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1 information privilege.

2 This is more in the nature of the absolute invocation  
3 of classified information privilege, which is no one shall  
4 discuss this at all costs. And those costs are sometimes  
5 sanctions when that invocation of classified information  
6 privilege affects the fair trial process, which is the  
7 argument that I was making in open court.

8 MJ [Col PARRELLA]: And while I generally agree with what  
9 you're saying, isn't it true that my predecessor looked at it  
10 and said it is sufficient and that the defense doesn't need  
11 the -- all the specifics; this three-page exhibit puts the  
12 defense in the same or substantial position? In other words,  
13 it was fed through the process, what you received was the  
14 product.

15 [Alarm in courtroom.]

16 MJ [Col PARRELLA]: It appears that the cell phone  
17 detector has gone off. It may be technical difficulty, but I  
18 would just ask everybody to please triple check to ensure that  
19 they don't have anything that would cause that to go off. And  
20 if it's the case, that it is a technical difficulty, then  
21 we'll talk to WHS about having it turned off.

22 Okay. It appears then that this was just technical  
23 difficulty. All right.

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1           And with that, then we will proceed. So my question  
2 was ----

3           LDC [MR. CONNELL]: I understand the question, sir.

4           MJ [Col PARRELLA]: Okay.

5           LDC [MR. CONNELL]: The -- and the answer is, I think,  
6 partially, because the -- as I read -- and all I have is  
7 574B (Amend) to go on. But as I read 574B (Amend), the --  
8 Judge Pohl did assess [REDACTED] right, which I assume was  
9 a more informative version of [REDACTED] and made an  
10 assessment as to -- [REDACTED]  
11 [REDACTED] that we received.

12           It is opaque to me, one, what other information  
13 Judge Pohl reviewed, right? There is a reference to some  
14 other information; I don't know its scope or anything. But  
15 two, I also can't tell from 574B what, other than [REDACTED]  
16 [REDACTED] was  
17 intended as a substitute for.

18           You with access to the -- to the ex parte information  
19 might be able to tell -- I'm not saying that you can't -- but  
20 the idea that Judge Pohl decided that [REDACTED]  
21 [REDACTED] was an adequate substitute for all possible  
22 information relevant to the defense about this, I think, is  
23 reading 574B (Amend) far too broadly in that there is -- you

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1 know, there ----

2           Imagine Judge Pohl was a big fan of Venn diagrams,  
3 but there's three circles, right? The largest circle is --  
4 well, let's say four circles. The largest circle is all  
5 possible information about this. The smaller circle is all  
6 information about it that is relevant to the defense --  
7 relevant and material to the defense. A -- the third smallest  
8 circle is the information that Judge Pohl reviewed, and then  
9 the smallest circle is what he approved as an adequate  
10 substitute.

11           The reason why I mentally draw these circles is I  
12 don't think -- I think that it is 100 percent true, and I  
13 conceded in open court, I conceded again today, that with  
14 respect to [REDACTED] Judge Pohl did make a substitution  
15 which falls within the scope of the bar on reconsideration.

16           The -- but it does not appear to me from the limited  
17 information that I have in the adversarial record that that is  
18 a substitute for all information otherwise relevant and  
19 material to the defense, which is the -- the thing that I am  
20 going to address in more specificity when we get to 600.

21           MJ [Col PARRELLA]: Okay.

22           LDC [MR. CONNELL]: All right. So having talked about  
23 that in subparagraph a., I do want to advise the military

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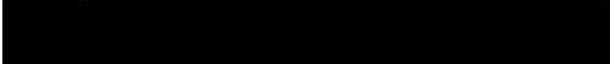
1 commission that I followed through on my commitment, and  
2 Mr. Trivett and I conferred over the break with respect to the  
3 question of what is the difference between subparagraph b. and  
4 subparagraph a., like why are they not redundant? What does  
5 subparagraph -- what additional restriction does  
6 subparagraph b. provide that subparagraph a. does not provide.  
7 And I laid out some hypotheticals for him, and he is  
8 considering the question and is going to get back to me on it.

9 MJ [Col PARRELLA]: Okay.

10 LDC [MR. CONNELL]: I will tell you that what I think the  
11 difference is is that -- or what I read the text to be -- but  
12 if he wants to give it an authoritative construction, of  
13 course he can suggest one to the military commission, and it's  
14 the military commission's order, and the military commission  
15 can adopt whatever construction it considers appropriate.

16 But what it looks like to me is that subparagraph a.  
17 is about the classified or sources of information -- excuse

18 me, 

19  whereas subparagraph b.

20 prohibits any reference outside a closed session to any fact,  
21 whether known or surmised, related to the sources or methods.

22 So what I think this means is that if I were to  
23 know -- that I can't know or even try to find out what the

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1 actual source or method was, but I related to Mr. Trivett  
2 three open-source sources -- hypotheticals as to how the  
3 source information -- or how the information came into the  
4 possession of the United States.

5 And I think that that, you know, laying out my  
6 hypotheses as to how the information got to the United States  
7 are

8 [REDACTED]  
9 [REDACTED]

you know,  
10 maybe the military commission wants to give it a construction  
11 or maybe the government will advise me as to its view as well.  
12 But otherwise, I can't tell what the difference between a. and  
13 b. is.

14 MJ [Col PARRELLA]: Okay.

15 LDC [MR. CONNELL]: All right. And that's all I have on  
16 601.

17 MJ [Col PARRELLA]: Any other party want to be heard on  
18 601 before we move on?

19 LDC [MR. NEVIN]: Same objection, Your Honor.

20 LDC [MS. BORMANN]: We are in the same space, Judge.

21 MJ [Col PARRELLA]: All right. I understand. Okay.

22 That being said, 574, I believe, is next.

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Yes, sir, 574G.

2 The government argued yesterday in open source -- in  
3 open court that [REDACTED] referred to in the  
4 substituted evidentiary foundation did not come from black  
5 sites. That may be true. I have no way of knowing. I can't  
6 test that, but it may be true.

7 But the one thing that I do know is that the use of  
8 [REDACTED] and the information [REDACTED] was

9  
10

11 And if the military commission -- does the military  
12 commission have easily available to it 574G?

13 MJ [Col PARRELLA]: I believe I do. Give me one moment.  
14 Yes, I have it.

15 LDC [MR. CONNELL]: Thank you, sir. If you could turn to  
16 page 8, I just want to call your attention to something.

17 MJ [Col PARRELLA]: All right. I'm there.

18 LDC [MR. CONNELL]: Thank you, sir.

19 So on page 8 is a chart, a summary chart, which  
20 establishes the -- which demonstrates the relationship  
21 between, for example, [REDACTED] -- one way to put it is  
22 [REDACTED] but another way to  
23 put it is the use of [REDACTED]

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[REDACTED]

And so on various topics which are in the left-hand column of the chart on page 8, we correlate the [REDACTED] discovery, these -- which is what's at issue here in 574G, and

[REDACTED]

[REDACTED]

[REDACTED]

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1 Your Honor, may we have the feed from the document camera?

2 MJ [Col PARRELLA]: You may.

3 LDC [MR. CONNELL]: So what I am about to show the  
4 military commission is found at Attachment C in AE 574G, and  
5 it is Bates numbered [REDACTED] And I know that normally  
6 the discovery numbers don't -- don't help the record, but in  
7 this case, this is the way that the documents are numbered  
8 within Attachment C.

9 And so I want to show you, beginning at 571 -- so let  
10 me just show you what this is. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] that the government seeks to introduce. [REDACTED]

18 [REDACTED] and the government contends

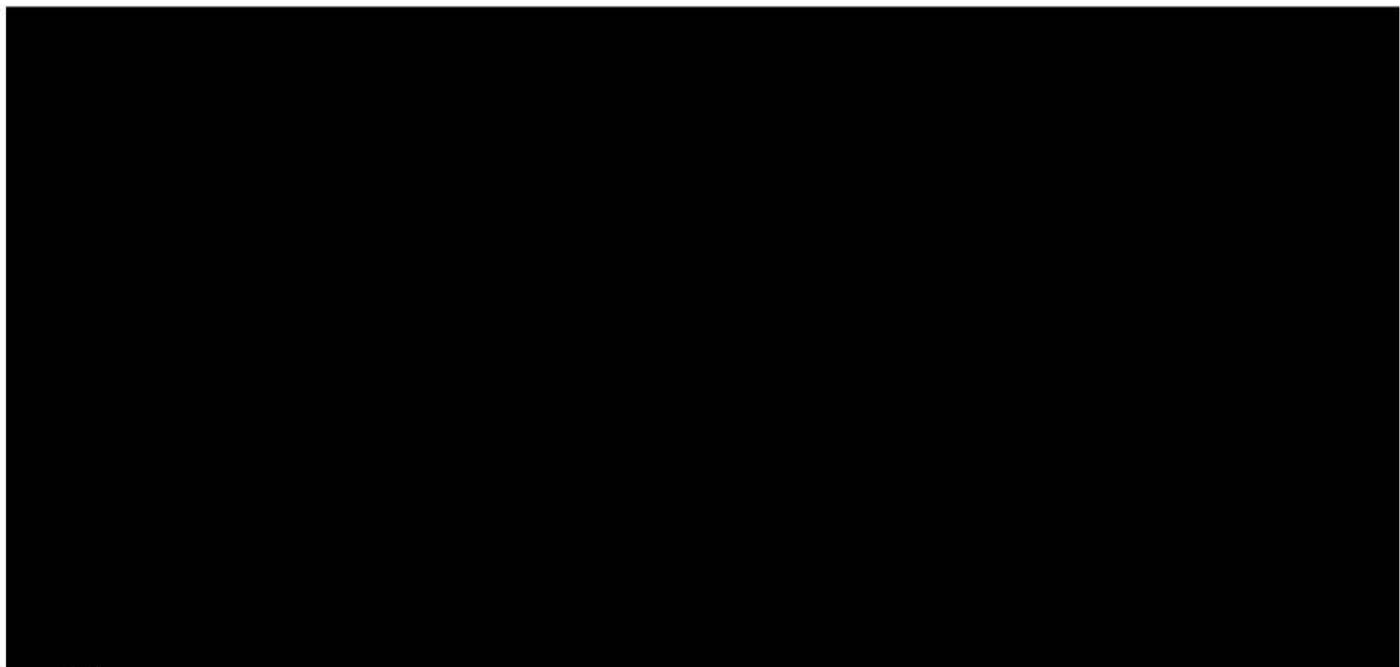
19 that it is inculpatory.

[REDACTED]

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11 Now, that could be true; I'm not saying that it is  
12 necessarily untrue. But it is certainly suspicious that first  
13 the CIA concluded that the -- in their interrogations of

14 Mr. Mohammad [REDACTED]

15 [REDACTED] and that is certainly an example  
16 of -- not just paragraph 1 of the proposed evidentiary  
17 substitute but places that how the FBI and when the FBI came  
18 into possession of this information is extremely important.

19 I am done with the document camera.

20 The third point that I want to make with respect to  
21 574G is to draw the military commission's attention to AE 574G

22 [REDACTED]  
23 [REDACTED]

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1 this case that the government will seek to call, and he  
2 speaks, for example, I can't -- I can't talk about it because  
3 of the -- Protective Order #3, but I can write about it. And  
4 Special Agent [REDACTED] does talk about a potential source  
5 and method by which [REDACTED] might have been derived, and  
6 we would certainly seek to cross-examine him about that and to  
7 introduce evidence about that.

8 But I bring that to the military commission's  
9 attention because, in my view, it is one thing to say, oh,  
10 we'd want to cross-examine, but I want -- these two examples  
11 that I gave you here are actual discovery with actual  
12 questions about actual sources and methods that we would want  
13 to ask the witnesses about.

14 I don't have anything further with respect to 574G.

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

16 Any other defense counsel care to be heard on 574G?

17 LDC [MR. NEVIN]: Same objection, Judge.

18 MJ [Col PARRELLA]: Noted.

19 LDC [MS. BORMANN]: Same with us, Judge.

20 MJ [Col PARRELLA]: All right. Noted.

21 Negative response from the other defense teams.

22 Trial Counsel?

23 MTC [MR. TRIVETT]: Subject to your questions, sir.

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1 MJ [Col PARRELLA]: I would like you to address a point,  
2 Mr. Trivett, if you wouldn't mind. With respect to the  
3 defense's theory that there is data beyond what the commission  
4 considered which is relevant to [REDACTED], what's the  
5 government's position on that?

6 MTC [MR. TRIVETT]: Can you ask that question one more  
7 time, sir? I want to make sure I understand.

8 MJ [Col PARRELLA]: Certainly.

9 The defense had mentioned that they believe, using  
10 the Venn diagram example, that there's data, relevant data  
11 beyond what was provided to my predecessor when he made the  
12 determination that the exhibit was a suitable substitute that  
13 exists, so it's not asking for reconsideration because it was  
14 never part of what was fed into the 505 process. I'm  
15 just ----

16 MTC [MR. TRIVETT]: The government's discharged our  
17 discovery obligations. We explained what we did in the  
18 ex parte filing. We made a determination as to what was  
19 discoverable and provided that information to the defense.

20 So what they do have is they have [REDACTED]

21 They have [REDACTED]

22 [REDACTED] I believe, [REDACTED]

23 [REDACTED] And they have information regarding the substituted

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1 evidentiary foundation.

2           So I believe that the military judge had all the  
3 information he needed and made a determination, and we didn't  
4 ask him -- we made our own determinations at times, like we  
5 always do, that certain information is not discoverable. But  
6 in this instance, we explained everything that we reviewed to  
7 the military judge. So he certainly was aware of what our  
8 process was. And we've made, like we always do, some  
9 determinations that certain information is not discoverable  
10 after reviewing it, but we did review it.

11           MJ [Col PARRELLA]: Okay. And with respect to  
12 Mr. Connell's final point about Special Agent [REDACTED] and  
13 the fact that the defense would like to cross-examine him  
14 about his portion of his statement I would think that might  
15 pertain to potentially the sources and methods, I take it the  
16 government's position would be as long as it's not part of [REDACTED]  
17 [REDACTED] that's protected by Protective Order #3, then they  
18 would be free to do so; if it falls within the gamut of  
19 Protective Order #3, in other words, it's these [REDACTED]  
20 [REDACTED] in question, then they would be prohibited from doing  
21 so?

22           MTC [MR. TRIVETT]: That's correct. And we are always in  
23 a tough situation. And Mr. Connell gave me three

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1 hypotheticals, including some that were unclassified as far as  
2 what a possible source would be and some that are -- and we  
3 can't get -- from the prosecution's perspective, we can't get  
4 into the routine of saying, "Don't worry, it wasn't that  
5 source and method. And don't worry, it wasn't that source and  
6 method." Because as you start to eliminate certain sources  
7 and methods, you make it more likely that you're going to  
8 reveal the actual source and method.

9           And that's why we sought the protection. You know,  
10 we believe the Military Commissions Act permits us to do it  
11 because this can't be adversarial.

12           But looping back to the question about  
13 Special Agent [REDACTED] we did note in our motion that this  
14 was not relevant at all to what we were doing. This was a

15  
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21 [REDACTED] So how  
22 that could possibly be relevant to anything we are doing now  
23 is hard and difficult for us to say, but it wouldn't per se be

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1 limited by Protective Order #3.

2 Now, again, if you are -- understanding that sources  
3 and methods are always classified, if they're asking a witness  
4 for classified information that hasn't otherwise been  
5 discoverable, we are going to assert a national security  
6 privilege over it but not because of Protective Order #3,  
7 based on relevance and the fact that it's classified and we  
8 haven't provided it in discovery because it's not relevant.  
9 It's not -- just because we have a witness on the stand who  
10 has certain knowledge of classified information, it doesn't  
11 become a discovery fishing expedition for classified  
12 information.

13 And that's our concern too and why we did what we did  
14 with the substituted evidentiary foundation. When we laid out  
15 those seven things, we wanted to explain to the military  
16 judge, who had to make the determination that it was reliable  
17 and admissible, exactly how we were going to do it to, not  
18 only show its authenticity, but then to also establish its  
19 relevance to the case. But 2 through 7 is -- it's part of the  
20 overall foundation, but it doesn't necessarily go to the  
21 authenticity of [REDACTED] the data.

22 So -- but certain of those witnesses might have a  
23 bunch of that classified information in their mind. So we

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1 didn't envision it necessarily as them having to read it off;  
2 we were going to be able to answer it just in question and  
3 answer, and they were going to answer consistent with that  
4 foundation. And then we were going to get into how they  
5 corroborated it and why we believe it was [REDACTED] and all of  
6 those things.

7           So when Mr. Connell raised a couple of issues  
8 specifically on what he would like to know, whether the  
9 analysts relied on statements, he can ask. Whether the  
10 interpreter relied on something from the RDI program, he can  
11 ask. Those things aren't tied to the source and method by  
12 which [REDACTED] was acquired.

13           So he's going to have a robust cross-examination and  
14 be able to fetter out bias and -- and impeachment. He's just  
15 simply not going to be able to find out how it is that we  
16 obtained this. That's how the system was set up by Congress,  
17 but the judge is the check on that.

18           Like I said yesterday, the judge is the check. He's  
19 had that check. We believe that he's approved our substitute,  
20 our substituted evidentiary foundation, and obviously we  
21 disclosed [REDACTED] that we believed were discoverable,  
22 but that any other discovery would be a motion to reconsider  
23 his ruling.

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1 MJ [Col PARRELLA]: All right. So although Judge Pohl, I  
2 believe, indicated that a proposed evidentiary substitution, a  
3 proposed substitution, would be appropriate, he didn't approve  
4 the specific one. And it may be premature to do that now I  
5 think, but nevertheless it's been put forward in front of the  
6 commission, and we discussed this yesterday.

7 So why is paragraph number 7, for lack of a better  
8 word -- why is that in there? That doesn't seem to be a  
9 statement of -- related to the evidentiary foundation of that  
10 information.

11 MTC [MR. TRIVETT]: I'm sorry, paragraph 7? I'm not  
12 sure where you're at ----

13 MJ [Col PARRELLA]: The statement is [REDACTED]

14 [REDACTED]  
15 [REDACTED] It seems to be vastly sort of  
16 like representative. It's a conclusion.

17 MTC [MR. TRIVETT]: Sure. We envisioned that -- what we  
18 envisioned from that is that the intelligence analysts -- we  
19 will ask a question and say yes, we -- we created a  
20 presentation, we corroborated that evidence, and then all of  
21 our next questions are how we corroborated it.

22 So again, we were in a position where we had to  
23 establish for the judge, in a unique ex parte fashion, how the

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1 evidence was authentic and the foundation for it and why it  
2 was relevant. So all of those things are what we believe is  
3 the correct foundation for us to then begin the examination of  
4 the witness.

5           So it's a little bit artificial. Like I said, we  
6 can -- it need not be read into the record. They're simply  
7 questions we are going to ask. But 2 through 7 are free for  
8 cross-examination once we admit -- once we admit the evidence.  
9 It's one that's the main part that we are protecting.

10           Again, in order to establish the admissibility, which  
11 is one of the requirements we have to file ex parte on a  
12 substituted evidentiary foundation, we felt like we had to lay  
13 out the authenticity and relevance. And that's how we're  
14 going to do it, through witnesses [REDACTED]

15 [REDACTED] And then we'll have a normal  
16 evidentiary presentation, like anything, that the defense will  
17 be able to cross-examine regarding the substance of [REDACTED]  
18 and regarding why we believe it's significant [REDACTED]

19 [REDACTED]  
20           MJ [Col PARRELLA]: So it is my understanding, and maybe I  
21 misunderstood, that the intent was to have these witnesses  
22 read these statements into the record. Is that not the case?

23           MTC [MR. TRIVETT]: The order says that. I'd have to look

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1 back at what we asked. But it was, as far as the reading, we  
2 were going to ask a question, they were going to answer. So:

3 [REDACTED]

4 Yes, I did.

5 How did you do it?

6 [REDACTED]

7 [REDACTED]

8 I used A, B, C, D, E.

9 [REDACTED]

10 [REDACTED]

11 MJ [Co1 PARRELLA]: So the question would be did you  
12 corroborate as opposed to a statement that these were  
13 corroborated?

14 MTC [MR. TRIVETT]: Oh, yes, sir. Yes, sir.

15 MJ [Co1 PARRELLA]: Okay.

16 MTC [MR. TRIVETT]: All of those are going to be what the  
17 answer is ultimately to the questions we ask, but we fully  
18 envision a question and answer, not unlike regular testimony.  
19 But again, we laid out the whole foundation for the judge.

20 In theory, could we have just given that first  
21 paragraph over to the defense and said this is our substituted  
22 evidentiary foundation for the acquired? We could have just  
23 turned that over to the defense, but we had no problem giving

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1 them the roadmap of exactly where we were going so they  
2 understood where they would be able to cross and where they  
3 wouldn't.

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

5 I have no further questions. Thank you.

6 MTC [MR. TRIVETT]: Thank you, sir.

7 LDC [MR. CONNELL]: Sir, I'm going to address some of the  
8 government's arguments that were just made in the context of  
9 600.

10 But before I leave 574G, I need to make one more  
11 observation, which is the government just made the argument  
12 that the judge is the check, and in every other situation,  
13 that is in fact true. If an advocate on either side asks a  
14 question and that question is inappropriate or objectionable  
15 for some reason, then the other side objects, and the judge  
16 checks them.

17 If a witness is about to give an answer, even if it  
18 was an unobjectionable question, the witness is about to give  
19 an answer, under 505(i), the government objects,  
20 hypothetically the defense could object, and the judge is the  
21 check, right? The judge makes the decision, is that relevant,  
22 is there assertion of classified privilege, is it overcome,  
23 et cetera.

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1           What's so insidious about Protective Order #3 is that  
2 the judge is no longer the check; the advocate is the check.  
3 I have to self-censor myself, and on multiple occasions  
4 yesterday and today have done so, declining to make the  
5 arguments which I find most persuasive because there is a  
6 prior restraint on my speech.

7           It is entirely different from I would like to ask a  
8 question and -- over an objection, the objection is sustained,  
9 and I can't ask the question. That's what it means for the  
10 judge to be the check, whether that's in open session or  
11 closed session, as we've seen again and again in this military  
12 commission.

13           It is entirely different for -- to rob me --  
14 Mr. al Baluchi of a record and to rob the military commission  
15 of its role as arbiter by requiring me not to make the  
16 argument in the first place to self-censor. That is the  
17 difference between a prior restraint and a subsequent  
18 sanction.

19           You know, if I would go ahead and say the classified  
20 thing anyway in open session, there is a sanction for that,  
21 but that is different from me having to be the check, me  
22 having to be the person, especially given the ambiguous  
23 language that even this morning we can't 100 percent agree

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1 with it; we can't agree what the difference between a. and b.  
2 is. The -- it leads me to impose a chilling effect on myself,  
3 which is what I've done, and it's the reason why this is the  
4 wrong approach to this problem.

5           So moving on, with the military commission's  
6 permission, to 600.

7           MJ [Col PARRELLA]: You may.

8           Before you do, anybody else care to be heard on 574G?

9           LDC [MR. NEVIN]: Same objection, Your Honor.

10          MJ [Col PARRELLA]: Noted. Okay.

11          You may proceed, Mr. Connell.

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

13          So the government just made the argument that  
14 Judge Pohl had all the information that he needed in order to  
15 make this decision. In my mind, that begs the question of in  
16 other contexts when the government wanted to seek  
17 substitutions, we were allowed to submit a theory of defense.  
18 And it so happens that our theory of defense does have a  
19 little bit about [REDACTED] in it, but mostly the focus was on RDI  
20 because that was what the main topic at the time was.

21          At the time that the government submitted this  
22 ex parte claim to the military commission, it had in its  
23 possession DR-280-AAA, which is in the record at AE 600

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1 Attachment B, which laid out not just the information that we  
2 on the defense thought was important but several paragraphs  
3 explaining why we thought it was important. Essentially we  
4 told the prosecution what our theory of defense around these  
5 statements was.

6           And only you and the government know whether the  
7 government in good faith submitted our theory of defense. The  
8 order, 574B (Amend), says that the military commission  
9 considered our theory of defense, but whether it's referring  
10 to AE 073F or whether it's talking about the specific  
11 information that we provided to the government as to our  
12 theory of defense around this is something that only the  
13 military commission and the government can know.

14           But if it is not true that the government provided  
15 all of the information that was available about the defense  
16 theory -- that was in its possession about the defense theory  
17 of defense, then I would suggest that the military commission  
18 might want to sua sponte reexamine that substitution in light  
19 of our articulated theory of defense which the government had.  
20 They can tell us what they did with it.

21           So moving from there, I would like to address the  
22 individual items that are sought in AE 601 -- AE 600, excuse  
23 me, and I will do so in the context of what we have learned

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1 over the past two days.

2           One of the things that we've learned over the past  
3 two days is that, as in the colloquy that just occurred, items  
4 2 through 7 are different in kind than item 1 in the  
5 government's proposed evidentiary substitution in that item 1  
6 is truly an invocation of the classified information privilege  
7 and no further information can be forthcoming.

8           The -- items 2 through 7 on the other hand were just,  
9 in the government's words, a roadmap setting out what the  
10 prosecution intends to ask witnesses. Now, I don't know if it  
11 was always that way, right? The order very clearly says these  
12 are the seven items to be read by two different FBI witnesses,  
13 but, you know, this is litigation. Ideas evolve over time,  
14 and people make compromises and everything else. I'm  
15 perfectly fine with that.

16           But it does seem to me now as we sit here, items 2  
17 through 7 are not appropriate for -- even if you rule against  
18 me wholly on everything else, are not appropriate for a  
19 proposed evidentiary foundation because they are going to be  
20 witnesses. Item 1 is different, however.

21           So -- and the second thing that we've learned over  
22 the past two days is some little insight into the scope of the  
23 information that Judge Pohl reviewed that came into the

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1 [REDACTED] the  
2 exhibit, which was the approved substitute.

3           And the reason I say that is, despite my argument and  
4 a direct question from the military commission, the government  
5 did not in its argument on 574G state that -- the scope of the  
6 information that Judge Pohl had. And as we go through these  
7 items, which I normally don't do in a discovery request, but  
8 it's important here because some items that we asked for  
9 probably do, and one in particular probably does fall within  
10 the scope of the information Judge Pohl reviewed if the  
11 government's representation that this has a relationship to [REDACTED]  
12 [REDACTED] rather, is accurate.  
13 But many of these items now we know do not fall within the  
14 scope of what Judge Pohl reviewed because of the government's  
15 arguments about items 2 through 7. I will be a little more  
16 specific as I go through that.

17           So my -- I take as my text the Attachment B to  
18 AE 600, 27 October 2016 Discovery Request 2, DR-280-AAA. It  
19 will probably be helpful to have that in front of you.

20           MJ [Col PARRELLA]: I have it in front of me.

21           LDC [MR. CONNELL]: Okay. Great.

22           With respect to -- so the structure of this, just for  
23 orientation, is on page 2. At the top of the page is our

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1 explanation of why these documents are relevant to the  
2 defense, essentially a short version of our theory of defense,  
3 and then we -- there are items 1 and 2 which are the actual  
4 requests.

5 So 1.a. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 If the government's representation about the  
9 similarity of [REDACTED] the base document that Judge Pohl  
10 was working from, is that -- they make the claim that it's  
11 similar to [REDACTED] If that's  
12 true, then [REDACTED] would have been  
13 among the material that Judge Pohl examined. I don't know if  
14 that's true or not, but if that representation is true, [REDACTED]

15 [REDACTED] You  
16 know, if you look at [REDACTED] it says, you know,

17 [REDACTED]  
18 [REDACTED] if you will, is  
19 excluded.

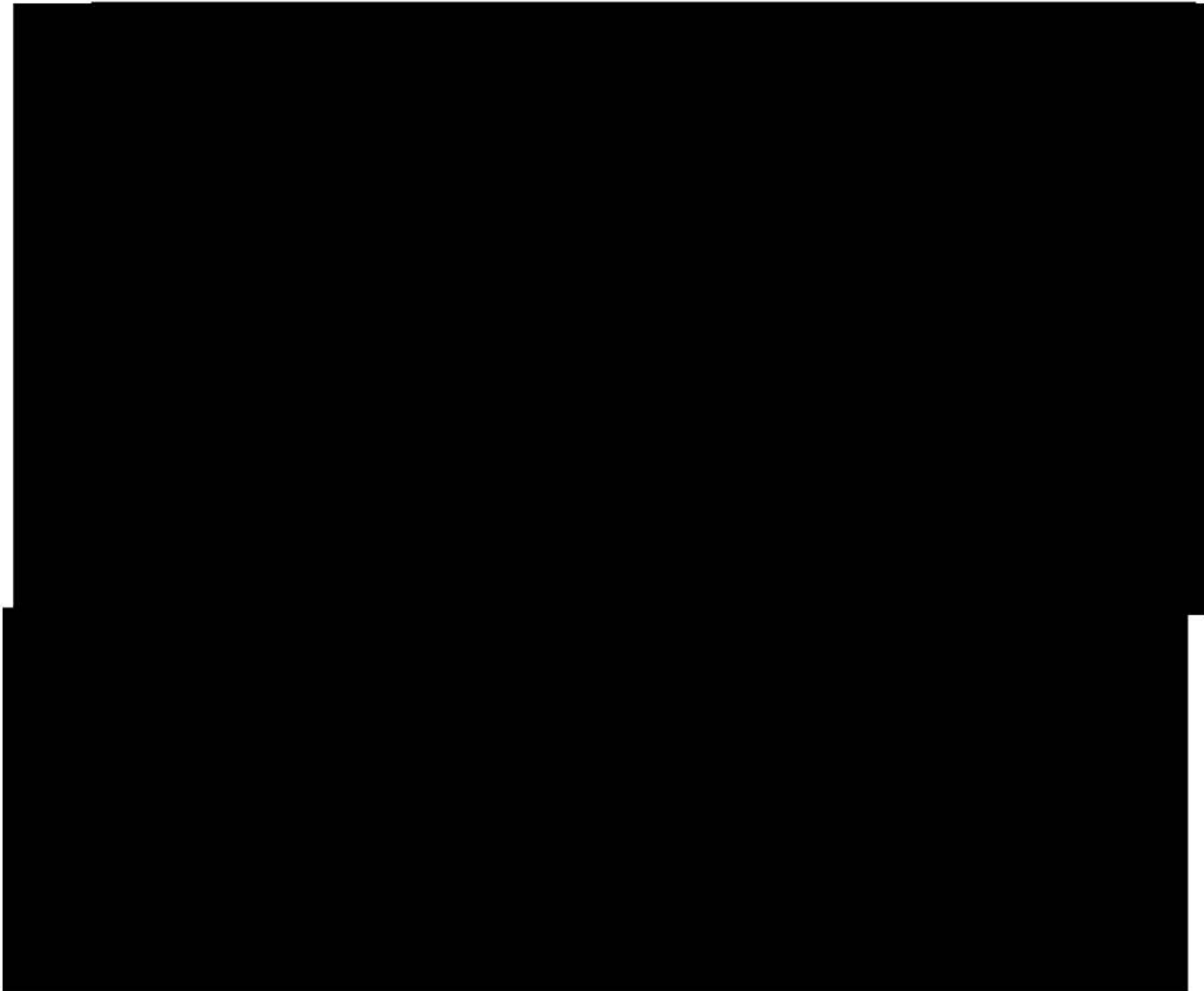
20 I think that is important, but I think it's important  
21 to -- for telling the story of the conspiracy and  
22 Mr. al Baluchi's role in the conspiracy, but I also want to  
23 acknowledge that it is possible that that information was

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1 already reviewed by Judge Pohl.



20 What I mean is basically what does

21 Is it basically

22

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[REDACTED]

Item d. is especially important, [REDACTED]

[REDACTED] This is important to

our hostilities argument. One of the arguments that I discussed with the military commission yesterday was the tie-in to hostilities that if the United -- imagining the world where the United States were at war with al Qaeda prior to 2001, the -- if the United States knew the location of Khalid Shaikh Mohammad, [REDACTED] then the fact that it chose, elected not to take kinetic action against him is a factor that the finders of fact would no doubt want to consider while assessing whether hostilities against al Qaeda existed.

1.e. is [REDACTED]

[REDACTED] that the government has not produced. It is difficult for me to understand -- since [REDACTED]

[REDACTED]

it

is difficult for me to understand how statements of a

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1 defendant, for Mr. Mohammad, or statements of a codefendant  
2 would not be relevant.

3           You know, we cite in the brief Yunis and its  
4 discussion of the showing of relevance for a defendant's  
5 statements is normally just very small. The -- and it's  
6 difficult to see how these additional --

7 [REDACTED]  
8 [REDACTED] would not be discoverable.

9           The -- item f. [REDACTED]  
10 The government does not represent -- and I thought it was [REDACTED]  
11 at the time; the judge's order says [REDACTED] I will go with the  
12 judge. He can probably -- instead of what I thought.

13           But this goes to the universe, and the question --  
14 this is the question that I articulated yesterday of: Is  
15 Mr. al Baluchi [REDACTED] of the  
16 conspiracy? [REDACTED]

17 [REDACTED]  
18 [REDACTED]

19           And then item g., [REDACTED]

20 [REDACTED]  
21           Item g. is [REDACTED]

22 [REDACTED]  
23 [REDACTED]

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1           What the government is saying now is that it has not  
2 invoked classified information privilege over the method used  
3 to enter -- [REDACTED] The government just argued  
4 a few minutes ago to you that if we want to know the way the  
5 analysts made [REDACTED] we'll be able to  
6 cross-examine about that, which makes it an entirely relevant  
7 scope for -- place for discovery.

8           And typically a report to that effect from an analyst  
9 or [REDACTED] of some kind would  
10 be turned over to us in discovery, and it certainly should be  
11 now that we know the government is not seeking to protect that  
12 aspect of the -- of the case.

13           Now, with respect to item 2, the a. is essentially  
14 [REDACTED] That goes to the chain of  
15 custody. Item b. is no longer included. According to the  
16 government's representations today and yesterday, it is no  
17 longer included in the classified information privilege at  
18 all, which is: What did this analyst do? The analysis of [REDACTED]

19 [REDACTED]  
20 [REDACTED]

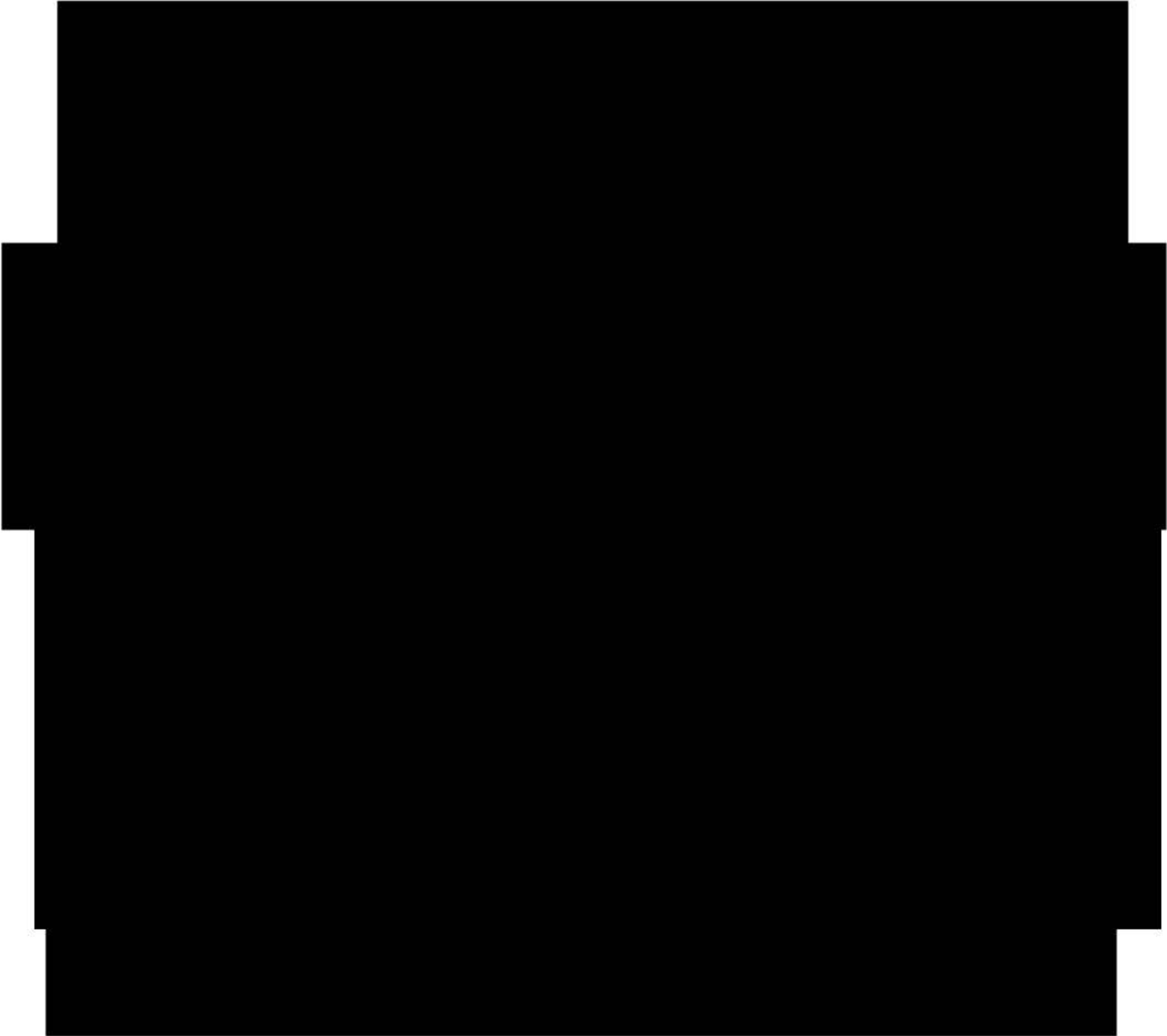
21           Typically, when this comes up in a gang case, there's  
22 a report from an expert saying, you know, "This is my  
23 experience. [REDACTED]"

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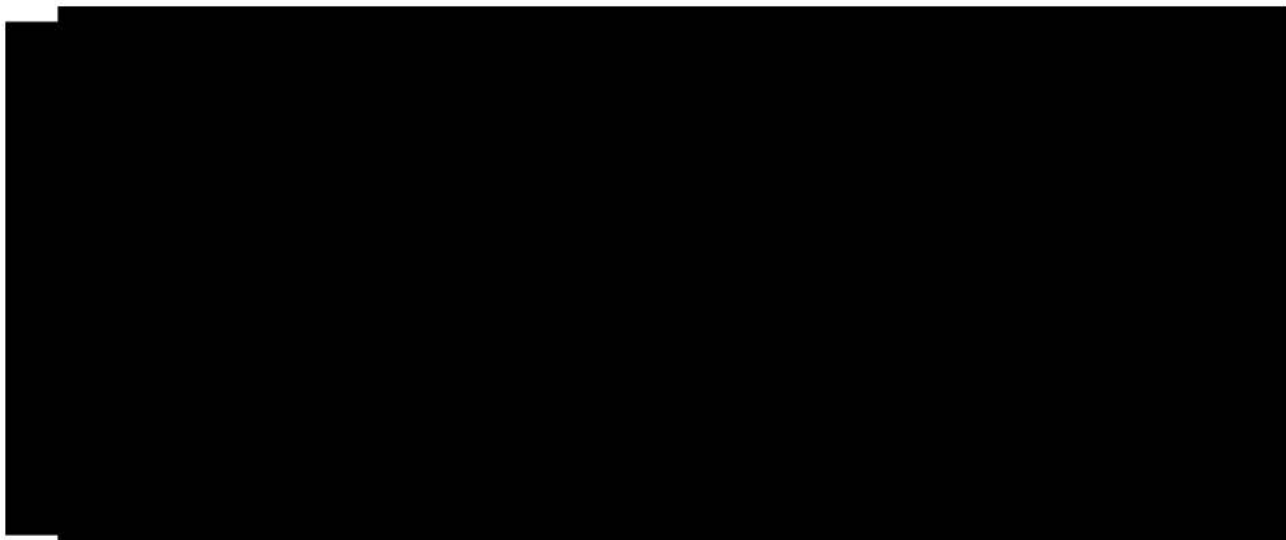
1 This is how I identified the players." And according to the  
2 government, that's going to be a ripe area for  
3 cross-examination for us.



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9           So that brings us to while the government was  
10 obtaining ex parte its substitution, the -- we were preparing  
11 a follow-up because this -- [REDACTED]  
12 [REDACTED] And so what we realized is that there is an  
13 issue with respect to the authority for [REDACTED]  
14 [REDACTED] and that is found in DR-280A-AAA,  
15 which is contained at Attachment C to AE 600 (Amend).

16           I won't go these -- through these one by one because  
17 they're essentially variations on the theme of what was the  
18 authority -- under what legal or regulatory authority were  
19 [REDACTED] excuse me, obtained,  
20 and which -- depending upon what the answer to that is, the  
21 answer might be none, in which case we may have a statutory  
22 claim as to their suppression.

23           So just to summarize, the important -- the

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1 information that we are seeking here, very little of which  
2 seems to fall within the scope of what Judge Pohl probably  
3 reviewed, is important information to challenge the  
4 authenticity, the chain of custody, and the weight that the  
5 fact-finder should give to [REDACTED] possibly to  
6 suppress under [REDACTED] law, or to be introduced  
7 affirmatively by the defense in our argument against  
8 hostilities. But -- I have averted to this a few times, but I  
9 do want to explain in just a little more depth these are also  
10 important to our minor role argument in -- in the sentencing  
11 phase.

12 Under the Federal Death Penalty Act, minor role, of  
13 course, is a statutory mitigating factor. They don't have  
14 statutory mitigating factors in the military commission, but  
15 the idea is the same.

16 But there are two others. The -- for example, the  
17 fact that Mr. al Baluchi is one of a -- is only a small part  
18 of the conspiracy -- which I think we'll be eliciting similar  
19 information from a number of the FBI witnesses, affects his --  
20 his threshold determination for the death penalty under the  
21 Enmund-Tison rule, Enmund v. Florida, 458 U.S. 782, and  
22 Tison v. Arizona, 481 U.S. 137.

23 And then earlier today I referred to the Burrage

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1 case, which is the threshold that when you have eligibility  
2 for the death penalty because of a statute in which the  
3 defendant commits a crime which leads to death, such as  
4 selling drugs which leads to death or conspiracy, in this  
5 case, which leads to death, the Supreme Court has held that  
6 there's a much higher standard for causation if there is  
7 essentially but-for causation that is required under  
8 Burrage v. United States, 571 U.S. 204.

9 MJ [Co1 PARRELLA]: Thank you, Mr. Connell.

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

11 Any other counsel wish to be heard on 600?

12 LDC [MR. NEVIN]: Same objection, Your Honor.

13 MJ [Co1 PARRELLA]: Noted.

14 LDC [MS. BORMANN]: Judge, we have the same situation.

15 MJ [Co1 PARRELLA]: I understand.

16 Negative response from other defense counsel.

17 Trial Counsel?

18 MTC [MR. TRIVETT]: Sir, in your 806 order, you granted me  
19 permission to argue 600 and 599 together.

20 MJ [Co1 PARRELLA]: I did. So let me make inquiry about  
21 599, unless you want -- unless you want to argue it.

22 MTC [MR. TRIVETT]: Well, I would prefer to hear what  
23 Mr. Montross has to say and then just address both, Mr. Ali's

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1 and Mr. Bin'Attash's.

2 MJ [Col PARRELLA]: Ms. Bormann, what's your intent with  
3 respect to 599?

4 LDC [MS. BORMANN]: Mr. Montross will be addressing the  
5 issue.

6 MJ [Col PARRELLA]: Thank you.

7 Good morning.

8 DC [MR. MONTROSS]: Good morning.

9 Your Honor, to begin, we want to emphasize, lest the  
10 military judge conclude otherwise, that my team, I, myself, as  
11 well as a member of that team, continue to remain unable to  
12 discharge our ethical and constitutional responsibilities to  
13 determine the presence of conflict in this case.

22 MJ [Col PARRELLA]: So, Mr. Montross, let's get to 599.  
23 Let's close argument on 599.

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1 DC [MR. MONTROSS]: I am getting to that, Your Honor.

2 MJ [Col PARRELLA]: Great.

3 DC [MR. MONTROSS]: 599 poses particular challenges, and  
4 the challenge that it poses is the gravity of what is at stake  
5 in 599. 599 is a motion, at least for Mr. Bin'Attash,  
6 concerning evidence of actual innocence in this case,  
7 innocence as to the charges for which he faces before this  
8 military judge.

9 Also, Your Honor, in such a grave matter, we do stand  
10 alone in regard to the litigation surrounding [REDACTED]  
11 [REDACTED] the subject of not only this motion, 599, but also  
12 the subject of 574G, the subject of 600, the subject of 601.

13 So unlike any other team, Mr. Bin'Attash, at this  
14 time in the 599 motion, Judge, is not preparing to  
15 challenge -- to challenge the legality of [REDACTED] We  
16 are not standing before you challenging the foundation of [REDACTED]  
17 [REDACTED] We are not preparing to challenge the chain of  
18 custody in 599 [REDACTED] I'm not standing here  
19 challenging the authenticity or asking that we need  
20 information so that I can challenge the identification [REDACTED]  
21 [REDACTED]

22 I have heard and I understand why those challenges  
23 are being made by the other teams. And if we were in their

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1 situation, I hope that we would be making the very same  
2 arguments. But we're not, and I'm standing arguing 599  
3 because we actually embrace [REDACTED]  
4 [REDACTED] and if Mr. Bin'Attash is the person that the  
5 government professes him to be, [REDACTED]  
6 [REDACTED]  
7 Ours is a claim of right to all [REDACTED] not  
8 because we seek to challenge them but because we seek them as  
9 defense evidence of innocence. We seek them because they're  
10 exculpatory. Hence, I argue 599 today, though under conflict.  
11 Who has the government alleged Mr. Bin'Attash to be?  
12 They describe him repeatedly as a senior al Qaeda lieutenant,  
13 charged with the conspiracy to specifically attack critical  
14 targets in New York City and Washington, D.C., the 9/11  
15 attacks, resulting in the life of loss -- the loss of life of  
16 thousands of people.  
17 Who did he conspire with? The government alleges  
18 that Mr. Bin'Attash conspired with the man who sits at one  
19 table in front of him, Mr. Mohammad, to commit the attacks on  
20 9/11.  
21 So I want to briefly review what's been provided to  
22 us at this time. There are a total, as far as we know right  
23 now, [REDACTED]

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[REDACTED]

It's completely unclear from the information that we've been given, okay, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

10

[REDACTED]

11 Your Honor, you just heard 574G, and I'm prepared to hand out  
12 what is the attachments to 574G, but I also don't want to  
13 clutter the record. And if Your Honor is amenable to going to  
14 pages in 574G -- is that something that you would prefer  
15 to ----

16 MJ [Co1 PARRELLA]: Yes, I can certainly do that, so just  
17 guide me to the page, and I will go there.

18 DC [MR. MONTCROSS]: Okay. So on the bottom of 574G --  
19 there's a totality of 223 pages. Does Your Honor see that?  
20 Right.

21 MJ [Co1 PARRELLA]: I do.

22 DC [MR. MONTCROSS]: Okay. Can you go to page 187 of that  
23 223.

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1 MJ [Col PARRELLA]: I am there now.

2 DC [MR. MONTROSS]: So in the beginning paragraph is:

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

8 Then the government directs the reader to certain  
9 portions [REDACTED] So if you go to 191,  
10 Your Honor, four pages later, the same thing. Many of [REDACTED]

11 [REDACTED]  
12 [REDACTED]

13 Then it directs the reader to [REDACTED]  
14 [REDACTED] Go to page 195, Your Honor. Again,

15 [REDACTED]  
16 [REDACTED]

17 So as Mr. Connell indicated, they're using [REDACTED]  
18 [REDACTED] when they are interrogating, in this case  
19 particularly Mr. Mohammad. But they also -- what's important  
20 from our perspective, from Mr. Bin'Attash's perspective, is  
21 how they describe [REDACTED] right?

22 [REDACTED] -- and Mr. Trivett called them  
23 yesterday statements of co-conspirators, but they're more than

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1 that. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Now, I can understand, okay, why the government  
6 intends to use [REDACTED] as evidence in its  
7 case-in-chief, right, [REDACTED] that they gave us.  
8 And I appreciate that, right?

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 But my appreciation of the government's intent to use  
13 [REDACTED] as evidence in its case-in-chief is  
14 coupled with a lack of appreciation on my part about why the  
15 very same government did not see this evidence as exculpatory  
16 as to Mr. Bin'Attash and provide it to us as Brady information  
17 and not through a process where we are now analyzing it as  
18 evidence that they intended to introduce during its  
19 case-in-chief. It's affirmative evidence as to others, but  
20 it's not to us. It's Brady, and they should have seen that,  
21 and this should have been produced as Brady.

22 Now, we know there is [REDACTED]

23 that's what this spreadsheet says. I think my -- I am bad at

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[REDACTED]

We've also been told at this point, okay, that on [REDACTED]

[REDACTED]

But the fact that [REDACTED]

[REDACTED] that's Brady just like the [REDACTED]  
okay, are Brady. And we're entitled, okay, [REDACTED]

And I want to address why that's important, why it's  
important that we get the balance. I think it is Brady  
evidence. It's clearly exculpatory [REDACTED]

[REDACTED] period. But how are we going to use -- [REDACTED]

[REDACTED] How do you see us using  
those in a trial?

And I'm hoping, as serving as a judge in military

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1 courts-martial, that you have not had an opportunity to do  
2 multi-codefendant, long-term [REDACTED] drug [REDACTED]  
3 cases. I pray that you haven't had to do those, but  
4 unfortunately I have. And I have sat next to eight other  
5 defendants, and the worst thing that you can get is the box  
6 full of [REDACTED] all the conspiracy  
7 for -- for a year.

8 But I will say the greatest gift that a defense  
9 attorney ever gets is when you get [REDACTED]  
10 [REDACTED]  
11 in a codefendant conspiracy charge is your client. You dance  
12 a dance of joy. And you are not seeking to avoid, okay,  
13 [REDACTED] and you are not seeking to  
14 limit them.

15 In fact, [REDACTED] my cross-examination  
16 would be going through in granular detail, okay, everything

17 [REDACTED]  
18 [REDACTED] And if my client was really part of that  
19 conspiracy, [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 Fortuitously for you, you may not be the judge, okay,  
23 when you are going to listen to me do [REDACTED] cross-examinations,

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1 okay, [REDACTED] and that would be a powerful moment  
2 for you. But the rest of the other people will be here  
3 listening to that. And I intend to do that, Judge, [REDACTED]

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

7 Now --

8 MJ [Co1 PARRELLA]: Now, I understand that argument with  
9 respect to [REDACTED] which I believe you do have, correct?

10 DC [MR. MONTROSS]: I do have those.

11 MJ [Co1 PARRELLA]: Okay. But with respect to [REDACTED]  
12 what if they have absolutely no relevance to 9/11, to this  
13 conspiracy? I mean, the government hasn't given those to  
14 anyone.

15 DC [MR. MONTROSS]: Okay. Great question, okay? So I  
16 think there's two ways perhaps that Your Honor -- so I looked  
17 at [REDACTED] -- I'm assuming you have, too -- and I  
18 think maybe you're thinking of maybe two ways that perhaps are  
19 not related to 9/11.

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

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[REDACTED]

it's important, is

exculpatory.

[REDACTED]  
I would like to show during mitigation, okay, that my client is not part of the inner circle, okay; that he is not intimately connected to Mr. Mohammad; that he's not one of the worst of the worst; [REDACTED]

[REDACTED]

But if Mr. Bin'Attash is [REDACTED]

or they don't have that type of relationship, that's important for me, maybe not at the guilt phase, but it is certainly important to me as I am attempting to make a mitigation presentation.

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[REDACTED]

it's

6 still relevant and material to me for a sentence other than  
7 death.

8 Does that answer the question?

9 MJ [Co1 PARRELLA]: It does.

10 How do you limit the universe, though, of information  
11 that might be out there that fails to refer to your client?

12 DC [MR. MONTROSS]: Okay. Well, we ----

13 MJ [Co1 PARRELLA]: In other words, there's got to be some  
14 logical part where the court would say the absence of it is  
15 still relevant.

16 DC [MR. MONTROSS]: And that is certainly an admissibility  
17 and relevance question that the court can determine when it  
18 comes out at trial. But when I'm attempting to prepare and  
19 investigate my mitigation and penalty phase presentation --  
20 this is discovery now, okay? I think the question that you're  
21 asking is a legitimate question about what evidence is  
22 actually going to be heard, okay, during trial, but that is  
23 mitigation.

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1           That other point -- one other point, Judge ----

2           MJ [Co1 PARRELLA]: I just want to -- let me interject. I  
3 think the same issue potentially revolves to discovery as  
4 well, not just trial.

5           DC [MR. MONTROSS]: Okay. Yesterday Mr. Connell had an  
6 analogy. He said is there a difference in your mind, okay, if  
7 I'm one in six, okay, if I'm one in 60, if I'm one in 600, or  
8 if I'm one in 6,000. And I had not thought in my mind of  
9 framing it that way yesterday, but that moved me yesterday  
10 when it was a conversation about what potentially his client's  
11 responsibility is in the 9/11 conspiracy, okay, [REDACTED]

12 [REDACTED]

13           So I would want -- that matters, okay, the universe.  
14 I don't know the size of the universe yet, Your Honor. What I  
15 know is [REDACTED]

16 [REDACTED] Part of my discovery request is  
17 just tell me how many more are out there.

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] And I assure you that one of the arguments  
21 that the prosecution is going to be making at trial is it  
22 doesn't matter [REDACTED]

23 [REDACTED]

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1 But how much more powerful that I can stand in front of a  
2 panel, okay, and say not only [REDACTED]

3 [REDACTED]  
4 So their argument that perhaps he's just not caught  
5 up in that, okay, or that he's [REDACTED] or  
6 there's all this other information that implicates him, I can  
7 refute that by talking about [REDACTED]

8 I say [REDACTED] I thought that was a powerful analogy  
9 that Mr. Connell used yesterday. Right now I am talking about  
10 [REDACTED] Judge. That's all I'm talking about.

11 I don't even know -- and that's part of the  
12 information that I am asking -- [REDACTED]  
13 [REDACTED] I don't know. I want that question  
14 answered. If they say yes, [REDACTED]  
15 then that's a separate motion we can deal with. I just want  
16 to know are there more and can I have the balance [REDACTED]  
17 [REDACTED] That's all I'm asking right now.

18 Subject to any further questions, Judge.

19 MJ [Co1 PARRELLA]: I have none. Thank you, Mr. Montross.

20 DC [MR. MONTROSS]: Thank you.

21 MJ [Co1 PARRELLA]: Any other defense counsel wish to  
22 present argument on 599?

23 LDC [MR. NEVIN]: Same objection, Your Honor.

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1 MJ [Col PARRELLA]: Noted. Okay.

2 Negative response.

3 Trial Counsel, you may make argument on 600 and 599,  
4 please.

5 MTC [MR. TRIVETT]: So Mr. Bin'Attash was not one of the  
6 19 hijackers on September 11th, 2001, and that's not an  
7 exculpatory fact. Neither was Mr. Mohammad. Neither was  
8 Mr. Ali or Mr. Binalshibh.

9 Conspiracies have different roles for everyone, and  
10 when you look to the evidence and you look to whether or not  
11 they're entitled to discovery, you have got to tie it to the  
12 actual charge sheet and what we've alleged.

13 Mr. Bin'Attash had a vital role in the conspiracy,  
14 but all but one of his overt acts is December of 1999 to early  
15 2000. What we have alleged in the charge sheet is that he  
16 assisted two of the first hijackers who were coming to the  
17 United States to take flight lessons, and ultimately later  
18 became muscle hijackers; and that he cased U.S. air carriers  
19 to figure out how to circumvent the security to get razor  
20 blades on board so that pilots' throats could be cut. The  
21 evidence at trial will show that he then did a casing report  
22 and provided it to al Qaeda leadership and that that was later  
23 used to train the hijackers.

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1           Who knows what would have happened if Mr. Bin'Attash  
2 would have gotten caught, had the blade not made it through  
3 security, and whether al Qaeda would have decided that the  
4 plan would not work.

5           So he had an important and vital role in the  
6 conspiracy, but for the most part, he was not committing overt  
7 acts in furtherance of the conspiracy [REDACTED]

8 [REDACTED]

9           It's interesting that Mr. Montross would make his  
10 argument as to why he is entitled to it knowing full well that  
11 the case law we cited directly contradicts his position. In  
12 the Apodaca and Scarpa cases -- let me quote from the  
13 opinion -- a defendant may not seek to establish his innocence  
14 through proof of the absence of criminal acts on specific  
15 occasions.

16           Mr. Apodaca made the same argument that he was  
17 required to have all of his co-conspirators [REDACTED] and the  
18 judge noted -- the court noted that just because he wasn't on  
19 [REDACTED] didn't make the evidence per se  
20 exculpatory or discoverable, and that ultimately there are far  
21 easier methods for him to make those arguments than getting  
22 [REDACTED]. And we are not against that.

23           If Mr. Montross wants to make the argument that

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1 [REDACTED] he can  
2 ask the witnesses that we put on about that. If he wants to  
3 offer a stipulation to the United States, we will look at the  
4 language of it, and if it seems like it is accurate, we will  
5 stipulate to it.

6 But they don't really want us to do that. They want  
7 to put us on a never-ending quest for discovery. Just like  
8 Mr. Farley said, they are requesting things that they don't  
9 believe exist, having us play go-fetch. It doesn't work that  
10 way. It could never work that way. Cases would never get  
11 tried if it did work that way.

12 I want to address some specific things in 600 that  
13 Mr. Connell raised, specifically on Appellate  
14 Exhibit 600 (AAA), where he walked through the paragraphs a.  
15 through g. and then a. through f. of paragraph 1 and 2. And  
16 our position is that a. through d. all would reveal the source  
17 and method. They were all considered by the judge in making  
18 his determination in our ex parte filing. The same with f.

19 For e., [REDACTED]

20 [REDACTED]  
21 [REDACTED] -- those are determinations that we had made based on the  
22 fact that they are classified and that they could tend to  
23 reveal -- the more you provide, obviously the more you tend to

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1 reveal the source and method. But ultimately it was a  
2 discovery call that we made, a classified -- the information  
3 was not -- we reviewed them. The information was not  
4 noncumulative, relevant, and helpful to a legally cognizable  
5 defense, rebuttal of the prosecution's case-in-chief, or to  
6 sentencing.

7 And for g., [REDACTED]  
8 [REDACTED] there  
9 will be witness testimony on that. We are aware of our Jencks  
10 and Giglio obligations; and to the extent there would be any  
11 Jencks on that, we would certainly provide it.

12 Going through paragraph 2, letters a., c., d., e.,  
13 and f. all would reveal the source and method, all of which we  
14 believe the military judge considered when giving us our  
15 adequate substitute that we filed in the ex parte motion.

16 As far as letter b., analysis [REDACTED]  
17 [REDACTED]  
18 [REDACTED] that will be done through the  
19 FBI intelligence analyst, and they can cross-examine on that  
20 as well.

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

22 MJ [Col PARRELLA]: You may.

23 MTC [MR. TRIVETT]: In regard to the hostilities argument,

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1 what's important I think in determining whether or not it  
2 would even be relevant to their argument, even if the  
3 government doesn't agree with their argument, you have to look  
4 at how many inferences the defense piles on to even get there  
5 that it might have some kind of logical or probative value.  
6 All right?

7           And I'm not going to get into the source and method,  
8 but this is what Mr. Connell's argument presumes: [REDACTED]

9 [REDACTED]

10 [REDACTED] and if we were at war, we would have targeted and killed  
11 him. All right? So it presumes that we are able to do that.

12 [REDACTED]

13 [REDACTED] It presumes  
14 that we could have immediately launched some type of weapon to  
15 kill him. It presumes that even if we could launch a weapon  
16 to kill him, that the collateral damage would have been,  
17 depending on where he was, in accordance with the law of war.

18           So all I would ask you, whenever they are making  
19 these arguments about hostilities, is there are so many  
20 inferences piled upon inferences, where, in the end, even if  
21 we did have someone we could target, and even if we did  
22 believe we were at war, there could be a hundred reasons that  
23 we decide not, that we were not to target them, even just a

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1 tactical and strategic reason like, well, maybe we will follow  
2 this guy for a while and see who else he leads us to.

3           There are hundreds of different reasons why you might  
4 not target someone under the law of war doesn't mean you are  
5 not at war. When you pile inference upon inference to try to  
6 justify getting discovery, all I would ask is that the  
7 military judge look very closely at everything that is  
8 presumed in all of those requests as to why they need it for  
9 armed conflict.

10           So in citing back to our filing, the Matera case and  
11 the Poindexter case are also very helpful. The government  
12 need not disclose evidence that is not exculpatory but is  
13 merely not inculpatory. And I think some of what the military  
14 judge was asking brings this point to light. Where does it  
15 stop? Where does the absence of your guy in any of the  
16 evidence stop? And the answer is that there is no way to do a  
17 principled determination on it.

18           There is evidence that proves that he was an  
19 important part of the conspiracy. There is evidence that  
20 proves that other people were doing other aspects. It would  
21 be completely different if we said that Mr. Bin'Attash had a

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1 [REDACTED] We have alleged that as to the  
2 other four, and we are going to prove that as to the other  
3 four, and that's why it can't be exculpatory to Mr. Bin'Attash  
4 that he wasn't involved in something that we said he was not  
5 involved in.

6 Is he involved in the overall conspiracy?

7 Absolutely. Are we going to prove beyond a reasonable doubt  
8 that he is a principal in that he aided, abetted, counseled,  
9 and commanded some of the hijackers and worked to make sure  
10 that the attacks were a success? You bet. But in the end, we  
11 haven't alleged against Mr. Bin'Attash anything that's  
12 revealed [REDACTED]

13 I'm not sure how Mr. Montross thinks discovery works  
14 from the prosecution's perspective, but this whole Brady  
15 argument, one, they are not entitled to it at all, but we  
16 provided what we provided to them. We can make a strong  
17 argument, as did the Apodaca case and the Scarpa case, that  
18 they weren't entitled to this at all. We provided it anyway  
19 because we tried to provide all of the discovery to all of the  
20 accused. But we weren't required to do it. He claims it was  
21 Brady and that somehow we should have turned it over earlier  
22 than we did.

23 I don't have a Brady stamp in the office. I don't

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1 look at everything from a discovery standpoint and say that's  
2 Brady, that's Brady, that's 701. It's either discoverable or  
3 it's not, but if it's classified, even if it is Brady, it  
4 still has to go through the process. Right.

5           So we still have to wait until the defense can  
6 receive classified information; that they have signed the MoU  
7 to do it; that we were able to file a motion and get the  
8 substitute and the protections that we sought before turning  
9 it over. So one, I don't think it was discoverable at all as  
10 to Khallad, but we turned it over. I don't think anything  
11 additional was discoverable to Khallad for the reasons we  
12 said. And ultimately they got everything that everyone else  
13 got in regard to [REDACTED]

14           MJ [Col PARRELLA]: You seem to have, in the beginning of  
15 your argument, conceded there's probative value that [REDACTED]  
16 [REDACTED] would be a  
17 salient point he could bring out on cross-examination, the  
18 government offered to stipulate [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21           Is that something that the government is willing  
22 to -- you know, obviously it might be more compelling to say  
23 [REDACTED]

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[REDACTED]

MTC [MR. TRIVETT]: To the extent that that would potentially compromise the source and method, no, but we would certainly be willing to stipulate [REDACTED]

[REDACTED]

14

15 So those are [REDACTED] in regard to  
16 the 9/11 Commission as far as the U.S. Government is aware.

17 [REDACTED]

18 [REDACTED] they wouldn't be  
19 relevant or discoverable based on our review. If that answers  
20 your question, sir.

21 It's difficult being in my position when I get a  
22 question, understanding that we have sought to protect the  
23 source and method, and that there is a chunk of this that's

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1 not supposed to be adversarial, but I am trying to answer your  
2 questions to the best of my ability.

3 MJ [Co1 PARRELLA]: I appreciate that, and I think it  
4 answers my question.

5 MTC [MR. TRIVETT]: Subject to any additional questions  
6 you have, sir.

7 MJ [Co1 PARRELLA]: I don't have any.

8 So, Mr. Connell, if you want to reply with respect to  
9 600.

10 LDC [MR. CONNELL]: Sir, I rise only to address the size  
11 of the universe question. The -- with -- essentially with  
12 respect to any argument, there is always an argument  
13 ad infinitum that can be made, a line drawing problem, when  
14 how many hairs on your chin do you have to have to have a  
15 beard. The -- but in this case we don't really have to get  
16 philosophical on it because the one thing that we know about  
17 the sample -- so there is a broader population of which we  
18 have a sample, and the one thing that we know about the sample

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

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[REDACTED]

4 That, I propose, sets a limitation as to people. [REDACTED]

5  
6

[REDACTED]

6 but we are not really  
7 dealing with that situation. We don't have any evidence that  
8 that ever existed. I'm sure the government would bring it  
9 forward if it did.

10 So we do have a limiting principle. We have one  
11 limiting principle in that [REDACTED]

12

[REDACTED]

13 We have a second limiting principle in the time  
14 period that the charge sheet charges a conspiracy that is  
15 alleged to have lasted from 1996 to 2001 and that gives us a  
16 second limiting principle for the universe. So we essentially  
17 have one limiting principle of time, another of spatial  
18 relationships, and I think that's how we define the universe.

19  
20

[REDACTED]

21 [REDACTED] Thank you.

22 MJ [Col PARRELLA]: Thank you.

23 Mr. Montross.

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1 DC [MR. MONTROSS]: I join Mr. Connell's limiting  
2 principles. I remind the military judge that repeatedly the  
3 government claims that Mr. Mohammad is the prime mover and the  
4 mastermind behind the 9/11 attacks. He is certainly an  
5 appropriate hub to serve as the limiting principal, at least  
6 in terms [REDACTED] that the  
7 government has to produce.

8 I heard the government not answer your question [REDACTED]  
9 [REDACTED] I  
10 abide by the limiting principles that Mr. Connell suggested.  
11 But, Judge, okay, it makes all the difference in the world,  
12 okay, if they can just even give us a number. Okay. [REDACTED]  
13 [REDACTED]  
14 [REDACTED] that really makes a big  
15 difference.

16 Now, I'm not sure what the government's vision of a  
17 conspiracy is, okay? But this one apparently starts in 1996  
18 and it ends with the attacks on September 11th, 2001. I  
19 haven't been given any notice, okay, by the government that  
20 they are not charging him, okay, with the conspiracy after  
21 early 2000 wherein they say the overt acts stopped. If that's  
22 the case, let me know, okay? But he is charged with a  
23 conspiracy up to the events of September 11th, 2001.

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1 [REDACTED]  
2 [REDACTED] impact his role in a charged conspiracy that he is still  
3 identified as a principal in. How can that not be exculpatory  
4 [REDACTED] And I do stand confused by  
5 the government's position that, yes, introduces by different  
6 means, yes, seek a stipulation, yes, it would be relevant at  
7 trial, but we are not going to give it to you at all because  
8 we don't believe that it's exculpatory.

9 Now, the last point, I was criticized by the  
10 government for failing to apparently acknowledge that they  
11 argued Apodaca. I didn't talk about Apodaca in front of  
12 Your Honor because I actually dealt with it in my pleading.  
13 Okay. I'm sorry, okay, if the government apparently missed  
14 the reference to Apodaca in my pleading.

15 So I am going to say what I wrote. The government  
16 repeatedly cites United States v. Apodaca, and I give the cite  
17 for its narrow view of its discovery obligations. The  
18 government does not disclose that Apodaca was exclusively a  
19 case involving an application of Rule 16 of the Federal Rules  
20 of Criminal Procedure and did not involve application of Brady  
21 principles, okay? I also indicate in my conversation about  
22 Apodaca that moreover, in Apodaca, the government produced a  
23 defendant under Rule 16 the very evidence that the government

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1 now seeks to deny Mr. Bin'Attash.

2 The District Court specifically noted that the,  
3 quote, government has already produced to the defendants the  
4 [REDACTED] used by the defendant  
5 and the underlying applications and orders for those  
6 [REDACTED] as well as the applications, affidavits, and  
7 orders related to the [REDACTED] utilized  
8 by individuals other than the defendant. And then I cite the  
9 page in Apodaca where it says that.

10 So if they think Apodaca is the binding rule, I would  
11 love if Apodaca talked about Brady, which is what my argument  
12 is, but the defendant Apodaca got everything that I am  
13 standing here seeking right now. So if they want to use that  
14 as suggestive case law, I am more than happy to adopt it.  
15 Anything further, Judge?

16 MJ [Col PARRELLA]: No, thank you. Okay.

17 Any counsel have anything further on 599 or 600?

18 All right. There being a negative reply, I believe  
19 we have now addressed everything that was docketed for this  
20 closed session. The commission will then recess. And since  
21 we have now gotten through open and closed argument on this,  
22 all the items on this week's order of march, the only thing  
23 left is the potential testimony of the interpreter. So we

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1 will continue with the plan that we will be in here in a  
2 closed session at 0-9 Thursday morning unless we are told  
3 otherwise.

4           There are a couple of folks standing. Mr. Ryan, I am  
5 going to go to Mr. Connell who is standing first and then I  
6 will come to you.

7           LDC [MR. CONNELL]: Sir, could I request a brief 802 once  
8 you close this 806?

9           MJ [Co1 PARRELLA]: Absolutely.

10          TC [MR. RYAN]: Your Honor, I was just seeking to inquire  
11 your plans on holding a 505(h) in regard to government's  
12 pleading that we filed yesterday, and it pertains to the  
13 interpreter's testimony. That would be 616Q.

14          MJ [Co1 PARRELLA]: Right. So I didn't have an  
15 opportunity to compare what was in 616Q with what the  
16 government previously sought in the 505(h) hearing we  
17 conducted in January. I would assume, then, Mr. Ryan, this is  
18 new information that you wish to use?

19          TC [MR. RYAN]: Correct, sir. It follows the items we  
20 noticed in January and had argument about. It's within the  
21 same genre. There will be items pertaining to the  
22 interpreter's testimony. These are specific items that he  
23 himself will identify and authenticate.

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1 LDC [MR. CONNELL]: Sir, this unclassified argument would  
2 be more appropriate or discussion would be more appropriate  
3 for 802.

4 MJ [Co1 PARRELLA]: Okay. I'm going to address it right  
5 now, so thank you, but we can continue to discuss it too -- we  
6 can discuss it in the 802 too.

7 LDC [MR. CONNELL]: Please note my objection.

8 MJ [Co1 PARRELLA]: It's noted.

9 My concern with this, Mr. Ryan, is frankly the  
10 timeliness of it. So it wasn't -- I think there was plenty of  
11 opportunity. Frankly, we were supposed to take up the  
12 testimony in a closed session in January but for my own  
13 condition we were unable to do so, which still afforded the  
14 parties, you know, maybe an opportunity to revisit these  
15 issues and to submit additional documentation in the interim  
16 time period or to request a hearing. That wasn't done so.

17 So this -- frankly, at this point, I am not inclined  
18 to do a 505(h) hearing. I think we have what we have. I am  
19 prepared to take the testimony. I briefly looked at what you  
20 intended to notice and I didn't see this as necessary for the  
21 interpreter's testimony. There is no pending motion for any  
22 action related to the interpreter's testimony, so some of that  
23 information may become more relevant should there be a

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1 subsequent motion made by the defense in response to the  
2 interpreter's testimony. But I'm not inclined to do a 505(h)  
3 hearing for that information that's noticed because I think  
4 it's -- also, in part, sets a bad precedent for the timeliness  
5 in which these notices have been filed.

6 TC [MR. RYAN]: Understood, Your Honor. I will just state  
7 that as they become relevant, I may ask Your Honor to  
8 reconsider that.

9 MJ [Col PARRELLA]: I understand.

10 TC [MR. RYAN]: That is, during the testimony, sir. Thank  
11 you.

12 MJ [Col PARRELLA]: Okay. Anything further?

13 If not, this commission is recessed.

14 [The R.M.C. 806 session recessed at 1235, 26 March 2019.]

15 [END OF PAGE]

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