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1 [The R.M.C. 803 session was called to order at 0910, 10
2 September 2021.]

3 MJ [Col McCALL]: The commission is called to order.
4 Trial Counsel, please account for all the government counsel
5 who are present, both here and at the Remote Hearing Room.

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

7 MJ [Col McCALL]: Good morning.

8 MTC [MR. TRIVETT]: Representing the United States are
9 myself, Mr. Clay Trivett; Mr. Robert Swann; Mr. Edward Ryan;
10 Mr. Christopher Dykstra. Representing the United States in
11 the Remote Hearing Room in Virginia is Major Jackson Hall. At
12 counsel table are paralegals Mr. Dale Cox, Mr. Rudolph Gibbs,
13 and Ms. Carissa Grippando.

14 Also present in the courtroom from the Federal Bureau
15 of Investigation, Supervisory Special Agent Rami Nimri and
16 Staff Operations Specialist Stephanie Downing. I also note
17 for the record that they were not announced but were in the
18 court on Wednesday morning as well.

19 Your Honor, these proceedings are being transmitted
20 via closed circuit television to sites in the continental
21 United States pursuant to the commission's previous orders.

22 MJ [Col McCALL]: Thank you, Mr. Trivett.

23 Defense, please account for all the defense counsel

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1 who are present, both here and at the RHR.

2 LDC [MR. SOWARDS]: Yes, Your Honor. Good morning. Gary
3 Sowards on behalf of Mr. Mohammad, who is not present, along
4 with David Nevin, Rita Radostitz, and Lieutenant Peter Berg,
5 United States Navy.

6 I understand the proceedings are also being observed
7 from the remote facility by Air Force Major Rodrigo Caruso.

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

9 Ms. Bormann?

10 LDC [MS. BORMANN]: Good morning, Judge. With me today --
11 I'm Cheryl Bormann on behalf of Mr. Bin'Attash. He is not
12 present. To my right is Major Jay Peer, United States Air
13 Force. To my left is Ms. Anisha Gupta. Missing today are
14 Mr. William Montross and Mr. Edwin Perry.

15 MJ [Col McCALL]: Mr. Bruck.

16 LDC [MR. BRUCK]: Good morning, Your Honor. David Bruck
17 for Ramzi Binalshibh, who is not present today. With me is
18 Ms. Donna Cline and Lieutenant Clayton Lawrence, United States
19 Navy. Mr. Wyatt Feeler is present at the Remote Hearing Room.
20 Thank you.

21 MJ [Col McCALL]: Mr. Connell?

22 LDC [MR. CONNELL]: Good morning, Your Honor. For
23 Mr. al Baluchi are myself, James Connell; Alka Pradhan;

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1 Lieutenant Commander Leah OBrien. With the Court's
2 permission, Lieutenant Corey Krzan will enter his appearance
3 on the record today.

4 MJ [Col McCALL]: He can step forward.

5 If you could please state your qualifications and
6 detailing information.

7 DC [LT KRZAN]: Good morning, Your Honor. I'm Corey M.
8 Krzan, Lieutenant, Judge Advocate General's Corps, United
9 States Navy.

10 I was detailed to this military commission by
11 Brigadier General John Baker, United States Marine Corps,
12 Chief Defense Counsel of the Military Commissions Defense
13 Organization, pursuant to R.M.C. 503. I'm qualified and
14 certified in accordance with Article 27(b) and sworn under
15 Article 42(a) of the UCMJ. I'm also qualified in accordance
16 with R.M.C. 502.

17 My detailing memorandum and notice of appearance are
18 in AE 004CCC, filed 10 September 2021. I have read all
19 relevant protective orders and signed all relevant MOUs. I
20 have not acted in any manner which might tend to disqualify me
21 from this commission.

22 MJ [Col McCALL]: Thank you, Lieutenant Krzan. Please
23 raise your right hand.

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1 [Counsel was sworn.]

2 MJ [Col McCALL]: All right. The last defense team.

3 ADC [MS. LACHELIER]: Good morning, Judge. Suzanne
4 Lachelier and Sean Gleason on behalf of Mr. al Hawsawi.
5 Learned counsel, Mr. Walter Ruiz, is absent.

6 MJ [Col McCALL]: I note that the -- all five accused are
7 absent this morning. Trial Counsel, do you have a witness to
8 testify as to the absences I just noted?

9 COMMANDER, U.S. NAVY, was called as a witness for the
10 prosecution, was sworn, and testified as follows:

11 DIRECT EXAMINATION

12 Questions by the Trial Counsel [MR. SWANN]:

13 Q. Commander, are you the same witness that testified on
14 Wednesday of this week?

15 A. I am.

16 Q. Very well. I remind you that you are still under
17 oath.

18 A. Understood.

19 Q. Let's take the first detainee, Khalid Shaikh Mohammad.
20 Did you have occasion to advise Mr. Mohammad of his right to
21 attend today's proceeding?

22 A. I did.

23 Q. And do you have what's been marked as Appellate

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1 Exhibit 838A, consisting of three pages, in front of you?

2 A. I do.

3 Q. Is that his signature on the second page of this
4 document, the English version?

5 A. It is.

6 Q. And did you follow this form when you advised him of
7 his right to attend?

8 A. I did.

9 Q. Walid Muhammad Salih Mubarak Bin'Attash, 838B, again,
10 consisting of three pages?

11 A. Yes.

12 Q. Did you have occasion to advise him of his right to
13 attend today's proceeding?

14 A. I did.

15 Q. Did you use this form in doing so?

16 A. Yes, I did.

17 Q. Is that his signature that appears on the Arabic
18 version of this document?

19 A. It is.

20 Q. Ramzi Binalshibh. It's marked as Appellate Exhibit
21 838C. Again, a three-page document.

22 A. I have it.

23 Q. Did you have occasion to advise him of his right to

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1 attend today's proceeding?

2 A. I did.

3 Q. And did he sign the second page of that document?

4 A. He did.

5 Q. Ali Abdul Aziz Ali, Appellate Exhibit 838D, again
6 consisting of three pages. Do you have that in front of you?

7 A. I do.

8 Q. Is that his signature that appears on the second
9 page of this document?

10 A. It is.

11 Q. And finally, Mustafa Ahmed Adam al Hawsawi, Appellate
12 Exhibit 838E. Again, a three-page document. Is that his
13 signature that appears on the second page of this document,
14 the English version?

15 A. It is.

16 Q. Do you believe that each of these men voluntarily
17 waived their right to attend today's proceedings?

18 A. I do.

19 TC [MR. SWANN]: I have nothing further, sir.

20 MJ [Col McCALL]: Mr. Swann, can the commission get
21 working copies of those five documents?

22 TC [MR. SWANN]: Sir, he has -- in front of him.

23 MJ [Col McCALL]: May I retrieve from the witness?

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1 A. Your honor.

2 MJ [Col McCALL]: Got it. Thank you.

3 Do any defense counsel have any questions of this
4 witness?

5 LDC [MR. CONNELL]: Yes, Your Honor.

6 MJ [Col McCALL]: Mr. Connell.

7 **CROSS EXAMINATION**

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

9 Q. Good morning, Commander.

10 A. Good morning.

11 Q. My name is James Connell, we haven't met. I represent
12 Ammar al Baluchi, 10018.

13 A. Okay.

14 Q. Pause before you answer this first question, please.
15 Can you please state your name and spell it for the record.

16 TC [MR. SWANN]: Your Honor, we're going to object.

17 LDC [MR. CONNELL]: Sir ----

18 TC [MR. SWANN]: This has been litigated ----

19 MJ [Col McCALL]: I'll -- so hold on, Mr. Connell. So go
20 ahead and state the basis for your objection.

21 TC [MR. SWANN]: All right. This matter has been
22 resolved, I believe my recollection says at 605, that
23 Judge Parrella ruled that an individual testifying in these

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1 proceedings along these matters under pseudonym does not have
2 to state their true name.

3 Mr. Connell has done this with Judge Pohl and it was
4 over -- his -- I objected, judge sustained the objection.

5 Throughout these proceedings, it's -- it happens every
6 time with either a new judge or a new individual, and we -- we
7 submit that there is no reason for this individual to state
8 their true name.

9 MJ [Col McCALL]: All right. Response?

10 LDC [MR. CONNELL]: Sir, the -- Mr. -- the government has
11 correctly stated that we have adequately made a record as to
12 our objection to anonymous, not pseudonymous, but anonymous
13 testimony each time there is a new judge or a new individual
14 who is testifying. Judge Parrella granted us -- did rule
15 against us and granted us a continuing objection so that we
16 didn't have to do it every time that a person testified.

17 This is the first time, and I would ask the military
18 commission for the same continuing objection to the use of
19 anonymous testimony without a sufficient foundation for some
20 reason for anonymous testimony, or an invocation of national
21 security privilege.

22 MJ [Col McCALL]: Okay. So I want to hear a little more.
23 So my staff has let me know that this is an issue, that it has

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1 been -- I understand it's -- and this is fairly typical
2 that ----

3 LDC [MR. CONNELL]: You make a record.

4 MJ [Col McCALL]: ---- you know, a new judge, so you want
5 to have a continuing objection, make sure the record is clear.

6 But, Mr. Swann, could you tell me a little more about
7 the reason for the government to have a witness testify
8 anonymously?

9 MTC [MR. TRIVETT]: Just one second, Your Honor.

10 MJ [Col McCALL]: Sure. Take your time.

11 MTC [MR. TRIVETT]: While we're waiting, sir, we were also
12 informed that you're hard to hear because your mic is too far
13 from your face.

14 MJ [Col McCALL]: I appreciate that.

15 MTC [MR. TRIVETT]: Thanks.

16 [Pause.]

17 TC [MR. SWANN]: Your Honor, the actual Appellate Exhibit
18 is 603. And the reasoning the government provided when we
19 sought this, is that given the nature of the testimony and the
20 demonstrated threats against assistant staff judge advocates,
21 anonymous testimony is appropriate under the circumstances and
22 does not violate any right the accused may arguably possess
23 under the Sixth Amendment to the Constitution.

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1 Furthermore, because the SJA's identity is classified
2 when associated with his or her work with high-value
3 detainees, such information is protected under M.C.R. --
4 Military Commission Rule of Evidence 505 and anonymous
5 testimony by an assistant staff judge advocate is not
6 prohibited under the Regulations for Trial by Military
7 Commissions as such. And where an objection is not the
8 procedural mechanism by which to seek discovery, the defense
9 [sic] should overrule the defense objection without any
10 further oral argument.

11 MJ [Col McCALL]: Fair enough. Thank you, Mr. Swann. I
12 just wanted to get that fleshed out a little bit more just for
13 my understanding.

14 Mr. Connell, I'll let you be heard briefly on this.

15 LDC [MR. CONNELL]: I don't need -- I've been heard many
16 times on this, Your Honor. I don't need to be heard again.

17 MJ [Col McCALL]: All right. I get the parties'
18 positions. I'm going to overrule the objection, but I
19 understand why you are making it.

20 LDC [MR. CONNELL]: If I correctly understand, sir, you're
21 sustaining the objection.

22 MJ [Col McCALL]: Oh, I'm sorry. I'm sustaining the
23 objection. Thank you.

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1 LDC [MR. CONNELL]: Not that I'm trying to suggest it,
2 but ----

3 MJ [Col McCALL]: No. No, I understand.

4 LDC [MR. SOWARDS]: Excuse me, Your Honor. Also just so
5 the record is clear, I believe we have in the past joined
6 Mr. Connell in this objection.

7 MJ [Col McCALL]: Understood, Mr. Sowards.

8 LDC [MR. CONNELL]: All right. I told you to pause.

9 **CROSS EXAMINATION CONTINUED**

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

11 Q. Sir, pause before this one too, although I'm not sure
12 it's as clear. Do you have an unclassified call sign or
13 pseudonym that you're identified by? That's a yes-or-no
14 question. I'm not asking for it yet. I'm just asking, do you
15 have one?

16 A. Yes.

17 Q. Okay. And now pause. Could you state your
18 unclassified pseudonym or call sign?

19 A. Pa.

20 Q. Paul?

21 A. Pa, as in P-A.

22 Q. Okay, P-A. Thank you. All right.

23 Sir, we're talking about 10018, Ammar al Baluchi.

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1 What exactly did he say to you this morning when you advised
2 him of his right to be present?

3 A. I won't get it verbatim. I will try to remember
4 generally. So with 18, he -- I believe he wanted to speak to
5 his counsel this afternoon and perhaps with the guard force
6 this morning to talk about the detainee's perception of the
7 adequacy of the medical treatment for ISN26.

8 Q. Okay. And did he say anything about his own physical
9 or mental condition, his ability to come to court, whether he
10 was too exhausted, anything like that?

11 A. He said that he wanted to meet with his counsel this
12 afternoon because he wanted to sleep this morning because he
13 was tired because he was taking care of 26.

14 Q. Okay. And 26, for the military commission's benefit,
15 is Hadi al-Iraqi?

16 A. Correct.

17 Q. Okay. And Hadi al-Iraqi, just for -- just slight
18 background for the military commission, is a 60-year-old man
19 with a fused cervical and lumbar spine?

20 A. I am not a medical doctor. I understand in the
21 proceedings for ISN26, there is a motion by the defense and a
22 response due by the government today that will spell out the
23 fact that there is adequacy of medical care.

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1 MJ [Col McCALL]: Sir, if you could stop for a second. We
2 have ----

3 TC [MR. SWANN]: Your Honor, this -- I know you do not
4 follow the Twitter accounts of folks. I tend to look at them
5 every once in a while. This is little more than a propaganda
6 attempt by Mr. Connell to tell the world that -- that Mr. Hadi
7 suffered some sort of medical condition that's being
8 adequately taken care of. There's no need for us to get any
9 further into this.

10 The question is, is did he voluntarily waive his right
11 to attend this morning. And if not, then we can forcibly
12 extract him and bring him here to that court. That's the
13 alternative that the judges in this case have set.

14 And we can't get into this every morning about did he
15 sign the waiver or not. That ought to be the end of it. But
16 now we're getting into things down the road, as to what this
17 witness might think the individual's motives or attempts were.

18 MJ [Col McCALL]: So the objection is relevance?

19 TC [MR. SWANN]: Yes, sir.

20 LDC [MR. CONNELL]: Sir, that is a foundational question
21 to the next questions, which are: What recently happened that
22 would affect Mr. al Baluchi's ability to come to court.

23 MJ [Col McCALL]: Objection overruled. You can continue

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1 with the questioning.

2 LDC [MR. CONNELL]: Okay.

3 CROSS EXAMINATION CONTINUED

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

5 Q. So I don't have another question about that. I just
6 have that -- I just want to make sure that I understand the
7 same -- the answer to that one question. 26, or Hadi
8 al-Iraqi, is -- let me ask a foundational question to that.

9 So you're a staff judge advocate; is that correct?

10 A. I'm the assistant staff judge advocate, yes.

11 Q. Assistant staff judge advocate. And one of your
12 responsibilities as assistant staff judge advocate is to
13 understand the -- maybe not every little thing, but the
14 prominent issues with the different detainees?

15 A. Yes.

16 Q. Okay. And in the course of your duties as assistant
17 staff judge advocate, you have learned that Hadi al-Iraqi has
18 serious -- even if you don't know specifically what they are,
19 but serious spine issues that have required JTF to conduct
20 multiple surgeries; is that right?

21 A. Yes, I understand that.

22 Q. Okay. And so what happened in the last 48 hours that
23 would change the -- that would affect Mr. al Baluchi's ability

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1 to come to court?

2 MJ [Col McCALL]: Don't answer the question yet.

3 Mr. Swann, I see you standing.

4 TC [MR. SWANN]: Again, relevance, Judge.

5 MJ [Col McCALL]: Okay. I'll see where you're going. So
6 objection overruled.

7 Go ahead. You can answer the question.

8 A. Again, as I say, today I believe in the case for ISN26
9 the government will address the motion by the defense in this
10 case. I would say that in the last 48 hours, ISN26 has
11 claimed to -- I believe his claim is that he has been
12 paralyzed and that his condition has worsened.

13 My understanding, again from wanting to know, you
14 know -- that my responsibility includes knowing the issues
15 that are going on, is that that is inaccurate, that he does
16 not have a worsened medical condition, and that that will be
17 addressed better by the government later this afternoon.

18 Q. All right. So I'd like to follow up on your testimony
19 that that is -- that claim is inaccurate.

20 MJ [Col McCALL]: Mr. Connell, if we ----

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

22 MJ [Col McCALL]: ---- can focus in, I don't know that
23 he really ----

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1 LDC [MR. CONNELL]: My actual question was super narrow.
2 It was about the effect on my al Baluchi; the answer wasn't
3 but the question was.

4 MJ [Col McCALL]: So if you can, then, go back to that
5 direct question.

6 LDC [MR. CONNELL]: All right.

7 MJ [Col McCALL]: Keep it on that.

8 **CROSS EXAMINATION CONTINUED**

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

10 Q. So with this issue with Mr. al-Iraqi, what effect does
11 that have on -- has -- to your understanding or from -- either
12 from Mr. al Baluchi or otherwise, what effect has that had on
13 Mr. al Baluchi, his physical and mental state, and his ability
14 to come to court?

15 A. It would be pure speculation on my part.

16 Q. Okay. I'm not asking you to speculate. What did
17 Mr. al Baluchi tell you the effect had been?

18 A. As I said earlier, he said he is tired and he would
19 like to get some sleep this morning before meeting with his
20 counsel later this afternoon because he says he has been
21 taking care of ISN26.

22 Q. Basically, up all night, helping him move, get him
23 onto his hospital chair, onto the toilet, that kind of thing?

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1 A. Hard to say. He didn't -- he didn't elaborate.

2 Q. Why is it Mr. al Baluchi's responsibility or the other
3 prisoners' responsibility to provide nursing care?

4 A. It is not. My understanding is they refused to allow
5 a female corpsman to offer medical assistance at least at one
6 point and are otherwise ----

7 Q. Who is "they"?

8 A. Both ISN18 along with ISN14. I believe both of those,
9 and then I'm -- I'm not sure otherwise. I believe both of
10 those were the ones that have stated that they are providing
11 assistance to ISN26.

12 Q. Okay. So they're providing the -- they said they're
13 providing assistance to 26?

14 A. I believe so.

15 Q. Okay.

16 A. This is the best of my understanding from multiple
17 conversations.

18 Q. Okay. And on the responsibility question, has the --
19 there's a senior medical officer, right?

20 A. There is.

21 Q. And has the senior medical officer been to the camp to
22 address this situation?

23 A. I believe so.

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1 Q. Okay. And there's a chief medical officer, right?

2 A. That there is a -- my understanding, a new position of
3 chief medical officer, which is not necessarily direct --
4 direct interaction with the detainees or medical treatment. I
5 believe the chief medical officer is a different position
6 compared to the medical staff that provide the medical care
7 for the detainees.

8 Q. Okay. And so the chief medical officer, if I
9 understand your answer, has not been to the camp to address
10 this situation?

11 A. I dont' ----

12 TC [MR. SWANN]: Again, another objection, sir.

13 LDC [MR. CONNELL]: That's my last question, actually, if
14 we can ----

15 MJ [Col McCALL]: Objection overruled. If it's your last
16 question, but you -- I see where you're going. If we can just
17 stay ----

18 LDC [MR. CONNELL]: ---- right.

19 MJ [Col McCALL]: ---- to, you know, the effect on your
20 client ----

21 LDC [MR. CONNELL]: Yeah.

22 MJ [Col McCALL]: ---- rather than getting into the other
23 detainees' medical condition or care.

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1 LDC [MR. CONNELL]: Right, I'm not in that. I'm really at
2 whose responsibility is it to do what.

3 A. I do not know if the chief medical officer has been to
4 the camp and whether or not he has had any interaction with --
5 with ISN26.

6 LDC [MR. CONNELL]: All right. Sir, that completes my
7 question. After I hear any other testimony, I'll address the
8 court on our position.

9 MJ [Col McCALL]: Okay. Any other defense counsel desire
10 to question this witness?

11 Negative response. And no need to -- negative
12 response from the counsel, it appears. All right. At least
13 no affirmative response.

14 Government, do you have any redirect on this witness?

15 TC [MR. SWANN]: No, sir.

16 MJ [Col McCALL]: All right.

17 LDC [MR. CONNELL]: May I have a moment, Your Honor?

18 MJ [Col McCALL]: You may.

19 [Pause.]

20 LDC [MR. CONNELL]: Your Honor, the government has stated
21 that if we take the position that Mr. al Baluchi's presence is
22 not voluntary, that they will order a forced cell extraction.
23 They consider that to be the alternatives. Either we consent

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1 to his voluntariness or he'll be attacked and dragged out of
2 his cell. So under those circumstances, I do not object to
3 the voluntariness of his nonappearance.

4 MJ [Col McCALL]: Well, I'll say those aren't the
5 circumstances. So, I mean, this commission is the one who is
6 going to decide whether the accused need to be present today
7 and whether there's going to be a forcible extraction.

8 So what I want to hear is the defense's position on
9 whether it was a knowing and voluntary waiver of their
10 presence here, and then we'll discuss remedies.

11 LDC [MR. CONNELL]: I understand, sir.

12 The -- the short answer is each time there is a good
13 reason why the defendants don't -- sometimes they just don't
14 want to come to court, right? I understand that. Each time
15 there's a good reason why they don't come to court -- they're
16 ill, they're too tired, something like that -- there's a
17 difficult struggle that we have to sort of make as counsel of
18 where does that fall on the voluntary/not voluntary spectrum.

19 In this situation, we have a good explanation for why
20 he's not coming to court. We also have the testimony
21 uncontroverted, which we didn't impeach, that he said that he
22 was doing so voluntarily and we have 838D which has his
23 signature on it. It's a document he knows well and he didn't

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1 write anything else on it.

2 Under those circumstances, Your Honor, I'm going to --
3 I think it's a -- you know, it's something I struggle with
4 everything time, but I'm going to elect not to object to his
5 voluntariness.

6 MJ [Col McCALL]: Okay. All right. So I'll say this:
7 Obviously -- well, no, Mr. Connell, go ahead and have a seat.
8 This is not to you. This is to all counsel and the parties.
9 So ----

10 ADC [MS. LACHELIER]: Judge, I'm sorry. I just want to
11 make one comment. There's been a lot of talk about "they,"
12 both from the witness and Mr. Connell, and I just want to be
13 clear, we're not objecting to voluntariness. Thank you.

14 MJ [Col McCALL]: Okay. Thank you.

15 So, you know, this commission is not going to allow
16 the accused to dictate when we have hearings. Period. You
17 know, this is a commission. It's just like any other trial.
18 Yes, as Mr. Swann had mentioned, the accused are subject to
19 forcible extraction, if necessary, to bring them to this
20 hearing.

21 That being said, the commission is also well aware of
22 the incredible logistics hurdles on dealing with a case in
23 this manner with detainees that -- you know, a typical court,

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1 it would be much -- the commission is trying to have some
2 flexibility, and so I believe that's why this process was set
3 up, fairly unusual, that we have detainees who -- there's this
4 process of them talking with a witness, saying whether they
5 want to come to court, they, you know, sign on the form, and
6 yet defense counsel don't necessarily have easy access to them
7 to confirm it, which would be a much more standard practice.
8 Again, I understand why, given the logistical hurdles of what
9 we're dealing with in this commission.

10 So, you know, in this case, defense is not objecting.
11 I understand that there may be issues from time to time where
12 there are questions as to whether or not it is a free and
13 voluntary waiver on the part of the accused. They did sign
14 these documents. I know that they said they were tired. I
15 will just offer this: You know, we have some flexibility
16 today because what was planned, as counsel is aware from my
17 order of march, was to go through the challenges, potential
18 challenges this morning for the -- about the military judge,
19 go through the listed motions, and then I anticipated breaking
20 at the lunch hour and then coming back and we were going to
21 have an ex parte hearing this afternoon with -- for one of the
22 defense teams on their defense theory of the case.

23 It seems fairly easy to swap that and flip-flop them,

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1 assuming Mr. Bruck's team would be prepared to go ahead and
2 have the ex parte briefing this morning, and then that
3 allows -- it seems like only one of the accused, Mr. Ali, but
4 still it -- he is an accused, give him a chance to sleep in if
5 he was up late last night, and we'll start this afternoon.

6 So I'm just going to toss that over to Mr. Connell. I
7 know you didn't object, but I don't like going forward when
8 there is a bit of a cloud on the -- of this issue.

9 LDC [MR. CONNELL]: May I have a moment, Your Honor?

10 MJ [Co] McCALL]: Sure. And, Mr. Bruck, if you can maybe
11 talk with your team and let me know if that would work as
12 well.

13 LDC [MR. BRUCK]: Well, Your Honor, I -- I have not been
14 asked for any estimate of how much time we need, but we are
15 not going to have a long presentation. So I'm not sure how
16 much downtime would be avoided by following that approach. I
17 don't think we're going to need more than 45 minutes to an
18 hour.

19 MJ [Co] McCALL]: Okay.

20 LDC [MR. CONNELL]: Your Honor, to address -- I appreciate
21 very much what you said. And to address it, may I ask one
22 more question of the witness?

23 MJ [Co] McCALL]: You may.

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1 today's session.

2 Let me start by summarizing the R.M.C. 802 conference
3 that we had on Wednesday of 8 September 2021.

4 At that time I conducted an R.M.C. 802 conference with
5 trial and defense counsel. The accused were present at this
6 conference. We discussed the following: I informed the
7 parties that I did not intend to hold an open session on
8 Thursday 9 September because I wanted to give the parties time
9 to prepare any challenges for -- and for defense counsel to
10 consult with their clients.

11 Regarding the sessions for today and the sessions for
12 next week, I informed the parties that I was considering
13 hearing oral argument on motions that would not be as impacted
14 by Mr. Ruiz's excused absence. And those were AEs 768, 629I,
15 722, 697, 766, 770, 771, 775, 783, and 785. I also indicated
16 that I was willing to hear the ex parte defense presentations
17 on theories of the case, the government's logistics brief, and
18 possibly the government ex parte presentation on summaries and
19 substitutions under R.M.C. 505, though I acknowledge that
20 there was a motion pending regarding whether to even have such
21 an ex parte briefing.

22 The government indicated that it was prepared to give
23 its logistics brief next week. Mr. Trivett stated that the

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1 logistics brief would all be classified -- classified because
2 it involved operational matters, though properly redacted
3 slides would be released.

4 I asked the parties if they had conferred regarding an
5 amendment to AE 679F.

6 Ms. Bormann correctly indicated that a joint notice
7 had been filed.

8 Mr. Connell and Ms. Bormann pointed out that AE 697
9 was not among the motions specified on the docket order.

10 Mr. Trivett indicated that the prosecution was
11 continuing their review of the M.C.R.E. 505(g) notices and
12 would file their consolidated responses by today. He stated
13 the prosecution did not intend to object to any 505(g) notices
14 related to AE 833.

15 Mr. Connell indicated that he was prepared to give his
16 ex parte presentation on theory of the case on 9 September,
17 and I agreed to start at 0900.

18 Mr. Bruck indicated there was a 505(g) notice related
19 to AE 629I. He also explained that Mr. Feeler was prepared to
20 argue 629I, 711, 721, 722, and 812 in person next week but
21 would need to argue from the RHF -- now called the RHR -- if
22 argument was scheduled on those motions today.

23 Ms. Lachelier asked whether the expedited briefing

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1 process would still apply given Mr. Ruiz's absence, and I
2 replied that it would.

3 Mr. Sowards also indicated that he wished to defer
4 arguments on numerous AEs.

5 I think I've covered everything that we discussed at
6 the 802, based on my recollection. Do counsel for either side
7 have any additions or corrections to the commission's summary
8 of the R.M.C. 802 conference?

9 MTC [MR. TRIVETT]: No additions or corrections, Your
10 Honor.

11 MJ [Col McCALL]: Defense counsel?

12 No one is standing up, so I take that as a no.

13 All right. The -- what you -- we were calling the
14 Remote Hearing Facility and going forward we will call it the
15 Remote Hearing Room, RHR. It's a typical military, we're
16 changing acronyms.

17 Yesterday the commission issued AE 833A. It's a
18 supplemental trial conduct order dealing with access to the
19 Remote Hearing Room in Arlington, Virginia. I issued that TCO
20 in response to the increase in HPCON level in the National
21 Capital Area from bravo to bravo plus. In that TCO, I invoked
22 the provisions of an exception to policy starting Monday, 13
23 September, in order to continue to make use of the RHR, to

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1 safely accommodate up to 50 participants if needed.

2 I stressed that the Remote Hearing Room is not
3 intended to be a viewing facility, such as are located at Fort
4 Meade or the Pentagon. It is instead supposed to be an
5 extension of the well of the courtroom, intended for use of
6 the participants in the proceedings; i.e., the personnel from
7 your teams who would normally be here in court at the -- at
8 NSGB.

9 Additionally, as noted in the TCO, beginning Monday
10 there will be a requirement that your personnel attest to the
11 fact that they are either fully vaccinated against COVID-19 or
12 that they have tested negative for COVID-19 within three days
13 of their entry into the RHR. I'm taking people at their word.
14 I don't have a bailiff up there right now. I'm not going to
15 have -- security personnel I believe under their policies
16 don't feel they can ask for that information. So when you're
17 certifying that these people are the ones you're asking for
18 access, you're understanding that that's -- they need to have
19 that, be vaccinated or having taken a COVID test.

20 All right. Order of march docket order. Yesterday I
21 also issued AE 833, second sup -- supplemental docket order in
22 which I laid out our order of march for the next days. I
23 expect to have another one that I'll work on this weekend,

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1 again, as we're kind of adjusting things. As indicated in
2 that order, I intend to begin today by hearing any challenges
3 the parties may have against me as the military judge.

4 Depending on how long that takes for challenges, what
5 I'd like to do after that is we'll probably go ahead and take
6 a recess after that if it -- depending on how long it goes.
7 But then I'd like to hear oral argument on the following
8 motions before lunch: AE 785, that's Mr. Mohammad's motion to
9 compel discovery regarding Mr. Mohammad's cooperation with
10 interrogators. AE 766, that's Mr. Mohammad's motion to compel
11 discovery of all documents related to Mr. Mohammad's ICRC
12 requests. There is AE 775, which is Mr. Mohammad's motion to
13 compel all information regarding the substance and
14 circumstances of Mr. Mohammad's interrogation in January 2007
15 at Naval Station Guantanamo Bay Cuba. AE 783, motion to
16 compel discovery in a form releasable to Mr. Mohammad. And AE
17 697, which is a defense motion to compel discovery related to
18 persons who had contact with Mr. Bin'Attash between 1
19 September 2006 and 29 February 2008.

20 LDC [MS. BORMANN]: Judge, I hate to interrupt you ----

21 MJ [Col McCALL]: Yes. No, please.

22 LDC [MS. BORMANN]: ---- when you're on a roll, but with
23 respect to AE 697 ----

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1 MJ [Col McCALL]: Yes.

2 LDC [MS. BORMANN]: ---- we filed a 505(g) notice on that.
3 The government has indicated they don't have an objection to
4 it, but it will have to be in a closed session to properly
5 argue Mr. Bin'Attash's position.

6 MJ [Col McCALL]: Okay. No, I appreciate you bringing
7 that to my attention. We'll hold off on that, then, until we
8 can figure out if we need to have that closed session.

9 LDC [MS. BORMANN]: Okay.

10 MJ [Col McCALL]: And I don't know that we'll get there
11 anyways. But, yeah.

12 Mr. Connell.

13 LDC [MR. CONNELL]: Sir, we actually addressed that in our
14 proposed order of march. Mr. al Baluchi also has a 505(g)
15 notice, but we think that, given the posture of that motion,
16 that we can address our position in open court. So probably
17 only take five minutes, but ----

18 MJ [Col McCALL]: Okay.

19 LDC [MR. CONNELL]: ---- if you choose to hear it, we are
20 prepared to go forward.

21 MJ [Col McCALL]: Okay. We'll see what we get to. I'll
22 try and give everyone a chance.

23 Mr. Trivett?

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1 MTC [MR. TRIVETT]: Yes, sir. Just to ask Ms. Bormann to
2 clarify whether or not she needs an open argument and a closed
3 argument, or if she believes the entire argument needs to be
4 in closed.

5 LDC [MS. BORMANN]: Depending on what Mr. Connell
6 argues -- we're not going to actually -- this is more in the
7 nature of a status issue. But to properly inform you on the
8 status of things, we will need at least some supplemental
9 information provided to you in a closed session.

10 MJ [Col McCALL]: Okay.

11 LDC [MS. BORMANN]: Depending on how Mr. Connell updates
12 you, I may not have anything for open session and simply maybe
13 two minutes in closed session.

14 MJ [Col McCALL]: Okay. And I'll just say this. So
15 again, as I'm new to this process of dealing with
16 classified/unclassified, it sounds like we can start in
17 unclass, get things rolling, and then supplement it later if
18 need be with a classified hearing.

19 Is that what I'm hearing, Ms. Bormann?

20 LDC [MS. BORMANN]: We will need to supplement it. So
21 there's no doubt about that. But I have no objection to
22 Mr. Connell and -- and Mr. Trivett, you know, giving you the
23 update and the unclassified facts and then just moving into a

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1 closed session later in the hearing.

2 MJ [Col McCALL]: Okay. Thank you.

3 Mr. Connell?

4 LDC [MR. CONNELL]: Sir, I'll just point out that AE 833
5 second supplement has a closed session scheduled for Tuesday
6 of next week, and that would be the appropriate time ----

7 MJ [Col McCALL]: Right. Okay.

8 LDC [MR. CONNELL]: ---- in our view.

9 MJ [Col McCALL]: No, that makes sense.

10 Mr. Trivett?

11 MTC [MR. TRIVETT]: One more administrative matter, sir.
12 And I apologize.

13 MJ [Col McCALL]: No, please.

14 MTC [MR. TRIVETT]: For AE 783, KSM motion to compel
15 discovery in a form releasable to Mr. Mohammad, we intend to
16 have Major Jackson Hall argue, at least briefly, but from the
17 Remote Hearing Room. So I did want to inform you and anyone
18 else from a communications standpoint that that's our
19 intention.

20 MJ [Col McCALL]: Yeah, and I appreciate that. And, you
21 know, I -- I know that issue had originally come up during an
22 earlier -- I believe it was during one of the earlier 802s
23 where we discussed whether Mr. Feeler, I believe, was going to

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1 argue a motion; he wasn't present until next week. And, you
2 know, I did give it some -- at that time I didn't rule. I
3 wanted to think about the RHR capabilities. And I'm
4 comfortable having argument from the RHR. I mean, we'll see.
5 It may change after we hear it and if it starts to become
6 problematic. So that's fine, Major Hall can argue from there.

7 All right. And again, I want to make it clear, you
8 know, I know it was discussed early in the week, and I see you
9 standing up, but I know we discussed that there had been a
10 process in place potentially with previous judges on a
11 ten-minute rule. I don't have that. I'm still in the early
12 stages where I think argument can be useful for me. I've
13 obviously read the briefings, but there potentially can be
14 something from the oral arguments, so that rule is not in
15 effect. I just want to make that clear.

16 And then Ms. Lachelier -- I'm sorry. I'm butchering
17 your name probably.

18 ADC [MS. LACHELIER]: **[Microphone button not pushed; no**
19 **audio.]**

20 MJ [Col McCALL]: Sure.

21 ADC [MS. LACHELIER]: It's Lachelier, but I'm not very
22 picky. I'm used to it being mispronounced. Thanks, Judge.

23 I just wanted to make the record that we are

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1 presumptively joined to all of these motions that are on the
2 docket, Judge, and you made an effort in 833FF to defer all
3 the motions as I -- as we understood it, all but the 505s. So
4 proceeding with these without learned counsel, in our view, is
5 impairing Mr. al Hawsawi's right to learned counsel. And we'd
6 ask that all the motions be deferred. We did mention that in
7 the docket order, but I wanted to reiterate that.

8 Judge Pohl in -- and we mentioned in our footnote, the
9 479L ruling of Judge Pohl, in which a similar issue happened
10 with Mr. Bin'Attash's case in which Ms. Bormann was not able
11 to be present due to an emergency. It was essentially the
12 same situation we're in. And Judge Pohl struck a proper
13 balance by deferring all the motions, conducting the 505
14 hearings that were not related to Mr. Bin'Attash's case in
15 that instance, and putting off the motions themselves until
16 Ms. Bormann was available again at the next session.

17 In this instance, we're only talking about next month,
18 and that's what we'd ask the judge to do. Thank you.

19 MJ [Col McCALL]: All right. Thank you, Ms. Lachelier.
20 You can stay there because you may want to make more of a
21 record.

22 I will say I have considered this. I'm aware of your
23 position from our -- you know, the last 802 that we had. So I

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1 think this is one situation where perhaps me being new to the
2 case is actually an advantage because I don't foresee hearing
3 argument and immediately having a ruling because I need to,
4 you know, think about some of these issues and kind of absorb
5 them.

6 So, you know, as I mentioned in the ruling where I
7 released Mr. -- excused Mr. Ruiz from these hearings down here
8 for this week and next, I explained that -- so team Hawsawi
9 will be able to file any written responses by 1 October. And
10 so there's not going to be any rulings between the argument,
11 and then I'll wait, I'll see what your defense team has, you
12 know, once you've had the chance to confer with Mr. Ruiz.

13 You know, the only issue that I see right now where
14 that may not work, that it would be with the -- Mr. Mohammad's
15 motion dealing with whether or not to even go forward with the
16 government's ex parte briefing to me regarding the 505
17 process. I still -- my view is that came up after I had
18 already excused Mr. Ruiz.

19 ADC [MS. LACHELIER]: Right.

20 MJ [Col McCALL]: Mr. Ruiz was tracking I was requesting
21 that motion -- that briefing, so I do intend to stick with
22 that expedited schedule and for the motion, the response, the
23 replies, and then the hearing. And then I may or may not have

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1 that -- make that decision and have that briefing before that
2 1 October.

3 I understand the position that puts team Hawsawi in,
4 but it -- I think you have enough counsel that, for this
5 issue, you should be able to address it.

6 ADC [MS. LACHELIER]: I had intended to make a further
7 record when we addressed, because I saw it on your docket for
8 next week, the issue of the ex parte briefing.

9 MJ [Col McCALL]: Sure.

10 ADC [MS. LACHELIER]: And -- and as I understand the
11 judge, you feel because it came up after Mr. Ruiz was excused
12 that somehow it's more acceptable to proceed, and I guess I
13 would see it as the opposite. What we've -- you've asked for
14 is an expedited briefing in the absence of learned counsel,
15 and our ability to weigh in on the issue is just simply not --
16 is impaired as adequate counsel because of Mr. Ruiz's absence.

17 So -- and those issues we did, as I mentioned in the
18 brief we filed last night, I don't know if you had an
19 opportunity to read it yet, Judge, but we weighed in heavily
20 on those ex parte questions when it was previously litigated.
21 And given that it's now being presented again, we would want
22 to weigh in again. I know that Mr. Ruiz would want to have
23 active participation as learned counsel in those issues.

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1 And effectively, on those ex parte matters, Judge,
2 what we're asking for is to be heard and which can be done by
3 October 1, or at least we can file by October 1. And then you
4 can review. There is a record in this case of Judge Pohl
5 having conducted ex parte sessions with the government. If
6 you were to decide to proceed with the government ex parte,
7 there is a record of the judge, -- Judge Pohl having done that
8 in the National Capital Region.

9 So what we're asking for really doesn't prevent the
10 government from doing what you might hope they might do with
11 you in ex parte session, and we can debate the wisdom of
12 having an ex parte session in D.C., but that's a separate
13 matter.

14 But the point is what we're simply asking for is for
15 learned counsel to be available again on -- to be able to
16 brief adequately these issues that you've ordered an ex parte
17 briefing on -- or sorry, an expedited briefing on.

18 MJ [Col McCALL]: And I understand your position. I have
19 not had a chance to review the filing that came in last night.
20 I will review that. I don't have to make this decision right
21 now. For now, I'm sticking with what the -- I've said ----

22 ADC [MS. LACHELIER]: Yeah ----

23 MJ [Col McCALL]: ---- for the expedited briefing

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1 schedule.

2 ADC [MS. LACHELIER]: Like I said, I had intended to
3 address it later since it's on your docket.

4 MJ [Col McCALL]: Understood. I figured just roll it all
5 into one right now.

6 ADC [MS. LACHELIER]: Sure, sir.

7 MJ [Col McCALL]: Thank you.

8 ADC [MS. LACHELIER]: Thank you.

9 MJ [Col McCALL]: All right. So we'll see how far we get
10 with these motions. I don't know what to expect on them if --
11 I am anticipating that at approximately 12:00, we'll recess
12 until Monday morning at 0900. And any AEs that are still
13 outstanding of those ones that I had gone through a few
14 minutes ago, we'll move them to the Monday morning session.

15 The commission intends to return to the courtroom at
16 1400 today to review an ex parte presentation from counsel for
17 Mr. Binalshibh on the defense theories of the case.

18 At 0900 on Monday, 13 September 2021, the commission
19 will reconvene in open session to hear oral argument on any of
20 the issues that we are unable to get to today on those pending
21 motions. And as time allows, the commission will also hear
22 oral argument on AE 722. That's Mr. Binalshibh's motion to
23 compel production of discovery related to forced shaving.

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1 After breaking for lunch on Monday, the commission
2 will at 1400 receive an ex parte presentation by counsel for
3 Mr. Mohammad on the defense theories of the case.

4 And then on Tuesday, 14 September of 2021, if
5 necessary, the commission will reconvene. I will convene in a
6 closed session to hear classified oral argument.

7 On Wednesday, 15 September 2021 at 0900, the
8 commission will hear oral arguments on AE 833CC,
9 Mr. Mohammad's motion to defer government ex parte
10 presentation.

11 And then as I noted earlier, I'm open to suggestions
12 of the parties as to the scheduling order or other AEs and
13 necessary presentations throughout the week. But I
14 anticipate, again, putting out another amended order of march
15 this weekend.

16 LDC [MS. BORMANN]: Judge?

17 MJ [Col McCALL]: Yes.

18 LDC [MS. BORMANN]: Thank you. I just wanted to -- I
19 don't know that you've seen it, but I wanted to bring to your
20 attention that yesterday we submitted, pursuant to your order,
21 a supplement to the theories of defense, and then following
22 that, the request for the ex parte presentation toward the end
23 of next week ----

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1 MJ [Col McCALL]: Right.

2 LDC [MS. BORMANN]: ---- if that's suitable for you.

3 The other option, if that does not work because of
4 timing, obviously we could also do it in the National Capital
5 Region. Up to you.

6 MJ [Col McCALL]: Yeah, I haven't figured out a time for
7 it yet, but I did see that and I do intend to have it down
8 here next week. I think we'll have time. And I did see the
9 parties' -- I don't know if you want to say -- the term
10 "joint," but, yeah, the proposed order of march and I'm still
11 going through that. If things change -- if -- if counsel
12 think of other AEs they wanted to get into as we see, you
13 know, what time becomes available, based on how quickly or
14 slowly these motions go, then I'm just opening it up to the
15 parties to resubmit another one.

16 LDC [MS. BORMANN]: Thank you.

17 MJ [Col McCALL]: All right. Voir dire -- during voir
18 dire -- changing topics, obviously -- Mr. Trivett asked if I
19 had reviewed the names of the persons listed as victims on the
20 charge sheets. I -- I had but in a very -- you know, skimmed
21 through it. So yesterday I did go through and I reviewed all
22 the names listed on the charge sheet, and I can state that I
23 did not recognize any of the names.

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1 I will just -- for the parties, I can't imagine this
2 changes anything, but I did notice in the -- the parties have
3 submitted their filings for personnel to access the RHR.
4 There was a Derrick Adams paralegal listed. I don't know if
5 this is a retired Air Force paralegal, I figured it might be.
6 I see a nod from Mr. Connell. So he was my NCOIC of
7 justice -- that's the noncommissioned officer in charge -- for
8 my justice section when I was the Deputy Staff Judge Advocate
9 at Kadena. So I worked with him for three years. He was a
10 great paralegal. Nothing negative to say about him. Never
11 socialized with him outside of work. And I didn't even
12 realize he had retired. It seems like he has.

13 All right.

14 LDC [MR. CONNELL]: Sir?

15 MJ [Col McCALL]: Go ahead, Mr. Connell.

16 LDC [MR. CONNELL]: Before we move off of that, just so
17 there's a clear record and nothing about your association with
18 Mr. Adams would have any effect on your impartiality, correct?

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

20 So at this point, I will ask the parties to state
21 whether or not they have any challenges in accordance with the
22 Rule for Military Commissions 902D. I'll start with trial
23 counsel.

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1 Mr. Trivett, does the ----

2 LDC [MR. CONNELL]: Sir?

3 MJ [Col McCALL]: ---- government wish to challenge the
4 military judge?

5 LDC [MR. CONNELL]: Sir?

6 MJ [Col McCALL]: Oh, I'm sorry.

7 LDC [MR. CONNELL]: I'm sorry. I was trying to wait until
8 you got to the end of your stuff. I have two administrative
9 matters.

10 MJ [Col McCALL]: Oh, sure. Please.

11 LDC [MR. CONNELL]: Sir, I know there's an ocean of
12 pleadings and things can get lost in there, so I'd like to
13 take this opportunity to call two matters to your attention,
14 which I think could use the attention of the military
15 commission.

16 The first one of those is AE 804D. The military
17 commission may know that the government and Mr. al Baluchi's
18 team are working together to try to facilitate the discovery
19 around medical and psychological issues. One issue that has
20 come up is the question of raw data from the neuropsych
21 examination. It's our position that it's not necessarily
22 discoverable, but we're willing to produce it to their expert
23 under an appropriate protective order.

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1 The government and I negotiated a protective order and
2 it's attached to AE 804D. And if the military commission has
3 an opportunity to review that, if it chooses to issue it, then
4 we can go ahead and produce the information that the
5 government's expert needs.

6 The second thing, Your Honor, is although I saw that a
7 number of the requests for excusal have been ruled on, our AE
8 833BB has not been ruled on yet. And I suspect we will be
9 taking advantage of at least some of the capabilities of
10 the -- I like to say "RHR," but for next week. And so if --
11 if the military commission would be able to give its attention
12 to 833BB, I would appreciate it.

13 MJ [Col McCALL]: I'll take a look at that.

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

15 MJ [Col McCALL]: And I anticipate granting that. I
16 think, you know, we're being fairly liberal on who we're
17 excusing.

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

19 MJ [Col McCALL]: All right. Moving back to challenges.

20 Government?

21 MTC [MR. TRIVETT]: The government has no challenge, sir.

22 MJ [Col McCALL]: Mr. Sowards, does Mr. Mohammad wish to
23 challenge the military judge?

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1 LDC [MR. SOWARDS]: Yes, Your Honor. May I approach the
2 podium?

3 MJ [Col McCALL]: Please.

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

5 Thank you, sir. And good morning again.

6 MJ [Col McCALL]: Good morning.

7 LDC [MR. SOWARDS]: And just by way of context, sir, I
8 wanted to give just a perhaps ten-second endorsement of what I
9 think is your fine judicial demeanor throughout these
10 proceedings, your openness, and your forthrightness during the
11 voir dire process. And I think you've demonstrated, at least
12 by my lights, capabilities far beyond your years, both in
13 terms of as a lawyer and as a judge. And if left solely to
14 me, I would like very much to proceed with you in these
15 proceedings.

16 The problem, and I will leave it to -- to you because
17 you're the one who has to resolve it, is that this is a death
18 penalty case and so the things that I would like to do, I
19 cannot always do. And in particular, when they bump up
20 against protecting Mr. Mohammad's right to a fair and
21 impartial tribunal and a trial.

22 And as many people, both on our team and outside the
23 team can attest, as late as yesterday afternoon, if someone

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1 asked me, which they did, whether we had any objections or
2 would be filing any challenges or raising any challenges, the
3 answer was no. And certainly at the end of our voir dire, had
4 you said to me, Do you have any challenges, I would have said
5 no.

6 But as an example of both your thoroughness and, as
7 recently demonstrated in response to Mr. al Baluchi's problem,
8 your nimbleness as a judicial officer, both of which are very
9 admirable, you put us to the task of going back and thinking
10 about this for a day, reviewing our notes and making sure we
11 were making an informed and intelligent decision on our
12 client's behalf.

13 And having reviewed my notes and then looking at the
14 various standards, the issue I have, the problem I have, and
15 which I think unfortunately speaks to the propriety of your
16 recusal, is that in 28 U.S.C. 455 of the federal counterpart
17 of R.M.C. 902(a), the provision is that any justice, judge, or
18 magistrate judge of the United States shall disqualify himself
19 in any proceeding in which his impartiality might reasonably
20 be questioned. The identical provision in 902(a) is
21 supplemented with the appropriate disjunctive reference to a
22 judge who's -- when he or she is in a position that their
23 impartiality might reasonably be questioned.

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1 And the significance of that -- that language, that
2 those -- those two terms, as interpreted by the United States
3 Supreme Court in Liljeberg v. Health Services Acquisition
4 Corporation, that's at 486 U.S. 847, is that the goal of 455A
5 is to avoid even the appearance of partiality. If it would
6 appear to a reasonable person that a judge has knowledge of
7 facts that would give him, again the limited pronoun, an
8 interest in the litigation, then an appearance of partiality
9 is created, even though no such partiality exists.

10 And then In re Murchison at 349 U.S. 133, it explains
11 the obvious, that a fair trial in a fair tribunal is a basic
12 requirement of due process. Fairness, of course, requires an
13 absence of actual bias in the trial of cases. But our system
14 of law has always endeavored to prevent even the possibility
15 of unfairness. To this end, no man can be a judge in his own
16 case and no man is permitted to try cases where he has an
17 interest in the outcome. To perform its high function in the
18 best way, justice must satisfy the appearance of justice.

19 And then the other day when we were talking, I -- I
20 alluded to the U.S. Supreme Court's decision in Indiana v.
21 Edwards, where Justice Breyer reminded us again that
22 proceedings must not only be fair, they must be fair to all
23 who observe them.

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1 And what that brings me to is, as I looked at our
2 discussion of AE 811 and the series of events which led to
3 your departure from the case, when we first learned of
4 Judge Watkins' preemptory removal of you from the case and we
5 filed 811, it was in a real sense of, I think, actually shock
6 and outrage. And we said in that pleading that this was
7 shoddy treatment of a judicial officer and a military officer.

8 What, of course, we didn't know at the time is that
9 you had had some sort of -- some degree of involvement in --
10 in putting that series of events into -- into action. And it
11 was particularly disturbing, as I mentioned to you, that it
12 occurred after the issue had been properly joined before the
13 military commission through the filing of the prosecution's
14 motion for you to recuse yourself in AE 806.

15 And there are issues which have been -- which are left
16 unresolved by the Court of Military Commission Review, the
17 so-called CMC. The recent decision the other day, as we
18 mentioned, is premised only on the parties' agreement that you
19 were not qualified. And the complaint is the way in which the
20 government and the military judge went about removing you.

21 Our -- our -- the gravamen of our arguments in 811 are
22 more significant and more fundamental, because what we say is
23 that you are qualified. You are qualified under the -- and

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1 were qualified, more importantly, under the MCA and under the
2 R.M.C. And that is a point that the CMCR acknowledges in
3 footnote 7 of their opinion.

4 And as I mentioned the other day, what has never been
5 discussed by CMCR or acknowledged, at least in your
6 discussions, is that the Rule for Trial by Military Commission
7 6-3D is by the terms of its own opening section, Section 1,
8 limited to situations where it does not conflict with the MCA
9 or the R.M.C. And unfortunately, what happened, I believe,
10 and what you have in essence confirmed, is that you took the
11 analysis of one side beginning with -- because even though you
12 may have made up your mind before 806 was filed, everything
13 was set in motion between you and Judge Watkins with the
14 filing of the prosecution's statement of position on the very
15 day you were detailed to this case.

16 And so what that leaves us with at this juncture is we
17 still have 80 -- I'm sorry, 811 unresolved. It is of
18 fundamental importance to this case going forward, because if
19 you were to rule that we are correct on several points, one
20 point being -- which I believe the -- even the government or
21 at least CMCR agrees with, is that you are the only person who
22 is vested with jurisdiction to decide your qualifications.
23 With all due respect to Judge Watkins, he had no role in this.

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1 And early on in -- in response to 811, the prosecution
2 said, well, the fact that Judge Watkins re-detailed himself to
3 the case may have had the consequential effect of displacing
4 Judge McCall, but there's no suggestion at all that he did
5 that to short-circuit the litigation in 811. But your
6 responses to -- your very candid and open and forthcoming
7 responses during voir dire indicate that that is not the case,
8 that Judge Watkins did this exactly because you told him you
9 were convinced and prepared to do the right thing by recusing
10 yourself. And unfortunately, all of that was done
11 extrajudicially and without a benefit to Mr. Mohammad of a
12 litigation -- course of litigation that would comply with due
13 process.

14 So now with that -- that motion still pending -- and
15 believe me, it pains me to say this, but as I struggled with
16 it last night looking at this, it leaves us with the fact that
17 no matter what you do to resolve 811, there is going to be at
18 least the reasonable questioning of whether this was a wholly
19 impartial act divested or divorced of any of your personal
20 considerations, or whether on the one hand it was a decision
21 to say, oh, look, at the end of the day, there was nothing
22 wrong with what happened with -- with Judge Watkins, maybe I
23 shouldn't have talked to him, all of that, but I in my own

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1 mind have decided it doesn't matter what the limitations are
2 of the Rule of Trial by Military Commission, I find that,
3 indeed, I was unqualified and ineligible at that time.

4 People are going to look at that and say, well, of
5 course he's going to say that because that makes it no harm,
6 no foul what happened before. And there are similar questions
7 if you decide to rule in our favor. It's not -- it can't be
8 devoid, it can't be divorced from that.

9 The other sort of possible refuge I took in examining
10 this is that Rule for Military Commission, Rule 902(a), unlike
11 the other grounds for disqualification does have a waiver
12 provision. So what I could do, as we do sometimes in
13 conflicts, is to speak with Mr. Mohammad about this, tell him
14 how impressed I am with you as a jurist, and suggest that this
15 really should be waived because, as I think about it, that the
16 appearance, it is only an appearance of lack of impartiality
17 and there can be nothing behind it.

18 And the problem is, as I struggle with my conscience
19 on this, I can't say that. And so it's sort of something that
20 I have to punt to you to -- to tangle with this issue. And so
21 it's in the spirit I do that, it's in the spirit I make
22 this -- whether it's technically a challenge, but it happens
23 to just arise from the unrefuted and unrefutable facts of

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1 where we are and how we got here and how it will look going
2 forward.

3 MJ [Col McCALL]: Okay.

4 LDC [MR. SOWARDS]: Thank you very much, sir.

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

6 Ms. Bormann?

7 LDC [MS. BORMANN]: I rise with a slightly different
8 issue, and it stems not from concerns about partiality or
9 bias, but instead about the canons of both legal practice and
10 judicial obligations.

11 So I'm going to start with the -- and I needed some
12 schooling on this as well -- so thank goodness I have Major
13 Peer -- but the Air Force Rules of Professional Conduct that
14 apply to all attorneys in the Air Force.

15 And Rule 1.1, right up front, entitled "Competences,"
16 a lawyer shall provide competent representation to a client.
17 Competent representation requires the legal knowledge, skill,
18 thoroughness, and preparation reasonably necessary for
19 representation.

20 Now, obviously, you're a judge and not an advocate in
21 this case, but you are still bound by these rules. And the
22 concern that we have is what you and I discussed yesterday,
23 and that is that with respect to this case at this point, at

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1 this juncture, you are not familiar with the record, nor with
2 the numerous -- like thousands of previous filings, the
3 previous judicial orders in the case, one of which was
4 revisited this morning, because you simply don't have --
5 haven't had the time, nor the opportunity, to do the review
6 necessary to make yourself knowledgeable about the facts and
7 the law of this case.

8 Additionally, you are not familiar with the law as it
9 applies to capital cases. You were very forthright in your
10 answers to both Mr. Sowards and myself. You have not yet
11 taken any courses with respect to this, although you have one
12 scheduled. And you have not read the relevant case law that
13 really surrounds and mandates how this case has to go forward.

14 Then in thinking about this last night, I thought,
15 well, you know, the ex parte presentations are not really a
16 problem, because in that case you are literally absorbing the
17 information you need to go forward.

18 My concern is the adversarial litigation that you've
19 scheduled over the next week and some-odd days. Because even
20 though you can go back to chambers at some point after
21 argument and read what you believe you need to read, being a
22 judge in a trial courtroom requires you to rule spontaneously
23 on objections, like the one that occurred earlier -- the

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1 several that occurred earlier today. And without the legal
2 knowledge on the case law, nor the reading of the vast record
3 of this case, you are not prepared to do so.

4 So then I looked to the Air Force Uniform Code of
5 Judicial Conduct, specifically Canon 3 titled: "A judge shall
6 perform the duties of the judicial office impartially and
7 diligently," and I'm going to focus on the "diligently" part.
8 Canon 3B(2) states: "A judge shall be faithful to the law and
9 maintain professional competence in it." The rest of it deals
10 with partisan interest, which I'm not concerned about.

11 That is, of course, the minimum that we should require
12 from our judicial officers. And in this case at this point,
13 you are not there. This can be rectified by taking the time
14 to review the record, familiar yourself -- familiarize
15 yourself with the relevant case law, and take the courses
16 necessary and the learn -- undertake the learning necessary to
17 make the decisions that you will be required to make
18 spontaneously.

19 I also want to draw your attention to the Air Force
20 Standards for Criminal Justice. Chapter 3, there is an entire
21 chapter, called "Special Functions of the Military Judge."
22 And under what they title "Basic Duties," Standard 6-1.1,
23 General Responsibilities of the Military Judge, subsection B,

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1 says that, in relevant part for our purposes: "The military
2 judge should give each case individual treatment and the
3 judge's decisions should be based on the particular facts of
4 that case."

5 You do not, as we sit here today, have the knowledge
6 to do that. And so while I am also impressed with your
7 judicial demeanor, I cannot be impressed by your preparedness
8 to sit in judgment for a series of motions that you intend to
9 litigate over the next week and couple days.

10 We don't have an objection to you absorbing
11 information and preparing yourself for future litigation. We
12 do, however, ask you to delay litigation on matters that will
13 require you to adjudicate objections and arguments while you
14 are not in a prepared state and while you are not acting
15 consistently with both your legal requirement as an attorney
16 for the United States Air Force and as a judge.

17 MJ [Col McCALL]: Thank you, Ms. Bormann.

18 Mr. Bruck?

19 LDC [MR. BRUCK]: It is my understanding that we are
20 joined, by operation of law, to these motions as well as to
21 any other that we do not disjoin from. On that basis, I would
22 like to state that we have nothing further with respect to
23 your qualifications.

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

2 Mr. Connell?

3 LDC [MR. CONNELL]: Sir, on behalf of Mr. al Baluchi, we
4 do not concur with the view of the facts and the law of
5 Mr. Mohammad and Mr. Bin'Attash, and we unjoin their challenge
6 to the military commission. We have no objection to you, sir,
7 sitting as judge in this matter.

8 I will continue with one additional piece, which is
9 that when we wrote AE 111 -- 811A nine months ago, obviously,
10 we were trying to predict -- there were a number of scenarios
11 that could have come to pass, and we joined Mr. Mohammad in
12 the unlawful influence portion of AE 811, although not the
13 other portions.

14 One could read our AE 811A position as -- which is the
15 same position that we presented to the CMCR, as including a
16 challenge to whoever -- whatever judges came down the row
17 afterward, which would include you, sir. I will tell you that
18 we withdraw that element of AE 811A. I will formally update
19 our position in a supplement. The new facts justifying the
20 supplement will, of course, be your voir dire, and I will
21 incorporate that additional information when we appeal the
22 CMCR decision to the D.C. Circuit.

23 The remaining issue, in our view, is not your

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1 impartiality or unlawful influence over you as an individual.
2 The remaining issue is the validity of the orders that Judge
3 Watkins issued during the period to which he was subject to
4 the unlawful influence of the Deputy Secretary of Defense. So
5 that's the issue that we will continue to go forward on with
6 the D.C. Circuit. And to the extent that our pleading could
7 be read to contain a challenge to your fitness to serve, sir,
8 we withdraw that element.

9 MJ [Col McCALL]: Okay. Understood.

10 LDC [MR. CONNELL]: Thank you.

11 MJ [Col McCALL]: Thank you, Mr. Connell.

12 ADC [MS. LACHELIER]: Just for the record, Judge, we
13 obviously reserve further voir dire on our position until
14 Mr. Ruiz is available. Thank you.

15 MJ [Col McCALL]: Understood.

16 All right. We've been going for about an hour and a
17 half. So I understand counsel's position. I'll take it under
18 advisement on this issue of the challenges and then I'll issue
19 a decision in due course.

20 So before we move into the AEs, we'll go ahead and
21 take a -- let's take a 20-minute recess. So it's 1024, so
22 let's plan on being back on the record at approximately 1044.

23 [The R.M.C. 803 session recessed at 1024, 10 September 2021.]

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1 [The R.M.C. 803 session was called to order at 1050,
2 10 September 2021.]

3 MJ [Col McCALL]: The commission is called to order. The
4 parties are present. The accused are still absent.

5 All right. Let's proceed with oral argument on
6 AE 785. It's Mr. Mohammad's motion to compel discovery
7 regarding Mr. Mohammad's cooperation with interrogators.

8 DC [LT BERG]: Good morning, Your Honor.

9 MJ [Col McCALL]: Good morning.

10 DC [LT BERG]: First, before I start, I just want to
11 reserve some time for rebuttal. I know we're not doing time
12 limits, but I would like a chance to offer rebuttal argument
13 to the government's oral argument.

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

15 DC [LT BERG]: On February 2nd, 2017, the government
16 provided the defense with a batch of discovery that included,
17 quote, collective summaries of statements made by the
18 defendants during interrogations at CIA black sites. For
19 Mr. Mohammad alone, this totaled statements from 803 separate
20 interrogations. It was one of the largest productions of
21 statements we have received to date.

22 When you look at this discovery, what you see is that
23 these aren't really statements at all. Each page is simply a

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1 one-sentence statement that during a certain time period, a
2 defendant cooperated on X number of occasions but did not
3 provide substantive information. For example, one collective
4 summary, MEA-STA-2153, included in our Attachment B states,
5 quote, on 32 occasions in early 2003, Khalid Shaikh Mohammad
6 cooperated during interviews and said he was unable to
7 recognize or identify persons, places, or materials of
8 interest to the United States.

9 For Mr. Mohammad, these 803 separate interrogations
10 were boiled down into 11 short pages, each containing a single
11 conclusory statement and one page that tallied the number of
12 cooperative interrogations that took place at each black site.

13 No details were provided about how the government
14 determined Mr. Mohammad was being, quote/unquote, cooperative.
15 No information about how interrogators were trained to
16 recognize cooperation. No information about what behavior,
17 body language, words, et cetera, Mr. Mohammad was projecting
18 in each individual interrogation that led interrogators to
19 conclude he was being cooperative. No details about whether
20 the government tortured him to secure his cooperation. No
21 details about the circumstances of each individual
22 interrogation session or how long Mr. Mohammad was subjected
23 to questioning. No details about why Mr. Mohammad was not

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1 able to provide substantive information. And no details about
2 which person, place, or thing Mr. Mohammad was shown but could
3 not identify.

4 And this last omission is particularly significant. I
5 noted previously that a number of these instances of
6 cooperation date from, quote, early 2003. And, Your Honor,
7 this is what the government was doing to my client in early
8 2003. They were stripping him of his clothing. They were
9 shackling him naked to the ceiling of his cell where he hung
10 for days by his arms with his feet barely touching the floor.
11 They were regularly depriving him of sleep, and in one
12 stretch, forcing him to stay awake for 180 hours straight,
13 which is longer than a week. They were shackling him to the
14 floor and forcing him to kneel and lean backwards at a painful
15 45-degree angle for hours on end. They were repeatedly
16 dousing him with water and keeping him wet and naked in a
17 cold, dark cell. They were blasting death metal music at
18 volumes so loud that it could cause hearing damage. They were
19 repeatedly slapping him, grabbing his face, and throwing him
20 into walls. They were sexually assaulting him, forcibly
21 inserting a tube into his anus and feeding him, not for
22 medical need but to demonstrate the interrogator's, quote,
23 total control over the detainee.

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1 They were strapping him to a board, placing a towel
2 over his face, and repeatedly forcing water into his mouth and
3 nose so often that it was described as a, quote, series of
4 near drownings. And that was 183 times, to be precise. And
5 to top it all off, they were threatening to murder his
6 children.

7 The collective summaries provided by the government
8 don't tell us whether any of this torture was inflicted at or
9 around the same time of his 32, quote, cooperative
10 interrogation sessions in early 2003.

11 We know of at least one instance where Mr. Mohammad
12 did cooperate, truthfully saying he didn't know about any
13 al Qaeda efforts to obtain, quote, nuclear suitcases, but was
14 waterboarded anyways. Was this, quote, cooperative, but
15 nonsubstantive interrogation included in the 32 from early
16 2003? It's impossible to say from the threadbare statements
17 that we've been given.

18 But if we were able to link to instances where
19 Mr. Mohammad was, in fact, tortured in spite of his truthful
20 cooperation, that would be powerful mitigation evidence going
21 to the heart of our anticipated motion to dismiss for
22 outrageous government conduct.

23 And if we could demonstrate that Mr. Mohammad began

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1 fabricating answers to avoid being tortured, that would
2 directly undercut the pervasive narrative that torture, quote,
3 worked. With more information, we could also chart the
4 decline of Mr. Mohammad's mental functioning as the severity
5 of his torture increased.

6 Memory loss is a known reaction to repeated exposure
7 to extreme stress. If we could show that Mr. Mohammad
8 genuinely believed he did not know someone or something that
9 he had once known, we could demonstrate the severe impact
10 Mr. Mohammad's torture has had upon him. But we can't even
11 begin to make these arguments unless we know what Mr. Mohammad
12 was asked and what he said in these 803 interrogations.

13 As the Supreme Court noted in Old Chief v.
14 United States, quote, a syllogism is not a story and a naked
15 proposition in a courtroom may be no match for the robust
16 evidence that would be used to prove it.

17 In any other case, if you had a client sit down for an
18 interrogation with an Air Force Office of Special
19 Investigation officer or the Naval and Criminal Investigative
20 Service, you would receive evidence from that specific
21 interrogation. A videotape, a transcript, a signed
22 confession, the notes of the agent maybe.

23 But here, Mr. Mohammad sat down for an interrogation

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1 803 times and all we know is one single word. That he was,
2 quote, cooperative. The other statements we have been
3 provided are at the very least individually summarized. A
4 number even include assessments of the defendant's behavior as
5 well as the substance of what he said.

6 So after receiving these collective summaries,
7 Mr. Mohammad filed a discovery request on February 26, 2018,
8 seeking three categories of information. First, documents,
9 information, standard operating procedures, and training
10 manuals which might describe what an investigator may perceive
11 or consider as qualifying -- qualifying as cooperation during
12 interrogation sessions and this was to include individuals --
13 individual interrogators' personal notes and documentation.

14 Document 2, documents and information regarding
15 specific criteria that may have been evaluated to determine
16 whether a person in general, or Mr. Mohammad specifically, was
17 being cooperative during interrogations.

18 And, 3, documents and information that might reference
19 whether or not Mr. Mohammad was perceived as cooperative or
20 uncooperative during individual interrogations.

21 The government provided a confusing response to this
22 request on May 17, 2018. As to the first two categories of
23 information sought, it said, quote, the prosecution has also

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1 identified additional materials related to training provided
2 to debriefers who participated in the CIA RDI program that
3 includes some additional information regarding how debriefing
4 of the accused were documented. Proposed summaries of those
5 materials are expected to be filed with the military judge in
6 the next several weeks. Once summaries are approved, the
7 prosecution will provide those materials to the defense.

8 Regarding the third category of information, the
9 government stated that, quote, where Mr. Mohammad provided
10 substantive information during an interrogation or debriefing,
11 summaries of those reports that included the subject matter of
12 the interview were prepared and submitted to the military
13 judge and, once the summaries were approved, provided to the
14 defense.

15 The confusion here stems from the fact that the
16 government's response did not indicate that the, quote,
17 cooperative but not substantive summaries had also been
18 submitted to the military judge for approval. And this
19 highlights one of the many challenges of the 505 process for
20 the defense. We have no independent way to verify whether
21 summaries provided to us have actually been approved by the
22 military judge. We interpreted the government's response to
23 mean that these collective summaries were not approved through

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1 the 505 process, which brings us to the current motion.

2 Importantly, the crux of this motion is not whether
3 the information Mr. Mohammad seeks is discoverable. The
4 government has conceded as much in its response to our
5 discovery request.

6 The question instead is whether the government ever
7 actually provided this information to Mr. Mohammad and, if
8 that information was provided in a summarized form, whether
9 those summaries had been properly approved by the military
10 judge. And being new to the 505 process, this motion might
11 help Your Honor understand not only the complexity of the
12 process but also its potential for abuse and mistake, which
13 has a direct negative ability on our -- direct negative impact
14 on our ability to defend our clients.

15 The government's response in AE 785A argues
16 exclusively that our motion is an improper motion for
17 reconsideration of a 505 ruling. Yet the commission has on
18 multiple occasions ruled, quote, that it can either sua sponte
19 or upon a motion to compel discovery review the summarized
20 information to determine if additional information should be
21 added to the summary in order to provide the defense with
22 sufficient information to give it substantially the same
23 ability to make a defense, as would discovery of or access to

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1 the specific classified information. And those rulings are AE
2 706B and AE 164C.

3 We are making just such a motion to compel here,
4 arguing that additional contextual information is needed about
5 these collective summaries to give the defense, quote,
6 substantially the same ability to make a defense as would
7 discovery of or access to the specific classified information.

8 Furthermore, the government's filing in AE 785A
9 neglects entirely those first two categories of information
10 that we sought, information that describes what an interpreter
11 perceives as cooperative and the specific criteria used to
12 determine whether Mr. Mohammad in particular in those
13 instances was being cooperative.

14 As mentioned previously, the government's response to
15 the discovery request stated that the summaries of this
16 information would soon be submitted to the military judge for
17 approval under M.C.R.E. 505. But given the secretive ex parte
18 nature of that process, we have no way of knowing whether
19 these summaries were submitted or whether approved summaries
20 were ever provided to us. The government never provided a
21 follow-up response to our discovery request or indicated
22 whether any discovery subsequently provided to the defense was
23 responsive to our request.

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1 More distressingly, however, on September 3rd, 2019,
2 the government provided the defense with 22, quote, updated
3 documents to the original 56 pages of collective summaries.
4 These updates increased the number of occasions where the
5 defendants were deemed to have cooperated with interrogators.

6 For Mr. Mohammad, the updated documents list 397
7 interrogations in which he was deemed cooperative but did not
8 provide substantive information, bringing that initial total
9 up to 817 total instances.

10 The very next day, on September 4th, 2019,
11 Mr. Bin'Attash's team asked the government whether these 22
12 updated documents had been approved by the military judge
13 pursuant to M.C.R.E. 505. The government never responded. We
14 are left to conclude that these 22 new documents, five of
15 which pertain to Mr. Mohammad, never went through the
16 M.C.R.E. 505 process. And if true, this would not be the
17 first time that the government has unilaterally manipulated
18 evidence before providing it to the defense.

19 In AE 659B, the commission expressed its concern that
20 the government was, quote, unilaterally redacting information,
21 end quote, from certain photographs before providing them to
22 the defense.

23 It reiterated that, quote, each time the government

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1 seeks to invoke the national security privilege over otherwise
2 discoverable information, it must do so in accordance with
3 M.C.R.E. 505(f). The government has previously been taken to
4 task over its M.C.R.E. 505 process.

5 In United States v. al Nashiri, Military Judge Acosta
6 chastised the government for providing what he described as
7 boiled-down accounts of desiccated statements of material fact
8 that, quote, not only deprives the defense of narrative
9 integrity, but renders the documents largely useless as a
10 basis for follow-on investigation.

11 Here we have been provided even less; desiccated
12 statements of material conclusions. We have been given zero
13 facts which support the conclusion that Mr. Mohammad was
14 cooperative on 817 occasions.

15 We've known for years that the government has what one
16 judge deemed a, quote, minimalist view of what is
17 noncumulative, relevant, and material. But what we have now
18 is direct evidence, for the first time, that the 50 -- 505
19 process actually broke down. And that was a substantive -- a
20 substantive cable was wrongfully included in these collective
21 summaries.

22 Mr. Binalshibh's supplement to AE 785 includes a cable
23 describing substantive conversations he had with interrogators

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1 in January of 2006. He received this cable on 30 March 2020.
2 That's more than three years after the initial production of
3 the collective statements was provided to us.

4 Mr. Binalshibh's counsel then asked the government
5 to -- asked the government whether that substantive
6 interrogation had been provided in -- had been included in the
7 total of the collective summaries provided way back in 2017.
8 And the government responded that it had. This was a
9 substantive statement that should have been provided
10 individually that inadvertently got swept up into the
11 collective summarization process. And it was only by pure
12 chance that the government recognized its mistake while
13 reviewing material for an unrelated discovery request.

14 What is most concerning is not just that the
15 government submitted inaccurate summaries to the commission,
16 but that the commission approved them, Your Honor. During the
17 505 process, the commission stands in the shoes of the
18 defense, because we are barred from participating. This
19 places a heightened responsibility on the commission to not
20 just get it right most of the time, but all of the time,
21 because there is no failsafe.

22 The government has repeatedly stated that this
23 judicial approval process adequately protects the interests of

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1 the defense. We now have in front of us direct evidence that
2 that's not true. And we are left to wonder about all the
3 other substantive statements that may have been wrongly
4 included in these collective statements.

5 There is an alternative, Your Honor. The government
6 should either provide the defense with the underlying
7 classified information about each interrogation or provide
8 individual summaries for each and every interrogation. This
9 will not only assist the government and the commission in
10 avoiding mistakes, but it will also help ease some of the
11 defense's concerns about the 505 process itself. In no sense,
12 therefore, is it possible to conclude that these summaries
13 provide the defense with, quote, substantially the same
14 ability to make a defense as if we were given the underlying
15 classified information.

16 And accordingly, the commission should compel the
17 government to produce the information requested by
18 Mr. Mohammad in his February 26, 2018 request, as it is
19 material to the preparation of the defense and discoverable
20 under R.M.C. 701.

21 Subject to your questions, Your Honor.

22 MJ [Co] McCALL: On your last point, on the summaries
23 that you're referencing ----

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1 DC [LT BERG]: Yes, sir.

2 MJ [Col McCALL]: ---- that you either want the underlying
3 information or the summaries, these would be new summaries
4 that would be created rather than the material that has been
5 provided?

6 DC [LT BERG]: Your Honor, the government can give us --
7 they don't have to create anything. They can give us the
8 cables themselves.

9 MJ [Col McCALL]: Right. The underlying ---

10 DC [LT BERG]: Which they already have.

11 MJ [Col McCALL]: Right.

12 DC [LT BERG]: Yes, Your Honor. If they choose to go
13 through the 505 process, we would ask that each interrogation
14 be individually summarized.

15 MJ [Col McCALL]: Okay. No questions at this time.

16 DC [LT BERG]: Thank you, sir.

17 MJ [Col McCALL]: Any other defense counsel wish to be
18 heard on this motion?

19 Ms. Bormann?

20 LDC [MS. BORMANN]: Judge, this was a very unusual -- this
21 was a very sort of unusual procedure on this motion, because
22 we wound up filing a reply to the government's response to
23 Mr. Binalshibh's supplement. So what I'd like to do is at

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1 this point not -- Mr. -- or Lieutenant Berg covered most of
2 the argument. I'm going to ask to be able to ----

3 MJ [Col McCALL]: Respond to the government?

4 LDC [MS. BORMANN]: ---- respond to the government's
5 argument, because our argument is in the nature of reply.

6 MJ [Col McCALL]: That's fine.

7 LDC [MS. BORMANN]: Thank you.

8 MJ [Col McCALL]: Mr. Bruck?

9 LDC [MR. BRUCK]: Your Honor, Lieutenant Berg has
10 adequately covered Mr. Binalshibh's issue with respect to the
11 supplement that we filed, so we have nothing further.

12 MJ [Col McCALL]: Mr. Connell? Negative response.

13 And the team Hawsawi, I understand your position and
14 you'll have a chance to respond, like file something by
15 1 October.

16 ADC [MS. LACHELIER]: That's correct, Judge. We'll just
17 assume for each motion that we have the standing objection.
18 Thanks.

19 MJ [Col McCALL]: Very good.

20 Government?

21 MTC [MR. TRIVETT]: Sir, can I get a brief clarification
22 on the mask rule for the arguments? I have seen it both ways.
23 I know what I heard last week.

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1 MJ [Col McCALL]: Yeah. So what I would prefer is if you
2 keep it on. If I can't understand you, I'll ask you to take
3 it off, but I've been understanding you fine.

4 MTC [MR. TRIVETT]: Yes, sir. Thank you.

5 So we certainly don't envy you, Your Honor. You're in
6 a tough spot. We have had nine years of pretrial litigation
7 and familiarity has certainly bred contempt amongst the
8 parties. I think you'll see, this is going to be one of the
9 most marked and adversarial processes certainly that you've
10 ever witnessed.

11 But with all that said, and because you are coming in
12 when you're coming in, and because the ten-minute rule no
13 longer applies, I did want to give an opportunity -- or to
14 take this opportunity to give you a discovery overview.
15 Because ultimately, at the end of the day, when you're
16 deciding any motions to compel discovery, it's certainly
17 helpful to understand what we've charged, what our theories
18 are, and what we've disclosed to date.

19 So if you'll indulge me for a few minutes this
20 morning, Your Honor, I believe that this will be helpful for
21 you in all of the motions to compel to come. We're obviously
22 not going to have to do it for every motion to compel, but I
23 did want and think it would be important for you to certainly

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1 have a one-stop shop in the record to be able to understand
2 what our positions are when you're deciding these issues.

3 MJ [Col McCALL]: That sounds useful. Go ahead.

4 MTC [MR. TRIVETT]: So as an initial matter, I wanted to
5 start with the charge sheet. There are eight charges, at
6 least five of which are capital, that are all exactly
7 identical for all five accused in this joint trial. We have
8 attacking civilians, attacking civilian objects, murder in
9 violation of the law of war, destruction of property in
10 violation of the law of war, hijacking, terrorism, committing
11 additional serious bodily injury, and a conspiracy to commit
12 all of those war crimes. They're all identical for all five.

13 We decided to forgo charges on several of the accused
14 for other offenses in order to ensure that we had one set of
15 unitary charges for everyone from a joint trial perspective.
16 Our position on the necessity of the joint trial is well
17 articulated in other motions in this commission. We've argued
18 it on several different occasions, but I invite your attention
19 to it.

20 Within the conspiracy charge itself, there are 167
21 overt acts dating from 1996, when we allege is the earliest
22 period of time in which al Qaeda had declared war against the
23 United States, to shortly after the attacks of 2001. There

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1 are 2,976 people that we have alleged were murdered by the
2 five accused in this courtroom, and there are 13 individuals
3 who suffered serious bodily injury in the attacks.

4 The government's position has been that the 9/11
5 attacks were seven distinct attacks, meaning there were
6 attacks on four separate airliners that were flown into three
7 different buildings, and that they're ultimately part of a
8 series of ten separate attacks beginning in 1998 when al Qaeda
9 attacked the United States embassies in Kenya and Tanzania and
10 following up in October of 2000 when they attacked the
11 USS COLE.

12 All of the individuals are being prosecuted under a
13 principle theory, meaning that they aided, abetted,
14 counselled, or commanded the 19 hijackers to commit the
15 offenses of September 11th.

16 The discovery that we have provided to date relating
17 to the case in chief and other parts of the defense
18 mitigation, there are 601,150 pages that have been disclosed.
19 20,908 of those relate to the CIA's former Rendition,
20 Detention, and Interrogation Program which ran for a series of
21 about four years and which all five accused were part of.

22 That information includes site surveys of certain
23 black site facilities that they were in, logbooks from certain

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1 black site facilities they were in, OLC memos, programmatic
2 materials, photos of the black sites, photos of the
3 individuals while in the black sites, or at least these five
4 accused while they were in the black sites, as well as the ten
5 categories of information that Judge Pohl ordered the
6 government to provide. And I want to take a little bit of a
7 step back so you can understand a little bit of the history of
8 this.

9 When Judge Pohl was first assigned to the military
10 commissions judiciary, he presided over the case of U.S. v.
11 al Nashiri. U.S. v. al Nashiri was -- is a capital case, much
12 like this, of an individual who was also held in the CIA's RDI
13 program. He presided over that case and made a ruling in that
14 case, while he was a judge also assigned to our case, that
15 required the government to provide information about the
16 Rendition, Detention, and Interrogation Program that fell into
17 ten categories.

18 So ultimately, the vernacular we've all adopted within
19 this commission from both parties is really this is considered
20 what's called the ten-category construct. As part of that
21 construct, all of the statements of the accused that they made
22 while in custody of the CIA were required to be provided.

23 Within the greater body of discovery that we have

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1 provided include all of the medical records of the individuals
2 from the time they were both in the RDI program as well as in
3 JTF-GTMO from September 2006, and we are up to date on
4 discovery through July 31st, 2021.

5 There are also Detainee Information Management System
6 information, which you might hear or see in the record as
7 DIMS, D-I-M-S, and those log the day-to-day activities of the
8 detainees, which are also -- been provided to the defense as
9 updated through July 31st, 2021. Understand that those are
10 rolling productions that continue to be produced because they
11 continue to be created.

12 So that's the discovery that we have provided to date.
13 As far as the case in chief and what the prosecution will be
14 relying on, we have filed a witness list with 172 witnesses,
15 for which R.M.C. 914 disclosures we are tracking as of now are
16 currently due on 23 November of 2021. And we anticipate
17 making that date for those identified 172 witnesses.

18 The types of evidence that we intend to use in our
19 case in chief -- and if you look at 701, certainly we have an
20 obligation to provide the case in chief information and
21 anything that would rebut the case in chief information. It
22 is still an open question certainly if we are required to turn
23 over other information that does not go to the case in chief.

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1 We have briefed that in several different instances,
2 notwithstanding the fact that we have obviously turned over
3 the mitigation that's been requested and certainly any of the
4 mitigation that was part of the ten-category construct that
5 was one of the four justifications that Judge Pohl gave.

6 Ultimately -- and I want to back up for a second
7 because I did miss an important part of this.

8 When Judge Pohl made the ruling in Nashiri, it was
9 immediately -- we moved for reconsideration. In the
10 government's mind, and not just the prosecution team, but the
11 government writ large, it was the largest order for classified
12 information in the history of -- in criminal cases. It was
13 obviously -- we're in a unique situation in which we had a CIA
14 program that had operated for four years and that had detained
15 and had interrogated under what we concede were coercive
16 conditions, all five accused in this case.

17 After the reconsideration and the clarification we
18 received, which I believe the reconsideration was granted, the
19 clarification was granted, but ultimately the ten categories
20 remained, we decided that we should adopt that ruling in our
21 case and asked the judge to do so.

22 We did that for some reason. One, it was the same
23 judge. And although Judge Pohl was -- was fond of saying a

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1 different case completely, the issues were the same, as we saw
2 it. Ultimately, we thought we weren't going to be able to
3 litigate the issue in our case because of the failures to sign
4 protective orders governing classified information, and where
5 we were with the docket, for at least 9 to 12 months. And
6 ultimately believed, quite reasonably, that we would probably
7 end up in the same exact situation as the Nashiri team, being
8 it was the same judge on the same concepts.

9 So that's why we asked that it be adopted, and we took
10 that -- that task and we worked it hard. And it took us a
11 long time. But from 5 April 2016 to 1 November 2019, we were
12 busy fulfilling the obligations of the ten-category construct.
13 So I did want to explain to you the background on where we got
14 where we got and how we went about asking for him to adopt
15 that.

16 Now, returning back to the case in chief. In a lot of
17 ways, the case in chief is going to look like a normal case in
18 federal court. We're going to have business records and phone
19 records and bank records and FBI witnesses that are going to
20 be cross-examined on 302s they wrote, or ECs that they wrote.
21 We have various pictures of the attacks. As you know, the
22 events of September 11th were one of the most photographed
23 events in world history. We have plenty of pictures of the

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1 attacks, videos of the attacks, and then various different
2 statements of the accused that we're going to be seeking to
3 admit, including statements that they gave before custody to
4 the FBI after they were -- after they left CIA custody, to
5 Combatant Status Review Tribunals, statements they made to the
6 court, whether it be in pleadings or in-court admissions, and
7 then conversations they had amongst one another in camp.

8 What's important for you to understand is at no time
9 are we ever going to be relying on a statement made by any of
10 the accused while they were in CIA custody in the case in
11 chief. That is not anything we intend to do. We have never
12 intended to do it. And I want to make it very clear there
13 will be no statements that the accused made while in the
14 custody of the CIA that are going -- we are going to seek
15 admission for in the case in chief.

16 There are additional items that were found in raids in
17 Afghanistan and Pakistan which have required some M.C.R.E. 505
18 treatment. And ultimately, when we get around to the case in
19 chief, which we hope is going to be in 2022, it really breaks
20 down into four parts, right? We have to prove beyond a
21 reasonable doubt the day of 9/11 what happened, the fact that
22 attacks occurred, and the fact that everyone we've alleged on
23 the charge sheet were killed or seriously -- or suffered

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1 serious bodily injury. That's the first part of the case in
2 chief.

3 The second part is a hijacker identification and
4 linking, showing who the 19 hijackers were and all the various
5 linkages between them. Obviously, it's -- some of it is
6 self-apparent from the fact that there were four hijacked
7 planes on the same day flown into airplanes [sic]. But we're
8 able to establish in a lot of different ways that the 19
9 hijackers knew one another, that they were part of al Qaeda.
10 It's part of our proof, also, of the fact that al Qaeda was at
11 war with the United States.

12 We do have to prove beyond a reasonable doubt
13 al Qaeda's war against the United States. We're going to do
14 that with both statements made from al Qaeda leaders and the
15 proof that al Qaeda committed the East Africa Embassy Bombings
16 and the USS COLE and, of course, the 9/11 attacks. That
17 includes, but is not as limited to, our response in August of
18 1998, when we shot more than 80 missiles at the Sudan and
19 Afghanistan in retaliation for the attacks on the embassies.

20 And then finally, once we establish all of that, we
21 turn the spotlight on each of the five accused. How did each
22 individual accused aid, abet, counsel, command, or conspire
23 with the 19 hijackers to commit the offenses. This principle

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1 theory of liability is probably familiar to you in Article 77
2 of the UCMJ. It's the same theory of liability that we're
3 going to be relying on in the military commission context.

4 Some of the things that we have filed, certainly in
5 the last couple of years, that should obviate the need for any
6 additional discovery, and certainly most additional discovery,
7 I wanted to sort of walk you through. We've already proposed
8 our finding and sentencing instructions. You can find those
9 in AE 799 (Gov), which we filed on 1 June of 2020.

10 We have filed a proposed member questionnaire ----

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

12 MTC [MR. TRIVETT]: ---- and trial script.

13 LDC [MS. BORMANN]: ---- I have an objection. This
14 is ----

15 MJ [Col McCALL]: Ms. Bormann.

16 LDC [MS. BORMANN]: ---- going far beyond the scope of
17 explaining discovery. We're now talking about sentencing
18 memoranda. So while I appreciate, you know, this is --
19 actually goes into my request that you delay until you're up
20 to speed, because this is going to be required to some extent.
21 But Mr. Trivett talking about sentencing memoranda, I think,
22 goes far beyond this M.C.R.E. 505 issue in Mr. Mohammad's
23 motion.

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1 MJ [Col McCALL]: Objection sustained.

2 So, Mr. Trivett, I ----

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

4 MJ [Col McCALL]: ---- appreciate the information you're
5 giving me, but if we can move -- I like the -- you gave me the
6 overview, the big picture and then went away from the trial
7 plan and into ----

8 MTC [MR. TRIVETT]: Yes, sir. No, I understand.

9 MJ [Col McCALL]: ---- theory.

10 MTC [MR. TRIVETT]: And those two are just filings I was
11 calling your attention to. The next thing I was talking about
12 is what we have agreed to stipulate to, which should take away
13 all of the discovery problems. So I was actually
14 transitioning into the proposed stipulation of fact.

15 MJ [Col McCALL]: Transition away.

16 MTC [MR. TRIVETT]: So in regard to the suppression
17 motions that have been filed, which you can find in the series
18 between AE 628 and I believe AE 632, we have filed with the
19 commission and have -- have given to the defense our proposed
20 stipulations of fact with everything we are willing to
21 stipulate to in regard to the treatment of the accused while
22 they're in RDI custody. That certainly ties directly into
23 what Lieutenant Berg was arguing.

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1 As part of those stipulations of fact, we have even
2 agreed that we will -- we will stipulate to any additional
3 information that you have that is something we can either
4 verify or is tethered to reality. So we are pretty much
5 writing a blank check for them to at least propose to us what
6 else they would like to stipulate to in regard to their
7 treatment while in the CIA custody.

8 This is one of the ways that we're choosing to try to
9 protect the important national security -- the national
10 security implications of the CIA RDI program that still
11 exists, which are down to pretty much three things. It's CIA
12 personnel and their identities, foreign countries who helped
13 host black sites, and foreign liaison governments who may have
14 assisted us in the capture of the accused, other than what
15 we've already provided them.

16 So as part of those proposed stipulations of fact, I
17 think they're each over 200 pages. I don't believe we've
18 heard back from any of the defense counsel yet on any proposed
19 additions or whether or not they would accept that stipulation
20 of fact. We believe under M.C.R.E. 505 that, if they don't,
21 we can at some point move the commission to just adopt that as
22 a statement admitting relevant fact for purposes of the
23 pretrial litigation at least. We haven't gotten there yet

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1 because we're waiting for them to have their opportunities to
2 add to the possible proposals, but I did want to call your
3 attention to them.

4 MJ [Col McCALL]: Well, so let -- explain that a little
5 more to me.

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

7 MJ [Col McCALL]: So you're -- and again, this is --
8 getting a little far from the motion, but you're saying that
9 you've proposed this stipulation of fact to the defense and
10 they could come back and ask to add in additional matters that
11 they might have a good-faith reason to believe that, you know,
12 happened, but that if that doesn't happen, the government
13 would move -- I mean, almost like this would be like a super
14 summary and substitution? Is that how you're picturing it?

15 MTC [MR. TRIVETT]: It would be a statement admitting
16 relevant facts of classified information in lieu of turning
17 over the other discovery.

18 MJ [Col McCALL]: Okay.

19 MTC [MR. TRIVETT]: So we haven't had to move for that.
20 We did that once on a Camp VII statement, admitting relevant
21 fact, because it just -- that body of information lent itself
22 to that. We certainly have the authority to do that. And,
23 quite frankly, I think in -- and certainly Judge Cohen and

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1 Judge Parrella were of the mind, in pretrial litigation
2 certainly, that if we agree to stipulate to something, then
3 it's not in contest for purposes of the pretrial litigation,
4 and that you can consider all of it as if it happened.

5 And that's -- that's one of the ways that we're trying
6 to ensure that the defense has everything they need to --
7 to -- everything they need to make their defense while still
8 protecting national security information ----

9 MJ [Col McCALL]: I understand your position.

10 MTC [MR. TRIVETT]: ---- and I wanted to call your
11 attention to that.

12 MJ [Col McCALL]: I understand your position. Go ahead.

13 MTC [MR. TRIVETT]: Thank you.

14 We were well into the suppression hearings. I believe
15 that began on December -- there was some initial suppression
16 hearing testimony that we're going to be relying on, although
17 there were not yet suppression motions filed, starting in
18 December of 2017.

19 MJ [Col McCALL]: And these were the motions with the
20 witnesses or ----

21 MTC [MR. TRIVETT]: Correct. So this was the testimony
22 about whether or not the statements taken in January and
23 February of 2007 by the FBI were voluntary.

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1 MJ [Col McCALL]: All right.

2 MTC [MR. TRIVETT]: So they were ordered -- briefed by
3 Judge Parrella and then we litigated most of them under Judge
4 Cohen as far as we got. I believe we are through 12 of
5 approximately -- don't hold me to these numbers. We're either
6 through or started testimony from approximately 12 of the 28
7 witnesses in that suppression hearing thus far. That's where
8 we were in February at our last hearing.

9 I believe Dr. James Mitchell who was the,
10 quote/unquote, architect of the CIA RDI program, had just
11 completed nine days of testimony. I believe Dr. Jessen was
12 about to start his testimony or just started his testimony,
13 then we recessed and we never came back after the COVID
14 situation.

15 MJ [Col McCALL]: Right. Ms. Bormann?

16 LDC [MS. BORMANN]: Yes, Judge. I just want to correct
17 the record. Dr. Mitchell had completed his testimony with
18 respect to unclassified matters. The judge had ordered a
19 closed session that never occurred.

20 MJ [Col McCALL]: Okay.

21 MTC [MR. TRIVETT]: And I concede that that's correct.

22 MJ [Col McCALL]: And just to make sure I'm
23 understanding ----

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1 MTC [MR. TRIVETT]: Yep.

2 MJ [Co] McCALL: ---- the posture of the case, so this
3 was sort of an unusual cart before the horse a bit. Witnesses
4 for the motions to suppress, but they were also basically
5 almost like in a deposition where you're gathering information
6 because it wasn't ----

7 MTC [MR. TRIVETT]: No, sir.

8 MJ [Co] McCALL: Am I misunderstanding?

9 MTC [MR. TRIVETT]: That's not our position. The
10 suppression motions were all filed.

11 MJ [Co] McCALL: But wasn't the understanding that then
12 the -- depending on what came out from the witness testimony,
13 that defense would then be allowed to come back and file
14 another -- basically update their motions for ----

15 MTC [MR. TRIVETT]: Yes, sir. There was going to be --
16 yes. Yes, sir. So they were envisioning a closing argument
17 at the end and additional -- and argument for additional
18 witnesses as necessary based on what was said. So yes.

19 MJ [Co] McCALL: Okay.

20 MTC [MR. TRIVETT]: I misunderstood you, but yes, that is
21 true.

22 MJ [Co] McCALL: Thank you.

23 MTC [MR. TRIVETT]: All right. So Judge Cohen

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1 indicated -- and I wanted, sir, to break this down a little
2 bit for you.

3 At some point after that last session, Judge Cohen had
4 informed the parties that he was going to do what was called
5 an interim -- interim findings of fact that would help guide
6 the parties in additional witness testimony and -- and what he
7 had already found as an issue of fact. We do not know -- we
8 do know that he didn't send any of those interim findings of
9 fact to us. What we don't know is if he even started to work
10 on them.

11 So what we did, prior to knowing he was going to
12 retire, was we proposed findings of fact based on the
13 transcript during the suppression hearings. You can find
14 those at AE 791 (Gov). We filed those on 3 April 2020. I
15 believe he -- his retirement -- he had set forth in one of the
16 other docketing orders was going to be effective at the end of
17 that month.

18 MJ [Co] McCALL: Mr. Trivett, hold on.

19 Ms. Bormann?

20 LDC [MS. BORMANN]: Judge, I have to rebut this. It's
21 gone far afield. So we disagree with many of the propositions
22 that Mr. Trivett has been allowed to expound upon, including
23 the nature of Judge Cohen's order, et cetera, et cetera. I

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1 have an objection to the relevance of any of this.

2 MJ [Col McCALL]: Yeah, I'll sustain the objection and
3 just say let's just go ahead and ----

4 MTC [MR. TRIVETT]: I can tie it back. That was the last
5 thing I was going to say, sir.

6 MJ [Col McCALL]: Perfect. It's been useful, but I also
7 want to get to ----

8 MTC [MR. TRIVETT]: I understand.

9 MJ [Col McCALL]: ---- at least the substance of this. So
10 take me, then, to where we're at, then, in this motion.

11 MTC [MR. TRIVETT]: So where we're at in this motion, as
12 part of the ten-category construct, we were required to turn
13 over all of the statements of the accused while in the RDI
14 program. We determined that that -- at least we initially
15 determined that that would be the substantive statements that
16 they made. So to the extent that there may have been a
17 photograph that he did not recognize, that that was not
18 included at least initially in those summaries, that had been
19 approved by the judge.

20 Now, one of the issues that we have for the litigation
21 is we started the 505 process under Judge Pohl and then
22 Judge Parrella might have seen it a little bit of a different
23 way, and Judge Cohen might have seen it a little bit of a

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1 different way, so this has been an iterative process where it
2 has grown a bit.

3 So at some point, and I believe it was during Judge
4 Cohen's time, in -- when we were asking to do some additional
5 substitutes and summaries, this was raised to our attention
6 that it should be included within the information we give to
7 the defense but it could be done in the way that we gave it.
8 So we believe that this was a fully-approved judicial process
9 by which we bunched the ones and the times where they were
10 shown a photo but didn't recognize it. And to the extent that
11 it was mitigating, or at least that the court may have seen it
12 potentially mitigating -- again, the court has the defense
13 theories of the case that we don't have.

14 I would assume they could argue, if they wanted to,
15 that cooperation that they gave during the RDI program is
16 somehow mitigating; although, most of the cooperation, we
17 would note, is again information about the plots they were
18 hatching against the United States, we're still agreeing to do
19 it.

20 I don't know -- other than the testimony that's
21 already been before this court from Dr. James Mitchell, right,
22 there is no document that said he was cooperative every time
23 he didn't give something, right? But we put that in, I

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1 believe, with judicial approval -- with judicial approval and
2 guidance in that. To the extent they want to argue it's
3 mitigating, we'll concede that it's mitigating. If they want
4 to argue that, we'll concede that it's mitigating.

5 But this concept that Lieutenant Berg seems to think
6 exists where there was someone writing and saying he's been
7 completely cooperative on, you know, these five photos but he
8 doesn't recognize them, but completely uncooperative in other
9 five photos, that part doesn't exist. So we're simply
10 indicating that while in the cooperative stage, meaning he
11 wasn't in his EIT period but he was otherwise giving
12 information that we believed was helpful and substantive, that
13 during those interrogations he may have also not recognized
14 certain photos that we gave him.

15 And so that's what those documents are seeking to
16 capture. To the extent they want us to stipulate that that
17 was cooperation, we're willing to do it, and that's why I
18 wanted to lay out the stipulations and what our position is.
19 We're willing to stipulate to that if that's what they want.
20 But there is no documents that -- that goes down every one of
21 those 813 instances and someone's analyzing whether or not
22 he's telling the truth or not.

23 There may be in some instances, there's certainly not

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1 in all of them, and it was all during the period of time after
2 which he began to cooperate. That's what we did. We believe
3 it's under 505. We do believe it's a motion to reconsider
4 that's not appropriate to reconsider.

5 And I wouldn't have had to argue in so much detail on
6 that issue if it were in front of the judge who dealt with it,
7 but obviously you're not, and that's why I got into a little
8 bit of the inside baseball on it so you can understand why we
9 did what we did.

10 Let me get back to some of Lieutenant Berg's specific
11 arguments.

12 MJ [Col McCALL]: Let me sidetrack you ----

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

14 MJ [Col McCALL]: ---- before you get back into that ----

15 MTC [MR. TRIVETT]: Please.

16 MJ [Col McCALL]: ---- and then you can go back and
17 readdress his arguments. But -- so I'll just ask this. So
18 has all the requested material -- you know, defense said that
19 some of the government response was it will be submitted to
20 the military judge via the 505 process, and then there wasn't
21 a government response afterward saying, hey, it's all -- it's
22 all been through the judge. It -- off of our plate.

23 MTC [MR. TRIVETT]: Right. So we take issue with his

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1 statement that we don't inform them when they are 505
2 approved. We may not always point back to the specific one of
3 a thousand discovery requests we get. But when we do forward
4 it over to the defense, usually on the classified side, if it
5 was something that was approved from the military judge under
6 the 505 process, that's usually the last sentence that we put
7 in.

8 I just reviewed one. I don't know if it was the exact
9 one in which we sent -- it was the exact one in which we sent
10 that information over. It made clear that these were turned
11 over as part of the 505 process.

12 MJ [Col McCALL]: Okay. All right.

13 MTC [MR. TRIVETT]: Okay. So I did want to call Your
14 Honor's attention -- and I know this is part of Ms. Bormann's
15 argument, but we do do quality control. We've been dealing
16 with thousands and thousands of pages of discovery, and we're
17 human beings and we're not perfect and we've never said that
18 we're perfect. We're going to make mistakes from time to
19 time.

20 If the defense sees mistakes from time to time and
21 points it out to us, we tend to try to correct those mistakes
22 as soon as possible and we tend to try to work with them. I
23 do believe we have a very good working relationship with the

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1 defense. In regard to the information that they are confused
2 about, we always try to clarify it for them.

3 But what -- what was those -- that one document that I
4 think Lieutenant Berg raised was we have our own processes in
5 our office and, for lack of better terms, we put something in
6 a bucket, in one bucket or the other bucket. The substantive
7 statements go into the substantive statement bucket. These
8 non -- what we call nonrec in the vernacular, the
9 nonrecognition photos go in another bucket. They get worked.
10 They get summarized. They get put forth sometimes in separate
11 filings, sometimes in the same filing, but they get worked
12 separately. And at some point in time, we identified that
13 what -- that the one document that Lieutenant Berg was
14 referencing was a substantive statement that also included a
15 nonrec portion of it and somehow that got in the wrong bucket.
16 So that one is the nonrecognition bucket as opposed to the
17 substantive statement bucket because it included both. It was
18 summarized like that. When it was called to our attention
19 through our quality control checks and through another request
20 the defense may have made, we realized our error.

21 I will point out to the commission and the parties
22 there are two other instances where this occurred. They are
23 both in the 505 process now where we're asking to correct it.

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1 I don't want the commission to be left with the idea
2 that there are actually 803 separate interrogations where it
3 was -- where a photo was just shown. Like the example I just
4 gave, the photo may have been shown during another substantive
5 interview, and it just later gets pulled out to summarize to
6 make sure that the defense has all of both the substantive
7 information, and when he wasn't able to identify some
8 particular person that the CIA may have had interest in at the
9 time. So I wanted to make sure that that was clear, that
10 that's our position on that.

11 So there have been times, and, quite frankly, in --
12 when I'm often asked by other counsel beginning to work other
13 cases, there are times when we will, in advance of an
14 approval, give information to the commission -- to the defense
15 before going for 505 approval to the commission, and then
16 simply notifying the commission that we've already provided
17 it. It's a sort of no harm/no foul thing.

18 And if I had this all to do over again starting in
19 2012, we would have done that with all of it, I think, because
20 it very quickly backlogged into the judiciary just because
21 there was one person working it, where we could put, you know,
22 our entire team on it.

23 So there are some times when we do that, and there are

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1 some times certainly when we use adopted conventions that the
2 commission has already approved for other documents. If
3 they're a identical type of document with an identical type of
4 convention that we're seeking to substitute or summarize,
5 there are times when we have done that. I think that was the
6 example Lieutenant Berg gave when we added six additional.

7 If necessary, we can certainly come back to the
8 commission. I think Judge Cohen was at some point, I believe,
9 that he was comfortable with the position if -- that the
10 general convention had been approved, that it might not be
11 something he needs to see again. We're happy to do it either
12 way, however you guys in the judiciary look at that piece of
13 it.

14 But as described before, when we take redactions to
15 things, we are taking redactions on 701 relevance grounds.
16 And we see those redactions as being no different in any way
17 than any of the thousands and thousands of documents that we
18 reviewed that we determined were not discoverable and which we
19 did not provide to the defense. If we are taking a 701
20 redaction, we do not need 505 approval. That is just within
21 the ambit of typical prosecutorial discretion. We have the
22 final call on discovery.

23 It's only when we're trying to change something -- so

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1 generally summaries, anything that we summarize down from an
2 original document into something else, where we are changing
3 something, do we seek approval. We may seek approval for
4 other limitations. But at the end of the day, anytime we're
5 changing something in a document, other than redactions, we
6 are seeking approval under 505.

7 So I believe that we have certainly satisfied our
8 obligations under, I believe it's AE 397F, the ten-category
9 construct. We've worked with the commission in order to come
10 up with this nonrecognition convention, to provide this
11 information to the defense. I believe the commission at the
12 time when they ordered that did take into account whatever the
13 defense theories of the case were. That's usually in the
14 findings portion of the 505 ruling. And I believe that the
15 defense is entitled to no further information.

16 So subject to your questions, sir.

17 MJ [Col McCALL]: No questions at this time.

18 MTC [MR. TRIVETT]: Thank you.

19 MJ [Col McCALL]: Lieutenant Berg.

20 DC [LT BERG]: Thank you, sir. Just real quick, I want to
21 touch on a few points the government had made right at the
22 beginning. I don't want you to be left with the
23 characterization that this ten-category construct concept was

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1 the government being very forthcoming about the information it
2 was willing to provide. That was only the product of, at the
3 very least, 14 separate motions to compel by the defense to
4 get that RDI-related information. At every stage of this case
5 we have been fighting tooth and nail to try to find out what
6 exactly happened to our clients in that program.

7 Second, the government has stated it won't use any of
8 these statements in its case in chief. And the government is
9 very careful to always say "case in chief." What they're
10 leaving completely open, however, is their ability to use
11 these statements, that we believe were obtained under torture,
12 in sentencing. And so they have not foreclosed that.

13 So having all of those statements that our clients
14 have made right now is important for us to be able to present
15 and prepare our defense, both in the case in chief,
16 guilt/innocence stage, and in any potential sentencing.

17 Next, the concept of these stipulations. The
18 government has said they're willing to stipulate to anything,
19 quote, tethered to reality. I can only say that we don't know
20 what we don't know. How can we possibly add anything to the
21 stipulations if we don't actually know what happened?

22 So turning to this specific motion, it does sound
23 like, from what Mr. Trivett said, that the updated files that

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1 we provided -- we were provided, were not sent through the
2 M.C.R.E. 505 process. We had no idea that Judge Cohen
3 apparently had some arrangement where it was all right for the
4 government to update later certain documents without
5 re-seeking M.C.R.E. 505 approval.

6 We strongly object to that practice. We believe that
7 every single time that a government -- that the government
8 updates a document, changes a document, amends a document,
9 summarizes or substitutes a document, they have to go through
10 the M.C.R.E. 505 process. And that is specifically because,
11 like I said before, there is no failsafe, other than Your
12 Honor, for any sort of mistakes. We are not involved in that
13 process.

14 And so for the defense to have any sort of reasonable
15 assurance that we're getting all the information that we need,
16 it needs to be followed by the book and it needs to be done
17 right every single time. And the government has acknowledged
18 that -- now apparently on three occasions, inaccurate
19 M.C.R.E. 505 summaries and substitutions were provided to the
20 court. And I'm glad that they're addressing it.

21 But the problem is there's no way for us to know if
22 this was -- if these were just lucky catches, right? Have
23 they done a full scrub of every single thing that they've

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1 submitted through the M.C.R.E. 505 process? I don't know.
2 That would probably take quite a bit of time. But we now know
3 that it's breaking down. And how are we supposed to have
4 confidence that we're getting everything that we're entitled
5 to?

6 And, Your Honor, if I could have just one minute to
7 confer.

8 MJ [Col McCALL]: You may.

9 [Pause.]

10 DC [LT BERG]: Thank you, Your Honor. Nothing further.

11 MJ [Col McCALL]: Ms. Bormann?

12 MTC [MR. TRIVETT]: Sir, briefly before Ms. Bormann goes,
13 can I clarify for the record a couple of things that were
14 brought to my attention?

15 MJ [Col McCALL]: Sure.

16 MTC [MR. TRIVETT]: So to the extent that I explained to
17 the commission that we have never asked for an approval of a
18 redaction, that's not accurate. There are times when we will
19 ask for approvals of redactions, but only in instances where
20 we believe the information to be otherwise discoverable. If
21 we make that initial determination under 701, that the
22 information is not otherwise discoverable, we'll take the
23 redaction, not seek approval. But if we're somehow redacting

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1 or overlaying or trying to substitute, but there are
2 redactions within the 505 process that we have sometime asked
3 for.

4 Also, in regard to the use of the statements, the time
5 in CIA custody, I kept emphasizing that we will not use those
6 statements in the case in chief. I should have also said we
7 will not use those statements in the case in chief or the
8 sentencing hearing.

9 MJ [Col McCALL]: All right.

10 MTC [MR. TRIVETT]: Sorry for the mistake, sir.

11 MJ [Col McCALL]: Thank you for that clarification.

12 Ms. Bormann, go ahead.

13 LDC [MS. BORMANN]: I frankly don't know where to begin.

14 So Lieutenant Berg addressed some of the concerns with
15 Mr. Trivett's recitation of the government's position on this,
16 some of which was accurate and some of which wasn't.

17 I find myself in a position of having to invoke and
18 request a 505 -- M.C.R.E. 505(g) notice on one of the
19 statements that Mr. Trivett made because I -- in order to
20 correct the record, I have to go into closed session, and that
21 is that the statements the government wishes to submit to the
22 panel members, the so-called LHM statements, were taken after
23 the defendants left CIA custody. I cannot address it in open

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1 court, so I will ask sort of on the fly. We've developed the
2 system to address that issue when we go into closed session.

3 MJ [Col McCALL]: Yeah, I believe we'll be in a closed
4 session next week ----

5 LDC [MS. BORMANN]: Right.

6 MJ [Col McCALL]: ---- so we can bring it up then.

7 LDC [MS. BORMANN]: The -- let me start with, first, just
8 the idea that we get this thing called a collective summary,
9 the first set in 2017. As far as I can tell, those went
10 through an M.C.R.E. 505 process. But when I say as far as I
11 can tell, in many instances we weren't told early on. And so
12 we -- and when I say "we," Mr. Bin'Attash's team -- when we
13 take in discovery, and there's been a lot of it in this case
14 and I'm going to address that a little bit later ----

15 MJ [Col McCALL]: You weren't told at the time when you
16 got a collective summary ----

17 LDC [MS. BORMANN]: Exactly.

18 MJ [Col McCALL]: ---- that it went through the 505
19 vetting process?

20 LDC [MS. BORMANN]: The first time we were, because there
21 was an order number said in it. But because the ex parte 505
22 process is so opaque, we, frankly, have no idea what's being
23 submitted, how long it's taking the trial judiciary to get

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1 through it, what types of redactions are happening -- you
2 know, I -- I can't tell you whether or not these collective
3 summaries, the ones from 2017, were -- the original documents
4 spanned, could be 5,000 pages, and then they're reduced to a
5 total of 70 one-sentence pages.

6 I don't know if that's the case. I don't know if
7 massive amounts of material were submitted and then it
8 resulted in a one-sentence thing, a summary that said
9 Mr. Bin'Attash was interrogated 120 times and didn't identify
10 52 people.

11 I don't know what that summarizes. The volume of
12 material, whether or not it contains extra details, we have no
13 way of knowing. But we do know that with respect to guilt and
14 innocence, and also mitigation, that Mr. -- the fact that
15 Mr. Bin'Attash could not identify known members of al Qaeda is
16 itself Brady material and, additionally, material in
17 mitigation of a death sentence because the government has
18 alleged a far-flung conspiracy in this case where
19 Mr. Bin'Attash is charged with committing a few overt acts.
20 And part of their argument is that Mr. Bin'Attash was
21 important in this conspiracy.

22 Now, it is clear to anyone who is applying reason to
23 this argument, that if Mr. Bin'Attash was shown 120

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1 photographs of known al Qaeda operatives and knew three out of
2 120, he probably wasn't an important operative in al Qaeda.
3 We've not been provided the opportunity, nor the information,
4 from which to make that argument. That's why this is so
5 important.

6 Now, I'm going to shift gears for just a second and
7 then go into the second batch which was provided to us. So in
8 2017, there is this collective summary dump by the government
9 that appears to have gone through an M.C.R.E. 505 process. I
10 think at that point, I'm not sure if it was Judge Pohl or
11 Judge Parrella -- huh?

12 Judge Pohl. The next dump we get on the collective
13 summaries is in -- right before the pandemic, like four
14 months, five months before the pandemic starts, so at the end
15 of 2019. And Mr. Garber, who is sitting right here at the end
16 of counsel table, takes in all of our discovery. So we get
17 another dump of collective summaries via e-mail and Mr. Garber
18 writes to the prosecution paralegal in an e-mail, which is
19 attached to our reply. It's Attachment David -- D -- delta --
20 I've never gotten the military alphabet quite right, so I try
21 to make up funny names.

22 Anyway, and it's dated -- the response is dated
23 September 4th of 2019. And Mr. Garber asks what he usually

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1 asks when he takes in discovery so that we understand the
2 nature of what we've received. And in this case, he notes
3 that it all appears to be substitutions for what would be
4 original documents. But he asks the question: Did these
5 substitutions go through the M.C.R.E. 505(f), as in frank, (2)
6 process? And if it hasn't, does the prosecution intend to
7 submit these documents? And then he thanks them for what he
8 was hoping to be a prompt response.

9 Well, crickets, right? We received nothing on this,
10 which is really indicative of how the discovery process in
11 this whole case happens. We receive discovery, Mr. Garber
12 writes back and says, "Is this responsive to a particular
13 discovery request or an order by the court? Can you please
14 provide us the order number or the request to which it's
15 responsive? Or is this general discovery, affirmative use
16 discovery?" And we get nothing back.

17 When we received that, we didn't know that what we
18 would later receive during the pandemic, in March of 2020,
19 which is, I think, MEA-6402, 6403, it's contained -- part of
20 the substance of it is contained on page 7 of Mr. Bin'Attash's
21 reply to the government's response to Mr. Binalshibh's
22 supplement. That's a mouthful. And we received this in
23 March. And when we received it, it -- we were notified it had

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1 gone through the M.C.R.E. 505 process, but, of course, it's
2 opaque so we don't know when or where or how.

3 And it struck us because it's exculpatory. It's not
4 just a statement of Mr. Bin'Attash's that has some fleeting
5 moment. In this -- so -- so to set the stage, the
6 government's theory against Mr. Bin'Attash is that he, with
7 knowledge of the operation of 9/11, met with two of the
8 hijackers and helped facilitate their travel to the
9 United States, knowing and intending that they would, you
10 know, fly into the towers on 9/11.

11 Our position, and I think what will be borne out by
12 the facts, is that Mr. Bin'Attash didn't know about 9/11 until
13 9/11. So the information that we were given in March said, in
14 relevant part, Mr. Bin'Attash said he did not know what
15 instructions Mihdhar and Hazmi had -- excuse me. Let me start
16 again.

17 Bin'Attash said he did not know what instructions
18 Mihdhar and Hazmi had been given to follow once they were in
19 the United States. That is a big piece of rebuttal to the
20 government's intent case. And we thought, my goodness, wow,
21 this is exculpatory. It wasn't given to us under Brady. They
22 didn't identify it specially, it just sort of dumped in.

23 The next thing that happened was Mr. Binalshibh sent

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1 an e-mail asking where this came from. And then we found out
2 that this document with this exculpatory piece in it had
3 actually been provided to the military judge at an earlier
4 time who allowed the government to summarize it as
5 Mr. Bin'Attash cooperated in -- on so many occasions and
6 didn't identify so many photographs.

7 That can't possibly have happened, right? At least
8 not properly. So either the government didn't provide this
9 and is mistaken or misrepresenting, or Judge Pohl just
10 completely missed it and was basically rubber stamping
11 whatever the government wanted him to rubber stamp. Because a
12 reasonable reading of this would in no way result in a summary
13 that simply said he cooperated.

14 That's why these -- this issue is important. And it's
15 especially important because it's the only glimpse we really
16 have into the M.C.R.E. 505 process. I mean, I learned so much
17 just from this one series of briefs. I didn't know that
18 Judge Pohl had reviewed this. I don't know what's out there
19 in the world of material the government's utilizing or not
20 utilizing. But I can tell you from this one little glimpse
21 that it is very likely that there is much more material out
22 there to which we would be entitled, and this is Brady
23 material, that we probably don't have.

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1 So Mr. Trivett got up here and said, with respect to
2 the September 2019 dump, the new consolidated whatever they
3 call it, we believe that that discovery production was covered
4 by a proper judicial order under 505. They don't need to
5 believe. They can prove it, right? Because there should be a
6 process in place. I don't know what it is, but I'm imagining
7 there is a submission process, there would be a filing,
8 they -- the judge in 2019 would have either approved it or not
9 approved it, would have sent it back or not sent it back.

10 I mean, you don't have to guess and Mr. Trivett
11 doesn't have to guess. And he didn't plead it in any of the
12 government's papers, so you don't -- you don't need to be
13 satisfied by a government assertion to something when there
14 should be proof of it.

15 The -- now I want to go on to a little bit about just
16 the concept of stipulation, because I was concerned when you
17 became interested in that. So the stipulation that has been
18 provided is -- does not provide the rich textural narrative of
19 what occurred to Mr. Bin'Attash in this case. And frankly, I
20 can't add or delete from it, because I don't have the proper
21 discovery. So it languishes there because, frankly, I don't
22 know what to do with it.

23 MJ [Col McCALL]: And, Ms. Bormann, you don't need to

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1 address that. I was curious because it is a little unusual,
2 something I haven't seen in trial, but I get -- I think
3 Lieutenant Berg had said we don't know what we don't know. So
4 it's hard to stipulate to matters that you don't understand.

5 LDC [MS. BORMANN]: Exactly.

6 MJ [Col McCALL]: Yeah.

7 LDC [MS. BORMANN]: And the government refrain has been,
8 and I imagine will continue to be, that I can simply go to my
9 client and ask him. That so fundamentally misunderstands both
10 the burden on the government to provide discovery and what
11 happened to Mr. Bin'Attash during the five years or so, four
12 and a half years that he was questioned under coercive
13 interrogation pressures.

14 I mean, when you're hanging from the ceiling and you
15 lose consciousness for days on end, you're -- you don't have
16 the ability to recall what happened to you and what they did
17 when they kept trying to wake you up. I just -- I mean,
18 relying upon a client in that situation to recount the details
19 of what occurred when they've been deprived of every amount of
20 time that they were in, they had no clocks, they were
21 purposefully disrupted so that they -- they perceived that
22 they had absolutely no control over their environment. I
23 mean, this is the testimony that was elicited from

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1 Dr. Mitchell, in part.

2 And so the idea that I would somehow go to -- I mean,
3 I think it would be malpractice, right? Mr. Bin'Attash, you
4 tell me exactly what happened to you during the three and a
5 half years you were overseas being tortured and after you
6 arrived here in Guantanamo Bay and then were questioned. That
7 is not going to happen because I can't rely upon it, frankly.

8 Let's see. I think that's about it. I don't think I
9 have anything else. Give me just a moment, please.

10 MJ [Col McCALL]: Take your time.

11 [Pause.]

12 LDC [MS. BORMANN]: I am told by unanimous consent over
13 here I missed something important.

14 All right. Mr. Trivett said we had an understanding
15 of Judge Cohen that we could just go ahead and extrapolate --
16 I'm paraphrasing; I don't think he used the word
17 "extrapolate" -- but extrapolate from Judge Cohen's previous
18 orders and just unilaterally redact the amount of material
19 that we wanted to redact without putting it through the 505
20 process.

21 The only time that's ever appeared in an order was
22 addressed by Lieutenant Berg and, in fact, they were directed
23 not to do that. But more importantly, if that's the case, it

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1 would be nice if Judge Cohen would have told us that. But
2 I -- he didn't, because it's likely it didn't happen.

3 So at any rate, I don't know why the government was
4 led to believe that. Maybe there was some sort of ex parte
5 communication that we're unaware of, but it certainly isn't in
6 writing anywhere.

7 And subject to any questions you might have.

8 MJ [Co] McCALL]: No questions.

9 LDC [MS. BORMANN]: Okay.

10 MJ [Co] McCALL]: Thank you, Ms. Bormann.

11 And I know that we've gone a little past 12:00. You
12 know, the real reason I had 12:00 as the break is I wanted to
13 make sure that we were able to break for prayers. I don't
14 know that that's an issue with the accused being not present,
15 so I'd like to press a little bit longer.

16 Mr. Bruck? Okay.

17 Mr. Connell?

18 LDC [MR. CONNELL]: Sir, do you mind if I remove my mask?
19 I'm more than six feet from anyone.

20 MJ [Co] McCALL]: If you don't mind keeping it on.

21 LDC [MR. CONNELL]: I do not mind, sir.

22 MJ [Co] McCALL]: Yeah.

23 LDC [MR. CONNELL]: Up to you.

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1 The -- on behalf of Mr. al Baluchi, there are about
2 85 percent of what the government said that I agree with and
3 much of it may sound familiar from yesterday, about 10 percent
4 that I disagree with -- and I'm not going to go into the
5 global part, I'm really just going to address the specific
6 motion. But then there's five percent that it's impossible
7 for me to know whether it's true or not. And I'll address
8 that as well.

9 And so I really have four main points. The first is
10 one that I agree with the government, and I applaud them from
11 coming forward from -- with, is that the theory of liability
12 is that arising under 950q, 10 U.S.C. 950q. The government
13 referenced Article 77 and they're very, very similar. You
14 know, when -- when I had addressed the court earlier, I had --
15 I wasn't -- until today, I wasn't sure what the theory of
16 liability was.

17 I think that's a good narrowing. I applaud the
18 government for that. I think it narrows what we need to deal
19 with, makes the law more certain, takes sort of international
20 law theories of Joint Criminal Enterprise 3 and this kind of
21 thing out of the picture. And 950q and Article 77 have a
22 well-established track record. We know what they mean under
23 the case law, and I think that's a good thing. I approve and

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1 I concur, and we will rely on that from here on out.

2 The second point is the government argued that its
3 narrowing constructions, such as substantive statements, were
4 part of a, quote, fully approved judicial process, and that
5 falls into the five percent that it's impossible for me to
6 know whether it's true or not. I can know and I do know that
7 it was not part of a publicly approved judicial process,
8 because the publicly approved judicial process around
9 statements is found in AE 397F, which was the order adopting
10 the government's proposed ten-category construction.

11 And specifically, it is subcategory H. Subcategory H
12 requires the government to produce statements obtained from
13 interrogators, summaries of interrogations, which is generally
14 what they produce, summaries of interrogations; reports
15 produced from interrogation, which they generally do not
16 produce; interrogation logs, which I don't -- I don't know if
17 they produce that or not, because I'm not sure what an
18 interrogation log is but -- and interrogator notes of
19 interrogation of each accused and all co-conspirators
20 identified in the charge sheet.

21 Now, that -- you know, this is sort of the difference
22 between public law and secret law. And one of the problems
23 with secret law is all the people who are involved in it can't

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1 know what the law is so that they can either comply or try to
2 argue that their adversary needs to comply. And under this
3 text of what the military commission's public order is, the
4 statements -- the summary statements listing cooperation on 37
5 events or whatever simply do not fall into the text of what
6 the military commission has ordered.

7 Whether there's additional ex parte communication
8 between the military commission and the government, I don't
9 know. I can't know. So -- but in our position, subsection H
10 is -- should be the universe of what the government is turning
11 over when it comes to statements.

12 The third point that I want to make is that the
13 government talked about judicial approval and guidance. And,
14 you know, to be honest, that word "guidance" is doing a lot of
15 work in that sentence because it -- there's the issue of the
16 secret law that I just mentioned, but there's also the issue
17 of the predictive nature of some of the government's discovery
18 production.

19 Mr. Trivett or for -- on behalf of the government
20 called it sometimes we'll give things in advance to the
21 defense. But what it actually means is that the government is
22 guessing what the redactions are and, on a number of occasions
23 they have told us in response to this -- this extensive

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1 process that the government described trying to work out
2 discovery, you know, issues on a minor level, that some things
3 have not been produced to the -- have not been submitted to
4 the military commission and the government applied the
5 redactions that they thought under their pre -- in good faith,
6 I'm sure, with their previous conversations with the military
7 commission, the military commission would have applied.

8 And a perfect example of that is in the AE 538 series
9 around the 75 -- 75 intelligence requirements from the FBI to
10 the CIA that the government produced to the defense without
11 judicial review and -- but now, after quite a bit of
12 back-and-forth between the parties and intervention of the
13 military commission, are before the military commission for
14 review.

15 And it's a perfect -- it's a -- it's a very good
16 example both of the work that guidance is doing in the
17 government's vision, but also at a fairly specific -- some
18 fairly specific examples of why substantive example --
19 statements are not satisfactory of the military commission's
20 order in 397F.

21 And I'd like to use an example, and that example is
22 already in the record at AE 628SSS Attachment G at FBI-27761
23 [sic], and lucky for us, this -- although it's over all a

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1 Secret document, it contains a number of unclassified
2 paragraphs. And just so the military commission knows, we
3 have -- the government has advised us as a matter of
4 classification guidance that the date and a general
5 discussion -- a topic area for the intelligence requirements
6 are -- may be said in open court that are unclassified.

7 So this FBI 23761 is dated 20 March 2006. And not
8 drawing on this document, I will tell you that in 2006 the
9 government started sort of an additional phase of
10 investigation in the case. It is sometimes called Operation
11 Encore. I don't know how official that name is or whether
12 that's an unofficial thing that gets bandied about, but we do
13 know that it's unclassified that in 2006, sort of an
14 additional phase of investigation took place.

15 And on 20 March 2006, the FBI sent an intelligence
16 requirement to the CIA, and reading from an unclassified
17 paragraph, in response to, redacted, blank -- or, redacted, is
18 submitting additional questions for high-value detainee Khalid
19 Shaikh Mohammad, Khallad Bin'Attash, and photographs to be
20 shown -- photographs be shown to all high-value detainees.

21 It continues that, in an unclassified paragraph,
22 Los Angeles International Airport videotape was found and --
23 which depicts certain people which I'll -- it's unclassified

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1 but I'm skipping to get to the important part. And then it --
2 asks a request. So this is the -- this is actually Special
3 Agent Drucker asking the CIA, the black sites, to conduct
4 certain investigation on behalf of the FBI.

5 And from an unclassified paragraph: In order to
6 determine if Hazmi and Mihdhar were assisting -- were
7 assisted, excuse me, by Yemeni support cell in Southern
8 California, we request that all high-level detainees are shown
9 all the photographs listed below for recognition and
10 knowledge: Ahmed Abdul Malek al Asbahi, Ahmed Abdullah al
11 Hussaini, Omar Abdul Aziz Nasser al Kumaim, Magdi Ali al
12 Sayaghi, Sami Sharif al Sharafi, and Anwar al Awlaki.

13 In the government's substantive statement scheme, it
14 is impossible for us to look at the cooperation -- the
15 one-liners that say Mr. al Baluchi was shown certain
16 photographs or Mr. Mohammad or Mr. Bin'Attash was shown
17 certain photographs, was cooperative and did not identify
18 anyone. It is not possible for us to match up specific
19 information like that we have in the intelligence requirements
20 to show Agent Drucker, an important figure in this case, went
21 to the CIA, asked for the interrogation of all detainees about
22 these particular photographs. And in many situations, we are
23 able to match that up by content, even if not by number or

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1 specific date, we're able to match that up with some sort of
2 summary that the military commission has approved of
3 statements of the defendants.

4 But this additional substantive statements requirement
5 takes away even that ability; that through detailed analysis
6 of content to match up what is happening to the defendants in
7 a black site and being reported back through the chain
8 ultimately in a TD-314 to the -- to the intel community, it's
9 impossible to match that up with what the FBI -- important
10 people in the FBI, like Special Agent Drucker, are asking be
11 extracted from the defendants.

12 And then finally, Your Honor, the government argues
13 that it has -- I quote here -- the final call on discovery --
14 which I disagree with; I think the military commission has the
15 final call on discovery -- and thus it apply -- unilaterally
16 applies 701 redactions. We've had quite a few examples of
17 those 701 redactions. And we know, even if we don't always
18 know in a summary what has been redacted out of it, in some
19 situations we do know.

20 And I'm going to show a document to the government,
21 which is AE 827D [sic] Attachment D. The -- at MEA-FBI-6724,
22 and this document is eligible to be shown to the public
23 because it is marked CUI and under AE 018 -- 118W amended,

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1 there is an agreement among the parties, approved by the
2 military commission, that information at -- which is marked by
3 the government as unclassified may be displayed to the public.

4 In addition, I took the additional precaution, even
5 though it's allowed under AE 18W Amended of submitting it to
6 more than one week in advance of travel to the court
7 information security officer, and so you will see an
8 additional redaction on here which doesn't appear in the
9 record but that's because of the review for public
10 consumption.

11 May I have access to the document camera, sir?

12 MJ [Col McCALL]: You may.

13 LDC [MR. CONNELL]: Sir, I'd ask for permission to display
14 the document camera to the parties and the gallery.

15 MJ [Col McCALL]: You may.

16 LDC [MR. CONNELL]: This is -- this is new because of the
17 RHR -- okay. There we go, great.

18 So this document, FBI-6724, I think is a good example
19 of what 301 redaction -- or 701 redactions come to mean. And
20 this is a document in which Special Agent Perkins, one of the
21 special agents who interrogated Mr. al Baluchi here at
22 Guantanamo Bay, was involved in an investigation on 14
23 November 2002 of a suspected co-conspirator, Omar al Bayoumi,

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1 and it's a situation where Special Agent Perkins, along with a
2 New York City detective, went to a -- the place of business
3 where Mr. Al Bayoumi allegedly worked, talked to the person
4 who was responsible for paying him and found out that he was
5 being paid substantial amounts of money under the table, never
6 for showing up -- although he never showed up to work.

7 The significance of it here is that this gives us a
8 very good idea of what relevance redactions look like to the
9 government. Because every name, every telephone number, every
10 cell telephone number, place of birth, the names of all the
11 other people who work with Mr. Bashi are all redacted
12 including Mr. al-Salmi, who is a very well known public
13 figure, are redacted out of this document.

14 Now, this is not an accident because we know that the
15 government in AE 161K -- or, excuse me, in the AE 161J, was
16 directed by the military commission to remove any PII
17 redactions from this document and about 20,000 others like it.
18 And the government represented in AE 161K that it had done so
19 and that all of its redactions that were left were ones that
20 were -- that were not related to PII, they were related to
21 relevance.

22 And the government later produced versions of many of
23 the first tranche of FBI documents which had black redactions

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1 instead of the word "redacted," although this is not one.

2 This is the only version of this that we were produced.

3 So I would say that in this situation, at least I can
4 see the redactions, right? I can look at it and say, okay,
5 well, Bashi obviously has a first name. I don't know what it
6 is, but there is a first name. But when we're dealing with
7 summaries and substitutions that go through the 505 process,
8 I'm, as an advocate, not able to subject them to the same
9 level of scrutiny because in that situation we don't even know
10 what we don't know.

11 And that's why I rise against this gloss on 397F of
12 substantive statements and ask the military commission to pay
13 special attention to the question of 701 redactions, because
14 it might be that the military commission doesn't even know
15 what it doesn't know. It may be that the government has
16 imposed a 701 redaction and withheld and not ever submitted it
17 for judicial review as the government just explained that it
18 does because it believes that it's not relevant whereas, in
19 fact, in light of the evolving -- I mean, this document that
20 I'm handing you here was produced in 2013. In light of the
21 evolving theories of the defense, which we have been very --
22 Mr. al Baluchi has been very forthcoming with his theories of
23 defense to the government.

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1 You know, in fact, there's a motion that the
2 government has filed in the 824 series to stop us from using
3 one of our theories of defense. I mean, they know what they
4 are. That -- it's important that the idea of substantive
5 statements as a restriction, the idea of guidance instead of
6 approval, and the idea of 701 redactions not swallow the 505
7 process.

8 Thank you, sir.

9 MJ [Col McCALL]: Thank you, Mr. Connell.

10 Lieutenant Berg, would you like to be heard?

11 DC [LT BERG]: Sorry, Your Honor. I just wanted to
12 clarify.

13 Mr. Connell had said that AE 390 -- 397, sorry,
14 subsection H, was the universe of authority for why these
15 statements had to be compelled to be produced by the
16 government. We also want to say that these statements are
17 compelled by the Fifth, Sixth, and Eighth Amendment mandate
18 for a fair and reliable determination of guilt and innocence
19 and penalty.

20 MJ [Col McCALL]: Thank you, Lieutenant Berg.

21 I'll go back to Mr. Trivett, if you want to respond.

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

23 MJ [Col McCALL]: Okay. All right. I appreciate the

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1 briefings. That was useful for me.

2 All right. We have gone past what I expected to be
3 the break. We'll go ahead and recess for the rest of the day
4 with the full group, with the understanding that we're coming
5 back with Mr. Alshibh's team at 1400 for a closed ex parte
6 hearing. Otherwise, the commission will be back on the record
7 at 0900 on Monday.

8 Commission is in recess.

9 [The R.M.C. 803 session recessed at 1222, 10 September 2021.]

10 [END OF PAGE]

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