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1 [The R.M.C. 806 session was called to order at 0913,
2 16 November 2018.]

3 MJ [Col PARRELLA]: This commission is called to order.
4 This session has been closed pursuant to Rule for Military
5 Commission 806 for the purpose of arguing classified material
6 as indicated in the previous closure orders.

7 Trial Counsel, if you could please account for the
8 members of the prosecution who are present.

9 CP [BG MARTINS]: Good morning, Your Honor. Present for
10 the United States, Brigadier General Mark Martins, Mr. Robert
11 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Mr. Jeffrey
12 Groharing, Ms. Nicole Tate, Major Christopher Dykstra. Also
13 in the courtroom at counsel table, Mr. Dale Cox, Mr. Rudolph
14 Gibbs, and Staff Sergeant Clifford Johnson. Securing the
15 doors are Mr. Pascual Tavaréz and Staff Sergeant Antony Kiser.
16 All personnel have the necessary clearances.

17 MJ [Col PARRELLA]: Thank you, Trial Counsel.

18 Defense Counsel, if you can please account for the
19 members of the defense team that are present.

20 LDC [MR. NEVIN]: Your Honor, for Mr. Mohammad, who is not
21 present, David Nevin, Lieutenant Colonel Poteet,
22 Ms. Radostitz, Lieutenant Commander Cole, Mr. [REDACTED], all with
23 the appropriate clearances.

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1 MJ [Col PARRELLA]: Thank you.

2 Ms. Bormann?

3 LDC [MS. BORMANN]: Judge, good morning. On behalf of
4 Mr. Bin'Attash, myself, Cheryl Bormann; Mr. Edwin Perry;
5 Mr. William Montross; Captain Brian Brady; and our single
6 intelligence analyst who also is performing the duties of
7 defense security officer, Mr. [REDACTED].

8 MJ [Col PARRELLA]: Thank you.

9 Mr. Harrington.

10 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
11 James Harrington, Lieutenant Mishael Danielson, Alaina
12 Wichner, and Douglas Oliver, all with the appropriate
13 clearances.

14 MJ [Col PARRELLA]: Just to clarify, Ms. Bormann, you may
15 have said this, and I apologize if you did, but all of your
16 team have the appropriate clearances and read-ons?

17 LDC [MS. BORMANN]: You know, I didn't, but that is
18 exactly the state of affairs, yes.

19 MJ [Col PARRELLA]: Thank you.

20 Mr. Connell.

21 LDC [MR. CONNELL]: Good morning, Your Honor.

22 MJ [Col PARRELLA]: Good morning.

23 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, myself,

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1 James Connell; [REDACTED]; Alka Pradhan; Benjamin
2 Farley; Lieutenant Colonel Sterling Thomas; and [REDACTED] -- DISO
3 [REDACTED] All have appropriate clearances and tickets.

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

5 Mr. Ruiz?

6 LDC [MR. RUIZ]: Judge, Lieutenant Commander Furry,
7 Ms. Susan Lachelier, Lieutenant Colonel Jennifer Williams,
8 Major Joseph Wilkinson, Mr. Sean Gleason, Mr. [REDACTED], and
9 [REDACTED], and Mr. [REDACTED], and myself, all on behalf
10 of Mr. al Hawsawi. And we all have appropriate clearances.

11 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

12 I also note that the Chief Defense Counsel, Brigadier
13 General Baker, is present. Sir, if you would please indicate,
14 or account for any members of your team and whether they have
15 the appropriate read-ons.

16 CDC [BGen BAKER]: Sir, it is just me, and I have the
17 appropriate clearances and read-on.

18 MJ [Col PARRELLA]: Thank you.

19 Mr. Nevin.

20 LDC [MR. NEVIN]: Your Honor, with the military
21 commission's permission, Lieutenant Colonel Poteet needs to
22 leave the courtroom at about quarter to ten to attend to other
23 business.

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1 MJ [Col PARRELLA]: That's fine. Thank you.

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

3 MJ [Col PARRELLA]: Okay. Mr. Connell, I think at the
4 close of, or towards the end of yesterday's session you
5 indicated that you would have a proposed order of march for
6 the commission; is that correct?

7 LDC [MR. CONNELL]: Yes, Your Honor. I understand that
8 the government has an issue that they wish to bring up, but

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16 MJ [Col PARRELLA]: Okay. I understand.

17 Brigadier General Martins.

18 CP [BG MARTINS]: Your Honor, I wanted to discuss two

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21 LDC [MS. BORMANN]: General Martins, I think I can save
22 your breath. We are going to withdraw those. We don't want
23 to take the position that we should be asking for rulings on

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1 the fly and not give public notice. So we already [REDACTED]
2 notice; it's III, I believe, on the same series. So we are
3 withdrawing the ones we filed yesterday.

4 MJ [Col PARRELLA]: Okay. Thank you, Ms. Bormann.

5 And in light of that, General Martins, does that moot
6 your issue?

7 CP [BG MARTINS]: Yes, Your Honor, it does. There may be
8 [REDACTED] I'm not sure. If it
9 arises, Your Honor, we'll address it, but that resolves the
10 immediate issue.

11 MJ [Col PARRELLA]: Thank you. And just to make sure
12 we're all tracking, it's still the position of the commission
13 that we're going to go ahead and [REDACTED]
14 [REDACTED] I know the commission already took unclass argument on
15 [REDACTED] but in light of the parties' request, we will go ahead
16 and defer any closed argument on those two series.

17 Okay. Absent any other objections to the proposed
18 order of march, the commission will adopt this order of march
19 as proposed by Mr. Connell, and we will start with the [REDACTED]
20 [REDACTED]

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

22 MJ [Col PARRELLA]: Good morning, Ms. Pradhan.

23 ADC [MS. PRADHAN]: Your Honor, briefly before I begin

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1 350, you very considerately on Monday morning invited us to
2 give you the correct pronunciations of our names. And if I
3 may, on the understanding that not everybody always gets it
4 right even when you have known me for a long time, the
5 pronunciation of my last name is Pradhan, with a soft T-H.

6 MJ [Col PARRELLA]: I understand. I appreciate that. I
7 will not promise that I will always get it right, but I will
8 endeavor to do my best. Thank you.

9 ADC [MS. PRADHAN]: I understand, Your Honor. I grew up
10 in Ohio. I'm used to it.

11 Your Honor, with regards [REDACTED] which
12 again I will take together, in open session, of course, we
13 have to protect classified information and so we made certain
14 representations in the hypothetical that we don't have to make
15 here in closed session. [REDACTED]

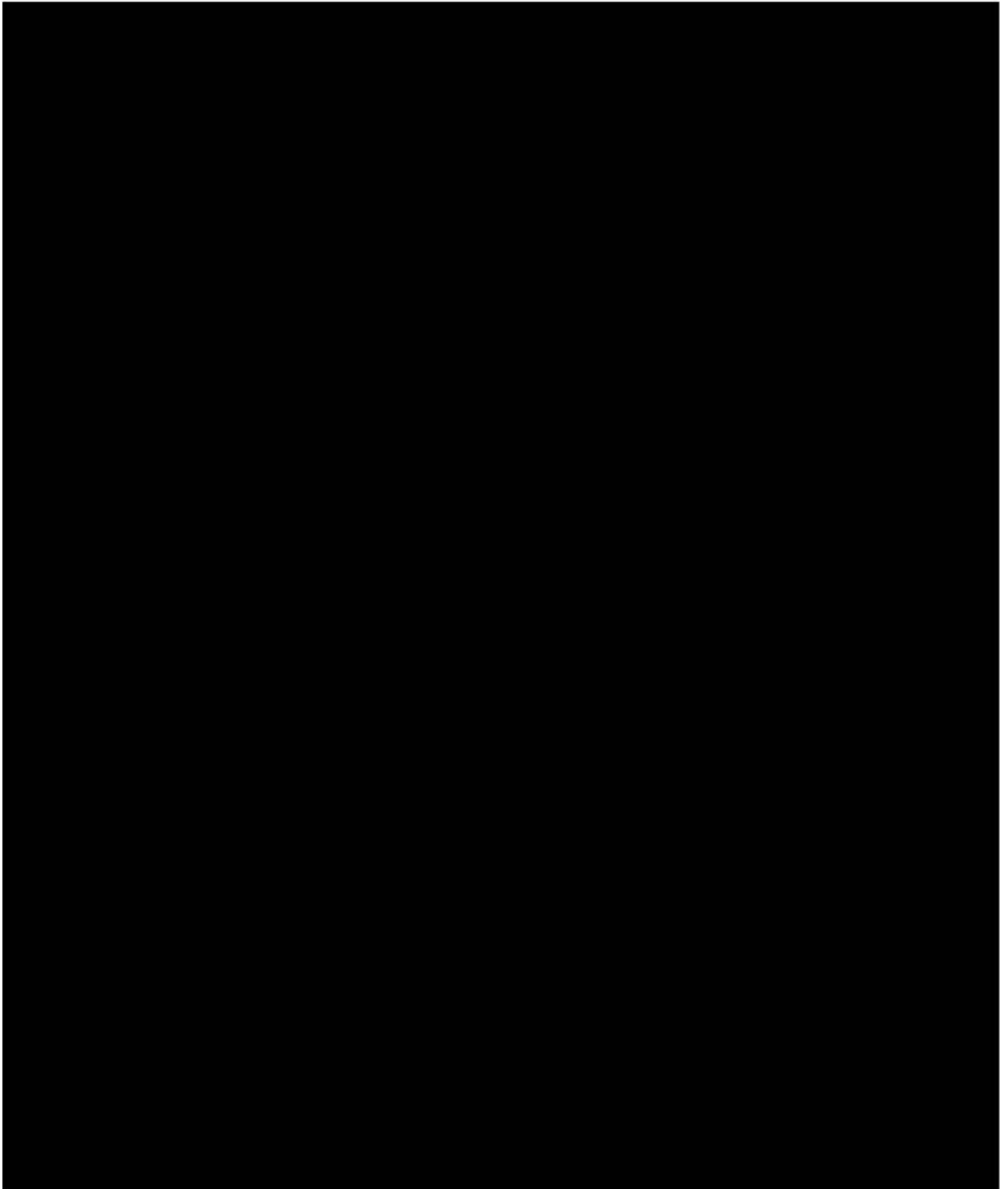
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The second area of inquiry, Your Honor, which I
touched upon briefly in open session,

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1 [REDACTED]
2 MJ [Col PARRELLA]: And in that respect, there are sort of
3 two areas of inquiry as I see it. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 So why should the commission at this stage order a deposition
13 into that? In other words, there is sort of established
14 procedures about interviewing or attempting to interview
15 individuals who had a direct and substantial role in that
16 black site time.

17 Why should the commission specifically order a
18 deposition and allow that sort of inquiry, sort of side
19 stepping the otherwise established process with respect to
20 this individual?

21 ADC [MS. PRADHAN]: Your Honor, for two reasons. First,
22 obviously, the deposition is for also the purposes of

23 [REDACTED] But setting

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1 that aside, I understand Your Honor's question to be why do we
2 need a deposition under oath from this individual about
3 conditions in the black sites? And the reason for that is

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 The other point of reference that I will go into some
14 detail about when we discuss [REDACTED] is that there is -- there are
15 serious concerns about [REDACTED]
16 [REDACTED]
17 [REDACTED] which, as the
18 military commission can imagine, is a serious area of concern
19 when we talk about the statements that led to the
20 [REDACTED] statements.

21 MJ [Col PARRELLA]: So if that's the case, in either the
22 [REDACTED] or some future series that involves an issue about
23 something that occurred at the black site, couldn't the

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1 defense simply request him as a witness? And if he meets the
2 standard, you know, that's established in the law for his --
3 for that testimony to become relevant and necessary, the
4 commission could order it.

5 I guess, why are we -- you know, we're opening up an
6 area here. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 ADC [MS. PRADHAN]: Well, Your Honor, we need to know --
10 there may very well be reasons, right? It is certainly not
11 out of the realm of possibility -- in fact, it is probable --
12 that there are incidences that [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 The military commission, I'm sure, appreciates the
17 sort of [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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1 [REDACTED]
2 Secondary to that, Your Honor -- and I apologize if
3 this wasn't clear, but secondary to that are the additional
4 considerations that [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 MJ [Col PARRELLA]: Thank you. I understand.

10 ADC [MS. PRADHAN]: Thank you, Your Honor. Subject to
11 your questions.

12 MJ [Col PARRELLA]: I have none. Thank you.

13 Mr. Nevin.

14 LDC [MR. NEVIN]: Your Honor, just to add two small
15 matters to what Ms. Pradhan said, first is just to call your
16 attention to the fact that we, I think in this session we
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 will say, and the military commission may not be aware of
21 this: When we meet with members of the guard force at Echo II
22 and when we went to -- when my team made a visit to Camp VII,
23 these men and women do not identify, do not identify

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1 themselves to us by name. They have pseudonyms that they use
2 even in conversation with us, so -- all apart from being on
3 the record. So we hear -- and I understand that this, the
4 idea behind this is to protect these people's safety.

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10 that's -- when you get down to it, that's what we are trying
11 to get to the bottom of. And so you might say in this

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14 Now, why would he do that? So all around us are

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17 It raises a whole raft of questions about -- fair questions, I
18 submit -- about why he decided to do that, what was in it for
19 him, who suggested that he do it, and so on.

20 And second, I understand the military commission to
21 have asked about -- to have been asking about Protective
22 Order #4, the protocol for contacting these witnesses. Two
23 things about that.

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1 [REDACTED]
2 [REDACTED]
3 witness who had direct and substantial contact, and I believe
4 that his testimony would show that. And so it is at the
5 outset anomalous or odd to me that he is not in the list of
6 persons who are considered to have had direct and substantial
7 contact.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 I think it's fundamentally unfair. I assume that the
23 reason for the UFI system and process in the first place is to

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5 But here is a guy who has revealed his identity. And
6 I think you can ask why, certainly, as I said before. But in
7 addition, I think it's fundamentally unfair to say having
8 revealed my identity, wait, now I want to have the protection
9 of the protocol of Protective Order [REDACTED], which is designed to
10 protect my identity.

11 I would submit to you that he, I mean, I think for
12 want of a better way to put it, has waived, or has been
13 overcome by events with respect to the purposes for Protective
14 Order #4 and that protocol.

15 Thank you.

16 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

17 Ms. Bormann?

18 LDC [MS. BORMANN]: We withdrew the [REDACTED] because
19 the others had noticed all of the information we were going to
20 argue anyway. So I want to talk a little bit about the one we
21 did notice, which is the work that he did for us. It is
22 attached to our filings in [REDACTED].
23 It is ex parte because it is privileged material. I would ask

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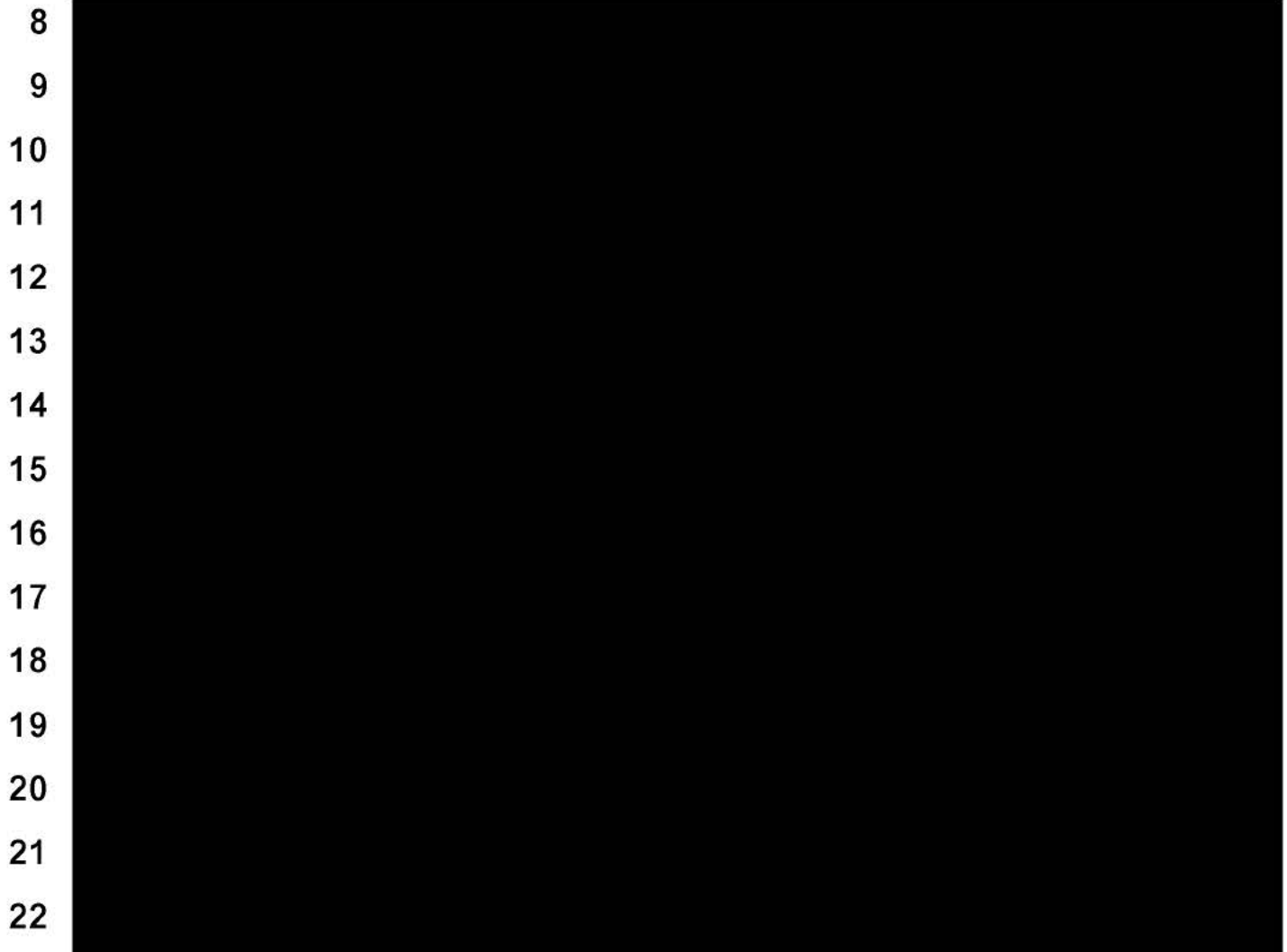
1 you to review it.

2 MJ [Col PARRELLA]: And the classification of that is
3 what, Ms. Bormann?

4 LDC [MS. BORMANN]: I believe TS.

5 MJ [Col PARRELLA]: TS. Thank you.

6 LDC [MS. BORMANN]: The situation that -- this was
7 unprecedented. We were sitting here in court and we were -- I



23 So we walked back and we're like -- I didn't believe

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1 it. You know, frankly, you're like, okay, they made a
2 mistake,

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 So you asked Ms. Pradhan how it is and why it is that
14 we want to talk about during the deposition not only what he
15 did with the materials that

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 So there has to be some belief system based upon what

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14 With that, I'm not saying -- I'm not saying that the
15 government, G -- small G, sitting over to my right knew that.
16 I don't think they did. I think they were as surprised as any
17 of us by this.

18 But the bottom line is we don't know any of the
19 answers to any of this until we have a [REDACTED]
20 [REDACTED] That's what
21 we're asking for. It's what we've been asking for the entire
22 time.

23 And so for all of those reasons, I'm asking that you

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1 grant the request. Do you have any questions?

2 MJ [Col PARRELLA]: I do not. Thank you.

3 LDC [MS. BORMANN]: Thank you.

4 MJ [Col PARRELLA]: Mr. Harrington, good morning.

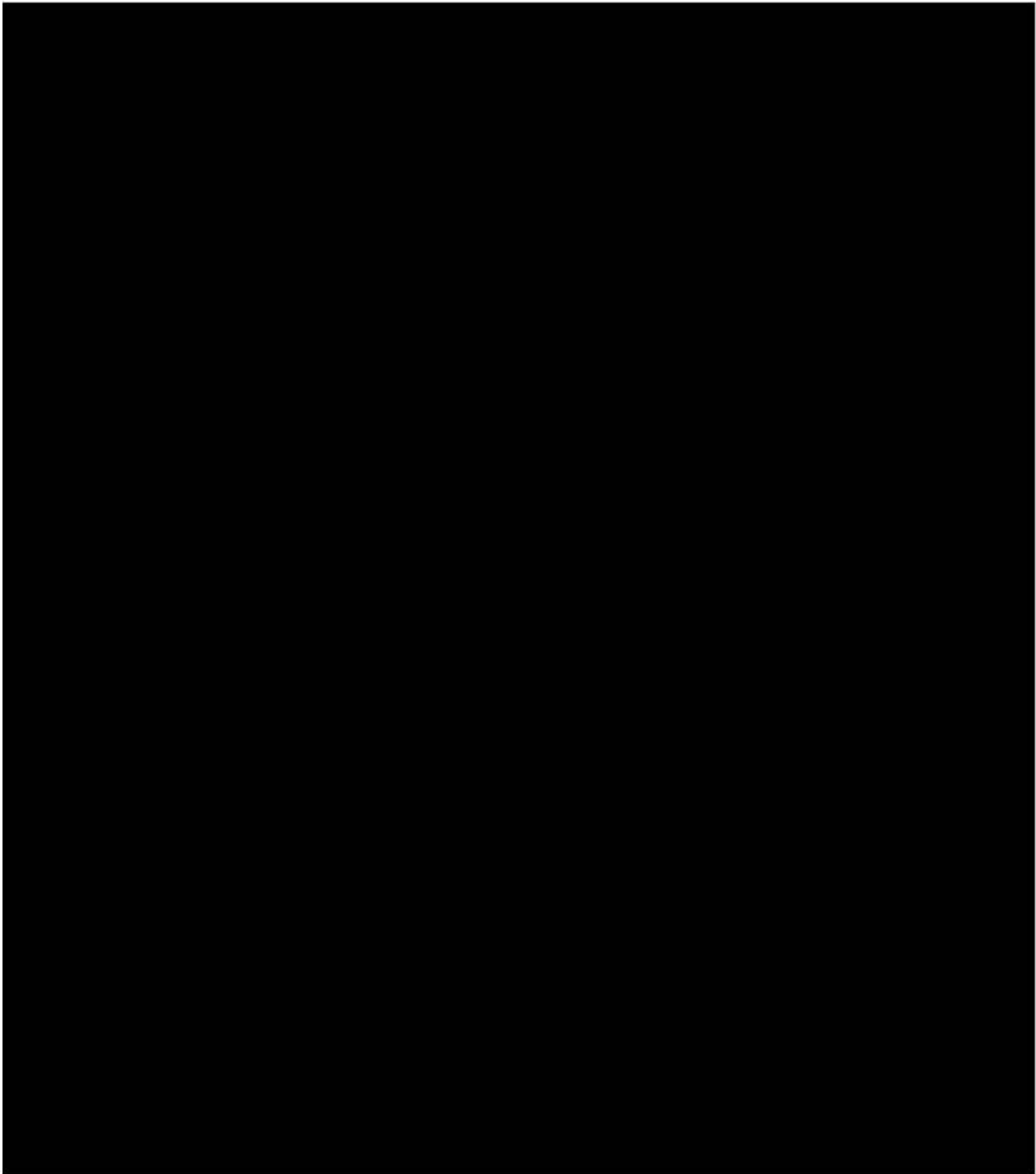
5 LDC [MR. HARRINGTON]: Good morning, Judge. Judge, just
6 because of your newness to the case, I think it might help for
7 me to give you just a little bit of background here.

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And one of the things, Judge, the reasons that we

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10 But putting him under oath puts him in a different
11 position. And if he has in his mind morally that it's okay to
12 do that, to lie because he has been sanctioned to doing that,
13 now he's in a different position when he is under oath. And
14 he may well tell the same lies again, but there's a potential
15 problem for him in doing that, which may well lead to an
16 opening of the door.

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9 And then again, I'm standing here telling you things,
10 as you said yesterday, it's just a proffer; and I realize
11 that. But it's also a situation where, in addition to what I
12 have just told you, there are many, many other things that
13 need to come out -- come from me as a witness in this case so
14 that it just enhances the need for our team to have
15 independent counsel in order for us to properly participate
16 and represent our client.

17 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

18 LDC [MR. NEVIN]: Judge, excuse me. Lieutenant Colonel
19 Poteet needs to leave to take care of other matters. It's
20 been our practice that we stop everything when the door gets
21 opened. I don't know if you want to ----

22 MJ [Col PARRELLA]: That's fine. We can do that.

23 LDC [MR. NEVIN]: Okay.

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1 MJ [Col PARRELLA]: Okay. I will note for the record that
2 Lieutenant Colonel Poteet has left the courtroom. Sir, you
3 may argue.

4 DC [LCDR FURRY]: Good morning, sir. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 And that was filed ex parte under seal. And it's not
8 [REDACTED] but when
9 you read that ex parte under seal attachment, that it contains
10 [REDACTED] you
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 MJ [Col PARRELLA]: So assuming -- okay. So I guess the
15 question is, what is it that you're seeking from this motion?
16 Are you seeking -- I understand you are seeking the
17 deposition, the discovery, but to what end?

18 DC [LCDR FURRY]: [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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[REDACTED]

MJ [Col PARRELLA]: Why?

DC [LCDR FURRY]: Because it's -- on its face it is just

[REDACTED]

So with that understanding, these are very natural questions that go to the -- Mr. al Hawsawi's rights to effective assistance of counsel and how that happened.

MJ [Col PARRELLA]: Well, I mean, I can understand you

[REDACTED]

But what I don't see is, with the argument that you're making as to why, [REDACTED]

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DC [LCDR FURRY]: Sir, it has to go to the

9 He put these -- he put these questions at issue. The
10 defense didn't. That's the relevance of that, sir.

11 MJ [Col PARRELLA]: Okay. Thank you.

12 DC [LCDR FURRY]: May I have a moment, please?

13 MJ [Col PARRELLA]: You may.

14 DC [LCDR FURRY]: Nothing further. Thank you.

15 MJ [Col PARRELLA]: Mr. Ryan. Good morning.

16 TC [MR. RYAN]: Good morning, Your Honor. Judge, I heard
17 from four of the five counsel who just argued the phrase "we
18 don't know" repeated more than once, and I think that's
19 telling.

20 The defense continues to offer you questions and a
21 great deal of speculation of all sorts of possibilities when
22 they have a burden to offer you exceptional circumstances.

23 I address the same arguments right now and factors

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1 that were addressed on Wednesday, but do so now in the context
2 of classified information entered into the record for the most
3 part by the defense, with maybe one exception.

4 The primary motion, Your Honor, that you must rule
5 upon that is filed in this series, and from which I suggest
6 all the others flow, [REDACTED]
7 [REDACTED]

8 In [REDACTED] filed, as I said, way back then when things
9 were very fresh, the defense relied on some specific factual
10 assertions. Certainly lying, which has remained a theme, but
11 back then it was lying with untruthfulness being under a
12 [REDACTED].

13 In [REDACTED] they say, "Because it is possible that [REDACTED]
14 [REDACTED] the
15 military judge should offer" -- order, I'm sorry -- "order a
16 deposition, under penalty of perjury, [REDACTED]
17 [REDACTED]

18 Mr. Harrington, I think, just repeated that argument
19 and I was somewhat surprised, because going back a good deal
20 of time now Military Judge Pohl suggested to the
21 prosecution -- did not require it [REDACTED]
22 might be a good first step. And I'll tell you, we resisted
23 initially but then ultimately turned [REDACTED]

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[REDACTED]

[REDACTED] It does appear in the
record. It has been in discovery. It contains no
requirements [REDACTED] So that

[REDACTED]

On the other hand, Your Honor, from a real life human
standpoint, I suggest that his untruthfulness is quite
understandable, and the defense does nothing to suggest that
this was not the case.

Consider this: The man, Your Honor -- and
Ms. Bormann, I think, did an ample job of describing what it
was like, and it was a strange moment for sure.

[REDACTED]

I also ask you to consider, Judge,

[REDACTED]

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1 Secondly, Your Honor, [REDACTED] which is a classified
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 there's nothing like that in the evidence. And, in fact,
21 Chief Prosecutor Martins specifically refuted those ideas back
22 at the time that this all happened.

23 MJ [Col PARRELLA]: So, Mr. Ryan, assuming I ----

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

2 MJ [Col PARRELLA]: Let's just assume that I agree with
3 you that there is no exceptional circumstance. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 TC [MR. RYAN]: Well, Judge, first of all, I would suggest

9 [REDACTED] and the

10 concern, I guess, would remain valid. But in the -- to the
11 extent that it hasn't happened already, I would submit there
12 is no need to worry that it is going to happen in the future.

13 MJ [Col PARRELLA]: Well, I guess that's the first

14 question. How do we know that it hasn't happened? [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 TC [MR. RYAN]: To the extent this commission is concerned
20 about such factors, this commission could certainly order the
21 prosecution to gather information without, obviously, getting
22 close to being in a position of learning anything, but
23 specifically involving the convening authority to report back

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1 to Your Honor that ----

2 MJ [Col PARRELLA]: I don't think it's so much the
3 commission's concern as I think -- maybe -- would you agree
4 that the defense counsel has some ethical obligation to make
5 inquiry about this, [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 TC [MR. RYAN]: The defense is certainly -- do they have
9 an obligation was your question, sir?

10 MJ [Col PARRELLA]: Correct.

11 TC [MR. RYAN]: They have an obligation to protect it.
12 Now, once something has happened, I'm not aware of an actual
13 dictate that says you must find out every detail of what did
14 happen ----

15 MJ [Col PARRELLA]: Sure. But knowing the scope ----

16 TC [MR. RYAN]: I'm sorry to interrupt, sir. Especially
17 under the circumstances.

18 MJ [Col PARRELLA]: That's okay. So knowing the scope of

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

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

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1 MJ [Col PARRELLA]: So I guess what I'm asking the
2 government is, if not a deposition, how do we get this
3 assurance?

4 TC [MR. RYAN]: I would suggest, Your Honor, you are in a
5 position to put forth directives -- and again, I think the
6 proper entity is the convening authority -- to gather
7 information as to the events, to the extent that's what you
8 want, but also to gather assurances from persons involved as
9 to -- if not assurances, [REDACTED] that
10 may have occurred. Although I represent that we are aware of
11 none, [REDACTED].

12 MJ [Col PARRELLA]: So something along the lines of, I
13 guess, the commission directing a declaration?

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

15 MJ [Col PARRELLA]: Okay. Thank you.

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

17 Your Honor just indicated that if you were to agree
18 with me as to the lack of exceptional circumstances, if that
19 is where Your Honor is, then I'm in no need of speaking any
20 further. However, if Your Honor is still looking at this with
21 an open question in your mind, I would like to continue my
22 argument.

23 MJ [Col PARRELLA]: Yes, please continue.

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1 TC [MR. RYAN]: All right. In [REDACTED], again, Judge, the
2 defense paints, in addition to the whole issue of maybe he had
3 [REDACTED] the defense also paints the
4 predictive picture of what I have kind of taken to call the
5 Jason Bourne scenario.

6 They say, quote [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 And again, this was filed very soon after the
19 incident, when I imagine everyone was operating under far
20 greater suspicions.

21 But as to that claim -- and again, this is the motion
22 that you have to decide [REDACTED]

23 [REDACTED] and to the best of

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1 anyone's understanding or awareness, [REDACTED]

2 [REDACTED]

3 So their claim that lying and a chance of running
4 equals exceptional circumstances I suggest on the facts falls
5 flat, Your Honor.

6 But in addition, I also want to point out that this
7 is inconsistent -- their claim of exceptional circumstances in
8 this situation is inconsistent with prior defense positions.

9 Mr. Bin'Attash, Mr. Ali, and Mr. Mohammad, in their
10 own pleadings in the [REDACTED], and thus all five by joinder,
11 took a position that said that witnesses were not likely to be
12 unavailable when they were in their eighties with general
13 health concerns. You were told the other day that my
14 statement about this motion was wrong. Well, it was not
15 wrong.

16 LDC [MS. BORMANN]: Judge ----

17 TC [MR. RYAN]: Well, it was not wrong. I know because I
18 lost this motion, and it broke my heart.

19 LDC [MS. BORMANN]: Judge ----

20 MJ [Col PARRELLA]: Mr. Ryan, hold on one second.

21 LDC [MS. BORMANN]: Objection. This is not classified
22 argument.

23 TC [MR. RYAN]: Agreed, Judge, but there is plenty of room

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1 for us to match the classified facts with unclassified.

2 MJ [Col PARRELLA]: To the extent it's required to give
3 context, proceed, but let's also be sensitive that this is
4 just for closed argument. We have previously, and the
5 commission has heard ample unclassified argument.

6 Please continue, Mr. Ryan.

7 TC [MR. RYAN]: That's fine, sir, and I will move off it
8 right now.

9 I will simply say that [REDACTED], both of
10 which were orders from Military Judge Pohl, there was specific
11 findings regarding unavailability and exceptional
12 circumstances that the defense urged on his Honor and his
13 Honor accepted, which I suggest is inconsistent with the
14 positions they are taking now.

15 [REDACTED]
16 Judge, and usually it's in the context of we don't know and
17 it's possible that this happened, it's possible that that
18 happened. There is evidence of it in this record in
19 classified form.

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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1 So here's how it's relevant, Judge. All of those
2 factors show that this wasn't a moment in time

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 Now, in all the time I've been sitting in this
18 courtroom listening to the accused make statements at times,
19 this is the first time I ever heard anything this clear. It's

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 At the same time, learned counsel states, "Judge, we

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1 have exactly the same issue. My client" -- meaning

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[REDACTED]
[REDACTED]
[REDACTED]
MJ [Col PARRELLA]: So how do I know that?
[REDACTED]
[REDACTED]

TC [MR. RYAN]: [REDACTED] Your Honor, contains the information
from the prosecution, which also contains the statement,
repeated by General Martins previously, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

MJ [Col PARRELLA]: And I've read that, and I understand
that's from the prosecution. But as I understand how this
went down, [REDACTED]
[REDACTED]

TC [MR. RYAN]: Yes, sir.

MJ [Col PARRELLA]: So the question was: [REDACTED]
[REDACTED]

TC [MR. RYAN]: It has not, sir.

Subject to your questions, Your Honor.

MJ [Col PARRELLA]: No questions. Thank you.


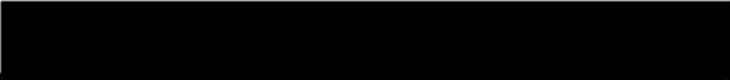
Ms. Pradhan or anybody else have anything further?

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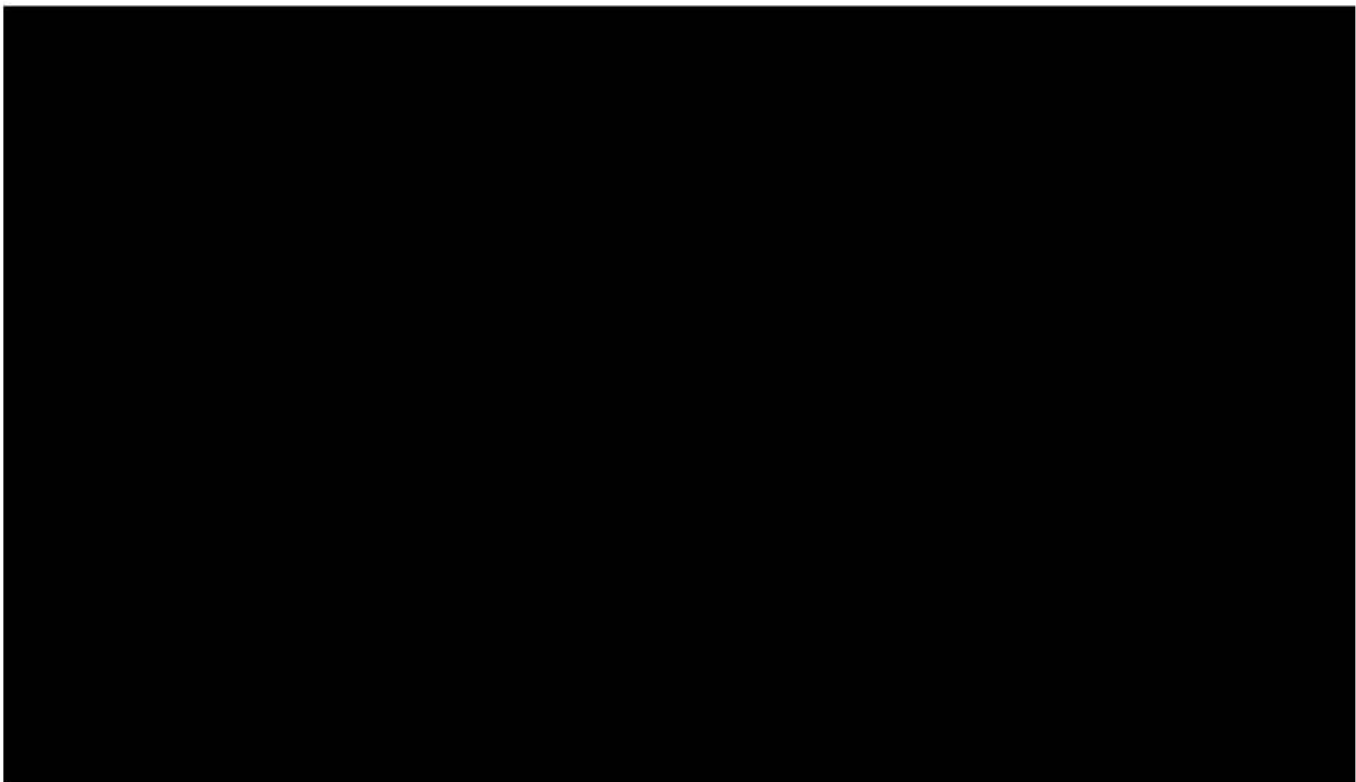
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1 ADC [MS. PRADHAN]: Just a few very brief points,
2 Your Honor.

3 Your Honor, as I will



10 This is the 9/11 case. It's not some case somewhere
11 else. And this is not the only incident that has happened
12 like this.

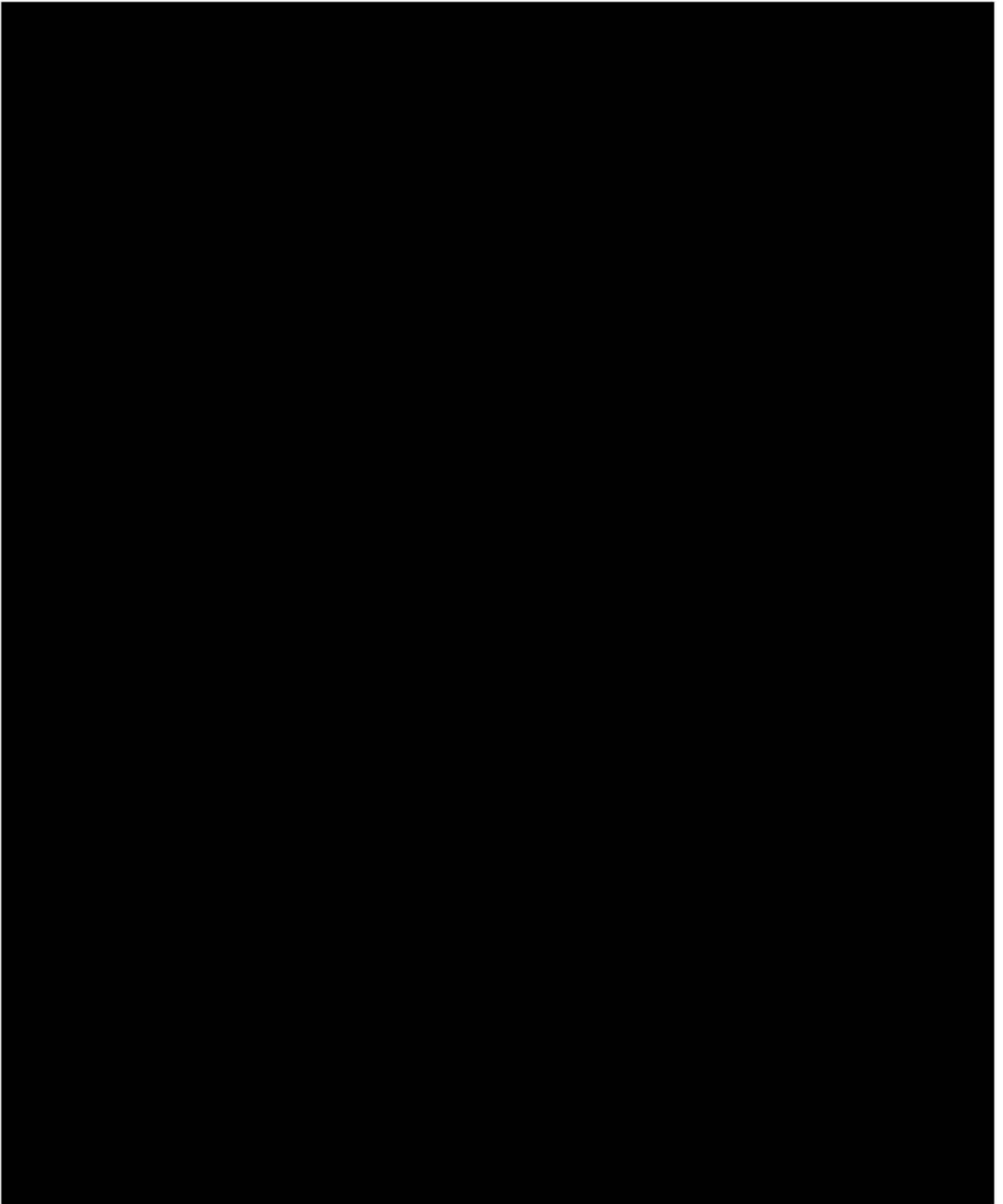


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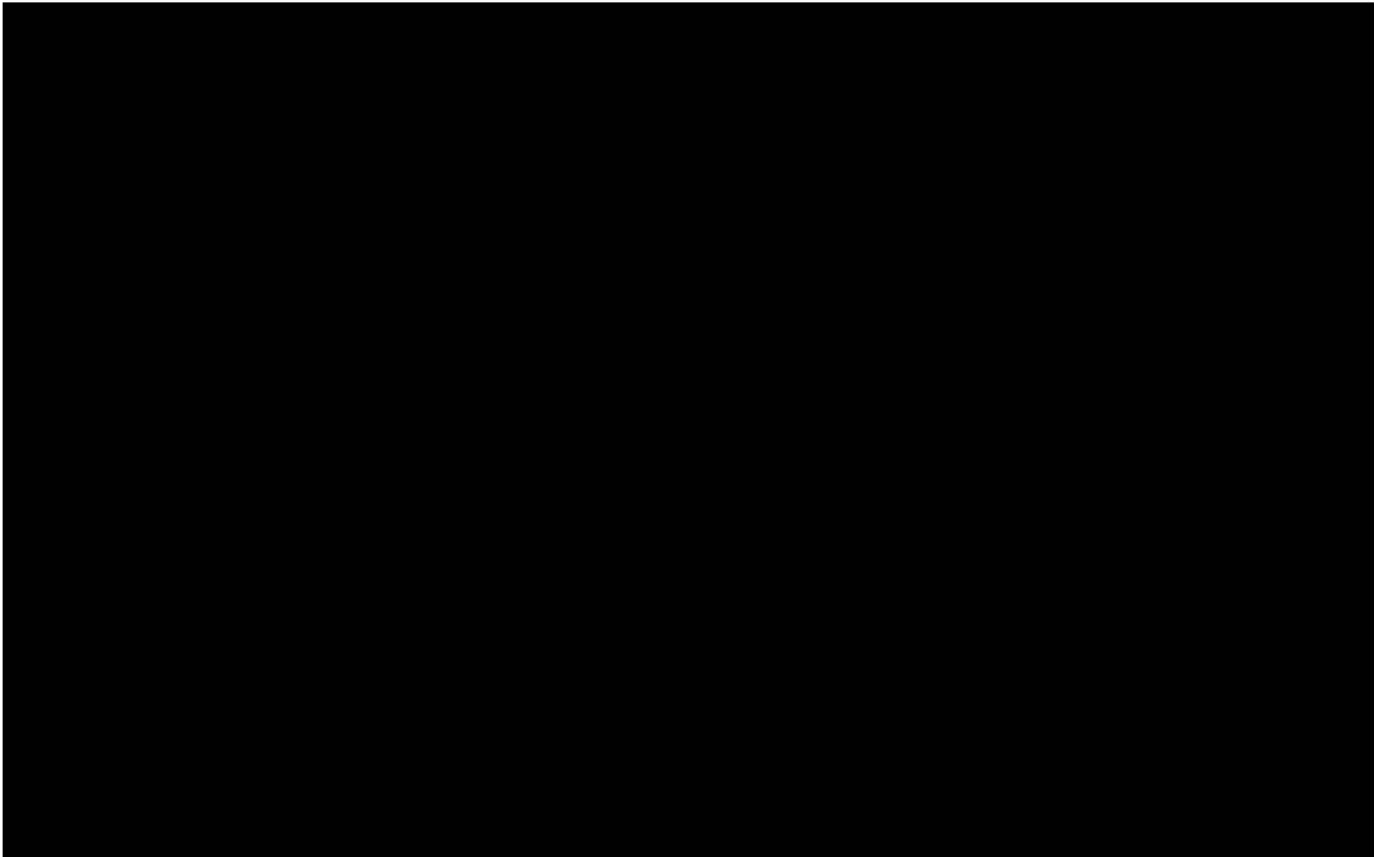
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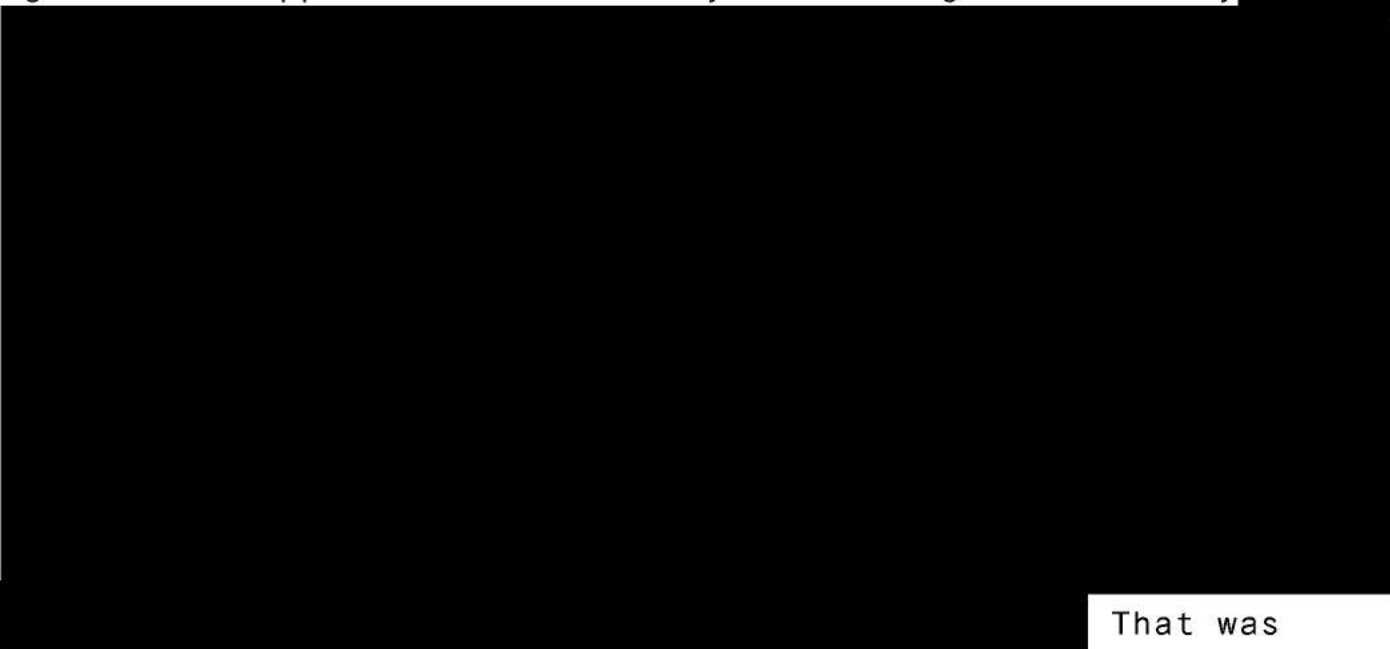
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Finally, I'm frankly not quite sure why the
government opposes so strenuously the taking of testimony



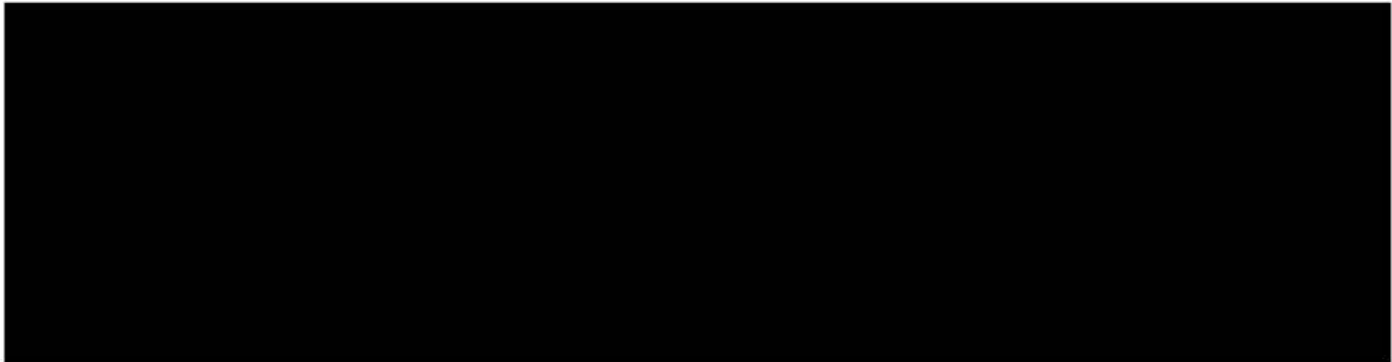
That was

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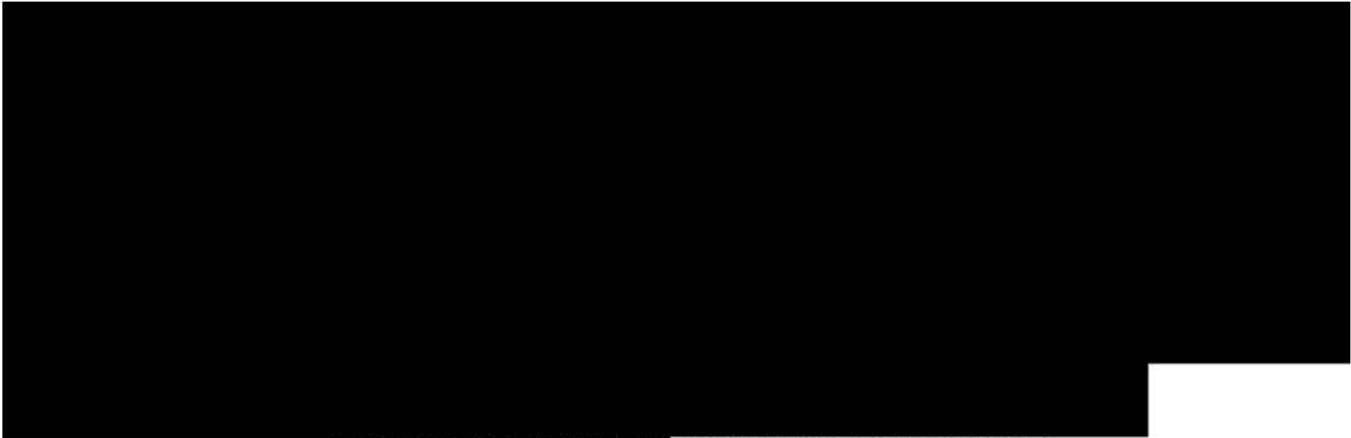
Subject to your questions.

MJ [Col PARRELLA]: Thank you.

Mr. Nevin?

LDC [MR. NEVIN]: Thanks, Your Honor. And I know we talked about it in the open session, the fact that the rule doesn't speak to unavailability exclusively as other -- some other criminal rules do; it speaks to exceptional circumstances. And I made the point that you don't get an awful lot more exceptional than that.

On that score, I heard Mr. Ryan saying that -- referring to this as the Jason Bourne scenario, sort of ironically. In other words, I take it the point is, what?



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But nonetheless, this is -- and, you know, we found smoke detectors -- microphones disguised as smoke detectors in our meeting rooms.

12 But we said this in the pleadings, and I would be
13 glad to say this in open court because I don't think it's
14 classified: Mr. Mohammad was told, "You will never be free of
15 us. You will never get away from us."

16
17
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19 Remember what we told
20 you? So I think there's a lot under the surface here that we
21 just need to get to the bottom of.

22 And as I listened to the reference to General
23 Martins' statement that no agency in the government -- I

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[REDACTED]

I took that to heart. I went back and looked at the language, and I think [REDACTED] but I think Judge Pohl said something similar at an earlier time; and I'm going to try to get to the bottom of what is in my recollection about why that was permissible. But I think the same thing would apply here. And I don't mean that I think counsel is misrepresenting on purpose. I don't mean that at all.

But what I mean is, again, it's only as good as the information that counsel has been given. And I think the way you get to the bottom of this is you have [REDACTED]

[REDACTED]

But this is what they say about the oath, that -- in cross-examination, that it's, you know,

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1 that language about the most effective engine for getting at
2 the truth.

3 So it may not be perfect, but it's a tool that we
4 have. And I think under the circumstances, under the
5 exceptional circumstances, clearly 40 years of practice, if
6 you told me I was going to be reciting the occurrence of
7 things like what I just recited to you, I would have said
8 you're crazy before I got to this environment.

9 These are -- we practically have an exceptional
10 circumstance every day, but this is what we have in terms of
11 how to get to the bottom of this and the military commission's
12 obligation to make this a regularly constituted court that
13 tries to protect its processes. And so ----

14 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

15 LDC [MR. NEVIN]: Thank you, Your Honor.

16 LDC [MS. BORMANN]: We rely on the comments of other
17 counsel. I have nothing further.

18 MJ [Col PARRELLA]: Thank you, Ms. Bormann.

19 Mr. Harrington?

20 LDC [MR. HARRINGTON]: Judge, I'm not going to beat the
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4 Mr. Ryan just said that we have the nondisclosure
5 agreement. We do have a nondisclosure agreement. I didn't

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7

8 and perhaps the nondisclosure agreement is what did it. We
9 don't know that. But that's the point about having this
10 deposition.

11

12 Mr. Ryan gave us a scenario that he's been outed,
13 he's trying to protect his family, whatever it is,

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17 We presented to you what we believe happened, and we
18 need to explore that under oath.

19

20 You just asked Mr. Ryan did the CIA ever do a declaration?
21 Anybody from the CIA do a declaration? Did they come forward
22 with anything to explain this? This is not some mythical
23 little problem in the air. This is -- this is really serious

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1 stuff.

2 You asked before, you know, to what purpose do we go?

3 How about outrageous governmental misconduct? [REDACTED] put

4 [REDACTED] put it with the other things that Mr. Nevin just

5 said. When do you reach the point that you have outrageous

6 governmental misconduct? That's a legitimate motion to be

7 filed in any court in this country, including the military

8 commissions.

9 Judge, in the black sites it's acknowledged that the

10 government used psychological manipulation to try and get the

11 information which they needed. The CIA readily admits that.

12 They had the enhanced interrogation program to do that, to

13 acquire information. It was a consistent tactic.

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8 But again, Judge, I don't see any other way that we
9 at least begin to get to the bottom of this without that
10 deposition. Thank you.

11 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

12 Lieutenant Commander Furry?

13 DC [LCDR FURRY]: Nothing further, sir.

14 MJ [Col PARRELLA]: Thank you.

15 Okay. We are going to go ahead and take a recess.
16 Before we do, a couple of things I would ask as we move
17 forward here.

18 Number one, just a reminder to keep your argument, to
19 the extent possible given necessary context, related to
20 classified argument, in other words, the documents that you
21 provided notice on classification. And secondly, I think it
22 would be helpful for the commission, as well as probably for
23 those transcribing, if you identified the classification level

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1 of the material before you argued it.

2 With that, let's go ahead and take a 10-minute
3 recess. This commission is in recess.

4 [The R.M.C. 806 session recessed at 1025, 16 November 2018.]

5 [The R.M.C. 806 session was called to order at 1042,
6 16 November 2018.]

7 MJ [Col PARRELLA]: This commission is called back to
8 order. All parties present when the commission recessed are
9 again present.

10 We will now take up [REDACTED]. Good morning,
11 Mr. Montross.

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

13 As Your Honor recalls, 360 involves the one discrete
14 videoconference or video communication that was not
15 transmitted to my client's family. We are seeking the answer
16 to the eternal question of why not.

17 In open session I attempted to delineate the
18 labyrinth of confusion surrounding classification of this
19 video, and its trek from presumptive TS to unclassified to sua
20 sponte reassessment, to now its current designation as secret.

21 Here in the closed session, I want to detail a little
22 bit more about the twists and turns in this classification
23 procedure that itself is classified.

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1 Judge, after we filed [REDACTED] which was the motion to
2 reconsider asking for an explanation about why the video was
3 deemed "not appropriate for transmission," we filed another
4 pleading in this series called 360D, as in David; and that was
5 seeking a motion to show cause why the government should not
6 be held in contempt or otherwise sanctioned for failing to
7 turn over the videos that Judge Pohl had ordered.

8 That filing was deemed a spill, and the reason it was
9 deemed a spill is because in that filing I talked about the 7
10 December 2014 video [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 So when talking about the 7 December 2014 video,

19 [REDACTED]
20 [REDACTED] that we have been
21 provided at that point in May of 2018. All forbidden.

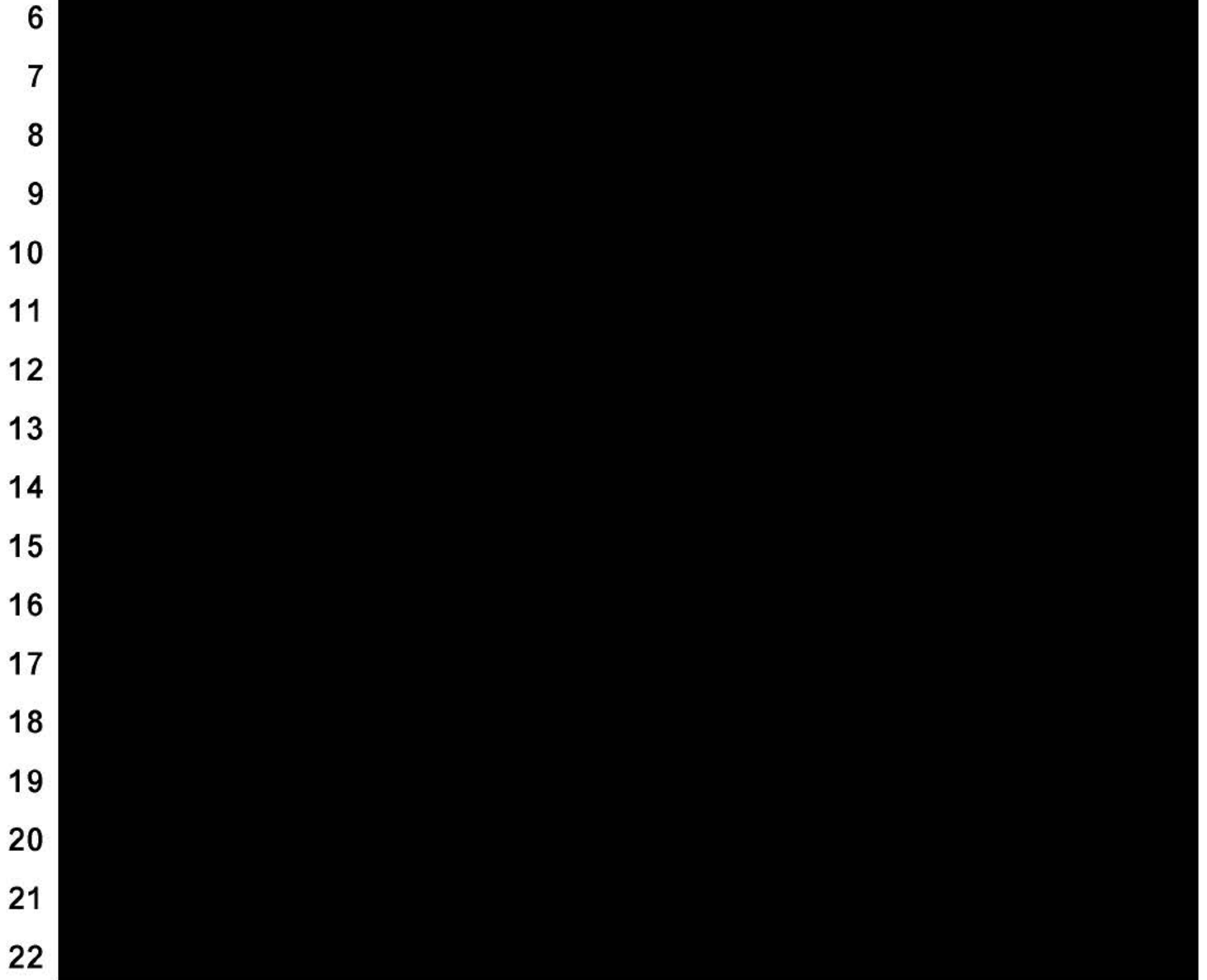
22 The problem was that other people, trial counsel, had
23 mentioned it multiple times in their pleadings that -- the

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1 7 December 2014 video, and, lo and behold, Judge Pohl said it,
2 too, in one of his rulings. So we had a problem. We had a
3 spill.

4 On July 24th, 2018, here in court pretrial
5 proceedings, the CISD provided new guidance related to AE 360.



23 So this is the kind of level of insanity that we are

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1 dealing with, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] In the 505(g) notice that we
5 provided for this -- well, let me take one step back.

6 In the open session, Major Dykstra did acknowledge,
7 at least what I heard, that there were some issues here with
8 this particular communication. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 So we addressed that briefly in our pleading, in
15 (WBA Sup), which is the subject of the 505(g) notice, Judge.
16 It was directing Your Honor to the classified portions of
17 (WBA Sup).

18 And what I would tell Your Honor, okay, [REDACTED]

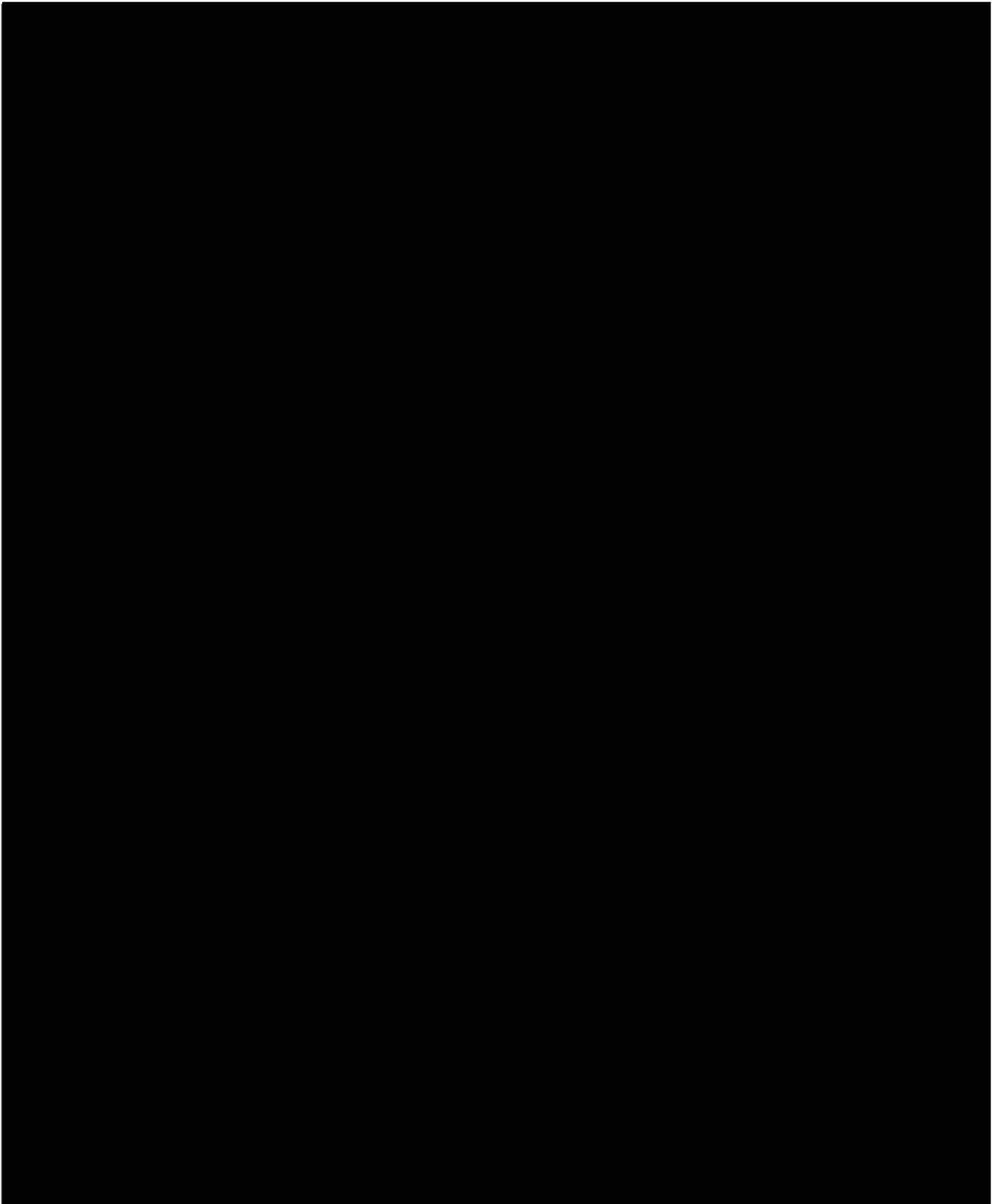
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1 And if you wish, in the interests of expediency, I
2 have one brief point on 399 that's related to this, and I can
3 handle that right now if Your Honor would be amenable to that.

4 MJ [Col PARRELLA]: Let's go ahead.

5 DC [MR. MONTROSS]: Okay. On 399 I had represented in
6 open session and encouraged this commission to please not
7 consider the government's defense, right, that the program,
8 the video communication program, was both efficient and a fair
9 substitution for in-person visitation. And I asked the court
10 not to consider that defense because I didn't have the
11 evidence and the ammunition to refute that.

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1 therefore, are not subject to being used as evidence by me in
2 order to defeat their claim that the program is an efficient
3 substitute for real in-person visitation.

4 And [REDACTED] is yelling at me. If I could have one
5 moment, Your Honor?

6 MJ [Col PARRELLA]: You may.

7 [Pause.]

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1 Mr. Bin'Attash. I just raise my hands in frustration at this
2 point.

3 Subject to your questions, Judge.

4 MJ [Col PARRELLA]: I guess my question, Mr. Montross,
5 let's go back to [REDACTED] I understand your frustration with the
6 classification guidance that you've expressed to the
7 commission, particularly with that one particular video, and
8 it seemed to have gone from presumptive TS to Unclass and back
9 to Secret.

10 But as you know, the commission is not a
11 classification, you know, authority, so what exactly do you
12 want the commission to do? You want paperwork relating to
13 that one video to explain why it was or was not released. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 I'm not -- obviously I'm not a classification
22 authority either. He has no derivative classification
23 authority. He attempts to divine -- [REDACTED] I'm referring

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1 to -- what is the classification status. I have no contact
2 with OCAs.

3 What I want you to do, Judge, is I want you to order
4 the government to provide either the OCA guidelines or JTF to
5 provide the basis for the refusal to transmit the
6 7 December 2014 video and to explain to me why.

7 MJ [Col PARRELLA]: Well, it seems the basis would be the
8 fact that it was classified. So really what you're looking
9 for -- I mean, it sounds to me, I guess, my point is it sounds
10 less like a discovery request and more like a request for
11 classification guidance.

12 DC [MR. MONTROSS]: I desperately need classification
13 guidance, yes.

14 MJ [Col PARRELLA]: Okay. I understand. Thank you.

15 DC [MR. MONTROSS]: Thank you.

16 MJ [Col PARRELLA]: Mr. Nevin.

17 LDC [MR. NEVIN]: No, Judge.

18 MJ [Col PARRELLA]: Mr. Harrington?

19 LDC [MR. HARRINGTON]: No, Judge.

20 MJ [Col PARRELLA]: Mr. Connell.

21 LDC [MR. CONNELL]: No, thank you, Your Honor.

22 MJ [Col PARRELLA]: Mr. Ruiz.

23 LDC [MR. RUIZ]: I don't have anything, Judge. Thank you.

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1 MJ [Col PARRELLA]: Trial counsel.

2 ATC [Maj DYKSTRA]: Nothing classified, Your Honor.

3 MJ [Col PARRELLA]: Trial Counsel, I have some questions
4 for you.

5 ATC [Maj DYKSTRA]: And I'm more than willing to answer
6 your questions, Your Honor.

7 MJ [Col PARRELLA]: Thank you. The first question is, if
8 you know, how did we go from presumptive TS to Unclass and
9 back to Secret again?

10 ATC [Maj DYKSTRA]: When we handed it over to them, it
11 still needed to go through a classification review. We are
12 just talking about the 7 December 2014 review video.

13 MJ [Col PARRELLA]: That's correct.

14 ATC [Maj DYKSTRA]: All the rest of the ones, we handed it
15 over to them with the correct classification and so forth.
16 After that they put it to the classification review. Due to
17 some bureaucratic processing errors, it didn't go all the way
18 through the process and got reported back to them
19 unclassified.

20 When that was discovered, it came back for review and
21 it went through the entire process, went through all the OCA
22 process and was determined to be classified at that point in
23 time. That was determined -- or that was reported back to

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1 Mr. Bin'Attash's team.

2 MJ [Col PARRELLA]: I've read the class guidance that was
3 issued pertaining to 360/399.

4 ATC [Maj DYKSTRA]: Yes, Your Honor.

5 MJ [Col PARRELLA]: I understand -- I think I understand
6 what's contained in there. What I don't understand is that in
7 light of reading that guidance

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We have kept ourselves walled off from what was put
forward into that process,

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MJ [Col PARRELLA]: I understand. Thank you,
Major Dykstra.

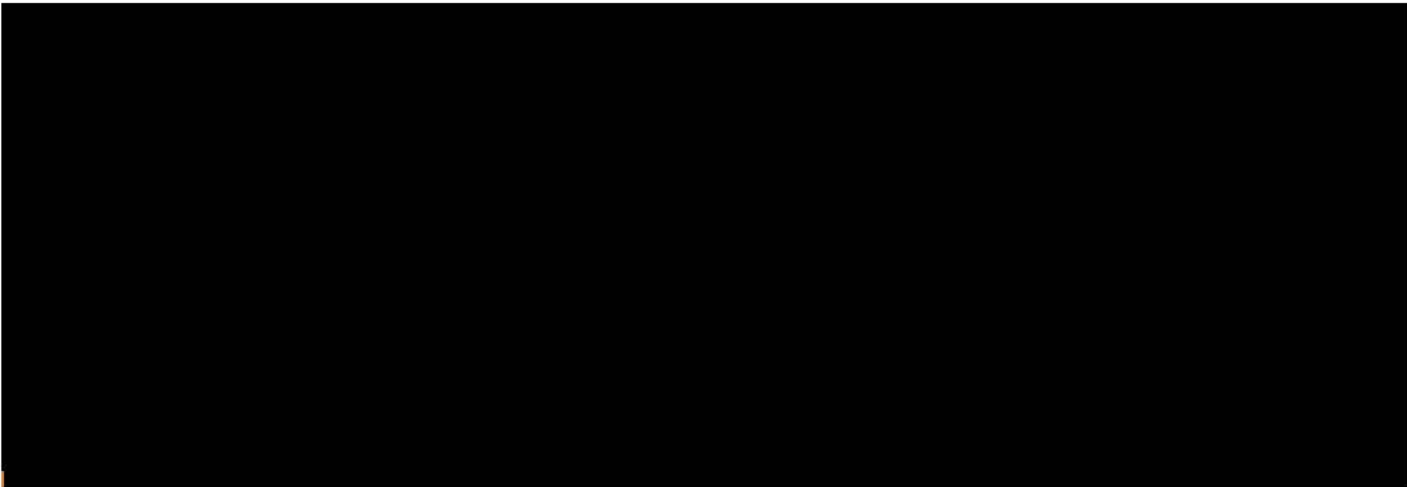
ATC [Maj DYKSTRA]: Yes, Your Honor.

DC [MR. MONTROSS]: May I?

MJ [Col PARRELLA]: You may.



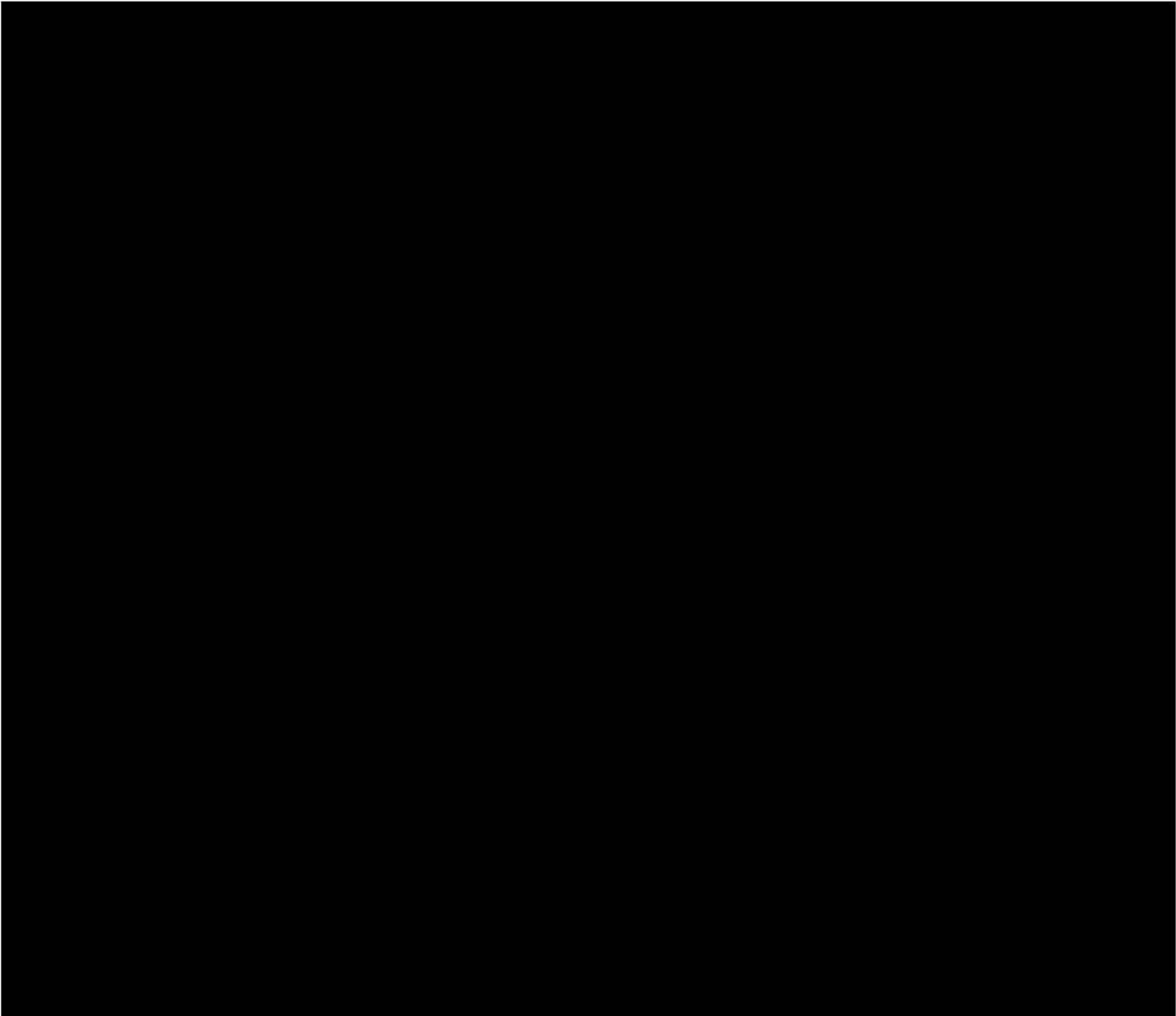
MJ [Col PARRELLA]: I will leave that to your discretion,
Mr. Montross.



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18 So I hear bureaucratic slipup twice now, just on this
19 one issue.

20 MJ [Col PARRELLA]: Thank you.

21 Mr. Ruiz.

22 LDC [MR. RUIZ]: Judge, I just want to add a few comments
23 to the subject which I think you raised, which was the

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1 commission's relationship in regards to classification
2 matters, and I will just add a few points for your
3 consideration.

4 It is true that you're not a classification authority
5 and you cannot direct anyone to change the classification of a
6 particular document. I think that is more than well
7 established.

8 However, throughout the course of this litigation we
9 have from time to time brought to the commission's attention
10 that you are not powerless. The commission is not powerless
11 in the face of what appear to be arbitrary or capricious
12 classification determinations.

13 In fact, I believe we briefed this in 018PP way back
14 when on this very issue. And the authority that the
15 commission has and the power that the commission has is to
16 look at classification of particular documents, and the court
17 can make a decision or a finding that says the documents
18 appear to be classified through an arbitrary or capricious
19 means or there appears to be an abuse of discretion.

20 Throughout -- and obviously you can't change the
21 classification. But certainly from the standpoint of the
22 commission, you can look at the facts that are presented. You
23 can look at varying changes in the classification of documents

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1 in the absence of a real explanation to the commission as to
2 how this comes about.

3 And this is a recurring theme through these
4 commissions. I just ask that you -- that the record does
5 reflect that. It is not at my fingertips at this moment, but
6 it does.

7 The commission can take an active role and can take
8 an active part in having the government put forth real
9 explanations. It goes back to what Mr. Montross says, a
10 classification guidance. Some kind of protocol by which these
11 decisions are being made and being determined.

12 And why is that important? Because we are here
13 litigating those very issues before the commission. There is
14 a real impact in time and energy that is invested into these
15 types of issues because there are these classification
16 restrictions that are being made, taken away, made again; and
17 this is but one very good illustrative example of that
18 instance.

19 Like I said, I think it's 018PP where we fleshed this
20 out a little bit more. I'm reaching back into the great
21 recesses of our memory there, but I will confirm that that's,
22 in fact, one of the places that we -- that we raised it.

23 So that's all I wanted to add on that point.

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1 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. Okay.

2 We're going to move on to [REDACTED].

3 TC [MR. GROHARING]: Judge, excuse me, Your Honor. Just
4 before we start, the prosecution has provided some exhibits on
5 this motion to the court reporter. It's the defense's motion.
6 They may want to argue first, but procedurally we should
7 probably admit those exhibits, make sure they're admitted, and
8 they're free to comment on them as well.

9 LDC [MR. CONNELL]: Your Honor, this is Ms. Pradhan's
10 motion but I'm happy to argue this procedural point if the
11 military commission will allow.

12 MJ [Col PARRELLA]: Sure.

13 LDC [MR. CONNELL]: Your Honor, the day of the closed
14 hearing is too late to admit -- to give notice of new
15 information -- new classified information for use in that
16 closed hearing. The government equivalent to a 5-1(g) notice
17 under Rule 505 is an (h)(2)(A) notice. The government did not
18 give notice of this additional material. It has not been
19 through a 505(h) use, relevancy, and admissibility
20 determination nor did the defense have the opportunity to
21 examine it in the context of this motion prior to the hearing.

22 So there would need to be a 505 -- there would need
23 to be a 505(h)(2)(A) notice, a 505(h) hearing, notice to the

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1 public, and then we could take that up.

2 MJ [Col PARRELLA]: Trial Counsel, response.

3 TC [MR. GROHARING]: Your Honor, the only information that
4 would be discussed in this hearing has already been noticed by
5 the defense. [REDACTED]

6 [REDACTED]
7 [REDACTED]

8 The fact that the government provided materials to
9 the defense in discovery has already been part of the
10 government's response in the [REDACTED]. The only
11 portions that would be discussed are the specific texts within
12 those documents that are contained in the paragraph d.
13 synopses that are the subject of [REDACTED] I believe, the defense
14 filing.

15 So the point is, as we've said in our pleadings, we
16 provided the information to the defense. The only point of
17 offering the exhibits is actually showing Bates-numbered
18 versions of the documents we've actually provided to the
19 defense.

20 MJ [Col PARRELLA]: And this is what's been marked as [REDACTED]

21 [REDACTED]

22 TC [MR. GROHARING]: Q, Your Honor.

23 MJ [Col PARRELLA]: ---- Q?

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1 So is this information -- information that was -- I
2 take it it was not previously a part of any other prior
3 notice. What you're looking to argue is the information
4 that's highlighted in the yellow portions?

5 TC [MR. GROHARING]: That's correct, Your Honor.

6 MJ [Col PARRELLA]: And could you state one more time,
7 Mr. Groharing? It didn't sound like you were looking to argue
8 the substance, but what was the purpose of the ----

9 TC [MR. GROHARING]: We've -- the documents that are the
10 exhibits are Bates-numbered materials that were provided to
11 the defense in discovery, and they support the position the
12 government has taken in the motion that, contrary to the
13 defense assertions, that the information contained and
14 specific information that the defense highlights [REDACTED] that
15 that information is included in other materials that the
16 defense has been provided, materials that were approved, the
17 summaries that were approved by the military judge before they
18 were provided to the defense.

19 LDC [MR. CONNELL]: Sir?

20 MJ [Col PARRELLA]: If you could, Mr. Groharing, address
21 Mr. Connell's, I guess for lack of a better word, objection to
22 the procedural aspect of this; in other words, that this was
23 not previously run through the 505 process and, therefore, the

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1 commission shouldn't take it up at this 806 session.

2 TC [MR. GROHARING]: Your Honor, the only information that
3 would be discussed -- and that's what we're looking to protect
4 through the 505 process -- it's the very same information that
5 the defense noticed and was discussed and was approved by the
6 military judge to discuss in this hearing.

7 It's the exact same subject matter, so there would be
8 no need to notice the exact same subject matter that
9 comes from -- just simply comes from a different document.

10 MJ [Col PARRELLA]: So assuming we could skip the
11 505(g) -- the 505(h) hearing for the use, relevance, and
12 admissibility, what's your position as to whether there has to
13 be a separate closure order with respect to this?

14 TC [MR. GROHARING]: The government's position is that
15 there would not need to be a -- it's the very same
16 information. We already have an order that covers the
17 information. Our position would be that if it went beyond
18 that information, yes, the commission would have to issue a
19 separate protective order, if it was information unrelated to
20 the information in question.

21 But certainly the same, the very same information and
22 information surrounding that would be appropriately covered by
23 the commission's prior order.

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1 MJ [Col PARRELLA]: Okay. Mr. Connell.

2 LDC [MR. CONNELL]: First, Your Honor, we disagree that
3 it's the same information. Looking at -- you know, having had
4 it handed to us this morning and examined it, it doesn't look
5 like the same information to us. But we can argue that when
6 we get to this.

7 But with respect to the government's position on 505
8 notices only cover information and then all information would
9 be swept in, we can bring in a whole bunch of new exhibits. I
10 love that position. That position is incredible. I wish that
11 I had had it on the record, and I am going to frame this
12 transcript.

13 Because we spent most of Wednesday listening to
14 government objections about how even when we gave notice of
15 information and then had a subset under that with the exact
16 documents which we wanted to rely on for the information, and
17 then identified page numbers within those documents, that **that**
18 was still not sufficiently specific notice.

19 So I love the idea that 505 notices cover only
20 information and not documents, and that the government, who
21 has a similar, arguably even stronger requirement under
22 505(h)(2)(A) to identify the specific classified information
23 at issue can -- that information is good enough.

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1 And if the military commission rules in the
2 government's favor on this, then I just want to draw the
3 party's attention that I would expect the same standard to be
4 applied to the defense.

5 MJ [Col PARRELLA]: Okay. So at this point let's go ahead
6 and proceed with your argument, Mr. Connell, [REDACTED]. At this
7 point I'm going to take it under advisement as to whether I
8 will allow the government to argue this information in this
9 hearing.

10 LDC [MR. CONNELL]: Thank you, sir. Given the importance
11 to going forward in the 505 process of how this works, I do at
12 some point request a ruling. I understand it's under
13 advisement.

14 MJ [Col PARRELLA]: No, I understand.

15 Ms. Pradhan.

16 ADC [MS. PRADHAN]: Yes, sir. If you don't mind,
17 Your Honor, I will just take a moment. I'm going to make use
18 of the document camera for documents that are in the record
19 and have been noticed to the military commission, so I just
20 want to get everything straight.

21 MJ [Col PARRELLA]: Okay.

22 ADC [MS. PRADHAN]: There have been incidences where I
23 have knocked large amounts of paper off the podium, so --

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1 And just for the military commission's essay,
2 Your Honor indicated that you wanted the information regarding
3 the classification level of the documents that we are going to
4 use. All of the documents that I would like to use and to
5 display on the document camera that I will be referring to are
6 classified at the SECRET//ORCON//NOFORN level, but I do expect
7 to make reference at certain points during my argument to the

8 [REDACTED]
9 [REDACTED]

10 MJ [Col PARRELLA]: Okay.

11 ADC [MS. PRADHAN]: Your Honor, as a preliminary matter,
12 [REDACTED] as Your Honor has undoubtedly
13 noticed, are all interrelated in certain ways.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 They're related because the government has
18 continually argued that investigation is unnecessary either
19 because they, the government, will facilitate access to

20 [REDACTED]
21 [REDACTED]

22 Now, [REDACTED] of course -- and I'm not going to argue
23 the substance of [REDACTED] that's for Mr. Connell. But I do

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1 want to just frame some of the issues in [REDACTED]

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10 So the literal carrying out of a phone interview is,
11 in the government's eyes sufficient to reach the standard of
12 investigation required in a capital case, but I'll talk more
13 in a little bit about the mechanics of the interviews when I
14 get to my third point on [REDACTED]

15 The important point is that the government does
16 not -- has not really wanted to delve into the substance of
17 the conversations we have had with the UFI witnesses and that
18 is because the substance largely supports our arguments in AE
19 [REDACTED] RDI discovery cannot be
20 relied upon.

21 I'm going to walk through [REDACTED] slowly because these
22 are obviously big and important issues.

23 MJ [Col PARRELLA]: Not too slowly.

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1 ADC [MS. PRADHAN]: Not too slowly. I don't think I am
2 capable of going too slowly, Your Honor. No one has ever
3 accused me of that.

4 But these are big and important issues that I don't
5 have to repeat that strike the heart of the case.

6 The government will respond with broad remarks about
7 the breath of their discovery productions. They will respond
8 by trying to convince the military commission that these
9 discrepancies are not serious, they are minor, they are
10 limited in scope. We have heard this before. And the
11 military commission cannot allow those responses any more.

12 There are a couple of overarching questions that
13 thread through [REDACTED] that the military commission, I ask
14 respectfully, should keep in mind regarding RDI discovery as a
15 whole.

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1 [REDACTED]
2 Your Honor, we asked the government to answer this
3 question directly: Under whose authority did they adopt this
4 limited definition? Because it colors the discovery that we
5 have -- that we have received, and it colors the fact that
6 there has been such significant delay in that discovery.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 The second overarching question is what is the
11 government's explanation -- really, this is a related
12 question: What is the government's explanation for
13 withholding that evidence until 2018?

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 They knew that Special Agent Fitzsimmons was in

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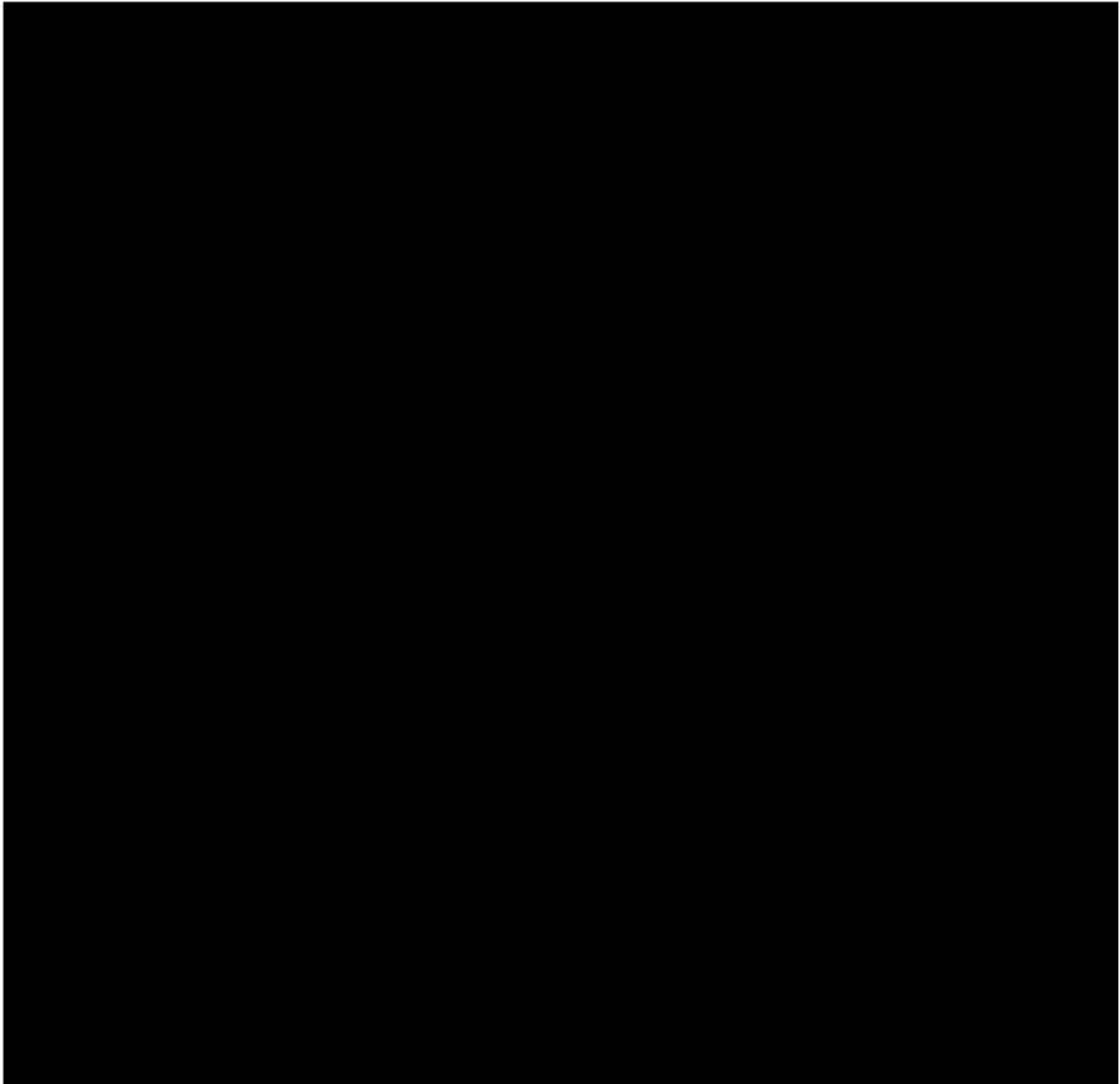
19 That brings me to our motion to compel the
20 [REDACTED] Your Honor
21 [REDACTED] We won't go over that
22 again, but I have -- the roadmap with your permission,
23 Your Honor, [REDACTED] essentially boils

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1 down to three main arguments. The first is the government

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21 If I may have access to the document camera.

22 MJ [Col PARRELLA]: You may.

23 ADC [MS. PRADHAN]: Thank you, Your Honor. The document

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1 that I'm putting up here is found in the record at [REDACTED]
2 [REDACTED] And I would like to
3 call Your Honor's attention to the first full paragraph on
4 that page. And I apologize for the quality of that copy, but
5 let me see if I can -- there we go.

6 It says, [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 And as a preliminary matter, Your Honor, I note that
13 you have not ruled on the government's desire to use
14 additional information on this, but they did provide further
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 And the point about this, Your Honor, is that medical
20 experimentation on human beings -- well, on prisoners, is a
21 crime. There are no two ways about it. There is law and case
22 law about this, both domestic and international.

23 Two days ago the ACLU released FOIA report

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1 acknowledging that the CIA had considered use of an
2 experimental truth serum on detainees. Now that plan was not
3 implemented, [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 information is there available about this? There must have
10 been other information that speaks directly to this that the
11 government reviewed in the process of creating this summary.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 And I'd like to call Your Honor's attention to

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

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[REDACTED]

Now, the specificity, Your Honor, of the purpose of that OIG interview to ascertain whether the Federal Anti-Torture Statute had actually been violated as early as 2005, that is significant. Who initiated that investigation? Was it triggered by a particular incident? Who else was interviewed in that particular OIG review? And what was the outcome? Was there a report issued on that specific potential violation? Those are all relevant questions to that paragraph, and that is why we would be seeking the information underlying that paragraph.

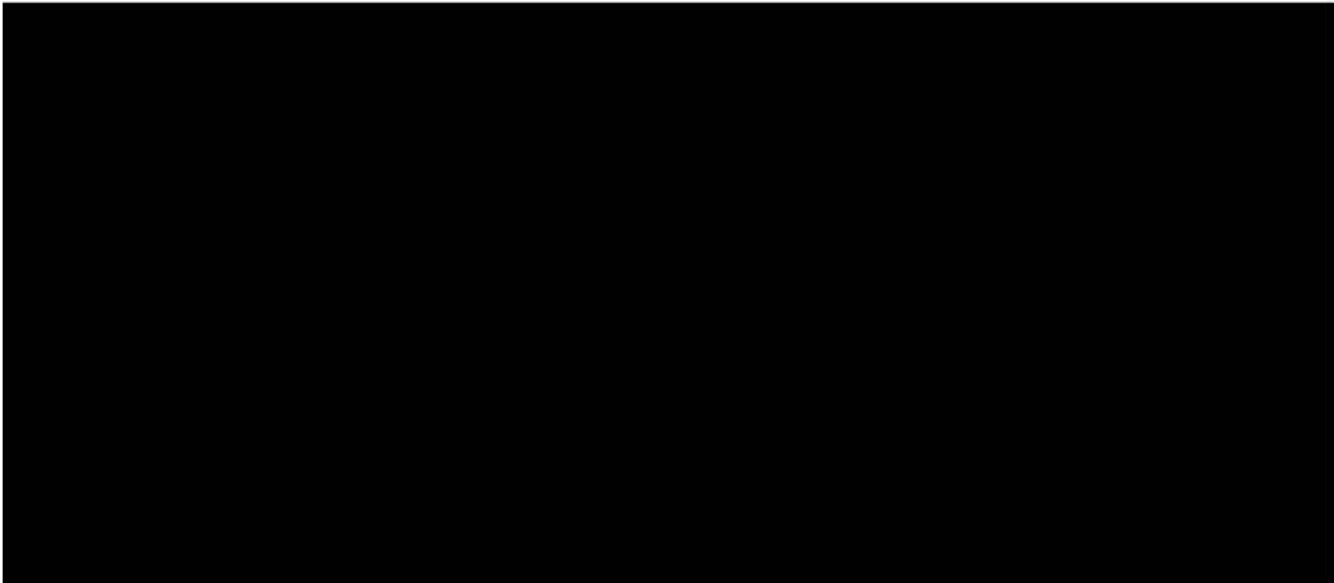
These are -- again, Your Honor, these are just a couple of examples.

[REDACTED]

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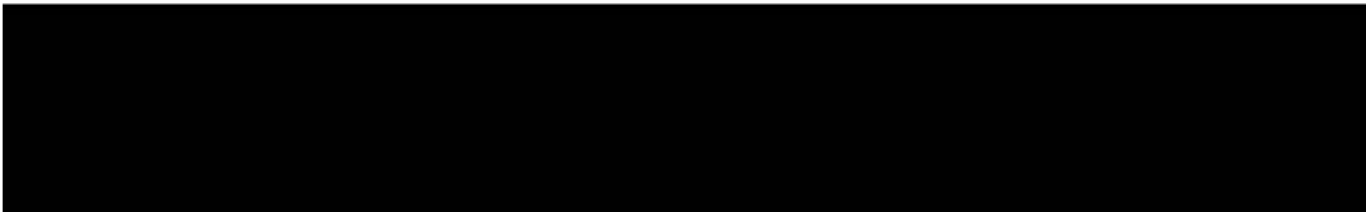


TC [MR. GROHARING]: Excuse me, Your Honor, if I could just interrupt. We are trying to find the documents. We don't have these in our materials that we discussed at the prior session, the prior 505(h) session.

So we would just ask clarification from counsel:
Which notice did this document come from?

MJ [Col PARRELLA]: Okay. Go ahead and finish your argument, finish your thought, and then if you could tell the commission where this information -- which notice it pertains from.

ADC [MS. PRADHAN]: Sure. These were already in the record, Your Honor, but absolutely.



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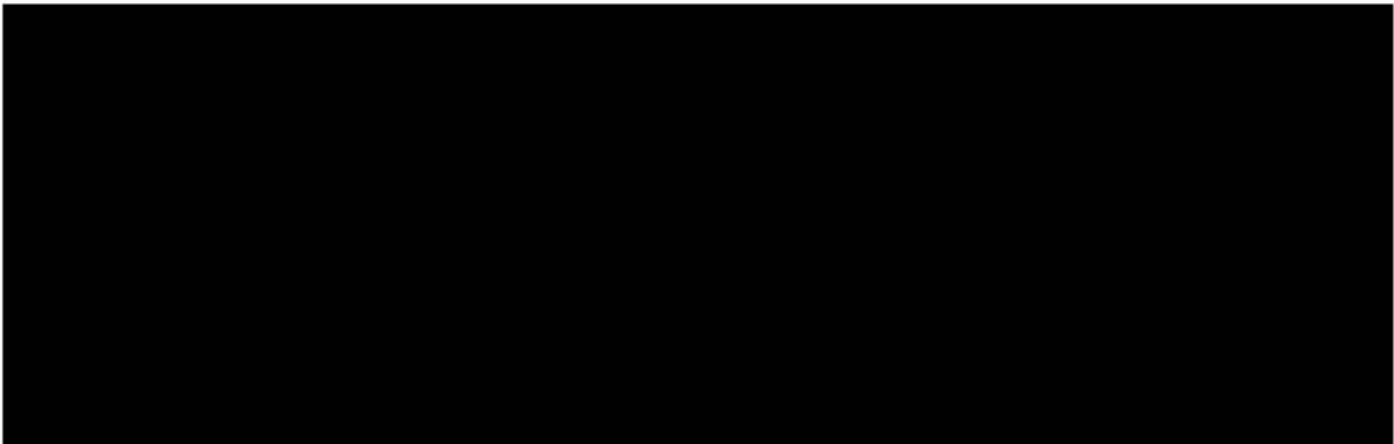
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May I have a moment to confer, Your Honor?

MJ [Col PARRELLA]: You may.

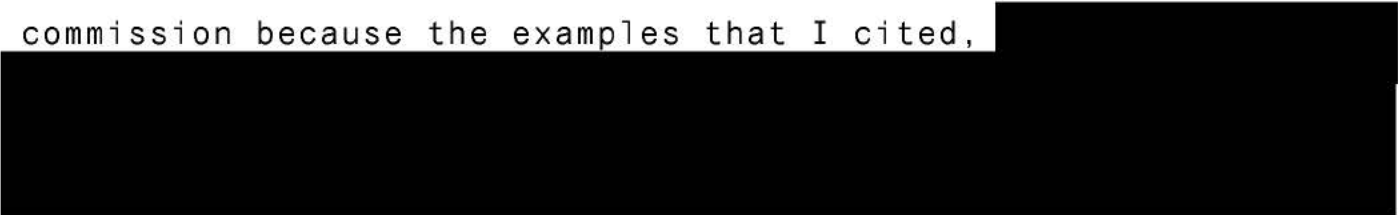
ADC [MS. PRADHAN]: Thank you.

[Pause.]

ADC [MS. PRADHAN]: I apologize, Your Honor, for the confusion.

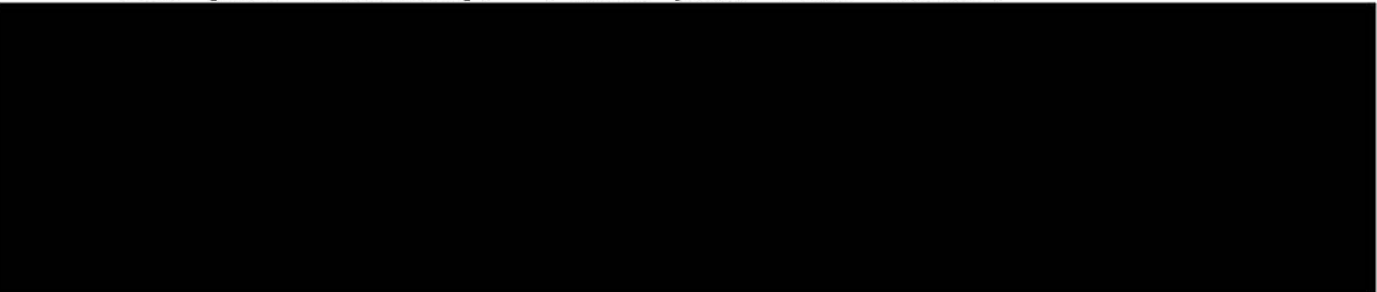
MJ [Col PARRELLA]: No problem.

ADC [MS. PRADHAN]: And I apologize to the military commission because the examples that I cited,



MJ [Col PARRELLA]: Okay.

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



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And in that the drafters of this report state, "We

17 Now, the government can, of course, give us a more
18 accurate picture of what they used in constructing these
19 profiles, but it seems clear that certainly these documents
20 are not all summarized in the discovery produced to us by the
21 government.

22 Now, moving on to my second point, Your Honor.
23 Before we conducted UFI interviews, we were able to identify

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Now, this states, Your Honor, in relevant portion --

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I apologize for the quality of the copy, but that's actually

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how we received it as well.

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But skipping ahead,

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The reasons they decided to torture them are

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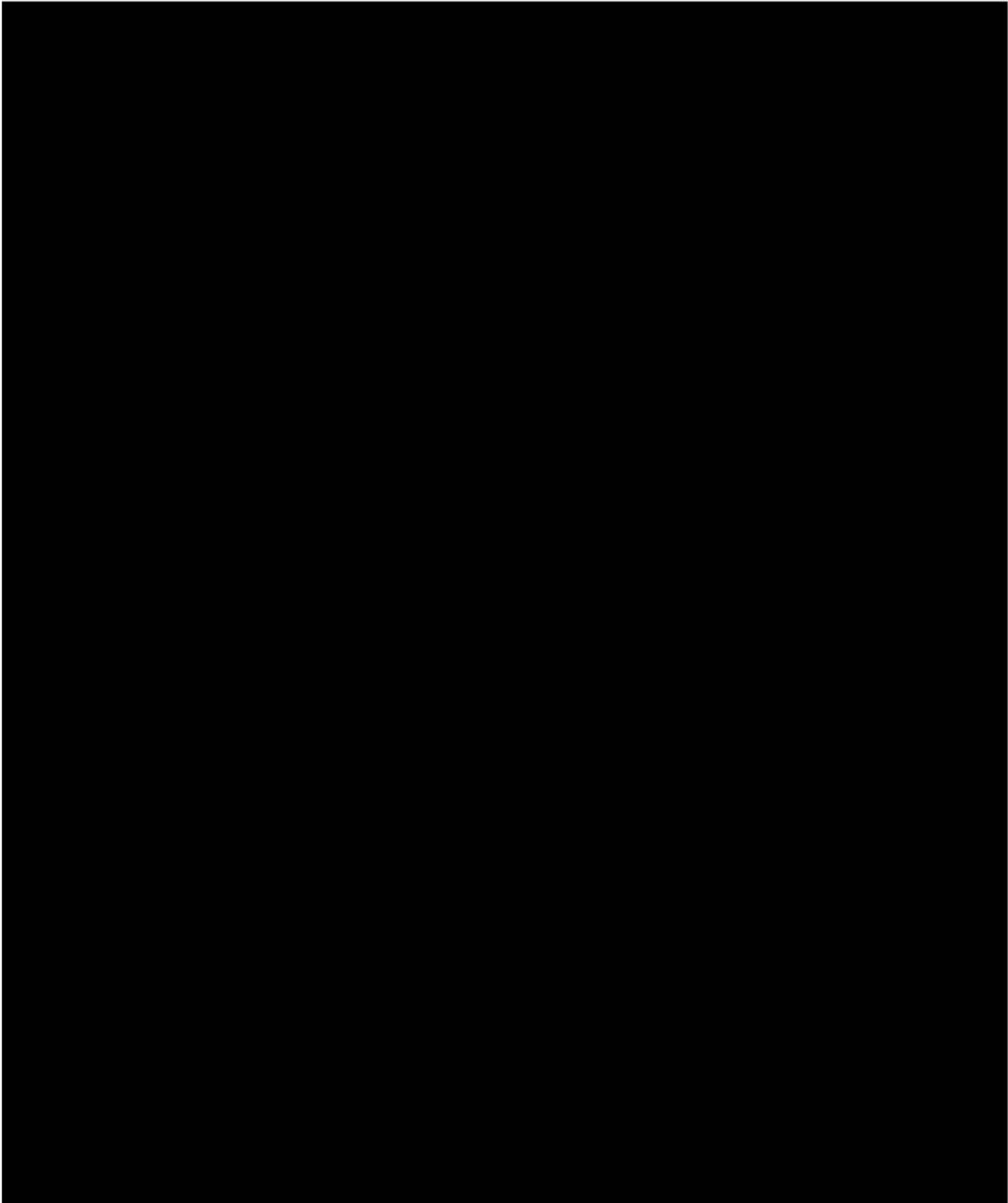
obviously relevant. And let me preempt the government here:

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1 [REDACTED] Mr. Connell is, of course, going
2 to address the protocol in these interviews and other
3 potential witnesses we want to speak to in some more detail in
4 [REDACTED]. But because I am the one who conducted [REDACTED] UFI
5 interviews, I will just say a few words, and this is reflected

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 Now, pursuant to the terms of Protective Order #4 and
14 considering the prosecution's threats in January of this year,
15 I read each witness a script at the beginning of each call,
16 introducing myself and my team members present and emphasizing
17 that we needed to discuss several restrictions. And the fact
18 that I did so is memorialized in the declarations, Your Honor,

19 [REDACTED]
20 [REDACTED]

21 I told them we would not be talking about specific
22 dates, that we would ask them -- to the extent we asked them
23 when something happened, it would only be for the month and

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1 the year. [REDACTED]

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10 as does everyone who has conducted investigations, how
11 chilling it is -- and they discussed this in their
12 declarations -- to issue such artificial barriers at the
13 beginning of an interview when you are trying to build rapport
14 to discuss difficult topics, and most often we have at least
15 had the benefit of doing it in person. [REDACTED]

16 [REDACTED] and I don't know what the
17 witnesses have been told about us in advance.

18 The government has sort of proffered certain details
19 that they told the witnesses that they had the ability to meet
20 with us in person. We just don't know. We don't know what
21 they were told ahead of time. We know that most likely CIA
22 and FBI agents spoke to them ahead of time, similarly to what
23 they did with Mr. Kiriakou that actually led to Mr. Kiriakou

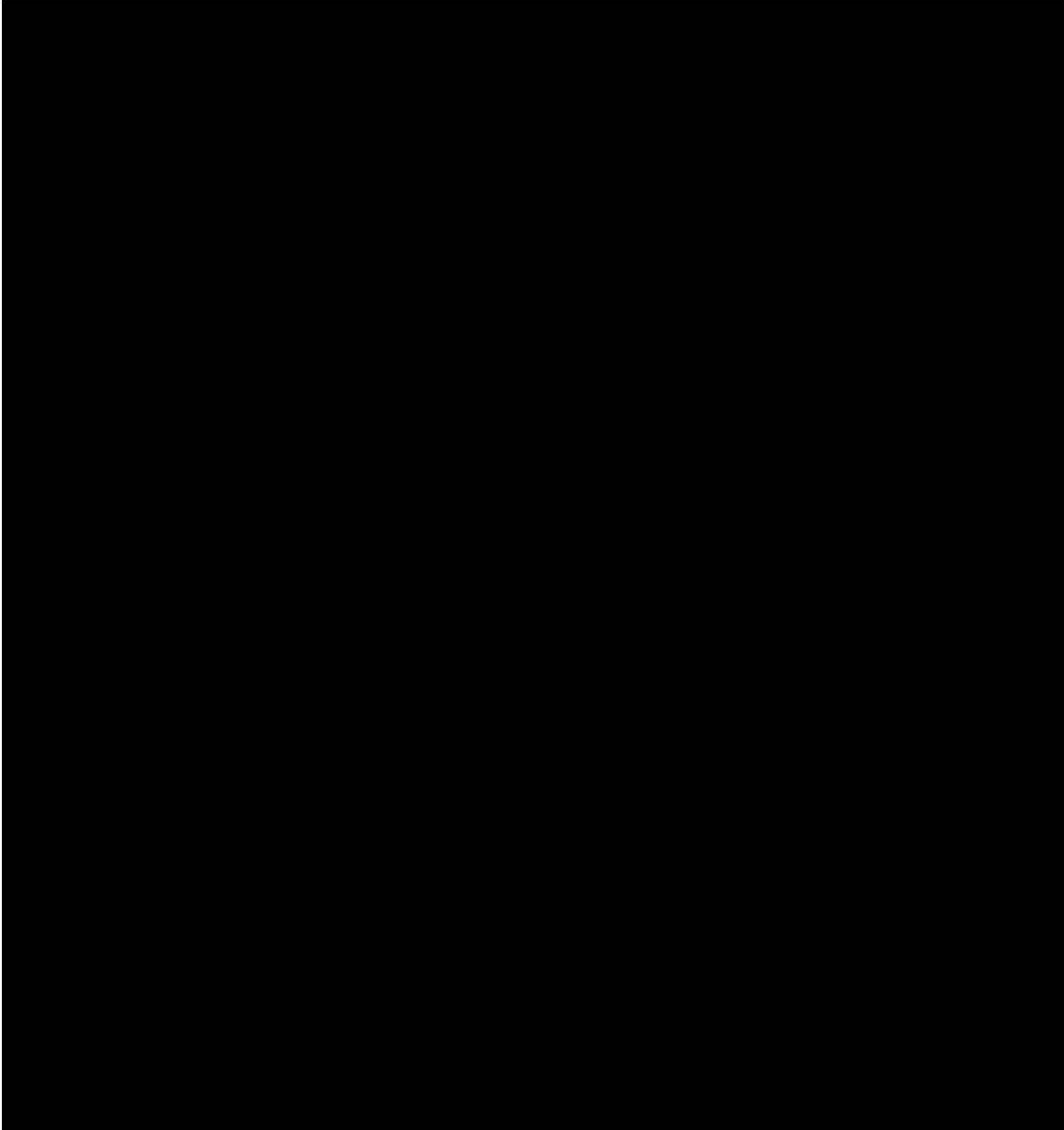
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1 refusing to speak to the defense, but we don't know what they
2 were told ahead of time. So that's the first issue.

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1 [REDACTED] They have a combined 40 years of investigative
2 experience.

3 Now, I will be honest, Your Honor, after the first

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

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1 see this -- I apologize, 

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[REDACTED]

Now, Your Honor, the military commission, I'm sure, understands what a huge area of inquiry this is for us when combined with the defendant's torture you have translators who may or may not have translated statements correctly. Incorrect translations could have led to more torture. We know that statements made or translated for the interrogators would lead to their -- to specific types of treatment by the interrogators.

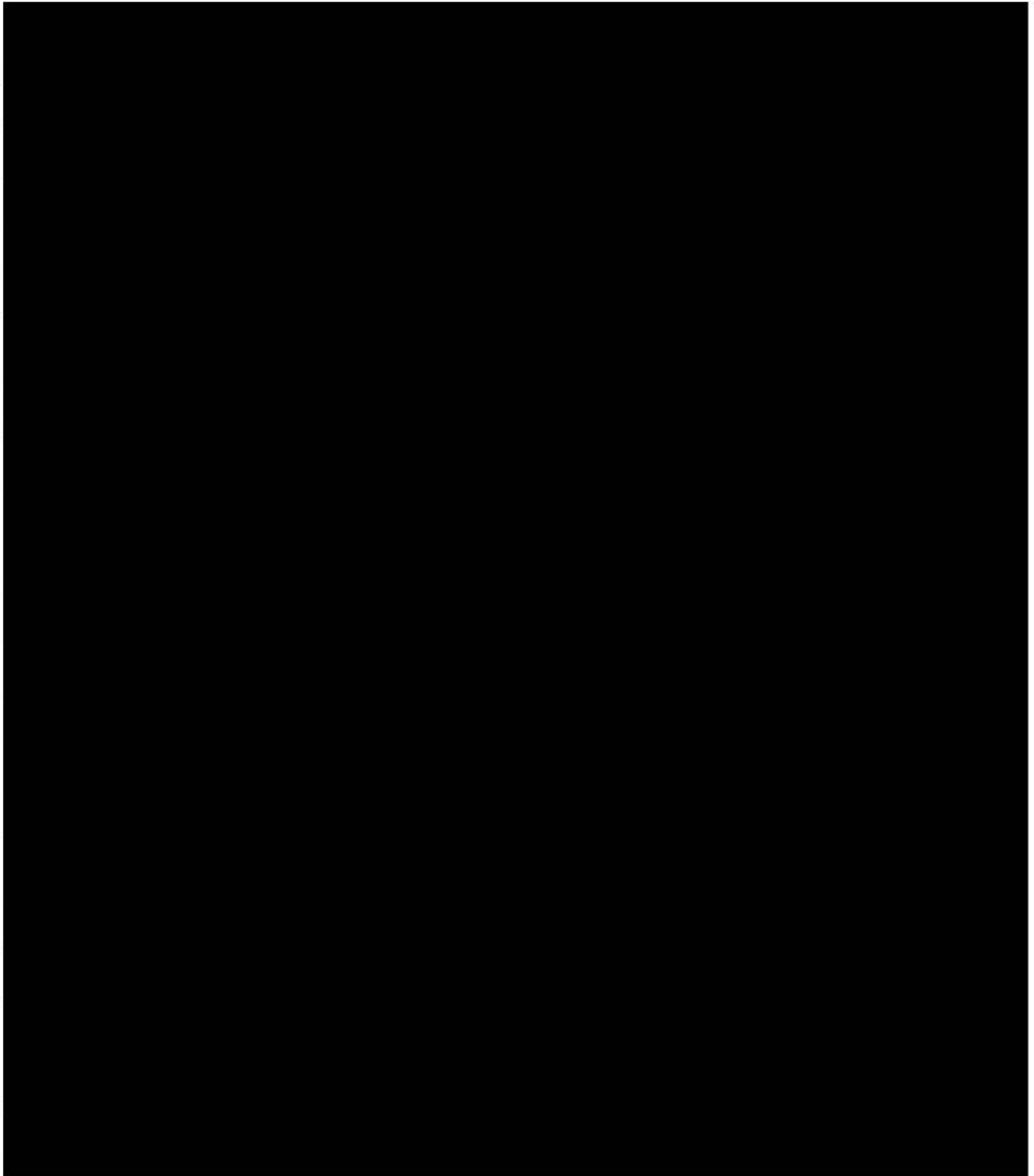
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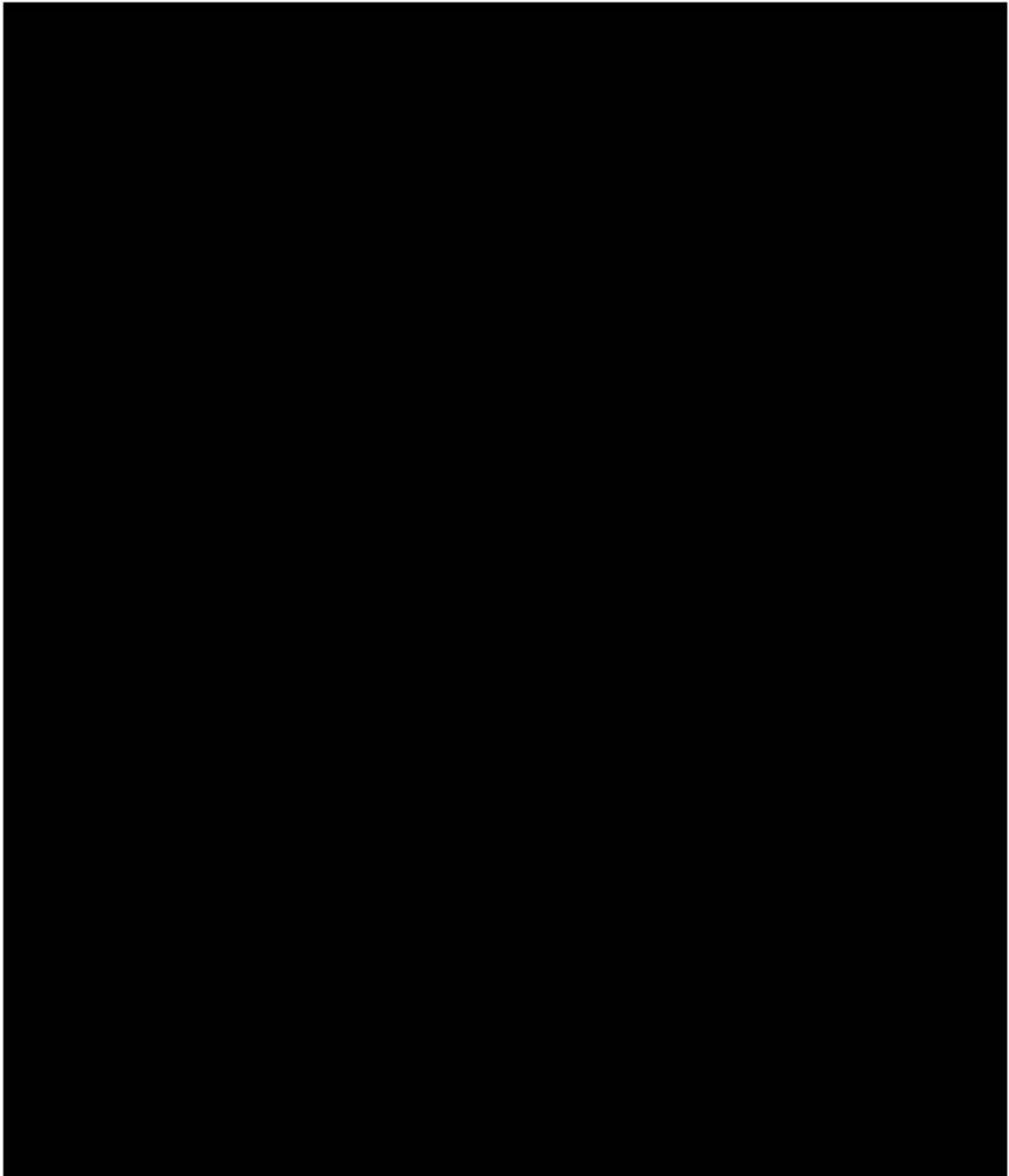


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So the government either intentionally left this

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And briefly, yesterday Mr. Groharing seemed to
downplay the importance of defense interviews with witnesses.
I think that's probably an understatement.

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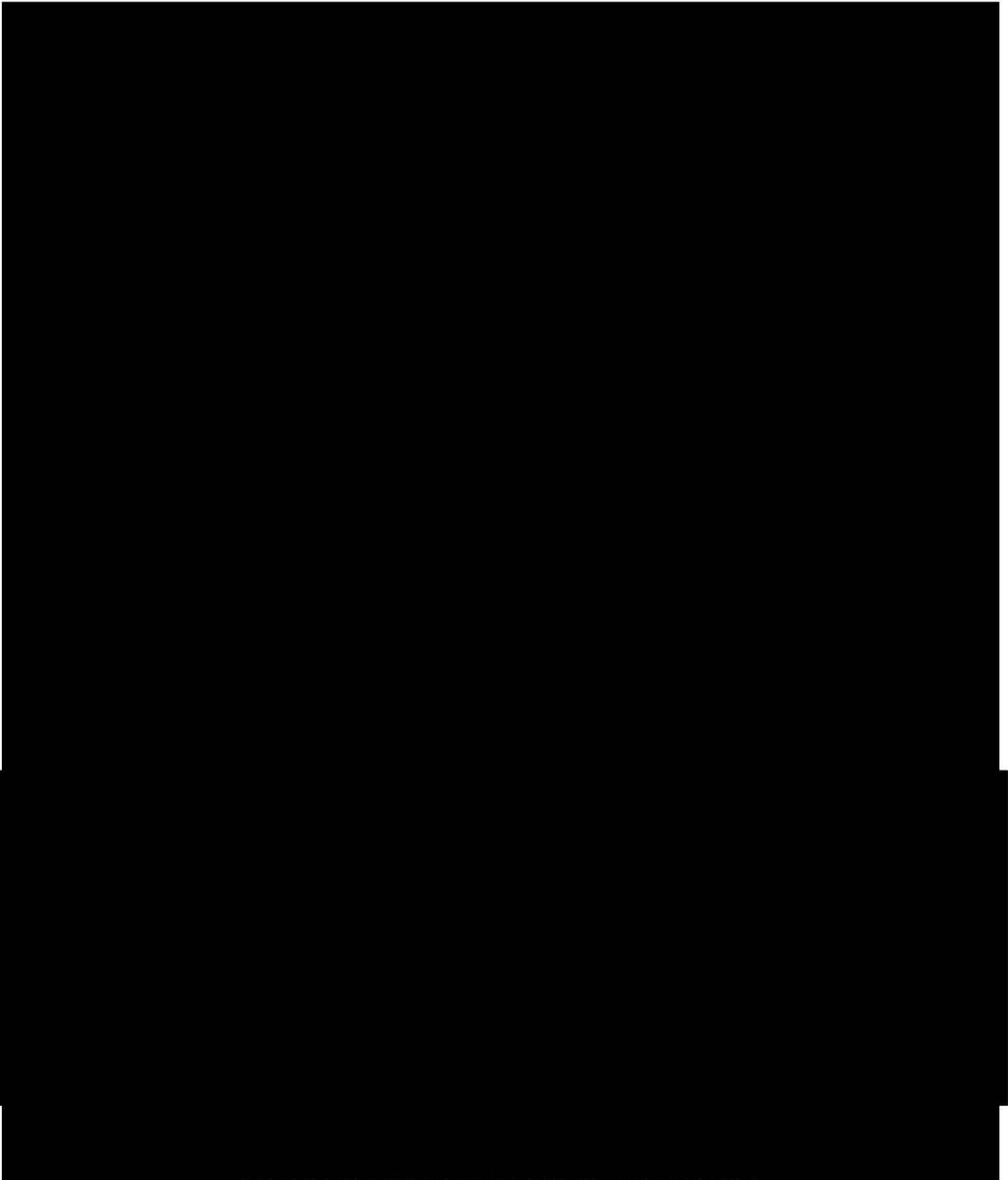
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7 I've said this on the record before, and Mr. Connell has said
8 it, were the some of the most useful discovery that we'd
9 received.

10 Perhaps the only thing worse than the government
11 withholding material discovery or giving it out in drips and
12 drabs over six years of pretrial hearings is the government
13 handing us discovery with such massive flaws.

14 Someone has to check their work here. They didn't go
15 through the 505 [REDACTED] so it can't
16 really be the military commission. And that leaves us.

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22 Subject to your questions, Your Honor.

23 MJ [Col PARRELLA]: I have none. Thank you.

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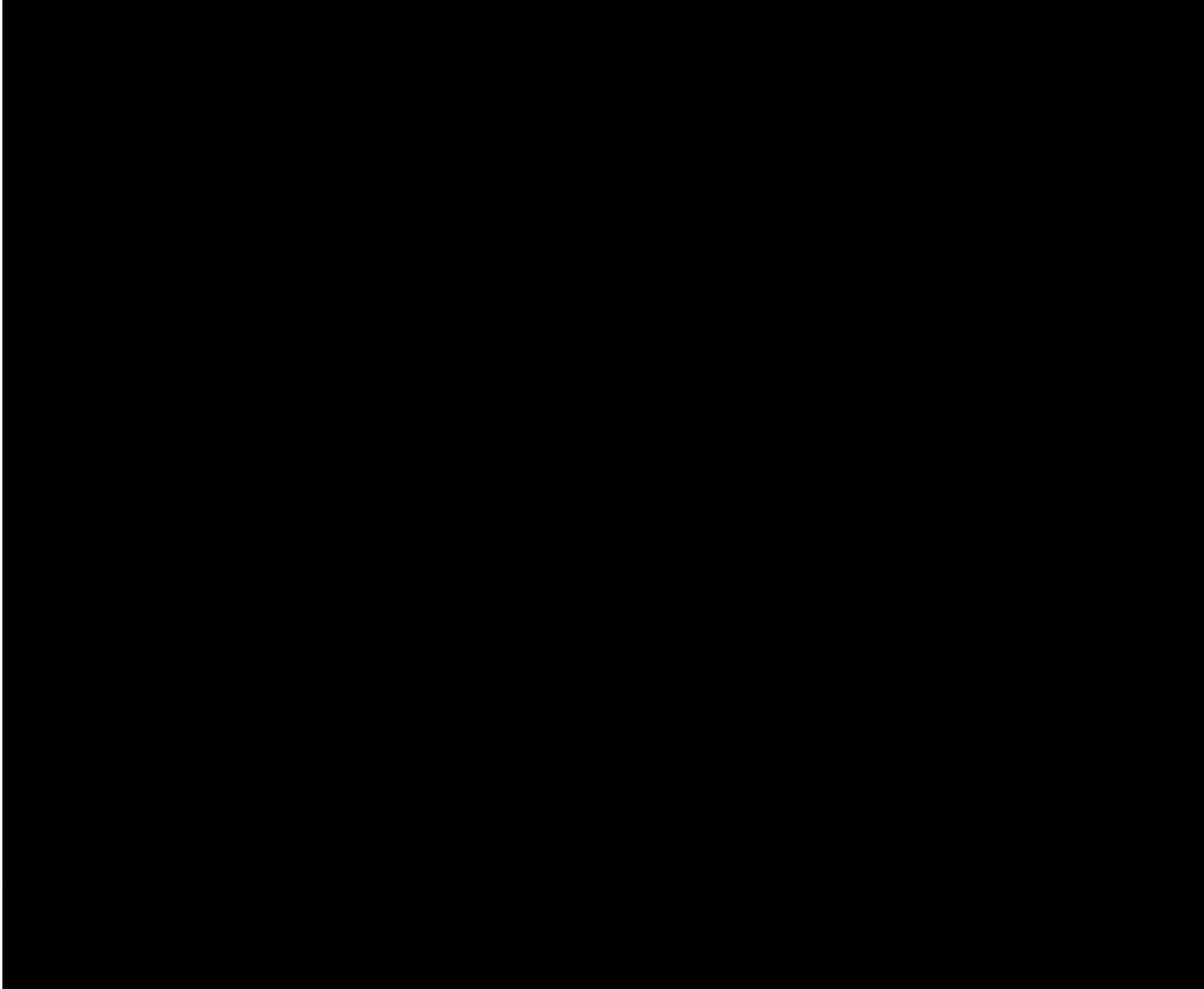
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1 ADC [MS. PRADHAN]: Thank you.

2 MJ [Col PARRELLA]: Ms. Radostitz.

3 ADC [MS. RADOSTITZ]: Your Honor, I would just like to
4 amplify a little bit on Ms. Pradhan's point number two, that

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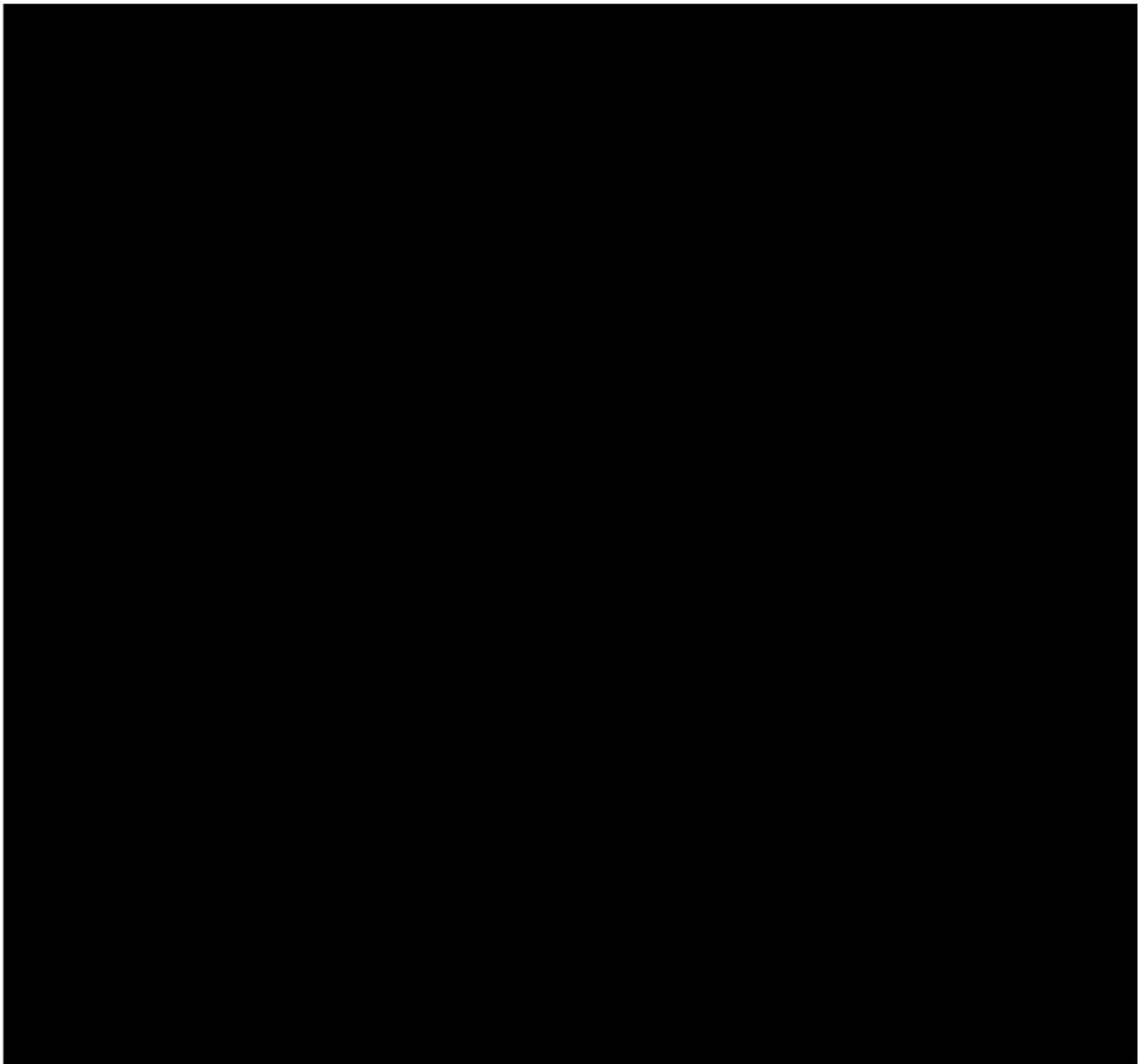
21 And then another problem is a real practical problem
22 as an investigation in a capital case, is that we look for
23 people who might know something that would be relevant to our

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1 preparation of our defense, and we go out and we find people
2 who have spoken publicly and we -- I'm going to give an
3 example.

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22 And we don't have a whole lot of time and we don't
23 have a whole lot of resources and we shouldn't be spending it

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1 traveling to go interview a witness that we get there and we
2 find out we can't actually talk to.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 MJ [Col PARRELLA]: Thank you. Ms. Bormann.

8 LDC [MS. BORMANN]: We adopt the arguments of
9 Ms. Radostitz and Ms. Pradhan.

10 MJ [Col PARRELLA]: Mr. Harrington?

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

12 MJ [Col PARRELLA]: Mr. Ruiz?

13 LDC [MR. RUIZ]: No additional argument.

14 MJ [Col PARRELLA]: Okay. Before you go, Mr. Groharing,
15 how long would you anticipate?

16 TC [MR. GROHARING]: Not very, subject to your questions,
17 Your Honor.

18 MJ [Col PARRELLA]: Okay. I'm just thinking, before you
19 go, I know you want a ruling or probably to know the breadth
20 and scope of your argument. So as I think this through, and
21 maybe it's just because I'm an optimist think that maybe you
22 are both right.

23 I don't think the government would need to notice

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