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1 [The R.M.C. 803 session was called to order at 0905,
2 1 March 2018.]

3 MJ [COL POHL]: The commission is called to order.
4 General Martins, who is here? Any changes since last time we
5 recessed on Monday?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: I will note that Mr. Ali and Mr. Hawsawi
8 are absent; the other detainees are present.

9 Mr. Nevin, any changes in your team since we recessed
10 on Monday?

11 LDC [MR. NEVIN]: No, Your Honor.

12 MJ [COL POHL]: Ms. Bormann?

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

18 MJ [COL POHL]: Mr. Ruiz?

19 LDC [MR. RUIZ]: No changes.

20 MJ [COL POHL]: Trial Counsel.

21 CP [BG MARTINS]: Major, can you please take the stand and
22 raise your right hand for the oath.

23 [END OF PAGE]

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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. You are the assistant SJA assigned to the Joint Task
6 Force?

7 A. That is correct.

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

9 Q. Major, did you have occasion to visit both Mr. Ali
10 and Mr. al Hawsawi this morning?

11 A. I did meet with both of them this morning.

12 Q. All right. You have in front of you what's been
13 marked as Appellate Exhibit 560 and 560A each consisting of
14 three pages. Let's take the one with respect to Ali Abdul
15 Aziz Ali first.

16 A. Okay.

17 Q. What time did you advise him of his right to attend
18 this morning?

19 A. I met with Mr. Ali just before 6:15, introduced
20 myself, advised him that he had a military commission this
21 morning, and asked him if he would be coming to the military
22 commission. He advised that he did not want to come. So I
23 began reading the English version at 0615 hours.

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1 Q. Did you deviate from the way you have done it tens of
2 times before?

3 A. Not at all. I asked him if he just wanted me to read
4 the English version, because that's what he normally prefers.
5 He said that's fine. So I read both pages of the English
6 version to him. There was an interpreter there. I asked him
7 if he had any questions, and he said he had no questions. And
8 then he signed the second page and dated the second page in my
9 presence, and then I signed the document.

10 Q. With respect to Mr. al Hawsawi, same procedure?

11 A. Same procedure. I met with Mr. Hawsawi just before
12 0619 hours to advise him that he had a military commission
13 this morning and to ask if he would be coming. He indicated
14 that he did not want to come to the military commission.

15 Q. Did he sign page 2 and 3 of this document?

16 A. Yes. And Mr. al Hawsawi always asks that I read him
17 the English version while he follows along with the Arabic
18 version, and then we have the interpreter read the full Arabic
19 version to him so he hears it in English and he hears it in
20 Arabic. And he actually filled out the Arabic version and
21 signed the Arabic version, and then he also asked to sign the
22 English version. So he signed both pages and, because he
23 signed both pages, I signed both pages as well.

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1 Q. Do you believe that both of these gentlemen
2 understood their right to attend and that they voluntarily
3 waived those rights to attend?

4 A. I do believe they both understood that they had the
5 right to be here and I believe that they both voluntarily
6 waived because, after they signed their waiver, I offered them
7 the opportunity to go to Echo II for legal meetings and
8 they've both accepted legal meetings today. So they're
9 willing to go to the meetings, they just did not want to come
10 to the military commissions.

11 Q. And the camp is able to accommodate those requests?

12 A. We are able to accommodate those requests.

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

14 MJ [COL POHL]: Mr. Connell, do you have any questions?

15 LDC [MR. CONNELL]: No, Your Honor. I do have an
16 objection to anonymous testimony under Smith v. Illinois and
17 United States v. Celis.

18 MJ [COL POHL]: Okay. The objection is overruled.

19 Mr. Ruiz, do you have any questions of this witness?

20 LDC [MR. RUIZ]: No, Judge.

21 MJ [COL POHL]: Thank you. You are excused.

22 WIT: Thanks, Judge.

23 [The witness was excused.]

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1 MJ [COL POHL]: Just for the way ahead today, I first want
2 to come back to 551. When we left it the other day, I asked
3 the trial counsel to coordinate with the webmaster about
4 whether or not they require an OCA review. Since that time, I
5 have been looking at the regulation. And the way I read it,
6 there is no track A that Mr. Connell referred to; that
7 19-4.c.1 says, "Filings and orders that do not require
8 classification security review shall be posted within one
9 business day." Okay? And then -- but this says, that do not
10 require classification review under Chapter 17-1.

11 Going back to 17-1, paragraph c.3., it says, "Once a
12 filing is properly filed with the chief clerk, the CSO," now
13 the CISO, "for the trial judiciary shall promptly examine the
14 filing or document and, in consultation with DoD security
15 classification and declassification review team and any
16 appropriate DoD federal department or agency, determine
17 whether any filing or document contains classified information
18 or any other information covered by 19-3.b."

19 The way I read those two things together is that
20 every filing must go to the DoD security
21 classification/declassification review team, which is a
22 de facto OCA review. That's how I read the regulation.
23 Accordingly, there is no one-day track A in the regulations.

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1 So quite frankly, what the webmaster -- his policy or her
2 policies really don't make any difference.

3 Any comments on that? Mr. Connell.

4 LDC [MR. CONNELL]: Sir, I'll take that as a ruling as to
5 your interpretation of the regulation. I won't ----

6 MJ [COL POHL]: Right.

7 LDC [MR. CONNELL]: ---- argue with you further on it.

8 I do want to point out that I have tendered to the
9 military commission AE 551D, which is an e-mail from the
10 convening authority's office stating their reading of the
11 regulation. I don't know what the government did, but I did
12 reach out to the webmaster and got the following answer from
13 the military -- the convening authority.

14 MJ [COL POHL]: Well, it would have been nice if I had
15 this before.

16 LDC [MR. CONNELL]: Well, they agree with you, sir, if
17 that's any consolation.

18 MJ [COL POHL]: Well, okay. I was kind of assuming they
19 disagreed with me, so it's -- oh, okay.

20 LDC [MR. CONNELL]: Okay.

21 MJ [COL POHL]: Thank you. And that's -- that was
22 551D (AAA)?

23 LDC [MR. CONNELL]: Yes.

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

2 I think most of today is going to be spent addressing
3 525, 524 issues, but there's one other one that we have which
4 I'd like to get to first, and then we're going to go to that,
5 and that's your -- Mr. Connell's 534.

6 ADC [MS. PRADHAN]: Good morning, Your Honor.

7 MJ [COL POHL]: Good morning.

8 ADC [MS. PRADHAN]: If I could have one moment, please,
9 sir.

10 MJ [COL POHL]: Yeah, sure.

11 [Pause.]

12 ADC [MS. PRADHAN]: Okay.

13 MJ [COL POHL]: Is there any unclassified pleadings in
14 this -- on this issue?

15 ADC [MS. PRADHAN]: Yes, sir.

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

17 ADC [MS. PRADHAN]: I'll be as careful as I can, sir.

18 MJ [COL POHL]: Okay.

19 ADC [MS. PRADHAN]: So, Your Honor, AE 534 initially began
20 as a request for information under category 2.h. of the
21 government's submission in AE 397. And I'll talk at length
22 about exactly what that request was, but essentially it's a
23 request for additional RDI discovery.

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1 The story of AE 534 highlights perfectly the issue of
2 the government's consistent delay and, frankly, damage to the
3 discovery process over the past few years. It also has to be
4 seen in conjunction -- and I know we'll talk about this
5 further in 114 and 525 and 524, and even AE 425 -- in terms of
6 exactly how crucial it is that we not only be given all
7 requested information and documents about the black sites, but
8 how the results of our own investigations at the end of the
9 day might be the only reliable sources we have to use in this
10 capital defense.

11 Just to give some context to the military commission,
12 once upon a time, on May 5, 2012, Mr. al Baluchi and the other
13 four defendants were arraigned before the military commission.
14 Today's -- we're in March 2018, March 1, 2018. It's been
15 almost six years since that arraignment. In 2012,
16 Mr. al Baluchi was coming up on six years of detention here at
17 Guantanamo, six years since he had been rendered to Guantanamo
18 from the CIA black sites, on the same day that President Bush
19 gave a speech stating that the government intended to
20 prosecute these men.

21 So for six years, the government knew that any
22 defense provided for Mr. al Baluchi and the other defendants
23 before 2000 -- would have to require information from the CIA

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1 black sites. Now, that's not to say they didn't signal their
2 intent to distract from the torture early on.

3 The January 2007 FBI interrogations were the tip of
4 that effort, and as we now know -- and I'll go into some
5 detail about this, Your Honor, with respect to AE 114 and
6 525 -- although the government marketed these interrogations
7 as clean, they were infected with CIA torture-acquired
8 information. Torture is -- Your Honor, it is the nasty center
9 of this case, whether we like it or not, and we have to deal
10 with it at some point.

11 So once Mr. al Baluchi is arraigned in 2012, the
12 discovery requests began. There have been nearly 400
13 discovery requests filed. Of those, a significant proportion
14 of them pertain to black site information. Many of those, as
15 the military commission knows, have become motions to compel,
16 as the government has determined that black site information
17 wasn't relevant to the defense and so they refused to produce
18 it. And so it's been this constant, constant struggle to get
19 basic information to which the defense is entitled.

20 On the 14th of June 2013, the government filed a
21 motion for a trial scheduling order, stating that the
22 prosecution's anticipated discovery is nearly complete. That
23 was in 2013. Meanwhile, defense counsel requests for

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1 discovery, sometimes bordering on desperate, in the case of
2 the full SSCI report, which we still don't have, for adequate
3 and legally-mandated discovery about the torture program is
4 not crazy. The government has stood here many times and taken
5 two contradictory positions.

6 First, that the defense has some hysterical obsession
7 with our client's state-sponsored torture, as if it didn't
8 have a direct bearing on their death penalty trial; and
9 second, they wring their hands that they have done all they
10 can to give us all of the relevant documents in their
11 possession, but with the caveat that they have, of course,
12 masked some of the most sensitive information because they are
13 the guardians of national security information and we are not
14 to be trusted.

15 So let's be clear, Your Honor. Much of what the
16 government is guarding is information about the CIA and other
17 officials who tortured our clients at secret prisons abroad,
18 who should have been prosecuted themselves for it. And
19 information -- this is information beyond what's in the public
20 domain that the CIA is desperate to bury. And this is the
21 thread that is going to go through not just 534, but 114 and
22 525, and the consolidated position on the prohibition of
23 defense investigation on 524 and 525 that Mr. Connell is going

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1 to address. The government is here carrying that water for
2 the CIA in denying that information not to the public, but to
3 top secret security clearance holding defense counsel.

4 Now, we know, Your Honor, that the provisions of the
5 Military Commissions Act, which was written specifically to
6 allow them to strip information from the original documents
7 and to summarize them, we know that, but we are still in
8 capital pretrial proceedings and we still have standards that
9 they're obligated to look like they're fulfilling.

10 And that brings us to AE 397, which they filed on
11 December 28, 2015; again, over three years after arraignment,
12 and swimming in discovery requests. This is when they come up
13 with a plan for RDI discovery. There were ten categories of
14 discovery proposed in AE 397 which were eventually accepted by
15 the military commission. The first is a chronology
16 identifying where each defendant was held in detention between
17 the date of his capture and the date he arrived in
18 Guantanamo Bay, Cuba, in September 2006.

19 The second is a description of how each accused was
20 transported between the various locations, including how he
21 was restrained and how he was clothed.

22 The third, or c., is all records, photographs,
23 videos, and summaries the Government of the United States has

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1 in its possession, which document the condition of each
2 Accused's confinement at each location, and their conditions
3 during each movement between the various locations.

4 d. is the identities of medical personnel (examining
5 and treating physicians, psychologists, psychiatrists, mental
6 health professionals, dentists, et cetera) guard force
7 personnel, and interrogators, whether employees of the U.S.
8 Government or employees of a contractor hired by the U.S.
9 Government, who had direct and substantial contact with the
10 defendants at each location and participated in the transport
11 between the various locations.

12 I am going to read all of them, Your Honor, if
13 that's ----

14 MJ [COL POHL]: It's your argument.

15 ADC [MS. PRADHAN]: e. are copies of standard operating
16 procedures, policies, or guidelines on handling, moving,
17 transporting, treating, interrogating, et cetera, what they
18 called high-value detainees at and between the various
19 facilities identified in paragraph a.

20 f., the employment records of individuals identified
21 in paragraph d., limited to those documents in the file
22 memorizing -- memorializing adverse action and positive
23 recognition in connection with performance of duties at these

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1 facilities.

2 g., the records of training in the preparation for
3 the performance of duties of the individuals identified in
4 paragraph d. So we start to see a theme, all referencing
5 paragraph d., the personnel profiles.

6 h., statements obtained from interrogators, summaries
7 of interrogations, reports produced from interrogations,
8 interrogation logs, and interrogator notes of interrogations
9 of defendants identified in the charge sheets. This is
10 crucial, and this is -- this was the category for which AE 534
11 was initially filed, to get these statements from the
12 interrogators, their notes, their summaries of their
13 interrogations, their logs, and their notes about that.

14 i. Was copies of requests with -- accompanying
15 justifications and legal reviews to employ what they called
16 enhanced interrogation techniques on the defendants.

17 And the last, j., was copies of documents
18 memorializing decisions approving or disapproving with any
19 additional guidance requests identified in the previous
20 category.

21 So pursuant to AE 397, the government committed to
22 completing its RDI discovery obligations by the end of
23 September 2016. So just here we see how the government has

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1 delayed and delayed and delayed, such that this statement from
2 June 2013 about being almost done with discovery turns into
3 slightly more sober pledges in September 2016, and yet that
4 deadline blew by as well.

5 So by the end of 2016, out of the 6.2 million pages
6 of known existing CIA documentation of the RDI program, we had
7 received -- at the end of 2016, we had received roughly 6600
8 pages. We have now received what I believe to be just over
9 17,000.

10 So that number did jump in 2017, and we thought in a
11 slightly more useful way. We received some more information,
12 albeit over-generalized and scrubbed, about Mr. al Baluchi's
13 conditions of detention at the black sites; we received some
14 more summarized information about conditions generally at the
15 black sites; and we received some summarized information about
16 the personnel at the CIA black sites pursuant to categories
17 d., f., and g. of AE 397, which I will refer to as the 2.d.,
18 2.f., and 2.g. discovery. Those are classified. I won't go
19 into the details of the documents that we've received in those
20 categories.

21 With this discovery and the production of -- by the
22 government of a rudimentary -- rudimentary chronology of
23 Mr. al Baluchi's CIA detention, we began the painstaking task

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1 of trying to put together a timeline of his detention from
2 capture to Guantanamo that would properly show the
3 relationships between his torture, his interrogations, the
4 personnel conducting both torture and interrogations, the
5 specific conditions of detention that changed from black site
6 to black site, and the condition of his mental and physical
7 health throughout.

8 The government's initial -- the government's response
9 to our filing in AE 534 boiled down essentially to three
10 points. First, that there is no 2.h. -- no additional 2.h.
11 info to give to the defense: No additional interrogator
12 notes, no additional interrogator logs, no additional
13 summaries of the interrogations to give to the defense. The
14 second is that they gave us a chronology under category 2.a.,
15 and we will speak more about that in a second. The third is
16 here's a chart -- what I'll refer to as the RDI index -- with
17 all you could ever want.

18 I'm getting to the chart, but let's first talk about
19 the chronology, Your Honor.

20 I've spoken previously in the context of AE 525 about
21 the so-called chronology that the government has given us of
22 Mr. al Baluchi's detention. It's classified. I won't go into
23 the details, but all I will say now is that the public --

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1 publicly available chronology of Gul Rahman's detention at
2 COBALT, which spanned only three months before his death in
3 2002, is three pages long. That's the publicly available
4 chronology of a detainee who died at COBALT and spent only
5 three months in detention.

6 I've put that chronology up here at least twice in
7 open and closed session to show Your Honor. I'd be happy to
8 put it up again, because the difference is striking. The
9 classified chronology of Mr. al Baluchi's detention, which
10 spanned three and a half years and multiple black sites, is
11 roughly one-fourth of a typed page.

12 Now, the military commission has recognized the
13 importance of having the kind of detailed chronology that
14 we're trying to put together. We talked with -- you know --
15 or we will talk, really, with regards to 114 and 525 about the
16 motion to suppress that the military commission has asked us
17 to file and that we absolutely intend to file with regards to
18 the January 2007 FBI statements. And we now recognize, of
19 course, that we may really only have one chance to file
20 properly, so we're not going to file it until we have all of
21 the available information to do that. The military commission
22 has asked us to do that and we would very much like to do
23 that. We need the information.

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1 With that in mind, it's worth recounting the exchange
2 between the military commission and the government in January.
3 And this is from the January transcript, page -- this is the
4 10th of January, page 18453.

5 And the military commission stated, "If there is no
6 dispute about what was done to them," them being the
7 defendants, "why doesn't the government just say here, we will
8 give you a complete timeline of what was done and when it was
9 done to them. I'm not talking about the policy stuff" --
10 again, this is the military commission speaking -- "I'm
11 talking about the tactical level stuff. On this day, Mr. X
12 was subject to this EIT for this period of time, at this
13 location and on this day, you know -- and just lay out" --
14 again, this is Your Honor speaking -- "and just lay out the
15 whole RDI program in one thing."

16 And the government said -- they responded, "Yes, sir.
17 We've done that. We believe we have absolutely done that. We
18 have certainly provided them charts to say that this statement
19 involves this treatment and we provided all of the treatment."

20 Now, the government went into slightly more detail a
21 little bit later in the proceedings and said, specifically in
22 regard to the issue of the timeline that was brought up --
23 when Your Honor ordered the ten-paragraph construct on

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1 information from AE 397, you listed it out in paragraphs.
2 Paragraph c. was the conditions of confinement that the
3 accused experienced, and we've provided those. We've provided
4 those in chronological order.

5 Paragraph e. is the standard operating procedures,
6 and we also provided all of those. And we did that in
7 chronological order as well.

8 h. was for the statements, right, which was the basis
9 again of AE 534. We've provided those statements in
10 chronological order.

11 i. was any request for EITs and j. was approval and
12 denial of those requests. We also provided those in
13 chronological order.

14 So they do have a chart that the military judge has
15 not seen and which we can certainly supplement the record, and
16 that chart was in the -- actually in the record at AE 534A,
17 Attachment B, that helped establish -- helps the defense
18 establish what direct and substantial personnel were involved
19 at the times of the relevant conditions of confinement,
20 statements, or SOPs.

21 Now, Your Honor, there are two things to note with
22 regard to the government's representations here. The first is
23 that until the government provided this chart, which again

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1 I'll refer to as -- I'll just call it the RDI chart as
2 shorthand -- we had almost no way to put together the
3 personnel profiles from 2.d. with the torture and
4 interrogation summaries. We had no way to do that.

5 So in that way, the government's production of this
6 chart was, at first, quite welcome. But as I'm going to go
7 into a little bit after this, and a lot in closed session, the
8 chart purporting to marry CIA personnel with what they did at
9 the black sites in a chronological order actually ended up
10 throwing the legitimacy of almost every page of the 2.d.,
11 2.f., and 2.g. discovery into doubt, as well as the actual
12 interrogation summaries.

13 The second note is that the government originally
14 submitted the RDI chart with an unclassified letter to the
15 defense, and this is the September 6 letter of last year that
16 we're going to talk about in some detail. That's the letter
17 from the government. And that letter, similar to the
18 representations in court in January, is remarkably unequivocal
19 about what they say they have provided to us. And again, this
20 letter was provided to us in the same submission that
21 prohibited us from interviewing former CIA -- former and
22 current CIA officials. So this is basically -- the chart is
23 basically their consolation prize for illegally cutting off

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1 our constitutionally-mandated investigation.

2 And I'd like to refer to the September 6th letter for
3 just a moment. I understand that it changed last night, and
4 Mr. Connell is going to talk about that in some detail, but
5 the letter describing the chart --

6 May I have use the document camera, Your Honor? This
7 is not for display to the gallery, it's just for the military
8 commission.

9 MJ [COL POHL]: I've got the letter in front of me.

10 ADC [MS. PRADHAN]: Okay. Well then, the letter
11 describing the chart says, "Over the course of many months,
12 the military judge has reviewed and ultimately approved
13 defense summaries of certain classified information related to
14 the CIA RDI program submitted by the prosecution in numerous
15 ex parte classified filings. The attached document is an
16 index of the discovery provided by the prosecution to date
17 relating to the Central Intelligence Agency's former
18 Rendition, Detention, and Interrogation program." Slowing
19 down.

20 "The military commission approved summaries that omit
21 certain information, including the dates of reports, names of
22 CIA employees or contractors, and information regarding the
23 locations where the defendants were held."

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1 It's the third paragraph that's really the most
2 interesting and provides the most information about this
3 index. "The index lists discovery provided by the prosecution
4 in chronological order of the event that is documented in the
5 materials. In some cases, the information in the original
6 materials was undated and the prosecution provided its best
7 estimate of when the event documented in the materials took
8 place."

9 "Where applicable" -- now, that's -- that's a slight
10 equivocation, right? There the prosecution is saying there
11 were some -- there were some summaries, there was some
12 materials, that didn't have dates on it. And so we, the
13 government, that has all of the information at our fingertips
14 about when these things may have taken place, basically took
15 our best guess as to when they may have taken place.

16 The next line, though, doesn't have that same
17 equivocation. It says, "Where applicable, the prosecution
18 provided a location, identified by location number, where the
19 event took place." So they seem pretty certain that they've
20 gotten the locations right.

21 Because of the nature of the involvement of certain
22 individuals in the CIA RDI program, and specifically the
23 nature of contact with the accused, the government assigned

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1 those individuals a unique functional identifier, a UFI. The
2 index identifies when particular individuals were present for
3 events documented in the discovery materials. Again, there's
4 no equivocation with that statement. They have gone through,
5 they had all of the information together, and they have
6 identified, unequivocally, when particular individuals were
7 present for events documented in the discovery materials. And
8 we are meant to rely upon those representations.

9 The biggest general problem, Your Honor, not with
10 just the RDI chart, but with all of the RDI discovery that
11 we've gotten ----

12 One second. One second. Sorry. Slightly
13 dehydrated.

14 MJ [COL POHL]: Okay. Take your time.

15 ADC [MS. PRADHAN]: ---- is where the government says the
16 summaries, quote, omit the dates of the reports.

17 Now, what the summaries have, and the military
18 commission is aware of this -- what the summaries have instead
19 is this very strange date-blurring convention of early, mid,
20 and late and then a year.

21 We've taken the most obvious meaning of this. We
22 have never received an explanation for this convention, but
23 most obvious, reasonable man's explanation of this --

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1 reasonable woman's explanation of this -- is that early would
2 be January to April of a year, the first four months; mid
3 would be May to August; late would be September through
4 December.

5 There are two major problems with this date-blurring
6 convention that the government has adopted. The first is that
7 it is impossible to construct any meaningful timeline with it
8 when you're talking about events or interrogations specific to
9 one day of one year that involved one or several CIA
10 personnel, as the military commission itself pointed out in
11 January.

12 The second is that the government has applied this
13 date-blurring convention completely arbitrarily, and in some
14 critical cases, most of which I'll be able to talk about more
15 in closed session, intentionally wrongly to mask the contents
16 of a document. There is no other explanation for some of the
17 discrepancies in those dates, Your Honor.

18 So I want to talk for a second about the need for the
19 exact dates, why do we need the exact dates in the timeline.

20 The CIA, in unclassified documents has described a,
21 what they call a, quote, predictable set of events for
22 detainees arriving at the black sites. The exact dates would
23 lead us to people at the site who in- or out-processed them.

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1 MJ [COL POHL]: Are you asking me to reconsider the
2 summaries I provided with the trimester date system?

3 ADC [MS. PRADHAN]: No, sir. I'm asking you to compel the
4 government to provide us all of the original documents.

5 MJ [COL POHL]: Well, what -- the documents the summaries
6 were based on?

7 ADC [MS. PRADHAN]: Yes.

8 MJ [COL POHL]: So you're asking me to reconsider the
9 adequacy of the summary if you need the original documents.
10 Aren't you asking me to reconsider the adequacy of the
11 summary?

12 ADC [MS. PRADHAN]: In a way, sir, but ----

13 MJ [COL POHL]: Are you allowed to do that by the statute?

14 ADC [MS. PRADHAN]: Well, Your Honor, we're not -- you
15 know, we're not asking you to look at the summary and come up
16 with a different summary. We're saying that we need the
17 original documents that underlie ----

18 MJ [COL POHL]: Because the summary is inadequate.

19 ADC [MS. PRADHAN]: Well, not just because the summary is
20 inadequate, but because the -- not particularly because the
21 summary is inadequate, but because the government's generated
22 RDI index, which I understand was not put through the military
23 commission, was not put through the 505 process, has thrown

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1 all of those summaries into relief.

2 MJ [COL POHL]: No, but what you're asking, though, is
3 in -- is that the government provided an original in the 505
4 process, they provided a summary, and I eventually approved
5 the summary.

6 ADC [MS. PRADHAN]: Uh-huh.

7 MJ [COL POHL]: This is not unique. This process is not
8 unique to the military commissions. It's identical to the
9 CIPA process ----

10 ADC [MS. PRADHAN]: Yes, sir.

11 MJ [COL POHL]: ---- in federal court and everything else.
12 Okay, the only difference is the statute in the military
13 commissions don't permit you to ask for reconsideration. I
14 understand that distinction. But if you say, I need the
15 original documents, you're basically saying the summary is
16 inadequate and therefore you're not -- you're asking me to
17 submit a -- to give you the original documents that I've
18 already held that the summary is adequate. How is that not a
19 reconsideration?

20 ADC [MS. PRADHAN]: Well, Your Honor, actually, under
21 R.M.C. 905(f), the military commission has actually found, in
22 164C, that the commission can, either sua sponte or upon a
23 motion to compel discovery, which this is, review the

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1 summarized information to determine if additional information
2 should be provided in the summary.

3 MJ [COL POHL]: Yes, but that's -- but understand, is you
4 cannot use a motion to compel, and I know why I said that and
5 why I did that because sometimes you have information I don't
6 have ----

7 ADC [MS. PRADHAN]: Yes, sir.

8 MJ [COL POHL]: ---- and sometimes, you know, you got
9 contacts I don't necessarily have.

10 But if I view the motion to compel as nothing more
11 than a motion for reconsideration, no matter what you label it
12 as ----

13 ADC [MS. PRADHAN]: Yes.

14 MJ [COL POHL]: ---- if I see it just as a motion for
15 reconsideration, then I feel I'm perfectly authorized to treat
16 it as a motion for reconsideration. If I -- but again, I put
17 that caveat in there because there could be circumstances, but
18 that was not a -- that was not a -- if you change the caption
19 on the motion from "reconsideration" to "compel," somehow that
20 automatically gets you to me to look at it again.

21 ADC [MS. PRADHAN]: Yes, Your Honor.

22 And just to be clear, though, the argument that I'm
23 making is not that only the summarized documents need to be --

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1 you know, not only the documents for which we have been
2 provided summaries need to be given to us, what we're saying
3 is that all of the -- this is a motion to compel all of the
4 original documents, whether they have been through the 505
5 process or not.

6 MJ [COL POHL]: I understand your position.

7 ADC [MS. PRADHAN]: So we believe it's broader.

8 MJ [COL POHL]: I'm not sure there's a distinction, but I
9 understand your position. I mean, you're saying you got a
10 summary, now you want the original document. Well, the whole
11 purpose of the summary is to put you in the same position you
12 would be as if you had the original document, at the same time
13 protecting any national security equities in the original
14 document. And that's the whole 505 process.

15 ADC [MS. PRADHAN]: Yes.

16 MJ [COL POHL]: And you're basically saying because of --
17 because we don't -- we want more information than the
18 summaries, we now want to see the original documents, would,
19 in essence, turn the whole 505 process on its head. Because
20 why go through the drill if you have a right -- we're talking
21 about a right here ----

22 ADC [MS. PRADHAN]: Uh-huh.

23 MJ [COL POHL]: ---- to see all of the original documents.

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1 ADC [MS. PRADHAN]: Yes, Your Honor. But again, the RDI
2 index -- the RDI index itself didn't go through the 505
3 process and the documents themselves, right, not every
4 document that we're talking about, went through the 505
5 process.

6 And so ----

7 MJ [COL POHL]: Again, I don't see a discovery that the
8 government gives you that doesn't -- I don't see all discovery
9 the government gives you, classified or otherwise.

10 ADC [MS. PRADHAN]: Right.

11 MJ [COL POHL]: I only see, you know, what I see, so --
12 and on the other hand, I don't see the discovery they don't
13 give you either as a general rule either, so -- but go ahead.

14 ADC [MS. PRADHAN]: Yes, Your Honor. And that's why we
15 went -- we go into quite some detail on that in 534B, and pull
16 in really all of the cross-referencing with ----

17 MJ [COL POHL]: Okay. No, I understand that.

18 ADC [MS. PRADHAN]: ---- with the other documents as well.

19 MJ [COL POHL]: Go ahead.

20 ADC [MS. PRADHAN]: So the government's -- just a little
21 bit -- I just want to touch back on the blurred-date
22 convention because the government's blurred-date convention
23 specifically prevents the creation of that chronology that I

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1 was talking about, with the -- with being able to put together
2 Mr. al Baluchi's torture with his interrogations with the
3 people who were in the room. Exact dates can help us evaluate
4 witnesses who we have to then have the ability to interview,
5 whose testimony turns on those dates. The government's date
6 convention specifically prevents that.

7 Exact dates would provide us with details that
8 corroborate a detainee's own observations. And we have argued
9 time after time after time that Mr. al Baluchi's recollections
10 of his own torture, while they may be helpful, are not
11 reliable precisely because of his torture over a lengthy
12 period of time. So corroborating those recollections of
13 events is specifically prevented by the government's
14 blurred-date convention.

15 And this brings me to the more specific -- specific
16 problems with the convention and with the RDI index, at least
17 the ones that I can discuss in this session.

18 To begin with, we have understood Mr. al Baluchi's
19 date of capture in Pakistan to be April 29, 2003, a date that,
20 again, according to a reasonable reading of this convention,
21 would fall in early 2003.

22 The government's deliberate obfuscation of the CIA's
23 involvement in Mr. al Baluchi's initial detention in Pakistan

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1 is clear in its summary of a custodial interview of
2 Mr. al Baluchi. The summary itself ----

3 MJ [COL POHL]: Is the summary classified?

4 ADC [MS. PRADHAN]: No. The summary itself is
5 UNCLASSIFIED//FOUO. And I can give you the Bates number which
6 is ----

7 MJ [COL POHL]: I don't need that. I just want to make
8 sure we're not drifting into classified information. Go
9 ahead.

10 ADC [MS. PRADHAN]: No, sir. No. But for reference by
11 the government, by the military commission, the Bates number
12 is MEA-STA-00001444.

13 The summary itself is dated early 2003, which would
14 place the interview squarely in Pakistan. But it's listed as
15 a custodial interview that would normally indicate that it was
16 conducted in CIA custody. All right. That's custodial
17 interview. It discusses Mr. al Baluchi's purported statements
18 regarding his knowledge or lack thereof -- and lack thereof,
19 really -- of associates of Usama bin Laden's. I won't go into
20 discussion of how it's labeled in the RDI index here in open
21 session, although it's relevant to the government's intent in
22 producing these documents.

23 Remember now, according to the government, the chart

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1 purports to list, in chronological order and with relevant
2 personnel, all of these documents. Its entry in this chart,
3 though, bears zero resemblance to the date or location stated
4 in the summary itself.

5 And it's obvious to the government, I think it should
6 be obvious to everyone, that the timing of Mr. al Baluchi's
7 interrogations regarding alleged connections to Usama bin
8 Laden and al Qaeda are fairly vital information for the
9 defense, along with the locations of those interrogations, the
10 personnel who were present, the -- you know, any methods of
11 coercion or torture that were used. But this summary is
12 intentionally shoe-horned by the government into, you know, a
13 different space altogether in this chronology to de-emphasize
14 its importance when placed in context.

15 What the RDI index has made clear is that the
16 capture, rendition, initial interrogations, and torture of
17 Mr. al Baluchi were not only intentionally obscured by the
18 government but they remain intentionally obscured, and they
19 will do so until we get those original documents.

20 The second broad issue goes to discrepancies between
21 the summaries or the -- you know, the documents listed in the
22 RDI index, and the publicly available information in the SSCI
23 report and other declassified CIA records.

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1 And here, I would like to use the document camera,
2 Your Honor. This is a document with Bates number
3 MEA-10018 ----

4 MJ [COL POHL]: Have you shown it to the CISO for review?

5 ADC [MS. PRADHAN]: I have not, Your Honor. It's marked
6 UNCLASSIFIED//FOUO and I don't intend to display to the
7 gallery.

8 MJ [COL POHL]: Okay. Just so it's clear that nothing
9 gets displayed to the third parties unless it goes through the
10 proper review process, I don't care what it says on it.

11 ADC [MS. PRADHAN]: I understand, Your Honor. This is
12 really just for you.

13 MJ [COL POHL]: Okay. Go ahead. You've got to make it an
14 exhibit, though, now.

15 ADC [MS. PRADHAN]: Okay. May I approach?

16 MJ [COL POHL]: Sure. Assuming it's not an exhibit in
17 something else. Ms. Pradhan, it's not an exhibit somewhere
18 else, is it? Okay.

19 TC [MR. RYAN]: Excuse me, Your Honor. May I be excused
20 for a moment, please?

21 MJ [COL POHL]: Sure.

22 TC [MR. GROHARING]: Your Honor, I'd just ask, if it's not
23 already an exhibit, I'd ask for a copy of what she's talking

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1 about.

2 MJ [COL POHL]: Sure.

3 [Pause.]

4 MJ [COL POHL]: Ms. Pradhan, the court reporters want you.

5 ADC [MS. PRADHAN]: Okay, Your Honor. Thank you, as
6 always, to the court reporters for their patience, and we will
7 provide it to the government, yes.

8 MJ [COL POHL]: No, you'll provide it to the government
9 now.

10 ADC [MS. PRADHAN]: Okay.

11 MJ [COL POHL]: I mean, they have a right to see it ----

12 ADC [MS. PRADHAN]: All right.

13 MJ [COL POHL]: ---- as you're talking about it.

14 ADC [MS. PRADHAN]: You know what, Your Honor, I'm going
15 to read from these.

16 MJ [COL POHL]: Okay. Well, since it's an exhibit now,
17 let me see a copy of it, please.

18 ADC [MS. PRADHAN]: Yes. And these are marked AE 534E.

19 TC [MR. GROHARING]: Your Honor, now that it's an exhibit,
20 I would like a copy of it as well.

21 MJ [COL POHL]: I thought she just gave you a copy.

22 TC [MR. GROHARING]: She didn't have a copy prepared, I
23 don't believe, Your Honor.

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1 ADC [MS. PRADHAN]: No, we didn't have an additional copy.

2 MJ [COL POHL]: Okay. How many copies do you have?

3 ADC [MS. PRADHAN]: One.

4 MJ [COL POHL]: That's not useful.

5 ADC [MS. PRADHAN]: Okay.

6 MJ [COL POHL]: Okay. I mean, move on to something else.

7 If you get additional copies in time, you can come back to it.

8 ADC [MS. PRADHAN]: Okay.

9 May I discuss these?

10 MJ [COL POHL]: I'm sorry?

11 ADC [MS. PRADHAN]: May I discuss these, Your Honor,
12 without -- without reading from them or ----

13 TC [MR. GROHARING]: Your Honor, perhaps we could take a
14 recess. It's now an exhibit and she wants to discuss it.

15 MJ [COL POHL]: Well, yeah. I mean, okay. Hold on a
16 second. I mean, you can't discuss facts not in evidence,
17 which is really what you're asking to do here. Okay. You
18 want to refer to an exhibit that's not been admitted, and
19 it's -- quite frankly, it's not useful to me without it, but
20 we'll -- we'll take a 15-minute recess and give you an
21 opportunity to make some copies.

22 ADC [MS. PRADHAN]: Thank you, Your Honor.

23 MJ [COL POHL]: This will count as the morning recess.

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1 The commission is in recess.

2 [The R.M.C. 803 session recessed at 0954, 1 March 2018.]

3 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1013,
2 1 March 2018.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present.

5 Just if I didn't make it clear on the record, that I
6 find the absence of Mr. Ali, Mr. Hawsawi to be knowing and
7 voluntary and Mr. Ryan has rejoined us.

8 CP [BG MARTINS]: Your Honor, Mr. Trivett is actually out
9 now.

10 MJ [COL POHL]: Okay.

11 CP [BG MARTINS]: He intends to come back in a few
12 minutes.

13 MJ [COL POHL]: Okay. Ms. Pradhan, I listened to you for
14 about 40 minutes now. And let me ask you -- just give me your
15 bottom line. What do you want me to do?

16 ADC [MS. PRADHAN]: Your Honor, what the RDI index makes
17 clear is this, you know, the documents -- the original
18 documents, including the summaries that the military
19 commission approved, there is information and discrepancies in
20 dates and in the underlying documents that the military
21 commission could not possibly have known when approving all of
22 these -- all of these documents, whether they -- if they went
23 through the 505 process.

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1 MJ [COL POHL]: Let me ask you a question. When you say
2 the dates are wrong, you're saying you have the chronology
3 provided by the government and you have the 505 summaries and
4 sometimes they don't mesh?

5 ADC [MS. PRADHAN]: It's more than sometimes, Your Honor,
6 and that's ----

7 MJ [COL POHL]: Okay. Okay. So you have a -- you have a
8 document, the summary, which is a second-level -- second-level
9 source ----

10 ADC [MS. PRADHAN]: Yes.

11 MJ [COL POHL]: ---- and then, after that, the government
12 puts together a chronology from those summaries and you see
13 errors in them.

14 ADC [MS. PRADHAN]: Yes.

15 MJ [COL POHL]: So can't you simply then take the -- take
16 the summary and say, okay, this is the correct date and that's
17 the wrong date on the chronology?

18 ADC [MS. PRADHAN]: No, sir, because what the chronology
19 also does is that it includes -- as the prosecution said in
20 their letter of September 6 -- it includes personnel as well.
21 It adds personnel and locations.

22 MJ [COL POHL]: Okay. So back to my point ----

23 ADC [MS. PRADHAN]: Yes.

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1 MJ [COL POHL]: ---- what do you want me to do? Order the
2 government to provide you the original documents?

3 ADC [MS. PRADHAN]: Yes, Your Honor. I think that's
4 what's necessary.

5 MJ [COL POHL]: Okay. Okay.

6 ADC [MS. PRADHAN]: And I think that when we go through
7 all of the examples in closed session of all of the
8 discrepancies and just how serious they are, I think the
9 military commission will see that there is no way we can rely
10 on the summaries. There's just no way. There are internal
11 discrepancies in the summaries. There are discrepancies
12 between the interrogation summaries and the 2.d. personnel
13 profiles. There are discrepancies between the summaries of
14 statements made by the defendants while they were being
15 tortured and the personnel profiles and the RDI index.

16 There are complex discrepancies that cannot be
17 explained away by relying on one or the other, or any of
18 these, and that is what we outlined in great detail, and I
19 know it's a lot of very dry detail in 534B, but something that
20 I'd like to illustrate both here and in closed session.

21 MJ [COL POHL]: Let's just -- I don't want to hear it
22 twice. I mean, I understand your point. Quite frankly, there
23 is no, to my knowledge, unclassified pleadings on this issue.

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1 ADC [MS. PRADHAN]: Well -- Your Honor, with respect ----

2 MJ [COL POHL]: I mean, I'm looking at my Data Locker.

3 There's no unclassified pleadings on this thing. I've asked
4 people at the break, is there any unclassified pleadings,
5 substantive pleadings -- I'm not talking about notices -- and
6 there is none.

7 ADC [MS. PRADHAN]: Your Honor, with respect, there are
8 examples, though, of the discrepancies that are unclassified.
9 And I think that the public has the right to see what those
10 discrepancies are and exactly for how long the government has
11 been producing this faulty discovery to the defense.

12 If I may, Your Honor, there are -- very briefly -- I
13 don't have a whole lot more on this, but there were
14 essentially four categories of -- broad categories of problems
15 with the discovery. The first I already discussed, and that
16 was the confusion about Mr. al Baluchi's capture and the CIA
17 involvement.

18 The second were the discrepancies between publicly
19 available records and the documents that the government has
20 given us.

21 MJ [COL POHL]: How do you know the publicly available
22 records are correct and the ones the government gave you are
23 wrong?

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1 ADC [MS. PRADHAN]: We don't. That's the problem.

2 MJ [COL POHL]: And so how do we resolve that?

3 ADC [MS. PRADHAN]: Through the original documents.

4 That's the only solution. And if I may ----

5 MJ [COL POHL]: You're assuming the original documents --

6 the summary is an inaccurate representation of the original
7 documents?

8 ADC [MS. PRADHAN]: We don't know which is accurate and
9 which is inaccurate. But, for example -- if I may give the
10 military commission an example.

11 MJ [COL POHL]: Okay. Just -- I mean, we're kind of
12 beating all of this to death. I got it. You can give an
13 example, but ----

14 ADC [MS. PRADHAN]: Okay. I'll try to keep it as short as
15 possible.

16 MJ [COL POHL]: Go ahead.

17 ADC [MS. PRADHAN]: Okay. So the document that I -- and
18 again, with apologies to the military commissions for the --
19 for the -- to the military commission for the disruption, but
20 the document that I attempted to hand out earlier or attempted
21 to show is a summary of a report from mid 2003 that purports
22 to document the interrogation of Mr. al Baluchi on the 18th of
23 May 2003 while he was likely at COBALT, according to the SSCI

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1 report. Right? COBALT is one of the black sites. The
2 original report, right, would contain valuable information for
3 his defense.

4 Now, the summary states that prior to his
5 interrogation -- and this is MEA-10018-00007258. The summary
6 states that prior to his interrogation on the 18th of May, he
7 was subjected to standing sleep deprivation since his initial
8 interrogation on the 17th of May 2003. A reasonable reading
9 of the summary would interpret initial interrogation session
10 as the first interrogation session at COBALT. This -- this
11 kind of granularity, Your Honor, is necessary. This is what
12 we have to put together, because this was his first period of
13 time, we think, in CIA custody and when his interrogations
14 began.

15 Now, there's confusion over the use of the word
16 "initial" in this summary, which I can talk about in closed
17 session, but we can't actually be certain that the original
18 document used the word "initial" as the government does here,
19 so we don't know.

20 The summary then states that Mr. al Baluchi was
21 subjected to what they called enhanced interrogation
22 techniques during the 18th May interrogation session. And it
23 talks about standing sleep deprivation, it talks about all of

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1 the techniques that were used on him.

2 The redacted executive summary of the SSCI report
3 says, however, that after Mr. al Baluchi was transferred to
4 CIA custody, the CIA subjected Mr. al Baluchi to CIA's
5 enhanced interrogation techniques from 17th May 2003 to
6 May 20th, 2003. This would mean that the May 17th
7 interrogation session, the initial interrogation session,
8 included the use of torture, or EITs, right? Now, when the
9 torture began is important. It is really, really important to
10 know when he was first interrogated, when they first tortured
11 him, and who was in the room for both of those, right? And
12 the conditions in which he was sitting when he was being
13 tortured.

14 Document -- there's one other document, which is a
15 summary of a report, that's pertinent to this. A summary of a
16 report dated early 2003, even though it discusses the same
17 general period of time, states clearly that on May 17th, 2003,
18 an interrogation session was held with Mr. al Baluchi. The
19 interrogation lasted two hours, incorporated no enhanced
20 techniques. So that summary includes no language about the
21 17th of May being an initial interrogation. But it does
22 state, contradicting the SSCI report, that the May 17th
23 interrogation included no EITs.

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1 So even further complicating this -- and this should
2 show the military commission just how much research we have
3 tried to do on this and how -- how granular we have gotten in
4 trying to pinpoint this. Complicating this analysis is a set
5 of publicly released CIA slides entitled "CIA Interrogation
6 Program Briefing Slides," dating -- it's dated July 29th of
7 2003. And that says that Mr. al Baluchi was interrogated,
8 just simply interrogated, from the 18th to the 20th of May of
9 2003.

10 So both the government and the SSCI report and the
11 SSCI -- excuse me, staffers, have had access to the original
12 CIA interrogation reports giving rise to the two fairly shoddy
13 summaries that we just went through. Without access to the
14 original reports, we have no explanation for how three
15 different bodies, the CIA, the Senate Intelligence Committee,
16 and the government here, with the same original reports came
17 to different conclusions about when exactly Mr. al Baluchi's
18 CIA interrogations and his torture began.

19 There is one other example, Your Honor. There are --
20 let me just make sure. There are actually two other examples.

21 MJ [COL POHL]: Just pick one. I mean, I got your point.
22 I mean, what you -- I mean, the point you're making to me,
23 I've got.

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1 ADC [MS. PRADHAN]: Okay.

2 MJ [COL POHL]: You believe the original document is going
3 to have more specificity on this issue than not.

4 ADC [MS. PRADHAN]: Yes.

5 MJ [COL POHL]: Okay. And so do you want me to go back
6 and look at the original documents ----

7 ADC [MS. PRADHAN]: No.

8 MJ [COL POHL]: ---- and to see ----

9 ADC [MS. PRADHAN]: Well, yes, Your Honor, but we want --
10 we want -- we want the military commission to compel the
11 government to give us the original documents.

12 MJ [COL POHL]: All -- well, just so I'm clear ----

13 ADC [MS. PRADHAN]: Yes.

14 MJ [COL POHL]: ---- you want all of the original
15 documents for which 505 summaries have been provided?

16 ADC [MS. PRADHAN]: We want all of the original documents
17 contained in the RDI index.

18 MJ [COL POHL]: Okay. For which 505 summaries were
19 provided, I'm assuming?

20 ADC [MS. PRADHAN]: I'm also assuming, yes.

21 MJ [COL POHL]: Well, no, no. You're the one asking. I'm
22 just trying to clarify what the scope of your request is. If
23 you want ----

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1 ADC [MS. PRADHAN]: Yes, Your Honor, ----

2 MJ [COL POHL]: ---- all the original ----

3 ADC [MS. PRADHAN]: The scope of the request ----

4 MJ [COL POHL]: Okay. So basically is, you want to
5 check -- you -- you -- let me just ask you this: And if I
6 were to order that, wouldn't that basically just throw the 505
7 process -- summary process out the window?

8 ADC [MS. PRADHAN]: No, Your Honor.

9 MJ [COL POHL]: Because if we're going to give you the
10 originals anyway, why go -- why did I spend God knows how much
11 time on doing all of this stuff if the answer is, well, we
12 don't like this summary, Your Honor, give us all of the
13 originals?

14 ADC [MS. PRADHAN]: I completely understand the military
15 commission's frustration, but it ----

16 MJ [COL POHL]: It's not a frustration, it's just how
17 the -- it's just how the statute reads.

18 ADC [MS. PRADHAN]: Absolutely. It would not throw the
19 505 process out. It, in fact -- it doesn't even -- it is
20 really not an indictment of the 505 process. What it is is an
21 indictment of what the government withheld, right, in
22 preparing these summaries. It's not ----

23 MJ [COL POHL]: But you're operating on the assumption

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1 that the summary I approved in the original documents, it
2 contains this information.

3 ADC [MS. PRADHAN]: Yes, Your Honor. It has to. There's
4 no other solution because the ----

5 MJ [COL POHL]: Okay.

6 ADC [MS. PRADHAN]: ---- RDI ----

7 MJ [COL POHL]: I'm going to tell you something -- and
8 just to let you know, when you say it has to, you've a lot
9 more faith in the government's, big G's, ability to write
10 detailed, comprehensive, well-read documents that number in
11 the thousands, if not the hundreds of thousands, that ----

12 ADC [MS. PRADHAN]: Well ----

13 MJ [COL POHL]: ---- each one would be -- I mean, you
14 understand these are stand-alone documents that come from
15 point -- one person at point A and to another person at point
16 B, and to say that the information has to be in there I think
17 is ----

18 ADC [MS. PRADHAN]: I completely understand.

19 MJ [COL POHL]: ---- not realistic. Let me just put it
20 that way.

21 ADC [MS. PRADHAN]: Just to clarify.

22 MJ [COL POHL]: Go ahead.

23 ADC [MS. PRADHAN]: I have absolutely no faith in the

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1 government's ability to maintain proper documentary records
2 whatsoever.

3 MJ [COL POHL]: Okay.

4 ADC [MS. PRADHAN]: But, but -- we know that the
5 underlying documents contain more information. And let me
6 pull out one last example, if I may. You said I could have
7 one more example.

8 MJ [COL POHL]: One more.

9 ADC [MS. PRADHAN]: I'll give you one more.

10 One of the most disturbing discrepancies involves a
11 document not included in the RDI index, actually, and that is
12 MEA-STA-0003740, summary of a custodial interview of
13 Mr. Mohammad that was conducted in early 2003. And the reason
14 I want to highlight this example is that it shows its
15 comparison with publicly available documents, shows how the
16 government intentionally stripped torture information from the
17 original documents. We know that the original documents had
18 torture information in them.

19 MJ [COL POHL]: How do you know that?

20 ADC [MS. PRADHAN]: We know that because the SSCI report
21 provides context for the summary.

22 So the summary describes how Mr. Mohammad explained
23 that his nephew, Mr. al Baluchi, my client, and Majid Khan

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1 discussed with Saifullah Paracha a plan. They were talking.
2 Mr. al Baluchi and Majid Khan also approached Mr. Paracha and
3 his son about settling Majid Khan in the United States. So
4 this is what the summary says. Nowhere in the summary is a
5 description of the interrogation questions or any other
6 context provided for the information Mr. Mohammad provided
7 regarding Saifullah Paracha. In fact, nearly all of the
8 summaries of the custodial interviews stripped the questioning
9 information, right?

10 So the statements of Mr. Baluchi and the other
11 defendants sound entirely spontaneous. They sound -- they're
12 unprompted by EITs or unprompted by corroborating information
13 or coercion or torture. And we know that they were tortured,
14 everybody knows this. The redacted summary of the SSCI report
15 provides greater context for this particular interrogation,
16 okay.

17 They say -- and this is pages 355 to 356 of the SSCI
18 report. A CIA interrogation report from March 24th, 2003, and
19 again, they had the original document, states that, "During
20 the afternoon, Mr. Mohammad continued to be subjected to the
21 CIA's enhanced interrogation techniques, including the
22 waterboard. That evening, Mr. Mohammad's interrogators
23 received reports on information being provided by Majid Khan,

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1 who is in foreign government custody and being interviewed by
2 FBI special agents and foreign government officers."

3 CIA cables, multiple cables, describe Mr. Mohammad as
4 being, quote, boxed in by reporting from Majid Khan before
5 providing information on the Parachas. "Mr. Mohammad
6 corroborated" -- again, this is under torture; he spent the
7 previous day being waterboarded -- "corroborated reporting
8 from Majid Khan about Ammar al Baluchi and Majid Khan
9 approaching Saifullah Paracha for assistance in resettling
10 Majid Khan in the United States."

11 The redacted -- the redacted executive summary
12 concludes this section with the following sentence: "A later
13 CIA cable" -- right, again, multiple cables here -- "a later
14 CIA cable provided additional background stating Mr. Mohammad
15 did not volunteer information on Paracha. He provided this
16 reporting only when confronted with details on his role and
17 other information on the plot which had been provided by
18 detainee Majid Khan, who was at the time in foreign government
19 custody."

20 The government's summary of the same CIA cable or
21 cables quoted by the SSCI report strips all context regarding
22 Majid Khan's interrogation and possible torture by the foreign
23 government. The impact of that reporting on Mr. Mohammad, the

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1 additional fact that Mr. Mohammad made the statements in the
2 summary immediately following a day of torture, including
3 waterboarding, it strips all of that. The government's
4 summary is grotesquely misleading in that it makes
5 Mr. Mohammad's statement seem fully voluntary when that was
6 not the case.

7 We don't know how many summaries or substitutions or
8 documents that the government has given us strip evidence of
9 coercion or cross-reporting from interrogation reports, which
10 is exactly, Your Honor -- which is exactly the information
11 that we have tried for two years to connect in a timeline for
12 use at trial. That is exactly what we're trying to do, and
13 that is exactly the information that the government stripped.

14 Now, I will not -- I won't go into lengthier examples
15 on the last two categories, Your Honor, because you've asked
16 me not to, but I do -- I would like to just note that we've
17 also found a great deal of information -- further information
18 about the FBI collaboration with the CIA interrogations and
19 torture at the black sites, which, of course, is relevant and
20 material to their 2007 interrogations of Mr. al Baluchi.

21 So at a minimum, the government has spent nearly six
22 years since the arraignment, frankly, wasting our time.
23 They've wasted the military commissions' time with, you know,

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1 what I see, with what -- very little insight into the process,
2 false promises of what they were going to give us, right? And
3 the military commission went, I think -- when you analyze the
4 RDI index and what it shows compared to what was originally
5 approved by the military commission, it shows those
6 discrepancies in stark relief. It shows the unreliability of
7 the information we have. And we have been through every page
8 of that discovery, every single page.

9 Where does that leave us? So contrary to the
10 government's representations to the military commission in
11 January, their distortion of the RDI documents means that we
12 can't determine when Mr. al Baluchi entered CIA custody. We
13 can't determine when he was first interrogated by CIA
14 personnel. We can't determine when he was first subjected to
15 torture. And other hundreds of critical details about the
16 three and a half years he spent in CIA custody to include the
17 dates of events, locations of events, the personnel who
18 oversaw all of these events. The entire body of discovery --
19 and this is not an exaggeration when we go through that RDI
20 index, the entire body of RDI discovery has to be viewed as
21 unreliable.

22 So the only possible conclusion can be that the
23 original documents have to be produced to the defense. The

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1 same way that the Senate staffers had access to them, the same
2 way that the government has access to them, the defense, who
3 are security cleared, should have access to them.

4 Thank you.

5 MJ [COL POHL]: Thank you.

6 Trial Counsel.

7 TC [MR. GROHARING]: Good morning, Your Honor.

8 MJ [COL POHL]: Good morning.

9 TC [MR. GROHARING]: Just a couple of points to make.

10 First I'll say, importantly and categorically, no
11 edits were ever made to any document to attempt to mislead the
12 defense. There was no intentional wrongdoing, no obfuscation,
13 no information intentionally stripped; and the summaries are
14 not, in any way, grotesquely misleading. I think those are
15 just some of Ms. Pradhan's quotes. She goes into much more
16 detail in the filing, and I categorically reject any of these
17 comments.

18 The summaries were prepared in painstaking detail of
19 voluminous original documents. All of the summaries that
20 we're talking about were summaries that were presented to the
21 judge, to you, Your Honor, for your review, where you can see
22 precisely the edits that were made to the original documents,
23 and you approved the proposed summaries that the government

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1 provided.

2 And so I don't doubt for a second, that in the
3 hundreds of thousands of pages of material that the United
4 States has gone through, and the tens of thousands of pages
5 that we've brought to the commission and summarized, that
6 mistakes could have been made on occasion. I would be
7 surprised if there were no mistakes in any summary provided to
8 the defense.

9 There's a way to -- in the normal course of
10 litigation, with normal practice and litigants who work with
11 each other to resolve problems, you'd pick up the phone, you'd
12 ask opposing counsel a question, and you might be able to
13 resolve some of these very simple questions that counsel have,
14 short of moving for dismissal of the case or an extreme remedy
15 of turning over all original classified information. But
16 regrettably, we don't have that here. I would suggest that
17 and commend that practice to counsel and we would be happy to
18 engage in it respectfully, contrary to their practice before
19 the commission with respect to this filing.

20 So what the government will do is look at these
21 complaints, to the extent we can understand them from the
22 defense pleadings, and answer their questions where we can.
23 The military judge is right, we summarized the documents we

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1 have. Sometimes those documents, the original documents, have
2 mistakes in them and we don't make up information and add
3 information in to fix that. So that's a -- certainly can be a
4 cause of some of the problems, as well as human error in the
5 process.

6 One of the comments about Mr. Mohammad's statement --
7 I mean, the simple answer to that is the index that they have
8 is from Mr. Ali. We gave each accused their own index where
9 they could understand the -- their own discovery as it applies
10 to them. So, of course, Mr. Mohammad's -- a statement that
11 Mr. Mohammad made would not be on Mr. Ali's index. We turned
12 over all of the statements of all of the accused to each
13 other, but we didn't capture those on the indices that we
14 provided to each individual defense team. So again, that's a
15 very easy explanation.

16 There's no nefarious intent there, notwithstanding
17 counsel's remarks. That's something that could have probably
18 been resolved in about a 30-second telephone call.

19 Your Honor, I would add that the dates issue raised
20 by counsel, the early, mid, late, that is a practice that was
21 followed to protect classified information. The original
22 classification authority has subsequently issued, and very
23 recently, yesterday, issued guidance that would allow

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1 additional dates to be provided in certain materials, not all
2 dates. That was submitted to the court in AE 542 (2nd Gov
3 Sup), a classified filing just filed yesterday. It wasn't
4 filed in relation to this motion, but I did just want to just
5 advise the court of that fact. Based on that new guidance, we
6 will update the indices and provide dates everywhere we can
7 that that is no longer -- where it's no longer classified.

8 MJ [COL POHL]: Do I have any role with the updated
9 guidance other than being told what it is? I mean, is this
10 triggering a new 505 review by me?

11 TC [MR. GROHARING]: There's -- so the guidance in
12 question, the 542 (Gov 2nd Amended) [sic] asks for relief for
13 other certain materials that we're providing to you, and the
14 guidance impacts those materials. We will then go back for
15 the indices and update those indices and replace where
16 permissible early, mid, late with a -- with a precise date.

17 MJ [COL POHL]: Yes.

18 TC [MR. GROHARING]: And I think that will solve ----

19 MJ [COL POHL]: That was 542?

20 TC [MR. GROHARING]: (Gov 2nd Sup), I believe, Your Honor.

21 MJ [COL POHL]: Okay. What level is it classified at?

22 TC [MR. GROHARING]: At Top Secret level, I believe, sir.

23 MJ [COL POHL]: Okay.

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1 TC [MR. GROHARING]: And so absent questions from Your
2 Honor ----

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

4 TC [MR. GROHARING]: All right. Thank you.

5 MJ [COL POHL]: Ms. Pradhan, last word.

6 ADC [MS. PRADHAN]: Just very quickly, Your Honor.

7 I'm amused at the government's characterization of
8 these as occasional mistakes. First of all, the RDI index was
9 not approved by the military commission. This is something,
10 again, that they gave us sua sponte as part of their -- as
11 part of their prohibition on our investigation into the black
12 sites. This was, as I said, a bit of a consolation prize to
13 us.

14 Now, Mr. Groharing said that this could have been
15 resolved in a 30-second phone call. I submit that it would
16 have taken in excess of 30 days to work out every single
17 discrepancy in this index that you now have before you, Your
18 Honor.

19 They're not occasional mistakes. They're not simple
20 mistakes. The government took the summaries that they
21 created, right, that have dates, to the extent that there are
22 dates, right, early 2003, late 2005, mid 2004 -- those are the
23 dates that are on each summary. Then they put them -- I mean,

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1 they have these summaries, right? They wrote these summaries.
2 They assigned the dates to these summaries. They put those
3 summaries in what that they called a chronology, and then
4 they, strangely, assigned entirely different dates in the RDI
5 index to those documents.

6 Why would the government put a document that has new
7 or interesting or, frankly, suspicious information about the
8 CIA's involvement in Mr. al Baluchi's initial detention in
9 Pakistan -- why would they take that, with perhaps a correct
10 date of early 2003 on the summary itself, and put it under a
11 completely different date in the index they provided to us?

12 And why would they do that tens of times? Not just
13 once, not just twice, not just three times. Again, 534B goes
14 through every -- not every -- not every example, because it
15 would have been a thousand pages long, but it picks -- I
16 believe it's 26 of the most compelling, complex discrepancies.

17 Because what they then do, Your Honor -- again, they
18 take their own summaries that have dates, they put them in the
19 index, different dates. They then, on top of that, assign
20 personnel to them, who in many cases, which we highlight in
21 534B, were not present, according to the profiles they gave
22 us, at the locations that they say they were at, at the time
23 they say they were at, in the RDI index. The personnel don't

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1 match the locations; they don't match the dates.

2 It's not one mistake, it's hundreds of mistakes, if
3 we're going to call them mistakes. If the government sitting
4 here, the Department of Justice, with access to all of this
5 information is possibly capable of making hundreds and
6 hundreds and hundreds of mistakes over 17,000 pages of RDI
7 discovery, then we're in a lot of trouble.

8 Thank you, sir.

9 MJ [COL POHL]: Thank you, Ms. Pradhan.

10 LDC [MS. BORMANN]: Judge, you didn't ask other counsel
11 who are properly joined to this whether or not they had any
12 comments, and I do have a couple.

13 MJ [COL POHL]: Okay. If you -- yeah, I mean, we're
14 really talking about -- I know you're joined to it, but we're
15 talking about specifically Mr. Ali's discovery. But -- but
16 sure, if you wish to add something, you may.

17 LDC [MS. BORMANN]: Thank you.

18 **[The military judge conferred with courtroom personnel.]**

19 LDC [MS. BORMANN]: Just a couple of things. So when we
20 argued 164, which is -- Your Honor referred to it earlier,
21 it's the motion to bar you from not reconsidering
22 substitutions and summaries. It's the difference between the
23 Military Commissions Act and CIPA.

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1 I was here and Ms. Pradhan wasn't. And I look around
2 this courtroom and there are very few people from the defense
3 who were there that day. But I'm going to bring your
4 attention back to that day, when Ms. Baltes, who was then
5 arguing for the government, got up and said something like the
6 following -- I don't have the transcript right in front of me,
7 but this was basically it -- judge, we understand -- the
8 prosecution understands that circumstances change, that, you
9 know, the information we provide to the judge for summaries
10 may not always encompass what the defense needs based on its
11 theories as they're developing, and so we have no objection to
12 asking for additional discovery once they get the summaries
13 based upon what is then relevant and that may have changed.

14 And I'm going to bring you back then to your ruling
15 in 164 and how you determined that the bars under 505(f)(3)
16 and 949p-4(c) were not unconstitutional. And you said nothing
17 bars the defense from bringing to the commission's attention
18 in a motion to compel additional discovery matters that are
19 relevant to their defense that, frankly, the commission might
20 not have known of earlier.

21 And, in fact, you invited the defendants to each
22 submit a list of theories of defense and to supplement that as
23 time went on, if necessary. But, of course, I don't expect

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1 you to have memorized what we submitted to you way back then.

2 And so when you're looking at summaries, there's two
3 things you cannot possibly know. One is that you've received
4 all of the information from the government. And I mean, the
5 big government. You, when you're looking at proposed
6 summaries and whatever the government has given you to base
7 those upon, cannot possibly know that you have everything.
8 And so it is possible, as we sit here today, that what the
9 Senate Subcommittee on Intelligence had when they drafted the
10 report on the RDI program referred to so eloquently by
11 Ms. Pradhan is a set of different documents than you have.

12 And, you know, unfortunately, all you can do, I
13 guess, is ask the government -- or compel the government to
14 provide you the documents that the SSCI folks relied upon in
15 making a very different determination than what the summary
16 you provided to us has, since they are so completely different
17 and so completely contradictory.

18 Mr. Groharing said something really interesting. He
19 said, sometimes the material we get, the original material --
20 and I don't know what they mean by original. If it's cables,
21 we know those are not the only original records. Those, in
22 fact, are summaries of other stuff. But let's assume that
23 we're talking about the original, original, original, the very

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1 first document or oral history to be made. And if that
2 contains mistakes, that is an argument that that material has
3 to be provided to the defense, because no summary can ever be
4 accurate. This is not something we included in our theories
5 of defense.

6 MJ [COL POHL]: Well, how would you -- how would -- if
7 somebody wrote a cable and it contained a mistake, okay, how
8 would we know that's a mistake?

9 LDC [MS. BORMANN]: Well, you would know because
10 Ms. Pradhan or later us, when we are able to correlate our
11 discovery in a way that makes it usable, will bring it to your
12 attention.

13 So in this case, let's assume that what Mr. Groharing
14 is saying is correct, that there was a mistake in the original
15 document. Why is that important for the defense to know?
16 It's important because it impeaches the very evidence that the
17 government will rely upon to say that what they eventually
18 want to introduce isn't tainted.

19 So if what they're getting is mistaken reports, if
20 all they have are a series of reports that are full of
21 mistakes, that in and of itself is evidence of the
22 carelessness and lack of reliability of the evidence purported
23 to not taint later statements.

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1 So that was a mouthful, and I apologize for that.

2 MJ [COL POHL]: I followed it.

3 LDC [MS. BORMANN]: So let me just -- let me just say
4 this. So if this were any other court and I had a detective
5 on the stand and I need -- or a special agent from the FBI,
6 and I needed to go into what happened to my client during a
7 36-hour interrogation, and I had a series of 302s from that
8 special agent and they were riddled with mistakes, my argument
9 to the jury would later be that they can't believe anything
10 that FBI agent says because that FBI agent is so careless in
11 his duties that everything that he says should be subject to
12 being found unreliable by the trier of fact. And so here we
13 have the same thing.

14 And so what I suggest to you is, these aren't motions
15 to reconsider; these are motions for additional discovery,
16 which you have allowed in your ruling on 164. And the
17 additional discovery we're asking for arises because
18 circumstances change. We now know that -- if we can take
19 Mr. Groharing at his word, that there are some mistakes in the
20 original material. Those mistakes should be provided to us.

21 I have nothing else.

22 MJ [COL POHL]: Thank you. Any other defense counsel wish
23 to be heard? Mr. Nevin?

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1 LDC [MR. NEVIN]: Yes. And, Your Honor, I do have
2 arguments that I would like to present on this subject, but
3 I'm not going to do it now because of the conflict that I
4 described to the military commission.

5 MJ [COL POHL]: Sure. Sure. If you are deciding to do
6 that, that is your choice.

7 LDC [MR. NEVIN]: No. I don't have any choice but to
8 decide that.

9 MJ [COL POHL]: Well, you and I disagree on that, but
10 that's, again, your decision. You don't -- you believe you
11 have a conflict that prevents you from doing anything. That's
12 your decision.

13 LDC [MR. NEVIN]: Well, yeah, it is, but ----

14 MJ [COL POHL]: Okay. Okay.

15 LDC [MR. NEVIN]: ---- I will say that Holloway also says
16 that you have an obligation, a duty to refrain from
17 embarrassing counsel in the defense of an accused by insisting
18 or indeed even suggesting that counsel undertake to
19 concurrently represent interests which might diverge. And --
20 and that's what you're doing. That's the position you're
21 putting us in by not addressing the conflict at the earliest
22 possible time.

23 MJ [COL POHL]: Mr. Nevin ----

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1 LDC [MR. NEVIN]: We feel ----

2 MJ [COL POHL]: ---- I'm going to say this for one more
3 time is, we can't address the conflict until we have a factual
4 predicate, right? And the factual predicate on this comes
5 from the government's guidance, at least that's ----

6 LDC [MR. NEVIN]: Which they provided yesterday.

7 MJ [COL POHL]: Okay, which they provided yesterday and
8 the day before yesterday. I'm going to get to it as soon as
9 I'm done with this -- this discovery issue, okay?

10 And if you want to come back later after we resolve
11 it or don't resolve it, whatever, that's up to you. But I'm
12 just saying, that's your choice.

13 LDC [MR. NEVIN]: Okay.

14 MJ [COL POHL]: And I certainly understand. I do take --
15 if you -- if you believe that I'm doing anything to embarrass
16 you or anybody else, A, that's certainly not my intent ----

17 LDC [MR. NEVIN]: No.

18 MJ [COL POHL]: ---- and I don't believe I've ever done
19 that.

20 LDC [MR. NEVIN]: Well, no, let me say ----

21 MJ [COL POHL]: You used the word "embarrassed" out of
22 Holloway. I know what Holloway says, I have done it a number
23 of times. But I do not believe that there's anything that I

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1 have done in this case in the last six years that has been
2 designed to embarrass counsel.

3 LDC [MR. NEVIN]: Well, I mean, it -- what Holloway is
4 saying is that it puts counsel in an awkward -- and they use
5 the term "embarrassing" -- position to say yes, I hear you
6 about your conflict of interest, but go ahead and argue
7 anyway, because it puts you on the horns of this dilemma where
8 you either have to -- and I've pointed this out to you before,
9 that, you know, we continue to argue, and we have done this in
10 other settings even though we brought a conflict to your
11 attention, and then later we hear that we did a great job
12 while we were making all of those arguments so we must not
13 really have been conflicted.

14 So that's the embarrassment. So I don't mean that
15 you're trying to make me look bad ----

16 MJ [COL POHL]: Okay. Okay.

17 LDC [MR. NEVIN]: ---- in some personal way. I just mean
18 it -- it has this embarrassing impact. And that's what I'm
19 complaining about.

20 MJ [COL POHL]: Okay. Got it.

21 And that brings us to 524/525, which is the issue we
22 were just talking about that.

23 Now, there's a number of issues -- there's the places

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1 issue and there's the people issue. And I don't know, has --
2 on -- today the government provided, at least it's dated
3 today, 524I, which is a notice that replaces the 6 September
4 2017 memorandum we've referred to earlier; and then in 524M
5 yesterday, the government provided a guidance that replaced
6 the guidance submitted in November.

7 LDC [MR. CONNELL]: Sir, just to be 100 percent clear,
8 it's 525M.

9 MJ [COL POHL]: M. Did I say 524? Okay, I meant ----

10 LDC [MR. CONNELL]: Yes, sir, it's easy to do. I have
11 done it a number of times.

12 MJ [COL POHL]: ---- it's 525M.

13 One moment, please.

14 And I suspect the government is not adhering to the
15 position in paragraph 4 that the 6 September memorandum still
16 is controlling; I would say that that's now the 28 February
17 memorandum.

18 Am I reading them correctly, Mr. Groharing?

19 TC [MR. GROHARING]: You're referring to 524I, Your Honor?

20 MJ [COL POHL]: No, 525M. You have the 27 February
21 guidance. In paragraph 4, it says, "Nothing in this document
22 is intended to alter the guidance contained in the
23 prosecution's 6 September 2017 memorandum."

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1 Now, obviously that's been replaced by the -- by the
2 one I just referred to.

3 LDC [MR. CONNELL]: 524I.

4 MJ [COL POHL]: 524I. Thank you, Mr. Connell.

5 So with that -- would that be a fair substitution,
6 Mr. Groharing?

7 TC [MR. GROHARING]: The only thing I would say, sir, the
8 524I, the 28 February 2018 guidance, that replaces paragraph 4
9 through 6.

10 MJ [COL POHL]: Okay.

11 TC [MR. GROHARING]: Paragraph 1 through 3 were, frankly,
12 explaining the discovery indices to the defense. So they're
13 not really on point with the guidance, but that would be the
14 only discrepancy.

15 MJ [COL POHL]: Okay.

16 So that being said ----

17 LDC [MR. CONNELL]: Sir, could I follow up on that?

18 MJ [COL POHL]: Sure.

19 LDC [MR. CONNELL]: I just want to summarize what I just
20 heard you say and to make sure that I understand it.

21 525M, the 27 February guidance, says that the
22 6 September 2017 letter is still operative.

23 524I, the 28 February guidance, says that

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1 paragraphs 4 through 6 of the 6 September letter have been
2 replaced by new guidance.

3 MJ [COL POHL]: Right.

4 LDC [MR. CONNELL]: Meaning that paragraphs 4 through 6 of
5 the 6 September 2017 letter are no longer operative.

6 MJ [COL POHL]: That's how I'm reading it.

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

8 TC [MR. GROHARING]: That's how I read it as well.

9 MJ [COL POHL]: But 1, 2, and 3, for what effect they have
10 of the 6 September, are still operative.

11 LDC [MR. CONNELL]: Right. Which is just what -- what we
12 just talked about with respect to 534B, Attachment B, the RDI
13 index.

14 MJ [COL POHL]: Now, I know there's a lot of rationales of
15 why you need to investigate what, but would it be a fair
16 starting point of discussing objections in the two guidances?

17 LDC [MR. CONNELL]: I'll proceed however you want, sir.

18 MJ [COL POHL]: Okay. Okay, because I'd like to -- it
19 seems to me that that's -- that's -- my -- my initial interest
20 is -- is the government's saying -- here's what they say are
21 the ground rules, and I know you've not had a lot of time to
22 review them, but I suspect you have.

23 LDC [MR. CONNELL]: Right, sir.

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1 MJ [COL POHL]: I suspect you have an opinion on them.
2 So -- and there's an issue I have with one of the things, but
3 I'll talk to the government separately about that, unless you
4 bring it up. Go ahead, Mr. Connell.

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

6 Excuse me just one moment.

7 [Pause.]

8 LDC [MR. CONNELL]: Sir, I've previously provided to the
9 CISO for review, and have amended them according to the CISO's
10 instructions, 524J, a set of slides, largely overtaken by
11 events by this point, but there are a couple of points in them
12 that I think will be useful in talking -- in answering the
13 specific question that the military commission just asked me.

14 I would ask permission to have the feed from Table 4
15 and to slide the -- display the slides to the public.

16 [The military judge conferred with courtroom personnel.]

17 MJ [COL POHL]: Go ahead.

18 LDC [MR. CONNELL]: Thank you, sir.

19 LN1, could we have slide 8, please?

20 Thank you. So slide 8 to 524J describes the previous
21 state of play with respect to the overlap of these two -- of
22 the two prohibitions, because -- what you're -- what you're
23 calling people and places, which makes sense. I understand

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1 that as a framework.

2 It used to be that people and places essentially
3 overlapped in this -- in this prohibition. That has changed
4 now. And so if we could cut the feed from Table 4.

5 MJ [COL POHL]: Just so I'm clear, on this slide, when we
6 say a prohibition, it was the requirement you have to go
7 through the government to talk to these people?

8 LDC [MR. CONNELL]: Well, there's really two. In the
9 6 September letter, there are two -- two different ----

10 MJ [COL POHL]: Yeah.

11 LDC [MR. CONNELL]: ---- aspects of it. Number one,
12 independent investigation is prohibited; and number two, if
13 you ask us, we will send FBI and CIA to talk to them.

14 MJ [COL POHL]: So when you say scope of investigative
15 prohibition previously, was this previous to 6 September or --
16 or after 6 September?

17 LDC [MR. CONNELL]: This was as of a week ago.

18 MJ [COL POHL]: Okay. Okay. Do you have a slide of what
19 you thought was permitted on the 5th of September?

20 LDC [MR. CONNELL]: Yes, I do. Can I have ----

21 MJ [COL POHL]: That may be helpful to ----

22 LDC [MR. CONNELL]: All right. May we have slide 2,
23 please?

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1 This is what I thought was allowed on the 5th of
2 September, which was the government's position when we argued
3 AE 013FF, which the government's position at that time was the
4 defense can interview any witness on any topic in any
5 location, on anything. I know that extra "on anything" is
6 redundant, but I think it was a rhetorical tool by Ms. Baltes
7 to make a point. And then the military commission added, as
8 long as it does not disclose classified information to the
9 witness. That is what we understood to be the rule. That is
10 the rule that we operated under, and I want to talk about
11 places first.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: Because I think that one is easy. In
14 my reading, 525M revokes and supercedes 525G.

15 And let's -- let's have slide 5, please, LN1. Sorry
16 for skipping around for you.

17 MJ [COL POHL]: Are we switching to 525 now? Okay.

18 LDC [MR. CONNELL]: Only because 525 is where places come.

19 MJ [COL POHL]: Right.

20 LDC [MR. CONNELL]: And 525G essentially was categorical
21 prohibition on defense -- on security-cleared personnel
22 involving -- investigating black sites. I believe that this
23 525G is now entirely superceded by 525M. And I believe that

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1 525M, the 27 February guidance, states the previous rule that
2 we can't -- we can't reveal classified information to anyone,
3 but other than that we're free to investigate.

4 MJ [COL POHL]: Including ----

5 LDC [MR. CONNELL]: And I -- I didn't have a whole lot of
6 time to read it, but I did see in the government's pleading in
7 549C at page 38, the government just -- in describing 525M
8 said, I quote here, "Defense personnel will be able to operate
9 substantially as before and will be able to conduct
10 investigation they deem necessary, while ensuring the
11 protection of highly sensitive classified information."

12 So what I think is, we are back to the September 5
13 state of play with respect to places.

14 MJ [COL POHL]: Okay. Let's -- let's -- obviously, I'd
15 want to talk about real places here.

16 LDC [MR. CONNELL]: Moon, Mars, and Venus work, sir.

17 MJ [COL POHL]: Yeah. Well, I usually use Canada, so
18 we'll stick with that.

19 LDC [MR. CONNELL]: Or Canadians.

20 MJ [COL POHL]: So under this guidance, you believe that
21 you could send an investigator, go yourself, to suspected
22 places of interest -- I'm just going to put it that way -- in
23 Canada, as long as you don't disclose any classified

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1 information.

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

3 MJ [COL POHL]: Okay. And that was --

4 LDC [MR. CONNELL]: That was the rule before, and I
5 believe it is the new -- it is the rule on March 1st.

6 MJ [COL POHL]: Okay. Hold that thought.

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

8 MJ [COL POHL]: Mr. Groharing, is that accurate?

9 TC [MR. GROHARING]: Your Honor, I ----

10 MJ [COL POHL]: I'm going to give you a chance to argue on
11 this thing, but I just want to -- if peace breaks out, I'm
12 always a big fan of it. I mean, is that an accurate
13 statement?

14 TC [MR. GROHARING]: Well, it's what information they use
15 to go to wherever they're going. So if they're basing their
16 investigation on classified information, like Mr. Connell has
17 some classified discovery that we provided him or classified
18 information ----

19 MJ [COL POHL]: Yeah, but let's talk -- let's just talk
20 about places. Let's just talk about places, actual places.
21 Because -- now, I'm careful of what I say here. Let me just
22 say ----

23 TC [MR. GROHARING]: Sir ----

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1 MJ [COL POHL]: ---- if we've got to do this in a closed
2 session, we can. But I'm just saying we're talking about
3 places.

4 TC [MR. GROHARING]: All right. We have never disclosed
5 any information about places to the defense ----

6 MJ [COL POHL]: Okay. Well, that's ----

7 TC [MR. GROHARING]: ---- locations.

8 MJ [COL POHL]: That's what I -- okay. Since you said it,
9 I'll now say it. So since we know you've never given them
10 that, then obviously any type of place interview would not be
11 based on classified information given to them by the
12 government. It doesn't mean it's not classified information.
13 I mean, that's that distinction we're talking about, right?
14 But that would not -- if Canada was classified, but that
15 information was never given to the defense, which the
16 locations have not been -- we're going to talk about that
17 later -- okay, and they open source or whatever, decide to go
18 to Canada to check it out and do the investigation, there's
19 nothing in this guidance that would prohibit them from doing
20 that.

21 TC [MR. GROHARING]: Correct, Your Honor. I think
22 where -- and maybe you want to ask me these questions when
23 it's my turn. But where we have given the defense

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1 information, photographs, for example, of facilities or
2 certain information, taking that document or information and
3 then asking someone about that, you perhaps would have
4 facts ----

5 MJ [COL POHL]: And again, I know we're kind of doing this
6 in an unusual manner, but I think it's a useful way to do it.
7 But that would be disclosing classified information to
8 somebody who's not authorized to receive it, and so that's
9 prohibited by a number of different other rules, right? Okay.
10 Okay.

11 LDC [MR. CONNELL]: Putting up a picture that the
12 government -- that's marked SECRET//NOFORN that the government
13 has given us and say, hey, have you ever seen this spot before
14 was prohibited before, is prohibited now, I understand that.

15 MJ [COL POHL]: Okay. Okay. So that deals with places.

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

17 MJ [COL POHL]: And so you say that -- and, Mr. Groharing,
18 I'm going to give you a chance to respond, but what I'm
19 hearing is that the 27 February guidance on places reverts to
20 the status quo and any other investigation that we've
21 discussed about places, whether in an open session or closed
22 session, is permitted. Mr. Nevin.

23 LDC [MR. NEVIN]: Would you ask Mr. Groharing if that

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1 applies to information we receive from our clients about the
2 locations of the torture?

3 MJ [COL POHL]: While we're doing this dialogue technique,
4 sure.

5 Mr. Groharing, I'm not sure the clients know the
6 locations, but I ----

7 TC [MR. GROHARING]: Well, for one, I think Mr. Nevin is
8 conflicted, so I'm not sure he can participate at this point.

9 MJ [COL POHL]: No, no, no. This is -- now, Mr. Nevin,
10 you don't need to respond. That was an unnecessary comment,
11 Mr. Groharing. Just go with me here.

12 TC [MR. GROHARING]: And I apologize to the commission for
13 that, Your Honor, but I couldn't resist.

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

15 TC [MR. GROHARING]: So what I will say is information
16 that Mr. Mohammad provides to counsel can be classified, and
17 that's consistent with guidance in Protective Order -- in
18 document Protective Order #1. So Mr. Mohammad absolutely
19 can -- has information that can be determined to be classified
20 when held by counsel.

21 LDC [MR. CONNELL]: All right. That is absolutely untrue.

22 We can -- we can -- we have debated that multiple
23 times. The government has never produced a single shred of

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1 authority for the proposition that people who were simply
2 abducted by the United States and have never entered into
3 privity with the United States can be the custodians of
4 classified information ----

5 MJ [COL POHL]: Isn't this the ----

6 LDC [MR. CONNELL]: ---- but we don't have to go there
7 today.

8 MJ [COL POHL]: No, okay, but I'm saying ----

9 LDC [MR. CONNELL]: But if that's the answer ----

10 MJ [COL POHL]: This reminds me of the discussion where we
11 talked about the foreign country guy who was -- the
12 janitor ----

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: ---- and who has no privity to the United
15 States whatsoever ----

16 LDC [MR. CONNELL]: Correct.

17 MJ [COL POHL]: ---- and it's different than the accused,
18 obviously, but I got it. Okay.

19 You said we don't need to go there, so let's not.

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

21 MJ [COL POHL]: Okay. Let's talk about people.

22 LDC [MR. CONNELL]: All right. If we could cut the feed
23 from Table 4, please, and just give me a blank screen. Could

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1 I just have a white screen, please?

2 Okay. Now we have a new -- I mean this is fresh as
3 of last night, so obviously I didn't have time to prepare a
4 slide on it, but we have a new state of affairs. And the new
5 state of affairs comes from the paragraphs in 524I. And 524I
6 broadly divides people into two categories. Category one is
7 what the government calls RDI, and category 2 is what the
8 government calls non-RDI. The ----

9 MJ [COL POHL]: Just so you and I are clear on this scope
10 here ----

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

12 MJ [COL POHL]: ---- we're only talking about CIA
13 personnel?

14 LDC [MR. CONNELL]: Only CIA personnel.

15 MJ [COL POHL]: Okay. So anybody -- that's all we're
16 talking about.

17 LDC [MR. CONNELL]: Right.

18 MJ [COL POHL]: Okay. Got it.

19 LDC [MR. CONNELL]: Whether they're in the FBI or they're
20 a janitor, it doesn't matter.

21 MJ [COL POHL]: This guidance is only to cover that, got
22 it.

23 LDC [MR. CONNELL]: Is only covering CIA. Right.

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1 So there is one special category on the RDI side of
2 the page, and that is UFI witnesses. Okay. So UFI witnesses
3 are persons who are -- we have information about them in
4 summaries, unilateral summaries by the government. These are
5 the 2.d. summaries that were never approved by the military
6 commission, so they're unilateral. But the UFI summaries
7 describe people who have information and give them a unique
8 identifier, like A1A, okay? So that's paragraph 2.
9 Paragraph 2 falls under that circle.

10 The government second describes paragraph 3, which it
11 calls ----

12 MJ [COL POHL]: Let me go back -- let me go back to
13 paragraph 2, first of all.

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

15 MJ [COL POHL]: Okay. And the government is saying, if
16 you want -- and again, I'm not going to necessarily sure how
17 you can -- would necessarily identify these people without
18 going through the government, but let's -- the government
19 said, if you know -- talking about actual knowledge now; there
20 may be another standard out there -- if you know this person
21 has a UFI and you want to interview them, you have to go
22 through them, in essence, right?

23 LDC [MR. CONNELL]: That is their position. I don't know

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1 who -- anyone who has a UFI. So I have zero actual knowledge.

2 MJ [COL POHL]: Okay. If you knew somebody had a UFI, do
3 you object to going through the government to talk to them?

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: Okay, and I'll go into that in some
7 detail ----

8 MJ [COL POHL]: Okay, got it.

9 LDC [MR. CONNELL]: ---- I'm sort of laying out the lay of
10 the land here.

11 Paragraph 3 is what the government calls former CIA
12 officers involved in the RDI program for whom the defense need
13 not coordinate interview requests in advance. That is a
14 carve-out to the RDI category, and they say that those are
15 eight persons: Cofer Black, Glenn Carle, Michael Hayden,
16 Bruce Jessen, James Mitchell, John Rizzo, Jose Rodriguez, and
17 George Tenet.

18 So paragraph 3 is a carve-out that I'm just going to
19 put down here.

20 MJ [COL POHL]: Mr. Connell, let me just ask you, because
21 when I read that, I made a note to myself, since I don't think
22 it's a very hard question, would there be any others in that
23 category?

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

2 MJ [COL POHL]: Off the top of your head?

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

4 TC [MR. GROHARING]: Judge, I don't think this would be
5 the proper forum to be speculating about who may or may not.

6 LDC [MR. CONNELL]: No, no, no, I'm not speculating, sir,
7 I'm just talking about people who have written books.

8 MJ [COL POHL]: Mr. Groharing, in their books, don't they
9 mention other people who are involved in the RDI process? CIA
10 people?

11 TC [MR. GROHARING]: Again, without knowing the specific
12 passage that we're talking about, without knowing whether or
13 not that's undergone a classification review ----

14 MJ [COL POHL]: So you're saying that -- let me just
15 understand. I understand your concern, but I'm just saying is
16 is that I don't know how many of these guys have written
17 books. A lot of them have. A lot of them are career CIA
18 guys, Rizzo and Rodriguez, for example, and they go through
19 the pre-publication review. And I see there's a caveat in
20 here. Even that's not necessarily good enough.

21 Let me give you another example. I'm going to give
22 you an example that I don't think is particularly -- what
23 about Porter Goss? Wasn't he the CIA Director during part of

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1 this time? He's not on this list.

2 TC [MR. GROHARING]: Your Honor, what I would suggest
3 is ----

4 MJ [COL POHL]: I'm not going to go through a bunch of
5 other names, I'm just throwing that one out.

6 TC [MR. GROHARING]: If the defense has questions about
7 that, that's something again they could ask a question to us
8 and we could clear it up rather quickly, I believe. I don't
9 think in a public hearing that's the place to do that because
10 I don't know what examples they're going to give.

11 MJ [COL POHL]: Okay.

12 TC [MR. GROHARING]: We're more than happy to work with
13 the defense. I think I would suggest that ----

14 MJ [COL POHL]: I just -- he answered my question, are
15 there any others other than these eight.

16 LDC [MR. CONNELL]: Unequivocally, yes.

17 TC [MR. GROHARING]: I don't disagree that there could be.
18 The eight names are the names that we provided and that were
19 on Mr. Connell's witness list for the 502 hearing and they
20 were based on that.

21 MJ [COL POHL]: Okay.

22 TC [MR. GROHARING]: Well then, we're happy to work --

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Paul Pillar is on the list. He's
2 CIA ----

3 MJ [COL POHL]: Okay. We'll address this issue -- okay.
4 I got it. Keep going because we're going to come back to this
5 when we talk about the whole limitations or lack thereof.

6 LDC [MR. CONNELL]: All right. So the government's
7 category 4 or paragraph 4 is other CIA officers potentially
8 involved in the RDI program.

9 And so that falls on this side. We're going to call
10 this area category 4. And then 5 and 6 are overt CIA officers
11 and contractors not involved in the CIA program, and covert
12 CIA officers not involved in the CIA program. I don't know
13 how I would know the difference, not knowing who is overt and
14 covert, but combining them into a single category, that would
15 be 5 and 6, and they fall over here on non-RDI.

16 So this is the lay of the land as I see it.

17 MJ [COL POHL]: Okay. Got it.

18 LDC [MR. CONNELL]: Okay. Now, you began with the
19 question of do I object to the restrictions on my right to
20 interview this category 2, or category 4 for that matter,
21 or -- and absolutely, that is true. And for different reasons
22 for the RDI category and for the non-RDI -- actually, let me
23 just give you another carve-out.

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1 I read -- maybe peace has broken out here, too. On
2 the right-hand side of the screen, on the non-RDI category, I
3 read the government's request for coordination with them to be
4 nothing more than a request. There is no legal authority
5 which is cited here, there is no threat to prosecute us, which
6 is here, there is nothing other than the extending of, hey, if
7 you want to call us up and have us set up the appointment, we
8 can.

9 And I will tell you that there is one witness who I'm
10 going to take them up on that. There is a witness who has --
11 a CIA witness, a senior CIA witness who has agreed to speak to
12 us if the -- if we can clear it through what he considers to
13 be the processes. And so I'm going to take the government up
14 on that invitation.

15 But for anyone else who falls under categories 5 and
16 6, the government has asked that I should advise them if I am
17 unwilling to abide by this guidance, and if they are treating
18 that -- that's in paragraph 7, and if they are treating
19 paragraphs 5 and 6 as mandatory, I'm advising them I'm
20 unwilling to abide by the guidance.

21 MJ [COL POHL]: Let me ----

22 LDC [MR. CONNELL]: I'll also ask ----

23 MJ [COL POHL]: Okay, go ahead.

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1 LDC [MR. CONNELL]: ---- about negotiating in good faith
2 to modify it. And I'm delighted to negotiate. I will
3 entertain any proposals that the government has.

4 MJ [COL POHL]: Let me back up to one question, is: Do
5 you take issue with paragraph 6?

6 LDC [MR. CONNELL]: No. All the government says is the
7 government is prepared to facilitate requests in the same
8 manner as described in paragraph 2, if we follow -- if we
9 protect classified information. All they're saying is, in
10 paragraphs 5 and 6, is if we want to take advantage of their
11 offer, we can do so.

12 MJ [COL POHL]: So -- and again, I'm looking at
13 paragraph 6 because it talks about covert.

14 LDC [MR. CONNELL]: I don't know who is overt and covert.

15 MJ [COL POHL]: Yeah. But if you knew somebody was
16 covert, do you believe you could approach them on your own
17 without requesting the government? If you knew he was covert
18 or she was covert.

19 LDC [MR. CONNELL]: Had been covert at some point in the
20 past? Like now the name is Jill Jones and it used to be
21 Stephanie Smith? I don't know -- I'm not even sure what
22 "covert" means, to be honest, but I assume it means that a
23 person used to have a different identity.

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1 MJ [COL POHL]: Okay. We'll -- I'll -- we'll -- when
2 Mr. Groharing gets his chance, we'll try to flesh that out.

3 LDC [MR. CONNELL]: Okay.

4 MJ [COL POHL]: Go ahead.

5 LDC [MR. CONNELL]: That will be fine. I'll come back and
6 give you a better answer.

7 But I don't -- I don't actually know any distinction
8 between paragraphs 5 and 6, because unless somebody writes a
9 book, you know, "My Life as a Covert CIA Officer," I don't
10 know even how I would know that they had been a covert CIA
11 officer.

12 MJ [COL POHL]: And similarly, you would not necessarily
13 know who has a UFI.

14 LDC [MR. CONNELL]: I don't even know if the people who
15 have UFIs know that they have UFIs.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: So, you know, I don't -- I honestly
18 don't have any problem -- I don't see -- I see that as just --
19 paragraphs 5 and 6, I see an offer by the government to work
20 with us if we request it; and I will take them up on that
21 offer and not take them up on that offer as I exercise my
22 professional judgment.

23 MJ [COL POHL]: Got it.

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1 LDC [MR. CONNELL]: All right? So that brings us to
2 the -- so like we've got huge carve-outs here, I think. I
3 mean, there are lots of things where ----

4 MJ [COL POHL]: Well, the government has not agreed to
5 your interpretation of 5 and 6 yet, but -- but we can be
6 hopeful.

7 LDC [MR. CONNELL]: I'm sure we'll have like a sixth
8 guidance come along shortly.

9 MJ [COL POHL]: Okay. But go ahead.

10 LDC [MR. CONNELL]: So let's talk about the left-hand side
11 of the screen, the RDI witnesses. So that's where we have
12 actual prohibitions, which continue in paragraph 4. "Other
13 than the eight individuals listed in paragraph 3, the defense
14 should make no independent attempt to locate or contact any
15 current or former CIA employee or contractor regarding their
16 potential involvement with the RDI program, regardless of that
17 individual's cover status."

18 This paragraph 4 is essentially the same -- very
19 similar language to what appeared in the 6 September letter;
20 it's just that the government has narrowed the scope of it,
21 making it, in my opinion, completely clear that their intent
22 of this letter is to protect CIA information about torture,
23 not other CIA information.

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1 That prohibition absolutely I object to, and it's, in
2 fact, already prohibited by this military commission's orders.
3 In AE 013BBB paragraph 6(c), the Protective Order #1, states
4 that -- in fact, I have a slide on this. Your Honor, can we
5 take a screen shot of this basketball court that I just drew
6 on here?

7 MJ [COL POHL]: Sure.

8 [Pause.]

9 LDC [MR. CONNELL]: Okay. Great. Could we have the feed
10 from Table 4, please? Are you going to -- before I erase
11 this, are you going to have any questions about the
12 interactions of these various paragraphs?

13 MJ [COL POHL]: Are you talking about your basketball
14 court?

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: No, I think I got it.

17 LDC [MR. CONNELL]: You got it? All right.

18 MJ [COL POHL]: It's done at my level, so I got it.

19 LDC [MR. CONNELL]: Thank you. Sir, slide 3 of AE 524J
20 describes your order that that essentially is a carve-out in
21 the protective order, which is that nothing in this protective
22 order shall be construed to interfere with the right of the
23 defense to interview witnesses, regardless of their location.

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1 And it goes on to give what I consider to be the safe harbor
2 provision of the protective order, which is, if we act
3 according to these principles, then we're safe.

4 And the reason why this came up originally was the --
5 was questions related to the sort of thing in 525G. What if a
6 janitor in another country gives us information, how do we
7 handle that? Like, do we mark it? Do we not mark it? And
8 this is our safe harbor provision, which we have -- which we
9 have abided by.

10 So the -- you know, why is that important? Why is
11 there something in the protective order protecting the right
12 to interview witnesses? And I thought it was interesting this
13 morning that the government's argument on 534 really made the
14 point powerfully. The government argued that, I quote here,
15 "Sometimes original documents have mistakes."

16 And the question was asked repeatedly, well, how will
17 we know what the truth is. Right? We have these documents,
18 even these original documents that you've seen, the
19 watered-down summaries that we've seen, but somewhere there's
20 truth out there and a trial is a search for truth. The way
21 that we get to that truth is by interviewing witnesses. Now,
22 that doesn't mean holding up the classified document to them,
23 although some of these documents are unclassified, but it does

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1 mean asking them about what really happened. And that's how
2 we get to the truth.

3 Because before we can bring a witness in here to
4 present to you about what really happened, or present to a
5 panel about what really happened, we have to interview them.
6 That's the basics.

7 So let's talk about the categories -- let's talk
8 about the paragraph 2, the UFI witnesses. The first aspect is
9 that the government does have a privilege to protect the
10 identities of certain witnesses. That privilege is laid out
11 in the military commissions, in Military Commission Rule 507,
12 and it's laid out by the United States Supreme Court in
13 Roviaro v. United States and by the D.C. Circuit in the United
14 States v. Yunis. That issue, the question of do we get to
15 know who those category 2 witnesses are, the UFI witnesses, is
16 dealt with in AE 523.

17 And the standard is that the privilege for disclosure
18 of witness identities must give way when, I quote, "The
19 disclosure of an informant's identity or the contents of his
20 communication is relevant and helpful to the defense of an
21 accused, or is essential to the fair determination of a
22 cause."

23 Now, the 114 and 397 series contained extensive legal

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1 discussions of relevance and helpfulness, and the AE 534
2 pleadings contain detailed factual discussions of relevance
3 and helpfulness.

4 Your Honor, may I ask that Colonel Thomas be excused?

5 MJ [COL POHL]: Yes, he may.

6 LDC [MR. CONNELL]: But with respect to these UFI
7 witnesses, you don't -- there's no further determination that
8 you even have to make. Because on each of these documents in
9 the 2.d. series, the government concedes that they are -- the
10 witness is relevant and helpful, and they go so far as to add
11 noncumulative, and they give their detailed description of why
12 they think they're relevant and helpful and noncumulative.
13 All of those materials are quoted at length with the original
14 government statements of relevance, helpful, and
15 noncumulativity in the 502J series, which is where we asked
16 for the production of these witnesses in the first place.

17 The Yunis/Roviario standard with respect to those UFI
18 witnesses has absolutely been met by the government's own
19 admission. The reason why that's important is category 2 is
20 not really a separate category than category 3 -- excuse me,
21 than category 4.

22 The ----

23 MJ [COL POHL]: Let's -- let's stick with category 2 for a

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1 second.

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

3 MJ [COL POHL]: You have a UFI and you want to interview
4 the person.

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

6 MJ [COL POHL]: Okay. What I'm reading in paragraph 2, it
7 says you can do that, but you've got to go through the
8 government to do it.

9 LDC [MR. CONNELL]: No, sir. Category 2 says ----
10 paragraph 4 says that we can make no independent attempt to
11 locate them. Category 2 ----

12 MJ [COL POHL]: No, I'm talking about 2.

13 LDC [MR. CONNELL]: ---- is -- right. But ----

14 MJ [COL POHL]: You have a -- you have someone with a UFI.

15 LDC [MR. CONNELL]: Right, but paragraph 4 covers -- is an
16 investigative prohibition that covers 2. That's why I, you
17 know, made the basketball court, that UFI is a subset of the
18 larger prohibition.

19 MJ [COL POHL]: Well, no, but I'm just saying is that --
20 is that you say you have -- you need access to the UFI folks,
21 let's just say that.

22 LDC [MR. CONNELL]: Right.

23 MJ [COL POHL]: But you don't know who they are?

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: So what I'm reading paragraph 2 says, if
3 you need to do that, you need to come through us and we'll
4 arrange it or ----

5 LDC [MR. CONNELL]: Right.

6 MJ [COL POHL]: And I use the term "arrange."

7 LDC [MR. CONNELL]: Let's talk factually about that for a
8 second.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: The first one is that's how this
11 started. That's what we actually did. Attachment B to 534,
12 which is a Secret-level document, I'm not going to describe it
13 in detail, but was our January -- excuse me, 21 July 2017
14 request to interview these witnesses. That's where we
15 started. The way we got to the prohibition on 6 September is
16 that we asked, proactively we said, Government, could you
17 arrange interviews with these witnesses? There were 45 of
18 them that we listed out and with references to why we thought
19 they were important and, you know, they're material and in
20 discovery.

21 MJ [COL POHL]: Were these people all had UFIs?

22 LDC [MR. CONNELL]: Those 45 people had UFIs.

23 MJ [COL POHL]: What was the government's response?

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1 LDC [MR. CONNELL]: The government has never responded in
2 any way other than -- well, no, that's not true. That's not
3 true. Their response was the 6 September letter.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: The 6 September letter prohibiting us
6 from investigating. That's ----

7 MJ [COL POHL]: But now on the 28 February one, it strikes
8 to me is -- is they're saying you're following the procedure
9 they're telling you to follow, and now they ----

10 LDC [MR. CONNELL]: Oh, I followed it eight months ago.

11 MJ [COL POHL]: Yeah. I know, I know, I know, I know.
12 But we're not -- I don't have a time machine. Let's do it
13 with the March.

14 LDC [MR. CONNELL]: But it's important because it
15 demonstrates what -- that the whole procedure is not a
16 procedure. It is simply an obstacle.

17 MJ [COL POHL]: No. I got it. I got it. You deserve an
18 answer. Even if the answer is no, you deserve an answer. But
19 I got that. And that's true of everybody, when you request
20 something -- and one of the frustrations sometimes as a judge
21 is that one side or the other just doesn't respond, and then
22 we go from there.

23 But -- okay. So -- but I'm back to my major point

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1 was, do you have any objections to the paragraph 2 procedures
2 for people with UFIs?

3 LDC [MR. CONNELL]: Yes. And I will describe them now.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: The first is, and the reason why I
6 went through the -- highlighted the 523 Roviaro/Yunis standard
7 is that -- I'm citing here from United States v. Opager, 589
8 F.2d 799, "A witness' desire not to be interviewed becomes
9 relevant only after his whereabouts has been disclosed when
10 the witness, and not the government, must decide whether he
11 will accede to a litigant's request to an interview."

12 So the first step in this process is not -- should
13 not be a request for access to a UFI witness, it should be the
14 over -- you should make a decision as to whether we have
15 overcome -- we have met the standard in Roviaro and Yunis for
16 disclosure of the witness' identity by overcoming the
17 privilege that the government has in hiding the identity of
18 someone.

19 And that process occurs both constitutionally under
20 Roviaro and Yunis, but it also occurs under Rule 507 of the
21 Military Commissions -- excuse me, of the Military Commissions
22 Rule of Evidence. Which has a -- it's a little bit different
23 from the Roviaro standard, it's broader in some ways, it's

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1 narrower in some ways. It has a broad definition of
2 informant. And as Yunis makes clear, the classified
3 information privilege with respect to identities of
4 individuals is an application of the Roviaro informant's
5 privilege.

6 And then it says -- and I'm looking at 507(c)(2), "If
7 a claim of privilege has been made under this rule, the
8 military judge shall, on motion by the defense, determine
9 whether the disclosure of the entity of the -- identity of the
10 informant is necessary to the accused's defense on the issue
11 of guilt or innocence. Whether such a necessity exists will
12 depend on the particular circumstances of each case, taking
13 into consideration the offense charged, possible defense,
14 possible significance of the informant's testimony, and other
15 relevant factors."

16 That's what 523 is. And we cite M.C.R.E. 507 in
17 there.

18 MJ [COL POHL]: But it says on guilt or innocence.
19 Isn't ----

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: Isn't RDI witness on guilt or innocence?

22 LDC [MR. CONNELL]: Absolutely. I have explained at some
23 detail how we both plan to file motions to suppress and, under

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1 Crane v. Kentucky, introduce evidence of the unreliability of
2 the statements that Mr. al Baluchi made to the FBI and the
3 CITF in January of 2007 to the members in the guilt and
4 innocence phase.

5 MJ [COL POHL]: But if, if ----

6 LDC [MR. CONNELL]: There is a mitigation aspect to
7 torture.

8 MJ [COL POHL]: I got it.

9 LDC [MR. CONNELL]: There is also guilt and innocence
10 aspects as well.

11 MJ [COL POHL]: Well, the guilt and innocence is -- is --
12 and correct me if I'm wrong here, you're making the assumption
13 that your suppression motion fails.

14 LDC [MR. CONNELL]: Yes, sir. I am.

15 MJ [COL POHL]: Okay. But if your suppression motion were
16 to succeed on these statements, then would the RDI people
17 information be relevant to guilt or innocence?

18 LDC [MR. CONNELL]: Wow.

19 MJ [COL POHL]: No, you know, the judges can rule both
20 ways.

21 LDC [MR. CONNELL]: So I hear, sir.

22 MJ [COL POHL]: Just to let you know.

23 LDC [MR. CONNELL]: Maybe. I have to get back to you

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1 about that. I'm not willing to commit at this moment because
2 I had not really entertained that possibility.

3 MJ [COL POHL]: I got it.

4 LDC [MR. CONNELL]: But the -- but, yes, that could change
5 the analysis.

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

7 LDC [MR. CONNELL]: But the reason why that's important
8 here is that the UFI should not actually be a separate
9 analysis from paragraph 4 because we should have the
10 identities of the -- of the UFI witnesses under the
11 Roviaro/Yunis standard.

12 So let's talk about paragraphs 2 and 4 in a combined
13 way, if you don't mind, because the -- the procedure is the
14 same for both. The government says in paragraph 4 that we
15 can't make any independent investigation, but that they are
16 prepared to facilitate defense requests in the same manner as
17 paragraph 2. So paragraph 2 and paragraph 4 are completely
18 linked.

19 And what the cases establish, the military as well as
20 the civilian cases establishes that government control of the
21 process for -- of requesting interviews with witnesses
22 violates due process and it violates and it constitutes
23 unlawful influence.

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1 The -- you know, one way to initially frame this
2 question is the government is proposing to advise these
3 witnesses only of their advice -- of their right not to speak
4 to the defense. They're not offering general advice to the
5 public about you have the right to remain silent whenever you
6 want. This is a situation where only if the defense wants to
7 talk to a person do they get advised that they don't have to
8 speak to the defense.

9 And there are really three cases, one of them a
10 military case, that are pretty clear on this control of the
11 process question. The first one is United States v. Fischel,
12 the -- which describes it as a different matter to place a
13 defendant at a technical advantage by reserving to itself
14 alone the ability to request an interview with a material
15 witness.

16 The most -- the military case most directly on point
17 is United States v. Enloe, E-N-L-O-E, at 35 C.M.R. 228, a
18 C.M.A. case from 1965, which had two aspects to it. The Air
19 Force Office of Special Investigations commander required
20 interview requests to go through the prosecution, and if
21 available, a prosecutor to be present at interviews. But the
22 only mandatory part of that was that the interview request go
23 through the prosecution.

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1 The CMA reversed saying that, quote, it is beyond the
2 authority of the United States to interpose itself between the
3 witness and the defense counsel.

4 And third, there was a state case, but I thought it
5 was -- it was important because there is so little law on this
6 topic and it was relevant, which is that Alaska based an
7 actual statute on this in 1991, and it talks about the
8 difference between answering a question by a witness, hey, do
9 I have to talk to the defense, and giving unsolicited advice
10 like sending out a CIA and FBI agent to tell them that they
11 don't have to talk to the defense, or -- but they can if they
12 want to. And it says that unsolicited advice convey -- about
13 the right to not speak to the defense or to speak to them --
14 conveys an implied suggestion to prospective interviewees that
15 it would be best if no interview was given. This
16 none-too-subtle warning in turn substantially interferes with
17 defense efforts to obtain evidence.

18 Now, the Supreme -- I mean, excuse me, the military
19 cases have been exceptionally strong on the question of
20 interfering with access to witnesses by the defense. Two
21 cases, Aycock at 35 C.M.R. 130 and Wyson at 26 C.M.R. 29 both
22 held that such a prohibition -- prohibition of witnesses
23 speaking to the -- excuse me, defense counsel speaking to

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1 witnesses --

2 MJ [COL POHL]: What were the years of those cases?

3 LDC [MR. CONNELL]: '64 and '58. Most of the military
4 stopped interfering with defense access to witnesses. This
5 became, I suggest ----

6 MJ [COL POHL]: No, I'm not -- I'm not saying just because
7 they're old, just when you see a C.M.R. cite --

8 LDC [MR. CONNELL]: Right. Yeah. A C.M.R. cite means
9 it's old. I get that. But I think that's because the people
10 got the message, but they didn't -- they didn't completely get
11 the message, because there are cases as recent as 2004 which
12 describe the same prohibition or interference process, but as
13 unlawful influence instead.

14 The unlawful -- the most recent unlawful influence
15 case involving witnesses is United States v. Gore at
16 60 M.J. 178 from the CAAF in 2004. That case cites a whole
17 bunch of other cases, because it seems that interference with
18 the right
19 to -- of the defense to interview witnesses, either one way or
20 the other, hey, don't talk to that witness; or hey, don't talk
21 to that counsel, is the most -- is -- over the years has been
22 common.

23 The -- and there's a reason for that. You know,

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1 not -- 10 U.S.C. 949b(a)(2)(C) prohibits other people, and
2 it's really anybody in the world, from unlawfully influencing
3 the defense exercise of their professional judgment. And
4 given the core responsibility of defense counsel to
5 investigate a case, whether it's a shoplifting case or a
6 capital murder, interfering with that responsibility is itself
7 unlawful influence.

8 All of those cases draw on the leading case on the
9 topic, which happens to be from the D.C. Circuit, also an old
10 one, but has been cited many, many times by many cases. And
11 that is Gregory v. United States at 369 F.2d 185 from the
12 D.C. Circuit in 1966, which held that witnesses are the
13 property of neither the prosecution nor the defense. Both
14 sides have an equal right and should have an equal opportunity
15 to interview them.

16 The third objection to paragraphs 2 and 4 is the
17 conflict of interest that it creates for defense counsel, both
18 structural and personal. You heard a little bit about that
19 already this morning. But the primary duty of defense counsel
20 is to investigate. Strickland itself makes that clear;
21 Rompilla makes that clear; Wiggins and Williams make that
22 clear. And the only thing that the government has made clear
23 is the threat of prosecution should we carry out that

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1 constitutional duty.

2 Now, I do want to be clear on our position that we
3 think that really there are two different kinds of conflict of
4 interests which are created here. There's the personal
5 conflict of interest, the one like we examined in 292 of the
6 individual interests of a defense attorney not to be
7 prosecuted. All we have here are threats. We don't know of
8 any actual active investigation.

9 But there's also a structural conflict of interest,
10 in that if this proposed guidance from the government becomes
11 the law of this military commission, then the structure is set
12 up so that the defense counsel must do A and cannot do A,
13 A being investigation. It establishes a structural conflict
14 between the requirement to investigate and a prohibition on
15 investigation.

16 MJ [COL POHL]: But, Mr. Connell, let me ask you this: If
17 there's a limit on your investigation, is that a -- that --
18 and again, I -- understand, when I ask these questions, I'm
19 making no decision on this, ----

20 LDC [MR. CONNELL]: Of course, sir.

21 MJ [COL POHL]: ---- I'm just running down the road here.
22 If there's a court-approved limit on your investigation, that
23 the court says this is what you're allowed to do, okay -- that

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1 you disagree with, I got it -- does that create a conflict of
2 interest or simply a legal issue?

3 LDC [MR. CONNELL]: Well, it depends. I could imagine a
4 type of court-approved limit -- I'm not going to approve this
5 trip, for example -- that might just create a legal issue.

6 This is broader. This kind of court-approved limit,
7 if it became a court-approved limit, would be structural, in
8 that the -- it is not simply one minor -- you know, a
9 disagreement over whether certain investigations were
10 necessary, which is what would be the situation if a trip were
11 disapproved, for example. It would instead be a structural
12 limit on the -- on the defense, on the ability to present a
13 defense, and the access to witnesses. It would be this set of
14 witnesses is off limits to you unless you used this procedure,
15 which all of the cases have disproved.

16 So the difference is between -- you know, you talked
17 about the eight people earlier and are there more people on
18 that list. I certainly know more people on that list and
19 we're going to talk about some more people in just a minute.
20 But the idea of you must investigate says the -- says the
21 cases, and the Military Commissions Act, for that matter, by
22 establishing a defense function, versus you cannot investigate
23 this entire critical swath of the case, would be a structural

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1 conflict of interest.

2 Now, I'm not saying that every limit on defense
3 investigation, which I think was your question, would
4 necessarily create a structural conflict, but something of
5 this magnitude does.

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

7 LDC [MR. CONNELL]: Thank you.

8 The other point that I want to make is this conflict
9 has been -- this threat of prosecution has been present in a
10 latent form for a long time, and this really makes it patent.
11 The memorandum of understanding that you required us to sign
12 sets out different bases on which we could be prosecuted. It
13 makes us acknowledge that possibility of criminal sanctions
14 for violation of the Intelligence Identities Protection Act,
15 misuse of government property, gathering, transmitting, or
16 losing defense information, communication of classified
17 information, and espionage.

18 And, in fact, I'm not sure whether you knew that this
19 is what was happening or not, but Protective Order #1, which
20 includes language proposed by the prosecution, actually
21 advises us of the national defense information quality of some
22 of the information that we'll be handling, which is a
23 prerequisite for a prosecution under the Espionage Act. So,

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1 in fact, all of the pieces -- sort of the intent pieces the
2 government has been working to set up since the beginning of
3 2012 or mid 2012, and that's in paragraph 9(c) of the
4 protective order.

5 Now, the government does not cite any authority for
6 these restrictions in this version. Right? This new 524I
7 does not cite any authority. It's abandoned its Touhy claim
8 in January, and I give them -- I give the government credit
9 for not resurrecting its Touhy claim. But what it does do is
10 it talks about how we might accidentally reveal classified
11 information.

12 I just want to talk a little bit about the sort of
13 self-promulgated CIA affiliations that are present in the --
14 in the public sphere. Four case officers list themselves on
15 the Human Rights First website as being FBI officers.

16 MJ [COL POHL]: FBI or CIA?

17 LDC [MR. CONNELL]: Excuse me. CIA. Excuse me. Thank
18 you.

19 Three additional people, Gary Schroen, Robert Grenier
20 and Michael Scheuer, have written books about their time in
21 the CIA. The CIA Inspector General, John Helgerson, issued a
22 press release about his own CIA involvement upon his
23 retirement. One of the witnesses that we requested in 502J,

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1 Paul Pillar, and another, Bruce Riedel, list their CIA
2 affiliation on their website for Brookings Institute. Robert
3 Baer lists his CIA credentials on the CNN website. And then
4 another person, whose name I won't say, but my personal
5 favorite, lists her 25-year career in the CIA on her real
6 estate website, trying to get customers for her real estate
7 business.

8 I'm not even going to talk about LinkedIn. People
9 come to us and say, well, where do you find all of these
10 people? We really just find people on LinkedIn. Because
11 everybody lists I worked at Guantanamo; I worked at the CIA; I
12 worked in a black site. They all list it on their LinkedIn
13 profile. And so that's where we find witnesses. We don't --
14 we're not, you know, trolling Piggly Wigglys looking for
15 witnesses. We find them on LinkedIn.

16 And so the idea that we are the problem is --
17 displays a fundamental misunderstanding of the
18 self-promulgated, open-source information which is available.

19 The idea that by going to someone and asking them,
20 hey, I -- I read your profile that you posted online on your
21 website on, for example, RobertGrenier.com, that you may have
22 information, can I ask you a few questions? What do you know
23 about that's relevant to this case?

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1 And we never reveal classified information in that
2 process, but we do obtain extremely valuable, important
3 information. Now, if they say, listen, I have something
4 classified to say, then we invite them to our SCIF.

5 The process here is not one which raises -- reveals
6 the information which is discussed in the process -- in the
7 government's brief; it is, rather, a matter of carrying out
8 our constitutionally mandated requirement to investigate.
9 That's all that we do.

10 The cases are pretty clear that the government
11 doesn't get to control the pipeline of access to witnesses.

12 That's all I have now. I know you asked me to brief
13 the question of whether you could compel witnesses or not. I
14 think that the -- if we could have ----

15 MJ [COL POHL]: The government witnesses -- I -- I read
16 your response.

17 LDC [MR. CONNELL]: Yes. Okay. Very good.

18 So I think the cases are pretty clear that you do
19 have that authority if you choose to exercise it. It's not
20 something I'm asking for right now.

21 MJ [COL POHL]: Again, I -- I want to focus on these two
22 documents because ----

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

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1 MJ [COL POHL]: ---- for the further of the argument. Let
2 me ask you one other question before you walk away.

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

4 MJ [COL POHL]: And I don't need to say it again but I
5 will say it again. Don't take anything from this question.

6 LDC [MR. CONNELL]: Of course.

7 MJ [COL POHL]: The government in their pleadings say,
8 well, you know, the defense won't agree for this, we're going
9 to ask for a protective order.

10 LDC [MR. CONNELL]: Yes, sir. As they did in 441.

11 MJ [COL POHL]: Yeah. Okay. So assuming they ask for a
12 protective order that's consistent with this -- and again, as
13 I discussed yesterday, I have no authority over the Department
14 of Justice or the people in charge of the security
15 clearances ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: ---- so even if I were to say no, I'm
18 going to say it's protected, you know, I'm not going to do
19 this protective order, I think these restrictions are
20 improper.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: That doesn't provide you any protection,
23 right? I mean ----

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1 LDC [MR. CONNELL]: Well, it may, sir.

2 MJ [COL POHL]: You may have a defense.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: You may have defense. It doesn't protect
5 you from ----

6 LDC [MR. CONNELL]: I'm in the defense business. I
7 appreciate defenses.

8 MJ [COL POHL]: But it doesn't protect you from the
9 threat.

10 LDC [MR. CONNELL]: No, it doesn't. It does protect us
11 from the structural conflict, however.

12 MJ [COL POHL]: Yeah, okay. So assuming we get to that
13 impasse -- I know people hate when I do this because I go down
14 these hypotheticals but ----

15 LDC [MR. CONNELL]: I don't hate it.

16 MJ [COL POHL]: I'm the judge; I can do it.

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

18 MJ [COL POHL]: That the government and I disagree on
19 what's proper in these -- but they're saying this is our
20 guidance.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: And I'm -- I say again, I can't control
23 DoJ or the classification people.

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

2 MJ [COL POHL]: Okay. What's the remedy? Other than -- I
3 got dismissal, but are there other remedies, potential
4 remedies, if we got to that point?

5 LDC [MR. CONNELL]: I think there are. Let me point -- if
6 you give me just one moment, I think there's actually a rule
7 that might help us here.

8 MJ [COL POHL]: Sure.

9 LDC [MR. CONNELL]: Let me point you to 505 -- I have to
10 chase back the letter -- (h)(6)(B). I can say that again.

11 MJ [COL POHL]: (h)(6)(B).

12 LDC [MR. CONNELL]: (h)(6)(B). Which might not be
13 100 percent on all fours but is awfully close to that
14 situation, because we have not actually come to the situation
15 in this case so far where the government has stood on its
16 national security privilege to prevent information.

17 Now, it has said that it will never provide location
18 information and would absorb whatever sanctions would be
19 necessary in order to -- in order to protect that information.

20 This may be a similar situation where, rather than --
21 and this is their decision, right? The government is the
22 controller of the national security privilege. It is their
23 decision that if they want to protect this particular aspect

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1 of torture information, they have to do so at a cost.

2 And so what 505(h)(6)(B) does is lays out different
3 possibilities. Dismissal is the default, but it does lay out
4 additional ones as well, which include findings against the
5 United States on any issue to which -- as to which the
6 excluded classified information relates. That strikes me as
7 an alternate remedy which could come into play in this
8 situation. Not all alternate remedies are applicable in every
9 situation. But the -- it might be possible that, if the
10 United States continues to maintain its position here and
11 invokes national security privilege for it, that that element
12 of finding against the United States on any issue as to which
13 excluded classified information relates could be an alternate
14 remedy.

15 Do you want me to go -- I see -- do you want me to
16 give you an example of what that might look like?

17 MJ [COL POHL]: Sure. Please.

18 LDC [MR. CONNELL]: So with respect -- you know, you gave
19 me a hypothetical earlier about what if you -- what if you won
20 the motion to suppress and doesn't that make a bunch of this
21 stuff irrelevant at trial. And that's an example -- and
22 yet -- and I may think of something, but that's pretty much
23 true, that the current uses that I have been considering for

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1 this information in the guilt and innocence phase all assumed
2 that we had lost a motion to suppress and the January 2007
3 statements were being introduced. There might be some other
4 uses.

5 But finding against the United States on the question
6 of the admissibility of the January 2007 statements, for
7 example, and -- would probably take care of a great deal of
8 the -- of the issues. It would take care of the suppression
9 motion issues, it would take care of at least most of the
10 trial issues. We would have to find a different wording of a
11 finding for any possible sentencing phase, but that's the
12 example of government, you -- the government has a right not
13 to have its witnesses interviewed, except under unacceptable
14 conditions. If it sticks to that right and invokes
15 national security privilege for it, it does so at a cost. And
16 that cost is either the process of the case, which is
17 dismissal, or that it's going to lose the motion to suppress
18 and certain aspects of the sentencing phase.

19 So that's the example of how the rule, which is laid
20 out in 505(h)(6)(B)(ii) could come into play.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: Thank you, sir.

23 MJ [COL POHL]: Thank you, Mr. Connell. Do you want to go

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1 to lunch? I thought so. Okay. We'll break for lunch now and
2 reconvene at 1315. The commission is in recess.

3 [The R.M.C. 803 session recessed at 1155, 1 March 2018.]

4 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1316,
2 1 March 2018.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed.

6 Mr. Nevin, do you wish to be heard?

7 LDC [MR. NEVIN]: I do, Your Honor. And two things that I
8 want to return to that happened this morning, just briefly.

9 One is my remark about the military commission --
10 quoting from Holloway that the military commission was not to
11 embarrass counsel by putting me in the position of choosing
12 between two conflicting interests. And I just wanted to say
13 again that that's meant in the same way that we say like I'm
14 temporarily financially embarrassed as a way of saying that I
15 don't have enough money. It means being put in an untenable
16 position.

17 My own view is that the military commission has been
18 careful all around the courtroom not to embarrass counsel in
19 the colloquial -- in the normal sense of the term and I just
20 wanted to be clear about that.

21 MJ [COL POHL]: Thank you.

22 LDC [MR. NEVIN]: The second thing is, you know, when
23 Mr. Groharing said that Mr. Nevin has a conflict, I was going

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1 to get up and say stipulated; but I know that what he meant
2 was you have been saying all along you have a conflict, why
3 are you suddenly now talking. And fair enough, after you've
4 been telling us for the last few days that you weren't going
5 to say anything, and -- fair enough.

6 But the reason I stood up at that point was -- was
7 because this is what I was really asking you to do from the
8 outset, was to touch on the things that create the conflict so
9 that we can get the point -- to the point of resolving them.

10 MJ [COL POHL]: Got it. Understand.

11 LDC [MR. NEVIN]: Yeah. Okay. And so ----

12 MJ [COL POHL]: Understand.

13 LDC [MR. NEVIN]: And so what I wanted you to ask
14 Mr. Groharing had to do with the central question that is
15 really -- and I'm going to be pretty brief about this, because
16 I think what Mr. Connell said about 524 is fine, I don't
17 really have anything else to say about that. I think it
18 creates a conflict of interest. I haven't had time to review
19 the new guidance on approaching CIA agents, and I am not going
20 to speak to that.

21 MJ [COL POHL]: Okay.

22 LDC [MR. NEVIN]: But with respect to 525, I disagree with
23 Mr. Connell. And, in some ways, I think we would need to wait

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1 to hear from Mr. Groharing. And it does have to do with the
2 question I wanted you to ask him. Because my understanding
3 throughout has been that it is the government's position that
4 the information that we acquire from Mr. Mohammad on those
5 subjects that are contained in the protective order, namely,
6 places of torture, persons who conducted the torture, and
7 facts that surround the circumstances of arrest, apart from
8 the date and place of the arrest, that those are all
9 considered to be classified.

10 And it is, of course, correct that the government has
11 never confirmed to us the locations of the black sites. So we
12 have not acquired information from the government about the
13 location of the black sites, but we may have acquired
14 information from our clients. And I -- my team in particular
15 may have acquired information from Mr. Mohammad.

16 And I have always understood that it was the
17 government's position, despite the fact that to me it makes no
18 sense, and I think it's inconsistent with the law, that words
19 that come out of Mr. Mohammad's mouth about his own personal
20 experiences and observations could be classified if they are
21 on those subjects.

22 So if it is true that -- that statements made by
23 Mr. Mohammad about these subjects are no longer classified,

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1 then everything has become a lot simpler, including our
2 ability to, under the Convention Against Torture, referring to
3 the AE 200 series, including our ability to complain about the
4 torture and to seek redress from international bodies,
5 including our ability to participate -- or at least for
6 Mr. Mohammad to be heard in the anticipated ICC investigation
7 of the CIA torture program, and on other matters.

8 If what Mr. Mohammad says to us is not classified,
9 then -- then we're good to go, or we're something awfully
10 close to good to go, with a couple of exceptions that I'll
11 mention to you now. And I know Mr. Groharing or someone from
12 trial counsel's side is going to speak shortly and --

13 MJ [COL POHL]: Mr. Nevin, let me make sure I understand
14 your position. And I'm analogizing this to open-source
15 information, okay?

16 If you -- if there's open-source information -- and
17 if I'm misstating the government's position, I'm sure they'll
18 tell me. *The New York Times* says -- and I'm using Canada, not
19 to pick on Canada, but it's just an easy -- an easy convention
20 to use. *The New York Times* says a black site was in Canada.
21 Okay. And you become aware of that.

22 LDC [MR. NEVIN]: I become aware of *The New York*
23 *Times* ----

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1 MJ [COL POHL]: Of *The New York Times* saying that. Okay.
2 Okay. And you're also aware of the classification guidance
3 you just alluded to. Okay. That doesn't declassify that
4 information, does it?

5 LDC [MR. NEVIN]: What information?

6 MJ [COL POHL]: *The New York Times* is saying a black site
7 is in Canada.

8 LDC [MR. NEVIN]: No. It doesn't -- the fact -- the
9 information that *The New York Times* says there was a black
10 site in Canada is not and never could be classified.

11 MJ [COL POHL]: Oh, I -- I'm parsing it. I'm saying --
12 and again, when you say *The New York Times*, there's a separate
13 component to how this could be used outside. I'm just saying
14 the information about the location of the black site itself,
15 okay, does that remain classified, even though it's been --
16 appeared in *The New York Times*?

17 LDC [MR. NEVIN]: No. To be classified, it has to be
18 information which the government owns or controls; and the
19 government doesn't own or control -- now, well, let me back
20 up. If *The New York Times* has -- has reproduced a piece of
21 classified information that is marked CLASSIFIED that says
22 there was a black site in Canada, then yes, then the -- that
23 information in *The New York Times* would be classified. But if

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1 *The New York Times* has conducted an analysis of its own that's
2 not based on classified information and has come to the
3 conclusion and reports it in a story that there was a black
4 site in Canada, that's not classified. The government doesn't
5 own that information.

6 MJ [COL POHL]: Okay. Let me make sure I understand,
7 because I think there's going to be a -- because I'm not
8 sure -- wait a minute. Let me go forward. Okay.

9 *The New York Times* says there's a black site in
10 Canada. You know from your classification guidance that that
11 information -- not *The New York Times*, the information is
12 classified ----

13 LDC [MR. NEVIN]: Yeah.

14 MJ [COL POHL]: ---- never been declassified by the United
15 States Government.

16 LDC [MR. NEVIN]: Correct.

17 MJ [COL POHL]: Okay. Okay. I'm just -- I'm not talking
18 about the source, *The New York Times*, I'm talking about the
19 black site information. Never been declassified by the United
20 States Government. Okay. Now, because it's now in *The New*
21 *York Times*, you believe the information now is no longer
22 classified?

23 LDC [MR. NEVIN]: No. No.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. NEVIN]: I believe that if the information is in
3 the hands of the government, and if it's information that the
4 government controls and owns, that fact is classified.

5 I think this gets us to the whole problem because --
6 in the way that I differ with -- that we differ with
7 Mr. Connell about 525. Because the whole issue that has
8 really brought us here over all of these years has been this
9 problem of confirming or denying. And the government has made
10 it -- has stated this in many different ways, that it's one
11 thing to simply say, I read in a classified document that the
12 government gave me there was a black site in Canada; it's
13 another thing to buy a ticket to go to Canada when I am
14 representing Mr. Mohammad. By doing that, I could
15 theoretically be confirming or denying the existence of
16 classified information; namely, that there's a black site in
17 Canada.

18 So that what -- I remember back in October when we
19 were having this argument that led you to turn to the
20 government and say, so what can they do? And then you
21 directed them to file something within some period of time,
22 and ultimately that led to 525G.

23 So -- because the question was -- I remember counsel

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1 saying -- making the remark that we shouldn't be told -- that
2 the government shouldn't be ordered to tell us the locations
3 of the black sites because, after all, if we went there in
4 reliance on that information to conduct an investigation, we
5 would be revealing classified information. This is the --
6 this is the mosaic or the -- or the confirming or denying
7 classified information implicitly as opposed to by directly
8 revealing it.

9 So when Mr. Connell says to you, when we go to a
10 place to do an investigation, we don't reveal classified
11 information, of course, he means -- I take it he means he
12 doesn't hand over to someone he's talking to a piece of
13 classified information and say, What do you think about this?
14 But the problem you identified at the very beginning of this
15 whole process back in October was what kinds of things that
16 you would do in the course of investigation could constitute
17 confirming or denying the existence of classified information.

18 And so, for example, if I am known to be counsel for
19 Mr. Mohammad and if I am known to be interested in
20 investigating the places where he was tortured, does the fact
21 that I buy a ticket to go to Canada constitute confirmation or
22 denial?

23 MJ [COL POHL]: And again, I think the November guidance

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1 seemed to say you couldn't do that. But the way I'm reading
2 this, and I'll let, of course, Mr. Groharing to say, the 28
3 February guidance is you can do that, as long as it's not
4 based on classified information.

5 LDC [MR. NEVIN]: Okay, and ----

6 MJ [COL POHL]: And that's -- and that's why I come back.
7 I just -- it may have just been inartfully or maybe I heard it
8 incorrectly, is that information is either classified or not,
9 okay? And if it appears in *The New York Times*, that does not
10 make it unclassified, does it?

11 LDC [MR. NEVIN]: No.

12 MJ [COL POHL]: Does not make the -- the baseline
13 information unclassified -- I thought you told me, you said
14 earlier, well, once it's in the *The New York Times*, it's now
15 unclassified because the government no longer owns it.

16 LDC [MR. NEVIN]: No. And I think I was ----

17 MJ [COL POHL]: We may be talking across each other a
18 little bit here, so ----

19 LDC [MR. NEVIN]: Yes. I believe we were, and I
20 appreciate you, once again, not embarrassing me. Because what
21 I meant to be saying was the fact that it's in the *The New*
22 *York Times* is not classified.

23 MJ [COL POHL]: Correct.

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1 LDC [MR. NEVIN]: It's written in the *The New York Times*.
2 The words that are in *The New York Times* are not classified.
3 When I buy *The New York Times* and get on the subway and see
4 that there's a story that says there was a black site in
5 Canada ----

6 MJ [COL POHL]: Right.

7 LDC [MR. NEVIN]: ---- I don't have to stick it inside my
8 backpack and act like I never saw it. So *The New York Times's*
9 possession of, repetition of, publication of the material is
10 not itself classified.

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: I agree that -- that the underlying
13 fact, if it's a fact about Canada, which it's ----

14 MJ [COL POHL]: Yeah.

15 LDC [MR. NEVIN]: ---- if it's a fact about Canada, that
16 that would be classified.

17 MJ [COL POHL]: Okay. Okay. Good.

18 LDC [MR. NEVIN]: So really, mainly what I wanted to do
19 was to say to you, I don't think that -- and I'll be
20 interested to hear what Mr. Groharing says, or whomever
21 speaks, but I don't think that 525G -- I don't think that
22 525M, the most recent 525 pleading, resolves the problems that
23 were presented in 525G. If I'm wrong about that, great.

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1 MJ [COL POHL]: Okay. Just for the way ahead, because
2 I -- when we started this, we kind of went back. Instead of
3 following my normal process, I had Mr. Groharing, we went back
4 and forth. So I want to now focus on the 525 itself, and so
5 not just the -- if you have got anything in addition to the --
6 to the guidance. So kind of get back on track. I'm going to
7 talk about the whole motion.

8 Mr. Connell, I'll give you another opportunity, too.

9 Are you with me on this, Mr. Nevin?

10 LDC [MR. NEVIN]: Well, yes, although ----

11 MJ [COL POHL]: I don't -- quite frankly, the reason why I
12 started the way I did, is until we resolve this issue, all the
13 other ones really don't -- are not resolvable. But anyway, go
14 ahead.

15 LDC [MR. NEVIN]: Well, let me just say -- let me just
16 speak to the guidance briefly so that we're all on the same
17 page about what my problem is. And I can do it ----

18 MJ [COL POHL]: Okay.

19 LDC [MR. NEVIN]: ---- I can do it briefly.

20 Our view is that the new guidance that came day
21 before yesterday, 520 -- 525M, leaves the original question
22 open of what would constitute confirming or denying. And so
23 it says that you could -- you can ask a question based on

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1 open-source information, but you can't ask a question based on
2 classified information. And so I think a very typical
3 situation is going to be that a person is going to be in
4 possession of both classified information and unclassified
5 information.

6 So Mr. Mohammad has said to me, I was tortured at X
7 location. And an NGO, let's say, has conducted an
8 investigation and has determined that there was a CIA black
9 site at X location. Okay. So I go to X location and I'm
10 standing outside, and I say, so did you see anything unusual
11 over there? Because I think there was a black site here at X
12 location. Is my question based on what Mr. Mohammad told me,
13 or is it based on what I read in the open-source material?
14 And how do I determine the difference, bearing in mind that
15 criminal prosecution and the loss of security clearances and
16 the loss of employment turns on the answer to that question.
17 And I submit to you, at the very least, 525M doesn't answer
18 that question.

19 I had -- we had identified to you when we filed 525I,
20 our response to 525G, we had identified a separate problem,
21 and that was that it wasn't -- that 525G was more subtle about
22 it. It implied that you could rely on open-source material to
23 conduct an investigation, and that that was a substitute for

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1 being able to conduct the investigation yourself. And we made
2 the argument that that's not a correct way of looking at how
3 we fulfill our obligations; that that meant we were relying on
4 volunteers who fortuitously show up and conduct an
5 investigation, and then make available to us or make available
6 generally.

7 MJ [COL POHL]: You're talking about this uncleared
8 investigator theory?

9 LDC [MR. NEVIN]: I'm talking about the idea that the
10 government could say, you may fulfill your obligation by
11 relying on what Human Rights First has done.

12 MJ [COL POHL]: I got you.

13 LDC [MR. NEVIN]: And I'm -- we made the point in 525I
14 that -- that the people who conduct those kinds of
15 investigations are not representing Mr. Mohammad, they're not
16 charged or sworn to act in his behalf; the information they
17 acquire doesn't have to be protected from disclosure by rules
18 of confidentiality and is not protected by the attorney-client
19 privilege. Those investigations are not being directed by
20 counsel and they aren't, of course, obligated to provide to
21 us all of the products of their investigation.

22 Every one of those things I just mentioned: Control,
23 privilege, all the rest, all of those things are required by

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1 the cases. And we laid this out in 525I. And I -- I am sure
2 you're aware of this, but -- but this 525M, the most recent
3 guidance, has all of these same problems because it seems to
4 posit, seems to suggest that the solution to the investigation
5 problem is that, although you can't act on classified
6 information, you can rely on what other people have done for
7 you. And that is -- that is not the way lawyers are charged
8 with fulfilling their obligation to conduct an investigation.

9 So I submit to you that -- and -- and Mr. Groharing,
10 or whomever is to speak next, may prove me wrong, and, if so,
11 great, but I submit that 525M leaves all of the same problems
12 that 525G did. That's what created the conflict of interest.
13 The conflict of interest, of course, was also created by the
14 prohibitions on speaking to employees, present and former, of
15 the CIA that's referred to.

16 MJ [COL POHL]: Yeah, and I want to bifurcate the two,
17 because that's a 524.

18 LDC [MR. NEVIN]: That's a 524 issue. And as I said,
19 Mr. Connell, I thought, made the point nicely, that -- that
20 that creates a conflict of interest. I think you and
21 Mr. Connell referred to it as a systemic or a structural
22 conflict of interest. And really, the same thing is true in
23 terms of a structural conflict; the same thing is true with

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1 525. And we're still in that box.

2 So that's what I wanted to speak to with respect to
3 the existence of a conflict. What I am saying to you on
4 behalf of Mr. Mohammad is that his lawyers have a conflict
5 now, and this conflict, we can't go forward until this
6 conflict gets resolved.

7 MJ [COL POHL]: Okay.

8 LDC [MR. NEVIN]: Thank you for hearing me.

9 MJ [COL POHL]: Mr. Connell, do you want to add anything
10 so we can -- since I kind of -- on 525? Since I kind of
11 limited you when you were up earlier.

12 LDC [MR. CONNELL]: Right.

13 So procedurally I want to say what I think is
14 happening because I think that's what you're asking me, which
15 is my argument earlier was intended to cover 524 and 548 and
16 549 and 525G forward.

17 There's still -- there's still a separate question of
18 the base motion of whether the motion to compel should be
19 granted ----

20 MJ [COL POHL]: Right.

21 LDC [MR. CONNELL]: ---- and there's going to be argument
22 on that, but that's -- so that's what I think that I'm
23 covering here.

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1 There are two points that I want to make just on that
2 one little -- the thing that I think you're asking me about.
3 The first one is your idea that information is either
4 classified or it's not, sort of an ontological inquiry into
5 the -- into whether a particular piece of information is by
6 its nature classified. And that's not -- that's not accurate.

7 And so let's take it out of the RDI context and let's
8 say the square root of three. All right. The square root --
9 the government may have encryption or other reasons why the
10 square root of three calculated out to 100,000 decimal points
11 is classified because it's used in some algorithm for
12 encryption or whatever. So when the government calculates the
13 square root of three out to 100,000 places, it's classified.
14 It's information they produced. They control it.

15 If a scientist in Finland also calculates the square
16 root of three out to 100,000 places, when that person
17 calculates it, it's not classified because it's not owned,
18 controlled, or produced by the United States Government. It
19 has not been acted upon by an original classification
20 authority in the speech act of saying ----

21 MJ [COL POHL]: I got that, Mr. Connell. That wasn't what
22 I was saying.

23 LDC [MR. CONNELL]: Oh, okay. Well, I misunderstood then.

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1 MJ [COL POHL]: What I was simply saying was, is a piece
2 of information that is classified appears in *The New York*
3 *Times* does not become declassified because it's in a public
4 source. That was my only point.

5 LDC [MR. CONNELL]: Right. And the fact that it
6 spontaneously arises some other place does not make it
7 classified, right? There's no -- except in the area of
8 nuclear information. Only nuclear is born classified.

9 MJ [COL POHL]: I don't think we're going to deal with
10 nuclear information, so move that aside.

11 LDC [MR. CONNELL]: Exactly. And, you know, your example
12 about Canada and *The New York Times* is a perfect one, was --
13 at the risk of denying classified information, there was no
14 black site in Canada. And so if *The New York Times* published
15 an article that there was a black site in Canada, we actually
16 wouldn't know if it were true or not. And under our current
17 state of ignorance, that's true for every open source
18 suggesting that any place had a -- had a black site.

19 Now, that leads to the question of, well, does the
20 government, you know, sort of pollute the waters by telling us
21 where the black sites were, which is the 525 itself, which
22 somebody else is going to argue, but that's a different
23 situation, and I'll let that be argued there.

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1 The place that Mr. Mohammad's team and I part company
2 is whether 525M muddies the water or clears the water. I
3 think that 525M clears the water. And the sentence that seems
4 to be causing the difficulty is, in 525M, "Cleared personnel
5 can ask questions based on open-source information, but those
6 questions cannot be based on any classified information or
7 other classified -- classification guidance."

8 And I understand what counsel for Mr. Mohammad to be
9 saying is, well, if I'm talking about the square root of three
10 and I calculated it myself and I read it in a classified
11 document, how am I supposed to know whether I'm asking my
12 question based on open-source information or classified
13 information. I don't read that to be what that sentence says.
14 I read the -- that sentence to be -- to address the problem of
15 presenting -- because the sentence right before it talks about
16 presenting open-source information.

17 I see the problem of presenting classified
18 information as addressed by that question, which came up
19 earlier in our argument, which is that I freely acknowledge
20 I can't take a classified picture of a black site that the
21 government has given to me and hold it up and say, hey, does
22 it -- you know, do you recognize this.

23 MJ [COL POHL]: Well, I'm looking at this and it talks

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1 about -- I'm looking at paragraph 3.

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

3 MJ [COL POHL]: "Cannot disclose classified information to
4 anyone who does not have the requisite clearance."

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

6 MJ [COL POHL]: That's not particularly earth shaking.

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: "When conducting investigative efforts in
9 this case, cleared personnel are permitted to present
10 open-source information to individuals who do not have a
11 clearance." Again, not particularly earth shaking to me.
12 "Cleared personnel can ask questions based on the open-source
13 information, but those questions cannot be based on any
14 classified information defined by AE," blah, blah, blah, which
15 tells me your questioning is limited when you're talking to
16 people without clearances to nonclassified information.

17 LDC [MR. CONNELL]: Yes, the scope of the open source.

18 MJ [COL POHL]: Yeah. That is the way I'm reading this.

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

20 MJ [COL POHL]: I mean, I don't read it the way
21 Mr. Nevin -- I'm just reading what -- and I'll clarify with
22 Mr. Groharing. Am I reading that correctly?

23 TC [MR. GROHARING]: Your Honor, if it helps, I agree,

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1 that's the correct reading. That's how I would read it as
2 well.

3 MJ [COL POHL]: We're talking about disclosure. You're
4 prohibited from disclosing classified information to uncleared
5 people.

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

7 MJ [COL POHL]: That's what all that language seems to say
8 to me.

9 LDC [MR. CONNELL]: And that is why I believe that 525M
10 returns us to the status quo ante, which is ----

11 MJ [COL POHL]: Yeah.

12 LDC [MR. CONNELL]: ---- we can't reveal classified
13 and ----

14 MJ [COL POHL]: And I think there's going to be an example
15 we discussed last time in a classified session that will
16 illuminate this in a way that we will know for sure the way
17 ahead.

18 LDC [MR. CONNELL]: All right, sir.

19 MJ [COL POHL]: Okay. Do you have anything else on 525?

20 LDC [MR. CONNELL]: I do have one other thing, but I know
21 that Mr. Groharing -- sir, you asked me before the break about
22 examples or about how alternate remedies work under 505. And
23 so I did find one case, United States v. Murphy. It's at 2008

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1 CCA LEXIS 51, it's a 2008 case from the Court of Criminal
2 Appeals. I've provided the prosecution a copy and I would
3 approach.

4 MJ [COL POHL]: You don't -- what's the cite?

5 LDC [MR. CONNELL]: 2008 CCA LEXIS 51, because it's an
6 unpublished case. And it's a fairly famous case actually, so
7 you might be familiar with it. There was an individual -- a
8 colonel who worked at the White House.

9 MJ [COL POHL]: Colonel Murphy of the Air Force?

10 LDC [MR. CONNELL]: Yes, sir, who worked at the White
11 House.

12 MJ [COL POHL]: I believe he's now Lieutenant Murphy,
13 but I know who you are talking about.

14 LDC [MR. CONNELL]: Yes, sir. There was an alternate
15 remedy other than dismissal that was imposed on that case,
16 that being a maximum punishment of no punishment. I'm not
17 saying that's exactly on all fours as far as the answer, but
18 the Military Rule of Evidence 505(i) that is being applied in
19 that case is very similar to our M.C.R.E. 505(h). So it
20 seemed to me a good illustration of how alternate remedies can
21 work when the government asserts its privilege not to reveal
22 information over a contrary finding by a military commission
23 or a court-martial.

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1 MJ [COL POHL]: Thank you.

2 LDC [MR. CONNELL]: Thank you.

3 MJ [COL POHL]: You will get another chance. Let me ----

4 LDC [MR. NEVIN]: I just wanted to make sure only to say
5 that, with respect to 548, we do request the opportunity to
6 file a responsive brief.

7 MJ [COL POHL]: Okay.

8 LDC [MR. NEVIN]: 548, the government's pleading that they
9 filed yesterday. 548C.

10 MJ [COL POHL]: Okay. I'll -- okay.

11 LDC [MR. NEVIN]: I did not intend to -- I thought I was
12 just arguing the conflict question of whether the impact of
13 525 ----

14 MJ [COL POHL]: Well, these things are so intertwined ----

15 LDC [MR. NEVIN]: I understand.

16 MJ [COL POHL]: ---- it's difficult to break them up. But
17 do you want to file on 548 ----

18 LDC [MR. NEVIN]: Yes.

19 MJ [COL POHL]: ---- and we'll defer argument on 548 until
20 that's done.

21 Anybody else want to be heard on 525?

22 LDC [MR. RUIZ]: Judge, just on behalf of Mr. al Hawsawi,
23 I want to make clear on the record that we are aligned with

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1 the interpretation advanced by Mr. Ali's counsel of the
2 guidance. I know there have been multiple
3 interpretations ----

4 MJ [COL POHL]: Got it.

5 LDC [MR. RUIZ]: ---- so I want to make it clear that our
6 reading is in line with Mr. Ali's reading.

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

8 LDC [MR. HARRINGTON]: Judge, we also agree with
9 Mr. Connell's position.

10 MJ [COL POHL]: Okay. Ms. Bormann?

11 LDC [MS. BORMANN]: Judge, we just received these filings
12 when the commission did, and so we've had a short time to
13 review them and think about them. So I, like Mr. Nevin, will
14 be asking for time to brief the topics, both in response to
15 the government's new filings in 525M and 524I and also in
16 four -- sorry, 549 and 548. I think those are the right
17 numbers.

18 However, just based upon what we're doing here today,
19 I do have a couple of comments and a couple of questions
20 that ----

21 MJ [COL POHL]: Just to be clear here, because I don't
22 want this thing to drag out forever. These were both notices.
23 And the normal rule is a notice doesn't trigger any briefing

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1 period ----

2 LDC [MS. BORMANN]: Sure.

3 MJ [COL POHL]: ---- as everybody knows.

4 LDC [MS. BORMANN]: Right.

5 MJ [COL POHL]: But given the positions of the parties in
6 this case, it is triggering a briefing period, and you will
7 have two weeks to ----

8 LDC [MS. BORMANN]: Right.

9 MJ [COL POHL]: ---- to -- you're actually the -- it's a
10 response. I'm treating -- okay. Consider it a motion.
11 Your -- you have two weeks for a response. The government
12 will have one week for reply from the date we return on
13 Monday.

14 LDC [MS. BORMANN]: That's right.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: That's the way I assumed it would
17 happen. I mean, we are all sort of grappling with what this
18 means. You can see it, the commission is ----

19 MJ [COL POHL]: Sure.

20 LDC [MS. BORMANN]: ---- the prosecution is, and all of
21 the defense counsel are.

22 So with respect to 525M, I understand how both
23 Mr. Nevin and Mr. Connell can reach their conclusions because

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1 I don't think it's absolutely clear. But I do want to say for
2 the record that I lean toward Mr. Connell's conclusion only
3 because, you know, just like we are not -- we were never told
4 where the locations were, so by landing in Canada, I can
5 neither confirm nor deny anything classified because nobody's
6 told me that there was a black site in Canada. And, like me,
7 my client was also not informed that there was a black site in
8 Canada. And so even if he told me that he believed there was
9 a black site in Canada, it would neither be confirming nor
10 denying any classified information.

11 More importantly, there is an issue -- and I want to
12 touch on this very briefly, and maybe it can be addressed by
13 the commission when Mr. Groharing argues. If, let's say, as
14 Your Honor put it, *The New York Times* printed an article that
15 says, you know, we've done our own investigation and we
16 believe that there was a black site in Canada.

17 The question and the issue before the commission
18 should be, and I know the answer for myself, based upon that,
19 given the fact that I've never been provided with the actual
20 locations of the black sites, do defense counsel have a duty
21 to investigate in Canada? And I would suggest to you that we
22 do. Since we haven't been provided that information, it would
23 probably be derelict not to.

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1 So, leaving that as it may, those are the issues I
2 have with 525M.

3 Do you want to hear about 524I?

4 MJ [COL POHL]: No. I want to break this up.

5 LDC [MS. BORMANN]: Okay. Because I just have one comment
6 on that. I know Mr. Connell touched on it, and I disagree.

7 MJ [COL POHL]: No. I just kind of want to get the lay of
8 the land with Mr. Connell, but now I'm going to try to get
9 back to a more structured approach of ----

10 LDC [MS. BORMANN]: Okay.

11 MJ [COL POHL]: ---- one exhibit at a time.

12 Mr. Groharing. And what I would like to do is address 525
13 now and we'll come back to 524.

14 TC [MR. GROHARING]: Okay.

15 So, Your Honor, first, before I comment specifically,
16 I think it's important to talk about what's at issue in this
17 series of motions and the significance of the information at
18 issue.

19 And we're talking about both the protection of
20 identities of CIA officers and contractors as well as the
21 locations of overseas detention facilities. And this is some
22 of the most highly classified information that the government
23 has. It's extremely sensitive information, and it's extremely

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1 important that we protect that information.

2 You've acknowledged that, Your Honor, in previous
3 orders. Specifically, we filed with respect to locations in
4 AE 308C, and the substitutes proposed by the government, you
5 approved in AE 308V. In that filing, we specifically asserted
6 the national security privilege over this information. And
7 consistent with the assertion of that privilege, you provided
8 relief to the government and gave the defense an adequate
9 substitute.

10 With respect to identities, we asserted the
11 national security privilege over the identities, the same ones
12 we're discussing here today.

13 MJ [COL POHL]: Mr. Groharing, I -- that's 524, right? I
14 know they're connected, but I need to break them up now, okay?

15 TC [MR. GROHARING]: Okay.

16 MJ [COL POHL]: And I'll give you an opportunity to be
17 heard on the identity issue. I just -- I want to get a little
18 more structure to this than I did earlier.

19 TC [MR. GROHARING]: Okay.

20 MJ [COL POHL]: And it's my fault, nobody else's. So
21 that's why I kind of -- so let's just talk about 525 places.
22 I have a question for you just while I'm interrupting you.

23 TC [MR. GROHARING]: Sure.

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1 MJ [COL POHL]: And this has not been brought up by
2 anybody, but there was one particular line, I'm just curious
3 what exactly it means. In paragraph 3 of the 27 February 2018
4 memo, "Individuals who have been granted security clearances,
5 cleared personnel, cannot disclose classified information to
6 anyone who does not have the requisite clearance and possess a
7 need to know the information as determined by the original
8 classification authority."

9 Does that last phrase modify "clearance" or the "need
10 to know" or both?

11 TC [MR. GROHARING]: It's meant to modify the need to
12 know.

13 MJ [COL POHL]: Okay. Now, we've gone -- we've discussed
14 this earlier, and I'm just trying to understand the
15 government's position here, is -- this could be read that each
16 time -- let's say Mr. Connell gets a piece of classified
17 information and he wants to give it to a cleared investigator,
18 one of his. Okay. Does he have to go to the OCA to establish
19 a need to know for that investigator?

20 TC [MR. GROHARING]: I would think no, Your Honor, with
21 respect to that information.

22 MJ [COL POHL]: Then what does this mean?

23 TC [MR. GROHARING]: Information that we're providing to

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1 the defense, if it's provided to the defense team, and they
2 all have the same clearance, that need-to-know determination
3 has been made with respect to that defense team.

4 MJ [COL POHL]: No. But my question is: What does this
5 mean, practically speaking, in the context of your memo? I
6 don't know. That's what's -- I've got a problem with the OCA
7 determination, but that's a separate issue altogether. Are
8 you with me on this? I don't know what this means.

9 Let me just back up. Everybody starts out with a TS.
10 You get your SCI, you get your SAP, and basically you get your
11 need to know to participate in this case. Any case, let's
12 say. Okay? And, now, this seems to -- seems to me, could be
13 read that there's another need-to-know determination somehow
14 down in the investigative process. Is that what this is meant
15 to be, or is this meant to be you've cleared those hurdles at
16 the start?

17 TC [MR. GROHARING]: That's how I would read it, Your
18 Honor. I don't -- in order for someone to have classified
19 information, they have to have the clearance and a need to
20 know.

21 MJ [COL POHL]: Yeah.

22 TC [MR. GROHARING]: It's the OCA who decides if they have
23 a need to know.

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1 MJ [COL POHL]: But I'm saying is that the -- once they
2 get the proper clearances and proper read-ons ----

3 TC [MR. GROHARING]: Right.

4 MJ [COL POHL]: Okay? And to do that, you have to have
5 the need to know, right? I mean, you're not going to get
6 read-on on our program, you don't have a need to know what's
7 in the program. I mean, if it's another step, I don't know.
8 That's behind mirrors that I don't see. But what I'm trying
9 to figure out is this language, is there another need-to-know
10 determination that's got to be made during the course of
11 investigating the case?

12 TC [MR. GROHARING]: I don't believe so, Your Honor. And
13 I'm not sure I'm completely tracking ----

14 MJ [COL POHL]: Well, I'm just trying to ----

15 TC [MR. GROHARING]: ---- what you're asking, but ----

16 MJ [COL POHL]: ---- figure out what this language is,
17 because it seems to say -- could be read to say that further
18 investigation requires a need to know that's determined by the
19 OCA, which I'm not sure is a correct statement of the law.
20 That's a separate issue altogether, but --

21 TC [MR. GROHARING]: It doesn't ----

22 MJ [COL POHL]: You don't mean ----

23 TC [MR. GROHARING]: ---- qualify the investigation.

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1 MJ [COL POHL]: Okay. So basically what you're saying,
2 this is just boilerplate language of you've got to -- you've
3 got a clearance, you've got a need to know as determined by
4 the OCA, and there's really no need to go back to the OCA on
5 an individual case-by-case basis. Okay.

6 TC [MR. GROHARING]: That's accurate, Your Honor.

7 MJ [COL POHL]: Okay. That's fine. Okay. That was --
8 that's what caused me confusion. The next question I had was
9 the one I discussed earlier with Mr. -- I believe it was
10 Mr. Connell and it may have been Mr. Nevin, about paragraph 3
11 essentially prohibits disclosing classified information to
12 uncleared people, right? I mean ----

13 TC [MR. GROHARING]: Yes, sir.

14 MJ [COL POHL]: Okay. Now, does that prevent the
15 defense -- okay, that's disclosure to third parties if -- and
16 in the places it is relatively easy, because they have not
17 been given the places. But if they get a piece of information
18 from their client that is classified, okay -- now, they don't
19 need to go -- I'm not talking about the clients. And I
20 understand that they have no privity to the United States,
21 okay -- can they use that piece of classified information to
22 investigate as long as they don't disclose it? Because this
23 doesn't seem to address that.

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1 TC [MR. GROHARING]: I think that would be very fact
2 specific with how -- when you say they use that piece of
3 information, what they do.

4 MJ [COL POHL]: Yeah.

5 TC [MR. GROHARING]: If -- and, you know, we can have lots
6 of hypotheticals, but I would think that there could be a way
7 that the defense uses information -- classified information
8 from Mr. Mohammad, let's say, where they then go and conduct
9 investigation based on that.

10 MJ [COL POHL]: Without disclosing the classified
11 information.

12 TC [MR. GROHARING]: Well, I think it depends on what it
13 is they're doing. I mean, if the information is here's a
14 specific description of a specific place ----

15 MJ [COL POHL]: Okay.

16 TC [MR. GROHARING]: ---- that they got from him that's
17 classified under -- the protective order, classified under the
18 prior guidance that we have with respect to classified
19 information, if they use that in a way where it's disclosing
20 the information, I think it could be ----

21 MJ [COL POHL]: Okay. Well, again, I'm coming back to the
22 issue, and again, this is the place issue rather than the
23 people issue, is if they disclose the classified

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1 information -- because it appears to me that the most recent
2 guidance is really saying don't disclose classified
3 information to people who don't have a clearance.

4 TC [MR. GROHARING]: Right.

5 MJ [COL POHL]: But it does not appear to say that if you
6 have some type of classified information, you can investigate
7 based on the classified information, with the understanding
8 you don't disclose it. Is that a fair reading of the
9 guidance?

10 TC [MR. GROHARING]: I think it's a fair reading, and I
11 think it would come down to how you're using the information.

12 MJ [COL POHL]: Okay. And then back to -- but again, if
13 you don't use it at all, where -- I see what you're saying.
14 By using the information, as long as you use it in a way that
15 does not disclose it, which could actually be a physical act
16 as opposed to just a verbal act. Okay. I've got that.

17 Okay. Let me go to one of Mr. Nevin's examples. If
18 they have the information from two sources, okay, as long as
19 they can say, hey, I've found from *The New York Times* that
20 there was a black site in Canada, the fact that they may have
21 that in some other classified source, they're fine, right?

22 TC [MR. GROHARING]: That's correct. Yes, Your Honor.

23 MJ [COL POHL]: So they double-tap it and they're fine as

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1 long as they say they can point to an open source for it.

2 Okay. Okay.

3 Go ahead.

4 TC [MR. GROHARING]: I think it's worth talking just a
5 little bit about the scope of the investigation, and it's fair
6 to say that the prosecution and the defense disagree with
7 regard to the scope. We have briefed that. I don't think I
8 need to talk about it in detail. But I think it's important,
9 you know, in, first, the commission's decision in the Nashiri
10 case that brought us the ten paragraphs, and then -- I got it,
11 it's another case, but same -- same reasons supported the ten
12 categories, I assume, for the commission implementing 397 in
13 this case, as far as the particular uses that the defense
14 might have for the types of information that they're going to
15 acquire, whether it's overseas or the other issue with the
16 witnesses.

17 I think it's important, as we -- as we discuss these
18 issues for the court to keep in mind what the defense does
19 have and how necessary additional investigation is considering
20 what the defense does have right now. Right now, the defense
21 is in a position to paint a very vivid picture of the
22 experiences of the accused in the RDI program. They have
23 thousands of pages of discovery that have been provided by the

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1 government. They've got significant prior investigation that
2 you're aware of, thousands -- it sounds like dozens of trips
3 and thousands of hours documented in the discovery materials,
4 in the pleadings that you have in front of you. They have
5 significant public releases of information related to the RDI
6 program, and they have the accused.

7 And of all of the sources of information, the accused
8 is the best source of information about their experiences in
9 the RDI program. They can work with the defense to do this,
10 and they have worked with the defense to do this.

11 And in our pleading, we cite specifically to you
12 numerous instances where the defense have submitted materials
13 to the court articulating in vivid detail their experiences in
14 the RDI program. So they very much have this information.
15 And as we stand here or sit here, they're in a position right
16 now to make compelling cases for whatever purposes are
17 appropriate to the military commission.

18 So as we talk about the damage to the
19 national security of the United States, and that's what we're
20 talking about here today, and efforts that the defense is
21 making that run up against that very important equity, it's
22 important to keep in mind, Your Honor, that they, right now,
23 have substantial information to make the arguments that they

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1 need to make in this commission. And these additional
2 matters, frankly, will -- likely will be cumulative with the
3 information they already have as far as what they will yield.

4 I'll also add that these matters, the conditions of
5 the confinement of the accused, are not matters that the
6 government -- that aren't going to be reasonably in dispute.
7 We have said repeatedly that we will agree to reasonable
8 descriptions of the accuseds' conditions of confinement. And
9 the term we use in 548C is as long as they're tethered to
10 reality. We're not going to quibble. We're not going to call
11 witnesses and debate about whether Mr. Mohammad was
12 waterboarded 183 times or 283 times. We, frankly, think that
13 has little relevance to the commission and the issues before
14 it.

15 The defense will be allowed to present that as
16 mitigation as they see fit, and the members will decide
17 whether or not any of these conditions, in as vivid terms as
18 the defense, you know, displays them to the court, presents
19 them to the court, should have an impact on their ultimate
20 sentence and how that weighs into whether or not -- what
21 penalty they should get, assuming we get to the penalty phase.

22 So we don't -- you know, as long as the defense is
23 conducting their activities in a way that doesn't disclose

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1 classified information, it's up to them to decide how to
2 allocate the resources. But what I would say is, when the
3 time comes and we -- as we continue to have discussions about
4 a trial schedule, we will oppose any request for delay to
5 investigate the actual facts at issue in this case. And the
6 actual facts are the offenses of September 11th, 2001. None
7 of this has anything to do with that.

8 The defense investigative resources should be -- and,
9 again, it's their call on how to allocate their resources; but
10 respectfully, they should be focused on the charges that they
11 are facing here in this commission and not trying to find
12 additional cumulative information when the government doesn't
13 really even dispute what has happened to the accused.

14 So -- and I don't know how far you want me to get
15 into 548 and the unlawful influence, or -- if you want to
16 discuss that argument here today, sir, I'm happy to do that.

17 MJ [COL POHL]: I believe Mr. Nevin wishes to be -- file a
18 pleading on 548. Yeah. So let's stick to --

19 TC [MR. GROHARING]: What I will say, Judge, with respect
20 to the guidance ----

21 MJ [COL POHL]: Stick to 525 and then we'll take each one
22 as a separate motion.

23 TC [MR. GROHARING]: And, you know, we went and got

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1 additional guidance specifically asking to enable the defense
2 to -- how -- to ask the question of how can the defense --
3 what can they do with open-source information, and encouraged
4 the OCA to articulate a policy that was clear, that would
5 allow them to investigate, while still protecting classified
6 information.

7 So that's what led to 525M, the policy, and it gives
8 the defense greater ability than they had in 525G. I think
9 525G was a fair reading of the policy in place up until
10 November, frankly. That's, I don't think, inconsistent with
11 what the government said at any point along the way as far as
12 what they could do to investigate the case overseas.

13 I think Ms. Baltes' comments, I think, are taken
14 somewhat out of context, and you talked about this earlier.
15 That was a motion on whether or not -- you're talking 013FF,
16 whether or not the defense needed to go into a SCIF when
17 they're talking to some non-clearance holder overseas. And
18 there was a lot of discussion in there about -- you know, and
19 in the context those comments were made by Ms. Baltes was, as
20 long as they're in receive mode, it's about what information
21 they're getting. And then the question was, what do they do
22 with that information when they get back here, how can they
23 use it? And it was tied into that discussion. It wasn't tied

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1 into a discussion about what they can tell somebody who
2 doesn't have a clearance.

3 So, to the extent those comments now are -- it's
4 claimed that they're inconsistent with the policy, I think
5 that's incorrect when you read all of the actual -- you know,
6 the pleadings and put them in the proper context.

7 And so all along that, you know, that guidance, the
8 challenge that when you conduct an investigation overseas or,
9 frankly, any investigation when you're talking to somebody who
10 doesn't have a clearance, is not doing it in a way that
11 discloses the classified information to them.

12 And so the rules have not changed in that regard, as
13 far as the defense's ability to provide classified
14 information. But I think it's fair to say that the
15 interpretation of the open-source guidance, the guidance
16 that's been provided in 505M -- or I'm sorry, 525M -- allows
17 the defense greater flexibility in using open-source
18 information to conduct these investigations. And we believe
19 that that is sufficient for whatever investigation the defense
20 still needs to conduct. And we frankly don't think that much
21 additional investigation is necessary.

22 MJ [COL POHL]: Okay.

23 TC [MR. GROHARING]: So, Your Honor, obviously, I -- we've

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1 already argued aspects of 525. I don't have any additional
2 points to add that we haven't made in our previous argument or
3 in our previous pleading, but I'm happy to answer any
4 questions that the court has.

5 MJ [COL POHL]: Just to clarify, your 27 February and your
6 28 February, this is the government's final position on this?

7 TC [MR. GROHARING]: It's -- yes, Your Honor. I mean,
8 we -- to be clear, and as I've said before, I don't make
9 classification guidance.

10 MJ [COL POHL]: No, I understand. But apparently the
11 people who do change it. I just want to make sure, and this
12 is one of the things when Mr. Nevin and I talked on Monday,
13 was I just want to know what the lay of the land is.

14 And so -- so you believe that anything -- if the
15 defense were not to follow the guidance -- and let's just go
16 525 -- actually, I'll wait until 524, because 525, I don't
17 think, raises the issue.

18 Okay, that's all I have, Mr. Groharing. Thank you.

19 Any other defense counsel want to be heard on 525?
20 Mr. Connell.

21 LDC [MR. CONNELL]: Sir, a lot of what the government has
22 argued has been argued in other places, and I'm not going to
23 address it here. But there are two questions that the

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1 military commission asked.

2 First, in 525M, the military commission asked, does
3 OCA modify need to know. And that has been a problem ever
4 since AE 013P. Because AE 013P, the first version of the
5 protective order, had this language in it that need to know as
6 determined by the original classification authority.

7 Now, in the second to last version of the protective
8 order, the military commission sua sponte changed that
9 language from need to know as determined by the original
10 classification authority, to need to know as determined by the
11 government. And that appears in AE 013BBBB, paragraph 5.a(3).

12 I've never understood it. I've never understood the
13 reason why the military commission changed it. It wasn't
14 argued by the parties. I have never understood the origin of
15 that language or what it means. What I have concluded, based
16 on what the military commission has said about these things,
17 and practiced, is that there is no internal need-to-know
18 determination whatsoever. I have made the point on multiple
19 occasions to the military commission that I have -- in fact,
20 we even argued a motion to dismiss on the basis that you
21 are -- the protective order ostensibly requires a need-to-know
22 determination, and we have no mechanism to request a
23 need-to-know determination from any OCA.

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1 But what you recognized in 6.j. of the protective
2 order, paragraph 6.j., is that you recognized the need to know
3 of the defense teams to operate on a joint basis. And so I
4 want to say that I don't think that that -- I think the
5 government -- the military commission has, over my objection,
6 ruled with the government that the OCA determines need to know
7 as opposed to what the actual Executive Order 13526 says.
8 I've always thought it was wrong, but I don't think that it
9 has any practical application; I don't think there's any
10 additional.

11 MJ [COL POHL]: Let me just clarify, after looking at
12 something I wrote six years ago ----

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

14 MJ [COL POHL]: ---- or five years ago. When that
15 language was in there, I was addressing the initial need to
16 know.

17 LDC [MR. CONNELL]: Yes, sir. That makes perfect sense.

18 MJ [COL POHL]: I think DoD -- what I'm reading from now
19 is the DoD Manual 5200.01 says, "A determination of need to
20 know is made by the authorized holder of classified
21 information" which I think has been the argument all along.

22 LDC [MR. CONNELL]: Amen, sir. I'm not going to say
23 anything else about that.

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1 MJ [COL POHL]: Okay. But I'm just saying that was the
2 context of that, as similar to the context that it's in the
3 February order.

4 LDC [MR. CONNELL]: That's how I will read it, sir.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: The second is that you asked us
7 paragraph 3, how does it address the question of information
8 which is sourced from multiple places. There's actually a
9 D.C. Circuit case from the 50's and I was looking for it, but
10 I couldn't find it. But I wanted to say that I agree with the
11 government's reading, that if we ask a question, you know,
12 which is apparently based on *The New York Times*, the fact that
13 there might be some other classified information available
14 somewhere else does not mean that we're confirming classified
15 information.

16 MJ [COL POHL]: Yeah.

17 LDC [MR. CONNELL]: So I agree with their reading on
18 multiple sourcing.

19 MJ [COL POHL]: But if it is classified information, you
20 want to source it to *The New York Times* when you ask the
21 question. According to *The New York Times*, X.

22 LDC [MR. CONNELL]: I do that all the time, Your Honor. I
23 mean, maybe 100 times a day I say, according to unclassified

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1 sources, blah, blah, blah.

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

3 Mr. Harrington, you wanted to add something? You can stay.

4 LDC [MR. HARRINGTON]: Judge, just a couple of comments on
5 some things that Mr. Groharing said, but I don't think can be
6 allowed to remain as they were.

7 One is he talked about the accused as a source of
8 information. This is a new mantra from the Department of
9 Justice all around the country. It's their -- it's bedrock
10 law that the prosecution has the burden of proof, and the
11 defense doesn't have to do anything with respect to their
12 client to defend a case nor get it -- obviously, you try to
13 get information from your client. If your client says, I
14 didn't do it, then you're left on your own to investigate the
15 case in whatever way you can.

16 But the burden is still on the prosecution to fulfill
17 their discovery and other obligations with respect to any
18 case. And saying that we can get information from our clients
19 and it helps us to prepare the case, and that we should focus
20 on the guilt or innocence part of the case and not the
21 sentencing part of the case, is a total ignorance of what
22 capital law is all about. You start a capital case from the
23 end, assuming that your client is convicted and you're going

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1 to go to a sentencing phase, and then you work your way
2 backwards. And you defend the case, of course, on the guilt
3 and innocence, but you have to prepare for the death penalty
4 part of it. You can't -- the prosecution cannot tell the
5 court or us what manner or style or anything else in the way
6 that we defend our case.

7 And suppose our client is the source of information.
8 Fine. And we use that to investigate. Fine. Is the
9 prosecution saying that the only way we can present our
10 defense is to put our clients on the stand in a sentencing
11 phase, which we may or may not want to do? They can't dictate
12 that kind of process to it -- to us.

13 And I'll just conclude, Judge, by saying -- the issue
14 comes up all the time when we talk about torture. And torture
15 affects the way that we get information from our clients. It
16 started in the beginning; it continues to this day. And the
17 notion that we should go to our clients for getting
18 information that we need to present a case to a jury in the
19 trial is just -- is just preposterous. Thank you.

20 MJ [COL POHL]: Thank you, Mr. Harrington.

21 Mr. Nevin.

22 LDC [MR. NEVIN]: And, Your Honor, just on that score,
23 I take it Mr. Groharing's remarks about the amount of

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1 information that we have been provided already and our ability
2 to go to our clients, that goes to the arguments in 548 that I
3 said a few minutes ago I was requesting additional time to
4 respond to.

5 I would just say that we provided some earlier
6 briefing on this same subject in the 367 series, and one of
7 the things that we'll be doing is addressing the military
8 commission's attention to those pleadings as well, but
9 amplifying them some in view of what's contained in the
10 government's pleading in 548.

11 I also understand the position about the distinction
12 between a question being based on one thing as opposed to
13 another, and that what controls is how the question is
14 articulated or phrased and not the source within the mind of
15 the questioner, the source for the information.

16 So I take it we would be free, for example, to go to
17 Canada and publish an article -- publish an advertisement in a
18 newspaper and say, anybody with information about the black
19 site that's reported -- that was reported in the *The New York*
20 *Times*, please call -- you know, please call me, we'd like to
21 talk to you about that. And so I understand, but I understand
22 the government's position and the military commission's
23 clarification of it.

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1 I still think we're left with the problem here that
2 all of this assumes that a private organization, a volunteer
3 of some kind has gone forward to dig up this information and
4 to publish it. Because, otherwise, if the only place I have
5 the information is from the government is that there was a
6 black site in Canada -- if I go and I run that article in the
7 newspaper and solicit information and input or if I put an
8 investigator on the street and have that person go from place
9 to place, I'm going to be revealing classified information.

10 It's only when I get lucky enough to have some NGO
11 come forward and on their own go and develop the evidence
12 related to a black site in Canada that I can kind of glom on
13 to that and use it as a -- as a stalking horse to get in the
14 door to talk about conducting my investigation. I don't think
15 that's what -- the investigation that the Supreme Court
16 mandates us to conduct. I don't think that satisfies those
17 requirements, and I still maintain that position. Thank you.

18 MJ [COL POHL]: Ms. Bormann or Mr. Ruiz, do you wish to be
19 heard?

20 LDC [MS. BORMANN]: Judge, nothing further, although we
21 adopt the comments of other counsel.

22 MJ [COL POHL]: Mr. Groharing, anything further?

23 TC [MR. GROHARING]: No, Your Honor.

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1 MJ [COL POHL]: Okay. That brings us to 114.

2 LDC [MR. CONNELL]: Sir, I'm -- didn't you want to talk
3 about 524?

4 MJ [COL POHL]: Eventually.

5 LDC [MR. CONNELL]: All right, sir.

6 MJ [COL POHL]: I just want to talk about places. Of
7 course, we've already argued 114 before, so ----

8 ADC [MS. PRADHAN]: Yes, sir, we have.

9 MJ [COL POHL]: ---- any additional argument just is in
10 the context of the 525 issue, right?

11 ADC [MS. PRADHAN]: Yes, Your Honor, although ----

12 MJ [COL POHL]: I know you didn't argue it before,
13 Ms. Pradhan, but that doesn't mean ----

14 ADC [MS. PRADHAN]: I actually did argue 114.

15 MJ [COL POHL]: Okay.

16 ADC [MS. PRADHAN]: Yes. I was here in October,
17 Your Honor, and I don't plan to show you any of the same
18 slides over again, if that's helpful.

19 MJ [COL POHL]: Okay. Okay.

20 ADC [MS. PRADHAN]: But really -- so 114 is about the
21 physical characteristics of the black sites and requesting
22 documents and information about the physical characteristics
23 of the black sites. 114F, which is also outstanding, is a

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1 request for the government to facilitate access to any
2 existing remaining black sites. And obviously, these are
3 taken together with the other arguments you've just heard and
4 also with the base motion of 525, which is the request, of
5 course, for the government -- the request for the government
6 to disclose the actual locations of the black sites.

7 And so I don't -- again, I don't plan to reiterate
8 all of my previous arguments, but we do actually need to
9 highlight the importance of 114 and 525 in light of both
10 425PP, the military commission's ruling recently, and the
11 testimony of Special Agent Perkins in December.

12 So in 502, Your Honor, the military commission
13 recently suspended our movement towards the personal
14 jurisdiction hearing for Mr. al Baluchi until we could file a
15 motion to suppress the 2007 statements made by Mr. al Baluchi
16 to the FBI. Now, our position has been, as I said in 534, and
17 continues to be, that we cannot file that motion until we have
18 the information we need to properly illustrate all of the
19 factors that influenced Mr. al Baluchi's 2007 statements.

20 The most important point I have to make is that there
21 is a straight line between what we're asking for in 114 and in
22 125 -- 525, excuse me, and the evidence that the government is
23 trying to use to execute Mr. al Baluchi.

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1 Just to take a step back and contextualize, the
2 government just now wanted to comment on the importance of the
3 information being requested in the national security context,
4 and we recognize that. We recognize that there are national
5 security considerations to this. But in discussing the black
6 sites, we're not raising some obscure argument.

7 This is the most infamous covert program in modern
8 American history, and the government has admitted, yes, that
9 they held Mr. al Baluchi in secret prisons abroad for over
10 three and a half years. They have admitted that they tortured
11 Mr. al Baluchi in secret prisons abroad for three and a half
12 years. They have also admitted destroying evidence from the
13 secret prisons, videotapes to now an entire -- at least one
14 entire black site.

15 The government has recently, with the testimonial
16 evidence of Special Agent Perkins about the FBI's
17 interrogations of two -- at least two of the defendants in
18 January of 2007, six months after they were brought to
19 Guantanamo, they have admitted using torture-acquired evidence
20 taken from those secret prisons in those -- in the preparation
21 for those January 2007 interrogations that they seek to rely
22 upon to execute these men.

23 So with respect -- when the military commission said

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1 in 425PP that the destruction of the black site did not
2 destroy exculpatory evidence at that one particular black
3 site, that evidence of torture is not evidence against the
4 defendants in these proceedings, that is simply not true. And
5 that is why we are here to reemphasize the specifics of
6 114 and 525.

7 So in AE 425PP, the military commission characterized
8 evidence of CIA torture as, quote, at most, mitigation
9 evidence are useful in certain defense motions. And this is
10 -- this is simply not correct. And I want to reframe it with
11 reference to Rule 701.

12 Your Honor, we have ----

13 MJ [COL POHL]: You're not here rearguing 425, are you?

14 ADC [MS. PRADHAN]: Not at all, Your Honor.

15 MJ [COL POHL]: Okay. So I don't -- argue 114 and 114F.

16 ADC [MS. PRADHAN]: Okay.

17 MJ [COL POHL]: I heard your arguments on 425 and I made
18 my ruling. I'm not ----

19 ADC [MS. PRADHAN]: I understand that.

20 MJ [COL POHL]: I don't want to hear again why you think
21 it's wrong.

22 ADC [MS. PRADHAN]: Absolutely, Your Honor. And we
23 understand the ruling in 425. But the ruling in 425 was for

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1 post hoc relief. What we're asking for now in 114 and 525 is
2 prospective relief and for information to create that motion
3 to suppress that you've requested from us. We would like to
4 be able to do that very much in an as expeditious a way as
5 possible, but we can't quite do that quite yet.

6 So all I wanted to talk about with regards to
7 R.M.C. 701 is that R.M.C. 701, Section (e) says that
8 trial counsel shall, as soon as practicable after referral of
9 charges, disclose evidence that, (A), negates the guilt of the
10 accused of an offense charged; or (B), reduces the degree of
11 guilt of the accused with respect to an offense charged. And
12 then you get to (C), which is reducing the punishment and
13 that's our mitigation.

14 So there are two elements to get through before
15 mitigation that will be dealt with in the trial phase of these
16 proceedings, and those will inevitably revolve around whether
17 Mr. al Baluchi's torture at the CIA black sites affected the
18 statements being used against him to execute him. So it's a
19 central feature of this.

20 And to make that link, I want to refer briefly to the
21 transcript from December, and Special Agent Perkins'
22 testimony. And this was a question actually by the military
23 commission. And Your Honor asked, "Did you have access to any

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1 CIA cables documenting any statements that he, Mr. al Hawsawi,
2 was the subject of those, may have made in his former custody
3 with the CIA?"

4 Excuse me. This was the government posing this
5 question, and Your Honor followed up with, "The question is
6 did you use any of those statements? You said you didn't rely
7 on them. The question is did you use any of the CIA
8 statements in preparing your interview?"

9 And Special Agent Perkins said, "Having them in my
10 mind, sir, may have influenced me, so I can't disassociate
11 completely."

12 Now, there are a few documents that show, briefly,
13 just how damaging it is to the government's case that
14 Special Agent Perkins reviewed the black site documents, and
15 perhaps relied upon them, prior to the interrogations that the
16 government wants -- now wants to rely upon.

17 Here are some of the very, very little that we know
18 about the reliability of the black site documents. I'm
19 referring here to MEA-10018-00 ----

20 MJ [COL POHL]: Is that an exhibit?

21 ADC [MS. PRADHAN]: It is an exhibit, Your Honor.

22 MJ [COL POHL]: What's the exhibit number?

23 ADC [MS. PRADHAN]: The exhibit number is AE 114FF.

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1 MJ [COL POHL]: Thank you.

2 ADC [MS. PRADHAN]: And I believe that the government has
3 their copies.

4 MJ [COL POHL]: And just refer to it by exhibit number and
5 not the Bates stamp number.

6 ADC [MS. PRADHAN]: Okay.

7 MJ [COL POHL]: Go ahead.

8 ADC [MS. PRADHAN]: So AE 114FF is a report from, we
9 think -- it's dated mid 2003 so we'll go with that.

10 It says, "On 20 May 2003, the interrogation of Ammar
11 al Baluchi was conducted. Ammar had been kept naked in the
12 standing, sleep-deprivation position since his initial
13 interrogation session on 17 May 2003."

14 Skipping down to the third paragraph, it says,
15 "Approved enhanced interrogation technique of sleep
16 deprivation in excess of 72 hours was used during the session.
17 Ammar had been sleep deprived for circa 82 hours at the start
18 of the session." About three and a half days.

19 The fourth paragraph, "Ammar was significantly
20 fatigued during this session due to the standing,
21 sleep-deprivation position he had been in since 17 May. His
22 resistance posture had begun to decline. He appears to be
23 answering questions truthfully."

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1 "He was presented naked for this session. He was
2 allowed to sit in reward for his increased cooperation at the
3 end of the previous session." At the very bottom it says,
4 "Ammar was clearly fatigued."

5 The second page of this, very briefly, contains a
6 psychological assessment. And the psychologist says that
7 "Ammar was drowsy and nodded off for a few seconds frequently
8 during the interview, consistently with three days of sleep
9 deprivation associated with standing. Ammar may have been
10 experiencing some sensory distortion in his cell, but with
11 questioning, it is more likely that he was dreaming during the
12 brief moments he dozed off. In any case, he was able to
13 complete the interview successfully despite the sleepiness
14 that he exhibited."

15 And at AE 114EE, there's one line I want to refer to,
16 and this is the second-to-the-last paragraph ----

17 **[The military judge conferred with courtroom personnel.]**

18 ADC [MS. PRADHAN]: Excuse me, Your Honor.

19 114EE states that "Ammar is still developing a sense
20 of learned helplessness which is contributing to his
21 compliance, and the team will continue to lessen the intensity
22 of the interrogation sessions relative to Ammar's
23 cooperation."

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1 So when the government says that Mr. al Baluchi is
2 the best source of information about his torture, that is
3 clearly not true. But, more importantly, we have to question,
4 just in this very brief snapshot, the reliability of the
5 information he was giving at the time and how that changed the
6 information that he then continued to give for three and a
7 half years, and the answers then he -- that he gave in January
8 2007.

9 We have submitted -- I believe the numbers are
10 AE 425NN and 00, but I will double-check that -- declarations
11 from a neuroscientist -- from two neuroscientists, actually,
12 talking about how memory is changed by torture, talking about
13 how brain function is changed by torture. And, in fact, we --
14 there is a later document that talks about how Ammar discussed
15 a story in early 2004 that he had actually recanted.

16 So evidence of their treatment, including the
17 physical characteristics of where they were being held while
18 they were making statements that morphed into the 2007
19 interrogations that are now being used against them is central
20 to the case.

21 So the -- one thing that I want to address very
22 briefly that I believe the government may stand up and talk
23 about is the fact that we have been provided with a visual

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1 substitute for the black site that is also supposed to
2 substitute for the documents and information about the
3 physical properties of the black site.

4 Now, I understand this was argued in AE 425, Your
5 Honor, and so I'm not going to go into every detail about why
6 we disagree with the fact that we have been given ----

7 MJ [COL POHL]: You're not going to go into any detail
8 because 425 is decided.

9 ADC [MS. PRADHAN]: Understood, Your Honor. But it's
10 important to recognize that, even if we were given an adequate
11 visual representation of a black site, which we don't believe
12 we were, but even if that were the case, it would be a visual
13 representation of a single black site. All right?

14 I have been working on rendition ten years. I think
15 everybody in here understands that there was more than one
16 black site. We know that Mr. al Baluchi was held at more than
17 one black site, and we also know that conditions varied widely
18 among the different sites that these men were held in. Some
19 may have been controlled by the CIA, some may have been less
20 so. Some may have had different climates. Some may have had
21 different temperatures. Some may have had different physical
22 structures. They were all different sites.

23 Giving us a visual representation, even if it were

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1 adequate -- which it was not; it was decidedly not -- would
2 not satisfy information about the physical structure of the
3 black sites.

4 And, Your Honor, we have submitted, at AE 425E,
5 declaration after declaration after declaration after
6 declaration from experts, from torture experts, from prison
7 experts who -- all of which I could read out to you, every
8 single one of which concludes that there is no adequate
9 substitution for physical inspection of a torture site. Every
10 single one of them. They also provide a great deal of
11 information about what is useful in terms of information,
12 right? If there were to be additional information provided,
13 what would that information be?

14 And so they talk -- this is where -- you know, when I
15 argued this in October, we talked about the climate, we talked
16 about obtaining the blueprints so that we could get a sense of
17 what the plumbing was like in the facility, both for water
18 supply and for water torture. We talked a little bit about
19 finding out what the building materials would be, what the
20 walls were made of when Mr. al Baluchi was, you know, in
21 standing sleep deprivation for three and a half days. What
22 was the temperature like, right?

23 In one of those documents, it talks about how he was

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1 sent to a reward space where the ambient temperature was 70
2 degrees or above, but we don't know what the temperature was
3 like in his cell where he had been held naked for three and a
4 half days. Right?

5 And also not knowing where that cell was, in which
6 site, in which location, doesn't allow us to really build an
7 accurate picture of what the conditions were like, returning
8 to the idea that, again, these sites all had very, very
9 different characteristics.

10 Just a few examples from the SSCI report: At COBALT,
11 the windows were blacked out -- and I apologize, this is the
12 SSCI report exec -- the redacted Executive Summary at page 49.
13 At COBALT, the windows were blacked out. There are about 20
14 cells. There are four sleep-deprivation cells with bars
15 across the top, which was probably how Mr. al Baluchi was
16 shackled during his sleep deprivation. There was a central
17 area outside of the interrogation room. There was a dirt
18 floor outside the cells, and it lacked heating, air
19 conditioning, conventional plumbing, appropriate lighting,
20 shower facilities, and laundry facilities. All right.

21 So we know what it -- we have an idea of what it
22 lacks, but we don't have an idea of actually what the
23 structure is, and what it looks like, and what Mr. al Baluchi

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1 would have seen while he was there. It was described by CIA
2 personnel as being like a dungeon. What does "like a dungeon"
3 mean exactly?

4 Now, at DETENTION SITE code named GREEN, this is at
5 page -- excuse me, page 28, of the Executive Summary. Abu
6 Zubaydah's cell is described as being white with no natural
7 lighting or windows. There are four halogen lights pointed
8 into the cell and air conditioner in the room, so maybe a
9 place or climate that required air conditioning or maybe it
10 was a torture technique and we don't know. And there was a
11 white curtain separating the interrogation room from the cell.
12 Sounds very different from COBALT.

13 All we know about DETENTION SITE BLUE, and this is
14 from page 62 of the Executive Summary, is that it had three
15 purpose-built holding units. We don't quite know what holding
16 units are exactly. We don't know really what their purpose is
17 or how long they were there, how big they were. The SSCI
18 report does say that DETENTION SITE BLUE was initially
19 designed for two-day detainees. But by early in 2003, it
20 reportedly held five, which is very different from COBALT,
21 which apparently had 20 cells.

22 At DETENTION SITE ORANGE, some cells included
23 plumbing, again, very different from COBALT. We don't know

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1 about the plumbing at GREEN, BLACK, or BLUE or any of the
2 other sites, but waste buckets were used in smaller cells.
3 Now, we don't know what those smaller cells -- where those
4 were located, what they were used for, what the shackle points
5 are, any of that information, Your Honor.

6 So when the government says they have what they need
7 to build a vivid description, we simply don't. That's a fact.
8 These are just the sites for which we have some rudimentary
9 descriptions in the SSCI report. And so, no, we don't have
10 that ability.

11 Now, I won't go through -- again, I won't go through
12 all of the physical characteristics that we went through in
13 October, but ----

14 MJ [COL POHL]: Thank you.

15 ADC [MS. PRADHAN]: You're welcome, Your Honor.

16 But I understand you don't want to hear all of the
17 details about change orders and blueprints, but you understand
18 that's what we're asking for and ----

19 MJ [COL POHL]: Sure.

20 ADC [MS. PRADHAN]: ---- the reason we're asking for those
21 is to be able to compare and contrast how Mr. al Baluchi's
22 detention differed from when he may have been at COBALT to
23 when he may have been somewhere else, and where he may have

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1 been in a third place. Which personnel followed him from
2 place to place? Were they the same personnel who tortured him
3 at a later point in time? That could be significant. That
4 could have an impact on what he said at that time.

5 Now, the -- this brings me back to -- I do want to --
6 you know what, I want to make a quick point about
7 atmospherics, and this is something that -- you know, we talk
8 about the individual physical characteristics, but the
9 atmospherics are what are important, and this sort of brings
10 me to 114. No visual representation or documents -- this
11 brings me to 114F, excuse me -- can convey as much information
12 about a place and its ability to create a sense of something,
13 right, despair, sadness, happiness, whatever it is, than the
14 place itself.

15 Or -- you know, consider, for example, Camp X-Ray,
16 right, which still conveys the desperation from 2002 even now.
17 Completely overgrown. It looks very little like it did in
18 2002. But the observers who come down to these hearings now
19 in 2017, 2018, 16 years later, still have a lot to say about
20 their impressions of it and its time housing detainees.
21 Imagine what a forensic analysis could do, right? Imagine
22 what -- when you actually analyze lines of sight, stand in the
23 site and feel the climate, all of those things are radically

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1 important, right?

2 And this is basic. This is not a radical request
3 from the defense for information that has never before been
4 asked for in a criminal proceeding.

5 Again, if you refer back to the declarations in 425E,
6 the process that these experts and attorneys who have engaged
7 in these kinds of analyses and inspections are outlining is
8 exactly what the motions in 114 and 114F and 525 request from
9 the military commission. Tell us where the prison was.
10 That's basic. Give us the building documents and other
11 information about the physical structure so that we can, you
12 know, start putting that together and give us access to the
13 physical sites to the extent possible, to the extent that
14 anything still exists, because nothing can replace that.

15 And we understand that one of the sites was
16 destroyed. We get that. We lost that. But every one of
17 those declarations says that, and I'd be willing to bet there
18 isn't a torture expert on earth who believes that there is any
19 adequate substitute for physical access to a torture site.

20 The military commission has already made its --
21 you've issued your order in 425PP. I understand that. I'm
22 not here to relitigate that, Your Honor. I really am not.

23 MJ [COL POHL]: Okay.

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1 ADC [MS. PRADHAN]: I'm pointing out my disagreement with
2 it, but I'm not here to relitigate it.

3 MJ [COL POHL]: And you've done that a couple of times. I
4 got it. I mean, when I rule, usually 50 percent of the people
5 are unhappy and sometimes 100 percent are. I got it.

6 ADC [MS. PRADHAN]: Absolutely. And you learn -- you
7 learn to lose. But that's not why I'm here. It really is
8 not. What I'm here to do is put your ruling in 425PP in its
9 context. We now have the ability in 114, in 525 to obtain
10 further information, right? To obtain information that is
11 still out there that we have the appropriate clearances for to
12 put this picture together, to allow us to write that motion to
13 suppress, to allow us to proceed to a personal jurisdiction
14 hearing, to take all of these steps to move forward. The
15 military commission has the power to order that, and so we ask
16 you to do so. Thank you.

17 MJ [COL POHL]: Thank you, Ms. Pradhan.

18 Any other defense counsel want to be heard on
19 114/114F? Apparently not.

20 Trial Counsel, do you wish to be heard?

21 CP [BG MARTINS]: Your Honor, the United States rests on
22 its earlier argument based on the hundreds of photographs that
23 we provided, some of which come from all of the different

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1 sites. Thank you.

2 MJ [COL POHL]: Okay. Ms. Pradhan, do you wish to respond
3 to that?

4 ADC [MS. PRADHAN]: No, thank you, Your Honor.

5 MJ [COL POHL]: Okay. That brings us to 524.

6 Mr. Connell, when we discussed the guidance in 524 earlier, I
7 was kind of -- again, kind of mixing it up with 525 and
8 everything else. Do you wish to add anything to what you
9 stated earlier?

10 LDC [MR. CONNELL]: No, sir. As far as I'm concerned, I
11 argued 524.

12 MJ [COL POHL]: Okay. Any other defense counsel want to
13 be heard on 524? Apparently not.

14 Mr. Groharing, do you wish to be heard again?

15 TC [MR. GROHARING]: Thank you, Your Honor.

16 So we started with the September guidance in --
17 that's at issue originally in 524, and I think it's important
18 to walk through how -- why we issued that guidance. I think
19 that's where some of the confusion came in when we were
20 talking about this on Monday.

21 That guidance came with the indices that we have been
22 talking about, and it was meant to address the CIA personnel
23 associated with the RDI program as opposed to CIA personnel

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1 writ large. I think that caused some of the confusion and
2 comments about how our -- what we were saying, what I was
3 saying, was seemingly inconsistent with the guidance provided
4 in September.

5 So we went back and hopefully clarified that guidance
6 in a way that it's clear to everyone how witnesses should be
7 treated, as far as CIA witnesses, whether they're potential
8 witnesses, whether they're part of the RDI program or
9 otherwise. And I think that guidance that we provided in 524I
10 makes that clear and gives the defense the guidance they need
11 and the opportunity to contact and request to interview
12 witnesses while still protecting very sensitive classified
13 information.

14 So Mr. Connell indicated that -- and as it indicates
15 in the guidance, there are eight that are listed in the
16 guidance, eight individuals that have publicly been connected
17 to the RDI program. And that was eight from his list that he
18 had provided in 502. I'm happy to work with Mr. Connell, or
19 anyone else, frankly, to answer their questions about anybody
20 else, as well as with the OCA to come up with a list beyond
21 just the folks that Mr. Connell ----

22 MJ [COL POHL]: But do they -- so I just want to make sure
23 I understand this. So they've got -- do they have to come to

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1 you to say that -- to say, is it okay to talk to somebody who
2 has already identified himself as being involved in the RDI
3 program? When they have publicly identified themselves, they
4 have to come to you to say, can I talk to -- I'm just using
5 Porter Goss as an example who is not on your list. And he was
6 the CIA Director.

7 TC [MR. GROHARING]: I think it would depend on the
8 context what you mean by publicly identify. That example, no,
9 I mean, and that's someone I think, when I get a more robust
10 list from the original classification authority, and again,
11 the eight in question were based on Mr. Connell's witness list
12 in 502 ----

13 MJ [COL POHL]: I understand that. But I mean bottom
14 line, when I'm talking about this category of witnesses, okay,
15 witnesses that have identified themselves as being involved in
16 the RDI program or witnesses that the government has given the
17 true name to the defense as being involved in the RDI program,
18 you're saying that if they're not on your list of eight,
19 they've got to come back to you before they can talk to them?
20 Or haven't they already been disclosed that they should be
21 fair game?

22 TC [MR. GROHARING]: Your Honor, I think that's going to
23 be very fact specific about what that disclosure is. So it's

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1 tough to answer categorically ----

2 MJ [COL POHL]: But how do you -- how do you provide --
3 how do you provide guidance to the defense if your answer is,
4 well, it's fact specific? How do -- well, what -- I mean, you
5 use -- and I don't mean to give you a hard time -- well,
6 actually, I kind of do, but anyway, Mr. Groharing, is that you
7 have given categories and that category talks about people
8 that have been publicly identified either or -- and as I also
9 put in the category, myself people that the government has
10 disclosed to the defense ----

11 TC [MR. GROHARING]: Officially identified, I think is
12 the ----

13 MJ [COL POHL]: Yeah. Okay.

14 And then you say, well, it's these eight and
15 everybody else we'll talk about. And my question really is,
16 it's not really a category then if they've got to come back to
17 you each time and say, what about this guy, what about this
18 gal?

19 TC [MR. GROHARING]: And I think that I will be able to
20 get a list that's more complete with respect to the people
21 like Porter Goss, people not on Mr. Connell's witness list
22 that the CIA has publicly acknowledged were connected with the
23 RDI program. Again, this came up Monday, and I will -- it was

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1 moving fairly quickly to get guidance, frankly, by
2 Wednesday -- updated guidance and coordinated through all of
3 the different places that it needs to be coordinated.

4 So I have that for action and I will follow up with
5 it ----

6 MJ [COL POHL]: Okay.

7 TC [MR. GROHARING]: ---- with a more detailed list.

8 After we get the list, then you have somebody, I think it will
9 be very fact specific. Hopefully, we have captured everybody
10 who should be captured, but it's as simple as asking a
11 question. You know, Mr. Connell saying, hey, there's this guy
12 that I want to talk to that I think is associated with the RDI
13 program; I think -- maybe he says I think he has been publicly
14 acknowledged for whatever reason. We can run that to ground,
15 I think, relatively quickly.

16 But this isn't meant to be an impediment to counsel,
17 and I don't think will present much of an impediment to
18 counsel, frankly. They will be able to get an answer to them
19 very quickly for these types of requests. And I'm happy to
20 take that on.

21 MJ [COL POHL]: Okay.

22 TC [MR. GROHARING]: And the key is, it's where this
23 information is coming from. There very well could be someone

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1 who it seems, you know, is out there publicly, but hasn't been
2 officially acknowledged to be part, for whatever reason;
3 somebody else outed them, you know, there's something that
4 you -- the defense may get in a newspaper or whatever source,
5 and that person's association with the CIA may very well still
6 be classified, and certainly their association with the RDI
7 program may be classified.

8 So we're just trying to avoid problems with having
9 either individuals outed or people otherwise disclosing
10 classified information when it should be easily avoidable.
11 And I -- I don't think we could provide guidance that answers
12 every single fact scenario. I think the guidance in 524I,
13 though, does provide appropriate guidance, and it puts,
14 then -- you know, to the extent that the defense needs
15 additional guidance, they should ask, and we're happy to
16 provide that to avoid disclosing this information.

17 MJ [COL POHL]: Now, Mr. Connell also said that he --
18 reading paragraphs 5 and 6, that they only have to go to the
19 government if they want the government assistance, but they
20 can go on their own if they so choose. Do you read those
21 paragraphs the same way?

22 TC [MR. GROHARING]: And I'll take them in turn.
23 Paragraph 5 -- and we do in paragraph 5. To the extent the

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1 defense is asking about official government information, this
2 is akin to a discovery request. So the way it should work
3 is -- and that's consistent with the guidance that we provided
4 in the Hadi bench brief memo. The defense comes through us,
5 we work with the OCA to define the scope of a permissible
6 interview, assuming that the defense wants to talk about
7 official government information.

8 And ----

9 MJ [COL POHL]: What would be their interest in
10 nongovernmental information?

11 TC [MR. GROHARING]: I have no idea, Your Honor, what ----

12 MJ [COL POHL]: But what we're talking about here,
13 Mr. Groharing, we're talking about the RDI program. And
14 you've got those rules and now we're talking about non-RDI
15 program. And Mr. Connell, one of his 502 issues was about
16 Infinite Resolve, which I forget when that was but it was a
17 while ago, and some other things, says it's not an RDI issue
18 so he wants to talk to somebody who knows about that. If the
19 CIA person is involved in that, do they have to -- but he
20 doesn't want to go -- he -- does he have to go through the
21 government to talk to anybody on something like that?

22 TC [MR. GROHARING]: I think he should. I think that
23 would be the ----

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1 MJ [COL POHL]: Oh, should is not the same as have to.

2 TC [MR. GROHARING]: Well, I don't know that we can
3 force -- if Mr. Connell goes to an overt CIA officer and makes
4 contact and says he wants to talk to him, he's not breaking
5 any law by doing that.

6 MJ [COL POHL]: Okay. So he's free to do that if he so
7 chooses. So paragraph 5 would be if he goes to the
8 government, he needs this procedure; but for anybody in
9 paragraph 5, so there's an overt ----

10 TC [MR. GROHARING]: In reality what should happen at that
11 point, though, is the individual should contact their Office
12 of General Counsel security folks, and end up back in the same
13 place.

14 MJ [COL POHL]: This is where I kind of got confused here.
15 Because ultimately, all of these individuals I'm assuming get
16 all of these briefings and everything like that. And if
17 Mr. Connell or Mr. Nevin or Mr. Harrington knock on their door
18 and say I want to talk to you about a CIA program from 2000,
19 I'm assuming their initial reaction is going to be, who are
20 you? And then probably, wait, let me check to see whether I
21 can do this or not. But if they choose not to, and assuming
22 it's unclassified information, you're saying there's no
23 problem with them talking to them.

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1 TC [MR. GROHARING]: Well, again, you just made the
2 assumption that it's unclassified information.

3 MJ [COL POHL]: No, I'm saying when they knock on the
4 door, if they're going to talk about classified information,
5 they'd have to do that in a classified setting.

6 TC [MR. GROHARING]: Right.

7 MJ [COL POHL]: But I'm just trying to make clear here
8 about paragraph 5 says -- is basically if they want to knock
9 on that door and talk to that person -- and we're not going
10 back to Piggly Wiggly, so don't worry about that -- and
11 there's nothing in paragraph 5 that would limit their ability
12 to do that on their own. Is that your reading of it also?

13 TC [MR. GROHARING]: That is my reading, with the obvious
14 caveat that I gave before, is that the better course would be
15 to come through us, we define the scope.

16 MJ [COL POHL]: Okay.

17 TC [MR. GROHARING]: That way you have OC involvement and
18 the most productive interview for the defense outlined where
19 they don't get in the situation where the individual then has
20 to go talk to somebody and get further guidance on what can
21 and cannot be said.

22 It's government information we're talking about, and
23 the government owns that information. And to the extent

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1 they're contacting individuals in an effort to conduct
2 discovery, the government should be involved in that process.
3 And the appropriate original classification authority should
4 be able to make the determination of whether or not the
5 defense needs to know.

6 Frankly, a lot of the subject matter here, the
7 original classifications already made those determinations,
8 and based on the discovery that we've provided. So it
9 wouldn't be appropriate for the defense to ----

10 MJ [COL POHL]: So if I understand ----

11 TC [MR. GROHARING]: ---- do an end-around of that
12 process.

13 MJ [COL POHL]: If a -- because I think from now it could
14 almost come full circle, is the defense has been provided
15 discovery, and they say, I want to talk to so and so and they
16 go through your procedure ----

17 TC [MR. GROHARING]: Right.

18 MJ [COL POHL]: ---- and then the OCA says, well, we gave
19 you this discovery; therefore, you don't have a need to know,
20 therefore, denied.

21 TC [MR. GROHARING]: I'm not saying that, Your Honor. I'm
22 saying, in the discovery, certain information was provided and
23 maybe other information was not provided because there wasn't

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1 a need to know the information. So the OCA could provide
2 guidance regarding the parameters of topics that are ----

3 MJ [COL POHL]: Okay.

4 TC [MR. GROHARING]: ---- fair game or not fair game. For
5 example, if the defense went and asked about other potential
6 covert employees, or asked questions that are beyond the
7 need-to-know determinations made by the OCA, if they asked
8 any -- you know, do you know the locations of black sites ----

9 MJ [COL POHL]: Okay. Let's assume ----

10 TC [MR. GROHARING]: So that ----

11 MJ [COL POHL]: The defense -- the -- we're going to
12 resolve the black site issue, whether they get knowledge of
13 that or not. But for the sake of my question, let's assume
14 that the current limitation on their actual -- the government
15 disclosing the actual black sites to them is in place. So
16 they go to somebody and say, tell me where the black sites
17 are. Okay? Knowing that that -- they're not allowed to get
18 that, that's one issue.

19 TC [MR. GROHARING]: Right.

20 MJ [COL POHL]: Okay. If they go to somebody else and
21 tell me what you did, and he goes, by the way, when I was at
22 place X, and they blurt it out, that doesn't make it
23 unclassified, I got it. But that's not a lick on the defense

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1 counsel, is it? That's a lick on the guy who answered the
2 question improperly.

3 Similarly, if somebody were to identify -- I'm going
4 to use Valerie Plame as the example -- that discloses -- the
5 question is, what did you do, and he goes, well, me and
6 Valerie did X, Y, and Z when she still had covert status,
7 isn't that just strictly on the person answering the question
8 improperly because there's nothing improper in the question
9 from the questioner? Do you understand what I'm saying? I'm
10 saying is that there is an issue that you can't ask questions
11 for areas that you're not supposed to.

12 TC [MR. GROHARING]: Right.

13 MJ [COL POHL]: But there is the possibility when you ask
14 an open-ended question that the answer may drift into those
15 areas, but is that any ----

16 TC [MR. GROHARING]: All the more reason why ----

17 MJ [COL POHL]: ---- risk to the questioner?

18 TC [MR. GROHARING]: All the more reason why the better
19 course is to have clearly delineated boundaries of the scope
20 of the conversation when you are talking to these witnesses,
21 who the question could very easily lead to areas that are
22 beyond information that the defense needs to know for purposes
23 of this litigation.

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1 So the -- the example, though, that talked about
2 officers potentially involved in the RDI program, though, and
3 that's covered by paragraph 4, that clearly -- anybody in that
4 scenario we are saying the defense should come through us. So
5 that's a different category. So an overt officer, known in
6 the CIA officially, if the defense believes they were part of
7 the RDI program, they should come through us to facilitate the
8 request for interview and we can ----

9 MJ [COL POHL]: Just so I understand your proposed
10 procedure, is that if defense wants to talk to somebody in
11 category -- let's pick an easier category. Category 4, okay?
12 And so your proposed procedure is they go to the government
13 and say, I want to talk to so and so.

14 TC [MR. GROHARING]: Right.

15 MJ [COL POHL]: And then the government -- then he says,
16 and by the way, here's what I want to talk to him about, and
17 you give the little list, and that goes -- this sounds like a
18 Touhy process to me, but without invoking Touhy, it sounds
19 very close. Then that goes in and that goes through some type
20 of agency scrub. Okay, these questions are on limits or off
21 limits, which again is sounding more like Touhy to me than
22 anything else. Okay.

23 TC [MR. GROHARING]: Regardless of whether it's Touhy,

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1 it's the process to ----

2 MJ [COL POHL]: I know. I know. But what I'm saying is,
3 is that what you envision, and then once the topics are
4 approved, the defense counsel can sit down with this
5 individual?

6 TC [MR. GROHARING]: Right. And it would -- exactly --
7 exactly, Your Honor.

8 MJ [COL POHL]: Would there be a third party present?

9 TC [MR. GROHARING]: Only if the individual requests it,
10 like any other witnesses. So the prosecution is not injecting
11 itself. The OCA is not injecting themselves into the
12 interview. Like any other witness who says, yeah, I'll meet
13 with you, but I'd like someone present. I'd like a member,
14 you know, from the Office of General Counsel present or a
15 prosecutor present. That happens all the time in
16 court-martial practice. Other than that, we would -- and
17 we -- we're doing nothing to insert ourselves in the process.

18 MJ [COL POHL]: But if you require the defense to provide
19 the notice of what they're going to talk about ----

20 TC [MR. GROHARING]: Right.

21 MJ [COL POHL]: ---- okay, who decides whether those are
22 appropriate topics or not?

23 TC [MR. GROHARING]: The OCA.

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1 MJ [COL POHL]: Okay. And the OCA says topics 1 to 4 are
2 okay and 5 and 6 are not okay. Now what do we do?

3 TC [MR. GROHARING]: So if the defense has trouble with 5
4 and 6, they -- what I would say is they come back to us, and
5 say, hey, we really need to talk about 5 and 6 for -- here's
6 why it's important to the case. Here's why we need to know.
7 They may convince the prosecution of that. And then we'll
8 engage with the OCA to see if a determination can be made that
9 the defense should be able to ----

10 MJ [COL POHL]: And the OCA says no, then what happens?
11 Then I get involved?

12 TC [MR. GROHARING]: Then you get involved, yes, sir. Or
13 if we say no, we don't agree either, or you -- we agree that 5
14 and 6 should be off limits, at that point the defense can
15 bring it to the court and maybe there's -- you know, that
16 would be an area of classified information that you think the
17 defense needs to be able to discuss and we'd have to figure
18 out some kind of substitute to having access to that
19 information.

20 MJ [COL POHL]: Okay.

21 TC [MR. GROHARING]: So, Judge, it's -- and you've said
22 many times you're a process guy. This is -- all this is is a
23 process. With a mailbox, defense is sending requests that

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1 we're facilitating in a way that protects some of the most
2 sensitive information that our country has.

3 And we have provided declarations to you about the
4 significance of this information and the potential damage that
5 can be caused, and all we're trying to do is protect that
6 information. And we're not talking about subject-matter-wise.
7 You know, if the defense wants to talk to people about what
8 happened at the black sites, we're not -- we're not saying
9 that that -- you know, that's fair game with something that
10 they would want to talk about. It's -- that's not what we're
11 trying to protect and that information is largely
12 unclassified.

13 It's the identities of these people. There's no
14 reason why the defense ever needs to know the identities of
15 these people. It doesn't have anything to do with this
16 litigation. They're not government witnesses. We're not
17 calling them to testify or anything like that. These are
18 witnesses that observed completely collateral matters to this
19 litigation. So whatever they need from them, it's the
20 information that's relevant to this case. It doesn't involve
21 their identity. And all we're asking for is a process that we
22 can use to protect those identities to avoid the grave impact
23 that it would have if these identities were revealed.

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1 And I -- you know, the defense cites a number of
2 cases, and I think Mr. Connell talked about them moments ago,
3 many of them as well, they're all easily distinguishable from
4 these facts.

5 You know, Gore, that's a case where a commanding
6 officer directed a witness not to testify on behalf of a guy
7 at a sentencing hearing. I mean, obviously those aren't the
8 facts of this case. Nobody's telling anybody not to cooperate
9 or not to testify. So that's very easily distinguishable from
10 the facts of this case.

11 Same way with Gregory. Gregory was when a prosecutor
12 said, do not talk to opposing counsel in this case, and said
13 at other times, Do not talk to opposing counsel unless I'm
14 present. He injected himself in that process and directed
15 witnesses not to cooperate with the defense. Obviously that's
16 not the case here as well. All of the cases cited by the
17 defense are easily distinguishable.

18 You know, Enloe, I believe, is the other case
19 Mr. Connell talked about. That was Air Force OSI where, if
20 you wanted to talk to an Air Force OSI agent, it was a policy
21 in place, a written policy that said you had to have a senior
22 agent present, and ideally, a member of the prosecution as
23 well. Again, that's not what we're talking about here.

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1 All we're talking about is facilitating a request.
2 It doesn't -- we don't get to anything where we're injecting
3 ourselves in the actual interview, either ourselves personally
4 or CIA personnel in the interview.

5 So, Judge, we think this is a -- an appropriate
6 approach that respects the protection of classified
7 information while still allowing the defense to interview
8 potential witnesses in this case.

9 I would just finally add in -- you know, this is a
10 practice that the court in the Hadi al-Iraqi case adopted, and
11 by all accounts, I'm not aware of any problems at this point
12 with the implementation of that practice. Mr. Connell has --
13 he mentioned earlier, he has provided a number of -- a request
14 to speak to a number of these people. I'm told by March 15th,
15 every one of those contacts will have been made and I'll be
16 able to report back to Mr. Connell who is willing and not
17 willing to speak to him and, we'll take it from there as far
18 as setting up the interview process.

19 So this process can and will work. And I think it's
20 an appropriate process to follow to protect this information.
21 Subject to your questions, I have nothing further.

22 MJ [COL POHL]: I just want to conclude with you, is the
23 same thing I concluded earlier with Mr. Connell. When I

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1 talked about remedies ----

2 TC [MR. GROHARING]: All right.

3 MJ [COL POHL]: ---- and he referred to 505(h)(6)(B)(i),
4 (ii), and (iii), but there's a triggering mechanism on that,
5 and because we've -- I know you filed some declarations, on
6 (6)(A), I don't know ----

7 TC [MR. GROHARING]: Right.

8 MJ [COL POHL]: Do you want to have a chance -- do you
9 know what I'm talking about? Go ahead and grab your Rules of
10 Evidence. I'm talking about process here, Mr. Groharing.
11 It's on page 332, if you've got the --

12 TC [MR. GROHARING]: I'm there, Your Honor.

13 MJ [COL POHL]: Okay. There's a (6)(A) process that --
14 before it triggers any remedies.

15 TC [MR. GROHARING]: I've got it right here, Your Honor.

16 MJ [COL POHL]: Okay. You filed -- you've already filed
17 declarations on this, correct?

18 TC [MR. GROHARING]: Yes, Your Honor.

19 MJ [COL POHL]: Okay, do you need to file updated
20 declarations in lieu of the additional guidance?

21 TC [MR. GROHARING]: No, Your Honor.

22 MJ [COL POHL]: Okay. And the other part of that is a
23 trial counsel request the judge issue an order, and I don't

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1 believe you've done that yet. Correct?

2 TC [MR. GROHARING]: With respect to this -- the protocol
3 that we've ----

4 MJ [COL POHL]: The two protocols.

5 TC [MR. GROHARING]: We have not asked the judge to issue
6 an actual order. We're hoping that what we've -- the protocol
7 that we have proposed is a workable solution and ----

8 MJ [COL POHL]: I'm trying to -- again trying the process.
9 And don't read too much into what I'm about to say, but what I
10 have right now are two notices of guidance. I have
11 everybody's kind of view of what they like about it, and what
12 they don't like about it, okay? But what's the next step?
13 What's the next step?

14 Nobody's asked -- well, at least with the current
15 guidance, and again, unless you filed something and I'm
16 looking at the defense here, you may have filed something,
17 nobody's asked right now for any relief, either side. You've
18 not asked for additional protective order, and I don't think
19 the defense has asked for any relief on this either, am I
20 wrong?

21 You said ----

22 TC [MR. GROHARING]: Other than what's before the
23 commission.

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1 MJ [COL POHL]: I'm just saying procedurally where I'm at
2 now. Let's say I -- let's say I agree with the government
3 100 percent, or I disagree 100 percent, okay? What's my next
4 step ----

5 TC [MR. GROHARING]: Well, if ----

6 MJ [COL POHL]: ---- given the posture of where the
7 pleadings are now?

8 TC [MR. GROHARING]: If the defense is not going to follow
9 the procedure, so if we get to a point where the defense
10 isn't -- they're reaching out and contacting people contrary
11 to the procedures here, we would at that point seek a
12 protective order from the court requiring the defense to do
13 this.

14 MJ [COL POHL]: Okay. So they're not bound by the
15 procedures until they get a protective order?

16 TC [MR. GROHARING]: Well, they're bound to the extent
17 we've advised them as far as actions they do that could be
18 disclosing classified information. And I want to be careful
19 because we have no interests in anybody getting prosecuted.
20 Every time we say something like this, everyone claims threats
21 of prosecution and things like that. And we have never made
22 such a threat, but it's our duty to advise them on the proper
23 handling of classified information.

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1 MJ [COL POHL]: Yeah, but let's just ----

2 TC [MR. GROHARING]: I'm cautious about, you know, saying
3 things like that. And if we need to get a protective order
4 from the court to get these -- get procedures in place, we'll
5 take that approach.

6 MJ [COL POHL]: Well, I just ----

7 TC [MR. GROHARING]: Hopefully, we can do this and ----

8 MJ [COL POHL]: Okay. Okay. I'm just trying to figure
9 out the procedural way ahead. What I have right now are two
10 notices, okay, which I have heard verbal objections to, for
11 which -- and the question is, it strikes to me, is that we
12 have got to put this in a litigation posture.

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

14 MJ [COL POHL]: And if the defense were to file a motion
15 objecting to it, then you file your response, and then defense
16 files its reply, and then now we have requested relief and we
17 go from there. Are you with me? Do you understand what I'm
18 saying? You're saying here's your guidance. I'm just asking
19 for -- well, I'm not asking -- you know, what's the way ahead,
20 legally and procedurally?

21 I tell you what, Mr. Groharing, if you hold that
22 thought. I think Mr. Connell wants to weigh in and I'll give
23 you a chance to come back in.

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1 TC [MR. GROHARING]: Is it ----

2 MJ [COL POHL]: Again, don't read anything into this, I'm
3 just saying is I'm dealing with notices here, and I just --
4 with no requested relief, which is -- I can certainly do
5 nothing, but I suspect that's not what either side wants.

6 LDC [MR. CONNELL]: Thank you, sir. And I'll start where
7 you left off there.

8 I was concerned about the same issue, because of this
9 weird 524/525 procedural posture, which is why we filed 548
10 and 549, because I wanted to put a request for relief for --
11 to have a clear record, if nothing else, on this somewhat
12 amorphous debate that we're having in 524 and 525, so yes.

13 MJ [COL POHL]: You filed -- you filed both of those
14 before the new guidance.

15 LDC [MR. CONNELL]: Well, paragraph 4 is not -- is only
16 narrower. It's the same procedure.

17 MJ [COL POHL]: Yeah. Okay.

18 LDC [MR. CONNELL]: I mean, I'm happy to update them, if
19 that's what you're asking. But yes, it was before the new
20 guidance. And to the -- to the extent it implicated places,
21 that's off the table now, right? My position is clear, places
22 have -- are back to where they were.

23 With respect to paragraphs 5 and 6, the government

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1 did not contradict my reading, although you asked them
2 multiple times to confirm or deny and they didn't want to.

3 So, you know, on March 11, I have to issue a new
4 memorandum to my team telling them what is -- what they are
5 suspended from doing and what they are not suspended from
6 doing. And when I do so, the -- I'm going to lift the place
7 in prohibition and I'm going to lift the non-RDI prohibition.
8 But the RDI prohibition, other than the eight people -- and
9 it's not case by case. Paragraph 4 is categorical: "Other
10 than the eight individuals listed in paragraph 3, the defense
11 should make no independent attempt to locate or contact any
12 current or former CIA employer or contractor regarding the RDI
13 program." It's categorical. There's no case-by-case
14 analysis.

15 And so when that happens, my view as we stand here is
16 that non-RDI individuals, there's no investigation
17 restriction. Places, there's no investigation restriction.
18 But the restriction on investigating persons related to RDI
19 program, who worked at some point for the CIA, is still the
20 same that -- today as it was, you know, say last week.

21 The -- so to be clear, in case there is anything
22 unclear about this, except if I choose to do so in the
23 exercise of my professional judgment, I'm not going to tell

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1 the government about any witness that I want to -- and
2 Mr. Groharing in particular, and he knows what he's done --
3 the -- I'm not going to tell them about any witness that I
4 choose to interview.

5 The -- so I do agree with the -- I'm not going to say
6 the suggestion, but at least the thread of an idea that if the
7 government wants to compel us to abide by these restrictions,
8 it should do the same thing that it did in AE 441 and request
9 a protective order from the military commission. That will
10 frame up the 505(h) issue in a way that the military
11 commission can address concretely; however, the only other
12 thing that I want to add is that the reason that we filed 548
13 separately from 549 is that the military commission in general
14 for -- once it finds unlawful influence over the professional
15 judgment of defense counsel, or of the convening authority or
16 the prosecutor for that matter, has much more -- slowing
17 down -- flexibility in crafting remedies than strictly under
18 the rule.

19 I pointed the military commission to the rule earlier
20 with respect to 549, because I think that it -- that it sort
21 of addresses, at least by analogy, the situation, but 548
22 addresses the issue of unlawful influence over the
23 professional judgment of defense counsel and gives a lot more

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1 flexibility to the military commission in fashioning remedies.

2 MJ [COL POHL]: One moment, please. And again, I get
3 these two things. So you believe your remedy -- the remedy
4 portion that I was concerned about is addressed in 548/549?

5 LDC [MR. CONNELL]: Yes, sir. Although we didn't -- we
6 didn't really get as specific -- I ----

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

8 LDC [MR. CONNELL]: There is a prayer for relief in 548
9 and 549. We didn't get down into the nuts and bolts of
10 exactly how that remedy would work, which was how I understood
11 your question earlier. But there is -- you know, part of your
12 colloquy with the government was, is there -- you know, is
13 anybody requesting relief here, and so my answer to that is
14 yes, in 548 and 549 we are requesting relief.

15 MJ [COL POHL]: The 505 relief would have to come after
16 the government ----

17 LDC [MR. CONNELL]: Filed a protective order.

18 MJ [COL POHL]: ---- filed for a protective order.

19 LDC [MR. CONNELL]: Yes. UI relief would not.

20 The -- but -- but -- so that's why I think that the
21 idea, which I won't attribute to you or anyone else, but the
22 idea that if the government really wants to frame this up,
23 they should seek a protective order, and in Attachment B to

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1 540 and 524I, the government asks for us to notify them if we
2 do not -- or if we are unwilling to abide by the guidance. I
3 am unwilling to abide by the guidance. If they want to
4 negotiate, they can make an offer; but the 441 posture of
5 protective order is exactly the right way to do this.

6 MJ [COL POHL]: Thank you.

7 LDC [MR. CONNELL]: 441 was a similar restriction on
8 investigation, but classified.

9 MJ [COL POHL]: Okay. Mr. Groharing, given there's the
10 two ways -- and again, we're talking about the remedies here,
11 but don't -- again, don't read too much into what I'm about to
12 say. There's one remedy under 505 that requires a protective
13 order, and there's another remedy that doesn't require a
14 protective order. Does the government intend to file for a
15 protective order, given the fact that obviously the defense
16 disagrees with, particularly, 524?

17 TC [MR. GROHARING]: It's something we'll certainly
18 consider. I think that's probably likely the case. We're
19 doing our -- we're trying to be as reasonable as possible.
20 We're asking the defense, you know, to -- in here, you know,
21 let us know -- you know, we don't know exactly how --

22 MJ [COL POHL]: I don't -- I don't sense a lot of
23 negotiation from the defense.

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1 TC [MR. GROHARING]: Yeah. And that's fine. I mean,
2 we're trying in good faith to find a way forward.

3 MJ [COL POHL]: Okay.

4 TC [MR. GROHARING]: If the defense is unwilling to
5 participate in that, we can go a different route.

6 MJ [COL POHL]: Okay.

7 TC [MR. GROHARING]: It's something we'll want to take
8 under advisement before we decide on ----

9 MJ [COL POHL]: It's one of the things when I was talking
10 about this earlier in the week, is the factual predicate has
11 moved again and again in this case. And what I have now is
12 two orders of which are not the same as the previous
13 two -- two issues of guidance, okay?

14 So here's what we're going to do. If you want to
15 file for a protective order, you will do that not later than
16 one week from Monday, which makes it the -- whatever Monday
17 is. Okay.

18 TC [MR. GROHARING]: And just so I'm clear, Your Honor, we
19 have two different issues, I think, here with overseas
20 investigations where defense is using FOUO information to talk
21 to uncleared or non-clearance holders.

22 MJ [COL POHL]: I think it's going to be cleaner to
23 request a protective order for each one.

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1 TC [MR. GROHARING]: And I don't know that a protective
2 order is necessary for the overseas piece.

3 MJ [COL POHL]: Okay. I just want to make it clear, is
4 that if you choose to -- I'm not telling you to, I'm saying if
5 you choose to, if you want to just do only one piece, that's
6 fine. That's up to you.

7 TC [MR. GROHARING]: Okay. Just to be clear, that is not
8 an offer to negotiate, that's guidance. That's guidance that
9 we gave the defense on behalf of the original classification
10 authority. So the defense is not free to disregard the
11 guidance that we gave them with respect to their activities
12 and use of FOUO information.

13 MJ [COL POHL]: What I'm simply saying is that if you want
14 to trigger the 505 process, you have to file a protective
15 order.

16 TC [MR. GROHARING]: I ----

17 MJ [COL POHL]: Okay? If we go the other route -- and
18 just because you trigger the 505 process does not mean that
19 forecloses the other route, too, the UI route. Okay? And
20 again, I'm not -- I just want to make sure we get this
21 procedurally set up. So if you decide to file a protective
22 order ----

23 [The military judge conferred with courtroom personnel.]

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1 MJ [COL POHL]: ---- file it by the 12th of March.
2 Defense, you will then have two weeks to respond to the
3 protective order and/or -- well, the protective order should
4 cover it because we've got new issues. And then, Government,
5 you will have your normal one week to reply. And then we can
6 address this hopefully first thing -- well, as soon as we can.
7 All clear?

8 LDC [MR. CONNELL]: I have one question, sir.

9 MJ [COL POHL]: Sure.

10 LDC [MR. CONNELL]: That will be an adversarial motion,
11 right? Not ex parte protective order?

12 TC [MR. GROHARING]: And that's actually -- we'll take
13 that under -- that piece of it under advisement. And we may
14 very well file ex parte consistent with the Rules for Military
15 Commission and Military Commissions Act, so --

16 MJ [COL POHL]: Yeah. No, I understand that, but I'm
17 just -- just to hopefully clarify to me, if you want a
18 protective order that applies to the defense, don't you have
19 to give it to them?

20 TC [MR. GROHARING]: The ultimate order, yes. You don't
21 have to litigate the order with them.

22 MJ [COL POHL]: I understand. I got it. I got it. I'm
23 assuming that you're going to provide a protective order to

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1 the defense that you want me to sign for them to comply with.

2 TC [MR. GROHARING]: Again, we'll discuss this matter, but
3 we very well may file a motion with the commission ex parte
4 requesting a protective order that you would issue, then the
5 defense can make whatever objections they have to that
6 protective order.

7 I mean, we don't normally -- when we go to the court
8 to get a protective order regarding classified information,
9 that's not something we litigate with the opposing counsel.

10 MJ [COL POHL]: No, no, but you eventually give the
11 protective order to the defense, don't you?

12 TC [MR. GROHARING]: Correct.

13 MJ [COL POHL]: Okay. You're -- I'm with you on that.

14 LDC [MR. CONNELL]: Yes, sir. But then as you said
15 earlier today, any argument we make to it is a
16 reconsideration. Right? They're trying to trap us on the bar
17 on reconsideration by not being heard on -- into not being
18 heard on this issue at all. That's why on this particular
19 protective order, it needs to be adversarial.

20 MJ [COL POHL]: I'll tell you what, hold off on the
21 suspenses. I'm looking at the defense. Hold off on the
22 suspenses. We'll see how the government proposes the
23 protective order and we'll go from there. Okay. Because

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1 it's -- I can resolve the issue without a protective order. I
2 just won't do the 505 process. I'll just see whether it's
3 useful or not. Okay?

4 TC [MR. GROHARING]: Yes, Your Honor.

5 MJ [COL POHL]: That's if you want one. You know, if you
6 don't want to put one in, just let my staff know that the
7 government has considered it and they don't intend to issue a
8 protective order. And then once that happens, we'll notify
9 everybody and we'll go straight back to the 548 and 549
10 remedies, okay? Got it?

11 TC [MR. GROHARING]: Yes, Your Honor.

12 MJ [COL POHL]: Anything else to take up in the open
13 session today?

14 Apparently not. Tomorrow we have a closed classified
15 session only, that would begin at 0900. We will begin with a
16 505(h) session to discuss the 525, and I don't have the
17 sub-number of what it is initially, and then we will evolve
18 into the 806 right thereafter. Okay?

19 The detainees may stay in the courtroom until 1700
20 hours. And tomorrow is a closed, classified session, so there
21 will be no public or detainees here.

22 The commission is in recess.

23 [The R.M.C. 803 session recessed at 1523, 1 March 2018.]

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