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1 information if it has already been noticed. But with that  
2 respect, I guess the question for you, Mr. Groharing, would  
3 be: These documents you provided, what's the specific 505(g)  
4 notice wherein you believe this information was previously  
5 noticed? So that would be the one thing. And I don't know if  
6 you need time to figure that out or if you have that at your  
7 fingertips.

8 TC [MR. GROHARING]: I'd need a little bit of time,  
9 Your Honor, to reference the specific defense notice that I'm  
10 talking about. The information in question comes from  
11 [REDACTED] I just don't have at my fingertips the notice where  
12 the defense asks to discuss that information in closed  
13 session.

14 MJ [Col PARRELLA]: I think where we fall in is that the  
15 commission has noticed that Mr. Connell's 505(g) notices are  
16 typically very precise, so if the government's information  
17 doesn't fall within one of the precise areas noticed, then I  
18 think his objection has validity.

19 And that sort of weighs in favor of the defense being  
20 particular, because I guess in that sense you're limiting the  
21 extent to which the government can then stand up and say it  
22 falls within that information already noticed.

23 Some of the other notices, however, are much broader,

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1 and I think the commission, at least at this last 505(h)  
2 hearing, was pretty generous in some of those rather broad  
3 notices. So to the extent it falls within one of those, then  
4 I'm inclined to say that it is fair, fairly noticed, and the  
5 government should be able to get up and argue it here today.

6 Okay. So with that I think what we'll do is we'll go  
7 ahead and take an hour recess for lunch and come back, and  
8 then that that will give the government an opportunity to take  
9 a look and see if it falls within that gamut.

10 The commission is in recess.

11 LDC [MR. CONNELL]: Sir, may I ----

12 MJ [Col PARRELLA]: I'm sorry, let's hold on one second.

13 LDC [MR. CONNELL]: I just want to throw out the idea that  
14 possibly a 30-minute lunch might be sufficient. I know that a  
15 lot of people have a lot of things to do and pack out and  
16 other things and we all want to move as best we can, so I'm  
17 just throwing out that idea.

18 MJ [Col PARRELLA]: We're going to stay with an hour.

19 Thank you.

20 [The R.M.C. 806 session recessed at 1207, 16 November 2018.]

21 [The R.M.C. 806 session was called to order at 1314,  
22 16 November 2018.]

23 MJ [Col PARRELLA]: All right. This commission is called

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1 back to order. All parties present before the commission  
2 recessed are again present.

3 Mr. Groharing. And if you could start off by just  
4 addressing the issue we discussed about the notice.

5 TC [MR. GROHARING]: Yes, Your Honor. Over the recess we  
6 looked, and I stand corrected. I don't believe there is a  
7 notice.

8 The information in question comes from [REDACTED].  
9 I was under the impression that that motion was part of one of  
10 the defense notices that was approved, but I don't believe  
11 that is the case. I don't believe there's a notice that  
12 covers the motion in toto.

13 And so I agree in that respect with Mr. Connell as  
14 far as that's not information that either the defense or the  
15 government has noticed for discussion in this closed session,  
16 so I don't intend to reference the subject matter contained  
17 either [REDACTED] as far as the classified  
18 information in there, or in the exhibits that I've offered to  
19 the commission.

20 I would ask the commission to consider those  
21 exhibits, though, on the motion, but I don't need to discuss  
22 them, other than just a general reference to orient the  
23 commission on why they are significant to the motion.

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1 MJ [Col PARRELLA]: I understand.

2 TC [MR. GROHARING]: May I proceed, Your Honor?

3 MJ [Col PARRELLA]: You may. Please.

4 TC [MR. GROHARING]: Your Honor, I think we should start  
5 with the relief requested [REDACTED] And that's, the defense  
6 requested the original documents that formed the basis for  
7 [REDACTED].

8 There has been a lot of confusion throughout the  
9 filings as far as what these documents are. And just to be

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18 The synopses in question that we have discussed this  
19 morning are noncompulsory products that were originally  
20 prepared by the government and proposed to the military judge  
21 in its original [REDACTED] but later withdrawn.

22 And the government did not request the military judge  
23 approve those summaries for provision to the defense.

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1 Nevertheless, we went ahead and provided them to the defense  
2 to aid in their understanding of the materials and how these  
3 people fit into the overall discovery with respect to the RDI  
4 program.

5 I'll talk a little bit about how they were created.  
6 There are a number of products that the government produced  
7 pursuant to the [REDACTED] the [REDACTED]

8 [REDACTED]  
9 [REDACTED]  
10 And then with respect to d., again, as I said, in

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 So when we prepared the synopses, those were prepared  
19 using the same batch of information that we used to populate  
20 the other products. So there are -- there is information from  
21 statements. [REDACTED]

22 [REDACTED]  
23 [REDACTED] That comes from counting up the

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9           They weren't meant to be all inclusive by any  
10 stretch. They weren't meant to be comprehensive by any  
11 stretch, but just something to orient the defense with respect  
12 to how that person generally fit into the program.

13           And so to the extent there are complaints that they  
14 are not comprehensive, they weren't meant to be. That's not  
15 the purpose for which we prepared them, and the government  
16 certainly isn't required to prepare them for that purpose.

17       MJ [Col PARRELLA]: So in the absence -- I understand that  
18 point, and that was a question that I had, that they're not  
19 meant to be all inclusive or comprehensive.

20           So what's the mechanism, from the government's  
21 perspective, the defense would have to make their

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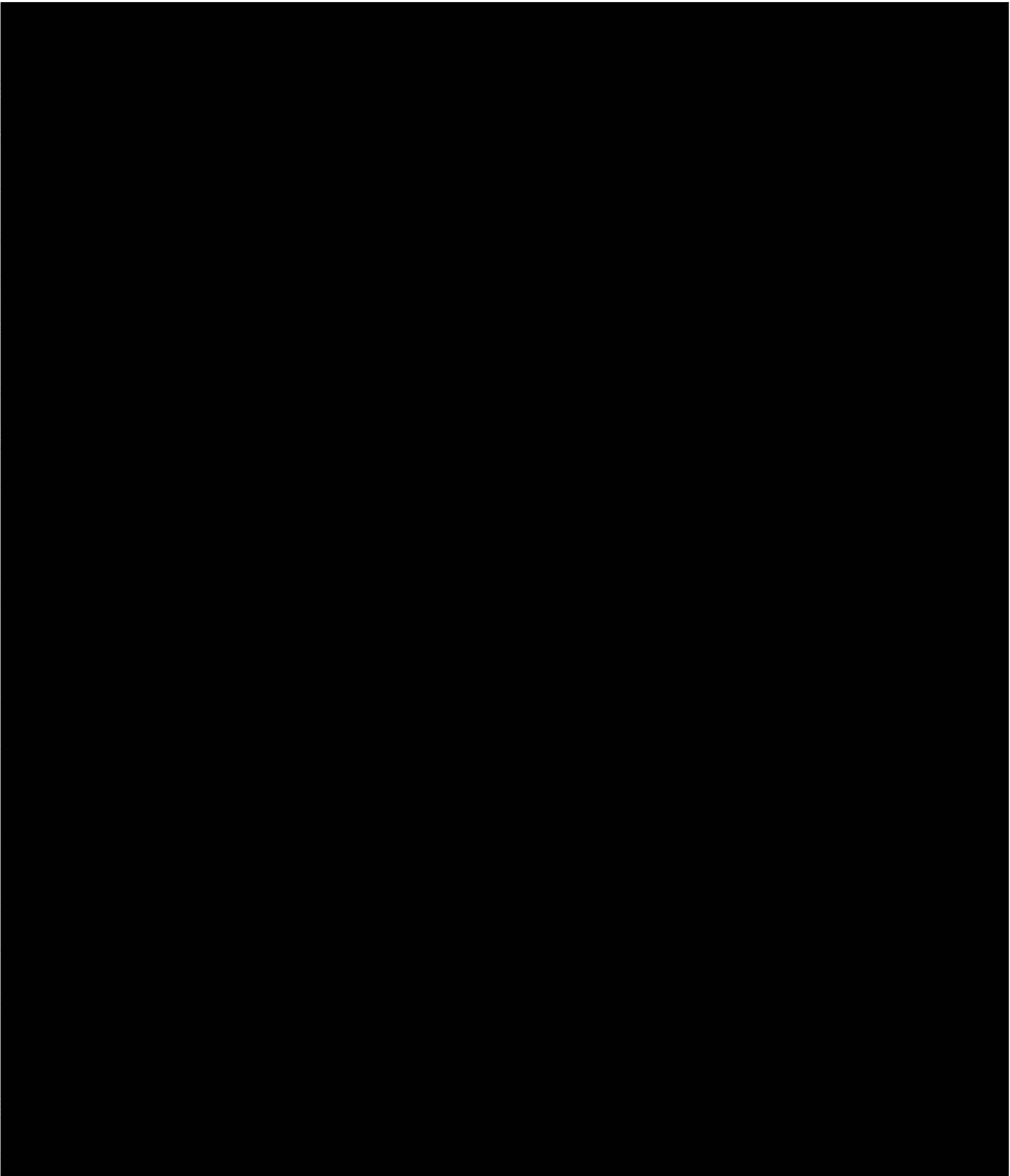
23       TC [MR. GROHARING]: Well, certainly they could take all

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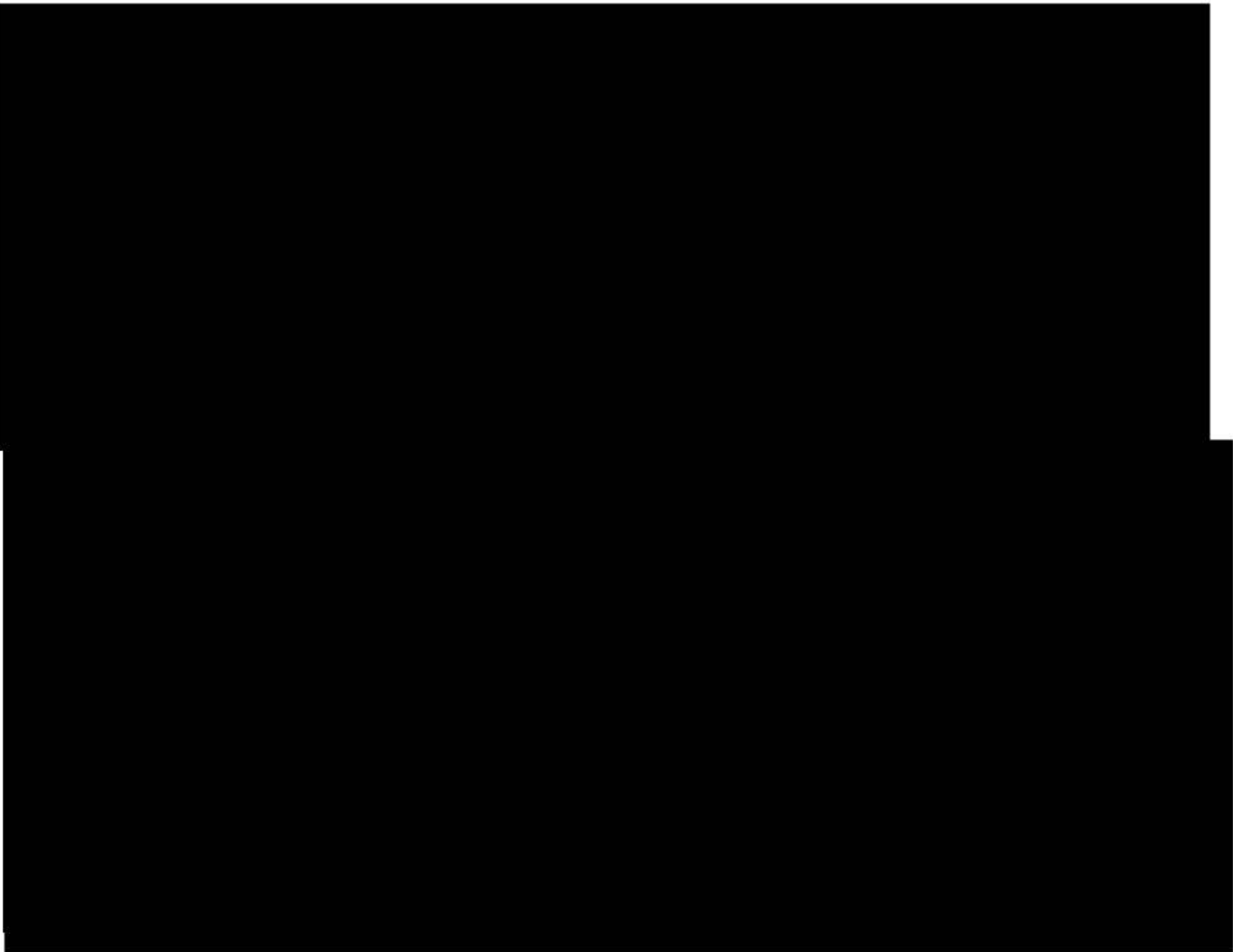


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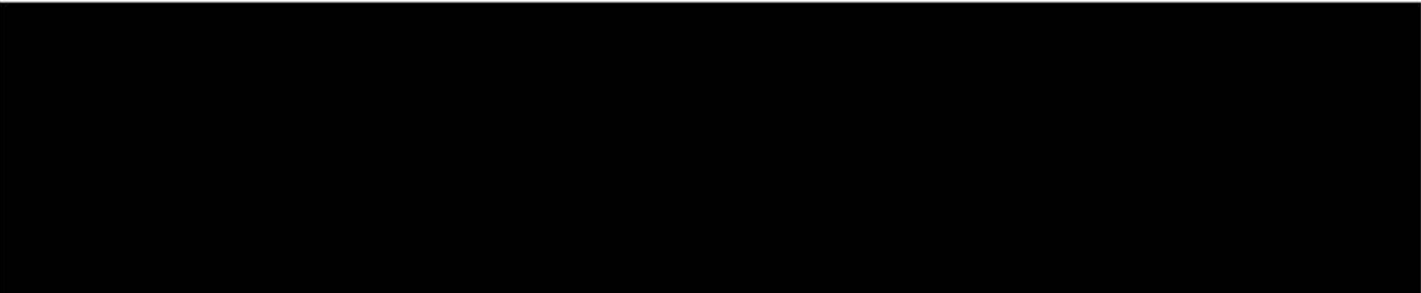
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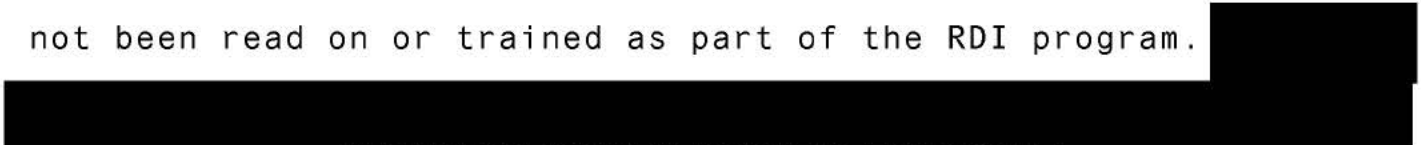
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Jim Fitzsimmons -- who we've talked a lot about him,



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At that point Jim Fitzsimmons did not have -- he had  
not been read on or trained as part of the RDI program.



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[REDACTED]

They have -- I would say that the only reason they know about Special Agent Fitzsimmons is because of the discovery that we've provided the defense.

As early as 2014 we provided discovery to the defense, documenting that Special Agent Fitzsimmons was

[REDACTED]

These materials that the government provided to the defense are cited by the defense. I would just point Your Honor to [REDACTED] That's the report that the government provided to all the defense, I believe, in [REDACTED] documenting Special Agent Fitzsimmons' interviews of [REDACTED]

[REDACTED]

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1 MJ [Col PARRELLA]: Mr. Groharing, the synopses that you  
2 have provided the defense, Ms. Radostitz brought up a point  
3 that they are only provided to the respective accused. Is  
4 that the case? Or are they provided to counsel for all of the  
5 accused?

6 TC [MR. GROHARING]: [REDACTED]

7 [REDACTED] So that was not done -- that  
8 discovery was not any different for any of the teams.

9 MJ [Col PARRELLA]: Okay. And then you said discovery was  
10 provided, regarding the FBI, to the defense and to the  
11 commission. Where was -- when was it provided to the  
12 commission? [REDACTED]

13 TC [MR. GROHARING]: Your Honor, I believe -- one moment,  
14 Your Honor. I can get you the precise -- Your Honor, its's  
15 [REDACTED] I believe it's in the defense pleading.

21 [REDACTED]  
22 [REDACTED]  
23 government has provided significant additional information

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7 MJ [Col PARRELLA]: Is that related to why we are delaying  
8 538 and 561?

9 TC [MR. GROHARING]: Yes, Your Honor.

10 MJ [Col PARRELLA]: I understand.

11 TC [MR. GROHARING]: So one of the arguments of the  
12 defense was with [REDACTED]

13 [REDACTED] That was intentional. These aren't things, as I've  
14 said, that were created and we were just summarizing and  
15 turning over -- or they aren't things that existed and we  
16 summarized and turned over. These are things that we created  
17 ourselves, and specifically with the purpose of providing them  
18 for the individuals we identified as being direct and  
19 substantial for the defense. So that's intentional.

20 [REDACTED]  
21 [REDACTED] or I think more appropriately, more information,  
22 they should make a discovery request. They should ask the  
23 government for specific additional information regarding the

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1 particular matter. But the government has no obligation to

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

7 And just to be clear, those were materials that we  
8 provided directly to the defense; they didn't go through the  
9 505 process. Those aren't summaries that were approved by the  
10 military judge and then we provided them.

11 So we addressed in our motions -- we provided  
12 responses to specific defense claims [REDACTED]

13 [REDACTED] we addressed that in our  
14 filing [REDACTED] Both of those individuals were

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 They did appear enough in the materials that we  
20 provided a UFI so that the defense could make sense of the  
21 discovery that they had. But if you look at either of those,  
22 and we addressed this in our filing, neither had any  
23 meaningful contact with any of the accused in this case.

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1           The government did acknowledge, in response to the AE  
2           [REDACTED] and that  
3           [REDACTED] We addressed  
4           that in our filing.

5           I would note, though, Your Honor, that although the  
6           [REDACTED]  
7           [REDACTED]  
8           [REDACTED]  
9           [REDACTED]  
10          [REDACTED]

11           What I would respectfully suggest in those type of  
12          instances, that the defense could have just asked us and we  
13          would have explained the discrepancy and would have been able  
14          to explain to them why they have different -- differing  
15          information.

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

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7           So that's not, absent some other connection ----

8           MJ [Col PARRELLA]: Hold on one moment, please.

9   [Pause.]

10          MJ [Col PARRELLA]: Okay. Mr. Groharing, you may  
11 continue.

12          TC [MR. GROHARING]: So, Judge, I was just saying, absent  
13 some other connection, an allegation of abuse related to  
14 another detainee is not something that the government would  
15 necessarily provide in this case. Obviously, if it was  
16 closely related to our accused it may become relevant.

17               But particularly with this one, the broomstick  
18 incident with respect to Mr. Ali is not something that the  
19 government is disputing at all. [REDACTED]

20 [REDACTED] that we provided to the defense. To the extent  
21 that individuals talked about that incident to the [REDACTED]

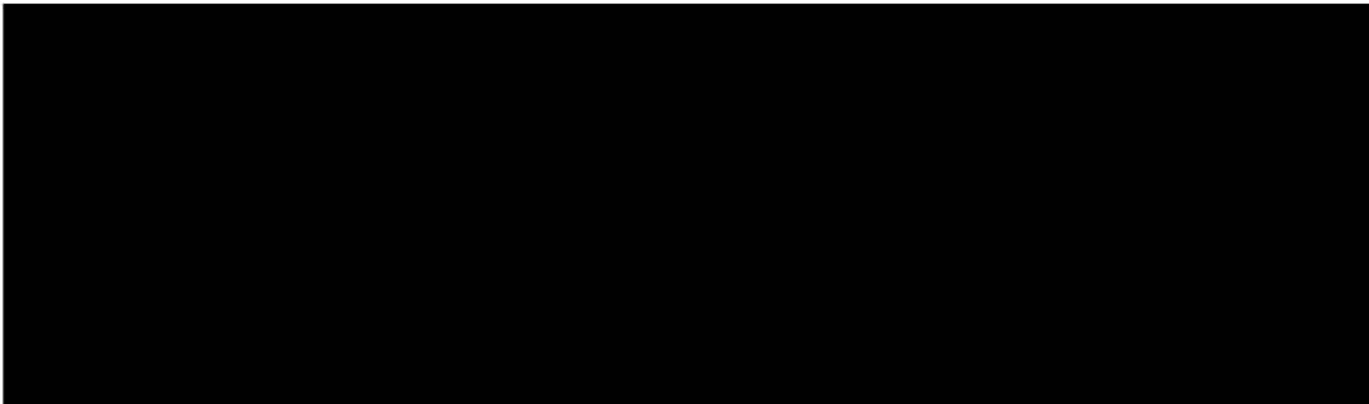
22 [REDACTED] we provided that to the defense, and we don't dispute  
23 in any way that that happened.

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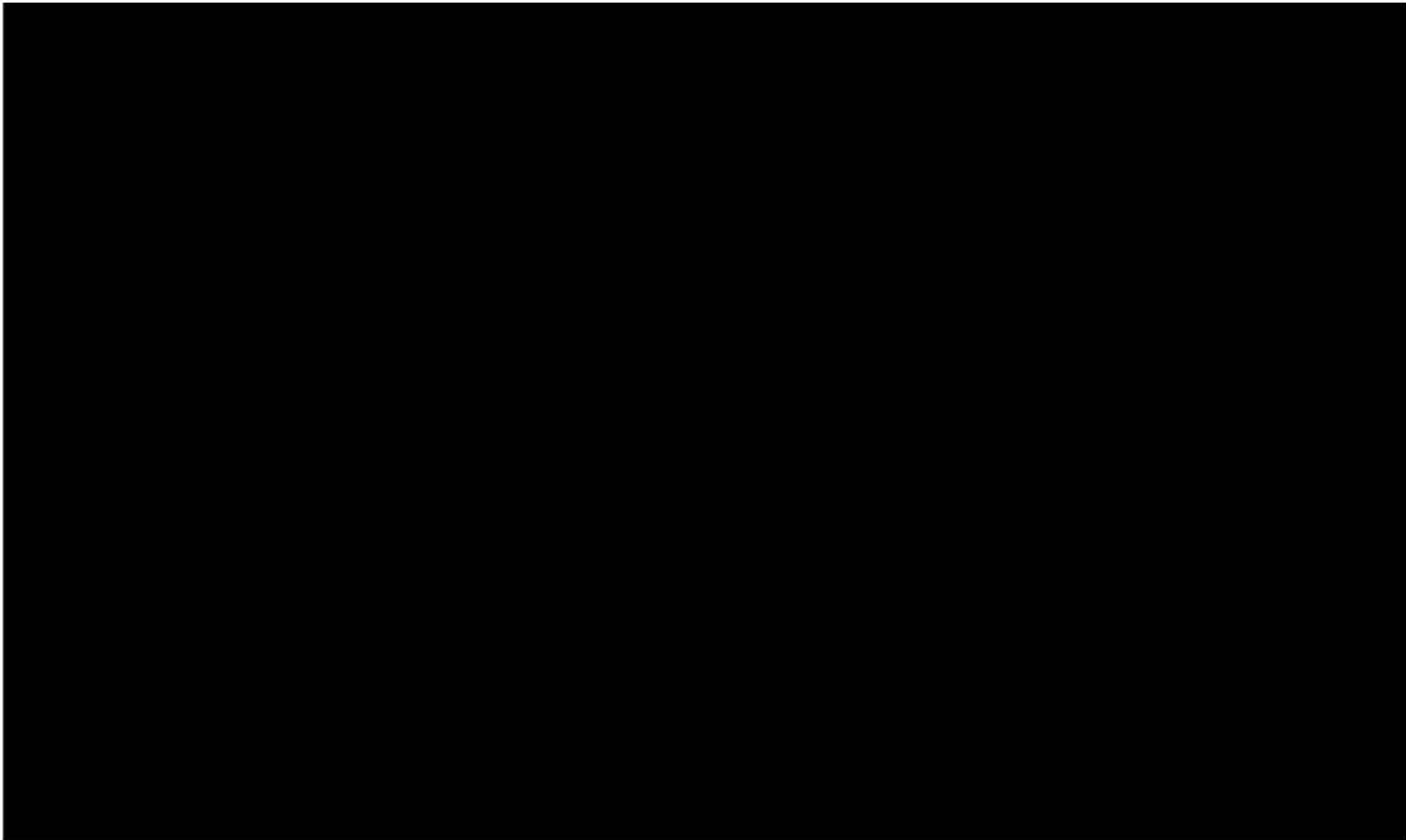


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And so the government, when making these summaries, has to go with what we have. And so to the extent that information is incorrect in original materials, that information could end up in the defense summaries. We don't audit every piece of information in the original materials of the CIA when making these summaries.



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1 we've provided to the defense. We've provided 185 statements  
2 regarding these investigations. And many statements from  
3 within those materials are contained in the d. synopses. And  
4 I think that's where some of the confusion comes in.

5 Just moving specifically to [REDACTED] and, Judge, that  
6 was a reply filed by the defense. The government does offer  
7 [REDACTED]  
8 [REDACTED] portions of those. And they go through the  
9 [REDACTED] And information within those documents is  
10 highlighted, such that Your Honor will be able to see exactly  
11 the information the defense claims they do not have in  
12 [REDACTED]

13 Again, these are matters that the government suggests  
14 should be brought to the attention of the prosecution directly  
15 by the defense. I think most of these perceived discrepancies  
16 are easily explained, and we're happy to do that.

17 In this case we were able to find all the references  
18 [REDACTED] and have now pointed the commission's and  
19 the defense's attention to them. We could have done that  
20 without the need of any time of the commission or any filings  
21 necessary. I would commend that practice to the defense, and  
22 we are happy to engage in it as necessary.

23 So, Your Honor, the request for relief is for all

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1 [REDACTED]  
2 summaries -- I'm sorry, synopses. That information has been  
3 provided to the defense in other materials that they have, and  
4 so there is no reason to go and revisit the original materials  
5 and consider providing the original materials to the defense.  
6 That request should be denied.

7 And the government would just suggest that to the  
8 extent the defense has questions, they raise those with us,  
9 and we are happy to answer them.

10 MJ [Col PARRELLA]: Thank you, Mr. Groharing.

11 Okay. Ms. Pradhan.

12 ADC [MS. PRADHAN]: Thank you, Your Honor. I just want to  
13 note that of the dozens of examples of major discrepancies  
14 that you find [REDACTED]  
15 Mr. Groharing really only addressed a couple of those today.

16 And again, what I said at the beginning of my  
17 arguments remains true, that the government stood up,  
18 minimized the few very small discrepancies, and didn't really  
19 address the big ones.

20 MJ [Col PARRELLA]: Okay. Let me get to, I guess, an  
21 underlying question that I have.

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col PARRELLA]: The government has represented that --

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1 I mean, these synopses were comprised, arguably  
2 gratuitously -- there wasn't necessarily an overt  
3 requirement -- but were comprised of information that has been  
4 provided to the defense. So in other words, they took the  
5 substitutions provided to the defense, put together this index  
6 to assist in making sense of it.

7           So I guess what else is it -- I mean, I understand  
8 that you want the underlying documents. But my predecessor  
9 already approved those substitutions. So if you don't like  
10 the synopses, why couldn't you just make your own synopses?

11           And I guess you demonstrated to the court, through  
12 the use of these vivid examples, that you are able to sort of  
13 understand where there is holes in the synopses and where you  
14 may need additional information, and in some aspects you have  
15 gathered that information.

16           So I guess, you know, it sounds like a motion for  
17 reconsideration is, I guess, where I'm going here.

18           ADC [MS. PRADHAN]: Not at all, Your Honor, and let me  
19 explain why. Because we're talking about several different --  
20 I think the government used the word "chart." I think we're  
21 talking about several different things here.

22           So we do -- it is our position that the information  
23 [REDACTED] and you heard

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1 that argument in open session, so I won't repeat it here  
2 today. Because otherwise the only discovery that the  
3 government has provided, [REDACTED]

4 [REDACTED]  
5 MJ [Col PARRELLA]: Okay. But they represented too though  
6 that it is not an all-comprehensive, complete synopsis of  
7 those substitutions, those approved substitutions.

8 ADC [MS. PRADHAN]: I understand, Your Honor. But to be  
9 clear, [REDACTED]  
10 maintain are not compulsory, that we believe are compulsory,  
11 were not approved by the military commission; they were not  
12 subjected to the 505 process. So they have not been reviewed  
13 or compared with any other discovery that the defense has  
14 gotten.

15 And that is precisely why we are here, because the  
16 government produced those directly to us. They didn't put it  
17 through a 505.

18 MJ [Col PARRELLA]: But the process to get to that, what  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 ADC [MS. PRADHAN]: No, Your Honor, and the reason is

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1 this: Judge Pohl did certainly go through the 505 process to

2 [REDACTED]  
3 [REDACTED]

4 What we are saying is that that discovery, all of  
5 those documents, do not contain all of the documents that  
6 underlie the profiles that the government produced directly to  
7 us; that there is other information in the universe of  
8 documents that the government used to create those profiles  
9 that are actually not in the discovery that Judge Pohl  
10 approved.

11 MJ [Col PARRELLA]: Okay. So let's say that that's true.  
12 So if anything, then they gave you more than what was  
13 required, correct?

14 ADC [MS. PRADHAN]: That's not our position, Your Honor.  
15 Our position is [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 So that's my first point, is that they are -- they  
21 are obliged to provide us more information than what was just  
22 in that chart, right? And that's actually reflected in the  
23 record by statements -- in statements from Judge Pohl in, I

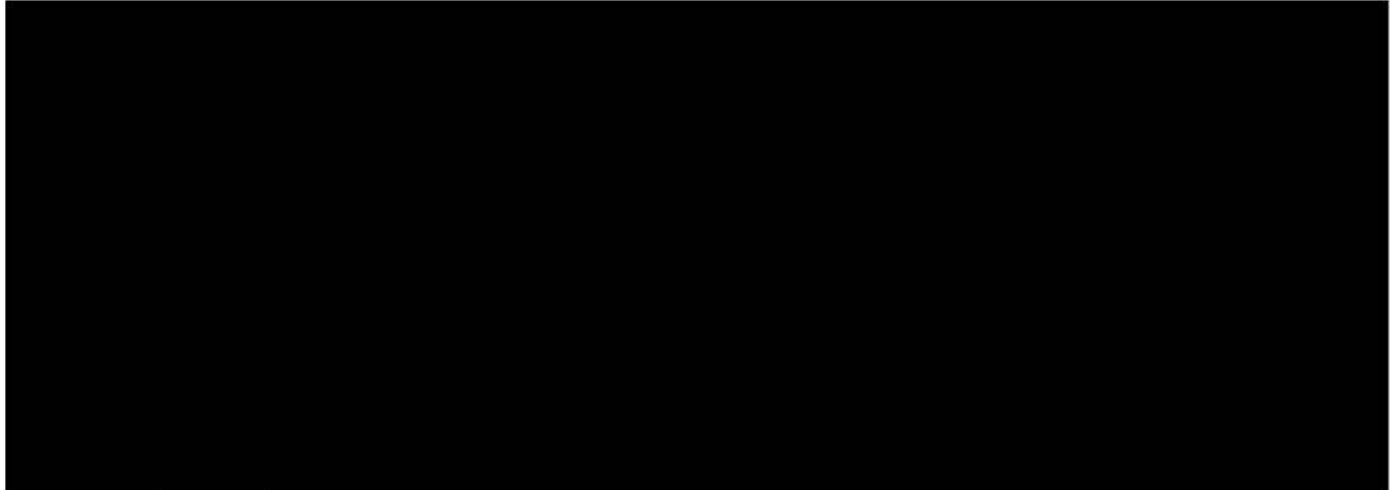
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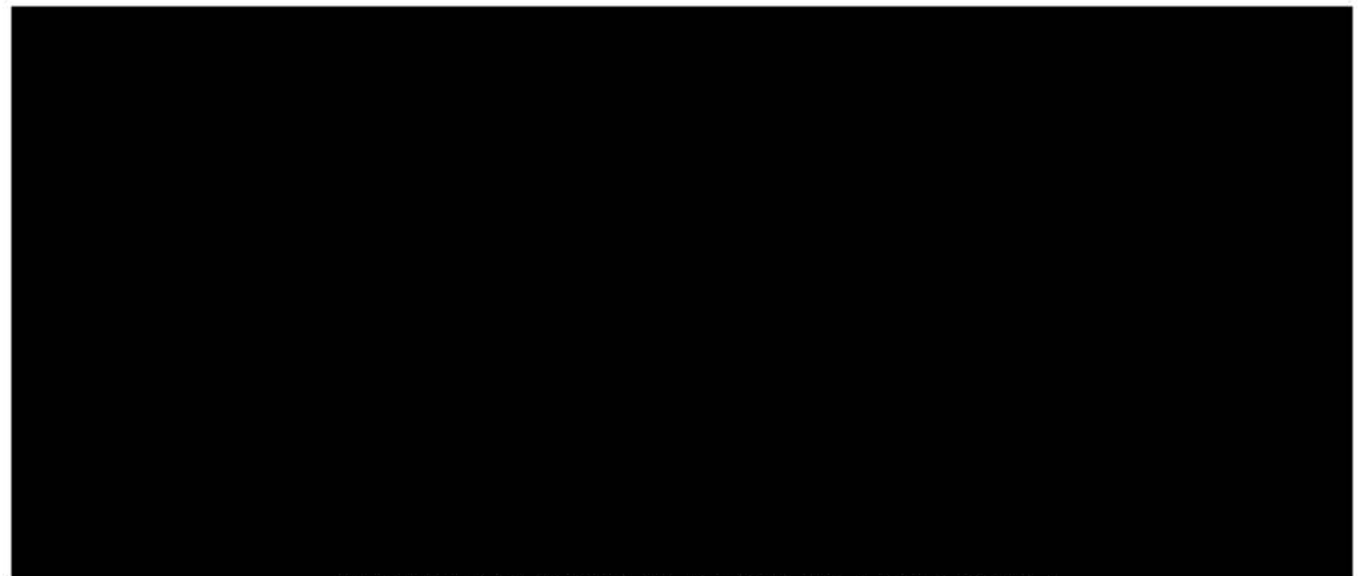
1 believe, January and again in March when he stated why can't  
2 you give the defense something that says on this date these  
3 were the people who were there, this is what they were doing  
4 to them, right?

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12 A, for [redacted] the universe of documents that have to exist, and  
13 that comprise some of the examples I provided to the military  
14 commission in my original argument today. Some of the  
15 examples of the documents that have to exist, that the

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[REDACTED]

Now, they may not be obliged to produce this information to us, and that's a question for the military commission. But having produced it, they are obliged not to produce inaccurate information to us.

MJ [Col PARRELLA]: Well, but they represented to you at the time they gave them -- there is no guarantee on there that they are all inclusive, comprehensive. I mean, the government stated that here today in open court.

ADC [MS. PRADHAN]: Yes, sir.

MJ [Col PARRELLA]: And certainly the defense would be free to come up with their own better product, add to the product, change the product.

ADC [MS. PRADHAN]: Yes, sir.

MJ [Col PARRELLA]: But it seems the government has represented that everything that was used to come up with the [REDACTED] provided to the defense, whether that be the portion that did go through the 505 process that Judge Pohl approved, or some other original document that didn't, but they chose to give to the defense anyway.

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1 ADC [MS. PRADHAN]: Well, and again, Your Honor, I have  
2 two responses. And the first is that it is our -- it is our  
3 position that that is simply not true; that is simply false.  
4 We do not have all of the documents that the government had

5

6

7 And if you listen to the examples that Mr. Groharing  
8 provided, he certainly didn't cover all of the gaps. I mean,  
9 there is -- you know, there are -- there may be summaries that  
10 contain additional information about some of the discrepancies  
11 that we noticed, but either those are so -- those are  
12 summaries as to the completely unrecognizable from what they  
13 appear to be in the profile, so we couldn't possibly put them  
14 together, or they simply have not been produced to us.

15 MJ [Col PARRELLA]: So what about Mr. Groharing's point?  
16 I mean, you have provided several examples. Some he has  
17 explained or provided an explanation, some not.

18 Before coming to the commission and seeking relief,  
19 why not seek clarification from the government? I mean, the  
20 discovery process in this case is somewhat unique; I think you  
21 would agree?

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col PARRELLA]: Why not seek clarification?

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1 ADC [MS. PRADHAN]: Your Honor, we have spent six years  
2 submitting discovery requests to the government for precisely  
3 this sort of information. I don't have the number offhand,  
4 but I know that we have -- we have said it in oral argument  
5 before, the number of discovery requests pertaining

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9 I think when the government keeps making this  
10 argument, as if we are in some sort of domestic mediation, as  
11 if I should just call them up and say, hey, I found 57 errors  
12 in this one particular page of the RDI index, could you please  
13 explain every single one of them ----

14 MJ [Col PARRELLA]: I mean, I understand that it's an  
15 adversarial process. But there's also an aspect where, you  
16 know, the adversarial process exists when the parties can't  
17 come to an agreement.

18 I mean this is essentially, as I understand it --  
19 this is evidence, this RDI evidence, this will be defense  
20 evidence. This is evidence the defense wants to be the  
21 proponent of. So it's in the defense's interests to come up  
22 with as complete and accurate and vivid a description or an  
23 account of this time that the accused were in the program.

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1           So I don't know that you've answered the question as  
2 to when there can be clarification. I certainly understand  
3 there's going to be times where we are going to be here in  
4 court litigating this. But when we don't have to, why? You  
5 know, why not go seek some clarification?

6           Because if I were to believe Mr. Groharing's account,  
7 he's provided at least an explanation here in the few minutes  
8 that we've been sitting here in court as to why, I guess, that  
9 retort some of your examples.

10          ADC [MS. PRADHAN]: A few of them, Your Honor, and I  
11 answer -- I have two answers to that. The first is the sheer  
12 number of discrepancies. And I'm calling them discrepancies.  
13 But our position has been, [REDACTED] that  
14 certain information has simply been intentionally stripped  
15 from them. And we believe that the purpose of that -- and we  
16 have briefed this fully and included it in oral argument,  
17 Your Honor. Our position is that the purpose for that is --  
18 was to obscure the role of the [REDACTED].

19               So the first answer to your question is the sheer  
20 number of discrepancies that were included in both the RDI  
21 index, as we'll talk about in a little more detail [REDACTED] I  
22 don't know that I need to go into a lot after this, but a  
23 little bit -- and the sheer number of discrepancies between

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17           And so that was our first -- that was our first  
18 method of analysis, Your Honor, was exactly -- it was using  
19 the government's rationale that, hey, we're giving you these  
20 profiles. They're based on other information you already  
21 have. We said okay, let's go through the information we  
22 already have. And we found mistake after mistake after  
23 mistake after mistake. And I use the word "mistake" loosely.


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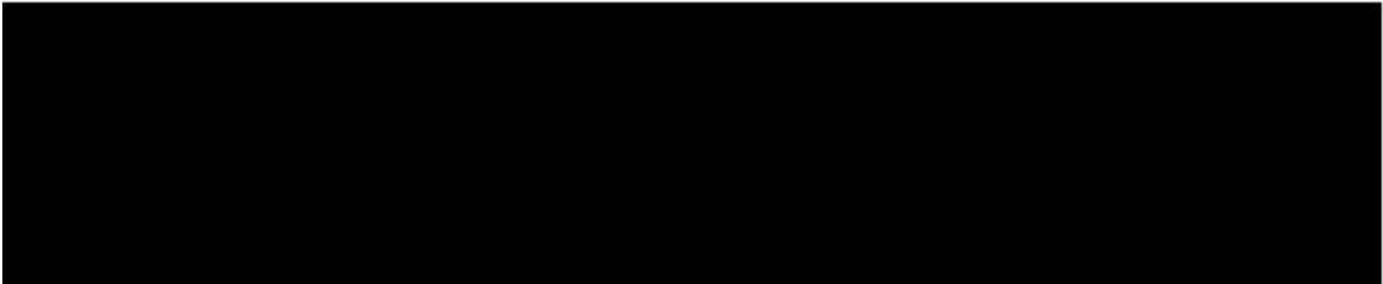
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1 But we found so many discrepancies that it's -- I  
2 mean, at the very least it wasn't in the interests of our time  
3 to go back and sit on the phone with Mr. Groharing for a week  
4 and go through each one of them.

5 But the second reason, I submit to you, Your Honor,  
6 and the reason we would not go to the government with this, is  
7 precisely that question of intent. The government has, for a  
8 number of years, intentionally withheld discovery from the  
9 defense. This is -- it's irrefutable.

10 And the primary topic on which the government has  
11 withheld discovery   
12 You heard them yesterday talk about those statements as the  
13 centerpiece of their case. Anything that undercuts the  
14 centerpiece of their case was going to be withheld as long as  
15 possible.

16 Now, I know Mr. Groharing referred to the fact that  
17 he -- that the one-page document referring to Mr. Fitzsimmons

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22 It was produced as a chain-of-custody document, all right, and  
23 buried in a whole lot of other documents.

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1           And so, you know, it's that kind of disingenuous  
2 representation that led us to litigation when faced with a  
3 basket of errors or discrepancies, of mistakes of this  
4 magnitude. That is what led us to litigation [REDACTED]  
5 [REDACTED]

6           And so, you know, I would just ask Your Honor to  
7 refer -- and I know the military commission has already  
8 referred -- has already read the pleadings. I would ask you  
9 to go back to [REDACTED] our initial analysis of the RDI index, and  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13           It is not our intention to come here and waste the  
14 military commission's time with small errors. It's when you  
15 start to put together hundreds of errors, in the case of the  
16 [REDACTED]  
17 [REDACTED]  
18 potentially the most valuable evidence we could have. That's  
19 when we come before the military commission and we say, look,  
20 there is something seriously wrong, either with how the  
21 government is analyzing the information that they have, or  
22 with the underlying information itself, right?

23           There's a mistake in one or the other. I don't know

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1 where that is. The only way to figure that out is to have the

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 Because standing here in front of you right now, I  
6 don't have that ability, and I have been through all of this  
7 discovery. We have spent enormous amounts of time going  
8 through everything, [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 I know Mr. Groharing talked a little bit about  
13 cross-referencing and implied that perhaps we hadn't done that  
14 cross-referencing. And to that I say not only have we done  
15 that, but it is also impossible to Control-F what isn't there.  
16 We can't find information that is not in the profile. We

17 [REDACTED]

18 And a lot of that we didn't know until we were able to  
19 cross-reference, until we were able to interview people. We  
20 didn't know that.

21 You know, now we hear, oh, we have this additional  
22 information. The only time we get admissions of errors, aside  
23 [REDACTED] is when the government

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1 stands up here and gives us two or three small corrections,  
2 and doesn't address the bigger issue, right? They are not  
3 addressing the bigger issue of have we actually summarized

4 [REDACTED]  
5 [REDACTED]

6 Now, Your Honor, you said something yesterday about  
7 proffers, and not wanting to accept too many proffers on the  
8 record. And that is precisely what the government is doing  
9 here. They are proffering that they have been through -- you  
10 know, that they -- that everything they used is summarized for  
11 us. We are telling you that is not the case.

12 And they are also saying that they went through --  
13 for example, [REDACTED]

14 [REDACTED]  
15 [REDACTED] This is a significant incident. We've  
16 briefed it in our supplement, and we pulled up, I think, five  
17 different sources from the discovery, everything we could find  
18 talking about that incident, because it was a significant  
19 incident.

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

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5           Now, the government stands here and says I went back  
6 and looked at the documents. It was somebody else. There is  
7 zero indication in anything we have been given that there was  
8 ever another incident like that, right? So either the  
9 government is misrepresenting, or there is some sort of  
10 mistakes in the original documents. The only way for us to  
11 know is by seeing the original documents.

12           And I know I talked a little bit in my original -- in  
13 my argument earlier today about how even if that didn't  
14 happen, that particular incident was not Mr. al Baluchi, the  
15 fact that it happened more than once and on more than one  
16 detainee, by the same interrogator, is extraordinarily  
17 significant. It's extremely significant.

18           The experimentation of techniques on Mr. al Baluchi  
19 is something that is [REDACTED] as  
20 they weigh whether or not our laws were violated with respect  
21 to Mr. al Baluchi. And so if that technique was experimented,  
22 either on him or on someone else, we need to know that.  
23 That's going to figure in our eventual chronology.

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1           So, you know, when we -- as I stand before you today,  
2 we can go back and forth on these small discrepancies, and I  
3 suspect we can do it for a very long time; but it doesn't  
4 address -- it doesn't address the reason for litigating this,  
5 which is the volume of them, and how the government could have  
6 gotten so many things wrong in both these summaries and the

7

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9           And I just want to note that there is still, still no  
10 explanation from the government as to why they have chosen to

11

12 definition, when no government agency shares that

13 definition -- why the government in this room,

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16           MJ [Col PARRELLA]: Ms. Pradhan, let's -- I don't think  
17 this was even addressed by the government, so the purpose of  
18 the rebuttal argument is obviously to hit the points that he  
19 brought up. So let's just wrap it up, please. You brought  
20 that up, and I noted that.

21           ADC [MS. PRADHAN]: That was my last point, Your Honor.

22 But I will just note that Mr. Groharing did go into some

23 explanation of why Mr. Fitzsimmons was not included, and

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1 that's [REDACTED]

2 MJ [Col PARRELLA]: Got it. I understand. Thank you.

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

4 MJ [Col PARRELLA]: Thank you.

5 Ms. Radostitz.

6 ADC [MS. RADOSTITZ]: Your Honor, I want to apologize,  
7 because I want to respond to your question to Mr. Groharing.

8 I was conflating [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 And that was -- so that's our confusion, is those two  
18 different things. It turns out one doesn't exist, and I  
19 wasn't -- I wasn't thinking about the fact that maybe it just  
20 doesn't even exist.

21 MJ [Col PARRELLA]: I understand.

22 ADC [MS. RADOSTITZ]: So I want to apologize for that.

23 And then I want to make one other point, which is

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1 that Judge Pohl often said that when he's looking at  
2 substitutions -- he's not looking at what the government isn't  
3 seeking to substitute.

4 So he only knows that they've got these documents and  
5 they want to give us these documents. What he doesn't know is  
6 are there 100 other documents that they're using and they have  
7 made a determination that they're not relevant or they're not  
8 material or whatever.

9 And so that's where this isn't a reconsideration,  
10 because what we're asking for is for us to be able to look at  
11 all the documents that they considered and put into these  
12 synopses, is that those are documents that haven't gone  
13 through the 505 process.

14 Those are the only two points I wanted to make.

15 MJ [Col PARRELLA]: Thank you.

16 Ms. Bormann?

17 LDC [MS. BORMANN]: Thank you. Just a couple of things to  
18 answer your question to Ms. Pradhan. I think you said -- it's  
19 sort of why can't we all get along?

20 So Judge Pohl started in 2012 with that same thing  
21 and hasn't asked that for many years, and maybe it's because  
22 he has presided over, and had presided over a long morass of  
23 us trying to get information.

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1 And so I'm just going to bring your mind back [REDACTED]  
2 what was argued earlier by Mr. Montross. [REDACTED]  
3 Judge Pohl issued -- we requested discovery, nicely, kindly.  
4 We sent something, we get no response. Eventually we get a  
5 response that says no.

6 We file a motion to compel. We have to litigate it.  
7 And then Judge Pohl agrees with us, and we get an order. And  
8 then it takes two years of us [REDACTED]  
9 [REDACTED] of defense resources e-mailing, prodding,  
10 asking nicely, just to get what has already been ordered to be  
11 provided.

12 So that horse left the barn a long time ago. 2011, I  
13 began requesting discovery pre-referral, because we had to  
14 submit a mitigation report, and now we are here. So yes, we  
15 continue to submit discovery requests, just like Mr. Groharing  
16 says.

17 When we do that, and then we have to file a motion to  
18 compel, the government complains that we are filing too many  
19 motions. But we continue to do this in spite of the fact that  
20 it seems to get us nowhere.

21 I have a question regarding the exhibits that are  
22 [REDACTED] provided by the government to me  
23 earlier. Are those being made part of the record? Because

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1 I'll tell you why.

2 Judge Pohl informed me in a very direct way about two  
3 years ago that providing exhibits on the day of oral argument,  
4 where the parties had not seen them and could not comment  
5 about them, and then asking the judge to consider them without  
6 the other party being able to comment upon them, was not to be  
7 used regularly.

8 And what the government has done here is provided  
9 some highlights. I don't know what they're about. They  
10 haven't been supplemented into the record. They appear to be  
11 from discovery that they had in their possession during the  
12 pleading period in this case.

13 And so if the court's acceptance of exhibits is going  
14 to be changed from what Judge Pohl did, I'm happy to go along  
15 with that program.

16 MJ [Col PARRELLA]: I'm not changing any procedure. The  
17 government had them marked because they intended to talk about  
18 them, and then Mr. Groharing said that over the lunch break he  
19 reviewed it, realized it wasn't noticed, and wasn't going to  
20 argue it.

21 So I'm going to keep them marked in the record, just  
22 simply so it's a complete record, so we know what it was. And  
23 if the appellate court wants to look at what we were

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1 discussing, they can see that it's in the record. But I'm not  
2 going to consider it as part of their argument, if that's what  
3 you mean.

4 LDC [MS. BORMANN]: Great. That's what I wanted to know.  
5 Thank you.

6 MJ [Col PARRELLA]: You're welcome.

7 ADC [MS. LACHELIER]: Just two quick points, Judge. Just  
8 by way of history, in 286 series -- we draw your attention to  
9 286 series, which was originally filed in April 2014. This  
10 was a motion to compel the Senate report. At that point it  
11 had not yet been publicly released.

12 Eventually the government [REDACTED] which was  
13 their proposal for this [REDACTED] The record is  
14 replete with Judge Pohl saying this is just a first volley --  
15 my words, not his -- but instances where Judge Pohl made clear  
16 that [REDACTED] was just supposed to be the  
17 first pass at discovery of the SSCI report, of materials  
18 underlying the SSCI report.

19 So the [REDACTED] which includes,  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 And to echo Ms. Bormann's statements about the record

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1 of attempting to get discovery from the government: The SSCI  
2 report -- we can speculate, but I think it's fair to say the  
3 government was never going to release the documents underlying  
4 that report until the Senate released it.

5 And why can we say that? Because, as Ms. Bormann  
6 alluded to, she submitted a discovery request to the  
7 government back in 2011. We submitted a discovery request  
8 asking for these types of documents back in 2013 at least.

9 So the requests have been out there and pending with  
10 the government. And the only reason they have been brought to  
11 even the [REDACTED] is because of the litigation  
12 that we have had to engage in to get them here, and because  
13 they were forced to with the public release of the Senate  
14 report.

15 And then the other point I wanted to go back to was  
16 something Mr. Groharing mentioned, that they can only give us  
17 what's as good as what they get from the CIA, or whatever  
18 agency they're dealing with.

19 I don't know where that passes for appropriate. If a  
20 police officer hands a lawyer a report that has blatant  
21 omissions or a lie in it, certainly the government is going to  
22 be sanctioned for that. So they should not be able to get  
23 away with that kind of passing the buck to the CIA. The CIA

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1 can then do whatever they want with what they produce, and we  
2 get what's left. So at some point sanctions would be  
3 appropriate if and when we ask for them.

4 MJ [Col PARRELLA]: Well, I didn't take it as that they  
5 would deliberately pass something they knew to be false. What  
6 I took it as is that in the volume of documents, they simply  
7 can't, you know, audit the veracity of everything that another  
8 agency puts into their reports. So not that they would do it  
9 deliberately but ----

10 ADC [MS. LACHELIER]: No, and I'm not alleging they would  
11 do it deliberately, but turning a blind eye to the fact that  
12 maybe their practices on the agency side are not perfect, or  
13 not as good as they should be, should not be the standard.  
14 And the agency should not be able to use the government as a  
15 Chinese wall to say we took care of it, we handed it to a  
16 prosecution that doesn't know better. And that's what's going  
17 on.

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

19 We're going to go ahead and move on [REDACTED] I think  
20 we've heard -- given the overlap, we have heard some of this.  
21 But if we can keep that in mind as we present our arguments so  
22 we're not repeating it.

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

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1 absolutely correct. In the interest of time, I will be as  
2 brief as possible on this.

3 I just want to highlight really a couple of examples  
4 regardin [REDACTED] We have already argued the base motion and the  
5 reply in open and closed session in March, and I went through  
6 numerous examples.

7 And I would, as I said, refer Your Honor back to  
8 [REDACTED] which is really the largest analysis that we conducted  
9 of the original RDI index, much of which, as we relate in our  
10 second supplement, is still relevant to the second RDI index.

11 But I just want to give you two examples of  
12 conflicting and missing information that have cropped up that  
13 triggered the two supplements that we filed, including the  
14 second RDI index.

15 The first example is the example that I skimmed  
16 across in open session of Mr. al Baluchi's torture. I want to  
17 recall that Mr. Montross correctly identified this pattern,  
18 that the government offered no specific rebuttal to my

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] They got away with standing up in open session

22 and broadly stating that, hey, [REDACTED]

23 [REDACTED] without actually having to

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1 drill down and respond to my point.

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22 Now, recall also the example of D95, who may or may  
23 not -- we can't drill down on exactly whether he was -- have

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1 been in the room when Mr. al Baluchi had the stick put behind  
2 his knees.

3 So those are the issues that we're having with  
4 actually figuring out who was in the room.

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

9 Because if you look at the actual summaries that are  
10 [REDACTED] to the occasions of  
11 Mr. al Baluchi's -- what they refer to as the application of

12 [REDACTED]  
13 [REDACTED]

14 MJ [Col PARRELLA]: I don't have Bates numbers,  
15 Ms. Pradhan.

16 ADC [MS. PRADHAN]: I apologize, Your Honor. But we have  
17 actually -- these are all attached to either

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 You can't tell from those summaries who is doing  
22 what. There is absolutely no way to tell who is observing,  
23 who is applying the techniques, who's checking him, who is

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1 asking questions, who is writing things down. And so that's  
2 our problem.

3 There's no -- there's also no way, even if you go  
4 outside of those two summaries in which the -- that actually  
5 describe the application of the EITs, there's no way to  
6 connect those descriptions of Mr. al Baluchi's torture with  
7 the statement summaries that surround those [REDACTED]  
8 [REDACTED] Those are the  
9 statements that he apparently made under torture. There's no  
10 way to connect those.

11 So clearly some of them were taken during his  
12 torture. But we, again, can't figure out which personnel were  
13 asking questions. And that would be relevant, [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 I don't know why it seems so difficult to identify  
20 who was in the room, but this is a basic, basic question and  
21 one that we took up with Judge Pohl. And Judge Pohl, you  
22 know, also seemed to express some frustration with the  
23 government that we still did not have the tools relevant to do


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1 that.

2 Now, the second example, briefly, Your Honor, is that

3 which we



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Those are the two examples I have for you,

23 Your Honor. Needless to say, the overarching questions that I

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1 wanted to raise for you -- that I did raise for you at the  
2 beginning of my argument [REDACTED] apply equally to the argument  
3 [REDACTED].

4 And really the only -- we believe the only conclusion  
5 the military commission can come to is that at this point in  
6 the discovery process, six years in, and several years -- you  
7 know, again, I don't mean to beat this in, but there is some  
8 significant -- there is some significant frustration with the  
9 fact that several years after we were meant to have all of the  
10 discovery produced under [REDACTED] we  
11 [REDACTED]  
12 [REDACTED]

13 So at this point we say that if the government  
14 doesn't want to provide a chronology for us, if they don't  
15 want to provide exhaustive information about the individuals,  
16 that is -- you know, we don't believe they are fulfilling  
17 their discovery obligations in that.

18 But we still need this information if we are going to  
19 go to trial. And so the only way to get that information and  
20 to put together a proper defense is to have those original  
21 documents, because the summaries are just not reliable.

22 MJ [Col PARRELLA]: Thank you.

23 ADC [MS. PRADHAN]: Thank you.

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1 MJ [Col PARRELLA]: Mr. Nevin?  
2 LDC [MR. NEVIN]: No, thank you, Your Honor.  
3 MJ [Col PARRELLA]: Ms. Bormann?  
4 LDC [MS. BORMANN]: Nothing further, Judge.  
5 MJ [Col PARRELLA]: Mr. Harrington?  
6 LDC [MR. HARRINGTON]: Nothing, Judge.  
7 MJ [Col PARRELLA]: Mr. Ruiz?  
8 LDC [MR. RUIZ]: Nothing, Judge.  
9 MJ [Col PARRELLA]: Trial Counsel.  
10 TC [MR. GROHARING]: Just a few points, Your Honor. We  
11 talked about this an awful lot already, but it might help for  
12 everyone's benefit just to help everyone understand the  
13 process of how this works.

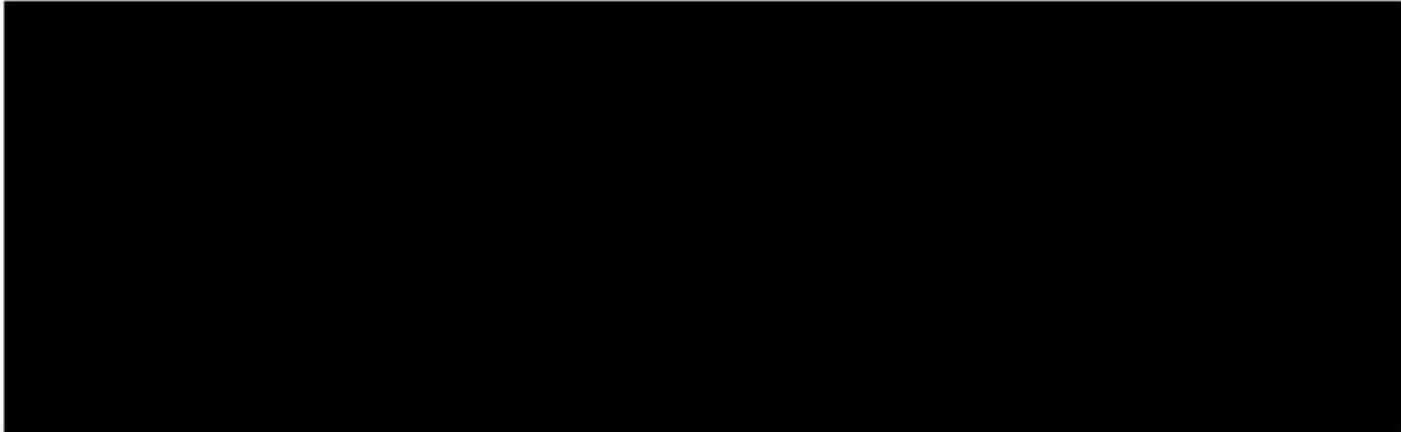
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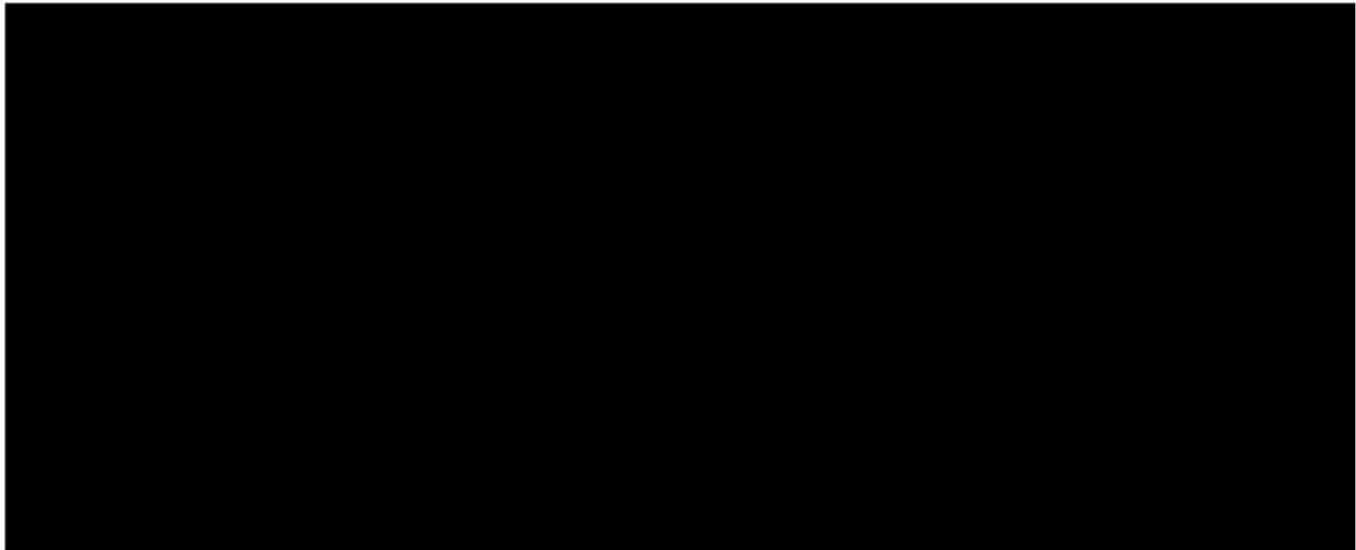
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That couldn't be completed until we had all the discovery approved that we could give to the defense so we could put the Bates numbers on the documents. We did not date the materials for reasons that we've explained to the military judge in the ex parte proceedings.



But also on the index, we then put -- to the extent



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1           Is all of the discovery consistent? No, it can't be,  
2 because all of the original information is not consistent. I  
3 think Judge Pohl certainly understood that. He had seen all  
4 the originals, and I think the military judge likely  
5 understands that as well.

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

10           So counsel is right now situated to understand when a  
11 particular statement was made in relation to particular  
12 conditions of confinement. [REDACTED]

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

16           Again, it can't be perfect, just by the nature of the  
17 information that we are starting with. Sometimes dates will  
18 be wrong on original documents. And if the defense gets  
19 something that doesn't look right on the index, they should  
20 bring it to our attention, and we'll make as much sense of it  
21 as we can, and we are happy to do that, just like I mentioned  
22 before with respect to the synopses.

23 [REDACTED]

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3 MJ [Col PARRELLA]: With respect to that -- and I think  
4 the question, you know, that Ms. Pradhan posed to the  
5 commission is:

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9 TC [MR. GROHARING]: Exactly.

10 MJ [Col PARRELLA]: So what about other folks that were in  
11 the room?

12 TC [MR. GROHARING]: And what we've said, when we have  
13 provided the indices to the defense, was that if the defense  
14 believed they needed to speak

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20 So we are amenable to that process. No one's ever  
21 invoked that process to make such a request. But we indicated  
22 that in September 2017 when we provided the RDI indexes to the  
23 defense.

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17 But it cannot be that

18 We don't get specific requests. It's we  
19 want everybody who was in the room on every occasion. And  
20 that cannot be the standard. "Direct and substantial" must  
21 mean something just beyond present.

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And, Judge, this ties into the argument we're having

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Again, the matters for which they're seeking

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additional information are matters that really aren't in

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dispute in the first place. And so you should consider that

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when you consider the defense arguments in particular on this

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case asking for all original information that the government

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summarized and the military judge approved that was provided

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to the defense.

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This is a motion to reconsider, just as Judge Pohl

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correctly pointed out when we litigated this multiple sessions

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ago. And we would ask that the commission deny the defense

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motion.

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Absent additional questions, Judge, that's all I

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have.

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MJ [Col PARRELLA]: With respect to the specific example

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

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1 We looked at the direct and substantial contacts. That  
2 analysis, [REDACTED]

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9 We have given reports to the defense. At some point  
10 it's on the defense to come back [REDACTED]

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14 But absent that, we don't believe that there are any  
15 additional people that have been specifically identified that  
16 we need to provide the defense. But at this point it's on  
17 them. And again, it has to be a specified request. It cannot  
18 be -- again, that's what we get is, every single person and  
19 every single event. It has to be a targeted, specific request  
20 and we will field those and respond to those as we get them  
21 and litigate them as necessary.

22 MJ [Col PARRELLA]: So if you get the request [REDACTED]

23 [REDACTED]

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3 TC [MR. GROHARING]: So in that case, Judge, if the  
4 defense makes that request,

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8 I would clarify that with the defense. Assuming  
9 that's what they want, and consistent with what's now

10 Protective Order #4, we would pass along that request,

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19 But it would start as a request for more information.  
20 Presumably they would want to know more about what happened at  
21 the event,

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23 MJ [Col PARRELLA]: Thank you, Mr. Groharing.

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