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1 [The R.M.C. 803 session was called to order at
2 0900, 19 February 2020.]

3 MJ [Col COHEN]: This military commission is called to
4 order.

5 General Martins, it appears your team is the same as
6 yesterday; is that correct, sir?

7 CP [BG MARTINS]: Good morning, Your Honor. Yes, that is.

8 MJ [Col COHEN]: Good morning. All right. Thank you.

9 Mr. Sowards, good morning. It seems your team is the
10 same as well, and Mr. Mohammad is here.

11 LDC [MR. SOWARDS]: Good morning, sir. Yes, that's
12 correct.

13 MJ [Col COHEN]: Okay, thank you.

14 Ms. Bormann, it looks like your team is the same, but
15 Mr. Bin'Attash is currently absent.

16 LDC [MS. BORMANN]: That's correct.

17 MJ [Col COHEN]: Mr. Harrington, it is my understanding --
18 it looks like your team is the same. Nope, you've got an
19 addition?

20 LDC [MR. HARRINGTON]: No.

21 MJ [Col COHEN]: Nope, no additions.

22 LDC [MR. HARRINGTON]: The same.

23 MJ [Col COHEN]: You're the same. And then Mr. Binalshibh

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1 is here but has asked to come in a few minutes later; is that
2 correct?

3 LDC [MR. HARRINGTON]: Yes, Judge.

4 MJ [Co] COHEN]: And consistent with what he told me, then
5 you're just asserting that that is a voluntary choice on his
6 part?

7 LDC [MR. HARRINGTON]: Judge, especially because the first
8 issue deals with -- can I just have one of my other lawyers
9 run back there and make sure we have that ----

10 MJ [Co] COHEN]: Absolutely, sir. All right. Thanks.

11 Mr. Connell, it looks like your team is the same, but
12 Mr. Ali is not currently here.

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

14 MJ [Co] COHEN]: All right. Thank you.

15 Mr. Ruiz, it looks like your team is the same, but
16 Mr. al Hawsawi is not here; is that correct?

17 LDC [MR. RUIZ]: Yes.

18 MJ [Co] COHEN]: Okay. Thank you, sir.

19 Okay. With respect to Mr. al Hawsawi, Mr. Ali, and
20 Mr. Bin'Attash, is there a witness?

21 CP [BG MARTINS]: Yes, Your Honor, there is.

22 Major, if you would please proceed to the witness
23 stand, remain standing, raise your right hand for the oath.

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

3 **DIRECT EXAMINATION**

4 **Questions by the Chief Prosecutor [BG MARTINS]:**

5 Q. You are assigned to the Joint Task Force; is that
6 correct?

7 A. Yes, sir.

8 Q. As an assistant Staff Judge Advocate?

9 A. Yes, sir.

10 Q. And your grade is Major in the United States Army?

11 A. Yes, sir.

12 CP [BG MARTINS]: Thank you.

13 MJ [Col COHEN]: Mr. Swann, your witness.

14 **DIRECT EXAMINATION**

15 **Questions by the Trial Counsel [MR. SWANN]:**

16 Q. Major, do you have in front of you what's been marked
17 as Appellate Exhibit 764, 764A, and 764B?

18 A. I do.

19 Q. Now, I note that both 764 and 764B consist of three
20 pages and the other one consists of two pages.

21 A. Yes, sir.

22 Q. All right. With respect to Bin'Attash, did you advise
23 him of his right to attend today's proceeding?

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1 A. I did.

2 Q. And I have that in front of me. Did he sign the
3 Arabic or the English version?

4 A. Arabic.

5 Q. Did you follow the form in advising him of his rights?

6 A. Yes, sir.

7 Q. Did you use an Arabic translator?

8 A. No. Mr. Bin'Attash asked that I read it in English.
9 He followed along in Arabic and then signed it in Arabic.

10 Q. And that's his signature?

11 A. Yes, sir.

12 Q. With respect to Ali Abdul Aziz Ali, a two-page
13 document. It appears that he signed the English version of
14 this document?

15 A. Yes, sir.

16 Q. And is that his signature?

17 A. Yes, sir.

18 Q. And finally, with respect to al Hawsawi, a three-page
19 document. I see a signature that appears on the Arabic
20 version. Is that his signature?

21 A. Yes, sir.

22 Q. Do you believe that each of these men voluntarily
23 waived their right to attend today's proceeding?

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1 A. I do.

2 TC [MR. SWANN]: Nothing further.

3 MJ [Co] COHEN]: Thank you, sir.

4 Note the standing objection with respect to identity
5 of the witness.

6 Ms. Bormann, I'll start with you. I'm looking at
7 AE 764. Have you had the opportunity to review this document,
8 and do you have any questions of the witness?

9 LDC [MS. BORMANN]: I have reviewed the document. I have
10 no questions.

11 MJ [Co] COHEN]: All right. Thank you, ma'am.

12 Mr. Connell, same questions to you with respect to
13 AE 764A.

14 LDC [MR. CONNELL]: Your Honor, I have reviewed AE 764A.
15 I have no questions.

16 MJ [Co] COHEN]: All right. Thank you, sir.

17 And then finally, Mr. Ruiz, same questions to you with
18 respect to AE 764B.

19 LDC [MR. RUIZ]: I have reviewed it, and I have no
20 questions. Thank you.

21 MJ [Co] COHEN]: All right. Thank you, sir.

22 I will excuse you. Thank you very much for your
23 testimony.

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1 WIT: Thank you, sir.

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

3 MJ [Co] COHEN]: Based on the testimony presented and the
4 documentation before me, I find that Mr. Bin'Attash, Mr. Ali,
5 and Mr. al Hawsawi have voluntarily waived their right to be
6 present. Obviously, if they change their mind, they're always
7 welcome to attend, assuming those accommodations can be made
8 in time to let them be here at a later portion of these
9 sessions or the afternoon session.

10 Handing those to the court reporter.

11 Mr. Harrington, with respect to Mr. Binalshibh, is it
12 his desire to watch from the cell at this point?

13 LDC [MR. HARRINGTON]: Judge, it's my understanding that
14 the guards are moving him in right now.

15 MJ [Co] COHEN]: Perfect. All right. Then I'll -- I will
16 wait a minute. Take a brief recess in place.

17 **[The accused, Mr. Binalshibh, entered the courtroom.]**

18 MJ [Co] COHEN]: The military commission is called to
19 order. Mr. Binalshibh has joined us. The parties are still
20 present.

21 Counsel, bear with me. I've probably got about ten
22 pages of information to read, so -- start off with a summary
23 of an R.M.C. 802 conference from yesterday. I'll just let the

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1 translators know I'll try to speak slowly -- or interpreters.
2 Excuse me. But just hit me with the yellow light if I need to
3 slow down.

4 Following yesterday's open session, the commission
5 held an R.M.C. 802 conference with counsel for all parties.
6 The accused were also present. The following is a summary of
7 what was discussed generally:

8 I advised the parties of my intent to schedule various
9 motions for oral argument for Wednesday, today, and Thursday.
10 Mr. Sowards asked that AE 735 be argued prior to any other
11 motions because of concerns of surreptitious surveillance of
12 defense teams and possible ethical issues that he may have,
13 based on actions by intelligence agencies in the courtroom.
14 Mr. Sowards also asked me to review AE 425X and AE 133QQ
15 regarding AE 735.

16 I advised the parties that oral argument on AE 735 was
17 premature because I was -- because I would be releasing
18 discovery to the parties germane to AE 735 that might impact
19 the positions of the parties on the issues raised in AE 735.
20 I further advised the parties that I am convinced that nobody
21 is authorized to eavesdrop or listen to defense teams in this
22 courtroom.

23 Mr. Connell joined Mr. Sowards' view that AE 735

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1 should be argued before other motions, but stated that AE 735
2 was a motion filed by his defense team, and their position was
3 not that there was surreptitious surveillance of defense
4 teams. Instead, Mr. Connell believed the issues raised in
5 AE 735 resulted in a violation of the commission's ruling in
6 AE 133QQ.

7 After discussion with the parties and receiving
8 consent for certain AEs where the briefing cycle was not
9 complete, I set the following schedule for Wednesday, today,
10 and Thursday, assuming time allows. Accordingly, the
11 following AEs will -- at least it's my intent to have these
12 argued today: AE 632E (MAH), Motion to Compel Discovery;
13 AE 656 (MAH), Motion to Compel Discovery; AE 672 (MAH), Motion
14 to Compel Witness Information; AE 551M (AAA), Motion to Compel
15 Immediate Public Release of AE 628RRRRR; and, if Mr. Sowards
16 chooses to, AE 667A (KSM), Notice of Status Update Government
17 Production of R.M.C. 701(c)(2) Evidence in Compliance with
18 AE 639M (Amend), if the Mohammad team wants to argue the
19 motion before AE 735.

20 However, I explained to counsel yesterday this is an
21 opportunity to argue, but the court is completely capable of
22 ruling without oral argument on most of these motions. This
23 is your opportunity to be heard, but if you choose not to be

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1 heard and waive your -- waive that, that's fine.

2 The following AE will be argued Thursday: AE 701
3 (WBA), Motion to Compel Information Regarding Presence of FBI
4 Special Agents At Black Sites; AE 744 (KSM), Mr. Mohammad's
5 Motion to Dismiss Based on the Ex Post Facto Removal of the
6 Right to a Speedy Trial, if the Mohammad team wants to argue
7 the motion before AE 735; AE 730 (MAH), Defense Motion for
8 Partial Dismissal Based on Multiplicity and Unreasonable
9 Multiplication of Charges; AE 687 (AAA), Mr. al Baluchi's
10 Motion to Dismiss Unreasonably Multiplied Charges.
11 Mr. Connell had requested this addition in -- this addition of
12 an AE for oral argument as it relates to the issues raised in
13 AE 730.

14 Government agreed to all of these -- to these. Per
15 the commission's consolidated docket order and trial conduct
16 order, AE 690B, I informed counsel they would each have ten
17 minutes of oral argument per AE and inquired if any counsel
18 thought they would need more. None of the counsel indicated
19 they would at this time, or at least at the time we discussed
20 it yesterday in the 802.

21 I also advised the parties that I intended to issue a
22 supplemental docket order reflecting the motions for oral
23 argument. However, due to technology, I was unable to do so

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1 yesterday. I'm just putting it on the record now. Wish I
2 could say I only had those problems down here, but I
3 apparently have those problems no matter where I am in the
4 world.

5 Mr. Connell advised me that AE 490, AE 733, AE 741,
6 and AE 742 merited oral argument either this session or at a
7 future session. The government objected to -- or preferred
8 not to argue AE 733, AE 741, and AE 742, as the briefing cycle
9 was not complete and they did intend to -- to file replies.
10 Made sense. There wasn't a lot of contention about that. We
11 just said absolutely, we can push those and the briefing cycle
12 can work.

13 In fact, that's one of the things I talked about with
14 the counsel, was that some of these the briefing cycle had not
15 been completely -- had not been completed, but that if they
16 were nonetheless willing to argue them, I would -- I would be
17 happy to give them time.

18 The government did object or indicate that they would
19 object to any further argument on AE 490 as it had been argued
20 previously.

21 Mr. Ruiz stated that AE 490 was their team's motion
22 and they would like time to assess whether they wanted
23 argument this session. I asked Mr. Ruiz to advise me of --

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1 actually, Mr. Connell I think is the one I specifically asked
2 this to, to advise me of the page numbers in the record of
3 trial of the prior argument.

4 I advised the parties that I would look at the prior
5 argument, determine whether to grant additional oral argument.
6 I will probably get those at some point today from -- from
7 Mr. Connell or Mr. Ruiz. I'll review those, and then if we
8 need to have oral argument -- if I decide that I personally
9 need to have argument because I can't make sense of what
10 previously was discussed, I will -- I'll put it on the docket
11 order in the future.

12 Mr. Sowards also stated that motions from the Mohammad
13 team regarding the death sentence merited oral argument at
14 some point. This was in response to my questions, are there
15 any other ones that you all think need to have oral argument
16 at some point prior to -- prior to ruling or that you think it
17 would be helpful.

18 And Ms. Bormann and Mr. Ruiz stated that classified
19 information would need to be disclosed in argument of AE 701
20 and AE 656, or at least potentially with AE 656, respectively.

21 The government orally moved -- or indicated that it
22 would orally move, and I'll confirm that with them here
23 momentarily, for an M.C.R.E. 505(h) hearing. Once they put

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1 that on the record I will -- I intend to grant that and will
2 have, at the conclusion of today, an M.C.R.E. 505(h) hearing
3 before we wrap this up so that we can -- so I can make a
4 decision as to whether or not we need to have a closed 806
5 argument as well as an open argument on those motions.

6 Ms. Bormann asked for ex parte presentations for
7 AE 677 and AE 368F. I told Ms. Bormann that I was inclined to
8 grant the ex parte presentations for -- for AE 368F for sure.

9 Mr. Connell also asked about introducing videos in
10 support of AE 628 that are cumulatively approximately four
11 hours or so in length. He asked if he should provide those to
12 the government. I indicated that if he intended to offer them
13 into evidence at any point, it makes sense to just to go ahead
14 and give those to him. He indicated that he would. And
15 whether we hear them this session or -- or a future session or
16 whether it's something that I'll -- I'll wait to hear from the
17 parties as to whether -- how -- how we want to do that.

18 General Martins asked if I was planning to call Rear
19 Admiral, Retired, Reismeier to testify this week. He is the
20 convening authority. I advised him that I was not. I further
21 advised the government that if I did not schedule Rear
22 Admiral, Retired, Reismeier's testimony prior to the May/June
23 session, I would delay the convening authority's 1 April 2020

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1 deadline to provide an amended convening order to the
2 commission to a 1 June 2020 deadline.

3 All right. Do any -- I'll just stop there for --
4 momentarily. Do any of the parties have any corrections or
5 additions to my summary of the R.M.C. 802 conference? I'm not
6 asking for any argument on any motions or those kinds of
7 things. I'll get to that this morning, but just the 802
8 itself. Is there anything that I completely missed?

9 CP [BG MARTINS]: Not from the United States, Your Honor.

10 MJ [Co] COHEN]: All right. Thank you.

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

12 MJ [Co] COHEN]: Good morning.

13 LDC [MR. SOWARDS]: Just to clarify, so if I understand
14 it, 744 was one of the motions the government was requesting
15 an opportunity to complete the briefing cycle, so we would not
16 be taking that up ----

17 MJ [Co] COHEN]: That is correct, sir.

18 LDC [MR. SOWARDS]: ---- under any circumstances.

19 Secondly, I understood, perhaps incorrectly, that Your
20 Honor's reference yesterday to 667A, the status update, was to
21 say that if we were unable to proceed today, we would have
22 oral argument on that at a -- at a different time, not that we
23 were waiving oral argument.

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1 MJ [Co] COHEN]: Okay. Yeah, I will -- right. I will --
2 if you're not ready to argue or you can't argue it here, I
3 will continue to take a look at it and look at whether I need
4 oral argument on it or not.

5 All right. Mr. Trivett, anything you'd like to add,
6 sir?

7 MTC [MR. TRIVETT]: Yes, sir. For 744, we did respond and
8 would be prepared to argue.

9 MJ [Co] COHEN]: Okay. All right. Thank you.

10 LDC [MR. SOWARDS]: I think there's a reply brief
11 outstanding.

12 MJ [Co] COHEN]: Oh, I understand. All right. Thank you.
13 All right.

14 Mr. Trivett, since we're at this point real quick,
15 does the government move -- move orally for that
16 M.C.R.E. 505(h) hearing?

17 MTC [MR. TRIVETT]: It does, sir.

18 MJ [Co] COHEN]: All right. Thank you. That will be
19 granted.

20 Mr. Connell.

21 LDC [MR. CONNELL]: Sir, with respect to the 802 summary,
22 there was a substantial discussion of the allegation that the
23 government had a device in the courtroom that would allow an

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1 intelligence agency from outside to provide it information,
2 and the military commission's summary said that we said that
3 that would violate AE 133QQ.

4 I think that's true in a very technical sense, but
5 what I actually said was that that -- I did not make an
6 allegation that we were being spied upon, which seemed to be
7 where the -- like there was a lot of discussion of that.

8 MJ [Col COHEN]: Right.

9 LDC [MR. CONNELL]: But that the real issues are, number
10 one, that the reasoning of AE 133QQ is that the -- there was
11 no violation of due process or other legal right because the
12 government was not using information from outside the
13 courtroom to assist in the prosecution of the defendants; and
14 then, second, that the use of an outside device, at least on
15 31 January 2020, allowed the government to invoke national
16 security privilege and deny the public access to parts of the
17 proceedings without actually making an invocation of national
18 security privilege.

19 The -- one other piece is that I advised the military
20 commission that AE 735 had not been accepted for filing, and
21 although AE 735A, which appears to be a kind of on-the-fly
22 request for an ex parte hearing, had been accepted for filing,
23 the military commission informed me that it would consider it

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1 accepted for filing as of yesterday, I suppose.

2 The thing that I have to bring to your attention, sir,
3 is that that is the device, that silver one right there,
4 right? And it didn't -- I could not figure it out, what you
5 meant by you were going to provide more information, until
6 yesterday.

7 And what it appears to me, sir, is that -- and I say
8 this with all the respect that I feel, that it appears to me
9 that the government has had some kind of ex parte contact with
10 the court and the court has ordered or authorized the
11 installation of a CIA device in the courtroom to allow the CIA
12 externally to assist the government in their prosecution,
13 which flies in the face of every idea, not just of due
14 process, but of an adversarial system and democratic values.
15 And I don't know if that's what actually happened, sir, but
16 from where I sit, it certainly looks like it.

17 MJ [Co] COHEN]: Counsel, I understand your position.
18 I -- it is public record that the OCAs are -- are monitoring
19 this and that they have an obligation themselves to prevent
20 spills, period. We can't have spills.

21 Now, whether or not national security privilege is
22 invoked or not -- but spills cannot occur. That is the bottom
23 line. The goal is zero spills. So you all litigated this,

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1 and it's public knowledge. It's in the AE 133QQ ruling. It's
2 in the testimony that you specifically elicited that the OCAs
3 have always had realtime monitoring of this.

4 It's the difference between assisting and someone
5 indicating that there has been a spill that has occurred.
6 There is an absolute difference between someone providing
7 litigation strategy and an OCA, whether that be the CIA or an
8 FBI or SC/DRT or any OCA indicating that a spill has occurred
9 and a transmission must be temporarily suspended while that's
10 worked out.

11 But who makes that decision is absolutely consistent
12 with everything from 2016 to present, which is that's me. I'm
13 the only one who can tell this man to my right to cut a feed.
14 But everyone, to include yourself, has 100 percent
15 responsibility for avoiding a spill.

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

17 MJ [Co] COHEN]: And if we learn of any spill whatsoever,
18 we must take immediate action to respond to that. That is the
19 bottom line. That's where all of this comes from. And
20 whether there -- so there's two options.

21 Either someone can be -- can be monitoring and we can
22 use technology to -- to address things, or I can have 12
23 people sitting in the courtroom who stand up and say we need

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1 to -- we need to cut the feed; there's been a spill. We need
2 to address this. Either way, the result is exactly the same.
3 And they have an absolute right.

4 And anytime they believe a spill has occurred, you
5 have an absolute right and an obligation, based on your
6 security clearance, that if you think there's been a spill,
7 that there's even the possibility of a spill, to stand up and
8 affirmatively ask me to cut that feed while we work out the
9 issue. That is your responsibility, your -- and your security
10 clearance relies on that responsibility.

11 So the fact that someone, especially the government,
12 since September of 2016 -- 2019, when I specifically told them
13 you will be primarily responsible for this because it's your
14 equities, not mine, not the defense's. We will assist, I will
15 take the responsibilities that I have, but that is the bottom
16 line here.

17 There cannot be any spills. That is the goal. And if
18 we're going to actually be serious about that, then what we're
19 going to start doing is we're going to change the whole 505
20 process. You guys are going to give itemized lists of every
21 piece of information that you want, and then we're going to --
22 we're going to review it for potential spills and whether or
23 not you can use it.

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1 Because the idea now is that you guys get to file
2 2,000 pages of documents. You may only use 20 of them but we
3 give 2,000. I don't know what you're going to use in that --
4 what specific lines you're going to use in that. And the
5 other problem is is no one knows what follow-up questions
6 you're going to ask based on responses, and oftentimes it's
7 the follow-up question that actually leads to a spill. That's
8 the reality of where we are.

9 We're -- we can CIPA this all day long. I have no
10 problem with that. I have worked with the parties entirely to
11 do this. So the fact that we -- that -- the fact that the
12 government would want to work with the defense to allow them
13 this more general process of giving general notice of
14 thousands of pages of information they want to use under these
15 various topic areas, but then have the ability to make a
16 decision in 40 seconds about whether or not a spill has
17 occurred -- that's 40 seconds, Counsel. I've spent more time
18 talking to you about this issue now than we have to make a
19 decision on pushing that red button and avoiding a spill. And
20 if I know there's a spill and I take no action to do it, I am
21 in violation of the law. That is the reality.

22 So we can work this process entirely differently. But
23 the reality is is no one is providing litigation advice to the

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1 United States of America on how to prosecute this case. The
2 only thing that is ever happening in any way, shape, or form
3 is that people are working to avoid spills, while allowing the
4 defense to have a much more generalized process of giving,
5 through thousands of pages of information, without any
6 specificity about what actually is intended to be elicited out
7 of that information, which also inures to the benefit of the
8 defense because then you don't have to show your hand
9 beforehand.

10 But the reality is, under CIPA I can require you and,
11 in fact, if I'm actually looking at it the way that the rules
12 are actually written, I'm obligated to require you to provide
13 that level of specificity, which you have -- personally have
14 said is untenable and would completely bog down the process.
15 And you're right.

16 We could spend the next year working through your tens
17 of thousands of pages of information that you want to have
18 witnesses read from in the courtroom and working around these
19 classified informations, or I can have you provide the level
20 of specificity that's required.

21 So there's no spying going on in this courtroom.
22 There's no one assisting in the prosecution. We aren't adding
23 multiple people. And to be honest with you, if you really

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1 want me to consider the fact that I'll just have the OCAs
2 present in the courtroom, okay, but it isn't going to change
3 anything. They still have the opportunity to -- to advise not
4 only you and the prosecution, but the court as to when there's
5 been a spill.

6 That's the whole purpose of this. That's all the --
7 this is ever intended to do. There's nothing nefarious about
8 this. It is intended to avoid spills which, under the law,
9 cannot happen, period. Zero. That's the goal: Zero spills.
10 That's where I feel on this.

11 LDC [MR. CONNELL]: Yes, sir. The -- and I agree with
12 about 95 percent, maybe 98 percent of what you just said. I
13 defer to no one in my slavish devotion to my responsibility as
14 a custodian of national security information.

15 I myself have made a request to the military
16 commission to activate the security device when I thought that
17 there was a spill. I am very careful to advise each witness
18 of their responsibility under the military commission's
19 approach. The -- I have worked the classification review
20 process. I have worked with the prosecution. I have
21 submitted extensive 505(g) notices. And I understand there
22 are levels of -- there's specific and there's specific. I get
23 that.

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1 The last activation of the security device in the
2 January hearing is what made me believe that there was more to
3 the process than I had ever been advised, and that is because
4 the two prosecutors who were handling Dr. Jessen did not
5 actually understand why they had to ask to hit the button.

6 You may recall -- and I went back and looked at the
7 record and one of the -- one of my issues here is how poor the
8 record can wind up on these things because it happens in a
9 conversation between counsel, which the military commission
10 has been very patient and generous with those conversations,
11 and I believe that those conversations in general have helped
12 accomplish the goal of zero spills.

13 MJ [Col COHEN]: I can tell you there's been multiple
14 spills.

15 LDC [MR. CONNELL]: All right. They don't tell me what
16 are spills. I have no ----

17 MJ [Col COHEN]: Some of your questions have led to
18 spills.

19 LDC [MR. CONNELL]: They don't tell me either in advance
20 or on the back end. I have no learning process. I have no
21 feedback loop of "Don't do that again, Counsel."

22 The situation there was that the prosecutors did not
23 understand the basis for why they had asked to activate the

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1 security device. Couldn't explain it to us, and ultimately,
2 it had to be, "Well, we'll look at the transcript when it
3 comes out."

4 It became clear to me in that situation that there was
5 more to the -- to what was going on than what I knew about.
6 And I have scoured the filings inventory for an appropriately
7 timed notice of ex parte order, or notice of ex parte request
8 that didn't match up with something that I already knew. And
9 I can't -- because of the nature of ex parte claims, I can't
10 represent to you that it's not there. I can represent to you
11 that I have earnestly looked and have not found it at any time
12 that makes sense to me.

13 You also should know what -- that this is not the
14 first time. In the 052 series we had a adversarial argument
15 over whether a black site should be preserved, after which,
16 viewed in the best possible light to the government, the
17 government opted out of the adversarial process, attained an
18 order of which the defense did not get notice for years, and
19 the black site was at least partially destroyed.

20 In the 802, the military commission made a reference
21 to that issue is before the D.C. Circuit. In fact, the only
22 issue that is before the D.C. Circuit is whether the
23 preservation order from this military commission, which is

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1 currently in effect, will be lifted. Not the merits, not what
2 actually happened, just is there any reason to preserve
3 whatever remains further.

4 When I thought that the government was using a device
5 to get additional information, the -- it appeared to me that
6 it was a qualitative change in what was happening. That is
7 not the same as somebody from the back of the room saying,
8 "Ooh, did you hear that?" That happens to me. Certainly, I'm
9 sure it happens to the prosecution. It seemed to me to be a
10 change in practice, given the events in Dr. Jessen's
11 examination.

12 So I agree completely with the goal of no spills. I
13 have advocated, sometimes successfully and sometimes
14 unsuccessfully, for greater transparency in classification
15 guidelines, right? The record is replete with my requests for
16 a classification guide, which has been consistently denied.

17 The -- so if what I hear the military commission
18 saying is that the military commission is aware of this
19 situation and that the military commission has approved the
20 use of a device for OCAs to communicate with the prosecution,
21 then that's the substance of it.

22 I believe that the prosecution has come to rely on
23 ex parte approaches to the military commission for things that

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1 it wants, and that it has exceeded the boundaries of the
2 Military Commissions Act and the M.C.R.E. and the R.M.C. I've
3 briefed that on many occasions. There's nothing in any of
4 those authorities that would authorize a request of the type
5 that -- that we have here.

6 If our goal as a community is to avoid spills, that
7 conversation should take place in a way that does not drive
8 suspicion but, rather, creates transparency.

9 MJ [Col COHEN]: And you may be right. So I'll take -- go
10 back and look at the issue and -- yes, I'm -- like I said,
11 part of the discovery I'm providing you is I'm aware of --
12 that there's a communication device on that thing for realtime
13 interaction with the OCAs to determine -- to get clarification
14 on, hey, is this a spill or is this not a spill? That is the
15 extent of it. There's no listening capabilities. There's --
16 there is nothing along those lines.

17 Now, I can tell you right now, consistent with the --
18 with the ruling in 133QQ that Judge Pohl issued years -- you
19 know, over -- almost four years ago, this is the least
20 invasive opportunity we have to -- to possibly address this
21 issue.

22 The reality is is this: No matter how much you look
23 at a guide, no matter how much the prosecution looks at a

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1 guide, no matter how much my CISO looks at a guide, we
2 still can have misunderstandings about what is classified and
3 what isn't or what the nuance is and all those kinds of
4 things. So the idea that we do a temporary pause, which is
5 all we're doing, to determine whether or not we actually have
6 an issue with a spill, that's it. Doesn't necessarily
7 preclude any testimony. If it's not a spill, we move on.

8 But it's not an invocation of the national security
9 privilege when you -- when you do that. It's an invocation
10 that there might be classified information. It just might not
11 be able to be discussed. The national security privilege
12 is -- as it is interpreted and will be enforced by this court
13 is you can't ask it in any forum whatsoever and you will never
14 be able to get the answer to that. We've got that about the
15 black sites and everything else.

16 So when you say national security privilege, that is
17 completely different in my mind than the idea of I can't
18 discuss classified information in an unclassified forum,
19 period, dot. So we're -- there's just no opportunity. I
20 can't -- I can't allow that.

21 Unless I go through a 505 process and you tell me that
22 I need to be able to talk about this particular piece of
23 classified information in an unclassified forum and I use the

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1 505 process and I say I agree. Government, you've got an
2 option. Either you allow it, you declassify it, you come up
3 with a -- with some kind of substitution that puts the defense
4 in substantially the same position that they otherwise would
5 have been and is consistent with a fair trial. Or if I
6 believe that it's useful, relevant, and admissible and that
7 it's the only piece of evidence that you can -- and there's no
8 other substitution or they just point at and give me the hand,
9 the Heisman, and say we're not doing anything, then I can take
10 action. And that's how the CIPA process has consistently
11 worked. That's how this would work as well.

12 But all that red light does is say pause. That's it.
13 That is the only purpose of that red light. It does not make
14 a ruling. When I pause and it's my decision whether to hit
15 it, it does not mean that you can't ask any further questions.
16 It means let's take a moment, let's figure out what just
17 happened. And as you guys have mentioned -- and I have lauded
18 you time and time again of take that pause, let's figure out
19 why -- can it be asked a different way in an open forum as
20 opposed to a closed forum.

21 And with the exception of a couple of times -- I mean,
22 there have been times where, I'll be honest with you, I
23 don't -- I get generally why it might be a red light, but I'm

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1 not 100 percent positive myself. But if I've got to err, I
2 have to err on the side of if it is classified, it can't go
3 out, so let's take a moment and figure it out.

4 And it's not ideal. I completely agree with you
5 100 percent. But I've got to have something because I can't
6 just ignore the fact that there may be -- that there might be
7 a spill. That I know I cannot do. And that's kind of the
8 position where we find ourselves.

9 And the idea that someone might want to leverage
10 technology to assist in doing their -- and to assisting in
11 this responsibility -- I mean, we're in the 21st century. I
12 mean, you guys are -- are throwing videos up from your counsel
13 table as opposed to having to put them in a VCR. I mean,
14 we're leveraging technology every single day in this
15 courtroom. I understand that it may not be the way you want
16 to do it.

17 And I'll go back and look at the idea of does it
18 matter whether we use a computer or does it matter whether we
19 have the OCAs present in the room, but either way, the OCA is
20 going to be present whether it's via remote means or present
21 means. Because their input on whether or not something is
22 classified is something that all of us should consider.

23 Ultimately, I get to make the decision on whether or

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1 not I'm hitting that red button, but I can tell you that in
2 other cases, it is not unusual for an OCA to even just be
3 sitting in the back to stand up and immediately the judge
4 says, "Hey, we're going to pause right here."

5 And then sometimes, it can be something that's
6 discussed with the defense, and then sometimes it's based on
7 ex parte declarations -- which I don't like personally, I
8 don't like the ex parte nature of this. I'll be honest with
9 you. I don't like the ex parte nature with the defense
10 either. But I use it routinely to assist you all. I mean,
11 the idea that you guys can file ex parte motions to compel and
12 I get to rule on it and the government has no way whatsoever
13 and whether or not something is relevant and admissible and
14 stuff like that, that is contrary to everything in the
15 military justice system.

16 In the military justice system, all your requests go
17 through the prosecutor, up to the convening authority for
18 approval, and the prosecutor would get to comment on it and
19 whether or not it should be approved or disapproved. But I'm
20 okay with the process that we have. The problem is I'm
21 adapting to the process and I'm using the process that -- that
22 exists.

23 And if you -- and if you look at the paradigm of --

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1 it's like it may not be a perfect process and there may be
2 tweaks, and to the extent I will accept your criticism that
3 maybe I should think about, you know, what should be ex parte
4 and what shouldn't be, you know, ex parte and stuff, I do.
5 And if I get it wrong sometime in the opinion of one side or
6 the other, you have my apology. That's not the intent. I'm
7 not trying to help one side or the other; I'm just trying to
8 help the process move forward and to find ways of -- of doing
9 this. That's my bottom line, period.

10 I don't care what the outcome of this case is, and I
11 mean by that, I just want to get to an outcome. Whether it's
12 an acquittal or -- or a conviction, that is -- that is
13 irrelevant to me. That's not my job as a judge. If I cared
14 about the -- the end -- the end state, then I'm already
15 abusing -- I'm already not doing what I should be doing as a
16 judge. I'm impartial.

17 So if sometimes I look at something and believe that
18 this is just a minor issue and -- and it should have no impact
19 on -- on anyone of a substantive nature, impacting cases and
20 stuff like that, and someone disagrees with that, I'm sorry.
21 That's the reality. I am.

22 Sometimes I have to make calls, and people are always
23 going to disagree with my calls. I'm going to make a ruling

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1 this morning that I promise you some or all -- some, most, or
2 even all are not going to be completely happy with what I'm
3 about to say. I'm used to that. Been doing it for five years
4 now. I'm used to the fact that every decision I make upsets
5 somebody. The idea that I can ever make a decision that
6 everyone is going to sit there and say that is the best
7 decision ever -- except for maybe terminating the day early, I
8 might win on that one. But, I mean -- yeah, throw a little
9 lightness into this. But that's where I'm coming from.

10 So, yes, I knew they had a computer on there. I had
11 no idea -- I'll be honest with you, up until recently I have
12 completely mis -- underestimated and misunderstood the level
13 of skepticism and -- and distrust that exists among the
14 parties. And that's on me, because I have never seen this
15 level of distrust and skepticism in any case I've ever tried
16 in 21 years.

17 I'm not saying it's not warranted. I'm not telling
18 anyone that their feelings are wrong, that their distrust, how
19 they feel. You know, I can never change how someone feels.
20 But hopefully, I have demonstrated over the last eight months
21 that I'm just trying to be a fair arbiter; that I'm just
22 trying to help the process move along; that I'm trying to work
23 with the parties to make things happen.

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1 If I could get rid of every piece of classified
2 information in this case, I would, because it would be great
3 if -- if we just had to push play and let the witnesses talk
4 and all those other kinds of stuff. Unfortunately, that's
5 outside my control.

6 The other thing I wish -- you know, but -- but I --
7 but I could also sit there and say just because they provided
8 50,000 pages of classified discovery doesn't mean all 50,000
9 pages are relevant and -- and all of these kinds of things.

10 But the reality is there are no ethical conflicts here
11 on the part of any defense counsel. No one is being -- no one
12 is being listened to. And, in fact, it would be in direct
13 contradiction of orders that I have specifically given to make
14 sure that none of you -- and in 133QQ, there's no -- that's --
15 that's the order.

16 Implement the JTF, you know, the -- the Colonel
17 Burger [sic] -- or colonel stuff in there and make sure that
18 there are no, you know, oversights of this and, oh, and by the
19 way, when new counsel come in, make sure they understand that
20 there is the possibility in some of these locations of being
21 overheard, and so they need to, you know, take that
22 inconsideration. That's the actual order. That's
23 paragraph 7. of 133QQ. I stand by that 100 percent.

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1 And you have my absolute word if I ever had evidence
2 that the defense was being actively listened in -- listened to
3 at this point in the trial, I would dismiss the charges
4 without thinking twice about it. That absolutely cannot go
5 on, and it will not go on in my courtroom.

6 That's not even -- I mean, that's not even a tough
7 decision for me. And that's by anyone. Not the prosecution.
8 I don't care who it is in the government. If there is
9 evidence of that, these charges are dismissed. I will
10 affirmatively state that on the record now, and I will never
11 back away from that. That simply cannot happen, and it will
12 not happen without the most significant consequence that I can
13 give. And I have no problem stating that on the record right
14 at this very moment.

15 So if I have made a mistake, in your eyes or any other
16 eyes, I apologize for doing something that I -- at the time
17 did not understand was an issue. That's all I can say. I
18 don't think it makes me partial. It was never intended to be
19 partial. It was consistent with what I believed was the
20 moving of the cheese for the prosecution, that if you're going
21 to assert -- if you're going to assert that there's a spill,
22 you're going to be primarily responsible because I can't be.
23 As a judge, I cannot be primarily responsible.

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1 I cannot be paying attention to objections on
2 evidence, taking down witness testimony, paying attention to
3 which -- which accused is coming and going, oh, and at the
4 same time, hope that I caught a nuance, based on information
5 that most of the time I haven't even seen before the time that
6 it's actually used in court, and do all of that in 40 seconds.

7 So as a community, if our real goal is to avoid any
8 spills, then we should use the tech -- we should use the
9 capabilities available to us to -- to do that.

10 LDC [MR. CONNELL]: Why not include us in that
11 conversation, sir?

12 MJ [Col COHEN]: At the time, Counsel, there were -- there
13 were technical capabilities, there were classified information
14 that was -- that was produced in that, which is the reason it
15 came ex parte. To be honest with you, it was early on in my
16 decision as a judge, and I didn't even think about it,
17 Counsel, to be honest with you.

18 It came as an ex parte filing. I completely
19 understood why it was an ex parte filing, and I just issued an
20 ex parte order. That was it. I mean, I -- there's really
21 nothing more to that. It was -- it was -- I'll be honest with
22 you. That's why I said I -- I never would have thought this
23 would have been an issue at the time. Believe me.

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1 I realize anything can be an issue now, but -- I mean,
2 we -- we sat there and took 30 minutes of time yesterday to
3 discuss the size of vans. I get it. Anything can be an issue
4 here. But that's the -- that's the sincere answer, is I --
5 there were certain things that are classified, but -- which
6 makes sense why it came ex parte, and because of an ex parte
7 filing, I issued an ex parte order.

8 And I clearly regret it now in the sense that -- not
9 that I regret what my decision was, but, yeah, you're right.
10 I -- I should have put more thought into that. I didn't. And
11 I won't make the same mistake twice. That's all I can say.
12 That is -- that is the truth.

13 LDC [MR. CONNELL]: Thank you for hearing me, Your Honor.

14 MJ [Co] COHEN]: You're welcome.

15 LDC [MR. CONNELL]: Oh, sir, with respect to AE 490, which
16 seems a quotidian at this point, but here it is. You asked
17 for the dates on which it was argued. Those were -- that was
18 16 May 2017 at pages 15752 through 844 in the transcript.

19 MJ [Co] COHEN]: Once again, the -- you said 15752?

20 LDC [MR. CONNELL]: 15752 through 844.

21 MJ [Co] COHEN]: Great. Thank you, Counsel. I appreciate
22 it.

23 LDC [MR. CONNELL]: Thank you, Your Honor.

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1 MJ [Co] COHEN]: And the reason for the delay, Counsel,
2 just so, you know, it was ex parte still. I can't really -- I
3 wasn't going to unilaterally, you know, inform the parties
4 that I issued an ex parte order authorizing it without having
5 the opportunity to -- to let the prosecution know, in the same
6 way that I would never issue -- release an ex parte ruling for
7 you guys without getting your permission to do so.

8 Mr. Sowards.

9 LDC [MR. SOWARDS]: Good morning, Your Honor. Gary
10 Sowards on behalf of Mr. Mohammad.

11 Just one clarification. I wasn't sure you and
12 Mr. Connell had covered it. But what I understood him to say
13 initially was that the ex parte that we're talking about, with
14 respect to authorizing the device, has no trace in the record.
15 So there's no -- not only is there an ex parte, but there's
16 no ----

17 MJ [Co] COHEN]: No, there is. It's -- I'll get you the
18 number.

19 LDC [MR. SOWARDS]: Okay.

20 MJ [Co] COHEN]: There was an ex parte filing, and there's
21 an ex parte order.

22 LDC [MR. SOWARDS]: And thank you, Your Honor.

23 MJ [Co] COHEN]: And I'll release it. I mean, I have no

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1 problem releasing it. I was going to. I was just getting
2 some additional information as well. I will still issue --
3 I've spent way more time talking about it here than what I'll
4 probably put in writing, but you'll have the actual order.

5 I mean, that was one of the reasons why -- so when we
6 said the 730 -- you filed 735. I wrongly considered it that
7 it was accepted. As a result of that, the government and I
8 needed to have that ex parte to say I'm going to release this
9 because I think they need to have this.

10 Because I don't want this to become an issue that it
11 really isn't, because I was smart enough, come February of
12 2020, to realize before this metastasizes into something that
13 really isn't, let me -- I'm going to release this, which is
14 why there was a quick ex parte, to give them time to say,
15 look, I don't think this contains -- it -- I don't believe
16 that this has any -- gives up any classified information as a
17 result of that, but if you need -- but if you -- but I'm going
18 to give you, you know, a couple days to come take a look at it
19 and make sure.

20 And that's why I've told you guys all along, is I'm
21 going to give you information. I have no reason to hide from
22 the decision I made. I just had to work through a process to
23 be able to release an ex parte ruling.

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1 LDC [MR. SOWARDS]: Okay. And I apologize for my
2 confusion, but on February 10th I thought it was the
3 government that requested the ex parte.

4 MJ [Co] COHEN]: They did. They formally requested the --
5 the ex parte. My folks told them that, you know, the -- that
6 I -- that I was -- that if they were going to request one,
7 that they should do it sooner rather than later. But -- but
8 that's it.

9 LDC [MR. SOWARDS]: Okay. And I appreciate that the dose
10 of reality Your Honor provided us a little earlier in response
11 to Mr. Connell's remarks.

12 I would just like to say that the reason I was
13 addressing you this morning along those same lines was to
14 request that we defer all discussions and argument on any
15 motions or any substantive commission business until actually
16 we have had an opportunity to review the discovery Your Honor
17 is -- is going to disclose to us. I think ----

18 MJ [Co] COHEN]: The discovery would essentially be a
19 memorandum on how I made that -- why I issued the ex parte
20 ruling, which I've now put on the record, and the fact that I
21 issued an ex parte ruling.

22 LDC [MR. SOWARDS]: Okay. And with respect to ----

23 MJ [Co] COHEN]: That is the -- that's the entirety of it.

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1 There's nothing else. I mean, it really is nothing more than
2 that, Counsel.

3 LDC [MR. SOWARDS]: Okay. And that ----

4 MJ [Co] COHEN]: And that was the entirety of what's going
5 on.

6 LDC [MR. SOWARDS]: With respect, Your Honor, that would
7 not allay our concerns with respect to the unauthorized
8 monitoring of attorney-client communications.

9 MJ [Co] COHEN]: Counsel, there is just no evidence that
10 you have of any unauthorized monitoring of attorney-client
11 communications.

12 LDC [MR. SOWARDS]: I know there's no evidence.

13 MJ [Co] COHEN]: That's exactly right.

14 LDC [MR. SOWARDS]: We've had that problem since 2013 when
15 we've asked ----

16 MJ [Co] COHEN]: Every time they've looked at it, Counsel,
17 in this courtroom, there's never been any evidence of that,
18 and that's consistent with 133QQ as well.

19 LDC [MR. SOWARDS]: Okay. And I just -- you know, my
20 position on the record, just so it's clear ----

21 MJ [Co] COHEN]: Okay.

22 LDC [MR. SOWARDS]: ---- is that every time we've raised
23 this, the government has been allowed to assert the national

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1 security privilege beginning with, I believe it was Maurice
2 Elkins, who had information about where these -- where these
3 feeds are going and who has them.

4 All I'm saying is our position -- I understand your
5 position -- you're the judge. It will be your final ruling.
6 Our position is this is a wholly inaccurate -- inadequate
7 record to reassure professional counsel that their -- their
8 conversations are not being -- not being monitored.

9 MJ [Co] COHEN: Right. Based on the evidence before me,
10 I find that you do not have an ethical conflict, and I ask you
11 to represent your client.

12 LDC [MR. SOWARDS]: Okay. And what I'm saying is that I
13 don't know what evidence you have before you because we don't
14 have any of it.

15 MJ [Co] COHEN: I've looked at the evidence from 133. I
16 mean, the testimony was provided on this. Counsel, look ----

17 LDC [MR. SOWARDS]: Okay.

18 MJ [Co] COHEN: ---- you can have a theory that something
19 is going on, but a theory doesn't make it reality, and the
20 reality is -- is this. You have a represent -- you have a
21 person to your left that you have to represent, and you have
22 motions that are actually filed.

23 Either you can be heard on those motions or you're not

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1 going to be heard on those motions. But you can weigh the
2 theoretical ethical conflict with the actual ethical conflict
3 of not representing your client, but that's the opportunities
4 you're going to have.

5 LDC [MR. SOWARDS]: Okay. And so the record is clear,
6 then, I would like to put on the basis for the ethical and
7 professional conflict that we have ----

8 MJ [Co] COHEN]: You can. I mean, you can tell me what
9 theories you have, but ----

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

11 MJ [Co] COHEN]: ---- but you have no evidence of it.

12 LDC [MR. SOWARDS]: Okay, I will do that. First of all,
13 just to begin, what I'd like to say, again, with respect to
14 both you and Mr. Connell is if the goal of this part of
15 this -- these proceedings and our procedures is to have zero
16 spills, that is an unachievable fool's errand, and it has
17 nothing to do with the defense.

18 If you go back and look at the record ----

19 MJ [Co] COHEN]: Would you like me to sit there and just
20 unilaterally say, well, 10 percent is okay?

21 LDC [MR. SOWARDS]: I don't know what's acceptable. I'll
22 tell you ----

23 MJ [Co] COHEN]: I'll tell you what's acceptable. We

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1 should be looking for zero.

2 LDC [MR. SOWARDS]: And what we do and what I think
3 Mr. Connell was saying we do is we abide strictly by all rules
4 that are disclosed to us. The problem is twofold:

5 One, you just said it was difficult for you and your
6 CISO and the prosecution, even with the classification guides,
7 to know what's classified. We do not have those
8 classification guides. So one thing that I'm asking for
9 before we proceed under -- under this particular regime is
10 that we have those classification guides. That is our right
11 under Lankford v. Idaho.

12 Secondly, if you look at the record, the vast number
13 of the so-called spills result because the government
14 discloses information to us. It is put up on the screen, and
15 then later, the people monitoring this in Langley decide that
16 is not a good thing for them or the case or for the public to
17 see. And suddenly, something that everyone has -- has been
18 handling and passing around and -- and treating it
19 unclassified documents becomes classified and a spill.

20 You're never going to eliminate that because at
21 bottom, when you talk about 20th -- 21st century technology,
22 it is 21st century technology in service of covering up
23 15th and 16th century torture. That is 99 percent of the

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1 classified information in this case.

2 You say you have an obligation to report spills. You
3 also have an obligation under treaty obligations to report
4 individuals you know engage in torture, and there has not been
5 a judge in this commission to date that has discharged that
6 responsibility.

7 The entire focus of the government -- virtually the
8 entire focus of the government's invocation of classified
9 information and procedures is to protect the individuals,
10 including those currently at -- at some of the highest
11 echelons in the CIA, from being exposed for being involved in
12 a torture program.

13 And so they twist and turn themselves into knots --
14 I'm sorry, I'm slowing down -- into knots, trying to figure
15 out what can and cannot be said, and the end result is the
16 definition of an arbitrary and capricious procedure, which is
17 incompatible with the Eighth Amendment. So a starting point,
18 at least for us, to be forearmed, is to know what this
19 classification guidance is, not to get it piecemeal from these
20 individuals.

21 When you speak about the -- the question of the level
22 of distrust -- and I will not bore Your Honor or take up
23 the time today. I just commend Your Honor to read AE 530S, as

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1 in Sierra, pages 14 to 23, which will disclose to you all of
2 the documented actionable intrusions of the defense camp by
3 the prosecution.

4 And when I invited your attention to -- for AE 425X,
5 that was to alert you to our experience, which you have not
6 shared because you weren't here, to a situation in which not
7 only was material evidence destroyed, it was destroyed at a
8 time when the government knew we didn't have notice.

9 And when they were asked about that, what they said
10 with a straight face and what we had to endure was the
11 government saying, "Look, Judge Pohl said that evidence will
12 not be destroyed pending further order of the court. We, the
13 government, got a further order of the court. There's nothing
14 in the original order that said you would know about the
15 further order of the court. So we have one. We're in
16 compliance."

17 And when they understood that that was not exactly the
18 most persuasive argument for Judge Pohl, they then offered up
19 the -- the excuse that this was a, quote/unquote, innocent
20 case of miscommunication. And what 425X lays out in fairly
21 disturbing detail is exactly how that was not the case; that,
22 in fact, what they did was tried to enlist trial judiciary in
23 misleading us as to the existence and nature of any orders

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1 authorizing the destruction of a black site until six months
2 after it happened or at least six months after the order had
3 been -- had been issued.

4 My concern about 133 and the -- and the possibility of
5 government surveillance, what I -- what I mentioned in the 802
6 and I will say for the record, is that our understanding in
7 the -- and it's the same sort of situation as 425X -- anyone
8 giving a reasonable reading to 133QQ, as in Quebec, would hear
9 and understand Judge Pohl to be saying of course an original
10 classifying authority has the same right as certainly the
11 interpreters to receive realtime feeds, and if we're missing
12 something, to alert somebody that classified information has
13 been disclosed.

14 Everybody understood that to mean that they would have
15 perhaps some access similar to that available to the
16 interpreters. They did not understand that to be a special
17 wiring of this courtroom. But what they -- what has not been
18 disputed by the government, and I haven't heard Your Honor
19 dispute with Mr. Connell, is 133QQ is also very clear to say
20 that even in the instance in which the -- the monitoring
21 authorities may see a spill or a classification violation,
22 they're not the ones who activate the red light, in effect,
23 and that ----

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1 MJ [Co] COHEN]: I definitely said that.

2 LDC [MR. SOWARDS]: Yes. And that's -- but that's what
3 this device does. It allows them ----

4 MJ [Co] COHEN]: No, it doesn't.

5 LDC [MR. SOWARDS]: Yes, it does. Let me say it this way.

6 MJ [Co] COHEN]: Counsel, it doesn't. I decide, period.

7 LDC [MR. SOWARDS]: Your Honor, with respect, I have to
8 insist on the facts in defense of my client. The -- the
9 proceedings I observed was a relay of information to you to
10 turn on that light, and that's what happened.

11 You did not say to them, "Why am I turning on the
12 light?" You didn't say, "I'm not going to turn on the light
13 because I and my CISO did not perceive a classification" ----

14 MJ [Co] COHEN]: Anymore than when Mr. Connell himself has
15 asked me that you need to hit the red light, I have not --
16 I've not at that moment asked him why. I've said I have
17 trusted him, I have trusted counsel, that there's a reason why
18 I need to hit the light. If I'm absolutely certain that there
19 is no reason to hit the light, I will not hit the light
20 regardless of whether the fact that someone questions that.

21 LDC [MR. SOWARDS]: And if Mr. Connell or if one of the
22 prosecutors says, "Wait a minute, objection. We have a
23 problem," they are available for consultation with everyone

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1 else present in representing the clients. The person at
2 Langley or wherever who's monitoring this, because of this
3 feed, is not available. And all we know is the light goes
4 off.

5 That's -- that was Mr. Connell's point. Is that they
6 were ----

7 MJ [Co] COHEN]: Right. So we have a pause while we work
8 out whether or not there's been a -- been a spill.

9 LDC [MR. SOWARDS]: Right. And that's exactly what we had
10 back in ----

11 MJ [Co] COHEN]: No, that's not what you had back then.

12 LDC [MR. SOWARDS]: Yes, we did.

13 MJ [Co] COHEN]: No, you didn't.

14 LDC [MR. SOWARDS]: Your Honor, I was there in 2013.

15 MJ [Co] COHEN]: I've read the record. Someone
16 unilaterally set off the red light without the judge taking
17 any affirmative action. That's what you had. That is not
18 what you've had in any session where I have been present,
19 period. That is the fact, Counsel. That is the fact.

20 LDC [MR. SOWARDS]: That is -- that is a literal fact and
21 I ----

22 MJ [Co] COHEN]: Thank you. That is right.

23 LDC [MR. SOWARDS]: And I'm saying ----

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1 MJ [Co] COHEN: Literal is all that matters. Not
2 theoretical, not euphemistically. Literal. You said it.
3 I'll accept your words. Move on.

4 LDC [MR. SOWARDS]: My point was there is no practical
5 difference between it being relayed to you ----

6 MJ [Co] COHEN: That is your opinion.

7 LDC [MR. SOWARDS]: Well, let me say it this way, Your
8 Honor. You had no information as to why you were setting off
9 that light other than they asked you to. And they had no
10 information ----

11 MJ [Co] COHEN: There was a potential spill.

12 LDC [MR. SOWARDS]: ---- other than the CIA was asking.

13 MJ [Co] COHEN: There was a potential spill, Counsel.
14 That's all I need to do to make a decision within 40 seconds
15 as to whether or not I'm just going to ignore it or whether
16 I'm going to take a pause and hear what the positions are.

17 LDC [MR. SOWARDS]: Okay. So the understanding that -- at
18 least my position is the understanding of the parties is we
19 did not understand there was a separate feed to the CIA that
20 would get this red light activated.

21 MJ [Co] COHEN: To OCAs.

22 LDC [MR. SOWARDS]: Well, we knew in -- in 2013 that it
23 was the CIA. So if they've -- if they've changed up the

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1 lineup, then okay, we'll call it the OCA.

2 MJ [Co] COHEN]: There are multiple OCAs that work on this
3 case, Counsel.

4 LDC [MR. SOWARDS]: I understand. The one that was
5 identified in 2013 was CIA. That's -- that's why I refer to
6 them.

7 MJ [Co] COHEN]: Okay. They remain a CIA -- I mean, the
8 CIA is definitely an OCA, as is SC/DRT.

9 LDC [MR. SOWARDS]: Okay.

10 MJ [Co] COHEN]: What's your ethical conflict, Counsel?
11 Can we please get to that issue?

12 LDC [MR. SOWARDS]: Yes.

13 MJ [Co] COHEN]: You've got three minutes to wrap it up.

14 LDC [MR. SOWARDS]: Okay. And what I'm asking -- so what
15 I was asking for is the -- is to disclose the discovery you've
16 referred to. You said that's a memo. It won't change
17 anything.

18 We would also like a disclosure of the transcript of
19 the ex parte conducted on February ----

20 MJ [Co] COHEN]: Not going happen.

21 LDC [MR. SOWARDS]: Okay. We would also, for the record,
22 request a -- a -- a transcript of the ex parte that you
23 conducted that led to the machine being placed in here.

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1 MJ [Co] COHEN]: Not going happen.

2 LDC [MR. SOWARDS]: That's not going to happen.

3 We would also like the -- a disclosure of the as-built
4 schematics for the wiring of this hearing facility so we can
5 see exactly where the ----

6 MJ [Co] COHEN]: Counsel, I'm inclined to let you have a
7 ladder and let you walk all over this place.

8 LDC [MR. SOWARDS]: Oh, you wouldn't want me to do that.

9 MJ [Co] COHEN]: No, actually, I would.

10 LDC [MR. SOWARDS]: First of all, I'd hurt myself. But I
11 wouldn't know what I was looking at. The reason I want the
12 schematics, Your Honor, so we can make an intelligent decision
13 about this. But if you want to let me -- I'll take you up on
14 that if you want to let me crawl around here. I, you know, I
15 can do that.

16 I don't think you mean that seriously. I'm asking
17 seriously for the as-built schematics, which we have been
18 denied since 2013.

19 MJ [Co] COHEN]: All right.

20 LDC [MR. SOWARDS]: And then the final thing, which I
21 mentioned before, was to request a copy of the actual
22 classification guides, because we remain at a
23 disadvantage ----

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1 MJ [Co] COHEN]: The classification guide that I primarily
2 rely on in this case, because I don't maintain copies of all
3 the classification guides, which is exactly the reason why I
4 ordered the government to issue the AE 658 series, including
5 AE 658A, because that is the definitive classification guide
6 for us to base on.

7 Now, if issues arise, that's why it needs to be
8 modified, if there's something that was initially missed in
9 that. But that is what -- that is what I sit up here with a
10 copy of. And if you were sitting more than three feet away
11 from your client or, you know, you could have a copy of it
12 sitting right next to you as well, or at least Mr. Nevin could
13 right here at the end of the table, who's a very capable -- a
14 very capable attorney. Not to mention you can review it as
15 many times as you want because it's already been provided to
16 you.

17 LDC [MR. SOWARDS]: You're talking about that
18 classification guide that they can't cite the provisions for
19 and which the -- the person at SC/DRT or CIA or MIA or -- I
20 don't know -- TWA?

21 MJ [Co] COHEN]: I can give you a very basic
22 classification guide. If it's in a classified document, don't
23 use it.

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1 LDC [MR. SOWARDS]: Sir, my point is that armed with that
2 summary, these -- and these gentlemen's experience, apparently
3 they need the assistance of somebody off site monitoring this
4 in real time to request Your Honor to activate the red light.
5 And the bottom -- the -- at bottom, what all of this says is
6 this has nothing to do with those classification guides, this
7 has nothing to do with legitimate state interests. This has
8 everything to do with protecting the people involved in the
9 conspiracy to torture and to cover up the torture.

10 And until we at least get something concrete in terms
11 of the -- the criteria under which we're supposed to be
12 working, we're always going to have spills.

13 MJ [Col COHEN]: Counsel, they did a really horrible job
14 of -- of covering it up when we had nine -- nine days of
15 testimony on -- on these allegations of torture. Not to
16 mention the -- the hundreds and thousands of pages of
17 documents that you guys have on the issue.

18 LDC [MR. SOWARDS]: Yes. And we're -- and we're talking
19 about the testimony that -- that tracked the -- the executive
20 summary of the Senate torture report.

21 MJ [Col COHEN]: Counsel, I think you guys alone filed
22 several thousand pages of information related to their --
23 their years of detention in the RDI program, correct?

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1 LDC [MR. SOWARDS]: That's correct, Your Honor.

2 MJ [Co] COHEN]: All right. Yeah. All right.

3 Thank you. I understand your position. I didn't hear
4 a single ethical rule that you cited to me, but I appreciate
5 it. Thank you.

6 LDC [MR. SOWARDS]: Well, and so that if I may say very
7 quickly, then, Your Honor, to cite to Powell v. Alabama.

8 MJ [Co] COHEN]: No. Your bar ethics rules.

9 LDC [MR. SOWARDS]: I'm sorry?

10 MJ [Co] COHEN]: Tell me the bar ethics rule that you're
11 applying here.

12 LDC [MR. SOWARDS]: The bar rules that I operate under out
13 of California require me to take every reasonable effort to
14 protect the disclosure of confidential information.

15 MJ [Co] COHEN]: And you have.

16 LDC [MR. SOWARDS]: Powell vs. -- I have not.
17 Powell v. Alabama says that the attorney-client communications
18 are to be -- are respected on the order and regarded as -- as
19 sacrosanct as discussions in the confessional.

20 MJ [Co] COHEN]: I completely agree with you, which is why
21 I said if I get any evidence whatsoever that -- that those --
22 that someone is listening in on those conversations or
23 recording them, I will dismiss this case immediately.

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1 LDC [MR. SOWARDS]: Right. But our ----

2 MJ [Co] COHEN]: I can't think -- I can't think what else
3 I can do for you, Counsel. That is an absolute. That is a
4 direct order of the court ----

5 LDC [MR. SOWARDS]: And you're ----

6 MJ [Co] COHEN]: ---- and stronger than any theoretical
7 concerns that you may have.

8 LDC [MR. SOWARDS]: And are you ruling on the request for
9 the as-built schematics?

10 MJ [Co] COHEN]: I will take that under advisement.

11 LDC [MR. SOWARDS]: Okay. Then I would defer
12 participating until I've had an opportunity to see that.

13 MJ [Co] COHEN]: That is your choice.

14 LDC [MR. SOWARDS]: Thank you.

15 MJ [Co] COHEN]: That's another ethical rule that you need
16 to consider.

17 LDC [MR. SOWARDS]: Yeah. And I should say, Your Honor,
18 it's compelled by my ethical obligations, not my choice.

19 MJ [Co] COHEN]: All right. Thank you.

20 LDC [MR. SOWARDS]: Thank you, sir, for your time.

21 MJ [Co] COHEN]: All right. We're in recess.

22 [The R.M.C. 803 session recessed at 1012, 19 February 2020.]

23 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1028,
2 19 February 2020.]

3 MJ [Col COHEN]: The military commission is called to
4 order. Parties are present. Mr. Mohammad and Mr. Binalshibh
5 are both present.

6 Following the 802 conference, I accompanied -- I,
7 accompanied by representatives from the government and
8 Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh, and Mr. Ali, all
9 conducted a site visit on both the large and small vans used
10 to transport the accused to and from Camp VII to the ELC. And
11 we had the opportunity, if we chose, to actually sit in the
12 smaller van.

13 After the site visit, and as recommended by the
14 government, I engaged in an ex parte in camera session with
15 Mr. Binalshibh and his defense team to discuss representation
16 issues pertaining to AE 761.

17 I will now issue my preliminary ruling. I reserve the
18 right to modify this ruling prior to a final ruling being
19 issued at a later date. That will make sense as I get through
20 the ruling.

21 Since taking over as the military judge in June 2019,
22 I have worked with the parties, sometimes contrary to either
23 their personal and/or collective desires, to overlay structure

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1 on a process that for over seven years had none. Motions
2 filed by the parties were driving the docket rather than the
3 docket driving the motions and so forth.

4 The case had been consumed by various investigations,
5 ethical allegations, and breakdowns among certain accused and
6 counsel. Notwithstanding numerous requests for a trial
7 scheduling order, none was issued. Moreover, notwithstanding
8 assertions of discovery having been completed by the
9 government, time and again, such assertions were met by the
10 need to provide hundreds and/or thousands of pages of
11 additional discovery.

12 Substantive witness testimony, on the rare occasion
13 when it occurred, provided new insights into the roles of the
14 FBI and other government agencies in the RDI program and the
15 FBI's use of the CIA's RDI program to submit questions to the
16 accused and then analyze responses from those questions for
17 potential leads and follow-ups in the 9/11 case.

18 Moreover, the declassification of the SSCI executive
19 summaries, to include the Majority Report, the Minority
20 Response, and the CIA's response also led to new discoveries
21 of information, the need to conduct additional discovery and
22 locate additional witnesses who had not previously been known.

23 Although there still remains hundreds of thousands of

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1 pages of information, much of which is classified, and we are
2 still many months from being able to begin voir dire and sit a
3 panel, this case has made significant strides in the last
4 eight months, and for the first time in over eight years, this
5 case is finally headed to trial.

6 Contrary to various opinions, the commission does not
7 share the view the commissions are a failed experiment, a
8 kangaroo court, or a travesty of justice.

9 First of all, it is not the system itself that is to
10 blame for the years of delays, the repeated motions on mold,
11 art, laptops, investigations of defense teams, legacy
12 microphones in defense offices, unexpected revelations about
13 interpreters and attempts to recruit defense team members, or
14 even revelations about the FBI's presence at black sites and
15 use of the RDI program by the FBI to gather information for
16 future criminal investigations. The system did not create
17 these problems. The humans did by the way they implemented
18 the system, oversaw the system, and worked the system.

19 This is not to say that the system is perfect. It is
20 far from perfect, but there is no perfect system. This is not
21 to say -- excuse me.

22 Comparisons are routinely made to the military justice
23 system and the Article III court system. And while those

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1 systems may have provided greater clarity on processes and
2 procedures from the beginning, because of the centuries and
3 decades of experience and precedents those systems have, and
4 the records that can be reviewed, that does not mean that
5 similar issues and problems would not have arisen in those
6 systems, too, except for perhaps the arguments about mold,
7 carcinogens and cancer risk from the facilities, unless we
8 were trying this case down range in Afghanistan or Iraq.

9 Part of the problem also arises from the expectations
10 of both the parties and the public. For decades, military
11 courts have tried -- have been tried in expeditionary
12 settings. Makeshift courtrooms have been made out of tents,
13 apartments, offices, and warehouse. In fact, as recently as
14 February of 2019, I personally presided over a major felony
15 case at Mountain Home Air Force Base where a makeshift
16 courtroom was constructed in a maintenance building due to
17 ongoing construction in the base courtroom. It was a public
18 hearing, and the rights of both the prosecution and the
19 accused were protected and a fair trial was conducted.

20 Those of us with litigation experience recognize that,
21 in the end, it is not the appearance of the courtroom.
22 Whether it be the palatial chambers of the Second Circuit of
23 New York or the sparse and comely courtroom of a remote town

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1 in middle America that ultimately matters, but it is instead
2 the level of advocacy that occurs therein that makes the
3 difference in whether or not a fair trial occurs. The same
4 can be said about the commissions and the Expeditionary Legal
5 Center.

6 Over the last eight months, I have confirmed that the
7 level of advocacy exhibited by both the prosecution and the
8 defense is on par with any courtroom in the United States,
9 and, to be honest, far exceeds the ability of many attorneys
10 practicing in criminal courtrooms on a daily basis throughout
11 our nation, which is the level of advocacy our society expects
12 from a case in which the United States is seeking to take the
13 lives of five men, not by combat, but by the rule of law.

14 Although the decision to execute a death sentence may
15 take less time in the heat of battle, Lady Justice demands
16 more when such penalties are executed in her name.
17 Consequently, cases take longer and discovery is more robust
18 when the death penalty is on the table. That is the reason
19 why most death penalty cases ultimately end up in pleas to
20 take the death penalty off the table or in years of
21 post-conviction litigation before a sentence is ever executed,
22 if it is one of the few to not be either sent back for retrial
23 or have the sentence commuted to life.

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1 Therefore, even without some of the avoidable issues
2 that have occurred in this case, a single death penalty case
3 could easily have taken two years to get to trial. And when
4 you multiply the issues by five, as a result of this joint
5 trial, that number gets even higher.

6 Moreover, the decision to try these cases jointly,
7 which definitely has its merits and rational reasons for doing
8 so, puts the case at risk of lengthy delays whenever the case
9 must be stopped to handle issues related to an individual
10 party, as well as increases the number and length of motions
11 practiced, the number and length of direct and
12 cross-examinations, the length of the filings and rulings, and
13 the number and length of arguments by a multiple of five.

14 Therefore, if a typical death penalty case would have
15 taken at least five to six months of motion practice, it
16 should come as no surprise that a joint death penalty case
17 where five accused are represented by five different teams
18 with individual strategies, issues, and facts, would take at
19 least two to three times that long if not five times as long.

20 Furthermore, the sheer volume of classified evidence
21 in this case and the inability to get even more information
22 declassified, which is an issue that will inevitably result in
23 weeks, if not months, of additional argument over defense

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1 505(g) notices prior to trial on the merits in this case
2 concerning their intent to disclose classified information and
3 desire to use some of that information in an open session.

4 Thus, contrary to anything that has been argued or
5 said by anyone in or out of this courtroom, there is simply no
6 equivalent or precedent in any case for handling the volume of
7 classified information that exists in this case and managing
8 the properly -- proper -- the proper handling, discovery, and
9 use of it under either CIPA or the CIPA-plus system that
10 applies here.

11 Consequently, there have been necessarily growing
12 pains as the commission has worked with the parties to define
13 the process, interpret the statutes and rules, and endeavor to
14 make rulings that put an accused in substantially the same
15 position he would have been had the classified information
16 either been declassified or simply provided as is in discovery
17 rather than via the 505 process.

18 Additionally, the reluctance and/or hesitancy by both
19 parties to fully utilize the CIPA-plus process to address
20 classified information issues ex parte, as specifically
21 authorized by the law, has also resulted in an inability to
22 efficiently resolve issues and avoid others.

23 The commission in the past has also been reluctant to

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1 unilaterally call for ex parte presentations in discussions
2 with the prosecution and defense, which decision has also made
3 the process less efficient than it could have been. However,
4 as referenced earlier, it is not the system that has caused
5 the problem, but the implementation of the system.

6 As the commission has demonstrated over the last eight
7 months, the proactive use of the tools provided by the system
8 to conduct ex parte and in camera presentations, reviews and
9 discussions, are not only specifically authorized by the
10 statutes and Rules for Military Commissions, but they're also
11 essential to keeping this case on track and dislodging logjams
12 in the discovery process, pushing back on OCA declarations and
13 classification guidance with which the commission does not
14 agree or for which the accused do not have the ability to
15 personally challenge directly with the OCAs.

16 Such use of the ex parte and in camera process has
17 resulted in changes to the 505 process, which has directly
18 benefited the defense and the prosecution, allowed the
19 commission to approve expert funding and motions to compel
20 expert assistance, and allowed the commission to balance the
21 real and legitimate security needs of the United States with
22 the notions of justice for the accused and the other -- and
23 the prosecution.

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1 While some may take issue with the system and find
2 certain aspects of the system as unfair, untenable, or even
3 lacking, it is a system which the commission believes is set
4 up to either allow a military judge to ensure a fair trial
5 occurs or to dismiss the case if the military judge ultimately
6 determines that a fair trial cannot occur notwithstanding the
7 various tools and remedies provided to the military judge by
8 the system.

9 It is with this understanding that my predecessors and
10 in particular I have proceeded in overseeing this case. In
11 the last eight months, this cases has established a trial
12 date, taken weeks of substantive testimony related to
13 evidentiary issues directly impacting the outcome of this
14 case, set more dates for hearings in court than have ever been
15 set, established a process for addressing logistical issues
16 that still have the potential to impact our ability to try
17 this case, and established deadlines for the filing of
18 motions, almost all of which will be filed over six months
19 before we are even scheduled to begin jury selection.

20 Although there is still much to be done before this
21 case is ready to go to trial, and there always exists a
22 possibility that the trial could slide slightly to the right
23 on the calendar to some extent, a possibility that was fully

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1 contemplated by the commission when the trial scheduling order
2 was published, there is no doubt that this case is on the best
3 footing and has the best opportunity to get to trial that it
4 has had in the past eight years.

5 Such a feat is not just the result of the military
6 judge and the court's orders, but is also due in significant,
7 and I would say primary part, to the willingness of both the
8 prosecution and defense counsel to affirmatively work with the
9 judge to move this case forward while still implementing the
10 overarching structure to the process that was lacking for so
11 many years. And contrary to some opinions, both parties
12 should be lauded for their willingness to do so. We could not
13 have gotten so far in eight months without the parties working
14 with the commission.

15 All of which brings us to the current issue before the
16 court, which is Mr. Harrington's request to be released as
17 learned counsel for both health reasons and an irreparable
18 schism between Mr. Harrington and his defense team to include
19 the accused. This court is absolutely convinced that
20 Mr. Harrington's request to withdraw is not a delay tactic or
21 some ploy to throw a wrench in the machine.

22 Over the last month -- eight months, I personally have
23 had the opportunity -- I personally had the opportunity to

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1 observe Mr. Harrington both in and out of the courtroom. It
2 is apparent to this judge that Mr. Harrington, at the age of
3 75 and counting, is no longer the marathon runner that he used
4 to be. He moves slowly, clearly gets tired more easily, and
5 the long and grueling days of even pretrial practice clearly
6 have a greater effect on him than someone of younger age, such
7 as Mr. Ruiz or Mr. Connell.

8 Moreover, it did not go unnoticed by the court that
9 when Mr. Harrington first brought this matter to my attention
10 in the ex parte session and again in court yesterday, he was
11 very emotional and torn about his request.

12 What this commission has observed during the ex parte
13 sessions, the filings, and the arguments is a man who has come
14 to grips with the fact that he is not the attorney he once was
15 and will never be again. He has also come to grips with the
16 fact that his health and physical limitations are currently
17 limiting and will continue to limit his ability to effectively
18 represent his client in the way he believes he should.
19 Consequently, he has swallowed his pride and, for the benefit
20 of both his client, this case, and his family, has requested
21 to withdraw.

22 There is no doubt that this request did not come at
23 the most opportune time, but it is even more apparent that a

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1 request to withdraw on the eve of trial or, even worse, a
2 debilitating health issue manifesting itself during the travel
3 and subsequent multi-week hearings here on island for the rest
4 of this year or during the trial itself would be even more
5 devastating to the progress of this case.

6 Additionally, it is imperative that the commission be
7 proactive vice reactive to allow the parties sufficient time
8 to make adjustments and to also allow the commission to take
9 actions to ensure that each party has the right to a fair and
10 impartial trial without unnecessarily -- without unnecessary
11 and avoidable delay, especially on the eve of trial or during
12 the actual trial itself. In short, although a military judge,
13 assistant trial counsel, or even an assistant defense counsel
14 can be replaced with minimum to no impact on a case, a learned
15 counsel cannot be so easily swapped.

16 Consequently, based on the evidence provided, the
17 motions submitted and the arguments of counsel, as well as my
18 ex parte discussions with Mr. Ramzi Binalshibh, with the
19 consent of the accused, the commission concludes that there is
20 good cause to grant Mr. Harrington's request to withdraw as
21 counsel, subject to some limitations.

22 Having found good cause based on the physical and
23 mental fatigue concerns of Mr. Harrington, as well as the

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1 commission's serious concerns about Mr. Harrington's
2 willingness and ability to continue to represent a death
3 penalty-eligible client, there is no need to address the other
4 basis for withdrawal and release.

5 Rather than chide Mr. Harrington for his integrity in
6 bringing these issues to the commission, the commission must
7 instead determine whether or not it is willing to assume the
8 risk of forcing a 75-year-old man, who has completely lost the
9 desire to try cases at this point and has no further desire to
10 represent his client, to be indefinitely forced to remain on a
11 death penalty case in the hope that he will not only be
12 physically able to make the trips back and forth to sessions,
13 but that he will actually get on the plane and continue to
14 come down to Guantanamo.

15 Based on the candid responses to the commissions in
16 the ex parte session later -- yesterday, the commission finds
17 that Mr. Harrington can no longer be relied on to represent
18 his client in a trial advocacy setting, due to both his
19 physical and mental fatigue.

20 He has agreed to continue in an advisory role that
21 would not require travel to bring a new learned counsel up to
22 speed. But although the commission could order him to return
23 to Guantanamo against his will, and against the will of his

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1 client, such an order is fraught with uncertainty and has in
2 the past only led to further implosions of cases.

3 This is even more true when the worst thing that could
4 happen to Mr. Harrington is for him to possibly be sanctioned
5 by his bar or lose his license to practice law, with either
6 option having significant less impact on a man in his
7 mid-seventies who is well beyond full retirement age and is in
8 his statistical twilight years.

9 The following actions will be taken by the commission
10 and the following limitations will be placed on
11 Mr. Harrington's ultimate withdrawal:

12 First, Mr. Harrington's withdrawal will not take
13 effect until a new learned counsel is appointed and his
14 withdrawal is affirmatively approved in writing by the
15 commission.

16 Second, although law motions were due on 10 February,
17 because of potentially any confusion based on these issues,
18 due to the issues occurring this week, I will allow the
19 parties additional time, until 31 March 2020 to file any final
20 law motions.

21 Mr. Harrington, as learned counsel, and with the
22 consent of his client, will review any filings filed by his
23 team as learned counsel until he is ultimately released and/or

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1 a new learned counsel is appointed. His role will be to
2 ensure that any issues related to a capital case are
3 considered with respect to any motions filed between now and
4 the time new learned counsel is appointed.

5 Third, the RBS team will provide updates every two
6 weeks on the status of the appointment of learned counsel,
7 beginning two weeks from today. Based on my review of
8 Chapter 9 of the Military Commissions Regulations, it is
9 apparent that the judge does not play any role in the actual
10 selection and approval of learned counsel, but the commission
11 definitely has a right to know what is happening, and it will.

12 The commission recognizes the responsibility to
13 appoint learned counsel falls to the Chief Defense Counsel and
14 the convening authority. Although the regulation does not
15 specifically address replacement of learned counsel, by
16 analogy it only makes sense that if the chief -- that if the
17 Chief Defense Counsel has 14 business days to notify the
18 convening authority on whether or not it is practicable to
19 detail a MCDO attorney as learned counsel upon notification of
20 referral of a capital case, the Chief Defense Counsel should
21 have 14 business days to do so in this circumstance. However,
22 given the declarations by Brigadier General Baker, it is
23 likely that such notification can be considered completed

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1 because he has already asserted that there is no one.

2 Therefore, if MCDO does not have someone available,
3 the CD -- the Chief Defense Counsel has up to 45 business days
4 to either make a recommendation to the convening authority to
5 approve someone within the civilian pool or to request an
6 extension.

7 Prior to the 45 business days tolling, the Chief
8 Defense Counsel must either request that extension of time or
9 the convening authority may unilaterally appoint a learned
10 counsel, pursuant to the language in the regulation. If this
11 process follows to the maximum number of days, a learned
12 counsel should be appointed sometime around the end of
13 April 2020, subject to availability and any extensions granted
14 by the convening authority.

15 Fourth, within three weeks of the new learned counsel
16 being appointed, the RBS team shall provide the commission
17 with a transition plan, to include estimates of how long the
18 new learned counsel will need to prepare for trial and get
19 caught up on the history of the case, as well as develop a
20 trial strategy.

21 Having been a defense counsel and a military judge who
22 has taken over cases in the past, this one being one of them,
23 I am keenly aware of how a new counsel or judge may choose to

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1 take different approaches and strategies than those taken by
2 his or her predecessors.

3 Consequently, the transition plan should provide an
4 explanation, which can be filed ex parte to the extent that it
5 needs to be, as to what, if any, significant strategy
6 deviations will occur and an estimate of how long it will take
7 the learned counsel to implement those strategies, as well as
8 what additional motion practice would be necessary, if any, to
9 address those specific matters. The transition plan will also
10 include information on how, if at all, the new learned counsel
11 will use Mr. Harrington's experience on the case and for how
12 long in the transition process.

13 Fifth, I have advised Mr. Binalshibh of his rights to
14 learned counsel, of the fact that he will be appointed learned
15 counsel, and that whomever is appointed will be his learned
16 counsel from this point moving forward until the completion of
17 trial. I also explained that although he can provide input on
18 the selection, ultimately there is -- unless there is more
19 than one learned counsel available, whomever is available and
20 qualified to be his learned counsel will be appointed
21 regardless of his personal preference. I have also advised
22 Mr. Binalshibh that any last-minute decisions to choose pro se
23 representation are likely to be looked on unfavorably the

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1 closer this case gets to trial.

2 Sixth, notwithstanding the fact that the commission
3 specifically asked all of the remaining parties to provide the
4 commission with contingent motions to sever if they so
5 desired, the commission did not receive any motions to sever
6 at this time. Consequently, although the commission will not
7 unilaterally sever Mr. Binalshibh at this point in time, the
8 commission does believe it is in the interest of justice to
9 modify the current hearing schedule for 2020.

10 Now, before the parties let emotion take precedence
11 over wisdom, the commission wants to provide detail on how,
12 over the last several days, the commission has developed a
13 plan that, even with a brief continuance, the march towards
14 trial in 2021 can still continue.

15 With respect to the March 2020 session, the commission
16 will cancel that session. Although there was an opportunity
17 to take some witness testimony in March and hear some oral
18 argument, the commission instead will hear oral argument on
19 all the current motions to compel discovery and law motions
20 that the commission has already determined are necessary to
21 rule on the various motions, notwithstanding any discussions I
22 put in earlier about the 802.

23 Therefore, having taken oral argument on motions that

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1 I was most interested in at this point and deemed necessary by
2 the commission, the commission will endeavor to issue rulings
3 on all of the pending motions to compel and law motions prior
4 to the June 2020 session, with a few possible exceptions
5 discussed yesterday in the 802.

6 Additionally, over the last several months the parties
7 have presented significant witness testimony and provided tens
8 of thousands of pages of attachments from which the parties
9 would like the commission to make findings of fact.

10 Because the only real purpose for calling witnesses
11 and presenting documentary evidence in pretrial motions
12 practice is to create a record of facts which the judge may
13 use when issuing essential findings of fact for the various
14 motions, over the next two -- the next two months will be used
15 by the commission to issue interim findings of fact based on
16 the witness testimony already presented and the thousands of
17 pages of exhibits provided up to this point by the parties.
18 By issuing the interim findings of fact, it will make the
19 further presentation of evidence to prove a fact already found
20 by the court unnecessary, as well as provide greater scope to
21 the type and manner of testimony and evidence needed moving
22 forward.

23 Of course, because they are interim findings of fact

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1 and not final findings of fact, if the parties later believe
2 that a finding of fact is clearly erroneous, they will, of
3 course, necessarily be allowed to present evidence
4 demonstrating why that fact is inaccurate and request the
5 court to not find such fact in its final findings of fact
6 prior to ruling on the various motions. That is -- that
7 would -- that just should go without saying.

8 However, if the fact is not erroneous and is therefore
9 no longer in dispute, there will be no need to present any
10 further evidence on that fact. This will not in any way
11 prevent a party from proving up a relevant fact that has not
12 already been found by the commission.

13 Notwithstanding the fact that Mr. Binalshibh remains a
14 party to this current case, whether or not he remains a party
15 indefinitely will depend on how long it takes to appoint a new
16 learned counsel and how long a new learned counsel will need
17 to prepare for trial.

18 I have considered keeping Mr. Harrington on as learned
19 counsel throughout the transition. But given it is the
20 travel, length of the case, and stress of the case that gives
21 both Mr. Harrington and his doctor concerns about him
22 remaining on the case, requiring him to remain and travel for
23 an indefinite period of time stands in direct contrast to the

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1 very reasons for which I am releasing him. By cancelling the
2 March session, he will not need to travel, but he can continue
3 to provide consultation with the RBS team as learned counsel,
4 and, in fact, he is ordered to do so.

5 Moreover, given what the commission intends to take on
6 itself to resolve issues and streamline future motions
7 practice, this short pause and loss of two additional weeks of
8 testimony and one week of oral argument will not have a
9 significant impact on the overall timeline.

10 However, if after seeing how long it will take to get
11 the new learned counsel up to speed on this case, even if the
12 government or another party does not move to sever
13 Mr. Binalshibh, the commission does have the authority to do
14 so unilaterally in the interest of justice. It's not a
15 warning. Just saying I recognize that I have that authority.
16 Facts determine outcomes, not the whims of the judge.

17 Finally, while the matter of the convening authority
18 disqualification remains an issue, in the event learned
19 counsel is selected and appointed by the convening authority
20 unilaterally vice by recommendation of the Chief Defense
21 Counsel, it would be prudent for that decision to be made by
22 someone other than Mr. Reismeier while the matter is still
23 pending.

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1 Additionally, because member selection is supposed to
2 occur in June and we have not yet heard his testimony, I will
3 move the selection of the members to August to allow time for
4 a ruling to be made prior to the actual selection of the
5 members by the convening authority.

6 If the convening authority testifies in another case
7 on this matter, I ask the trial counsel to ensure that the
8 defense and the commission get a copy of any testimony as
9 quickly as possible as it will help scope what additional
10 testimony is actually needed in this case.

11 A formal written ruling on this matter will be issued
12 by the commissions on this matter following the appointment of
13 counsel and the commission's final approval of any proposed
14 transition plan.

15 The commission did not take this decision lightly. I
16 might as well give you guys a little inside baseball.
17 Assuming this takes a year to get up to speed, it doesn't mean
18 that learned counsel couldn't do anything over that year.

19 When I first set the scheduling order, I initially
20 notionally put it in my mind that I pick June of 2021. In
21 consultations with my staff and thinking through it, the
22 decision was made, well, what do you really need that six
23 months for? And I said, well, because I don't know how long

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1 the motions practice is actually going to take, you know, and
2 those kinds of things. And so it was decided that we can
3 always slide to the right, but if you don't shoot to the left,
4 then it makes it harder, then -- then the June becomes
5 December of 2021 and those kinds of things.

6 So if someone is appointed and if it took them to a
7 year, and assuming they can continue to work on the case in
8 pretrial motions practice and those kinds of things while this
9 is going on, all ifs, the fact that we might go to trial as
10 late as June of 2021 is not something that I am not -- that I
11 did not conceive. It does not mean that I'm moving the trial
12 date. It doesn't mean that we don't push forward as we
13 currently are. But at the end of the day, if that's where
14 this case ended up, I would have been a great prognosticator.

15 But we're staying with the deadlines we've got.
16 Therefore, learned counsel that are still present, there are
17 still motions to be filed, there are deadlines to be followed,
18 and we're pushing forward. I'll adjust as we need to.

19 At the end of the day, as I indicated, if it comes
20 down to four people can go to trial and one can't, well, then
21 if I'm the only one who wants to make that hard decision, I'll
22 make that hard decision and allow the government to take four
23 people to trial as opposed to none. Or at least that's a

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1 possibility. I don't want to prejudge anything. That's kind
2 of where we're at.

3 So, Mr. Harrington, you can call your wife. You can
4 say you're not completely off the case, but I'm not -- and you
5 can't tell her when you're going to be completely done with
6 the case, but you can at least tell her that, and your doctor,
7 that you no longer have to travel down here and be in the
8 courtroom.

9 LDC [MR. HARRINGTON]: Judge, she's used to disappointment
10 from me, so ----

11 MJ [Co] COHEN]: Okay. All right.

12 LDC [MR. HARRINGTON]: Judge, one thing on your order,
13 which in number -- number three was that the RBS team should
14 report to you every two weeks. I think it might make more
15 sense to have the Chief Defense Counsel do that. He's the one
16 that's going to be really searching for the learned counsel.

17 MJ [Co] COHEN]: Absolutely, sir. The reason I -- I'm
18 very hesitant to kind of get outside my lane, and so we
19 actually discussed this. I'll give you a little more inside
20 baseball. We discussed this idea of do I order him to provide
21 this or do I order a party to provide this. And so I -- I
22 initially I -- my ultimate decision was I know I can order a
23 party, and I don't have to have any argument of what I can or

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1 cannot order the Chief Defense Counsel to do.

2 I am okay if he does that on behalf of the RBS team.

3 But, at a minimum, the RBS team is responsible for ensuring
4 that I get it every two weeks.

5 LDC [MR. HARRINGTON]: That's fine, Judge.

6 MJ [Co] COHEN]: Okay.

7 LDC [MR. HARRINGTON]: In my discussions with him, we had
8 discussed that anyways to ----

9 MJ [Co] COHEN]: Okay. Excellent. Yeah.

10 LDC [MR. HARRINGTON]: He'll be glad to do that, but ----

11 MJ [Co] COHEN]: So as long as it happens ----

12 LDC [MR. HARRINGTON]: ---- it can go through our team.

13 MJ [Co] COHEN]: ---- but the RBS team will be held
14 accountable if it does not come in.

15 LDC [MR. HARRINGTON]: Okay.

16 MJ [Co] COHEN]: All right. So just -- just going back
17 over again, over the things -- like I said, the transcript
18 will be available -- the stipulations to you being released
19 are, one, is that there is no definite end date right now, but
20 you don't have to travel down here anymore. You will remain
21 on in a -- in a -- in an advisory capacity for as long as the
22 new learned counsel needs you or until I decide that's just
23 not reasonable. And I can address that later, depending on

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1 when -- once we get that information.

2 Second, we talked about the every two weeks that I
3 want to get those updates.

4 And then fourth, within three weeks of the learned
5 counsel being appointed, I need a -- I need a filing on what
6 the transition plan is going to be. And I understand that can
7 change, but I need something to tell me where we're at and
8 how -- and what -- and what we're looking at.

9 Okay. Mr. Connell. Did you want to disagree that I
10 called you younger?

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

12 MJ [Co] COHEN]: Oh, okay.

13 LDC [MR. CONNELL]: I have a question about item six.

14 MJ [Co] COHEN]: Yes.

15 LDC [MR. CONNELL]: With respect to the interim findings
16 of fact, so the support for findings of fact are obviously
17 very important to the parties.

18 The -- one of the issues that the military commission
19 discussed in sort of reconsidering the reconsideration of the
20 524 issue is perhaps the original 524LL had not taken enough
21 evidence and -- and had enough -- was not supported by
22 sufficient findings of fact for the conclusion that it
23 reached, and it's also true that, if ultimately the military

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1 commission rules in our favor on one or more of these issues,
2 the government may have interlocutory appeal as an option to
3 it.

4 MJ [Col COHEN]: Absolutely.

5 LDC [MR. CONNELL]: With that in mind, would the
6 commission be willing to accept proposed interim findings of
7 fact from the parties?

8 MJ [Col COHEN]: Oh, I'll take that in a heartbeat.

9 LDC [MR. CONNELL]: Because I think we're better
10 positioned to correlate, you know, these tens of thousands of
11 pages and ----

12 MJ [Col COHEN]: That would be great. In fact, I'd
13 encourage the parties to do that.

14 The reason this kind of came to my mind, right? Is
15 this idea -- if I'm -- if I'm losing three weeks, where are we
16 at? But the idea is that certain things probably aren't in
17 dispute anymore. You know, for example, whether I call it
18 torture or whether I call it coercive inhumane and degrading
19 treatment, I may, I may not.

20 One thing I -- I don't think that anyone disputes is
21 that there was definitely coercive pressures placed on these
22 individuals prior to taking any statements by them in the RDI
23 program. That -- I'd love to hear the argument of how

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1 that's -- that that is in dispute at this point. I mean, the
2 whole purpose of the EITs was that very reason, to convince
3 them that they want to talk. So there's those kinds of
4 things, right?

5 The idea that -- you know, the other findings of fact
6 that I've made, which are no longer in dispute and that the
7 government has conceded, is that if you guys came up with a
8 million questions that you thought were -- were relevant to
9 ascertaining the -- the identity of anyone who worked in the
10 black sites or any covert CIA agents, you can't ask it. I
11 mean, we can ask it. You'll just never get an answer because
12 the government has invoked national security privilege. So
13 I've already kind of find that. So it's really kind of going
14 back in the record and where I've made of these things.

15 Another finding of fact is that, you know, that is not
16 in dispute is that the -- these five accused while they were
17 in the RDI program had no access to lawyers; that they were
18 never provided any -- any rights advisement, you know,
19 while -- while they were in there; that they were no longer --
20 not allowed to have access to any International Red Cross
21 meetings; that they -- that essentially, other than the
22 government employees that were allowed to have direct
23 interaction with them, they had no interaction with the

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1 outside world; and to a large extent, at least up until 2006
2 and probably even into 2007, that was limited only maybe to
3 the ICRC during those initial visits.

4 So those appear to be issues that really aren't in
5 dispute but are important facts ----

6 LDC [MR. CONNELL]: Uh-huh.

7 MJ [Col COHEN]: ---- to be had. And so those are the
8 kinds of things where I was going.

9 There are still lots of facts that I don't know, but
10 the idea was, is these things like that, you know, is once --
11 if those are facts and they're -- and they're accurate, then
12 there's really no reason to put more evidence on on those
13 particular facts. And I'll let the parties argue whether
14 that's favorable or unfavorable to a particular party.

15 That being said, I meant it, you know, with all
16 sincerity is is they're interim findings of fact to say, hey,
17 look, this appears to be stuff that is no longer in dispute
18 because there's evidence to support it.

19 You know, another example would be is -- is that --
20 that in the past the sheriff had been observed engaging in
21 unauthorized enhanced interrogation techniques on detainees.
22 Given the fact that you guys got that in there -- you know,
23 and the other thing, too, is is -- yeah, that's just another

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1 example, right, from Dr. Mitchell's testimony. And plus the
2 thousands of pages of -- tens of thousands of pages of
3 information that are available. So absolutely.

4 So I plan on starting work on those around the middle
5 of March. And it's possible that a lot of this stuff is in
6 that stipulation of fact that the parties were even
7 contemplating. So to the extent that there are things that
8 the parties have been able to agree on and the parties just
9 want to sit there and say, hey, we're good with these facts, I
10 will include those in the interim findings of fact.

11 Primarily -- you're a little bit further ahead than
12 some of them, but some of your facts may be relevant to the
13 other parties. But I think at least on the AE 628 series,
14 there is lots of information you provided me which I feel very
15 comfortable making findings of fact on because you've --
16 you've done a very good job.

17 And -- and the idea is, is let's narrow this down, and
18 then it also makes it -- when we get to the argument on
19 additional witnesses, it -- whether or not it's cumulative or
20 those kinds of things, it kind of helps scope that decision as
21 well.

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

23 MJ [Col COHEN]: Because we only need to call a witness if

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1 we need to prove a fact, right?

2 And understand, I don't understand the full scope of
3 how all these witnesses are going to do that, but I can at
4 least say, look -- and it's not an exhaustive list, it's going
5 to be what I can find over four or five weeks, spending about
6 three days a week in a SCIF on a computer, because I'm not
7 going to worry about whether it's classified or unclassified
8 at the time, I'm just going to type it up.

9 But I would absolutely take a -- take you up on your
10 offer, and the government as well, and the -- and the defense
11 as well. And if you guys want to give me the location of a
12 document, where it's found ----

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

14 MJ [Co] COHEN]: ---- even better.

15 LDC [MR. CONNELL]: Oh, yes, sir. It's clear to me that
16 we're better positioned to write the footnotes, if you
17 will ----

18 MJ [Co] COHEN]: Right.

19 LDC [MR. CONNELL]: ---- of -- than having to start ----

20 MJ [Co] COHEN]: No, I mean, what I envisioned was -- and
21 like I said, and I realized I was taking it on myself, but I
22 think it was ----

23 LDC [MR. CONNELL]: Oh, yes, sir.

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1 MJ [Co] COHEN]: ---- in the interest of the case. With
2 these predicaments, is I was literally going to go through all
3 the filings and I was going to go page by page by page and,
4 you know, and then look at the transcripts and that kind of
5 stuff.

6 So absolutely. If the parties have that, send it to
7 me. If you need some additional time, I'll let it roll in.
8 But I'm going to try to be doing this by the middle of the
9 week, on about the 18th of March.

10 LDC [MR. CONNELL]: 18th of March. Yes, sir.

11 MJ [Co] COHEN]: If you -- and like I said, you're
12 assisting me, so it's not really like a -- I'm not ordering
13 you to do it. But I will definitely take the help, and that
14 goes for all the parties.

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

16 MJ [Co] COHEN]: Because, like I said, there's just --
17 clearly, there are just certain things that really aren't in
18 dispute. And so let's really argue about what's in dispute
19 and present evidence on those things.

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

21 MJ [Co] COHEN]: All right. Thank you.

22 LDC [MR. CONNELL]: Thank you.

23 MJ [Co] COHEN]: All right.

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1 LDC [MR. RUIZ]: Judge, I have a question.

2 MJ [Co] COHEN]: Mr. Ruiz, yes.

3 LDC [MR. RUIZ]: I think I can do it from here, if that's
4 okay.

5 MJ [Co] COHEN]: Absolutely.

6 LDC [MR. RUIZ]: It sounded to me like you were saying
7 that there were only a few things that were going to get oral
8 argument, in terms of motions that are still pending from you.
9 Does that mean that you are ruling that all the other ones are
10 not going to get oral argument?

11 MJ [Co] COHEN]: No. Just on my initial review -- that's
12 why I said I kind of gave you guys some things. That's why I
13 also asked that question, are there certain ones? And you
14 guys definitely highlighted some of those. So I think I'm
15 probably -- whether I do 490 again, that will definitely
16 depend on that. But the ones you guys have specifically
17 thrown out there in numbers, I will definitely go back and
18 look at that.

19 A decision hasn't been made. But what I am going to
20 do is I just want to give you a heads-up that, to the extent
21 that I determine that oral argument isn't necessary, I'm going
22 to try to rule on as many of those motions as I can because I
23 think it's in -- especially your motion to compel discovery

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1 is, is you guys need to know. So I -- I think I'm -- that
2 seemed like the best use of my time over the next three
3 months.

4 LDC [MR. RUIZ]: I understand that. That's just so that
5 you know when you asked the question about the oral argument,
6 I was thinking that in terms of the next hearing.

7 MJ [Co] COHEN]: Yeah. So I'll tell you what ----

8 LDC [MR. RUIZ]: I was taking that in terms of ----

9 MJ [Co] COHEN]: ---- if by next, if by a week
10 from Friday, if you guys want to provide me a list of ones
11 that you would -- that you think you would like oral argument
12 on like -- and maybe it's like two or three sentences as to
13 why you think that would be helpful, I'll definitely take that
14 into consideration before ruling on any of those motions.

15 LDC [MR. RUIZ]: Sure. And I believe we've actually done
16 that ----

17 MJ [Co] COHEN]: You have on some of them. I'm sure you
18 have.

19 LDC [MR. RUIZ]: ---- but we can look at that and update
20 it and make sure that we get that to you ----

21 MJ [Co] COHEN]: Absolutely.

22 LDC [MR. RUIZ]: ---- to you as well.

23 MJ [Co] COHEN]: And like I said, and that's, once again,

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1 not an order that you must produce it, but that if you just
2 choose to, I will definitely take that into consideration.

3 LDC [MR. RUIZ]: Okay. Thank you.

4 MJ [Co] COHEN]: Absolutely. All right.

5 Let's go ahead and try to take up a couple of oral
6 arguments here before lunch. Well, we'll get to -- we'll take
7 up the first motion and then we'll see how many people need to
8 argue on that. Let's go ahead and start with AE 632E.

9 Mr. Ruiz, will you be arguing that or will someone on
10 your team?

11 LDC [MR. RUIZ]: Mr. Gleason will, Judge.

12 MJ [Co] COHEN]: Okay. Mr. Gleason.

13 Oh, Mr. Ruiz, while he's walking up -- or Mr. Gleason,
14 you can be heard on this. Did you also intend to add 672 to
15 that -- to that 505(h) hearing today? I think we got a notice
16 of that; is that correct?

17 I'm getting a nod. So, yes, that's an affirmative
18 response. Okay. That came in in that 505(g) notice. I
19 forgot to mention that this morning. So we'll do that 505(h)
20 hearing on that as well. We're good? Okay.

21 Mr. Gleason.

22 DC [MR. GLEASON]: Good morning, Your Honor.

23 MJ [Co] COHEN]: Good morning.

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1 DC [MR. GLEASON]: Sean Gleason on behalf of
2 Mr. al Hawsawi.

3 Your Honor, 632E is a motion to compel discovery
4 related to the suppression on the LHM statements. It's a
5 motion that we filed back in August, but the background on it,
6 as you probably saw from the attachments, is it goes to
7 discovery that we've been asking for going back to 2013 in
8 this case.

9 And the discovery is necessary because -- for several
10 reasons. One is that the government has offered these
11 statements against Mr. Hawsawi. They have claimed that
12 they're voluntary, that they were reliable, and that they were
13 attenuated.

14 And the government -- and the government has a
15 narrative that they've been projecting since the start of this
16 case. It started when they brought these gentlemen in for
17 arraignment in 2008. The government asserted that they were
18 transferred to Guantanamo in September of 2006; they were put
19 in DoD custody; they were never going back to CIA custody;
20 that an FBI clean team is what they called it, was brought in
21 that had no background and no information about the case and
22 took clean statements from these individuals, without
23 referencing any of the prior torture statements. That was the

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1 government's -- that was their story.

2 What we've learned since 2008, and most recently
3 starting in late 2017, early 2018, is that the government's --
4 what they've been projecting to the court and to the parties
5 is not true. There was a lot more behind the scenes that was
6 going on.

7 We know from Special Agent Perkins' testimony, the one
8 that conducted the interrogation of Mr. Hawsawi, that from the
9 time Mr. Hawsawi was captured and placed in the black sites,
10 she was involved in sending questions to the black sites so
11 that the people that were torturing Mr. Hawsawi could torture
12 him and get statements from him.

13 She testified that when she was called to conduct this
14 interrogation of Mr. Hawsawi at Guantanamo, she was given a
15 computer system with buckets of electronic information that
16 was generated during the interrogations of Mr. Hawsawi at
17 these black sites; that she read all that information and she
18 used it to prepare her interrogation of Mr. Hawsawi.

19 So the government's claim that, you know, the defense
20 has all the discovery they need and they're ready to litigate
21 the suppression motion is not true, and which is the reason
22 why we filed 632E.

23 I think you were new on the case at the time. The

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1 government had represented that the defense has all the
2 discovery, we want to proceed to trial and litigate this
3 suppression issue. I know the judge, taking the government at
4 their word, set a date for the parties to file a suppression
5 motion.

6 If you recall, we did not want to do that. We
7 objected to it for the reason that we didn't believe we had
8 all the discovery that's out there and that we are entitled to
9 in order to provide Mr. Hawsawi with a fair hearing on
10 suppression.

11 At the end, we ended up filing 632E, hoping that we
12 would get a quick ruling. This was back in August, and now
13 it's six months later and we're still trying to get a ruling
14 on discovery that we think is not only in existence and that
15 should be provided but that must be provided in order to
16 provide us with a fair opportunity to litigate the suppression
17 motion.

18 And if you -- and going through the motion, I -- it
19 was kind of interesting while I was reading through it last
20 night as we knew -- when we filed the motion in August, we
21 knew a certain set of facts, but now we know more facts based
22 on the testimony that has occurred since then. So if I jump
23 around a little bit, I apologize, sir, but I'm trying to

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1 incorporate additional testimony that was received from the
2 time that ----

3 MJ [Col COHEN]: That will actually be good, because
4 that's one of the questions I was going to have for you is:
5 So in light of the evidence that has come out since then,
6 where are we actually at and what do you actually need?

7 DC [MR. GLEASON]: Yes, sir. And I've consolidated it
8 down to five categories of unclassified information that we
9 can talk about today, and then we also need -- we have some
10 classified categories that we'll have to do in a closed
11 session.

12 MJ [Col COHEN]: Okay.

13 DC [MR. GLEASON]: I don't recall if you recall -- it was
14 a while ago -- but in September you ordered a classified
15 hearing on this motion that was in 632M, 12 September 2019.

16 MJ [Col COHEN]: Okay. I do vaguely recall that, but I
17 have no reason to doubt that's what that says.

18 DC [MR. GLEASON]: So, Your Honor, the first category of
19 information we seek is the names and contact information for
20 the Camp VII guards. These are the guards that were in place
21 when Mr. Hawsawi was transferred to Camp VII in September of
22 2006, and they're the guards that interacted with Mr. Hawsawi
23 on a daily basis for the next four months until he was

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1 interrogated by the FBI. So September '06 through
2 January '07.

3 According to the government in their responses to
4 these suppression motions, Mr. Hawsawi had very limited human
5 interaction during that time frame. They said he had
6 interaction with guard force personnel, occasional medical
7 personnel, and one to two visits with the ICRC, and that was
8 it.

9 So these guard force personnel would probably have the
10 most unique perspective as far as what was Mr. Hawsawi's life
11 like in Camp VII day to day during that relevant time period
12 for suppression. What were the lighting conditions in his
13 cell? How often was he sleeping in his cell? How often was
14 he moved? How did he appear when they interacted with him?
15 What was his -- any conversations that they had with him? How
16 was his English language proficiency? How was his logical --
17 the logical way in which he communicated with them? All those
18 things matter for suppression, sir.

19 MJ [Co] COHEN]: And remind me again, like I said, because
20 I -- it's okay for you to sit there and say, hey, we've talked
21 about this before, but on a given day I may have forgotten
22 something that came up.

23 You do or do not have UFIs for those folks?

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1 DC [MR. GLEASON]: We do not have UFIs, sir.

2 MJ [Co] COHEN]: Okay.

3 DC [MR. GLEASON]: So we have -- for these guards, we have
4 absolutely no information.

5 MJ [Co] COHEN]: Okay.

6 DC [MR. GLEASON]: And the government in their response
7 said that they're not going to provide that information
8 because they believe the names of these guards is cumulative
9 with other information that they provided.

10 MJ [Co] COHEN]: Okay.

11 DC [MR. GLEASON]: And I want to just briefly touch on
12 their arguments, because I think they're somewhat ridiculous.

13 They said that we shouldn't have these names -- or we
14 don't need the names of these guards because, one, we have
15 access to DIMS records. And we attached a copy to AE 632I,
16 which was our reply in this series -- we attached a copy of
17 the DIMS records so you can take a look at it, Your Honor.

18 And what you'll see from the DIMS records is the DIMS
19 records don't provide a whole lot of information. They say
20 Mr. Hawsawi was fed at this time, a corpsman gave him
21 medication at this time, that there was a time he was taken
22 out of his cell to be searched. That's indicated in DIMS, but
23 there's no other information in there. Not the type of

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1 information that we could gain from an eyewitness who
2 interacted with Mr. Hawsawi on a daily basis.

3 The prosecution also claims that we don't need the
4 guards' names because they gave us names of medical personnel.
5 As I said, from looking at the DIMS records, what we have is
6 it looks like the medical personnel would do a round once a
7 day, a corpsman, and it was very rare that Mr. Hawsawi would
8 meet with the medical personnel.

9 But I can represent to the commission that based on
10 the medical personnel list that the prosecution has provided
11 us, we've reached out and tried to contact medical providers
12 for that September '06 to January '07 time frame, and I can
13 represent that the senior medical officer for Camp VII is now
14 deceased. The camp psychiatrist for Camp VII is on the
15 government's suppression witness list and has refused to talk
16 to us. We are able to find one corpsman that worked at
17 Camp VII, but he was in a supervisory role, so he said he
18 interacted with Mr. Hawsawi one to two times that he recalls.
19 And that's it for medical personnel that we can find.

20 MJ [Col COHEN]: Okay.

21 DC [MR. GLEASON]: So we really don't have a whole lot of
22 information from those medical personnel, which is why we need
23 the names of these guards.

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1 MJ [Co] COHEN]: Okay. So I find that assuming things
2 does -- usually does not work out well for me, so let me just
3 ask sometimes obvious questions because I don't want to
4 assume.

5 Even if you had these names, what -- what do you --
6 what do you really want to know? I mean, he's talking about
7 the fact about how well he spoke English. The -- I mean, I
8 can see some relevance to that, but -- obviously because of
9 the -- the LHM statements, so obviously that is a -- that is
10 an important fact to know.

11 But just remind me off the top of your head: Did your
12 client use a translator during his statements or did he do it
13 all in English?

14 DC [MR. GLEASON]: So according to the FBI, he spoke
15 perfect English and they didn't need a translator.

16 MJ [Co] COHEN]: Okay.

17 DC [MR. GLEASON]: That's their story.

18 MJ [Co] COHEN]: Okay. All right. Got it. All right.
19 So you would at least want to ask someone if they -- based on
20 their interactions, what they thought, so it potentially could
21 contradict that assertion?

22 DC [MR. GLEASON]: Yes, sir.

23 MJ [Co] COHEN]: Okay. All right. That's fair.

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1 DC [MR. GLEASON]: The other issue, just to highlight for
2 you, sir -- I don't know if you've read through our
3 suppression motion yet or not, but Mr. Hawsawi had a major
4 surgery before he was transferred to Guantanamo ----

5 MJ [Co] COHEN]: Yes.

6 DC [MR. GLEASON]: ---- in the summer of 2006.

7 MJ [Co] COHEN]: I do recall that.

8 DC [MR. GLEASON]: And he was in considerable pain for
9 those four months. The government is going to likely
10 represent that he was fine, and we need to talk to the guards
11 in order to rebut that information.

12 MJ [Co] COHEN]: Okay.

13 DC [MR. GLEASON]: So we need to know, you know, how was
14 he? How was his daily condition? How was his apparent
15 physical and mental condition during that time?

16 MTC [MR. TRIVETT]: Sir, can I interrupt for one second to
17 meet with counsel?

18 MJ [Co] COHEN]: You may.

19 [Counsel conferred.]

20 MJ [Co] COHEN]: Mr. Gleason?

21 DC [MR. GLEASON]: Yes, sir. The other issue is going to
22 be the conditions at Camp VII, whether they -- Mr. Hawsawi was
23 able to sleep during those four months or whether he had

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1 prolonged sleep deprivation leading up to his FBI
2 interrogations. And the guards will have firsthand knowledge
3 about those conditions, sir, and that's conditions that aren't
4 captured in DIMS.

5 The government, in one of their pleadings, they said
6 they were going to provide us the Camp VII SOP. That's never
7 happened. That's actually the subject of a motion to compel
8 discovery in AE 705, which you have pending before you.

9 MJ [Co] COHEN]: So let's go ahead and just talk about
10 that real quick, just in general. The -- obviously I know
11 what SOP are. What are you -- what -- what information are
12 you hoping to -- like I said, this is discovery, so that's why
13 we're arguing about this.

14 So, I mean, so what questions do you have, for
15 example, on those SOP that you're hoping will -- that you'll
16 at least know whether that sheds light on it or not?

17 DC [MR. GLEASON]: Mostly the environmental conditions of
18 the -- the conditions of confinement.

19 MJ [Co] COHEN]: Okay.

20 DC [MR. GLEASON]: What was the routine? What was the
21 schedule? What were the procedures that were in place? Those
22 types of things, sir.

23 MJ [Co] COHEN]: Okay. Give me a second. I need a pen.

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1 Thank you.

2 DC [MR. GLEASON]: So, for example, did they do -- is
3 Mr. Hawsawi woken up at midnight for them to do head counts?
4 Is he then woken up at 3:00 in the morning to be provided his
5 breakfast meal? All those things are important for us to
6 evaluate whether he was getting adequate sleep leading up to
7 this interrogation.

8 MJ [Col COHEN]: Okay. Have you -- in the medical
9 records, do -- first of all, just to confirm, once again,
10 rather than assume. Do you have medical records of his time
11 there between his arrival -- I -- basically from the time of
12 his surgery to the time period within like a week or so after
13 his LHM statement?

14 DC [MR. GLEASON]: Sir, we have medical records from his
15 time that he was transferred to Guantanamo in September
16 through the LHM time period.

17 MJ [Col COHEN]: Okay. Does that list medications, those
18 types of things? In other words, whether or not he would have
19 been on any narcotics, those types of things?

20 DC [MR. GLEASON]: It does, sir.

21 MJ [Col COHEN]: Okay.

22 DC [MR. GLEASON]: Okay.

23 MJ [Col COHEN]: Okay. All right. I understand.

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1 DC [MR. GLEASON]: And that -- that is everything I had
2 for the Camp VII guards, unless you had any other questions on
3 that category, sir?

4 MJ [Col COHEN]: No. No, that helps. Thank you.

5 DC [MR. GLEASON]: The second category of information is
6 people that watched Mr. Hawsawi's FBI interrogation and the
7 notes that they took.

8 So when Mr. Hawsawi was interrogated by the FBI, it
9 occurred over a period of four different days in January. And
10 we understand from testimony that -- and from the government's
11 response, that there was dozens of people that remotely
12 watched this interrogation; that there was a live video feed
13 set up and that there were people watching this interrogation.

14 The government represented at least 33 names that they
15 gave us in the response, and they said they were going to look
16 for the sign-in log to see who all the names were. I can
17 represent that we've never received that sign-in log. It's
18 something that obviously exists out there. Because it's a
19 classified area, people would have had to sign in to go in
20 there.

21 MJ [Col COHEN]: Right.

22 DC [MR. GLEASON]: We still haven't gotten that log.

23 MJ [Col COHEN]: But they did indicate to you that as many

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1 as 33 different people had the opportunity ----

2 DC [MR. GLEASON]: Yes, sir. I'm sorry, sir.

3 MJ [Co] COHEN]: So they had -- whether they actually
4 observed or not, but they at least had the opportunity, they
5 would have been in a position where they could have
6 potentially observed. Is that ----

7 DC [MR. GLEASON]: Yes, sir.

8 MJ [Co] COHEN]: Okay. Got it.

9 DC [MR. GLEASON]: And based on those 33, one was a
10 Camp VII OIC who started his testimony in court here.

11 MJ [Co] COHEN]: Got it.

12 DC [MR. GLEASON]: The majority are FBI personnel who we
13 could -- we were told we could not directly contact. And we
14 went through the FBI point of contact, and thus far we have
15 been able to interview zero of those FBI personnel.

16 MJ [Co] COHEN]: Okay. So do you have their -- do you
17 have them by name, then?

18 DC [MR. GLEASON]: We have about 30, sir.

19 MJ [Co] COHEN]: Okay.

20 DC [MR. GLEASON]: Yes, sir. It's FBI agents and FBI
21 analysts.

22 MJ [Co] COHEN]: Okay.

23 DC [MR. GLEASON]: And then we had asked for, in our

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1 discovery motion, any notes that these dozens of people took
2 while they were watching these four days of interrogations.
3 The government's initial response in their reply -- or their
4 response was no, that no notes were taken, or they're not
5 aware of any notes being taken. And when we had the testimony
6 of the Camp VII OIC, he directly contradicted the government's
7 position.

8 MJ [Co] COHEN]: Okay.

9 DC [MR. GLEASON]: On 1 November 2019, the camp --
10 former Camp VII OIC testified that FBI agents were listening
11 to the interrogations and they were taking handwritten notes.
12 This is at the transcript at page 28694. And I can represent
13 that we've received none of these notes in discovery. And
14 obviously, we need those notes to evaluate whether to suppress
15 this statement.

16 MJ [Co] COHEN]: Okay.

17 DC [MR. GLEASON]: And the notes are important because, as
18 the government's represented, the FBI didn't audiotape or
19 videotape these interrogations. So other than the LHM report
20 itself, these notes are going to be the most accurate
21 historical record of what was said during that interrogation
22 process, what the note-takers perceived to be Mr. Hawsawi's
23 apparent mental or physical condition, how the questions were

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1 asked, how the questions were answered, those types of things
2 that we can use to prepare our case, to evaluate whether the
3 LHM report is accurate, for one, and also to potentially
4 impeach the -- Special Agent Perkins and Special Agent
5 Fitzgerald, who generated the LHM report.

6 MJ [Col COHEN]: Copy. All right. Let's go to your third
7 category.

8 DC [MR. GLEASON]: Yes, sir. So the third category was we
9 asked for information that Special Agents Perkins and
10 Fitzgerald had reviewed prior to interrogating Mr. Hawsawi. I
11 believe the government's initial response was no, it was a
12 clean team, they didn't review anything. Then when Special
13 Agent Perkins testified in December 2017, she represented
14 that, yeah, I did review a stack of documents from the CIA.
15 And that -- that was the limited information we had at that
16 time.

17 MJ [Col COHEN]: Let me just stop you there. Let me go
18 over to trial counsel just to ask a question.

19 Trial Counsel, do -- have you inquired as to whether
20 or not those buckets, I think is what we ended up calling
21 them, you know, by jargon, whether those buckets still exist
22 and whether or not it is possible to ascertain what was
23 actually in those buckets?

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1 TC [MR. RYAN]: Judge, could I have the court's indulgence
2 one moment? I'm not sure I'm understanding the question
3 perfectly.

4 MJ [Co] COHEN]: Sure. Let me -- I'll rephrase it.

5 TC [MR. RYAN]: Yes, sir.

6 MJ [Co] COHEN]: My question was -- is if I was to compel
7 at least notice of what documents were in the bucket
8 generally, maybe not specifically but just, let's say --
9 especially if it's all MEAs that have already been provided,
10 those kinds of things, do they still exist on a server
11 somewhere, or is there someone who can actually definitively
12 say?

13 Because the witness testimony was definitely like,
14 look, I reviewed them, but I couldn't tell you today exactly
15 what was in there and what wasn't, but -- so is there someone
16 who can or can't -- could we get that information if I
17 determine that it was discoverable?

18 TC [MR. RYAN]: I can represent that the documents that
19 would have been or could have been reviewed by the special
20 agents, prior to conducting the LHM interviews, were the same
21 universe of documents that ultimately became the basis of
22 discovery in this case. We could not, upon checking,
23 determine that the -- any particular document was reviewed by

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1 any particular agent.

2 MJ [Co] COHEN]: Okay.

3 TC [MR. RYAN]: And in the case of Agent Perkins, Judge,
4 I'll have a little bit more to say about it when it's my turn.

5 MJ [Co] COHEN]: Absolutely, sir.

6 TC [MR. RYAN]: Thank you, sir.

7 MJ [Co] COHEN]: Thank you. All right. I wanted to at
8 least get to what I could even potentially ----

9 DC [MR. GLEASON]: Yes, sir.

10 MJ [Co] COHEN]: Okay. Great. So we're at that issue. I
11 understand your position that you ----

12 DC [MR. GLEASON]: I just want to give you ----

13 MJ [Co] COHEN]: Okay.

14 DC [MR. GLEASON]: ---- a transcript reference for Special
15 Agent Perkins' testimony on that issue, sir.

16 MJ [Co] COHEN]: Yes.

17 DC [MR. GLEASON]: It's pages 26641 and 26658. And she
18 had testified that not only did she have access to this
19 electronic bucket with all this information that she used to
20 review for the four months leading up to the interrogation,
21 but when she showed up, she also had an eight- to ten-inch
22 stack of hard copy printouts from the CIA that she reviewed.
23 And I know the government in their response says that they no

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1 longer have that eight- to ten-inch stack of information; it's
2 been destroyed. And now it appears from Mr. Ryan's
3 representation that they no longer have the electronic bucket;
4 that that has been lost as well.

5 MJ [Co] COHEN]: Okay. And that may be the case. But --
6 yeah. I mean, her -- she definitely even had a better
7 recollection of how that played out than Fitzgerald did on the
8 stand, so I got it.

9 DC [MR. GLEASON]: And if that's the case, that this
10 information -- the government didn't keep track of it and it's
11 been lost, then we had to ask for findings of fact in our
12 reply.

13 MJ [Co] COHEN]: Copy.

14 DC [MR. GLEASON]: Just saying that, you know, obviously
15 this would be critical to evaluating whether the information
16 that he was asked was derived from prior torture. The
17 government, if they have destroyed it or lost it, that is a
18 finding of fact that we need.

19 MJ [Co] COHEN]: Okay. All right. I understand.

20 DC [MR. GLEASON]: And we can pursue the remedies as far
21 as the loss or destruction of evidence.

22 MJ [Co] COHEN]: Absolutely. Got it.

23 DC [MR. GLEASON]: The fourth category, sir, was the

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1 recordings of interrogations. We'd asked for not only the
2 recordings from the FBI's interrogation, but any prior
3 recordings that the CIA had conducted with Mr. Hawsawi. The
4 government represented that there are none. And so we ask for
5 a finding of fact to that effect. We've asked for it. The
6 government's representation to the -- to the commission and
7 the parties at this time is that they've never existed.

8 MJ [Co] COHEN: Okay. So you want a finding of fact that
9 they don't exist? Is that what you're asking for?

10 DC [MR. GLEASON]: That the government has represented
11 that they don't exist, sir, and that they never existed.

12 MJ [Co] COHEN: Okay.

13 DC [MR. GLEASON]: If it's the case where the government
14 changes and says they did exist but they've since been
15 destroyed, then we would like a finding of fact to that effect
16 as well.

17 MJ [Co] COHEN: Okay. All right. Got it.

18 DC [MR. GLEASON]: And the final -- the fifth and final
19 unclassified category of discovery is Mr. Hawsawi's CIA
20 detention records. We'd ask for those so we could evaluate
21 the treatment that Mr. Hawsawi endured, the conditions of
22 confinement.

23 The government's response was, you know, you've had

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1 this information, or some of this information, through the 397
2 ten-category construct process, which we agree that we've
3 received information through that process. The only question
4 we have is: What don't we have that the government didn't
5 feel was relevant to put through that process? So there's
6 other detention -- there's a larger universe of detention
7 records that have Mr. Hawsawi by name that have not been
8 provided.

9 MJ [Co] COHEN]: Okay. And remind ----

10 DC [MR. GLEASON]: And we ask that ----

11 MJ [Co] COHEN]: Remind me from your argument what your --
12 your belief that those do exist is because of the government's
13 response to your discovery request; is that right?

14 DC [MR. GLEASON]: Yes, sir.

15 MJ [Co] COHEN]: Okay. Got it.

16 DC [MR. GLEASON]: Yeah. They said that they've provided
17 us some information, but they've made a decision that other
18 information is not relevant.

19 MJ [Co] COHEN]: Okay. Got it. And what is the universe
20 of what you currently have?

21 DC [MR. GLEASON]: It's the ten-category construct from
22 297F, sir.

23 MJ [Co] COHEN]: Got it.

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1 DC [MR. GLEASON]: And what we're looking for in the fifth
2 category is an order for the government to turn over all
3 information that mentions Mr. Hawsawi by name that pertains to
4 his CIA detention.

5 Similar -- I don't know if you've done any FOIA
6 litigation, sir, but similar to a Vaughn Index in a FOIA case,
7 where the government has to list, hey, we did a keyword search
8 of our records for Hawsawi, we have, you know, 20,000
9 documents, we are only turning over 100, and we are
10 maintaining the other 19,900 are not releasable.

11 MJ [Co] COHEN: Okay.

12 DC [MR. GLEASON]: But in a FOIA case, the judge gets to
13 see that list, and he gets to evaluate the government's
14 determination. So we ask that you do the same in this case,
15 sir.

16 MJ [Co] COHEN: Okay.

17 DC [MR. GLEASON]: And that's it for the unclassified
18 part, sir.

19 MJ [Co] COHEN: Okay.

20 DC [MR. GLEASON]: Obviously, we have a few classified
21 items we'd like to argue in a closed session.

22 MJ [Co] COHEN: All right. I understand. Thank you.

23 DC [MR. GLEASON]: And I don't know if you had any

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1 additional questions, sir, or if we've covered them all.

2 MJ [Col COHEN]: Give me just a second. I'll ask -- or
3 I'll look, and then I'll let you know.

4 DC [MR. GLEASON]: One moment, sir.

5 MJ [Col COHEN]: You may.

6 [Counsel conferred.]

7 MJ [Col COHEN]: Mr. Gleason.

8 DC [MR. GLEASON]: Sorry about that, sir.

9 MJ [Col COHEN]: No, it's all right. You asked
10 permission. I granted it. We're good.

11 DC [MR. GLEASON]: All right, sir. Did you have any
12 questions to start with, sir?

13 MJ [Col COHEN]: No. I think I'm good. I asked my
14 questions all the way along. I definitely understand what
15 you're talking about, and I will consider it.

16 I guess, actually, I do have a question, which is: It
17 appears that 705 and 632 are somewhat related. Do you agree
18 or disagree?

19 DC [MR. GLEASON]: So 705 I believe is the -- the reason
20 Mr. Hawsawi was transferred to Location 6 and Location -- and
21 Camp VII ----

22 MJ [Col COHEN]: Okay.

23 DC [MR. GLEASON]: ---- and also asking for the SOPs at

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1 those locations.

2 MJ [Co] COHEN]: Okay.

3 DC [MR. GLEASON]: So there is overlap, yes, sir.

4 MJ [Co] COHEN]: Okay. Okay.

5 DC [MR. GLEASON]: Obviously, 705 is going to be directly
6 relevant not only to the preparation of our case for the
7 merits and sentencing, but also for the suppression motion.

8 MJ [Co] COHEN]: Copy. And you all have already
9 provided -- a little bit of my southernism comes out. You
10 have provided that -- a 505(g) notice for AE 705.

11 DC [MR. GLEASON]: Yes, sir. I ----

12 MJ [Co] COHEN]: All right. My staff was telling me that
13 you had.

14 So the reason why I was asking this is -- and we
15 are -- and I already briefly asked some questions. Would you
16 all like to just go ahead and take up that matter while we're
17 down here as well if the government has no problem doing so?

18 DC [MR. GLEASON]: Sure, Your Honor. My understanding is
19 705 is -- it hasn't officially been accepted by the
20 commission, I believe. It may still be hung up in the
21 classification process.

22 MJ [Co] COHEN]: Well, I will check. This is obviously
23 not going to be the first or the last time that I get ahead of

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1 the process.

2 DC [MR. GLEASON]: Or maybe I'm confusing it with a
3 different motion, sir.

4 MJ [Co] COHEN]: Obviously, the ----

5 DC [MR. GLEASON]: But, yes, we are prepared to argue.

6 MJ [Co] COHEN]: I am with the parties that I wish things
7 could move a little bit faster sometimes.

8 LDC [MR. RUIZ]: Judge, I'm told that it has been
9 accepted. It's 699B that has not.

10 MJ [Co] COHEN]: Perfect. All right. 705 is in.

11 Trial Counsel, what are your thoughts on just lumping
12 these together and taking care of both of them while we're
13 down here?

14 MTC [MR. TRIVETT]: Yes, sir. If it gets moved until
15 tomorrow, we would be prepared to argue.

16 MJ [Co] COHEN]: Okay. Then will you -- if you haven't
17 already added that, do you want to orally request me to add
18 that to the 505 this afternoon?

19 MTC [MR. TRIVETT]: Yes. Please consider this my oral
20 motion.

21 MJ [Co] COHEN]: Perfect.

22 MTC [MR. TRIVETT]: Thanks.

23 MJ [Co] COHEN]: All right. Then we'll take that up

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1 tomorrow as well.

2 DC [MR. GLEASON]: Judge, I just -- in speaking with
3 Mr. Ruiz, I just have four brief points to clarify ----

4 MJ [Col COHEN]: Absolutely.

5 DC [MR. GLEASON]: ---- some of the questions that you had
6 asked.

7 Going back to category one, regarding the names of the
8 guards, I believe it's important for the commission to
9 understand and refocus the commission on the government's
10 narrative. The government's narrative is once Mr. Hawsawi was
11 transferred to Camp VII, he was in DoD custody, and that there
12 was an attenuation of time and circumstances; that his
13 circumstances were much better at Camp VII than they had been
14 in the black sites is the government's public narrative.

15 We believe if we have the opportunity to talk to the
16 guard, we will be able to attack that narrative because the
17 guards will have information about Mr. Hawsawi's daily
18 activities at Camp VII, and then we can use that information
19 to compare and contrast how he was treated in the black sites.

20 And we believe, based on the limited information that
21 we have, is that the conditions initially at Camp VII were far
22 worse than the conditions had been at the black sites prior to
23 Mr. Hawsawi's transfer to Camp VII.

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1 MJ [Col COHEN]: Okay.

2 DC [MR. GLEASON]: So that information is -- will only
3 come from speaking with the guards, and it will be important
4 for our motion.

5 MJ [Col COHEN]: Okay. All right.

6 DC [MR. GLEASON]: The second point, sir, just to clarify,
7 you'd asked about medical records. And I indicated that we
8 received medical records from when Mr. Hawsawi was transferred
9 to Guantanamo, but we don't have records prior to that
10 transfer, and that includes the surgery records for the
11 surgery that occurred just prior to his transfer to
12 Guantanamo.

13 And with regards to the findings of -- sorry.

14 [Counsel conferred.]

15 DC [MR. GLEASON]: I thought I'd mentioned this, sir, but
16 I must have misspoken. We wanted it to compare and contrast
17 the conditions of confinement at Camp VII, when Mr. Hawsawi
18 was transferred, with the black site that he was immediately
19 transferred from.

20 MJ [Col COHEN]: Copy.

21 DC [MR. GLEASON]: So I think that will be important for
22 the analysis on suppression.

23 MJ [Col COHEN]: Okay. All right.

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1 DC [MR. GLEASON]: With regard to the findings of fact,
2 regarding the evidence that the government can't find, claims
3 was lost, claims it never existed as far as recordings go,
4 sir, the government has taken equivocal positions on -- I
5 guess to put it most favorable to them -- on our request.
6 Sometimes they say that the information we're seeking never
7 existed. Sometimes they say, you know, we don't know that it
8 exists. And sometimes they say the government [sic] hasn't
9 proven that it exists, so we're not going to go look.

10 So on the findings of fact, sir, what we'd ask is that
11 the government make some representation to the commission that
12 what due diligence they've exercised to see if this
13 information exists. Did they actually reach out to the OCAs
14 and get an assurance from the OCA that this information never
15 existed or this information was destroyed, or they just asked
16 some random underling and they were told no, it doesn't exist.
17 I believe that's going to be important for the finding of fact
18 analysis.

19 MJ [Co] COHEN: Okay.

20 DC [MR. GLEASON]: Not only at this stage, but also if
21 there is an appellate stage, sir.

22 MJ [Co] COHEN: Got it.

23 DC [MR. GLEASON]: And finally, sir, I just wanted to

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1 point out I mentioned for the CIA detention records, I
2 compared this to the Vaughn Index in a FOIA case. And
3 Mr. Ruiz wanted me to point out in a FOIA case, that's a civil
4 case, not a lot at stake, and here we are in a capital death
5 penalty case.

6 MJ [Col COHEN]: Right.

7 DC [MR. GLEASON]: And the government doesn't have the
8 same standard of providing transparency to the court as far as
9 what exists out there.

10 MJ [Col COHEN]: Okay.

11 DC [MR. GLEASON]: And we think, based on the facts of
12 this case, based on the fact that this is such a critical
13 motion, that the government should have to represent this is
14 the universe of detention records, this is what we provided
15 and this is what we have not provided, and justify why they
16 haven't provided it all.

17 MJ [Col COHEN]: Copy.

18 DC [MR. GLEASON]: All right, sir. Thank you.

19 MJ [Col COHEN]: Appreciate it.

20 All right. Mr. Feeler or Mr. Connell, you both want
21 to make comments as well? All right. I assume there's
22 similar motions to compel by the other parties, so I just ask
23 you limit it to specifically your issues.

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1 DC [MR. FEELER]: Sure, Judge. I'll be very brief.

2 The main reason that I wanted to add a few comments
3 and arguments to this is because we have three motions pending
4 that deal with very similar issues.

5 The first is 629I, which was our own motion to compel
6 related to the LHM statements.

7 MJ [Co] COHEN]: Okay.

8 DC [MR. FEELER]: It requested much of the same
9 information, and we got similar responses to the government.
10 I won't go into that in detail here.

11 MJ [Co] COHEN]: Okay.

12 DC [MR. FEELER]: The second would be 629T, which is our
13 motion to compel witnesses. T as in Tango.

14 MJ [Co] COHEN]: Copy.

15 DC [MR. FEELER]: Attachment B was the request for
16 witnesses. And a number of the witnesses are relevant and
17 some of the very same people that Mr. Gleason was just talking
18 about.

19 MJ [Co] COHEN]: Copy.

20 DC [MR. FEELER]: And the third I would -- I would bring
21 to your attention is AE 711, which is a motion to compel CIA
22 information related to Camp VII. Because we have reason to
23 believe, based on the SSCI Report, that there are CIA records

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1 that related to Camp VII that we have not gotten and don't
2 have access to at this point.

3 MJ [Co] COHEN]: Copy.

4 DC [MR. FEELER]: Very briefly on those requests, Judge.
5 I want to focus on the Camp VII records related to our
6 suppression argument. And that is because from the very
7 beginning, if you go back to our original motion to suppress,
8 Camp VII has been an integral part of our suppression
9 argument. Our argument has been that there was one long
10 period of coercion, over 1500 days from Mr. Binalshibh's
11 capture up through the LHM statement.

12 And I know you've heard a lot about -- a lot of talk,
13 a lot of evidence about the RDI program, and that is obviously
14 a critical part of our motion to suppress as well. But these
15 Camp VII-related records are critical to our motion, and I'll
16 give you just a couple reasons ----

17 TC [MR. RYAN]: Judge, I object at this time. This goes
18 beyond the scope of 632E, which is the motion Your Honor
19 listed for oral argument.

20 MJ [Co] COHEN]: Okay. Yeah, Mr. Feeler, why don't you
21 talk specifically about the issues that are addressed there.
22 If you guys want to add one of these others to -- if you want
23 to add 711, I'll consider doing that. That way the government

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1 can decide who they want to argue that.

2 DC [MR. FEELER]: Yeah. So, Judge, my intent was to focus
3 on the request for the identities of the guards.

4 MJ [Co] COHEN]: Okay.

5 DC [MR. FEELER]: And so let me just be clear that's what
6 I'm specifically focusing on. I'm not going to argue 711.

7 MJ [Co] COHEN]: Great. So on that particular issue, the
8 identities of the guards, any reason you would want it, other
9 than what Mr. Gleason indicated -- as to why Mr. Gleason
10 indicated he would want it?

11 DC [MR. FEELER]: Just -- sure, Judge. Just
12 specifically -- and this has to do with Mr. Binalshibh's case
13 in particular. And you see this if you look at our
14 suppression motion.

15 Mr. Binalshibh, before his EIT period and the RDI
16 program, was forcibly shaved. In the week leading up to his
17 LHM interrogation, he was forcibly shaved. He was held in
18 isolation in the RDI program. He was held in isolation, again
19 returned to isolation in the week leading up to his FBI
20 interrogation.

21 MJ [Co] COHEN]: Okay.

22 DC [MR. FEELER]: Put on restrictive diet in the RDI
23 program. Again put on a restrictive diet in the week leading

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1 up to his FBI interrogation.

2 So as Mr. Gleason said, the people who interacted with
3 him the most, the guards would be the people with that kind of
4 information. And right now we have no access to the guards
5 who could provide us more information about this incredibly
6 tumultuous week leading up to, you know, involving a forced
7 cell extraction, among other things, leading up to
8 Mr. Binalshibh's FBI interrogation.

9 MJ [Co] COHEN: Okay.

10 DC [MR. FEELER]: The government has said that the camp
11 commander -- that this information is cumulative because of
12 the camp commander. And to liken this to a kind of criminal
13 case I'm used to, Judge, I would venture to say, to me the
14 analogy is that's like saying you don't need a detective as a
15 witness because you have the police chief. The camp commander
16 has some helpful information, but he doesn't have the
17 information on the level that we're talking about from the
18 people who actually interacted. And I think we saw that
19 during his testimony.

20 MJ [Co] COHEN: Copy. All right. That's perfect.

21 DC [MR. FEELER]: Just two other brief notes I want to
22 add, similarly to what Mr. Gleason said. The government's
23 primary argument against our suppression has been attenuation.

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1 The government wants to focus on this period of time. And,
2 you know, we disagree that that should be the only focus, but
3 that's their prerogative. But if they're going to do that,
4 then we should have all the witnesses and all the information
5 from that period of time.

6 MJ [Co] COHEN: Copy.

7 DC [MR. FEELER]: Finally, Judge, just on the importance
8 of witnesses, a brief note, again, to what Mr. Gleason said.
9 We were provided the same list of 33 people who, you know,
10 some of whom probably viewed our client's interrogation.

11 We were able to talk to one of those people who -- who
12 viewed the interrogation. And he told us other people who
13 viewed it with him who were not on the list of 33. And I
14 don't say that to impugn the information the government
15 provided us, but just to say that when you talk to witnesses,
16 when you're able to encounter people, they give you
17 information. And sometimes the government might even think
18 they have the totality of information, and when we're able to
19 talk to people and talk to witnesses, we find out that that's
20 not the case.

21 MJ [Co] COHEN: Copy.

22 DC [MR. FEELER]: That's just an example of that.

23 MJ [Co] COHEN: I understand.

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1 DC [MR. FEELER]: Subject to your questions, I'll sit
2 down.

3 MJ [Co] COHEN]: No. No. I understand why this is
4 important to you as well.

5 DC [MR. FEELER]: Thank you.

6 MJ [Co] COHEN]: Great.

7 LDC [MS. BORMANN]: Judge, may I clarify something?

8 So according to the trial conduct order issued on 17
9 May 2019, anything filed under 532 or any of the designated
10 numbers for each of the defendants is not automatically
11 joined, so we are not automatically joined to this ----

12 MJ [Co] COHEN]: No.

13 LDC [MS. BORMANN]: ---- particular motion of
14 Mr. al Hawsawi. We have separate motions to compel ----

15 MJ [Co] COHEN]: Yes, ma'am.

16 LDC [MS. BORMANN]: ---- which we would like to weigh in
17 on. I don't want to waive the issue.

18 MJ [Co] COHEN]: You are not.

19 LDC [MS. BORMANN]: But we had not prepared to argue this
20 because our understanding in the trial conduct order is we are
21 not ----

22 MJ [Co] COHEN]: No, ma'am.

23 LDC [MS. BORMANN]: ---- joined.

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1 MJ [Col COHEN]: You need to file your own motion to
2 compel and you will not be waiving any argument, should I
3 indicate that I'm providing oral argument. But, yeah, I -- I
4 treat your motions to compel individually. To the extent that
5 there's something that they want the exact same information
6 and it deals with the same -- the scope of AE 632E, I will
7 allow someone to be heard, but you're not waiving a thing.

8 LDC [MS. BORMANN]: Yeah. I mean, Mr. -- I read their
9 motion. I understand it. It relates to Mr. al Hawsawi's
10 records.

11 MJ [Col COHEN]: Right.

12 LDC [MS. BORMANN]: That is not Mr. Bin'Attash. So I just
13 wanted to clarify. Okay. Thank you.

14 MJ [Col COHEN]: I understand.

15 Mr. Connell.

16 LDC [MR. CONNELL]: Sir, I just wanted to answer your four
17 questions with respect to Mr. al Baluchi.

18 Your first question was do the Camp VII guards have
19 UFIs. And I can see why you'd think that they might, because
20 the military commission has actually already ordered the
21 production of the guard identities.

22 In AE 397G subparagraph d., the military commission
23 ordered the identities of, among others, guard force personnel

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1 who had direct and substantial contact with each accused at
2 each location and participated in the transport of the accused
3 between the various locations.

4 I suppose there might be some ambiguity about whether
5 Camp VII is a location. But under subparagraph a., which was
6 the chronology identifying where each accused was held in
7 detention, the government did treat Guantanamo as a location.

8 The real question is whether -- so as far as we can
9 tell, the guard force -- Camp VII guard force in the relevant
10 period between September and, say, end of
11 January-February 2007, does not have UFIs, or at least they're
12 not identified that way.

13 The real question is: Do they fall under Protective
14 Order #4? The -- the restrictive category in Protective
15 Order #4, that is, were they present or former CIA employees
16 or contractors? And I don't know the answer to that. I don't
17 think so, but I don't know. The evidence ----

18 MJ [Col COHEN]: Okay. I'll take a look at it.

19 LDC [MR. CONNELL]: ---- that's before the military
20 commission is twofold: One, testimony of Camp VII camp
21 commander that although they wore uniforms, the guard force
22 were not military. And then number two, the testimony of
23 Dr. Mitchell, that he thinks they were probably involved in

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1 the rendition to Guantanamo, they being MJA, Mitchell,
2 Jessen & Associates, which would fall under subparagraph d.
3 but he thinks that they were probably not involved in
4 Camp VII.

5 Your second question was: What do you want to know?
6 And I'll pick up there. We are actively investigating the
7 involvement of Mitchell, Jessen & Associates, if any, in
8 Camp VII, and certainly some witness who with direct knowledge
9 would know. Like if we could track down a couple of those
10 guards, I would probably get the answer.

11 MJ [Col COHEN]: Okay.

12 LDC [MR. CONNELL]: Second, the military commission may
13 recall from the -- my examination of Special Agent Fitzgerald
14 that on 18 January 2007, the -- which is the day of his first
15 interrogation by the FBI, he suffered a head injury. I've
16 included -- that document appears at MEA-10018-209. It's at
17 AE 672D (AAA).

18 You'll see that -- and I will let you know that we
19 were able to find the purported author of that document who is
20 SV6B. SV6B denied that he -- that that was his signature,
21 despite the notation, the pseudonym which was placed on it,
22 and has subsequently died.

23 The third thing that we specifically want to know is

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1 that Mr. al Baluchi has publicly alleged that in the days
2 leading up to the interrogation by the FBI-DoD team that
3 sounds were played over the intercom at Camp VII, screams and
4 other sounds to basically remind them of what had happened
5 previously. I'd like to find a guard to either confirm or
6 deny that allegation.

7 Fourth, mitigation itself is quite important. In a
8 death penalty case, it's quite common to call guards to talk
9 about the -- because they've seen the person in confinement.
10 I'll tell you in the dozens of witnesses who were given UMIs
11 who have agreed to speak with us and that we've interviewed,
12 Mr. al Baluchi has routinely been described as friendly,
13 personable, speaking good English, likable person. One of
14 them said, "If -- if he weren't a terrorist, I'd be his
15 friend." And that's the kind of information that members will
16 want to know when they're making their individual moral
17 judgment about the death penalty.

18 And then finally, one of the issues which is hotly
19 contested is that the government introduced evidence, the XYM
20 statements which were taken -- I can't say how they were
21 taken, but XYM statements that Dr. -- that Mr. Fitzgerald
22 testified about. And the guard force -- we've had testimony
23 from Mr. Adams and Mr. Parker and Mr. Fitzgerald but

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1 certainly were put on by the government, certainly we're
2 entitled to investigate witnesses to contradict or maybe
3 confirm their story.

4 MJ [Co] COHEN]: Copy.

5 LDC [MR. CONNELL]: The third answer -- question you asked
6 was about medical records. I believe that the prosecution has
7 done everything it possibly can to get us medical records, but
8 the underlying medical record system is broken.

9 The -- we do have redacted records for the entire
10 period between early September and -- and more or less the
11 present. The -- some of the earliest psych records have
12 redactions which I believe precede the government's
13 involvement, and we'll be bringing a spoliation of evidence
14 claim with respect to that.

15 And for the non-psych records, the main two types of
16 records -- there are a bunch of different kinds of records,
17 but the main two are psych and medical, and we are essentially
18 missing the unredacted versions of the 2006 to 2008 medical
19 records.

20 So I think that the government has done their very
21 best to get us everything that they have, but they can only
22 work with what they are given ----

23 MJ [Co] COHEN]: Copy.

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1 LDC [MR. CONNELL]: ---- and I think that that's going to
2 be a significant issue.

3 MJ [Co] COHEN]: All right.

4 LDC [MR. CONNELL]: The third -- the fourth issue, you
5 asked about the buckets. The government didn't actually
6 answer your question, which was: Have you inquired and does
7 the list of information still exist?

8 The answer that the government gave was it's the same
9 universe of documents that were used to produce discovery, and
10 we could not determine any particular document was reviewed by
11 any person.

12 I've previously described that as the government's
13 hyper-technical defense. That doesn't actually answer the
14 question about what was in the buckets. And I'll point the
15 military commission's attention to the pleading in AE 538Z,
16 which at one point the military commission asked us to sit
17 down and to discuss the highest priorities for the defense.
18 They -- the -- what was in the bucket was one of the highest
19 priorities for us, and 538Z documents the government's
20 response that they simply declined to produce the contents of
21 the buckets.

22 MJ [Co] COHEN]: Copy.

23 LDC [MR. CONNELL]: Thank you.

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1 MJ [Co] COHEN: Thank you. All right. Anybody else on
2 this -- this limited scope of guard names, medical records
3 prior to arriving, et cetera?

4 Negative.

5 Mr. Ryan, you'll finish this up and we'll be done.
6 Sir, I want to take a -- I'm going to take a stop at 1215.
7 That doesn't mean that -- because I let them go a little bit
8 longer than ten minutes. If you need to go a little longer
9 than 1215, I definitely will give you time after lunch.

10 TC [MR. RYAN]: Oh, no, Judge. You see, as I recall, it
11 was I who asked Your Honor to issue that order of ten minutes,
12 so the last thing I intend to do is violate it.

13 MJ [Co] COHEN: All right.

14 TC [MR. RYAN]: Let me state this, Judge. First of all,
15 the issue of guards and guard identities is something that has
16 developed some overlap over the other motions. So, for
17 example, as to that particular argument regarding guards, that
18 also appears in 672, which is to be argued, I believe, later
19 on.

20 MJ [Co] COHEN: Okay.

21 TC [MR. RYAN]: Mr. Trivett will be handling that.

22 MJ [Co] COHEN: Okay, sir.

23 TC [MR. RYAN]: So as to the issue of the guards, I'll be

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1 deferring to him.

2 MJ [Co] COHEN]: Perfect.

3 TC [MR. RYAN]: I'll just touch upon it.

4 MJ [Co] COHEN]: No, that's perfectly fine. Like I said,
5 as long as I have some argument on it before we leave island,
6 that'll be great.

7 TC [MR. RYAN]: Understood, sir.

8 As to the specific points raised -- and I won't go
9 into a lot of argument about the surrounding optics, but I'll
10 just try to answer the questions as quickly and directly as I
11 can.

12 As to the issue of recordings -- and this has been
13 something that's been raised for literally years now -- we are
14 unaware of any recordings. We have stated this on many
15 occasions. Furthermore, we submit that this issue has been
16 extensively litigated and has been covered in the commission's
17 orders in 375L and 375FF.

18 MJ [Co] COHEN]: And the -- is it your position now, just
19 on the record one last time, that the government has not
20 only -- is not only the government is not -- is not aware but
21 that you have affirmatively taken steps to reach out to the
22 CIA, FBI, et cetera, to verify that -- that no such recordings
23 exist?

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1 TC [MR. RYAN]: That is correct, sir ----

2 MJ [Co] COHEN: Okay.

3 TC [MR. RYAN]: ---- and we've -- and I'll also note and
4 direct Your Honor or refer Your Honor to the government's
5 pleading which we ----

6 MJ [Co] COHEN: Right.

7 TC [MR. RYAN]: ---- take some more detail on this issue.

8 Next, we have ----

9 MJ [Co] COHEN: If I was to find as fact that the
10 government has taken those steps and no such evidence has been
11 located despite those efforts, you don't contest that finding
12 of fact?

13 TC [MR. RYAN]: Correct, sir.

14 MJ [Co] COHEN: Okay.

15 TC [MR. RYAN]: We have looked for and could find no
16 logbooks as to the issues of who was present, who was
17 watching, and so on, as raised by counsel in 632.

18 On page 7 of 632H, which is a classified pleading, and
19 it was alluded to by at least two counsel, we have provided
20 the names of some 32 to 33 individuals who were, in fact,
21 present. I'll note for Your Honor's consideration that at
22 least eight of those persons in that list of 33 either have
23 been or we intend to call as witnesses in the course of the

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1 suppression hearings before this commission.

2 MJ [Co] COHEN: Okay.

3 TC [MR. RYAN]: As far as notes are concerned, I
4 understand what counsel just stated in regard to the camp
5 commander. We are unaware and have looked for and have talked
6 to people about any notes that anyone who may have been
7 watching took of the interviews as they were taking place. In
8 fact, and you've heard this in the testimony already, it was
9 the directives at the time that there only be notes taken by
10 the persons conducting the interviews inside the room.

11 As far as the -- back to the issue of Agent Perkins, I
12 think that's been covered now, Your Honor. To the extent you
13 have any questions or there is anything unclear, we will be
14 happy to put it in writing and put it on the record as to the
15 positions in regard to that. And I note, sir, that there will
16 be more witnesses to come in regard to issues of who had
17 access to what prior to the LHM interviews.

18 MJ [Co] COHEN: Copy. Nope. No questions.

19 TC [MR. RYAN]: As to all CIA detention records, the
20 prosecution considers its discovery obligations, which were
21 extensive by any measure, to be complete by virtue of the --
22 the discovery process that was -- that is, for the most part,
23 generally described and covered in AE 308 and 397, in which

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1 the prosecution lived up to the ten-paragraph construct
2 entered by Judge Pohl and, of course, employing the 505
3 process. I know Your Honor is well aware of those efforts.

4 MJ [Co] COHEN: Yes. Okay.

5 TC [MR. RYAN]: And, Judge, there was one issue -- as I
6 went through the pleading, there was one place where we were
7 -- where we had left open the door as to one issue.

8 MJ [Co] COHEN: Okay.

9 TC [MR. RYAN]: On page 4 of 632H, and this is
10 Attachment B, a classified addendum, we agreed to provide
11 certain discovery. I would like to report at this time that
12 we have done so and consider that obligation to be complete,
13 and we did so on September the 4th, 2019. It can be found at
14 Bates stamp number MEA-SOP-5619 through 5828.

15 MJ [Co] COHEN: Thank you.

16 TC [MR. RYAN]: As to all other matters raised, Your
17 Honor, both classified and unclassified, we did put a good
18 deal of information in our pleading, and if it's all right
19 with you, sir, I'll just rely on that.

20 MJ [Co] COHEN: That's fine.

21 TC [MR. RYAN]: Thank you, Judge.

22 MJ [Co] COHEN: Thank you.

23 Okay. I understand the issues. I will definitely

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1 take a look at all the pleadings, and let's go ahead and take
2 a lunch recess. We'll return at 1315 hours.

3 [The R.M.C. 803 session recessed at 1204, 19 February 2020.]

4 [The R.M.C. 803 session was called to order at
5 1319, 19 February 2020.]

6 MJ [Col COHEN]: The military commission is called to
7 order. Parties are present. Mr. Ali has joined us for this
8 afternoon's session, along with Mr. Binalshibh and
9 Mr. Mohammad. Mr. al Hawsawi and Mr. Bin'Attash are still
10 absent.

11 LDC [MS. BORMANN]: Captain Peer is not here this
12 afternoon. He is excused to do other commission-related
13 business.

14 MJ [Col COHEN]: Okay. Yes, ma'am. Okay.

15 All right. We've covered AE 632E. Here's kind of the
16 way I'm going to use the afternoon. We will take up AE 656.

17 Mr. Ruiz, are we still able to take up part of AE 672?

18 LDC [MR. RUIZ]: Yes.

19 MJ [Col COHEN]: Okay. Excellent. And then we'll take up
20 AE 551M at that point. I will recess around 3:15 today
21 temporarily. It will be -- the extended lunch -- excuse me,
22 the extended midafternoon recess, do some prayer time. We'll
23 let the accused then leave prior to a 505(h) hearing, which I

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1 would like to hold around 1600. We'll have that discussion.

2 Then we'll come back on the record tomorrow morning at
3 0-9, and we will definitely hear open session argument on
4 AE 701, AE 730, AE 687. And then if there's any other request
5 from the KSM team, I'll hear what those are. Otherwise, we'll
6 press.

7 And then we will take a brief recess at that point,
8 unless there's one that I've forgotten, in which case you guys
9 will definitely remind me, and we will take up closed session
10 testimony depending on where we're at at that point -- not
11 testimony but argument.

12 Yes, ma'am.

13 LDC [MS. BORMANN]: Judge, we're -- we're ready to do the
14 ex parte presentation on AE 368 ----

15 MJ [Co] COHEN]: That's right.

16 LDC [MS. BORMANN]: ---- 368F. It can't take more than
17 ten minutes to explain the situation that you asked me about
18 yesterday ----

19 MJ [Co] COHEN]: Okay.

20 LDC [MS. BORMANN]: ---- in a sort of roundabout way.

21 MJ [Co] COHEN]: All right. Let me do that directly,
22 then, after the 505(h). I'll just ----

23 LDC [MS. BORMANN]: That's what we were going to suggest,

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1 yeah.

2 MJ [Co] COHEN]: Perfect.

3 LDC [MS. BORMANN]: Okay, thank you.

4 MJ [Co] COHEN]: Absolutely.

5 Mr. Ruiz.

6 LDC [MR. RUIZ]: Judge, I just want to let you know that
7 for 656 and 672, what we're going to try to do is argue
8 everything in an unclass setting.

9 MJ [Co] COHEN]: Perfect.

10 LDC [MR. RUIZ]: And the 505 are there in case we're not
11 able to get through all the material, but that's our
12 intention.

13 MJ [Co] COHEN]: All right.

14 LDC [MR. RUIZ]: So it may be a case that those
15 become moot. Just wanted to let you know that.

16 MJ [Co] COHEN]: No, that's perfect. Yeah, anytime you
17 guys can do that, that's wonderful. And I did just get a copy
18 of your reply in AE 730B.

19 LDC [MR. RUIZ]: Thank you.

20 MJ [Co] COHEN]: All right. All right.

21 LDC [MR. SOWARDS]: And Your Honor, I'm sorry.

22 MJ [Co] COHEN]: Mr. Sowards.

23 LDC [MR. SOWARDS]: Good afternoon. As to 667A, which I

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1 understand is the status update, Ms. Radostitz is prepared to
2 do that tomorrow.

3 MJ [Co] COHEN]: Okay. I'll put it on tomorrow's docket.
4 Okay. Excellent. All right.

5 Then let's go ahead and pick up, then, with AE 656.
6 Similarly, we'll go by the same guidelines. If there -- if
7 another party wishes to address a specific issue related --
8 pertinent to them that is also pertinent to this particular
9 motion, I will hear from them on that particular issue.
10 Otherwise, no one is waiving their own individualized motions.

11 Good afternoon.

12 ADC [MS. LACHELIER]: Good afternoon, Judge.

13 MJ [Co] COHEN]: How are you doing?

14 ADC [MS. LACHELIER]: Good. How are you?

15 MJ [Co] COHEN]: Doing well. Thank you.

16 ADC [MS. LACHELIER]: I haven't appeared before you yet.

17 MJ [Co] COHEN]: No, no. Like I say, the surprise showing
18 in my voice, oh, someone I haven't had the opportunity to
19 speak with before.

20 ADC [MS. LACHELIER]: We try to freshen it up at our table
21 every so often.

22 MJ [Co] COHEN]: All right.

23 ADC [MS. LACHELIER]: So, Judge, I'm focusing my arguments

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1 on this motion to compel on paragraphs -- the first four
2 paragraphs of our request ----

3 MJ [Co] COHEN]: Okay.

4 ADC [MS. LACHELIER]: ---- and then the last requested
5 item, and those appear -- the paragraphs I'm referring to, if
6 you want to look at them, are on page 2 of our reply brief.

7 MJ [Co] COHEN]: Okay.

8 ADC [MS. LACHELIER]: Before -- as I get started, I want
9 to emphasize for the court Special Agent -- or former Special
10 Agent Drucker's role. I know he's testified before, and
11 you've heard his testimony.

12 By the government's own -- own admission in testimony
13 from -- from this witness when he was in the court -- before
14 the commission in October, he is the foremost expert on the
15 financing of the 9/11 plot.

16 As the commission's probably aware at this point, the
17 gravamen of the charges against Mr. al Hawsawi are financial
18 -- alleged financial transactions. So this witness is
19 particularly important because the government has advanced him
20 as an expert in 9/11 financing -- or financing of the 9/11
21 plot, and also because the government has noticed him in
22 AE 682, the government's notice of witnesses for trial.

23 MJ [Co] COHEN]: Okay. So ----

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1 ADC [MS. LACHELIER]: So ----

2 MJ [Co] COHEN: ---- let me just start with just a couple
3 general questions. If you can spend some of your time -- I'll
4 let you address whatever you want, but some of the things that
5 would really help me as -- as we ----

6 ADC [MS. LACHELIER]: Sure.

7 MJ [Co] COHEN: ---- take this moment to kind of argue
8 this is in light of his testimony and in light of the
9 discovery that you've been provided, to the extent that you
10 can give me examples of what you want, why you believe it
11 exists, and how that's going to be of consequence to -- to
12 your case, that would be very helpful.

13 ADC [MS. LACHELIER]: Okay. So first, one other
14 procedural note, though, for this witness in particular,
15 Judge, if -- because I know it's hard to remember all the
16 details with all the different people who have testified and
17 what the different teams have done. We reserved ----

18 MJ [Co] COHEN: You did.

19 ADC [MS. LACHELIER]: ---- cross-examination of this
20 witness back in October, precisely because we knew we had
21 pending discovery -- sorry, getting the yellow light -- we had
22 pending discovery for this witness, and so among that -- among
23 the discovery that's pending is what we're discussing today.

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1 MJ [Col COHEN]: Okay. Perfect.

2 ADC [MS. LACHELIER]: All right. So what the government
3 represented in their -- in their response at page 9 is that
4 they gave us a financial spreadsheet -- or they were going to
5 give us a financial spreadsheet at the time that they wrote
6 their -- their response.

7 They did, on September 26, give us a financial
8 spreadsheet. And I have here for -- it's rather lengthy, so I
9 just printed four pages. And it's really just demonstrative,
10 so I'm not offering it. But, Judge, what I'm pointing to you
11 is this is the spreadsheet, blacked out.

12 MJ [Col COHEN]: I've seen that, and I've seen the
13 unredacted version as well.

14 ADC [MS. LACHELIER]: Right. And that -- so we -- we were
15 asking for the unredacted version because -- because of what I
16 just explained in terms of this witness' role for
17 Mr. al Hawsawi. He is the foremost 9/11 financing
18 investigator. These are spreadsheets that he prepared in his
19 analysis for the 9/11 Commission about the financing of the
20 9/11 plot. There couldn't be anything more relevant coming
21 from a government witness, a government-proffered expert, and
22 as to the charges specifically -- specifically against
23 Mr. al Hawsawi.

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1 The government uses the argument that there's some
2 personal work product. I think the commission's aware there
3 is no such exception in -- in terms -- that's an exception
4 under FOIA, under the Freedom of Information Act. The work
5 product would not apply in this instance because he has
6 testified about this subject matter.

7 This spreadsheet is about the subject matter about
8 which he's testified, so it falls under Jencks. It falls
9 under the information that an expert used to develop his
10 analysis, and he testified as an expert. So under all those
11 grounds, this is discoverable information. And under 701
12 generally, it is relevant and material discovery to Mr. al
13 Hawsawi.

14 MJ [Col COHEN]: Give me just one second. I -- what you
15 held up is not what was in my mind, so let me just see -- let
16 me look ----

17 ADC [MS. LACHELIER]: I wondered when you said you had
18 seen it because, to be frank, I'm not sure you were involved
19 in these redactions, and that's one of the issues we have.

20 MJ [Col COHEN]: I -- I'm not sure I was either. I was
21 looking at the -- that's -- the filings are classified Secret,
22 correct?

23 ADC [MS. LACHELIER]: Yes, they are. Yes, they are,

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1 Judge. It's because of the -- because of the attachments
2 mostly, that's why. Not because of arguments.

3 MJ [Co] COHEN]: Give me just one second to see what I
4 have on my -- I -- this will not come out of your time.

5 ADC [MS. LACHELIER]: I would specify, Judge. I don't
6 know if it helps, because I don't know how you organize your
7 documents. The document I held up is not classified.

8 MJ [Co] COHEN]: Okay.

9 ADC [MS. LACHELIER]: There are attachments that are
10 classified to our motion, though.

11 MJ [Co] COHEN]: Yeah. So I have seen -- so what
12 attachment that is. What I had in my mind was Attachment C to
13 AE 656A (Gov).

14 ADC [MS. LACHELIER]: Oh, right.

15 MJ [Co] COHEN]: Like I said, that -- that attachment ----

16 ADC [MS. LACHELIER]: I don't think ----

17 MJ [Co] COHEN]: ---- was unclassified.

18 TC [MR. RYAN]: Your Honor, just maybe I can clarify.
19 That's a document produced by the prosecution regarding all
20 discovery in the financial universe.

21 MJ [Co] COHEN]: Got it. Okay. Thank you. All right.

22 ADC [MS. LACHELIER]: Right. I think it's all the FIN, if
23 I'm correct. It's all the FIN designated ----

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1 TC [MR. RYAN]: That's correct.

2 MJ [Co] COHEN]: All right.

3 ADC [MS. LACHELIER]: Okay. And so that's essentially an
4 index the government gave us of all the FIN, and that's --
5 they are correct, while I didn't verify that specific
6 spreadsheet before coming in here that every single
7 document -- they're correct. They've provided a number of
8 pages of FIN Bates-numbered documents.

9 And I'll quote you back to yourself, Judge. You said
10 just because they provided 50,000 pages of discovery doesn't
11 mean all the 50,000 pages are relevant.

12 MJ [Co] COHEN]: Correct.

13 ADC [MS. LACHELIER]: And that's kind of what we're
14 dealing with here.

15 MJ [Co] COHEN]: No, I gotcha.

16 ADC [MS. LACHELIER]: They provided thousands of pages of
17 financial records. What we're asking for isn't about -- well,
18 it is. We are also asking for bank transactions, but it's a
19 separate -- that's a separate item on our list.

20 What we're asking for is what -- what forms the
21 foundation and the basis of Agent Drucker's work, because
22 that -- the -- the documents that went into it, we can't
23 identify.

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1 They're saying, well, these FINs we gave you are it,
2 and that's the classified part in this attachment to our
3 motion, AE 656. We have information suggesting that
4 Agent Drucker prepared and used a number of documents. And
5 those documents, the ones he prepared, we don't have in an
6 unredacted form. The statement he made to the
7 9/11 Commission, we don't have in an unredacted form.

8 And the documents that underlie his analysis in his
9 spreadsheet, we don't know if we have. The government just
10 threw a bunch of -- thousands of FIN at us, but we don't know
11 what of those documents feeds into the spreadsheet of Special
12 Agent Drucker. And we especially cannot tell because of the
13 volume of redactions on the spreadsheet from Special
14 Agent Drucker.

15 So even if -- even if we were able to check, using the
16 spreadsheet against the FIN discovery the government provided,
17 we can't because of the extensive redactions the government's
18 unilaterally put on the Drucker spreadsheet.

19 So -- and a lot of my legal arguments for this
20 information, Judge, are -- are similar for each of the items,
21 so I won't -- I won't repeat sort of the relevance. I think
22 you understand he testified as an expert. This is a criminal
23 case, not a FOIA case. He -- the government qualified him as

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1 an expert. He is testifying about financial transactions.
2 Mr. Hawsawi's major charges against Mr. Hawsawi are involving
3 financial transactions. So for all those reasons, work
4 product of this individual are particularly important to our
5 defense.

6 So that -- so I think we covered -- I think I covered,
7 unless the judge has more questions, I think I covered the why
8 we need the spreadsheet unredacted.

9 Why we need his statement unredacted, I would draw the
10 judge's attention to our Attachment B at AE 656, page 16 of
11 Attachment B -- or, sorry, page 14 of Attachment B. It's
12 MEA-DRUCKER, multiple zeros, 14. I won't describe it any more
13 detailed than that, but I would draw your attention, there's a
14 redaction on that page that's particularly relevant.

15 MJ [Co] COHEN: Okay. Thank you.

16 ADC [MS. LACHELIER]: And that -- yeah. I think you'll
17 know what Attachment B is. I'm trying to be careful here.

18 MJ [Co] COHEN: No, no, no, you're doing it perfectly. I
19 have the document. So the fact that I know what document you
20 want me to look at will be sufficient.

21 ADC [MS. LACHELIER]: So the other item we ask for, and
22 again, it's something we know exists because of the
23 information we have in Attachment B, is a binder of original

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1 account statements. And the government indicates -- and their
2 excuse as to both these two items that I'm going to refer to,
3 the binder and the CD of data, their response to that is that
4 we don't get discovery in a particular format or organized in
5 a particular style. We understand that. We're not even
6 asking about a specific format. That isn't our point, and so
7 that -- that's, frankly, a red herring.

8 Again, it goes back to -- and I'm not going to
9 repeat -- it goes back to the importance of this individual to
10 the case against Mr. al Hawsawi and the fact that he has
11 testified and that the government is proffering him as a
12 witness for trial.

13 MJ [Co] COHEN: If I recall, I mean, essentially the --
14 the allegation is that your -- your client's role was as a --
15 somehow as a financier or involved in the financial
16 transactions, and that was essentially the -- the sum total of
17 his involvement; is that correct?

18 ADC [MS. LACHELIER]: That's the government's allegation,
19 is they use the term -- over time they've used different terms
20 for his involvement in the financing. But "financier" is one
21 of the terms the government has used, yes. Yes, Judge.

22 MJ [Co] COHEN: All right. Which means that money would
23 be the crux of -- of the evidence against your client.

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1 ADC [MS. LACHELIER]: Right. Yes, Judge. And his
2 testimony -- sorry, Agent Drucker's testimony in October bears
3 that out, where, even though we did not examine him, he was
4 testifying about his involvement in interrogations related to
5 transactions that Mr. -- are imputed to Mr. al Hawsawi.

6 MJ [Co] COHEN]: Copy. All right. So help me understand.

7 ADC [MS. LACHELIER]: So ----

8 MJ [Co] COHEN]: I'll pull up your reply real quick. One
9 second. I'm looking at that page you wanted me to. Give me
10 just one second. I want to look at that.

11 ADC [MS. LACHELIER]: Sure. At Attachment B, Judge?

12 MJ [Co] COHEN]: Yes.

13 ADC [MS. LACHELIER]: Okay. I just want to make sure I
14 have it open.

15 MJ [Co] COHEN]: Page 14. Okay. So looking at the -- and
16 those are pages -- so page 14, the MEA-14 actually shows up on
17 page 29 of AE 656 (MAH), and then it carries over into page 30
18 of that AE exhibit.

19 Is there a way for you to tell me why you believe that
20 what is redacted on those pages actually contains information
21 related to your client and/or this case as opposed to just
22 something else entirely?

23 ADC [MS. LACHELIER]: I want to make sure I have the

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1 right -- I see 14. Are you talking DRUCKER-14?

2 MJ [Co] COHEN]: Yes, DRUCKER-14.

3 ADC [MS. LACHELIER]: Okay.

4 MJ [Co] COHEN]: And then it looks like -- maybe I had the
5 wrong number. I thought the next page of that was DRUCKER-15.

6 ADC [MS. LACHELIER]: Okay.

7 MJ [Co] COHEN]: See what I'm saying?

8 ADC [MS. LACHELIER]: Yes.

9 MJ [Co] COHEN]: It starts off on the end of 14, you've
10 got the big black block, and then on 15 you've got nothing
11 except essentially a big black box. Is there an unclassified
12 way ----

13 ADC [MS. LACHELIER]: Yes ----

14 MJ [Co] COHEN]: ---- because if you can't, that's fine,
15 we can take it up.

16 ADC [MS. LACHELIER]: ---- I think so. I mean, the
17 preceding paragraph, immediately preceding those blackouts,
18 and I don't want to say more than that.

19 MJ [Co] COHEN]: No, no. That's fine. No, I'm with you.

20 ADC [MS. LACHELIER]: It's -- it's portion marked SECRET.

21 MJ [Co] COHEN]: Nope. Exactly. So based on the language
22 that's in that paragraph, then, you believe that there would
23 be follow-on information that is related to your client

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1 and/or -- and/or this case within the -- the subsequent
2 paragraphs or portions that have been redacted?

3 ADC [MS. LACHELIER]: The way this is structured, there's
4 every reason to believe that. And given the content of this
5 document, and the fact that it mentions Mr. Hawsawi in an
6 unclassified fashion in other places, and the fact that it's
7 from Agent Drucker, who is the government's foremost expert on
8 the 9/11 financing plot, there's reason to believe there's
9 relevant information behind those blackouts, yes, Judge.

10 MJ [Co] COHEN]: Okay. Is there anything else that you
11 have come across -- and I don't ask this because I'm ruling in
12 any way. I just want to make sure, because I don't know what
13 else you have. So you guys can put puzzle pieces together
14 that, until I actually get to see the puzzle, I may not be
15 able to.

16 Is there other reasons, beyond just the context of
17 what is -- what is initially written there, that has led you
18 to believe that there -- that there would also be relevant
19 information? Or is that the sum total of -- of just your gut
20 tells you that this is kind of what's going on? And it's okay
21 if it's just your gut. It's just ----

22 ADC [MS. LACHELIER]: I mean, on those blackouts,
23 honestly, it's our gut.

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1 MJ [Co] COHEN]: Okay.

2 ADC [MS. LACHELIER]: There's a lot of context, I guess is
3 why I hesitated, both about Drucker -- and I guess I can
4 proffer to the court, Agent Drucker testified before the
5 9/11 Commission, in addition to providing this statement.

6 MJ [Co] COHEN]: Okay. Got it.

7 ADC [MS. LACHELIER]: Another -- another item -- I mean, I
8 guess the unredacted -- that unredacted -- if they don't have
9 it unredacted, for whatever reason it doesn't exist, one of
10 our other requests is that we get whatever memorialization
11 there was of his interview ----

12 MJ [Co] COHEN]: Copy.

13 ADC [MS. LACHELIER]: ---- with the 9/11 Commission.

14 MJ [Co] COHEN]: Okay.

15 ADC [MS. LACHELIER]: The government got stuck on our use
16 of the word "recording." We use it in the larger sense of the
17 term. It doesn't have to be an audio recording. It doesn't
18 have to be visual. It's any memorialization of that
19 interview. So if that is not it and that -- that -- that's a
20 statement, and there was some interview memorialized in -- by
21 some third party, then we would want that.

22 MJ [Co] COHEN]: Makes sense. I understand.

23 ADC [MS. LACHELIER]: And then finally, my -- unless you

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1 have specific questions about the items of discovery we're
2 asking for?

3 MJ [Co] COHEN]: Let me just go back and check real quick.

4 It's an unclassified paragraph, so I know I can talk
5 about this. So on your initial filing, which is the AE 656 --
6 it's just easier for me to look at those paragraphs because
7 those are the ones that are most prevalent in my mind and
8 they're right in front of me as well.

9 In paragraph 2, just want to make sure what you say,
10 an unredacted recording of Supervisory Special Agent Drucker's
11 interviews with the Commission, you are referring back to your
12 use of the 9/11 Commission, correct?

13 ADC [MS. LACHELIER]: That's correct. Right.

14 MJ [Co] COHEN]: Remind me -- and it may be in your -- in
15 your motion, but I -- until I go back and read it again,
16 before -- before issuing a ruling, I'm not always going to
17 remember everything that everyone wrote.

18 So the redacted spreadsheet that you have, is that --
19 what did the government tell you was -- was their -- if they
20 told you anything about their basis for redacting the -- the
21 remaining portions of that? That it just wasn't relevant,
22 that it was cumulative, that it was ----

23 ADC [MS. LACHELIER]: To my recollection, so the order of

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1 how this went, Judge, is we filed our motion after our request
2 that requested it, after we filed our initial motion, then the
3 government said we will be providing.

4 MJ [Co] COHEN: Okay.

5 ADC [MS. LACHELIER]: Then before we filed our reply, they
6 provided us the spreadsheet. So there hasn't been really an
7 articulation between us and -- in their motion -- and I want
8 to double check to make sure I'm not overstating, but in their
9 motion, all they said was they were going to be providing it.
10 I don't think they said in a redacted form and we're redacting
11 for these reasons. I'm pretty confident about that, but I can
12 check for you.

13 MJ [Co] COHEN: No, that's fine. Like I said, I -- did
14 the government provide you any ----

15 ADC [MS. LACHELIER]: I think -- so if I have the right
16 answer, and I'm guessing a little bit, regarding the financial
17 spreadsheet, quote/unquote, in quantifications of travel and
18 living costs for Mr. Hawsawi, which is the other item on our
19 list that we're requesting, they say they appear to be
20 personal work product of Drucker's and for his own use in --
21 as a summary or calculation of various financial documents.

22 MJ [Co] COHEN: Okay.

23 ADC [MS. LACHELIER]: And I think I've -- I believe I've

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1 answered, I hope, for the judge ----

2 MJ [Col COHEN]: Right.

3 ADC [MS. LACHELIER]: ---- why we don't think that's
4 responsive ----

5 MJ [Col COHEN]: Right.

6 ADC [MS. LACHELIER]: ---- given the importance of
7 Agent Drucker to the case and to Mr. Hawsawi's prosecution in
8 particular.

9 MJ [Col COHEN]: Okay.

10 ADC [MS. LACHELIER]: What -- I think what -- so I -- I
11 think I've covered each and that is the spreadsheet, the
12 reference to travel documents or travel information that
13 Agent Drucker worked -- worked with that specifically involved
14 Mr. al Hawsawi, the reference to interviews and any recording
15 of an interview.

16 The binder of original account statements, one thing I
17 would emphasize is we have no foreign account statements,
18 period. Yes, we have financial -- what is it? -- money
19 transfers from different money transfer organizations. We
20 have no foreign bank statements. We have U.S. bank statements
21 from -- from U.S. affiliates in the U.S. But we don't have
22 foreign bank statements, if that makes sense, if you've got
23 the distinction I was making.

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1 MJ [Co] COHEN]: I definitely understand the distinction.

2 ADC [MS. LACHELIER]: Uh-huh.

3 MJ [Co] COHEN]: I guess the question is, is -- so, for
4 example, I -- I'm just throwing out -- throwing out a thing.

5 If Citibank basically -- why -- from your perspective,
6 why does that matter? In other words, I guess if it's a
7 completely different account, it would ----

8 ADC [MS. LACHELIER]: It is ----

9 MJ [Co] COHEN]: ---- that would make perfect sense,
10 right? I mean, well, you know, versus ----

11 ADC [MS. LACHELIER]: It is ----

12 MJ [Co] COHEN]: ---- just an affiliate who has
13 information about that bank account in another bank.

14 ADC [MS. LACHELIER]: No, no, no, we'd agree. I don't
15 want to throw a bank out there. I don't know if it's
16 appropriate or not for right now, so I just say if you have
17 bank A ----

18 MJ [Co] COHEN]: Yeah, I just threw Citibank out because
19 it's a big bank.

20 ADC [MS. LACHELIER]: Yeah. Some U.S. bank that does
21 business over there in some branch, that's not what we're
22 asking for. We're asking for foreign banks operating foreign
23 bank accounts, and they're distinct from anything else we've

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1 gotten.

2 MJ [Co] COHEN]: Okay.

3 ADC [MS. LACHELIER]: And I can refer you to specific
4 pages.

5 MJ [Co] COHEN]: That would be great. Thank you.

6 ADC [MS. LACHELIER]: It's in Attachment B, again, to our
7 656.

8 MJ [Co] COHEN]: Okay.

9 ADC [MS. LACHELIER]: Let me make sure I can see.
10 Actually, one of them is -- I thought it was classified, but
11 it's not. So it's on DRUCKER-4, page 4 of Attachment B to
12 AE 656. And it's the third full paragraph down from that
13 page, and it refers to foreign banks.

14 And then on page 17, DRUCKER-17, again -- and this --
15 this one I won't give you any details for, but it's the third
16 paragraph from the bottom, Judge.

17 MJ [Co] COHEN]: One second. Let me ask you this. I
18 think we can definitely do this without going into the
19 specific contents. So I'm on DRUCKER-17 that you just
20 referenced to me.

21 ADC [MS. LACHELIER]: Uh-huh.

22 MJ [Co] COHEN]: You asked me to look at the third
23 paragraph from the bottom. I have now looked at the third

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1 paragraph from the bottom.

2 On that third paragraph from the bottom, it's easier
3 for me to say what -- you know, the -- so -- you believe that,
4 although that information is not about your client, that the
5 government is going to assert that your client had something
6 to do with that -- with the information that's in that
7 paragraph?

8 ADC [MS. LACHELIER]: No. We can't posit -- I can't posit
9 that, quite honestly.

10 MJ [Col COHEN]: Okay.

11 ADC [MS. LACHELIER]: I think what -- what -- I'm being
12 careful.

13 MJ [Col COHEN]: No, that's fine. Take your time.

14 ADC [MS. LACHELIER]: To the extent it involves anyone
15 else -- to the extent it involves anyone else related, I guess
16 that's my point. There's a conspiracy alleged here.

17 MJ [Col COHEN]: Okay.

18 ADC [MS. LACHELIER]: And it -- if it involves someone
19 else related, then -- on the conspiracy theory, I think -- we
20 believe it absolutely is relevant.

21 MJ [Col COHEN]: Got it. Okay. And that's fine. That's
22 why I ask these questions, so I can understand where you --
23 where you're coming from.

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1 ADC [MS. LACHELIER]: Do you have any other specifics,
2 Judge? I just have one sort of broader comment about
3 the government's ----

4 MJ [Co] COHEN]: No. Like I said, I appreciate you giving
5 me the page cites so I can ask these questions now as opposed
6 to later.

7 ADC [MS. LACHELIER]: I think what I want to emphasize at
8 the end here and what we want to point out to the judge is
9 that the government highlighted very clearly that they
10 exercised due diligence and requested a due diligence search
11 when it came to the financial spreadsheet.

12 As to all our other requests, they don't proffer that
13 they exercised that due diligence. All they said is not
14 relevant, you don't get it, we don't -- you don't have a
15 theory, no.

16 And that poses some concern to us, that they -- they
17 acknowledge exercising due diligence in one area and actually
18 were able to get something out of their exercise of due
19 diligence. The other areas that we're asking about, they
20 don't say they did the same. And that -- as you mentioned
21 this morning, there's -- there's definitely a certain level of
22 distrust that this due diligence is being exercised so, at the
23 very least, the government needs to proffer on the record that

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1 they exercised due diligence as to each of the categories
2 we're requesting.

3 And even -- and then their invocation of the relevance
4 is -- is -- or their -- or the lack of relevance, I should
5 say, is -- is completely aside from the relevance of -- of
6 Special Agent Drucker that I already explained to you.

7 MJ [Co] COHEN]: All right. Thank you very much.

8 LDC [MR. RUIZ]: Judge, could we have a moment to confer?

9 MJ [Co] COHEN]: You may.

10 **[Counsel conferred.]**

11 ADC [MS. LACHELIER]: Judge, I apologize.

12 MJ [Co] COHEN]: That's all right.

13 ADC [MS. LACHELIER]: I forgot to check with learned
14 counsel before I walked away from the podium.

15 MJ [Co] COHEN]: That's all right.

16 ADC [MS. LACHELIER]: So if you may indulge me for a
17 second. On the redaction on -- that we were referring to on
18 page 14 of DRUCKER.

19 MJ [Co] COHEN]: Yes.

20 ADC [MS. LACHELIER]: I want -- one argument I didn't -- I
21 failed to make and I wanted to emphasize, even if the
22 paragraph immediately preceding was not directly relevant --
23 again, dancing around things -- the relative role, relative

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1 culpability, the -- the sort of -- the sort of mosaic theory
2 of -- of involvement that the government has and where
3 Mr. Hawsawi fits in that picture is also relevant.

4 So the -- the goal in asking for this information that
5 is under these redactions is not that it should be tethered
6 directly to Mr. Hawsawi. It's -- it's tethered to the
7 finances of the 9/11 plot, and the government has alleged
8 Mr. Hawsawi has a role in that plot. Where he fits in that
9 role, if, in fact, he did have a role, is also important to
10 mitigation, to relative culpability, and to mitigating against
11 the death penalty, obviously.

12 MJ [Co] COHEN: Okay.

13 ADC [MS. LACHELIER]: So I want to make sure the judge is
14 aware of that. Just as we in the SSCI discovery that --
15 sorry, the Senate reports -- the discovery regarding the RDI
16 program and the Senate report, and we went around and we asked
17 information about what happened to other detainees in the
18 program, because that informs what happened to Mr. al Hawsawi,
19 very similar with the finances and probably more compelling
20 because this is really about the allegations the government is
21 making against Mr. al Hawsawi.

22 MJ [Co] COHEN: I understand.

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Sir, we are joined to this motion but
2 I have a somewhat narrower focus. I just wanted to focus on
3 the three memoranda for record of Special Agent Drucker with
4 his three interviews with the 9/11 Commission.

5 The -- with respect to your question about what are we
6 asking for, we are asking for unredacted versions of the three
7 memoranda for record.

8 MJ [Co] COHEN: Okay.

9 LDC [MR. CONNELL]: In my view, the way that that works is
10 after you order it, the government might try to have 505(f)
11 substitutions or redactions.

12 MJ [Co] COHEN: Okay.

13 LDC [MR. CONNELL]: The redactions which currently exist,
14 I'll talk a little more detail, but were not done under
15 505(f). They're either FOIA redactions in one case, or
16 unilateral prosecution redactions in the other.

17 MJ [Co] COHEN: All right. Which then gives you the
18 right, because it's a 701 redaction, to -- to ask for me to go
19 ahead and compel it.

20 LDC [MR. CONNELL]: Yes, sir. It's also a very small
21 universe of documents that I'm asking for in camera review of.

22 MJ [Co] COHEN: Okay.

23 LDC [MR. CONNELL]: Really, less than 25 pages.

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1 I do want to, just for the military commission's
2 reference, point out that Special Agent Drucker testified
3 about these three documents in the unofficial transcript of
4 open testimony at 27895 through 920 and 27948 and 49, and then
5 in the official unauthenticated transcript of the closed
6 session, he testified about them at 27235 through 44, and
7 27290 through 95.

8 MJ [Col COHEN]: Last one again, please.

9 LDC [MR. CONNELL]: Last one was 27290 through 95.

10 MJ [Col COHEN]: Thank you.

11 LDC [MR. CONNELL]: And a couple of important points out
12 of there.

13 First, with response to one of your questions about
14 how do you know it's not about something else? Special Agent
15 Drucker actually testified that he only discussed 9/11 matters
16 with the 9/11 Commission; that he didn't go outside the
17 parameters of that and talk about some other conspiracy or
18 some other issue.

19 On each occasion in which he was asked whether the MFR
20 was accurate, he affirmed that that was what he had said, that
21 it was accurate, but that he didn't know what was under the
22 redactions. So I think we've pretty much covered all the
23 evidentiary bases with that.

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1 MJ [Co] COHEN]: Copy.

2 LDC [MR. CONNELL]: Last global observation I'd like to
3 make is that, in my humble opinion, the military commission
4 has already ordered production of these documents in 538AA,
5 because they memorialize the connection and coordination and
6 integration between the CIA and the FBI, which will be the
7 focus of my comments today, not so much the financial part.

8 So the first of those three documents is a 16
9 July 2003 memorandum for record. It's found -- it's
10 unclassified and it is found at AE 628RRR Attachment G,
11 with -- I'll show this to counsel for the government, but then
12 I can make it a lot easier if I just put it on the ----

13 MJ [Co] COHEN]: That would be great.

14 LDC [MR. CONNELL]: ---- on the document camera.

15 [Counsel conferred.]

16 LDC [MR. CONNELL]: Sir, this document, AE 628RRR
17 Attachment G, was not produced by the government at all in any
18 form, redacted or unredacted. This came from the National
19 Archives, which is where 9/11 Commission unclassified records
20 are stored. This is -- so all of the redactions in this
21 document are -- are not even 701 redactions. They are FOIA
22 redactions.

23 MJ [Co] COHEN]: Okay.

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1 LDC [MR. CONNELL]: The -- so with respect to page 1, what
2 we would do with the unredacted information is have
3 additional -- make different arguments, additional arguments
4 regarding the integration between the FBI and the CIA. This
5 was a -- actually a co-briefing between -- if you look at the
6 top line, it says, "Event: FBI-CIA Briefing on Financing of
7 September 11th Plot." And then at various times it talks
8 about who from the CIA was involved in the briefing.

9 On page 2 -- and this is in response to your question
10 about are there external link-ups that we know how these
11 things fit together. On page 2 of AE 628RRR Attachment G,
12 there's "Drucker and a CIA officer" -- redacted -- "noted that
13 KSM" -- redacted -- "stated that the plot costs 4,000 --
14 \$400,000." That is a reference to the CIA intelligence
15 summary, which is found -- a summary of which is found in the
16 record at STA-5909 in AE 628AAAA Attachment E.

17 On page 5 of the document, the -- the first two
18 redactions, it's very difficult to know exactly what they are,
19 with respect to your question to counsel, but we know that the
20 statement which appears between the two redactions is,
21 "Detainee comments on financing to date have not necessarily
22 been truthful."

23 The -- in fact, we -- Special Agent Drucker testified

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1 that the detainee comments, when he was talking with the
2 9/11 Commission, referred to the intel reporting from black
3 sites that they had mutual access to.

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: The third redaction could be regarding
6 Shayk Sa'adi, the, quote, known al Qaeda financier, potential
7 alternate suspect. Probably refers to AE -- excuse me, to
8 STA-3816 found in the record at AE 628UUUUU (AAA).

9 Page 6 of this document has a redaction of particular
10 value or importance because Drucker explained how the FBI --
11 blank -- "unravelled the aliases used by Abdul Aziz." The --
12 it probably says under there some relationship to his
13 co-presenter from the CIA.

14 Given the -- one of the government's primary remaining
15 arguments with respect to Fitzgerald is that the government
16 knew everything well in advance before Mr. al Baluchi was even
17 captured. It seems to me -- and there -- we've been through
18 this in the testimony as well, but the CIA definitely played a
19 role in establishing the information. Sometimes the CIA was
20 the sole source.

21 The -- one other thing that I want to talk about with
22 respect to page 6 and 7 is one of the things that we know
23 about -- these are FOIA redactions, as I said, but some of

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1 them might provoke national security privilege statements
2 given the UAE investigation aspect of it over which the
3 government has in open court invoked national security
4 privilege. And it's one of the reasons why these redactions
5 are important because the sort of generic redaction gives the
6 government a pass on whether to invoke national security
7 privilege or not because they don't have to identify the basis
8 of the redaction.

9 The -- at page 7, the -- we -- this is one where we
10 can tell from context and the -- the large redaction in the
11 bottom of the page relates to Fayez Banihammad, and it is
12 probably covered by the, quote, little blue notebook
13 requirement, and that's unclassified. The document itself in
14 which the little blue notebook requirement occurs is FBI-23850
15 at AE 628SSS Attachment G and Mr. al Hawsawi's responsive
16 statement appears unclassified in the record at AE 628
17 quintuple -- excuse me, SSSS Attachment C, which is STA-347.

18 I know that I can sometimes bore everyone with all
19 these record cites, but the significance of it is, is that
20 this document and the redactions in the document -- the
21 material under the redactions very likely documents the
22 process of the information exchanged between the CIA and the
23 FBI and then it comes back.

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1 We see that even more with the next document. The
2 second memorandum for record is from 12 January 2006, found in
3 the record at AE 628SSS Attachment B. These are unilateral
4 redactions, although the government claims that they were 701
5 redactions.

6 I direct the -- the court's attention to DRUCKER-5,
7 which is found at AE 628SSS Attachment B. DRUCKER-5 does
8 contain some unclassified paragraphs. And if I could direct
9 your attention to -- excuse me -- DRUCKER-5, there's a block
10 in the middle of the page.

11 But the unclassified paragraph immediately above the
12 redaction talks -- tells us that this is probably not a 701
13 redaction but probably a national security privilege redaction
14 because it's talking about specific agencies within UAE that
15 were -- assisted. The government invoked national security
16 privilege over those specific UAE authorities in the official
17 transcript at page 27170 through 72.

18 Now, why is that important? Why is it important what
19 happened there? Because what happens from here is that
20 Special Agent Drucker sends that information from the UAE
21 authorities relating to Mr. al Hawsawi to Special
22 Agent Gaudin, who is at Location Number 3, who, along with
23 Dr. Mitchell and Special Agent Soufan, uses that information

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1 to interrogate Abu Zubaydah, which is testimony that we had
2 previously. That testimony appears at -- in the record at
3 28162, 64. So what we have here is documentation of a -- an
4 exchange of information where Drucker gets the information,
5 sends it to another FBI agent, and it's then used by the CIA.

6 One other example in this document appears at
7 DRUCKER-14, and I think this is the large bottom-of-the-page
8 box and top-of-the-page box that you were discussing with
9 counsel. And from the last paragraph, the one that you all
10 were discussing, it seems to link future FBI investigation to
11 information from Mr. al Hawsawi.

12 But one of the reasons why we can believe that that is
13 true is that this document is dated 12 January 2004. On the
14 next day, 13 January 2004, Special Agent Drucker sends an FBI
15 requirement which is found in the record at AE 628DD FBI-23659
16 with a pass line to SG1, S-G-1, who interrogated
17 Mr. al Baluchi at Location 2, although we can't determine the
18 complete link because of the invocation of national security
19 privilege.

20 We then know in unclassified format that WC2 questions
21 Mr. al Baluchi at Location 7 about this information and
22 shortly after Drs. Mitchell and Jessen questioned
23 Mr. al Baluchi at Location Number 7. So it's all very tightly

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1 together -- tied together. And although I can't know what's
2 under the redaction, of course, the -- both the internal
3 context of the document and the external linkages suggest that
4 it's tightly -- tightly put together.

5 Now, just to show you how this is ultimately going to
6 matter, and this is just the one extended example, is that
7 that interrogation produces multiple intelligence reports.
8 Special Agent Drucker testified that -- about that at 27921 to
9 32. Those intel reports include STA-1467 and 1697 at
10 AE 628AAAA Attachment E and STA-254 at AE 628CC Attachment I.

11 Now, why is that important? That information becomes
12 the sole source -- and Special Agent Drucker acknowledged
13 it -- the sole source for the information which appears at
14 note 102, page 497 of the *9/11 Commission Report*, regarding
15 Mr. al Baluchi's alleged involvement in ordering videos, a
16 CityBird video and a related document.

17 That note 102, which only came from -- through this
18 channel with Special Agent Drucker, becomes the basis for
19 Special Agent Fitzgerald questioning Mr. al Baluchi about that
20 CityBird video. That testimony offered by the government
21 appears at -- in the transcript at 25517.

22 And then that questioning becomes the basis for Overt
23 Acts 33 and 34 of the charge sheet. And the only place that

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1 that information comes from is at the request of Special Agent
2 Drucker, the interrogation of Mr. al Baluchi in Location 7,
3 and that information winds its way through Special Agent
4 Fitzgerald into the actual charge sheet which is before the
5 military commission.

6 The last MFR just really has one giant redaction.
7 That's the 19 May 2004 MFR found in the record at AE 628SSS
8 Attachment B. And although it is not entirely possible to
9 tell the basis of the redaction or what is underneath it,
10 the -- after the one long redaction at the beginning of the
11 document, there's an unclassified paragraph.

12 The first sentence picks up with, "Drucker said that
13 the lack of an ID requirement let Ali use aliases for the
14 transactions he made from the U.A.E. Exchange Centre." So
15 although we don't have enough information to externally link
16 that, it seems very likely from the context that because the
17 first sentence picking up after where it talks about
18 Mr. al Baluchi, that those redactions probably relate to
19 Mr. al Baluchi.

20 It seems to me that the appropriate remedy is to
21 compel the government to produce these three specific
22 documents which were already argued -- compelled in the
23 general in AE 3 -- 538AA and then let the government seek

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1 approval of -- judicial approval of its redactions if they are
2 so advised.

3 MJ [Co] COHEN]: Okay. Mr. Ryan. Mr. Ryan, are you
4 arguing this one?

5 TC [MR. RYAN]: Your Honor, in light of the commission's
6 recent directives to us regarding in camera review of some
7 decisions made by the prosecution in terms of the -- of
8 documents previously discovered under 538, and understanding
9 where things are in terms of Your Honor's overview of the 538
10 process, we would consent to -- if Your Honor directs us --
11 the production of the three documents learned counsel just
12 spoke of to Your Honor for review under the same rubric that
13 we've ----

14 MJ [Co] COHEN]: Okay. I'll do that.

15 TC [MR. RYAN]: And I'll only note this, Judge. The -- as
16 far as the issue of how information regarding CityBird video
17 came about, we're a long way from having to get into how that
18 evidence came about, but I'll only note that I believe the
19 video itself was in the possession of the government -- or at
20 least references to it.

21 We believe -- and I don't think today is the right
22 time to do it, but I believe -- we believe strongly that at
23 some point all of the evidence that we -- form the basis of

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1 the charge sheet, including all the overt acts, was well
2 independent of any black site information. But that's just
3 stating it for purposes of today.

4 MJ [Co] COHEN: I understand. Yeah, we'll -- I'm sure
5 we'll get a -- well, I'm not sure. If we get a derivative
6 evidence, we'll deal with it at that point.

7 TC [MR. RYAN]: I fully recognize the fight is yet to come
8 on this.

9 MJ [Co] COHEN: Yes.

10 TC [MR. RYAN]: Turning to specific -- the 656 motion as
11 it existed on the docket, brought by the -- the Hawsawi team,
12 one, Your Honor, I'll just note this in passing.
13 Mr. Hawsawi's role, although sometimes described as a mere
14 financier, once you have seen the evidence, goes far beyond
15 that.

16 MJ [Co] COHEN: Okay. Like I said, I make no
17 presumptions. I just know that was ----

18 TC [MR. RYAN]: Very well, sir. And I don't think it
19 needs to be belabored at this time.

20 MJ [Co] COHEN: Okay.

21 TC [MR. RYAN]: Number two, the documents regarding now
22 Mr. Drucker have been turned over really going back several
23 years because, number one, he was certainly an integral member

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1 of the PENTTBOM team and the investigation efforts into the
2 9/11 attacks. And I, not for one second, dispute the fact
3 that he is an expert in this field. Also, documents regarding
4 Mr. Drucker have been turned over pursuant to the 538
5 analysis. And Your Honor heard the testimony, and I'm sure
6 it's quite clear to you why he was an important part of that
7 whole analysis.

8 I will note, sir, and we did say it in our motion --
9 or in our pleading at the bottom of page 9, that although
10 the -- that in a footnote that the prosecution notes that it
11 does not intend to call Supervisory Special Agent Drucker as a
12 witness in this case. He is on the list, I recognize that.
13 However, at this moment, I -- it is my intention that he will
14 not be called as a witness, for what that's worth to the
15 commission.

16 We intend to introduce a tremendous amount of the
17 financial evidence in the case, but we do not feel that it's
18 necessary to call Agent Drucker to do that, nor the analysis,
19 sir.

20 Your Honor, and this goes to general, and it probably
21 should have been said this morning. Much of the discovery
22 analysis and discovery arguments that have been raised before
23 this commission have left the realm of material to the

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1 preparation of a legally cognizable defense, to the point that
2 it actually alters the quantum of proof in favor of the
3 defense to the realm of it would be really interesting for us
4 to see this, or it might give us more ideas, or it might lead
5 to something else.

6 And I would submit that, although it's always in the
7 commission's interest to be careful in this analysis, that at
8 some point we should, and the commission should be returning
9 to the law as to discovery. And that once we're outside of
10 things that are being introduced in an affirmative sense, the
11 government's obligations concern only the areas where it is
12 material to the preparation of a legally cognizable defense.

13 Next, sir, as to this issue of the Drucker
14 spreadsheet, I'll note that at the bottom of page 9, the last
15 sentence, which continues onto page 10, "Although the
16 prosecution maintains that the spreadsheet is a cumulative
17 refinement of facts, those -- and those facts already
18 possessed by the defense, the prosecution intends to provide
19 the relevant portions of this located spreadsheet to the
20 defense in accordance with past discovery practices."

21 This is what I think Your Honor was asking about in
22 terms of the spreadsheet that Mr. Drucker prepared, not the
23 one that was provided by the prosecution.

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1 MJ [Co] COHEN]: What's ----

2 TC [MR. RYAN]: I can report ----

3 MJ [Co] COHEN]: Mr. Ryan, what's the difference? Help me
4 understand. I'm not sure -- it's not really clear in my mind.

5 TC [MR. RYAN]: I sure can, Judge.

6 MJ [Co] COHEN]: Okay. Thank you.

7 TC [MR. RYAN]: The spreadsheet that was prepared by
8 Mr. Drucker was not prepared for purposes of this case, it was
9 not prepared for purposes of his testimony. Rather, it was
10 prepared by him in the course of his duties many years ago,
11 ultimately that I believe he at least used to some extent in
12 his testimony to the ----

13 MJ [Co] COHEN]: Okay. That's the redacted one that --
14 that was referenced earlier?

15 TC [MR. RYAN]: Yes, sir.

16 MJ [Co] COHEN]: Okay. Got it.

17 TC [MR. RYAN]: And I can report, sir, that the -- the
18 spreadsheet was provided on 26 September 2019. It appears at
19 the Bates number of MEA-DRUCKER-0019 through 90. There were
20 redactions taken because it was -- this spreadsheet was
21 provided to the defense, although we felt it was not
22 necessary, for purposes of the Hawsawi defense. We,
23 therefore, redacted it consistent with the Hawsawi entries

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1 therein.

2 MJ [Co] COHEN]: Okay. So the difference, then, between
3 the ones I see in your response is that that's a trial
4 counsel-produced spreadsheet of all of the financial documents
5 that have been prepared; is that right? Is that the best way
6 of understanding that?

7 TC [MR. RYAN]: What I just described was Mr. Drucker's
8 own ----

9 MJ [Co] COHEN]: Right.

10 TC [MR. RYAN]: ---- spreadsheet that he used. For want
11 of a better term, it became sort of work product of his own.

12 MJ [Co] COHEN]: Okay.

13 TC [MR. RYAN]: Now, the difference, the significant part
14 for Your Honor is this: The item that is contained at
15 Attachment C -- it's an unclassified document, and that's the
16 one I think Your Honor said you had seen it.

17 MJ [Co] COHEN]: It was -- it was many pages long.

18 TC [MR. RYAN]: Many pages long, correct, sir. And that
19 appears as Attachment C to 656A, is an index provided by the
20 prosecution to the defense with 342 entries on it, describing
21 all of the discovery that has been provided in the area of the
22 financing of the September 11th attacks.

23 The info that -- information that is contained on that

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1 spreadsheet, that is shown at Attachment C, includes the date
2 that it was produced, the Bates numbers, the page numbers, and
3 a description of all the documents. And in some cases, the
4 entries represent documents that are several hundred pages
5 long.

6 MJ [Col COHEN]: So ----

7 TC [MR. RYAN]: The importance of this document, Judge, is
8 it gives to the defense the full universe of all financial
9 documents that upon which the government will be relying in
10 its presentation of its affirmative case, but also other items
11 related to it that were collected as part of the financial
12 analysis of the attacks. All of those documents contained --
13 that are referenced in that attachment have been available to
14 the defense for quite some time.

15 Much of our argument, sir, in regard to this
16 particular motion, is to say they've got the stuff that
17 matters. They've got the documents. They've got the evidence
18 from which we are going to be drawing inferences that
19 Mr. Hawsawi committed these offenses.

20 Much of what they seek comes down to things that
21 either Mr. Drucker or others may or may not have analyzed and
22 come to some conclusions. Most of the time -- I'm sure almost
23 all the time consistent, but maybe on occasion inconsistent,

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1 but that's not the evidence. The evidence is the items that
2 are contained within these documents.

3 Now, I agree, sir, that if the United States puts a
4 witness on the stand and he testifies in a contrary fashion,
5 or if the defense puts a witness on the stand who testifies in
6 a contrary fashion to something we know otherwise is untrue or
7 inaccurate, we have certain obligations.

8 But as far as discovery is concerned right now, we
9 would suggest that the attachment to 656A, and all the
10 documents that it references, is enough for this commission to
11 conclude that the defense has everything that it needs and
12 deserves under discovery rules.

13 MJ [Co] COHEN]: Okay. I understand.

14 TC [MR. RYAN]: Now, and as you see, Judge, in the course
15 of argument and in the pleadings themselves, there are many
16 occasions where they'll say, well, we want this CD or this
17 spreadsheet, or some other form in which documents and records
18 are collected, or were collected or stored in some other
19 format. Whenever possible, we have looked to see if they
20 still exist. And as we report in our pleading -- and I rely
21 on that -- for the most part they do not or they could not be
22 found or they never existed in the first place.

23 But again, anything that contained the documents that

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1 are summarized in Attachment C, the evidence is that, not
2 where -- how -- some other way it was collected and stored
3 over the course of many years and many investigations.

4 MJ [Co] COHEN]: Okay.

5 TC [MR. RYAN]: And one last update, sir. On page 10 of
6 656A -- I'm sorry, sir. That was my reference to the -- to
7 the spreadsheet.

8 As to all other matters that are raised in the
9 defense's motion, whether it's classified or unclassified, we
10 will rely on our pleading and rest on that, sir.

11 MJ [Co] COHEN]: Okay. Thank you. Mr. Ryan, one last
12 question. Mr. Ryan, just one last question. When you -- I
13 mean, it was the prosecution that made the redactions to the
14 spreadsheet referenced by counsel for Mr. al Hawsawi, correct?

15 TC [MR. RYAN]: The spreadsheet prepared by Mr. Drucker.

16 MJ [Co] COHEN]: Yes.

17 TC [MR. RYAN]: Yes, sir.

18 MJ [Co] COHEN]: Okay. What was the methodology used
19 to -- to make those redactions?

20 TC [MR. RYAN]: Sir, I'm sorry?

21 MJ [Co] COHEN]: What was your methodology that was used
22 to make those redactions?

23 TC [MR. RYAN]: Under the analysis of 701, of looking as

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1 to what it was, and what it referred to, and we made our
2 redactions from there.

3 MJ [Col COHEN]: Okay. All right. Because I'm looking at
4 701(c)(1), "After service of charges upon a request of the
5 defense, the government shall permit the defense counsel to
6 examine the following materials: Any books, papers,
7 documents, photographs, tangible objects, buildings, or places
8 or copies or portions thereof which are within the possession,
9 custody, or control of the government, the existence of which
10 is known or by the exercise of due diligence may become known
11 to trial counsel, and which are material to the preparation of
12 the defense."

13 Not to a cognizable defense. In other words, it's not
14 like it has to be directly related to a -- I am referencing an
15 alibi defense, but just to the preparation of the defense, the
16 defense in general, their entire -- their entire case.

17 "Or" -- and here's the other prong, "or are intended
18 for use by the trial counsel as evidence in the prosecution
19 case in chief."

20 TC [MR. RYAN]: Yes, sir. Yes, sir.

21 MJ [Col COHEN]: So it's a little bit broader than just a
22 cognizable defense. In other words ----

23 TC [MR. RYAN]: Well ----

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1 MJ [Co] COHEN]: In other words, sentencing is -- for
2 example, is part of a -- is part of material preparation to
3 the defense. Levels of culpability in this case would clearly
4 be relevant to the issue of whether death penalty should be
5 adjudged or not adjudged. So that's what I need to feel --
6 feel comfortable about on this, is that -- is -- and this says
7 to the preparation, not even to the presentation.

8 But for example, the prosecution has all these
9 documents that you intend to introduce but there may be
10 documents that you chose not to introduce but that the defense
11 may want to introduce, and if they don't have those documents
12 to look at, how can they make that decision?

13 TC [MR. RYAN]: Well, Judge, as to -- I mentioned this
14 before, but in Attachment C, that -- that big, long
15 spreadsheet of all discovery that was provided, by no means
16 are all of those going to be all government exhibits for
17 purposes ----

18 MJ [Co] COHEN]: Right.

19 TC [MR. RYAN]: ---- of trial. And enormous as Your Honor
20 can imagine, and that was -- and as was testified to by
21 Drucker, among others, in those months after 9/11, there was a
22 great deal of effort spent on the collection of both domestic
23 financial records but also foreign financial records, which

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1 are contained in that same attachment or at least described in
2 that same attachment. And all of those, for the most part,
3 have been turned over and are the subject of discovery, not
4 just the ones that nail right on point the accused's guilt.

5 MJ [Co] COHEN]: So how many of these things that were
6 redacted in the spreadsheet by Drucker were additional
7 financial documents that the defense has never seen but are
8 related to -- to the 9/11 investigation? If you need to get
9 back to me, that's fine.

10 TC [MR. RYAN]: I do, Judge.

11 MJ [Co] COHEN]: Okay.

12 TC [MR. RYAN]: Yeah, I just like to be very careful about
13 it.

14 MJ [Co] COHEN]: I'd like to know that.

15 TC [MR. RYAN]: And that's all I'll say about that at this
16 moment.

17 MJ [Co] COHEN]: Okay. All right. I'll let you get back
18 to me on that.

19 TC [MR. RYAN]: Thank you, sir.

20 MJ [Co] COHEN]: All right. Thank you.

21 Rebuttal argument? Sure. I'll give you two minutes
22 for rebuttal.

23 ADC [MS. LACHELIER]: It takes longer to walk up to the

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1 podium, Judge.

2 MJ [Col COHEN]: That's all right. And if it is really
3 short, you guys are welcome to just stand back there. I will
4 not take offense.

5 ADC [MS. LACHELIER]: Okay. Thanks. I'll take that under
6 advisement for the next time.

7 The government's proffer that they're not going to
8 call Agent Drucker is really disconcerting at this point. In
9 their pleading, yes, in footnote 1 filed on September 20,
10 2019, they said, "We're not calling him." In their pleading
11 to the court per your order when they filed witness lists,
12 they said, "We are calling him," and that was filed
13 December 1st, 2019.

14 Today, out of, I would submit, self-serving interests
15 they're saying now, "We're not calling him," which they know
16 very full well, if they don't call him, it somewhat reduces
17 the possible relevance of his testimony or the evidence that
18 we're asking for. One, he's already testified. We didn't
19 examine him. We intend to call him. We intend to examine
20 him. So he's going to be a witness anyway.

21 MJ [Col COHEN]: Right.

22 ADC [MS. LACHELIER]: Second, I would ask the court not to
23 take under advisement at all that they are proffering today

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1 that they're not calling him. They listed him in 628 -- 628,
2 their notice of government witnesses, as a witness who will
3 testify about the acquisition of certain business records
4 obtained overseas. He will also testify in accordance with
5 another pleading of the government's about his interview of
6 Zaineb Aqeel if she elects not to testify. She is a foreign
7 witness who may not be able to come and who may decline to
8 testify, and that's why Agent Drucker is going to be here as
9 well, to substitute for her.

10 So I -- with all due respect, I don't give any
11 credence to their proffer that he's not testifying.

12 MJ [Co] COHEN]: Okay. Like I said, that's a decision to
13 be made months from now, but I understand. Thank you.

14 I'm going to take a brief comfort break. Let's be
15 back in ten minutes.

16 [The R.M.C. 803 session recessed at 1426, 19 February 2020.]

17 [The R.M.C. 803 session was called to order at 1440,
18 19 February 2020.]

19 MJ [Co] COHEN]: The military commission is called to
20 order. Parties are present. We still have Mr. Ali,
21 Mr. Binalshibh.

22 Mr. Sowards, my understanding is that Mr. Mohammad has
23 exercised his right to go back and rest a little bit. Is

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1 that -- do I have your permission to move forward?

2 LDC [MR. SOWARDS]: That's correct, Your Honor.

3 MJ [Col COHEN]: All right. Thank you.

4 Okay. All right. I'm going to hold you guys to some
5 tight timelines to see if I can get done with oral argument
6 today. So let's go ahead and take up AE 672, and -- can't
7 pray early, but we can pray a couple minutes late, so if I run
8 a little bit past the time, then we should be all right.

9 All right. Good afternoon.

10 ADDC [LTC WILLIAMS]: Good afternoon, Your Honor. How are
11 you, sir?

12 MJ [Col COHEN]: I'm doing well. I get to see the whole
13 team today. This is new.

14 ADDC [LTC WILLIAMS]: Yes, sir. Lieutenant Colonel
15 Jennifer Williams for Mr. al Hawsawi.

16 Your Honor, AE 672 (MAH) is a request for witnesses.
17 And in this, we're asking you to open the gate, which will
18 allow us access to witnesses, eyewitnesses, that possess
19 relevant and material information to the events that
20 Mr. al Hawsawi endured, to his torture, to his condition of
21 confinement in CIA custody and in the time leading up to his
22 clean team statements to the FBI in early 2007.

23 I'm not going to repeat the argument of my co-counsel,

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1 Mr. Gleason, in this regards, regarding the nature of the
2 characterization by the government that these statements were
3 voluntary, reliable, and attenuated from the prior treatment.
4 Instead, I will adopt that argument, Your Honor, as it
5 pertains to the argument in relation to this motion.

6 MJ [Col COHEN]: Okay.

7 ADDC [LTC WILLIAMS]: These witnesses can also provide
8 information about the observable impact that the events,
9 torture, and condition of confinement had on Mr. al Hawsawi.
10 The government has kept this gate to these witnesses closed
11 tight for too long, only allowing a few to get by, and those
12 few witnesses seem to further their narrative and not benefit
13 Mr. al Hawsawi.

14 This is inconsistent with constitutional standards set
15 out in Strickland v. Washington, requiring the defense to
16 thoroughly investigate the facts or to determine that that is
17 not necessary. It is inconsistent with the Military
18 Commissions Act, which gives a defendant in this military
19 commission the opportunity to obtain witnesses and evidence
20 comparable to that in an Article III court. And it is
21 inconsistent with the due process clause of the Fifth
22 Amendment which requires access to information that is
23 material to either guilt or punishment.

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1 Our written filings, both unclassified and classified,
2 go into detail as to why these witnesses are necessary to
3 defend Mr. al Hawsawi against the use of statements that we
4 believe are derived from torture, as well as to present a
5 totality of circumstances surrounding the interrogations and
6 the events leading up to the ultimate clean team statements.

7 In addition, it is required for us to develop a case
8 in mitigation. Each witness that we are denied is a missed
9 opportunity to explore avenues that could possibly provide
10 evidence to sway one member of the panel against death in this
11 case.

12 We ask you to open the gate and allow us to explore
13 these avenues in seven different categories. I'm not going to
14 repeat again everything that's in the filings, Judge, but I am
15 going to highlight for you in each of the categories why we
16 think it is still necessary, why we think we have not gotten
17 the witnesses that we need, the access that we need in this
18 regard.

19 The first category that we are requesting is ICRC,
20 International Committee of the Red Cross, personnel who met
21 with Mr. al Hawsawi before his clean team interrogation in
22 January of 2007. Although we have been provided with the
23 names of two individuals who were in the ICRC delegation, we

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1 have asked for all individuals.

2 Again, any witness that is denied any opportunity for
3 us to explore that avenue, what they would have observed
4 during that critical period of time where the government is
5 indicating they feel that the torture had been attenuated is
6 critical in this regards, and those meetings were soon after
7 he arrived here from CIA custody.

8 The two individuals that they have given us have
9 summarily refused to speak with the defense. And I would
10 point your attention, Your Honor, to Attachment L of our
11 classified filing which just indicates that there is knowledge
12 that at least four people on one particular instance from the
13 ICRC visited Mr. al Hawsawi and had an opportunity to speak
14 with him in this time frame that is critical to the statements
15 given to the FBI.

16 The second category of witnesses that we are asking
17 for are Camp VII personnel who interacted with Mr. al Hawsawi
18 from September of 2006 through February of 2007. Again,
19 Mr. Gleason did argue about the guards. Sometimes words are
20 minced, and we want to ensure that we are capturing all
21 individuals who were working and had the ability to observe
22 Mr. al Hawsawi, whether they were guards or in some other
23 capacity.

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1 I will refer back to the camp commander or the OIC's
2 testimony where he indicated that individuals served as guards
3 that were personnel that were nonmilitary, and that is found
4 on 1 November 2019, page 28661, lines 2 and 3.

5 In addition to individuals who may be characterized as
6 personnel and not necessarily titled guards, other individuals
7 who would be relevant during this time frame include
8 librarians, include the SJA, or other personnel at the camp
9 who had direct access to him. Their observations are perhaps
10 the best information that we can garner about Mr. al Hawsawi's
11 condition previous to the FBI clean team interrogation.

12 In fact, the government in an unclassified paragraph
13 in 628C, on page 3, indicate that other than being
14 fingerprinted by the FBI and meeting with the ICRC, that the
15 medical and detention staff that had routine interactions were
16 probably the most substantive contact of individuals that
17 met -- that saw Mr. al Hawsawi during this critical period
18 of a five-month period of time.

19 This is important because one individual may not
20 perceive things the way another would. The OIC commander also
21 testified -- and this could be found at page 28594 of the
22 transcript, Judge -- that any of the guards who had interacted
23 with Mr. al Hawsawi would have done so in a transactional

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1 fashion only. However, even in a transactional manner,
2 someone can observe things that could be extremely telling
3 about his physical and psychological conditions.

4 A wince observed from pain from sitting or lying down
5 is something that can be observed in a transactional type of
6 setting, as could be other indicators of psychological issues
7 of being passive and depressed, which the SSCI Report
8 indicated to us on page 19 in footnote 32 was one of the main
9 reasons why the learned helplessness was initiated in the RDI
10 program.

11 So these are the types of things that we can't get
12 from other individuals. And the OIC, camp commander, who
13 testified does not give us that information. Only if we have
14 enough information to reach out to these people and be able to
15 speak with them about what their observations were, are we
16 going to be fulfilling our obligation to leave no stone
17 unturned in defending Mr. al Hawsawi.

18 The third category of witnesses ----

19 MJ [Col COHEN]: Before you go on to the third, let me ask
20 you real quick about the second.

21 ADDC [LTC WILLIAMS]: Yes, sir.

22 MJ [Col COHEN]: So what do you have -- and you may have
23 nothing, but that's why I'm asking. With respect to

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1 documentation of interactions with Mr. al Hawsawi during that
2 time period of September '06 through February 2007, what --
3 what are the types of information that you already have in
4 comparison to what -- the information you just described? Is
5 it just the DIMS? Is that all you've got or ----

6 ADDC [LTC WILLIAMS]: We do have the DIMS records, Your
7 Honor, and that is essentially where the information is
8 derived from. That tells us some things about the conditions
9 of confinement.

10 But certainly, someone can -- if someone has -- for
11 instance, is exposed to light 24 hours a day, as they had been
12 previously in a black site, and that condition is being
13 imposed on them here in Guantanamo once they get here, you can
14 see that in the DIMS record. But the reaction of the person
15 that may be observable, and that person who may remember it,
16 being a guard or a librarian or somebody else, is going to
17 give us much greater detail that is going to -- and possibly
18 even lead us to other witnesses that can fill in and provide
19 us additional information.

20 So we do know conditions of confinement. We do know
21 that there are times when he definitely met with these people
22 and interacted with them. And it is something that, until we
23 have an opportunity to at least speak with some of them, to

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1 get an idea of -- of what they can recall -- you know, it
2 is -- it's a situation where this is a very select group of
3 individuals. And Mr. al Hawsawi, being a high-value detainee,
4 and being brought in to Camp VII, people are bound to have
5 more than a passing memory of the individuals that they dealt
6 with here.

7 And it's -- to summarily say all the people who were
8 working there, all the personnel only had transactional
9 actions with them, I think is a -- is a false narrative. And
10 I think that the -- what the DIMS records do show us is that
11 there are events that certainly other people could have made
12 observations on that would give us clues as to his
13 psychological and medical state at the time that the clean
14 team statements were derived.

15 MJ [Col COHEN]: Okay.

16 ADDC [LTC WILLIAMS]: The third category of witnesses that
17 we're asking for are for medical personnel for a surgery that
18 happened on -- or that Mr. al Hawsawi underwent in May of
19 2006. And I do want to apologize, Judge, because we do have
20 that medical record. That was a -- Mr. Gleason mistakenly
21 represented we did not have that record. We, in fact, do have
22 that record.

23 What we do not have is the name of the people who

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1 produced that record. We do not ----

2 MJ [Co] COHEN]: Okay.

3 ADDC [LTC WILLIAMS]: ---- have a name or a UMI for the
4 surgeon, for the anesthesiologist, for the individuals who
5 assisted in that surgery.

6 And this surgery is important. This is a surgery that
7 happened less than four months before he was transferred to
8 Guantanamo, in May of 2006, and less than eight months from
9 the time that he made the statements. This is surgery for
10 prolapsing hemorrhoids, a very painful condition.

11 And this is something that is referenced on the
12 SSCI Report. It indicates on footnote -- or in footnote 584
13 on page 100 the fact that Mr. al Hawsawi was subjected to
14 rectal exam with excessive force, and after this time he
15 developed chronic hemorrhoids, an anal fissure, and
16 symptomatic rectal prolapse.

17 What we see is that the effects of torture can last
18 for years, as a constant reminder of the torture itself. What
19 these witnesses can tell us is how did they observe his
20 medical and psychological state just months before he was
21 transferred.

22 And it's important because these conditions have
23 plagued him since. He complained of pain, even during the

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1 time frame that he -- from September until January. So it's
2 very important for us to be able to -- to speak with the --
3 the medical personnel to try to find out what were the issues
4 there, what were the psychological complaints that maybe they
5 observed or issues that they observed at that time. And
6 again, that is information we have not been provided.

7 MJ [Col COHEN]: Question for you on that, once again, not
8 knowing the universe of discovery that you guys have.

9 ADDC [LTC WILLIAMS]: Yes, sir.

10 MJ [Col COHEN]: At varying times I've seen like the
11 medical cables or the psychological reports that are in there.
12 Do you have any of those types of things, where -- where you
13 may not have a name associated with it but it's clearly some
14 kind of medical professional reporting on, for example, their
15 observations during the -- the surgery or what they did prior
16 to the surgery and their follow-ups after the surgery, those
17 kinds of things?

18 ADDC [LTC WILLIAMS]: Well, what we have is a very
19 barebones surgical record that -- that occurred. And this --
20 this category of witnesses that we're asking for is very
21 specific to the time frame immediately preceding and after he
22 had this surgery. So what we do have is -- is that very
23 barebones report.

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1 MJ [Co] COHEN]: Okay.

2 ADDC [LTC WILLIAMS]: And I would also like Your Honor to
3 understand that this is a report that was done in 2006 that we
4 requested in our initial discovery request at the beginning of
5 this case. We did not receive this report until last year.

6 MJ [Co] COHEN]: Okay.

7 ADDC [LTC WILLIAMS]: And again, we have no identifying
8 information as to who drafted this report.

9 MJ [Co] COHEN]: To make sure I understand this, there's
10 no UFIs associated with that either?

11 ADDC [LTC WILLIAMS]: Correct.

12 MJ [Co] COHEN]: Okay.

13 ADDC [LTC WILLIAMS]: The fourth category of information
14 are persons who were detained with Mr. al Hawsawi at black
15 sites.

16 The government claims that there is zero relevance to
17 what somebody else may have observed or been subjected to at
18 black sites. We disagree. They can be eyewitnesses to
19 corroborate what happened to Mr. al Hawsawi. These are
20 individuals that, if we are able to identify them and speak
21 with them, may have heard Mr. al Hawsawi, heard his screams.
22 They may have witnessed or been part of barbaric treatment
23 that he underwent. At this point, we don't know. We

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1 summarily have been told you are not going to have access to
2 this.

3 What's important is individuals who were detained with
4 Mr. al Hawsawi -- and probably most important to us, are those
5 that are not the other accused in this case who sit in the
6 courtroom charged with capital offenses, but rather,
7 individuals who were at black sites with Mr. al Hawsawi who
8 never had charges brought, perhaps, or who don't have charges
9 currently pending, as they are going to be available to us to
10 potentially talk, as well as be credible and reliable to
11 present evidence to a jury about what went on.

12 Government witnesses have a tendency and incentive to
13 want to sanitize and portray what happened as palatable;
14 whereas, an individual who underwent the same treatment is
15 going to give an honest assessment of what happened. And
16 again, it may turn out that they're actually a witness to
17 something that was done to Mr. al Hawsawi himself. If we are
18 not given that opportunity to even speak with any of these
19 witnesses, to know who they are, then we are missing an
20 opportunity to develop evidence that could sway a panel member
21 in this case.

22 MJ [Col COHEN]: Got it.

23 ADDC [LTC WILLIAMS]: The fifth category of witnesses are

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1 foreign nationals. In this regards, I would point the
2 military judge's attention to Attachment H of our pleading.
3 It's MEA-JDM-00000299.

4 This document is a classified document, so I won't go
5 into the substance of it, but I think it shows the significant
6 substance that a foreign national could potentially testify to
7 in this case ----

8 MJ [Col COHEN]: Okay.

9 ADDC [LTC WILLIAMS]: ---- and that it would be very
10 important for us to be able to explore witnesses in that
11 regards, like foreign nationals that are mentioned in that
12 document.

13 MJ [Col COHEN]: Okay.

14 ADDC [LTC WILLIAMS]: The sixth category are persons who
15 were involved in Mr. Hawsawi's rendition between place to
16 place. I, again -- in different black sites. I would ask you
17 to please look at Attachment I of our filing.

18 This can assist in assessing -- in your assessment of,
19 again, how witnesses who made these observations would be
20 relevant and very important in our case, not only to the
21 suppression of the statement but also to mitigation.

22 MJ [Col COHEN]: Copy.

23 ADDC [LTC WILLIAMS]: And lastly, Judge, is persons who

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1 generated medical and psychological records between March of
2 2003 and January of 2007. So this encompasses the whole time
3 that Mr. al Hawsawi was in CIA custody as well as the time
4 that he was in custody here at Guantanamo between September of
5 2006 and January of 2007, when he gave his statement to the
6 FBI.

7 The importance was probably illustrated best in an
8 exchange between Mr. Ruiz and Dr. Mitchell of why it is so
9 important to be able to identify what records an individual
10 actually produced and to know the name of the witness who
11 produced different records.

12 In the transcript in pages 30937 to 30939, and this
13 was from 24 January, you see that Mr. Ruiz is asking him --
14 he's saying, "Were you there for a medical evaluation of
15 Mr. al Hawsawi?"

16 And Mr. Mitchell says, "I don't -- I don't think so.
17 I wouldn't have been there for an evaluation."

18 And it goes on and back and forth. "Well, we're given
19 information that you had substantial and direct contact with
20 him at this period of time. Do you remember that?"

21 And it goes on, and it was clear that -- that
22 Mr. Mitchell does not recall this.

23 And -- and finally, he is asked on page 30939, "Do you

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1 recall being present at the medical evaluation December of
2 2003?"

3 Mr. Mitchell testifies, "I don't recall being in the
4 room when he was doing it."

5 And Mr. Ruiz says, "Okay. Is it possible there were
6 times you could be present in the room where a medical
7 assessment was being conducted?"

8 And he says, "That would be unusual."

9 You know, so we're given information that he has
10 direct and substantial contact. He's showing a document to
11 him, a document that he doesn't know whether or not he
12 created, but now says, "This would be unusual for me to have
13 any contact."

14 Again, if we knew that this was generated by the
15 witness, we would be able to then say, "Well, we can
16 affirmatively state you were the individual who generated
17 that. Does that change or does that refresh your memory or
18 your recollection in this regards?" We don't have the
19 opportunity to do that.

20 In regards to the summaries, we absolutely do not have
21 the individuals' names who compiled those summaries between
22 March of 2003 and September of 2006, and we don't have
23 sufficient information to request -- to have access to these

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1 witnesses.

2 MJ [Co] COHEN]: Okay. Any last comments? I understand.

3 ADDC [LTC WILLIAMS]: I think that -- that is the last
4 one. May I beg the court's indulgence for one moment?

5 MJ [Co] COHEN]: You may.

6 [Counsel conferred.]

7 MJ [Co] COHEN]: Yes, ma'am.

8 ADDC [LTC WILLIAMS]: Your Honor, that is all I have. I
9 just want to reiterate that this gate to access for these
10 witnesses really has been closed for far too long, and we are
11 asking that you please consider our filings, both our -- our
12 classified and our unclassified filings and -- and grant the
13 request for witnesses.

14 MJ [Co] COHEN]: Okay. Thank you. I think 1531 is prayer
15 time today. So we've got a couple more minutes before I
16 hear -- Mr. Ryan, is it you or Mr. Trivett that's going to --
17 Mr. Trivett? Okay, great.

18 Is there any further argument on this specific issue?

19 Major Bush. Good to see you again.

20 DC [Maj BUSH]: Nice to see you, sir.

21 MJ [Co] COHEN]: All right.

22 DC [Maj BUSH]: Good afternoon.

23 MJ [Co] COHEN]: Good afternoon.

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1 DC [Maj BUSH]: So, sir, there is two larger categories
2 within Mr. Hawsawi's motion that we are also asking for you to
3 compel.

4 MJ [Col COHEN]: Okay.

5 DC [Maj BUSH]: They are bullets number 2 and 6 which have
6 to do with Camp VII personnel and rendition personnel. I'm
7 not going to address those items because Mr. Connell covered
8 them pretty thoroughly earlier today, and I don't believe
9 there's anything I could possibly add to that.

10 So I'm going to focus on bullet point number 7, which
11 has to do with medical personnel.

12 MJ [Col COHEN]: Okay.

13 DC [Maj BUSH]: And to sort of narrow it down even
14 further, I'm going to focus on medical personnel from
15 September 2006 going forward.

16 MJ [Col COHEN]: Okay.

17 DC [Maj BUSH]: And the reason I'm going to do that is
18 because there has already been a motion to compel on these
19 witnesses, and the government has already been ordered to
20 provide the names, e-mail addresses, and phone numbers of
21 these witnesses to the defense in 523J, and then there was a
22 second motion on it in 523M.

23 And it's our position that the government has done

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1 everything they can to comply with this order, but that
2 they're simply unable to due to the spoliation of evidence.
3 But the order actually specifically requires them to notify
4 the court if they're unable to comply with the order, and they
5 have not provided that notice.

6 MJ [Col COHEN]: Okay.

7 DC [Maj BUSH]: And so just to give you a little bit of
8 information, essentially what 530 -- 523J talks about is an
9 order to compel the names of the medical providers in the
10 medical records from here at Camp VII. And with that motion,
11 the judge found that these documents were relevant and that
12 the government needed to provide these names because they had
13 already provided the associated medical records.

14 MJ [Col COHEN]: Okay.

15 DC [Maj BUSH]: And there was a subsequent motion after
16 that in which the government requested to substitute unique
17 medical identifiers for these individuals' information. That
18 motion was granted, and the government did comply and provide
19 us with a list of about 156 names of medical providers, as
20 well as e-mail addresses and phone numbers.

21 Now, unfortunately, that list is inaccurate and
22 incomplete. We have interviewed a large number of these on
23 Mr. al Baluchi's team, and we have found a large number of

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1 problems with the records and, specifically, I want to say
2 with the names of the medical providers.

3 And just to give you a little bit of context, sir, the
4 medical records sort of evolved over time. At the very
5 beginning in the very first few months, these medical records
6 have the real names of the medical providers. But as time
7 went on, that system was changed, and instead of medical
8 providers' real names, they started to use pseudonyms. Not
9 UMIs, just pseudonyms, things like Dr. Cadillac. Clearly --
10 sometimes they were clearly not real, but sometimes they were
11 questionably not real. It was something, you know, like
12 Dr. Simpson, which was a reference to The Simpsons, but in
13 theory could be a real name. So it was slightly less clear.
14 And so from that point in time, those pseudonyms were actually
15 changed again and so Dr. Simpson became Dr. 65.

16 And it appears from interviewing UMI witnesses,
17 several things: One, many of these doctors don't remember
18 their pseudonyms anymore. And, two, as far as I can tell,
19 none of the doctors realized that their pseudonyms were at
20 some point changed to numbers, and those numbers have now been
21 turned into unique medical identifiers. So these doctors
22 essentially all have four names that could be presented to the
23 court.

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1 And so when you look at that, the problem becomes that
2 it appears -- and this is conjecture, Your Honor, but it
3 appears that the government did not keep track of these
4 changes over time. And I submit that to you because when we
5 got the list of UMIs from the government, what we did was we
6 provided back a discovery request with a list of 146
7 pseudonyms which had no match.

8 And that list has since grown to at least an
9 additional 30 names, and it continues to grow as we continue
10 to look at the medical records. The government has begun to
11 provide us with unredacted medical records, and so as we get
12 that, we can -- we've been able to make some match-ups, but
13 there's still clearly gaps.

14 And in response to the 146 names -- you know, we
15 didn't just give them names. We actually gave them Bates
16 numbers so that they could try to match them up, you know. We
17 didn't just say, hey, we want to know who Dr. Flag is. We
18 said we want to know who Dr. Flag is on MEA, and we gave them
19 a Bates number to assist them because we're not -- you know,
20 we actually want the information. We're not trying to send
21 them on a fishing expedition. And we did not get a response
22 to that discovery request, and that was submitted in
23 July 2019.

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1 And just to provide you sort of an idea of what we're
2 talking about, sir -- so when you look at the spreadsheet,
3 just to give you an idea of some of the things we're talking
4 about with the spreadsheet, for example, UMI W7TE and Y5WF
5 were both identified on the UMI spreadsheet as Dr. 22. Dr. 22
6 also has an additional pseudonym which was used. It was
7 changed from something else.

8 And one of the people who was identified as Dr. 22 was
9 actually a guard. They were not a medical provider at all.
10 And they were a guard with no HVD contact.

11 MJ [Col COHEN]: Okay.

12 DC [Maj BUSH]: And the second person was, in fact,
13 Dr. 22. And this is a consistent trend.

14 One of the UMI witnesses, BI8R, was actually a command
15 chaplain with no HVD contact. BI8R was a command chaplain --
16 or, I'm sorry, was -- NU9F said he hadn't been in the military
17 since the '80s and he had never been to Guantanamo Bay. ED6Q
18 was a public affairs sports writer for *The Wire* here at
19 Guantanamo Bay with no HVD contact. And so the list is
20 faulty.

21 And -- and honestly, Your Honor, our position at the
22 end of the day is that we don't believe that the government is
23 playing fast and loose. We honestly believe that they don't

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1 have the information.

2 And if that's not true, either way, what we are asking
3 for here is that you order them to comply with 523J and 523M
4 and either produce the names, numbers, e-mail addresses and
5 UMIs for all of the names in the medical records, or
6 pseudonyms in the medical records, invoke national security
7 privilege, or affirmatively state that they do not have this
8 information so that we can file the appropriate motion for
9 spoliation.

10 MJ [Col COHEN]: Okay. I got it. Makes sense. Thank you
11 very much.

12 DC [Maj BUSH]: Thank you, Your Honor.

13 MJ [Col COHEN]: Looks like there's no one else.
14 Mr. Trivett, you can have the remaining 18 minutes, if you'd
15 like.

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

17 MJ [Col COHEN]: Good afternoon. Haven't heard much from
18 you so far.

19 MTC [MR. TRIVETT]: Yes, sir. I wanted to address first
20 the ICRC comments from team Hawsawi. When we got this request
21 for the ICRC individuals, we did look to see if there were
22 logs. There were not logs.

23 We did our due diligence and confirmed through -- I

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1 believe it was the Department of Defense OGC, that the ICRC
2 has special arrangements that they work out with JTF-GTMO.
3 It's not like a typical visit. It's specific to how the ICRC
4 and the JTF-GTMO agree.

5 And because of that, we were told specifically that
6 there's only two members that were the head of the delegation
7 that did declare who they were, and that the others who were
8 working for them were undeclared. That's what we were told
9 when we did our due diligence.

10 We informed the defense counsel of those facts. We
11 gave the two names we did know and said you're certainly
12 welcome to go ask them. Those aren't government employees.
13 They're members of a nongovernmental organization within the
14 ICRC. If they chose not to cooperate, that's not within the
15 control of the U.S. Government. But that was the due
16 diligence that we did in regard to the ICRC documents.

17 MJ [Co] COHEN]: Back in, like, late 2006, given the fact
18 that they had just come over, the testimony we've heard about,
19 you know, wanting people to be very careful about who had
20 contact because of what they could hear, et cetera, is there
21 no documentation or did we not require them to sign anything
22 that -- like I said, I understand the role of the ICRC, so
23 it's very possible.

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1 But, so the -- your understanding as the prosecutor,
2 having exercised your due diligence, is that the two heads
3 said, hey, here's who we are. We're bringing in some
4 additional folks, that we didn't require them to declare and
5 we didn't require them to sign any nondisclosure agreements
6 or -- or anything along those lines?

7 MTC [MR. TRIVETT]: That's -- that's my understanding.
8 They wouldn't have been cleared. They wouldn't have had
9 clearances. They're not government employees.

10 MJ [Col COHEN]: Right.

11 MTC [MR. TRIVETT]: I know that the ICRC specifically --
12 and I can't speak to every individual meeting, but those
13 meetings are completely different. I do believe that they are
14 at Echo. I think they are with the door open. I don't think
15 they're monitored in any way ----

16 MJ [Col COHEN]: Okay.

17 MTC [MR. TRIVETT]: ---- where the U.S. Government is
18 actually listening. That is my understanding.

19 So what I do know, and why I am saying this isn't to
20 represent exactly how it goes, other than to say that it's not
21 the same and there are special agreements that are made.

22 MJ [Col COHEN]: Okay.

23 MTC [MR. TRIVETT]: So when we went to JTF and when we

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1 went to DoD OGC, that's the information they provided to us
2 after they did their due diligence.

3 MJ [Co] COHEN]: Okay. All right.

4 MTC [MR. TRIVETT]: You know, so often we do rely on -- on
5 other people within the U.S. Government to make
6 representations to us. We don't always go and open every file
7 cabinet and look under every desk, but we do know who to ask
8 for them to do that. And then we did, in this instance, for
9 the ICRC.

10 MJ [Co] COHEN]: So the only people, based on where you
11 stand in front of me today, is -- if I understand you
12 correctly, is they've given you everything that the United
13 States Government has on the people that were here by name?

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

15 MJ [Co] COHEN]: And if they aren't willing to provide you
16 additional information -- I mean, I understand your position,
17 that's outside my control, unless a judge compels them to come
18 to court and testify, for example.

19 MTC [MR. TRIVETT]: Yes, sir. And they have the two names
20 of the individuals who were the head of the delegation ----

21 MJ [Co] COHEN]: Okay.

22 MTC [MR. TRIVETT]: ---- who, in theory, should be able to
23 testify about whatever they observed, you know, subject to any

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1 privilege that they might try to claim.

2 MJ [Col COHEN]: Right.

3 MTC [MR. TRIVETT]: I know that the privilege doesn't
4 apply to this case specifically. They have already come into
5 the court in earlier litigation and asserted privilege that
6 they believe they have.

7 MJ [Col COHEN]: I'm generally familiar with that, but I
8 haven't spent much time in it, but ----

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

10 MJ [Col COHEN]: Okay.

11 MTC [MR. TRIVETT]: Yes, sir. That's our position in
12 regard to the ICRC information.

13 MJ [Col COHEN]: Okay. Thank you.

14 MTC [MR. TRIVETT]: I want to touch upon the camp, the
15 Camp VII personnel briefly.

16 MJ [Col COHEN]: Yes. Let me ask you, just to kind of
17 hit -- kick it off.

18 MTC [MR. TRIVETT]: Sure.

19 MJ [Col COHEN]: Based on the testimony of the Camp VII
20 commander -- and I can definitely talk about the open session
21 testimony, which makes it a little bit easier. The -- there
22 should definitely be a finite group of individuals that had
23 the ability to have these transactional transactions with --

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1 with the accused during this time period.

2 Is there a reason why we couldn't just provide UFIs
3 and allow them to reach out then and see if these UFIs would
4 like to be interviewed?

5 MTC [MR. TRIVETT]: And are we talking specifically the
6 time frame between September ----

7 MJ [Co] COHEN]: Yes.

8 MTC [MR. TRIVETT]: ---- and ----

9 MJ [Co] COHEN]: The specific time frame they're kind of
10 asking for. This period of, they arrive in September 2006
11 until -- I guess we go to whoever made their final LHM
12 statement, whatever that date is.

13 MTC [MR. TRIVETT]: Right. So 672 is limited. The motion
14 that Mr. Ryan argued on our behalf and which Mr. Gleason
15 argued initially for Hawsawi, seems to want all of the guards.

16 MJ [Co] COHEN]: Okay.

17 MTC [MR. TRIVETT]: And what we've always said is you've
18 got to give us something. You have lots of information. You
19 have the DIMS. You have the medical records. You have your
20 client. You have the photos. You have -- excuse me. You've
21 had the inspection of Camp VII.

22 At some point, if the client said, "You know what? I
23 was really friendly with a guard back in September 2006 who

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1 I'm sure would say that I'm a great guy and don't deserve
2 death," give that to us. We'll then go, we'll do our due
3 diligence, we'll try to figure out who that person is, and
4 then we'll provide that information.

5 So we don't believe that they're entitled, even though
6 this is a capital case, to every single person who ever had
7 contact with the accused at any point from his capture until
8 now. And that's been our position consistent for the
9 last ----

10 MJ [Col COHEN]: Right.

11 MTC [MR. TRIVETT]: ---- eight years. And that was our
12 position, consistent with the medical personnel as well,
13 understanding that the medical personnel had, at least
14 theoretically, more information than a guard.

15 I believe the testimony came very clear that, per the
16 SOP, these guards were not having substantive conversations
17 with these individuals. They were transactional in nature.
18 The individual -- the accused didn't know the guards' names.
19 Quite frankly, most of the guards didn't even know the
20 accused' names. They all call them by their ISN numbers.
21 They would have very brief transactional interactions
22 according to the testimony of the 2007 Camp OIC, and that's
23 it.

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1 So that can't be enough. That can't be enough for the
2 government now to open up the vault ----

3 MJ [Co] COHEN]: Right.

4 MTC [MR. TRIVETT]: ---- on all the classified identities
5 of these individuals. And they are all classified. We heard
6 testimony. If they're interacting with Camp VII detainees,
7 their identities become classified.

8 MJ [Co] COHEN]: Copy.

9 MTC [MR. TRIVETT]: So we're not saying that they can't
10 have any. We're just saying that they have a burden here to
11 show who they want, that they don't have to describe by name,
12 but ultimately they can describe by incident or by time frame
13 or something along those lines, and that we'll work to get
14 those.

15 But that, unless otherwise ordered by the commission,
16 we're not going to simply provide every single name because we
17 don't think we're entitled -- that they're entitled to it. It
18 is classified information. And we also don't believe that
19 simply by referring a case capitally, that we have then agreed
20 to forfeit all of our classified information in order to have
21 this case.

22 So that's been our position consistent for the last
23 eight years on this. They never do it. They never come back

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1 with a specific.

2 Now, to answer your question directly: There is
3 probably a more finite number between that period in time, but
4 they should still go through that same process. They should
5 still say there's a notation here in the DIMS that says
6 something happened that would be significant to the
7 suppression motion.

8 Because it all has to -- it still has to come down to
9 whether or not the accused voluntarily gave a statement in
10 January 2007. It's got to be relevant to that. They should
11 be able to articulate that, either through their client or
12 through the DIMS, and then we'll work to get that information.

13 MJ [Co] COHEN]: Okay.

14 MTC [MR. TRIVETT]: So that -- that's our position on it.
15 Obviously, the commission will -- will make its own call, but
16 I wanted to be clear on what it is that they do ----

17 MJ [Co] COHEN]: I understand.

18 MTC [MR. TRIVETT]: ---- have before we argue about what
19 it is that they should have, in addition to what they already
20 have.

21 MJ [Co] COHEN]: All right.

22 MTC [MR. TRIVETT]: And subject to that, those are the two
23 things I wanted to specifically address. And then I figured

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1 you may have some very specific questions on other aspects of
2 their request.

3 MJ [Col COHEN]: Yes. So your last comment, for
4 example -- yeah, I think it was Mr. Connell. I'm going to try
5 to pull from an earlier argument ----

6 MTC [MR. TRIVETT]: Yes, Judge.

7 MJ [Col COHEN]: ---- just because you asked about
8 specifics.

9 So, for example, what you're looking for is close to
10 what Mr. Connell said earlier, which is -- and I'm
11 paraphrasing, so if I get it wrong -- but my client tells me
12 in the week leading up to this that there were all these
13 recordings being played -- and if I have the wrong accused, I
14 apologize -- all these recordings being played of screams and
15 all of this kind of stuff, in that week leading up to the LHM
16 statements.

17 And then they come back and say, so we would like to
18 know which guards worked the shifts during that time period
19 who could potentially tell us whether or not they overheard
20 anything that my client recalls hearing.

21 MTC [MR. TRIVETT]: Sure. That would be a -- that would
22 be a limiting request that we would then consider going forth
23 and trying to find the identity of that guard.

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1 MJ [Col COHEN]: Okay.

2 MTC [MR. TRIVETT]: So all of these guards will have
3 signed nondisclosure agreements. And we have reason to
4 believe that the defense have reached out to certain guards.
5 Whether they were Camp VII guards or other JTF-GTMO guards in
6 the past, have gone directly with them.

7 That's a very difficult way to do it. We concede
8 that's a very difficult way to do it. And, quite frankly, we
9 believe that doing it in that way violates our privilege. We
10 don't know what classified information they're asking someone
11 who's got a nondisclosure agreement to -- to disclose.

12 MJ [Col COHEN]: Well, and if they're adhering to the
13 nondisclosure agreement, that's probably -- if they're
14 adhering to it, they're not going to answer anything anyway,
15 so.

16 MTC [MR. TRIVETT]: Yes, sir, certainly if they recall.

17 So that was why we had to do our communication plan
18 that we did for the unique medical identifiers under
19 Judge Parrella. We had to do a reach-out. We had to explain
20 it's okay to talk to them. We had to explain how we were
21 protecting their identity. We had to go through that entire
22 process.

23 And I can tell you, in the medical 523 series, we put

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1 thousands of man-hours over several months into trying to
2 figure out every doctor who may have had contact with the
3 accused. We did our level best. We informed the commission
4 that we had exhausted our resources and that this is the best
5 that we can do. So to the extent that there was any
6 notification requirements under 523, we believe we've complied
7 with those notification requirements by communicating to the
8 commission that this is the best we can do.

9 MJ [Col COHEN]: Okay.

10 MTC [MR. TRIVETT]: Part of the issue with that was that
11 there were -- not only were they all under pseudonym, they
12 were all under pseudonyms that got recycled. And this was not
13 a plan of the prosecution. This was ----

14 MJ [Col COHEN]: I know. I got it.

15 MTC [MR. TRIVETT]: ---- just a way to protect ----

16 MJ [Col COHEN]: It was before you guys started working
17 this case.

18 MTC [MR. TRIVETT]: Right, to protect the classified
19 information and to make sure that these people could get
20 high-quality healthcare and we can still protect the people
21 who were providing that high-quality healthcare. So we have
22 done everything we could. But it was not easy and it probably
23 was not perfect.

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1 MJ [Col COHEN]: Right.

2 MTC [MR. TRIVETT]: And we never said that this was going
3 to be perfect, but we gave a list of 150 or so, or however
4 many I'll take ----

5 MJ [Col COHEN]: So with respect to the July 2019
6 follow-up, or sometime around that time with respect to, hey,
7 can you get us this additional information? Is the
8 government -- is the government willing to -- to stipulate to
9 a -- to a finding of fact that we have done everything we
10 possibly can and we just can't get you this information? It
11 just doesn't exist, or because of the way it was worked we
12 just can't get it to you?

13 MTC [MR. TRIVETT]: Can I have a second to consult with
14 Mr. Swann?

15 MJ [Col COHEN]: Absolutely, yeah.

16 **[Counsel conferred.]**

17 MJ [Col COHEN]: Counsel, why don't you guys step away
18 from the podium. I'll do the same thing for you guys that I
19 do for the defense. Don't stand in front of the mic.

20 **[Counsel conferred.]**

21 MJ [Col COHEN]: Mr. Trivett.

22 MTC [MR. TRIVETT]: Thank you for the ----

23 MJ [Col COHEN]: Absolutely.

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1 MTC [MR. TRIVETT]: ---- indulgence, sir. Mr. Swann has
2 been handling, quite ably, the medical records issue for ----

3 MJ [Col COHEN]: Okay.

4 MTC [MR. TRIVETT]: ---- for years, so he wanted to remind
5 me that, contrary to what, I believe it was Major Bush said,
6 we have provided all of the unredacted medical records. And I
7 believe we did so in the August or September 2019 time frame.

8 MJ [Col COHEN]: Okay.

9 MTC [MR. TRIVETT]: So they have those.

10 Mr. Swann reminded me that he also has agreed -- which
11 include, I believe, true names up to the point where JTF-GTMO
12 began to use pseudonyms.

13 MJ [Col COHEN]: Okay.

14 MTC [MR. TRIVETT]: So at the beginning, they were true
15 names. And when we turned them over initially in the 2008
16 iteration of this case, we -- we started giving pseudonyms of,
17 you know, Dr. #1, Dr. #2, Dr. #3, but they were originally
18 true names. At some point, JTF-GTMO just switched and they
19 went completely to pseudonym.

20 So -- so the defense has all of the true names that
21 are in the actual records themselves. At some point, those
22 turn to pseudonym. Mr. Swann reminds me that he has made
23 himself available to the defense team, to Mr. Ali's defense

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1 team specifically. He'll spend as many weeks as they want.
2 He's willing to come down in March, if they want to come down
3 in March, now that we're not doing proceedings, sit down and
4 walk them through all of the records one by one to try to
5 figure out who the people are.

6 MJ [Co] COHEN]: Okay.

7 MTC [MR. TRIVETT]: So we will do everything we can. And
8 I think that's why he rose when he rose. You know, absent
9 that finding of fact, we will continue to try to work with
10 them ----

11 MJ [Co] COHEN]: Okay.

12 MTC [MR. TRIVETT]: ---- to do everything we can to
13 provide that information to them and get them as accurate
14 information as we have.

15 MJ [Co] COHEN]: Okay. Well, I'll tell you what. I'll
16 let you guys see if -- see if they can take you up on that
17 before I make -- make a finding of fact. At some point, if we
18 get to the point where there's -- there's a finite list of
19 names, for example, there's 35 names that just no one is ever
20 going to figure out, if that's the type of thing we do, then
21 just let me know.

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

23 MJ [Co] COHEN]: And if the parties are ready to say, hey,

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1 look, this is a valid fact, we just can't provide these 35
2 names, I'll be happy to make that finding. But I'll give you
3 guys some additional time to work with them to see if you can
4 resolve any issues.

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

6 And in regard to any spoliation of evidence issues, we
7 would ask that they actually have to file a motion that we
8 would then respond to ----

9 MJ [Co] COHEN]: Yes, definitely.

10 MTC [MR. TRIVETT]: ---- and not simply do not find,
11 because there may be a redaction somewhere that was put on in
12 the original document, that that somehow constitutes
13 spoliation of evidence. I think the commission and the
14 parties would benefit from briefing that.

15 MJ [Co] COHEN]: Oh, I agree. Yeah. No, the finding of
16 fact would be simply there's 35 names that the -- that despite
17 all efforts, we just can't -- you know, they cannot be
18 determined, something along those lines. Yeah, no, that --
19 that's more than a finding of fact. That's an actual, you
20 know, conclusion of law ----

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

22 MJ [Co] COHEN]: ---- and that's definitely going to have
23 to be briefed.

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1 MTC [MR. TRIVETT]: Yes, sir. Subject to any additional
2 questions you have.

3 MJ [Co] COHEN]: No. That's great. Thank you so much.

4 MTC [MR. TRIVETT]: Thank you.

5 MJ [Co] COHEN]: Any last thoughts? I'll start with MAH,
6 since you started, then, Major Bush, I'll have your last
7 couple of comments as well.

8 ADDC [LTC WILLIAMS]: Your Honor, and I am aware of the
9 time, and I will be happy to wait for a recess for prayer to
10 have an opportunity for the accused.

11 MJ [Co] COHEN]: How much do you have?

12 ADDC [LTC WILLIAMS]: I need to confirm with counsel, so
13 that would give me an opportunity to do that as well --
14 confer. Sorry.

15 MJ [Co] COHEN]: Okay. All right. Major Bush, how much
16 do you have?

17 DC [Maj BUSH]: Two minutes.

18 MJ [Co] COHEN]: Two minutes, great. I'll take two
19 minutes. It's 1531, so we'll get them there. I know they
20 can't go early, but they can go a few minutes late in the
21 prayer.

22 DC [Maj BUSH]: So, sir, just to clarify, we agree that
23 the government has provided us a large amount of unredacted

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1 records in August of 2019. We believe we do have the complete
2 list of psychiatric records for the entire time frame.

3 What we are specifically missing is September 2006
4 through the end of 2008, the medical records, is what we do
5 not have the unredacted copies of.

6 And we agree that Mr. Swann has offered multiple times
7 to meet with us. We've tried to coordinate that. It just
8 hasn't worked out yet. And we will absolutely continue to
9 work with that.

10 And just for the court's clarification, it's closer to
11 165 pseudonyms.

12 MJ [Col COHEN]: Okay.

13 DC [Maj BUSH]: So it's a pretty substantial number that
14 we're looking at. And I'm not submitting to the court that
15 it's 165 people.

16 MJ [Col COHEN]: Right.

17 DC [Maj BUSH]: Because of the fact that they've changed
18 multiple times, it's -- it is possible that it could be a
19 quarter of that number, just because the pseudonyms have
20 changed so many times. It's also possible that, as the
21 government accurately said, there's ten people that went by
22 JTF Psych. And so it's difficult to know who those different
23 ten people are who all use the same name over and over again.

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1 MJ [Col COHEN]: No, I understand. All right. Let's --
2 like I said, I'll let you guys continue to work that issue.
3 If there are some missing medical records, it sounds like
4 Mr. Swann is definitely willing to sit down with you, if this
5 is your issue, and work through this. Hopefully you guys,
6 with this recess until June, you'll be able to make some
7 headway.

8 And then if not, I will -- I'll hold off on -- on
9 ruling on this particular portion until I hear back from one
10 party or the other that we've done all we can.

11 DC [Maj BUSH]: Yes, Your Honor.

12 MJ [Col COHEN]: All right. Thank you.

13 All right. We're in recess.

14 **[The R.M.C. 803 session recessed at 1532, 19 February 2020.]**

15 **[The R.M.C. 803 session was called to order at 1617,**
16 **19 February 2020.]**

17 MJ [Col COHEN]: The military commission is called to
18 order. The parties are present. Mr. Ali is here,
19 Mr. Binalshibh is here, and my understanding is Mr. Mohammad
20 has voluntarily absented himself for the rest of the day; is
21 that correct, sir?

22 LDC [MR. SOWARDS]: That is correct, Your Honor.

23 MJ [Col COHEN]: Okay. All right.

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1 Mr. Connell, I'm going to go ahead and move 551 to
2 tomorrow.

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

4 MJ [Col COHEN]: Okay. We'll do that tomorrow. In fact,
5 I'll take you up first thing in the morning on 551.

6 All right. Lieutenant Colonel Williams, you have some
7 final comments?

8 ADDC [LTC WILLIAMS]: Thank you, sir.

9 MJ [Col COHEN]: You're welcome.

10 ADDC [LTC WILLIAMS]: As Mr. Trivett argued, he implored
11 you to -- that the prosecution should not have to lay out all
12 their cards on the table when it comes to national security.
13 I would refer Your Honor back to AE 292QQ (Amended), which was
14 filed on 16 December 2014, where the commission previously
15 noted, "The government has to decide which path it chooses to
16 take in the prosecution of these cases. While there are
17 limitations on the permissible use of classified information,
18 as in any trial involving such, the government must be mindful
19 that unwarranted or improper interference with the trial
20 procedures of this or any court cannot be tolerated.

21 "If the government believes the needs of national
22 security trump the need for a just criminal proceeding, the
23 means are available to accomplish this. Rule for Military

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1 Commission R.M.C. 604 permits the withdrawal of charges for
2 any reason. And when taken into consideration of Rule for
3 Military Commission 407(b), a proper reason is a determination
4 of harm to national security."

5 MJ [Col COHEN]: Copy.

6 ADDC [LTC WILLIAMS]: In this case, we are asking for what
7 we think is very defined witness information so that we can
8 access them.

9 Regarding the personnel at Camp VII, the government is
10 a bit duplicitous in their argument. They're saying, well,
11 these people just had transactional or incidental interactions
12 with Mr. al Hawsawi, yet they expect Mr. al Hawsawi to be able
13 to know who these people are, what date he may have interacted
14 with them years before he ever had counsel and years before
15 the trial of this case. He didn't know who they were. He
16 didn't -- he wasn't allowed to. And he certainly wasn't
17 allowed to engage in significant conversation with them.

18 That does not mean that these individuals, one of the
19 few subset of individuals that could have actually observed
20 Mr. al Hawsawi during this time, did not have distinct
21 impressions and memories that would be incredibly valuable to
22 our motion to suppress, regarding the voluntariness of these
23 statements, as well as evidence in mitigation.

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1 The information that we're able to see in DIMS, part
2 of it is submitted for you in our pleading 370 -- I'm sorry,
3 672. Another example of a DIMS record, Judge, I would ask you
4 to refer to is AE 621I (MAH) Attachment B. There's a few days
5 during this relevant period of time that are mentioned. And
6 while I can see what Mr. al Hawsawi ate for breakfast, lunch,
7 and dinner during that period, there's no other significant
8 information that is really listed for a couple-day period of
9 time.

10 Again, a guard who was there may have had a distinct
11 impression or memory that could be very helpful. That's not
12 going to help us to be able to speak with Mr. al Hawsawi and
13 identify a specific instance in which a guard had an
14 interaction with him.

15 We litigated even getting DIMS that had dates and
16 pseudonyms for guards. This litigation can be found in the
17 AE 336 series that began in 2015. For a number of years, we
18 litigated even getting the information that we now have, which
19 we still believe is insufficient.

20 In addition, we feel that it is very reasonable, and
21 that we have narrowed the witnesses we have requested in time
22 and place and in proximity to this litigation. What they
23 observe here in force and opine about, what they were engaged

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1 in during their day, is something that could be extremely
2 beneficial to us in determining the voluntariness of the
3 statements and our arguments on suppression and in mitigation.

4 The government has chosen to make attenuation of these
5 statements a key feature in their argument. And failure to
6 provide us with witnesses that can counter that argument makes
7 us unable to perform our obligations in regards to
8 investigating and determining witnesses and evidence in
9 regards to suppression and mitigation.

10 In addition, without these witnesses, personnel that
11 we have asked for in this motion, it's going to inhibit us and
12 limit us in any Skipper evidence that we may be able to
13 produce, the value of which cannot be understated in a death
14 penalty case.

15 It is a choice for the government to seek the death
16 penalty. This requires heightened due process and
17 reliability. If national security prohibits disclosure of
18 this finite group of individuals we are requesting, then they
19 must make a choice on how they want to proceed in the
20 prosecution of this case.

21 Regarding the medical personnel, Mr. Trivett indicated
22 that at some time they -- when they first were brought to
23 Guantanamo, the medical personnel used real names, and then

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1 shortly after that it switched to pseudonyms. At this time,
2 the government knew these men were being brought to Guantanamo
3 to be tried. They knew, according to President Bush, that
4 this was for justice to be sought. They knew the death
5 penalty was going to be sought long before Mr. al Hawsawi had
6 counsel. Long before any representation occurred on his
7 behalf, the government knew.

8 In fact, that was the whole purpose of the LHM
9 statements and the interactions that members of the
10 prosecution may have had or observed during the period of time
11 where the FBI statements were taken.

12 At this case -- at this time, to say that they knew
13 enough to orchestrate clean team statements and yet no one
14 else on the camp knew well enough that the witnesses who
15 interacted with these high-value detainees could be potential
16 witnesses to relevant information that was material to our
17 ability to present both fact testimony as well as mitigation
18 testimony I find to be not credible.

19 Lastly, regarding the ICRC, understanding that
20 Mr. Trivett and the prosecution did conduct some due diligence
21 in order to try to determine whether or not these individuals
22 could be identified, I submit to the court that everyone who
23 travels to Guantanamo must go through a country clearance

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1 process, or a SECNAV process, in order to have access to this
2 base; that everyone who interacted with these HVDs, with
3 Mr. al Hawsawi in particular, who was determined to be a
4 high-value detainee, was, in fact, tracked. And I would
5 simply ask Your Honor to please order that they revisit their
6 due diligence in this regard.

7 Beg the court's indulgence.

8 MJ [Col COHEN]: Thank you.

9 ADDC [LTC WILLIAMS]: Thank you, Your Honor.

10 MJ [Col COHEN]: Thank you.

11 All right. Thank you very much for your arguments
12 today. Like I said, we didn't get to 551, but we will first
13 thing in the morning.

14 Bear with me, Counsel. If I promised you oral
15 argument on something, then -- and we don't get to it because
16 things take longer, I won't forget the fact that I originally
17 intended to give you oral argument. So I -- if for some
18 reason I don't, I would definitely reach out to the parties
19 via something and just saying, hey, you need to submit
20 something to me in writing perhaps, these are my specific
21 questions, you know, those types of things, rather than just
22 ruling on the matter.

23 That being said, we'll take a brief recess here

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1 momentarily. We'll allow the accused to be removed from the
2 505(h). Regardless of the issue I just specified, the statute
3 is very clear that with respect to the 505(h), that the --
4 that everything stands.

5 Then tomorrow, like I said, we'll start out with 551M.
6 We'll have argument on 701, 667A -- in fact, 667A will be
7 number two tomorrow. Number three will be 701. And I am very
8 hopeful -- and I think we probably will, because the ruling in
9 other matters took up a significant part of the morning today,
10 that I think we can probably get into by early afternoon open
11 session argument on 730 and 687 respectively.

12 In addition, following the 505(h) hearing, I will
13 allow the other parties, with the exception of the WBA team,
14 to -- to exit the room, and then I'll have that ex parte with
15 you all, as requested. All right.

16 LDC [MR. RUIZ]: Judge?

17 MJ [Co] COHEN]: Mr. Ruiz.

18 LDC [MR. RUIZ]: I just want to let you know that we will
19 not be asking for classified argument on 656 or 672.

20 MJ [Co] COHEN]: Okay. Excellent. Thank you very much.
21 All right. You could have, but that just kind of gives me an
22 idea of what we're looking at tomorrow.

23 So it looks, then, that the only classified argument

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1 we may have is 701. Does that sound right to everyone?

2 Okay. I think so. Okay.

3 Mr. Gleason.

4 DC [MR. GLEASON]: Sir, we actually have classified
5 argument in 632E.

6 MJ [Co] COHEN]: That is correct. Thank you.

7 DC [MR. GLEASON]: You also indicated you wanted to hear
8 argument on 705, which we have not had a 505 session yet.

9 MJ [Co] COHEN]: That's right. We added that to this one
10 we're going to have just momentarily. That's right. Thank
11 you for reminding me about 705.

12 Mr. Trivett?

13 MTC [MR. TRIVETT]: Sir, if 701 is the only 505 that we'll
14 have, can I have a second to consult with the Chief Prosecutor
15 who may have a way around having to do the (h) hearing at all?

16 MJ [Co] COHEN]: It sounded like we had to do 632E as
17 well. There's some classified argument they wanted to make on
18 that, and so I don't think it is actually the only one.

19 MTC [MR. TRIVETT]: Okay. The court's indulgence for one
20 minute, sir?

21 MJ [Co] COHEN]: I'll tell you what. What I'll do is, let
22 me go ahead and go into recess.

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

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1 MJ [Co] COHEN]: We can have a brief 802 where you guys
2 can just update me and I can always put it back on the record,
3 if you guys want to work out, however that works. And then in
4 the meantime, if we need a 505(h), great. If not, everyone
5 else can leave and I'll still have the ex parte with -- with
6 the WBA team.

7 All right. We're in recess.

8 [The R.M.C. 803 session recessed at 1629, 19 February 2020.]

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