11

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1 Commission. This is staffers on the -- that's why it's Staff  
2 Statement.

3 Staffers put together basically a working paper on  
4 here's what we think about the military, and that's Number 6.  
5 There are other ones for financial, and et cetera.

6 MJ [COL POHL]: Well ----

7 LDC [MR. CONNELL]: So to say that we have that is -- is  
8 not accurate, because all we have -- we don't -- we don't have  
9 the primary documents, we don't have the secondary documents.  
10 We have, like, quaternary documents describing the existence  
11 of those previous -- of the documents.

12 MJ [COL POHL]: So to the best of your knowledge and  
13 belief, there is some written-out Inherent Resolve plan?

14 LDC [MR. CONNELL]: Yes, probably multiple of them.

15 MJ [COL POHL]: Okay. That -- and so you would know what  
16 was being considered ----

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

18 MJ [COL POHL]: ---- if you got the plans.

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

20 MJ [COL POHL]: And you would know that they were never  
21 executed.

22 LDC [MR. CONNELL]: What we would -- but the other piece  
23 that we would know, if we -- if you grant 512, is that we

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1 would know what political decisions -- what decisions were  
2 made by the political branches around those.

3           Like, we know today -- and this -- this is one little  
4 facet of your point. We know today, obviously, that the  
5 United States did not engage in hostilities with al Qaeda. We  
6 know that they didn't attack them, other than on 20 August  
7 1998.

8           But what we don't know is -- and the government has  
9 already argued, oh, it's because of, you know, the Predator,  
10 or the Hellfire missile wasn't ready for the Predator. Oh, it  
11 was a lack of high-value targets. That might be true. That  
12 might support our position. That might not be true.

13           But the reasons why the United States chose not to  
14 implement plans that it made is very important to the -- the  
15 ultimate persuasive value of our position that there were no  
16 hostilities between the United States and al Qaeda. It is the  
17 difference between the bare-bones timeline and the real, live  
18 actions of United States decision-makers who had the  
19 United States' interest at heart and what they chose to do and  
20 elected not to do and the reasons they chose it.

21           So do -- is it -- is it more important if you're  
22 making a choice between how many TLAMs the plan called for,  
23 versus why the Clinton and Bush administrations chose not to

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1 implement the plan? And the second half of that is far more  
2 important to a fulsome presentation of the defense.

3 MJ [COL POHL]: Okay. Thank you.

4 LDC [MR. CONNELL]: Thank you.

5 Trial Counsel?

6 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

7 MJ [COL POHL]: Good afternoon.

8 MTC [MR. TRIVETT]: So the prosecution's position on  
9 hostilities is that it's the actions of the United States and  
10 not the inactions that determine whether or not we were at  
11 armed conflict with al Qaeda. There were ten attacks over  
12 three years; 3,200 people were dead; thousands more were  
13 injured; lower Manhattan nearly destroyed; the outer ring of  
14 the Pentagon nearly destroyed, at least on the one side it was  
15 struck by the plane; four civilian airlines where the biggest  
16 piece isn't much bigger than this podium I'm standing at; a  
17 warship with a gigantic hole in the side that almost sank; and  
18 two embassies that were severely damaged. That's our  
19 hostilities in a nutshell, and that's what we presented during  
20 the Hawsawi portion of it. And that's what we're relying on  
21 ultimately for both jurisdiction and what we're going to be  
22 relying on at trial.

23 But it's not accurate for Mr. Connell to say that

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1 Operation Infinite Resolve was the war that wasn't. It's just  
2 not true. There were tremendous amount of plans that were in  
3 place. And I want to call the judge's attention specifically  
4 to Staff Statement 6, very last page in the conclusions.

5           They concluded that the military prepared a wide  
6 array of options for striking bin Laden and his organization  
7 from May 1998 onward. Following the August 20th, 1998 missile  
8 strikes, both senior military officials and policymakers  
9 placed great emphasis on actionable intelligence as the key  
10 factor in recommending or deciding to launch military action  
11 against bin Laden and his organization, and that ultimately  
12 they expressed frustration with the lack of actionable  
13 intelligence that was had.

14           Ultimately, it wasn't that there was a decision not  
15 to wage war. There was never a good target to shoot at. And  
16 that's a completely different concept than what Mr. Connell is  
17 advocating.

18           MJ [COL POHL]: So are you saying you have evidence that,  
19 during the Infinite Resolve planning, that the United States  
20 was up to the point of just give us a target and we're ready  
21 to execute?

22           MTC [MR. TRIVETT]: The ----

23           MJ [COL POHL]: You have evidence of that?

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1 MTC [MR. TRIVETT]: There absolutely -- there is ----

2 MJ [COL POHL]: That's the only thing keeping it in the  
3 way of doing something?

4 MTC [MR. TRIVETT]: Correct. There are documents that  
5 state that. The staff ----

6 MJ [COL POHL]: Does the planning shown by Infinite  
7 Resolve in and of itself indicate hostilities or some ----

8 MTC [MR. TRIVETT]: In and of itself, it clearly does not.  
9 Right? If that's all that we had, and we didn't have the  
10 attacks that al Qaeda committed on us, no, that wouldn't be --  
11 that wouldn't be sufficient ----

12 MJ [COL POHL]: Okay.

13 MTC [MR. TRIVETT]: ---- but ----

14 MJ [COL POHL]: Go ahead.

15 MTC [MR. TRIVETT]: I'm sorry.

16 MJ [COL POHL]: No, go ahead. I'm sorry.

17 MTC [MR. TRIVETT]: It's certainly evidence that the  
18 United States considered itself in hostilities with al Qaeda.  
19 Absolutely. Because we were planning to attack both  
20 Usama bin Laden and his organization. We have a wide array of  
21 military options available. And the frustration -- and  
22 that it was -- the intelligence was never ripe enough at the  
23 time to be able to launch Tomahawks and know for sure that he

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1 was going to be there and that there wasn't going to be  
2 significant collateral damage that was caused if he wasn't.  
3 That's what all the documents indicate. That's what the 9/11  
4 Commission Report found.

5 But it's also not accurate to say that we haven't  
6 turned over any Operation Infinite Resolve or Operation  
7 Infinite Reach documents to Mr. Connell. We have. We've  
8 turned over over 1300 pages of it, including an Infinite ----

9 LDC [MR. CONNELL]: Objection, Your Honor. The objection  
10 is that this is the exact thing that we talked about in the  
11 classified session, that if the government wanted to go line  
12 by line through the discovery, then we were going to have to  
13 do that in a classified session.

14 MTC [MR. TRIVETT]: I don't need to go to -- I can simply  
15 indicate what I've provided. If he wants to make further  
16 argument in closed, that's fine. I'm not getting anywhere  
17 near anything classified.

18 MJ [COL POHL]: Okay. I got it. You've given some  
19 discovery in Infinite Resolve and Infinite Reach. I don't  
20 need to know the details of it.

21 MTC [MR. TRIVETT]: Okay, that's fine, sir.

22 MJ [COL POHL]: Okay.

23 MTC [MR. TRIVETT]: So we've gone through, they are -- it

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1 is redacted. We've taken 701 redactions on relevance. We  
2 believe that he has all of the information he needs to be able  
3 to make whatever argument he's going to make regarding a lack  
4 of inaction. I don't think it's accurate. I don't think that  
5 that's what it supports. But if he says it does and he wants  
6 to make that argument, he certainly has everything he needs to  
7 be able to do that.

8 MJ [COL POHL]: How long was the Infinite Resolve planning  
9 process?

10 MTC [MR. TRIVETT]: It started the very day after the  
11 attacks in Infinite Reach, and it continued all throughout the  
12 President Bush administration until September 11th.

13 MJ [COL POHL]: So approximately three years.

14 MTC [MR. TRIVETT]: It was never taken off the shelf. It  
15 was always a developed plan.

16 MJ [COL POHL]: But in military plans, they grow, they --  
17 I got it, and they modify them.

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

19 MJ [COL POHL]: So what the government says, this is  
20 showing that for this three-year period prior to 9/11 that the  
21 government was prepared to exercise kinetic strikes against  
22 al Qaeda or members of al Qaeda, and the only thing that --  
23 the only thing that prevented that was targeting -- lack of

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1 sufficient targeting information?

2 Is that the government's position as far as Infinite  
3 Reach is concerned?

4 MTC [MR. TRIVETT]: Yes, sir. And that's certainly what  
5 the 9/11 Commission Report found. Now, if every individual  
6 who was involved in this, including Lieutenant General Newbold  
7 or Vice Admiral Fry or someone else may have a different  
8 perception of that, that's completely possible. But that was  
9 certainly the findings of a 9/11 Commission that was duly  
10 authorized by law to look into these issues and ----

11 MJ [COL POHL]: Do you want me to -- think about this  
12 answer before you answer it.

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

14 MJ [COL POHL]: Do you want me to accept the findings of  
15 the 9/11 Commission as authoritative on this issue and other  
16 issues?

17 MTC [MR. TRIVETT]: I don't think it's -- I don't think  
18 it's binding on you, certainly.

19 MJ [COL POHL]: I know it's not binding, but, I mean,  
20 you're citing that as authority that the report written by the  
21 United States Senate Select Committee on Intelligence is  
22 somehow evidence of -- of your position. I mean, you're  
23 saying ----

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1 MTC [MR. TRIVETT]: 9/11 Commission Report.

2 MJ [COL POHL]: Oh, I'm sorry, the 9/11 Commission. But

3 it's the same.

4 MTC [MR. TRIVETT]: Yeah.

5 MJ [COL POHL]: Their conclusions are somehow weight?

6 MTC [MR. TRIVETT]: I think they're admissible as

7 evidence, certainly ----

8 MJ [COL POHL]: Well, then wouldn't Mr. Connell -----

9 MTC [MR. TRIVETT]: -- with documents.

10 MJ [COL POHL]: I'm sorry. I'm sorry I got it confused

11 with the Senate thing.

12 MTC [MR. TRIVETT]: Okay. That's fine.

13 MJ [COL POHL]: And therefore, so shouldn't Mr. Connell

14 then be allowed to present other contrary expert opinion on

15 the same issue? You want me to consider ----

16 MTC [MR. TRIVETT]: Expert opinion's a different issue,

17 right? The question is ----

18 MJ [COL POHL]: Well, the 9/11 Commission, if you want me

19 to consider their opinions, what would it come under except

20 expert opinions? Do you have some other ----

21 MTC [MR. TRIVETT]: It's just an official government

22 record. It's -- it falls under a specific hearsay exception

23 because they were authorized by law.

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1 MJ [COL POHL]: No, no, you're talking about the  
2 evidentiary rule ----

3 MTC [MR. TRIVETT]: Right.

4 MJ [COL POHL]: ---- I'm talking about what weight do I  
5 give to it as a government publication like a ----

6 MTC [MR. TRIVETT]: It was a bipartisan commission  
7 who looked at this.

8 MJ [COL POHL]: I -- I know all that. I'm simply saying  
9 is, it's just, I believe, ten people. They wrote a report.  
10 This is what their conclusions were.

11 MTC [MR. TRIVETT]: Correct.

12 MJ [COL POHL]: Okay. Based on this body of evidence that  
13 they considered. Okay.

14 MTC [MR. TRIVETT]: Yes, sir, that they had access  
15 to information ----

16 MJ [COL POHL]: They gleaned their opinion from the --  
17 from that body of evidence, right?

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

19 MJ [COL POHL]: Okay. So and then -- but at the end of  
20 the day it's opinion evidence, isn't it? Well, the part I'm  
21 talking about is opinion evidence. There's also actually  
22 factual evidence. I'm not talking about that.

23 MTC [MR. TRIVETT]: Right.

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1 MJ [COL POHL]: I'm talking about ----

2 MTC [MR. TRIVETT]: We've never taken the position that  
3 Mr. Connell shouldn't have any Operation Infinite Resolve  
4 documents. We've looked through the relevant information  
5 regarding Operation Infinite Resolve, and we've provided it.

6 What we're saying is that there's no right that he  
7 has, Mr. Connell or Mr. Ali, for us to have to provide him  
8 every single document that might have anything to do with  
9 Operation Infinite Resolve because he wants to make an  
10 argument that we've conceded, and specifically that we've  
11 conceded that there's not a kinetic strike that was taken from  
12 August 20th, 1998 until after September 11th.

13 MJ [COL POHL]: Okay.

14 MTC [MR. TRIVETT]: We don't think it impacts your  
15 determination as to whether or not hostilities exist because  
16 we have our ten attacks that we're relying on. But we have  
17 provided information on the specific topic, but he's asking  
18 for every possible document on Operation Infinite Resolve, and  
19 he's simply not entitled to it under 701.

20 MJ [COL POHL]: Have you given him the base document?

21 MTC [MR. TRIVETT]: Yes, sir. What we've provided, we've  
22 provided an 80-page operations brief, a 63-page CENTCOM  
23 brief ----

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1 MJ [COL POHL]: Okay. And then ----

2 MTC [MR. TRIVETT]: ---- and many other individual briefs.

3 MJ [COL POHL]: Again, I'm talking about the base  
4 document. If that's the base document, sometimes it's done in  
5 that format. I got it. So he would know what the Operation  
6 Infinite Resolve plan was ----

7 MTC [MR. TRIVETT]: Yes, sir. He should.

8 MJ [COL POHL]: ---- including details of who's going to  
9 do what and things like that?

10 MTC [MR. TRIVETT]: Does he know every single detail?

11 No ----

12 MJ [COL POHL]: I've got that.

13 MTC [MR. TRIVETT]: ---- we redacted. We redacted. We  
14 believe that we left unredacted that which was relevant.

15 MJ [COL POHL]: Okay.

16 MTC [MR. TRIVETT]: And we have gone back to the Joint  
17 Chiefs of Staff, who own these documents. We've asked to do  
18 another classification review on it. It's possible that  
19 because of the time frame being almost 20 years old now that  
20 there may be an ability to declassify more of them.

21 MJ [COL POHL]: Uh-huh.

22 MTC [MR. TRIVETT]: If more of the documents get  
23 declassified, we'll provide more without conceding that

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1 they're discoverable.

2           We believe we've satisfied our discovery obligation  
3 regarding Infinite Resolve. That doesn't mean that there  
4 won't be more documents coming at some point in time, mostly  
5 from Mr. Connell's requests.

6           We went out -- just so you understand the due  
7 diligence. We sent teams out to the Bush Presidential  
8 Library, the Clinton Presidential Library, and the National  
9 Archives to look at all of the classified materials. It  
10 required a lot of coordination with the White House and Joint  
11 Chiefs of Staff. We've reviewed over 100,000 documents that  
12 Mr. Connell has asked for. We're continuing to review those  
13 as we speak. We have teams in the back, in the rear, sort of  
14 trying to categorize those documents for us to make a final  
15 determination on classification -- I mean on discoverability.

16           But ultimately we believe we've satisfied it with  
17 what we've already done. We're simply looking at what  
18 Mr. Connell has asked specifically for, which is a voluminous  
19 amount of documents. As Your Honor knows, having been in the  
20 military for a very long time, there are tremendous amounts of  
21 documents that would be generated for any military operation  
22 that was contemplated, planning orders, warning orders,  
23 modifications, back briefs after they were done, all of those

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1 types of things.

2           And I think I gave this example last time. And we  
3 provided a document that actually has failure rates for  
4 Tomahawks. How failure rates for Tomahawks are relevant to  
5 anything Mr. Connell would want is beyond me, but we provided  
6 that aspect of it.

7           So we did take our responsibility seriously. We did  
8 our due diligence on this. We're going to try to provide more  
9 if more is declassified, but ultimately we believe that we've  
10 satisfied our discovery obligation in this regard.

11       MJ [COL POHL]: Thank you.

12       MTC [MR. TRIVETT]: Thanks.

13       MJ [COL POHL]: Mr. Connell?

14       LDC [MR. CONNELL]: Three points, Your Honor.

15           First, even the core of the government's argument  
16 about the staff statement is wrong. The staff statement is  
17 not from the 9/11 Commission. It's not from politically  
18 appointed people. The staff statement is from the staff, the  
19 people who went out and dug up documents and did the work.

20           So -- the second point is every claim that the  
21 government just made to you was a factual claim that should be  
22 tested by evidence. They said the United States was  
23 completely ready to -- they talked about cruise missile

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1 attacks, not Special Operations, which is also a piece of  
2 this, but we're only missing a target. That's a factual  
3 claim. There's a document that either demonstrates that or  
4 does not demonstrate that.

5           One of the witnesses that we will call to testify  
6 in -- in the -- the -- we have asked to call to testify in the  
7 personal jurisdiction hearing will testify that that's not  
8 true; that there was actionable intelligence, there were  
9 real-life targets, and the political branch for their reasons  
10 chose not to be engaged.

11       MJ [COL POHL]: Who was that witness?

12       LDC [MR. CONNELL]: Mr. Scheuer.

13       MJ [COL POHL]: Okay. Thank you.

14       LDC [MR. CONNELL]: The government argued that these  
15 documents showed that the United States thought that they were  
16 engaged in hostilities. The actual evidence will be to the  
17 contrary, that the United States did not think it was involved  
18 in hostilities with al Qaeda, and for the reasons that they --  
19 for political as well as targeting reasons.

20           The final argument that the government makes is that  
21 they somehow turned over to us the base documents. They have  
22 confused, I believe, Operation Infinite Reach and Operation  
23 Infinite Resolve.

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1 I invite the military commission to look at 502Y,  
2 Attachment B, which is the complete set of documents that the  
3 government produced to the defense on this. It's important to  
4 have these in the record because the 98 percent redaction in  
5 those hundreds and hundreds of documents did not go through  
6 the 505 process. They are not documents that you saw and made  
7 determinations about the adequacy of the substitutions or  
8 deletions. They are unilateral redactions from the  
9 government.

10 MJ [COL POHL]: What's the -- what's the exhibit number  
11 again, please?

12 LDC [MR. CONNELL]: 502Y, Attachment B.

13 MJ [COL POHL]: One moment.

14 LDC [MR. CONNELL]: And I'll -- in the classified session  
15 I'll be happy to take you through those documents and  
16 demonstrate why the government has simply gotten confused on  
17 this topic.

18 MJ [COL POHL]: Go ahead.

19 LDC [MR. CONNELL]: That's all I have, sir.

20 MJ [COL POHL]: Okay. Thank you.

21 Mr. Trivett, anything further?

22 MTC [MR. TRIVETT]: Nothing further, sir.

23 MJ [COL POHL]: Okay. Brings us to 524.

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1 LDC [MR. CONNELL]: Yes, sir. Court's indulgence for just  
2 a moment?

3 MJ [COL POHL]: Sure.

4 [Pause.]

5 MJ [COL POHL]: Go ahead. I'm sorry.

6 LDC [MR. CONNELL]: Thank you.

7 Sir, AE 524 presents a critical question in the  
8 military commissions. The government has identified a number  
9 of witnesses, mostly by pseudonym, to the RDI program. They  
10 did so in summaries. These particular summaries, which  
11 identify these witnesses by pseudonyms, did not go through the  
12 505 process. We'll talk about that in more detail. But in  
13 each of these summaries the government specifically identifies  
14 the -- each of these witnesses by the statutory language,  
15 "relevant, necessary, and noncumulative." The government goes  
16 on in the summaries to, in fact, explain its internal  
17 reasoning as to why these witnesses were relevant, necessary,  
18 and noncumulative.

19 So obviously, we would like to interview these  
20 witnesses. In fact, it would probably be deficient  
21 performance not to. The Supreme Court has been very clear  
22 about the duty of defense counsel to pursue mitigation and  
23 investigation, unless they make a reasoned decision, based on

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1 available evidence, not to pursue the investigation.

2           The -- this is one of a very small number of motions  
3 that I believe the government -- the military commission must  
4 resolve before we get to the statements basket. 523 and 524  
5 both address the question of how are we going to approach  
6 pseudonymous anonymous witnesses.

7           Now, the history. After the government produced  
8 these witnesses in the 2.d discovery, we issued DR-333-AAA on  
9 13 July 2017 requesting identifying information for the  
10 witnesses so that we could interview them. That is -- that is  
11 AE 523, Attachment B. Of the ----

12          MJ [COL POHL]: Do you have sufficient information of what  
13 the witness' apparent role in the process was?

14          LDC [MR. CONNELL]: We have -- we have a ----

15          MJ [COL POHL]: Let's just say -- and I don't know what  
16 to -- I don't want to get into those things.

17          LDC [MR. CONNELL]: We have the ----

18          MJ [COL POHL]: Witness 123 is ----

19          LDC [MR. CONNELL]: ---- an interrogator or a debriefer or  
20 a medical personnel.

21          MJ [COL POHL]: But that's -- is that tied in with a  
22 particular debriefing?

23          LDC [MR. CONNELL]: I want to answer -- could you repeat

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1 that question again, because I want to answer it specifically.

2 MJ [COL POHL]: Okay. 123 -- 123 is a debriefer and  
3 debriefed ----

4 LDC [MR. CONNELL]: ---- Mr. al Baluchi in location X.

5 MJ [COL POHL]: X on this date.

6 LDC [MR. CONNELL]: Right. Now ----

7 MJ [COL POHL]: That's what you have?

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

9 MJ [COL POHL]: Okay. I got it.

10 LDC [MR. CONNELL]: Now, we have some additional level of  
11 detail to that, and we have a statement that, for certain  
12 reasons articulated by the government, that witness  
13 information -- and their information is relevant,  
14 noncumulative, and necessary to the defense. So that's what  
15 we have for each of those people.

16 MJ [COL POHL]: So you want, under the 524, the ability to  
17 interview these persons to see whether or not you wish to call  
18 them?

19 LDC [MR. CONNELL]: Yes, sir. Though to be pedantic about  
20 it, that was our request in 523, because something happened  
21 after it. So our first request was to interview them. You  
22 know, what we want is their identifying inform -- who are they  
23 so that we can go interview them.

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1           And just to remind you from October, sir, in 523, we  
2 went through the analysis under Roviaro v. United States and  
3 United States v. Yunis about once -- that the identities of  
4 witnesses for whom the government claims privilege, whether  
5 that's informer's privilege in Roviaro or classified  
6 information privilege in Yunis, must yield when the -- that  
7 witness's identity is relevant and necessary to the -- helpful  
8 to the defense, in the language of Yunis.

9           So this is the next step after that. The -- because  
10 we -- in addition to requesting those witnesses in DR-333 and  
11 335, not only did the government not produce the witnesses or  
12 give us any information -- with three exceptions. There were  
13 three non-CIA witnesses for whom they produced identifying  
14 information. But with the exception of those three witnesses,  
15 the government, instead of producing information, the  
16 government wrote to counsel for Mr. Bin'Attash on 6 September  
17 2017, a letter which is attached, critically important and is  
18 attached at AE 523, Attachment C.

19           That letter stated, and I quote slowly, "The defense  
20 should make no independent attempt to locate or contact any  
21 current or former CIA employer or contractor, regardless of  
22 that individual's cover status." It continued, "These  
23 necessary restrictions on defense efforts are critical to

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1 produce -- protecting very sensitive classified information  
2 and must be followed."

3           The government cited statutes about protection of  
4 classified information, raising the clear implication that  
5 defense counsel might even be prosecuted for investigating  
6 their own defense if the government elected to do so.

7           This prohibition on investigation by the government  
8 clearly interferes with the right to investigate and to  
9 prepare a defense, including the untrammelled access to  
10 prospective witnesses. D.C. Circuit precedent on this matter  
11 is clear in the case of Gregory v. United States, 359 [sic]  
12 F.2d 185, a D.C. Circuit case from 1966, which reversed a  
13 conviction because the government told witnesses not to speak  
14 without their presence.

15           The sweeping prohibition that the government put into  
16 place in that 6 September letter, with all due respect to the  
17 government, we declined; and Attachment D is our letter  
18 rejecting the government's position.

19           Now, the government on prior occasions has sought  
20 orders from the military commission prohibiting certain forms  
21 of investigation. 441, AE 441, is the clearest example of  
22 that. The -- but together with what will be litigated next  
23 time surrounding 525G, the government has made it clear that

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1 it intends that the defense should not be able to investigate  
2 independently the RDI issues and present them to the military  
3 commission.

4 Now, the government in its brief cites two claims for  
5 why it has this extraordinary truly unprecedented power. The  
6 first of those is Touhy regulations, which for the CIA are  
7 found at 32 CFR 1905.1 and sequential. This issue has already  
8 been resolved against the government. There are two different  
9 situations in which a -- we find ourselves. The first is for  
10 those witnesses whom we have requested their production in  
11 502J, the -- a demand has been made under the Touhy  
12 regulation. A demand is a form of judicial process; and for  
13 those 29 witnesses, they fall under the Touhy regulation. You  
14 already ruled that in 386M.

15 And what you also ruled in 386M is that a 703  
16 compliant notice satisfies the CIA Touhy regulations. And for  
17 those 29 witnesses that fall into that category, the  
18 government raised no objection on 703 grounds. So there was  
19 no objection to the synopsis. They didn't claim that we  
20 haven't given a sufficient synopsis, nor could they have since  
21 we essentially gave the military commission every single piece  
22 of information that we had about those anonymous witnesses.

23 Now, for those who are outside the judicial

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1 process ----

2 MJ [COL POHL]: Well, let's talk about those.

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

4 MJ [COL POHL]: So where are they at now, the 29?

5 LDC [MR. CONNELL]: Sir, we're waiting for you to rule on  
6 them.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: That's 502J, and we actually chopped  
9 down from 29 to a ----

10 MJ [COL POHL]: Got it.

11 LDC [MR. CONNELL]: ---- somewhat smaller number in  
12 502J (AAA Sup).

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: So that's where those are at, sir.

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: With respect to the others, those  
17 witnesses are outside the judicial process. And it's not that  
18 the Touhy regulation is -- this is separate from our claims  
19 about the validity of the Touhy regulation. It is just that  
20 following the Touhy regulation imposes no duty on the defense  
21 for interviews outside of the judicial process. The Touhy  
22 regulation at -- slowing down -- 32 CFR 1905.2(b) is the  
23 triggering event for the CIA Touhy regulations. And they only

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1 come into play when a demand -- some sort of judicial process  
2 has been issued. The Touhy regulations have nothing to say  
3 about interviews outside of the Touhy process.

4 Now, there is, in fact, a case -- I was somewhat  
5 surprised, but there's actually a case, very, very similar to  
6 this situation, which is McElya -- which is spelled  
7 M-c-E-L-Y-A -- v. Sterling Medical, Incorporated, at  
8 129 F.R.D. 510. It's a circuit -- I mean, it's a district  
9 court case, the Western District of Tennessee from 1990.

10 And in that case, a -- someone was suing the Navy  
11 over medical malpractice, and the Navy tried something even --  
12 not nearly as serious as what the government is doing here,  
13 but the Navy invoked Touhy to say not that their witnesses  
14 could not be interviewed pretrial, but that counsel for the  
15 Navy needed to be present at each -- at the -- to attend each  
16 of those interviews.

17 In very strong language, the court analyzed the Touhy  
18 regulations and explained that Touhy -- neither Touhy nor any  
19 other authority allows a party to -- when the government is a  
20 party, allows the government to deny access to pretrial  
21 interviews of their witnesses. I haven't found any case and  
22 certainly the government doesn't cite any to the contrary  
23 because that's not the -- that's -- in fact, virtually every

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1 case -- every Touhy case which addresses this as a principal  
2 matter is to the contrary, and McElya is the one case where  
3 the government has tried to assert specific control over  
4 pretrial interview of its witnesses.

5           So there's -- there's literally nothing to this Touhy  
6 claim by the government. So that brings us to the second  
7 claim, which is classified information privilege. Now, first  
8 of all, it's important to note that unlike many other  
9 situations, the government has not invoked classified  
10 information privilege over the 2.d. discovery, which includes  
11 the witnesses who are identified by UFI, or unique functional  
12 identifier. The military commission specifically noted that  
13 in its ruling in 308HHHH explaining that the government did  
14 not request the military commission to review those -- that  
15 2.d. discovery under 505, and so the military commission was  
16 not going to do so.

17           That is the packet of discovery that we're talking  
18 about, the one that the government said, we're not asking for  
19 review. You have never seen the underlying documents. You  
20 have only -- you have seen these two -- this 2.d. discovery,  
21 but you never reviewed it for its power of substitution.

22           And so this claim, the classified information claim,  
23 is governed by that Roviaro/Yunis framework that was addressed

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1 in AE 523. If the witness identity is helpful to the defense,  
2 the government privilege is overcome. That's been clear since  
3 the 1950s when the government first advanced its -- its  
4 informer privilege at the time, but its privilege claim over  
5 the identities of witnesses in the United States Supreme Court  
6 in Roviaro.

7 The last thing that I -- actually, I'm just going to  
8 leave it there. That's all I have, unless you have any other  
9 questions.

10 MJ [COL POHL]: I have no further questions. Thank you,  
11 Mr. Connell.

12 Trial Counsel? General Martins.

13 CP [BG MARTINS]: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon.

15 CP [BG MARTINS]: Your Honor, the United States maintains  
16 that the controlling law and considerations in this matter are  
17 contained in a series of rulings of the military commission  
18 and that those rulings reflect respect, not only for an  
19 accused facing serious war crimes charges, but also respect  
20 for the responsibilities that Congress and the Executive  
21 Branch have to protect national security.

22 I would refer the commission first to Appellate  
23 Exhibit 397F, the commission's April 2016 trial conduct

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1 order -- we've discussed it a bit here today -- directing the  
2 government to provide information relating to the Central  
3 Intelligence Agency's former Rendition Detention Interrogation  
4 program in ten categories. That bears upon this.

5           The second ruling of the commission that I would  
6 direct the commission to is Appellate Exhibit 386M, as in  
7 Mike, of October of 2016. Mr. Connell alluded to this. We  
8 actually see it the other way. In that ruling the commission  
9 denied a defense motion to invalidate regulations requiring  
10 counsel to seek information from CIA personnel through CIA  
11 processes and in a regulation that I'll get to here more in a  
12 minute.

13           The third ruling I would direct the commission to is  
14 Appellate Exhibit 308 hotel four -- times four, so 308HHHH, of  
15 May of 2017, and Mr. Connell alluded to this as well. But  
16 this is important because in that ruling, the commission  
17 approved a government motion requesting substitutions and  
18 other relief relating to three of those categories in the  
19 ten-category construct, specifically the identities,  
20 information relating to identity of those who had direct and  
21 substantial contact with the accused while in CIA custody,  
22 those medical personnel, guard force personnel, and  
23 interrogators or debriefers, their employment information

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1 relating to adverse action or other action taken with regard  
2 to their involvement in the program, and training records,  
3 training information. So d., f., and g. of the ten-category  
4 construct.

5 That's important because the commission did approve  
6 the government's request to provide three-digit unique  
7 functional identifiers in lieu of the actual individuals, and  
8 then also approved summarized information relating to the  
9 employment and training records.

10 Importantly, in that ruling the commission  
11 acknowledged our proffer of the things that make this  
12 substantially the same position for the defense as they would  
13 have if they had the original information. And we explained  
14 that we were going to facilitate, in addition to the  
15 information provided -- facilitate an opportunity to have  
16 access to the individuals provided under category d.

17 So those three rulings, we would maintain, are the  
18 law of the case on this. And in the 386M ruling in  
19 particular, the commission acknowledged that the CIA's Touhy  
20 regulations apply to this case.

21 So in those three rulings, there is decisional law,  
22 statutory law, and regulatory law then that bear upon this  
23 matter and that the commission has duly recognized in these --

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1 in this law of the case. The first and leading case in this  
2 is, of course, the Supreme Court's 1951 decision in  
3 Touhy v. Ragen. And for the court reporters I'll cite 340  
4 U.S. 462, in which the court recognized, and I quote: When  
5 one considers the variety of information contained in any  
6 government department and the possibilities of harm from  
7 unrestricted disclosure in court, the usefulness, indeed the  
8 necessity of centralizing determination as to whether -- in  
9 that case it was a subpoena duces tecum -- but demands for  
10 information will be willingly obeyed or challenged is obvious,  
11 end quote.

12 So that's the leading case. This is implemented by  
13 Congress. The current statute that applies that the  
14 commission cited to was 5 U.S.C. Section 301, authorizing  
15 executive departments and agencies to control the conduct of  
16 their employees and the custody and use, preservation of its  
17 records, papers, and information.

18 Your Honor, the other statutory authority I would  
19 cite to is Military Commissions Act Section 949p-6,  
20 subsection (D). And the commission did acknowledge this when  
21 we offered to provide a mechanism by which defense could  
22 interview -- seek to interview witnesses. We acknowledge that  
23 the -- it would be up to the witnesses whether to speak.

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1           But that -- that section of our classified  
2 information procedures provides -- or authorizes alternative  
3 procedures to enable the requisite protection of the  
4 classified information. And here we have very sensitive  
5 equities involved here.

6           MJ [COL POHL]: General Martins, let me ask you a  
7 question. And I'm going to use the 123 as an identifier.  
8 Defense wants to interview 123 to see whether or not this  
9 person can provide helpful information on any issue, whether  
10 this issue or another issue. And to interview him, to even  
11 ask to interview him, the way I take it, he's got to ask the  
12 government, who will then go to 123 and say, "Do you want to  
13 be interviewed by the defense?" And if the answer is yes,  
14 then there could be an interview, right?

15          CP [BG MARTINS]: Yes, Your Honor.

16          MJ [COL POHL]: Okay. If the answer is no, there is no  
17 interview. Okay.

18          CP [BG MARTINS]: No, Your Honor.

19          MJ [COL POHL]: Okay. And this has happened frequently in  
20 this case, is -- then what is the defense to do? They have a  
21 witness who they think can give them evidence. They don't  
22 know because they haven't talked to them, but they have some  
23 basis for it.

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1 CP [BG MARTINS]: Uh-huh.

2 MJ [COL POHL]: The witness refuses to be interviewed.

3 The result is what? We order them to show up? And this has  
4 happened frequently here because witnesses refuse to talk to  
5 the defense counsel, the ones that are allowed to. The result  
6 being is that we end up calling them as a witness. The  
7 witnesses -- it's kind of discovery, quite frankly, because  
8 they're seeing what the witness will say. Is that the way we  
9 should run this railroad?

10 CP [BG MARTINS]: Your Honor, I mean I think the  
11 commission acknowledged it in our -- in 308HHHH, in noting  
12 that we can't compel a witness to talk to the defense. We  
13 neutrally lay out for them they have a right to speak to the  
14 defense if -- if approached in this manner appropriately  
15 through our -- the 6 September 2017 memorandum that counsel  
16 impugned and that we stand by as fully consistent with the  
17 law, unapologetically. This is the way we have to protect  
18 these very sensitive equities. And we also explain they have  
19 a right not to. We neutrally explain it, and we lay out in  
20 that memo how the process would work.

21 An important part of the protections we think are --  
22 must be accorded this very sensitive information in this  
23 proceeding are that, you know, the commission is going to

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1 truly determine whether, for the purpose before the  
2 commission, that testimony is relevant. We produced it in  
3 discovery, but we then have to determine is there a fact of  
4 consequence to the determination now?

5           And this is some of what Mr. Trivett has been getting  
6 at with regard to the issues associated with hostilities. We  
7 don't have to call all these witnesses for each issue because  
8 the government would submit there are approaches to getting  
9 the commission the competent, admissible evidence that's  
10 necessary without just simply serially going through all these  
11 different personnel. And we're relying on relevance and  
12 necessity determinations that act as an appropriate razor to  
13 cut away this stuff that's not bearing on the issues.

14          MJ [COL POHL]: Let me give you another -- and on the  
15 personal jurisdiction issue there's a lot of them -- defense,  
16 at least Mr. Connell said I never talked to them but I have  
17 this document. So I've got that.

18           But let me give you another example of you have  
19 someone with an identifier who was there at the time of the  
20 actual application of the EIT, and defense wants to talk to  
21 him about how it was done.

22          CP [BG MARTINS]: Well, you set up in 386M that we're the  
23 mailbox ----

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1 MJ [COL POHL]: Okay.

2 CP [BG MARTINS]: ---- so I mean they can do that through  
3 a 703 ----

4 MJ [COL POHL]: And they say no.

5 CP [BG MARTINS]: Right.

6 MJ [COL POHL]: Or either -- well, I won't get to agency  
7 objections because that's -- currently I don't have that  
8 before me in terms of what the resolution of the -- let's just  
9 assume it gets through that hurdle. It goes to the -- 123 is  
10 the name I'm using, and he says, "I don't want to talk to  
11 them."

12 CP [BG MARTINS]: Why would you assume it wouldn't go  
13 through that hurdle?

14 MJ [COL POHL]: No, no, no, no. I'm saying it's meant  
15 that -- there's not that objection.

16 CP [BG MARTINS]: Okay.

17 MJ [COL POHL]: There's not a hurdle at the agency level.

18 CP [BG MARTINS]: Right. Right.

19 MJ [COL POHL]: I'm not saying that -- but I'm just  
20 saying -- and so defense says, "I wanted this guy to come in  
21 to interview him to see exactly how my client was treated on  
22 this day during this interrogation." And the guy says ----

23 CP [BG MARTINS]: Well ----

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1 MJ [COL POHL]: ---- and the guy says, "I ain't gonna talk  
2 to you."

3 CP [BG MARTINS]: Well, they've received significant -- a  
4 large amount of information about what occurred to their  
5 clients.

6 MJ [COL POHL]: I understand. I understand that. I'm not  
7 saying this will come up.

8 CP [BG MARTINS]: Right.

9 MJ [COL POHL]: But I'm saying if you go that  
10 scenario what the option that the defense has is, well, then  
11 we've got to call 123 and see what he's got to say. Is  
12 that where we're at?

13 CP [BG MARTINS]: Well, that -- you know, this kind of  
14 goes in the no good deed goes unpunished scenario, but we did  
15 provide them dozens of synopses related to those  
16 interrogators, guard force personnel, medical personnel who  
17 had direct and substantial contact, and summarized our  
18 understanding of these individuals' involvement in the RDI  
19 program and ----

20 MJ [COL POHL]: Well, they can use what you've provided  
21 them ----

22 CP [BG MARTINS]: They could use those.

23 MJ [COL POHL]: ---- as a basis for questioning the

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1 witness.

2 CP [BG MARTINS]: Yes. We would ----

3 MJ [COL POHL]: Okay.

4 CP [BG MARTINS]: They could use that and introduce that  
5 as -- for this motion and as a way to ----

6 MJ [COL POHL]: No, but I'm talking about to get to the  
7 testimony phase.

8 CP [BG MARTINS]: If they -- well, I mean this commission  
9 has important powers to get relevant, admissible,  
10 necessary ----

11 MJ [COL POHL]: Uh-huh.

12 CP [BG MARTINS]: ---- noncumulative evidence in front of  
13 it.

14 MJ [COL POHL]: I understand that. I'm just saying is,  
15 General Martins ----

16 CP [BG MARTINS]: We can't force them to talk to the  
17 defense.

18 MJ [COL POHL]: I don't know what the practice is in  
19 federal court. I've never been a judge in federal court.  
20 When this issue comes up in military courts, the answer  
21 usually is -- well, rephrase that. The answer always is, yes,  
22 they have a right not to testify -- or not to be interviewed.

23 CP [BG MARTINS]: Right.

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1 MJ [COL POHL]: But as I always tell the government:  
2 Encourage them to be interviewed now. That way, we don't  
3 waste their time to come on the stand in a 39(a) and say what  
4 they're going to say. And -- and it seems to work most of the  
5 time.

6 But basically -- I'm not saying you're not -- they  
7 don't have the right not to be interviewed. But we end up  
8 with -- to conflate with another issue is there's a complaint  
9 in the 478 series that as soon as the FBI agents got done  
10 testifying, they got a request for discovery from Mr. Ruiz.  
11 Well, perhaps because they didn't get interviewed prior to it.

12 CP [BG MARTINS]: Your Honor, these are very sensitive  
13 equities, and the independent approach by the defense to try  
14 to, quote, investigate and become their own, you know, private  
15 attorney general, or whatever disembodied investigative  
16 authority they think they have outside the commission, would  
17 frustrate and eviscerate the very protections these rulings  
18 you've issued provide.

19 And the -- there's a way for them to get the  
20 information they're entitled to. The Touhy process has been  
21 recognized by courts. This is like no court-martial you or I  
22 have been part of, and it involves very sensitive equities  
23 that we have invoked privilege over.

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1 MJ [COL POHL]: Okay. Let me -- let me go at another side  
2 issue: Does this apply to -- let's talk about the CIA  
3 employees -- CIA employees who have been publicly identified?

4 CP [BG MARTINS]: The Touhy process and the regs duly  
5 cited by counsel, 32 CFR 1905.1 through 5, do cover anyone who  
6 gained their information through their association with the  
7 CIA.

8 MJ [COL POHL]: So if -- and I'm going to use a name  
9 that's very public, Mr. Rodriguez. The defense wants to  
10 interview Mr. Rodriguez, they've got to go through the  
11 government to interview him?

12 CP [BG MARTINS]: We believe that the Touhy regulation  
13 applies to him, Your Honor, yes. And counsel, I thought, was  
14 a little cavalier with the requirements of the reg, but if you  
15 look at -- I would -- I would refer the commission to  
16 1905.4 sub (d) and (e). You know, that lays out the fact that  
17 the CIA should be responsible for notifying the appropriate  
18 individuals and providing advice and counsel as to the  
19 implementation of the decision. That's the only way we can  
20 protect these ----

21 MJ [COL POHL]: I hear you.

22 CP [BG MARTINS]: ---- very sensitive equities.

23 MJ [COL POHL]: I hear you, and I understand your

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1 position. Let me ask you this: On these unique functional  
2 identifiers, do they only relate to CIA personnel or do they  
3 also include others, for example DoD personnel?

4 CP [BG MARTINS]: We have a Touhy reg as well, Your Honor,  
5 and, you know, the ----

6 MJ [COL POHL]: No, I ----

7 CP [BG MARTINS]: ---- DoD has a -- has a ----

8 MJ [COL POHL]: I didn't ask you that. I'm simply saying  
9 there's non-CIA personnel involved in this process. That's  
10 all I asked. Is that a yes or a no?

11 CP [BG MARTINS]: Yes, Your Honor, if they seek to ----

12 MJ [COL POHL]: No. My question is, as I'm looking at the  
13 letter in AE 523, which seems to be CIA-specific ----

14 CP [BG MARTINS]: Right.

15 MJ [COL POHL]: Well, it is CIA-specific.

16 CP [BG MARTINS]: Yes.

17 MJ [COL POHL]: But the same procedure would apply to any  
18 USG personnel, regardless of whether they worked for DoD, DIA,  
19 United States Information Agency, whatever.

20 CP [BG MARTINS]: I mean, each situation relates to what  
21 discovery do they have. I mean, the courts ----

22 MJ [COL POHL]: No, I'm just trying to ----

23 CP [BG MARTINS]: Go ahead.

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1 MJ [COL POHL]: ---- clarify this is that, everybody  
2 involved in the RDI program from -- rephrase that.

3 I'm sure there's some who don't fit this category.  
4 There may be foreign nationals somehow unconnected to the  
5 United States Government, but the bulk of the people involved  
6 in the RDI program are a large number -- I don't want to  
7 quantify whether it's 90 percent or whatever -- are related to  
8 the U.S. Government as some type of employee: contractor,  
9 soldier, CIA operative, Special Forces, whatever. Whatever  
10 that category is.

11 So everybody in that box -- we're back to boxes now  
12 instead of baskets -- everybody in that box would require a  
13 Touhy notification from the government perspective because, no  
14 matter who they are, they essentially belong to some  
15 U.S. Government agency for Touhy purposes and for interviewing  
16 purposes. Is that the government's position?

17 CP [BG MARTINS]: Your Honor, I'm speaking of the  
18 6 September 2017, is what I focussed oral argument on and to  
19 assist you on.

20 MJ [COL POHL]: Yeah.

21 CP [BG MARTINS]: And that relates to all current and  
22 former employees who've gotten their information, their  
23 classified information through an official work relationship

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1 with the CIA.

2 MJ [COL POHL]: Right.

3 CP [BG MARTINS]: And so ----

4 MJ [COL POHL]: I ----

5 CP [BG MARTINS]: ---- those individuals, definitely yes.

6 And they shouldn't be independently ----

7 MJ [COL POHL]: That's not the question I'm asking.

8 CP [BG MARTINS]: What is your question?

9 MJ [COL POHL]: I read the 6 September memorandum and I

10 see how it covers CIA people.

11 CP [BG MARTINS]: Right.

12 MJ [COL POHL]: My question is: Everybody -- non-CIA

13 people who work for some other U.S. Government agency, do the

14 same rules apply?

15 CP [BG MARTINS]: Yeah, they shouldn't be approaching them

16 independently either. If we're talking RDI information ----

17 MJ [COL POHL]: My ----

18 CP [BG MARTINS]: ---- and official government

19 information, how else are we supposed to protect the

20 information?

21 MJ [COL POHL]: No, I'm asking you questions. Just give

22 me answers.

23 CP [BG MARTINS]: Sure.

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1 MJ [COL POHL]: So the answer to your question is this  
2 6 September memorandum for CIA people, although it's --  
3 applies -- the framework, obviously not CIA people, applies to  
4 everybody who worked for the U.S. Government as part of the  
5 RDI program, regardless of which agency they happen to be  
6 working for.

7 CP [BG MARTINS]: Your Honor, I don't want to be so global  
8 because it's not anchored enough. We want them to get the  
9 information they're entitled to. We want them to be able to  
10 interview witness. We've issued a memorandum of 6 September  
11 of last year that we stand by that relates to very --  
12 indicators we've gotten that they want to go independently  
13 approach CIA personnel. So that's what I'm prepared to talk  
14 to you about.

15 You know, you're raising a kind of a global question  
16 that would get me, you know, speaking to hypotheticals you've  
17 got in your head that may be different than the ones I have.

18 MJ [COL POHL]: Okay. Simple example -- I'll try it one  
19 more time, and if it doesn't work, I got it.

20 CP [BG MARTINS]: Can you give me a concrete example?

21 MJ [COL POHL]: Yes. A soldier, U.S. Soldier, E-7, is at  
22 a black site watching an EIT applied to an individual, okay?

23 CP [BG MARTINS]: They should not approach that soldier

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1 without coming to us.

2 MJ [COL POHL]: Okay. So simple question, then:

3 Therefore this procedure in the 6 September memorandum would  
4 apply -- although it does talk about CIA -- would apply to  
5 that soldier, too?

6 CP [BG MARTINS]: It would be -- yeah, it would implement  
7 the -- it might implement a different Touhy reg.

8 MJ [COL POHL]: Yeah, I know each agency has got its own.  
9 Yes.

10 CP [BG MARTINS]: Yes.

11 MJ [COL POHL]: Okay, that was my only question. Got it.

12 CP [BG MARTINS]: That helps. Thank you, Your Honor.  
13 Subject to your questions, Your Honor.

14 MJ [COL POHL]: I have nothing further.

15 LDC [MR. CONNELL]: A General in the United States Army  
16 just told you that the defense in a capital case should not be  
17 investigating.

18 MJ [COL POHL]: Did I ----

19 LDC [MR. CONNELL]: I just want to sit there for a second.

20 MJ [COL POHL]: No, I heard that, Mr. Connell.

21 LDC [MR. CONNELL]: The reasons that the government gave  
22 for that position hold no legal water whatsoever. The first  
23 position -- other than a list of existing statutes and

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1 regulations, the first argument that the -- excuse me, just  
2 one second.

3           The first argument that the government just made was  
4 that in 30 -- in 308HHHH, the military commission approved the  
5 synopsis, the government-created synopsis that included the  
6 UFI. I am going to read to you from 308HHHH page 2:

7           "Attachment B, Tab 2, contains 64 Sub-Tabs that  
8 contain Government created synopses that detail information  
9 about the 64 individuals listed at the Table at Attachment B,  
10 Tab 1. The Government indicated that these synopses will be  
11 provided directly to the Defense and did not request that the  
12 Military Judge approve the synopses as substitutes for the  
13 underlying" classification -- "the classified information upon  
14 which they were based."

15           The government has always treated these UFI witnesses  
16 as a carve-out from its invocation of classification privilege  
17 and its 505 process; I suggest probably because it does not  
18 want the military commission to review the underlying  
19 information underneath those witnesses. But to simultaneously  
20 take that position and then to claim that the military  
21 commission has blessed these UFIs is simply inconsistent with  
22 the facts.

23           Now, the second argument that the -- another argument

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1 that the government just made is that -- that there are dates  
2 contained in this information. The -- they do not -- the 2.d.  
3 information does not contain dates, as you will see in 502Y.  
4 But earlier today the government referred to a chart, what it  
5 called a timeline.

6 And I just want to give you the citation on that  
7 so-called timeline for you to look at and make your own  
8 independent evaluation. That is, it is attached at AE 534A,  
9 Attachment B, and that is the government's so-called timeline.  
10 I won't say anything else about it because it's classified,  
11 but I won't have to say anything about it once you take a look  
12 at it.

13 The third argument is -- the government makes, that  
14 if -- if we ask for witnesses to be -- ask to interview  
15 witnesses, they will send an FBI agent and a CIA agent to tell  
16 them about their rights not to testify or to testify -- or,  
17 excuse me, to be interviewed or to be interviewed [sic]. This  
18 is the sort of interference with defense investigation that  
19 has been thoroughly rejected in the wide variety of cases that  
20 I cited. But let's also just test it. Let's just assume that  
21 that worked.

22 I invite you, Your Honor, to -- we, on 13 July, 2017,  
23 in DR-333-AAA, asked the government to interview approximately

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1 47 witnesses that fall under this framework. Just ask the  
2 government how many of them said yes and how many said no.

3 MJ [COL POHL]: I bet you know the answer.

4 LDC [MR. CONNELL]: I don't, because they never responded.

5 MJ [COL POHL]: You never got a response back. Okay.

6 LDC [MR. CONNELL]: That's right. The -- ask them if they  
7 asked them.

8 The next argument that the government makes is that  
9 you have to screen for relevance. It's a little bit lucky,  
10 because the government -- with respect to these 2.d.  
11 witnesses, the government already screened for witnesses --  
12 for relevance.

13 Each one of these witnesses has both a banner marking  
14 at the top and a textual explanation in the body that the  
15 government has already considered these witnesses to be  
16 relevant, necessary, and noncumulative to the defense, and  
17 that gives reasons why it considers them to be relevant.

18 So no further relevance -- we don't have to go to  
19 the -- you know, the circles and the sliver. There's no  
20 further relevance screening that is required. They've even  
21 already screened them for noncumulateness, which the  
22 government describes as a good deed. But I think -- I would  
23 suggest because the -- it will not provide even the underlying

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1 classified documents to the military judge is no good deed  
2 whatsoever.

3           The next argument that the military commission  
4 invited the -- excuse me, the government invited the military  
5 commission to read 1905.4(d), which he said that defense  
6 counsel dealt with in a cavalier manner. The 1904(d) is  
7 triggered -- the application of 19 -- excuse me, 1905.4(d) is  
8 triggered by 1905.3(a) in the CFR of -- 32 CFR, which provides  
9 that no employee shall produce any materials or information in  
10 response to a demand without prior authorization as set forth  
11 in this part.

12           1905.4(d) itself, which the government just relied  
13 upon, talks about information, quote, sought by a demand.  
14 The -- this has nothing to do with the question of whether the  
15 CIA Touhy regulations exceed the housekeeping statute or  
16 whether they violate the rule for reciprocity in discovery.  
17 For the purposes of this, I am assuming completely that these  
18 regulations are entirely valid as interpreted by you in 386M.

19           Instead, what these regulations say is, to the  
20 distinction that I began with, that there is a distinction  
21 between witnesses who are sought by a demand, for which the  
22 government is the mailbox under 386M, and witnesses who are  
23 not sought by a demand who we just seek to interview in which

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1 Touhy has no -- this Touhy regulation has no application  
2 whatsoever.

3 I also found remarkable the government's position  
4 that we shouldn't be interviewing DoD witnesses either,  
5 especially given their position in the 386 litigation that DoD  
6 was not covered by -- that this military commission was not  
7 covered by DoD Touhy regulations, which they said fell under  
8 the exception for courts-martial.

9 The last thing that the government argued is that we  
10 have no ----

11 MJ [COL POHL]: Just so I'm clear here, your position  
12 is -- let's take Mr. Rodriguez, for example ----

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

14 MJ [COL POHL]: ---- since he's a well-known CIA employee.

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

16 MJ [COL POHL]: That if you ask -- if you go through the  
17 government, you comply -- Touhy needs to be complied with.

18 LDC [MR. CONNELL]: So let me just be a hundred percent  
19 clear what go through the government means because there --  
20 only because there are two separate things.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: There's please may I interview  
23 Mr. Rodriguez, or there is please produce Mr. Rodriguez as a

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1 witness.

2 MJ [COL POHL]: Let's just go -- let's try the interview  
3 step to begin with.

4 LDC [MR. CONNELL]: Interview step. No, the government  
5 has no role in my interview of Mr. Rodriguez.

6 MJ [COL POHL]: Okay.

7 LDC [MR. CONNELL]: And the Touhy regulation has no  
8 application to that situation.

9 MJ [COL POHL]: But if you ask, I want to interview  
10 Mr. Rodriguez; I don't know where he is; Government, tell me  
11 where he is; or you ask for their assistance, that still  
12 doesn't trigger Touhy?

13 LDC [MR. CONNELL]: Right. What triggers Touhy is ----

14 MJ [COL POHL]: But I want him, after talking to him, I  
15 want him to come to testify. After reading his book, I want  
16 him to come testify, and that triggers a Touhy.

17 LDC [MR. CONNELL]: Because that's a demand. That's a  
18 judicial process.

19 MJ [COL POHL]: The way you're looking at, or reading the  
20 6 September memo, is that to interview Mr. Rodriguez, you'd  
21 have to ask whether -- you'd have to ask the government --  
22 permission is not the right word -- coordination, for want of  
23 a better word. And then they will go to Mr. Rodriguez and

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1 give him his options. And then if he says yes -- and he --  
2 actually, he might say yes. I don't know. But anyway ----

3 LDC [MR. CONNELL]: I will tell you that we directly ----

4 MJ [COL POHL]: Yeah.

5 LDC [MR. CONNELL]: ---- approached Mr. Rodriguez, and he  
6 declined to be interviewed.

7 MJ [COL POHL]: Okay. Well, you can talk to a lot of  
8 other people. That's why I thought he might, he might be  
9 more ----

10 LDC [MR. CONNELL]: Welcome to my world, sir. I'm  
11 familiar with that ----

12 MJ [COL POHL]: Okay. So, but then -- then when they send  
13 whoever over there, they say Mr. Connell would like to talk to  
14 you, and you don't have to talk to him, but you can if you  
15 want to. And then they convey that answer back to you. And  
16 if the answer is yes, you interview them; if the answer is no,  
17 you don't.

18 LDC [MR. CONNELL]: That is the process that the  
19 government describes in that letter.

20 MJ [COL POHL]: Okay. And if you don't follow that  
21 process, and let's say you just go knock on Mr. Rodriguez's  
22 door ----

23 LDC [MR. CONNELL]: Well, we did go knock on

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1 Mr. Rodriguez's door.

2 MJ [COL POHL]: No, but I'm saying is what's -- what's the  
3 sanction if you don't go through the government to go  
4 interview somebody?

5 LDC [MR. CONNELL]: According to that letter, prosecution.

6 MJ [COL POHL]: Okay. I just want to make sure we're  
7 reading the same letter. That's all.

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

9 MJ [COL POHL]: That's the only reason I asked. Go ahead.

10 LDC [MR. CONNELL]: Yes, sir. I mean, if you need to give  
11 me Miranda warnings, sir ----

12 MJ [COL POHL]: No, no, no, no. You said "we." I'm not  
13 sure who "we" is, so I don't know.

14 LDC [MR. CONNELL]: The -- the last thing that I want to  
15 say is that the government made an argument that we are trying  
16 to set up as some kind of attorney general, which what I took  
17 that argument to mean was that we were trying to investigate  
18 the case. And the government is correct about that. We are  
19 trying to investigate the case, not simply because  
20 Mr. al Baluchi and the other defendants have a right to a  
21 proceeding which comports with ordinary due process, but  
22 because we as attorneys have a duty to investigate.

23 And the Supreme Court has been explicit on this

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1 topic, that that is our main job. We may think because we all  
2 show up here every month or so that our main -- my main job is  
3 standing up here and arguing to you. But that is not my main  
4 job. My main job is coordinating the investigation. And I  
5 simply present the fruits of that investigation to you here in  
6 the military commission.

7 So, yes, it is the core -- our core duty to  
8 investigate and speak to these witnesses.

9 Nothing further.

10 MJ [COL POHL]: Thank you.

11 LDC [MR. NEVIN]: May I be heard?

12 MJ [COL POHL]: Sure. And although this is  
13 Mr. al Baluchi's motion to compel on the particular witness  
14 is -- I see the possibility that this implicates other  
15 accused, and, therefore, I will give you leave to argue,  
16 Mr. Nevin, is what I'm saying is.

17 LDC [MR. CONNELL]: Sir, I have no problem with that. I  
18 just did -- I think you accidentally misspoke there. It is  
19 actually not our motion to compel. It is our motion to  
20 dismiss for interference with our investigative function.

21 LDC [MR. NEVIN]: Thanks. Your Honor, I took it that we  
22 are not unjoined from this motion ----

23 MJ [COL POHL]: No.

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1 LDC [MR. NEVIN]: ---- unlike certain other motions we are  
2 unjoined from.

3 MJ [COL POHL]: No, I know. But we're talking -- the  
4 relevance of these witnesses are to a Mr. al Baluchi motion,  
5 so I got you.

6 LDC [MR. NEVIN]: And ----

7 MJ [COL POHL]: But we want to talk procedure here, or how  
8 it impacts on your case, too. I got it.

9 LDC [MR. NEVIN]: Right. And I just -- I just want to  
10 say -- point the military commission to one aspect of the last  
11 remark that Mr. Connell made and to one of the remarks that  
12 trial counsel made.

13 And as I heard it, there was language from trial  
14 counsel to the effect that I don't know where they think  
15 they -- what obligation they have to investigate, whether they  
16 see themselves as private attorney generals, or something to  
17 that effect. And Mr. Connell just made the point that we are,  
18 of course, obligated to conduct an investigation. There are a  
19 few things that are any clearer, if you read the Supreme Court  
20 opinions in capital cases.

21 These cases get reversed on habeas with a high degree  
22 of regularity. In fact, it's one of the arguments for  
23 abolition of the death penalty altogether, that this happens

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1 so frequently, that defense counsel fail to conduct a thorough  
2 investigation. They fail to determine whether a defense can  
3 be supported before they abandon it, and they fail to conduct  
4 a thorough investigation on that subject, and similar kinds of  
5 problems that arise.

6           So I mention it only -- so I don't have any -- really  
7 on that score much different than what Mr. Connell said to you  
8 to say, but I just ask for you -- I stood up here a couple of  
9 months ago when counsel made a similar remark about going to  
10 investigate in a foreign country and made the point that if we  
11 did that, we would be disclosing classified information. And  
12 I got up here and said, "Did you hear what he just said?"

13           And it -- somehow out of that we ended up with 525,  
14 with your order in 525 that the government speak to that. And  
15 that led to 525G, and we're preparing responses to that for  
16 you. But that became the third time we've been told not to  
17 investigate. We've been told you may not investigate.

18           So anyway, the fact that at this late date in this,  
19 after I've been at this podium and many other lawyers have on  
20 so many occasions saying, do you know what the United States  
21 Supreme Court requires us to do in capital cases? Have you  
22 studied that?

23           And that counsel is still referring to this as if it

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1 were some kind of extraneous, odd inclination that we have,  
2 something on the order of envisioning ourselves as a private  
3 attorney general that drives us to go and try to interview  
4 people who know things about our clients being tortured.  
5 Never mind enhanced interrogation techniques. We want to talk  
6 to the actual people who were there and saw it. And we have a  
7 right, not only a right, but an obligation to do it. And it  
8 is not some odd species of desire on our part to do that. It  
9 is fulfillment of our obligation.

10           So anyway, the only different thing that I want to  
11 say is: I ask you to consider that when you're ruling on 505  
12 substitutions, when you're thinking about what the government  
13 is telling you about whether they have fulfilled their  
14 obligations. This seems to me to carry the clear implication  
15 that they don't understand their obligation or ours, despite  
16 the fact that they frequently intone the proposition that they  
17 do. So thank you for hearing me out.

18           MJ [COL POHL]: Thank you, Mr. Nevin.

19           General Martins, anything further?

20           CP [BG MARTINS]: Your Honor, briefly because I think  
21 counsel, Mr. Connell, spoke incorrectly on two items.

22           Your 308HHHH does cover the table of pseudonyms and  
23 your order clearly embraces it, and it does acknowledge, even

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1 though we are providing them in discovery those synopses, no  
2 good deed goes unpunished, separately it does acknowledge that  
3 as part of what put -- what we are saying puts them in  
4 substantially the same position. So counsel was incorrect on  
5 that.

6 386M at 8 says that when the defense -- this is your  
7 ruling: "When the defense seeks the production or disclosure  
8 of agency materials or information from employees of the  
9 agency without going through R.M.C. 703, the defense is  
10 required to file a Touhy notice pursuant to Touhy  
11 regulations." So the courts speak to this not being able to  
12 enlarge the scope of discovery through some kind of side  
13 process.

14 Unapologetically, we're going to protect sources and  
15 methods that relate to the kinds of things that brought the  
16 Towers down that you've seen in recent sessions of this court.  
17 And we've given a process that protects their ability to  
18 access witness -- witnesses and evidence in a capital case,  
19 but also protects all of these important national security  
20 interests. Thank you.

21 MJ [COL POHL]: Do you take an issue -- just a second --  
22 that the defense has a -- within the rules, I've got that.  
23 But do you take issue that the defense has an independent

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1 responsibility to investigate this case or any case, quite  
2 frankly?

3 CP [BG MARTINS]: I think they have to be zealous. They  
4 have to work within the rules to get hold of the evidence and  
5 witnesses they need to defend their client, absolutely.

6 MJ [COL POHL]: Okay.

7 CP [BG MARTINS]: But they are not supposed to be going  
8 outside of this process to enlarge the scope of discovery, and  
9 in this case, in this specific situation, really threaten  
10 important national security interests. There's a reason for  
11 these processes.

12 If the commission were to grant this motion, we would  
13 have to regard it as a denial of a protective order, and we  
14 have invoked national security privilege over this  
15 information.

16 MJ [COL POHL]: Okay. Thank you.

17 CP [BG MARTINS]: Thank you.

18 LDC [MR. CONNELL]: Sir, the government -- the government  
19 made one new argument. May I address it?

20 MJ [COL POHL]: Sure.

21 LDC [MR. CONNELL]: Sir, first time I read -- the  
22 government just read you a sentence from 386M, and the first  
23 time I read that sentence, I thought the way that the

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1 government -- I read it the way the government just did, which  
2 was that's wrong because outside of judicial demand, there is  
3 no requirement for a Touhy notice.

4 But when I reread the sentence, I came to understand  
5 the sentence, the last four words of which kind of dropped off  
6 in the government presentation there which was "pursuant to  
7 the Touhy regulation."

8 And so the way I read that is that you are saying  
9 that when we are seeking information, we have to follow the  
10 Touhy regulation. And in the CIA Touhy regulation, it --  
11 duties are imposed on the defense only when there is a demand  
12 under 1905.3 and .4.

13 So I read your order to say we have to follow the  
14 regulation, not that you are imposing some additional duty on  
15 top of the regulation. If that's not what it meant, you  
16 should let us know.

17 MJ [COL POHL]: Okay. Thank you. That brings us to 530.  
18 And there's actually, each side has got a little bit on 530  
19 here.

20 LDC [MR. CONNELL]: Who do you want to hear from first,  
21 sir?

22 MJ [COL POHL]: Let me hear from Mr. Ryan first.

23 TC [MR. RYAN]: I think that is appropriate, Your Honor.

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1 The actions underlying this motion were the government's  
2 seizure, and, of course, the circumstances of that have led us  
3 to make requests of the commission.

4 In 530, Your Honor, the prosecution asks this  
5 commission to rescind its order in AE 149 in which Your Honor  
6 granted the provision of laptop computers to the five accused,  
7 and we also asked you to -- in addition to rescinding that, to  
8 enter an order granting the government the right and the  
9 ability to conduct a walled-off forensic review of those  
10 laptops, that being a noncontent review, so as not to disturb  
11 any concerns about attorney-client privileged materials.

12 Although the order in 149 was yours, the issue of  
13 laptops with the accused predate you, as you know, by several  
14 years. And this is how it came about, Judge. The extreme  
15 step of giving laptop computers, and not just giving it to  
16 them, but letting them have it for 24 hours a day and seven  
17 days a week, giving such access to law of war detainees was  
18 born of a need to provide discovery to the accused back at a  
19 time -- and this is in the 2008-2009 time frame when a number  
20 of them had already indicated -- or had already been granted  
21 the right to proceed in a pro se basis and the remaining  
22 accused in this case were heading in that same direction.  
23 They'd already announced their intention to do so, and some

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1 logistical issues still remained before then Judge Henley, I'm  
2 speaking now presumably, was to grant them the same right.

3           So we have people who were representing themselves.  
4 They had essentially sent their lawyers to the back of the  
5 room, and we had the issue of how to provide discovery to them  
6 in their dual role. And the idea of coming up with providing  
7 laptops was the solution at the time.

8           Of course, things have changed quite a bit. In 2012  
9 the case was arraigned again. Some time thereafter, the  
10 laptops remained, and I won't go through very long, somewhat  
11 painful chronology.

12           I will say this, Judge. In all of the camps on  
13 Guantanamo, no other detainee has the right or has the ability  
14 to possess a laptop computer at all. This includes the  
15 similarly situated accused in the bombing of the USS COLE,  
16 Mr. Nashiri.

17           I'll also state, Judge, that I am aware of no BOP or  
18 United States Marshal Service prisoner who has the same  
19 ability of possessing a laptop computer personally of his --  
20 on a 24-hour-a-day/seven-day-a-week basis.

21           In light of the events of 530 that we have described,  
22 that we have provided to Your Honor, it is time that this  
23 good-faith experiment ----

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1 MJ [COL POHL]: What have you provided me in terms of  
2 evidence?

3 TC [MR. RYAN]: We've provided you, sir, with the reports  
4 of the guards, the guard force; we've provided you with our  
5 recitation of those facts; we have provided you with the  
6 seized document.

7 MJ [COL POHL]: Have you provided me with any evidence of  
8 what was exactly the -- was done and what the risk would be  
9 from somebody with that background?

10 TC [MR. RYAN]: As far as -- well, Judge, you're holding  
11 us to a standard that I would submit is going to be impossible  
12 in this sense. The items were taken. Immediately defense  
13 attorneys -- and you'll remember because it was happening in  
14 this courtroom -- were quick to point out to you that this was  
15 a violation and that you should order them returned  
16 immediately.

17 MJ [COL POHL]: No, but -- but what I'm saying, Mr. Ryan,  
18 and I'm not sure this is too high a burden, is -- and we've  
19 revisited why they got the laptops, and again, that ship has  
20 somewhat sailed. And basically, there was found that some had  
21 been either altered or attempted to be altered, and there was  
22 some evidence of instructions to that effect.

23 TC [MR. RYAN]: Yes, sir.

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1 MJ [COL POHL]: And my question has always been is, is  
2 that -- which I asked the other day was: What type of  
3 alteration are we talking about here and what's the risk? And  
4 as I told you the other day is -- a proffer isn't -- so  
5 what I've got before me is, is they broke the rules. Okay.

6 TC [MR. RYAN]: They broke ----

7 MJ [COL POHL]: At least the ones -- and I know who set  
8 the rules up.

9 TC [MR. RYAN]: Sir, they broke your order.

10 MJ [COL POHL]: I know. I know. I know. The rules,  
11 orders. Okay. Fine. I got it. Okay.

12 TC [MR. RYAN]: Yes, sir.

13 MJ [COL POHL]: But what I have before me is, at least  
14 in -- whether it's two or three, two or three laptops have  
15 been externally observed to have been altered, in violation of  
16 my order, right?

17 TC [MR. RYAN]: No, sir. One.

18 MJ [COL POHL]: One. Okay. We have one that's been --  
19 okay. And we have other evidence, a piece of paper of  
20 instructions and things like that to somebody else. Okay.

21 So that's what I have before me, is basically they --  
22 is one of the detainees messed with his computer in violation  
23 of my order, okay? Okay. And you want me to -- because of

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1 that, to take away the computers from all the detainees  
2 because one person didn't obey my order, and take it away from  
3 the one person who disobeyed my order, when I have no idea  
4 what harm or what threat it has -- it presents to the  
5 confinement facility or to some other entity?

6 Do you understand what I'm saying? What I'm saying  
7 is that's what I've got.

8 TC [MR. RYAN]: I do, Judge, but let me say this to you,  
9 sir: If the government and if the guard force and if the JDG,  
10 who take an awful lot of criticism in this courtroom, if they  
11 were to do what they wanted to do at the moment this was all  
12 exploding in front of them, which was to conduct that forensic  
13 analysis, even walling themselves off from a content review, I  
14 would be in a position here of telling you probably a lot  
15 more. I can't say for sure because it hasn't happened.

16 MJ [COL POHL]: Okay. Just -- just ----

17 TC [MR. RYAN]: So ----

18 MJ [COL POHL]: Just ----

19 TC [MR. RYAN]: Yes, sir. I'm sorry. Go ahead.

20 MJ [COL POHL]: I'm not -- Mr. Ryan, don't get so excited.  
21 I got you.

22 So what you're telling me is, is my question I asked  
23 you the other day of what the alterations would have done and

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1 what risks they presented needs a forensic exam before you can  
2 answer that question in an intelligent manner? Is that what  
3 you're telling me?

4 TC [MR. RYAN]: I would say, sir, that if you are  
5 uncomfortable with the extent of the evidence on the record  
6 before you, and I think you know pretty much everything that I  
7 know, then a forensic examination, as we've detailed in our  
8 pleading, would be the step, or the next step -- next  
9 necessary and relevant step that might -- might provide more  
10 information ----

11 MJ [COL POHL]: Okay.

12 TC [MR. RYAN]: ---- to Your Honor.

13 MJ [COL POHL]: So you said one computer has been altered.  
14 That means four have not been.

15 TC [MR. RYAN]: Well, we don't know that, sir. All we can  
16 say is your ----

17 MJ [COL POHL]: Externally ----

18 TC [MR. RYAN]: Your question was more -- I think you said  
19 three computers had been physically altered. All I can say is  
20 right now, based on everything in front of us, we know that  
21 one has. We do not know as to the remaining ones. The reason  
22 we know the one has is Mr. Ali handed over to the guard force  
23 a piece of the computer that should have been on the inside

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1 that was no longer on the inside.

2 MJ [COL POHL]: Okay. I got you.

3 TC [MR. RYAN]: In addition to the letter that was seized  
4 in which he describes how he altered it.

5 MJ [COL POHL]: So in order to answer my question of what  
6 was altered and what risk does the alteration present, you  
7 would have to do the forensic exam?

8 TC [MR. RYAN]: It is certainly one step, Judge. It's  
9 certainly the reason we're asking for that forensic analysis.

10 MJ [COL POHL]: I mean, let's say, for example, that  
11 another detainee's computer shows no evidence of altering at  
12 all, and do we take his away, too, because Mr. Ali altered  
13 his?

14 TC [MR. RYAN]: I will absolutely -- I shouldn't say  
15 absolutely.

16 MJ [COL POHL]: I'm not -- again, you understand when I  
17 ask questions I'm not ----

18 TC [MR. RYAN]: Yeah.

19 MJ [COL POHL]: You know, I was asked whether I have an  
20 open mind, and I have an open mind when I ask these questions.  
21 I'm just trying to figure out the lay of the land here.  
22 Because you're saying you want to look at all five computers.  
23 And what I'm saying is are the sins of one going to be imputed

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1 to the other four? Or is it going to be -- I mean, is that  
2 the government's position, that we can't trust any of them  
3 now?

4 TC [MR. RYAN]: I am here today, Your Honor, to ask you  
5 and to provide you with information, and hopefully persuasive  
6 argument, that will say to you that this was a bad risk, and,  
7 in fact, some bad possibilities have already come to pass, and  
8 that trying to go backward in the idea that these could be  
9 provided to these men, any of them, in this case, these  
10 co-conspirators, is a bad idea. And I can make an argument  
11 about that.

12 MJ [COL POHL]: Okay. I understand.

13 TC [MR. RYAN]: And the point -- Judge, while you have me  
14 here, one of the questions you asked was what's the evidence  
15 of the actual alteration? But the other thing you stated was  
16 what are the risks involved? The -- and you asked me this on  
17 Monday, too.

18 As long as we're on that subject, I want to refer you  
19 to, within the documents the -- the declaration of the JDG  
20 commander, Colonel Gabavics. For the court reporters, that's  
21 G-A-B-A-V-I-C-S.

22 Colonel Gabavics gives a ----

23 MJ [COL POHL]: What exhibit is that attached to?

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1 TC [MR. RYAN]: This is, Your Honor -- court's  
2 indulgence -- Attachment F of 530F.

3 MJ [COL POHL]: Okay. One moment, please.

4 TC [MR. RYAN]: So Attachment F to 530F.

5 MJ [COL POHL]: Okay. One moment.

6 TC [MR. RYAN]: And it's in paragraphs 7, 8, and 9.  
7 Colonel Gabavics, who I believe has something of a tech  
8 background himself, gives very detailed ----

9 MJ [COL POHL]: Hold on a second, Mr. Ryan.

10 TC [MR. RYAN]: Yes, sir.

11 MJ [COL POHL]: I'm looking at paper here.

12 Okay. What paragraph?

13 TC [MR. RYAN]: Paragraphs 7, 8, and 9, sir, on pages 2  
14 through 3.

15 MJ [COL POHL]: Okay. I read the three paragraphs. Go  
16 ahead.

17 TC [MR. RYAN]: Thank you, sir. Returning to my argument,  
18 we position -- our position, sir, is that in light of the  
19 events of 530 that we've been discussing and that are before  
20 you now and that I'll be mentioning as I go forward, our  
21 position is that this good-faith experiment that we undertook  
22 ourselves, that being the prosecution, that these self-avowed  
23 clear enemies of the United States could adequately be

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1 controlled under these circumstances must come to an end.

2 On 16 October, Your Honor, members of the guard force  
3 conducted a search of the legal bin of Mr. Khalid Shaikh  
4 Mohammad at the conclusion of the hearings in this courtroom.  
5 Such examination and search is authorized by Your Honor's  
6 order, the written communications order in AE 018U. It has  
7 also become a standard procedure by the guard force at the end  
8 of every court day in this courtroom.

9 One of the guards saw a paper in Mr. Shaikh  
10 Mohammad's bin with the specific number attributable to not  
11 the accused Mohammad but to the accused Ali. The guard  
12 recognized that to be a violation of camp policy. It was  
13 among other papers that were apparently part of some ICRC  
14 documents, that being the International Committee of the Red  
15 Cross.

16 The guard called the accused Mohammad's attention to  
17 this document, and Mr. Mohammad said to him, "Well, those are  
18 just ICRC messages." In short, he was lying to keep the guard  
19 from looking any further.

20 The guard then further called his attention to --  
21 Mr. Mohammad's attention to the documents saying, "But that's  
22 the number for the accused Ali."

23 The accused Mohammad answered to the effect of,

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1 "Yeah, just give it back to Ali," again attempting to obstruct  
2 the guard from finding out the truth and at the same time,  
3 relinquishing his possession or any claim to the document.

4 Now, as to this document, Your Honor, the guard force  
5 does not know how long the document existed and how long the  
6 accused Mohammad had it. I will note, sir, that the  
7 document -- the actual page itself was a prayer schedule that  
8 the JDG folks have printed up for the detainees to use in sort  
9 of regulating their own day. This particular prayer schedule  
10 was from two months earlier in August. So it is -- I would  
11 say it's reasonable to say that the outer limit of how old the  
12 document could be would be about two months. It could be much  
13 shorter than that.

14 The guard force also does not know how it got from  
15 the accused Ali to the accused Mohammad, although I would  
16 note, especially since it was at the end of a court day, that  
17 one strong possibility is that it was turned over in this  
18 courtroom. The guard force also does not know who else may  
19 have had it along the way, if anyone else had it along the  
20 way.

21 The document was seized and translated. It appears  
22 in the record at AE 530, Attachment C. This document, Your  
23 Honor, shows even to a noncomputer type, a very detailed plan

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1 to alter the laptop, and indicates that the accused Ali had  
2 already altered his. Such alteration all by itself is a  
3 violation of AE 182K; that is Your Honor's order sending the  
4 laptops back to the accused.

5 On 18 October, the guard force seized the five  
6 computers. At the same time, also seized from the accused Ali  
7 was an item described and pictured in AE 530, our pleading to  
8 you, at Attachment B. And we submit that item is also  
9 described in the seized translated document as a makeshift  
10 tool.

11 Also seized from Mr. Ali at that time was an internal  
12 computer component that he had removed from the laptop, again  
13 showing a violation of Your Honor's order in 182K.

14 A search of the cell of the accused Bin'Attash  
15 revealed a similar document with writing also showing  
16 instructions for altering the laptops. As to this document,  
17 the guard force does not know how long it existed -- it was  
18 not on a prayer schedule with a date -- who it came from,  
19 although it is certainly reasonable to assume it came from the  
20 accused Ali, as we point out a Microsoft certified engineer.  
21 The guard force does not know who else may have had it along  
22 the way. The guard force does not know whether the -- it had  
23 been used to actually alter Bin'Attash's laptop or anyone

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1 else's, for that matter.

2           Now, the defense opposes our requests, Your Honor.  
3 They don't want a forensic analysis. They want this  
4 commission and the prosecution to forget the whole thing,  
5 including the violation of 182K, and return the laptops maybe  
6 with the promise that they won't misbehave again.

7           They want the JTF -- and I suggest this is more  
8 important, Your Honor -- they want JTF or JDG, which is  
9 charged with the security and the detaining of these accused,  
10 to allow the laptops back into the camp, despite everything  
11 that has happened -- that had happened at that moment.

12           But in their respective replies, Your Honor, taking  
13 many pages in which they make many detailed representations  
14 about how computers work and in which they have detailed many  
15 representations as to what couldn't really possibly be  
16 happening and why Your Honor shouldn't care about this at all,  
17 they glaringly omit the answer to this basic and, I suggest,  
18 very important question: What were the accused up to?

19           The document that was intercepted and seized shows  
20 significant technical knowledge. It shows ingenuity,  
21 creativity, and most of all, plain old sneakiness. Combine  
22 that with their well-documented desire to continue to hurt the  
23 United States, and the stakes become very high.

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1           And at this point, Judge, I would draw your attention  
2 back to the litigation surrounding what became known as the  
3 accused Mohammad's letter to President Obama which was, in  
4 fact, anything but a letter to President Obama, and when it  
5 became public became a propaganda tool for al Qaeda, including  
6 a four-minute video released on or about September 11th of  
7 2017, which included Shaikh Mohammad's letter to  
8 President Obama along with footage of the attacks of  
9 September 11th.

10           Now, having been caught, the accused offer no  
11 justification, no explanation from the accused by way of a  
12 declaration that it's all just a terrible misunderstanding,  
13 and certainly they offer no apology for so blatantly thumbing  
14 their nose at Your Honor's order, both in its wording and in  
15 its intent.

16           Since they oppose our motion and since I expect  
17 counsel will be making argument on this motion, sir, I would  
18 urge you to ask them the question: What were your clients  
19 doing? My strong belief is that the answer will be, "I don't  
20 know," since counsel certainly wouldn't have been party to  
21 these actions.

22           So where are we now, Judge? And this goes back to  
23 where we started, I think, at the beginning. Since literally

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1 the time of seizure and Your Honor's initial order and  
2 actually our expectation that you would enter an order  
3 freezing everything in place, no investigation has occurred.  
4 They are essentially gathering dust, all taped up, and not  
5 being looked at in any way.

6           So that means the disturbing reality is that the only  
7 ones in this courtroom who know what was going on, what they  
8 were doing, are the five, the accused, with specific knowledge  
9 being in the mind of the accused Ali, again, the Microsoft  
10 certified engineer.

11           Consider also this fact, Judge. They wanted and  
12 would use only these specific laptops even when new ones had  
13 been purchased and were sitting at the camp in boxes and had  
14 been requested by the Chief Defense Counsel to update and give  
15 the accused the newest and the fastest and the one with the  
16 most bells and whistles. The accused said, "Let them sit in  
17 their boxes. We want to keep our old ones." The only  
18 exception being that of Mr. Binalshibh's because his old one  
19 had broken.

20           This strange string of events and this fact I just  
21 recited should concern all of us. And most of all, it  
22 concerns those who are responsible for the secured detention  
23 of these five, the protection of the guard force, the national

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1 security, and protecting all of us against those in the  
2 outside world that could be directed or inspired by these five  
3 individuals.

4           Your Honor, I submit that the United States  
5 Government is entitled to answers as to what was happening and  
6 also what could happen. I submit that they have forfeited  
7 this commission's good faith and good will in allowing them to  
8 possess the laptops at all.

9           I'd like to make a final couple of points, Judge.  
10 And this is relevant and new since the time of 182K. WiFi now  
11 exists in the containerized housing unit area, known as the  
12 CHUs or the Cuzcos. That signal can be received in the ELC,  
13 including the holding cells, including this courtroom. Your  
14 Honor has seen -- we all have seen in the last few sessions  
15 the emergence of this Cellbusters alarm.

16           I cannot say at this point that it's related exactly  
17 to that. But you should be aware, sir, that because of this  
18 WiFi emergence, there is now a signal available literally  
19 within the courtroom.

20           LDC [MS. BORMANN]: Judge, I'm going to object because  
21 Mr. Ryan is testifying; they've put on no evidence of this  
22 whatsoever; it's not subject to cross. I'm asking you to  
23 disregard it.

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1 TC [MR. RYAN]: This was requested as part of  
2 the discovery which we provided.

3 LDC [MR. NEVIN]: Yes, I join that request as well, Your  
4 Honor.

5 MJ [COL POHL]: Just a second. I'm sorry, Mr. Ryan, your  
6 response?

7 TC [MR. RYAN]: I said, Your Honor, this was requested by  
8 the defense in form of discovery. We provided it in such.

9 MJ [COL POHL]: Well, I'm not sure that makes it evidence.  
10 Objection sustained. Go ahead.

11 TC [MR. RYAN]: Also, Your Honor, T-Mobile now covers the  
12 entire naval base.

13 LDC [MS. BORMANN]: Judge, same objection.

14 TC [MR. RYAN]: Judge, I think that's probably something  
15 you can take judicial notice of, since everywhere you look you  
16 see it on the island.

17 MJ [COL POHL]: Any objection to me taking judicial notice  
18 that T-Mobile is on the installation?

19 LDC [MS. BORMANN]: There is T-Mobile on the installation.  
20 I have no idea if it reaches in here or not.

21 MJ [COL POHL]: Okay. With that caveat, I'll accept your  
22 representation. Go ahead, Mr. Ryan.

23 TC [MR. RYAN]: It is the first time cellular coverage

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1 exists on the island. Now, as far as once cellular coverage  
2 exists in a location ----

3 LDC [MR. NEVIN]: I object to that, Your Honor. That's  
4 just factually incorrect. I'm sorry.

5 LDC [MS. BORMANN]: I agree with that. I also object.  
6 That's factually incorrect.

7 TC [MR. RYAN]: Well, I'm sure they can make arguments,  
8 sir. If they want to say something else was here before that,  
9 that's fine with me.

10 MJ [COL POHL]: Let's ----

11 LDC [MR. NEVIN]: I ----

12 MJ [COL POHL]: This is all a side issue, okay? I got  
13 what the issue is before me. The current WiFi/cellular  
14 capability of the installation is -- is -- I understand what  
15 you're saying, Mr. Ryan.

16 TC [MR. RYAN]: Thank you, sir.

17 MJ [COL POHL]: But we don't need to go to the eaches. So  
18 the objection is sustained.

19 TC [MR. RYAN]: With that restriction, Your Honor, I will  
20 state that, based upon all of the reasons I have recited and  
21 based upon the evidence that is before Your Honor, we ask that  
22 you grant the motions -- the government's two-part motion,  
23 that being to rescind your order and, secondly, to order a

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1 forensic analysis.

2 MJ [COL POHL]: Okay.

3 TC [MR. RYAN]: Absent your questions, Judge.

4 MJ [COL POHL]: I have no further questions. Thank you.

5 Defense? Whoever wants to go first.

6 LDC [MR. CONNELL]: Could we take the comfort break?

7 MJ [COL POHL]: We're going to take a prayer break in 15  
8 minutes.

9 LDC [MR. CONNELL]: Okay.

10 MJ [COL POHL]: So I'd prefer to keep going.

11 [The military judge conferred with courtroom personnel.]

12 LDC [MR. CONNELL]: Can I just have a two-minute recess,  
13 please? May I have just a moment?

14 MJ [COL POHL]: Yeah. Do we need to recess or can  
15 Mr. Nevin start?

16 LDC [MR. CONNELL]: Go ahead.

17 MJ [COL POHL]: Okay. Go ahead, Mr. Nevin. Mr. Nevin.

18 LDC [MR. NEVIN]: Thanks, Your Honor. I thought maybe I  
19 would begin by anticipating that you might ask the question  
20 that Mr. Ryan asked you to ask, which is what happened and  
21 what could have happened, and ----

22 MJ [COL POHL]: No, I wasn't going to ask that.

23 LDC [MR. NEVIN]: Oh, all right.

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1 MJ [COL POHL]: I wasn't going to ask it. Why would I ask  
2 you what your client did? I think there may be some problems  
3 with that type of question ----

4 LDC [MR. NEVIN]: You might ----

5 MJ [COL POHL]: ---- so I never intended to ask that  
6 question.

7 LDC [MR. NEVIN]: Okay. Well, I ----

8 MJ [COL POHL]: If you want to volunteer, that's a  
9 different issue, but I'm not going to ask you what your client  
10 told you about alleged misconduct.

11 LDC [MR. NEVIN]: And I guess what I would say happened,  
12 based on the record we have and based on my understanding, is  
13 that nothing happened. There's not been any evidence that  
14 anything happened, that anything was done to Mr. Mohammad's  
15 computer. And ----

16 MJ [COL POHL]: How can the government know that if they  
17 don't do the forensic exam they're requesting?

18 LDC [MR. NEVIN]: Well, the -- how can they -- there has  
19 to be something upon which they base a suspicion that  
20 something was actually done to Mr. Mohammad's computer. And  
21 so on -- on the evidence that we have, there's not -- there  
22 is -- and I took -- I heard you at the beginning of this, and  
23 you asked on another occasion what is the evidence? Where --

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1 where is the expert evidence that will say -- and this is  
2 complicated. I admit this is complicated information, but  
3 it's -- the burden is on the government to demonstrate to you  
4 that the action it requests ----

5 MJ [COL POHL]: And they're saying we have to do the  
6 forensic exam to answer that question intelligently.

7 LDC [MR. NEVIN]: But that is just their assertion as  
8 well. When you asked for someone to say what is the expert  
9 evidence that something has happened, and what is the evidence  
10 that it could be harmful, that any harm could come from it,  
11 what you got was a lot of layperson testimony, a lot of  
12 layperson argument from Mr. Ryan.

13 And I don't quarrel with his faith in making the  
14 argument. That's fine. But he's not an expert, neither am I.  
15 And I take it from things the military commission has said,  
16 neither are you. And when you asked him where is the expert  
17 evidence, he tells you a paragraph of Mr. -- or of  
18 Colonel Gabavics' declaration, and he tells you that he thinks  
19 Colonel Gabavics is a pretty savvy guy about computers.

20 And I don't know what that means, but when you read  
21 that paragraph of that declaration, it doesn't say that there  
22 is an actual risk that any of these things could occur, that  
23 they could take place. It just -- it just lays out a list of

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1 possibilities that, in his opinion, if the computers had a  
2 particular capability, a harm that could flow from that.

3 And, really, I think we probably don't have to be  
4 experts to know that in order for those harms to flow, there  
5 would have to be some ability to contact the outside world.  
6 And that's why I take it Mr. Ryan is telling you that there  
7 now is a T-Mobile cell signal that's available even inside  
8 this courtroom.

9 So understanding that I'm not an expert either, this  
10 is why I joined Ms. Bormann's objection. There's been cell  
11 signal available here on the island for a long time, not only  
12 the cell phones that we used for many years that were handed  
13 out to us that were internal to the island, but also from --  
14 from the surrounding communities. I frequently get, I will  
15 say, just make a representation to you that I frequently ----

16 MJ [COL POHL]: Now, are you doing what you just objected  
17 to Mr. Ryan doing?

18 LDC [MR. NEVIN]: Well, you -- but you -- I guess my point  
19 is you let Mr. Ryan do it.

20 MJ [COL POHL]: Didn't I sustain your objection?

21 LDC [MR. NEVIN]: Well, you didn't sustain the objection  
22 to the proposition that there is cell coverage here.

23 MJ [COL POHL]: It's a general proposition, but I'm not

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1 going to -- don't, don't testify. I don't like him  
2 testifying, I don't like you testifying.

3 LDC [MR. NEVIN]: Okay. Fair enough.

4 So I think I would answer those two questions -- if  
5 you had asked me, which I recognize you didn't, I would have  
6 said to you nothing happened and there is no risk. There is  
7 no way for these men or any of us, for that matter, from  
8 within Camp VII or from within this courtroom, to communicate  
9 with the outside world. It's just not possible.

10 You issued an order in 182K, 182 Kilo, on 23 February  
11 2016 when you let these computers go back to these gentlemen.  
12 You issued an order that -- and I'll read it to you. "If an  
13 accused misuses a returned laptop, the JDG may take  
14 appropriate remedial action against that accused."

15 And I will say to you then that I understand that  
16 remedial action has been taken. And I will -- I'll let  
17 counsel for that accused speak to you about this directly, but  
18 you provided for the possibility that your order would be  
19 violated.

20 And so I guess what I'm telling you is that on this  
21 record, the -- there's no -- the government has failed in its  
22 obligation to establish the technical, expert, factual  
23 predicate for the proposition that there's any possibility,

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1 any actual possibility that harm could come from this.

2           Let me just say in passing that you originally -- and  
3 part of -- part of my -- the limitations that I'm laboring  
4 under here have to do with an order that you gave at the  
5 outset of this entire matter in which you said the people who  
6 took away the computers will talk to the defense lawyers and  
7 explain to them all the circumstances of what happened, or  
8 words to that effect. And the government later decided that  
9 it would not follow that order. And I raised it with you  
10 subsequently, and you advised me that the order would not be  
11 enforced.

12           So I have not had the ability to go and interview  
13 Colonel Gabavics, for example, to ask him what's the basis?  
14 What is he referring to in that particular paragraph?

15           MJ [COL POHL]: Have you asked? Have you asked to talk to  
16 him?

17           LDC [MR. NEVIN]: Yes.

18           MJ [COL POHL]: And he won't talk to you?

19           LDC [MR. NEVIN]: Well, I contacted the SJA, and I asked  
20 for permission to interview witnesses who had knowledge about  
21 this matter, and I was told that that would not be permitted.

22           MJ [COL POHL]: Okay. Got it. Thank you.

23           LDC [MR. NEVIN]: So I do want to make sure the military

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1 commission understands the unusual posture that we are in  
2 here, and I have raised this in our moving papers. But the --  
3 we do have an unusual situation because of the volume of  
4 discovery and because of the inability of our client to  
5 process all of this discovery and understand it without  
6 electronic support.

7           And I -- I stated in the moving papers and I'll say  
8 it now: It is impossible for him to participate meaningfully  
9 in his defense unless he has some ability to manipulate  
10 evidence electronically, whether it be searching documents for  
11 keywords or, you know, whatever it be.

12           And the military commission made -- I know you  
13 recognize this because you made a remark to this effect, that  
14 this is -- when the government seizes these computers, they  
15 are seizing -- they are seizing all of the materials that  
16 these men rely on to participate in their own defense.

17           And you also see this in the 530G carve-out that I  
18 have referred to earlier that I recognize we're not going to  
19 litigate today. But when we find -- when Mr. Mohammad has to  
20 fall back on these 26 bins that have legal material in them,  
21 it is -- it becomes an impossibility. It becomes practically  
22 an impossibility to even store it where he has access to it,  
23 and it becomes impossible, literally impossible, to catalog

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1 materials or to recall where they are or to organize them in  
2 any kind of meaningful way so that you can have -- so that he  
3 can have meaningful access to them.

4           So we're not just talking about -- it's not as if  
5 we're talking about a computer that would -- that would be  
6 used in a casual way for whatever purposes a person might  
7 decide to use a computer. It's necessary to being able to  
8 provide a defense and necessary to being able to review and  
9 understand discovery.

10           And I guess the second part is: It contains  
11 extremely sensitive information because we -- Mr. Mohammad  
12 uses the computer to record his own observations about the  
13 materials. We use his computer to communicate with him, in  
14 order to send written materials to him, which he then reads by  
15 bringing them up on the computer. And these materials, a  
16 really large number of them are stored on the computer.

17           I suggested to you in the moving papers -- or we did,  
18 rather, that this was, in effect -- what the government was  
19 proposing was, in effect, the search of a law office, so --  
20 but, I mean, just in terms of -- just in terms of how the  
21 military commission might think about the sensitivity of  
22 what's being requested here.

23           So I think when you put these things together, my

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1 suggestion is that the right to possess a computer that the  
2 government refers to there not being, and Mr. Ryan argues  
3 again here today there's no right for a defendant to possess a  
4 computer, is a red herring. This case cannot go forward in  
5 any kind of meaningful way unless Mr. Mohammad has access to a  
6 computer with which to review and organize discovery materials  
7 and participate in his defense.

8           You see this by the government's citation to the Neff  
9 case, which is in 530F at pages 17 to 18. And it is true  
10 there that the judge in that case recited that the defendant  
11 did not possess a right to possess a computer. But the judge  
12 went on to recognize that it was necessary for the -- for the  
13 defendant to have access to a computer and provided that the  
14 defendant would be allowed to have access to a desktop  
15 computer for -- I believe the number was seven hours a day. I  
16 think the effect of the order was that the defendant was --  
17 the confinement facility was ordered to allow the defendant  
18 to -- I believe it was raised from five to seven hours a day  
19 in lieu of the proposition that the defendant wasn't allowed  
20 to have a laptop on his possession.

21           So it isn't a question of a right. It's a question  
22 of a necessity under the circumstances. And I say that  
23 particularly in the context of a -- of a situation in which

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1 there's not been any indication that anything improper was  
2 done to Mr. Mohammad's computer.

3           So I just have to touch for a moment on the remark  
4 about propaganda. Because the military commission will recall  
5 that with respect to AE 371, which is the Obama letter, the  
6 letter to the President, that the military commission directed  
7 that the letter be delivered and directed that the letter be  
8 released as well. And the letter was, indeed, released, and  
9 that was done pursuant to the military commission's order.

10           So when the government refers to propaganda, they  
11 are, as people usually do when they refer to propaganda,  
12 they're referring to opinions or views or remarks that they  
13 disagree with. And that's really all that is.

14           I saw, though, the reference in the government's  
15 papers to the idea that the -- that al Qaeda somehow had the  
16 actual letter. I believe the word "actual" was used. And the  
17 implication was that somehow al Qaeda -- that there was an  
18 actual letter, an original physical paper letter, and that  
19 somehow al Qaeda had access to that.

20           And again, that's something that's completely  
21 unsupported. It's not true. And there is no actual letter as  
22 such. The only letter that was ever dealt with among the  
23 parties and with the military commission was in the form of a

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1 PDF. So ironically, then, when the government complains about  
2 this propaganda problem, they include a reference to the very  
3 computer website where the letter lives. And so there's a --  
4 and lives today. And they call attention to anyone who's  
5 reading the pleading to where you can actually go and see the  
6 letter.

7           So there is this irony in the government's  
8 presentation that both complains about the letter being made  
9 public and also calls attention to the very text of the letter  
10 itself.

11           So I say that only because I suspect -- well, I say  
12 that because I ask you to consider it when you're deciding  
13 whether there is genuine harm that has the potential to flow  
14 from this, because if there really were harm that had the  
15 potential to flow from this, the government would not have --  
16 would certainly not have dealt with it in that way, would not  
17 have -- would not have called attention to it again.

18           So the final point, Your Honor, is the question of  
19 whether the government can be called upon -- can be trusted to  
20 conduct a forensic exam. And I submit to you, lest there be  
21 any doubt about it, that there has not been a sufficient  
22 showing made to justify doing anything to Mr. Mohammad's  
23 computer, aside from giving it back to him.

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1           And the -- if you decide that a forensic examination  
2 does need to be conducted, it should not be conducted -- it  
3 should not be conducted by the government because the  
4 government, as we state in our responsive pleading, has  
5 shown ----

6           MJ [COL POHL]: Who should conduct it, then?

7           LDC [MR. NEVIN]: It should be -- actually, it should be  
8 conducted -- it should be -- what should happen is exactly  
9 what the government insisted take place with respect to  
10 the new computers. If you'll remember, the government  
11 insisted on entering into an agreement with respect to the new  
12 computers. And I recognize that Mr. Mohammad doesn't have one  
13 of the new computers. But this was the government's idea,  
14 that defense IT personnel would certify any time the computer  
15 came out of the camp, such as being put in the possession of  
16 defense counsel, that defense IT assets would certify that the  
17 computer was in the correct configuration before it went back  
18 in.

19           And the military commission may recall that when  
20 these computers were returned to these men, one of them was in  
21 the position of having the WiFi enabled at the time that it  
22 went back in.

23           MJ [COL POHL]: But if you have the defense IT personnel

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1 do the forensic exam and find something wrong with the  
2 computers, that something had been altered that created a  
3 capability that they should not have ----

4 LDC [MR. NEVIN]: Yes.

5 MJ [COL POHL]: ---- are you now going to have defense IT  
6 personnel come in here and testify against the accused?

7 LDC [MR. NEVIN]: The defense IT personnel would return  
8 the computer -- the agreement was that IT personnel would  
9 return the computer to a compliant condition and then it would  
10 be returned to the ----

11 MJ [COL POHL]: Okay. But I'm saying under this scenario,  
12 the defense IT personnel do the forensic exam, find something  
13 wrong, and then they -- do they report the wrongdoing, or do  
14 they simply return it to compliant status?

15 LDC [MR. NEVIN]: No, they just return it to compliant  
16 status. That's how -- that was the agreement that the  
17 government insisted on following, so ----

18 MJ [COL POHL]: So let me just go down this scenario,  
19 is -- worst-case scenario, something was enabled that really  
20 never should have been, or there's an operating system that  
21 shouldn't be on there, okay, and we know then whoever did that  
22 to that computer has that capability, okay?

23 We give it to the defense IT people; they look at it;

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1 they find all these problems. They simply erase the problems,  
2 stick it back into the compliant status, give it back to the  
3 accused, and nobody knows, except for that defense IT  
4 personnel, what was done to that computer, and nobody knows  
5 whether it could be done to them -- to it again?

6 LDC [MR. NEVIN]: Yeah.

7 MJ [COL POHL]: Is that what you're asking me to do?

8 LDC [MR. NEVIN]: Well, I'm -- no. What I'm telling you  
9 is, that's what the government insisted the arrangement be.

10 MJ [COL POHL]: That was on a different issue. I'm saying  
11 on this issue -- let's just talk about this particular issue.  
12 I'm saying, as you say it, I don't mind a forensic exam as  
13 long as it's done by defense IT personnel, you know?

14 But what I'm saying is if they find something wrong,  
15 you say that stays in the defense area and nobody knows what  
16 they did to it and nobody knows -- I'm just telling you. It's  
17 your suggestion. I'm just wondering how you want to implement  
18 it. That's all.

19 LDC [MR. NEVIN]: I understand. I'm only responding to --  
20 you know, I've talked to you enough to know when you -- when  
21 you're sounding incredulous in the way you phrase a  
22 question ----

23 MJ [COL POHL]: Sometimes I do, and sometimes I don't.

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1 No, I'm just saying ----

2 LDC [MR. NEVIN]: No, but I'm responding to that ----

3 MJ [COL POHL]: Yeah.

4 LDC [MR. NEVIN]: ---- and I guess I'm saying yes, number

5 one ----

6 MJ [COL POHL]: Okay. That's all.

7 LDC [MR. NEVIN]: ---- and number two ----

8 MJ [COL POHL]: That's the way we did it the other time.

9 I got that.

10 LDC [MR. NEVIN]: Part of my yes, that was what the

11 government suggested we do before, and that was seen as -- and

12 here's why. Here's why. Because these computers can't be

13 configured to pick up -- I don't -- you know, cell signals?

14 Is there any evidence in the record that you can use a

15 personal computer to connect to a cell signal? I mean ----

16 MJ [COL POHL]: You're asking the wrong guy.

17 LDC [MR. NEVIN]: I know, and I'm talking from the wrong

18 guy. I'm not the right guy either. But my point is there's

19 no evidence to suggest that's true.

20 There is no -- there's no ability to -- for people to

21 connect to wireless signals from Camp VII. There's no

22 indication that that's possible, even if I went over there

23 with my fully functioning wireless-enabled laptop that hasn't

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1 been altered by anyone.

2 MJ [COL POHL]: Do the detainees bring their laptops to  
3 court?

4 LDC [MR. NEVIN]: Yes.

5 MJ [COL POHL]: Okay. Thank you. That's just a question.

6 LDC [MR. NEVIN]: Yeah, they do. They bring their laptops  
7 to court. But again, you have a -- well, I just will say  
8 there has been a failure of expert testimony on this subject  
9 to suggest that there really is -- that there really does  
10 actually -- that there really is actually a problem here.

11 And then, finally, there's been a reference to  
12 encryption software, something having to do with encryption  
13 software. And I will simply echo the remarks that other  
14 counsel have made in their written materials submitted to you  
15 that the government has repeatedly stressed to us that we  
16 should use encryption and that many of the programs that were  
17 completely approved for use by Mr. Mohammad have encryption  
18 capabilities, like, for example, Microsoft Word. So this is,  
19 again, something in the nature of a red herring.

20 So I ask you, specifically with respect to  
21 Mr. Mohammad, to direct that his computer be returned to him  
22 and that we -- and that we go on from here.

23 MJ [COL POHL]: Okay. Thank you, Mr. Nevin.

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1 LDC [MR. NEVIN]: Thank you, Your Honor.

2 MJ [COL POHL]: Any other defense counsel want to be heard  
3 on this? Mr. Connell?

4 LDC [MR. CONNELL]: I do, Your Honor, but I could sure use  
5 a comfort break. You promised me one in 15 minutes 15 minutes  
6 ago.

7 MJ [COL POHL]: I did, didn't I? Yeah, let me -- one  
8 housekeeping thing.

9 General Martins, the other day we asked about a  
10 status of a classification review of a certain document.  
11 Without going into too much detail, were you able to get any  
12 type of report on that?

13 CP [BG MARTINS]: Your Honor, just that they're working  
14 it. I know they're in communication with the Bin'Attash team,  
15 but it has not been resolved.

16 MJ [COL POHL]: Okay. Okay. Thank you. Okay.

17 We'll recess for a half hour. We'll reconvene at  
18 1545. The commission is in recess.

19 [The R.M.C. 803 session recessed at 1515, 10 January 2018.]

20 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1550,  
2 10 January 2018.]

3 MJ [COL POHL]: Commission is called to order. There  
4 appears to be everybody again present that was present when  
5 the commission recessed.

6 Defense? Mr. Connell.

7 LDC [MR. CONNELL]: Sir, before we get to the actual  
8 argument in 530, I need to talk to you about the access of the  
9 public to -- and the transparency of the military commissions.

10 The -- this is the issue where I submitted slides for  
11 review and also an exhibit for display to the public, which I  
12 think will pretty much resolve the risk arguments that the --  
13 that have been raised here today. But the information came  
14 back from the CISO review redacted.

15 And so before we display anything, I -- because it's  
16 a little bit confusing, I have provided copies of both the  
17 originals and the redacted, and I'm happy to walk everybody  
18 through what the situation is. So ----

19 MJ [COL POHL]: Because the originals are?

20 LDC [MR. CONNELL]: 530HH.

21 MJ [COL POHL]: And the redactions are?

22 LDC [MR. CONNELL]: 530II. And then with respect to the  
23 second document which are not slides but is an element of the

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1 lab report from the last forensic analysis that was done of  
2 these computers, the unredacted version is 530JJ, and the  
3 redacted version I submitted to the military commission on the  
4 prior -- in December, and that is 530Z.

5           When I submitted 530Z to the military commission, the  
6 military commission directed the government to find out to  
7 whom I could appeal for these redactions. The government has  
8 reported -- and they can speak for themselves, but briefly,  
9 they have reported to me that the -- there was an additional  
10 review that took place after the first time they submitted  
11 these documents, and that's the reason for the redaction. But  
12 to whom I appeal, I still don't know, so I'm appealing to you.

13       MJ [COL POHL]: Hold on.

14 [Pause.]

15       MJ [COL POHL]: Okay. Okay. The redactions are on  
16 page -- back half of page 3 and the front of page 4; is that  
17 correct? Those are the three redactions you're referring to?

18       LDC [MR. CONNELL]: I would call it page 1, 2, 3 ----

19       MJ [COL POHL]: They're just on the ----

20       LDC [MR. CONNELL]: I would say that there were redactions  
21 on -- in 530II, that there were redactions on page 6, page 7,  
22 and then page 10 was removed altogether.

23       MJ [COL POHL]: Let's make it simpler, because your

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1 redactions, we're not necessarily tracking identically.

2 LDC [MR. CONNELL]: Okay.

3 MJ [COL POHL]: On the unknown software slides, last  
4 redaction is at the bottom of that; is that correct?

5 LDC [MR. CONNELL]: Yes, that's correct, sir.

6 MJ [COL POHL]: The encryption slide, the first paragraph  
7 and then in the middle of the second paragraph?

8 LDC [MR. CONNELL]: Yes, that's right.

9 MJ [COL POHL]: And the last one is the -- okay.

10 LDC [MR. CONNELL]: The last one is the BIOS page ----

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: ---- which appears in 530HH but was  
13 removed entirely from the redacted version.

14 MJ [COL POHL]: Okay. I'm being told that this is  
15 pursuant to a DoD determination consistent with the markings  
16 on 530F.

17 Okay. Now, one of us has got to talk.

18 LDC [MR. CONNELL]: All right. Well, I'll say I don't  
19 know what that means.

20 MJ [COL POHL]: No, what I'm saying is if you read --  
21 these are all from 530F, right?

22 LDC [MR. CONNELL]: From?

23 MJ [COL POHL]: From. The -- the quotes.

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1 LDC [MR. CONNELL]: No, absolutely not. So page 10, for  
2 example, are just images I downloaded from Google Images. I  
3 specifically did not put anything that was FOUO in these  
4 slides for the precise reason I didn't want the slides to be  
5 FOUO.

6 [The military judge conferred with courtroom personnel.]

7 MJ [COL POHL]: One moment, please.

8 [Pause.]

9 MJ [COL POHL]: Okay. The -- and again, on the encryption  
10 slide?

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

12 MJ [COL POHL]: Where it goes 182K?

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

14 MJ [COL POHL]: That next line is verbatim out of the  
15 530F, page 16.

16 LDC [MR. CONNELL]: That next line is what, sir?

17 MJ [COL POHL]: Verbatim ----

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: ---- out of ----

20 LDC [MR. CONNELL]: This is the ----

21 MJ [COL POHL]: But I'm saying -- well let me make sure I  
22 understand what you want. Are you saying you just want to do  
23 the redacted versions?

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1 LDC [MR. CONNELL]: No, sir.

2 MJ [COL POHL]: You want to do that ----

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: Okay, that's kind of what I thought. I'm

5 just saying that one is verbatim out of the -- NOT RELEASABLE

6 TO THE DETAINEES OR PUBLIC version of ----

7 LDC [MR. CONNELL]: Of the NOT RELEASABLE TO THE

8 DETAINEES, so ----

9 MJ [COL POHL]: Page 16. I'm reading.

10 LDC [MR. CONNELL]: Let me be clear here.

11 MJ [COL POHL]: No, I understand. This is not a

12 classification issue.

13 LDC [MR. CONNELL]: Yes, I understand.

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: This is a FOUO issue ----

16 MJ [COL POHL]: Yeah.

17 LDC [MR. CONNELL]: ---- I suppose. This was marked --

18 this was not marked UNCLASSIFIED//FOUO. When it came to me,

19 it was marked UNCLASSIFIED.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: Even if it is FOUO in some way,

22 Protective Order #2 provides specifically the FOUO will not

23 interfere with the presentation of material in the courtroom.

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1 MJ [COL POHL]: No, I understand that. I'm just  
2 saying is -- I'm not deciding yet, so ----

3 LDC [MR. CONNELL]: I understand.

4 MJ [COL POHL]: Is I'm reading on that particular line  
5 from 530F, my version, that has a banner marking UNCLASSIFIED  
6 FOR -- FOUO//NOT RELEASABLE TO DETAINEES OR PUBLIC.

7 LDC [MR. CONNELL]: Just one second, please, sir.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: I see, sir. I stand corrected on that  
10 banner marking. The -- I thought I was using non-FOUO, but I  
11 suppose that -- I see what you mean that that is FOUO. And  
12 the same is true for the unknown software ----

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: The unknown software is a clip out of  
15 the government's brief as well.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: Both of those are clips out of the  
18 government's briefs. Slide 10, on the other hand, is just  
19 images that I downloaded from Google Images.

20 MJ [COL POHL]: Okay. We can proceed two separate ways in  
21 this, Mr. Connell. You can put up slide 10. I mean,  
22 that's -- I'll take your representation that it's just -- you  
23 got that from your Google search of the pictures.

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

2 MJ [COL POHL]: Okay, so that's -- but the other two we  
3 would have to revisit the other redactions, or do you wish to  
4 proceed with the redactions with the understanding that you  
5 can use slide 10?

6 LDC [MR. CONNELL]: Okay. Here's what I really want.  
7 What I really want is some mechanism to appeal what I see as  
8 arbitrary redactions and intrusions on the transparency of the  
9 military commission. So that might -- the person -- that  
10 might be to you, in which case I would like to make argument  
11 to you about why there is -- I should be able to use the  
12 unredacted versions of the government's arguments that they  
13 have articulated again today.

14 MJ [COL POHL]: I'll tell you what. Hold that thought.  
15 Government, why can't he use your own pleading if  
16 it's FOUO? Isn't this FOUO, what we do?

17 MTC [MR. TRIVETT]: Sir, use in court is the official use  
18 for FOUO documents.

19 MJ [COL POHL]: Okay.

20 MTC [MR. TRIVETT]: Unless there is a specific caveat that  
21 says NOT DISPLAYABLE TO THE DETAINEE OR PUBLIC, which is a  
22 small portion. But I'd have to see exactly what ----

23 MJ [COL POHL]: So it's the whole pleading. It's not a

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1 small portion. It's your whole pleading has got that banner  
2 marking on it.

3 MTC [MR. TRIVETT]: If our pleading is marked FOUO and  
4 Mr. Connell wants to argue from it ----

5 MJ [COL POHL]: No. Your whole pleading is marked  
6 FOUO//NOT RELEASABLE TO DETAINEES OR THE PUBLIC. What  
7 regulation, statute, empowers some third party to put that on  
8 there?

9 MTC [MR. TRIVETT]: DoD has an obligation to protect  
10 certain information. Usually that falls under your Protective  
11 Order #2. But I'd have to see exactly -- I'm arguing in the  
12 blind here. I haven't even seen the slides. So it's ----

13 MJ [COL POHL]: It's not the slides that are the issue.  
14 It's your pleading is the issue. The slides are -- what  
15 we're -- look at 530F. My copy has got banner markings on it  
16 that says FOUO for -- okay. It says UNCLASSIFIED//FOUO -- FOR  
17 OFFICIAL USE ONLY//NOT RELEASABLE TO THE DETAINEE OR THE  
18 PUBLIC.

19 MTC [MR. TRIVETT]: So the concern specifically is not  
20 advertising to either the remainder of the detainees or to the  
21 public at large how the computers that we have provided them  
22 can be -- the security can be circumvented so that they could  
23 possibly get on the Internet. Everything that Mr. Ryan ----

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1 MJ [COL POHL]: Is that a TTP issue for the confinement  
2 facility?

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

4 MJ [COL POHL]: Then why isn't it SECRET?

5 MTC [MR. TRIVETT]: If you read the declaration of General  
6 Douglas Fraser that was filed in support of Protective  
7 Order #2 ----

8 MJ [COL POHL]: Uh-huh.

9 MTC [MR. TRIVETT]: ---- there are certain techniques,  
10 tactics, and procedures that rise to the classified level and  
11 then there are certain techniques, tactics, and procedures  
12 that are sensitive information but that do not rise to the  
13 level of classified.

14 MJ [COL POHL]: And who makes that decision?

15 MTC [MR. TRIVETT]: That's done through guidance at the  
16 Department of Defense.

17 MJ [COL POHL]: Okay. So ----

18 MTC [MR. TRIVETT]: SOUTHCOM.

19 MJ [COL POHL]: So what we have here is a procedure in  
20 place that limits the distribution of a document done by  
21 somebody up at SOUTHCOM, and it says the whole document, every  
22 page, every word is NOT RELEASABLE TO THE PUBLIC. And you --  
23 if it was a classified document, we would at least have it

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1 portion marked.

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

3 MJ [COL POHL]: Okay. You're agreeing with me that's what  
4 it is?

5 MTC [MR. TRIVETT]: I agree that it's not portion marked.  
6 I believe that Mr. Connell can make arguments consistent with  
7 how Mr. Ryan made arguments.

8 MJ [COL POHL]: No.

9 MTC [MR. TRIVETT]: It's just the detail that's the  
10 concern.

11 MJ [COL POHL]: No, I understand. I understand. But I'm  
12 not focussing on this particular argument. Yeah, he can make  
13 his argument going through this one. I got it. My concern is  
14 that somebody is making these -- this restriction on the  
15 public's right to -- forget the detainees -- I'm not going to  
16 forget them. I'm putting them to one side. And I understand  
17 there's a different issue there. I've got that.

18 But basically you're saying the public can't see  
19 this, so it amounts to a -- does it amount to a closure?

20 MTC [MR. TRIVETT]: No, sir. In -- it depends on what the  
21 use is, right? We have to start from the premise that the  
22 defense doesn't have oral argument as a right anyway. If he  
23 wants to make oral argument and if you want to take oral

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1 argument, he can. He's got documents that can't be presented  
2 necessarily to the public or to the detainee but that you  
3 could watch and that he can see and that you can argue from.

4 This doesn't happen very often. But there's certain  
5 scenarios whereby DoD needs to assert these equities to  
6 protect important aspects of their techniques, tactics, and  
7 procedures.

8 MJ [COL POHL]: And I'm supposed to just glean through  
9 here of what is important and what's not important when all  
10 they -- my impression -- and again, Mr. Trivett, I understand  
11 you didn't make this decision. My impression is somebody saw  
12 this, said we don't want to give it to the detainees, and  
13 rather than doing any type of scrutiny of the document itself,  
14 let's just stamp banners on every page.

15 I'd have a little more faith in that they're trying  
16 to protect TTPs if at least they're restricted to the filing  
17 of the argument. The whole thing is stamped this way,  
18 including, for example, stuff that's already been released.  
19 Like the -- let me -- let me confirm that I'm not talking  
20 excessively.

21 Didn't -- hasn't the letter to President Obama been  
22 released, as I recall when we litigated that? And now it's  
23 released for then, and then somebody decides it's now

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1 unreleasable to the public. Or I understand we're not talking  
2 about released technically, we're talking about publication.  
3 But I -- but it -- you know, we talk about transparency here.  
4 This causes me concern.

5 MTC [MR. TRIVETT]: I understand. And the prosecution and  
6 the government is committed to transparency, if at all  
7 possible. I would not disagree with you that that, over our  
8 objection, was released publicly, that letter that you  
9 reference. I take it to heart that perhaps when we do these  
10 in the future we should portion mark them as opposed to mark  
11 them on every portion -- or on every page. And I can  
12 certainly discuss that.

13 I haven't -- and we certainly didn't walk in  
14 prepared -- I don't have an answer for you for every single  
15 paragraph in this instance. But we can certainly take that  
16 back.

17 MJ [COL POHL]: But you understand my concern,  
18 Mr. Trivett, that we have a document -- and now I'm referring  
19 to the letter to President Obama -- that if -- on one hand  
20 it's an order release to the public, and then on the other  
21 hand, if Mr. Connell put that version up that was released,  
22 he'd be okay. But he'd be precluded from putting the  
23 identical document up because somebody -- and, of course,

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1 who's doing this? Do we have a name? No. Do we have any box  
2 on the side saying where it came from? No. All we have is  
3 somebody somewhere, and you say SOUTHCOM, so I'll take your  
4 word. Somebody in Miami, or wherever they're at, decides I  
5 don't think -- and as another example, how about the -- the  
6 Google picture? Where did that come -- what's the authority  
7 on that one?

8 MTC [MR. TRIVETT]: Is that part of the slide, sir?  
9 Because I can't speak to that.

10 MJ [COL POHL]: Yes. Yes, it is. That's the one they  
11 didn't want to show at all. And, Mr. Trivett, I know you were  
12 blindsided, and I know it sounds like I'm giving you a hard  
13 time -- only because I am. But, and you know -- I hope you  
14 know is, I understand my role here when it comes to classified  
15 material, okay? And I don't sit there and say why is this  
16 piece of paper classified SECRET when it's -- it shouldn't be?  
17 I don't do that because it's not my job.

18 But this is my job. And to defer to somebody who I  
19 don't know, who I -- well, I wouldn't know these people  
20 anyway, but there's no accountability, there's no line up  
21 here. I have no reason why all of a sudden something's not  
22 releasable to the detainee or the public. And I'm just  
23 supposed to accept on face value what they put on a piece of

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1 paper, which on a classified document I have to.

2 But on this, is there any requirement that I -- that  
3 I do this? Or can I sit there and say, no, I disagree and you  
4 can go ahead and publish it to the world?

5 MTC [MR. TRIVETT]: I believe it's -- we're clearly  
6 authorized to do it under 506 and the declarations we filed  
7 and your order to Protective Order #2 in general. But that  
8 said, your point is well taken that that document probably  
9 should have been better portion marked so that we could just  
10 articulate the concerns we have about the specific instances  
11 of TTPs.

12 MJ [COL POHL]: Okay.

13 MTC [MR. TRIVETT]: I agree with you.

14 MJ [COL POHL]: Okay.

15 MTC [MR. TRIVETT]: And we'll be sure to take that back to  
16 the classification review team and make sure that in the  
17 future, even for FOUO//NOT RELEASABLE TO DETAINEE OR PUBLIC,  
18 that that is better portion marked.

19 MJ [COL POHL]: Okay.

20 MTC [MR. TRIVETT]: But we do believe that we're  
21 completely legally authorized to do this in the certain small  
22 instances that we do, at least to specific techniques,  
23 tactics, and procedures.

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1 MJ [COL POHL]: And that's by my protective order?

2 MTC [MR. TRIVETT]: In part, but it's through the  
3 authority in M.C.R.E. 506. It's government information.

4 MJ [COL POHL]: Did you invoke M.C.R.E. 506?

5 MTC [MR. TRIVETT]: In -- what we did at the beginning for  
6 Protective Order #2 is that we invoked the -- we invoked the  
7 government information privilege over certain categories of  
8 information, which would include techniques, tactics, and  
9 procedures, names of guards, those types of things.

10 MJ [COL POHL]: None of this is that. This is not a TTP.  
11 This is something that happened in the confinement facility.  
12 In fact, I would argue the government position here is that  
13 this is not an approved tactic, technique, and procedure, and  
14 that's why we're here.

15 MTC [MR. TRIVETT]: The technique, tactic and procedure is  
16 the means by which the U.S. Government is able to secure the  
17 laptops and the vulnerabilities to that process. That's the  
18 technique, tactic, and procedure we're dealing with.

19 What they did, obviously, is not authorized and not a  
20 technique, tactic, and procedure. But if we display it to the  
21 world, now there's a vulnerability for the security functions  
22 that we put into place to try to avoid them ever being able to  
23 get on the Internet. That's the concern and the crux of it.

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1 I agree if we had attached, as an example, Khalid  
2 Shaikh Mohammad's letter to the President and that had been  
3 released, that that shouldn't have had that banner marking.  
4 So that's -- that's on us ----

5 MJ [COL POHL]: Okay.

6 MTC [MR. TRIVETT]: ---- and we'll make sure we have more  
7 precise markings.

8 MJ [COL POHL]: I don't know want to beat this to death  
9 because I know what I'm going to do, but -- and I know this  
10 isn't -- we're only talking about publishing here. So what  
11 I'm about to say, I'm not publishing, obviously. But on  
12 what -- one redaction says, "Also supports the need for  
13 forensic analysis of what computer software programs are on  
14 the laptops and vulnerabilities of how the 2016 and the 2008  
15 laptops can be manipulated going forward."

16 Just what we talked about with Mr. Ryan. Is this  
17 your ----

18 MTC [MR. TRIVETT]: Yeah.

19 MJ [COL POHL]: Yeah.

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

21 MJ [COL POHL]: So we can talk about it, but we can't put  
22 it on the overhead. Tell you what I'm going to do,  
23 Mr. Trivett -- and again, I know -- you can tell from my tone,

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1 my skepticism of this process.

2 I'm going to let him put up all the unredacted  
3 slides. Now, do you want time to object to that or just note  
4 your objection? I'm giving you an opportunity here if you  
5 want to take a break and do something, but I find this ----

6 MTC [MR. TRIVETT]: Can we have a ten-minute break to  
7 review the slides?

8 MJ [COL POHL]: Sure.

9 MTC [MR. TRIVETT]: Thank you.

10 MJ [COL POHL]: Commission is in recess.

11 [The R.M.C. 803 session recessed at 1612, 10 January 2018.]

12 [The R.M.C. 803 session was called to order at 1622,  
13 10 January 2018.]

14 MJ [COL POHL]: Commission is called to order. All  
15 parties again present.

16 Just to clarify one point because I think there was a  
17 miscommunication during the recess, I asked my CISO about the  
18 review of this. As I recall, you first submitted these slides  
19 in December?

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

21 MJ [COL POHL]: Apparently -- and, of course, they don't  
22 tell us these things at the time -- they thought the last  
23 slide, what we're calling the Google slide, was from the

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1 actual device.

2 LDC [MR. CONNELL]: Oh.

3 MJ [COL POHL]: Okay, and we went back to them and told  
4 them -- not me -- that it was the Google image and, therefore,  
5 they really have no -- there was no -- that -- the basis for  
6 it -- which is one of the problems here, we don't know what  
7 the basis for, so that's simply a miscommunication on that  
8 one, so that one would have been permitted anyway.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: Back to Mr. Trivett.

11 MTC [MR. TRIVETT]: Sir, we were certainly going to oppose  
12 that last slide. We don't feel like we've had adequate time  
13 for the other redactions. If I can just have a recess in  
14 place to discuss with ----

15 MJ [COL POHL]: You've lost me here, Mr. Trivett.

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

17 MJ [COL POHL]: The -- and just so everybody knows what  
18 the procedure is here, you submit the stuff to the CISOs. The  
19 CISOs then coordinate with the stakeholders. The CISOs are  
20 not the decision-maker on this. We screen it. We see  
21 whether -- who it has to go to. I say we. They do and -- on  
22 behalf of the court. And then they go back, and then they  
23 bring it back, and we get what we get. And then we go back to

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1 whoever wants to publish the document and say here's what's  
2 all -- and there's an issue about it, like we're doing now, we  
3 get to it.

4           So when you say you still object to the -- the Google  
5 slide, when I've been told that the people who we send these  
6 things to say it's fine ----

7       MTC [MR. TRIVETT]: I didn't say that, sir.

8       MJ [COL POHL]: Okay, I'm sorry.

9       MTC [MR. TRIVETT]: You misunderstood me.

10      MJ [COL POHL]: Misunderstood. About the other ones?

11      MTC [MR. TRIVETT]: Right. If it's been communicated to  
12 the CISO that it was based on a miscommunication and they  
13 don't have a concern, again, we're not a part of this process,  
14 so we'll take that at its word. We'll take that in good  
15 faith, and if they don't have a concern and Mr. Connell is  
16 saying that -- that this -- that these documents aren't from  
17 the actual Toughbook and -- and the people who have looked at  
18 it agree that if that were the case that it can be displayed,  
19 then we're not going to -----

20      MJ [COL POHL]: Okay.

21      MTC [MR. TRIVETT]: ---- we're not going to do that. But  
22 there were a couple of other ones that were just -- that was a  
23 misunderstanding we had as well. I -- that was a new fact for

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1 me.

2 MJ [COL POHL]: Okay. So let's move the Google slide  
3 away, because I think that's been resolved. How about the  
4 other redactions?

5 MTC [MR. TRIVETT]: The other redactions I'd like just a  
6 two-minute recess in place to discuss with counsel because we  
7 were going to oppose based on the Google redaction only which  
8 would have subsumed these other two. Hearing what we're being  
9 said about this Google redaction, it's not an issue that ----

10 MJ [COL POHL]: I'll give you ten minutes. Commission in  
11 recess.

12 [The R.M.C. 803 session recessed at 1625, 10 January 2018.]

13 [The R.M.C. 803 session was called to order at 1634,  
14 10 January 2018.]

15 MJ [COL POHL]: Commission is called to order. What's  
16 this? Did you -- okay. Thank you.

17 Mr. Trivett.

18 MTC [MR. TRIVETT]: Thank you, sir. So we communicated  
19 back to the review team. And it's been reported to us that  
20 the redactions, other than the Google redactions, but the  
21 redactions from the slides were also redacted based on the  
22 mistaken belief that the Google slide was an actual slide from  
23 the actual computer; therefore, the redactions need not stand.

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1 We're not going to assert 506 over it, and it can be used in  
2 open court.

3 MJ [COL POHL]: Okay. It's funny how communication  
4 resolves these things.

5 LDC [MR. CONNELL]: Great.

6 MJ [COL POHL]: Mr. Connell.

7 LDC [MR. CONNELL]: Sir, do we need to talk at all about  
8 the other -- the one other FOUO page, 530JJ?

9 MJ [COL POHL]: Is there a redacted version, too?

10 LDC [MR. CONNELL]: Yes, sir. It's 530Z from the last  
11 hearing. I do have an extra copy if you don't have 530Z near  
12 you.

13 MJ [COL POHL]: Please.

14 LDC [MR. CONNELL]: Your Honor, the document that I just  
15 handed you and the prosecution was introduced at the last  
16 hearing as 530Z, so I'm not asking for another copy to go in  
17 the record.

18 MJ [COL POHL]: Okay. You're only talking about the first  
19 page? I mean, the one you gave me as an example has got stuff  
20 on the back.

21 LDC [MR. CONNELL]: Yes, sir. The one page. The page  
22 that says Tags 1, 2, 3, 5 -- 1, 3, 4, 5, and the one that says  
23 tag 2.

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1 MJ [COL POHL]: Okay. And then I'm looking at the other  
2 one which is 530JJ. Do you have a copy of that, Trial  
3 Counsel? Mr. Trivett, is this one -- your issue, too?

4 MTC [MR. TRIVETT]: These are all sub-issues. I'm not  
5 arguing the actual motion.

6 MJ [COL POHL]: Right.

7 MTC [MR. TRIVETT]: But yeah, I took care of this based on  
8 the commission's request yesterday.

9 MJ [COL POHL]: Okay. 530JJ is just for FOUO and that's  
10 the basis for not -- for the redaction. We're not talking  
11 about the PII redactions, are we here?

12 LDC [MR. CONNELL]: No, sir, I don't have an issue about  
13 the PII redactions.

14 MJ [COL POHL]: So we're only talking about the middle  
15 ones. Tags 1, 3, 4 and 5 and Tag 2?

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

17 MTC [MR. TRIVETT]: So we looked into this issue, and this  
18 is an anomalous issue. So we provided this document to the  
19 defense counsel in 2013 and the way we did it is we simply  
20 attached it to a motion because I believe, as I recall, we had  
21 an obligation to provide this to the commission. At some  
22 point the defense had requested this information go back to  
23 them.

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1           So it did not go through our typical normal discovery  
2 process. It does not have a Bates stamp on it. And because  
3 of that, when it came to us it came to us FOUO from Air Force  
4 OSI. Now, Air Force OSI is typical law enforcement, and  
5 typical law enforcement generally released their discovery --  
6 at least the Air Force does, as an FOUO document.

7           That said, they never -- they don't take into account  
8 the specific concerns that they may have that this gets  
9 released to the public in a military commission or to the --  
10 or to the accused. So this then -- I guess when Mr. Connell  
11 put this through the process, it was being looked at for the  
12 first time by the folks who review it specifically for the DoD  
13 equities that are at play. So we believe that all of these  
14 are redacted and defensible under 506 for public presentation.

15           Again, Mr. Connell can use an unredacted copy. He's  
16 got an unredacted copy. He can provide that to the judge.  
17 And while I don't have at the tip of my tongue every single  
18 redaction, I can say that it's generally serial numbers that  
19 are specific to the computer that they used. It's ----

20           MJ [COL POHL]: Do you know ----

21           MTC [MR. TRIVETT]: ---- examiner names.

22           MJ [COL POHL]: Do you have the unredacted version of  
23 this?

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1 MTC [MR. TRIVETT]: I can pull it up. I don't have it  
2 right in front of me, sir.

3 MJ [COL POHL]: I think you're getting it, because we're  
4 not talking about -- and again, Mr. Connell, we're not going  
5 to put the PII stuff.

6 LDC [MR. CONNELL]: There's no PII. The PII issue is not  
7 the thing ----

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: It's the ----

10 MJ [COL POHL]: It's the middle stuff.

11 LDC [MR. CONNELL]: It's the BIOS settings.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: The middle stuff.

14 MJ [COL POHL]: Okay.

15 MTC [MR. TRIVETT]: I spoke specifically to the head of  
16 the review team yesterday on this, and they assert that it's  
17 necessary to protect this information from the public and from  
18 the detainees.

19 MJ [COL POHL]: This is -- we've spent a lot of time on an  
20 issue that, quite frankly, I'm not sure doesn't necessarily  
21 have much harm or much impact on the 530 argument. I've got  
22 that. At least in my view, it doesn't. But this is a bigger  
23 issue.

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1           And Mr. Trivett, I have before me a piece of paper  
2 that says FOUO, and now what you're saying, it really should  
3 say FOUO//NOT RELEASABLE TO THE PUBLIC OR THE DETAINEE and  
4 because it -- because now sometime later in the game somebody  
5 should know that.

6           MTC [MR. TRIVETT]: Like I said, I don't anticipate that  
7 this is a recurring issue. I think this is an anomaly because  
8 generally we don't provide discovery just through a motion.  
9 This was five years ago before the process in place was as  
10 solidified as it is now.

11          MJ [COL POHL]: Okay.

12          MTC [MR. TRIVETT]: So I don't anticipate this being a  
13 recurring problem. But what I can say is that it makes sense  
14 to me that Air Force OSI would find it to be FOUO without  
15 contemplating necessarily that FOUO would one day involve  
16 showing it to law of war detainees or showing it to the public  
17 writ large, specific information regarding the computers we  
18 provided them.

19          LDC [MR. CONNELL]: Well, sir, I'll jump in there just  
20 to -- you know, this came from a lab report about these exact  
21 computers that were seized. And the earlier parts which I  
22 didn't provide of this lab report, you know, recognize that  
23 they were seized from law of war detainees who were being

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1 prosecuted in a military commission. I mean, the idea that  
2 OSI didn't know what this was about defies reality because  
3 I ----

4 MJ [COL POHL]: But ----

5 LDC [MR. CONNELL]: And it's -- just for the record, it's  
6 AE 149C is the complete version of this document.

7 MJ [COL POHL]: Yeah, I don't want -- I don't want to get  
8 too down in the weeds in this, but what I'm hearing here is  
9 that the -- originally the document says FOUO, okay? Okay.  
10 And then somebody else later on says, well, wait a minute, I  
11 want it NOT RELEASABLE TO THE PUBLIC.

12 So my question to you, Mr. Trivett, is: Who is --  
13 and this is the wrong term, but who is the OCA on these  
14 documents? Or do we just -- does it just keep going review  
15 and review and review until everybody gets to see it and  
16 somebody decides they want to chop it?

17 MTC [MR. TRIVETT]: No, sir. So under General Fraser's  
18 declaration, he authorized the SOUTHCOM  
19 Classification/Declassification Review Team, which we  
20 sometimes call SC/DRT, as the consolidator of all of DoD  
21 equities. So ultimately, that's the team that looks at  
22 everything from a DoD perspective.

23 Air Force OSI is not part of that team, and

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1 ultimately SC/DRT should have had an opportunity to review  
2 this prior to the filing five years ago and did not. And  
3 again, when Air Force OSI sees these, it was either at the end  
4 or after the commissions had been -- the commission charges  
5 had been dismissed back in 2009, I believe.

6 MJ [COL POHL]: Okay. Procedurally, if you want to claim  
7 a 506 privilege, which is what you're telling me you want to  
8 do, are you going to show me where in the declarations it  
9 justifies it for these particular redactions? I mean, this is  
10 different than a classification issue, right?

11 MTC [MR. TRIVETT]: It is. It's a 506 versus a 505. Yes,  
12 sir.

13 MJ [COL POHL]: Again, if you stamp something TOP SECRET,  
14 we're done.

15 MTC [MR. TRIVETT]: Correct.

16 MJ [COL POHL]: To a large degree, we're done. But this  
17 is -- I don't know what this is. I've got an FOUO copy and  
18 I've got a releasable copy. I don't have anything that says  
19 FOUO//NOT RELEASABLE TO THE PUBLIC, but you're representing  
20 that's the current status of the document, so I should have a  
21 third one saying that. But be that as it may, where in the  
22 documents -- and I'm not saying it's not there, but I'm saying  
23 if you're going to invoke the privilege, you've got to tell me

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1 where in the declaration the privilege is properly invoked.

2 MTC [MR. TRIVETT]: So in Protective Order #2, you  
3 approved our invocation for certain categories of information,  
4 which include all DoD personnel. So I can tell you that any  
5 of the names were under the DoD personnel aspect.

6 MJ [COL POHL]: Mr. Trivett, don't keep giving me  
7 low-hanging fruit. We're not talking about the names.

8 MTC [MR. TRIVETT]: I thought you wanted me to justify all  
9 of the redactions, sir.

10 MJ [COL POHL]: No, no, I got the names. The names are  
11 not in dispute about the appropriateness of those redactions.  
12 It's the other information that's in the middle of the  
13 document that Mr. Connell wants to present to support his  
14 argument on 530.

15 MTC [MR. TRIVETT]: So this is specific -- so this is  
16 specific to laptops, U.S. Government laptops, right? We own  
17 the laptops. We bought the laptops. We provided them to the  
18 detainees with certain security protocols in place. By  
19 describing specifically the things in Tags 1, 3, 4, and 5 and  
20 Tag 2, it starts to discuss specifics about the laptops which  
21 the SC/DRT is concerned will start to reveal to either the  
22 detainees or the public how the laptops have been disabled and  
23 certain information about the laptops that could allow someone

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1 who is seeking to access the laptops an easier way to do it.

2 MJ [COL POHL]: Mr. Trivett, I think I understand what  
3 you're saying. But these are laptops that these accused had  
4 for a couple of years. And reading at -- the exhibit, we're  
5 talking about what's enabled and what's not enabled. And we  
6 don't want them to know what was enabled and not enabled in  
7 2010 because that's some type of ----

8 MTC [MR. TRIVETT]: It would fall under techniques,  
9 tactics, and procedures, but it's not all just for them,  
10 right? It's also the concern that it become publicly known  
11 how the DoD will disable laptops that it wants to disable.

12 MJ [COL POHL]: Well ----

13 MTC [MR. TRIVETT]: And again, they don't have access or  
14 shouldn't have had access to the insides of the computers. I  
15 think that was the initial concern with the Google aspect.

16 MJ [COL POHL]: Of course, nothing in here says what was  
17 disabled. It only says what was enabled.

18 LDC [MR. CONNELL]: And, sir, I'm also about to say it.

19 MJ [COL POHL]: Go ahead.

20 LDC [MR. CONNELL]: No, I'm also about to orally -- I  
21 mean, I understand why the government doesn't want people to  
22 see this information, because it's very damaging to their  
23 wireless Internet argument.

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1 MJ [COL POHL]: Here's what we're going to do, okay?

2 We've spent too much time on this issue, for 530.

3 LDC [MR. CONNELL]: I understand, sir.

4 MJ [COL POHL]: Okay. But if it comes up again,

5 Mr. Trivett, and you're telling me this is a one-off and we're

6 not going to see this again, if you want -- if the government

7 wants to say things are nondisplayable to the public and the

8 detainee -- the detainee actually, on FOUO stuff, I need to

9 have a specific portion marked, and then, if asked, somebody

10 to tell me the reason why, okay?

11 MTC [MR. TRIVETT]: Understood, sir.

12 MJ [COL POHL]: Okay. So for this issue, Mr. Connell, I'm

13 going to require you, for purpose of publication only, but you

14 certainly can -- since you can talk to it, apparently, you

15 have to publish the redacted version of the O -- who are these

16 people? -- the Air Force document.

17 LDC [MR. CONNELL]: 530CC.

18 MJ [COL POHL]: Apparently there's no issue about you

19 talking about the redactions.

20 LDC [MR. CONNELL]: I understand, sir. And I understand

21 that you are -- please note my objection and ----

22 MJ [COL POHL]: Yeah.

23 LDC [MR. CONNELL]: But the thing that I want to say is

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1 your initial, you know, reaction to this in December was:  
2 Well, who does Mr. Connell go to to argue about this? And  
3 there was a whole question about we don't want the CISO to be  
4 the go-between, and this came up serious -- in a serious,  
5 serious way. I mean, these redactions are perhaps not the  
6 most serious issue in the world, but it came up in a very  
7 serious way in October, where there was a government claim  
8 that my slides taken as a whole created a mosaic which was  
9 classified.

10 And the question of what is my -- what is my relief?  
11 Where is my administrative procedure? How can I explain to  
12 someone, hey, I downloaded those things off of Google? Are  
13 you -- you know, there's no procedure in place. It just  
14 blocks. It is just yet another roadblock to actually having  
15 transparency in the military commission.

16 MJ [COL POHL]: To which I have two responses, is: On the  
17 published documents, as happened in -- was it October we had  
18 the XXX problem?

19 LDC [MR. CONNELL]: Yes.

20 MJ [COL POHL]: Okay. And on this issue is, as I've  
21 explained to you, you give them to the CISO. The CISOs go to  
22 the OCAs, they come back -- quite frankly, I look -- I look,  
23 one of the -- just for people going forward, so it's -- I want

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1 to see things that are published before trial anyway ----

2 LDC [MR. CONNELL]: Of course.

3 MJ [COL POHL]: ---- just as running a trial. So it's not  
4 just for this purpose. So that's why we require them to be  
5 submitted. And I take you on good faith you're only  
6 submitting things that you intend to publish.

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: Okay. It comes back. And then a lot of  
9 times, the CISO will tell me this is why, this is why, this is  
10 why, and sometimes -- but as we discussed in the other one,  
11 the XXX issue, is they said the second XXX, not the first but  
12 the second one, was somehow classified and had the government  
13 invoke the privilege, okay?

14 That's your appellate process, for want of a better  
15 term. The government can do that, and I would have told them,  
16 as I did tell them, that under these circumstances I do not  
17 believe that is classified. If they want to take their CIPA  
18 appeal because I'm -- and they, of course, have these options.  
19 I understand everybody's lane here. If they want to take --  
20 I'm saying CIPA appeal, but ----

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: ---- it's totally not CIPA, but anyway --  
23 that I'm worrying release of classified information

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1 improperly? I will give them the option to do it. Just like  
2 I gave them an option today to take a recess that somehow they  
3 reserve the privilege. But that's where I see the process  
4 working.

5           Ideally, it would simply be, you know, some more  
6 iterative process directly back with the OCAs. But as we  
7 found out in at least on 399, that sometimes that takes a  
8 while just to get what it is. So that's the best I can give  
9 you.

10       LDC [MR. CONNELL]: All right, sir.

11       MJ [COL POHL]: Okay.

12       LDC [MR. CONNELL]: I'm ready to proceed on 530.

13       MJ [COL POHL]: Okay. Let's go ahead on 530.

14       LDC [MR. CONNELL]: Your Honor, I have provided the  
15 government and the military commission and the CISD with a set  
16 of slides which are marked AE 530HH. I would request  
17 permission for the feed from Table 4 and to publish them to  
18 the gallery.

19       MJ [COL POHL]: You may. Go ahead.

20       LDC [MR. CONNELL]: Thanks. Sir, there is a reason, I  
21 suggest, that the government has done such a minimalist  
22 approach to trying to justify the search of these computers.  
23 There's a reason why there's, no expert or declaration from an

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1 expert. There's a reason why nobody is testifying or  
2 providing information about what it means to reset BIOS  
3 settings to their default, or what it means to use TrueCrypt  
4 to encrypt or -- and there's a reason why the couple inches of  
5 1/16-inch gauge wire that were seized from Mr. al Baluchi,  
6 which he turned over to the guards, are described as a tool  
7 instead of a little piece of wire. And there's a reason why  
8 the little block that is the heat sink gets described as an  
9 internal component instead of, you know, a little -- a little  
10 block of material.

11 And the reason is, is all that sounds scary and  
12 technical. Oh, there's access to the BIOS. Oh, there's an  
13 internal component that was seized. There's a tool that's  
14 been used. It all sounds scary, trying to lead to the result  
15 of, well, we have to do something. We don't know what the  
16 risk is, Judge, but perhaps we better have a full forensic  
17 analysis of this computer just so we can see if -- make sure  
18 there are no risks.

19 When, in fact, the real situation is that the holder  
20 of the burden of proof, the government, has produced virtually  
21 no information which would lead the military commission to  
22 take so radical a step as to do a review of what information  
23 is on two different computers, multiple portable hard drives

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1 which couldn't run computers -- programs anyway, and ----

2 MJ [COL POHL]: Do they want to review information or  
3 systems only?

4 LDC [MR. CONNELL]: Well, let's read the order. "The  
5 U.S." -- I am reading from Attachment H to 350 -- sorry, to  
6 530F: "The U.S. Army's 308th Military Intelligence Battalion  
7 shall conduct the forensic examination of the laptops,  
8 portable hard drives, and E-Readers. No other entity of the  
9 United States Government will be part of the forensic  
10 examination. The examination will be" -- and there's the  
11 word, "limited."

12 I thought I had slowed down. Sorry, y'all.

13 "The examination will be limited to a forensic  
14 examination of the laptops, to include inspecting the exterior  
15 case and ports, internal hard drive(s), and other hardware  
16 components, and the operating system, program and metadata  
17 files. The examination will also include an analysis of what,  
18 if anything, was done to an attempt to manipulate the"  
19 computer -- or "computers to bypass security or operating  
20 protocols," whatever those are. The examination will focus on  
21 operating system files, and program or metadata files and will  
22 not examine any content files created by the Accused or  
23 Counsel or anyone on the Defense teams." How they know who

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1 created which content file, I don't know.

2 "The forensic examination shall also include a full  
3 accounting of all the software that is present on the 2008  
4 laptops and the 2016 laptops. The results of the forensic  
5 examination will be provided to the Office of the Chief  
6 Prosecutor, who, in turn, will then ensure that it is provided  
7 to U.S. SOUTHCOM, JTF-GTMO, defense counsel, and the military  
8 judge."

9 So what kind of review? Extremely extensive review.  
10 The -- now, I have some suggestions if the military commission  
11 is looking for -- if this were a search warrant, I doubt the  
12 military commission would grant it, because there's no claim  
13 that a crime has been committed. There's no evidence that  
14 there's going to be evidence of a crime produced. The -- and  
15 a search warrant in -- from, you know, the last 15 years of a  
16 computer would not generally allow it to be this broad, unless  
17 it were a full search to find out everything that was on the  
18 computer.

19 So -- but I want -- what I wanted to do is take you  
20 through the evidence which actually exists, and strip it of  
21 sort of technical issues, and just show you what  
22 justifications the government has put forward and why those  
23 justifications don't justify a search of this computer.

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1           So I do want to address Mr. -- the government's  
2 argument about the 2008 versus the 2016 laptop, because this  
3 is an issue on which I am -- which is ----

4           MJ [COL POHL]: Mr. Connell, is this a probable cause  
5 search standard I'm applying here or ----

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

7           MJ [COL POHL]: ---- is this a -- well, let me ask my  
8 second part of my question.

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

10          MJ [COL POHL]: Is this no different than an abuse of a  
11 privilege in a confinement facility issue?

12          LDC [MR. CONNELL]: It is certainly not that, no. This is  
13 a -- you ----

14          MJ [COL POHL]: What I'm saying is -- let's take the one  
15 that was -- that was -- there's some evidence of manipulation.  
16 Let's just say ----

17          LDC [MR. CONNELL]: Yes.

18          MJ [COL POHL]: Okay. We gave the computer not as a  
19 matter of -- we can argue whether it's a matter of right or  
20 not. You guys may disagree with that but let's just say that,  
21 okay?

22          LDC [MR. CONNELL]: Sure.

23          MJ [COL POHL]: We gave you the computer and then you

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1 misused it and then -- so we're going to take it away from  
2 you.

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: We're not going to search it. We're just  
5 going to take it away from you because we gave it to you not  
6 as a matter of right but as a matter of privilege, no  
7 different than other things that happen in confinement  
8 facilities, okay?

9 LDC [MR. CONNELL]: Right.

10 MJ [COL POHL]: Okay. So therefore the remedy might be,  
11 okay, you don't have probable cause to search, but I am going  
12 to -- but I am going to say you don't get the computers  
13 anymore because you violated my order.

14 LDC [MR. CONNELL]: That's right. That's one of the  
15 analyses. So, yes, I -- I ----

16 MJ [COL POHL]: I mean, I don't -- I don't know if I want  
17 to give you that option, but, I mean, if ----

18 LDC [MR. CONNELL]: No, I understand.

19 MJ [COL POHL]: If you get -- you know, but that's a very  
20 low standard. That's not, certainly not probable cause for  
21 just not -- if you ----

22 LDC [MR. CONNELL]: For not returning it.

23 MJ [COL POHL]: If you assume it's a privilege and not a

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1 right ----

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: ---- okay, then say, okay, fine. We're  
4 not going to look at them. We're not giving them back either.

5 LDC [MR. CONNELL]: Right.

6 MJ [COL POHL]: And by the way, because you abused the  
7 privilege, you're not getting a new one.

8 LDC [MR. CONNELL]: Yes. I think I agree with everything  
9 that you just said because if we are -- if the government is  
10 trying to establish a search of a computer used for legal  
11 purposes, absolutely, it has to satisfy a search standard and  
12 higher than a search standard. It has to satisfy the  
13 crime-fraud exception.

14 But if this is simply a question of is the laptop  
15 going to be returned to the defendant or not, the -- that's  
16 not a search standard. It's not a crime-fraud exception  
17 standard.

18 So I think I agree with you that they're really two  
19 different questions governed by two different standards. One  
20 is search of -- of legal materials. One is abuse of a  
21 privilege and not getting that privilege anymore, using the  
22 framing that you just articulated.

23 MJ [COL POHL]: Okay. Go ahead.

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1 LDC [MR. CONNELL]: So the -- I want to be 100 percent  
2 clear on this 2016 laptop issue. I know precisely why, and  
3 it's well articulated in the -- in documents which are in the  
4 record why my advice has been not to take the 2016 laptop.  
5 And that is because the convening authority -- I personally  
6 negotiated that agreement for a specific type of laptop, and  
7 the convening authority bought a different type of laptop.

8 I turned to the prosecution for help, and, to be  
9 frank, they did not honor our agreement. So there is a --  
10 there is a disagreement among the -- and we have continued to  
11 work with the convening authority or argue with the convening  
12 authority, to be fair. So the idea that the 2008 ones, you  
13 know, have a radar on top or something that are super special  
14 and that's why they won't take the 2016 one really has no  
15 relationship to the actual facts.

16 But let's go to the -- what the government actually  
17 argues with respect to the -- as their justification. The  
18 first is the blatant and wanton violation of 182K. The second  
19 is we don't know what content is on there. The third is we  
20 don't know what software is on there. The fourth is there was  
21 possibly encryption software used. And the fifth is they  
22 might have modified the BIOS.

23 With respect to 182K, the government doesn't cite any

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1 material, what it thinks the abuse was, but clearly there is a  
2 phrase, "If an accused misuses a returned laptop, the JDG may  
3 take appropriate remedial action against that accused." I  
4 guess that is the blatant violation, the misuse.

5           Now, misuse is not defined, but one can be pretty  
6 broad with it. That's not a problem. And, in fact, the JDG  
7 has taken appropriate remedial action. The JDG imposed a week  
8 of disciplinary status on Mr. al Baluchi related to this whole  
9 event, and then it was over. That was the remedial action.  
10 That was the -- that was the punishment that was imposed for  
11 this, and the ----

12       MJ [COL POHL]: Because he served the punishment, he gets  
13 his computer back?

14       LDC [MR. CONNELL]: No, sir.

15       MJ [COL POHL]: Okay. Go ahead.

16       LDC [MR. CONNELL]: That's not my claim.

17       MJ [COL POHL]: Go ahead.

18       LDC [MR. CONNELL]: My claim is that the violation of 182K  
19 does not justify a search under the term misuse. All right?  
20 You're blinking at me. Do you have a question about that?

21       MJ [COL POHL]: No, no. My eyes blink.

22       LDC [MR. CONNELL]: Okay. Sure.

23       MJ [COL POHL]: Don't read me that closely, Mr. Connell.

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1 Go ahead.

2 LDC [MR. CONNELL]: Yes, sir. All right.

3 Moving on from there, the second argument that the  
4 government made -- and this is the -- you know, I was really  
5 interested that when you hard pressed the government on, well,  
6 what's the risk, they go to paragraph 7, 8, and 9 of  
7 Colonel Gabavics' declaration.

8 Number 9 is this argument: We don't know what's on  
9 there. And that's always been true. In fact, in 2013, the  
10 government argued we don't know what's on those computers as a  
11 reason to avoid giving them back to the defendants. But  
12 what's significant there is they will never know what is on  
13 those -- is on the 2008 computers, nor do they have any right  
14 to know that content. Even their order that they proposed  
15 says that there won't be a content search.

16 If you were to go that direction, that needs to be  
17 tightened -- that language needs to be tightened up a lot.  
18 But the idea that Colonel Gabavics proposes that we don't  
19 know -- they could have, you know, tracked -- let's just make  
20 a hypothetical. They could have tracked what time the guards  
21 move. Well, how they would do that? They would do that by  
22 putting it in a spreadsheet or a Word document which are not  
23 supposed to be searched.

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1           The -- what -- the remedy that the government is  
2 proposing doesn't have anything to do with the -- with the  
3 problem that they're claiming.

4           Now, what about unknown software? The -- with  
5 respect to software, there's not actually any restriction on  
6 software and the -- the one that -- on the 2008 computers.  
7 For the 2016 laptops, there is a separate negotiated agreement  
8 about software, but with respect to Mr. al Baluchi and three  
9 other defendants, that has never -- that 2016 laptop has never  
10 come into play.

11           The one thing that we know that the government  
12 objects to is PowerPoint. We know that the government does  
13 not like the fact that the 2008 computers had PowerPoint on  
14 them. I'm not 100 percent sure why, but PowerPoint is  
15 important to them. We know that the 2008 computers had  
16 PowerPoint on them. The government didn't like it. But the  
17 software issue, there's no -- there's no software issue  
18 that -- the government doesn't have any control over what  
19 software is on the 2008 computers.

20           And that brings us to when -- on Monday when you  
21 asked the government: Well, what is the risk here? There  
22 were two risks that they identified at that time. One of  
23 those was the use of encryption. The other was the -- was a

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1 possible access to the Internet, which is what we heard a lot  
2 about today.

3           So with respect to possible use of encryption, that  
4 is -- there were two places in 530F that I found relating to  
5 this encryption issue. The first of the government's argument  
6 was none of the approved software in the laptop agreement to  
7 the government's knowledge was to have encryption  
8 capabilities. Now, when I read that, I really had to wonder  
9 about the extent of the government's knowledge because there  
10 are 16 programs which are listed in the 2016 laptop agreement,  
11 eight of which -- eight of which have encryption capabilities.  
12 Not just Microsoft Word, not just Microsoft Excel, but also  
13 WinRAR, WinZip. WinRAR and WinZip are, at their core, file  
14 compression and file encryption programs.

15           So you encrypt data, which makes it nonsearchable,  
16 and then you put a password on it. That's encryption. So the  
17 idea that -- that they didn't -- the government didn't know  
18 that the material in the -- in the laptop agreement had  
19 encryption capabilities means that they just didn't look very  
20 closely at the laptop agreement.

21           The -- so there's another thing. The other thing  
22 that the government says is that encryption software may have  
23 allowed for clandestine, meaning nonmonitored, I suppose,

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1 messages. But, in fact, the government has been -- oh, sorry.  
2 I forgot I had this slide. We have a list here of all the new  
3 laptop-approved software with encryption capability which  
4 includes the operating system, Windows 7, and even the old  
5 operating system, XP Service Pack 2, which is specifically  
6 mentioned.

7 But I just want to take you back to 2013 for a minute  
8 when the government called a witness -- called a witness on  
9 the encryption capabilities of Microsoft Word. The government  
10 called this witness on the encryption capabilities of  
11 Microsoft Word because it was at that time trying to argue in  
12 favor of defense use of encryption.

13 Now, the -- so there is actual evidence already in  
14 this record about the -- that the Office product, including  
15 back to Office 2007, has AES encryption at 256 bit. Now, that  
16 sounds spooky, but it's routine in today's world.

17 Now, that brings us to the last issue, which is about  
18 the BIOS. I know that BIOS sounds like a super-technical  
19 thing. So here's what I want to explain: Think about the  
20 light bulb in your house, like just your kitchen light, okay?  
21 There are three switches in that kitchen light -- I mean  
22 three -- three electrical connections: One is at your circuit  
23 breaker, one is the light switch on the wall, and one is the

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1 connection to the light bulb, right? The -- you have to have  
2 all three things present. You have to have the circuit  
3 breaker flipped, you have to have the light switch on, and you  
4 have to have the light bulb in the light socket in order for  
5 that light to come on.

6 In this computer system, it -- the BIOS, the program  
7 you're using, the graphical interface, and the -- and the  
8 wireless card are exactly equivalent to those. So the BIOS is  
9 like the master switch, the circuit breaker at your house.  
10 The thing that you click on your computer there to increase --  
11 to open -- to connect to wireless is like the light switch.  
12 And the wireless card is like the light bulb. Without a light  
13 bulb in the light socket in your kitchen, it doesn't matter  
14 how many times you flip that switch, your light is not going  
15 to come on.

16 That's exactly the situation that we have here.  
17 These computers do not have a wireless card. These computers  
18 do not have a Bluetooth card. So one of the ways that we know  
19 this is by the last time that these computers had a forensic  
20 search, which was about one one-thousandth of the scope of the  
21 forensic search that the government is looking for here.

22 And so if I could have access to the document camera,  
23 I'm showing 530Z, which is the redacted version of 530JJ.

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1 The ----

2 MJ [COL POHL]: Go ahead.

3 LDC [MR. CONNELL]: This document is a laboratory report,  
4 and I just want to walk you back a little bit through what  
5 happened.

6 The person went to a different investigation. The --  
7 in 2010, when these computers were taken from the defendants  
8 the first time, there was the question of: Had they ever  
9 accessed the Internet? And so there was a very limited search  
10 and seizure document which was in -- issued by a military  
11 magistrate. And that document provided for that -- a search  
12 only of the capabilities for wireless. OSI conducted that  
13 search and issued this report, which is found in its entirety  
14 in the record at AE 149C, introduced by the government.

15 Now, the tag in this -- and you have 530JJ in front  
16 of you, even if it's not -- if it's redacted on the screen.  
17 The tag is which computer that we're talking about. There  
18 were five computers, Tag 1, Tag 2, Tag 3, Tag 4, Tag 5.  
19 Mr. al Baluchi's computer was Tag 2. And when the OSI looked  
20 at Mr. al Baluchi's computer, it found that the BIOS wireless  
21 LAN was enabled, that the BIOS Bluetooth was enabled, that the  
22 BIOS wireless switch was enabled, and I'm reading now from a  
23 sentence which is

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1 valuable -- which is legible, "Although the above findings are  
2 notable, there is no supporting evidence that the submitted  
3 items have been connected to any network or the Internet.  
4 There was some Internet history which appears to be from the  
5 initial operating system setup."

6 Now, I know that you're saying, well, you know, what  
7 does this mean for things to be enabled? So if I could have  
8 the feed from Table 4 again. I have here a sample on the left  
9 of what the BIOS of your computer looks like. And anybody can  
10 access the BIOS to their computer if they just interrupt its  
11 boot-up process.

12 The -- this on the left is just a random BIOS example  
13 that I downloaded from Google. It has nothing to do with  
14 Mr. al Baluchi's computer in particular. But it shows you  
15 that there's just a little -- a little tab where you can click  
16 on "Enabled" or "Disabled" and enable or disable each device.

17 When the government returned Mr. al Baluchi's  
18 computer to him in 2015 -- or to us in 2015, no one had  
19 changed these BIOS settings, which means they had exactly the  
20 BIOS settings that they had when it was forensically examined  
21 by OSI, which is that the wireless LAN was enabled, the  
22 Bluetooth was enabled, and the wireless switch was enabled.  
23 Does that mean that the computer could access the Internet?

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1 Absolutely not, because it does not have the cards which are  
2 necessary.

3           And on the right-hand of this slide in the upper is  
4 just a -- just Google Toughbook wireless card, what wireless  
5 card does this model take, and what Tough -- what does the  
6 Bluetooth card look like. I just wanted you to see what they  
7 look like.

8           The significance of all of this is that it doesn't  
9 matter how many -- how the switches on the circuit breaker are  
10 set. The government knew when it returned this computer that  
11 the circuit breaker switches were already set to on. But  
12 because there's no light bulb, none of that matters.

13           Now, the -- if you were concerned about the access to  
14 the Internet, which is only -- or access to Bluetooth, which  
15 is the only sort of ration -- fear that the government has  
16 really articulated around this, you could confine a search to  
17 the scope of determining either: Does it have a wireless card  
18 or a Bluetooth card? Somebody just breaks the glue on the  
19 screws on the back of it, and the forensic examiner just  
20 looks, does it have a card? And we know from the whole  
21 process from before, those cards were removed.

22           But the -- one step up from that is that you could  
23 order the same search that took place before, that search

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1 being was there -- was the computer ever used to access the  
2 Internet? The answer to that will be no because it doesn't  
3 have the physical capability.

4 MJ [COL POHL]: Would I have probable cause to order that  
5 search?

6 LDC [MR. CONNELL]: No. But I'm -- in these -- in  
7 proposing these alternatives I'm laying out -- assuming I lose  
8 that probable cause issue. I don't think that we should lose  
9 the probable cause issue. There is no probable cause of  
10 anything.

11 MJ [COL POHL]: I got it. I got your point.

12 LDC [MR. CONNELL]: Yeah.

13 The last thing that I want to say is: I've focused  
14 here on the -- sort of what -- I've focused here on the  
15 questions that you asked the government, which is what is the  
16 risk, which is a totally legitimate question.

17 But in our brief in 530T, we lay out extensive  
18 information from the law of searches of computers. And one  
19 thing that is completely clear is, especially when the search  
20 of -- the law of search of computers intersects with the  
21 search of legal material, that any order that is crafted has  
22 to be extremely narrow and tightly contained.

23 The order that the government has submitted here is

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1 extremely broad, and even -- the reason why I was telling you  
2 the possible alternatives was that if you rule against us and  
3 say that you do think that there's probable cause, if you do  
4 think that the government has satisfied the crime-fraud  
5 exception, then what you should do is craft a much more  
6 narrowly tailored order than this one that the government has  
7 proposed.

8 MJ [COL POHL]: Okay. Mr. Connell, let me ask you this  
9 hypothetically. Hypothetically, there is lack of probable  
10 cause, hypothetically, but there is evidence of a misuse of  
11 a -- of a privilege. And, therefore, on the one hand, there's  
12 insufficient evidence to order a search, but there may be  
13 sufficient evidence to say, okay, you lose your privilege, and  
14 not return, unless you consent to an examination under certain  
15 rules.

16 Now, I read the government's order, and I understand  
17 it, and there is obviously different ways to tailor it. The  
18 government has got a concern about what was done. You have a  
19 concern to protect your materials. So we're in that middle  
20 ground.

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

22 MJ [COL POHL]: Where does that leave us? Because let's  
23 say I buy your -- your probable cause argument.

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1 LDC [MR. CONNELL]: I got it.

2 MJ [COL POHL]: And particularly for your client.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: And I say, okay, there's enough prima  
5 fascia evidence ----

6 LDC [MR. CONNELL]: ---- currently situated.

7 MJ [COL POHL]: ---- yeah, yeah, that he abused a  
8 privilege and I -- and for a hypothetical you say I don't see  
9 a right to this. This was giving it to him as a matter of --  
10 convenience is too weak a word, but that's what I meant -- for  
11 his use. So since you're objecting to any type of forensic  
12 examination of it and the government has established the  
13 baseline of the abuse of privilege, the middle ground is fine.  
14 Well, maybe not fine.

15 LDC [MR. CONNELL]: No.

16 MJ [COL POHL]: And each side gets punished to a degree on  
17 that, but ----

18 LDC [MR. CONNELL]: That's right.

19 MJ [COL POHL]: But that's a middle ground that you're  
20 kind of exploring.

21 LDC [MR. CONNELL]: I see what you're saying there, and I  
22 think that in that middle ground, there could be articulated a  
23 way to link the risk and the remedy, which is, since the

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1 actual risk here -- the only real articulated risk is access  
2 to the Internet. We know there are at least two ways -- which  
3 is why I kind of jumped ahead and articulated possible  
4 narrowing constructions.

5           We know there are at least two ways to guarantee that  
6 the -- or to -- with a limited -- highly limited forensic  
7 search determine whether the computers have ever been  
8 linked -- connected to the laptops or not. One of those is  
9 the easiest way is just to look, do they have technical  
10 capability to do that.

11           MJ [COL POHL]: Okay.

12           LDC [MR. CONNELL]: But the other one is, you know, I  
13 know -- I knew that the government had conducted this search.  
14 I didn't challenge it because when I looked at the -- this  
15 search meaning the 2010 OSI search -- and I made a specific  
16 strategic decision not to challenge it because I thought it  
17 did not -- having read the report, done the research, I  
18 thought that it did not infringe on the attorney-client  
19 privilege. And so there's no Witherspoon motion related to  
20 that search, and that's for a specific reason, that I looked  
21 at it, I thought it was narrowly tailored, sufficient.

22           So I'm not giving you an answer now because -- and  
23 you haven't asked me a specific question, but

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1 hypothetically ----

2 MJ [COL POHL]: There's something in writing before we get  
3 to it.

4 LDC [MR. CONNELL]: Yes. If -- if you were to offer -- if  
5 the solution was ----

6 MJ [COL POHL]: Hypothetically.

7 LDC [MR. CONNELL]: Hypothetically.

8 MJ [COL POHL]: Hypothetically the steps would be as  
9 follows ----

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: ---- A, government requests for forensic  
12 examination on their own basis is denied. B is -- I'm just  
13 going to say ----

14 LDC [MR. CONNELL]: I know. I'm with you.

15 MJ [COL POHL]: ---- make a finding that there was prima  
16 facie evidence abuse of the -- of the ----

17 LDC [MR. CONNELL]: Privilege of the laptop.

18 MJ [COL POHL]: ---- privilege of the laptop. C is until  
19 defense agrees to an examination of, the laptop will not be  
20 returned with no guarantee it will be returned after such  
21 forensic examination. And, C [sic], that if defense wishes a  
22 forensic examination, they may propose their own order, serve  
23 it on the government, and -- to see the parameters of the

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1 order, whether it protects the government's interest and the  
2 defense interest and then we go from there.

3 LDC [MR. CONNELL]: I understand, sir.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: Would you like feedback on that  
6 or ----

7 MJ [COL POHL]: Well, hypothetically it ----

8 LDC [MR. CONNELL]: Hypothetically, it sounds like the  
9 wisdom of Solomon.

10 MJ [COL POHL]: Well, I'm not sure about that, but it --  
11 it's just a proposal.

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

13 MJ [COL POHL]: A thought. Okay.

14 LDC [MR. CONNELL]: It sounds like a very reasonable  
15 thought to me.

16 MJ [COL POHL]: Thank you, Mr. Connell.

17 It's getting late. We've got plenty of time  
18 tomorrow. I don't want to rush anybody, but one proposal  
19 would be to pick this up first thing tomorrow at 0900, and  
20 then when we complete it, because that's all we've got left --  
21 478 I was going to talk about, but if I do, it's going to be  
22 very brief because we've still got motions. There's still  
23 some motions I've got.

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1           So the proposal would be -- would be we would do  
2 the -- finish up the 530 at 9:00 and then pick up with the  
3 classified session thereafter.

4           LDC [MR. RUIZ]: Judge, that is my preference on behalf of  
5 Mr. al Hawsawi.

6           MJ [COL POHL]: Okay. Because I don't want to --  
7 Mr. Ryan?

8           TC [MR. RYAN]: That's fine, sir, as to 530. As to 478,  
9 Your Honor indicated you had some questions. We'll be  
10 prepared to answer them tomorrow. I haven't seen the  
11 pleadings that ----

12          MJ [COL POHL]: I'm kind of looking at it, but I know that  
13 there is some additional pleadings coming in. I may have a  
14 short session on it. It will not be anything -- it won't be  
15 like me earlier with Mr. Trivett blindsiding him with  
16 something he hadn't seen, so we'll be okay.

17           Okay, so that's the way ahead. I can't guarantee  
18 what time we will start the classified session. It will be at  
19 least an hour or so when we get done, but I don't -- I can't  
20 speak for how long everybody intends to talk tomorrow, but I  
21 would suspect we could get to it relatively early. But with  
22 the understanding that that means the detainees will be --  
23 will be returned at that time, those who decide to come.

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1   Okay.

2                   Commission is in recess until 0900.

3   [The R.M.C. 803 session recessed at 1720, 10 January 2018.]

4                                   [END OF PAGE]

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