

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0903, 4 March 2024.]

2 MJ [Col McCALL]: The commission is called to order.

3 Good morning, Mr. Trivett. Can you please identify who's
4 here on behalf of the prosecution, both here in the courtroom and at
5 the Remote Hearing Room.

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

7 Representing the United States today in the courtroom in
8 Guantanamo Bay is myself, Mr. Clay Trivett; Lieutenant Commander
9 Robert Baxter; Colonel Joshua Bearden; Mr. Christopher Dykstra. Also
10 present are paralegals Karissa Grippando and Rudolph Gibbs.

11 From the FBI, we have Supervisory Special Agent Joseph
12 Hokanson, Staff Operations Specialist Kiana Ray, OGC Attorney
13 Katherine Eisenreich, and Unit Chief Geoffrey Will.

14 In the Remote Hearing Room representing the United States,
15 Mr. Jeffrey Groharing, Major Neville Dastoor, and paralegal present
16 is Staff Sergeant Samantha Resendiz.

17 Your Honor, these proceedings are being broadcast via CCTV
18 sites in the continental United States pursuant to the commission's
19 orders.

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

21 Good morning, Mr. Sowards.

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

23 Appearing on behalf of Mr. Mohammad, who is not present in

1 the courtroom, Gary Sowards; Kathleen Potter, Lieutenant Colonel,
2 United States Air Force; William Xu, Lieutenant, United States Navy;
3 and Denise LeBoeuf. We're also joined in the courtroom by Michael
4 Leahy, Captain, United States Air Force. And we will be momentarily
5 joined by Elspeth Theis, Major, United States Air Force.

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

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

8 MJ [Col McCALL]: Good morning, Mr. Montross.

9 DC [MR. MONTROSS]: Good morning, Your Honor.

10 On behalf of Mr. Bin'Attash, who is not present, William
11 Montross, Captain Marian Messing, Lieutenant Austin Ridgeway.

12 In the RHR, Learned Counsel Matthew Engle, Ms. Tasnim
13 Motala, and Mr. Joseph Bond.

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

15 Good morning, Mr. Connell.

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

17 On behalf of Mr. al Baluchi are myself, James Connell; Major
18 Daniel Kim; and Lieutenant Corey Krzan.

19 From the Remote Hearing Room representing Mr. al Baluchi are
20 Alka Pradhan, Rita Radostitz, and Lieutenant -- excuse me, and that's
21 it. Lieutenant Jennifer Joseph is also present but is not detailed.

22 MJ [Col McCALL]: Okay. Got it.

23 Good morning, Mr. Ruiz.

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

2 I'm here on behalf of Mr. Al Hawsawi with Ms. Suzanne
3 Lachelier, Captain Patrick Tipton, Captain Kerry Mawn, and Mr. Sean
4 Gleason.

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

6 I note that none of the four accused are not present this
7 morning. Trial Counsel, do you have a witness to account for these
8 absences?

9 DMTC [MR. DYKSTRA]: Yes, Your Honor.

10 MJ [Col McCALL]: Go ahead, Mr. Dykstra.

11 **[Counsel conferred.]**

12 DMTC [MR. DYKSTRA]: I wanted to get the perspective of
13 Mr. Ruiz and Mr. Connell.

14 MJ [Col McCALL]: All right. It's good to change that up
15 sometimes.

16 DMTC [MR. DYKSTRA]: Yes, Your Honor.

17 **CAPTAIN, U.S. Army, was called as a witness for the prosecution, was**
18 **previously sworn, and testified as follows:**

19 **DIRECT EXAMINATION**

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

21 Q. Captain, you previously testified during these
22 proceedings, correct?

23 A. Yes, I did, sir.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. And what is your pseudonym?

2 A. Pepé.

3 Q. Thank you.

4 A. You're welcome.

5 Q. Now, I'll just remind you that you remain under oath. Did

6 you have the opportunity to advise the accused of their rights to be

7 present this morning?

8 A. Yes, I did, sir.

9 Q. And what form did you do so?

10 A. It's a form called Statement of Understanding, Right to be

11 Present at Commission Proceedings.

12 DMTC [MR. DYKSTRA]: Your Honor, if I may I approach the

13 witness, I'm going to hand him what has been marked -- previously

14 marked as Appellate Exhibit 932GG (KSM), 932HH (WBA), 932II (AAA),

15 and 932JJ (MAH).

16 MJ [Col McCALL]: Go ahead.

17 A. Thank you, sir.

18 Q. Now, are these the forms that you used to advise the

19 accused of their rights to be present this morning?

20 A. Yes, they are, sir.

21 Q. And approximately what time did you do so this morning?

22 A. They were all done between 0650 and 0705 this morning.

23 Q. And in what language did you do so?

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. I read it in English. There was an Arabic interpreter
2 next to me in case there were any questions and an Arabic translation
3 was available.

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

5 A. All four individuals stated that they will not be
6 attending commission proceedings today.

7 Q. And are some of attending attorney-client meetings
8 instead?

9 A. Yes, they are, sir.

10 Q. All right. Did you have any concerns about the
11 voluntariness of these waivers this morning?

12 A. I had no concerns, sir.

13 DMTC [MR. DYKSTRA]: Your Honor, no further questions.

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

15 DMTC [MR. DYKSTRA]: And, Your Honor, just for purposes of the
16 record, I request permission to excuse myself this week generally,
17 so.

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

19 DMTC [MR. DYKSTRA]: Thank you.

20 MJ [Col McCALL]: All right. Do any defense counsel have
21 questions of this witness?

22 Apparently not.

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

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 WIT: Thank you, Your Honor.

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

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

6 All right. Some administrative matters. So as we've been
7 doing the past three weeks, I intend to follow pretty much the same
8 hours where we'll start at 0900, take a lunch/prayer break from noon
9 until 1330, and then generally try to end the evening before 1800.

10 On days where we have accused present, we'll try to take an
11 additional prayer break sometime around 1530. I assume that works
12 for the parties if accused are present?

13 All right. So last week we finished up the unclassified and
14 classified testimony of both Dr. James Mitchell and Special Agent
15 Hodgson.

16 Prior to recessing for the weekend we conducted a very brief
17 R.M.C. 802 conference where we discussed scheduling issues, we
18 discussed the sequencing of Supervisory Intelligence Analyst Waltz's
19 testimony this week, and the commission's intent to nail down the
20 witnesses for the April/May hearing session and the potential for
21 continuing oral argument on AE 809 during any open periods.

22 Anything to add or amend to that summary of that 802?

23 Apparently not.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 All right. So I would like to go ahead and start off with
2 talking about the witnesses -- go ahead, Mr. Sowards.

3 LDC [MR. SOWARDS]: Yes, thank you, Your Honor.

4 Just for the record, we wanted to acknowledge that Major
5 Theis has joined us.

6 MJ [Col McCALL]: Okay.

7 LDC [MR. SOWARDS]: And also, we had just one additional
8 administrative matter to put on the record if we may.

9 MJ [Col McCALL]: Okay. Go ahead.

10 Good morning, Ms. LeBoeuf.

11 CDC [MS. LeBOEUF]: Good morning, Your Honor.

12 Your Honor, I want to take a few minutes, a very few minutes
13 to put on the record the continuing problems with transporting and
14 communicating with our client specifically. I think I speak for some
15 of the other clients as well, but they have counsel and they can do
16 that.

17 But I can tell you that this -- as the commission is aware,
18 the repeated problems with almost every aspect of transport,
19 meetings, locations of meetings, number of people present in the
20 meetings, whether we're allowed to use the courtroom or the larger
21 meeting room or the container or the -- have them at Echo II, almost
22 every aspect of almost every attorney-client meeting at this session
23 has been disrupted or there's been a change. Not only a change from

1 what we've done in the past, but a change from what we did yesterday
2 in this session.

3 Your Honor has put on the record four times so far this
4 session that we get thrash, I believe, was Your Honor's word, when
5 there's a guard changeover. Excuse me. This is well beyond that
6 level. This is not the normal "things always change here." This is
7 a level of upset and uproar from conditions at the camp and the
8 transportation and meeting problems that is unprecedented in my
9 experience, which goes back to 2008 with these commissions.

10 So the seemingly minor changes, on Monday you could meet
11 here with so many people; on Wednesday, that's not the SOP, which is
12 the refrain whenever you ask one of the guards -- and this is not
13 about any individual persons. I'm not imputing bad will to the
14 individuals I've had to deal with, but it's the Wizard of Oz here.
15 It's all the man behind the curtain.

16 I've been representing death-threatened or death-sentenced
17 individuals for decades. They're always in custody. I always have
18 lawyers to deal with who work for the custodial institution, and I
19 always have custodial authorities to deal with from the transport
20 guards to the warden or the chief of the custodial institution. And
21 I can deal with them because I'm a lawyer; I can pick up the phone
22 and talk to them. We don't have to be friends. We don't have to
23 agree, but we have a solution-based way forward.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And that's what I'm asking the military judge to think about
2 here, that we can write up a list of solution-based, you know,
3 procedures that you have authority over and you can be explicit in
4 putting them on the record. That would include we can have use of
5 the courtroom and use of the containers and use of the larger holding
6 facility and use of spaces that you control that they're not
7 shackled, that we can use them on the weekend, that we can have more
8 people visiting in the larger facility, which is -- was made larger
9 so more team members could come. And that's at counsel's discretion
10 if that seems like a good thing to do.

11 And that's where all of this from -- you know, you've heard
12 of a hunger strike at the camp. You've heard -- you've seen no
13 clients have attended other than the mandatory few minutes that they
14 came the very first Monday. It's because of this level of uproar and
15 dysfunction.

16 And I can represent to you there were days in the past where
17 I used to be able to call the SJA lawyer to lawyer. Used to be able
18 to go to his office or her office, knock on the door or call and say
19 "can we get a meeting" and we straighten things out.

20 The system can't be what happened yesterday, which is that
21 Mr. Sowards and I waylaid your staff and the prosecution on the way
22 to their meeting with you. That's not useful. I mean, I have to say
23 that your staff, in particular Mr. Lavender, was extremely helpful

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and very solution based. All we want is a solution going forward.
2 That's what we want so that we can say to our clients that the
3 expectation you have that you can meet in a place where you think you
4 can meet with the team members you think will be there and that that
5 communication can be relied upon from your clients is not dislocated.

6 Because we've heard about dislocated expectations quite a
7 bit in here. And we know what happens to tortured people when their
8 expectations are, once again, dislocated; when they are, once again,
9 thrown back into the atmosphere of controlled chaos that was the goal
10 when this -- when this facility was set up. And the control is on
11 somebody else's hands.

12 And that -- Your Honor, as recently as December of last
13 year, quoted the 2017 from -- I think it's from -- the original is
14 from AE 018T, but you stay out of the business of the general running
15 of the camp. But it is, respectfully, your business to ensure legal
16 protections for the accused. And you have to intervene if the daily
17 operation adversely impacts the ability of the commission to protect
18 those legal interests.

19 There's a Sixth Amendment right at stake here, and a due
20 process right for a fair trial. The way to do it is AE 364 -- what
21 is that years ago? 2015, 2016? -- was withdrawn as moot. AE 364E
22 was withdrawn as moot because it was about the ability to have
23 culturally traditional meals for prisoners, and we withdrew it

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because we worked something out.

2 All those past arrangements that have been worked out have
3 gone by the wayside this time around. And it's -- I don't know what
4 else to do but to say I'm grateful for the prosecution's help.
5 Mr. Dykstra, in particular, is available and we've worked through
6 some of this stuff with them. But, again, waylaying them in the
7 parking lot or constantly moving the prosecution to do what
8 isn't -- they don't control this either.

9 I appreciate the help from the people who have helped, but I
10 think this problem needs to be on the record.

11 MJ [Col McCALL]: All right. I appreciate that.

12 Mr. Dykstra?

13 And while you're coming up to the podium, kind of
14 formulating your thoughts, so here's my initial thought. And, again,
15 this is something -- I appreciate that the parties, that there is
16 some dialogue going on. I'm understanding that -- I do hear from my
17 staff some of these issues and how it's being worked.

18 My thought would be to maybe have a little bit more of a
19 formula -- a formal process as far as -- as I mentioned before on the
20 record, every time when we come down there's sometimes new guard
21 force, there might be changes at the JTF, changes here in our
22 facility.

23 So just as when at the height of COVID we were getting COVID

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 guidelines as we -- before we -- like, the week before we came down
2 saying here's how COVID is being treated at GTMO, maybe we need
3 something for the logistics that we can put forward, like, our
4 expectations for the commission as far as stuff I typically say on
5 the record that first week.

6 You know, if we're after sessions or in between sessions,
7 I'm fine with the defense counsel using the courtroom to meet with
8 the clients, I'm fine with them meeting in the holding cells. But
9 maybe have something like that more formalized so that we can make
10 sure that we and the JTF are on the same page.

11 Again, I'm trying not to overstep my authority, but I'm
12 also -- I mean, this is eating up time every day. And I think it
13 would just make it a little bit easier for everyone. So that's my
14 initial thought.

15 But, I mean, what is the government's position? I know that
16 you've been working behind the scenes on a lot of this.

17 DMTC [MR. DYKSTRA]: Yes, sir. And I have been working a lot.
18 I devote a significant amount of my time working these issues, and
19 I'm happy to do so.

20 I have been accused by some to be over-accommodating rather
21 than under-accommodating. So I just want to let you know that the
22 prosecution really views it as important to enable the defense to
23 meet with their clients in a fashion that balances the force

1 protection concerns with their need to discuss whatever legal issues
2 are at play.

3 Now, a lot of the, quote/unquote, thrash that has occurred
4 over the last two, three weeks that Ms. LeBoeuf was mentioning is, A,
5 working through -- there have been some issues, admittedly, that
6 we've been working through. Food was one that we have been working
7 through. But some of this comes down to just following the SOPs,
8 ensuring that stuff like asking -- if they want more people in a
9 meeting, a special request form is submitted. Or if they want to
10 meet over here, a special request form is submitted.

11 Speaking with JTF, they're happy to accommodate whatever the
12 defense want as long as they can support it. But a lot of times
13 these issues pop up at the last minute; that they don't have notice
14 of, hey, we want 12 people in this meeting or, hey, we want to meet
15 over at [REDACTED] A lot of this comes down to the night before a
16 decision is made that they want to come over here.

17 Now, admittedly, as Ms. LeBoeuf has admitted to me, that
18 their client doesn't always know until the last minute, but that puts
19 JTF in a very difficult position, not only arranging logistics but
20 also ensuring all the SOPs are followed. Now, the military works off
21 of SOPs. I mean, that's bottom line.

22 And so what has happened and what Ms. LeBoeuf is probably
23 chafing against is a lot -- there have been a lot of exceptions to

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the SOPs over the years. And a lot of that has not been documented
2 and so forth.

3 So right now they're trying to follow the SOPs that are
4 written. And if there's a special request form, they're not going to
5 require a huge justification here. They're not going to require,
6 hey, spell out what you need to discuss in this meeting or otherwise.
7 They just want to have the proper paperwork form.

8 And even -- paperwork bureaucracy is a pain in the butt
9 sometimes. But it's also necessary to ensure that everyone has the
10 correct message, everyone knows who's going where and stuff like
11 that. It's not a -- it's a logistically complex mission that JTF
12 has, and so all that they request is that the SOPs are followed.

13 Now, that being said, it's on them also to inform the
14 defense counsel of what the expectations are. And so I'm working
15 with them to ensure that is the case going forward, if that has not
16 already been done previously. And I'm not conceding that it has not
17 been done previously.

18 MJ [Col McCALL]: Sure.

19 DMTC [MR. DYKSTRA]: But I don't think it's something where we
20 need to -- because it's -- what they're getting into is meetings at
21 the Echo II and all this other stuff. Basically, what that is is all
22 the SOPs. And so I'd rather have the commission devote its time to
23 the issues in front of it rather than the -- basically becoming the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 runner of the jail.

2 And so all that I'd ask of the commission is some latitude
3 to work with JTF to make sure that defense counsel have -- know
4 exactly what's required of them going forward, whether that's, hey,
5 they need to submit a special request if they have additional people,
6 or if they want to -- food going back to the camp or whatever like
7 that.

8 I know JTF and the commander of the JTF is willing to
9 consider anything and everything submitting on those special
10 requests, but I don't think it's something where the commission needs
11 to get involved with in the day-to-day operations. And that's
12 basically what defense are requesting here, is you get into the
13 day-to-day operations of the camp.

14 And so subject to your questions, that's all I have
15 regarding this issue, Your Honor.

16 MJ [Col McCALL]: All right. And, again, I'll continue to
17 think about this. I have some ideas on -- just ways of getting
18 everybody on the same page. And, again, I don't want to overreach my
19 authority or -- I have enough on my plate.

20 So -- but no questions. Thank you, Mr. Dykstra.

21 Mr. Connell?

22 DMTC [MR. DYKSTRA]: And I'll just keep on putting out there,
23 and Ms. LeBoeuf has mentioned it, I -- I'm willing to intercede on

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anything involved.

2 MJ [Col McCALL]: I appreciate that, but I think maybe we're
3 at the point where perhaps it would be useful, just as we used to
4 have the logistics brief from the prosecution, maybe it would be good
5 to have a JTF type of brief at some point, like, early in a session
6 or at the end of -- to -- for defense to ask their questions on how
7 things -- if we want to do this or this, how are we supposed to
8 handle it? How are we supposed to -- who are we supposed to call
9 and -- to help improve that communication.

10 Again, I'd rather not eat up commission time with it, but
11 it's something I'm toying with.

12 DMTC [MR. DYKSTRA]: Well, let me offer this. I believe, at
13 least I was told this morning, that there is some sort of document
14 that defense counsel are provided with respect to expectations and
15 how attorney-client meetings are supposed to occur and what's
16 required.

17 Let me source that document. If I can source it, I'd like
18 to file it with the commission and maybe that will answer many, if
19 not most, of your questions.

20 MJ [Col McCALL]: Okay. That would be terrific.

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

22 MJ [Col McCALL]: Thanks.

23 Mr. Connell.

1 LDC [MR. CONNELL]: Sir, may I contribute briefly to that
2 discussion?

3 MJ [Col McCALL]: Please.

4 LDC [MR. CONNELL]: It occurs to me that there are really two
5 different problems, one of which is very much under your area and one
6 of which less so.

7 Mr. al Baluchi has not been coming to court because of the
8 new security issues at the jail which were put in place for a reason
9 that had nothing to do with the men who were there at Camp V. I
10 understand if the judge -- if Your Honor says, well, you know, that's
11 really running of the jail, that's not about me. But the running of
12 this space and the immediately adjacent space very much is
13 your -- within your cognizance.

14 And I'd like to just give you one example from my own
15 experience that I think illustrates this. When we came down for this
16 hearing, we did not know whether [REDACTED] was going to be made
17 available for the defendants or not. We had received conflicting
18 information about that. It has been -- in the recent past, it has
19 been both ways.

20 The -- so what we did is we sent in a special request, as
21 counsel suggested, and we just asked for [REDACTED] for the first two
22 weeks of the hearing. It was really a trial balloon. It wasn't that
23 we wanted to hog the [REDACTED] we didn't even expect Mr. al Baluchi to

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 come every day. We just didn't know what the rule was and so we sent
2 the special request to find out, you know, what JTF's position was.
3 Because we can't have an ordinary dialogue of, hey, when is [REDACTED]
4 available, in part because JTF doesn't control [REDACTED], right? It
5 belongs to another organization. The -- so they have to check with
6 somebody else. I get the complexity of that.

7 But what that meant was that we were technically -- we
8 technically had reservations [REDACTED] for the first two weeks, and
9 so that did create problems. And I was kind of the author of them,
10 where other teams would want to use it because Mr. al Baluchi wasn't
11 going to be using it and they would come to me and I'm like, well,
12 it's not really mine to reassign. It belongs to JTF, who is in
13 custody of it for some other agency, and -- you know, it was a mess.
14 And I was part of the problem in that mess.

15 But the mess came from the fact that there weren't clearly
16 articulated rules. If the rule was you can -- if, you know, it's
17 first come/first served [REDACTED] for this period of time, or
18 defense should establish a rotation, which is what we did for the
19 previous two years.

20 Now, that was when the government was involved in sort of
21 the reservation-making, if you will, and Mr. Dykstra did an awful lot
22 of work around that, for which I'm grateful, but in July of '23 they
23 declined to be further involved in that and it went back to JTF.

1 And so I hope you can see that it is, in part, the lack of
2 clear expectations and understanding of rules that generates what on
3 my -- could be seen as opportunistic behavior -- right? -- because it
4 wasn't really that I wanted the [REDACTED] for two weeks but I didn't
5 know how else to find out when it was available.

6 So if we had more clear rules for things that -- in the
7 category that does fall within the military commission's ambit, I
8 think it would be very valuable.

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

10 LDC [MR. CONNELL]: I have one unrelated matter if we're ready
11 to move on.

12 MJ [Col McCALL]: It sounds like Ms. LeBoeuf wants to be
13 heard.

14 CDC [MS. LeBOEUF]: Yes, very briefly. But just, again,
15 praise all around for the help with the larger holding facility and
16 for Mr. Lavender and Mr. Dykstra's help. But I very much like the
17 suggestion, and I will show up for a JTF briefing at the start of
18 every session.

19 But the acknowledgment -- I mean, if you look at each
20 individual small problem, there are sides to it and ways to work it
21 out and that sort of thing.

22 The result to the defendants in a capital case is that what
23 was a reasonable expectation on Monday is dislocated on Tuesday. And

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that is implicit in what Mr. Dykstra said, which is that there were
2 exceptions to the SOPs that were the practice. So we came to rely on
3 the practice. We have no way of knowing that there are exceptions to
4 the SOPs. We don't get to see the SOPs. We've asked for them.

5 So it's not a matter of, you know, counsel for the
6 defendants having a written list. We now have a written e-mail from
7 JTF about LSS going forward with the larger holding facility, et
8 cetera. We'll, of course, comply with it.

9 But it's not -- I want to correct the record, the notion
10 that we have a sheaf of SOPs that we can leaf through and make sure
11 we're dotting our I's and crossing our T's. We don't get to know
12 until we're standing there with somebody saying what you did on
13 Monday, you can't do on Wednesday. It's SOP.

14 MJ [Col McCALL]: Understood.

15 DMTC [MR. DYKSTRA]: Your Honor, just for the -- to correct
16 the record, the defense counsel do have the 2021 legal meeting SOP.
17 I'm happy to provide them the Bates number that we provided to them.

18 MJ [Col McCALL]: Okay. Thank you.

19 All right. Mr. Connell, you had another issue?

20 LDC [MR. CONNELL]: Yes, sir. Though I don't want to jump my
21 turn. If you want to talk about scheduling witnesses first, that's
22 fine.

23 MJ [Col McCALL]: Yeah, let's go ahead and discuss the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 witnesses.

2 So I know from the 802, it sounded like the parties were
3 pretty close to solidifying the lineup. If -- I'm not sure who
4 wanted to speak, whether Mr. Trivett, Mr. Connell?

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

6 MJ [Col McCALL]: Go ahead, Mr. Trivett.

7 MTC [MR. TRIVETT]: All right. So this isn't an on-the-fly
8 motion for an extension of our suppression responses but it's sort of
9 related to it. So understanding that your suppression deadlines were
10 seemingly predicated on the departure date -- your anticipated
11 departure date in June of 2024 and your pending extension of six
12 months to December 2024, we're going to be asking for an extension of
13 our response, some of which then impacts the ordering of the
14 witnesses.

15 So I'll explain -- I wanted to give you that up front so we
16 can explain sort of where we're at with the witnesses.

17 MJ [Col McCALL]: Okay.

18 MTC [MR. TRIVETT]: So there are certain witnesses that aren't
19 impacted by that ----

20 MJ [Col McCALL]: Sure.

21 MTC [MR. TRIVETT]: ---- and those are the ones that we tried
22 to ensure that they were available for and then carve out.

23 So for the first week of the April 2024 hearings, we're

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 recommending that Mr. Evan Kohlmann testify from the 16th through the
2 19th. That leaves that Monday off, the 15th, just in the event that
3 Ms. Waltz's testimony is not finished this week, we at least have
4 another day that we can build in there. So we're proposing
5 Mr. Kohlmann. He's available and willing and able to testify during
6 that first week.

7 The second week we would reserve for Special Agent Gaudin
8 from the -- I want to make sure I have these dates right -- 22nd
9 through the 26th. We anticipate that will probably be all five days.

10 MJ [Col McCALL]: All right.

11 MTC [MR. TRIVETT]: And then the next week we propose
12 Mr. Aaron Zebley from the RHR on the 29th and 30th.

13 And I should have noted, Mr. Kohlmann would likely be
14 testifying from the RHR. That's not completely solidified but it's
15 certainly easier and gives us more flexibility.

16 Special Agent Gaudin would be here at Naval Station
17 Guantanamo Bay. Mr. Zebley on the 29th and 30th would be from the
18 RHR.

19 MJ [Col McCALL]: All right.

20 MTC [MR. TRIVETT]: So starting in -- so for the remainder of
21 that week, we do not have a witness that was available that didn't
22 get impacted by our pending motion for extension.

23 But the following week, May 6th through the 10th, we

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anticipate Dr. Morgan, one of the defense counsel's experts, to
2 testify on 6, 7, 8. And then Dr. 1/WK5I testifying from the RHR on
3 the 9th and the 10th.

4 The following week we would have the first camp commander
5 from the 13th through the 15th, so that gives him three days. And
6 that would -- we're not sure yet if that's going to be in the RHR or
7 at Naval Station Guantanamo Bay.

8 MJ [Col McCALL]: All right.

9 MTC [MR. TRIVETT]: We defer to the defense on Dr. Morgan.

10 So certainly we've had a very aggressive timeline over the
11 last couple of months. It was our understanding that it was
12 predicated on you wanted to get through certain issues before you
13 left. This was originally going to be your first -- I believe this
14 was going to be your last session at least initially, and then you
15 last session indicated that you were going to be moved out to the end
16 of the April/May session. And now this session you've indicated that
17 you're going to be at least until December.

18 We may want to voir dire the judge at some point. I'm not
19 ready to do it today, I'm not prepared to do it today, just so we can
20 have a better understanding of what the judge's intent is and what,
21 you know, Your Honor envisions your role to be, whether or not your
22 going to be here for the actual case in chief or not.

23 But this will all be part of voir dire. I just wanted to

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 give you -- as a professional courtesy, let you know we're going to
2 be asking those questions at some point later in the week.

3 MJ [Col McCALL]: Okay.

4 MTC [MR. TRIVETT]: But we've been crushed. The last two
5 months have been a crushing up-tempo that I don't know has ever been,
6 at least from the prosecution's perspective, ever been this high
7 during the last decade of the litigation. Maybe when we were trying
8 to get our September 30th deadline for the 10-category construct,
9 that one stands out in everyone's mind as well.

10 So it's been extremely difficult. We're balancing lots of
11 things. We're moving the witness that's going to testify today up a
12 month and a half and that, you know, required us to reshuffle the
13 decks as far as who is taking what and what can be done.

14 So we don't anticipate actually being able to meet the
15 deadline that you have currently.

16 The prosecution's responses to the three updated suppression
17 motions are due in 10 days and obviously we're working through for
18 the next seven days, or at least the next five days, through the
19 testimony of Ms. Waltz.

20 Our fourth response is due on 6 May and that's during the
21 third week of the five-week session that's coming up.

22 So what we're going to ultimately ask for -- and we'll
23 memorialize this if necessary in writing -- is that we're going to

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ask for an extension until 30 days after the defense teams submit an
2 additional supplement after all the testimony is done. We have, what
3 we believe, sort of a watershed moment in the testimony of
4 Dr. Mitchell in regard to fear extinction that now requires us to
5 prepare our expert witness and get him educated on this concept of
6 fear extinction. Much of the defense's entire theory of suppression
7 relies on a concept that they were so scared from what happened in
8 the RDI program that they couldn't help but cooperate when the FBI
9 walked in many years later.

10 So that's an important part of the litigation. We had not
11 anticipated that. That's going to require some additional time for
12 us to prepare.

13 And it's very difficult sort of doing this because we're
14 trying to update where we are in the suppression motion responses,
15 and understanding that the defense already had to do this, and I
16 understand that they had a busy up-tempo as well, so I'm not trying
17 to say that this is all on the prosecution.

18 But it's very difficult to really get your full argument in
19 and all of the facts in while we're still running with the witnesses
20 that we do believe are still relevant to suppression. And not just
21 as to each individual, but there are several people, including
22 Ms. Waltz, whose testimony we believe impacts all four of the accused
23 in this case.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So, if necessary, we'll certainly file a written response,
2 allow the defense to answer. But we are going to be asking for our
3 response to follow 30 days after the -- when we all agree is the last
4 agreed-upon witness, which we believe the last agreed-upon witnesses
5 will testify in the July/August 2024 session. So it would be
6 sometime in September or October that we would anticipate getting our
7 final position in, and then going from there with whatever additional
8 litigation the military judge feels is necessary.

9 So that's where we're at, sir. That's where the witnesses
10 are available and that's why there's a little bit of white space in
11 there ----

12 MJ [Col McCALL]: Okay.

13 MTC [MR. TRIVETT]: ---- because especially as to Drs. Jessen,
14 who's still having ongoing health issues, we're in constant contact
15 with his attorney who happens to be the same attorney as
16 Dr. Mitchell's attorney, Mr. Paszamant. It's a serious
17 health-related issue. We can file it under seal if necessary, but we
18 don't believe he's going to be available in April/May. And it would
19 always be our preference that our expert witness wrap it all up at
20 the end, Dr. Welner, from a psychological standpoint.

21 We believe that the psychology of this is really the most
22 important fact and the most contentious issue being fought over. I
23 think that the facts of a lot of our witnesses and the agents who

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have testified during the LHM are far less in contention.

2 I won't speak for the defense on that, but we think that
3 that's the most important issue, that that's probably the dispositive
4 issue now on determining whether or not these statements are
5 voluntary. We have the burden on it. And as our burden, we would
6 like Dr. Welner to be able to testify after all of at least the
7 agreed-upon witnesses are done so we can wrap it up and have him
8 testify about the psychological impacts of the RDI program from a
9 government expert perspective, right?

10 Dr. Mitchell was a defense expert. They solicited the
11 opinion. They got the opinion. Now we want to make sure that our
12 expert has an opportunity to look at it and determine on his own
13 whether or not he agrees with that science.

14 So ----

15 MJ [Col McCALL]: All right.

16 MTC [MR. TRIVETT]: ---- that's where we're at, sir.

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

18 So I'm just looking through my list of witnesses that are
19 still outstanding as well.

20 So it looks like there is still Agent Soufan, right?

21 Dr. Jessen. Is -- Special Agent Graziano, is he still one that the
22 parties are looking at? No?

23 MTC [MR. TRIVETT]: I don't think he's necessary in light of

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Special Agent Hodgson's testimony on the Camp VII recording chain of
2 custody.

3 MJ [Col McCALL]: So which other witnesses are still -- the
4 parties are in agreement on? I know that there's a long list of ones
5 that are in dispute that were -- we pushed to the -- after we hear
6 from the other witnesses first.

7 MTC [MR. TRIVETT]: If I can have a second to consult with
8 Mr. Dykstra?

9 MJ [Col McCALL]: Sure.

10 LDC [MR. CONNELL]: I can also address that, Your Honor.

11 MJ [Col McCALL]: All right. Yeah. And if you need to
12 crosstalk, like Lieutenant Commander Hanrahan? I'm not sure ----

13 LDC [MR. CONNELL]: Yes, we've been talking about this. I can
14 tell you about it.

15 MJ [Col McCALL]: All right.

16 MTC [MR. TRIVETT]: So that's the only other witness, I guess,
17 is Dr. Hanrahan.

18 MJ [Col McCALL]: Okay, got it.

19 And then I'm fine to be voir dired whenever the parties wish
20 to question me. Just before -- you can have a seat, Mr. Connell.
21 Just to address the issue a little bit now.

22 I don't have a goal necessarily as far as -- I think I
23 mentioned it multiple times in the fall, that I wanted to, at the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 very least, see how well we could posture the case for the next
2 judge. With just the complexity of this case, the number of years
3 that have gone on, the more that we could do to get the witnesses
4 wrapped up and then fresh briefings from the parties to show what was
5 still in dispute I thought would help a new judge rolling in.

6 I'm in the position, again, that nothing has changed since
7 the parties voir dired me on my retirement. I'm still somewhat
8 ambivalent about whether or not I want to work after I retire. I
9 have not applied for any jobs, so that gives me a great deal of
10 flexibility. When I look at the amount of progress that we're
11 making, I am able to adjust fire and extend.

12 I don't know that I could or would do that any further than
13 I have. At a certain point there's reasons that I wanted to retire
14 and those are still out there, as far as just personal reasons. I'll
15 just leave it at that.

16 So I don't imagine I will be the trial judge. I don't think
17 that that is going to work because I don't think that we're that
18 close to trial. But because we're not that close to trial, after
19 having gone for so long, is why we're going to continue at this pace.

20 So I understand that I'm pushing the parties and that we
21 are -- with the motions practice and the witnesses and all the
22 logistical hurdles, it is a lot of work, and I understand that. It's
23 a lot of work for my team as well. But the government decided to do

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this case down here, and -- with this level of complexity, and I
2 understand that.

3 But the answer is, talk to your leadership and get more
4 people on your teams, both for the defense or the government, if need
5 be, because we're going to continue at this pace, at least while I'm
6 the judge. So the 2024 schedule is going to -- we're going to be
7 filling up those weeks.

8 And this summer I intend to put out a 2025 schedule. Again,
9 that's not any type of hinting that I'm going to be the judge for
10 those. I don't think that I will be. But, again, I want to block
11 off the parties' calendars in case the commission -- the chief judge
12 of the commissions is able to detail a new judge that can get up to
13 speed quickly, I want them to have that ability to continue on.

14 So anyway, if what I've said gives you additional questions,
15 please feel free to ask me. You don't have to do it right now, but
16 you can ask me later this week if that ----

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

18 MJ [Col McCALL]: Go ahead.

19 MTC [MR. TRIVETT]: ---- our main concern, sir, is that we're
20 making strategic prosecutorial decisions based on the information
21 that you're providing us as to when you're leaving. And it's
22 primarily based on do we file -- if this case doesn't go to trial in
23 2025, it may never go to trial. I'm being completely honest with

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you, right? Because as the length of time continues to get further
2 and further, witnesses die, memories fade.

3 MJ [Col McCALL]: You're preaching to the choir.

4 MTC [MR. TRIVETT]: Right.

5 So the concern we have is that if we were waiting to file
6 our motion for a trial date for the new judge, because I don't
7 believe you're going to bind any new judge -- if you're not going to
8 be here as the judge who takes the case in chief through trial,
9 you're not going to bind him to a trial date. That's just a pretty
10 reasonable assumption that we're making, right?

11 So now instead of being able to fight hard for a trial
12 date -- and we can make a bunch of strategic decisions if we know
13 that we're in front of the man who's actually going to call this case
14 to trial and say the five magic words we've been waiting for for 12
15 years: "Government, call your first witness." Right? We don't have
16 that. And now we don't have that for nine more months.

17 So -- and the concern is that nine more months happens, new
18 judge comes on, he needs time to get up to speed, and assuming that
19 we don't have a replacement of any other learned counsel, now we're
20 automatically getting pushed out to 2026, right?

21 There's a bunch of strategic decisions we can make if we
22 know that we have the judge in front of us, which includes whether or
23 not we continue to pursue certain evidence that's taking a lot of

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 litigation time, right? So there's motions to pre-admit that if
2 we're able to get decisions on, we can then make that decision as to
3 whether or not to continue to fight for other -- for other evidence,
4 sir, or other witnesses.

5 We can't make any of those decisions because we don't have
6 the person in front of us who's actually going to say those five
7 magic words. And so that's why it's difficult for us strategically
8 to be able to figure out how to move this case to trial, but it is
9 imperative that we move this case to trial.

10 And that was the concern when we had heard now that you're
11 no longer leaving in March, but now there's nine months. That's nine
12 months of dead time for us -- not that we're not going to litigate
13 stuff. We are going to litigate stuff, I understand that, and we'll
14 be ready to litigate whatever the judge wants to litigate, but it's
15 not actually moving us any closer to a trial date. And that's the
16 concern that we have, that we can't make those strategic decisions.
17 We can't decide what we want to go with and what we don't want to go
18 with because we don't have the judge at the end.

19 Now, it's not your fault. I mean, you're in the position
20 you're in. You obviously are entitled to retire whenever you want;
21 you've earned that. But that is some of the frustration that we have
22 right now is that we can't make the decisions we need to make to move
23 this forward and we're getting bound up by, you know, decisions of

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the judiciary as to who's going to stay and preside over the case,
2 so...

3 But I appreciate you taking the time to at least let us know
4 your plans. That will help us formulate, you know, whether or not we
5 want to do any additional voir dire or take any other additional
6 action.

7 MJ [Col McCALL]: Understood.

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

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

10 LDC [MR. CONNELL]: Sir, I would like to echo the government's
11 view about the incredible up-tempo. And I say that, in part, for
12 people who are watching who -- because their constant question is:
13 Why does it take so long? And one thing that people should know is
14 that it's not because everybody involved is not working incredibly
15 hard.

16 The government talked about its January -- December/January
17 up-tempo. You know, our 220-page, extremely dense, court-ordered
18 update to the motion to suppress was due at that time, and so, you
19 know, in some ways it was double the up-tempo because we had to work
20 so hard on that. And I'm not saying that we shouldn't, I'm just
21 saying that's the facts of the situation.

22 Yesterday we had our fifth team member here at Guantanamo
23 have to take a day because they were ill. And that just doesn't

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 happen in -- up north. It's just Guantanamo is a toxic, corrosive
2 environment, and people are away from everything that they know.
3 This is -- this four weeks marks the longest that I have ever been
4 away from home in any case in any situation since I got married 25
5 years ago.

6 So I say this all just to echo the government -- and I hear
7 what you're saying about we're going to keep going, and I'm here for
8 it. I say that as the only person who has ever been to every single
9 day of the military commissions. And I intend that to continue as
10 long as my health allows me.

11 The -- so with all that noticed, I do have one important
12 comment on the government's proposed witnesses. It is true -- I have
13 a couple of comments.

14 The first one is I want to tell you about Dr. Hanrahan. So
15 since he was originally appointed by the military commission -- by
16 the convening authority, rather, he was -- he has left the Navy and
17 has gone into private practice.

18 So I've been in contact with him. He is willing to come and
19 testify. But that means that there's a whole funding situation to be
20 worked out with the convening authority, which we're working to do.
21 So I told Mr. Dykstra in our extensive conversations on this topic
22 that, you know, don't expect him for April/May because we're just not
23 going to be -- the convening authority doesn't work that fast. The

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 system doesn't work that fast, but we hope to have him in place for
2 the July hearing.

3 The thing that I disagree with the -- really, the only place
4 that I part company with the government is about Dr. Welner.
5 The -- you know, if we were doing this in an ordinary court-martial
6 or an ordinary federal court, the prosecution would put on its
7 witnesses, the defense would put on its witnesses. Now, because of
8 the location and the length of the witnesses and the number of
9 witnesses and other factors, we've been perfectly okay to just go
10 ahead and mix in the defense witnesses.

11 Ordinarily -- you know, the government just made an argument
12 about wanting to draw further on Dr. Mitchell. In an ordinary case,
13 Dr. Mitchell wouldn't even have testified yet because he's a defense
14 witness. And the government also made an argument about wanting
15 Dr. Welner to follow the testimony of Dr. Jessen, who is also
16 Mr. al Baluchi's witness. So I don't think the government is in a
17 very strong position there.

18 But it -- so I would propose that Dr. Welner testify during
19 week three. We only have two days of testimony there. I think that
20 Dr. Welner will take a full week, but Mr. Zebley can slide to -- you
21 know, is a lower-priority witness, as articulated to the government,
22 can slide to somewhere else.

23 That would mean, Your Honor, that if Dr. Welner testified

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 during week three, then in the April/May hearings, we would complete
2 the government's case in chief. We would -- their last
3 witness -- because they adopted the first Camp VII commander as their
4 witness, that would be their last witness and we would be done with
5 the government case in chief and we would be on to the defense case.

6 The -- it is an accident and an -- and a windfall to the
7 government to be able to schedule Dr. Welner after Dr. Morgan,
8 because ordinarily Dr. Morgan would be rebutting Dr. Welner, not the
9 other way around, if we did this in the usual pattern of government
10 and defense witnesses.

11 The -- you know, that layers on top of, until very, very
12 recently, Waltz, Kohlmann -- until December, Waltz, Kohlmann, and
13 Welner were not really contemplated to be testifying at all. The
14 government gets to put on its case the way that it wants to, that's
15 fine. But it doesn't mean that it gets to put it on out of order in
16 a strategically advantageous way to take advantage of that.

17 So I agree with the government's proposed witnesses, except
18 I think that Dr. Welner should come and testify during week three so
19 that we can get that out of the way, we can get the government's case
20 in chief done. And then we're on to what is really at this point
21 Mr. al Baluchi's case, defense case. Because I went and checked and
22 there are UFIs and Dr. Soufan **[sic]** have been requested by
23 Mr. Bin'Attash's team, but there's not some other deadline that's

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 been out there for request of other defense witnesses.

2 So right now we're going to hopefully in July do Soufan,
3 Jessen, and Hanrahan, and Zebley, if necessary, all of which are
4 defense witnesses -- Mr. al Baluchi's witnesses. And then we're at
5 the question of how many more witnesses are going to come. And
6 that's will there be UFIs -- I mean, CIA officers who were actually
7 in the room with the torture of Mr. al Baluchi? Are those people
8 going to come testify? Or, you know, is someone like Mr. D'Amuro,
9 who -- the FBI agent who actually knows the little -- what we've
10 heard in little fragments from FBI agents about the FBI's attempts to
11 participate in the RDI program. You know, will we have somebody at
12 that level come and testify and explain what all these fragments that
13 we've heard and -- you know, so at that time we'll be facing that
14 question.

15 But the best place to get to that question and to move, you
16 know, this issue and this case to its next logical stopping point or
17 starting point, depending on how you look at it, the next logical
18 point, is for the government to go ahead and complete its case in
19 chief, which would include Dr. Welner, and it seems like week three
20 would be a very reasonable time for him to testify then.

21 MJ [Col McCALL]: All right. So -- and I'll take it under
22 consideration.

23 Just while you're up and talking about the witnesses, so

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 what other witnesses are you looking at? And, again, I know the many
2 RDI witnesses, the ones that are only identified by a UFI and we
3 probably can't talk about much in this setting but like Dr. Gur? Are
4 you calling him.

5 LDC [MR. CONNELL]: So we're going to rest on -- Dr. Gur has a
6 report. We're going to rest on his report.

7 MJ [Col McCALL]: Dr. Shea?

8 LDC [MR. CONNELL]: Dr. Shea, yes. We'll be calling Dr. Shea.

9 MJ [Col McCALL]: Professor O'Mara.

10 LDC [MR. CONNELL]: I need to check on that one.

11 MJ [Col McCALL]: Okay.

12 LDC [MR. CONNELL]: He has to come from overseas. But some
13 high priority ones would be Dr. Shea, Pasquale D'Amuro -- Pat
14 D'Amuro.

15 And then some of the UFI witnesses are higher priority than
16 others. People like KM4 and NZ7 and B7F and F1G are all high
17 priority witnesses in that.

18 And I'd be happy -- we've been, obviously been looking at
19 this same list that you're looking at with the, okay, who do we
20 really need out of this. The one thing that I do want to follow up,
21 since you are looking at that list, is our last proposal on this,
22 which occurred during COVID, was to break this up into live witnesses
23 that we needed ----

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: I recall.

2 LDC [MR. CONNELL]: ---- people that we could depose and
3 people that we could do interrogatories for. No one's really ever
4 engaged with that proposition. I understand why. I'm not -- I'm
5 not -- but it means that we need to update our position because if
6 nobody's interested in -- if there is no interest in interrogatories,
7 there's no interest in depositions, then we just need to put -- we
8 need to go through the list, figure out who needs to move into the
9 live witness category.

10 Obviously, we've been investigating for several years since
11 then. We have a few new people that we want to put in that mix. So
12 we're perfectly willing to update that list and intended to do so
13 before July, because we know we'll be arguing it in July. So we're
14 happy to proceed in whatever way you want to do that, Your Honor.

15 MJ [Col McCALL]: All right. And -- all right. So this
16 question, then, is more for the government. So -- anything else,
17 Mr. Connell ----

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

19 MJ [Col McCALL]: ---- before I turn back to them?

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

21 MJ [Col McCALL]: All right. So, again, understanding how
22 much is on the parties' plates, I think we're getting to the point
23 where we need to start planning further out rather than, like, say in

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this one, even this is a little more advanced than what we've done in
2 the past just because we had more time in between sessions.

3 So has the government tracked down some of these UFI
4 witnesses? And the reason I raise it is because I know when we all
5 of a sudden had an opening this session and I asked the parties, hey,
6 do you have any witnesses you want to try to plug in,
7 Mr. Bin'Attash's team had -- I believe it was, had mentioned a
8 UFI-identified witness but it sounded like this person has not been
9 located.

10 You're aware of that list that Mr. Connell had put out of
11 some of the witnesses that are -- I know the government is disputing
12 whether or not they need to be called, but are those
13 witnesses -- like, do you have good contact info for them if we start
14 looking to try to line them up at some point later in the year?

15 MTC [MR. TRIVETT]: So we certainly have had work done on
16 identifying the folks that had been requested to be spoken with by
17 the defense counsel. So I don't have committed to my memory every
18 UFI ----

19 MJ [Col McCALL]: Of course.

20 MTC [MR. TRIVETT]: ---- and where we're at with all of them.
21 But what I can say is that we'll continue to do that, to seek contact
22 information at least on our own.

23 Now, we have a very specific process in place that we

1 believe needs to be followed prior to a UFI ever hitting the stand,
2 which includes stipulations of fact and other things already in the
3 record. So we're certainly not conceding that any of them are
4 necessary at this point based on our willingness to stipulate to
5 pretty much anything tethered to reality.

6 So -- but we'll continue to look for specific individuals.
7 And I can get a report back at some point to the commission if we've
8 been able to -- to contact and locate them.

9 MJ [Col McCALL]: All right.

10 MTC [MR. TRIVETT]: That, I can do.

11 As far as Dr. Shea and the defense experts that he named,
12 we're not opposing them coming to testify. We believe we do have a
13 right in a rebuttal case, regardless. And so it would make sense,
14 and I think be a matter of judicial economy, to have Dr. Welner
15 testify one time at the end after he's seen all of the relevant
16 testimony, being that it's our burden. We feel it's the same thing
17 as a case in chief. When you have a burden, you have the ability to
18 rebut whatever came out in the defense. Understanding we haven't
19 done it in exact order, we still are going to exercise our right to
20 do that.

21 The -- so as far as the defense experts, we don't oppose
22 them. A bunch of people that were just named in that list that you
23 went off with Mr. Connell we do not believe are relevant to the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 litigation of the suppression motion. I think we have an open
2 opposition to that.

3 MJ [Col McCALL]: Right.

4 MTC [MR. TRIVETT]: So we would just need to finish that or
5 have a ruling on that before those. I just didn't want this time to
6 pass with the judge believing that we conceded that they can come
7 testify.

8 MJ [Col McCALL]: No, I appreciate that clarification and I
9 was tracking that.

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

11 MJ [Col McCALL]: All right. All right.

12 LDC [MR. CONNELL]: Can I crosstalk for just a second?

13 MJ [Col McCALL]: Sure. Go ahead. And while -- well...

14 **[Counsel conferred.]**

15 LDC [MR. CONNELL]: Sir, the thing that I wanted to check with
16 the government was whether they were considering Dr. Welner a
17 rebuttal witness, because I had actually e-mailed, you know,
18 earlier -- when I first heard that he was going to come, I was, like,
19 is this as a rebuttal witness? What's going on here? And the answer
20 was complex, and I'll let them speak for themselves. But the answer
21 was basically no, that he's not being treated as a rebuttal witness.

22 So if he is being treated as a rebuttal witness, then the
23 government gets to call him at the end of the defense case as if

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 they -- if he is not being treated as a rebuttal witness, if he is a
2 case-in-chief witness, then he should testify in the government's
3 case in chief, which is why I am proposing week three.

4 MJ [Col McCALL]: Thank you, Mr. Connell.

5 All right. Mr. Sowards and then Mr. Ruiz.

6 LDC [MR. SOWARDS]: Thank you, Your Honor. And just as a
7 preliminary statement, we may want to inform the visitors in the
8 gallery, particularly the victim family members, not to be alarmed,
9 that this often happens. We just have to sort out a few things
10 before we go forward.

11 MJ [Col McCALL]: Right.

12 LDC [MR. SOWARDS]: I just wanted to say quickly as to
13 Mr. Trivett's comment or request about the 30-day -- I think he said
14 after a second supplement by the defense before they respond to the
15 one we filed before we came down here. And as Mr. Connell said, that
16 was kind of added to the burden of the preparation, which is fine.
17 That was the schedule, and I think some of us even asked for that.

18 But what I would say is perhaps what we can do is get
19 together and just propose jointly a particular date or more specific
20 timing for you. We don't mind at the end of whatever Mr. Trivett
21 thinks is a logical stopping place when we have everything in the
22 record that we're going to rely on that we can add to the supplement
23 to 630 (KSM) that we filed for you before we came down here in

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 February. And so that's fine, we can work that out. So we'll get
2 together with them.

3 But as to the rest of it -- and I don't mean this
4 disparagingly, I just mean it quite literally -- I didn't understand
5 what Mr. Trivett was saying about somehow if we litigate in front of
6 Your Honor, we're sort of accomplishing nothing because we don't know
7 who the new judge is, although I do appreciate Mr. Trivett at the
8 very end of his comments allowing for the possibility that it could
9 be a female as well as a male.

10 But whoever the judge may be, I think he or she will greatly
11 benefit from the work you have accomplished. I acknowledge that it
12 is at a brisk pace. And I mentioned to someone the other day that
13 I'd gone to bed at 10:00 the night before, why is it I feel a little
14 tired? And someone said, well, that's because we're doing 14-hour
15 days.

16 But I think you had the answer to all of our concerns last
17 November when we were talking about trying to get a brief for you
18 that you wanted right after Thanksgiving. And you kind of looked at
19 the dates and then you shrugged and you said, well, that's the life
20 of a litigator. So we chose this, we chose this case, and whatever
21 you need, you know, we're happy to accommodate.

22 And I would just remind counsel that Judge Cohen set a trial
23 date that they were very happy with and then he left. And then COVID

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 came and, you know, things intervened. But we can know far in
2 advance what the ultimate trial date will be and we can set one now.
3 And if it should need to bend or be altered because of intervening
4 events, so be it.

5 And also in -- contrary to, I believe, one of our
6 colleagues' comments about the time we have spent thus far at this
7 session, I actually joined Mr. Connell in his comments the other day
8 when he said that we found Dr. Mitchell's testimony to be immensely
9 significant and immensely helpful, really a lot of things that were
10 added to the record.

11 And the only thing I would add for the short term in terms
12 of selecting witnesses, because we concur with the e-mail traffic
13 that went back and forth over the weekend between Mr. Connell and the
14 prosecution about the universe of witnesses and their priorities for
15 the upcoming hearings, what I would ask the commission to make note
16 of is we do think that Dr. Jessen is a high-priority, necessary
17 witness. And so we would like to have his testimony before whatever
18 judge reviews the record before we conclude this portion of it.

19 Additionally, though, in looking at a -- or longer-range
20 scheduling, what I would also remind -- and I'm sure it's on
21 everybody's mind someplace, but remind everyone that beyond the
22 strict confines of this particular motion that we're litigating,
23 which Judge Parrella asked us to litigate, in terms of both the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 discovery issues and the suppression issues, are a lot of other
2 motions which the commission anticipated we would be taking evidence
3 on for judicial economy's sake, but which will survive a ruling or
4 extend beyond a ruling on the suppression issue and the ability of
5 the defense to be able to conduct a meaningful and constitutionally
6 effective representation in the form of the investigation we've been
7 permitted to conduct to date.

8 And that includes such things as outrageous governmental
9 misconduct, which, although some counsel have the issue before you
10 now, we think will be served by additional litigation. And, indeed,
11 calling other witnesses whom the parties may have identified as less
12 important to the core suppression issue but, nevertheless, they're
13 very important to the other issues.

14 The other thing I would just ask to be acknowledged on the
15 record is that when Mr. Trivett talks about objections to some of the
16 UFIs, that really brings us back full circle to the problem he's
17 identified this morning from his perspective about the length of time
18 it's taking to litigate this case. Because what we're talking about
19 with the UFIs in many cases is, in addition to Dr. Mitchell, who is
20 purportedly a defense witness because the only way he could get -- we
21 could get his testimony before Your Honor or any judge was to call
22 him ourselves -- he and Dr. Jessen are the only two people that they
23 identify in the room when the torture is occurring.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 What we do know from the RDI index is that there are as many
2 as six other individuals who are in that room who saw the details of
3 what happened. And we had Dr. Mitchell say, well, those -- those
4 cables you're working off of, really those summaries of cables you're
5 working off of, are summaries of cables that are actually
6 compilations of a number of people's observations, those who made
7 observations.

8 And that's what we're trying to introduce as evidence about
9 what happened in the room. At no time do we have an opportunity to
10 directly talk to other people about what they saw and heard. And it
11 is the government who is resisting at all stages putting their
12 testimony and their observations in the record.

13 So a lot of this stuff for the last 15 years or so has been
14 the litigation about who we can get access to and talk to and who we
15 can present in court.

16 The other point with respect to Dr. Welner, whatever he is
17 called -- and I mean, I wasn't -- I guess with Mr. -- if I understood
18 Mr. Connell correctly, it's something, like, no, he's -- he is or he
19 is not but let us make up our mind about whether he is rebuttal. The
20 point is I would just have us look back as -- both as relatively
21 recently and as long ago as December when Mr. Trivett represented to
22 the commission that Dr. Welner was part of a trio, along with
23 Mr. Kohlmann and Ms. Waltz, who the prosecution had been in contact

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 with before about certain aspects of the case but suddenly had to
2 realign their strategy in light of the decision in al Nashiri.

3 And that gave them a whole different perspective on the case
4 and they now had to retool these people to address what they saw as a
5 critical issue. That's why Dr. Welner was being called.

6 That is not a -- doesn't sound like a rebuttal witness or
7 somebody who is being asked to come in and observe the proceedings in
8 this case and then rebut. That is somebody who is being -- who is
9 being prepared to be an affirmative witness.

10 Be that as it may, whatever the -- whatever the label is, we
11 now hear that no, no, no, Dr. Welner is being called because, zounds,
12 we didn't realize that we were going to -- we were going to hear
13 Dr. Mitchell suddenly reveal this whole notion of fear extinction.

14 Well, of course, they did because that's what he had talked
15 to Mr. Groharing about. That's what they had prepared him to talk to
16 Mr. Groharing about, I submit, as another way around the very
17 straightforward finding of Judge Acosta which says it doesn't take a
18 psychologist -- in fact, Dr. Welner in that case testified for
19 several days and got a mention in a footnote for the, you know, not
20 stunning proposition that if you scare the bejesus out of somebody
21 and do terrible things to him, he might continue to do what it is you
22 want at later dates.

23 So that's, you know, that's not high science, but if that's

1 how they want to spend their time and money, that's fine. But,
2 again, that is yet a different theory for what Dr. Welner's going to
3 be testifying to, both of which are issues outside this case. We're
4 in this case and we're here now and the focus of the hearing was to
5 say the government having admitted, having conceded for purposes of
6 this motion that what happened in the black sites was at least
7 coercive, very euphemistic term for the torture, but nevertheless,
8 coercive, and so the obligation is now on the prosecution to show
9 that coercive impact of that horrific torture was completely
10 dissipated by the time they got before the FBI.

11 And it's not -- it's not something that is going to be
12 affirmatively proved by Dr. Welner. But if it is, and they want to
13 do it, we're ready to hear that evidence. But I think all of that
14 both supports Mr. Connell's proposition that they be called
15 as -- Dr. Welner be called in their case in chief on this issue, but
16 I think it also argues for the disclosure of Dr. Welner's report,
17 which the prosecution said they were working on in December, or even
18 before December, and were caught unawares by Your Honor's ruling
19 about when they would be testifying because, lo and behold, they had
20 said they would try to get together as soon as April or May and now
21 you were talking about an expedited schedule.

22 So what I -- and I would say that it's very critical for us
23 to exactly see what this theory is, which continues to evolve and

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 change, before Dr. Welner's allowed to testify and that we have some
2 adequate notice as to what -- as to what his opinion will be.

3 Thank you very much.

4 MJ [Col McCALL]: Thank you, Mr. Sowards.

5 Mr. Ruiz?

6 LDC [MR. RUIZ]: Judge, lots of ground to cover now, third up.
7 I have to confess, I'm kind of lost at what it is we're arguing. But
8 lots of things have been argued, so I want to articulate a couple of
9 points on behalf of Mr. al Hawsawi and draw your attention to a
10 number of AEs I think that are relevant to some of the discussions
11 we've had this morning.

12 In terms of our position on the way forward, you have that.
13 That's at 632U (MAH Sup). Ex parte piece of that filing also
14 highlights for you certain issues, some of which we need your action
15 on that will allow us to move forward, depending on how things shake
16 out. One of those issues is 931 (MAH), which was filed on 8
17 February 2024. It's a significant issue. And I think you understand
18 why.

19 MJ [Col McCALL]: I'm tracking.

20 LDC [MR. RUIZ]: So I know I've highlighted that for you
21 before, but certainly something that is relevant to our ability to
22 move and to adjust and to participate effectively in whatever
23 litigation may come forward.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 In terms of other AEs, the one that I've a number of times
2 have highlighted for you is 524MMM (MAH). And I'm going to keep
3 banging my drum, even though I fear that I'm swimming upstream on
4 this one or against the tide, but it continues to be our position
5 that 524MMM (MAH) is the right course of action and is the right
6 course of action now at this time in the juncture in the litigation.
7 And I would submit that this discussion only supports that notion as
8 well as some of the litigation that we've seen.

9 Now, one of the things that I was interested in is that my
10 comments about Dr. Mitchell seem to have touched a nerve on lots of
11 sides.

12 MJ [Col McCALL]: Individualized justice. Each defense team
13 has a different perspective. I understand that.

14 LDC [MR. RUIZ]: Absolutely. And as I said before, that
15 comment was made because of a statement you made regarding your view
16 on how Dr. Mitchell's testimony helped the defense, didn't help the
17 defense. And you're right, individualized justice is absolutely the
18 way we approach it. And even though we sit on the same side of the
19 courtroom, we all have very different clients and very different
20 cases.

21 So if I were sitting at table 1, perhaps I would be happy to
22 sit on endless days and endless days of testimony because delay at
23 the end of the day is our friend -- right? -- but I don't represent

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that client.

2 I represent a man who, in our assessment, has a case that
3 can -- and is triable, has a factually defensible case, and who I
4 think would welcome the ability and the opportunity to bring closure
5 to this situation. And so we've tried to do the best we can to move
6 that litigation forward. Obviously, for many, many reasons we have
7 not been able to do that.

8 And, upon reflection, I do think that there was some value
9 in Dr. Mitchell's testimony. I think the value was in showing how
10 monumentally insignificant his testimony was, right? Because at the
11 end of the day, it puts us right back where 524MMM (MAH) tells us or
12 puts us, is there is no direct testimony, there is no direct
13 evidence, there is no particularity and nuanced account of
14 Mr. al Hawsawi's time in those black sites.

15 Now, we knew that before he ever took the stand just based
16 on the information that we had. And I guess after going through five
17 days of that, we still know that. The point is that the government
18 has also denied every single UFI witness that we've requested in
19 connection with this litigation on voluntariness. They've already
20 done that. We submitted that witness request very early on. They
21 took their position. They made it very clear that they weren't going
22 to provide any of those UFI witnesses.

23 Mr. Trivett again today seemed to double down on that when

1 he said that they were going to first be willing to stipulate and
2 tether anything to reality which is, of course, the normal refrain in
3 terms of the UFI witnesses. But it still sounds to me like none of
4 those witnesses are coming here. None of those witnesses are ever
5 going to take the stand. And none of those witnesses are going to
6 add that particularity and that nuance that is necessary for us to
7 effectively litigate with respect to due process and heightened
8 reliability Mr. al Hawsawi's time in those black sites.

9 No matter how many witnesses we take, no matter how many
10 doctors we call, there is only one witness left that arguably has any
11 relevance to anything that happened in the black sites, Dr. Jessen.
12 And he, like Dr. Mitchell, had absolutely zero contact with
13 Mr. al Hawsawi. No personal direct observations of what happened to
14 him or what was done to him. And he's not going to add anything to
15 Mr. al Hawsawi's factual bases on this motion either.

16 So I fear that there is this desire to look like we're
17 working very hard -- and we are, right? And anybody that's ever run
18 a long race understands that the key is not necessarily running as
19 fast as you can as hard as you can every time that you can. The key
20 is to do so with efficiency and intelligence, and I think that's the
21 way we've tried to approach it.

22 In terms of the comments with respect to the pace, I'll say
23 to you bring it on. If you want to bring it up, we'll be there to do

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it. We have been. Our team is the only team that has brought and
2 traveled with every person that we have on the team and has been here
3 throughout these proceedings.

4 And at least I think that, top to bottom, they're showing up
5 to work every day, they're doing what they need to do. And I'm never
6 going to stand up here and tell you that we're working too hard or
7 that we need you to adjust the tempo. That's just not going to
8 happen. It's just not the way we work.

9 And I agree, if that is the case and if there is a problem,
10 get more people. Get more people to do the work and do the job. We
11 did. We filed 524MMM before it was even due and then we followed
12 that up with a motion to suppress supplement. You set the timelines,
13 we'll meet them. Right?

14 And this notion that we can't make decisions because we have
15 some degree of uncertainty? Well, too bad. That's Guantanamo. And
16 we make the decisions that we have to make today with the information
17 that is before us at the time that we have it. And yes, we try to
18 project out as best we can.

19 And, you know, if you want to engage in forum shopping, too
20 bad, you know? Don't make your decisions or do make your decisions,
21 but make a decision and move forward because that's exactly what
22 we're doing here.

23 So in terms of that argument, I would say it doesn't matter,

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and it shouldn't weigh into what you do and what schedule you set as
2 we move forward.

3 But I do want, Judge, you to -- I kind of see where you're
4 going and I see many, many reasons why that may be the case, and
5 you're the judge and you get to make these decisions. But 524MMM
6 (MAH Sup) is still out there. And the government should not get an
7 extension to respond to that motion, because nothing that happens
8 from here on out in the litigation -- unless their response is going
9 to be we will provide these UFIs and we will make them available to
10 the defense and they will come here and testify for days, okay, then
11 maybe that makes a difference. But that's not going to happen.

12 Every witness that you've talked about here today has
13 nothing to do with what went back in 524LLL. Nothing at all. And it
14 won't change that analysis at all.

15 And if you want a path to trial, there's your path to a
16 trial right there. It would take some courage, though, to say that
17 at this stage, based on this record, there is no further use, no
18 further efficiency -- we can run, we can work, we can do all of these
19 things. But there is no further efficiency to continuing to engage
20 in this litigation when the very infirmity that was identified by
21 Judge Pohl after eight years on the bench of going through this and
22 seeing everything that you are now seeing identified and issued a
23 ruling and gave us a remedy because of what he saw and what he

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 learned and what he understood.

2 We're just chasing our tails here. And I've -- you know, I
3 know I've said that a number of times. But you want a path forward?
4 That's the path forward. Rule on 524MMM (Sup). Move us along from
5 this litigation. And let us focus on litigation that will actually
6 set the boundaries for a trial.

7 Mr. Hawsawi's ready to meet that. We've been ready to meet
8 that from the government. We've asked them to sever us so we can go
9 and meet them in a trial and meet their evidence with ours. We're
10 ready to do that. We've been ready to do that. They have been
11 unwilling to do that. They have been unwilling to sever us. Right?

12 But if you want a path, that's a path. It's a path for us
13 to litigate these issues and to do so in a timely manner. And when
14 we're done with this argument, whatever this is, Judge -- I know we
15 have a witness waiting -- we do have a motion pending regarding her
16 testimony, it's 9220, to talk about the scope of her testimony.

17 Because now, in addition to an experiment that has to do
18 with testing whether we can actually do what we need to do and due
19 process and heightened reliability, now it seems like we're expanding
20 the scope of witnesses litigation to lay foundations for introduction
21 of evidence and motions that haven't yet been filed, right? I heard
22 Mr. Trivett say that last week with Agent Hodgson, that we have a
23 motion to pre-admit.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And so now, in addition to the voluntariness, now in
2 addition to the ongoing experiment about whether we can do anything
3 about what happened in the black sites and actually get a real
4 picture of what happened there, apparently now we're also litigating
5 the admissibility of all kinds of evidentiary issues because the
6 government's not going to start laying foundation during these
7 hearings.

8 So -- okay. So, you know, we'll do the best that we can.
9 But this is -- this is just no way to litigate. These issues of
10 admissibility of evidence are pending before the commission and
11 they're pending in various motions, right?

12 So Agent -- you know, Ms. Waltz's testimony, there are a
13 couple of issues -- a couple of motions pending on the admissibility
14 of some of that testimony as well. But those issues merit discrete
15 and precise hearings to really delve out, you know, what these
16 evidentiary issues are.

17 Rather than bringing that into a hearing that's supposed to
18 be about suppression, voluntariness, and this other experiment, well,
19 now we're also going to be talking about evidentiary issues that are
20 pending before this commission in individual motions challenging the
21 admissibility of that evidence and we're going to start taking
22 testimony on that. I object to that, Judge, and I'll get to that
23 when we do our motion.

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So I think I've covered all the ground I had to cover. And
2 that's all I have for now.

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

4 All right. I hate to ask, but anything else?

5 All right. So on that last point of Mr. Ruiz's, I do want
6 to just put on the record that on Sunday afternoon the commission
7 received a classified ex parte presentation from the prosecution
8 during which the prosecution informed the commission of the
9 prosecution's understanding of the applicability of Protective Order
10 #3 to the anticipated questioning of Supervisory Intelligence Analyst
11 Kimberly Waltz. Neither the accused nor defense counsel were present
12 for the prosecution's presentation.

13 Nothing in that ex parte presentation caused me to doubt the
14 applicability of Protective Order #3 to the subject matter of the
15 anticipated testimony of Ms. Waltz on direct.

16 So, again, I've read the -- I know this area has been
17 litigated, as Judge Pohl was the one that put out Protective Order
18 #3. And then it was litigated before Judge Parrella, as far as the
19 defense asking for it to be rescinded, which that motion was denied.

20 And then Judge Cohen looked at the issue in the 650 series,
21 and in 6500 talked about adjusting the process going forward for any
22 new protective orders or new substituted evidentiary foundations.
23 But, again, it seems clear that there is nothing that's -- the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anticipated testimony of Ms. Waltz is going to be covered under what
2 has already been out -- put out there under Protective Order #3.

3 So I'm ready to go forward. I'd like to hear from the
4 parties if -- go ahead, Mr. Connell.

5 LDC [MR. CONNELL]: I do have my one other administrative
6 matter, sir. And I am prepared ----

7 MJ [Col McCALL]: Okay.

8 LDC [MR. CONNELL]: ---- to address that, although that sounds
9 like exactly the opposite of what everyone assured me was not going
10 to happen on Friday. So I definitely want to be heard on that, both
11 on the -- on the ----

12 MJ [Col McCALL]: Well, first, let's hear your administrative
13 matter and then -- go ahead.

14 LDC [MR. CONNELL]: Sir, I'd like to update the military
15 commission on the release of transcripts to the public issue.

16 On today, the 4th of March, 2024, the -- only three
17 transcripts have been released: The 12th, the 14th, and the 15th of
18 February.

19 We talked -- the last time that I updated this, we talked
20 about the effect on the public, which is -- is significant. But in
21 the intervening time, the Mr. Bin'Attash team had made a motion about
22 the late disclosures from the government around the studies that
23 Dr. Mitchell relied on. And the military commission ----

1 MJ [Col McCALL]: Right.

2 LDC [MR. CONNELL]: ---- correctly observed, well, you know,
3 you all have experts, you should talk to them.

4 And so, you know, the very first thing, after we learned of
5 these new reliances by Dr. Mitchell, was that I called our own expert
6 to talk to him about it. And the second thing I did was I contacted
7 the two experts that Dr. Mitchell relied upon, both of whom responded
8 to me.

9 But in none of those three situations could I send them the
10 transcript of what the -- what Dr. Mitchell had actually said and
11 what we had actually said about, you know, Dr. Harris' or Dr. Todd
12 and Dr. Mulner's (phonetic) studies, because the only thing that we
13 have is a Top Secret version of those transcripts.

14 So I did want to point out that it's not simply a matter of
15 the public, although the public interest in this is very important,
16 but the fact that we don't have our transcripts in what used to be a
17 day or two, sometimes the same day, sometimes the day after, at
18 worst, two days later, has really affected the litigation in a way
19 that we saw illustrated with Dr. Mitchell. So it's a serious
20 problem.

21 And I know that, you know -- we had this same, a similar
22 argument in front of Judge Parrella and Judge Parrella did some
23 things, some of which were at my suggestion, to try to solve the

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 problem. And it has only gotten much, much worse over time.

2 MJ [Col McCALL]: All right. And I know you've raised this
3 issue before and I'm tracking. Let me get -- I'll give it some
4 thought on how we can try to address it and improve the pace of
5 putting those out.

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

7 MJ [Col McCALL]: All right. And so before we move on, then,
8 so just based on the comment that you said about any assurances you
9 had on Friday -- I mean, based on my understanding of what Ms. Waltz
10 is going to testify about, I'm comfortable going forward with -- I
11 had planned on earlier than now, this morning, starting with her open
12 testimony and then because of some of these limitations on Protective
13 Order #3 that causes some, I guess, choppiness to her testimony, I
14 was planning on having her do her open direct and then go into her
15 closed direct, and then having a break before we went into the
16 defense teams having their open cross and then closed cross just to
17 allow to make sure that the defense teams understood the left and
18 right on what they could get into with Ms. Waltz.

19 But, I mean, is -- is there confusion among the parties? I
20 mean, is this something that crosstalk would be helpful if we take a
21 recess or do we need a closed session or is this something that we
22 can discuss in open session? I'm open.

23 LDC [MR. CONNELL]: So, sir, I do have comments but I promised

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Ruiz that he could go first since 9200 is his pleading.
2 MJ [Col McCALL]: Okay.
3 LDC [MR. CONNELL]: So I don't want to -- I'm happy to talk
4 but I also don't want to ----
5 LDC [MR. RUIZ]: I'm fine, Judge, with waiting.
6 MJ [Col McCALL]: All right.
7 LDC [MR. RUIZ]: I'm good.
8 LDC [MR. CONNELL]: So let me just grab my notes, Your Honor,
9 if I could.
10 MJ [Col McCALL]: Sure.
11 DDC [LT XU]: Your Honor, before we get into that, I just want
12 to make sure we are -- we are clear on sort of the procedurally, if
13 we're still talking about the ex parte hearing and what is supposed
14 to happen afterwards. I just want to clarify, Your Honor, exactly,
15 before we get into the relevance arguments and all of that, when
16 would be an appropriate time to discuss that.
17 MJ [Col McCALL]: Sure. I mean -- well, I'd like to hear from
18 Mr. Connell first and then before we get into her testimony we can
19 discuss that.
20 DDC [LT XU]: Thank you, Your Honor.
21 MJ [Col McCALL]: Go ahead, Mr. Connell.
22 LDC [MR. CONNELL]: So, sir, responding to your last question
23 first, we don't know what Protective Order #3 means. It has been a

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 big -- you know, when we -- Protective Order #3 came about ex parte
2 under a process which has now been at most kindly clarified by the
3 military commission.

4 And I want to be clear that our position is that the entry
5 of ex parte -- of Protective Order #3 ex parte was illegal. But I
6 also understand 6500 and what it says about the retroactivity.

7 But when we had an argument in front of Judge Parrella about
8 Protective Order #3, the government walked back a number of their
9 restrictions. But we -- the -- we still don't know what Protective
10 Order #3 means itself.

11 So on the ex parte part, what I was afraid of last week is
12 that the government was going to be trying to, ex parte, clarify the
13 meaning of Protective Order #3 and my understanding was that no,
14 that's not what was going to happen in the ex parte. And I may have
15 misunderstood, but I thought that I just heard the military
16 commission say that the government explained its understanding of
17 Protective Order #3 and its application to Special Agent -- excuse
18 me, SIA Waltz.

19 And if that is an accurate understanding, and it might not
20 have been an accurate understanding on my part -- you were there, I
21 wasn't -- but if it was, then that should have been done in an
22 adversarial format, because 6500 makes clear what 949p-6(c) and (d)
23 say, (d)(3) in particular, that there has to be a hearing. It can be

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 in camera. You know, we made an argument as to why parts of it
2 should not be in camera. I think that's one of the things that we're
3 going to be doing today, is that 949p-6(d) hearing, partially in
4 camera -- you know, partially closed, partially not.

5 But I want to -- to -- so, first of all, if the government
6 did address the scope of Protective Order #3, then I renew my
7 objection to the ex parte hearing and that should be done in open.
8 Now, maybe ----

9 MJ [Col McCALL]: And I guess -- well, let me just cut you off
10 briefly, Mr. Connell, just to focus you in.

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

12 MJ [Col McCALL]: And perhaps we're all talking a little bit
13 past each other. I mean, so I've looked at your position in, I think
14 it was, 574N ----

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

16 MJ [Col McCALL]: ---- and it seemed if -- maybe I
17 misunderstood you -- that your concern was if the protective order or
18 the substituted evidentiary foundation were being expanded, were
19 being altered in some way to cover, like, new areas which -- it
20 doesn't seem like it is. And so I guess that's the question, is if
21 the protective order is already out there and the substituted
22 evidentiary foundation has already been put out there and the
23 government is simply reaffirming that, I mean, why -- why does that

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 need to be a contested hearing ----

2 LDC [MR. CONNELL]: Okay.

3 MJ [Col McCALL]: ---- when that ship sailed with the 574
4 series?

5 LDC [MR. CONNELL]: So, first of all, in the 574 series, the
6 ship did not sail on the substituted evidentiary foundation. In 574B
7 (Amend), the military commission made it clear that it was deferring
8 the decision about a substituted evidentiary foundation. There is no
9 approved substituted evidentiary foundation which is currently in
10 existence. And there's not been a ruling after that on the
11 substituted evidentiary foundation, which is one of the things which
12 under 6500 has to be addressed in an in camera hearing, other than
13 pure substitutions -- right? -- which we understand under 949p-4
14 [sic].

15 The second issue is that the key -- so we lost Protective
16 Order #3, right? I get that.

17 MJ [Col McCALL]: Right.

18 LDC [MR. CONNELL]: Attorneys lose things.

19 MJ [Col McCALL]: Right.

20 LDC [MR. CONNELL]: We move on. But what we don't know, and
21 what has been a continuing issue, is what exactly are we prohibited
22 from asking and not prohibited from asking under Protective Order #3?
23 And so there is an approved prohibition on questioning that tends to

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 indicate the source of the telephone calls, and -- but what that
2 means in terms of the McKeever standard that we articulated or
3 any -- you know, the D.C. Circuit's approach to how you handle
4 telephone call evidence is all, you know, very much an open question.
5 And that's -- that's my concern.

6 So I understand what the military commission is saying about
7 an additional protective order or expanding the protective order, but
8 we've heard at least two major different accounts from the government
9 of what Protective Order #3 protects -- prohibits us from asking.
10 And at this point what the scope of Protective Order #3 is ----

11 MJ [Col McCALL]: Let's -- let's do this. And I don't mean to
12 cut you off.

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

14 MJ [Col McCALL]: But I think this seems like something that
15 we can hash out a bit better in a closed session. And I think you
16 know I like to have as much as we can in open, but let's do that.
17 Let's have where the government can put forward as much as they can
18 to explain what -- how they see the protective order applying, and
19 that may give us better fidelity on what else needs to be done.

20 LDC [MR. CONNELL]: That would sharpen the issues, I think,
21 Your Honor.

22 MJ [Col McCALL]: Right? Because I think here we're having to
23 kind of talk around, paint the corners, and I don't know that that's

UNCLASSIFIED//FOR PUBLIC RELEASE
UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that useful.

2 All right. Let's do this. It's 1035 -- and again, this is
3 somewhat what I mentioned last week that I participated. We will go
4 slow if we have to on this and get it right.

5 It's 1035. We will go ahead and take a recess, allow the
6 parties to do a little bit of crosstalk and prepare, and then let's
7 be back on the record at 1230 with a closed session. And we'll be in
8 closed the rest of today. I anticipate that we will be open again
9 for an open session tomorrow at 0900. If that has to adjust, I'll
10 have my staff send out an e-mail to let the parties know.

11 But, Mr. Trivett, what am I missing?

12 MTC [MR. TRIVETT]: So if footnote 25 to 6500, sir,
13 Judge Cohen found that they had already had the hearing. I'm happy
14 to discuss the parameters of Protective Order #3, but we believe that
15 the actual hearing that they were entitled to, Judge Cohen found that
16 they had already had. So I just wanted to bring that to the
17 commission's attention.

18 MJ [Col McCALL]: I'm tracking. And, again, as with -- I feel
19 like I've said this multiple times during this session alone.
20 Sometimes these issues as they bubble back up just epitomizes some of
21 the trouble and frustration that we have as I'm having to decipher
22 past judges' rulings in a complicated area that is actually extremely
23 novel.

