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1 [The R.M.C. 803 session was called to order at 0902, 27 July  
2 2016.]

3 MJ [COL POHL]: Commission is called to order. It appears  
4 that all detainees are present.

5 General Martins, any change in the prosecution team  
6 since we last recessed?

7 CP [BG MARTINS]: Your Honor, there are, and there are  
8 enough that I'd prefer now to just reannounce who we have got  
9 in the courtroom.

10 MJ [COL POHL]: Sure. Go ahead.

11 CP [BG MARTINS]: Brigadier General Mark Martins,  
12 Mr. Swann, Mr. Ryan, Mr. Trivett, Ms. Tate, and Major Dykstra,  
13 Paralegalman First Class Petrill, Mr. Dale Cox. And with us  
14 from the Federal Bureau of Investigation, Donald Fuhrer, and  
15 Patrick O'Malley.

16 MJ [COL POHL]: Thank you. Mr. Nevin any changes?

17 LDC [MR. NEVIN]: No change, Your Honor.

18 MJ [COL POHL]: Ms. Bormann?

19 LDC [MS. BORMANN]: Major Seeger has rejoined us,  
20 otherwise no changes.

21 MJ [COL POHL]: Mr. Harrington?

22 LDC [MR. HARRINGTON]: No changes, Judge.

23 MJ [COL POHL]: Mr. Connel?

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1 DDC [Lt Col THOMAS]: No changes, Your Honor.

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

3 LDC [MR. RUIZ]: No changes.

4 MJ [COL POHL]: That brings us to AE 079.

5 LDC [MR. CONNELL]: Your Honor, AE 079 was the public  
6 motion that we filed to defer consideration of the request to  
7 destroy a black site in AE 052. We wanted to have an  
8 unclassified version of that while all the discovery  
9 litigation was going on. The fact that it was never addressed  
10 is one of the reasons why we believed that the material had  
11 not been destroyed and that the military commission had not  
12 acted.

13 It seems now that it has been overtaken by events,  
14 but I don't withdraw it. I still think that the military  
15 commission needs to rule on it.

16 MJ [COL POHL]: Okay. In essence, you're just relying on  
17 your pleading, then?

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: Any other defense want to be heard on 079?

20 LDC [MR. NEVIN]: No.

21 LDC [MR. HARRINGTON]: No, thank you.

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

23 LDC [MS. BORMANN]: We join.

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1 MJ [COL POHL]: Any other counsel want to be heard or do  
2 you rest on your pleading?

3 MTC [MR. TRIVETT]: We rest, sir.

4 MJ [COL POHL]: Thank you. That brings us to 233.

5 LDC [MR. CONNELL]: Sir, 233 is now moot. We withdraw it.

6 MJ [COL POHL]: Okay. Just to clarify something, because  
7 as we were looking yesterday on certain withdrawn orders,  
8 particularly the 313 that Mr. Harrington withdrew, when I hear  
9 somebody say, I'm withdrawing, let's just say 313 or 233, with  
10 no further guidance as to any subparagraphs, I'm assuming  
11 they're -- the whole motion is now moot.

12 LDC [MR. CONNELL]: Yes, sir. 313 was ----

13 MJ [COL POHL]: And all variations of the theme.

14 LDC [MR. CONNELL]: For 233, that's certainly true. I  
15 think for 415 for the government it was true. 313 was kind of  
16 an odd bird.

17 MJ [COL POHL]: Yeah. That's one of the problems because  
18 I think at a time we had an -- and we're looking at this, is  
19 there was a period of time where Mr. Binalshibh's exhibits  
20 were separate and I think that's -- that's an administrative  
21 thing that we're going to work through and that was odd.

22 LDC [MR. CONNELL]: That's right. Certainly with respect  
23 to 233, the issue is wholly withdrawn. Nothing remains in

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1 233, sir.

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

3 Ms. Bormann?

4 LDC [MS. BORMANN]: Thank you. With respect to the  
5 government's withdrawal of AE 415 yesterday, I don't know the  
6 basis for withdrawal, but it doesn't appear to be moot. I  
7 don't know if they intend to refile. We have taken a position  
8 that is in direct contravention to theirs. They sought ----

9 MJ [COL POHL]: Who was the moving party on 415?

10 LDC [MS. BORMANN]: They are the government. So I don't  
11 know if they -- moot generally means, in terms of legal  
12 filings and a ruling, that either the parties have agreed so  
13 it's moot or it's been overcome by events so it's moot.  
14 Neither of those things seem to have happened here, so ----

15 MJ [COL POHL]: I'm taking it when they withdraw it,  
16 there's no issue for me to decide, whether they call it moot  
17 or something else.

18 LDC [MS. BORMANN]: Right.

19 MJ [COL POHL]: I use the term moot and -- because there's  
20 nothing for me to decide and that's kind of a generic term for  
21 all of these. And if later on a similar issue comes up and  
22 the government says, well, wait a minute, we want to do  
23 something else, we'll address that in due course.

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1 LDC [MS. BORMANN]: My suggestion would be, and that's why  
2 I want to address the court, to avoid confusion later on down  
3 the road because things seem to be growing exponentially,  
4 although we're moving through them rapidly this week, I would  
5 suggest that the order be that the proponent of the motion  
6 withdraw it.

7 MJ [COL POHL]: If you see the orders, that's already in  
8 there.

9 LDC [MS. BORMANN]: Okay.

10 MJ [COL POHL]: So I'm saying that's been withdrawn and  
11 therefore, for my purposes the issue is moot. I got it.

12 LDC [MS. BORMANN]: Thank you.

13 MJ [COL POHL]: 306.

14 LDC [MR. CONNELL]: Your Honor, you're doing 306 then 320?

15 MJ [COL POHL]: Yeah.

16 LDC [MR. CONNELL]: Yeah, that's fine. All right. Give  
17 me just a moment, Your Honor.

18 May I approach, Your Honor.

19 MJ [COL POHL]: Sure.

20 LDC [MR. CONNELL]: Foxtrot. I'm ready to proceed, sir.

21 MJ [COL POHL]: One moment. Go ahead.

22 LDC [MR. CONNELL]: Sir, I've provided a copy of a set of  
23 slides to the government, to co-counsel, to the bench, and to

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1 the CISO. I previously provided in advance of the hearing a  
2 copy of the same slides to the CISO. I would ask permission  
3 to make them part of the record as 306F and to publish them to  
4 the gallery.

5 MJ [COL POHL]: Okay. Permission granted for both.

6 LDC [MR. CONNELL]: May we have the feed from Table 4,  
7 please. Thank you.

8 MJ [COL POHL]: Go ahead.

9 LDC [MR. CONNELL]: Your Honor, when the Army Criminal  
10 Investigation Division or the Navy Criminal Investigative  
11 Service or the FBI or any law enforcement agency throughout  
12 the United States conduct a search for evidence for use in a  
13 criminal case, they follow certain procedures. They document  
14 the scene in a highly professional manner usually and there  
15 are certain artifacts of that documentation.

16 One of them is ordinarily a crime scene report that  
17 identifies each item and tells you where it was found.  
18 Another of those is typically a crime scene diagram which  
19 correlates with the report and physically identifies where  
20 information was -- where items were seized. The third is  
21 crime scene photography, usually both an establishing shot to  
22 show the placement of everything in the room and then  
23 individual -- often many, many individual photographs

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1 demonstrating where items were found. And then fourth and  
2 finally, there is typically a chain of custody that goes from  
3 the person who collected the evidence to the person who  
4 transported the evidence to the person who tested the evidence  
5 to the person who brought it to court, and perhaps with many,  
6 many variations on that theme.

7           The government in this case wishes to use the results  
8 of nine searches which were conducted which allegedly produced  
9 evidence which is collectively called the discovery.

10           The chain of custody of this evidence is what my  
11 six-year-old daughter would call a disastrophy. It is  
12 virtually impossible for the defense to find out in any way  
13 where the evidence was actually collected, what happened to it  
14 for the first several years, sometimes up to seven years of  
15 its existence. One -- and as far as I understand it, the  
16 government does not intend to produce any chain of custody or  
17 any crime scene photography or any crime scene diagram or any  
18 crime scene report.

19           One of the only windows we have into the question of  
20 these photographs that we have, what are they of, when were  
21 they taken, and who took them, is the metadata on those  
22 photos.

23           MJ [COL POHL]: Let me back up. This is evidence that

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1 you've been provided in discovery, did I just hear you say,  
2 but the government doesn't intend to use this at trial?

3 LDC [MR. CONNELL]: No, sir, you did not hear me say that.  
4 The government has identified which of the evidence it wishes  
5 to use, it calls it affirmative use evidence, but what it does  
6 not intend to produce, as I understand it, and they can  
7 correct me, I'd love to be corrected, that they don't intend  
8 to produce a crime scene diagram, crime scene photography,  
9 crime scene report, or chain of custody before about 2009.

10 MJ [COL POHL]: Okay. Let me make sure I understand what  
11 you're saying.

12 That last category, what they don't intend to  
13 produce, is that connected with the category of what they  
14 intend to introduce?

15 LDC [MR. CONNELL]: So what they -- so let us say that  
16 they're -- let's say that the item is a pen, all right?  
17 Normally if a pen was seized in a criminal investigation,  
18 there would be a documentation, a picture of the pen wherever  
19 it was found, a diagram showing where the pen was found, there  
20 would be a photography describing the pen, and what happened  
21 to the pen, until it was tested for whatever it was tested  
22 for.

23 The government, as I understand it through their

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1 correspondence, has said that they intend to introduce the pen  
2 at trial but only have chain of custody information for the  
3 pen from about 2009 forward and have no -- do not intend to  
4 turn over in discovery -- I don't know whether they have it or  
5 not -- but do not intend to turn over in discovery any crime  
6 scene or photography or chain of custody information prior to  
7 2009.

8 MJ [COL POHL]: So if the pen was seized in 2007 and ----

9 LDC [MR. CONNELL]: Or 2002.

10 MJ [COL POHL]: ---- just prior to your ----

11 LDC [MR. CONNELL]: Yeah.

12 MJ [COL POHL]: ---- your cutoff date ----

13 LDC [MR. CONNELL]: Right.

14 MJ [COL POHL]: ---- and the government says, well, they  
15 don't establish any chain of custody there, there's some  
16 theory of admissibility that that comes in?

17 LDC [MR. CONNELL]: You're going to have to ask them that  
18 question, sir. I've wondered about it myself.

19 MJ [COL POHL]: So isn't this -- if your issue is -- and I  
20 don't think it's your total issue, because there's a discovery  
21 component of this, too.

22 LDC [MR. CONNELL]: This is entirely a discovery motion.

23 MJ [COL POHL]: Yeah.

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1 LDC [MR. CONNELL]: I'm not arguing about admissibility of  
2 the pen or anything else.

3 MJ [COL POHL]: No -- yeah, but I'm saying, but you  
4 reference the fact that they're not going to put it in  
5 chain-of-custody documents.

6 LDC [MR. CONNELL]: They're not going to produce  
7 chain-of-custody documents; whether they have them, I don't  
8 know.

9 MJ [COL POHL]: But you believe they're going to try to  
10 introduce evidence without the chain-of-custody documents?

11 LDC [MR. CONNELL]: So they've told us, yes.

12 MJ [COL POHL]: Okay. Got it. That's a decision for  
13 another day.

14 LDC [MR. CONNELL]: Yes. Yes, sir. That's right. The  
15 decision that is before the military commission today is about  
16 the photographs, because the government has made available in  
17 Washington, D.C., the actual evidence, you know, the  
18 equivalent of the pen itself, and we have been, each week for  
19 a number of months, going and reviewing that evidence, working  
20 our way through it.

21 The -- but what they have produced in -- and that's  
22 their evidence. That's the actual physical items. Of course  
23 they maintain custody of those. What they have produced in

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1 discovery are PDFs of photographs of individual items like the  
2 pen.

3           The -- let's -- since we're talking about that, let's  
4 skip to slide three, please. The conversion process from  
5 whatever format the camera took the photograph in to PDF  
6 strips it of all of its metadata. We actually heard a  
7 reference to metadata from the government yesterday,  
8 interestingly, with respect to the health report, that they  
9 wanted to make sure that certain metadata came off of it.  
10 That metadata should not come off of evidence in a criminal  
11 case.

12           The Department of Justice, as we referenced in the  
13 briefs, has a protocol for the production of electronically  
14 stored information which requires production -- like as it  
15 does in civil cases, criminal cases alike, production of  
16 electronically stored information with its metadata intact.

17           Now, what -- let us go back to slide two, please.  
18 Thank you. The -- we are talking in many cases about  
19 photographs which were taken in 2002 or 2003 time frame. So  
20 obviously the cameras, the digital cameras, there could be  
21 film cameras, I haven't heard of that being involved here, but  
22 the digital cameras at the time had a different set of  
23 information than is now. So what I have put up -- that

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1 information that gets coded onto a photograph is known as,  
2 EXIF, E-X-I-F, data and is governed by an industry standard  
3 which is called the EXIF standard. In 2000, the EXIF 2.1 was  
4 in effect, and so I have produced a table from the EXIF  
5 standard which shows in 2002, 2003, 2004 time frame the  
6 minimum metadata which would be attached to a photograph. And  
7 there are four or five main sources of information that would  
8 be attached to documents -- to photographs at that time.

9           The first two of those tell us about the pixilation  
10 of the configure -- of the image. What I mean by that is how  
11 many -- how large was the image when it was taken. That's  
12 important to us because it tells us whether the photograph  
13 that we are looking at is the same one that was originally  
14 taken or if it's a crop. That's important for chain of  
15 custody, it's important for integrity of the information.

16           Next, at the time EXIF standard included manufacturer  
17 notes, which is, it tells you what kind of camera took the  
18 photograph. That is important and has been important in  
19 several cases that I have been involved in because it tells  
20 you how many different cameras were used. Now, obviously  
21 sometimes they might be using the same model camera, but  
22 generally not, and it can tell you how many witnesses should  
23 be expected and what witnesses to look for when trying to --

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1 when trying to review the discovery because you know how many  
2 cameras were used to take the photographs.

3           In 2002, 2003, 2004 time frame, the -- sometimes  
4 there were used related audio files. The cameras at that time  
5 would allow to you take short audio clips and some people used  
6 them to describe evidence. I don't know whether that happened  
7 in this case or not.

8           But finally, and perhaps most importantly for a 2002,  
9 2003, 2004 photograph, is the tags relating to the date and  
10 time. That tells us a number of things. There's at least one  
11 search in this case that took place twice on two different  
12 occasions and it's actually extremely important whether  
13 information was gathered in the first of those two searches of  
14 the same location or the second of those two locations. It  
15 also tells us -- it gives us actual information about if the  
16 government claims that these photographs were taken at a  
17 certain time or this, underlying items were gathered at a  
18 certain time, we can relate that to the date and time using  
19 the metadata.

20           I want to be clear: The United States courts have  
21 been clear that removing metadata from electronically stored  
22 information and -- before you produce it denies the opposing  
23 party valuable information. That's what the government has

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1 chosen to do here. In each of the photographs that it has  
2 produced, with one exception which we're going to talk about,  
3 but with eight of the nine raids, the government has converted  
4 all of the JPGs or RAW or whatever the native format was into  
5 PDF, stripping it of all of its metadata.

6 Now, some of these photographs, it may be were taken  
7 as late as 2009. Now, in 2009, of course, cameras were --  
8 digital cameras were much more advanced than they were in 2003  
9 or 2002, and the current EXIF standard shows quite a lot more  
10 information. In addition to date and time, it shows things  
11 like geo-tagging or G.P.S. location. In addition to the type  
12 of camera and camera settings, it can often tell you who  
13 created the file, who modified the file, and the last person  
14 to access the file. This is the sort of information that in a  
15 modern case is critically important with respect to a number  
16 of issues.

17 Those issues in this case include the validity of the  
18 government's investigation. I expect at trial the government  
19 will put on the defense that, well, we didn't think that they  
20 were investigating a criminal case and so we didn't do a very  
21 good job with the -- with the chain of custody or the  
22 documentation of gathering the evidence. That, of course, is  
23 a traditional place where the defense in any kind of criminal

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1 case tries to challenge the government's investigation.

2           The metadata can help demonstrate whether the  
3 government used valid evidence collection methods, whether --  
4 when and under what circumstances the evidence was collected,  
5 whether it was maintained in a valid chain of custody, and  
6 whether it has been maintained in a way that preserves  
7 whatever value that the government seeks to -- it for to  
8 introduce it in trial.

9           The last thing that I want to say is that the  
10 government did for one set of raid photographs produce the  
11 underlying information which was useful to us. For eight of  
12 the nine raid sites, they have not produced any actual  
13 photographs ----

14         MJ [COL POHL]: Just so I understand -- the green pie  
15 slice there, you've got the metadata on that?

16         LDC [MR. CONNELL]: That's correct, it ----

17         MJ [COL POHL]: So you need this in the EXIF file format  
18 rather than the PDF file format?

19         LDC [MR. CONNELL]: Yes, that's right.

20         MJ [COL POHL]: Got it.

21         LDC [MR. CONNELL]: And subject to your questions on that.

22         MJ [COL POHL]: Any other defense counsel want to be heard  
23 on this one?

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1 Mr. Nevin.

2 LDC [MR. NEVIN]: I think it's explicit in the pleadings  
3 but not in the remarks that Mr. Connell made a moment ago, I  
4 don't know if this material is still available or not. In  
5 other words, if the metadata still is in existence. If it's  
6 not, if it's been destroyed, it is another example of evidence  
7 destruction, which is a matter we have litigated in other  
8 contexts here. And I wanted to say that -- I think that's  
9 implicit in Mr. Connell's remarks. I wanted to say it  
10 explicitly. Thank you.

11 MJ [COL POHL]: Thank you.

12 Mr. Harrington, anything?

13 LDC [MR. HARRINGTON]: Nothing further, Judge.

14 MJ [COL POHL]: Mr. Ruiz or Ms. Bormann?

15 LDC [MR. RUIZ]: No, judge.

16 LDC [MS. BORMANN]: We simply join both arguments.

17 MJ [COL POHL]: Thank you.

18 Trial Counsel?

19 LDC [MR. CONNELL]: Your Honor, we can take down the  
20 slides unless Mr. Trivett wants them.

21 MJ [COL POHL]: Mr. Trivett.

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

23 MJ [COL POHL]: Good morning.

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1 MTC [MR. TRIVETT]: I'm a bit baffled by defense counsel's  
2 argument, so it's clear that we're not on the same page as to  
3 what we have been trying to communicate to them. I want to  
4 break it down to the judge so he understands exactly what it  
5 is we've provided, what we intend to provide, and ultimately  
6 what we intend to show at trial.

7 There are nine different raids from which we intend  
8 to use evidence seized from these raids. One of the raids was  
9 from where Khalid Shaikh Mohammad and Mustafa al-Hawsawi were  
10 captured, one of the raids was from where Mr. Binalshibh was  
11 captured, one of the raids was from one of the houses that we  
12 believe Khalid Shaikh Mohammad was at shortly before the raid.  
13 There's a couple of raids in Afghanistan, including a bombed-  
14 out house of a former military commander of al Qaeda. And  
15 then, of course, subject to some different approvals, we need  
16 to get still some items that were seized in the raid that  
17 killed Usama bin Laden.

18 We have provided chain-of-custody documents so I'm  
19 not sure exactly what is confusing about that.

20 MJ [COL POHL]: The chain-of-custody documents start at  
21 the time -- we're talking about the photographs here, right?  
22 Well, a lot of evidence, but the chain of custody start at the  
23 date of seizure ----

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

2 MJ [COL POHL]: ---- the date the photograph was taken all  
3 the way through?

4 MTC [MR. TRIVETT]: This is the confusing part and this is  
5 what I want to unpack for the commission. We have an  
6 obligation under 701 to let them inspect the actual, physical  
7 items that were seized. With very few exceptions, those are  
8 the items we're intending to present as evidence in the court.  
9 We've made that available since January of 2014. In April of  
10 2015, Mr. Connell's team began to review them. No other teams  
11 have reviewed them yet.

12 As a courtesy for discovery for their preparations  
13 and our preparations, on my direction, agents simply  
14 photographed these in the National Capital Region so we could  
15 turn them over for purposes of discovery so they could do  
16 preparation for the case without having to look at the  
17 physical items right away. Obviously we're making the  
18 physical items available, but this way they can prepare their  
19 case with these photos.

20 MJ [COL POHL]: So the photos that Mr. Connell referred to  
21 taken in Washington are not raids in Washington, photos were  
22 taken of raids taken somewhere else?

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

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1 MJ [COL POHL]: Got it.

2 MTC [MR. TRIVETT]: At my direction so we can provide them  
3 in discovery. That's the overwhelming majority of the  
4 pictures.

5 There are certain diagrams and photos of the home  
6 where Mr. Binalshibh was captured. There are certain photos  
7 of House 138, which we believe is where Mr. Mohammad was  
8 shortly before the raid occurred. We have provided those.  
9 House 138 is the one where, when we looked back at the  
10 metadata, we determined that it was arguably discoverable, so  
11 that was what we turned over.

12 MJ [COL POHL]: Is there -- on the photographs of the  
13 raids themselves ----

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

15 MJ [COL POHL]: ---- do you still have the version with  
16 the metadata?

17 MTC [MR. TRIVETT]: We did for House 138. I'll need to go  
18 back -- I believe we did for Tariq Road. We looked at the  
19 metadata and we determined that it wasn't discoverable based  
20 on what we reviewed the metadata as. But those are the two  
21 raids that have any metadata arguably even relevant to the  
22 case. The metadata of the pictures that we had that the  
23 agents take to just say, hey, there's a notebook here, there's

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1 a computer here ----

2 MJ [COL POHL]: It's the stuff that's been brought back to  
3 the United States?

4 MTC [MR. TRIVETT]: Correct. It's just the replacement  
5 for their ability to review the items.

6 MJ [COL POHL]: Okay. Let's talk about the photos at the  
7 raid itself.

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

9 MJ [COL POHL]: Okay. Were there photos taken during  
10 these nine raids?

11 MTC [MR. TRIVETT]: Not each of the nine. There's only  
12 contemporaneous photos for the Tariq Road Raid and the House  
13 138 Raid, I believe.

14 MJ [COL POHL]: And the 138 Raid is the one you've already  
15 given to the defense?

16 MTC [MR. TRIVETT]: Yes, sir. And the Tariq Road Raid we  
17 reviewed and determined it was not discoverable. There was  
18 nothing inconsistent on any ----

19 MJ [COL POHL]: Anything classified in it?

20 MTC [MR. TRIVETT]: I'd have to look.

21 MJ [COL POHL]: Okay. There's nothing classified in it,  
22 even if there is, why not just give it to them with the  
23 metadata and let them decide whether it's material or not?

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1 How hard is that?

2 MTC [MR. TRIVETT]: Well, we go through the process and we  
3 review everything that they asked for, sometimes we believe  
4 it's discoverable, sometimes we don't. I'll go back and look  
5 at it. It's the only other raid that we believe that the  
6 metadata is relevant on. We believe that the -- relevant  
7 meaning that it's even potentially evidentiary. There's  
8 nothing potentially evidentiary about the pictures that we  
9 took of the photographs that we provided.

10 MJ [COL POHL]: What I'm saying, on the Tariq Road  
11 one ----

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

13 MJ [COL POHL]: ---- there's metadata, you don't think  
14 that is material. This is on 138, there is material, and you  
15 give them that one. Why not make it go away and give them  
16 that one?

17 MTC [MR. TRIVETT]: I understand.

18 MJ [COL POHL]: I know that's not the standard. I  
19 understand. I got it. We're now, aren't we, in the position  
20 now that I have to start looking at it to see if it's material  
21 or not?

22 MTC [MR. TRIVETT]: I don't think we're in that position,  
23 but I thought it was clear that we had to litigate this

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1 because every single photo we take ----

2 MJ [COL POHL]: No, but I know there's two parts of this  
3 and I will go back to Mr. Connell.

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

5 MJ [COL POHL]: I'm talking about you're telling me  
6 there's metadata on two sites ----

7 MTC [MR. TRIVETT]: Correct.

8 MJ [COL POHL]: ---- of the pictures taken at the time.

9 MTC [MR. TRIVETT]: It's my recollection.

10 MJ [COL POHL]: And one you've given them and the other  
11 one you decided not to give them, but -- because you don't  
12 think it's material, but there's really nothing to prevent you  
13 from giving it to them.

14 MTC [MR. TRIVETT]: I have to look into that second part  
15 of the question.

16 MJ [COL POHL]: Okay. I'm just saying ----

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

18 MJ [COL POHL]: ---- there could be a classification  
19 issue, there could be something else in there, but I'm just  
20 simply -- you're making a materiality determination. I know  
21 you need to and discovery is predicated on the good faith of  
22 the government, so I understand how the process works.

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

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1 MJ [COL POHL]: Lord knows we have spent a lot of time on  
2 this -- on these discovery issues.

3 MTC [MR. TRIVETT]: I understand.

4 MJ [COL POHL]: But it just seems to me, since they've  
5 asked for a specific piece of evidence and you don't have any  
6 real objection to it, except you don't think it's material, it  
7 strikes to me it doesn't hurt just to give it to them then,  
8 unless you have another reason.

9 MTC [MR. TRIVETT]: Yes, sir. I'll certainly look into  
10 whether or not there's another reason. We examined this a  
11 long time ago.

12 MJ [COL POHL]: Okay. But the other seven sites, there's  
13 no such metadata photography, that's what you're representing  
14 to me?

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

16 MJ [COL POHL]: So there's no photos of the other seven  
17 raids? Let me back up and let me rephrase the question.

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

19 MJ [COL POHL]: Are there any photos of the other seven  
20 raids taken contemporaneously with the raid?

21 MTC [MR. TRIVETT]: Not that I recall, sir, no.

22 There are certain photos of not a raid but  
23 Mr. Bin'Attash and Mr. Ali were captured together that all we

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1 have are the photos. We never got the physical items for  
2 them. We provided those and I think we communicated that to  
3 one of the counsel a couple of weeks ago.

4 MJ [COL POHL]: And they're in a PDF file?

5 LDC [MR. CONNELL]: Sir, to rescue that, I understand what  
6 happened with those photos. The government did provide an  
7 explanation of why they only have the photos. That's not part  
8 of our motion. I understand what the situation with those  
9 photos is.

10 MTC [MR. TRIVETT]: I agree it's not part of the motion, I  
11 just wanted to clarify.

12 MJ [COL POHL]: Okay.

13 MTC [MR. TRIVETT]: But what's important here -- and there  
14 will be a filing that the judge gets shortly under 505 that's  
15 going to have information relating to the raids that we're  
16 going to help summarize what occurred to provide to the  
17 defense. That motion has not yet been filed, that motion is  
18 coming.

19 But I think what everyone will see at the end of it  
20 is these are not typical crime scene photos. They're not  
21 processed like typical crime scenes. We have scenes in  
22 Pakistan, we have scenes in Afghanistan where ultimately  
23 people are getting captured. There's a rush to grab as much

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1 information as possible and to bring it out. So it's not  
2 being processed like a crime scene. We're not apologizing for  
3 that. It was obviously battlefield conditions where we were  
4 grabbing people as quickly as we can and grabbing things as  
5 quickly and as expeditiously as we could. And we established  
6 a chain of custody to the extent -- when I say we, the U.S.  
7 Government established a chain of custody as soon as they  
8 could, and then started tracking it more like typical evidence  
9 at that point.

10           So subject to your questions, that's the government's  
11 position.

12           MJ [COL POHL]: I have no questions.

13           MTC [MR. TRIVETT]: Thank you.

14           MJ [COL POHL]: Mr. Connell, anything further?

15           LDC [MR. CONNELL]: Nothing further, sir.

16           MJ [COL POHL]: Okay. What I'm hearing the government  
17 say -- I have something further. What I'm hearing the  
18 government say is that you've got -- you've already got what  
19 you're asking for as far as one site.

20           LDC [MR. CONNELL]: Yes. And I agree with that, that's  
21 the pie slice.

22           MJ [COL POHL]: And that the other pie slice that's  
23 available is the Tariq Road one.

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1 LDC [MR. CONNELL]: I -- you heard the representation  
2 today, I heard the representation today. I just want to be  
3 clear, what we received is a whole bunch of photographs,  
4 right?

5 MJ [COL POHL]: Right.

6 LDC [MR. CONNELL]: They have no time stamps on them. We  
7 don't know where they were taken, when they were taken, under  
8 what circumstances they were taken.

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

10 LDC [MR. CONNELL]: Until we filed this motion, we never  
11 heard what the government said in its response, oh, we just  
12 took those here in Washington, which was a complete surprise  
13 to us at the time and -- or at least to me at the time.

14 MJ [COL POHL]: That's not really -- your issue, if they  
15 took them in Washington simply as -- because they moved from  
16 point A to point B, you want the point A photos.

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

18 MJ [COL POHL]: What I'm hearing the government represent  
19 to me, the only point A photos with metadata that you don't  
20 have is the Tariq Road one.

21 LDC [MR. CONNELL]: I heard that representation, too.

22 MJ [COL POHL]: Okay. So -- okay, got it. Thank you.

23 LDC [MR. CONNELL]: I'm next anyway.

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1 MJ [COL POHL]: Mr. Connell or Mr. Nevin, do you want to  
2 be heard again on this, sir?

3 LDC [MR. NEVIN]: No, thank you, Your Honor.

4 MJ [COL POHL]: Anybody else?

5 LDC [MR. HARRINGTON]: No, sir.

6 MJ [COL POHL]: Apparently not.

7 That brings us to 320.

8 LDC [MR. CONNELL]: Sir, 320 is just in the nature of a  
9 status check. It's -- you know, the ex parte processes are  
10 opaque, but, as I read it, on 3 June of 2015, the military  
11 commission requested that certain material be made available  
12 to it for in camera review relating to our requests for  
13 discovery about communications between Pakistan and the United  
14 States over consular access.

15 MJ [COL POHL]: Uh-huh.

16 LDC [MR. CONNELL]: Just to remind you exactly what  
17 happened, the government produced some documents, they had  
18 internal references to other documents in them. I requested  
19 the internally referenced documents and then the military  
20 commission in 320F requested a -- that material be made  
21 available to them in camera.

22 I see two filings after that. One, 320G on 2 July  
23 2015; and one, 320G Supplement on 18 August 2015. I interpret

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1 those as the government produced some information for  
2 in camera review. And I just wanted to mention it so that it  
3 doesn't -- you know, that was a while ago, and I just wanted  
4 to bring it to the commission's attention. I'm not asking for  
5 any specific relief at this time.

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

7 LDC [MR. CONNELL]: Thank you.

8 MJ [COL POHL]: 399. Is it 399C? Apparently so.

9 Mr. Schwartz.

10 I didn't give the government a chance to respond to  
11 320. Did you want to?

12 MTC [MR. TRIVETT]: No, sir. We did provide that to you.  
13 320G Gov Sup.

14 MJ [COL POHL]: Got it. Mr. Schwartz, 399.

15 DC [MR. SCHWARTZ]: Good morning, Your Honor.

16 MJ [COL POHL]: Good morning.

17 DC [MR. SCHWARTZ]: 399C is a motion for two witnesses who  
18 are required to testify before we can argue 399, also 321,  
19 since we know that's tied in.

20 In 321 and 399, we have moved for the commission to  
21 intervene in the operation of the camp as it relates to the  
22 denial of the defendants' ability to communicate with their  
23 family members. The ultimate remedy that we're seeking here

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1 is for the commission to recognize and to find that there's  
2 been a violation of the defendants' rights to communicate with  
3 their families pretrial, either as law of war detainees or as  
4 pretrial defendants in a capital case.

5           Setting aside the issues of torture that obviously  
6 will be litigated in detail down the road, you know, one of  
7 the most shocking things about the current detention  
8 situation, the current conditions of confinement in this case  
9 has been violations of international law and domestic law in  
10 regards to the defendants' ability to prepare for trial. And  
11 that extends to the ability to communicate with family  
12 members. We put evidence into 321 and 399 of that. We put  
13 law in. We put examples from cases of how the ability to  
14 communicate with family members is essential to a pretrial  
15 defendant.

16           But I think the very best evidence that you have in  
17 front of you on this issue is what we discussed when we talked  
18 about the Ghailani SAMs. The issue with the Ghailani SAMs  
19 that we focused on, of course, was only written  
20 communications. But on the very same page and the few pages  
21 that follow that section in the SAMs, you have examples of  
22 Mr. Ghailani's ability, pretrial, after being moved from  
23 Guantanamo to communicate with family members by telephone and

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1 in person. And that ultimately is the context for this  
2 motion.

3 The commission should order the production of two  
4 witnesses who can testify to the facts on the ground in  
5 Camp VII regarding Mr. Bin'Attash's inability to communicate  
6 with his family.

7 When we get to 399, there will be a large debate over  
8 the legal standard, over what the baseline opportunity the  
9 defendant must have to have such communications. But here at  
10 issue ----

11 MJ [COL POHL]: Is there any factual dispute of what the  
12 current communications is?

13 DC [MR. SCHWARTZ]: Absolutely. That's really why these  
14 witnesses are relevant and necessary.

15 The government's position is that Mr. Bin'Attash  
16 currently has near-realtime communication with his family.  
17 The history that we've laid out in 321 and also 399  
18 demonstrates that that's absolutely incorrect. The witnesses  
19 can testify why that is in detail about the amount of what the  
20 government calls near-realtime communication that has existed.  
21 At the time we filed 399, which was January of this year, in  
22 13 years of detention, Mr. Bin'Attash had never had any kind  
23 of contemporaneous communication with his family. Before that

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1 in 321, we set out facts regarding his inability to even  
2 communicate in writing because the mail process is so  
3 deficient.

4           Since filing 399, my understanding is -- and we need  
5 to supplement this once we can actually establish the facts,  
6 but my understanding is he's been afforded one single  
7 opportunity for what we've referred to as this delayed video  
8 teleconference-type communication. The government's position  
9 is that it currently is available to him and will be available  
10 to him in the future. The reality is that hasn't been what  
11 we've seen in Camp VII, at least for Mr. Bin'Attash's  
12 situation.

13           MJ [COL POHL]: Now, I notice in your motion you want an  
14 ICRC rep really?

15           DC [MR. SCHWARTZ]: Yes, sir. The ----

16           MJ [COL POHL]: Don't we have a problem with that?

17           DC [MR. SCHWARTZ]: I don't think we have a problem at  
18 all.

19           MJ [COL POHL]: No, I'm just referring back to the ICRC  
20 litigation. And as I recall, and I don't have it sitting in  
21 front of me, that the ICRC's position was not just the  
22 reports, but they don't -- they don't testify at proceedings.

23           DC [MR. SCHWARTZ]: They do when they're ordered to by a

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1 judge.

2 MJ [COL POHL]: Oh, really?

3 DC [MR. SCHWARTZ]: I would think they do. If they want  
4 to defy your order, that's another issue.

5 MJ [COL POHL]: No -- yeah, but what I'm saying is, first  
6 of all, when you say an ICRC rep, where is this person?

7 DC [MR. SCHWARTZ]: The ICRC has an office in Guantanamo.  
8 They have a ----

9 MJ [COL POHL]: Do I have authority over them in  
10 Guantanamo?

11 DC [MR. SCHWARTZ]: Your Honor, if you don't have  
12 authority to order a relevant and necessary witness to come  
13 testify, then we have a much bigger problem. And certainly we  
14 can litigate that down the road, but, you know, that -- that  
15 question ----

16 MJ [COL POHL]: We've already discussed this,  
17 Mr. Schwartz, about the authority of the commission to order  
18 people to come to GTMO from the United States. We've  
19 discussed that already. And I think it's no different than a  
20 court-martial in Germany. A judge can't order a person to  
21 come from the States to Germany to testify in a  
22 court-martial ----

23 DC [MR. SCHWARTZ]: Sure.

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1 MJ [COL POHL]: ---- and I can't order a civilian to come  
2 to Guantanamo Bay. Now, can I order a civilian to go from  
3 point A to point B in the United States for a VTC, that's a  
4 separate issue. But what you want me to do, I don't know  
5 whether this ICRC is an American or not, but to order somebody  
6 to come from -- who's currently in GTMO, I have authority to  
7 order him to come here, and even though their organization to  
8 which he belongs would indicate that they don't -- they don't  
9 testify in these proceedings or any proceedings?

10 DC [MR. SCHWARTZ]: Sir, that's an assumption that I'm not  
11 applying to this.

12 MJ [COL POHL]: Isn't that what they -- isn't that their  
13 position when we discuss the ICRC thing? I'm -- not just the  
14 reports, their position is they don't play in anything.

15 DC [MR. SCHWARTZ]: I don't know if that's their position  
16 or not. The discussions ----

17 MJ [COL POHL]: Well, okay.

18 DC [MR. SCHWARTZ]: But it gets that -- I mean, that  
19 question assumes that they would be unwilling to, and I don't  
20 think that that evidence is before us. Really what this  
21 motion is about is forcing the government to do its job and  
22 provide the opportunity for that witness to come in. If the  
23 witness ends up being unwilling, then we can have another

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1 conversation. To the extent that we've raised this before,  
2 this issue of what authority does the commission have to  
3 compel a witness to come to GTMO whether it's an American  
4 witness or not, I don't think we do have resolution on that.

5           But here's the real issue, if we're going to talk  
6 about a court-martial in Germany or a federal trial in New  
7 York or Virginia, you know, here's the secret: This isn't  
8 classified. It's just something nobody ever talks about.  
9 We're not in Cuba, we're in the United States. There's  
10 nothing about this environment that would suggest we're in  
11 another country.

12           So the commission does have the authority to say --  
13 looking around, seeing that there's no Cuban flag, there's  
14 just an American flag, seeing that there are no Cubans other  
15 than Cuban refugees, seeing that we have complete control over  
16 access to this base, there is a border between us and Cuba,  
17 the commission says, yes, there is a witness in the United  
18 States and that witness will travel to the United States here  
19 in Guantanamo Bay.

20           MJ [COL POHL]: Mr. Schwartz, if that were true, then when  
21 the district court judge ordered in a case a long time ago for  
22 a person to be released from confinement in Guantanamo Bay and  
23 brought to the United States, he would have complete authority

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1 to do that, and then the district court said no, that's an  
2 immigration issue. The court of appeals said no, that's an  
3 immigration issue. That's the sole prerogative of the  
4 Executive Branch.

5 I understand your argument, but if you want me to say  
6 that Guantanamo Bay is part of the United States, that would  
7 be an interesting -- I would like some authority for that  
8 position. Because I'm going to tell you, quite frankly, it's  
9 not. It's -- I agree with the control issue. I got that. I  
10 got that. But if that were true, then all of this habeas  
11 litigation where people win their habeas cases and nothing  
12 happens to them because there's no authority to order their  
13 release, if you win a habeas case in Florida, you're released.

14 Now, if you're an alien, you may be released and put  
15 on a plane, I've got that. But here they're not even  
16 released. They win their habeas action, what happens? They  
17 stay right where they are until the Executive Branch decides  
18 what to do with them.

19 DC [MR. SCHWARTZ]: Right.

20 MJ [COL POHL]: You keep equating this to the United  
21 States, I think that's a bridge too far under any type of  
22 legal theory that I'm aware of.

23 DC [MR. SCHWARTZ]: That assumes that the Executive Branch

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1 is going to follow the law. I mean, the judge is going to say  
2 what the law is and then there's a question of whether the  
3 United States decides to ----

4 MJ [COL POHL]: Oh, I have the authority to declare this  
5 part of United States?

6 DC [MR. SCHWARTZ]: No. I'm answering your question as to  
7 the hypothetical of a habeas litigation. We don't need to go  
8 down that road. I don't think -- not that I don't think, the  
9 factual predicate underlying these habeas rulings, these  
10 District Court rulings, don't include the facts that we now  
11 know, that we can establish here, prove that this is the  
12 United States.

13 When we land at the airport, which we do a lot, if  
14 somebody has forgotten his passport, you know, that's never a  
15 popular thing with the quote/unquote customs agents who are at  
16 the airport. But what ultimately happens each time it really  
17 becomes an issue is they say, you know, maybe at a whisper, go  
18 ahead, you know, head over to the Windjammer and have dinner,  
19 we'll work out the paperwork. If this were a foreign country,  
20 that would never happen.

21 But more to the point, the ICRC witness -- I'm not  
22 sure, and to the extent that's my fault, I can go find out and  
23 provide you the fact of whether the ICRC witness is going to

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1 refuse to testify. That's going to be an entirely separate --  
2 separate issue. What we're asking here is for at least the  
3 government to do its duty to go and find a witness who is  
4 relevant and necessary.

5           The JTF witness who we request first is somebody who  
6 can talk about the process, somebody who can talk about the  
7 infrastructure to some degree, somebody who can talk about the  
8 access or lack of access that Mr. Bin'Attash has had with  
9 respect to the video recordings and the delayed VTC  
10 opportunities. But the ICRC -- my understanding is, after  
11 speaking with the prospective witness, the ICRC basically runs  
12 this program. And to the extent there have been problems with  
13 either IT issues on the back end in Saudi Arabia or  
14 miscommunications with other people outside of JTF, the JTF  
15 witness can't testify to that.

16           You know, we're not asking for ----

17           MJ [COL POHL]: And if there's IT issues in Saudi Arabia,  
18 that's somehow now in my bailiwick?

19           DC [MR. SCHWARTZ]: Completely.

20           MJ [COL POHL]: I'm really expanding my authority here.

21           DC [MR. SCHWARTZ]: No. Here's why. If there's something  
22 that's happening in Saudi Arabia completely outside the  
23 control of the United States and that -- that -- whatever that

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1 something is, that IT impediment or refusal on the other end  
2 to cooperate means that Mr. Bin'Attash can't communicate with  
3 his family, then the commission has to intervene and say, all  
4 right, we need to figure out another way for it to happen.  
5 Because the law is clear, and we're not arguing 399 today, but  
6 the law establishes that he has to have a certain amount of  
7 communication.

8           We put in 399 ----

9           MJ [COL POHL]: Let's say theoretically -- let's just  
10 forget IT issues. Let's say theoretically a foreign country  
11 where a family member is -- I don't want to pick any  
12 particular foreign country, a foreign country where a family  
13 member is and the foreign country says, I'm not going to allow  
14 this communication, whether it's IT issues or something else,  
15 what happens next?

16           DC [MR. SCHWARTZ]: I'll jump to the far end, the easiest  
17 solution to all of this, and there could be, you know,  
18 examples in between that would be satisfactory under the law.  
19 But one solution would be for the commission to order JTF to  
20 authorize family members of Mr. Bin'Attash to land on an  
21 airplane here, to be transported to have in-person  
22 communication with him and then to leave.

23           The law requires him to have that opportunity, some

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1 opportunity to communicate with his family. And if there is a  
2 reason that's not happening, even if it's outside of the  
3 control the United States, and the commission has a remedy to  
4 that, which would be JTF, you have to let somebody knocking at  
5 the door in for a face-to-face visit, just like Mr. Ghailani  
6 had at the MCC in New York, then, yes, the commission has the  
7 authority to do that.

8           Now, we're getting into the debate of what actually  
9 is the baseline communications standard.

10           MJ [COL POHL]: Well, no, but I mean -- I mean, your basic  
11 argument here is about a -- about a right your client has and  
12 I'm just going through the iterations of, if he has this  
13 right, how is it to be enforced. We have gone from this is  
14 the United States to telling the government to fix Saudi  
15 Arabia's IT issues or whatever ----

16           DC [MR. SCHWARTZ]: No, Your Honor.

17           MJ [COL POHL]: ---- or ordering -- saying if you don't  
18 provide a plane to Mr. Bin'Attash's family, we'll abate the  
19 proceedings until you do.

20           DC [MR. SCHWARTZ]: These solutions -- first, I'm not  
21 asking for the commission to engage with any foreign country  
22 at all. Clearly, that's not the issue here. What we have to  
23 establish in the factual predicate before a ruling on 399 is

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1 what the facts are on the ground, and there's clearly a  
2 dispute over that. Our position and the reality is, he  
3 doesn't have access. The government's position is he does.

4 MJ [COL POHL]: No, but are the facts on the ground a  
5 dispute about what his current access is?

6 DC [MR. SCHWARTZ]: Yes.

7 MJ [COL POHL]: Okay.

8 DC [MR. SCHWARTZ]: The government claims very clearly in  
9 399A that he currently has near-realtime communications. He  
10 doesn't. So that's -- I mean, that's where -- this is a  
11 narrow issue. This is -- a pretty simple solution to this  
12 problem of establishing the factual predicate is we put the  
13 witnesses on the stand, we ask the witnesses what the reality  
14 is, and then you don't have to hear from us, the parties,  
15 telling you contradictory information because we'll establish  
16 it in the record.

17 At that point, we can have the debate over what the  
18 law requires over, you know, what potential remedies would  
19 satisfy the law. But here, there's no way for me to satisfy  
20 the need for a factual predicate until these relevant and  
21 necessary witnesses are put on the stand, and that's what  
22 we're asking for in 399C.

23 MJ [COL POHL]: Thank you.

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1 DC [MR. SCHWARTZ]: Thank you.

2 MJ [COL POHL]: Any other defense counsel wish to be heard  
3 on this issue? Apparently not.

4 Trial Counsel?

5 TC [MR. RYAN]: Your Honor, with the commission's  
6 permission, I am going to rest on our pleadings, sir.

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

8 That brings us to 227.

9 DDC [LtCol GLEASON]: Your Honor, good morning.

10 MJ [COL POHL]: Good morning.

11 DDC [LtCol GLEASON]: Your Honor, 227, the issue raised in  
12 this motion is our right to discovery in order to prepare a  
13 defense for Mr. Hawsawi.

14 227 pertains to 24 triple hearsay incident reports  
15 that were generated by JTF-GTMO on 23 January 2012. These  
16 reports were marked FOUO by the government, so we filed our  
17 motion under seal in accordance with the protective order, and  
18 I won't go into detail of the reports themselves because of  
19 this reason. But one thing you will see from our pleading is  
20 the reports that were received in discovery have been heavily  
21 redacted by the prosecution and they are also marked not  
22 releasable to the detainee.

23 In their response, the prosecution said, on 10

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1 October 2013, that they will provide a copy that will be  
2 releasable to Mr. Hawsawi. So we ask that the commission  
3 solidify the prosecution's promise which was made three years  
4 ago and order that a copy be produced to Mr. Hawsawi.

5           The second point of the motion and the reply, the  
6 prosecution opposed defense counsel receiving unredacted  
7 copies of the reports themselves. As you will see from the  
8 reports, such information as the name of the accuser and the  
9 witnesses to the events have been redacted, which prevents the  
10 defense counsel from investigating the facts of these reports  
11 and prevents us from having an intelligent discussion with  
12 Mr. Hawsawi about these events.

13           And I can tell you from at least one of the reports  
14 that we reviewed, we have serious questions about the accuracy  
15 and the reliability of these reports. As I indicated, they  
16 were all generated on the same day in 2012 and they purport to  
17 report incidents that occurred between January 2007 and  
18 January 2012. One of the reports, for example, in the header  
19 cites Mr. Hawsawi's ISN number, but in the body of the report  
20 references an entirely different detainee. So again, we have  
21 serious questions about the accuracy of these reports. And in  
22 order to prepare Mr. Hawsawi's defense, we need unredacted  
23 copies so we can compare this against other discovery that we

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1 have received in the case.

2 And subject to your question, Your Honor, that's all  
3 I have.

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

5 DDC [LtCol GLEASON]: Thank you, sir.

6 MJ [COL POHL]: This appears to be a Mr. Hawsawi unique  
7 issue, so I'm not sure if any other defense counsel would have  
8 a dog in this fight.

9 Trial Counsel, do you wish to respond? Mr. Swann.

10 TC [MR. SWANN]: Your Honor, we're going to provide the  
11 reports. We said in 10 October 2013 that we would provide the  
12 defense with unclassified, releasable to the detainee, reports  
13 of these 24 disciplinary reports. And to the extent that we  
14 haven't, I apologize for that. But that said ----

15 MJ [COL POHL]: So there's -- so basically what you are  
16 saying, if I grant the motion, you're going to do it anyway?

17 TC [MR. SWANN]: We're going to grant -- if you grant the  
18 motion, we're going to go ahead and give it to them anyway.  
19 Even if -- we're just going to give it to them is what I'm  
20 saying. We give them reports throughout the years. This  
21 probably was back -- well, it's three years old, so it just  
22 slipped the radar. But I'm not sure that we haven't already  
23 done it. I'll go back and take another look.

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1 MJ [COL POHL]: So what you're basically saying, you have  
2 no objection to the requested relief because you're going to  
3 do it anyway?

4 TC [MR. SWANN]: No objection to the requested relief.  
5 They won't be unredacted because there's certain things in  
6 those reports, maybe names or guard numbers or something like  
7 that, but we'll go ahead and give those. We have no intention  
8 of using this kind of information at trial.

9 MJ [COL POHL]: So what I'm going to rephrase as PII or  
10 sensitive information may be redacted, you will give them the  
11 reports, and once that is done, if the reports as given to the  
12 defense are inadequate, I'm sure they'll let me know.

13 TC [MR. SWANN]: I'm sure so. Thank you.

14 MJ [COL POHL]: Thank you.

15 That brings us to 336, unless -- I'm sorry.

16 DDC [LtCol GLEASON]: Your Honor, I just had one other  
17 point to raise based on Mr. Swann's comments.

18 MJ [COL POHL]: Sure. Go ahead.

19 DDC [LtCol GLEASON]: Mr. Swann said that they will  
20 provide the reports but they are going to redact PII  
21 information. One thing we'd like to highlight, in order to  
22 have an intelligent discussion with Mr. Hawsawi, we need the  
23 guard numbers. And we don't need their actual names in the

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1 reports that are releasable to him, but we need the guard  
2 numbers and we need the dates in the reports.

3 MJ [COL POHL]: Let me see what they're giving to you and  
4 we'll see if it's adequate or not. We're talking about  
5 something that happened four years ago.

6 DDC [LtCol GLEASON]: Some of the events go back to  
7 allegedly 2007, Your Honor. The reports were generated at the  
8 same time in 2012.

9 MJ [COL POHL]: Let's do this. Let them give it to you  
10 and then if you wish to complain about the redaction, let's go  
11 from there. The reason I say that, just see what you get,  
12 what they're telling me they're going to give you, and they're  
13 going to make certain redactions. Let's see what they give  
14 you and then rather than speculate what's redacted, let's see  
15 what's actually redacted, and then if you need more  
16 information, you let me know.

17 DDC [LtCol GLEASON]: Your Honor, the same point, in  
18 addition to the copy that they're going to provide that's  
19 releasable to Mr. Hawsawi, the defense also requested a copy  
20 of the unredacted reports themselves. The prosecution can  
21 provide those not releasable to Mr. Hawsawi. If they're  
22 classified, then we can receive them in the classified format,  
23 but we would like unredacted copies for defense use, sir.

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1 MJ [COL POHL]: Okay. Thanks.

2 DDC [LtCol GLEASON]: Thank you, sir.

3 MJ [COL POHL]: Mr. Swann.

4 TC [MR. SWANN]: I heard what he said, Your Honor, and  
5 I'll go ahead and take a look at what we can do. And then if  
6 he -- they don't agree with what we have done, they can file  
7 another motion.

8 MJ [COL POHL]: What I'm hearing him say is they want a  
9 set releasable to Mr. Hawsawi and then an unredacted set that  
10 may not be releasable to Mr. Hawsawi and may be classified.

11 TC [MR. SWANN]: Yeah. That's what I heard, too, sir, and  
12 I'll see what I can do.

13 LDC [MR. RUIZ]: Judge, can we have a moment on that? Can  
14 we have a moment on that? I want to make sure that's clear  
15 for us.

16 MJ [COL POHL]: Okay.

17 TC [MR. SWANN]: Your Honor, Mr. Trivett reminded me that  
18 all of this predated the MOU by about two years. And when  
19 they finally signed the MOU, I believe in 2015, things  
20 changed. We'll go back and take a look at these 24 pages and  
21 try to knock that out next week so that they get what they're  
22 entitled to.

23 MJ [COL POHL]: Okay. What I want you to do, Mr. Swann,

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1 after you do that, just file a status report with the  
2 commission and both sides so I kind of know where this is.

3 TC [MR. SWANN]: Will do, sir.

4 MJ [COL POHL]: Thank you.

5 That brings us to 336.

6 ADC [MS. LACHELIER]: Judge, I think 336 actually  
7 dovetails well into what we just discussed in 227, but on a  
8 broader level, and that is, we ask in AE 336 for nonredacted  
9 Detainee Information Management System records, that's DIMS  
10 records, and to be able to share those records with  
11 Mr. Hawsawi.

12 In this, our filing, which we filed under seal  
13 because it contains DIMS records, you can see at Attachments B  
14 through D the type of records that we're getting from the  
15 government. We're not talking about dated records or some  
16 pre-MOU production by the government, what they're producing  
17 to us, Judge, is records in which -- there is no PII to begin  
18 with. So the question that there might be PII and that  
19 there's a concern about producing this to Mr. Hawsawi because  
20 he might be given the names of guards is completely false.  
21 They already use pseudonyms in the records we're getting.  
22 What we're asking is to be able to share those pseudonyms with  
23 Mr. Hawsawi so that we can have an intelligent discussion with

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1 Mr. Hawsawi about the contents of these reports.

2           The government has not invoked any authority for why  
3 they are redacting these records. They are simply redacting  
4 them and producing them, by the way, unclassified. So there's  
5 not a classification issue when they produce them to us. I  
6 mean, I guess the point, Your Honor, is that they have no  
7 authority for the redactions they're engaging in. And  
8 Mr. Hawsawi is entitled to see this information in order to  
9 have an intelligent discussion with us about these reports.

10           Once the government started marking or -- or at --  
11 the government has now taken the position -- this ties into  
12 018U, I'm afraid. The government has taken the position that  
13 they're not going to mark items releasable and not releasable  
14 to the detainees anymore, that includes the DIMS, so we have  
15 been getting DIMS -- to give you a background, we have been  
16 getting DIMS that have been marked releasable to Mr. Hawsawi  
17 and we have been getting DIMS that are marked nonreleasable.  
18 The nonreleasable ones have dates in them, the releasable ones  
19 do not have dates in them, so we are unable to have  
20 intelligent discussions with Mr. Hawsawi about incidents or  
21 anything reported in these DIMS because the dates are not in  
22 there. And also, the copies given to Mr. Hawsawi are redacted  
23 with -- the pseudonyms of the guards are redacted. I want to

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1 specify, again, Judge, the pseudonyms of the guards are  
2 redacted. We're not talking PII here at all. There's no  
3 question about PII in these records that are redacted, they're  
4 not in there.

5           So what the government has done now that it's  
6 moved -- there's layers to this. What the government has done  
7 now that they're marked not releasable to the detainee  
8 anymore, what they have done is say, okay, now they're  
9 classified. So the same records we were getting six months  
10 ago marked not releasable to Mr. Hawsawi but releasable to us  
11 are now marked classified. That's how they're getting around  
12 our being able to show it to Mr. Hawsawi. It's the same  
13 records with the same redactions. What we need is unredacted  
14 records or proper invocation on the part of government of some  
15 authority for the redactions they're engaging in these  
16 records. They have not articulated any legal basis for the  
17 redactions they're engaging in.

18           So just to summarize -- and I will come back, I'm  
19 sure, after the government has spoken, but to summarize, we  
20 need these to be able to have an intelligent discussion with  
21 Mr. Hawsawi about his detention, about incidents that happened  
22 in the detention, about incidents that don't happen. This is  
23 all relevant to mitigation evidence that we need to develop.

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1 The standard is not the government doesn't intend to use them  
2 in their case in chief and therefore they don't have to  
3 produce them or they can redact them as they wish. This is  
4 legitimate mitigation investigation evidence that we can use.

5 MJ [COL POHL]: Thank you. Any other defense counsel want  
6 to be heard on this?

7 Yes, of course. Mr. Connell.

8 LDC [MR. CONNELL]: Your Honor, I just want to highlight  
9 to the court that this motion overlaps with 161. You asked me  
10 about that earlier in the session. We argued 161 in December,  
11 we argued it again in May. I'm not going to argue it again  
12 today. I just wanted to say that the question of DIMS and  
13 redactions, our position is fully set out in 161, including  
14 what we've received and what we haven't received. It has not  
15 changed since May.

16 MJ [COL POHL]: Okay, yeah. I had just asked you whether  
17 there has been any factual change since May and you indicated  
18 no.

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: Got it.

21 LDC [MR. CONNELL]: Thank you.

22 MJ [COL POHL]: Thank you.

23 Ms. Bormann.

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1 LDC [MR. CONNELL]: I do want to be clear about one thing.  
2 The government does continue on a rolling basis to produce  
3 these records like medical records.

4 MJ [COL POHL]: Uh-huh.

5 LDC [MR. CONNELL]: The records that we talked about in  
6 May have not changed, those are exactly the same. The  
7 government may have produced some new ones, you know, on a  
8 rolling basis, but those weren't the topic of 161 in May.

9 MJ [COL POHL]: Got it. Thank you.

10 LDC [MS. BORMANN]: I want to join the concerns that  
11 Ms. Lachelier mentioned, and I want to point you to the real  
12 problem when there are redactions involving dates and guard  
13 pseudonyms. So let's make it very clear.

14 DIMS are the only way, as you've heard numerous  
15 witnesses testify to, the way that Camp VII tracks what occurs  
16 with its detainees on a regular basis. So if there's an  
17 incident -- let's say there's a disagreement or an argument  
18 between a particular detainee in Camp VII and one of the  
19 guards and that results in a tier supervisor being called, all  
20 of that, according to the government, is noted in DIMS  
21 records.

22 Those DIMS records will eventually be used down the  
23 road by the government in its case in aggravation. It will

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1 provide evidence for them to call witnesses to say that one  
2 defendant or another might cause harm to guards going forward.  
3 This is a capital case. That type of evidence is often used  
4 to rebut mitigation evidence. Without the ability to discuss  
5 with a defendant exactly what occurred as close to the time  
6 period that it occurred, the defendant is denied the ability  
7 to investigate possible aggravation down the road. So if you  
8 take away a date and you take away the pseudonym of a guard,  
9 defense counsel is left with nothing to have a conversation  
10 about, other than the following ----

11 MJ [COL POHL]: Let me ask you this: I understand the  
12 significance of the date. What does the pseudonym of the  
13 guard give you?

14 LDC [MS. BORMANN]: Because the guards use their  
15 pseudonyms with the detainees. That's why they have a  
16 pseudonym. So, you know, that's how they're identified.  
17 They're not just -- these are people interacting with people.  
18 So, you know, it's not just guard. You know, the detainees  
19 have been given information, a pseudonym of some sort, so that  
20 they know how to identify someone. So let's say that there  
21 are ----

22 MJ [COL POHL]: Let me ask you this then, but -- so let's  
23 say the pseudonym is Joe.

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1 LDC [MS. BORMANN]: Uh-huh.

2 MJ [COL POHL]: Just pick it out of the -- okay. And  
3 there's a dispute about -- and DIMS shows some type of a  
4 disturbance or whatever, something of significance. So is the  
5 next step then is you want to know who Joe actually is to  
6 interview Joe?

7 LDC [MS. BORMANN]: Well, it depends. So the first thing  
8 I need to be able to do is go to my client, sit down, and say,  
9 hey, I know it happened a long time ago, but I just got this  
10 record, and they say that back in 2012 you had a -- on  
11 September 4 of 2012, you had an interaction with a guy that  
12 went by the name of Joe. Do you remember that?

13 Now, it may be that a defendant wouldn't remember, it  
14 may be that he would. But at least I would be able to give  
15 him the date and the pseudonym to try and remind him. Right  
16 now as it stands, I can't even give him a date.

17 You know, you've been in custody here since 2006 and  
18 here's -- here, Mr. Bin'Attash -- between 2006 and now, for  
19 the last ten years, the government says that on a certain date  
20 that I can't tell you about, I can't even tell you the year,  
21 you had an interaction with some guy I can't name and I can't  
22 describe and I can't even give you his pseudonym, but maybe  
23 you could tell me about that. That's how the conversation

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1 would have to go under the regime we're practicing under. It  
2 gives us no ability whatsoever to establish and counter a  
3 government narrative that may not -- that -- to counter a  
4 government narrative we're required to counter if we can, and  
5 that may lead to our client's wrongful execution.

6 So going forward, I mean, this is more than just I  
7 need to be able to sit down with Mr. al Hawsawi and, you know,  
8 talk about medical issues, this is preparation for a capital  
9 sentencing hearing.

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

11 Anything else from the defense? Apparently not.

12 Trial Counsel?

13 CP [BG MARTINS]: Your Honor, if we could just have a  
14 moment.

15 MJ [COL POHL]: Sure.

16 TC [MR. SWANN]: Sir, we have essentially two time events,  
17 before the MOU and after the MOU.

18 Before the MOU, the defense got -- defense counsel  
19 got redacted DIMS. Since signing the MOU, they have, or will  
20 receive shortly, unredacted DIMS. The accused ----

21 MJ [COL POHL]: Just so I understand -- totally  
22 unredacted?

23 TC [MR. SWANN]: Totally unredacted DIMS.

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1 MJ [COL POHL]: Okay.

2 TC [MR. SWANN]: They get everything. They get the date,  
3 they get whatever is in those documents. Those documents will  
4 be marked with a classification level.

5 MJ [COL POHL]: Including the pseudonym numbers of the  
6 guard.

7 TC [MR. SWANN]: Including the pseudonym and whatever is  
8 contained in the documents, they will get those.

9 MJ [COL POHL]: They get an unredacted -- it may be  
10 classified, unredacted copy of the DIMS?

11 TC [MR. SWANN]: Unredacted copy of the DIMS to counsel.

12 MJ [COL POHL]: To counsel. I got it.

13 TC [MR. SWANN]: The accused will receive a redacted copy.  
14 It will redact maybe dates and -- a lot of times the pseud  
15 numbers are in there. The dates may be redacted because of a  
16 combination of tactics, techniques, and procedures that those  
17 that take a look at these documents have determined that give  
18 the accused some advantage that they should not have in the  
19 confinement facility.

20 Now, all of this will be provided or has been  
21 provided. We have been very careful with providing the  
22 accused with an unclassified -- excuse me, an unclassified  
23 releasable version to the detainee so the detainee can take a

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1 look at it. Apart from all of that, there's very little in  
2 these DIMS. You have copies before you which talk about --  
3 well, I won't even address it, but it deals with such issues  
4 as what do they eat for the day and -- or things of that  
5 nature.

6 If there is a disciplinary action contained in those  
7 documents, there's a separate copy of -- made of those, which  
8 is a serious incident report. We give those to the defense  
9 counsel, and they have access to all of them as well.

10 So this issue about the DIMS is being resolved.  
11 There's going to be a major dump going back, all the way back  
12 to 2006, that is pre-MOU they will get additional documents  
13 that they can take a look at and do whatever they can do with.

14 MJ [COL POHL]: Now, Ms. Bormann's -- was discussing about  
15 if we don't -- we don't have the date and the pseudonym, it's  
16 difficult, if not impossible, to focus our client on the  
17 issue. And what you're telling me is that they -- the defense  
18 counsel will have the date and the pseudonym, but they will  
19 not be allowed to tell that to the client.

20 TC [MR. SWANN]: Well ----

21 MJ [COL POHL]: Is that what you're telling me?

22 TC [MR. SWANN]: They will have the date, they'll have  
23 whatever is in that document. Now, if they want to come back

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1 and say to us, you know, there's this one incident here, and  
2 there I'm ready to evaluate anything if it becomes relevant  
3 and material to some issue in the proceedings.

4 I keep hearing something about what goes on in the  
5 camp and the type of Skipper evidence. I don't know at this  
6 time I can tell you that we're going to offer anything to  
7 indicate their camp time.

8 MJ [COL POHL]: Well, if they -- if the defense -- and  
9 again, we're way down the road here, but since you mentioned  
10 it and Ms. Bormann mentioned it, if the defense were to  
11 present how well they've done in confinement, you're telling  
12 me the government is not going to introduce any rebuttal  
13 evidence to that about incidents ----

14 TC [MR. SWANN]: No, I won't tell you that, because we've  
15 got -- we're too far away from when trial happens for it to --  
16 for us to not even consider that at this particular point in  
17 time.

18 MJ [COL POHL]: No, I understand that. I just want to  
19 make sure that I understand your position now. Got it.

20 TC [MR. SWANN]: All right, sir.

21 MJ [COL POHL]: Thank you.

22 Anything further, Ms. Lachelier?

23 ADC [MS. LACHELIER]: Judge, the relevance of the

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1 pseudonyms -- well, I mean, I'll also specify the pseudonyms  
2 are either names or numbers for the guards. Those are names  
3 and numbers that Mr. al Hawsawi and his co-accused see on a  
4 daily basis. This is not something that is kept from the  
5 accused to begin with, which is why, as Ms. Bormann stated,  
6 this is information that allows us to connect events for our  
7 clients in time.

8           Mr. Hawsawi can clearly identify an individual if we  
9 tell him, hey, this is the entry, this is the time, this is  
10 the date, this is the person involved, do you remember that  
11 person? That's the discussion that we need to have with him.  
12 And as Your Honor pointed out yourself, it isn't just about  
13 incident reports of problems with the guards, it's about good  
14 conduct, it's about guards that may be -- they have developed  
15 a relationship with. Mr. Hawsawi may have a relationship with  
16 a guard that we want to try to reach out to. That should be  
17 allowed. We don't need the name of the actual individual,  
18 which would be PII, but the pseudonym is necessary to engage  
19 in that communication, as is the date.

20           The government has absolutely no authority -- I want  
21 to repeat myself, but they have cited no authority for  
22 redacting dates. There's just -- we are talking, as  
23 Ms. Bormann pointed out, ten years of records. We need the

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1 dates in order to have this discussion with Mr. Hawsawi.

2           Finally, I will note they're emphasizing this pre-  
3 and post-MOU again. We signed the MOU in September 2015,  
4 September 14, 2015, we turned over our MOU -- to our  
5 individual MOUs to the government. They've had it since then.  
6 They have produced DIMS to us since then. Those DIMS continue  
7 to be redacted in the manner that we've described in our  
8 motions. So the problem is still there.

9           Finally, I'll return to the point that they -- they  
10 produced some that were classified now, which is how they're  
11 preventing us from having any discussions with the clients.  
12 The same records we were getting before that were marked not  
13 releasable to Mr. Hawsawi are now provided to us redacted with  
14 certain redactions and marked classified. So obviously that  
15 completely shuts us off from discussing those records with  
16 Mr. al Hawsawi. And clearly the government is using the  
17 classification as a strategic method to prevent us from having  
18 these discussions with Mr. al Hawsawi on these records.

19           So I don't trust and we don't trust the claim that  
20 they're going to provide this information in some unredacted  
21 form and this is a post-MOU issue and it's going to be  
22 resolved. It hasn't been resolved since September when we  
23 signed the MOU and the months before when the government said

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1 everything would be given to us when we sign the MOU, there's  
2 no reason to believe now we're going to get records that can  
3 be used.

4           Again, we repeat our request to get unredacted DIMS  
5 that we can show to Mr. al Hawsawi. There are methods for  
6 protecting force protection. Those methods are in place. The  
7 Protective Order Number 2 protects how we can that get that  
8 information and we file that information under seal as we did  
9 this very motion. Protective Order Number 2 requires us to  
10 make sure that that we don't use identifying information for  
11 the guards, PII type of identifying information, using  
12 pseudonyms.

13           And by the way, Judge, going back in time, we have  
14 used pseudonyms before in litigation and the government's  
15 providing them to us in reports when they want to turn over  
16 incident reports, that's correct giving us the pseudonyms and  
17 they're releasing them to Mr. al Hawsawi.

18           So we have records from the government. When they  
19 recognize that the guard's identity is important, they are  
20 providing us the pseudonyms. There's no force protection  
21 issue with turning over pseudonyms or dates for that matter  
22 and we need that information to discuss that with Mr. Hawsawi.

23           Thank you, Judge.

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1 MJ [COL POHL]: Thank you. Anything further?

2 LDC [MS. BORMANN]: What you just heard from Mr. Swann is  
3 yet one more example of the government's attempt to deny us  
4 discovery. Mr. Swann would not say that they won't use DIMS  
5 records to find matters in aggravation and in the same  
6 paragraph stated that the government has determined that  
7 they're not yet material. That's crazy.

8 I have to prepare this case like it will go to  
9 sentencing. I have to prepare this case, we all do on the  
10 defense side, like we will be arguing for our clients' lives.  
11 Now, it may not happen, but we can't pretend it won't. So  
12 everything that pertains to a death sentencing  
13 aggravation-mitigation hearing is material to the defense. So  
14 DIMS records that contain pseudonyms or numbers involving  
15 guard incidents and the dates of those guard incidents are not  
16 only material, they're essential. And our ability to talk  
17 about them with our client is also essential.

18 So please don't go down the trap that this stuff  
19 isn't material. It is.

20 MJ [COL POHL]: Thank you.

21 Mr. Swann.

22 TC [MR. SWANN]: Sometimes I sit there and I kind of  
23 wonder, have they even looked at what we've given them? I'm

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1 looking at a document right now that's releasable to the  
2 detainee, and it has the pseud numbers of every one of the  
3 guards that were involved in whatever occurred that day.

4 ADC [MS. LACHELIER]: Judge, we'd ask the government to  
5 identify what record they're referring to. Is it in the  
6 record?

7 TC [MR. SWANN]: I will, Your Honor. It is a document  
8 that was returned -- given to the defense, and in this case  
9 the Hawsawi table. It says, RELEASABLE TO ISN 10111, NOT  
10 RELEASABLE TO THE PUBLIC.

11 ADC [MS. LACHELIER]: And what's the exhibit number on  
12 that?

13 TC [MR. SWANN]: MEA-10011-00006933.

14 MJ [COL POHL]: Mr. Swann, rather than talking about an  
15 individual document, let me ask you this: How do you respond  
16 to the comment that the date -- rephrase -- that the pseudonym  
17 is already known to the accused because it's on the guy's  
18 uniform at the time of the incident. So why -- what are we  
19 hiding from them now?

20 TC [MR. SWANN]: We're not hiding the pseud numbers at  
21 all. They're in the documents. We have been ----

22 MJ [COL POHL]: Okay. Let me back up then.

23 What is redacted from what you propose to give to

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1 the -- releasable to the detainee?

2 TC [MR. SWANN]: The date. It goes to the defense  
3 counsel, they have everything. The date is redacted from the  
4 detainee.

5 MJ [COL POHL]: What's the basis for that redaction?

6 TC [MR. SWANN]: Because it's the combination of the date  
7 and the pseud number that can reveal certain tactics,  
8 techniques, and procedures, movements, locations, where guards  
9 are during a certain time of the day, where guards are not  
10 during a certain time of the day.

11 MJ [COL POHL]: Hold on. On these -- just trying to  
12 figure out -- on a DIMS entry, it's interaction with a  
13 detainee, right?

14 TC [MR. SWANN]: It may not be. It may be -- it may  
15 indicate that the detainee was gone during a certain period of  
16 time and something occurred.

17 MJ [COL POHL]: But the issue that comes up is the  
18 interaction between -- what seems to be the gravamen of the  
19 issue here is the interaction between detainees and the guard  
20 force, okay, and you're going to redact out the name -- the  
21 dates of these interactions because it may reveal TTP?

22 TC [MR. SWANN]: Yes.

23 MJ [COL POHL]: Even though the detainee at the time saw

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1 what was going on?

2 TC [MR. SWANN]: It may not be the case, sir.

3 MJ [COL POHL]: I'm talking about ----

4 TC [MR. SWANN]: It may not be the case that he sees  
5 everything. Obviously, if he has a conversation with a  
6 particular individual, that is reflected, too. But there are  
7 so many many other things contained in these DIMS. For  
8 instance, movements, how many folks are involved, and other  
9 things that happened in the camp, these are all reflected  
10 here. The dates have been removed. It's the combination. We  
11 give them the -- we give them pseud numbers, but we just don't  
12 give them the dates.

13 The defense counsel have the dates. They can look at  
14 it and say, hey, this is an important incident, or this is not  
15 an important incident. You know, whether a guy turned in his  
16 laundry that day to guard number X, that's not important,  
17 that's not worth going and investigating.

18 These kind of things that they have ----

19 MJ [COL POHL]: So your proposal, if I understand it  
20 correctly, is you will give the unredacted DIMS to the defense  
21 counsel.

22 TC [MR. SWANN]: It's being done or hasn't ----

23 MJ [COL POHL]: Got it.

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1 TC [MR. SWANN]: It's being done.

2 MJ [COL POHL]: Okay. It's in the process, for want of a  
3 better term. You will give redacted versions releasable to  
4 the detainee without dates and other TPPs that you feel should  
5 be redacted ----

6 TC [MR. SWANN]: That's correct.

7 MJ [COL POHL]: ---- and if defense believes that a  
8 particular DIMS needs to be discussed with him, they need to  
9 come back to you and say we want to give this unredacted one  
10 to him. That's your proposal?

11 TC [MR. SWANN]: That's my proposal.

12 MJ [COL POHL]: Got it. Thank you.

13 ADC [MS. LACHELIER]: Judge, can I add to what the  
14 government just represented?

15 MJ [COL POHL]: Briefly.

16 ADC [MS. LACHELIER]: What the government's asking us to  
17 do is turn over to them our strategy every time we want to  
18 look at something in DIMS and discuss it with Mr. al Hawsawi.  
19 And what we can foresee is going to happen is they will deny  
20 us that opportunity after we've revealed our strategy and we  
21 will be right back before you litigating every instance that  
22 we need to unredact from these records in order to discuss  
23 with Mr. al Hawsawi. So that's the prospect that we're

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1 looking at. It's much easier and it's -- thanks -- it's much  
2 simpler and it is the proper thing to do under the rules and  
3 the law for us to get these records so that we can have an  
4 intelligent discussion with Mr. al Hawsawi about his records.

5 MJ [COL POHL]: Thank you.

6 That appears to exhaust the motions being discussed  
7 in open session for these hearings. Mr. Nevin, you're  
8 standing.

9 LDC [MR. NEVIN]: Just to put on the record where we stand  
10 with 425 ----

11 MJ [COL POHL]: I think it was on the record yesterday.  
12 We were still on the record when we discussed it. We can do  
13 it again if you want me to. We're -- okay, we'll just -- let  
14 me explain -- say what I said yesterday, and I think it was on  
15 the record, is there's an issue about the classification of  
16 052 that Mr. Connell and I believe Mr. Ruiz believe is being  
17 subject to a declassification review. And the idea was, if  
18 that happens, then we can discuss all of 425 in an open  
19 session, which is my preference.

20 And so that's where we're at. There's no way we can  
21 resolve it until that issue is resolved, even ----

22 LDC [MR. NEVIN]: We could do complementary closed and  
23 open sessions, but we all concluded that it's -- it would be

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1 better to try to do it all in an open setting, which may well  
2 be possible.

3 MJ [COL POHL]: Okay.

4 LDC [MR. NEVIN]: Thanks, Your Honor.

5 MJ [COL POHL]: That's kind of where we're at.

6 That being said, as discussed earlier, we had a  
7 505(h) hearing and I ordered closure to discuss classified  
8 matters under Rule for Military Commission 806, and those  
9 would be 321, 486, 441, 373, 018Y, 01800, TT, WW, YY, and then  
10 Ms. Bormann had a bit of 396 to discuss.

11 Given the time, what we will do is -- Mr. Trivett,  
12 you are standing. Did I miss something or put something on  
13 you didn't think I did?

14 MTC [MR. TRIVETT]: Just to clarify, sir, we had AE 386,  
15 not 486.

16 MJ [COL POHL]: I'm sorry. You are correct.

17 MTC [MR. TRIVETT]: Thank you.

18 MJ [COL POHL]: I misspoke. Okay. But given the time, it  
19 seems to be reasonable we can -- we will do that hearing today  
20 at 1300 hours, and we will be discussing classified  
21 information. It will not be a public hearing, and only those  
22 parties to be present at the hearing. As discussed earlier,  
23 the detainees will be absent, noting that there's a continuing

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1 objection to their exclusion from 806 hearings.

2           And given the time and the sequence, the detainees  
3 can stay here until 1200 hours, and at which time they will be  
4 returned to the camp, and we will continue -- we will have the  
5 hearing at 1300.

6           And Mr. Harrington, you're standing.

7           LDC [MR. HARRINGTON]: Judge, could I just have a moment  
8 to talk to the other lawyers about that schedule going ahead  
9 before you finalize it?

10          MJ [COL POHL]: This is actually at the request of  
11 Mr. Connell yesterday.

12          LDC [MR. HARRINGTON]: I understand that, Judge, but could  
13 I just have a moment with them before you solidify that?

14          MJ [COL POHL]: Sure.

15 [Pause.]

16          MJ [COL POHL]: I didn't know it was going to take this  
17 long, but...

18                 Mr. Harrington, do you need more time? I mean, if I  
19 need to take a recess, I will. I did not -- I was kind of  
20 assuming it wasn't going to take too much time.

21          LDC [MR. HARRINGTON]: Judge, the request that comes from  
22 me on behalf of my client, and Mr. Ruiz joins me in, and  
23 Mr. Nevin doesn't take a position, and Mr. Connell, I don't

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1 think -- is not in favor of it, but the request was that we be  
2 able to do the 806 tomorrow and be able to spend an extended  
3 period of time with our clients here today to resolve things  
4 before we end up this session of court. We don't know when  
5 we'll be leaving, whether it's going to continue to be  
6 Saturday or if they try to move it to Friday, but that's the  
7 request, Judge.

8 MJ [COL POHL]: I'll tell you what I'll do,  
9 Mr. Harrington. I will -- we will move the 806 today to  
10 1400 hours. The detainees can stay here through their prayer  
11 time, and then they will be excused and we will do it -- we'll  
12 do the 806 today.

13 LDC [MR. HARRINGTON]: All right. Thank you.

14 MJ [COL POHL]: Commission is in recess until 1400 hours  
15 for the closed session.

16 The detainees can remain in the courtroom and discuss  
17 with their attorneys until -- movement takes about a half  
18 hour? Approximately. Okay. Until about 1330.

19 Commission is in recess.

20 [The R.M.C. 803 session recessed at 1034, 27 July 2016.]

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