

1 [The R.M.C. 803 session was called to order at 1009  
2 22 September 2023.]

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

4 All right. Before we begin accounting for the parties, I  
5 want to call attention to my ruling in AE 9060, AE 914EE, which was  
6 issued yesterday afternoon, in which I found Mr. Binalshibh is not  
7 competent to stand trial and severed his case from that of the  
8 remaining four accused.

9 As a result of that ruling, I also issued AE 914D. It's the  
10 fourth amended docket order, explaining that we will be proceeding  
11 for the foreseeable future in this case with the prosecution and four  
12 remaining defense teams in attendance, specifically those  
13 representing Mr. Mohammad, Mr. Bin'Attash, Mr. Ali, and  
14 Mr. al Hawsawi.

15 Before I current -- because I currently remain the judge in  
16 Mr. Binalshibh's case, I anticipate that we'll have an R.M.C. 802  
17 conference sometime next week with Mr. Binalshibh's defense team and  
18 the prosecution to discuss the way forward in his case. I'm just  
19 letting the parties know that because conducting that 802 conference  
20 may necessitate taking a short break in this case at some point next  
21 week, and we'll just see how it goes.

22 All right. Trial Counsel, are all of the government counsel  
23 who were present at the close of the previous session again present?

1 MTC [MR. TRIVETT]: Good morning, Your Honor. Everyone ----

2 MJ [Col McCALL]: Good morning.

3 MTC [MR. TRIVETT]: ---- in this courtroom that was previously  
4 present are currently present.

5 For the Remote Hearing Room, we now have Mr. Jeffrey  
6 Groharing and Major Neville Dastoor and paralegal LN1 Sean Spence.

7 The additional people that we have from the FBI is  
8 supervisory intelligence analyst Kim Waltz.

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

10 All right. Defense, with the exception of the defense team  
11 for Mr. Binalshibh, who -- are all the defense counsel who were  
12 present at the close of the previous session present today?  
13 Mr. Sowards.

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

15 MJ [Col McCALL]: Good morning.

16 LDC [MR. SOWARDS]: Yes, for Mr. Mohammad, who is present in  
17 court, they are the same. And then additionally in attendance to  
18 make their appearances are Gabriela McQuade and Lieutenant Kathleen  
19 Potter.

20 MJ [Col McCALL]: Okay. And we can go ahead and do that now.

21 LDC [MR. SOWARDS]: Very good, Your Honor.

22 MJ [Col McCALL]: If they can hear us in the RHR, they can  
23 step up to the podium.

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1 LDC [MR. SOWARDS]: With whom ----

2 MJ [Col McCALL]: We can start with whichever one, McQuade or  
3 Potter.

4 LDC [MR. SOWARDS]: Very good. Alphabetical always safe.  
5 Thank you.

6 MJ [Col McCALL]: Sure.

7 CDC [MS. McQUADE]: Good morning.

8 MJ [Col McCALL]: Good morning.

9 CDC [MS. McQUADE]: My name is Gabriela McQuade. I have been  
10 detailed to this military commission as civilian defense counsel for  
11 Mr. Khalid Shaikh Mohammad.

12 By Chief Defense Counsel, John Baker  
13 pursuant ---- R.M.C. 503. I am a United States citizen and a member  
14 in good standing of the Bar of the District of Columbia. I have not  
15 been subject of any sanction or disciplinary action by any court, bar  
16 or other competent government authority for relevant misconduct.

17 I currently hold the necessary and appropriate clearances,  
18 and I have agreed in writing to comply with orders, rules, and  
19 regulations of these military commissions.

20 My detailing memorandum and notice of appearance are in AE  
21 004QQQ which was filed 20 September of this year.

22 I have read all relevant protective orders and signed all  
23 relevant memoranda of understanding, and I have not acted in any

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1 manner which might tend to disqualify me from this commission.

2 MJ [Col McCALL]: Thank you. If you'll raise your right hand.

3 **[Counsel was sworn.]**

4 DC [Maj POTTER]: Good morning, Your Honor.

5 MJ [Col McCALL]: Good morning.

6 DC [Maj POTTER]: I am Major Kathleen Potter, the United  
7 States Air Force JAG Corps. I have been detailed to this military  
8 commission by Brigadier General Jackie L. Thompson Jr., Chief Defense  
9 Counsel, military commissions defense organization.

10 My detailing memorandum is at AE 004RRR (KSM) filed on 20  
11 September 2023. I'm qualified and certified under Article 27(b) and  
12 sworn under Article 42(a) of the Uniform Code of Military Justice.  
13 I'm also qualified and certified under Rules of Military Commission  
14 502 and 503.

15 I have not acted in any manner which might tend to  
16 disqualify me and I have read all relevant protective orders and  
17 signed all relevant memoranda of understanding.

18 MJ [Col McCALL]: Thank you, Major Potter. Would you raise  
19 your right hand.

20 **[Counsel was sworn.]**

21 MJ [Col McCALL]: All right. I'm not sure who is speaking,  
22 right, if it's going to be Mr. Engle or Mr. Perry.

23 LDC [MR. ENGLE]: Good morning.

1 MJ [Col McCALL]: Good morning.

2 LDC [MR. ENGLE]: On behalf of Mr. Bin'Attash, all counsel who  
3 were present in the courtroom at the end of our last session are  
4 present again. In the RHR, Ms. Anisha Gupta had been present at the  
5 last session. She's not present today. Otherwise our team is the  
6 same.

7 MJ [Col McCALL]: All right. Thank you, Mr. Engle.

8 Good morning, Mr. Connell.

9 LDC [MR. CONNELL]: Good morning, Your Honor. No changes to  
10 counsel.

11 MJ [Col McCALL]: Okay. Good morning, Mr. Ruiz.

12 LDC [MR. RUIZ]: Good morning, Judge. No changes to our  
13 counsel.

14 MJ [Col McCALL]: Okay. Terrific.

15 And I note that the four remaining accused are all present  
16 this morning. All right.

17 So just a little bit of housekeeping. I know we mentioned  
18 this a bit earlier in the week, but as I indicated earlier this  
19 morning, Mr. Binalshibh's case has been severed from that of the  
20 other remaining accused in this case. So as all of you know, there  
21 are a great many motions that have been filed in this case, some of  
22 them initiated by Mr. Binalshibh's defense team. Due to the  
23 automatic joinder rules of this court, the remaining defense teams

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1 were previously joined to many of Mr. Binalshibh's motions that have  
2 yet to be ruled on.

3 So one of the things that we'll need to take care of moving  
4 forward is which of these motions the remaining defense teams believe  
5 are still applicable to this case.

6 So what I would like you all to do is, I would appreciate if  
7 the remaining defense teams could consult and file a joint notice  
8 listing those applicable pending motions that had originally been  
9 filed by the Binalshibh defense team and indicate which ones -- which  
10 of those motions they wish to remain joined to.

11 And obviously, you know, if there are any issues that the  
12 parties want to bring to the commission's attention based on the fact  
13 that Mr. Binalshibh's team has been severed, you know, please, you  
14 know, consider it and just raise it with the commission and we can  
15 take it up at some point if there is some other issue. That, to me,  
16 seems to be the main issue that we need to deal with right now.

17 Mr. Connell.

18 LDC [MR. CONNELL]: Is there a suspense on that, sir?

19 MJ [Col McCALL]: No. I think we'll leave it open. You know,  
20 take your time, take a look at those. I think we have enough on our  
21 plate for the session while we're down here right now that we're not  
22 going to get into necessarily pending motions from the Binalshibh  
23 team. But if there is one that the parties wish to go ahead and get

1 into, we can take that up by itself, that issue of that motion. But  
2 yeah, I'll leave it as an open-ended request.

3 LDC [MR. CONNELL]: Yes, sir. Obviously, the hot one is the  
4 AE 910, with the testimony anticipated shortly. That was filed  
5 jointly between the parties, although Mr. Binalshibh was the  
6 primarily movant on that. But I assume we all remain joined in 910  
7 and we'll just proceed as planned.

8 MJ [Col McCALL]: Yeah, that was my view. That one seemed to  
9 clearly implicate all of the teams because it was an expert that  
10 other defense teams were planning on relying on.

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

12 MJ [Col McCALL]: All right. So moving forward, I would like  
13 to hear oral argument and take witness testimony generally as has  
14 been set out in our docket orders. So in accordance with the fourth  
15 amended docket order, I'd like to proceed with the following today.

16 So we'll start off with, I'll allow the defense teams who  
17 wish to do so to conduct voir dire of me regarding my upcoming  
18 retirement, and then we're going to move into discussing the recently  
19 filed M.C.R.E. 505(g) notices to establish whether or not the  
20 prosecution intends to object to them and determine if we still need  
21 to have some type of closed M.C.R.E. 505 hearing.

22 And then I want to have a discussion with the parties to  
23 discuss which of the AEs that are listed in the docket orders are

1 ready for oral argument potentially today.

2 As I mentioned at both the 802 and during our previous open  
3 sessions, I had intended to go through the AEs in the way that they  
4 were set out in the docket order. I know Mr. Mohammad's defense team  
5 had asked for the 779 series to be handled before any witness  
6 testimony, so I -- in one of the docket orders I put that to the  
7 front of the list.

8 But also looking at just the most recent filings on some of  
9 these AEs, I know that they were paused, based on some of the  
10 potential settlement discussions, and so I want to have a discussion  
11 with the parties and see which ones are ready to potentially argue  
12 today, if we can have an open session or if we have to look at doing  
13 a closed session.

14 So we'll move into that after we deal with the 505 notices.  
15 And then obviously later, potentially today, as I mentioned earlier  
16 in the week, we'll conducted one of those M.C.R.E. 505(h) hearings  
17 this afternoon if it's needed. All right.

18 Let's go into any issues then, any other housekeeping  
19 matters to take up just before we go into potential voir dire of me?  
20 Mr. Sowards.

21 LDC [MR. SOWARDS]: Yes, thank you, your Honor. Good morning  
22 again.

23 MJ [Col McCALL]: Good morning.

1 LDC [MR. SOWARDS]: I don't know if you were contemplating  
2 this as being folded into a possible later discussion. You had  
3 mentioned the possibility, after you resolved the very weighty issue  
4 of the 909 proceedings, that we might have an 802 session. And I  
5 don't know if a formal one is necessary or not. But in the -- and,  
6 again, we understand very overwhelmingly important issues that were  
7 occupying the commission's attention.

8 There was the matter of the formal ruling on our 914, I  
9 believe it was D motion, and then the interconnection with the  
10 pending discovery in 711, which I believe the government did not have  
11 an opportunity to provide the commission until Friday before we came  
12 down here.

13 And, again, I can't say it often enough, I understand you  
14 all were very busy with other things, but I do just want to alert the  
15 commission that I think their -- as far as we can track, we don't  
16 have resolution of that latter issue, which relates to the former.  
17 And so we may be -- or we will be, I think, asking at  
18 least for -- because I know you've indicated the ruling on 714. We  
19 haven't seen it yet, and I don't want to belabor that. But there may  
20 be the necessity for us to request some movement on the broadcast  
21 from the remote hearing center as to Special Agent, Retired,  
22 Pellegrino and Antol's testimony. So whenever it's convenient for  
23 the commission to discuss, we would appreciate that.

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1 MJ [Col McCALL]: Okay. And I anticipate I'm going to get out  
2 a ruling on your motion today. That's the plan. And so maybe that  
3 will resolve things. Let's see if I can get that out, maybe during  
4 the lunchtime. Like I said, it's pretty close.

5 And then if necessary -- I also think the discussion that  
6 we're going to have about the potential 505 hearings and the notices  
7 and whether we're going to have hearings, and then that discussion  
8 about the AEs, which ones are still potentially in a paused status,  
9 which ones the parties are ready to go forward with, that may spill  
10 over into delaying some of the testimony for next week. And so it  
11 may resolve itself. But we can have that discussion later today, and  
12 definitely before we all of a sudden have witnesses in here.

13 LDC [MR. SOWARDS]: Thank you, sir. I just wanted to bookmark  
14 that for you.

15 MJ [Col McCALL]: I appreciate that. And then also we have  
16 the 630 series as well that we need to address. So again,  
17 that -- and I believe there's also Mr. Connell's motion regarding  
18 presence of Mr. Ali, although I believe that one just deals with the  
19 JTF commander, which would be much later, so it's not quite as  
20 urgent. But yeah, I'm tracking, so I appreciate you raising that.

21 LDC [MR. SOWARDS]: Okay. And now that you mention that also,  
22 Your Honor, we have the separate notice for Mr. Mohammad for some  
23 earlier witnesses.

1 MJ [Col McCALL]: Right. And that's what I was mentioning as  
2 far as the 630. I know it was filed under 914 I believe.

3 LDC [MR. SOWARDS]: Right.

4 MJ [Col McCALL]: But I'm tracking.

5 LDC [MR. SOWARDS]: Thank you very much, sir. Appreciate it.

6 MJ [Col McCALL]: Any other housekeeping matters?

7 Yes, Mr. Engle.

8 LDC [MR. ENGLE]: I think this falls in the category of  
9 housekeeping. You had asked me the other day to track down Form 9-2  
10 when I was entering my appearance. So I just wanted to let you know  
11 that I did, in fact, track that down and I had, in fact, signed  
12 that -- it looks like it was 13 May 2022. And I have a copy if the  
13 commission needs one.

14 MJ [Col McCALL]: Perfect. Actually, if you could submit  
15 that. And you can approach and hand it to the court reporters. I'll  
16 have them mark it.

17 **[Pause.]**

18 MJ [Col McCALL]: All right. Thank you for that, Mr. Engle.  
19 I'd actually completely forgotten about that one.

20 LDC [MR. ENGLE]: Of course.

21 MJ [Col McCALL]: All right. It looks like that's it for the  
22 housekeeping. All right.

23 Do any of the parties desire to voir dire me regarding my

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1 potential retirement or -- because I will say it's not approved yet.  
2 I'm still anticipating that it will be.

3 Yes, Mr. Connell.

4 LDC [MR. CONNELL]: Thank you, sir. I just have a couple of  
5 questions.

6 MJ [Col McCALL]: Sure.

7 LDC [MR. CONNELL]: The first one is: Is your -- at this  
8 point in your career, is your retirement optional or mandatory? Were  
9 you required to ----

10 MJ [Col McCALL]: It's optional.

11 LDC [MR. CONNELL]: Optional, okay.

12 And I read AE 001S, which talks about having submitted your  
13 retirement. Does that mean that you have formally applied for  
14 retirement?

15 MJ [Col McCALL]: Sure. The way it works is once you are  
16 within 12 months of the 20-year mark -- for me the 20-year mark would  
17 be in February of 2024 -- you're allowed to, what they say, push the  
18 button.

19 And so it really is like, no kidding, a button that you push  
20 on a website. And you put in the data of when you're looking to  
21 retire. And then it goes to your supervisor -- actually, it's your  
22 commander. And then it goes to the Air Force personnel people to  
23 decide if that is okay with the military, if you -- whether you have

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1 any kind of, like, commitments still, like if you are -- if you move  
2 from one job to another you usually incur an active duty service  
3 commitment. Sometimes for educational reasons there's an additional  
4 active duty service commitment.

5 So mine is at the point where it -- I've been told by the  
6 personnelist that I do not have any remaining commitments and my  
7 commander has approved the date that I requested. And, again, as I  
8 mentioned in the letter, it would be 1 July.

9 And then typically, based on how much -- we call it  
10 leave -- it's vacation time -- that you have built up, it moves that  
11 date of when you'd go on what we call terminal leave. And so that's  
12 why I would probably -- I anticipate that I would be starting  
13 terminal leave sometime around 1 April. In this job I don't really  
14 use leave very often so it's actually built up quite a bit.

15 And so that's what we're looking at. It's not approved. It  
16 wasn't mandatory. And I anticipate I should be hearing sometime in  
17 the next few weeks that it has been approved.

18 LDC [MR. CONNELL]: Do you recall when you pushed the button?

19 MJ [Col McCALL]: So I pushed the button probably about two  
20 weeks ago, I want to say.

21 LDC [MR. CONNELL]: Okay. And was that about the time you  
22 made the decision to retire? Or had you made the decision earlier  
23 and delayed pushing the button?

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1 MJ [Col McCALL]: I had been debating it. So I think every  
2 military member gets to a certain point where they have to decide  
3 once they're eligible to retire, do they -- how much longer do they  
4 want to go. And so I had been debating it, having the discussion  
5 with my family. And it was about the same time. I'd say it was  
6 within a few days of pushing the button that I had made that  
7 decision.

8 LDC [MR. CONNELL]: Sure.

9 Obviously, you know, over the course of the last 18 months  
10 or so, there have been some discussion of pleas and some -- you know,  
11 which would mean that -- a sentencing within some reasonable period  
12 of time after a plea.

13 Was your plan originally to stay through pleas and  
14 sentencing? In other words, my question is: Did the news about the  
15 fact that pleas were not imminent have any effect on your decision to  
16 retire?

17 MJ [Col McCALL]: Yeah, it -- I'll say it was a factor. I  
18 don't want to get too much into my decision-making as far as how it  
19 affects the case, but I think if I thought the cases -- I could  
20 resolve them, given that I knew enough about the case, I think it  
21 would be a strong motivation to stay in longer.

22 As I mentioned in my letter, there's just some personal or  
23 family matters that I feel it's the right time to have more control

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1 over my life, where I don't have to be TDY as much as I am currently  
2 and I can actually live where I need to live to, like, help out with  
3 family. So that's the driving force. But I can't say that it  
4 wouldn't be a factor if I thought that things could get resolved ----

5 LDC [MR. CONNELL]: Okay.

6 MJ [Col McCALL]: ---- quickly.

7 LDC [MR. CONNELL]: And last question is: Other than that  
8 factor that you just discussed and internal factors to your family,  
9 was there any other external factor that motivated your decision to  
10 retire?

11 MJ [Col McCALL]: No.

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

13 MJ [Col McCALL]: Sure.

14 Would any other parties like to voir dire me?

15 Mr. Sowards.

16 LDC [MR. SOWARDS]: Thank you, your Honor. I appreciate the  
17 opportunity to ask you just a couple of questions.

18 And again, I think when I -- we first met and we had a voir  
19 dire when you were joining the case, as I say, the following  
20 questions I have are not at all rhetorical. They are purely seeking  
21 information, and there's no judgment or point intended. I'm really  
22 trying to get ----

23 MJ [Col McCALL]: Understood. I know you're doing your job.

1 LDC [MR. SOWARDS]: ---- information from you.

2 But in light of what just -- Mr. Connell just raised, how to  
3 phrase this, and that is: Do you believe that in the time that you  
4 will remain with us, which I believe will accommodate two other  
5 scheduled hearings, two weeks in November and then I believe four  
6 weeks beginning in next February, whether you would have an  
7 opportunity, if the information is presented, to fairly resolve the  
8 current suppression motion issue? Or is that one you've contemplated  
9 leaving while it is still pending?

10 MJ [Col McCALL]: So that's a very tough question because ----

11 LDC [MR. SOWARDS]: I apologize for ----

12 MJ [Col McCALL]: No. No. Hey, that's why I get paid the big  
13 bucks, right?

14 So if I thought they could be resolved, I would be open to  
15 it. I mean, my -- the way I'm looking at my job right now is, I want  
16 to focus on the case and continue to rule on pending motions, as I'm  
17 ready to, and see what progress I can continue to make in the case.

18 Again, kind of like what we discussed when I first came up  
19 here and you voir dired me, I feel no pressure to try to get  
20 something done, like, hey, I want to make a big decision and get some  
21 type of closure before I leave. So there's no rush. I'm going to  
22 continue to go at my pace. And when I feel comfortable with a  
23 decision, I'll enter a ruling on it.

1           And -- so for the suppression motions, I've obviously had a  
2 chance to read the past testimony that's happened with the prior  
3 judges. I've read the submissions of the parties. I've gotten the  
4 ex parte presentations from the parties. So I feel like I have a  
5 very good understanding of the case.

6           I know the parties still have quite a few witnesses that  
7 they are asking for. So I'm not going to try to strong arm the  
8 parties into having some type of hearing if they're not ready for it.  
9 Again, it's -- I can't remember which -- I think all the defense  
10 teams, probably, have mentioned how unusual this is, where we're in  
11 this situation of Judge Pohl having made a ruling, Judge Parrella  
12 coming in and basically saying no, we're going to have these -- we're  
13 going to take more evidence and see what evidence is out there, and  
14 then you've had the change of judges with Judge Cohen and then to me.

15           Like I say, I have a good feel for the issue, but I'm not  
16 going to try to make the parties get this before me before I retire  
17 if they're not ready. If the parties want to have, like, motions  
18 argument, if you feel that the evidence has been set out well enough  
19 to lend you argument and what you need to put it in front of me, I'm  
20 open to that.

21           LDC [MR. SOWARDS]: Okay.

22           MJ [Col McCALL]: Long-winded answer. I hope that answers  
23 your question.

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1 LDC [MR. SOWARDS]: No, I -- that was very thorough and, as I  
2 say, much more forthcoming than we're used to in civilian court.

3 And then the last, I guess, related question is -- because  
4 your Honor mentioned there are potentially a whole number of  
5 additional witnesses that I think fairly would probably take us  
6 beyond April of next year to thoroughly examine.

7 And as you indicated, there were some very significant,  
8 consequential witnesses, Drs. Mitchell and Jessen, for instance, who  
9 testified in front of Judge Cohen. And the issue for him  
10 was whether -- after he left, was whether Your Honor needed to rehear  
11 those witnesses or they could be read on paper because of the  
12 importance of judging credibility, which you can only get really when  
13 the person testifies in front of you.

14 And I'm just wondering whether you have given thought  
15 to -- and I won't say the fairness, but I guess the effectiveness of  
16 if you should leave this issue unresolved. And by the way, this is  
17 not a pitch to continue any witnesses. What I'm asking is whether  
18 you've given thought to the fairness of leaving unresolved the issue  
19 if some consequential witnesses, whoever they may be, testify in  
20 front of you and then a new judge comes in, whether that's affected  
21 your timing at all.

22 MJ [Col McCALL]: So again, I've read the transcripts on these  
23 witnesses. And I think it's clear when there's areas that maybe the

1 defense is able to impeach some of these witnesses. I don't know  
2 that it necessarily would have required me to see them in person. I  
3 think it's clear from the questioning and their answers, or lack of  
4 answers.

5           So personally I don't feel like I would have needed to  
6 rehear these witnesses just to be able to judge their credibility. I  
7 know, again, we're in this unusual position where typically discovery  
8 would be complete before you're calling witnesses. And as Judge  
9 Cohen had put out, and I believe Judge Parrella as well, and I've  
10 mentioned we're in a position where there's still discovery that is  
11 being provided, and so it may lend itself to additional questions for  
12 some of these witnesses to be called back.

13           So I think you're already in that position. But it's going  
14 to be up to that next judge if it's not something that we can resolve  
15 while I'm a judge. It will be that next judge having to make that  
16 decision.

17           Personally, I don't see it being an issue that I can read  
18 the transcripts and I would -- I guess I would need some type of  
19 argument from counsel on which witnesses particularly demonstrated  
20 some type of hesitancy or nonverbal, that I need to call them back.  
21 But I'm not seeing that when I read the transcripts.

22           LDC [MR. SOWARDS]: Okay. Thank you very much, sir. I  
23 appreciate your time.

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1 MJ [Col McCALL]: Sure.

2 I see some discussion among counsel, so I'll give you a  
3 chance if you're thinking about some questions.

4 Mr. Trivett.

5 MTC [MR. TRIVETT]: Sir, I have some questions, but I'd like  
6 to go after the defense, if they're done.

7 MJ [Col McCALL]: Sure.

8 LDC [MR. ENGLE]: We don't have any questions right now. I'll  
9 just say congratulations on your retirement, sir.

10 MJ [Col McCALL]: Thank you, Mr. Engle. And it doesn't look  
11 like Mr. Ruiz has any questions.

12 LDC [MR. RUIZ]: No questions.

13 MJ [Col McCALL]: Okay. Mr. Trivett.

14 MTC [MR. TRIVETT]: Thank you, your Honor.

15 The issue of post-military employment is obviously an  
16 important issue for the government, to ensure that all of the time  
17 that you've spent on the case is well-spent time and that those  
18 rulings remain. And so the questions I have are based on that.

19 There's some open litigation right now in the Court of  
20 Military Commission Review as to how you would be defining actively  
21 seeking employment, whether or not that would be pushing a button on  
22 a federal employment website -- and we're just talking about federal  
23 employment at this point -- or even picking up a phone and calling

1 someone to say if there's a spot open in their office.

2 MJ [Col McCALL]: Let me -- and I don't mean to cut you off,  
3 and if you have follow-up questions, feel free to ask them.

4 I think my answer can cut off most of this line of  
5 questioning. So as I mentioned at the 802 that we had on Sunday, so  
6 at this time, I have -- my plans are to retire. And I'll be 53 next  
7 year. I have, like I said, some family matters that I'd like to be  
8 able to focus on. And so because of that, I have not sought any job.  
9 I have not looked at any jobs. I have not applied for any jobs. And  
10 I'm not intending to work, as I sit here today.

11 Now, I will say, I'm missing some data points because I'm  
12 still attempting to figure out what exactly my retirement pay will  
13 look like. I don't own a house, so I have to figure -- and I don't  
14 know where I want to retire to. So my family and I are trying to  
15 figure that out.

16 And once we figure out the cost of living where we're going  
17 to retire and what the -- how painful the mortgage might be, and what  
18 the impacts on our finances are, at that point, I'm guessing that  
19 would be somewhere like nine, 10 months from now, I may change my  
20 mind and I may decide, oh, you know what, I will continue to work.

21 And at that point I would let the parties know if I'm still  
22 the judge, but right now I'm not planning on working. I'm in a  
23 position where I don't feel like I have to. I will probably do some

1 volunteering. I used to do work as a guardian ad litem. I think I  
2 might do that. That's in state family court. I can't imagine a  
3 volunteer position like that would impact -- have any kind of  
4 conflict.

5 And I might go back to teaching at some point. I was a  
6 teacher before. So I could see that. Maybe use this as a bit of a  
7 sabbatical where, after a couple years I'm bored and my hobbies  
8 aren't keeping me interested and I go back to doing something. But  
9 right now I've not looked for work and I'm not planning on working.

10 MTC [MR. TRIVETT]: Okay. Thank you for that, sir.

11 MJ [Col McCALL]: Sure.

12 MTC [MR. TRIVETT]: If you would commit that if that were to  
13 change, that even inquiring into offices, even if that's not  
14 employment, would be something that certainly the parties would like  
15 to be informed of immediately so that we can formulate our litigation  
16 positions on them.

17 MJ [Col McCALL]: Absolutely. If I decide that I'm going to  
18 look for employment, I will let the parties know. If I decide that  
19 I'm going to apply for employment, any employment, I will let the  
20 parties know.

21 I know that the -- obviously I've read the decision in  
22 Nashiri, but I'm also aware of the ongoing litigation with retired  
23 Judge Acosta working -- just working for the Air Force. So I know

1 it's a -- the parties have probably maybe a broader definition of  
2 what might create a conflict than I do, and so I'll let the parties  
3 know while I'm still the judge.

4 MTC [MR. TRIVETT]: Thank you for that. So have you been  
5 informed for certain that you will be left on the case until your  
6 retirement date?

7 MJ [Col McCALL]: No. So I spoke to the Chief Judge and just  
8 told him exactly what's in the letter, that, you know, I was open to  
9 staying on until 1 April, if my calculations are correct as far as  
10 terminal leave. And he didn't say one way or the other.

11 I let him know that I was issuing the decision yesterday,  
12 stating that I still was intending to be the judge on United States  
13 v. Binalshibh. And again, I haven't heard to the contrary, that he's  
14 thinking something differently. But as we all know, there may become  
15 a good candidate and they decide let's make a move now and they  
16 switch me out. I mean, I don't know that that would be that unusual,  
17 but I anticipate they're going to want to let me stay in place until  
18 1 April.

19 MTC [MR. TRIVETT]: Okay. No further questions, sir. Thank  
20 you.

21 MJ [Col McCALL]: Any further questions based on Mr. Trivett's  
22 questions? Apparently not.

23 Okay. Let's move on, then, to the M.C.R.E. 505 issues. So

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1 again, knowing that we haven't had to deal with some of these  
2 recently and there were quite a few late notices, just again, I know  
3 that we probably got out our docket order a little later than normal,  
4 based upon some of the changing facts in this case, which then  
5 necessitated later 505 notices.

6           So as of this morning, I've received quite a few of them  
7 from the defense teams, and then one notice of nonobjection from the  
8 prosecution that relates to some of them, but not all of them. So  
9 before we start with oral argument, I just want to spend some time  
10 sorting these out and making sure we're on the same page.

11           So let's begin with the notices that were timely filed and  
12 which were addressed in AE 914W, the prosecution's notice of  
13 nonobjection. I do -- before we get into it, though, I want to note  
14 that the prosecution's individual nonobjections in that 914W that  
15 contain the words the nonobjection was for oral argument and didn't  
16 cite the other potential uses like, for like, witnesses, I assume  
17 this was maybe some language that had just been left in from  
18 other -- the government doesn't have any objection, correct?

19           MTC [MR. TRIVETT]: No objection to that, sir.

20           MJ [Col McCALL]: All right.

21           MTC [MR. TRIVETT]: We'll make sure we clear up that language  
22 in the next ----

23           MJ [Col McCALL]: Sure. Sure. And, again, I appreciate the

1 government's leaning forward and getting that nonobjection notice  
2 out.

3 Okay. And so for -- and I don't know if you have it in  
4 front of you, Mr. Trivett. Okay.

5 MTC [MR. TRIVETT]: So I have a list of the pending 505  
6 notices for the hearing, including a subset that we believe were  
7 filed after the normal time. So I have a position on the ones that  
8 we believe were filed after normal time. I just want to make sure  
9 that you and I are in agreement as to exactly which ones they are.

10 MJ [Col McCALL]: Why don't you go down your list and I'll  
11 kind of check them off my list.

12 MTC [MR. TRIVETT]: So we would have no objection to the use  
13 of the noticed classified documents in a closed session for whatever  
14 purpose the defense wants.

15 In 628WWWWWW (AAA) ----

16 MJ [Col McCALL]: Okay.

17 MTC [MR. TRIVETT]: ---- 630DDDD -- we have not yet received  
18 for 651 or 684, so we would have to see what that entails.

19 For AE 705M (MAH), we have no objection.

20 AE 7790 (KSM) we have no objection.

21 MJ [Col McCALL]: Okay.

22 MTC [MR. TRIVETT]: AE 779P (AAA), we have no objection. AE  
23 910J, I'm not sure which team that is, but we have no objection.

1 AE 910K (AAA), no objection.

2 And AE 914Y (KSM), we have no objection.

3 So the two that we're not certainly of, because I don't  
4 think we've received them yet, are AE 651 and AE 684.

5 Can I have a second to consult, sir?

6 MJ [Col McCALL]: That's 651D? It's Ali; is that correct?

7 MTC [MR. TRIVETT]: I don't know that we even have the  
8 designation.

9 MJ [Col McCALL]: That's what I'm saying.

10 MTC [MR. TRIVETT]: So not 651D. There's another 651 that I  
11 think we received notice of but we haven't seen the notice.

12 MJ [Col McCALL]: Mr. Connell, I see you standing up. Maybe  
13 you can resolve ----

14 LDC [MR. CONNELL]: Yes, sir. Two things. And I think one  
15 is, I think the government actually does have an objection to 910J.  
16 That's our notice for Mr. al Baluchi to be present when  
17 Colonel Jemmott testifies. Mr. Trivett and I discussed that this  
18 morning and he explained they did object. There is an outstanding  
19 briefing order. Their briefing is due today.

20 MJ [Col McCALL]: That's right. And then -- I believe, then,  
21 that your reply is due, like, Monday, and we'll take it up  
22 potentially later next week.

23 MTC [MR. TRIVETT]: So my apologies.

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

2 MTC [MR. TRIVETT]: So 910, it's a notice. We're going to  
3 object to the relief requested because it's more of a motion than a  
4 notice.

5 MJ [Col McCALL]: Yes.

6 MTC [MR. TRIVETT]: So I apologize if I spoke inartfully on  
7 that.

8 MJ [Col McCALL]: You're fine with the notice, but the motion,  
9 obviously, you're objecting to, or asking that I deny it?

10 LDC [MR. CONNELL]: Yes, sir. That's the procedure that we  
11 understood under 630CCCC (Amend). But the other thing that I wanted  
12 to say is the -- clearing up the question on 651, we have filed a  
13 motion for leave to file out of time an additional 505 notice in the  
14 651 series. That is 651-10. It's pending before the Military  
15 Commission right now.

16 And I do want to be clear, that every motion for leave to  
17 file out of time a 505 notice that we have filed is because the  
18 government provided the discovery after the deadline that the  
19 military commission had set for filing of 505 notices.

20 MJ [Col McCALL]: Understood. And again -- and that's why the  
21 commission has been pretty liberal on granting these. If counsel  
22 want to make -- can go ahead and cross-talk.

23 And I see Mr. Ruiz standing up.

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1 MTC [MR. TRIVETT]: Sir, can we have a minute to confer  
2 with ----

3 MJ [Col McCALL]: You may.

4 MTC [MR. TRIVETT]: ---- Mr. Sowards?

5 MJ [Col McCALL]: Yeah. Well, so, Mr. Ruiz, hold on while  
6 they cross-talk. I just want to make sure Mr. Trivett hears whatever  
7 your -- issue you're raising. Go ahead, cross-talk.

8 **[Counsel conferred.]**

9 MJ [Col McCALL]: Let's take an open-ended recess and I'll let  
10 the parties confer on these 505 notices, and then that way I think  
11 that will resolve some of these issues.

12 Was there something Mr. -- okay. It sounds like it's not  
13 something we need to take up before the recess. So we'll take an  
14 open-ended recess. I'll have my staff check on you and find out when  
15 you want to come back on the record. But take your time.

16 Again, I think this was a little convoluted with the  
17 different -- some of the late notices and trying to use some of the  
18 new procedures that we put in through the 630 series that we haven't  
19 used before. So take your time.

20 Court's in recess.

21 **[The R.M.C. 803 session recessed at 1049, 22 September 2023.]**

22 **[END OF PAGE]**

23

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1 [The R.M.C. 803 session was called to order at 1133,  
2 22 September 2023.]

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

4 It looks like we have all of the accused still present  
5 except for Mr. al Hawsawi. Is that correct, Mr. Ruiz?

6 LDC [MR. RUIZ]: That's correct.

7 MJ [Col McCALL]: And we're good to proceed without him?

8 LDC [MR. RUIZ]: Yes.

9 MJ [Col McCALL]: Mr. Trivett. I know you were working hard  
10 during the recess.

11 MTC [MR. TRIVETT]: Yes, sir. I just want to make sure that  
12 I'm meeting your intent here.

13 So do you want me to go back through the entire list, or do  
14 you just want us to focus on what we are objecting to or what we  
15 think we need a 505(h)? I'm happy to do either.

16 MJ [Col McCALL]: Yeah, just with the convoluted  
17 nature -- nature of it, let's go through the whole list. So let's go  
18 through the ones that were referenced in 914W. And why don't I just  
19 go -- I think in the ones that were listed in 914W, the ones I  
20 have -- are you good with me giving ----

21 MTC [MR. TRIVETT]: Please.

22 MJ [Col McCALL]: Okay. All right. So 330M.

23 MTC [MR. TRIVETT]: Okay.

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1 MJ [Col McCALL]: Appeared there was no objection to that.  
2 MTC [MR. TRIVETT]: All right. So I have 914W in front of me  
3 now.  
4 MJ [Col McCALL]: Okay.  
5 MTC [MR. TRIVETT]: Which is good. Okay. All right. So 330M  
6 we have no objection.  
7 MJ [Col McCALL]: Okay. 523X?  
8 MTC [MR. TRIVETT]: No objection.  
9 MJ [Col McCALL]: 628, I believe it is QQQQQQs?  
10 MTC [MR. TRIVETT]: No objection.  
11 MJ [Col McCALL]: 628RRRRRR?  
12 MTC [MR. TRIVETT]: No objection.  
13 MJ [Col McCALL]: 628 with SSSSSS?  
14 MTC [MR. TRIVETT]: No objection.  
15 MJ [Col McCALL]: 628TTTTTT?  
16 MTC [MR. TRIVETT]: No objection.  
17 MJ [Col McCALL]: 628UUUUUU?  
18 MTC [MR. TRIVETT]: No objection.  
19 MJ [Col McCALL]: 632WW?  
20 MTC [MR. TRIVETT]: No objection.  
21 MJ [Col McCALL]: 651D?  
22 MTC [MR. TRIVETT]: No objection.  
23 MJ [Col McCALL]: 684E?

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1 MTC [MR. TRIVETT]: All right. So you just said 651D, right,  
2 sir?

3 MJ [Col McCALL]: That's correct?

4 MTC [MR. TRIVETT]: Okay, and then ----

5 MJ [Col McCALL]: 684E.

6 MTC [MR. TRIVETT]: So I have 684E at the bottom of that, I  
7 have two more in between those.

8 MJ [Col McCALL]: Yeah, I think we moved them around because  
9 there were a few that it looked like there were some issues  
10 potentially with.

11 MTC [MR. TRIVETT]: All right. So for 684E there is no  
12 objection.

13 MJ [Col McCALL]: Okay.

14 MTC [MR. TRIVETT]: For 656Q (MAH) ----

15 MJ [Col McCALL]: Yeah, I can just jump to that. So yeah,  
16 656Q, go ahead. It looked like there was an objection, but it's  
17 really more of the government's position is just that this has  
18 already been argued.

19 MTC [MR. TRIVETT]: Correct. So for the entire series in the  
20 656 series and the 672 series, we're objecting to any additional  
21 505(g) notices because we believe the issue has already been fully  
22 briefed and fully argued.

23 MJ [Col McCALL]: Okay. I mean, but bottom line is I want to

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1 hear some argument on it.

2 MTC [MR. TRIVETT]: Then we would have a 505(h).

3 MJ [Col McCALL]: Okay.

4 MTC [MR. TRIVETT]: If you wanted to hear argument it would be  
5 505. If you wanted to hear classified argument, it would be in a  
6 505(h).

7 MJ [Col McCALL]: Okay. Got it. Understood. Okay. And then  
8 910G.

9 MTC [MR. TRIVETT]: I'm sorry, right. If you wanted -- if you  
10 wanted to hear argument on it, as opposed to argument on to why we  
11 needed to use it, it would be 806, not 505(h).

12 MJ [Col McCALL]: Okay.

13 MTC [MR. TRIVETT]: I wasn't clear what you were saying.

14 MJ [Col McCALL]: Yeah, and so I'm comfortable at this point  
15 that I do want to hear argument on it. If you want to argue that  
16 they don't need it, I guess that would be the question of whether we  
17 need -- so we don't need the 505(h) hearing ----

18 MTC [MR. TRIVETT]: If you are telling us you need -- yes,  
19 sir. If you're telling us you need argument on it, let's just go to  
20 an 806 and we'll argue it at the 806.

21 MJ [Col McCALL]: Perfect. Thank you.

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

23 MJ [Col McCALL]: All right. 910G?

1 MTC [MR. TRIVETT]: No objection.

2 MJ [Col McCALL]: 910I?

3 MTC [MR. TRIVETT]: 910I, no objection. My next one was 910H.

4 MJ [Col McCALL]: Okay. And I have that one, and also no  
5 objection on that?

6 MTC [MR. TRIVETT]: Correct.

7 MJ [Col McCALL]: Okay. All right. I believe that covers  
8 everything from 914W, correct?

9 MTC [MR. TRIVETT]: That's correct.

10 MJ [Col McCALL]: Okay. And then the notices that have come  
11 in since we arrived on island are -- and these are the ones I'm  
12 tracking and we'll go through which ones that maybe I'm not tracking.  
13 AE 914Y?

14 MTC [MR. TRIVETT]: Right. And we believe that one is pending  
15 a ruling on the underlying motion, and so it would be mooted,  
16 depending on how that motion was ruled on. I believe you indicated  
17 from the bench that were you going to deny that motion.

18 MJ [Col McCALL]: With oral argument, so yeah.

19 MTC [MR. TRIVETT]: So that would be mooted. We believe that  
20 one would be mooted.

21 MJ [Col McCALL]: We'll leave that until we get that ruling  
22 out. 628WWWWW?

23 MTC [MR. TRIVETT]: No objection.

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1 MJ [Col McCALL]: All right. 910K?

2 MTC [MR. TRIVETT]: No objection.

3 MJ [Col McCALL]: 914CC?

4 MTC [MR. TRIVETT]: One second, Your Honor on 914CC.

5 MJ [Col McCALL]: Sure. I believe that's the one regarding  
6 Mr. Mohammad's presence. But it's -- so I think you're objecting  
7 to -- and again it's the weird one where ----

8 MTC [MR. TRIVETT]: We actually think that's a motion as  
9 opposed to an M.C.R.E. 505(g) notice.

10 MJ [Col McCALL]: Yeah. Well, and it's probably from the  
11 commission's ruling where we had said put out a notice. So there's  
12 not actually any classified -- was there any classified material that  
13 you're wanting to give notice of, or is this just a -- it's called a  
14 notice, but it's actually a motion?

15 LDC [MR. SOWARDS]: Right. It's a notice with notice to the  
16 commission as to the classified information that will be discussed  
17 and why his presence is necessary in light of that.

18 MJ [Col McCALL]: Being discussed by the witness, not matters  
19 that your -- do you understand what I'm saying?

20 LDC [MR. SOWARDS]: We may introduce, or they may examine, or  
21 other parties may examine. This is particularly with respect to  
22 Mr. Pellegrino, Antol and calling the camp commander.

23 MJ [Col McCALL]: Okay.

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1 LDC [MR. SOWARDS]: And I believe that's the one that's  
2 pending.

3 It will be a joint response from the government today. And  
4 then pursuant to 910L, I believe it was, the expedited briefing  
5 order, the defense response is due Monday.

6 MJ [Col McCALL]: Okay. I think we can table that one anyway,  
7 so it's still pending.

8 MTC [MR. TRIVETT]: Right. So this actually -- our plan is to  
9 file a consolidated response to Mr. Ali's request, which I now  
10 understand has been joined by all remaining -- the four, all four  
11 teams in regard to presence during the JTF commander's testimony.

12 MJ [Col McCALL]: Right.

13 MTC [MR. TRIVETT]: We're going to be responding to that  
14 today.

15 MJ [Col McCALL]: Right.

16 MTC [MR. TRIVETT]: But we also then are asking for a  
17 consolidated designation so that we can also respond today to the  
18 request for presence as to Pellegrino and Antol.

19 MJ [Col McCALL]: Okay.

20 MTC [MR. TRIVETT]: And we are going -- just -- you know, I  
21 already identified to the parties we're going to be opposing those.

22 MJ [Col McCALL]: Sure.

23 MTC [MR. TRIVETT]: But a lot of those have sort of a personal

1 component to it under the two-prong standard you laid out.

2 MJ [Col McCALL]: Sure.

3 MTC [MR. TRIVETT]: So I need to just address quickly now as  
4 to all five as opposed to just Mr. Ali and Khalid Shaikh Mohammad.  
5 But the plan is to get it to you today. I know that it was on the  
6 docket as the second thing you wanted to do. I'm happy to argue our  
7 position as well, I just won't have the document filed. I'll just  
8 defer to you on what you want.

9 MJ [Col McCALL]: No. I think, again, we have some white  
10 space as far as if we have to slide the witness testimony a little  
11 bit until, like, a day to be able to argue this.

12 MTC [MR. TRIVETT]: I don't know how much time we have to  
13 slide. I know that the witnesses -- I know that Special Agent  
14 Pellegrino and Special Agent Antol were really only available during  
15 these small windows ----

16 MJ [Col McCALL]: Okay.

17 MTC [MR. TRIVETT]: ---- for this session. There was some  
18 flexibility with Mr. Hodgson, but now I -- you know, I gave notice  
19 that there's an emergent situation ----

20 MJ [Col McCALL]: He's not going to be able -- he's under the  
21 weather. Yeah, I'm only talking maybe one day. I think this is an  
22 issue that -- I get where the parties are coming from. I understand  
23 the argument. I would give you a chance to present argument to me

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1 and to brief it, but I don't think it's going to take me very long to  
2 make a decision so ----

3 MTC [MR. TRIVETT]: Yes, sir. Understood.

4 MJ [Col McCALL]: Mr. Connell.

5 LDC [MR. CONNELL]: Sir, I'll just add to that. We're also  
6 ready to argue that issue, if the military commission chooses to do  
7 it today ----

8 MJ [Col McCALL]: We'll do this. I mean, we're ----

9 LDC [MR. CONNELL]: ---- or whenever.

10 MJ [Col McCALL]: ---- starting to get close to when we're  
11 going to take a break anyway for the lunch hour. Maybe consider your  
12 positions, cross-talk, and then I'm certainly open to hearing  
13 argument later this afternoon.

14 LDC [MR. CONNELL]: Thank you.

15 MJ [Col McCALL]: All right. And then next one on my list was  
16 630DDDD.

17 MTC [MR. TRIVETT]: No objection.

18 MJ [Col McCALL]: And then 7790?

19 MTC [MR. TRIVETT]: No objection.

20 MJ [Col McCALL]: Okay. Those are the ones that I'm tracking.

21 MTC [MR. TRIVETT]: Okay. All right. So in conferring with  
22 counsel, we believe that there's two issues that require an  
23 (h) -- two additional issues that would require an (h) hearing. One

1 is on the 828D, and our response to that is 846BB. We viewed it more  
2 as a request for classification guidance as opposed to a 505(g)  
3 notice. But if -- it it's worth for the commission to hear some  
4 positions on that from the defense and from us, then we could just  
5 have that in a 505(h).

6 MJ [Col McCALL]: I think that would be useful.

7 MTC [MR. TRIVETT]: And then there's a 779P, which is a  
8 privilege log for attorney-client privileged information that we are  
9 asserting in 779 that requires at least some left and right limits as  
10 to what can be said in open and what can be said in closed. So  
11 unless we get additional guidance on that over lunchtime, which we  
12 may, then we may need a 505(h) for that as well.

13 MJ [Col McCALL]: Okay. And -- so tell me this. So for the  
14 779 series, and we can just go ahead -- that was actually the next  
15 thing on my list, was to move into like -- so I understand where we  
16 are on the 505s.

17 Let's do one on the 828 issue. And then for 779, if I'm  
18 understanding, just to make sure that I'm tracking, what we're  
19 talking about here is that the government had filed a motion asking  
20 that, basically some attorney-client material be redacted from some  
21 material that the government -- that I had in a previous ruling had  
22 said to produce, correct? Not the actual documents. I haven't seen  
23 those but ----

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1 MTC [MR. TRIVETT]: Right.

2 MJ [Col McCALL]: ---- this -- an area.

3 MTC [MR. TRIVETT]: Eight -- eight documents totaling 30  
4 pages.

5 MJ [Col McCALL]: Okay.

6 MTC [MR. TRIVETT]: But at least where we're at right now is  
7 that there may be -- and this we could use some additional time just  
8 today to see. There may be a way to resolve this issue without any  
9 further litigation, which it was just brought to our attention this  
10 morning.

11 MJ [Col McCALL]: Okay.

12 MTC [MR. TRIVETT]: So that's at least a possibility. But  
13 we're -- no update as of maybe 15 or 20 minutes ago, but I know that  
14 we're still working on potentially doing that.

15 If we -- if we did that, it would then require a quick 505.  
16 We wouldn't turn them over completely unredacted, but it would be  
17 similar protocols, 30 pages, something that we believe that you can  
18 turn pretty quickly.

19 And we also, I think, are going to take the position that  
20 it's not relevant to the testimony of Special Agent Pellegrino or  
21 Antol anyway. But that's sort of where we're at with it, but we  
22 think we may be able to resolve it without additional litigation.

23 MJ [Col McCALL]: Okay. Well, perfect. So I'll let you then

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1 try to resolve that, if you can.

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

3 MJ [Col McCALL]: And I get that. It -- basically there was a  
4 motion asking that those redactions be allowed. There was a response  
5 from Mr. Ali and from Mr. Mohammad's team, and I'm tracking their  
6 positions so -- okay.

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

8 MJ [Col McCALL]: We'll table that one.

9 MTC [MR. TRIVETT]: Okay.

10 MJ [Col McCALL]: Again, I understand that it originally had  
11 been brought up by Mr. Sowards at the 802, as far as wanting it to be  
12 resolved before any witness testimony, and we'll do that. Again,  
13 whether -- I think whether we can get the argument, it seems like a  
14 fairly straightforward issue. And if it does mean that I end up  
15 doing an in camera review, again it's, what, 30 pages or so?

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

17 MJ [Col McCALL]: All right. And you can go ahead, unless you  
18 have something more for me on the 505s?

19 MTC [MR. TRIVETT]: No, sir.

20 MJ [Col McCALL]: Okay. Then you can go back to counsel  
21 table, Mr. Trivett. Thank you for that. I appreciate you working  
22 that convoluted process.

23 All right. So the other AEs that I was tracking that

1 potentially we could get into this afternoon, then, would  
2 be -- sounds like we'll table the 779 for now.

3           There was the 630 series. Again, it sounds like the parties  
4 are going to discuss that over -- and reconsider their positions over  
5 the lunch hour and see if they want to go ahead and maybe argue that  
6 without additional briefing.

7           So that then takes us, as I'm tracking it, to the next one  
8 would be the AE 330, which is Mr. al Baluchi's motion to compel  
9 production of complete, unredacted medical records, which is  
10 basically -- I think we'd do two of them at the same time because it  
11 seems like it's hand in hand with AE 523, which is also  
12 Mr. al Baluchi's motion to compel production of identities of  
13 witnesses referred to by pseudonym in discovery.

14           And I wanted to make sure that it was clear. I assume the  
15 parties would have told me when I put out the docket order that, hey,  
16 this still needs to be paused; we're not ready. Is this one that is  
17 ready for argument? Again, I'm -- I will follow the parties' wishes.  
18 We have plenty of things to work while we're down here.

19           Mr. Connell.

20           LDC [MR. CONNELL]: Sir, we think that 330 and 523 are ready  
21 for the 523 series. I will say that 330 and 523 series have been  
22 going for a long time.

23           There is something of the nature of update, especially with

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1 respect to -- well, with respect to both motions. And then  
2 there -- in the 523 series there's also 523N, which is the pending  
3 motion to reconsider Protective Order #5, and we would propose to  
4 address the whole 523 series at one time.

5 MJ [Col McCALL]: Okay.

6 Mr. Sowards.

7 LDC [MR. SOWARDS]: Yes, your Honor. Thank you.

8 As to 330, our last meet-and-confer update to the commission  
9 was in October of 2022. Since then, as with all things related to a  
10 pause with respect to the ongoing negotiations, we have continued  
11 to -- continued to pause that. So we will not be participating in  
12 the argument at this time ----

13 MJ [Col McCALL]: Okay.

14 LDC [MR. SOWARDS]: ---- for that reason.

15 MJ [Col McCALL]: All right.

16 And Mr. Trivett, did the prosecution have a position on  
17 that?

18 MTC [MR. TRIVETT]: We're prepared to respond to any argument  
19 from Mr. Connell. We would just reserve the ability to do that in  
20 the future, should you not issue a ruling prior to Mr. Sowards'  
21 arguing.

22 MJ [Col McCALL]: Sure. Okay. So we'll look at handling that  
23 this afternoon, then.

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1           Let's go through a few more. Again, hard to say how long  
2 these arguments will take. So the next one on my list was AE 651.  
3 That's Mr. al Baluchi's motion to compel discovery requested in  
4 DR-393-AAA.

5           MTC [MR. TRIVETT]: Yes, sir. That's the one that -- 651-10,  
6 the motion for leave to file out of time the 505 notices pending. We  
7 think that that can all be wrapped up pretty quickly after the  
8 Military Commission rules, but I don't think it will be fully baked  
9 by this afternoon, but by early next week it would be.

10          MJ [Col McCALL]: Okay. We'll table it for now.

11          And then the next one I have is 656H. That's  
12 Mr. al Hawsawi's motion to compel discovery. I know I've issued some  
13 rulings on it; there's that one piece that's still out there. And  
14 are we ready to argue that? And that's also the one that Mr. Trivett  
15 mentioned that we would do a closed hearing, 806, but I believe there  
16 would be some argument that would be in open session as well.

17          Mr. Ruiz?

18          LDC [MR. RUIZ]: That's correct, Judge, in terms of the  
19 division of arguments. I've conferred with Mr. Trivett, and we are  
20 both in agreement that we would like to do that one later.

21          MJ [Col McCALL]: Okay.

22          LDC [MR. RUIZ]: We may also be able to obviate the need to  
23 argue it at all, so that's part of the reason why we want to have

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1 additional time on it.

2 MJ [Col McCALL]: Sure. I'm always happy to table it if the  
3 parties think they can resolve it.

4 Go ahead, Mr. Connell.

5 LDC [MR. CONNELL]: Sir, I just wanted to say that we also  
6 have a position in 656.

7 MJ [Col McCALL]: Okay.

8 LDC [MR. CONNELL]: And we'll go along with whatever the  
9 primary moving party wants to do.

10 MJ [Col McCALL]: Okay. I appreciate that.

11 All right. Next on my list is AE 672. That's  
12 Mr. al Hawsawi's motion to compel witness information.

13 ADC [MS. LACHELIER]: Yeah, Judge, we're ready. But as we  
14 moved, after you asked for clarification of the docket, we wanted 632  
15 argued with that ----

16 MJ [Col McCALL]: Yeah. And that was ----

17 ADC [MS. LACHELIER]: ---- because they -- they overlap in  
18 terms of the requests.

19 MJ [Col McCALL]: Perfect. And that was the next one on my  
20 list. And so, yeah, we can argue both of those -- so would you be  
21 prepared this afternoon?

22 ADC [MS. LACHELIER]: If we can kick it back, it would be  
23 great, but we can be prepared, yes.

1 MJ [Col McCALL]: Well, let's see where we get ----

2 ADC [MS. LACHELIER]: Yeah.

3 MJ [Col McCALL]: ---- and obviously if we're getting close to  
4 the end of the day we'll just table it until next week.

5 ADC [MS. LACHELIER]: 632 has a longer history. That's why  
6 it's just -- it's a little bit longer to argue.

7 MJ [Col McCALL]: Okay. And, Mr. Trivett, I see you like ----

8 MTC [MR. TRIVETT]: So that series of motions, AE 672 (MAH)  
9 and 632E (MAH) ----

10 MJ [Col McCALL]: Yes.

11 MTC [MR. TRIVETT]: ---- are to be argued from the Remote  
12 Hearing Room by Mr. Jeffrey Groharing ----

13 MJ [Col McCALL]: Okay.

14 MTC [MR. TRIVETT]: ---- and he's prepared to argue and would  
15 like to argue today.

16 MJ [Col McCALL]: Okay. Terrific. All right. Understood.  
17 Thank you, Ms. Lachelier.

18 Yes?

19 ADC [MS. LACHELIER]: As to 672, I think the government didn't  
20 mention -- in 672L the government didn't mention it. We did have a  
21 505 notice. When we conferred, I just want to make clear we had  
22 said, we can craft the argument so it's all open and no need for a  
23 closed session on 672.

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1 MJ [Col McCALL]: Okay. I appreciate that. All right, we'll  
2 see if we get to that this afternoon and we'll kind of just play it  
3 by ear. All right. Anything else to take up? 1151. I can release  
4 you a little bit early for lunch.

5 Go ahead, Mr. Connell.

6 LDC [MR. CONNELL]: Sir, was it your intention to do the  
7 505(h) this afternoon or not?

8 MJ [Col McCALL]: Yeah, I would like to.

9 LDC [MR. CONNELL]: Okay. I'm also ready on 827 if you needed  
10 it, but if we're doing a 505(h) then probably we have a full  
11 afternoon.

12 MJ [Col McCALL]: I think so.

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

14 ADC [MS. LACHELIER]: Judge, one more thing. Sorry. The  
15 government said this earlier this morning before the break, that they  
16 understand that 705M needs -- or we need a response from the  
17 government on -- on whether they object or don't object to the 505.

18 MJ [Col McCALL]: Okay.

19 ADC [MS. LACHELIER]: So that's the only one that was -- and I  
20 think they didn't -- they didn't object, but I wanted to confirm.

21 MJ [Col McCALL]: Sure. Thank you, Ms. Lachelier.

22 Mr. Trivett, do you know on that one? And take your time.  
23 I'd rather you get it right.

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1 MTC [MR. TRIVETT]: No objection.

2 MJ [Col McCALL]: Okay. Perfect. All right. Anything else?  
3 Apparently not. All right.

4 The commission is in recess until 1330.

5 **[The R.M.C. 803 session recessed at 1153, 22 September 2023.]**

6 **[END OF PAGE]**

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1 [The R.M.C. 803 session was called to order at 1337,  
2 22 September 2023.]

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

4 The parties are again present, to include three of the four  
5 accused. Mr. al Hawsawi is still not joining us right now, Mr. Ruiz;  
6 is that correct?

7 LDC [MR. RUIZ]: That's correct.

8 MJ [Col McCALL]: Okay. All right. Are we ready to proceed  
9 with AE 330 and AE 523? Mr. Connell?

10 LDC [MR. CONNELL]: Sir, medical issues are at the heart of  
11 Mr. al Baluchi's case. As soon as Mr. al Baluchi arrived at  
12 Guantanamo in 2006, he reported to medical authorities that his head  
13 had been bashed repeatedly against a wall. Department of Defense  
14 medical providers documented that and reported it to another agency  
15 who had responsibility for investigating allegations of abuse.

16 That report ultimately resulted in the CIA Office of  
17 Inspector General report, which explained that CIA officers, seeking  
18 certification for their interrogation qualifications, had bashed his  
19 head against a wall until they got tired and then switched to the  
20 next person.

21 That led Dr. Mitchell, a defender of the RDI program, to  
22 conclude in 2020, on January 23rd, at page 30698 in the transcript,  
23 that Mr. al Baluchi had been used as a training prop, not for

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1 intelligence, not to get information, not to stop threats to America,  
2 but as a training prop. That torture of course had consequences.

3 Throughout Mr. al Baluchi's medical records it is  
4 documented: [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 On Tuesday I was fascinated to hear counsel for  
8 Mr. Binalshibh say -- because I've never seen Mr. Binalshibh's  
9 medical records -- [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 Despite all this, the government disputes his impairment,  
21 and it will be a substantial issue at trial. There will be a  
22 substantial evidentiary presentation for both sides, including expert  
23 testimony, documentary testimony, and testimony from the providers

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1 from the Joint Medical Group.

2 The only way to successfully make this presentation is  
3 through documentary evidence, which is addressed in AE 330, and from  
4 witnesses, which is addressed in AE 523.

5 With respect to AE 330, the medical records have been a  
6 focus of enormous effort by both sides. Where we can agree, we have  
7 agreed. And I suggest that the base motion, 330, is ready for  
8 ruling.

9 There are broad areas of agreement, which are documented in  
10 AE 330K/AE 523V.

11 MJ [Col McCALL]: So let me -- and you know I try not to  
12 interrupt you.

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

14 MJ [Col McCALL]: Oh, I know. I know. But then it always  
15 takes a little bit to get back on track.

16 But when you say that 330 is not ready for ruling, that the  
17 parties have agreed -- I mean, do I need another joint status update  
18 to tell me what's still in dispute, what's still outstanding?

19 LDC [MR. CONNELL]: I'm sorry. I said "now ready for ruling."

20 MJ [Col McCALL]: I know. Yeah.

21 LDC [MR. CONNELL]: I don't -- I don't think so. I think that  
22 we have gotten to the place where everything that we can agree, we  
23 can agree on. And I think that today I can articulate the areas of

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1 disagreement and what I think that you should do about it.

2 MJ [Col McCALL]: Perfect.

3 LDC [MR. CONNELL]: Because we have all the medical records  
4 now that the government has agreed to produce, and we have them in  
5 both classified and unclassified versions.

6 And let me tell you, I just want to give special thanks to  
7 Mr. Dykstra and Mr. Cox and Ms. Zittritsch and Ms. Sadiq and the many  
8 people on both sides who sat with originals and copies, with the  
9 original file, with coffee stains and all, and the copies that we  
10 had, went through it page by page, filled in gaps that were missing,  
11 identified what the problems were. Enormous amount of effort went  
12 into this.

13 And to fully understand the issues, you have to understand a  
14 little bit about what these medical records look like.  
15 Obviously -- we're talking back as far as 2006 -- many of these  
16 medical records are in hard copy, not in electronic as they would be  
17 now.

18 So the first thing to know about them is that it is DoD  
19 records only. There are no originals that we have received of CIA  
20 medical records. We had a proposal for an eyes-only review, the same  
21 thing that we did with the DoD records, where we just sat with the  
22 pages to make sure that the substitutions that we have, which came  
23 very early in the case in 2012 and 2013, comported. But that was

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1 part of the policy principles ultimately and, as I understand it, the  
2 President rejected that under pressure from Congress -- or politics,  
3 at least.

4 Second, there is a small number of documents that are  
5 irretrievably redacted. And that is documented in the joint  
6 medical -- excuse me, the update at 330K at page 8. And now, through  
7 investigation, we know what happened. We know why that is that  
8 situation, and that someone hand-redacted those medical records  
9 before the ICRC reviewed them in 2007 or 2008.

10 And I have an example to show you, which appears in the  
11 record at AE 628ZZZZZ Attachment C. If I may have access to the  
12 document camera. This document is for display only to the courtroom  
13 and not for display to the galley.

14 MJ [Col McCALL]: Proceed.

15 LDC [MR. CONNELL]: I'll show this to counsel first.

16 Usually a light comes on on the document camera when  
17 it's ----

18 MJ [Col McCALL]: I can see it.

19 LDC [MR. CONNELL]: Oh, you can see the document?

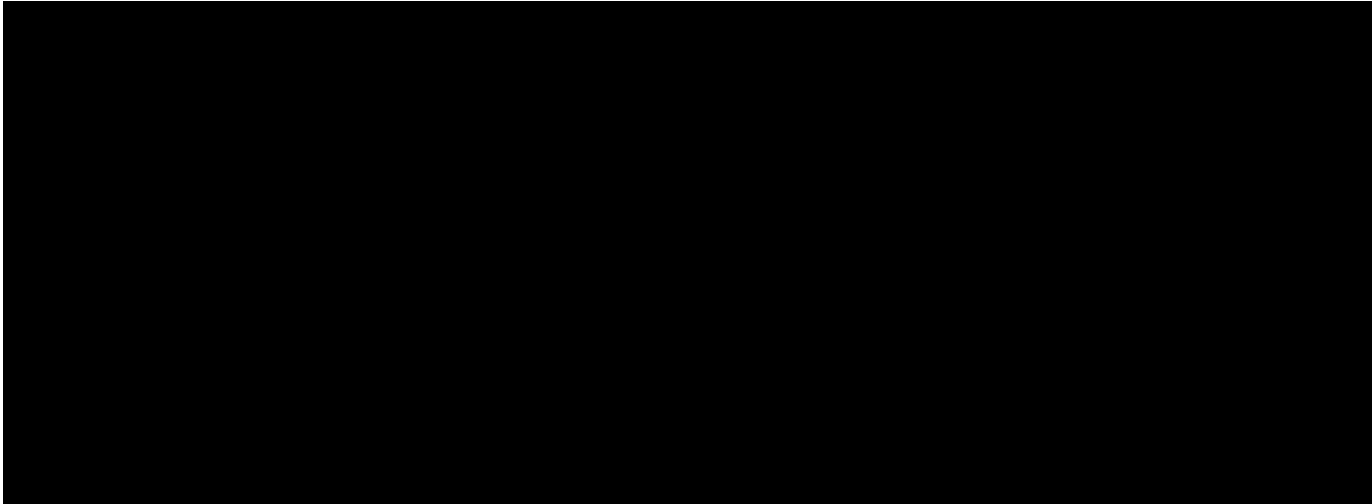
20 MJ [Col McCALL]: I can.

21 LDC [MR. CONNELL]: May I have a feed? Thank you very much.

22 And do counsel have a feed? Yes. Okay. Very good.

23 Just a couple of observations here:

1  
2  
3  
4  
5  
6  
7



8           The other thing that we know is the social aspect, is that  
9 he -- [REDACTED] which is that he is constantly worrying about  
10 his family, because they don't know whether he is alive or dead. The  
11 reason why I bring these to your attention is these are elements  
12 related to the -- to his indefinite detention, his detention without  
13 communication, and his treatment in black sites.

14           But then someone took what is literally a pen and scratched  
15 through other elements of the medical record. And we are calling  
16 those permanent redactions, because the government doesn't have a  
17 version -- it's not like they have a version of that, unredacted,  
18 that they're not turning over to us. This is what it looks like in  
19 the paper file.

20           So someone, before the Office of the Chief Prosecutor  
21 perhaps was involved, redacted this on a permanent basis. We would  
22 describe that as destruction of evidence, but I think that's probably  
23 for a later day. But I did want to give you an example of the kind

1 of thing we're talking about here.

2 There are not a lot of those, but there are some, and they  
3 are important, especially from important time frames immediately  
4 after Mr. al Baluchi arrived here at Guantanamo and was reporting.

5 I'm done with the document camera.

6 MJ [Col McCALL]: Okay.

7 LDC [MR. CONNELL]: The third issue about the medical records  
8 is that the medical records intentionally obscure the providers.  
9 They use fake names, like Dr. Shrek or Dr. [REDACTED] which will  
10 primarily be addressed in the 523 series.

11 So where to go from here, right? We have 99 percent of the  
12 records. There's no more reconciliation to be done between the  
13 parties. We've reconciled everything that can be reconciled. We're  
14 down to a small number of permanently redacted records, those which  
15 have, to my understanding, been addressed through substitutions in  
16 the AE 073 and 156 series, and the obscuring of providers which is  
17 addressed in the 523 series.

18 So what I would say is to go ahead -- my ask to the military  
19 commission would be to go ahead and grant the motion to compel.  
20 There's very little else for -- I don't know there's anything for the  
21 government to produce. But we do want a record that this material is  
22 all discoverable, which you have all -- the military commission has  
23 already recognized in 523J, that the medical records are

1 discoverable. And then the next step will be the consequences of  
2 permanent redactions and obscuring provider identities.

3           The military commission knows, from our pleadings, is that  
4 our position is that on many situations we cannot stop the government  
5 from withholding or asserting national security privilege or saying  
6 that certain information lies outside their ability to produce or our  
7 ability to receive. We can't stop them from doing that. But at some  
8 point there will be consequences for that, and the military  
9 commission will have to address what those consequences are.

10           That is, in many ways, what happened in the 524 series in a  
11 more narrow area, but there -- this issue goes throughout the case in  
12 a number of areas. And so we would ask that recognized medical  
13 records are discoverable, grant the motion to compel, with the  
14 observation that the government has already complied to the extent  
15 that it is able to do so. And then at some point there will be an  
16 argument before the military commission about what the consequences  
17 of the permanent redactions and assertion of national security  
18 privilege and other things which placed information outside the  
19 litigation are.

20           So, sir, that completes my argument on AE 330. I'm happy to  
21 entertain any questions about that or go to another counsel or  
22 proceed to 523.

23           MJ [Col McCALL]: No questions on that.

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1 LDC [MR. CONNELL]: Thank you.

2 So there are two open prayers for relief in the 523 series.  
3 The first is AE 523 base motion, and -- which requires a little bit  
4 of context.

5 In 2017, the government imposed first unilaterally then  
6 through a long series of evolutions -- and I won't rehearse all  
7 that -- but restrictions on investigation. And during the course of  
8 that, you know, that became the 524. And it's no accident that 523  
9 and 524 are right next to each other in the record.

10 523 had to do with the production of witness identities in  
11 general. And it really had six categories that were involved, some  
12 small, some large. One of those categories, that is persons  
13 associated with the CIA and the RDI program, became UFIs, right? And  
14 that was addressed to 524LL, et cetera.

15 The second category eventually became UMIs, the unique  
16 medical identifiers, which relates to the issue of obscuring provider  
17 identities, and we're going to talk about that in some detail.

18 There are four other categories contained in 523 and the  
19 oral argument which accompanied 523 which have never really been  
20 addressed, and those remain for the military commission to resolve in  
21 one way or another. And those four categories are: Witnesses with  
22 knowledge of conditions at Camp VII between September 2006 and  
23 January 2007.

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1 I will note that there's -- I believe there is some overlap  
2 between that pending issue back from original 523 base motion and  
3 some of the other motions that you'll hear where Mr. al Hawsawi is  
4 the primary movant today, the 532E series and the 672 series both  
5 address that.

6 The government did produce one witness, known as former  
7 Camp VII commander, who testified in part, but other witnesses with  
8 knowledge of conditions of Camp VII between September 2006 and  
9 January 2007 have not been identified.

10 The second category that remains outstanding is witnesses  
11 mentioned in the MEM discovery who do not have UFIs. We haven't  
12 talked much about the MEM discovery, but the MEM discovery is what  
13 are commonly known as the torture memoranda, memoranda issued by the  
14 Office of Legal Counsel relating to the RDI program.

15 And some of the people who are referred to in those  
16 documents have unique functional identifiers which were placed in the  
17 version that was produced to us, and some do not. And so the ones  
18 who do not are the other category -- the second category outstanding  
19 under 523.

20 The third is witnesses related to the XYM evidence, and  
21 that's all I can say about that in open court.

22 And then the fourth is -- it was identified that there were  
23 two witnesses related to the Bureau of Prisons who had knowledge of

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1 conditions at black sites, and those two witnesses are the fourth  
2 category that remain to be addressed under 523.

3           So we've already argued those. We've already argued all  
4 those. I'm not going to, you know, repeat myself, even though it was  
5 a number of years ago.

6           So the next element of 523 motion -- base motion in my mind,  
7 is the compliance with the military commission's order in AE 523J.  
8 And in 523J, the military commission made a number of findings.

9           The first of those findings was that Mr. al Baluchi cannot  
10 challenge the UFIs under 949p-4(c), Charlie, bar against  
11 reconsideration of 505 substitutions. The reason why that's  
12 significant is that there was a significant debate for a long time as  
13 to whether the UFIs had actually been approved by the military  
14 commission, because we did not have an understanding of the -- of the  
15 ex parte litigation which led to it, and the order which  
16 addressed -- which approved them did not say anything about UFIs in  
17 it. It said that the substitutions were approved and we on our side  
18 did not know what that meant. So that cleared up that question.

19           The military commission found in AE 523J the DoD medical  
20 records are discoverable, which is in part the basis for my request  
21 for a motion compelling discovery under 330. It found that the use  
22 of pseudonyms unreasonably impedes defense access to witnesses. And  
23 in AE 330K and 523V, and subsequently, the parties updated the

1 military commission on a number of issues. And essentially these  
2 facts are agreed between the parties. These were joint filings.

3 One of those is that the Department of Defense investigators  
4 were not able to identify the true names and identities of all  
5 medical providers identified by pseudonym in the DoD medical records;  
6 that despite best efforts on the part of a team of investigators who  
7 were tasked by the Office of the Chief Prosecutor, they simply could  
8 not accomplish that, that 20 of the witnesses that the government  
9 listed were simply guesses; that Joint Medical Group recordkeeping  
10 obscured the identities of some providers, that some medical  
11 providers will never be known. And that sort of captures  
12 the -- those factual issues, although they haven't been found by the  
13 military commission are agreed between the parties.

14 So with that in mind, Mr. al Baluchi has continued to  
15 identify errors and omissions in the government's matching of  
16 pseudonyms and witnesses and identities.

17 There are two specific documents in the record which  
18 describe the precision of that process. One of them, in July 2019,  
19 was identified by the parties as DR-017L-AAA. It's found in the  
20 record at AE 523V, Attachment C, which laid out here are some of the  
21 issues with the providers, with the matching that you have done.

22 More recently, in October of 2022, Mr. al Baluchi submitted  
23 DR-017M-AAA found in the record at AE 523Y, Attachment B.

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1           That particular document I have timely submitted to the  
2   court information security officer as CISO -- exhibit AE 523  
3   Exhibit 2. And I will, with permission, display that on the document  
4   camera, to include the gallery.

5           MJ [Col McCALL]: Proceed. It looks like it's up. I know the  
6   light is not on, but.

7           LDC [MR. CONNELL]: It may just take a minute. Yes, there we  
8   go.

9           The reason why I share this is not to read it or show it in  
10   detail, but what I wanted to show you is the level of detail with  
11   which we have identified the issues in the cross-matching of  
12   pseudonyms, unique medical identifiers, and medical records.

13          And so where there's a problem, this is not -- we've  
14   complained to the government, hey, these problems, these are not  
15   good. We have been extremely detailed in exactly what we have,  
16   exactly what the problems are, and provide them locations in the  
17   medical records where they can go look for it themselves.

18          That's the point that I want to make here, which is that  
19   this is not a general complaint in any way. This is a highly  
20   particularized complaint that we have provided, you know, as much  
21   information as we have to the government on the problems with these  
22   unique medical identifiers.

23          I'm done with the document camera.

1           So since October of 2022, the government has continued to  
2   produce new UMIs for -- as new medical records for when new medical  
3   providers come -- including as recently as 8 September 2023, but has  
4   not been able to address the deficiencies that Mr. al Baluchi  
5   identified in DR-017L or M. And those deficiencies matter.

6           There was an IT problem earlier -- let me just double-check.  
7   Can we -- yes. May we have the feed from Table 4, please? And I  
8   will be displaying what I submitted, timely submitted to the CISO as  
9   AE 523 CISO Exhibit 1 **[sic]**, which is the slide.

10          And what I wanted to do was lay out the course of this  
11   investigation for you because you may legitimately have the question,  
12   okay, counsel, they give you these records. What do you actually do  
13   with them?

14          And in October of 2022, which is when this slide was  
15   prepared -- no, no. I'm sorry. As of October 2022, which is last  
16   year, Mr. al Baluchi's team had spoken with 67 of the 274 witnesses  
17   at that time, and had attempted to reach another 24 without success.

18          This slide is updated to now, essentially. And as of now,  
19   Mr. al Baluchi has spoken with 79 of the 288 medical witnesses,  
20   and -- 60 of whom agreed to speak with us and 19 declined, and had  
21   attempted to reach another 28 witnesses without success, meaning we  
22   showed up and we knocked on their door. They had moved or they  
23   weren't there or they were deployed or whatever. And so we've

1 attempted to reach 170 of the 288 witnesses.

2 I think this makes -- there are three points of significance  
3 in this. The first is that these witnesses are so valuable to  
4 Mr. al Baluchi's case that we're willing to make a very large  
5 investment of investigative resources into them.

6 These 79 people that we've actually spoke to and another 28  
7 that we attempted without success represent over 70 investigative  
8 trips, well over 150 investigative person-days all over the United  
9 States and sometimes overseas. That's the point. We really care  
10 about this. It's really important to us.

11 The second point is that we've received a high rate of  
12 cooperation. It's been said in this court sometimes, you know, you  
13 say bad things about these people, why would they talk to you anyway?  
14 But that's not -- first, I don't think that we say bad things about  
15 them. But second, they do cooperate, by and large, because these are  
16 professionals, and they're generally willing to talk within their  
17 NDAs and other, you know, restrictions in appropriate locations and  
18 cooperate.

19 Of the witnesses that we've been able to locate over  
20 75 percent have agreed to speak with us. I would say that, in  
21 general -- these are just UMIs, but in general we get about an  
22 85 percent rate of agreement to speak with us. So the UMI rate is a  
23 little bit lower than usual. That is possibly because of the letter

1 that was approved ex parte in AE 523L which we're going to talk about  
2 in a minute, but I'm not sure of that. I don't know.

3 The third point of significance out of this is that cold  
4 calls are a key investigative tool. Witnesses do not respond to  
5 letters or phone calls. And I have a remarkable example.

6 Recently we knocked on the door of a UMI in the Pacific  
7 Northwest. And they told us they had received an e-mail or a letter  
8 from another defense team, but they had ignored it. But because we  
9 had gone to the effort of showing up at their house and knocking on  
10 their door, that they were going to speak with us. So it really  
11 matters being there in person, which is a point that we've made a  
12 number of times throughout this military commission.

13 So missing or erroneous witness information, like the  
14 mismatch between some of the UMIs and medical records really matters.  
15 If we have good information, we will locate and often the witnesses  
16 will agree to speak with us.

17 Now, with all that as update, I honestly believe there's no  
18 ruling left to make in 523 base motion. The government has done its  
19 best -- right? -- put its investigators on. Some of these records  
20 are just so bad and so old and so damaged by the original record  
21 keepers at the Joint Medical Group that I don't think there's  
22 anything else they can do, right?

23 They can keep better records going forward, which they're

1 doing, and we appreciate. I don't know what there is left -- you've  
2 already made the findings in 523J. I don't know that there's  
3 anything left to decide in 523 base motion. But I'm, of course,  
4 happy to answer questions about that.

5 And then -- but there is something remaining to decide in  
6 523N. And in our joint update between the government and us, we even  
7 put a footnote in there that both parties would like to put this 523N  
8 issue to rest so that we can know what the playing field is.

9 So with respect to 523N, which is the motion to reconsider  
10 the 523L, what happened was that on 12 November of 2018, the  
11 government filed AE 523K, which was an ex parte pleading. We didn't  
12 know what it was, of course. It's ex parte. But we now know from  
13 523M that AE 523K, excuse me, was an ex parte request for a  
14 protective order, which eventually became 523L Protective Order #5.

15 Now, on Mr. al Baluchi's team, we immediately recognized,  
16 because it came in the 523 series, that this protective order  
17 represented a threat to us, and we moved to reconsider the protective  
18 order on the basis that we had never had the opportunity to contest  
19 either its erroneous factual basis, in our view, or its expansive  
20 scope. That is our 523N.

21 Now, that was during the time when there was still a debate  
22 over the application of 949p-6 and whether the government could move  
23 for protective orders ex parte or not. And six months later, the

1 military commission agreed with Mr. al Baluchi's position in AE 6500,  
2 that the government could seek substitutions ex parte, but could not  
3 seek protective orders ex parte.

4 And it laid out a process, which is that when the government  
5 wants a protective order, it has to file with the military commission  
6 who will then order it to serve the defense with the relevant  
7 portions. And the military commission followed this on a number of  
8 times since then.

9 And -- but Protective Order #5, since it fell in sort of a  
10 gap between -- after we had argued this position but before the  
11 military commission had addressed it in 6500, Protective Order #5 is  
12 still in effect. And the military commission imposed classification  
13 on medical provider identities that until that time it had treated as  
14 sensitive but unclassified under Protective Order #2. And this has  
15 caused problems. But I have a few specific examples which are in the  
16 record.

17 The first one is in AE 014, the initial motion by the  
18 government around the time of the arraignment for a protective order  
19 for unclassified discovery, the government filed a declaration from  
20 the SOUTHCOM commander, which described that JTF personnel, including  
21 explicitly medical personnel, identifying information was  
22 unclassified but protected, that it fell under Protective Order #2,  
23 not Protective Order #1, because it was unclassified. And both

1 parties acted on them.

2 For example, in the record is AE 152P from 2014, where the  
3 government actually listed out some of the military medical personnel  
4 who had treated Mr. Binalshibh. It was the first time around that  
5 the question of Mr. Binalshibh's competency arose. And the  
6 government filed, here's a list of medical providers. Not  
7 classified, just an unclassified list under 152P.

8 In previous -- when we argued AE 330 previously on 20 March  
9 of 2017 at transcript 14647, the government argued that medical  
10 records, some of which -- which include some true names are, quote,  
11 by their very nature, unclassified.

12 And then finally, the government has provided medical  
13 provider names over the NIPR system as unclassified in 2017, and I've  
14 attached to -- that in the record at 523N Attachment C.

15 So up until the military commission issued 523L, it was our  
16 complete understanding that medical record -- medical provider names  
17 were unclassified but sensitive; that we needed to treat them  
18 carefully, of course, under Protective Order #2, but they were  
19 unclassified.

20 And it came as a real surprise to us in 523L to find out  
21 that after having treated military -- excuse me, medical provider  
22 names as unclassified in the record and in communications between the  
23 parties, that the government then claimed that they were classified.

1           And so, you know, that -- to me, that answers the question  
2 of, well, Mr. Connell, what would you have said if you had had the  
3 opportunity to oppose 523L and then -- you know, on the protective  
4 order? The answer is that we would have had a serious discussion  
5 between the parties as to whether these provider names were  
6 classified or not.

7           And I would have given these examples that I've given you  
8 today and we would have, you know -- at the end -- at the end of the  
9 day the government gets to say what's classified and what's not, but  
10 there would have at least been a discussion over it.

11           There would have also been a discussion over the wording of  
12 the letter that went out, which in Protective Order #6 there was some  
13 wordsmithing that the military did on the wording of the letter.  
14 And, you know, that -- and that's the reason why in 6500 the military  
15 commission held that when there's going to be a protective order that  
16 governs the behavior of the parties, that it should be adversarial  
17 discussion, so at least the military commission can hear the  
18 perspectives of the parties and go forward.

19           So with respect to 523N, my request to the military  
20 commission is to grant the motion to reconsider AE 523L and M, and to  
21 hold an adversarial hearing on the proposed protective order so that  
22 we could hash out these issues. The military commission may decide  
23 to issue another -- it may decide to treat it under Protective

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1 Order #2 ultimately. It may decide to treat it under Protective  
2 Order #1. It might decide to issue a new Protective Order #5. But  
3 at least the parties would have the opportunity to be heard on what  
4 the appropriate path for treating these military medical identifiers  
5 is.

6 And to be honest, it would now happen with the advantage of  
7 a great deal of experience, right? I mean, we've done so many  
8 investigative trips around this. We know what the problems are now.  
9 We know what the obstacles are, we know what the opportunities are.  
10 So I think that if there were a hearing on it we could bring  
11 appropriate experience to the military commission after having dealt  
12 with this issue extensively.

13 MJ [Col McCALL]: Okay. I do have a question for you about  
14 those, the 60 UMI witnesses that you have been able to interview.  
15 And so ----

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

17 MJ [Col McCALL]: ---- I guess is it productive? I mean, at  
18 this point you're still ----

19 LDC [MR. CONNELL]: Oh, yes, absolutely productive. There's  
20 one of these investigative missions per week, usually. And that's  
21 today. When we get to the 827, we'll talk about the person we  
22 interviewed last night.

23 These missions run constantly. We are working our way

1 through the others. Some of them we can't. You know, of the other  
2 188, some of them we can't identify, which is really the reason for  
3 this motion of -- because of the mismatch or the lack of information.  
4 But all the ones that we can identify we will continue to interview.  
5 And this is an -- extremely productive information.

6 We expect to call a number of these witnesses at whatever  
7 hearing is appropriate. That might turn out to be this -- part of  
8 the suppression motion. It might turn out to be the trial. It might  
9 turn out to be the sentencing. But this is very productive.

10 MJ [Col McCALL]: So what type of changes -- I mean, are you  
11 proposing to the protective order as far as -- I mean, you  
12 acknowledge that a protective order is still required or still ----

13 LDC [MR. CONNELL]: Yes, sir. It's an order that governs us.  
14 We follow it.

15 MJ [Col McCALL]: Okay. But I mean, so help me understand  
16 like what exactly could be done to make the process work better?

17 LDC [MR. CONNELL]: Here is, like, the biggest problem is that  
18 we cannot have the name of a detainee in the same communication with  
19 the name of the provider.

20 So let's say that it's Jill Jones. We cannot send an e-mail  
21 to Jill Jones saying, hey, back in 2013 you treated Ammar al Baluchi  
22 when you were stationed at Guantanamo. Can we have an appointment to  
23 come in and talk to you? We can't say that. That would be

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1 associating the name of a provider with the name of a detainee and  
2 that is what the government says is classified. That is a  
3 huge -- that is like the number one problem. Because what we have to  
4 do instead is write to Dr. Jones and say, we'd like to come in and  
5 talk to you. And that generates more friction than any other thing,  
6 because they're like what do you want to talk to us about? And we're  
7 like we can't tell you. Can we go to a secure collateral space? You  
8 know. And so it generates an enormous amount of friction around that  
9 particular point ----

10 MJ [Col McCALL]: Sure.

11 LDC [MR. CONNELL]: ---- that we would very much like to be  
12 resolved.

13 MJ [Col McCALL]: All right. And I mean is there language in  
14 the letter that you think you could craft that would be more  
15 useful ----

16 LDC [MR. CONNELL]: Yeah.

17 MJ [Col McCALL]: ---- or procedures for reaching out?

18 LDC [MR. CONNELL]: Yes. I think that we could -- that we  
19 could work on it, I mean.

20 MJ [Col McCALL]: Okay. Anything else?

21 LDC [MR. CONNELL]: No. I will say, you know, a couple of  
22 years ago when this was filed, we did do a redline version of the  
23 letter, of changes that we thought would be advantageous.

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1           You know, with the benefit of more experience, and I have a  
2   couple more years of experience in it, if the military commission  
3   goes that route, we'd like the opportunity to take one more pass  
4   through that letter to see if we could address some of these issues.  
5   But we did actually -- we were aware of the fact that the military  
6   commission might ask us for a chop on the letter and did submit a  
7   redline version of what we thought would be better.

8           MJ [Col McCALL]: Okay. I'm not sure I've seen that in the  
9   record. If you can find a cite for that it might be useful for me.

10          LDC [MR. CONNELL]: Yes. If you give me just a second, I will  
11   tell you right now.

12          MJ [Col McCALL]: Mr. Connell, why don't you take your time  
13   and I'll move on to the government and then when I come back to you,  
14   I'm sure you will have the cite at that point.

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

16          MJ [Col McCALL]: All right. Would any other defense teams  
17   like to be heard? I know Mr. Mohammad's team is holding off today.  
18   All right. Apparently not.

19          Mr. Trivett? Or I'm sorry for, whoever from the  
20   prosecution. I don't mean to steal your thunder, Mr. Dykstra.

21          DMTC [MR. DYKSTRA]: Sir, I can assure you people are always  
22   happy to steal my thunder and I'm always willing to allow them to do  
23   so.

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1           To answer your question, the proposed letter that  
2 Mr. Connell was talking about is an attachment to 523N, is a redline  
3 version of the letter. I'm going to go in order because I think it  
4 makes sense to break up the two issues. I know Mr. Connell kind of  
5 talked about both of them at the same time, but I'm going to break  
6 them up a little bit.

7           MJ [Col McCALL]: Okay.

8           DMTC [MR. DYKSTRA]: Mr. Connell's correct and we would agree  
9 that the reconciliation project has been very fruitful in the AE 330  
10 series when we're going through the medical records.

11           I've been happy to sit down with both his folks, as well as  
12 anybody in this room, to kind of show them what the actual medical  
13 records that are in existence and compare it to the discovery that  
14 they have.

15           In the limited instances where we have identified  
16 deficiencies in our discovery, we have provided that pretty quickly.  
17 I will note that -- and I do recall the -- and Mr. Connell can  
18 correct me -- his, I think, carts of goldenrod and blue paper that he  
19 showed and that's currently in the record. And I think through this  
20 reconciliation project, we have found that the goldenrods didn't  
21 necessarily exist. But I continue to be willing to work with the  
22 defense and reconcile this project.

23           What I would ask, and maybe -- and this kind of fits along

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1 with what Mr. Connell was talking about. The parties are interested  
2 to put this whole 330 series behind us.

3 To the extent that the parties want to finish that  
4 reconciliation project, we just put it -- we'd ask the commission to  
5 issue a date certain by which that reconciliation project -- I think  
6 closing the chapter on this and saying they have all the medical  
7 records that we have will be a benefit to the commission as well as  
8 the parties going forward.

9 MJ [Col McCALL]: Well, then correct me, maybe I misheard. I  
10 thought on this topic it sounded like Mr. Connell felt like that  
11 reconciliation effort was complete, that everything that's going to  
12 be found and can be reconciled has been done and wanted an order,  
13 just basically as an acknowledgment that the commission found that  
14 these documents should have been produced. And so the next step  
15 would be to look at whether or not there's a remedy for the ones  
16 where they've been redacted.

17 Was I misunderstanding your position, Mr. Connell? I mean,  
18 because if there needs to be ----

19 LDC [MR. CONNELL]: No, sir. That's our position. Although I  
20 don't speak for the other defendants, which I think is what  
21 Mr. Dykstra is talking about.

22 MJ [Col McCALL]: Okay.

23 DMTC [MR. DYKSTRA]: Yeah, that's exactly my point. I've been

1 down here for the last year and a half for about six months, and just  
2 trying to make myself available to do this kind of stuff. It would  
3 be beneficial, both for the government -- from a government  
4 resourcing standpoint to just put a -- put an end cap on the  
5 reconciliation process, to the extent practicable for the rest of the  
6 three parties that are sitting in this room, so.

7 Other than that, on the Appellate Exhibit 330 series, I  
8 think Mr. Connell aptly -- aptly described where we're at and kind of  
9 indicated where this commission will be heading with regards to  
10 medical records going forward, so.

11 As far as -- to finish off with the 330 series, I just  
12 wanted to point out that the CIA, all the medical records from the  
13 CIA did go through the M.C.R.E. 505 process. They're currently -- if  
14 Your Honor would like to look at them to make sure that they're still  
15 adequate substitutes, they're located in the Appellate Exhibit 156K,  
16 156N, 308LLLL, 308MMMM and Appellate Exhibit 542I.

17 Moving on to 523, and I will say the issuance of Protective  
18 Order #5 allowed us to, ironically, do the reconciliation project.  
19 Because until we had Protective Order #5 and they had the true names  
20 and identities, technically I could not show them the document  
21 because it had classified information on there.

22 So that did allow us, and did allow us to facilitate  
23 resolution of Appellate Exhibit 330 series, which I think is

1 a -- just an interesting side fact more than anything else. But as  
2 far as the 523 series, and just going back to the base motion where  
3 Mr. Connell described, when we got Judge Pohl's order, we put  
4 together a team of investigators. I think there was about four or  
5 five of them.

6 And they went through every single page of the medical  
7 records trying to identify every single pseudonym, every single other  
8 reference named within them, and tried to match them up to the best  
9 of their ability to true names and identities of medical providers  
10 that we knew existed. They spent over 800 man-hours doing this. So  
11 it was not a small task. And ultimately what we provided to defense,  
12 that was based upon their professional judgment the best that they  
13 could do.

14 The reality is JTF-GTMO does not have any corresponding list  
15 matching pseudonyms with true names, identities, at least as far as  
16 the medical providers go. So there's really no way other than what  
17 we did to really match that up.

18 So I want to impress on the commission that that's really  
19 the best that we're going to be able to do. And unfortunately it's  
20 not perfect. It's not a hundred percent that we wanted or were  
21 hoping for. But unfortunately, because of the information available,  
22 there's just no way to really do more than what we have done already.  
23 And we're happy to, on a onesie and twosie, kind of dig into it more,

1 but it took a lot of man-hours and resources to get where we're at  
2 right now going forward.

3 So Mr. Connell highlighted his one big point or his one big  
4 issue with Protective Order #5, and that was his ability to identify  
5 a true name of a medical provider and associate that with a detainee  
6 in an unclassified means. And unfortunately, the original  
7 classification -- or -- I won't even characterize it.

8 The original classification authority has determined that  
9 that connection with the true name and identity of a medical  
10 provider -- or really any detention personnel around here -- with a  
11 detainee is classified. There's just no way around it.

12 So Protective Order #5 was designed in order to facilitate  
13 discussions, or in order to allow them to reach out to these medical  
14 providers in an unclassified means, so they didn't have to travel to  
15 go meet with them first to figure out whether or not they would talk  
16 with them.

17 They certainly can do that if they want to, but our goal  
18 with this whole thing was to allow them to call this person up and  
19 quickly ascertain whether or not this person is willing to talk with  
20 them over a regular, unclassified phone, and allow them to talk about  
21 unclassified information.

22 Because like Mr. Connell said, they have unclassified  
23 medical records that they can talk to this medical provider already

1 about. So there's a lot of information that they can talk about over  
2 the phone, if they wanted to, using the unique medical identifier.  
3 And that's what the protective order is all about. It's basically a  
4 handling mechanism as well as classification guidance more than  
5 anything else.

6 So I just wanted to put that in front of the commission as  
7 well.

8 MJ [Col McCALL]: Mr. Dykstra, what about this. I mean, so is  
9 there a harm in reevaluating the protective order as far as -- again,  
10 just looking at the ones that I've dealt with where, again, we had a  
11 little bit of -- as Mr. Connell talked about, where the commission  
12 gave some input on those letters that went out, and that was just  
13 based on my view on how to try to get ahold of witnesses.

14 But here, as Mr. Connell raises, that they've actually  
15 reached out to some witnesses, started to get some data on what is  
16 effective, maybe what's not effective, maybe why some witnesses might  
17 be hesitant to respond or maybe why some are willing to respond and  
18 may tweak that language, tweak that procedure.

19 I mean, it seems like, just as with -- as this case  
20 continues on, and I know the government continues to look at whether  
21 or not matters can be -- the classification can be relooked at, maybe  
22 lessened. I mean, it seems like the same thing with a protective  
23 order, that as we proceed, maybe we should relook at it and see if we

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1 can't tweak those procedures to help get some more information to the  
2 defense.

3 I mean, what's the prosecution's position on that?

4 DMTC [MR. DYKSTRA]: I would say as far as the protective  
5 order goes, I don't think there's much room for tweaking at all. I  
6 think from our perspective, the protective order sets the basic  
7 minimum requirements for protecting the classified information in  
8 this case.

9 It's not -- it's not setting up protocols or anything like  
10 that, because we are actually giving them the true names and  
11 identities as well as contact information that we have. It's just  
12 basically a tool that they can use to facilitate contacting these  
13 people, while still staying within the classification of this  
14 information.

15 So as far as the protective order, I mean, we're always  
16 willing to take -- if Mr. Connell has ideas of how to improve it and  
17 so forth, we're always willing to listen, but that's not to say that  
18 we can necessarily always agree to that.

19 MJ [Col McCALL]: Sure.

20 DMTC [MR. DYKSTRA]: And in this case, I don't think there's  
21 going to be much room to maneuver with regards to this protective  
22 order, having worked on it myself, so.

23 But that being said, as far as the letter that you spoke of,

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1 the advisement of rights, I will note that this letter, it was not  
2 exactly the letter that we proposed in the original ex parte  
3 pleading. It was modified by Judge Parrella before it went out.  
4 We're happy to accommodate those changes, obviously, because the  
5 judge ordered them.

6 I will note that the letter, both in 523 and the one that  
7 you approved with changes in the 703 series, was -- are different in  
8 some respects. And we'd be happy to marry those up in some fashion,  
9 as well as take into consideration some of Mr. Connell's proposed  
10 edits.

11 That being said, as you'll see in the 523N pleading that  
12 he proposed -- his proposed advisement of rights, a lot of it's just  
13 happy than glad, and some of it is more substantive than otherwise.  
14 The letter itself was just designed to give them the basic advisement  
15 of their rights. It was not to induce them to talk or really prevent  
16 them from talking. It was a very basic letter.

17 And we would prefer to keep it that way, just because it  
18 seems to be -- it's not a letter of introduction from the defense.  
19 It is a letter from Your Honor basically notifying them of their  
20 rights.

21 So we'd be happy to consider any changes, but it would have  
22 to be -- yeah. I'll just leave it at that, Your Honor.

23 MJ [Col McCALL]: Fair enough.

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1           DMTC [MR. DYKSTRA]: But I would advise that to the extent  
2 there is any changes, that they only apply going forward and not  
3 having us to go back and advise 300 people of their rights.

4           Like Mr. Connell says, we have done a very good job of  
5 capturing all the current -- the medical providers that are coming  
6 and going from JTF since the commission issued its order in the 523  
7 series, and we'd be happy to just for those going forward.

8           But I think it would be difficult -- I won't say difficult.  
9 I think it would be -- it would be a substantial resourcing issue to  
10 kind of go back and advise them. And I don't know from a defense  
11 perspective whether or not that would be helpful or actually hinder  
12 them if we continue to reach out to these medical providers.

13           I do want to touch on, Mr. Connell talked about the nexus  
14 between 6500 as well as the issuance of this protective order. I do  
15 point out that 6500 was really geared towards the future. It was  
16 looking at pending ex parte requests for protective orders and those  
17 in the future.

18           At page 14, Section 6, Judge Cohen entitled the section  
19 "Application of Subchapter 5 to Pending Government Motions for  
20 Protective Orders."

21           At paragraph 6.c., Judge Cohen stated, "all the aspects of  
22 the relief requested by the government may be presented in pending ex  
23 parte motions."

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1           And then finally at paragraph 7, which is entitled "Future  
2   Proceedings," Judge Cohen stated, "going forward following ex parte  
3   presentations."

4           So I don't think his intent -- and ultimately, Your Honor,  
5   it's really whatever the commission intends at this point in  
6   time -- was to revisit all previous protective orders in line with  
7   what 6500. I think it was done looking forward; as we approach  
8   trial, what we are going to do for protective orders going forward.

9           I think Your Honor appropriately recognizes the nexus  
10   between 6500 and some of the protective orders that we've requested,  
11   such as in the 810 series, as well as there where you ordered us to  
12   file with the defense before we could discuss the limitations on  
13   cross that we're going to be seeking for the raids -- some of the  
14   raids evidence.

15           I think I've talked about everything that Mr. Connell  
16   discussed.

17           I did want to point out, with regards to the production of  
18   the identities of the Camp VII MEM, XYM, and Bureau of Prisons'  
19   witnesses -- and I can probably go into more of it in a classified  
20   session -- I would just say Appellate Exhibit 701E, your ruling in  
21   that case, might be something that renders some of this OBE at this  
22   point in time.

23           Subject to your questions, that's all I have, Your Honor.

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1 MJ [Col McCALL]: Okay. No questions.  
2 DMTC [MR. DYKSTRA]: Thank you, your Honor.  
3 MJ [Col McCALL]: Mr. Connell.  
4 LDC [MR. CONNELL]: Sir, can I double-check something with  
5 counsel?  
6 MJ [Col McCALL]: Sure.  
7 LDC [MR. CONNELL]: Just a moment, Your Honor.  
8 MJ [Col McCALL]: Take your time.  
9 **[Counsel conferred.]**  
10 LDC [MR. CONNELL]: Three points, Your Honor.  
11 MJ [Col McCALL]: It looks like Mr. Dykstra wants to retrieve  
12 something.  
13 DMTC [MR. DYKSTRA]: My apologies, Your Honor. I think it's  
14 701I actually.  
15 MJ [Col McCALL]: I.  
16 DMTC [MR. DYKSTRA]: Sorry about that.  
17 MJ [Col McCALL]: No problem.  
18 LDC [MR. CONNELL]: All right. So that was one of my points.  
19 MJ [Col McCALL]: All right. Now you're down to two.  
20 LDC [MR. CONNELL]: I'm down.  
21 Second one is that the letter that we had given our chop to  
22 is found in the record at AE 523N, a clean copy is at Attachment D; a  
23 redline copy is Attachment E. If peace has broken out on that topic,

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1 we'd be happy to take another look and submit a letter to the  
2 government to see if we can improve that situation.

3 I was intrigued by the idea, which counsel didn't advocate  
4 exactly, but mentioned of a -- of like a letter of introduction or  
5 something. So maybe there's another solution out there that  
6 we -- that I'd be happy to go off and explore and come back on, if  
7 that's the way the military commission wants to go on it.

8 I just don't understand the idea that the connection -- the  
9 OCA has determined that the connection between the detainee and the  
10 medical provider is classified when, for years and years, that was  
11 certainly not the case. And of course I, who am not privy to ex  
12 parte declarations, have never seen that, an explanation or whether  
13 it has any caveats or there are some parameters, there was a change  
14 in policy or something. I just don't know.

15 MJ [Col McCALL]: And maybe that's something that we can get  
16 into in the classified portion.

17 LDC [MR. CONNELL]: Sure. That makes sense.

18 MJ [Col McCALL]: Does it? Yeah.

19 LDC [MR. CONNELL]: That makes sense. And then the last point  
20 that I wanted to make about 6500, I concur that 6500 was a  
21 prospective ruling. But we were still right.

22 You know, our interpretation of 949p-6, and the difference  
23 between the ex parte powers of the government and the in camera

1 powers of the government, our analysis was still right. And that's  
2 what we brought forward in 523N. It just so happened that later, in  
3 the 650 series, the military commission said let's resolve this  
4 globally, because it keeps coming up again and again, and  
5 issued specified issues and we addressed those and the military  
6 commission ruled.

7 And it didn't wholly adopt our position, but it did  
8 recognize the distinction between the government's ability to seek  
9 substitutions ex parte and file declarations ex parte, but when it  
10 sought protective orders, it had to do that in an adversarial format.

11 So the same argument that we made in 523N is the same  
12 argument that we, al Baluchi, made in 650A. And we were  
13 largely -- our position largely prevailed in 650A. And the  
14 same -- the same analysis should apply for where we timely raised it  
15 within days of the ruling of 523L, we made the same analysis in 523N.  
16 So that's where we are.

17 MJ [Col McCALL]: I appreciate that. I can understand the  
18 logic of that argument.

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

20 MJ [Col McCALL]: All right. I'll take this under advisement.  
21 I think I have some ideas on the way forward potentially on this. I  
22 might want to have a joint status update from the parties on this  
23 topic of whether or not there can be some type of middle ground on

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1   tweaking the procedures without having a full adversarial hearing on  
2   the topic of the protective order. I'm probably leaning towards  
3   that. But let me consider it and I'll get something out to the  
4   parties.

5           All right. So it is 1430. We will take a recess and then  
6   come back in and move on to the next topic. But before we do that  
7   let's figure out the next topic.

8           So if I'm correct from what we had covered this morning, I  
9   guess there's two things that we could attempt to get into this  
10   afternoon. There's the 828D, I believe, the 505(h) hearing based on  
11   the 505(g) notice. Obviously for a 505 I need to get the stenos down  
12   here. It takes them about 30 minutes to set up their equipment. I  
13   would like to do that today if possible because I think we're going  
14   to be a little short on stenos next week from my understanding of  
15   personnel, so I think that's useful.

16           But how long are the parties expecting -- I don't know what  
17   to really expect in this hearing. Is it going to be pretty fast? Is  
18   it something we can wait until a little bit later and get into the  
19   other AEs that we had discussed? Maybe cross-talk?

20           LDC [MR. CONNELL]: Sir, in a lot of 505(h) hearings, it is  
21   very fast. You know, I stand up, read the formulaic script; the  
22   government reads their formulaic script, et cetera.

23           In this one, I don't fully understand the government's

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1 position.

2 MJ [Col McCALL]: Why don't you all cross-talk real fast and  
3 see if you think it's going to be ----

4 LDC [MR. CONNELL]: Yeah, okay.

5 MJ [Col McCALL]: ---- pretty quick. Because yeah, that was  
6 my thought. I actually haven't had to do a 505(h) hearing.

7 **[Counsel conferred.]**

8 MJ [Col McCALL]: Mr. Connell.

9 LDC [MR. CONNELL]: Your Honor, here's the update. The  
10 parties -- so there were really two things that were proposed for  
11 505(h). There was 779P and associated. And the parties have agreed  
12 that a solution may be coming down the track on that one that will  
13 make 505(h) unnecessary, so we're happy to postpone that.

14 With respect to 828, I think it would be advantageous to the  
15 government's inquiry into left and right limits if they could sharpen  
16 the question, which we can do in a 505(h) hearing.

17 MJ [Col McCALL]: Okay.

18 LDC [MR. CONNELL]: I think that 505(h) hearing in total would  
19 take half an hour or less.

20 MJ [Col McCALL]: Okay.

21 LDC [MR. CONNELL]: But we know there's a lot of issues of  
22 movement and other things around a 505(h).

23 I believe the united position of the parties is we would

1 prefer to do that today so that they could -- if they have homework  
2 from it, they could do that out.

3 MJ [Col McCALL]: Yeah, let's go ahead and do that then. So  
4 we will go ahead and take a lengthier recess. I'm going to make it  
5 an open-ended recess to give the stenos a chance to get set up. And  
6 once they're ready we'll come back in and proceed with the 505(h)  
7 hearing on 828.

8 LDC [MR. CONNELL]: Yes, sir. I just want to -- I understand  
9 that defendants will be moving in that situation, is that ----

10 MJ [Col McCALL]: That's correct.

11 LDC [MR. CONNELL]: Yes. Thank you.

12 Your Honor, in this mix, the government and Mr. al Baluchi  
13 are ready to argue the presence at the closed hearing issue.

14 MJ [Col McCALL]: Okay.

15 LDC [MR. CONNELL]: I know that Mr. Mohammad also has a  
16 position on that. I don't know what their position is. But I'd  
17 throw that out there in the mix.

18 MJ [Col McCALL]: All right. Well, yeah. I think that would  
19 be useful to take up.

20 Mr. Nevin?

21 CDC [MR. NEVIN]: Your Honor, on behalf of Mr. Mohammad, we'd  
22 like to see the government's pleading and have a chance to absorb it  
23 a little bit before we get put on the spot to respond.

1 MJ [Col McCALL]: And here's the thing, as I kind of thought  
2 it over during the lunch break. I mean Pellegrino is going to be  
3 starting in an 803, right? So it's going to be open session. So I  
4 mean, we really have time on -- I mean, without having the docket  
5 order in front of me and I guess what the government had put out as  
6 far as what they anticipated, the length of the testimony, how long  
7 are we looking before we're moving into an 806?

8 MTC [MR. TRIVETT]: I believe we noted two to three days  
9 total, with a significant portion of the first day being our  
10 examination, all of which will be unclassified. And then that will  
11 follow for defense cross-examination for the unclassified open  
12 session. So at some point, however long that takes, I would presume  
13 we wouldn't be into closed before Tuesday or Wednesday.

14 MJ [Col McCALL]: Yeah. And so with that being the case, I  
15 think -- I mean, because we're really just talking about having the  
16 accused present during the closed session. And I think I always  
17 benefit from getting the actual briefings from counsel. That kind of  
18 shows me what's actually in conflict and not and then gives me a  
19 chance to think about it a little bit. So let's do that.

20 We'll finish out the briefing cycle, the expedited briefing  
21 cycle. We'll plan on hearing that on Monday. At some point we'll  
22 just take a break from Agent Pellegrino, but we'll start with the  
23 open unclass testimony.

1           And then also just on -- while I'm talking to Team Mohammad,  
2   so probably as we sit here, maybe even, who knows, when we take a  
3   break, I'll find out that that ruling on your motion -- they were  
4   QC'ing it to put it out when we came down after the lunch break, so  
5   it should be in people's inboxes by the time we leave here is my  
6   guess.

7           LDC [MR. SOWARDS]: And I know we're in suspense as to the  
8   outcome, but I was going to ask also, Your Honor, as to the 505(h)  
9   you mentioned. Did you anticipate that would occupy the rest of the  
10  afternoon or ----

11          MJ [Col McCALL]: It will.

12          LDC [MR. SOWARDS]: ---- is this ----

13          MJ [Col McCALL]: I see that -- I don't think it would make  
14  sense to go into a closed session and we send the accused out and the  
15  public and then try to reopen.

16          And so I see it being the -- we -- if we end a little bit  
17  early, we end a little bit early. It's been -- everyone has been  
18  working hard this week. It will give you a chance to get started on  
19  your prep for next week.

20          And we'll also have probably an 802 just to discuss what we  
21  plan on getting into next week, in addition to Pellegrino and  
22  this -- I'll call it a 630 series even though it's -- I know it's  
23  been put under different AE numbers.

1 LDC [MR. SOWARDS]: Thank you, Your Honor. I appreciate it.

2 MJ [Col McCALL]: All right. So we'll recess. When we come  
3 back in, we will be in a closed session so the public won't be here,  
4 and the accused will not be here either.

5 LDC [MR. SOWARDS]: Okay. And then before they're removed,  
6 may we have a few moments with them?

7 MJ [Col McCALL]: Sure. I mean, like I said, I see this being  
8 at least 30 minutes, minimum, to get the stenos set up. So until,  
9 you know, that time, please go ahead and please confer with your  
10 clients.

11 LDC [MR. SOWARDS]: Thank you, Your Honor.

12 MJ [Col McCALL]: Court's in recess.

13 **[The R.M.C. 803 session recessed at 1445, 22 September 2023.]**

14 **[END OF PAGE]**