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1 LDC [MR. NEVIN]: Could I be heard, Your Honor?

2 MJ [Col PARRELLA]: You may.

3 LDC [MR. NEVIN]: Thank you. And just to respond to the  
4 last bit of colloquy that you had with Mr. Groharing, because  
5 this wasn't raised in the first round of arguments about this.

6 But this has been a persistent problem, and an  
7 approach that we've taken in motions to compel, and talking  
8 about the overview of how discovery is provided. And it's --

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18 And the counsel suggests, well, if there is someone  
19 you want to talk to, come forward and tell us. Well, of  
20 course, the question is: How would we know that? And I'm not  
21 saying it would be impossible to know it, but generally

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But I've done this, I don't know, probably literally hundreds of times. It's a bar fight. It's a shooting. It's a misdemeanor trial that we are getting ready to have, or maybe it's a felony. We're going to go and talk to everybody that we can find who was in the bar, let's say, and we're going to ask them, and here is what happens.

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This guy sees this. This guy here was looking down and didn't see that. This guy over here saw the next second after. And when you talk to everybody, what you get is --

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I don't know if this is the right time or the right mechanism to present this issue to you for resolution, but your question raised it -- your question to Mr. Groharing raised it.

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And I just wanted to speak to this now to have this in your random access memory, that this is a deficient process on its face. I mean, by -- from the outset, this does not give us the ability to understand and paint a complete

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1 picture.

2 There are people out there -- I promise you, there

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

6 And just as we were talking about yesterday, the need to get  
7 to these details, the way you get to them is you talk to  
8 everybody. And we are not in a position to do that.

9 So I just wanted to say that. Thank you, sir.

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

11 Mr. Montross.

12 DC [MR. MONTROSS]: Thank you, Your Honor. In my moldy  
13 [REDACTED] so I don't have it at hand. I

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

22 So seemingly their definition of "direct and  
23 substantial contact" is so restrictive and so narrow that

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8           You now, I've done capital work in Alabama, and I  
9   thought discovery was bad in Alabama, okay? At least when my  
10   client was beaten in Alabama by a police officer, I got to  
11   find out who were the other police officers who were present  
12   witnessing that. They may not have touched my client. They  
13   may not have said a word to my client. They may not have  
14   filled out a police report regarding my client. But I got to  
15   find out who was in that room.

16           And under this restrictive definition of "direct and  
17   substantial contact," I know no one else who was in that room  
18   when Mr. Bin'Attash was being beaten and eventually some form  
19   of answer was extracted from him.

20           This is the only court I've ever been associated with  
21   where that is a struggle that we are facing on a routine  
22   basis.

23           MJ [Col PARRELLA]: Thank you.

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1           Okay. Would anyone else on the defense?

2   Ms. Pradhan?

3           ADC [MS. PRADHAN]: I promise to keep this short,  
4   Your Honor, but -- excuse me, I'm sorry, because I think  
5   Mr. Nevin and Mr. Montross have covered some of the issues  
6   that I wanted to talk about with what Mr. Groharing says.

7           But I wanted to show you -- if I may have access to  
8   the document camera, [REDACTED]

9   [REDACTED]  
10          MJ [Col PARRELLA]: You may.

11          ADC [MS. PRADHAN]: Thank you. This is in the record at  
12   [REDACTED] This is the first page.

13          Now, I understand that the government believes there  
14   is a way this is supposed to work; there is a process to this;

15   [REDACTED]  
16   [REDACTED]

17          I understand how it's supposed to work, right? We  
18   understand; this is a fairly straightforward Excel  
19   spreadsheet. That is not, in fact, how it does work.

20          And again, I refer you back to our pleadings. This  
21   is the first page that is supposed to cover from before, you  
22   know, [REDACTED]

23   [REDACTED]

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1 This is for Mr. al Baluchi.

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1 MJ [Col PARRELLA]: Okay. Just for the record, what you

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3 ADC [MS. PRADHAN]: Yes, Your Honor.

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

6 ADC [MS. PRADHAN]: This is page 2 of that attachment.

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21 But, I mean, there are so many of these incidences,

22 right? In open argument we talk about how the government

23 referred to 100 occasions on which Mr. al Baluchi cooperated

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1 with investigators, right?

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12 So it is entirely possible that on those significant  
13 occasions when Mr. al Baluchi is cooperating with  
14 investigators, right, that there are people who were present  
15 who had that contact, who had that -- who witnessed those  
16 events, who are not listed here. And we just don't know  
17 whether they're in the original documents, and the government  
18 is just not putting them in there.

19 Well, we know they are in some of the summaries.  
20 There's just so much internal inconsistency here that it's  
21 impossible to use this as a guide.

22 And the one last point I wanted to make is there has  
23 been a lot of discussion ----

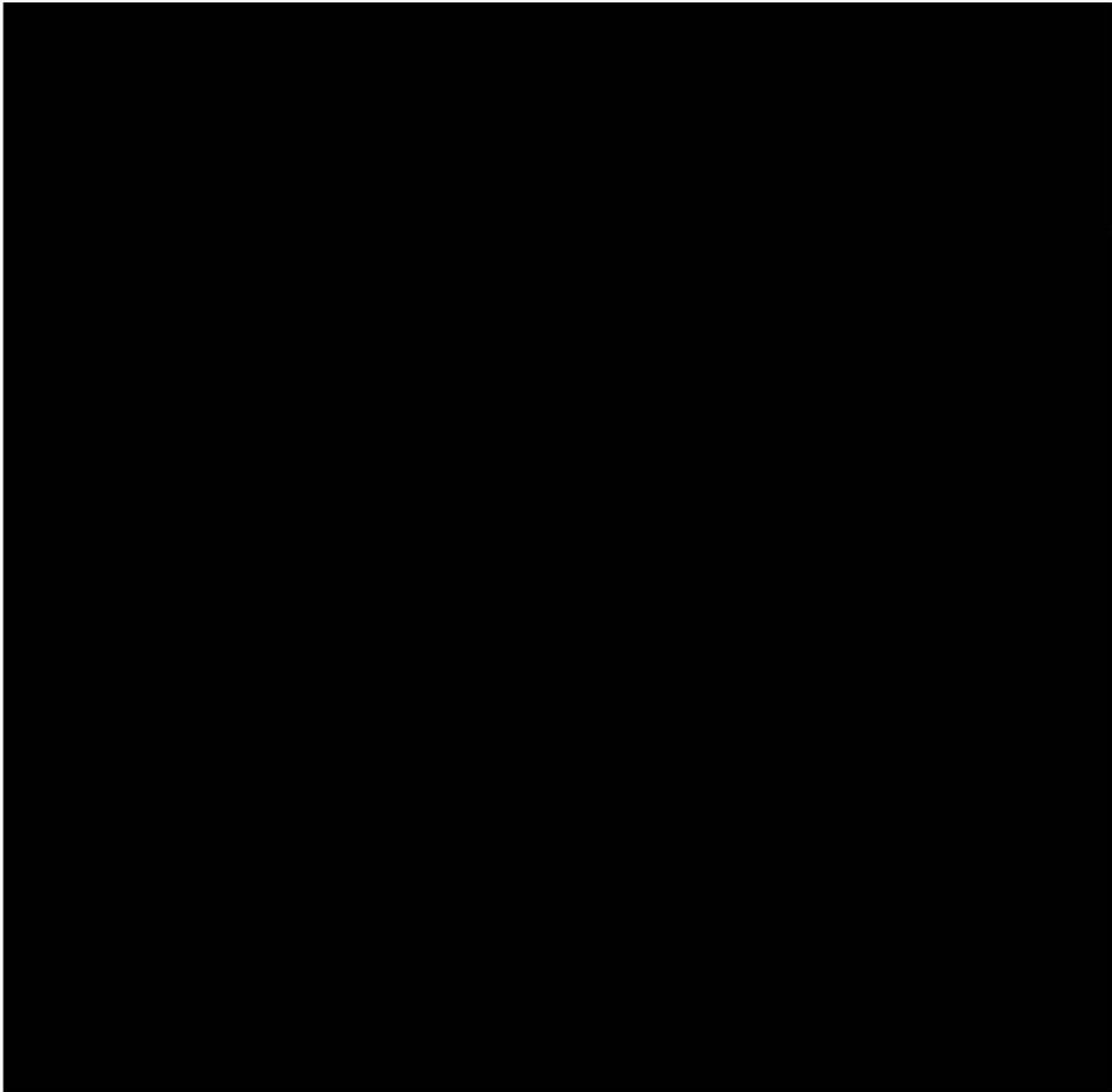
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1           Thank you. I'm done with the document camera.  
2           There's been a lot of discussion about direct and

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22           MJ [Col PARRELLA]: Thank you.  
23           ADC [MS. PRADHAN]: Thank you.

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1 TC [MR. GROHARING]: Judge, if I could just make one point  
2 very briefly.

3 MJ [Col PARRELLA]: No, thank you. What I don't want to  
4 do is get engaged in a back-and-forth. The defense is the  
5 proponent. I'm going to give them the last word. I think  
6 I've heard everything I need to render a decision.

7 So with that we're going to take a 10-minute recess,  
8 we're going to come back. We have two more AEs to take up.  
9 The commission is in recess.

10 [The R.M.C. 806 session recessed at 1442, 16 November 2018.]

11 [The R.M.C. 806 session was called to order at 1503,  
12 16 November 2018.]

13 MJ [Col PARRELLA]: The commission is called back to  
14 order. All parties who were present when the commission last  
15 recessed are again present.

16 I will also note that General Baker is not present or  
17 no longer present, nor was he during our last session.

18 Ms. Bormann?

19 LDC [MS. BORMANN]: Captain Brady has been excused to do  
20 other work as well.

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

22 Mr. Connell.

23 LDC [MR. CONNELL]: Accounting for parties, Lieutenant

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1 Colonel Thomas and Mr. Farley have not been present since the  
2 lunch break.

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

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5 TC [MR. GROHARING]: Subject to your questions,  
6 Your Honor.

7 MJ [Col PARRELLA]: No questions.

8 LDC [MR. CONNELL]: Your Honor, I put in unclassified  
9 session a list of motions as one of my slides demonstrating  
10 how many different threads of this case have come together in  
11 Judge Pohl's decision in 524LL. The -- so I have a lot of  
12 disparate pieces that I have to address over the course of  
13 this. So I will not lie to you, this is not brief. I will be  
14 as efficient as I can, but I cannot promise brevity.

15 The first point ----

16 MJ [Col PARRELLA]: Well, you understand I get veto power.

17 LDC [MR. CONNELL]: You have all the power in the world,  
18 sir. I do whatever you say. But, you know, and if you say  
19 wait until next time, that's what we will do.

20 But the first issue that I have to bring to your  
21 attention is the -- we talked about in unclassified session  
22 the strategic decision that the government had to make. There  
23 were a lot of pieces of investigative prohibitions that did

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1 not make it into 524LL.

2 There's a serious conflict of issue -- a conflict of  
3 interest issue because of the conflict between the  
4 investigative prohibitions and the duty of counsel to  
5 investigate. [REDACTED]

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

14 The importance of this to this motion to reconsider,  
15 524LL, is the strategic decision of the prosecution whether or  
16 not to seek a protective order. We talked in unclassified  
17 session about the strategic decision to choose the protective  
18 order route under 949p-6 as opposed to the UI route. This was  
19 a place where they made a different strategic decision.

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

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1 that protective order in either separate from or in addition  
2 to or combined with the other protective order. And there was  
3 some back and forth between the government there.

4 I would cite the military commission to the

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

9 At that point, [REDACTED] Judge Pohl directed the  
10 government to redraft the order if they wanted one.

11 Now, ultimately the government did not redraft that  
12 order, and they did not seek any further relief [REDACTED]

13 [REDACTED] strangely in fact, did not get wrapped up when  
14 Judge Pohl issued a number of sort of -- AE 524LL wrapped up  
15 the protective order issue, but then he issued other orders  
16 denying, for example, the UI issue because it was consumed in  
17 AE 524. [REDACTED]

18 The significance there is that as we talked about in  
19 unclassified session, the government made very clear strategic  
20 decisions as to which mechanism it wanted to proceed under.  
21 It chose the protective order regarding in the 524 series to  
22 proceed under, not the UI framework, which it would have done  
23 otherwise, [REDACTED]

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1           The second point that I wish to make is a response to  
2 the government's claim that the -- Judge Pohl's footnote  
3 citing all the different classified evidence that he had  
4 reviewed is in some way inconsistent with his decision that  
5 making a -- making decisions about whether one document was  
6 adequate to substitute for another document, it was conflicted  
7 in some way -- the government relied very heavily on this  
8 point -- with the idea that at that time when he was making  
9 all those decisions, he assumed there would also be defense  
10 investigation.

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21           The -- but the significant point that I want to tell  
22 you is that when Judge Pohl was taking a look at all these  
23 items, and he would say, all right, so we have an original

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1 document which we just heard a lot about, and then we have a  
2 substituted document. [REDACTED]

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14 It is instead to say that Judge Pohl had that delta  
15 in mind when he was saying whether it would be appropriate to  
16 utterly prohibit defense investigation into black sites that  
17 is independent outside of its very narrow protocol.

18 And just to give you just a couple of quick examples.  
19 So just to tell you what you are looking at, [REDACTED]

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[REDACTED]

So, for example -- if I may have access to the document camera.

MJ [Col PARRELLA]: You may.

LDC [MR. CONNELL]:

[REDACTED]

[REDACTED]

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1 to preserve the individual idiosyncrasies and character. Like  
2 we don't know what -- we don't have a close-up that gives us,  
3 for example, who wrote this.

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1 [REDACTED] No document that the government has produced  
2 has anything explaining what this is about. But Judge Pohl  
3 thought that us having pictures of it was enough to give us  
4 substantially the same ability to present a defense.

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

9 MJ [Col PARRELLA]: Mr. Connell, just a reminder, when you  
10 lean over the document, just keep the mike in front of you.

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

12 MJ [Col PARRELLA]: Yes.

13 LDC [MR. CONNELL]: [REDACTED]

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

23 And then finally, the same sort of error is

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8           The point of that is not to relitigate that question.  
9 I understand that I lost. It is instead -- it is, in my view,  
10 critically important to understand -- and I'm done with the  
11 document camera, thank you -- that when Judge Pohl evaluated  
12 holistically all the information which he recited in his order  
13 in 524LL, that the discovery that the government had given us,  
14 among other things, the voluminous, extraordinarily voluminous  
15 discovery the government had given us was not the same as  
16 allowing defense investigation. He had in mind the gaps and  
17 delta between what the original information would provide and  
18 what the substituted information would provide, I would  
19 suggest.

20           The third point that I want to make is, is closely  
21 related to one that the government just argued relating to the  
22 impact of Protective Order #4 that Judge Pohl knew when he was  
23 making his decision and how -- what the difference between

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1 mere discovery is -- thank you, sir -- between mere discovery  
2 and discovery plus investigation, which is normally considered  
3 to be the full function.

4 The government claimed on, I noticed last Wednesday,

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

16 And I think that the RDI program,  
17 as Ms. Pradhan said earlier, is not the appropriate standard;  
18 it's the treatment of the defendants is the appropriate  
19 standard. That's the universe of discovery. Not what is  
20 arbitrarily or perhaps bureaucratically defined as the RDI  
21 program.

22 But so I do want to point out the government just  
23 referred to this. If I could have access to the document

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1 camera again, [REDACTED]

2 MJ [Col PARRELLA]: You may.

3 LDC [MR. CONNELL]: So this is the report documenting the  
4 interviews of Mr. Ali, according to the government, what it  
5 had produced prior to May of this year. And, you know, one  
6 could debate whether this is a report at all; it looks more  
7 like a letter to me.

8 But there is only a sentence and a half about it that  
9 refers to interviews at all, and that's [REDACTED]

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1 the time of the closed argument in May 2018 is exactly the  
2 time that Judge Pohl [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 But in May 2018, Judge Pohl and the defense both  
6 thought that Special Agent Fitzsimmons, who we talked about at  
7 the time, would fall into the non-CIA category, that he would  
8 be category 1 in the protective order instead of category 4 in  
9 the protective order.

10 We knew at the time only that -- only just at that

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 Judge Pohl dealt with this in Protective Order #4. I

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1 mean, he adopted -- essentially he adopted my scope argument  
2 in Protective Order #4 when he was crafting the categories in

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22 But it's a perfect example, separate from -- and so  
23 Judge Pohl later came to know that information. Surely he

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1 took that into account in the crafting of Protective Order #4  
2 in AE 524LL, but it's a perfect example of the impact of  
3 Protective Order #4 on us and the defense, in that prior to  
4 Protective Order #4, the defense could and did interview  
5 Special Agent Fitzsimmons.

6 And, you know, it's -- I was taken -- the other day  
7 the government argued that why would any of these people want  
8 to talk to the defense? Well, the actual reality is, and what  
9 the military commission reflected in one of its questions, the  
10 actual reality is that most people are willing to talk to  
11 professionals, and that you present your -- if you're honest  
12 about your credentials and you explain what you're actually  
13 doing, what your role in the process is, and behave in a  
14 professional manner, most people will talk with you.

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1 subject to the restrictive protocol that the government has  
2 imposed.

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

12 And what we did with that information is twofold.  
13 First, it led us to push the government for more discovery;  
14 and second of all, it led us to other people, because he  
15 did

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

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1 sorts of useful information for the case in general.

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I would like to give you examples of different ways

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1 [REDACTED] They do fall into the category -- at least

2 [REDACTED]  
3 [REDACTED]

4 We are not allowed to, under Protective Order #4,  
5 speak to them about that as we frequently did before. In

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

11 So Glenn Carle,  
12 write a book.

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 Gina Haspel, [REDACTED] She has  
19 talked extensively about her various administrative roles in  
20 the RDI program. She testified about it in front of Congress.

21 James Mitchell, [REDACTED] He wrote a  
22 book and has been out on book tour. We have been out to his  
23 book signings. He didn't promise to meet with us at any book

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1 signings, but we've certainly been there.

2 MJ [Col PARRELLA]: I think I get your point, Mr. Connell,  
3 that, you know, if approached properly there are people who  
4 would be willing to speak to the defense. I understand that.

5 LDC [MR. CONNELL]: Great. I'll move on then.

6 MJ [Col PARRELLA]: Yes.

7 LDC [MR. CONNELL]: I mention that only because you  
8 incorporated that idea into one of your questions yesterday,  
9 so I just wanted to make the point that a lot of people market  
10 their CIA experience on their websites, on their LinkedIn and  
11 if they had anything do with RDI, [REDACTED]

12 [REDACTED]

13 Now, that brings us to this alternative procedure,  
14 because you asked a question of the government yesterday about

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

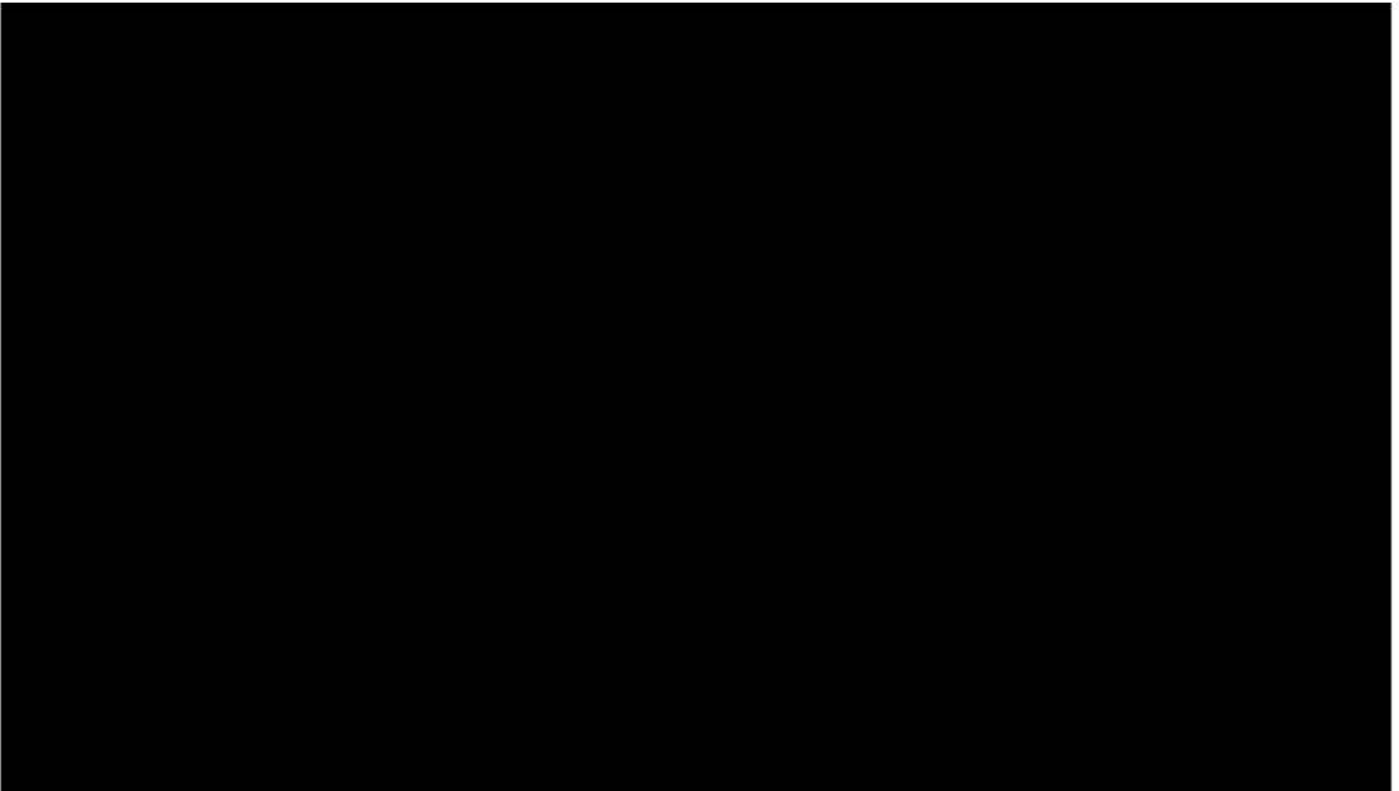
20 [REDACTED]

21 But there was a question that arose about couldn't  
22 you -- or I thought you could order interviews, and I briefed  
23 that question extensively. [REDACTED]

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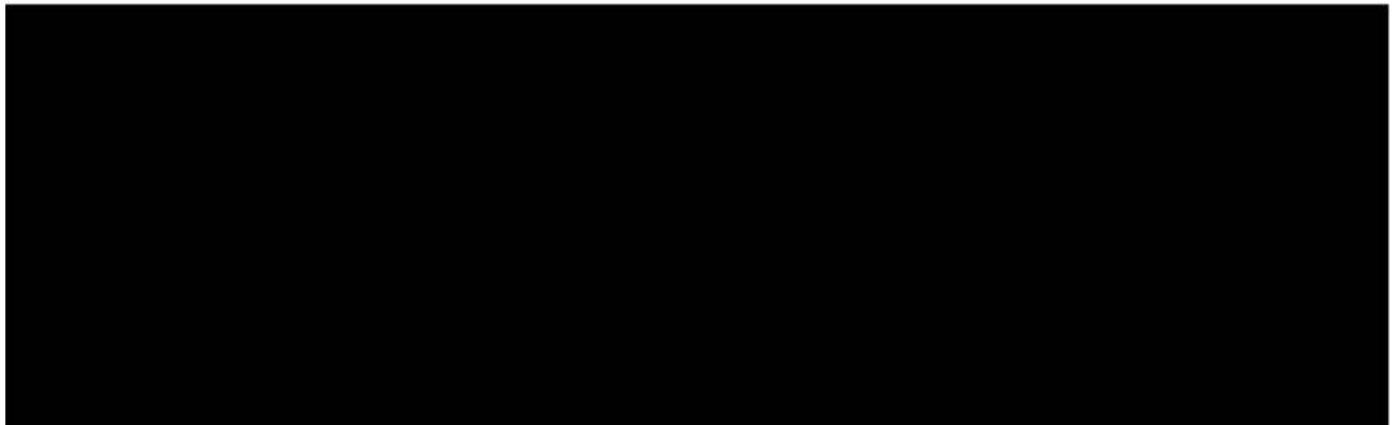
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12           What the government -- even in this idea of we can't  
13 investigate anybody; we can only rely on the discovery which  
14 was given to us. That creates this mock-trial-like universe  
15 where we're working from a set of documents which were never  
16 intended to be complete and are not guaranteed to be accurate  
17 as the universe of witnesses that we have to work from.

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14 Now, moving on to my fifth point, which is  
15 Judge Pohl's knowledge of the impact that his -- not just the  
16 impact of Protective Order #4, but his knowledge of the  
17 impact.

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17 MJ [Col PARRELLA]: While we are talking about Mr.  
18 Fitzsimmons ----

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

20 MJ [Col PARRELLA]: ---- what's your understanding of the

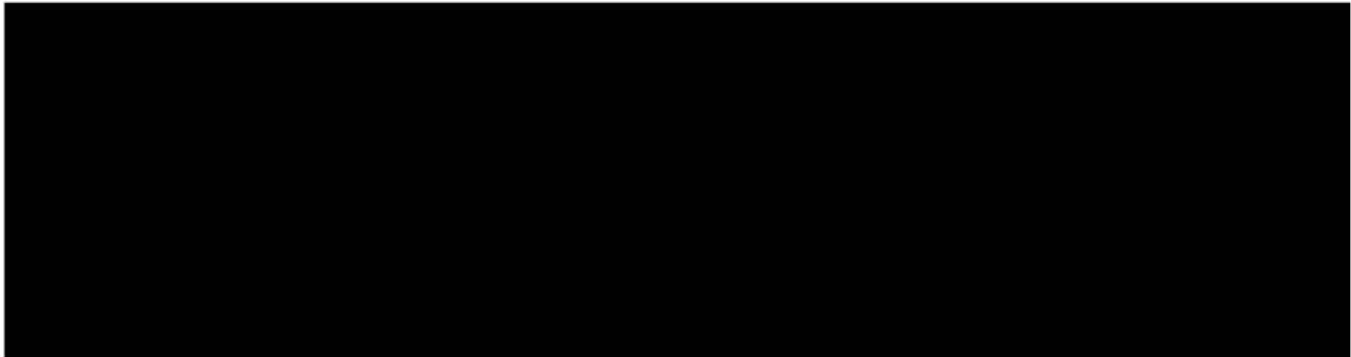
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23 LDC [MR. CONNELL]: So we actually have a specific answer


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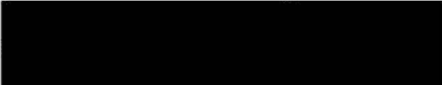
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MJ [Col PARRELLA]: Okay. Thank you.

LDC [MR. CONNELL]: Yes. But the point here is that it's an example of how Judge Pohl carefully modified the protective order to protect the government interests in RDI information -- in fact, more effectively I think in Protective Order #4 than the government did itself 

But at the same time Judge Pohl had detailed knowledge of how those restrictions would interfere with defense investigation, and because we were talking in such detail about this critical point.

Now, the sixth point of seven that I want to make is the substantive restrictions. Because we talked a little bit about logistical problems earlier with these -- under this program, this protocol, but what we did not talk about is the substantive restrictions, because Judge Pohl's protocol for witnesses who fall under  in addition to giving essentially the government control over the means of the interview, also sets out restrictions on what we can ask

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1 them, critical restrictions, restrictions that are very

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4 In fact, it's already come up, and the interviews and  
5 the declarations regarding those interviews demonstrate the  
6 impact that those substantive restrictions have on defense  
7 investigation.

8 For example, the government told us earlier that

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But the witness had never seen it, but he denied the  
substance of it. And we were just trying to get -- according  
trying to get to the bottom of this. Like  
does this mean that we need to seek further Brady material  
because the CIA is providing false material to the government?

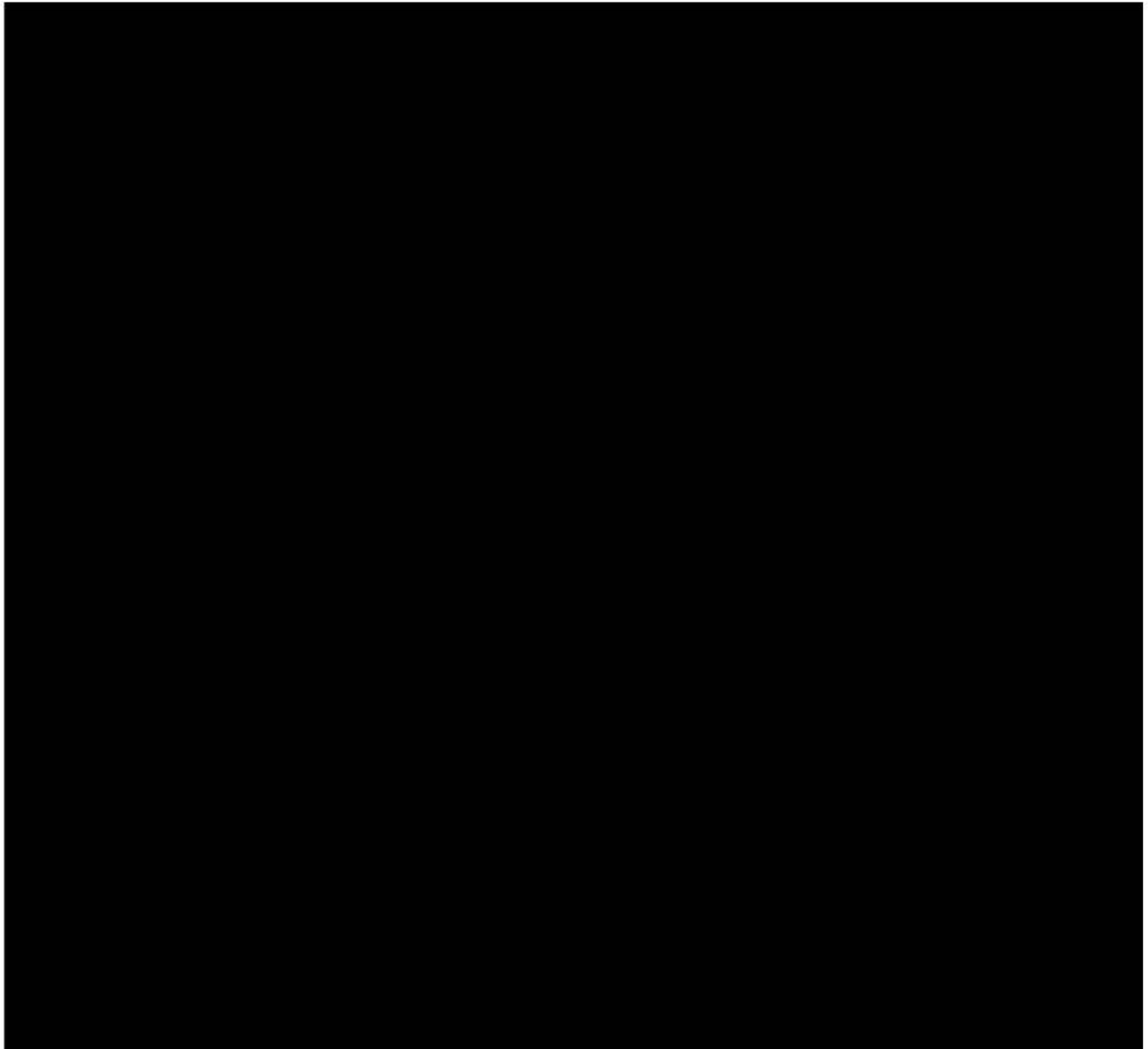
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1 Is this a government mistake? Is this the witness lying to  
2 us?

3 But we couldn't even show him the document to figure  
4 that out, and eventually -- and the declaration is very clear  
5 on this -- eventually we just gave up on the area.

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1 [REDACTED]  
2 And most importantly, he couldn't use this for  
3 networking, he couldn't ask this for additional witnesses,  
4 because the question in an interview is always well, who else  
5 should I talk to about this? And people pass us on to the  
6 next people that they think we should talk to. People wonder  
7 why this is such an iterative process and it's because you  
8 talk to the person, you build a relationship with them, they  
9 put you in contact with their friends, colleagues, et cetera.

10 In fact, [REDACTED] we had to  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 Now, the seventh of -- the seventh point that I want  
21 to make is that in October of 2017, when we first raised this  
22 issue, and throughout the winter and throughout the spring, we  
23 talked about -- because remember the al Baluchi team adopted

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1 these -- adopted limitations in January after the invocation  
2 of national limitation -- national security privilege.

3 The -- we are no longer investigating the CIA. We  
4 are acting strictly under Protective Order #4. That's an  
5 order of the court; we follow it.

6 But what that means is that two things are happening.  
7 Number one, our prejudice is getting much worse. Our leads  
8 are getting cold. Our ability to work with people is falling  
9 off. People are finding other investigative priorities. And  
10 we're just not making any progress.

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17 But the people that we would have contacted between  
18 January and now -- and I defer to no one in our diligence and  
19 investigation, no longer -- do not exist, because we didn't  
20 contact anybody who falls under a series of evolving and  
21 sometimes contradictory prohibitions. But our ability to  
22 prove prejudice is declining at the same time as our prejudice  
23 is increasing.

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1           So there was a question of, you know, what court  
2 should this be in, and now is the time to resolve this issue.  
3 And if the government thinks that it has appellate remedies,  
4 now is the time to pursue them, because our appellate remedies  
5 X number of years from now are not going to sufficiently  
6 capture our problem, because we will no longer be able to  
7 prove prejudice after January of 2018, because we are no  
8 longer investigating the CIA.

9           The situation is getting worse, but our record is  
10 getting worse at the same time, and there is nothing that we  
11 can do about it. That's just another impact of Protective  
12 Order #4. Thank you.

13         MJ [Col PARRELLA]: And no attempts under the protocol  
14 established in Protective Order #4 to investigate the CIA?

15         LDC [MR. CONNELL]: No attempts, sir?

16         MJ [Col PARRELLA]: Am I correctly summarizing what you're  
17 saying, is that -- I mean, Protective Order #4 doesn't say you  
18 can't investigate, right? It just simply says you have to go  
19 through the protocols established in Protective Order #4.

20         LDC [MR. CONNELL]: And we have on six occasions, sir.

21         MJ [Col PARRELLA]: Okay. That's what I just wanted to  
22 clarify.

23         LDC [MR. CONNELL]: Yes, sir. But what I'm saying is that

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1 we are following it, right? There are two main pieces to  
2 Protective Order #1 [sic], and I'm drawing a distinction  
3 between the word "investigate" and the word "interview."  
4 There is an interview protocol, highly restricted both in  
5 substance and in logistics.

6 MJ [Col PARRELLA]: I got it.

7 LDC [MR. CONNELL]: And we have followed that on six  
8 separate occasions. That is different from investigation.  
9 The investigation includes interviewing, but it's a much  
10 broader framework than simply talking to a small number of  
11 people.

12 MJ [Col PARRELLA]: All right. I understand that. I just  
13 wanted to clarify.

14 LDC [MR. CONNELL]: Thank you, sir. I just don't want to  
15 leave any -- if the question is have we somehow been  
16 nondiligent in not pursuing the few options that were  
17 available to us, we have pursued them with great gusto and  
18 have spoken to the prosecution on many occasions, have worked

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21 You know, we have been extraordinarily diligent in  
22 pursuing the few remaining investigative options which remain  
23 to us.

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1 MJ [Col PARRELLA]: I understand.  
2 LDC [MR. CONNELL]: Thank you, sir.  
3 MJ [Col PARRELLA]: Thank you. Mr. Nevin?  
4 LDC [MR. NEVIN]: No additional argument, Your Honor.  
5 MJ [Col PARRELLA]: Ms. Bormann?  
6 LDC [MS. BORMANN]: Nothing from us, Judge.  
7 MJ [Col PARRELLA]: Mr. Harrington?  
8 LDC [MR. HARRINGTON]: Nothing further, Judge.  
9 MJ [Col PARRELLA]: Mr. Ruiz?  
10 LDC [MR. RUIZ]: No additional argument.  
11 MJ [Col PARRELLA]: Trial counsel?  
12 TC [MR. GROHARING]: Just a couple points, Your Honor.  
13 The first point is the defense complained about the  
14 logistics of the interviews in question. I made that point  
15 yesterday, but I will make it again. Whatever logistics  
16 limitations there were placed upon them by the interviewees,  
17 and they certainly could have brought photographs, they could  
18 have brought whatever material they -- asked us to provide,  
19 whatever material they wanted to to have in front of a person  
20 to talk through on the telephone.  
21 That may not be ideal, but there was nothing that  
22 prevented that. The record is full of the e-mail  
23 communications back and forth between counsel where we offered

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1 to do this and, in fact, did do it at counsel's request.

2 LDC [MR. CONNELL]: Your Honor, objection to proffer in  
3 that all my arguments were based on evidence that we put  
4 before the military commission and not simply descriptions. I  
5 say that in part because characterizations like this are  
6 especially difficult proffers, because one person  
7 characterizes something in one way; the other attorney  
8 characterizes it in a different way.

9 It's a little bit different from a factual  
10 representation I did X -- you know, I put the envelope in the  
11 mailbox.

12 TC [MR. GROHARING]: Judge, the e-mails ----

13 MJ [Col PARRELLA]: Okay, the objection is overruled.  
14 This is argument. Go ahead and proceed, Mr. Groharing.

15 TC [MR. GROHARING]: The e-mails are on the record, Judge.  
16 I will just rely on those. They speak for themselves.

17 Briefly on the individuals the defense mentioned.  
18 Again, the folks that we are talking about are not those that  
19 are writing books or posting their affiliation with the CIA  
20 RDI program on social media. The people we are trying to  
21 protect are the individuals whose association with the program  
22 are still classified, remain classified.

23 Glenn Carle is -- you know, to the extent he's

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1 willing to talk to the defense, to the extent the defense  
2 wants to talk about RDI matters, they could still follow the  
3 protocol and facilitate that conversation. There is nothing  
4 that would prevent that. And if he's willing, we could  
5 facilitate that as quickly as he's available.

6 I would note that the other two examples that  
7 Mr. Connell mentioned, Gina Haspel and James Mitchell, both of  
8 those individuals declined defense requests to be interviewed.

9 So today as we stand here, I still don't see --  
10 there's still no one in the record that the defense has, that  
11 had contact with Mr. Ali, whose association in the CIA RDI  
12 program is classified that they've established is willing to  
13 talk to the defense. And they have been prevented from doing  
14 so by operation of the protocol. There is simply nothing in  
15 the record other than claims of their investigator.

16 And I respectfully suggest that those are not  
17 individuals that actually had contact with Mr. Ali. If they  
18 were, again, let us know who they are, we are happy to  
19 facilitate that interview consistent with Protocol #4. We  
20 don't want to get in the way of that.

21 All we are trying to do is protect the identity of  
22 CIA officers in a way that still allows the defense to seek  
23 information, but doesn't disclose that information.

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1           So those are the only points I wanted to make. I  
2 think everything has been adequately covered extensively on  
3 unclassified argument, but subject to your questions,  
4 Your Honor, that's all I have.

5           MJ [Col PARRELLA]: I have no questions. Thank you.

6           [REDACTED]

7           ADC [MS. RADOSTITZ]: Good afternoon, Your Honor.

8           MJ [Col PARRELLA]: Good afternoon.

9           ADC [MS. RADOSTITZ]: It feels so unfair that I have to go  
10 last. It's, you know, past 3:30 and we all have a flight that  
11 we have to get ready for. But this is an important motion, so  
12 I'm not going to rush too much through it, but I will try to  
13 be economical.

14           You had asked that we identify the classification  
15 level, and pretty much everything that I'm going to talk about

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

21           So I used to be a journalist. And one of the things  
22 that our professors in the journalism program told us is that  
23 you should show, not tell. And so I heard Mr. Groharing say

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1 today something I have heard him say a number of times before  
2 of, "if you don't have it, just ask us." So I want to talk  
3 about the "just ask us" that happened in this case.

4 [REDACTED]  
5 [REDACTED]

6 [REDACTED] so I am not going to go into all the permutations of  
7 it. But what I will say is that one aspect of it was that  
8 there was a carveout for certain people that were publicly  
9 acknowledged as participating in it, such as Dr. Mitchell.

10 And so in February we had a hearing, and  
11 Mr. Groharing said to the court -- you know, if there are  
12 other people -- these are the eight people we have identified.  
13 We've put them in a footnote in our proposed protective order;  
14 and if there's other people, the defense should just ask about  
15 them. So that was in February or early March.

16 Later in that month President Trump nominated Gina  
17 Haspel as Director of the CIA, and in a meeting with someone  
18 on our team, our client says, [REDACTED]

19 [REDACTED]  
20 [REDACTED]

21 So we took that information, we obviously did some  
22 media searches, and we saw that there is quite a bit of media  
23 information saying that she was involved in black sites. [REDACTED]

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1 [REDACTED]  
2 [REDACTED]  
3 So we looked at the information that had been  
4 provided and we saw that it was important to be really careful  
5 about how we asked this. We crafted an e-mail with the help  
6 of our DSO that did not in any way disclose any classified  
7 information. But what we asked was, essentially: Does Gina  
8 Haspel go into footnote number 1?

9 And we sent that e-mail on the 2nd of April -- I'm  
10 sorry, on the 16th of April. Lieutenant Colonel Poteet sent  
11 the e-mail to trial counsel. We didn't get any response.

12 In May the government [REDACTED]  
13 [REDACTED] Gina Haspel is not on that  
14 list, but there is still no affirmative response that she  
15 would be added to the list.

16 And this is important because we are moving towards a  
17 hearing before the Senate Select Committee on Intelligence,  
18 and our client would like to get this information before the  
19 Senate committee. But we know that we cannot share classified  
20 information with the Senate staff unless it's unclassified or  
21 we are given permission to do it.

22 Because we haven't been able to get information as to  
23 whether it's classified or not, we moved forward filing a

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1 [REDACTED] and we request permission to  
2 provide information to the Senate Select Committee that Gina  
3 Haspel was in Site Blue or #4, [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 Ms. Haspel testifies at the Senate Select Committee  
14 on Intelligence on the 9th of May. We still don't have a  
15 ruling as to whether we can provide that information; we don't  
16 get that ruling until long after the hearing is over. So  
17 that's sort of like a normal way.

18 And like Mr. Montross was describing it, I practiced  
19 in Texas, and we never could get discovery from -- I thought  
20 we could never get discovery in Texas, but I have to say that  
21 this is even worse than Texas, which is rare for me to say  
22 that about anything.

23 So now I want to get to sort of the substance of the

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1 argument. For more than a year now, we have been talking  
2 about the change in classification guidance. So we heard  
3 testimony -- or argument yesterday about the fact that  
4 starting in 2013 we were told we can go talk to anybody about  
5 anything at any location and that we were free reign. And a  
6 lot of people did. Our team did. Mr. Connell's team did a  
7 lot of that.

8 So then we talked -- we learned through a process, an  
9 iterative process, that there was a change in the  
10 classification guidance. And Judge Pohl lays out very well in  
11 524LL all of those changes.

12 We learned what the parameters of those changes were,  
13 and again, they were iterative. They changed from this to  
14 that. But again that's all laid out in 524LL.

15 We also have had a lot of litigation about how that  
16 impacts the defense, how it impacts Mr. Mohammad's team's  
17 ability to investigate, his Sixth Amendment right to counsel,  
18 the right of counsel to do -- or the implication to the  
19 obligation of counsel to do the investigation.

20 But what has not been discussed very much in any of  
21 this litigation is why. We talked about that there was a  
22 change in classification guidance, but we have never learned  
23 why there was a change.

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1           So my dad was a physicist. And one of the things  
2 that he told me all the time was -- we would talk about  
3 science with a capital S. And what he would say was  
4 correlation is not causation.

5           And so I cannot say as we stand here today that the  
6 fact that Gina Haspel became the Associate Director of the CIA  
7 and had more authority within the CIA, that that caused  
8 changes to the classification guidance. But what I can say is  
9 that we now have evidence that's been provided by the  
10 government that backs up everything that our client told us,  
11 except one small piece.

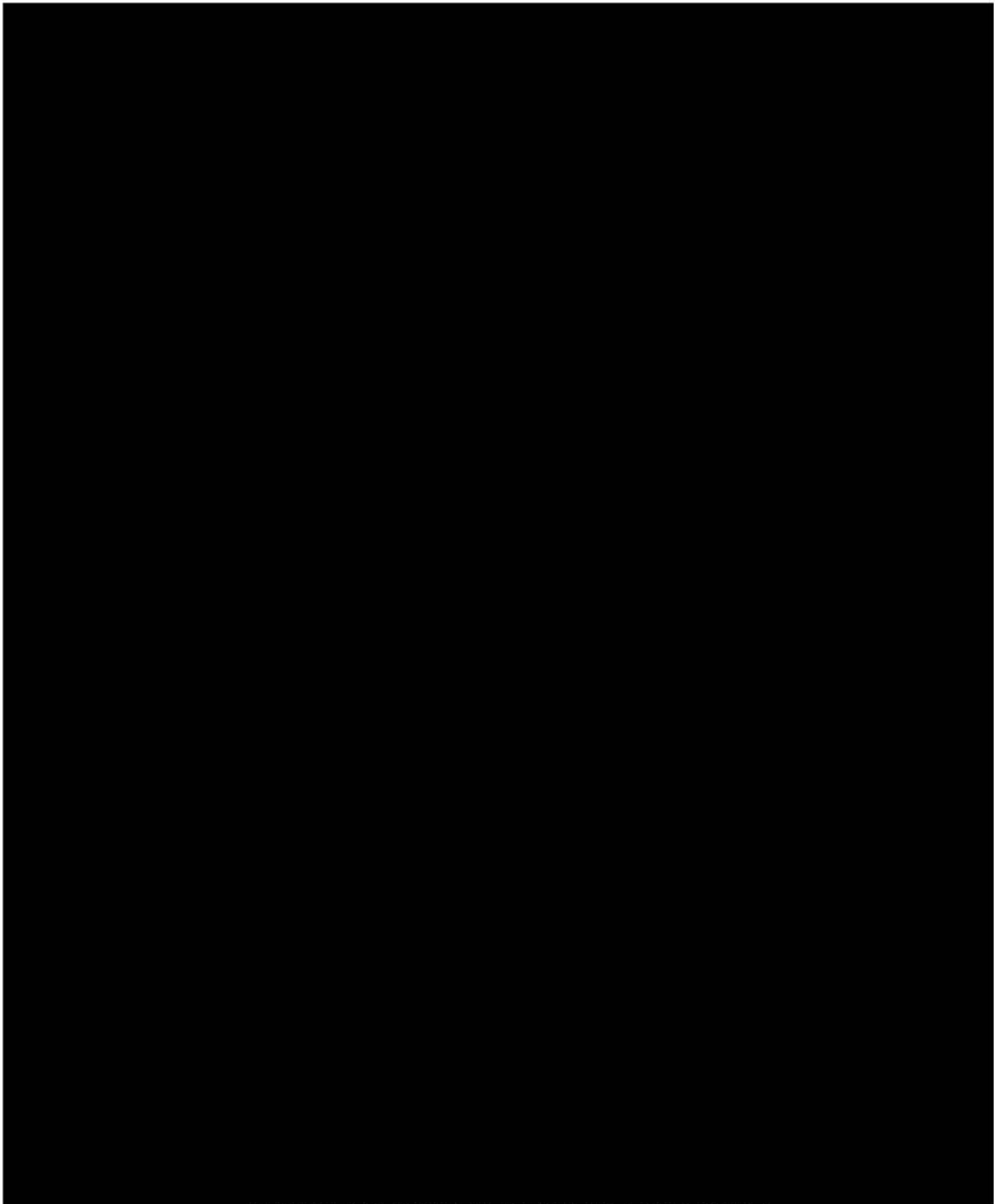
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[REDACTED]

Yesterday we heard a number of different times the government assert that they're not trying to cover up the torture, that they're happy to talk about the torture, and that we have everything that we need to know about the torture. But the one thing that they're not willing to talk about is the names of the people involved in the torture.

[REDACTED]

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1           So what incentive would she have to change the  
2 classification guidance? By doing so, it makes it impossible  
3 for us to find out more about her involvement. It makes it  
4 impossible to find out other people who saw her there. It  
5 makes it impossible for people at Guantanamo, who may have  
6 seen her when she was here as chief of base, to identify her  
7 and talk about it. Because the classification guidance means  
8 that we can't go talk to those people.

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15           And so again, our evidence here is that there is a  
16 change, a significant change, a sea change in the  
17 classification guidance once Gina Haspel becomes in a position  
18 of power within the CIA. And we don't know for sure, and we  
19 cannot tell you for sure that she is who requested that change  
20 in the classification guidance.

21           And that brings us to our motion for witnesses. The  
22 government's position is kind of odd in their response to our  
23 supplement, which is where we lay out all the connections

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1 between Director Haspel and the torture program. And they  
2 basically say you can't prove UI because you have no evidence,  
3 and you can't have witnesses because you haven't proved some  
4 evidence of UI. And that can't be right.

5 If we were in any other court and I wanted to be able  
6 to prove something that I had to show some evidence of, I  
7 would go talk to the person I wanted to get the information  
8 from and I would interview them. And then I would ask the  
9 clerk of court for a subpoena and then bring them to court. I  
10 can't do any of those things. I can't even approach her.

11 If I want to ask for an interview, which the defense  
12 has already done and she has declined, I can't do anything  
13 about that; she's declined. I can't bring her to court  
14 because I don't have the power to and we have to ask the  
15 government for permission to bring her to court, and she  
16 doesn't come here.

17 The other point I want to make is that we don't know  
18 if she is the person who made that decision, and we don't know  
19 if that person is protecting her or protecting others. We  
20 don't know who that person is. There is no evidence in the  
21 record as to whether she is the original classification  
22 authority or not.

23 Mr. Swann has said in argument that she is not, but

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1 there is no evidence. There's no declaration. There's no  
2 witness saying that she is not. All we have is her testimony  
3 under oath before the Senate Select Committee on Intelligence  
4 in which she says that she is ultimately responsible for all  
5 classification decisions of the CIA as Director, because at  
6 that time she was Interim Director.

7 And so the evidence -- and we've attached her  
8 testimony as an exhibit to our pleadings. The evidence before  
9 the court is that she is the classification authority. As I  
10 argued, and I'm not going to go into it again -- we argued in  
11 open session -- it kind of doesn't matter, because she is  
12 ultimately responsible.

13 If I may just have a moment, Your Honor.

14 MJ [Col PARRELLA]: You may.

15 ADC [MS. RADOSTITZ]: So our argument is we need  
16 witnesses. We need Director Haspel. If it isn't her that is  
17 the original classification authority and the person who made  
18 the decision to circumscribe defense investigation and change  
19 our ability to do this case, we need those witness. Because  
20 we need to know why. We need to know the answer to the  
21 question of not just that the classification guidance changed,  
22 but why.

23 Subject to your questions, Your Honor.

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

2 Ms. Bormann?

3 LDC [MS. BORMANN]: Judge, we adopt Ms. Radostitz's very  
4 able argument.

5 MJ [Col PARRELLA]: Mr. Harrington?

6 LDC [MR. HARRINGTON]: No further argument, Judge.

7 MJ [Col PARRELLA]: Mr. Connell?

8 LDC [MR. CONNELL]: Nothing further, sir.

9 MJ [Col PARRELLA]: Mr. Ruiz?

10 LDC [MR. RUIZ]: Nothing further.

11 MJ [Col PARRELLA]: Trial Counsel.

12 TC [MR. SWANN]: Subject to your questions, Your Honor.

13 MJ [Col PARRELLA]: I have none.

14 TC [MR. SWANN]: You have none. Thank you.

15 MJ [Col PARRELLA]: Thank you. Okay. Anything from the  
16 parties? Any other issues or concerns before we complete this  
17 closed session?

18 There being none, this commission is in recess.

19 [The R.M.C. 806 session recessed at 1607, 16 November 2018.]

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