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1 **[The R.M.C. 803 session was called to order at 0901, 01 May 2024.]**

2 MJ [Col McCALL]: Commission's called to order.

3 Good morning, Mr. Trivett.

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

5 MJ [Col McCALL]: Could you please identify who's here on
6 behalf of the United States, both in the courtroom and at the RHR?

7 MTC [MR. TRIVETT]: Yes, sir.

8 Representing the United States today in the courtroom in
9 Guantanamo is myself, Mr. Clay Trivett; Lieutenant Commander Robert
10 Baxter; Mr. Christopher Dykstra. Paralegals present are Ms. Karissa
11 Grippando and Mr. Rudolph Gibbs.

12 FBI personnel present are Supervisory Special Agent Joseph
13 Hokanson, Tactical Specialist May Higginson, Supervisory Special
14 Agent Farbad Azad, Special Agent Craig Waldman, and Special Agent
15 Scott Geissler.

16 Present and representing the United States in the Remote
17 Hearing Room is Ms. Nicole Tate.

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

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

22 Good morning, Mr. Sowards.

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

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1 Appearing on behalf of Mr. Mohammad, who is not present, are
2 Gary Sowards; Elspeth Theis, Major, United States Air Force; Gabriela
3 McQuade; Kathleen Potter, Lieutenant Colonel, United States Air
4 Force; and Michael Leahy, Captain, United States Air Force.

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

6 LDC [MR. SOWARDS]: You're welcome, sir.

7 MJ [Col McCALL]: Good morning, Mr. Engle.

8 LDC [MR. ENGLE]: Good morning, Your Honor.

9 For Mr. Bin'Attash: Matthew Engle, William Montross, Tasnim
10 Motala, Captain Marian Messing are in the courtroom.

11 And in the RHR we have Chris Pipe and Prax Kennedy.

12 MJ [Col McCALL]: All right.

13 Good morning, Mr. Connell.

14 LDC [MR. CONNELL]: Good morning, sir. On behalf of
15 Mr. al Baluchi, myself, James Connell; Rita Radostitz; and Defne
16 Ozgediz.

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

18 Good morning, Mr. Ruiz.

19 LDC [MR. RUIZ]: Good morning, Judge. I'm here on behalf of
20 Mr. al Hawsawi, along with Captain Kerry Mawn, Captain Patrick
21 Tipton, and Mr. Sean Gleason.

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

23 All right. I note that the four accused are not present.

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1 Trial Counsel, do you have a witness to account for these
2 absences?

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

4 **CAPTAIN, U.S. Air Force, was called as a witness for the prosecution,**
5 **was previously sworn, and testified as follows:**

6 **DIRECT EXAMINATION**

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

8 Q. Good morning, Captain.

9 A. Good morning.

10 Q. For purposes -- purposes of the record, could you please
11 tell us what your call sign is or pseudonym?

12 A. Doc.

13 Q. Thank you. And you have previously testified in these
14 proceedings, correct?

15 A. Yes, sir.

16 Q. I'd just remind you that you remain under oath.

17 A. Yes, sir.

18 Q. Now, did you have the opportunity to advise the accused of
19 their right to be present this morning?

20 A. Yes, sir. Between approximately 0640 and 0700 hours this
21 morning, I advised each of the accused of their respective rights to
22 attend today's session using the English version of the Statement of
23 Understanding, Right to Be Present for Commission Proceedings. I

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1 also had a translated version and a linguist available to them when I
2 did so.

3 DMTC [MR. DYKSTRA]: Your Honor, if I may approach the
4 witness. I'm going to hand him what has been previously marked as
5 Appellate Exhibit 943FF (KSM), 943GG (WBA), 943HH (AAA), and 943II
6 (MAH).

7 MJ [Col McCALL]: All right. Go ahead.

8 Q. Now, the forms that I just handed you, are these the forms
9 that you used to advise the accused?

10 A. Yes, sir. They are.

11 Q. And when you advised them, what was their response to
12 whether or not they wanted to attend this morning's proceedings?

13 A. Each declined to attend today's session. Several did
14 accept legal meetings or other appointments during the day.

15 Q. And did you have any questions or concerns regarding the
16 voluntariness of their decisions this morning?

17 A. No, sir. I did not.

18 DMTC [MR. DYKSTRA]: Your Honor, no further questions for this
19 witness.

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

21 Any defense counsel desire to question this witness?

22 Mr. Connell?

23 **[END OF PAGE]**

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CROSS-EXAMINATION

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Good morning, sir.

A. Good morning, sir.

Q. I'm resisting the temptation to say: What's up, doc? You must get that a lot.

A. A little bit.

Q. Mr. al Baluchi's actually here, right?

A. I believe so. Yes, sir.

Q. Okay. He's in the holding cell?

A. I believe so, sir.

Q. Okay. All right.

LDC [MR. CONNELL]: It's our position that he's present, Your Honor.

MJ [Col McCALL]: Understood. So I know that he's there. And, again, so he may join us at some point during the day, and I certainly don't mind that clarification. That makes sense.

All right. Any other questions?

Apparently not.

All right. You're excused. Thank you for your testimony.

WIT: Thank you, Your Honor.

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

MJ [Col McCALL]: The commission finds that Mr. Mohammad,

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1 Mr. Bin'Attash, Mr. Ali, and Mr. al Hawsawi have knowingly and
2 voluntarily waived their right to be present at today's session;
3 although I understand that Mr. Ali is in the adjacent facility, so he
4 can listen in and may join us at some point during the day.

5 All right. So yesterday we handled Mr. Sowards'
6 cross-examination of Mr. Evan Kohlmann. Today we're going to
7 continue on with the cross-examination of Mr. Kohlmann.

8 Before we start, just a few administrative matters.

9 Mr. Trivett, any update on that nondisclosure agreement that
10 came up yesterday?

11 MTC [MR. TRIVETT]: Sir, I believe I have enough to provide
12 you an interim response ex parte, if you're interested in it. It's
13 not a completed response because we still have other research to do,
14 but I can at least give you the nature of what it is.

15 MJ [Col McCALL]: We'll hold off. I'll give you more time to
16 try to get more information.

17 All right. Any other housekeeping matters to take up this
18 morning before we bring in Mr. Kohlmann?

19 Mr. Sowards, I think you got up before Mr. Connell.

20 LDC [MR. SOWARDS]: I think he was resting from his last trip.

21 I just want to clarify -- or my understanding or make sure
22 the record's clear. You indicated that I had had my
23 cross-examination yesterday. That was subject to further resolution,

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1 if possible, of this issue, which would also determine whether there
2 is additional open cross-examination or it would have to be conducted
3 in closed.

4 But I would respectfully request, Your Honor, before the
5 witness is excused, preferably during this session of the hearings,
6 we resolve that issue. Because, depending on the resolution of it, I
7 think there may be a requirement if the court -- if the commission
8 feels compelled to accommodate certain interests of the government
9 that result in that information not being disclosed to us to simply
10 strike the witness' testimony.

11 But I would like to be heard -- obviously, this is not the
12 place to do that. But I just wanted to make sure that, for the
13 commission's planning purposes, we didn't lose sight of the
14 possibility that there was more to discuss about that.

15 MJ [Col McCALL]: No, definitely. I'm tracking that. And I
16 will give you an opportunity to question Mr. Kohlmann about that
17 nondisclosure agreement once we get how to handle it resolved.

18 LDC [MR. SOWARDS]: Okay. I thank you very much, sir.

19 MJ [Col McCALL]: Sure.

20 All right. Mr. Connell?

21 LDC [MR. CONNELL]: Sir, I've been discussing the scheduling
22 with counsel and wanted to give you a heads-up.

23 It is -- you know, these predictions are always dangerous,

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1 but my prediction is that we will complete the cross-examination of
2 Mr. Kohlmann this morning.

3 MJ [Col McCALL]: Okay.

4 LDC [MR. CONNELL]: And so we're in the middle of oral
5 argument on 926. So it would make sense to pick up that next. I
6 know the parties are prepared.

7 The other issue that -- that we've discussed the possibility
8 of is something that hasn't come up before, so I want to explain it a
9 little bit, which is that in addition to seeking convening authority
10 funding for U.S.-based experts, at various times we have gone to the
11 world expert on many topics and -- related to torture, PTSD,
12 traumatic brain injury, et cetera, and have taken sworn video
13 declarations from those -- from those witnesses.

14 And one of those, which is sort of a primer on PTSD,
15 especially as applied to Mr. al Baluchi's cohort of people who grew
16 up in Kuwait around the time of the Iraqi invasion, is -- would in
17 an -- like, if we were in an ordinary court and we were each
18 presenting our -- our cases in order, it would make sense to play
19 that first before Dr. Morgan's testimony.

20 It's only about an hour. I provided it to the government in
21 2019, along with the transcript. It was pointed out to me that we
22 had never actually produced his CV, so I have sent them his CV now.

23 The -- and so -- but the government has an objection to that

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1 based on relevance. And so if we get there, if we're looking
2 for -- to fill white space this afternoon, in my view it would make
3 sense to go ahead and argue the relevance of that. And if -- if
4 ruled favorably in our favor, then just go ahead and play the video,
5 because that would set us up for Dr. Morgan next week, and then we
6 can go in a kind of, you know, an orderly fashion.

7 MJ [Col McCALL]: All right. And this expert -- what is the
8 expert's name?

9 LDC [MR. CONNELL]: Abdullah al Hammadi, A-L, hyphen,
10 H-A-M-M-A-D-I.

11 MJ [Col McCALL]: All right. And is this video located
12 anywhere in the record?

13 LDC [MR. CONNELL]: Yes, sir. It's already in the record. It
14 is AE 628TTTTT Attachment B, if memory serves, but I'll confirm that.

15 MJ [Col McCALL]: All right.

16 LDC [MR. CONNELL]: I got a thumbs up from the team, so memory
17 served.

18 MJ [Col McCALL]: All right. Perfect.

19 LDC [MR. CONNELL]: Thank you.

20 MJ [Col McCALL]: All right. Yeah, I'll consider that. That
21 makes sense. Let's see where we get with Mr. Kohlmann.

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

23 MJ [Col McCALL]: All right. Anything else before we bring in

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1 Mr. Kohlmann?

2 Apparently not.

3 All right. If we can bring Mr. Kohlmann into the RHR.

4 **[The witness, Evan F. Kohlmann, resumed the witness stand.]**

5 MJ [Col McCALL]: All right. Mr. Kohlmann, welcome back.

6 Please have a seat.

7 WIT: Thank you, Your Honor.

8 MJ [Col McCALL]: I just remind you you're still under oath.

9 All right. Go ahead.

10 CDC [MS. OZGEDIZ]: Thank you.

11 **CROSS-EXAMINATION**

12 **Questions by the Civilian Defense Counsel [MS. OZGEDIZ]:**

13 Q. Good morning, Mr. Kohlmann.

14 A. Good morning.

15 Q. It's nice to meet you. My name is Defne Ozgediz and I
16 represent Ammar al Baluchi.

17 First of all, I'd like to follow up on something that came
18 up during your testimony yesterday. You mentioned that your father
19 was waterboarded during World War II; is that right?

20 A. That's correct.

21 Q. First of all, I'm really sorry he went through that.

22 And if it's okay with you, if you're comfortable, can you
23 tell us a bit more about what happened to him?

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1 A. Yes. My father was a German Jew and was chased out of
2 Germany in 1938, was -- his citizenship was removed and he fled to
3 France where he was hiding underground as a 12-year-old.

4 He was eventually captured by the Nazis. He was imprisoned
5 in Fort Montluc in Lyon, and he was tortured, drowned in a bathtub,
6 et cetera.

7 Q. And do you remember when you first learned about this?

8 A. Probably when I was a child.

9 Q. And did he share anything with you about this experience
10 of being drowned in a bathtub?

11 A. It was -- it was very unpleasant, and he shared that when
12 it was happening, he would have said anything to have stopped
13 the -- you know, immediately stopped being drowned.

14 Q. And has he shared anything since about what kind of impact
15 it had on him?

16 A. I mean, he had -- he had lasting impact for it. I don't
17 think it changed his -- his particular perspective, although he
18 certainly had nightmares and he was -- it was -- it had a negative
19 impact on his life, I'm sure.

20 Q. I can imagine. Okay. Thank you for sharing that,
21 Mr. Kohlmann. I appreciate it.

22 Going forward, I plan to ask you mainly about one case that
23 you worked on back in 2005, and that is the case of United States

1 v. Uzair Paracha. Okay? And your work on that case briefly came up
2 during your cross-examination yesterday; is that right?

3 A. I believe so.

4 Q. And I know it's been a long time, so I don't expect you to
5 remember every detail. And if you need to see any transcripts or
6 other documents to refresh your recollection, please just let me know
7 and we'll provide those.

8 Now, in United States v. Uzair Paracha you served as an
9 expert witness for the government, correct?

10 A. That's correct. Yes.

11 Q. And that was a case charged in federal court?

12 A. That's correct.

13 Q. In the Southern District of New York?

14 A. Yes.

15 Q. And in that case the government -- and when I say
16 government, I mean the federal prosecutors -- asked you to provide
17 background information for the court about al Qaeda. Yes?

18 A. That's correct. Yes.

19 Q. And the government also asked you to offer your opinion
20 about certain people who Mr. Uzair Paracha had met before he was
21 arrested ----

22 A. I believe so.

23 Q. ---- is that right?

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1 A. I believe so, yes.

2 Q. And one of those people was Ammar al Baluchi?

3 A. I believe that's correct, yes. Excuse me.

4 Q. And at the request of the government, you did offer an
5 opinion about Ammar al Baluchi in that case?

6 A. I believe I did, yes.

7 Q. Now, I'm next going to ask you about the sources that you
8 relied on to reach your opinion about Mr. al Baluchi in the Paracha
9 case. Okay?

10 One source that you had relied on was the 9/11 Commission
11 Report; is that right?

12 A. That's correct, yes.

13 Q. And at the time you considered the 9/11 Commission Report
14 to be an extremely helpful source of information about
15 Mr. al Baluchi?

16 A. That's correct.

17 Q. And for you, the 9/11 Commission Report had one of the
18 best declassified summaries of information about what Mr. al Baluchi
19 knew and had admitted to?

20 A. Certainly at the time that was true, yes.

21 Q. And as part of your work in the Paracha case, you prepared
22 an expert report. Yes?

23 A. I believe I did, yes.

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1 Q. And that was the document where we looked at the first
2 page and the appendix yesterday during your testimony with
3 Mr. Sowards, right?

4 A. I believe that's correct, yes.

5 Q. And in the beginning of that report, you wrote a little
6 bit about, like, the origins of al Qaeda, right?

7 A. I believe I did. Although, as to your point, it's been
8 awhile. But I do recall offering an introduction about al Qaeda.

9 Q. Certainly. And if you do need anything to refresh your
10 recollection, just -- just do let me know.

11 When you say you believe you did, I understand you to be
12 saying that you recall doing this?

13 A. I generally recall. Yeah ----

14 Q. Okay.

15 A. ---- I don't recall necessarily the particulars in there,
16 but I recall offering a general introduction and short history of
17 al Qaeda.

18 Q. Sure. Thank you. Understandable. But just let me know
19 if you need anything to refresh.

20 In that same report you wrote several paragraphs about
21 Mr. al Baluchi and his activities prior to September 11th. Do you
22 recall that?

23 A. The general outlines, yes.

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1 Q. And in that section of your report about Mr. al Baluchi's
2 activities prior to September 11th, you cited to the 9/11 Commission
3 Report; is that right?

4 A. I believe so. I take -- if you -- if you suggest that's
5 what's in the document, I would -- I would take that as fact. That
6 sounds reasonable.

7 Q. So I'll represent to you that you cited to the
8 9/11 Commission Report. You can accept that representation?

9 A. Yeah. That sounds logical. Yes.

10 Q. Okay. And I'll also represent to you that in the section
11 of your report about Mr. al Baluchi's activities prior to
12 September 11th, the only source that you cited to was the
13 9/11 Commission Report.

14 A. I believe at the time that was the primary
15 source -- open-source information about Mr. al Baluchi's activities.

16 If I remember correctly, at the time of Mr. Paracha's trial
17 there was very little outside of that about Mr. Baluchi's activities
18 beyond the 9/11 Commission Report.

19 Q. Correct. And in -- in the section of your report about
20 Mr. al Baluchi's activities before September 11th, the
21 9/11 Commission Report was the only source that you cited to?

22 A. I -- I don't know whether that's the case, but it's
23 possible.

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1 Q. Sure. Would you like to take a quick look at your report
2 to refresh your recollection on that?

3 A. No. I -- I believe that's correct.

4 Again, at the time of the Paracha trial, as far as my
5 recollection goes, the only information about Mr. al Baluchi's
6 activities prior to 9/11 had been released through the
7 9/11 Commission report or through, you know, analogous law
8 enforcement statements or whatnot. It -- it wasn't -- it -- it
9 wasn't in the form of al Qaeda propaganda that I can think of.

10 Q. And the 9/11 Commission report itself drew from a number
11 of sources. Yes?

12 A. That's correct, yes.

13 Q. And one of the sources the 9/11 Commission relied on was
14 detainee reporting; is that right?

15 A. I believe that's correct, yes.

16 CDC [MS. OZGEDIZ]: May I just have one moment, Judge? Thank
17 you.

18 **[Pause.]**

19 Q. I'm now going to ask you about another source of
20 information that you relied on for your work in the Paracha case.
21 Okay?

22 A. Sure.

23 Q. And that other source that you relied on to form your

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1 opinion about Mr. al Baluchi was a set of declassified summaries of
2 statements made by Mr. al Baluchi. Do you recall that?

3 A. I do. Yes.

4 Q. And those declassified summaries of statements that had
5 been made by Mr. al Baluchi were given to you by the prosecutors in
6 the case of United States v. Uzair Paracha; is that right?

7 A. That is correct, yes.

8 Q. And the prosecutors in that case asked you to read the
9 summaries of Mr. al Baluchi's statements and offer your opinion about
10 what they meant; is that right?

11 A. I believe that's correct, yes.

12 Q. And you did that?

13 A. I did, yes.

14 Q. So now I'd like to turn to your expert report in this
15 case. In the expert report that you prepared for us, you discuss
16 your qualifications and your experience. Yes?

17 A. That's correct.

18 Q. And you mention your work as an expert witness in the
19 Paracha case?

20 A. I believe that's listed in my -- in my CV. That's
21 correct, yes.

22 Q. It's listed in your CV and in your report. Additionally,
23 you note that -- that Judge Stein, who had been the judge in Paracha,

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1 held a hearing on your qualifications as an expert witness?

2 A. That -- that's correct, yes. I also included that piece.

3 Q. And that hearing held by Judge Stein, that was a Daubert
4 hearing. Yes?

5 A. I believe so, yes.

6 Q. It was a hearing where Judge Stein heard about your
7 experience and your qualifications and sort of some preliminary
8 information about your opinions for the case. Yes?

9 A. Yeah. I believe it was a Daubert hearing. But
10 I -- honestly, it's been awhile. I -- I don't fully recall. I'm
11 sorry.

12 Q. You note that after the hearing held in the Paracha case,
13 Judge Stein found that you were qualified to serve as an expert
14 witness in that case?

15 A. That's correct. Yes.

16 Q. And you note that Judge Stein found your methodology to be
17 sufficiently reliable to meet the standards for admissibility of
18 expert testimony. Yes?

19 A. That's correct, yes.

20 Q. Now, after that hearing in the Paracha case, Judge Stein
21 did not allow you to testify at Mr. Paracha's trial about your expert
22 opinion on Ammar al Baluchi; is that right?

23 A. I don't recall. It's possible, but I -- I don't recall.

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1 Q. Would it refresh your recollection to see the transcript
2 of Judge Stein's decision about the scope of your testimony?

3 A. You can feel free to show it to me, but I -- that may not
4 have ever been communicated to me. It's possible that I was simply
5 asked to focus on certain things. It's very likely that I wasn't
6 told that I wasn't allowed to talk about this, but usually it's,
7 "We'll talk about these subjects."

8 So it's possible I might have seen it at some point, but
9 it's also possible I've never seen it. But you can feel free to show
10 it to me, sure.

11 Q. Sure. Just one moment, please.

12 CDC [MS. OZGEDIZ]: Your Honor, may I have permission, please,
13 to use the document camera to show MEA-BKG-00001491? This is in
14 the -- in the record at 942R, and this is just for the commission,
15 the witness, and the parties, please.

16 MJ [Col McCALL]: All right. Go ahead.

17 CDC [MS. OZGEDIZ]: Thank you.

18 Q. Okay. Can you see that, Mr. Kohlmann?

19 A. Yes.

20 Q. And I'll direct your attention to the transcript, starting
21 at line 14, where Judge Stein said: I am not going to permit the
22 expert to testify regarding the two alleged al Qaeda operatives who
23 are specifically involved in the allegations in this case; that is,

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1 Ammar al Baluchi and Majid Khan.

2 A. Yeah. Sorry. I can see that section.

3 Q. Okay. Does that refresh your recollection about whether
4 Judge Stein permitted you to testify in the case -- in the trial
5 about Ammar al Baluchi?

6 A. Again, I'm not -- it's been awhile, but I'm not sure
7 whether this was communicated to me in this way or simply I was asked
8 to cut out the material about al Baluchi and Khan, and there was no
9 explanation of why.

10 You know, I'm not -- it's -- oftentimes I'm just asked to do
11 things. It's not -- it's not clear because it's a court order or
12 it's simply a preference or what. In this particular case, I don't
13 recall whether I was specifically made aware of the court order or I
14 was just asked to cut out the material about al Baluchi and Khan from
15 my presentation.

16 Q. Okay. Understood.

17 I'll also direct your attention to the transcript, the same
18 page, starting at line 18, where Judge Stein said: I am concerned by
19 the fact that Kohlmann's testimony regarding al Baluchi's and Khan's
20 role in al Qaeda is based in not insubstantial part on Kohlmann's
21 review of the unclassified summaries of statements made by those
22 individuals.

23 Were you ever made aware of that finding by Judge Stein?

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1 A. Again, I -- I don't recall. I don't -- I don't recall
2 seeing this particular ruling. It's possible that this was
3 communicated to me orally, but I don't remember.

4 Q. Understood.

5 CDC [MS. OZGEDIZ]: Removing the document.

6 Q. And at trial Uzair Paracha was convicted. Yes?

7 A. I believe so, yes.

8 Q. And years later, Mr. Paracha's conviction was vacated?

9 A. I believe so, yes.

10 Q. And part of the reason that Mr. Paracha's conviction was
11 set aside was because new evidence came out after the trial that
12 Ammar al Baluchi was not part of al Qaeda?

13 A. I am not familiar with that particular evidence
14 or -- or -- or I am aware that Mr. Paracha -- there was an issue with
15 Mr. Paracha's case, but I am not familiar with exactly what you're
16 describing.

17 CDC [MS. OZGEDIZ]: Your Honor, may I have permission, please,
18 to use the document camera to show MEA-EXP-00002206, in the record at
19 AE 942T?

20 MJ [Col McCALL]: That's fine. Go ahead.

21 CDC [MS. OZGEDIZ]: And this is just for the commission, the
22 parties, and the witness, please.

23 MJ [Col McCALL]: All right.

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1 Q. Mr. Kohlmann, I'll direct your attention to the paragraph
2 near the bottom of the page that starts with the word "Third."

3 A. Yes.

4 Q. And this is from Judge Stein's decision vacating the
5 conviction of Uzair Paracha in 2018.

6 Judge -- Judge Stein wrote: Newly discovered evidence
7 contained statements by all three men professing that, contrary to
8 the factual assumptions on which this trial proceeded, Khan and
9 al Baluchi are themselves not members of al Qaeda.

10 Were you aware of this finding by Judge Stein?

11 A. No. I was not aware of this particular finding.

12 CDC [MS. OZGEDIZ]: Removing the document.

13 May I just have one more moment, Your Honor?

14 MJ [Col McCALL]: Sure.

15 CDC [MS. OZGEDIZ]: Thank you.

16 **[Pause.]**

17 CDC [MS. OZGEDIZ]: Your Honor, I just wanted ----

18 MJ [Col McCALL]: Go ahead, Ms. Ozgediz. You can take your
19 time.

20 **[Counsel conferred.]**

21 CDC [MS. OZGEDIZ]: Your Honor, I just -- for purposes of the
22 record, I cited to Mr. Kohlmann's expert report from the case of
23 Uzair Paracha. I did not put the record cite in there. And that is

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1 at MEA-EXP-00001953, in the record at 9420.

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

3 Q. Mr. Kohlmann, would it have made a difference in forming
4 your opinion about Ammar al Baluchi if you knew that the information
5 that had been obtained from him was obtained by drowning him in a
6 bathtub?

7 A. If there was other statements by other individuals that
8 corroborated activity or there was physical evidence such as
9 receipts, travel tickets, et cetera, that tended to corroborate
10 elements of that, I think it's possible that elements of it might
11 have been reliable.

12 But obviously having other information to back that up would
13 have been, I think, necessary. I would generally prefer -- again, as
14 I've stated before, I'm not an expert in torture or an expert in
15 extrajudicial techniques. But as, you know, someone who studies this
16 material, I generally prefer to get material that is taken through
17 consensual interviews, consensual statements, statements that are
18 made freely.

19 Even if they are biased, at least there is some indicia of
20 reliability. It is difficult sometimes with nonconsensual statements
21 to determine exactly the degree of reliability.

22 CDC [MS. OZGEDIZ]: Thank you, Mr. Kohlmann. And that
23 concludes my questions.

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

2 Go ahead when you're ready, Mr. Ruiz.

3 LDC [MR. RUIZ]: Thank you, Judge.

4 **CROSS-EXAMINATION**

5 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

6 Q. Mr. Kohlmann, I understood you to say that when talking
7 about the al Qaeda Media Committee, that from -- they had it as early
8 as '92 or '93, but it was not as effective as leading up into 1998;
9 is that correct?

10 A. That's correct. The individual who was allegedly
11 responsible for the media committee during the early years of when
12 al Qaeda was in Sudan, it was an individual who was known as Abu
13 Reuter. And the media committee was not being very effective. It
14 was not putting a lot of -- out a lot of content.

15 And, you know, part of that is possibly attributable to the
16 fact that in the early 1990s, it wasn't that easy to produce video
17 recordings, to distribute video recordings. It required physical
18 equipment. It required physical, you know, tapes and things like
19 that. The technology still required infrastructure that, frankly,
20 al Qaeda didn't really have.

21 Q. Correct. So the ineffectiveness of it was, in fact, very
22 much driven by the lack of technology?

23 A. No. I think it was a lack of -- it was a lack of two

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1 things. Because when you look at media, there's two elements of
2 media: Number one, there's the technological element. Right? But
3 there's plenty of -- there's plenty of very fancy Hollywood movies
4 that have lots of special effects but still bomb at a theatre, Right?
5 And that's because they don't have a good story line. They don't
6 have good acting. They don't have good story line.

7 So to produce good propaganda, especially for al Qaeda, it
8 was a combination of two things: Number one, it was having the
9 equipment to actually produce professional-looking content; but
10 number two, they had to have the actual content and they had to know
11 how to shape the message.

12 And, you know, again, this is just my expert opinion looking
13 back at their efforts from the early years, but it doesn't look like
14 the people who were in charge of that effort in the early years
15 really had a good conception of how to create a media campaign.

16 And I think what changed in the late 1990s was that you
17 obviously had folks that took over the media committee that had a
18 much clearer and better idea about how to communicate to the outside
19 world, because many of them spoke English.

20 And then the second piece of it is, is that it just became
21 much easier for them to get the equipment to make this stuff look
22 professional, even if it was being, you know, put together in a
23 one-room shack or something like that. It could still be done.

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1 Q. So you testified previously that it would have been in
2 2002 to 2003 that there was an explosion of al Qaeda propaganda on
3 the Internet, correct?

4 A. Yeah. I mean, it's not -- it's not quite like that. It
5 started really in about '99 or 2000. Then all of a sudden, after
6 2001, 2002, there was a shift from static websites to discussion
7 forums, to chat forums. And that created an avalanche where all of a
8 sudden there was the ability of these folks -- instead of focusing on
9 building websites, they could focus on producing video and audio and
10 text content and simply release it on the sites that already existed
11 that weren't being shut down.

12 So yeah, I would say that the video particularly began
13 taking off in 2003/2004, around the time of the war in Iraq.

14 Q. All right. So let me -- let me -- I want to pin you down
15 a little bit more on the timing.

16 So as I understand it, it was a gradual process and it began
17 approximately in 1998, correct?

18 A. That's correct, yes.

19 Q. And during the years of 2002 and 2003, that's when the
20 explosion of al Qaeda propaganda on the Internet really came about?

21 A. It depends what you're talking about. There is different
22 phases.

23 Q. Well, let me -- let me -- let me ask you that question one

1 more time, if you can answer that.

2 Was it correct that it was approximately in the years of
3 2003 that when the explosion of al Qaeda propaganda really came about
4 on the Internet?

5 A. It depends specifically what type of al Qaeda media you're
6 talking about.

7 Q. Well, do you agree with that statement, that in 2002/2003
8 it was the explosion of al Qaeda propaganda came about on the
9 Internet?

10 A. It depends -- it depends what kind of al Qaeda propaganda
11 you're talking about on the Internet.

12 Q. Okay. You, in fact, did testify, as I just indicated, in
13 United States v. Hamdan, correct?

14 A. Again, it depends upon what type of propaganda you're
15 talking about on the Internet. If you're talking about discussion
16 forums, yes. The shift from static websites to discussion forums
17 took place approximately 2002 to 2003.

18 However, the major shift towards video recordings, towards
19 large-scale video recordings being distributed, posted on the
20 Internet, that being the exclusive area of release, that took place
21 about a year and a half later in 2004 to 2005. That's when the major
22 push comes for video content.

23 LDC [MR. RUIZ]: And Judge, I'd like to display a document for

1 the witness. This will be just for the witness and for the parties.

2 MJ [Col McCALL]: Okay. What is the document?

3 LDC [MR. RUIZ]: It hasn't been previously submitted to the
4 court, so I need to have it marked.

5 MJ [Col McCALL]: Okay.

6 **[Pause.]**

7 MJ [Col McCALL]: All right, Mr. Ruiz. I believe the court
8 reporter has marked it. I see that you're showing it to the
9 prosecutor.

10 And so where will this be in the record?

11 LDC [MR. RUIZ]: 632UUU (MAH), Judge.

12 MJ [Col McCALL]: All right.

13 Q. Mr. Kohlmann, I'm just going to ask you to take a ----

14 LDC [MR. RUIZ]: If I can get the overhead projector, please,
15 feed?

16 Q. Just take a look at the highlighted portion of that.

17 A. Yes.

18 Q. So my -- my question is really: Do you agree with your
19 testimony from United States v. Hamdan that it was -- you said what
20 you said concerning the years 2002 to 2003, is what I'm asking you.

21 A. Sorry. If you wouldn't mind placing it back there,
22 because I think you forgot to -- the last statement: Al Qaeda
23 websites and pro-al Qaeda websites. So this is what I was talking

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1 about. Again, this goes into there are different types of al Qaeda
2 media, right?

3 So between 2002 and 2003 was the shift from static websites
4 to discussion forums. But video content -- the actual, like, video
5 content, the multimedia content, that started flourishing in
6 approximately mid-2004 as the result of two different events: Number
7 one, a series of al Qaeda attacks in Saudi Arabia; and number two,
8 the beheadings of Western hostages in Iraq.

9 That allowed these groups to start issuing short video clips
10 that were very powerful, and that was basically the start of the
11 multimedia campaign.

12 Q. Do you ----

13 A. So my statement was correct, but you forgot the second
14 piece of this, which is that I was specifically here talking about
15 al Qaeda websites and pro-al Qaeda websites.

16 Q. Sure. But you agree with ----

17 A. And that's the -- and in that regard ----

18 Q. But you agree with me that the -- that the year where that
19 began happening was 2002, 2003, and then there was a -- more of a
20 gradual process in 2004 and 2005, right? So it was post-2002.

21 A. That's correct.

22 LDC [MR. RUIZ]: Judge, I'd like to have this admitted into
23 evidence.

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1 MJ [Col McCALL]: All right. I mean, it's -- it's in the
2 record already.

3 LDC [MR. RUIZ]: All right. We'll make a copy available as
4 well.

5 MJ [Col McCALL]: Okay.

6 Q. You testified yesterday -- actually, I think it was the
7 day before yesterday -- regarding the -- one of Mr. al Hawsawi's
8 statements concerning his intent to go to Chechnya. Do you recall
9 that?

10 A. I believe so, yes.

11 Q. And your testimony was that you believed that that
12 statement was reliable and factual because it was exactly the
13 situation that we knew came about at that time. Do you remember
14 that?

15 A. I believe what I had stated was that Mr. Al Hawsawi's
16 description of the situation in Chechnya and the obstacles to
17 traveling to Chechnya were exactly correct as per the descriptions of
18 Arab-Afghan representatives who were in Chechnya at exactly that time
19 period.

20 Q. Can you -- can you elaborate a little bit more about that
21 in terms of the situation in Chechnya?

22 A. Yes. At that particular time there was a war -- or there
23 was a -- there had been a war going on in Chechnya, and now there was

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1 sort of a cold peace in the sense that the Russians hadn't
2 surrendered and the Arab-Afghans and their Chechen allies hadn't
3 surrendered. It was sort of a stalemate. And the Russians more or
4 less surrounded Chechnya and put roadblocks all over the place and
5 were preventing anyone from trying to go in and out.

6 So a number of different Arab-Afghan representatives had
7 tried traveling to Chechnya at that time, including the deputy
8 commander of al Qaeda, Ayman al Zawahiri, and they were unable to
9 enter because of that.

10 There was also another situation ongoing in the sense that
11 the Russians were doing everything they could to undermine support
12 and -- and pro-mujahideen sentiments among the local population.

13 There was a lot of suspicion among local Chechens about what
14 these foreign fighters were doing there. And thus, in addition to
15 running the risk of being caught at a checkpoint, there was also the
16 risk that you -- you could fall into the hands of individuals who
17 were not at all sympathetic to what these people were doing.

18 Q. Now, these foreign fighters wanted to get to Chechnya, in
19 part, because of the reporting that was coming out of Chechnya about
20 the atrocities that the Russians were committing in Chechnya,
21 correct?

22 A. In part, yes.

23 Q. In fact, there were, I think as you mentioned, propaganda

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1 videos that were produced by some of these fighters that were later
2 distributed to countries, such as Saudi Arabia, to try to get young
3 men to come out and to help fight the Russians, correct?

4 A. Yes. That's true.

5 Q. And these videos depicted, for example, ambushes of
6 Russian troops, correct?

7 A. Yes, they did.

8 Q. And they depicted civilian casualties and dead bodies and
9 bombings, correct?

10 A. Yes, they did.

11 Q. And the intention of that was to provide an incentive for
12 additional fighters to come in and continue to resist the Russian
13 onslaught, correct?

14 A. Yes.

15 Q. And you agree that, in fact, that was the situation at the
16 time?

17 A. I'm -- I'm sorry. What was the situation at the time?

18 Q. That, in fact, there was an ongoing conflict and there
19 were foreign fighters pouring in or trying to get to Chechnya in
20 order to help in what they viewed to be an unjust -- an unjust war
21 against the Chechnian Muslims, correct?

22 A. I would agree with everything except the word "pouring
23 in." Because the truth was, is that as far as I'm aware, at no point

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1 were people pouring in because it was very difficult to get into
2 Chechnya, and that many, if not most, of the people who tried to get
3 there were unable to get there, again, including the deputy commander
4 of al Qaeda, Ayman al Zawahiri.

5 Q. And that was because of the Russian encirclement of
6 Chechnya, correct?

7 A. Like I said, it's partially the Russian encirclement.
8 It's partially that this is an area that's not generally very safe
9 for anyone. There's a lot of disincentives to try to go to Chechnya.

10 Q. And what would typically happen just generally to somebody
11 who was trying to get to Chechnya to fight in that conflict but was
12 unable to do so?

13 A. Well, one of two things would happen -- one of three
14 things would happen. Either they would be simply unable to get past
15 the border, unable to get anywhere near, and they would be -- get
16 sent back.

17 Number two, they would get captured by the Russians,
18 interrogated, possibly imprisoned. That's what happened to Ayman
19 al Zawahiri. Or, number three, they might get killed.

20 Q. Are you familiar with the term "filtration camps"?

21 A. I'm sorry. What's that?

22 Q. Are you familiar with the term "filtration camps"?

23 A. No, I'm not.

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1 Q. Were you familiar with the bombardment of Grozny?

2 A. Yes.

3 Q. All right. Can you expound on your knowledge of that?

4 A. Yes. During the first, and I believe also during the
5 second, Chechen wars, the Russians used a variety of tactics in order
6 to try to win the conflict, most of which involved heavy artillery,
7 bombing the capital of Chechnya, Grozny.

8 It was a very -- it was an exceptionally brutal war.
9 Chechnya is a very, very difficult place to fight in. And the
10 Chechens are a very determined adversary. There were horrible
11 atrocities, I think you could say, on both sides, and a lot of
12 civilians were killed.

13 Q. Very well. You've had a number of questions about your
14 involvement in the Paracha case, correct?

15 A. I -- well, today, yes.

16 Q. It is correct that when you testified in the Paracha case,
17 you believed that one of the aliases for Mr. Ammar al Baluchi was
18 Mustafa, correct?

19 A. I don't recall. It's possible. But I don't -- as far as
20 my recollection, I don't remember associating anything with
21 Mr. al Baluchi on the basis of that pseudonym. That's too generic a
22 pseudonym to -- for me to be -- without further information, anyway.

23 Q. Okay. So if I understand you, you don't remember

1 utilizing a pseudonym with Mr. al Baluchi, but you do remember that
2 you would not have connected anything based on a pseudonym that you
3 don't remember using?

4 A. As in -- as in -- as in -- for me to connect someone on
5 the basis that they have the name Mustafa, myself, my own evidence, I
6 would not link someone on the basis that they are also named Mustafa.
7 Right?

8 If I'm given information suggesting that this person -- that
9 that's this person -- right? -- I will do that on the basis of that
10 information. But I do not generally link people together on simply
11 the basis that they share the same first name.

12 Q. My point is that when you testified under oath in United
13 States v. Paracha, you testified that Mr. Ammar al Baluchi had an
14 alias or an a/k/a, and that a/k/a that you knew him to be or go by
15 was Mustafa, correct?

16 A. It's possible. But again, I don't recall that
17 particular -- that particular name.

18 Q. Okay.

19 **[Counsel conferred.]**

20 LDC [MR. RUIZ]: May approach to have this marked?

21 MJ [Col McCALL]: You may.

22 **[Pause.]**

23 MJ [Col McCALL]: All right. Mr. Ruiz, you can retrieve your

1 document.

2 LDC [MR. RUIZ]: Judge, this now has been marked as Appellate
3 Exhibit 632VVV (MAH).

4 MJ [Col McCALL]: All right.

5 LDC [MR. RUIZ]: I'd like to display it to the witness and the
6 parties.

7 MJ [Col McCALL]: Go ahead.

8 **[The witness reviewed the evidence.]**

9 A. Yes. I've read it.

10 Q. Okay. Does that refresh your recollection?

11 A. I don't recall making this statement, but I believe -- I'm
12 sorry. If you wouldn't mind leaving it on the -- on the thing.

13 I believe what I was saying here was not that I -- I
14 personally know that, but that I have been instructed that that is
15 Ammar al Baluchi.

16 Q. Well, I mean, in the document here it doesn't say you had
17 been instructed. It just strictly says: The person known as Mustafa
18 who I -- ----

19 A. Right.

20 Q. ---- I know to be Ammar al Baluchi.

21 And then you're asked if you relied on that in reaching your
22 expert opinion in this case where this man was on trial, and you
23 said: Yes, I did.

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1 Do you dispute that? Did you testify to that?

2 A. I don't dispute that.

3 I'm suggesting that you're mischaracterizing what I said.
4 When I say "who I know," I was suggesting who I know is on the basis
5 of the information provided to me by the government. Not because I
6 personally know Ammar al Baluchi, who I do not personally know
7 Mr. al Baluchi.

8 Q. Okay. I think the document speaks for itself.

9 LDC [MR. RUIZ]: That's all I have, Judge.

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

11 And the Bin'Attash team, do you have any cross-examination
12 of this witness?

13 DC [MR. MONTROSS]: No. In light of his direct testimony, we
14 have none.

15 MJ [Col McCALL]: All right. Thank you, Mr. Montross.

16 Mr. Trivett, do you want to recess to consider whether or
17 not you have redirect?

18 MTC [MR. TRIVETT]: That would be great, sir. Thank you.

19 MJ [Col McCALL]: All right. So it's 0956. Let's plan on
20 being back on the record at 1015.

21 **[The witness withdrew from the RHR.]**

22 MJ [Col McCALL]: The commission is in recess.

23 **[The R.M.C. 803 session recessed at 0956, 01 May 2024.]**

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1 **[The R.M.C. 803 session was called to order at 1015, 01 May 2024.]**

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

3 The parties are present. The accused are absent.

4 Mr. Kohlmann is still on the witness stand.

5 **[The witness, EVAN F. KOHLMANN, resumed the witness stand.]**

6 MJ [Col McCALL]: Mr. Sowards.

7 LDC [MR. SOWARDS]: Yes, Your Honor. I did follow your
8 instructions to sit, but I wanted to stand before anyone else. Just
9 to let you know that William Xu, Lieutenant, United States Navy, has
10 joined us in the Remote Hearing Room.

11 MJ [Col McCALL]: All right.

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

13 MJ [Col McCALL]: Mr. Trivett.

14 MTC [MR. TRIVETT]: Sir, I have no questions for Mr. Kohlmann
15 on redirect.

16 But I would like to readdress, at some point after he's
17 excused, the possibility of doing at least this interim ex parte,
18 because I think that may at least give me some guidance from Your
19 Honor on the way ahead based on what I do know. I think it would be
20 useful if we were able to do it right after at least we temporarily
21 release Mr. Kohlmann and then potentially start back up in open for
22 the afternoon session.

23 I think that would help us attempt to resolve this issue and

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1 then be able to give direction to Mr. Kohlmann on whether he's
2 subject to recall, when he could testify about this, or how it's
3 going to be handled by the commission.

4 MJ [Col McCALL]: All right. That's fine.

5 All right. Mr. Kohlmann, I think you've heard that there is
6 this one issue that's remaining as far as that you may be asked
7 questions about on the nondisclosure agreement. So you're probably
8 going to be recalled at some point to finish your testimony. We're
9 not prepared to do that right now as we work through some of these
10 issues. But -- so I can't tell you when you're going to be called
11 back as a witness.

12 But I'll just remind you that during this period of time
13 between now and whenever you do come back to testify, either whether
14 it's still in this pretrial motion phase, or if you're then later
15 called as a witness at trial, please don't discuss your testimony
16 with anyone, to include counsel for either side, unless you get prior
17 authorization from the court.

18 WIT: Yes, Your Honor. Thank you very much.

19 MJ [Col McCALL]: All right. Thank you for your testimony.
20 You're excused.

21 WIT: Thank you, Your Honor.

22 LDC [MR. SOWARDS]: Your honor ----

23 MJ [Col McCALL]: Yes, Mr. Sowards.

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1 LDC [MR. SOWARDS]: ---- before the witness is
2 excused -- yeah. Don't mean to hold him up. I would like him to
3 step out of the hearing room but I -- before he's excused today
4 or ----

5 MJ [Col McCALL]: All right.

6 LDC [MR. SOWARDS]: ---- possibly this session, I'd like to be
7 heard. Thank you.

8 MJ [Col McCALL]: Sure.

9 Mr. Kohlmann, we have a legal matter to take up before you
10 leave the area. So if you could step out of the RHR, back to the
11 witness room, and I'll have someone let you know if you need to come
12 back in to come back on the witness stand.

13 WIT: Thank you, Your Honor.

14 MJ [Col McCALL]: All right. Ms. Tate, if you could just let
15 me know when he's left the RHR.

16 **[The witness was warned and withdrew from the RHR.]**

17 ATC [MS. TATE]: Mr. Kohlmann has left the RHR.

18 MJ [Col McCALL]: All right. Terrific.

19 What do you have, Mr. Sowards?

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

21 I want to make sure I was following the court's comments to
22 Mr. Kohlmann and, in particular, voice my request and objection to
23 proceeding in the alternative, that the question of the release of

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1 the nondisclosure agreement and his affiliation with any other
2 government agencies be resolved while we're in the pretrial hearing
3 stage and before this commission, if it does, relies on that
4 information or any information in resolving the -- the suppression
5 motion litigation.

6 My concern is that if this is extended through witness
7 availabilities and all sorts of other contingencies until after the
8 time Your Honor leaves the bench -- and I'm not presuming to indicate
9 which way you might rule or intend to rule on our issues, but I think
10 Mr. Kohlmann was a particularly, shall I say, necessary witness for
11 someone to have an opportunity to observe his affect and demeanor
12 while testifying, among other things. And I -- I don't have
13 confidence that all of that is going to be as evident to someone who
14 may succeed you if the issue is left unresolved.

15 So I think it's really paramount for the just resolution of
16 the suppression motion litigation to have that resolved either during
17 this session of hearings or those that are scheduled between now and
18 December.

19 MJ [Col McCALL]: Mr. Sowards, I understand your position and
20 I agree with it. So it will be a matter that is resolved before we
21 hear the -- or have the argument on the motion to suppress.

22 LDC [MR. SOWARDS]: And I thank you for clarifying, Your
23 Honor. And just so you understand, I was just alerted/referenced to

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1 the -- to the trial phase. So ----

2 MJ [Col McCALL]: Sure. I was just trying to ----

3 LDC [MR. SOWARDS]: ---- I didn't want this issue left
4 unresolved until ----

5 MJ [Col McCALL]: No. This issue will be resolved, one way or
6 the other, and before I take any decision on the motion to suppress,
7 if we're able to get there. But yeah, I agree with everything that
8 you said, and I understand there's a variety of remedies.

9 I'm going to hear from the government. We'll do this ex
10 parte at some point this morning and I'll get a little more fidelity
11 on what's going on. But we'll resolve it.

12 LDC [MR. SOWARDS]: Right. And also in terms of proceeding,
13 then, further today or this afternoon -- and seriously, I mean this
14 in no -- no joking fashion. I'm very intrigued with the prospect of
15 seeing the video that Mr. Connell mentioned. But I also think -- and
16 I leave it to you because you're very nimble about deconflicting and
17 sorting these things out.

18 To the extent information is revealed to you by the
19 prosecution in the ex parte that can be shared with the defense, to
20 the extent that information might otherwise lead us to be deprived of
21 the information we're seeking, I would request an opportunity to
22 respond to it. And I also understand that perhaps the government
23 would be insisting or requesting that that conversation be conducted

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1 in a closed session.

2 So without inconveniencing the members of the gallery and
3 the public or pushing off the opportunity to view this -- this
4 information that Mr. Connell mentioned, I would like the court to
5 give consideration to affording us a fair opportunity to respond to
6 whatever representations the government makes to the commission that
7 we can do consistent with your understanding of the national security
8 concerns or whatever they're raising.

9 MJ [Col McCALL]: Absolutely.

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

11 MJ [Col McCALL]: All right. So before we move into what else
12 to do today, if -- Ms. Tate, if you can let somebody know -- let
13 Mr. Kohlmann know that he can go ahead and leave the RHR location.
14 Just he needs to have -- however the government is contacting him in
15 case we do bring him back at some point today.

16 ATC [MS. TATE]: Okay. So just to be clear, he's just to
17 remain in the area until we release him officially. Is that
18 accurate?

19 MJ [Col McCALL]: That's correct.

20 ATC [MS. TATE]: Okay, sir. I will go do that now.

21 MJ [Col McCALL]: All right. So I'm inclined to hear this
22 video later today. I understand that they're -- well, I want to hear
23 argument. I did hear that the government has a relevance objection.

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1 I just got a, you know, brief synopsis from Mr. Connell on what the
2 video would show.

3 But, Government, do you have a position on this?

4 MTC [MR. TRIVETT]: So we have a written position on it in a
5 notice of objection.

6 MJ [Col McCALL]: Where is that at?

7 MTC [MR. TRIVETT]: 628YYYY. And I haven't had a chance to
8 review that in several years, but that's at least our written
9 position in the event you wanted to consider it on the papers.

10 MJ [Col McCALL]: No, understood. And so I do want to
11 consider that. Let's go ahead and get it working as far as, again,
12 how long this trial is going on. I know that they're -- it sounds
13 like they are behind the scenes having to work to get the video in a
14 manner that we can watch it in this facility. So let's do that. And
15 I believe my CISOs need to look at it as well, again, just to make
16 sure that it's something that we can watch in here.

17 We'll be working that while I review those -- the
18 government's position over lunch, and I'll let the parties know. But
19 just be ready to play it if I want to hear it.

20 All right. We always have oral argument. So I know that we
21 had left off last time on 926. That is Mr. Ali's motion to dismiss
22 all charges due to unlawful influence by members of Congress. If I'm
23 correct, I believe we had left off on the government. So -- and

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1 before we jump into that -- but is that correct?

2 MTC [MR. TRIVETT]: That is correct, sir. And to correct the
3 record, it's 628 with five Ys not three Ys.

4 MJ [Col McCALL]: Okay. Yeah. Which, again, is why we
5 changed the number designation on that. It started to get a little
6 too unwieldy.

7 All right. Understood, five Ys.

8 All right. Just before we go into that argument -- and
9 again, I think the parties know that I'm pretty flexible on this. I
10 know that there are some counsel that are not in court today as they
11 are working on matters outside of court to get us ready for next
12 witnesses, next session, you know, all of that.

13 What AEs are the parties prepared to argue today? The ones,
14 again, in order would be -- I know we have the 628, it looks like
15 it's six Js. That's the government's motion to compel production of
16 data relied on by Dr. Gur.

17 We have 877, that's Mr. al Hawsawi's motion to exclude
18 overseas business records.

19 878, Mr. al Hawsawi's motion to suppress camp recordings.

20 915, Mr. al Hawsawi's motion to compel XYM discovery.

21 And I could keep going. But I'm happy to take some out of
22 order if the parties are particularly ready. What I ask you to do is
23 go ahead and think about it and be ready.

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1 If we don't have anything, I'll give you back some time.

2 But I would like to be productive while we're down here.

3 So I anticipate we're going to take an early lunch, although
4 I'm probably jinxing us by saying that. But just -- I think we'll
5 just go ahead and finish the rest of this argument and then we'll
6 break a little bit early.

7 I'm still reviewing some of those 505 documents, the
8 underlying documents, to make my decision. So I know that there's
9 matters that I can take care of.

10 And then we also have the government ex parte.

11 All right. Mr. Trivett, are you ready?

12 MTC [MR. TRIVETT]: Just to clarify, you wanted argument on
13 the UI of Congress issue?

14 MJ [Col McCALL]: That's correct.

15 MTC [MR. TRIVETT]: Okay. If I could just have maybe five
16 minutes, sir?

17 MJ [Col McCALL]: That's fine. We'll just pause in place.

18 Mr. Sowards.

19 LDC [MR. SOWARDS]: Yes, Your Honor. Just for your planning:
20 You mentioned the 628 with a bunch of Js, and that is motion -- I
21 defer to Mr. Connell, but that was a motion that we had also raised
22 the possibility with Mr. Sims about hearing after we had an
23 opportunity to hear the testimony of W, as in whiskey, K, as in kilo,

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1 5I, India, witness.

2 MJ [Col McCALL]: I do recall ----

3 LDC [MR. SOWARDS]: Yes.

4 MJ [Col McCALL]: ---- being apprised of that. So that's

5 fine.

6 LDC [MR. SOWARDS]: Okay. And then the second issue is
7 whether the commission would wish to entertain argument at some point
8 whenever it's convenient on AE 940 (KSM), which is the concern about
9 the office intrusion issue.

10 MJ [Col McCALL]: I'm open to that.

11 LDC [MR. SOWARDS]: Okay. So whenever you want to hear that,
12 we would just obviously need an opportunity to grab the paperwork.

13 MJ [Col McCALL]: All right.

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

15 **[Pause.]**

16 MTC [MR. TRIVETT]: I believe I'm ready to proceed, Your
17 Honor.

18 MJ [Col McCALL]: All right. Go ahead.

19 MTC [MR. TRIVETT]: So I was listening hard to Ms. Radostitz's
20 argument on why she believes that the statements from the congressmen
21 were somehow considered unlawful influence on the President and the
22 Secretary of Defense, and I was actually hoping not to rise on this.
23 I was hoping not to have to make any argument at all.

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1 I think the position -- the legal position is clear, but it
2 just -- calling more attention to this issue I don't think is
3 helpful. I don't think it's helpful to the ongoing negotiations that
4 continue between the prosecution and certain defense teams. I don't
5 think it's helpful to reinvigorate more press attention on this and,
6 you know, perhaps set off another cycle of attention on this issue.

7 But there were enough facts in her argument that I think
8 need to be clarified in order for the commission to have a full
9 understanding of the government's position on this, both legally and
10 factually.

11 So when we set off in March on pursuing whether or not
12 pretrial agreements were possible, it was right on the heels of the
13 commission's decision to release Ms. Bormann. And so we certainly
14 knew we were going to be in for a period of delay while a new learned
15 counsel was identified and fully cleared and then up to speed
16 sufficient so that we could have another counsel, a learned counsel
17 who was actually ready to litigate the cases.

18 So we sat in this courtroom, we discussed what was possible,
19 what was within our power, meaning the office of the chief prosecutor
20 and the convening authority's power, and what we believed, at least
21 based on some preliminary conversations we were having with defense
22 counsel, what was going to be outside of the power of the convening
23 authority to grant.

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1 And so we characterized the ongoing negotiations as -- while
2 something we were willing to lend our good offices to to assist for
3 the issues that were not something that the convening authority had
4 the authority to do or the current JTF commander had the authority to
5 do, we would term those parts of the negotiation as policy principles
6 that we would forward up through our channels within the Department
7 of Defense Office of General Counsel and so they could get it to the
8 requisite people who would need to be making those decisions if, in
9 fact, they would be willing to make those decisions.

10 We made no promises. Obviously, it was out of our control.
11 And, quite frankly, a lot of it was outside of a prosecution concern,
12 an Office of Chief Prosecutor concern, right?

13 We were concerned with what we termed "the prosecution
14 principles." What would the accused be pleading guilty to? What
15 would any sentence limitation be? What evidence would we be able to
16 use? Would there be appellate waivers? Typical things that Your
17 Honor, I'm sure, has seen time and time again in his own practice in
18 the Air Force courts-martial system.

19 But I think there was a statement made at some point in time
20 from Ms. Radostitz in her argument that they believed that these were
21 many of the -- the policy principles were, quote, many of the things
22 the CA could have decided but was not willing to do so. That is
23 inaccurate. That is not true.

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1 And all of the recommendations, all of the -- all of the
2 things within the policy principles -- and I don't want to get into
3 too much granular detail, because, like I said, I don't think this is
4 helpful to any alternate resolution that may still occur in this
5 case.

6 But the policy principles the accused were seeking were to
7 try to get some type of certainty and guarantee on what their
8 conditions of confinement would look like after they pleaded guilty.

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

10 MTC [MR. TRIVETT]: That has always been the most important
11 thing that was communicated back to us through all of the counsel.
12 It included whether or not they would remain in communal detention;
13 whether or not there would be Department of Justice charges that
14 would be an -- agreed upon not pursued by the Department of Justice
15 on other offenses in which the government could allege that these
16 accused have committed crimes; different types of medical treatment
17 than they're currently receiving; and a greater amount of contact
18 with their family members.

19 Now, if one were seeking guarantees in that -- and that was
20 the idea, is to try to get some member of the Administration high
21 enough that could bind the Administration to -- and the
22 U.S. Government to future promises, that would ultimately be then
23 incorporated within the convening authority's pretrial agreement.

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1 We kept the convening authority at the time completely
2 unaware of the specifics of the request because we wanted them
3 separated to avoid this very issue, to avoid any claim that there
4 would be some kind of unlawful influence on what would be at the time
5 Colonel Wood's own discretionary decisions regarding a pretrial
6 agreement, and some other moving parts on the policy principles that
7 someone, in theory, if they had been joined, could be trying to
8 influence or pressure him to alter his own professional judgment on
9 what he believes is appropriate within the prosecution principles.
10 Right?

11 So we kept this separate intentionally right up until the
12 point where the government had made a determination that it was not
13 likely that we were going to be receiving any formal response.

14 And as Your Honor knows, he required the prosecution to
15 periodically update the commission on where it was. We had had a
16 series of updates to the commission that really were not updates.
17 They were not updates as far as we were not learning of any
18 additional information and understanding that at some point the case
19 must go on; if this was going to be a requirement from the defense
20 counsel as part of a pretrial agreement, that it wasn't likely that
21 the policy principles would ever be addressed.

22 But we continued to be willing to positively endorse to the
23 convening authority any pretrial agreement that supported what we

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1 thought was necessary in the prosecution principles and continue to
2 this day.

3 Then we had a change in convening authority last October.
4 We rebriefed the current convening authority, and she has assured us
5 that we can continue to negotiate on her behalf and that she is
6 willing to entertain pretrial agreements that -- that are positively
7 endorsed from the prosecution.

8 So really nothing has changed in that respect, except the
9 policy principles themselves were rejected by the Administration.
10 The reasons for the Administration rejecting those policy principles
11 are completely up to them. They're completely discretionary.

12 It has nothing to do with any part of their process within
13 the military commission process. They were not acting as convening
14 authorities. They were not acting as reviewing authorities. They
15 were not acting as appointing authorities.

16 This was a completely political decision based on conditions
17 of confinement and whether or not there could be guarantees going
18 forward after the accused pled guilty.

19 Now, if all the defense were seeking were recommendations by
20 the convening authority, we could have resolved this shortly probably
21 after we began negotiations. They were not seeking recommendations.

22 The convening authority under the regulation has the ability
23 to make recommendations on conditions of confinement. They're not

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1 binding. And the JTF-GTMO commander has the ability to work with the
2 convening authority on conditions of confinement, but it's
3 exceptionally naive for anyone to believe that a -- at the time an
4 O-7 or an O-6 could bind the government in perpetuity on whatever
5 conditions of confinement the accused were seeking to have guaranteed
6 as part of this pretrial agreement.

7 So the regulation always envisions, you know, to the extent
8 that the convening authority can make recommendations and work with
9 the JTF-GTMO commander on that, that it doesn't necessarily stop
10 there. They have chains of command. Certainly the JTF-GTMO
11 commander has a chain of command up through SOUTHCOM. SOUTHCOM talks
12 to the Office of the Secretary of Defense Policy.

13 And so the regulation always envisioned some type of
14 inter -- intergovernmental consultations and decisions on this. So
15 it's not accurate to say that the CA was not willing to do these
16 things.

17 The CA, along with the convening authority -- I'm sorry,
18 along with the JTF commander, simply do not have the authority to
19 bind the government in perpetuity. That should be understood. I
20 mean, most standing orders have to be reinstated every time the
21 change of command happens, right? So it's just an understanding of
22 how the government works, how the military works, and how the chain
23 of command would implicate that.

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1 It also does not then take out the fact that there may be
2 interbranch discussions in this regard. Right? Ultimately, Congress
3 funds everything. So to the extent that the President would be
4 making decisions that could wind up costing the government a certain
5 amount of money or expenditures over a long term, it's not improper
6 for Congress to have a role or a say in what they're hearing.

7 So this is a completely appropriate part of the government
8 function when it comes to -- and once the commission -- if, in fact,
9 the commission comes to an agreement that these policy principles
10 simply are something outside of the authority of the convening
11 authority, it really ends this whole motion series. Because -- and
12 that's our legal position, is that they were acting in an appropriate
13 political role that they were asked to do by the defense counsel.

14 And it was clear that we were going to send it up. This was
15 part of the discussions. I do not recall ever a part of the
16 discussion to say, hey, why don't we just handle it with the
17 convening authority recommendations? That was not something that I
18 ever recall, because it was inconsistent with what my understanding
19 was for why they wanted some type of guarantee going forward.

20 And those -- and it's an understandable request from the
21 accused, and we always believed it was an understandable request from
22 the accused. What am I signing up to if I sign up to this?

23 But that doesn't mean that we have the authority to -- to

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1 dictate that. Right? It's a big government. Everyone's got its own
2 part. But this continuing detention conditions are not something
3 that fall within the convening authority's authority or the Office of
4 the Chief Prosecutor's authority.

5 So we did what we could. We routed that information up. It
6 took far longer than we had hoped, and we had given up on actually
7 getting a result. We had communicated to the commission and to the
8 defense counsel that it was not likely that we were going to get a
9 response. That was just based on the best assessment of the issue by
10 the chief prosecutor who, you know, works through the Department of
11 Defense Office of General Counsel.

12 We communicated that to defense counsel. We went and sat
13 down with them again in a group meeting and ultimately said we would
14 still be interested in potential pretrial agreements and working out
15 what we think might be within the authority of the convening
16 authority. And I know that the chief prosecutor works hard on that
17 and has worked hard on that for the last, you know, year of his time.

18 So those things continue. And I think it's important for
19 Your Honor to understand that those things continue, because it shows
20 that there's no prejudice at all to whatever statements were made by
21 any members of Congress here.

22 The people who are responsible for endorsing, which is us,
23 or ultimately considering, which is the convening authority, are

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1 still willing to do so today. There has been no influence on anybody
2 who's actually part of this decision process on whether or not to
3 endorse or approve a pretrial agreement in this case.

4 MJ [Col McCALL]: Let me ask you a question on that.

5 MTC [MR. TRIVETT]: Yes, sir.

6 MJ [Col McCALL]: So how was it -- and, again, I know this was
7 preliminary and I don't really want to get into many of the details,
8 but how was it envisioned that it would eventually, if the policy
9 principles were agreed to, that it would be incorporated into the
10 pretrial agreement? Because that's where I guess I'm not -- I
11 understand how you're dividing it between ----

12 MTC [MR. TRIVETT]: Right.

13 MJ [Col McCALL]: ---- let's call them the policy principles
14 and the prosecution principles. But at some point if there was a
15 deal -- I mean, was the agreement going to be between the convening
16 authority and the accused?

17 And so if so, then how would that sub rosa agreement be
18 brought into -- because it seems like the accused would be premising
19 their agreement to the pretrial agreement with the convening
20 authority, premising it on the policy principles being enacted.

21 MTC [MR. TRIVETT]: Yes, sir. So that -- so we specifically
22 envisioned it in a way where there was no sub rosa agreements, Right?
23 So the idea was that the policy principles were going to come back in

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1 writing, signed by an official who had the authority to bind the
2 government going forward, and then that was going to be then brought
3 into the convening authority's consideration.

4 Like if, in fact, you accept this pretrial agreement, you
5 know, you bind the government to the agreement set forth by whoever
6 in the Department of Justice would agree that there were no charges,
7 and whoever within the Office of the Secretary of Defense would agree
8 on the continuing communal detention.

9 But then ultimately it was still going to be up to the
10 convening authority, whether or not she signed it or not. But there
11 was at least going to be separate agreements in the event that she
12 agreed -- he at the time, and now she -- agreed that the -- that a
13 pretrial agreement was in the best interest of justice in this case.

14 MJ [Col McCALL]: All right.

15 MTC [MR. TRIVETT]: So that's exactly how we envisioned it.
16 There was going to be no sub rosa agreements and that's why we
17 documented it going up both sides with the hope that if we got one
18 back from the policy principle side, it would then be brought over to
19 the convening authority side. But we did not want to blend them
20 until a decision was made, for the reasons that I just described.

21 MJ [Col McCALL]: Okay.

22 MTC [MR. TRIVETT]: So when we started these negotiations with
23 the defense counsel, it was always premised on an understanding that

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1 we had to consult with the victim family members in this case.

2 We have a regulatory requirement, both in the Department of
3 Justice and in military commissions under the Department of Defense,
4 to consult with victim family members before deciding whether or not
5 to enter into a pretrial agreement.

6 That is usually a fairly straightforward issue in most
7 prosecutions. You can understand how complicating that can be when
8 you're dealing with what is really over 20,000 family members, right?
9 When you do the 2,976 people who were murdered on September 11th and
10 realize that they had mothers and fathers and daughters and brothers
11 and sisters, that it quickly gets to be a much larger number.

12 And this had always been an important part. And although
13 there's no one here this week to hear the argument, I know that we
14 have a continuing relationship with the family members. We bring
15 them down so they can watch the proceedings. But this had been a
16 challenge even for the Moussaoui prosecution that had occurred -- and
17 had started I think as early as 2003.

18 So it's important to understand this, because there is a
19 timeline aspect where Ms. Radostitz's conclusions as to the UI impact
20 on it doesn't take into account the family member outreach.

21 So understanding that and meeting with hundreds of families
22 in my time working on this case, you need to understand how disparate
23 their opinions are both on what is justice in this case, what an

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1 appropriate sentence is in this case, whether or not there should be
2 a military commission, whether or not there should be a federal court
3 prosecution.

4 And it's almost as if they are so strong in number, but they
5 don't have any sort of collective strength in that number because
6 everyone has different beliefs as to what should occur. And we
7 respect every single one of them because those are their own
8 opinions.

9 So one of those things, and what is important, is when this
10 case was transitioned from the Eastern District of Virginia to the
11 military commission process right around 2006, there had to be a
12 handoff between the Eastern District Virginia VWAP folks who had
13 gathered that initial large family member database and the Department
14 of Defense VWAP program.

15 And out of respect for the people who may not want
16 updates -- and there are many people who do not want updates, because
17 this is like picking a scab for them every time we communicate 23
18 years after the fact about the status of the trial for people who
19 have already admitted that they murdered their loved ones.

20 So out of respect for that and for the family members, a
21 letter was sent out that allowed them to opt in or opt out of
22 continuing communications from the Department of Defense Office of
23 Military Commissions VWAP, right?

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1 And the number that opted in was far smaller than the
2 original number that was in place for the EDVA case of
3 U.S. v. Moussaoui. And we respected that absolutely. We did not
4 reach out to any of the people who did not want to opt in.

5 Now, I think, in retrospect, there were many people who we
6 believe we had effectively communicated and simply had not heard back
7 from who had later claimed that they weren't aware of the
8 communication or had forgotten the communication. This is all now a
9 very, very long time ago, right?

10 MJ [Col McCALL]: Sure.

11 MTC [MR. TRIVETT]: This is in 2006 when I think this
12 transition was happening.

13 So we dutifully went to anyone who had opted in, and we
14 pretty much did a tour of the East Coast consulting with the families
15 to discuss potential pretrial agreements in this case.

16 We took trips to Boston. We had several days in New York
17 City. We went to Florida, where a lot of people from New York have
18 retired. And then we did a VTC for the Pentagon area. That also
19 included anyone who couldn't attend in person who had opted into our
20 list.

21 And so we believed we had consulted with most people
22 that -- who were interested in this process. We felt like that
23 satisfied our obligation to continue to communicate and keep them up

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1 to date based on their own preferences that they had established
2 early in 2006.

3 The more we thought about it, though, and because of the
4 finality of this decision and because of the way the regulations were
5 written, we believed that we had an obligation under the regulation
6 to extend it to the larger group and to send out a larger
7 communication through the FBI because they all were still victims.
8 Even though they had opted out of the process, that doesn't mean that
9 they opted out of having a say in what they believed was the
10 appropriate disposition of the case in which the accused are alleged
11 to have murdered their loved ones.

12 So the letter went out after our tour of these various
13 areas, and that letter caused a lot of press attention. It caused a
14 lot of family members to either engage with the press or engage with
15 their congressman and their constituents, which it's their right to
16 do under our system of government.

17 And it caused a -- a lot of attention to be paid to this
18 issue that hadn't otherwise been paid. We had quietly sort of walked
19 through the process with all of the other family members. And
20 although not everyone agreed with the pretrial agreement, we were
21 able to -- and had established a relationship with them where they
22 trusted our judgment.

23 For this larger group of people, we generally and typically

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1 have not had a relationship with them out of respect for at least the
2 fact that we believed that they had opted out and had not been
3 interested in the Department of Defense.

4 So factually that is every bit as important to your analysis
5 as to how this issue got brought to the attention of politicians,
6 whether it was in the Executive Branch or the Legislative Branch.
7 That's the impetus for what caused much of the -- much of the
8 attention that was paid to it.

9 And it -- and it caught us a little by surprise, quite
10 frankly. I mean, we knew we had an obligation to do it, and we were
11 convinced that we had an obligation to do it. I don't think we were
12 expecting the reaction we got, certainly not after we had already
13 taken this to everyone who had opted in.

14 So I did want to make sure that Your Honor was understanding
15 how it bubbled up and that it wasn't some kind of internal
16 congressional thing, but it was more of a family-driven thing that
17 then got taken over, appropriately, by political people who -- who
18 represent these individuals.

19 And what I can say is that it's appropriate for Congress to
20 have interest in this case. That's not inappropriate.

21 What would be inappropriate is if they were trying to
22 influence directly a convening authority or a trial counsel or a
23 defense counsel in their professional judgment on how best to do

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1 this.

2 MJ [Col McCALL]: Well, that's a perfect segue, because that
3 was going to be my next question.

4 So you addressed the policy principles and that angle,
5 but -- all right. Let's go with that analysis as far as that it is
6 two separate negotiations.

7 So for the prosecution principles that you're saying was
8 part of the decision -- part of the authority of the convening
9 authority, address any potential unlawful influence on the convening
10 authority as far as -- because there were other questions as far as
11 removing the death penalty, taking a guilty plea. I don't know what
12 else.

13 Again, I don't want to get into too much details, but there
14 was discussion on some matters that were prosecution principles,
15 correct? Or were those hammered out?

16 MTC [MR. TRIVETT]: Yeah, I'm -- discussions by whom and
17 with whom?

18 MJ [Col McCALL]: I guess with the -- among the parties. So
19 were those ongoing? And -- I mean, because I know the policy
20 principles ----

21 MTC [MR. TRIVETT]: Right.

22 MJ [Col McCALL]: ---- went up, and we were all waiting and
23 then eventually got word that they were not going to be acted on or

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1 were then not going to ----

2 MTC [MR. TRIVETT]: Right.

3 MJ [Col McCALL]: ---- be agreed to. But then the prosecution
4 principles was another negotiation that was going on and it sounds
5 like may be still -- or at least it's open for negotiation.

6 But give me the government's analysis as far as whether
7 there was any unlawful influence on the prosecution principles.

8 MTC [MR. TRIVETT]: Right. There was not, because -- and how
9 I know this is because we established what it is that we were
10 requiring to do, what we thought was necessary in order to positively
11 endorse a case.

12 We had been negotiating with the defense counsel on that
13 piece of it. Ours has not changed. Ours did not change from March
14 when we started this. It did not change after any statements were
15 made by Congress. It remained static as far as the important things.

16 Now, we have negotiated with them in good faith. And so
17 we've -- you know, around the edges we've agreed to do things. But
18 our principles, as far as what we had asked for, have not changed in
19 any way.

20 So -- and I know that the convening authority is still
21 willing to consider any pretrial agreement that we positively endorse
22 based on the prosecution principles.

23 So this is all whirling around us, but it's not impacting

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1 us. And I know that because I know the positions we took, and I know
2 that the positions that we took at the time are still available.

3 So I know for certain that I haven't been unlawfully
4 influenced in any way. No one has threatened me to take away my job.
5 No one has told me not to negotiate consistent with what we believe
6 is a just result.

7 I believe that the Office of the Chief -- or the chief
8 prosecutor, who has given me the authority to do this, has not tried
9 to influence me in any way, and nor has he indicated that he's being
10 influenced in any way on the prosecution principle piece of it,
11 right?

12 So this was -- I mean, it became a little bit of a -- there
13 was some media furor on it, but it hasn't impacted us and it hasn't
14 impacted the convening authority. And it wasn't directed at us
15 either, right?

16 Even -- I think it was clear that the White House came back
17 and in a subsequent statement said, hey, the decision on whether or
18 not to enter into a pretrial agreement is up to the convening
19 authority alone. So we're not going to in any way make any further
20 comments about that.

21 I know that that's in the record. I don't have the exact
22 record cite to it.

23 So what I can say is that there has been absolutely zero

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1 unlawful influence that I have felt. The convening authority's
2 office has not communicated to me in any way that they feel under
3 pressure to do anything other than to consider what we would
4 positively endorse as a pretrial agreement.

5 Now, work continues on the -- to try to hammer out what
6 was -- is within the power of the JTF commander or the willingness to
7 do things for recommendations. And Admiral Rugh continues to work on
8 those.

9 But I can say, as an officer of the court, that I haven't
10 been influenced in any way by anything I've read. I haven't changed
11 my mind on this. But it's not up to me ultimately, right?

12 So the accused get a vote on this. They'd be waiving an
13 important trial right that they have. And it's going to be up to
14 them at the end of the day if they agree to do it. But it's not for
15 lack of trying, and it's not for lack of willingness on the Office of
16 the Chief Prosecutor or the Office of the Convening Authority.

17 MJ [Col McCALL]: All right.

18 MTC [MR. TRIVETT]: And the piece about Congress, which needs
19 to be remembered as well -- and this is not in any way intended to
20 disparage any congressman, but there were hearings held on pretrial
21 agreements in this case that were attended by the chief defense
22 counsel at the time and were chaired by a senator at the time.

23 So we didn't say that that was inappropriate. We didn't say

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1 that that was unlawful influence. But it would -- should not
2 surprise anyone that there may be other people within Congress that
3 have a different view on this.

4 So this wasn't actually the first time that Congress has
5 opined on a pretrial agreement. It's just a different opinion on
6 whether or not a pretrial agreement is appropriate in this case based
7 on the seriousness of the allegations.

8 All right. And I appreciated Mr. Ruiz parting company with
9 the portion of the argument that seemed to imply that we had some
10 role in causing this to happen. And I heard about the excellent
11 investigation team that found out that Mr. Trivett and Mr. Dastoor
12 and Captain Rodriguez went to the National Security Council. The
13 defense's excellent investigation team has revealed that we went to
14 the National Security Council.

15 I actually never went. I didn't get there. But it was all
16 being done to get approval of the hostilities-related discovery that
17 this commission ordered which Mr. Ali drove as far as the litigation
18 in their case to get approval to turn it over. That's all this was.

19 I did not go. Major Dastoor went. Captain Rodriguez went.
20 They got final approval from, I believe it was the SJA at the time
21 who worked through, had some questions. But this is not an uncommon
22 process for us. We need to get approval to use anything that's
23 ORCON, and this was just hostilities-related documents dating back to

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1 1998 in OPERATION INFINITE REACH and OPERATION INFINITE RESOLVE that
2 needed -- that needed approval before we could disclose it.

3 So we stand guilty of that. If that requires a dismissal of
4 the charges, then so be it. But please remember this, every time
5 they talk about their investigative prowess and how we're prohibiting
6 it, because that's all that that was.

7 And to clarify, Captain Anthony Rodriguez has never been
8 functioning as both a prosecutor in the Office of Chief Prosecutor
9 and a counsel to Senator Cruz. He left active duty orders to take
10 the job because Senator Cruz was his home-state senator and he had an
11 opportunity to go work there. He has since left there.

12 But I didn't want the commission to be left with this idea
13 that he is somehow operating in both branches of the government at
14 the same time and with cross purposes to whatever our intention as.
15 He was an assistant trial counsel on the case. I was very impressed
16 with his ability and his tenacity in the case, but at no point was he
17 functioning for both -- both sides of the government.

18 So with that, I believe my argument has concluded, subject
19 to any questions that you may have.

20 MJ [Col McCALL]: No questions. Thank you.

21 **[Pause.]**

22 MJ [Col McCALL]: Good morning, Ms. Radostitz.

23 ADC [MS. RADOSTITZ]: Good morning, Your Honor.

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1 I found it interesting that the entirety of Mr. Trivett's
2 argument had to do with actual unlawful influence, and not a word was
3 spoken about the apparent unlawful influence, which is really the
4 core of this.

5 And as you're well aware, with apparent unlawful influence
6 there doesn't have to be any showing of prejudice; that what we have
7 shown and the government hasn't disputed -- and I think that that's a
8 really important piece of this.

9 The last time we had unlawful influence arguments about an
10 involvement of outside forces, it was then the attorney general
11 talking to the SECDEF. Judge Parrella was the judge, and he reminded
12 the prosecution that proffers aren't evidence. If a party wants the
13 commission to consider evidence, they should present it.

14 They haven't presented any evidence. We have presented a
15 lot of evidence, which they have not disputed, is in fact what it
16 says it is, which is a number of members of Congress attempting to
17 make an influence on the Administration. And they don't -- the
18 members of Congress probably aren't as clear about what actually
19 happens in a military commission as the people in this courtroom are,
20 and so they went to the people that they thought could make a
21 difference. And they went to the President and they went to the
22 SECDEF.

23 And all of them were focused on -- as you pointed out in

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1 your questioning of Mr. Trivett, they were focused not really that
2 much on the policy principles. They were focused on: Should we have
3 a plea agreement in this case at all? If we do, should it involve
4 the death penalty? Those are two absolute issues within -- firmly
5 within the -- sorry -- the prosecution principles.

6 And the apparent unlawful influence is that these members of
7 Congress, who were not working as oversight committee -- if they
8 were -- if this had just come up in an oversight committee, like the
9 committee hearing that Mr. Trivett mentioned where Congress brought a
10 bunch of people in to talk not about should we have a plea agreement
11 in this case, but should we have any changes in Guantanamo? What's
12 going on? Why is it taking so long? It was a generic hearing.

13 And in that, it was actually a victim family member who came
14 forth and said, we want this resolved. Let us do a plea agreement.
15 It wasn't -- General Baker agreed with the victim family member at
16 the time, but it wasn't a "this hearing is about should we have a
17 plea agreement in this case." It was Guantanamo writ large, not only
18 in the 9/11 case, and it was a congressional hearing. That is very
19 different.

20 And this commission has found in the prior decisions that a
21 congressional hearing generically about Guantanamo is not the same as
22 a member of Congress commenting on the guilt or innocence of a person
23 in an active military commission and talking about what the

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1 appropriate penalty is.

2 So the other thing I wanted to address was: We agree, if
3 President Biden or the Secretary of Defense had decided this is a
4 political hot potato, I do not want to get involved, and had just
5 rejected the policy principles on that grounds, we wouldn't be here.
6 But that's not what happened.

7 What happened is they didn't answer. And then when the
8 members of Congress and the media got involved -- and whether it came
9 from push-out by victim family members or by any other means, it kind
10 of doesn't matter.

11 What matters is that the members of Congress sought to
12 influence people that they believed had the ability to make a
13 decision about the outcome of plea negotiations in this case, and
14 that that was broadly reported. And that when that changed, when
15 President Biden and the Secretary of Defense said we're not going to
16 get involved in these plea negotiations, they took victory laps.
17 They said, "We made this happen. We accomplished it. We appreciate
18 your help in accomplishing it."

19 And so that's what apparent unlawful influence is all about.
20 And we also still -- we know, the government has told us that the
21 convening authority is still willing to negotiate around this case.
22 But we don't know whether -- when it comes down to the very end,
23 they'll be -- the convening authority will be thinking back on this

1 influence that was apparent.

2 And it kind of doesn't matter, because, again, we don't have
3 to show prejudice. We just have to show that it happened, that it
4 constitutes unlawful influence. It constitutes not Congress acting
5 in their role as policymakers or in their role as budget deciders.
6 It wasn't about the budget. If it was about a budget, we would have
7 solved this case a long time ago. It was "We want to influence the
8 outcome of plea negotiations in this case and we want to take credit
9 for it when it happens."

10 And, Your Honor, on the rest of that -- one -- one last
11 thing I would say, I guess, is we have made a request for discovery.
12 We haven't talked about it a lot. We also made a request for
13 witnesses. We believe that we have met our burden to go forward on
14 the unlawful influence claims.

15 If the commission believes that we have not met that burden,
16 we would ask for you to allow us to argue, perhaps at a future time,
17 about the motion to compel the witnesses and the discovery, because
18 that really goes -- we believe that we've met the initial burden, and
19 now the burden is on the government to prove beyond a reasonable
20 doubt.

21 But if you believe we haven't met that burden, we want the
22 opportunity to seek those witnesses and seek the discovery and get a
23 ruling on that as well.

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1 MJ [Col McCALL]: Understood.

2 ADC [MS. RADOSTITZ]: Okay. Thank you.

3 MJ [Col McCALL]: All right. Mr. Sowards?

4 LDC [MR. SOWARDS]: Excuse me, Your Honor. I find myself in
5 the somewhat unusual position of agreeing with Mr. Trivett in that I
6 was somewhat trepidatious about this motion being brought,
7 particularly for the -- the impact it would have on rekindling some
8 discussions that really have nothing to do with the appropriateness
9 that both sides see in trying to reach a resolution of this case, and
10 that we would prompt more discussions from people such as Senator
11 Cruz, who want an end result without examining what this process has
12 done to everyone, and particularly the victim family members.

13 I know Mr. Trivett was speaking when he said there are no
14 family members here this week in the sort of official term. And I
15 guess sometimes we think of victim family members as those who have
16 taken the opportunity to be here at the invitation of the government,
17 to the extent they can, as members of families who have been
18 tragically touched by the events of 9/11.

19 Colleen Kelly actually is here, and she is the family member
20 to whom Mr. Trivett was referring who spoke very eloquently before
21 Congress and explained that victim family members -- many victim
22 family members -- she doesn't presume to speak for everyone, but we
23 have heard the same sentiment in innumerable victim family member

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1 meetings, which we religiously attend every week that victim family
2 members are here, to hear their concerns. Because we understand
3 what -- just from our past experience in capital cases how this
4 litigation affects those whose loved ones have been killed.

5 And the very consistent message we have heard from a wide
6 range of people has been that they have essentially two interests in
7 this case right now at this point in the litigation. One is to get
8 resolution, so we can bring the never-ending litigation to an end as
9 soon as possible.

10 But the second equally important goal is to find out why
11 9/11 happened. They want answers to their questions. And they want
12 answers, to the extent they can, actually directly from the
13 defendants.

14 And from long ago, that had been a central part of our
15 negotiation with the prosecution, was to afford an opportunity for
16 victim family members in their own right to be heard by Your Honor
17 and by the panel members to the extent they want to be present and
18 actually voice their experiences and what this has done to them. But
19 equally -- as I say, almost equally important to them is also the
20 opportunity to get answers as to why -- why these events were -- were
21 deemed to be necessary by somebody and what's at stake.

22 The reason I raise that with Your Honor is because all of
23 this, this litigation and the pushing off of the negotiations and all

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1 of that, risks a very tragic moment of lost opportunity.

2 That's what the negotiations represented, was an opportunity
3 to achieve as much as we could for as many people in resolving the
4 case and then working with the prosecution to agree upon, you know,
5 streamlining all of the litigation so we could actually present in an
6 open setting a full examination of the events of 9/11 and, equally
7 important, answer all of the -- all of the victim family member
8 questions about what happened and why it happened.

9 And as Your Honor responded affirmatively to Mr. Trivett, in
10 trying to get to that resolution, we all come from a background where
11 normally the conditions of confinement play no role.

12 You enter a guilty plea, the person accepts whatever the
13 sentence is deemed to be, and then we all assume that they're going
14 off into some sort of confinement, but one which -- which meets
15 minimum standards of humane treatment. And I do not inject a
16 reference to torture in this case to once again belabor the
17 overreaching and the misconduct of government agencies, which
18 is -- which is well documented.

19 But it is a reality. It is a reality that the government,
20 and whoever was refusing to talk to us for over a year and a half and
21 then finally convinced the President to reject any further discussion
22 about it -- you know, the fact that they don't want to acknowledge
23 it, it is a reality for individuals who have been told by their

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1 torturers: You can never get away from us. There is no judge, there
2 is no lawyer who can protect you.

3 And so when they look at the possibility of settling this
4 case and then going off into whatever custody awaits them, when all
5 of the judges and all of the lawyers and all of the press have gone
6 home and they're held someplace -- as Mr. Trivett suggested they're
7 concerned about -- they're held someplace where they have no contact
8 with their family, they have no -- no way to reach anybody, what is
9 going to happen to them? Can the government give them any
10 guarantees?

11 And Mr. Trivett was laying out the -- some of the issues
12 that we were -- we were concerned about. And he mentioned the level
13 of medical care that they would be getting, greater contact with
14 their family, and the communal detention.

15 Communal detention is a goal which is an alternative to
16 solitary confinement, which is being held in a metal box someplace
17 where nobody else talks to you other than guards who, consistent with
18 the black site procedures, are in a transactional relationship,
19 meaning they pass some food and they walk away. Nobody talks to
20 anybody. You do not have human contact.

21 Medical treatment, particularly among some of the -- and
22 you're going to hear the basis for that if we -- if we get to see the
23 video -- is just a reality in the case that what was done to them in

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1 the black sites has significantly and permanently damaged them.

2 And I understand there may be people in the government,
3 there may be people even among the family members, who say: If they
4 were horribly damaged by the torture, good. I hope they get more
5 damaged.

6 The fact of the matter is, though, under the Eighth
7 Amendment, that is not a guiding principle of corrections or of
8 confinement of a -- of an individual. But even if it were, it
9 affects the incentive for the defendant in question to decide whether
10 he, as Mr. Trivett says, wants to sign up for that.

11 And one of the things that, actually under the current
12 regime, that the convening authority is limited to doing is to
13 suggesting to some other government agencies that she would approve
14 of a settlement of the case with the understanding -- with her
15 recommendation or understanding that they would not be sent basically
16 back to a black site, or they would not be turned back over to the
17 CIA.

18 But as Mr. Trivett very significantly indicated to Your
19 Honor, she -- she can't control that. And so we are in the very
20 bizarre situation of saying to people who have been tortured for
21 three-and-a-half years: We can settle the case. We can do what we
22 need to do in terms of providing the victim family members with the
23 information they need on what you did and why you did it and answer

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1 their questions.

2 And in return for that, the convening authority can give you
3 the maximum of -- extent of her authority in recommending to the CIA
4 that they not come back for you. Or she will recommend to the
5 commander or the warden or whoever is housing you that they not send
6 you back into conditions that replicate your incommunicado solitary
7 confinement. But, in our case, Mr. Mohammad, that's all I, as the
8 convening authority, can do. And so we were looking to other people
9 who could give us these assurances.

10 Just a footnote to that, in terms of whether there are other
11 charges or people want to renew litigation and all that, that is
12 actually something that is contemplated as part of a pretrial
13 agreement. And that is something that, in fact, the convening
14 authority is required to do and then get a sign-off from the
15 Department of Justice. So that wasn't anything unusual.

16 But communal detention, which just means the way prisoners
17 are normally held unless there's some kind of disciplinary problem,
18 then of course they can be -- they could be sent to what they call
19 the hole or the administrative segregation. But normally the humane
20 way to do it is you give people a general population where they eat
21 meals together and talk to people and talk to the guards and that
22 sort of thing.

23 But what Mr. Trivett said is correct up to a point, that in

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1 the negotiations we were also in the very, very strange
2 situation -- strange to begin with because it was essential that we
3 be able to have clarity about the conditions of confinement.

4 And as Mr. Connell mentioned to the -- to the commission
5 recently, that's really sort of akin to these instance of -- I
6 believe it was in the discussion of the pretrial confinement credits.
7 It is -- that part of it is sort of essential in a knowing and
8 intelligent waiver for counsel to be able to say, as Mr. Trivett
9 says, here's what you're signing up for. Okay?

10 So in that instance, it's what exactly is your sentence?
11 How will it be calculated? Do you get good time/work time credits?
12 All of that.

13 In this instance -- and, you know, what we're trying to say
14 is at least here's the array of possibilities of confinement. Just
15 as any criminal defense attorney would do for a client in the federal
16 system where you say, you know, you have these different gradations
17 of security confinements, and based on your background and history,
18 whatever, this is what it's likely to be.

19 And we were in this position that we couldn't even tell them
20 the possibilities because of this cloud of the CIA's treatment and
21 the inability to say that wouldn't, again, loom into view.

22 And so we asked for some -- just some way that we could say
23 somebody with control over this would guarantee that certain things

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1 would not happen, and they would have minimum amenities or
2 protections, whatever you want to call them, that would happen.

3 And the curious thing was that for about a year and a half,
4 maybe 15 months or so, after we had come to an agreement with
5 Mr. Trivett and his team about all the other essentials, as he says
6 and confirms, it wasn't that it -- normal negotiations, you know,
7 would involve someone saying, well, no, we can't do this and we can't
8 do that and here's the problem why. And then you explore
9 alternatives or you see what you can do. That's called negotiations.

10 In this, it was stone silence. It was like trying to talk
11 to a, you know, petulant teenager who had gone to their room and
12 slammed the door. So, you know, can we just find out what you're
13 thinking? And it was like there was a rudderless or, you know, an
14 unsteered ship someplace. No -- not -- not even an -- just nothing
15 for 15 months.

16 And then finally, as Mr. Trivett says, there was at least an
17 indication that we wouldn't be getting an answer. So nothing to
18 even -- so all of this -- and we have to understand that this is in
19 the context which we've seen a little more immediate in the last few
20 weeks. It's a current theme that Your Honor is aware of that
21 the -- the defendants in this case, as part of their torture in the
22 black sites, were intentionally subjected to ever-changing rules and
23 regulations and treatment as a goal of keeping them off balance, to

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1 keep them confused and disoriented and in a state of continuous
2 anxiety.

3 And that, through either no fault of anyone or just
4 administrative -- we don't know what, but in recent weeks had taken
5 sort of an uptick with respect to regulations here. And with Your
6 Honor's intervention and the intervention of the JTF commander, we're
7 getting all of that kind of smoothed out.

8 But it's very difficult in any situation to go to someone
9 and say, the people who have -- were torturing you and said to you,
10 don't rely on judges or lawyers or anyone else, we can always get to
11 you, is very hard to say to a victim of that sort of -- that sort of
12 treatment, let's settle the case and what we want you to do is trust
13 unnamed people who won't even talk to us, trust them that this won't
14 happen to you again. They, very understandably, need a little more
15 reassurance than that.

16 And so the significant thing, then, that happened in this
17 case is not that they would no longer talk to us, but that the
18 President of the United States said, "No, I'm specifically rejecting
19 you getting any of those assurances that you basically won't be going
20 back to a black site."

21 And the question for the court in terms of the unlawful
22 command influence is what happened between the "we won't talk to you"
23 and "the explicit answer is no"? And it's there between

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1 those -- those two, and I think y'all call it the delta when we talk
2 about these things, is -- is the intervention of Senator Cruz and
3 other politicians.

4 But if we take it back just a step, Mr. Trivett mentioned a
5 significant and unfortunate development in this case, and that was
6 the letter that was sent to all victim family members. And the
7 really regrettable thing about that letter is it wasn't just sent
8 with the assistance of the FBI, it was sent by the FBI and the Office
9 of the Chief Prosecutor. That's how it was titled.

10 And whether -- again, I have no way of knowing, and this is
11 not to rekindle the issue of whether someone in Mr. Trivett's office
12 was doing this or what was going on. But I think a fair reading of
13 that letter would give someone the concern that if a settled -- a
14 negotiated settlement of the case were reached, there would basically
15 be no trial.

16 Somewhat just -- more like in the civilian context, I have
17 to add, and that's where all of these -- most of these folks live,
18 that the -- the defendant would come in and say I'm guilty. And then
19 the judge would at some point impose a sentence, perhaps after
20 referring them to the probation department or whoever the sentencing
21 report writers are, perhaps the prosecution, and that would be the
22 end of it.

23 No one, unless they have military law experience,

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1 understands the extent and the richness and the detail of a
2 sentencing proceeding that follows even a guilty plea. And we behind
3 the scenes knowing about this and what we had contemplated -- and, in
4 fact, that's where most of our negotiations about the -- what we call
5 the prosecution principles focused -- is how we will most efficiently
6 and thoroughly present the evidence of what happened, why it
7 happened, and have -- offer a forum for the victim family members to
8 be heard and to have their questions answered. That's what we were
9 working on.

10 I will say -- and I don't shy away from and I don't
11 apologize for -- I will say that I don't believe any of that was
12 communicated in this letter to the victim family members. In reading
13 that, I can see that many of them would have thought, wait a minute,
14 we talked to the defense, we talked to the prosecution, and I see
15 nowhere in here where we're going to have this thorough airing of
16 what happened.

17 And then what further happened, quite understandably, is
18 that there are victim family members who have colorable, cognizable
19 claims against whomever they believe may have funded this. We know
20 the focus of some of the litigation is against the Kingdom of
21 Saudi Arabia for that connection.

22 But there was a whole contingent of victim family members
23 who, in addition to seeking criminal justice, system justice in the

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1 case, were concerned about their legal claims. And they read this,
2 and there was a lot of information on the -- on the Internet as sort
3 of a stratagem by the government and the defense to close down any
4 airing or access to discovery or evidence they thought was in our
5 possession that would make this link.

6 So the whole thing sounded very, very contrary to any
7 suggestion of the open opportunity to hear information that a trial
8 affords. And that was the -- that was part of the -- part of the
9 impetus, I think, for some of the -- the backlash that Senator Cruz
10 and others had capitalized on to pressure the Administration, to
11 pressure the decision-makers to have no resolution in this case.

12 And I think the one thing that -- although I agree with a
13 lot of Mr. Trivett's summary of the history of the case up to this
14 point, other than perhaps not giving due consideration to the impact
15 of the prosecutor/FBI's, in my opinion, quite alarming letter to the
16 victim family members, is the one fact that I heard that was of, to
17 me, great interest in terms of the connection between Senator Cruz's
18 office and perhaps Sergeant -- is it Sergeant Rodriguez? -- is the
19 notion that Senator Cruz was able to put out to his public the
20 precise wording of the prosecution's notice to the defense that
21 the -- the policy principles had been rejected by the Administration.

22 To me, just as a both, you know, very interested but
23 somewhat casual observer of the events, it really did pique, you

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1 know, my attention to say: What exactly is the explanation for that?
2 And especially when -- when Mr. Trivett is going to great lengths to
3 explain that a former member of Mr. Cruz's staff has now cut the ties
4 and is solely working for the prosecution.

5 How else -- or how did Senator Cruz and whoever is managing,
6 you know, his website or the Twitter, now known as X, site, how did
7 they have advance knowledge of that precise language? That is very
8 troubling.

9 And so I just -- I just submit to Your Honor that there is,
10 not only for the reasons that Ms. Radostitz said, information that
11 either -- either supports a finding of unlawful command influence or
12 certainly compels and justifies a further investigation of it. But I
13 think it's very important to serving the interests not only of the
14 defense and the prosecution, but also of the -- of the family members
15 in this case.

16 And I also recognize that in the options or the remedies
17 available to the commission, it is some -- somehow also sort of
18 contrary to be arguing for what we're arguing for, because I -- I can
19 understand someone saying, well, wait a minute, Judge McCall grants
20 this and dismisses the charges, then what recourse do folks who
21 really want answers to this have?

22 And I think one -- one way to get there is to dismiss the
23 death penalty, because that is the focus of what Senator Cruz and the

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1 other people who were exerting this and apparently getting
2 information somehow from the prosecution were focused on.

3 As Ms. Radostitz said, it had nothing to do with budgetary
4 resolutions in the future. What Senator Cruz was saying is don't
5 take death off the table.

6 But if the commission were to do that, we would have a just
7 resolution in that regard with -- and at the same time allowing us to
8 go forward with a full and detailed evidentiary hearing.

9 Thank you, sir.

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

11 All right. We're going to at this time go ahead and take a
12 little bit of an early recess, at least for everybody but the
13 commission and the prosecution.

14 Let's be back at 1330 -- well, let's make it 1400. I want
15 to make sure there's enough time to get set up for the ex parte and
16 to conduct it.

17 So we'll be back in open session at 1400 potentially to hear
18 the video of -- is it mister or doctor, Mr. Connell, Abdullah
19 al Hammadi?

20 LDC [MR. CONNELL]: Doctor.

21 MJ [Col McCALL]: Doctor, so Dr. Al Hammadi. And then also
22 potentially further oral argument on some of the other pending AEs.

23 Any housekeeping before we recess?

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1 Mr. Trivett?

2 MTC [MR. TRIVETT]: So, sir, are we going to go into the
3 closed session as soon as possible?

4 MJ [Col McCALL]: That's right. I do want to go ahead and do
5 an ex parte. Again, we'll -- it takes a little bit of time to set
6 up. But -- so if the prosecution can remain, everyone else can go
7 ahead and start their lunch hour.

8 So, again, I'll go ahead and get everybody set up. And as
9 soon as they're set up, we'll do that ex parte. But, otherwise, for
10 the full group in open will be at 1400.

11 Commission's in recess.

12 **[The R.M.C. 803 session recessed at 1132, 01 May 2024.]**

13 **[END OF PAGE]**