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1 [The R.M.C. 803 session was called to order at 0901,
2 11 September 2019.]

3 MJ [Col COHEN]: Commission is called to order.

4 Trial Counsel, are all of the government counsel who
5 were present at the close of the previous open session again
6 present?

7 CP [BG MARTINS]: Good morning, Your Honor. Yes,
8 trial counsel representing the United States remain the same
9 as when the commission was last in open session on the
10 9th of September.

11 I have one other matter, Your Honor, pertaining to
12 courtroom attendance, if I may, prior to finish accounting for
13 the parties.

14 MJ [Col COHEN]: Okay.

15 CP [BG MARTINS]: Your Honor, today is September 11th. I
16 wish to advise the commission that family members of the 9/11
17 fallen will be moving quietly from a place just outside the
18 courtroom to their seats in the gallery and then back between
19 now and 1028 this morning. Without in any way interrupting
20 these military justice proceedings, they understandably wish
21 to observe in relative quiet and privacy the events in the
22 sequence they occurred 18 years ago when the different impacts
23 and deaths occurred.

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1 Certainly no disrespect is intended to this
2 commission. They do not request, nor does the government, any
3 halt or recess. And, Your Honor, we have coordinated with
4 security on this matter. Thank you.

5 MJ [Col COHEN]: All right. Thank you. Yeah, any events
6 that are taking place outside the courtroom will have no
7 bearing whatsoever on any actions I take today, nor is it
8 something that -- I appreciate it, but it -- yeah, it's -- I
9 appreciate you letting me know that that might be what's
10 happening, but it would be inappropriate for me to take any
11 further consideration. Thank you.

12 I see that Mr. Mohammad is here, and it appears that
13 all of the defense counsel, Mr. Sowards, who were previously
14 here are also here today; is that correct?

15 LDC [MR. SOWARDS]: That is correct, Your Honor.

16 MJ [Col COHEN]: All right. Thank you.

17 I note that Mr. Bin'Attash is absent today. We'll
18 take that testimony shortly. Ms. Bormann, it appears, though,
19 that the rest of your team is consistent with what was
20 previously noted.

21 LDC [MS. BORMANN]: Yes, Judge.

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

23 Mr. Harrington, I note that Mr. Binalshibh is absent,

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1 but it appears that the rest of your team is consistent with
2 the last open session; is that correct?

3 LDC [MR. HARRINGTON]: That's correct, Judge.

4 MJ [Col COHEN]: All right. Thank you.

5 I recognize that Mr. Ali is here. Mr. Connell, I
6 think this is -- your team is consistent with the last open
7 session; is that correct?

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

9 MJ [Col COHEN]: All right. Thank you.

10 And I recognize that Mr. Hawsawi is also absent;
11 otherwise, Mr. Ruiz, is your team consistent with the last
12 time we were in open session?

13 LDC [MR. RUIZ]: Yes, it is.

14 MJ [Col COHEN]: All right. Thank you.

15 Trial Counsel, do you have any witnesses to testify
16 with respect to the absences?

17 CP [BG MARTINS]: Your Honor, we do. Major Dykstra will
18 be examining them.

19 MJ [Col COHEN]: All right. That is fine.

20 ATC [Maj DYKSTRA]: Good morning, Your Honor.

21 MJ [Col COHEN]: Good morning.

22 [END OF PAGE]

23

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1 LIEUTENANT COMMANDER, U.S. NAVY, was called as a witness for
2 the prosecution, was sworn, and testified as follows:

3 **DIRECT EXAMINATION**

4 **Questions by the Assistant Trial Counsel [Maj DYKSTRA]:**

5 Q. And just as a couple of preliminary matters, are you
6 a lieutenant commander in the United States Navy?

7 A. I am.

8 Q. And you are assigned as an assistant staff judge
9 advocate at the Joint Task Force-Guantanamo?

10 A. Yes, sir.

11 ATC [Maj DYKSTRA]: Your Honor, permission to approach the
12 witness?

13 MJ [Col COHEN]: You may.

14 Q. For purposes of the record, I just handed what is
15 marked as Appellate Exhibit 660, 660A, and 660B to the
16 witness. And, Commander, could you please tell me what are
17 those forms?

18 A. They're the statement of understanding --
19 understanding, rather, right to be present at commission of
20 proceedings waiver of rights forms.

21 Q. All right. Thank you. Did you have the opportunity
22 to advise Messrs. Bin'Attash, Binalshibh, and Hawsawi of their
23 right to attend today's proceedings?

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1 A. Yes, sir.

2 Q. And what time did you do that this morning?

3 A. I did so at 6:22 for Bin'Attash, at 6:38 for alshibh
4 [sic], and at 6:29 for al Hawsawi.

5 Q. Did you do that in Arabic or English?

6 A. For alshibh and al Hawsawi, they elected to have it
7 read in English. For Bin'Attash, he elected to have it read
8 in Arabic -- or rather to read it in Arabic while I read it in
9 English.

10 Q. Thank you. And when you advised them of their
11 rights, did you adhere to the advisement forms that you have
12 in front of you right now?

13 A. Yes, sir.

14 Q. And what did they tell you after you advised them?

15 A. They signed the forms to voluntarily waive their
16 right to be present today.

17 Q. And do you have any cause to believe that their
18 choice was involuntary?

19 A. No.

20 ATC [Maj DYKSTRA]: And that's all I have, Your Honor.

21 MJ [Col COHEN]: All right. Thank you.

22 Lieutenant Commander, if I could please see those
23 documents?

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1 WIT: Yes, sir.

2 MJ [Col COHEN]: Ms. Bormann, have you had the opportunity
3 to review AE 660, which is -- which purports to be a statement
4 signed by your client?

5 LDC [MS. BORMANN]: Yes, Judge, and we have no questions
6 of this witness.

7 MJ [Col COHEN]: All right. Thank you.

8 Mr. Harrington, similar question. I have AE 660A,
9 which purports to be a statement signed by your client. Have
10 you had the opportunity to see that?

11 LDC [MR. HARRINGTON]: I have, Judge, and I have no
12 questions.

13 MJ [Col COHEN]: All right. Thank you.

14 And then finally, Mr. Ruiz, AE 660B purports to be a
15 statement signed by your client. Have you had the opportunity
16 to see that document?

17 LDC [MR. RUIZ]: I have.

18 MJ [Col COHEN]: Any questions?

19 LDC [MR. RUIZ]: No, thank you.

20 MJ [Col COHEN]: Okay. I note standing objections with
21 respect to the name of the witness. All right.

22 I have no further questions. You may be excused.

23 Thank you.

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1 WIT: Yes, sir. Thank you.

2 [The witness was excused.]

3 MJ [Col COHEN]: I'm handing these to the court reporter.

4 The commission finds that Mr. Bin'Attash,
5 Mr. Binalshibh, and Mr. Hawsawi have knowingly and voluntarily
6 waived their right to be present at today's session.

7 There's just a few initial comments that I would like
8 to make, and then we'll proceed into today's AE exhibits that
9 we intend to argue.

10 I know that counsel are just getting the opportunity
11 to know me. I'm sure we'll get to know each other well as we
12 continue. But I just wanted to let you all know a few guiding
13 principles that are important to me.

14 First is integrity first. If I tell you something,
15 it will always be what I believe to be accurate, period. And
16 I will stick by my word. It would have to be some
17 misunderstanding of the law, it would have to be some complete
18 misunderstanding of the facts, but if I tell you something, I
19 stick by my word. To the extent that anyone ever doubted that
20 that is the case with me, that is not. My integrity is
21 everything to me.

22 As we all know, you can spend your entire lifetime
23 building up a reputation of being just, and in a matter of

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1 moments, you can lose that reputation. That matters to me on
2 multiple grounds. It goes to the core of who I am.

3 So if you ever hear anything from me and then you
4 find out, oh, that doesn't sound right, you can come back to
5 me. If I have incorrectly stated something that I believe to
6 be true or that I have asserted is the way that I'm going to
7 do things, by all means come back to me, because that would
8 never, ever, ever be my intent as a judge. And you can expect
9 that every single issue that I deal with in this case.

10 My grandmother had a great influence on me. First
11 thing she taught me as a young man is that you catch more
12 flies with honey than with vinegar. That matters to me. You
13 can expect that I will be forthright, that I will be polite,
14 that I will treat you with the dignity and respect that I
15 would hope that you would reciprocate under the Golden Rule.
16 I'm not saying you haven't. I'm just letting you know this is
17 where -- this is the core of who I am as a person.

18 I respect the positions of the parties. I have done
19 your positions. What I do is completely different from
20 everything that you do. In this particular case, not only
21 have I been asked to rule on -- ensuring a fair trial, but to
22 sit in judgment in many instances of my own country and its
23 actions. I get the weight of that decision. I get the weight

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1 of the impact of the decisions that I'm making. Never
2 underestimate the weight that I feel each and every day with
3 the decisions that I make that impact the lives of people all
4 over the world.

5 You can expect that having a fair trial for everyone
6 involved is the first and foremost responsibility that I have.
7 You can also expect that I will look to the rules every single
8 time. In fact, my strategy as a litigator was always to start
9 with what are the instructions that go to the jury and what
10 are the Military Rules of Evidence that are potentially
11 applicable here, because that should frame everything that I
12 do from that point, whether I'm a prosecutor or a defense
13 counsel because that's the law, and we are a jurisdiction that
14 applies the law to the facts.

15 I expect that there will be public scrutiny of what I
16 do with every decision that I make. I expect that you all
17 will be either pleased, displeased, or perhaps indifferent to
18 the decisions that I make. That comes with the job. I wear
19 that responsibility, and I accept that responsibility; but
20 what others think of the decisions that I make will never
21 impact the decisions that I make. I will do what I believe to
22 be right under the law and in accordance with the facts.

23 I issued a trial scheduling order in this case, and I

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1 established dates. The dates that I picked were what I
2 believed to be consistent with the interests of justice, the
3 needs of the parties, and the obligation that I have to move
4 these matters of substance forward. Those of you who have
5 complied with the order, thank you. It is appreciated.

6 Consistent with that order, with respect in
7 particular to the motions to suppress, the way I drafted that
8 trial scheduling order was essentially to say even those
9 motions that are technically filed to suppress are the not the
10 final motions, and that was intentional. As you all know,
11 that was -- that was completely intentional in this case
12 because I understood the issues that were out there. And
13 everything that I have said about those motions to suppress is
14 true and what I intend to do.

15 So the reality is, is even if a motion to suppress
16 was filed two months ago, it's not the real motion to
17 suppress, because that's be coming on the final filings based
18 on all of the evidence that's presented. It was merely an
19 opportunity to start this process.

20 At the end of the day, we need to decide issues like
21 in personam jurisdiction, subject matter jurisdiction, what
22 evidence can be presented, whether there is derivative
23 evidence under M.C.R.E. 304, all of those things which impact

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1 whether or not we ever get to trial in this case.

2 And for seven years, as I look at it, we have been in
3 this quagmire of no order or process to addressing these
4 substantive issues. And you can expect that I -- I am not
5 going to do that. When I read 949, the first thing that
6 should have happened in this case was a scheduling conference,
7 pretrial conference that would have established discovery
8 dates for classified information. That's what the law says.

9 And so seven years later, I'm coming back and looking
10 at that law and saying I'm going to right what I believe
11 should have happened in the first place. Once again, looking
12 at the law.

13 We're going to talk about 650 today. And the purpose
14 of 650 is not to give anyone more rights than what they should
15 have, but to actually have an open and frank discussion about
16 what the rights really are under the statute and the Rules of
17 Evidence. That's it. That's the sole intent. And because I
18 actually find it potentially beneficial to have the inputs of
19 the various parties in helping me reach those decisions, and
20 to throw out some possible interpretations that I'm
21 considering with respect to Section 949p and its various
22 sub -- you know, various dashes, whether it's 1, 2, 3, 4, or
23 5.

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1 The question I have for the government is, is I
2 realize that although the majority of the accused have filed
3 motions to suppress, some have not; although there's
4 clearly -- although you don't have to necessarily file a
5 motion, really all you have to do is make an objection and it
6 triggers the obligation for the government. That's the way
7 304 reads. That is the language of 304, a motion or
8 objection. Clearly, at a minimum, all parties, all defense
9 counsel have provided formal notice to the commission of
10 intent to file motion to suppress for lack of voluntariness.

11 M.C.R.E. 611 specifically authorizes me as the
12 military judge to control the presentation of evidence, the
13 ordering of witnesses, and all of those types of things.

14 My question for the government is: Do you wish to
15 present your case in chief with respect to all of the accused
16 starting next Monday with respect to voluntariness?

17 MTC [MR. TRIVETT]: Sir, may I have a moment to confer?

18 MJ [Col COHEN]: You may.

19 [Pause.]

20 MJ [Col COHEN]: Mr. Trivett.

21 MTC [MR. TRIVETT]: Thank you, sir. I appreciate you
22 giving me the time to confer.

23 MJ [Col COHEN]: Absolutely.

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1 MTC [MR. TRIVETT]: So the short answer is yes, we intend
2 to present our facts to show the voluntariness of the
3 statements of all five accused in this room based on the
4 commission's determination that the intent is there and that
5 the filings are there, that everyone is going to do it.

6 With that said, the way we have planned it thus
7 far -- and although there is some overlap of the witnesses, we
8 were trying to handle the issue in the order that they were
9 filed. So primarily the witnesses that were first were
10 Mr. Ali related, although there are some of them that have
11 overlap. And then we were going to turn our attention to
12 Mr. Mohammad, Mr. Binalshibh, and Mr. Bin'Attash, and Hawsawi
13 in that order, which we envision doing over the next several
14 sessions of the commission.

15 MJ [Col COHEN]: Okay.

16 MTC [MR. TRIVETT]: So I just wanted to make clear that
17 the ones we have on Monday are primarily Mr. Ali, with the
18 exception of the fingerprint, Mr. Delury and Robert Antoon.

19 MJ [Col COHEN]: All right. Thank you.

20 MTC [MR. TRIVETT]: Thank you.

21 MJ [Col COHEN]: My ruling, as I essentially reconsidered
22 Judge Parrella's ruling which set aside the suppression of the
23 statements by Judge Pohl, which is the way I look at it, I --

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1 I took a look at it, I agreed with what I did, and I modified
2 it. It is now my ruling.

3 So based on this military judge's ruling, those
4 statements are no longer suppressed at this point, and that's
5 why we're having these suppression hearings. So, therefore, I
6 see even the -- the writ that's out there with respect to
7 Judge Parrella will have no impact because I have
8 independently addressed the matter.

9 In those motions when I addressed that matter, I
10 specifically found that, while I do believe that the trial
11 court for all of the reasons I cited in my ruling has the
12 authority to issue a trial scheduling order and set deadlines
13 for motions, that I did not disagree that, to the extent that
14 I would then treat a failure to comply with that on a motion
15 to suppress, for example, as a waiver of that right to file,
16 it didn't preclude me from setting an earlier date. It also
17 does not preclude me from setting an earlier date for entry of
18 pleas.

19 In the long footnote that I provided was what was --
20 was an effort by this court to say let's try to work together.
21 Therefore, the fact that the filing deadline was missed will
22 not be treated as a waiver; however, under 611, if the
23 government wants to present its initial evidence with respect

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1 to these individuals in a particular order, you may take the
2 notice of intent -- there's nothing in 304 that precludes you
3 from taking on that burden before it technically triggers.
4 And as a matter of judicial economy under M.C.R.E. 611, I find
5 that that would be in the interests of justice and judicial
6 economy, for you to be allowed to present your evidence.

7 Then we'll deal with the issues of whether or not --
8 you know, if and when motions are ever filed, motions to
9 compel witnesses, motions to produce evidence, and whether or
10 not those burdens can be met, if you decline those witnesses
11 to be recalled. But going through your direct examination
12 just puts the information in the record, and so I will allow
13 you to do so.

14 This is no prejudice to the accused in any way,
15 shape, or form because they will still be allowed the
16 opportunity to ask for testimony of any witnesses, to ask for
17 those witnesses for cross-examination purposes, for
18 depositions, written or otherwise, and to present any evidence
19 they wish in support of their motions.

20 So in other words, I'm simply allowing under 611 the
21 government to go ahead and call its witnesses, and if they are
22 here and present, as a matter of judicial economy, I will
23 allow you to present what you would during your direct

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1 examination, making no ruling that any further testimony will
2 not be allowed. That is not what I'm saying.

3 Specifically, M.C.R.E. 611, Mode and order of
4 interrogation and presentation says specifically, "Control by
5 the military judge. The military judge shall exercise
6 reasonable control over the mode and order of interrogating
7 witnesses and presenting evidence so as, 1, make the
8 interrogation and presentation effective for the ascertainment
9 of the truth; avoid needless consumption of time; and protect
10 witnesses from harassment or undue embarrassment."

11 Those who have the not filed still have leave of
12 court -- or of the commission to make their filings.

13 And I will state for this: When I established the
14 one -- or the 11 January 2021 date for the entry of pleas, it
15 was under the hope that we would be able to take up all of the
16 substantive issues prior to the entry of pleas.

17 We'll have to go back and re-look at that, but what I
18 can promise the counsel is that I am true to my word. Every
19 date that's on there for any type of motion is automatically
20 good cause for the filing on that date, automatically. I set
21 those dates for a reason, and we'll set those -- and you can
22 also ask for extensions. I mean it when I say what I say.

23 We will now take up AE 538 and AE 561. To the extent

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1 they overlap, you may argue them separately, together. Either
2 way, they do dovetail.

3 LDC [MR. SOWARDS]: Excuse me, Your Honor.

4 MJ [Col COHEN]: Mr. Sowards, yes, sir.

5 LDC [MR. SOWARDS]: Just one point of clarification is
6 whether the military judge, also during this session or today,
7 intends to hear argument on AE 652 and 639M.

8 MJ [Col COHEN]: Sir, give me one second. Those ----

9 LDC [MR. SOWARDS]: Thank you very much.

10 MJ [Col COHEN]: They were not on my mind at the time, but
11 that does -- let me take a look real quick.

12 LDC [MR. SOWARDS]: Yeah. I just ask because there was at
13 some point some passing reference, and we didn't know whether
14 that had been -- that had changed during the course of events.

15 MJ [Col COHEN]: Yes. We can -- as time permits today or
16 at least at some time while we are here in the commissions, we
17 will definitely address 652. Today would be great, if we
18 could do it. Let me get through -- we'll call that a
19 nonsubstantive motion because I understand the impact that it
20 has, but let me get through some of these more weighty
21 matters, and then as time permits. But yes, definitely while
22 we're here.

23 And then 639, sir, can you remind me what that was?

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1 I'm looking at my digitals here and I don't have that one
2 right off the top of my head.

3 LDC [MR. SOWARDS]: Yes. I believe that referred to our
4 discussion of the actual trial scheduling order.

5 MJ [Col COHEN]: That's right, thank you. Yes. Yes.
6 We'll take up both of those matters as time permits and
7 definitely before we adjourn for the next session.

8 LDC [MR. SOWARDS]: Okay, no rush. We were just seeking
9 your guidance.

10 MJ [Col COHEN]: No, thank you, sir. I appreciate it.

11 LDC [MR. CONNELL]: Sir?

12 MJ [Col COHEN]: Yes, Mr. Connell.

13 LDC [MR. CONNELL]: If I may chip in there. My
14 thinking -- or our position, I should say, is that I think
15 that we will learn a lot over the next couple of weeks about
16 how this process is going to work, probably some ground rules
17 will be negotiated and sort of tested. And I thought at the
18 end of that period of time would be an excellent time to talk
19 about paths forward and scheduling and those sorts of things
20 because we'll have a much more realistic idea of what the
21 situation is.

22 MJ [Col COHEN]: Okay. Let me think about that as well.

23 Thank you. All right.

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1 Let's go ahead and take up 538 and 561.

2 LDC [MR. RUIZ]: Judge, may I be heard?

3 MJ [Co] COHEN]: You may, Mr. Ruiz.

4 LDC [MR. RUIZ]: Good morning, Judge.

5 MJ [Co] COHEN]: Good morning.

6 LDC [MR. RUIZ]: Judge, just a couple of matters in terms
7 of preservation of the record on behalf of Mr. al Hawsawi. I
8 appreciate your recitation this morning. I think it's clear
9 and understandable. However, I do want to make a couple of
10 points clear on behalf of Mr. al Hawsawi.

11 Mr. al Hawsawi, from our perspective at this point,
12 has not communicated intent to file a motion to suppress,
13 certainly, not a legal intent in order to do that.

14 As you know, we have been clear on the record in
15 terms of what 524 comes out of. The responsive pleadings that
16 we filed in 524, and then subsequently thereafter, the new AEs
17 that were given for the motion to suppress were all filings
18 and motions that were responsive in nature; that is, they were
19 responsive to an issue that was thrust upon us at a time and a
20 choosing which was not our own. And so to that extent the
21 timelines that we submitted, the estimates that we gave to the
22 commission were all responsive in that nature.

23 So from our perspective and from Mr. al Hawsawi's

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1 perspective, as we stand now, we have not given a formal
2 notice of intent to file a motion to suppress before this
3 commission.

4 I will also feel compelled to say, Judge, after
5 listening to your comments this morning, and I think you know
6 this, that there is no personal offense that I hope you
7 take ----

8 MJ [Col COHEN]: Oh, no. Absolutely. And that's why I
9 noted. You -- we didn't disagree on what the law was with
10 respect to whether you waive or any of that kind of stuff.
11 I'm not -- like I said, I assume good intent. I understand
12 you're doing what you believe is correct, and there are
13 limitations to what I can -- to what my powers are as well.

14 LDC [MR. RUIZ]: Understood.

15 MJ [Col COHEN]: So I understand.

16 LDC [MR. RUIZ]: And I particularly understood and
17 appreciated your sharing your personal relationship with your
18 grandmother. I also was raised by my grandmother, and she
19 instilled certain values and principles that are core abiding
20 principles in my beliefs as well, and those are also that I
21 say what I mean and I mean what I say.

22 And then when I take on an obligation, I do it to the
23 best of my ability, and in this case, as you are well aware,

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1 that singular obligation is to represent Mr. al Hawsawi to the
2 best of my ability within the law and the ethics and to make
3 the best decisions that I think are in his interests and in
4 his interests alone. I think that is my mission. I think
5 that's what I'm here for. And that drives all of my
6 decision-making in all of the positions that I take before
7 this commission.

8 I do take you at your word. So far, I have not seen
9 other reason not to. But there are a couple of particular
10 issues that I think are worth highlighting, since you said,
11 you know, let me know if I have said something before.

12 Two in particular. Number one is your steadfast
13 commitment to individualized justice. From the very beginning
14 when we went through the voir dire process, we talked about
15 that. We talked about the complexity of this case, the fact
16 that it is, in fact, a co-accused case, and whether you were
17 committed to delivering individualized justice despite the
18 fact that we're in one courtroom on one side of the aisle and
19 at times we face common issues and issues of common interest.

20 And as I recall, your answer to that was decidedly
21 yes, I'm absolutely committed to individualized justice, and I
22 understand that at different times, different people will take
23 different approaches to the same issue. So that's number one.

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1 Number two, was your recitation in relation to the
2 former CIA interpreter who had access to Mr. al Hawsawi's
3 attorney-client privileged work product. And I took note of
4 that particular discussion on the record, even though I wasn't
5 directly involved, because you said something that mattered
6 quite a great deal to me, and it went along the lines of
7 individualized justice that you had already spoken about; and
8 that was that this commission dealt with the issues that were
9 before it, and thus were the legal issues that were raised by
10 the parties and no other issues alone.

11 You may recall that was in the context of filings
12 being had about the intent of defense counsel and whether, you
13 know, counsel had some intent to bring the witness or out the
14 interpreter in court. And you very firmly narrowed the issue
15 to the legal issue that was before the commission and said
16 this is what I'm focused on, the legal issue, and that's what
17 I'm going to address.

18 And so when I look at that and when I look at what
19 you've set forth this morning, I see a little bit of
20 inconsistency in that; and that is, there is no legal issue in
21 controversy before this commission in terms of
22 Mr. al Hawsawi's suppression of his statements. And I will
23 tell you very clearly, it is not -- it is not born out of a

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1 desire to needlessly delay. It is not born out ----

2 MTC [MR. TRIVETT]: Sir, we're going to object at this
3 point. Is this an oral motion to reconsider your ruling?
4 Because if so, we think it should be put in writing and that
5 we should have an opportunity to respond.

6 MJ [Col COHEN]: What is the intent?

7 LDC [MR. RUIZ]: Judge, the intent is to respond to your
8 comments.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. RUIZ]: That I think, at least, obviously since
11 we're one of the parties who hadn't filed, it went to the
12 heart of our particular issue and to preserve the record on
13 this issue.

14 Number one, preserve that we have not filed an actual
15 legal challenge before the commission. Number two is to
16 comment on your own comments about positions that you've taken
17 and promises that you've made, and I think those are important
18 in terms of the ability to move forward with this process.

19 MJ [Col COHEN]: I understand.

20 LDC [MR. RUIZ]: I think it's fair for me to have an
21 opportunity to speak and to make some comments based on yours.

22 MJ [Col COHEN]: I understand.

23 LDC [MR. RUIZ]: So that's my intent.

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

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

3 MJ [Col COHEN]: All right. Thank you.

4 LDC [MR. RUIZ]: So what we have is a standing objection
5 to the government proceeding on a presentation of evidence to
6 an issue that is not before this commission.

7 As I said, our position very clearly is we have not
8 raised this issue, we have not filed any sort of intent or
9 notice of a motion to suppress for Mr. al Hawsawi, and so we
10 think it is highly improper for the government to put on
11 evidence. Even though I very well understand you've set forth
12 a procedure that would allow us later to revisit those issues
13 when the time comes for us to file that motion to suppress;
14 however, I want to make an objection to that procedure.

15 MJ [Col COHEN]: Okay. Understand.

16 LDC [MR. RUIZ]: Thank you.

17 MJ [Col COHEN]: Thank you.

18 I'll just say this, and we'll get back to 538 and
19 561. Individualized justice is important to me. I don't know
20 to what extent the parties have thought about this, but I have
21 already started analyzing the whole issue of derivative
22 evidence, spillover, all those other kinds of things, and what
23 instructions I'll be giving in this case. Like I said, that's

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1 where I start. I start with the rules and the instructions
2 that might go to a jury. So I am concerned about that, and
3 all of those issues.

4 I will say this, though, that while I concur that a
5 formal objection and motion has not been filed, I also see
6 under M.C.R.E. 611 that the government presenting evidence,
7 they could present that in affidavits, they could do it
8 however they wanted to do. But if a witness is already here
9 and already testifying about something else, that if they also
10 wanted to include that evidence, that that is consistent with
11 M.C.R.E. 611. It does not preclude that witness testifying
12 again or anywhere, all of which goes to the issue of
13 individualized justice.

14 But I must match the needs of both sides of the
15 parties in determining and applying the rules. It's not a
16 one-sided rule.

17 All right. 538, 561. Mr. Connell, I think you're
18 going to make it up here this time.

19 LDC [MR. CONNELL]: Sir, I have produced to the parties
20 and submitted for review through the court information
21 security officer, including presenting a fresh copy this
22 morning at 0800, a set of slides which have been marked as
23 AE 538U. And since it appears to be efficient to do 538 and

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1 561 at the same time, I will also tell you that I have done
2 the same with a set of slides -- or really just two slides,
3 but marked 561Q (AAA).

4 I would request at this time permission to have the
5 feed from Table 4 and display those slides to the court and to
6 the gallery.

7 MJ [Col COHEN]: One second. You may.

8 LDC [MR. CONNELL]: Thank you, sir. Sir, I'll begin while
9 that's coming up.

10 Prior to the attacks of 9/11, there was a policy in
11 place in the Department of Justice, and really throughout the
12 United States, but the Department of Justice was the key,
13 which became known as "the wall." It was the idea that
14 intelligence information should not be used in criminal
15 investigations. And people have debated the wisdom of that
16 policy and people have debated the strength of that policy.

17 But one thing that is completely clear is that, in
18 the months following 9/11, that policy went away. Informally,
19 it went away in the early actions of the FBI and the CIA, but
20 formally it went away in the Homeland Security Act of 2002,
21 which required information sharing among all the members of
22 the intelligence community, which was accomplished in much the
23 same way that it had been accomplished before 9/11, through

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1 intelligence community message traffic, which most members of
2 the intelligence community have routine access to.

3 That doesn't mean every single person, but when a
4 person, for example, in the FBI doesn't themselves have access
5 to the message traffic, they have an analyst or an integration
6 center or an ops center who does have access and acts
7 accordingly.

8 The -- when we began the argument two or so years ago
9 on 538, the idea that the FBI and the CIA were integrated in
10 the Rendition, Detention, and Interrogation Program was a new
11 one to this commission. Special Agent Perkins in December of
12 2017 had testified in just a few answers to a few questions
13 about her submission of requirements or writing up of
14 questions, as she said, to the -- for submission to the CIA.

15 Since that time, the government has produced and
16 declassified -- has produced an enormous amount of information
17 and declassified some information about the relationship
18 between the CIA and the FBI and their integration in the RDI
19 program. I think at this point it is fair to say that the FBI
20 was a full, albeit junior, partner in the Rendition,
21 Detention, Interrogation program.

22 I'm going to talk about a few of the illustrations of
23 that, but the main topic that we're here today is to discuss

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1 what do I still think exists that the government has not
2 turned over, so delta between what they've turned over and
3 what we think exists.

4 And that has been a constant topic of discussion
5 between the government and Mr. al Baluchi's team, so -- and
6 I'm going to go into a couple of -- just a couple of those
7 things to show you that these are things that the government
8 has worked hard on, and we have really reached a place --
9 we've reached some places where the government is still
10 working and some places where we simply have differences of
11 opinion that require judicial adjudication.

12 So initially -- and this is covered -- and our
13 framework is -- for Mr. al Baluchi's position is in 538C, in
14 which we laid out some of the areas that we think exist. The
15 first of those is about FBI participation in the negotiations
16 over the stand-up of the RDI program. And it requires a
17 little bit of history and a little bit of documentation.

18 The history is that on or about 28-29 March 2002,
19 Abu Zubaydah was taken into U.S. custody, and a debate ensued
20 as to his -- he was in -- his health was in a life-threatening
21 condition at the time. There was a debate ensued in the
22 United States Government over what to do in this situation.

23 What actually happened was that a group -- and at the

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1 time, to be fair to those involved, it was pretty ad hoc,
2 right? This was not something that had been planned for,
3 maybe it should have been but it wasn't. So FBI, including
4 Special Agent Soufan who we have requested as a witness,
5 another FBI agent, and eventually psychologists and CIA were
6 involved.

7 In those early days, the -- from the end of March
8 through June 2002, the FBI was 100 percent full partner,
9 right? It was just a joint FBI/CIA process, and that's not
10 simply at the sort of ground level, but it's also at the
11 policy level, too.

12 If I may have access to the document camera, I have
13 an unambiguously marked document released and under the
14 Freedom of Information Act, which is also found in the record
15 at AE 538C (AAA 2nd Sup) Attachment G.

16 MJ [Col COHEN]: Does the government know what you're
17 putting up?

18 LDC [MR. CONNELL]: Yes. We discussed them this morning.

19 MJ [Col COHEN]: No problem. Just wanted to make sure.
20 There will be the procedures. I will just make sure that the
21 opposing party has seen the document.

22 LDC [MR. CONNELL]: Of course.

23 MJ [Col COHEN]: And then based on the protective order

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1 you have requested, which I think is now out, I'll allow you
2 to proceed. Thank you.

3 LDC [MR. CONNELL]: Thank you, sir. And just to be 100
4 percent clear, we also had a discussion this morning using
5 concrete examples of what we considered to be unambiguous and
6 ambiguous markings.

7 MJ [Col COHEN]: Perfect.

8 LDC [MR. CONNELL]: So there are some documents that might
9 be in the record but I will not be showing because the
10 markings were not as clear as one might wish.

11 MJ [Col COHEN]: All right, understand. Thank you, sir.

12 LDC [MR. CONNELL]: Luckily in this situation these --
13 many of the documents are released in litigation and so they
14 are completely unambiguous and they have a formal Unclassified
15 for Public Release marking on the top of them.

16 This is one of many cables that was sent from the
17 station where the interrogation of Abu Zubaydah was taking
18 place back to headquarters. So in those early days, we're not
19 having dissemination throughout the intelligence community,
20 we're really having a bilateral conversation between the
21 station and the -- and headquarters.

22 But the point that I want to bring to your attention
23 out of this document is how even -- all of these early

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1 documents are marked with -- as the very first item that to --
2 to a request that substantive portions of this information be
3 coordinated with FBI Headquarters. It's marked "attention" to
4 a specific person who has been redacted.

5 This particular document, Attachment G, concerns an
6 event which took place in late June of 2002 which became known
7 as the crisis precipitation event. And the crisis
8 precipitation event is when the FBI and CIA agents who were
9 involved, who had their differences and their commonalities,
10 decided that what they were doing was not working and that
11 they were going to precipitate a crisis with Abu Zubaydah.

12 And the document -- which Attachment G describes in
13 some detail the crisis precipitation event. And when the
14 crisis precipitation event takes place, six security staff
15 enter the cell, handcuff him, hood him, and then the
16 psychologist goes in and cuts the clothes off of him. He is
17 handcuffed. So at this point he's naked, he's grabbed, he's
18 handcuffed, and they tell him essentially, "We're done messing
19 around with you. Things are about to get ugly." The FBI was
20 a full participant in that event.

21 And what happens then is that they leave Abu Zubaydah
22 in isolation for a substantial period of time, about six
23 weeks. And during that six weeks, the psychologists who are

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1 involved, the FBI agents who are involved fly back to
2 Washington, and a series of meetings take place.

3 One document, somewhat ambiguously marked, so I'm not
4 going to show it, which has been released under the Freedom of
5 Information Act is found at AE 538C (AAA 2nd Sup)
6 Attachment S, it's the fax cover sheet for setting up the
7 meeting that I'm about to discuss. It has -- it has the names
8 of people who were involved from Office of Secretary of
9 Defense, from the Department of Justice, from the Joint Chiefs
10 of Staff, from the Department of State, from CIA, from the
11 National Security Council, from the DoJ and FBI, and from
12 CENTCOM and SOUTHCOM.

13 The meeting -- the topic of the meeting, however, is
14 found at the same AE number but Attachment T, and it talks
15 about a meeting being scheduled for a redacted date in July to
16 discuss the future of the Abu Zubaydah interrogations.

17 It says that they will meet in the CTC, which stands
18 for Counterterrorism Center, which is a subset of the CIA, in
19 the conference room, and it lists people who are attending,
20 including in the fourth line down of the attendees, the
21 Abu Zubaydah interrogation team. I suggest that probably
22 includes Special Agent Soufan and another FBI agent, as well
23 as Mitchell and some others -- Dr. Mitchell and some others.

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1 But then we have some information about what actually
2 happens, and I apologize the next one is not -- did I take
3 that away too soon, sir?

4 MJ [Col COHEN]: No, I have it up on my computers.

5 LDC [MR. CONNELL]: Okay. Very good.

6 In AE 538C (AAA 2nd Sup) Attachment U, there is a
7 discussion or a description and -- you know, Freedom of
8 Information documents are not always released in the best
9 possible readability, so I'm sorry that it's difficult to
10 read. But it talks about how on 1 July 2002 -- I forget it
11 myself -- Headquarters Alec -- and Alec is a reference to Alec
12 Station, which was the nickname of the Usama bin Laden unit of
13 the -- of the CIA -- to discuss the post-isolation phase of
14 Abu Zubaydah interrogation. The cable goes on to describe the
15 post-isolation strategy of more aggressive, as they say,
16 interrogation methods.

17 Now, the interrogation methods prior to the isolation
18 phase were no picnic. There are discussions of confinement in
19 small boxes, high-chaining, et cetera. But eventually the
20 Counterterrorism Center, as noted in paragraph 7, has
21 emphasized that we should not -- slash, not, rule out any
22 method of interrogation whatsoever so long as the
23 interrogation team believes it will be effective.

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1 There are some additional discussions that come out
2 of that meeting, and one of them is a meeting on July 13 --
3 excuse me just one moment -- oh, July 13 of 2002, and I'm
4 referring now to AE 538C (AAA 2nd Sup) Attachment Y, which
5 on 20 -- excuse me, 3 August 2002 the -- there was formal
6 approval for the next phase interrogation.

7 Now, informal approval had been given on 25 August --
8 July -- 25 July 2002 for use of every technique except
9 waterboarding. The 3 August, which you will note comes after
10 the 1 August 2002, is Mr. Hughes' memoranda that he issues
11 authorizing the use of these techniques, often called the
12 torture memos.

13 But the -- it notes that the CIA plans to implement
14 more aggressive techniques. It goes on to say -- and I'm on
15 the second page of that same document, on paragraph 5 -- that
16 on 13 July 2002, Acting General Counsel John Rizzo and CTC/LGL
17 met with the NSC Legal Advisor, John Bellinger; Deputy NSC
18 Legal Advisor; Deputy Assistant Attorney General John Yoo; and
19 another attorney from the Office of Legal Counsel, as well as
20 the head of the Criminal Division of the Department of
21 Justice, and the Chief of Staff to the Director of the FBI,
22 Mr. Levin, where they received a full brief as to the various
23 techniques.

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1 The -- further down it discusses -- it memorializes
2 that the CIA and FBI staff employees engaged in the
3 interrogation of Abu Zubaydah, who I've talked about before
4 are complimented by expert personnel, which I assume means the
5 psychologists who became the architects of this torture
6 program.

7 The lore around this meeting -- and if I may have the
8 feed from Table 4 again, please -- the lore around this
9 meeting is that Mr. Rizzo stated formally on behalf of the FBI
10 that the FBI would not be directly involved in any enhanced
11 interrogation techniques. It's not reflected in this cable.
12 Maybe it's reflected in the notes that we haven't seen or the
13 summary of conclusions or the other artifacts of the
14 interagency process.

15 But those July 2002 documents are the first category
16 of information that we are seeking in this AE 538 because
17 the -- yesterday the military commission asked me a question
18 of how much of this information did I receive from the
19 government. All of the documents that are attached in the
20 second supplement that I've shown you today were obtained by
21 the ACLU under the FBI process -- excuse me, ACLU under the
22 FOIA process or released in litigation of some of the victims
23 of Dr. Mitchell and Dr. Jessen in a lawsuit against them.

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1 The government has not provided -- and so this is a
2 place where we need a relevance determination. It's my
3 understanding that the government feels that this information
4 is not relevant and has declined to turn it over on that
5 basis. This is a place we need a legal judgment because the
6 parties have, I think, essentially reached an impasse.

7 There is one carveout to that, however, which is that
8 we have been engaged in a long-running negotiation with many
9 iterations of -- of enormous specificity with the government
10 over production of some of the Abu Zubaydah documents, as well
11 as some of the Majid Khan documents we're going to talk about
12 later, but Abu Zubaydah is what's important here.

13 And I'll just skip ahead for a moment, and you will
14 see that the last thing in my timeline here is the
15 September 26, 2002 cable which -- in which Dr. Mitchell
16 proposes that the Abu Zubaydah interrogation become the
17 concept of operations. And the SSCI later finds that
18 essentially Abu Zubaydah interrogation became a blueprint for
19 the later investigations -- interrogations which makes it
20 important.

21 I was addressing the carveout, however, and the one
22 carveout is that the -- in a long series of back-and-forths,
23 we have been negotiating with the government over the Abu

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1 Zubaydah documents. And on Thursday, the government produced
2 the first of -- the first Abu Zubaydah document, and it was
3 also -- that document also happened to be chronologically the
4 first cable that was ever sent from the station. And so what
5 I believe -- and the primary person that we're negotiating
6 with doesn't happen to be present right now, but the -- I
7 believe that the government is working -- is reviewing and may
8 produce more documents relating to the lead-up to this, the
9 Abu Zubaydah part that I showed you a little bit of right at
10 the beginning. So that's the carveout.

11 But we don't have any commitment from the government
12 on the July planning meetings, and so that is definitely -- I
13 think it would speed up the process if you were to make a
14 ruling that the Abu Zubaydah documents which demonstrate
15 FBI/CIA collaboration in the early part were relevant; but
16 certainly, we're asking for that with respect to the July 2002
17 meetings.

18 MJ [Col COHEN]: Okay. So let me just ask you this, and,
19 you know -- or remind everyone of the caveat, I have not made
20 a decision because I need to you help me understand this.

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

22 MJ [Col COHEN]: So when I look at like 538C, the document
23 you were just talking about, I believe you said was

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1 Attachment Y, I think that's what it is ----

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

3 MJ [Col COHEN]: ---- I mean, that document in and of
4 itself says the CIA -- that's unclass, right?

5 LDC [MR. CONNELL]: Yes, sir, it is.

6 MJ [Col COHEN]: CIA and FBI staff employees engaged in
7 the interrogation of Abu Zubaydah. That's -- that's -- so at
8 the very beginning, the FBI was there with the CIA engaging in
9 these interrogations, I guess. So -- so the question that I
10 become is at what point -- at what point -- what exactly are
11 you looking for -- because that's where I have to look at, is
12 what point are we looking for -- what exactly are you -- do
13 you believe -- I understand that this exists, but what -- what
14 do you believe that might show that you ----

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

16 MJ [Col COHEN]: ---- don't already have? Like I'm not
17 talking about -- because I'm not saying this one document is
18 sufficient. What I'm saying is is -- but clearly this could
19 be some evidence from which a party could argue that from the
20 very beginning the FBI was, you know, tied at the hip with the
21 CIA in this process.

22 LDC [MR. CONNELL]: Right. And that's the classic dilemma
23 of the discovery motion to compel, of course, right?

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1 MJ [Col COHEN]: Right.

2 LDC [MR. CONNELL]: Because if I walk in and say, you
3 know, I have this suspicion that there's this thing out there,
4 a judge is, you know, not -- is understandably going to say,
5 well, you know, your imagination is fine, Mr. Connell, but how
6 do we know that that sort of thing exists?

7 MJ [Col COHEN]: Right.

8 LDC [MR. CONNELL]: On the other hand, you know, diligence
9 on our part in scouring the open source for information which
10 is available should not preclude us from the discovery process
11 because ----

12 MJ [Col COHEN]: Right.

13 LDC [MR. CONNELL]: ---- one thing that we can tell from
14 some of these documents is a lot of important things are
15 redacted out of them.

16 MJ [Col COHEN]: Okay.

17 LDC [MR. CONNELL]: The date of the meeting, for example,
18 the attendees of the meeting. And I've given you my guesses
19 this morning as to Special Agent Soufan and to another, and on
20 all but one occasion Dr. Mitchell and others -- but I don't --
21 those are like my inferences that I've drawn.

22 MJ [Col COHEN]: Copy.

23 LDC [MR. CONNELL]: If there's actual evidence of that

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1 available to the government which I -- which, given the amount
2 of time that we've spent negotiating over the Abu Zubaydah
3 documents, I feel confident that they have reviewed, and I
4 also -- I feel equally confident that they have made a
5 reasoned judgment, as prosecutors are required to do, that the
6 material is not discoverable. Which is why we have come to
7 you for ----

8 MJ [Col COHEN]: Right.

9 LDC [MR. CONNELL]: ---- the legal determination.

10 And the -- I suspect that they may request 505
11 substitutions or something else. But the 505 substitutions in
12 many cases -- and this is not in every case, right? We have
13 occasions where we have a FOIA document and a 505
14 substitution, and the FOIA document actually has a lot more
15 information than the 505 substitution.

16 But the one thing that we have here is that we have
17 UFIs, right? So if there is a person who has -- whose
18 identity is classified, having a UFI for them is a lot better
19 than having a white piece of tape over a FOIA redaction.
20 Because then we can either work with the government for a
21 substitution or call the person as a witness, as necessary,
22 submit -- request a deposition or a written deposition, right?
23 There are ways to acquire that evidence which is not available

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1 to us simply from the FOIA document.

2 I'm presenting my inferences to you today and in good
3 faith, and they're my best legal judgment, but having an
4 actual document would be much more powerful. Especially when
5 it comes to talking to members, because it's a difference
6 between evidence and the argument of counsel.

7 MJ [Col COHEN]: Correct.

8 LDC [MR. CONNELL]: Right.

9 MJ [Col COHEN]: I get that.

10 LDC [MR. CONNELL]: So that's -- did I satisfactorily
11 answer your question, sir?

12 MJ [Col COHEN]: You did. I think I have a follow-on to
13 that. And like I said, I'll go back and thoroughly re-read
14 all of the motions before issuing a ruling ----

15 LDC [MR. CONNELL]: Of course.

16 MJ [Col COHEN]: ---- but just in processing what I recall
17 from these.

18 So at this particular point, the issue we're dealing
19 with now is you believe you -- the law would allow you to have
20 greater access to who was at that meeting and what -- and
21 generally what was discussed?

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

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. CONNELL]: That's correct.

2 MJ [Col COHEN]: And the purpose of that -- give me your
3 top three points that you potentially -- or facts of
4 consequence that you believe that that would go to.

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

6 The number one with ----

7 MJ [Col COHEN]: I'm not limiting you, just if you can
8 come up with the top three, that would be fine.

9 LDC [MR. CONNELL]: The number one factual consequence
10 with a star is the one that you articulated, that both
11 evidentially and rhetorically, the argument that the FBI was
12 involved from the very beginning is especially powerful.
13 Because we have substantial evidence, and we're going to go
14 into some detail about it tomorrow in the closed session, but
15 substantial evidence of FBI involvement in the RDI program
16 throughout. It's now declassified. Just as an example -- let
17 me just give you a few examples of those. The FBI -- that are
18 now declassified.

19 The FBI participated in interrogations of
20 Mr. al Baluchi, Mr. Bin'Attash, and Mr. Binalshibh in Pakistan
21 in 2002 and 2003. The SSCI Report that says -- says
22 throughout 2003, the FBI sought additional access to the
23 defendants in the black sites.

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1 We know now that the FBI detailed special agents to
2 the RDI program, and that on 15-16 May 2003, the FBI, in fact,
3 had a big conference at which -- to discuss the information
4 which had been extracted out of Mr. Mohammad in particular,
5 but others as well.

6 It's now declassified that CIA cables and other
7 intelligence products were used by the FBI, the DoD, and the
8 wider intelligence community, which certainly includes a lot
9 of unclassified documents. In this litigation we call them
10 the STA documents, for statements, but 95 percent or so of
11 those have been declassified, and you will be seeing a lot of
12 those next week during the questioning.

13 And we know that the FBI engaged in an extensive
14 dialogue with the -- with the stations which were conducting
15 the interrogations. The government has produced 85 so-called
16 requirements documents where the FBI sent questions to the CIA
17 to be -- for -- to be put to the detainees of the CIA, the --
18 sometimes with a request for -- for particular modes of
19 interrogation.

20 In those 85 that the government has produced there
21 are about 65 unique documents. Some of them are almost
22 exactly duplicative. A word or two has changed. 65 unique
23 documents. And in those 65 unique documents there are well

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1 over a thousand individual questions that the FBI was calling
2 for evidence from the CIA. And then what we're going to talk
3 about in 561 is that the government has withheld 77 documents,
4 requirements documents, where they're calling for additional
5 information.

6 MJ [Col COHEN]: So what will ----

7 LDC [MR. CONNELL]: The FBI used that ----

8 MJ [Col COHEN]: Right. So -- but I don't want to cut you
9 off entirely, but -- you just made a very good case for all of
10 the levels of evidence that you do have, and so let's focus on
11 this specific ----

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

13 MJ [Col COHEN]: Now, knowing all of that ----

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

15 MJ [Col COHEN]: ---- because I will be going back to the
16 rule.

17 LDC [MR. CONNELL]: Right.

18 MJ [Col COHEN]: Which is relevant, necessary,
19 noncumulative ----

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

21 MJ [Col COHEN]: All right. So I'm not saying it is or it
22 isn't.

23 LDC [MR. CONNELL]: Yes, sir. I understand.

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1 MJ [Col COHEN]: And you've definitely met your burden of
2 showing that this meeting happened, or at least someone said
3 it did, and that it addressed things that may be relevant to
4 the issues at hand, so if I'm looking at the necessary
5 prong ----

6 LDC [MR. CONNELL]: Yes, sir. Let me ----

7 MJ [Col COHEN]: Focus me on that.

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

9 MJ [Col COHEN]: Because a lot of times that's where these
10 rulings come down to. It's not so much the relevance of,
11 like, okay, I can potentially see the relevance here but it's
12 the necessity prong.

13 LDC [MR. CONNELL]: Right.

14 MJ [Col COHEN]: It is why is -- why is this -- how is
15 this beneficial in and of itself, this particular type of
16 evidence?

17 LDC [MR. CONNELL]: Right. I like the word "beneficial."
18 You know, what we know about the construction of that, is that
19 that relevant, necessary and cumulative standard draws on the
20 D.C. Circuit authority in the United States v. Yunis, which
21 draws a distinction between nearly relevant, like relevant
22 without anything else, and helpful to the defense, right?

23 MJ [Col COHEN]: Right.

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1 LDC [MR. CONNELL]: So helpful to the defense is the
2 Yunis -- is the D.C. Circuit standard. The Secretary of
3 Defense incorporated it into the rule. It's right there in
4 the commentary that the Secretary of Defense adopted.

5 And the -- and the other thing is we know all of that
6 becomes -- that's the Roviaro standard, right, sort of the
7 godfather of all of this.

8 So focusing on helpfulness, the -- this particular --
9 these set of meetings is important for two main things:

10 The first one is to demonstrate the early involvement
11 of the FBI. All of the other elements that I have -- that I
12 talked about in my trying to show the integration of the FBI
13 and the CIA, all occur later in the process.

14 The government has made the argument many, many times
15 that the worst abuses of these men occurred at the beginning
16 of their captivity with the CIA. And I suspect that at
17 some -- just like the government has, you know, now retreated
18 on hostilities to, well, forget '96 and forget '98, but, you
19 know, 9/11 itself would be hostilities.

20 MJ [Col COHEN]: I understand you're paraphrasing their
21 argument, so.

22 LDC [MR. CONNELL]: I am paraphrasing, yes, sir.

23 It seems to me that at some point they may retreat

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1 to, well, yes, you know, we used to say that it was a clean
2 team, but now it's just a team that didn't participate in the
3 worst abuses of the CIA, only in the inherently coercive
4 environment, as they say in their pleadings in the 628 series,
5 but not maybe the torture itself.

6 So involvement from the beginning of the FBI is
7 important to the application of 948r(a), which is the obtained
8 by torture standards that we rely on, like in -- in 628
9 itself.

10 And I'll put -- drop a footnote there to say our
11 position in 628 is not a pure voluntariness Fifth Amendment
12 claim, although in our reply I think we do a persuasive
13 argument of saying whatever other aspects of the Constitution
14 may or may not apply, a Fifth Amendment violation takes place
15 in that witness stand under your supervision, which means that
16 the Fifth Amendment does apply in this court, even if, say,
17 the Fourth Amendment does not where a Fourth Amendment
18 violation might take place in Pakistan.

19 The -- but separate from that, our other position in
20 948 -- excuse me, in our 628 pleading is itself a statutory
21 Military Commissions Act of 2009 claim that the statements of
22 Mr. al Baluchi were, quote, obtained by torture or other
23 cruel, inhuman, and degrading treatment. And the integration

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1 of the FBI into this process demonstrates the program or the
2 process by which his statements were obtained by torture and
3 CIDT. So that's item number one.

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: Item number two is that their
6 participation in these meetings is important to negate a claim
7 of ignorance on the part of the FBI; that we didn't know what
8 was going on. We didn't know that -- that we were talking
9 about tying up people and hanging them from the ceiling. We
10 didn't know that we were talking about stuffing people into
11 tiny boxes with insects. We didn't know that we were talking
12 about drowning people, either on a waterboard or on a tarp.
13 You know, we didn't -- we didn't know all that, right?

14 And their participation from the very beginning,
15 including the sort of strategy meeting, as it looks like, on
16 1 July 2002 where they're saying, "Well, what techniques do we
17 want to use? What should we pass up to the Office of
18 Legal Counsel so that they can give us top cover on?" That is
19 critically important to us.

20 So I hope that I have answered your question on that
21 particular matter.

22 MJ [Col COHEN]: Yes. So if I understand with respect to
23 this particular area, you have a desire to show, one -- and

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1 you believe this will show, based on the evidence that's
2 presented here, that the FBI was involved in the
3 decision-making process from the very beginning or very close
4 thereto.

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

6 MJ [Col COHEN]: At least upon the capture of
7 Abu Zubaydah.

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

9 MJ [Col COHEN]: And then two, then, is that in the event
10 they want to come in and say, we have clean hands, we had no
11 idea what was going on, we just did a typical FBI
12 investigation, this would potentially directly rebut that?

13 LDC [MR. CONNELL]: Yes, sir. And to put that second
14 point in a positive rather than negative way, it shows
15 knowledge. Right? If this were a criminal case and we were
16 prosecuting someone, it would be a guilty knowledge matter.
17 That they knew -- you know, if this were a conspiracy case
18 that we were prosecuting, that they knew the objects to the
19 conspiracy before they -- when they entered the conspiracy.

20 So those are -- so it's not simply dependent on a
21 claim by the FBI, but I think that we are in a position where
22 we want to affirmatively show their guilty knowledge.

23 MJ [Col COHEN]: Would this also go to claim of derivative

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1 evidence?

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

3 We have not yet as a group considered the parameters
4 of what derivative evidence means, and I'm not going to argue
5 644 in any way. We advance in our Kastigar pleading one view
6 of what derivative evidence means. Now, I'm not going to
7 mince words. It is an expansive view. All right. We feel
8 that compulsion by physical torture is just as legally
9 significant as compulsion by subpoena or order of immunity.

10 MJ [Col COHEN]: Right.

11 LDC [MR. CONNELL]: And the Supreme Court agrees with us,
12 right? We have several cases out of the Supreme Court which
13 draw that conclusion.

14 But turning to the rule itself, the -- I feel that it
15 is fairly clear that the rule itself does not -- is not
16 coextensive with the Fifth Amendment rule. You know, I'm
17 going to argue later in 650 that the confrontation rule that
18 the -- that Congress put into place for assessment of
19 reliability is not coextensive with Crawford. It's
20 coextensive with Ohio v. Roberts, right? They took an earlier
21 standard. That would be my -- that's our position, and that
22 will be my view later.

23 I think this is another place where the Secretary of

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1 Defense did not implement a rule that was coextensive with the
2 Fifth Amendment; although, as you pointed out from the Ali
3 case from the CMCR, you know, the Sixth Amendment right to a
4 public trial is coextensive with the rule. But I think this
5 is a place where probably a narrower interpretation was
6 intended. And in part we know that because the rule of the
7 M.C.R.E. is not the same as the rule of the M.R.E., right?
8 The language is different.

9 And it has some vaguer language about -- you know, a
10 prong about the interests of justice which would allow the
11 military commission to apply what standards it considered
12 appropriate. And it may be that we back into a coextensive
13 application of Rule 304(a)(5), but all I'm saying is we as a
14 group have not yet considered that question.

15 MJ [Col COHEN]: I understand.

16 LDC [MR. CONNELL]: And so depending on the scope of 304,
17 yes, it absolutely could go to the question of derivative
18 evidence. Because what actually happened here -- let's set
19 aside the law for just one moment and just look on the actual
20 facts. What actually happened, and this is well documented by
21 the minority report of the SSCI, not the main torture report,
22 but the Republican response, is that there was a waterfall
23 effect, in that people tortured information out of Abu

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1 Zubaydah, which led to the arrest -- or the capture or the
2 kidnapping, whatever you want to call it, of Ramzi Binalshibh.
3 They tortured information out of Ramzi Binalshibh, which led
4 them to be able to take Mr. al Hawsawi and Mr. Mohammad into
5 custody. They tortured information out of Mr. Mohammad that
6 allowed them to take Mr. Bin'Attash and Mr. al Baluchi into
7 custody.

8 So there's -- and we're close to being able to
9 demonstrate that. We need some of these Abu Zubaydah
10 documents to demonstrate it, but this is a -- there's a more
11 or less unbroken chain of torture that runs throughout all of
12 this. And it's not just that evidence, right? It's not just
13 statements. It's the evidence that they go out and seize;
14 it's the decisions that they make to go to their legate in,
15 you know, in UAE, for example, and try to get certified copies
16 of certain information.

17 And one of the things that we will be demonstrating
18 next week in evidence is, factually for you, sir, so that you
19 can conclude how -- how much the use of torture and
20 information derived from torture, directly from torture,
21 influenced the theory of the case.

22 You can essentially go through our charge sheet in
23 this case and match it up with cables from the CIA, even from

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1 as early as 2003, where the -- Mr. Mohammad says something
2 while he's on a waterboard and then that same -- that exact
3 same information makes it into the charge sheet in this case.

4 I mean, the 9/11 Commission report, chapters 4 and --
5 the middle chapters, the ones about what actually happened in
6 the lead-up to the attacks of 9/11, are almost entirely based
7 on information tortured out of these defendants. The -- the
8 whole narrative of what everyone in this courthouse believes
9 happened on 9/11 sprang from the dissemination of information
10 from these statements acquired by torture.

11 And I know this sounds like hyperbole, right? You
12 said earlier, I know you're characterizing the government --
13 paraphrasing the government. And that's true, right? All
14 advocates place their statements ----

15 MJ [Col COHEN]: My effort was to say that -- was to
16 basically say we don't need to reargue whether someone ----

17 LDC [MR. CONNELL]: Yes.

18 MJ [Col COHEN]: You may advocate, and it's just advocacy.

19 LDC [MR. CONNELL]: Right. But this, what I -- this last
20 couple of paragraphs that I have given Your Honor is no
21 hyperbole. We intend to demonstrate it by evidence, and that
22 is what we're beginning to do next week. So ----

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. CONNELL]: So, yes, it is important that the
2 headwaters of this waterfall are the torture of Abu Zubaydah
3 and the negotiations of the FBI and CIA over that process.

4 MJ [Col COHEN]: Copy.

5 LDC [MR. CONNELL]: There is one other minor, which maybe
6 we could call 2b or something like that, which is that I
7 suspect that when Mr. Rizzo or Mr. Levin testify, they will
8 say that at the July -- and neither -- both have declined to
9 speak with us. But I think that they will say from their
10 public statements that at the 13 July 2002 meeting, that it
11 was Mr. Rizzo's job or it was his clear duty to state that the
12 FBI would not be directly involved in use of enhanced
13 interrogation techniques or any sort of abusive technique by
14 whatever name.

15 The rest of the evidence will show how narrowly such
16 a protest was construed. And essentially what it came down to
17 is the FBI would not be in the room while the CIA was
18 torturing, but would -- might be somewhere nearby, might be
19 linked electronically, might be feeding information, might be
20 feeding questions, and some other similar structures that I'll
21 talk about in the classified session.

22 MJ [Col COHEN]: Copy.

23 LDC [MR. CONNELL]: So -- so I'll leave that there.

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1 MJ [Col COHEN]: Thank you. All right. I think I
2 understand that particular area and what you're looking for
3 very well. Let's talk about any specific -- other specific
4 pieces of evidence that you believe exist that we need to
5 address.

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

7 So my slides aren't numbered, but if we could skip
8 ahead, that's what I will do.

9 MJ [Col COHEN]: Oh, and by the way, Counsel, this will be
10 534V; U was the other classified document yesterday.

11 LDC [MR. CONNELL]: Your Honor, I can see here that it is
12 probably me misreading the handwriting. V it is. Apologies.
13 All right.

14 Well, then, let's skip ahead to the last slide, if we
15 will.

16 MJ [Col COHEN]: Okay.

17 LDC [MR. CONNELL]: Because it seems like ----

18 MJ [Col COHEN]: The interagency policy decisions?

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

20 MJ [Col COHEN]: Okay.

21 LDC [MR. CONNELL]: Sort of core points. I will skip over
22 some other things that I was going to say. If you need any
23 more convincing on the FBI/CIA integration, please let me know

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1 and I will address it. But let me ----

2 MJ [Col COHEN]: No, I definitely understand your -- your
3 position and, I'm sure, everyone else's position to the extent
4 that you're saying, hey, these guys were linked at the hip the
5 whole time and this is relevant on multiple levels.

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

7 MJ [Col COHEN]: So I -- that is crystal clear with me
8 what most likely the uniform -- or unanimous defense position
9 is on with respect to that integration and why that's
10 important.

11 LDC [MR. CONNELL]: Yes, sir. So let's skip ahead ----

12 MJ [Col COHEN]: Yeah, let's talk then about the specific
13 things that you might need.

14 LDC [MR. CONNELL]: That's right. So since we filed all
15 of these 538s and its supplements, we have continued to
16 interview witnesses and have learned a lot more about the
17 interagency process surrounding and after President Bush's
18 6 September 2006 announcement that the 14, at that time, CIA
19 so-called high-value detainees would be transferred to
20 Guantanamo.

21 Because when we started the interrogation of -- or,
22 excuse me, the questioning of Special Agent Fitzgerald and
23 Special Agent Perkins in December of 2017, the government

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1 turned over a memorandum dated 10 January 2007. I believe
2 it's in the record at AE 502YY.

3 The government turned over an FBI memo from Valerie
4 Caproni, the general counsel, to the agents which they relied
5 on, setting left and right limits: You're allowed to give
6 them a Miranda; you are allowed to say we are a different
7 agency from the ones that you were before, et cetera; so sort
8 of defining a cleansing -- so-called cleansing statement which
9 is much more narrower than Miranda. We backed out of that to
10 say, look, is this some kind of unilateral FBI decision, how
11 does this come out about?

12 And what we discovered in the Freedom of Information
13 Act process is two documents, which are attached to
14 538C (AAA 2nd Sup). And if you will give me -- if I could
15 have the court's indulgence for just a moment, I'll tell you
16 their attachment numbers.

17 Sir, I'm not going to take up your time while I look
18 for that. I'll get them back to you, but they won't be hard
19 to find.

20 MJ [Col COHEN]: Yeah. You can give it to me later.

21 LDC [MR. CONNELL]: The first is a cover sheet of a fax
22 that went out from -- I'm sorry -- is a cover sheet of a fax
23 that went out from the Office of Director of National

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1 Intelligence, summoning basically all of the members of the
2 intelligence community to a meeting to discuss a series of
3 questions.

4 And the fourth of those questions is shown at the top
5 of this slide, and this comes from the -- the top of this
6 slide comes from that fax, which is: Who should be permitted
7 to have access to the detainees now? How should such access
8 be regulated and by who?

9 The first item on that question is with a question
10 mark, "Joint FBI/CITF team to procure admissions for use at
11 trial." And the fourth bullet point is "Lawyers (prosecutors,
12 defense counsel and habeas counsel)."

13 I will pause here to talk about the environment in
14 which they found themselves. At Guantanamo, the -- at this
15 time, the -- the right to counsel at Guantanamo was fully
16 established. It had been established since 2004 in a series
17 of District of D.C. -- District of D.C. cases.

18 The -- at this time, in November of 2006, the
19 Military Commissions Act of 2006 had just been passed, which
20 included Section 7, which was later struck down in
21 Boumediene v. Bush, which stripped the federal courts of
22 jurisdiction over -- over habeas from Guantanamo prisoners.

23 The -- so at that point, the prisoners had a right to

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1 habeas counsel but not necessarily -- but not a right to
2 habeas. At the same time they clearly had a right to defense
3 counsel. The Office of the Chief Defense Counsel had been in
4 existence since the promulgation of Military Order #1 in 2003.

5 The -- at that point, I think they were on their
6 second or possibly even third actual Chief Defense Counsel,
7 the office was staffed, was up and running. Clearly, there
8 are defense counsel that could be turned to, and clearly,
9 these were what would now be called horizon cases, things they
10 intend to -- intend to charge.

11 So what I believe happened -- and to be honest, if we
12 got nothing more out of this than the second document -- an
13 unredacted copy of the second document that I'm about to refer
14 to, then I think it would demonstrate what I'm about to say,
15 which is that the second paragraph which is shown on this
16 slide is the -- is the paragraph about access to the HVDs.

17 "All representatives agreed that a law enforcement
18 team should be allowed to conduct a 'historical narrative'
19 interview of each of the HVDs."

20 Now before we move on, I will tell you that that
21 historically narrative has really confused me and we papered
22 the U.S. Government with FOIA requests for what a historical
23 narrative interview was and uniformly we got the response that

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1 we don't have any records about -- it's not that they refused
2 the records. They said, "We just don't have any records about
3 what historical narrative interviews are."

4 And then there is a redacted sentence, and my
5 suspicion is that that redacted sentence says defense counsel
6 shall not be allowed to have access to the detainees. Because
7 that's the one factor that was listed on the agenda that is
8 not answered in the summary of conclusions is: What about
9 defense counsel? What about habeas counsel?

10 Then it says, "DoD and DoJ lawyers agreed to seek
11 authorization for these interviews in the next week. All
12 agreed that this interview should happen. Request for access
13 by other groups, such as" -- I don't know. Defense counsel?
14 Habeas counsel? I don't know. "Military COCOM investigators
15 and NGOs will be determined by the prosecutors."

16 The -- what we did not know at the time we filed
17 this, but what we know now is that this interagency process
18 was only the tip of the interagency process network. Under
19 this, which might be considered a deputies committee meeting,
20 I -- I have heard -- different people have told me different
21 things whether they think this was a deputies committee
22 meeting or not, and I'm not sufficiently versed in the
23 intricacies of the interagency politics and I don't want to

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1 offend any deputies.

2 But the -- under this was the joint -- no, excuse me,
3 was the Senior Leadership Oversight Committee, which was
4 composed of senior leaders in the DoD, the DoJ and the CIA
5 which set interagency policy and resolved lower level
6 disputes.

7 Underneath that was the Special Detainee Follow-Up
8 Group interagency group, chaired at this time by Gordon
9 England, which set interagency policy specifically for, for
10 example, Camp VII, for the prosecution, for basically a
11 coordinated effort around the United States Government to deny
12 these men access to attorneys among many other policy choices.

13 And then underneath that was the High-Value
14 Prosecution Task Force composed of the Office of the Chief
15 Prosecutor, a number of FBI, CITF, and other government agency
16 bodies. And we're going to be hearing quite a bit of evidence
17 from that from the witnesses over the next several weeks.

18 So what I'm saying here is this is the highest level
19 decision that was made but it got implemented by interagency
20 bodies throughout the United States Government in a
21 coordinated way, in a way that affected Mr. al Baluchi and
22 others who were in Camp VII on a day-to-day basis and in a way
23 that certainly governed their right to counsel, their right to

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1 be held in some -- in -- not in incommunicado detention other
2 than with the ICRC, their right to access to legal materials,
3 their right to things that ordinarily occur in a jail or
4 prison.

5 And so this is the tail end of the process that I've
6 talked about, right? I think we have the evidence for the
7 middle.

8 MJ [Col COHEN]: Right.

9 LDC [MR. CONNELL]: What we're seeking is the evidence for
10 the beginning and the evidence for the end because ----

11 MJ [Col COHEN]: Let me ask some questions about that.

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

13 MJ [Col COHEN]: Okay. So at the end of the day with
14 respect to voluntariness, the law -- the rule is pretty clear
15 that I look at the totality of the circumstances. And so
16 essentially that's kind of what you're arguing here is you
17 want show the totality of the circumstances with respect to
18 these statements. You give me a couple of specifics.

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

20 MJ [Col COHEN]: For example, is it your position, then,
21 that the government has still not provided the defense in any
22 way, shape or form an affirmative statement either by
23 stipulation or otherwise about whether or not defense counsel

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1 were allowed to participate or whether there was a prohibition
2 against them?

3 LDC [MR. CONNELL]: No, it's clear that the defense
4 counsel were prohibited.

5 MJ [Col COHEN]: Prohibited. Okay.

6 LDC [MR. CONNELL]: What is not clear ----

7 MJ [Col COHEN]: All right.

8 LDC [MR. CONNELL]: And the government has never claimed
9 to the contrary on that, so ----

10 MJ [Col COHEN]: Like I said, I'm just trying to catch
11 up ----

12 LDC [MR. CONNELL]: Right.

13 MJ [Col COHEN]: ---- on exactly what were. Because you
14 referenced like, that may have talked about defense counsel
15 being prohibited. So what I'm trying to figure out is what
16 exactly is it that you -- that you believe that you need.

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

18 MJ [Col COHEN]: Because I'll go back to this ----

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

20 MJ [Col COHEN]: ---- necessary, helpful to the defense,
21 like you said, Yunis as adopted by the manual, et cetera. Got
22 it.

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

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1 MJ [Col COHEN]: So as I'm sitting here listening, I'm not
2 reaching decisions, but I'm doing that calculus in my
3 mind ----

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

5 MJ [Col COHEN]: ---- on, okay, I can theoretically see
6 where he's coming from on this, but -- so let's get into a
7 little more specifics.

8 LDC [MR. CONNELL]: Specifics. I like specifics.

9 MJ [Col COHEN]: What are we actually talking about that
10 might exist in this particular document, for example, that you
11 believe you have met your burden for showing and this is why
12 it's helpful and ----

13 LDC [MR. CONNELL]: Right.

14 MJ [Col COHEN]: ---- and why we meet the standard.

15 LDC [MR. CONNELL]: There are two basic reasons. The
16 first is that -- I'm pausing to formulate ----

17 MJ [Col COHEN]: And you may do so.

18 LDC [MR. CONNELL]: ---- this the right way.

19 For a period of time, there was a narrative that
20 there was a clean handoff between the CIA and the DoD on -- in
21 early September 2006 and that prior to that time the
22 defendants were under control of the CIA -- exclusive control
23 of the CIA, and afterward they were under exclusive control of

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1 the DoD.

2 The SSCI Report in an unclassified statement said
3 that the CIA, after the men were delivered to Guantanamo,
4 retained operational control over them. Now, as the
5 government has pointed out in 685, no further details about
6 what operational control are are supplied in the SSCI Report.

7 One of -- so the first of two theories, what I will
8 use this to prove, is that one of the things that operational
9 control meant was that through -- at least through the
10 interagency process, the CIA retained control over what we
11 would consider to be basic human rights of the men in
12 captivity; those basic human rights reflected in every -- in
13 the United States Constitution, the conventions of the United
14 Nations, and of Article 75 for -- as -- basic trial rights
15 include, if you are -- to be informed of the basis for your --
16 for your confinement; to have access to -- consistent with
17 security needs, to have access to family and to attorneys.

18 MJ [Col COHEN]: Okay.

19 LDC [MR. CONNELL]: All right. The -- and I will add one
20 more, which is normally access to one's consul, if one is a
21 foreign nation.

22 MJ [Col COHEN]: Copy.

23 LDC [MR. CONNELL]: And those sorts of decisions as to

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1 whether that would be happening or not, we will use this and
2 whatever, you know, documents surrounding it exist to
3 demonstrate that what CIA operational control meant was that
4 they never gave up over those. Their initial idea that these
5 men would be held essentially incommunicado until they died
6 did not end on September 6 of 2006, but was continued to be
7 implemented by the agency and others through the interagency
8 process during this time.

9 So the second of the bases is -- one of the things
10 that we point out in our 628 series is -- I spoke just a
11 moment ago about how the self-incrimination clause has been
12 held to apply to foreign nationals interrogated overseas in
13 every single case that has come before a tribunal. There's a
14 very significant one recently out of the Second Circuit, but
15 there's just -- there are many of them.

16 There's -- as I wrote in our reply in 628, the
17 D.C. Circuit itself, the only reason that the government's
18 argument that the self-incrimination clause doesn't apply to
19 these men, the only -- is not entirely foreclosed by
20 precedent, is that two judges in -- decided to assume that it
21 applied, and one judge said I can't assume it, I have to --
22 Judge Mikva said, "I have to go and decide this on my own,"
23 and independently decides that the self-incrimination clause

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1 applies.

2 But separate from that, the -- or flowing from that
3 is that one of the two standards which is articulated by the
4 Supreme Court in Missouri v. Seibert, S-I-E-B-E-R-T [sic], is
5 that -- is the question around self-incrimination of was there
6 a plan by police to circumvent the requirements of Miranda or
7 was it simply an accident.

8 And just as a refresher, since it hasn't really come
9 up in this series before, Seibert is the two-stage
10 interrogation case. A case where, on a much smaller time
11 scale than we're dealing with here, obviously, but where the
12 police have a question-first policy: They question a person
13 outside Miranda, and then they administer Miranda and then
14 they go back and question a second time.

15 And it's like a 4-1-4 decision, so there are really
16 two standards that have emerged out of it and the D.C. Circuit
17 hasn't chosen which one yet, but the one thread that runs
18 through that case is: Was this a policy decision which was in
19 favor of a self-incrimination clause violation or was this
20 some sort of accident?

21 And so what we will seek to use through these
22 interagency policy documents is that this was a policy
23 decision. This was not, you know, a -- the problem of the

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1 battlefield where, you know, an E-4 was forced to make a
2 judgment call as to what am I going to do about interrogating
3 this prisoner, this was a deliberate policy on behalf of the
4 United States Government.

5 MJ [Col COHEN]: Okay.

6 LDC [MR. CONNELL]: And the third smallest, perhaps,
7 reason, earlier -- you know, everyone likes to have three
8 reasons for things. And the third smallest reason is, this is
9 an important link in the chain, in the policy chain. We have
10 the documents which go before this where CIA and others are
11 negotiating what are we going to do when we get these people
12 to Guantanamo. And then we have the documents after this
13 where, on 10 January 2007, the FBI says, all right, here's how
14 we're going to implement the interagency policy, but this
15 is -- the interagency policy made between -- after President
16 Bush's announcement and before the FBI memo is an important
17 link in that chain, which is -- and I won't say it's entirely
18 missing because we know it happened from these two FOIA
19 documents, but it's certainly absent from the discovery.

20 MJ [Col COHEN]: Okay. I understand. Thank you.

21 LDC [MR. CONNELL]: So I will switch -- if I could ask
22 counsel -- excuse me, ask Table 4 to please switch to the 561
23 slides, which I understand to be 561Q (AAA).

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1 MJ [Col COHEN]: That is what it's marked in the one I
2 have. Thank you.

3 LDC [MR. CONNELL]: Good. Thank you.

4 And, sir, as you identified this closely linked to
5 538, I won't repeat anything that I have said, but I want to
6 focus on what we believe that we're missing.

7 MJ [Col COHEN]: Mr. Connell, just for your benefit, and
8 for the rest of counsel, the court reporter asked me to remind
9 you that if you continue speaking while you lean over the
10 document viewer, then they lose part of your voice.

11 LDC [MR. CONNELL]: Thank you for that. Like you, I'm
12 still sometimes experimenting with where the sound field is.

13 MJ [Col COHEN]: Understand. Thank you.

14 LDC [MR. CONNELL]: This diagram demonstrates the -- or
15 attempts to graphically capture the FBI requirements which
16 were sent to the CIA. And let me walk you through it.

17 I told you earlier that the government had produced
18 85 documents containing approximately 65 unique requirement
19 documents. Each of those requirement documents contains a
20 number of questions within it. And it is now unclassified,
21 the dates that they were sent, the person who sent them, and
22 the general subject of those questions. The government has
23 attached a couple of examples for your reference at AE 538M

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1 Attachments B and C, just so you can get a sense of the flavor
2 of what these requirements documents look like.

3 But in general, what they do is they are directed to
4 the CIA from the FBI on a certain date, and they lay out some
5 background of, hey, here's what we're interested in. That
6 background might include information from prior CIA
7 distributions, it might include information from FBI
8 investigation that has taken place. And then it says, we
9 would like these people, these men, to be asked these
10 questions, and then it will lay out, you know, usually between
11 10 and 20 questions.

12 And so the blue line on this chart tracks the number
13 of questions that the CIA was sending to the FBI over time
14 beginning in November of 2002, which I guess the system was
15 sort of being piloted. But then in the early part of 2003,
16 which is right around the -- the time that Mr. Mohammad came
17 into U.S. custody, is when the system really kicks off.

18 And over time, especially in 2003, a very large
19 number of questions get answered -- excuse me, get proposed
20 and, in general, answered. The blue line, which accounts for
21 well over a thousand questions, tracks the 85 -- or 65 unique
22 documents that the government -- approximately 65 unique
23 documents that the government has turned over to us.

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1 You'll notice -- and to be honest, I don't know the
2 reason why, but in March 2005, there's a huge spike. We had
3 to change the scale of the graph just to accommodate the fact
4 that there were 227 questions submitted in the March-April
5 time frame of 2005. But it gives you a sense -- and then it
6 tails off once we get into 2006, with the last questions being
7 submitted in August of -- or September of 2006. August, I
8 guess.

9 Now, on this graph, the red lines represent the 77
10 documents that the government has identified as FBI
11 requirements, and thus conceivably falling within the scope of
12 561, but has not turned over to us for review. The ----

13 MJ [Col COHEN]: So let me make sure I understand the way
14 the graph ----

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

16 MJ [Col COHEN]: ---- before we go further, okay? So now
17 that you're going to the color coding.

18 The blue, I take it you -- I do reference the numbers
19 on the left as to potentially, I guess, the number of
20 questions ----

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

22 MJ [Col COHEN]: ---- that were asked?

23 The red lines are just static as to ----

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

2 MJ [Col COHEN]: ---- these are just requirements but not
3 the numbers, you don't have the details as to how many
4 questions were asked?

5 LDC [MR. CONNELL]: That's precisely right, sir.

6 MJ [Col COHEN]: Okay. Got it. Thank you.

7 LDC [MR. CONNELL]: So we just put the red lines so we
8 could have a sense of ----

9 MJ [Col COHEN]: Yeah, I understand.

10 LDC [MR. CONNELL]: ---- both the volume and of what the
11 relevant times are. I mean ----

12 MJ [Col COHEN]: Copy.

13 LDC [MR. CONNELL]: ---- right around the time that --
14 when they take Mr. Mohammad and then in late April-May 2003
15 when they take Mr. Bin'Attash and Mr. al Baluchi, you can see
16 that there are both a large number of requirements that the
17 FBI sent that the government has turned over us, and -- but
18 also the highest concentration of requirements that the
19 government hasn't turned over to us. Which seem significant,
20 because that's when they're -- that's when they're building
21 their case at the beginning. That's when they're first
22 calling for evidence from the CIA. And we know that from the
23 requirements that we do have.

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1 Now, I do want to address the argument that the
2 government lays out in 538M, the unclassified argument, that
3 essentially they withheld these 77 documents because they were
4 not relevant to the offense charged.

5 And conspiracy, you know, is well regarded as the
6 darling of the prosecutors' nursery, and that cuts both ways
7 because the expansiveness of a conspiracy -- and this is
8 certainly true under D.C. Circuit law. The expansiveness of a
9 conspiracy means that the government gets to introduce a wide
10 variety of evidence, which some of which they have laid out in
11 the charge sheet as intrinsic to the conspiracy. They may
12 under 404(b) try to introduce additional proof of the
13 conspiracy extrinsically.

14 But, you know, they're introducing evidence is as
15 varied as writings of Usama bin Laden, of attacks which -- you
16 know, at the time of the East Africa embassy bombing attacks,
17 Mr. al Baluchi was barely 18 years old. I mean, you know --
18 so things that -- that there's no expectation that he had
19 anything to do with or even knew, you know -- really was
20 cognizant of world affairs at that time.

21 So, you know, they get to introduce a lot of
22 evidence, and I get that, right? That's the way that the law
23 works. But what that means is that the charged offense is, in

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1 fact, quite broad.

2 I mean, it seems very unlikely that the FBI would
3 reach out to the CIA and say please interrogate this person
4 about the Monica Lewinsky scandal, which was contemporary to
5 the '90s, to the materials that are charged in the -- quite
6 contemporary to the East Africa embassy bombings, as a matter
7 of fact -- or, you know, in 2003 or 2005, let's say, the
8 forthcoming iPhone, right?

9 I mean, there's -- it's unlikely that they reached
10 out to -- about things that had nothing to do with al Qaeda,
11 and the Count I or Charge I in the charge sheet is essentially
12 the entire al Qaeda conspiracy terminating slightly after the
13 attacks of September 11th, at least as it is in the charge
14 sheet.

15 Obviously, I can't tell you specifically that the --
16 that those materials do not -- that are directly related to
17 al Qaeda and the conspiracy and proposed attacks or historical
18 activities of the parties, but it certainly seems like they
19 would be. I mean, that's when they're out there looking for
20 evidence. It's during this time that Special Agent Fitzgerald
21 and Perkins are in UAE looking for evidence. I mean, there's
22 a -- this is the time of the investigation.

23 And it seemed -- one of the things that we know now

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1 that we didn't know before is that the FBI was anxious to know
2 things to resolve ambiguities, to shape its investigation, to
3 make sure it was going in the right direction. And it makes
4 complete sense within that framework that they would send
5 requirements seeking information about al Qaeda, about people
6 who were involved in al Qaeda, witnesses that they might talk
7 to, investigation that they might undertake.

8 So while I can't prove to you that it's related to
9 the charge, I can certainly see that -- I can certainly submit
10 to you that there's a legal decision as to the scope of the
11 conspiracy and the nature of these requirements that would
12 probably merit in camera review.

13 MJ [Col COHEN]: I'm not asking for the universe, but just
14 out of candor to the court -- like I said, I give it to you,
15 I'm sure you will give it to me. I have no reason to doubt
16 that.

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

18 MJ [Col COHEN]: Is that the only basis of relevance that
19 you're asserting for these, is this conspiracy charge?

20 LDC [MR. CONNELL]: No, sir. The -- and I heard you when
21 you said yesterday you've got to cite the right rule.

22 When I was addressing the conspiracy charge, really,
23 I was -- I was addressing the narrow question that their

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1 relevance objection was that it was not connected to the crime
2 charged.

3 MJ [Col COHEN]: Copy.

4 LDC [MR. CONNELL]: So what I assume -- and, you know, the
5 language is a little vague, but what I assume it means the
6 attacks of 9/11, right? That's what I read "crime charged" to
7 mean and my only point there was that ----

8 MJ [Col COHEN]: I understand the position.

9 LDC [MR. CONNELL]: ---- "crime charged" is actually
10 significantly broader than the attacks of 9/11 because of
11 the ----

12 MJ [Col COHEN]: Both the conspiracy charge and the
13 affiliation ----

14 LDC [MR. CONNELL]: ---- conspiracy charge. Yes, sir.

15 MJ [Col COHEN]: ---- and the fact that even the alleged
16 overt acts predate, in some cases, the acts of 9/11.

17 LDC [MR. CONNELL]: Yes, sir. That's right. And so let
18 me just throw out a couple of examples to illustrate.

19 Some requirements relate to al Qahtani, who came into
20 the United States in Orlando in 2001, was refused entry into
21 the United States and was sent away. He was later captured
22 and brought to Guantanamo, subjected to severely abusive
23 techniques of interrogation here at Guantanamo. He's sort of

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1 the infamous Prisoner 63. And the -- he's very much looped
2 into this, right?

3 I mean, was he involved in the attacks of 9/11? No.
4 But is -- is he included in the conspiracy? Certainly. And
5 that goes for a wide variety of other -- of other people, some
6 of which I'll demonstrate on the stand because they are
7 included in what we have.

8 So really, I was just addressing the narrow crime
9 charged.

10 MJ [Col COHEN]: I understand.

11 LDC [MR. CONNELL]: The broader issue -- which is what I
12 understand you to be asking me. The broader issue is twofold:

13 First, it is the coordination or the integration of
14 the FBI into the RDI program, which we have discussed
15 extensively in 538. I won't go over it again. But the fact
16 that they have such a consistent epistolary relationship with
17 the CIA certainly, I think, goes to that question.

18 But second, because it is absolutely going to address
19 the derivative evidence question. And I don't mean the sort
20 of broader Kastigar derivative evidence question. I mean the
21 304 evidence question.

22 Because at some point, you, sir, are going to be
23 called upon to make a decision which boils down to how

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1 independent is the government's evidence from what happened in
2 black sites, right? Which whether you want to call it torture
3 or whether you want to call it inherently coercive environment
4 certainly brings 304 into play.

5 And at some point, you are going to have to make an
6 assessment of, you know, I think this piece of evidence,
7 right, really -- which the defendants were never questioned
8 about in the black sites which there was never a requirement
9 about, I think that piece of evidence really is independent,
10 and I'm going to allow it.

11 And then there's going to be other evidence which
12 you're going to have a clear paper trail of the CIA sent out
13 this information, the FBI sent back these questions, the CIA
14 sent out this information, and then the FBI went to acquire
15 the evidence, right? And in that situation where you have a
16 clean paper trail, you may decide that the 304 bar on use of
17 derivative evidence comes into play and that evidence will be
18 excluded.

19 These requirements are critical to that inquiry
20 because to the extent that we -- I'm not saying we have a
21 burden, but, you know, litigation is real, and we have a -- we
22 have to show things. And to the extent that we are trying to
23 show the paper trail which leads to the acquisition of certain

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1 evidence from -- by the FBI -- and that might -- evidence
2 which on its own looks completely independent.

3 It might be a flight manifest which they found out
4 about the flight from the CIA because of the requirements they
5 submitted. It might be a business record that they found --
6 or that they chose to choose that business record as opposed
7 to spending their resources getting some other business record
8 because they knew from -- from the black site information that
9 that was valuable information.

10 So the -- you are going to be called upon to make
11 those decisions. I'm not asking you to prejudge them, but I
12 am asking you to give us the tools that we need to give you
13 the facts that you need.

14 MJ [Col COHEN]: I understand. Thank you.

15 I have no additional questions.

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

17 MJ [Col COHEN]: You've done a very good job of
18 summarizing -- not only summarizing but presenting your
19 position.

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

21 MJ [Col COHEN]: All right. We're going to take a
22 15-minute comfort break.

23 [The R.M.C. 803 session recessed at 1052, 11 September 2019.]

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1 [The R.M.C. 803 session was called to order at 1112,
2 11 September 2019.]

3 MJ [Col COHEN]: The commission is called to order.
4 Appears to me that all parties present when the commission
5 recessed are again present. All right.

6 Any additional defense argument from any of the other
7 teams on this matter?

8 LDC [MR. CONNELL]: Sir?

9 MJ [Col COHEN]: Mr. Connell.

10 LDC [MR. CONNELL]: Before I go, could I just clarify that
11 those two exhibits that I couldn't remember the numbers of are
12 538C Attachments E and F.

13 MJ [Col COHEN]: Thank you.

14 Ma'am, the podium is yours.

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

16 MJ [Col COHEN]: Good morning. How are you?

17 ADC [MS. RADOSTITZ]: When we decided who was going to do
18 argument today, we didn't realize that these two motions would
19 be argued together, so I'm going to address the first one and
20 Ms. LeBoeuf will address the second one.

21 MJ [Col COHEN]: That's fine. Thank you for letting me
22 know, though.

23 ADC [MS. RADOSTITZ]: Right. And I'm going to be brief

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1 but I want to first focus a little bit on a question that you
2 asked Mr. Connell regarding the standard for which you look at
3 this, and you both referenced the Yunis case which comes in
4 part from the rules. As you said this morning, you're going
5 to look to the rules and see what the rules say. And in this
6 situation, the Rule 701 in its discussion says when we are
7 talking about materiality, we are talking about it based on
8 what the D.C. Circuit said in Yunis.

9 And the reason I raise this is because what Yunis
10 says is simply that you -- it has to be helpful to the
11 defense. It does not use a "necessary standard." And I'm not
12 sure it matters in this particular argument because I think
13 it's both necessary and helpful to the defense. But I want to
14 just ----

15 MJ [Col COHEN]: That's fair.

16 ADC [MS. RADOSTITZ]: ---- point out that the standard is
17 simply helpful to the defense.

18 MJ [Col COHEN]: Yes, ma'am.

19 ADC [MS. RADOSTITZ]: And understandably, Mr. Connell was
20 focused on the helpfulness on the issues of suppression on
21 voluntariness because that's on everybody's minds this week.
22 But I want to make the record that these records that we're
23 requesting are not only relevant to suppression, they're

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1 relevant to both parts of the voluntariness, but also
2 reliability.

3 MJ [Col COHEN]: Okay.

4 ADC [MS. RADOSTITZ]: As Mr. Connell talked about, the
5 first part of all of this information comes from Mr. Abu
6 Zubaydah -- from Abu Zubaydah. And since 2002, when he was
7 tortured and then interrogated or interrogated as he was
8 tortured, the government has changed their position on what
9 his role was. And at this point in time, as I'm understanding
10 it, they don't even believe he was a member of al Qaeda.

11 And so the reliability is relevant -- or it is
12 relevant -- what all that information is is relevant to
13 reliability, because the government has said prior statements
14 are relevant to reliability, and they're relying on that.

15 MJ [Col COHEN]: Ma'am, can you walk -- sometimes it just
16 helps me to conceptualize something. You don't have to
17 potentially talk about specific evidence. Can you walk me
18 through kind of how an analysis would go in your mind, as to
19 how you get from, let's not even say it's Abu Zubaydah, but
20 anyone general as to how this would then get relevant to what
21 you are conceptualizing?

22 ADC [MS. RADOSTITZ]: So if one of the questions before
23 the court on -- just -- and this is only limited to the

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1 reliability thing.

2 MJ [Col COHEN]: Correct. Right. That's why I'm trying
3 to work with you to make sure I understand exactly what you
4 are saying.

5 ADC [MS. RADOSTITZ]: The government has asserted that
6 some of their evidence of Mr. Mohammad's statements is reliant
7 on other statements he might have made.

8 Some of ----

9 MJ [Col COHEN]: Okay.

10 ADC [MS. RADOSTITZ]: As Mr. Connell very nicely pointed
11 out, you start with Mr. Abu Zubaydah. It goes to
12 Mr. Binalshibh. It goes from there to Mr. Mohammad. And so
13 there's that fruit of the poisonous tree.

14 And if Mr. -- if the actions of the CIA and FBI
15 intertwined at the interrogation of Mr. Abu Zubaydah -- and
16 it's weird to say Mr. Abu Zubaydah because that's not really
17 the right word, but I am forgetting at this moment his true
18 name ----

19 MJ [Col COHEN]: I understand.

20 ADC [MS. RADOSTITZ]: ---- so I will use that.

21 Then there is that fruit of the poisonous tree, and
22 it goes to the reliability prong in addition. I think that's
23 that piece of my argument.

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1 MJ [Col COHEN]: Okay.

2 ADC [MS. RADOSTITZ]: But I also want to point out that
3 this is not only relevant to suppression. There are many
4 other aspects of the litigation that the intertwining and the
5 levels at which that intertwining come are relevant.

6 As you know, there will be a motion to dismiss based
7 on outrageous government misconduct. And it matters how far
8 up the chain of command or the -- if it's not the military
9 side, the chain of authority on the civilian side, these
10 decisions went. If it was just two rogue FBI and CIA agents
11 that made these decisions, that would be one thing. If it is
12 the President of the United States and the Director of the CIA
13 making decisions, that's a different thing. And we should be
14 allowed to get this information so that we can make that in
15 those types of arguments.

16 And then the third part really goes to evidence
17 presenting to the members. Even if you were to find that we
18 did not meet a pretrial standard on outrageous government
19 conduct, we still get to argue that to the members.

20 And the same is true on the issue of mitigation. If
21 Mr. Mohammad is convicted and we are in a sentencing hearing,
22 the actions of the U.S. Government are fully relevant on
23 mitigation.

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1 And under Wiggins -- I always forget the second half
2 of Wiggins, but Wiggins v. Smith, the -- all we have to do is
3 persuade one juror that one piece of information is sufficient
4 for them to vote for life. And that piece of information
5 might be that the highest levels of the government authorized
6 the torture of our client. And we need to be able to provide
7 factual evidence, we can't just make that an argument. And
8 these documents that we're requesting go to those issues.

9 MJ [Col COHEN]: Understand. Thank you. I appreciate you
10 indulging me on helping me walk me through the
11 conceptualization.

12 ADC [MS. RADOSTITZ]: Sure.

13 MJ [Col COHEN]: Thank you, ma'am.

14 Ms. LeBoeuf, welcome.

15 CDC [MS. LeBOEUF]: Thank you, Your Honor.

16 Your Honor, I'll be extremely brief. I rise just to
17 speak briefly about the constitutional dimensions of what
18 we're talking about. And I understand and appreciate Your
19 Honor's focus on the statute, but there are a line of cases
20 from the United States Supreme Court which they called --
21 loosely might be called the area of constitutionally
22 guaranteed access to evidence.

23 MJ [Col COHEN]: Copy.

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1 CDC [MS. LeBOEUF]: That's a quote from Valenzuela-Bernal.

2 And, of course, the cases that we're most familiar
3 with in this line are the Brady cases. And I'll begin where
4 Ms. Radostitz left off. Brady was a penalty case. Brady got
5 relief from his capital sentence, not from his conviction.
6 The evidence that we are seeking to get is relevant and
7 material to the death penalty.

8 You spoke this morning about the need for
9 individualized attention. Lockett v. Ohio says nowhere is the
10 need for individualized justice more important than in a
11 capital case. When the sovereign seeks the life of a human
12 being, that life has to be adjudged individually.

13 Brady, Agurs, Bagley looked at -- there was a line of
14 cases that looked through the question, should the defense
15 have to say, we specifically want this. And Agurs sort of
16 made a three-tiered assessment of a particularized request,
17 and Bagley did away with that and said, no, you don't have to
18 do that.

19 But in Kyles v. Whitley, the Supreme Court noted that
20 the fact that the prosecution was on notice that a particular
21 type of discovery or a particular piece of evidence that fit
22 the defense's theory made it more likely that a reviewing
23 court might find that evidence material and might find the

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1 failure to disclose it reversible error.

2 We are in advance of the less defense-friendly
3 standard. We're at the most defense-friendly point; we're at
4 pretrial. And you could not have a more particularized
5 request ----

6 MJ [Col COHEN]: Right.

7 CDC [MS. LeBOEUF]: ---- than Mr. al Baluchi laid out for
8 you this morning.

9 MJ [Col COHEN]: Thank you, ma'am.

10 CDC [MS. LeBOEUF]: Finally, I'd say that we're not
11 talking about destroyed evidence or unavailable evidence. The
12 prosecution has not said that this evidence doesn't exist yet
13 or that it has been destroyed or is rendered unavailable, but
14 that spectre is in this courtroom. And Arizona v. Youngblood
15 and the cases there speak to the harm and very much to the
16 motivation of the prosecution to destroy or render otherwise
17 unavailable evidence that's favorable to the defense and speak
18 to the remedies for that.

19 And, you know, what we are talking about here is in
20 effect the FBI sending in questions -- they're not standing
21 outside the dungeon door. They don't hear the thuds or the
22 cries or clean it up. But they are, in effect, sending in
23 questions. Look at the dates on the chart of the requirements

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1 and compare it to the SSCI, which we have done. Those are the
2 dates of the initial, when Mr. Mohammad was being kept seven
3 days without being allowed to sleep, naked, hooded, beaten,
4 suffered mock executions 183 times. And the FBI is sending in
5 questions.

6 His torture was during interrogation. If the
7 questions they're sending in to the interrogators are the
8 questions they ask him again in January of 2007, that's
9 relevant to suppression and it's relevant to penalty.

10 MJ [Col COHEN]: Thank you, ma'am.

11 Ms. LeBoeuf, I have one more question for you, if you
12 have some time.

13 CDC [MS. LeBOEUF]: I'm sorry.

14 MJ [Col COHEN]: That's all right. It's just something
15 that I had in my mind, then I continued to listen, and it came
16 back as you were sitting down. Kind of a conceptualization
17 question for you as well.

18 CDC [MS. LeBOEUF]: Uh-huh.

19 MJ [Col COHEN]: Not bound by how you're going to present
20 your sentencing case or those kinds of things, but
21 Ms. Radostitz mentioned this idea of just having to convince
22 this just one person, which you're right, it would have to be
23 a unanimous decision for sentencing purposes, not to mention

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1 you'd have to have the unanimous finding in the first place
2 for you to even make that a possibility.

3 But beyond what she said as with respect to the
4 relevance of 538 materials, the 561 -- is there anything
5 additional you'd like to add for just some additional --
6 something for me to think about with respect to the relevance
7 and how -- how this otherwise might be used in a sentencing
8 proceeding?

9 CDC [MS. LeBOEUF]: Well, in the -- as to the suppression,
10 it's the -- where I left off. It is this -- I want to know
11 what the specific questions were asked so that I can then ask
12 Mr. Mohammad, "So did they ask you this question when you were
13 at mock execution number 147" ----

14 MJ [Col COHEN]: Copy.

15 CDC [MS. LeBOEUF]: ---- "if you can remember?" And "Did
16 they ask you that same question phrased the same way in 2007
17 when the FBI was there?" So it's directly relevant, I think.

18 MJ [Col COHEN]: I understand. Thank you. I appreciate
19 that.

20 Additional defense argument?

21 Negative response from all defense counsel.

22 Trial Counsel? Mr. Ryan, are you going to argue
23 this? You may do so. Good morning to you.

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1 TC [MR. RYAN]: Good morning, Your Honor. Edward Ryan on
2 behalf of the United States.

3 Sir, let me begin, and I think it will help a little
4 bit if I sort of set the parameters of what the United States'
5 position is when it comes to these FBI statements.

6 MJ [Col COHEN]: That would help. Thank you.

7 TC [MR. RYAN]: Yes, sir. Our position is this, this is
8 what the evidence will be regarding them:

9 In January of 2007, several agents of the FBI went
10 into meeting rooms with the five accused in this case. These
11 agents are among the most knowledgeable subject matter experts
12 as to the accused and their actions and the attacks on
13 September 11th, 2001, the said anniversary of which we
14 acknowledge right now.

15 Inside those meeting rooms, and without going into
16 the tremendous detail that will ultimately come out, our
17 position is that the evidence will show that the accused were
18 not just acting voluntarily as stated in Military Commission
19 Rule of Evidence 304, but truly proudly. So when Khalid
20 Shaikh Mohammad was eye to eye with Frank Pellegrino, an agent
21 who had chased him for years, it was Mr. Mohammad's great joy
22 to explain his involvement in these attacks, among many other
23 things that he had done.

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1 I tell you this, Judge, because it's going to be
2 important going forward, I submit, for Your Honor to
3 understand that this isn't a case of should I talk or should I
4 not talk, but this is a case of I must get my message out. I
5 must acknowledge this. The worst day in one -- in this
6 country's life was the greatest day in theirs. This was their
7 crowning achievement.

8 So point number one, the evidence will show they were
9 happy to speak to the agents.

10 Point number two: Again, being very general, sir, no
11 evidence the prosecution will present in the course of this
12 case was derived from the time or -- or derived from the
13 events that occurred while these five accused were in the
14 custody of the Central Intelligence Agency.

15 And -- now, there's been already an awful lot of
16 speculation as to what that sort of term regarding derivative
17 means, but since Your Honor said it this morning, it's always
18 best to go back to the rules.

19 MJ [Col COHEN]: Correct.

20 TC [MR. RYAN]: And in this case we have 304, and a
21 specific subsection is at (A) which states, "Evidence derived
22 from a statement that would be excluded under section (a)(1)
23 of this rule may not be received in evidence against an

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1 accused who made the statement if the accused makes a timely
2 motion to suppress or an objection, unless the military judge
3 determines by a preponderance of the evidence that, (i) the
4 evidence would have been obtained even if the statement had
5 not been made; or (ii), use of such evidence would otherwise
6 be consistent with the" -- inconsistent -- I'm sorry, sir --
7 "use of such evidence would otherwise be consistent with the
8 interests of justice."

9 Now, I wanted to read that, Judge, because it is our
10 position, after much thought and consideration regarding our
11 evidence and deciding what will be presented and so forth,
12 that all of our evidence will meet those standards.

13 MJ [Col COHEN]: Okay.

14 TC [MR. RYAN]: And that's where our focus has been. And
15 that, by the way, is also guiding our decisions regarding
16 discovery.

17 Now, sir, turning to the motion at hand, we ask that
18 AE 538 and 561 be denied by the military commission as moot
19 because the prosecution has satisfied its agreed-to
20 obligations.

21 Your Honor, at the last session of this commission
22 during the argument in which the prosecution was asking Your
23 Honor to set forth a trial schedule, I informed you of -- I'm

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1 trying to give you some background.

2 MJ [Col COHEN]: Sure. That's fine.

3 TC [MR. RYAN]: I informed you at that time, kind of
4 letting you see some of the roads we had traveled, of fairly
5 recent developments at that time that had extended our
6 discovery efforts past when we had announced they were all
7 complete way back in 478CC. One of those recent developments
8 that I identified for Your Honor was 538 and 561.

9 In 538C specifically, the defense raised for the
10 first time the claim that the FBI statements -- and when I say
11 for the first time, at least the first time I think it was put
12 forth before the commission in a concrete manner that had an
13 effect on how we were going forward -- put -- the defense put
14 forth for the first time that the statements to the FBI were
15 not separate and apart from RDI but were, rather, part of what
16 they called, quote, one long interrogation.

17 In 538C on page 3, the accused Ali wrote, "The one
18 difference in emphasis is that AE 538" -- and, Judge, I should
19 note at this point, the original 538 motion, and I think you
20 mentioned this yesterday, concerned a very narrow area of
21 discovery regarding manuals.

22 In this -- as I was reading, "The one difference in
23 emphasis is that AE 538 focuses on evaluating the January 2007

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1 interrogations under an attenuation analysis.

2 Mr. al Baluchi's position is that the United States Government
3 obtained the January 2007 statements, quote, by the use of
4 torture or by cruel, inhuman or degrading treatment."

5 Further down it says, "It is not necessary to reach
6 the attenuation analysis because the January 2007 statements
7 were obtained by the, quote, learned helplessness or, quote,
8 interrogation compliance induced by the torture program."

9 A similar, if not identical, statement is made in
10 561. I will note in fairness that Mr. -- that the accused Ali
11 also notes that suppression would be appropriate under an
12 attenuation analysis as well. An attenuation analysis, I
13 think we can all agree, essentially goes to the cases of
14 Oregon v. Elstad and the progeny of how one statement made
15 under coercive circumstances can be followed by a statement in
16 uncoercive circumstances and then admitted into evidence.

17 This new theory represented to us a whole new -- or
18 has represented to us a whole new discovery effort. Let me be
19 clear, Judge, from that day and still today, I believe that
20 statement from 538C and the whole defense theory regarding
21 this one long interrogation is unsupported by the facts or the
22 law.

23 The facts -- and when I say facts, I mean the

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1 evidence that will be presented in this courtroom that Your
2 Honor will see and hear along with M.C.R.E. 304 and the
3 relevant case law all support a voluntariness analysis,
4 including examination of any attenuation that we can, in fact,
5 put on, which we intend to do, attenuation of that between the
6 time of the RDI program and the FBI statements in 2007.

7 The prosecution, since day one, lived with that
8 concept as our guide. It was in the rules. It was in the
9 facts. It colored much of the actions of the agents at that
10 time. And we have used that in regard to how we attacked
11 discovery regarding these statements.

12 Thus, our focus on discovery efforts for years in
13 this area centered on the accused themselves and what was in
14 their mental state on those days when the agents walked into
15 the meeting rooms, not -- although it certainly was part of
16 our larger discovery efforts, but not on actions the United
17 States Government took three to five years before those
18 statements of 2007, when this government, for this nation that
19 was so brutally attacked, was doing everything it could to
20 meet a threat that it did not fully understand and was not
21 completely prepared for, as is sadly demonstrated by the day
22 we recognize the anniversary for. And the threat that came --
23 whether they called themselves al Qaeda or jihadists or

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1 anything else, the threat that came from these men as well as
2 their compatriots that were still on the loose.

3 Let me be also clear, sir, that the prosecution will
4 introduce substantial evidence that the five accused were
5 anything but, quote, helpless, learned or otherwise, when they
6 happily confessed to the FBI. We're starting to send this
7 evidence to you in our responses that you may or may not have
8 seen, but I promises you that you will find this evidence
9 extremely compelling.

10 But having said all that, after significant
11 consideration, we accepted what became a very large discovery
12 effort that lasted several months at a point at which we had
13 already said we were done.

14 In 538H Attachment B, the prosecution executed a
15 memorandum to the defense, and it was provided to the
16 commission, which is why it has the AE number. We said in
17 relevant part, sir, "...understanding the centrality of your
18 claims to the progress of the case as a whole and the
19 uniqueness of the factual pattern, but without conceding
20 materiality, we have disclosed and will disclose material from
21 both organizations to provide you an understanding of the
22 relationship between the CIA and the FBI during 2002 through
23 2007.

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1 "Also, we will disclose relevant communications
2 between certain representatives of both organizations during
3 that time period that bear on the voluntariness of the accused
4 in making statements to the FBI.

5 "Finally, we will disclose information, if any
6 exists, bearing on the claim that FBI agents derived evidence
7 from statements made by the accused while they were in CIA
8 custody."

9 This was sent on April the -- 27 April 2018 and marks
10 the beginning of our efforts in regard to this new and
11 significant discovery effort.

12 Several months later, Your Honor, on 25 January 2019,
13 after much work already, the prosecution filed 538K. It is a
14 notice of status of discovery as of that time, although we
15 were not suggesting it was complete at that time. It is a
16 classified document, and taking Your Honor up on your offer,
17 I'm just going to refer to these things, even though they are
18 classified, so that Your Honor can consider them on your own.

19 MJ [Col COHEN]: That would be fine. Thank you.

20 TC [MR. RYAN]: In this classified document, sir, we
21 identified 22 separate areas of disclosure by the prosecution
22 that had been made at that time. I'd like to call to your
23 attention, sir, to some -- just a few of them.

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1 In paragraph I, subparagraphs D. through H., we
2 describe statements made -- we describe areas of disclosure
3 that are exactly what the case law says we don't have to do,
4 which is create discovery. We took formal statements from
5 persons central to this issue of 538 and 561 only for the
6 purpose of helping to apprise the defense of the significant
7 facts and other areas in regard to these people who, as I
8 said, were central to it all.

9 I also draw your attention to subparagraph N. which
10 concerns a memorandum to the defense providing significant
11 facts, concessions, and identifications of relevant
12 individuals. It was just our statement to them. We also in
13 that memorandum tie statements made by us in our narrative to
14 areas -- to actual Bates stamp numbers in our discovery. So
15 again, we created discovery to help guide them in this area.

16 If Your Honor directs -- and this one is not -- was
17 not attached to the pleading, but if Your Honor directs, we
18 will provide a copy of this memorandum to the commission
19 because it is well reflective of our efforts to arm the
20 defense and guide them through the discovery as it pertains to
21 the claims of the FBI/CIA integration.

22 MJ [Col COHEN]: Sounds like that might be relevant to my
23 decision.

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1 TC [MR. RYAN]: Yes, sir.

2 MJ [Col COHEN]: Thank you.

3 TC [MR. RYAN]: Although not accounted for in the
4 pleading, I do want to note one other thing that we did
5 provide, because I think it goes a long way -- it did go a
6 long way or should have gone a long way to helping the
7 defense.

8 We included in our discovery a report from the Office
9 of the Inspector General for the Department of Justice. The
10 report consists of 444 pages. It was released, Your Honor, in
11 unclassified form to the general public but with significant
12 redactions. It's titled "A Review of the FBI's Involvement in
13 and Observations of Detainee Interrogations in Guantanamo Bay,
14 Afghanistan, and Iraq." As I said, it was released publicly.

15 Now, I imagine Your Honor knows this, but an
16 inspector general is a significant position within the United
17 States Government, and exists within the various departments.
18 Within the Department of Justice, it's an entity which has
19 significant resources, significant oversight, and significant
20 investigative ability.

21 So in this report that, as I said, is well over 400
22 pages, the Inspector General for the Department of Justice
23 went on his own investigation into this area of FBI

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1 interrogation policy, interrogation practices, looked at
2 numerous incidents and events that have been the subject of
3 discussion with the commission in regard to this.

4 Now, since it was released publicly, I'm quite
5 certain that all the parties had it long before we sent it
6 over; however, as I said, it was heavily redacted. We, the
7 prosecution, went through this report, went through all of the
8 redactions, found what we believed to be the most relevant to
9 the -- to this examination and this issue as well. And in at
10 least 55 instances by my counting, we lifted -- we had the
11 relevant parties lift the redactions so that the defense could
12 see what was underneath them in a -- in a sense of materiality
13 to the issue. So that was -- K was released in January -- or
14 filed in January.

15 In March of this year, 2019, the prosecution filed
16 538M. It is a classified notice of the status of discovery.
17 So this is the second one that we filed in this area. In this
18 particular filing, we identified seven areas of disclosure. I
19 draw your attention to paragraph I, subsection D., which
20 describes the items discussed and provides examples.
21 Mr. Connell made mention of this. We actually provided
22 examples in this case for Your Honor to see at Attachments B
23 and C.

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1 MJ [Col COHEN]: I reviewed those -- I reviewed those
2 yesterday, Mr. Ryan, so I know exactly what you're talking
3 about.

4 TC [MR. RYAN]: Yes, sir. These are the requirements
5 cables from the FBI agents to the CIA about the charged
6 conduct in this case. And let me just spend half a second on
7 this issue of charged conduct and what that means.

8 The charge sheet was our writing. It was our
9 creation. We chose to include the conspiracy count. We are
10 well aware of the 167 or so overt acts that are in it. We
11 know how closely it reflects our evidence. So when we say
12 "charged conduct," we are well aware that that means a
13 significant conspiracy charge that we chose to put into this
14 charge sheet. On the other hand, I also know -- we also know
15 that charged conduct, including the conspiracy, does have its
16 limits. It is finite. We have used that as our guide.

17 So later, and in this particular pleading I was just
18 talking about, when we say "charged conduct," we do state
19 affirmatively that that includes the full breadth of the
20 conspiracy that was charged.

21 I believe counsel said that the requirements cables
22 totaled something around 85, although the actual number is
23 sort of dependent on how you view duplicates and things, but

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1 it's over 300 pages as well.

2 In 538M, prosecution announced that it has completed
3 its discovery efforts but noting, "We will consider specific
4 discovery requests going forward." We have done so and will
5 continue to do so.

6 It also, Judge, I should note, has colored our
7 practice of discovery in every other area, and I'll tell you
8 exactly what I mean. Recently -- and we talked about this at
9 the last session -- the prosecution was on the final steps of
10 its discovery efforts in the RDI world generally. And I don't
11 for a second suggest that the 538 discovery effort and the RDI
12 discovery effort weren't connected in some great way; that was
13 part of our acknowledgement of a whole new discovery effort.

14 But within the RDI discovery efforts, the
15 acknowledgement or the acceptance of the responsibility of 538
16 led us to make many decisions of discoverability because it
17 supported -- it went to the issue of FBI and CIA involvement
18 together during the relevant point, and also to support any
19 claims of the, again, one long interrogation avenue.

20 Judge, as to these discovery efforts in 538, again in
21 conjunction with everyone else, we absolutely stand by our
22 efforts. This one took many months. When we first started
23 it, we thought we'd be done -- and I believe it was even

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1 announced to Judge Pohl -- that we would be done by the next
2 session and that was not the case. It took months. At one
3 point we had as many as ten people just from the Office of the
4 Chief Prosecutor working on it. In the end, we produced 1,169
5 pages, but that does not include the RDI information that I
6 was just noting to you. So the number is actually much
7 higher.

8 Where we go from here, Judge, I think honestly in
9 practice, we're somewhat there right now. The proper path
10 forward is for the defense, if it wants something specific,
11 that they should request it with an explanation of materiality
12 within the theory of 538, 701, 703, and 651. That certainly
13 has been the policy regarding discovery -- or it's been the
14 practice regarding discovery throughout this case.

15 If we disagree and deny, they of course can move to
16 compel and demonstrate how each item -- and I submit, Judge,
17 that this is the analysis. This is the proper analysis --
18 demonstrate how each item that they want will change -- in and
19 of itself and by itself, will change the equation in their
20 favor in light of everything else that they have been given
21 and provided for over the course of the last seven years.

22 I'll note an example. The accused Ali submitted to
23 the prosecution a discovery request that they titled or they

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1 numbered 399A, and it was submitted to us on 14 February 2019,
2 so back in the middle of our 538 efforts. Within it there
3 were 57 separate requests for discovery, almost all of them
4 tied to Mr. Zubaydah and Mr. Majid Khan, who have been
5 mentioned several times today and who are not charged in this
6 case.

7 Our answer came as we were finishing the RDI efforts
8 last week. Our efforts came last week, and I think counsel
9 noted it was last Thursday when we provided a response to the
10 57 separate requests. And we said of the 57, four of them we
11 found reason to either had provided or are providing further
12 discovery.

13 This -- the reason for four out of 57 is we simply do
14 not believe the other ones, the remaining, were material to
15 the preparation of the defense, or to the Yunis standard or to
16 any theories regarding Brady, Giglio, et cetera. We see
17 Mr. Zubaydah and Mr. Majid Khan as completely immaterial to
18 this case and these individuals, especially back to that, the
19 narrow issues we're talking before what was in their minds,
20 the voluntariness at the time of the statements in 2007.

21 For those where we declined, the defense can
22 certainly move to compel, and we will answer that.

23 In closing, Judge, let me make you -- let me make

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1 this comment: AE 628 is the first motion to suppress the
2 voluntary -- the statements of the accused based on
3 voluntariness that have been filed in this case. It is,
4 again, from the accused Ali. I imagine you have already read
5 it. I imagine you didn't read it in five minutes.

6 The fact section alone I believe totaled 180 pages.
7 I'm fairly certain that all of the motions to suppress I have
8 answered over the course of a career didn't add up to 180
9 pages. Using Judge Pohl's famous language, it is extremely
10 rich and vivid.

11 Of the first 250 factual assertions in this motion to
12 suppress, 153 of them are footnoted and traced back to
13 prosecution-provided discovery. This is, again, according to
14 the footnotes in the motion. It keeps going from there. I
15 just gave up counting.

16 Now, I say this only to submit to Your Honor in
17 closing that over the course of these years, the prosecution's
18 efforts in regard to discovery, whether it was considered RDI,
19 701, 538, 561, and many, many others, our efforts were
20 extreme -- extremely substantial. It was significant.

21 We know this is the key to getting this case to
22 trial. We threw enormous resources at it. And I submit this
23 to you, and I mention that because, Judge, I think what it

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1 shows is that you can be confident that we are living up to
2 our obligations to arm the defense with everything they need
3 to litigate this case.

4 Subject to your questions, sir.

5 MJ [Col COHEN]: Yeah, Mr. Ryan, just a couple of things I
6 have in my mind.

7 TC [MR. RYAN]: Yes, sir.

8 MJ [Col COHEN]: We've talked about the charged offenses,
9 and I've heard both sides kind of argue that a little bit. As
10 a judge, I also think about other types of evidence that may
11 come in, and I don't -- if you filed it yet, I don't think
12 I've seen it, and I don't know if it's commissions practice or
13 not.

14 But have you done a completed 404(b) notice to the
15 defense? And, if so, does any of this stuff tangentially
16 touch your 404(b) notice?

17 TC [MR. RYAN]: We have not filed a 404(b) notice as of
18 yet; however, we have viewed our discovery obligations with a
19 view towards not just charged conduct, but any 404(b).

20 MJ [Col COHEN]: Okay.

21 TC [MR. RYAN]: The 404(b) to the extent any of it exists,
22 honestly, Judge, is -- I believe I'm saying this as accurately
23 and as precisely as I can ----

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1 MJ [Col COHEN]: Well, at the end of the day, your notice
2 is going to stand on its own.

3 TC [MR. RYAN]: Yes, sir, and I'll leave it at that. We
4 have governed our discovery obligations with an understanding
5 as to any 404(b) implications that might exist.

6 MJ [Col COHEN]: Okay. I was -- it was good to hear that
7 the government had -- like I said, that's not saying I agree
8 or disagree, but I think the defense has clearly started to
9 look at the rules and the derivative evidence. I was pleased
10 to hear that the government has as well. I do believe that's
11 going to be a significant issue in the case as well
12 potentially ----

13 TC [MR. RYAN]: Yes, sir.

14 MJ [Col COHEN]: ---- me addressing the issues. I don't
15 disagree with the parties on that.

16 In your analysis of derivative evidence, regardless
17 of how we all -- I ultimately end up interpreting 304, did the
18 government contemplate -- for example, a request goes out from
19 the FBI to the CIA, information is obtained, for example, from
20 Mr. Bin'Attash. That information then comes back or -- have
21 you accounted for -- when you say you've accounted for all of
22 your evidence and it's not derivative, what was your -- what
23 was your methodology in doing that? I guess that's the better

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1 way of asking it.

2 TC [MR. RYAN]: A variety of methods because the evidence,
3 as you probably can imagine, is going to total into the
4 hundreds of items. But the most basic way and I think you
5 will see it next week ----

6 MJ [Col COHEN]: Okay.

7 TC [MR. RYAN]: ---- often comes down to when it was
8 obtained -- the evidence was obtained. Much of the evidence
9 obtained and that will ultimately be used at least as to
10 Mr. Ali came from investigation that occurred quickly after
11 9/11 but before his capture. Agent Fitzgerald will testify to
12 this, so this will become clear as it comes out.

13 MJ [Col COHEN]: Okay.

14 TC [MR. RYAN]: And I guess this is the most important
15 thing, Judge: We are tailoring our evidentiary presentations
16 in regards to the motion to suppress with that view in mind so
17 that Your Honor doesn't have to guess how this piece of
18 evidence came into the government's possession.

19 MJ [Col COHEN]: Okay. Thank you. That's all the
20 questions I have right now.

21 TC [MR. RYAN]: Thank you, sir.

22 MJ [Col COHEN]: Thank you.

23 Mr. Connell, just if you have a brief point;

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1 otherwise, I think I have a pretty good idea of what the
2 issues are.

3 LDC [MR. CONNELL]: Right. I have just a couple of
4 points, and I'll make them very quickly.

5 MJ [Col COHEN]: Thank you.

6 LDC [MR. CONNELL]: The first one is I hope that in my
7 opening presentation I honored the government's efforts around
8 this, but what I -- because they have been -- done enormous
9 work. Discovery is generally not a matter of good faith or
10 not, but I have no -- nothing but confidence on this
11 particular point in the government's good faith. But it's
12 been guided by the military commission rulings.

13 If you look back at AE 073 and AE 156, those were the
14 government's initial productions, military -- 505 notices to
15 the -- or requests for substitutions to the military
16 commission. And at that time those minimal documents, a
17 couple of hundred pages, maybe, were all the government
18 intended to produce regarding the RDI program.

19 But then Judge Pohl in the Nashiri case decided
20 AE 120A; that became 308. And then eventually the government,
21 really in order to avoid producing some different discovery,
22 in 397 said, yes, we're going to adopt that. And then they
23 then began the process of RDI production in earnest. But it

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1 was a legal determination by the military commission that made
2 that difference, that guided them on what their
3 responsibilities are.

4 The -- I think the same is true here, but you can be
5 much more tailored here. Because you have in camera review as
6 an option available to you and because there's a limited
7 universe of documents that we're arguing about, you can make
8 relevance determinations in a much more tailored manner, if
9 you choose to do so.

10 That brings me to the second point. One of the
11 difficulties that I feel that I encounter in the discovery
12 practice with the government is the infinite regressive
13 nature -- infinitely regressive nature of the request for more
14 specificity.

15 I generally feel that no matter how specific we are,
16 the government, as anyone, has the option to say, well,
17 actually, there is another level of specificity that you could
18 give that you didn't give. But I was surprised to hear the
19 government today argue that if we want the evidence that we
20 are looking for here that we should make a request and provide
21 specificity. Because it is difficult to imagine more
22 specificity than we have brought here, and given that in the
23 majority of the cases we have brought redacted versions of the

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1 documents that we're looking for, which makes it quite easy.

2 In our 399 request, which the A means that it was the
3 second time that we asked for it, initially the government
4 rejected our quite detailed request on the basis of lack of
5 specificity. So we went through the SSCI Report and all of
6 the FOIA documents and identified document by document, by
7 whatever number we had for them why that was important.

8 And we're going to -- you know, now that will be
9 before the military commission another way, and I will address
10 Mr. -- or the government's response -- points about Majid Khan
11 and Abu Zubaydah at that time when it's nice and ripe.

12 But the last point that I wanted to make and ties to
13 that one is that the government often uses diligence on the
14 part of the defense as an attempted weapon. And as we
15 listened to the argument of the government on what a swell job
16 Mr. al Baluchi did on his motion to suppress, we cannot
17 help -- or I cannot help but call to mind the dilemma
18 presented by the framework the military commission has
19 articulated around 524, where one way if you look at it, if we
20 win our motion to suppress, we win it; but if we lose it, it
21 demonstrates that we didn't have enough evidence.

22 And the government's attempting to flip that on its
23 head and use the same double-bind, which is that if we don't

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1 present a motion to suppress, as Mr. al Hawsawi's chosen to
2 done -- to do, it asserts lack of diligence, waiver; yesterday
3 we heard relevance, you couldn't bring some other evidence
4 because there was no pending motion. Or if you do your best
5 and take everything that you have and put it into a document,
6 the government argues, well, look what a rich and vivid --
7 look what a good job they did, well done. You still lose, but
8 you had plenty of evidence.

9 So what I am suggesting is that it is the nature of
10 advocacy to make professional judgments and then do the best
11 you have with the evidence that's available to you. What we
12 tried to do for you -- what I tried to do for you this
13 morning, Your Honor, is lay out with specificity particular
14 narrow populations of documents that we can demonstrate exist,
15 their relevance to our overall theory of defense, so that the
16 military commission can exercise its ability to bring to bear
17 the fact-finding that needs to happen.

18 And that's all I'll say unless you have any
19 additional questions.

20 MJ [Col COHEN]: No. No, I appreciate it, and -- yeah,
21 that's it.

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

23 MJ [Col COHEN]: Hello again, ma'am.

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1 ADC [MS. RADOSTITZ]: Very briefly, Your Honor.

2 MJ [Col COHEN]: That's fine.

3 ADC [MS. RADOSTITZ]: I want to address what is most
4 troubling from the government's argument. There are a lot of
5 troubling things, but the most troubling thing to me is when
6 Mr. Ryan talked about how diligent they were in reviewing the
7 OIG report and that they went back and found the most relevant
8 things and asked that they be unredacted.

9 That's not the standard. The standard is not we're
10 going to give you what we find is most relevant. The standard
11 under 701 and under Yunis in this court is whether it is
12 helpful to the defense. Whether it's helpful to the defense.
13 It's not what the government wants to provide. They have an
14 obligation to provide everything that could be helpful to the
15 defense.

16 And it appears that in looking at this evidence in
17 the 538 motion, they were only looking at it with a view
18 towards suppression on the issue of voluntariness. And as I
19 argued in my initial thing -- and I'm not going to repeat --
20 that's not the only thing that this evidence is relevant to.
21 So that's my first point.

22 The second point is that the obligation on the
23 defense when we're describing what evidence we're seeking

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1 discovery of is not that it changes the equation in their
2 favor. That again, it's the wrong standard.

3 So if the government is looking at this discovery
4 obligation with the wrong standards, then some court 10, 15,
5 20 years from now is going to be reversing. That's not
6 what -- your obligation here is to not decide ----

7 MJ [Col COHEN]: To knowingly create error.

8 ADC [MS. RADOSTITZ]: ---- whether it should have been
9 reversed. It's not reversible error ----

10 MJ [Col COHEN]: I understand.

11 ADC [MS. RADOSTITZ]: ---- it's to avoid the error in the
12 first place. And that's what we urge you to do in looking at
13 these discovery motions.

14 MJ [Col COHEN]: No, ma'am, I agree. And I think
15 ultimately hopefully everyone would agree that is definitely
16 not my job is to knowingly put error into the record. So
17 thank you.

18 ADC [MS. RADOSTITZ]: Thank you.

19 MJ [Col COHEN]: I understand exactly what you're saying.

20 Ms. LeBoeuf, did you need to be heard again?

21 Negative. All right.

22 This is a good time to make a mental shift, so I
23 think we're going to take lunch. We're going to take -- we'll

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1 take 90 minutes. That will allot for a true lunch for the
2 parties, and then build in the time for prayer time. We'll
3 reconvene at 1330. We're in recess.

4 [The R.M.C. 803 session recessed at 1202, 11 September 2019.]

5 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1331,
2 11 September 2019.]

3 MJ [Col COHEN]: The military commission is called to
4 order.

5 Sorry, I like to scan the room and see if I see any
6 new faces. It appears to me that all parties present when we
7 previously recessed are again present. If that is incorrect
8 and needs to be -- the parties have leave to say something.

9 Negative response. Okay.

10 Two matters in particular I definitely want to take
11 up this afternoon. One is at least in part the 643 series,
12 and then I also want to at least begin to address, if not, at
13 least get through argument on the 650 series that we filed
14 which was the certified court issues.

15 The way I'll handle the 650 is -- not really sure
16 that there is a burden on a certified court issue, but
17 technically it would go to the government's issue of asserting
18 any privilege over this information. So I'll probably start
19 with the government argument on 650 and then give you the last
20 word on that matter as the holder of the privilege.

21 With respect to 643, I just took some time during
22 lunch to go back and review these, and I'm aware that -- I
23 don't want to get too far ahead. My team at least keeps me

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1 informed when AEs have been requested. I think there's also a
2 recent -- additional information the government's going to
3 provide with respect to AE 643. I don't know if that's been
4 formally filed yet or what that is, so I don't want to get too
5 far ahead, but I understand there's been at least an AE
6 requested.

7 MTC [MR. TRIVETT]: Yes, sir. We have filed it. I don't
8 have the number for you right now ----

9 MJ [Col COHEN]: Okay.

10 MTC [MR. TRIVETT]: ---- but we'll get that for you.

11 MJ [Col COHEN]: All right. Thank you.

12 All right, then. The underlying motion to disqualify
13 the convening authority, I'm not sure we'll get to that today.
14 What I'd like to address, because it seems to me that I'd be
15 taking that matter out of order if I don't address first a
16 motion to compel testimony and a motion to compel discovery
17 and rule on those. And then if we have all of the evidence
18 we're going to have, then we can argue the motion based on the
19 evidence as presented.

20 So to the extent that might modify anyone's
21 anticipation -- probably not, you guys are pretty sharp
22 attorneys. We'll start with, in no particular order, AE 643F
23 and then AE 643E, which was the motion to compel testimony of

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1 Mr. Reismeier and Mr. Foster. And I'm told that 643J (GOV)
2 will be the additional filing on this matter.

3 Sir, you may address those two issues. Is that okay
4 with you, just addressing those two issues today?

5 DC [MR. MONTROSS]: That is fine, Your Honor.

6 MJ [Col COHEN]: Okay.

7 DC [MR. MONTROSS]: Actually what I would suggest is 643F,
8 that's the discovery motion ----

9 MJ [Col COHEN]: Yes.

10 DC [MR. MONTROSS]: ---- that's -- I'm going to start with
11 that because ----

12 MJ [Col COHEN]: Perfect.

13 DC [MR. MONTROSS]: ---- depending on how Your Honor rules
14 on the 643 discovery motion F, in the discovery that if you --
15 assuming that you do grant our motion, I have an opportunity
16 to review the discovery, it may not be necessary to call
17 Mr. Reismeier or Mr. Foster depending upon what discovery is
18 turned over.

19 MJ [Col COHEN]: That makes sense.

20 DC [MR. MONTROSS]: So I think I would like an opportunity
21 to maybe make that assessment ----

22 MJ [Col COHEN]: Perfect.

23 DC [MR. MONTROSS]: ---- depending upon what you rule in

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1 643F.

2 MJ [Col COHEN]: All right. Thank you. That doesn't
3 sound unreasonable to me. I mean, it kind of makes sense of a
4 natural course of events.

5 DC [MR. MONTROSS]: Okay. Thank you, Judge.

6 MJ [Col COHEN]: Absolutely.

7 DC [MR. MONTROSS]: If I may start, then, on 643F. So on
8 June 14, 2019, Mr. Reismeier, after serving as the convening
9 authority for approximately one month, suddenly and without
10 warning, at least without warning to the defense, recused
11 himself from two cases. He recused himself from the Bahlul
12 case, and he recused himself from the Nashiri case.

13 Now, the reason that was articulated by the convening
14 authority, Mr. Reismeier, was an appearance of partiality. He
15 said, quote, Recusal is appropriate in order to avoid even the
16 appearance of partiality. And that's Attachment E on the 643
17 base motion, the June 14th al Nashiri recusal at 1.

18 Now, the underlining facts warranting that conclusion
19 were multiple instances where Mr. Reismeier, before becoming
20 the convening authority, met with, counseled, and assisted the
21 prosecution. There was the 2014 meeting between
22 General Martins and Mr. Reismeier where Mr. Reismeier assisted
23 General Martins in developing strategy for the presentation of

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1 evidence of hostilities in the al Nashiri case.

2 Now, I'll remind Your Honor AE 617K ruling in this
3 court leaves as an open matter the question of hostilities.
4 That's an issue that's still in front of Your Honor.

5 2015, Mr. Reismeier serves his amicus curiae in a
6 matter presented to the D.C. Circuit Court of Appeals in the
7 Bahlul case about the legal viability of conspiracy as a law
8 of war crime here in these military commissions. And that's
9 still being argued and yet to be decided in this case, Your
10 Honor, in the 9/11 case. AE 490F, that was Mr. al Baluchi's
11 filing, expertly detailing the ramifications of the Bahlul
12 decision here.

13 2016, we have the moot argument in the Nashiri case.

14 Now, at this point, having learned that, on
15 June 14th, 2019, defense counsel for Mr. Bin'Attash realized
16 that our current convening authority was certainly no stranger
17 to the prosecution, and to the contrary, on multiple occasions
18 had lent his name -- and by that I mean his power, his
19 credence, his rank, as someone who signed an amicus brief
20 supporting the government's position, lends his counsel, lends
21 his expertise to General Martins.

22 So at that point, our question became: How did this
23 ally of the prosecution become the convening authority? And

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1 we filed thereafter motions for discovery. And the discovery
2 motions were filed and focused on primarily two things, Your
3 Honor.

4 The first was: How did Mr. Reismeier become
5 selected, nominated, and eventually appointed to be convening
6 authority given his background? And two, discovery seeking
7 information about the nature and quality of the interactions
8 between Brigadier General Martins and Mr. Reismeier in 2014,
9 2015, 2016, the events at question here, Judge.

10 And that discovery was denied. It was denied
11 repeatedly by the same prosecution that received the benefit
12 of Mr. Reismeier's experience and expertise and name value on
13 occasion after occasion. So here we are today, we're seeking
14 to obtain that information.

15 Now, Your Honor, before proceeding further, before
16 detailing the need for this discovery and before detailing
17 what I think are some quite odd and revealing twists and turns
18 that have occurred since we filed the initial discovery
19 request, I do have to address something.

20 MJ [Col COHEN]: Okay.

21 DC [MR. MONTROSS]: And what I wanted to address with a
22 more fulsome argument than I did yesterday is what the
23 prosecution has claimed, that none of this discovery matters,

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1 that we're not entitled to it. And the reason that the
2 prosecution gives is because they claim that the only way that
3 Mr. Reismeier could ever be disqualified as convening
4 authority in this case is that if he fits the definition of
5 what in the military case law of parlance or by statute, okay,
6 is referred to as the accuser. Okay.

7 They say, 643C, page 15, it's their brief, their
8 responsive pleading, the sole ground for disqualification of
9 the convening authority is that the convening authority is an
10 accuser, and they take that language and they run it through
11 their responses to our discovery request. He's not an
12 accuser; therefore, you don't get any discovery.

13 Now the prosecution defines accuser, and they say
14 it's either someone who signs, right, or swears to the charge.
15 And I'll concede that Mr. Reismeier did not sign or swear to
16 these charges; that he directs another person to sign or swear
17 to them. That's the type two accuser. Mr. Reismeier is not a
18 type two accuser.

19 The third is that he has an interest other than an
20 official interest in the proceedings. And here is where the
21 government says, look, he has no other interest other than an
22 official interest. And they cite some cases that suggest that
23 if the convening authority was a victim, right, or the

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1 convening authority was being blackmailed, okay. Or the
2 person that the convening authority refers charges against was
3 somehow having an inappropriate affair or relationship with
4 some personal family member or fiancé of the convening
5 authority, then that becomes other than an official interest,
6 but they say that's not what's happening here.

7 Mr. Reismeier is not a victim. He certainly hasn't
8 been blackmailed. And I can only speak to Mr. Bin'Attash, but
9 my client certainly has had no inappropriate contact with
10 Mr. Reismeier's family.

11 So says the prosecution, he's not an accuser, and
12 that's the end. So we don't need to provide discovery because
13 nothing would inform that we're asking for whether or not he's
14 an accuser.

15 So I wanted to be crystal clear what that means, if
16 you accept the government's proposition. It means that
17 Mr. Reismeier can stand outside this courtroom today, the 18th
18 anniversary, okay, and give an interview to the press, to the
19 nongovernmental organizations, to family members of the
20 victims, and it could end up on the front page of *The New York*
21 *Times*. And the headlines can read "Reismeier says conspiracy
22 is a valid charge before these military commissions," and it
23 could say "Reismeier says U.S. courts have no role in deciding

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1 law of war questions before the military commission," and it
2 could say "Reismeier helps prosecution formulate strategy on
3 jurisdiction law of war." He has already said all of those
4 things. He has done all of those things.

5 But then Mr. Reismeier could say this, and it
6 wouldn't impact, under the prosecution's theory, whether or
7 not there's an appearance of partiality or impartiality
8 because it doesn't matter. Mr. Reismeier could stand up and
9 say, "Mr. Bin'Attash is guilty of the 9/11 attacks." It could
10 say -- or he could say, "Reismeier says that Mr. Bin'Attash
11 should be shot upon the conclusion of the trial." *The*
12 *New York Times* headline could read, "Reismeier will say that
13 he would pull the trigger himself."

14 And he could say all of those things. And if you
15 accept what the prosecution is telling you, that wouldn't make
16 a bit of difference because none of the things under the
17 prosecution's formulation would make him an accuser in this
18 case, okay? And I would hope that you would have some
19 hesitation about permitting a regime where Mr. Reismeier could
20 say those things.

21 Now, Your Honor, I've heard you repeatedly say both
22 yesterday and today, "I start with the rules." Okay. And
23 yesterday -- and this is unclassified -- you mentioned 504 as

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1 the starting place, okay?

2 MJ [Col COHEN]: R.M.C., that's correct.

3 DC [MR. MONTROSS]: Yes. Yes, sir, R.M.C. 504 is the
4 starting place.

5 And today repeatedly you have presented yourself
6 fully and honestly as a -- I don't mean this disparagingly --
7 as a rule man, as someone who likes the rules.

8 MJ [Col COHEN]: I will not be upset that someone says
9 that I like to follow the rules.

10 DC [MR. MONTROSS]: You enjoy the rules. The rules are a
11 good thing.

12 Okay. What I'm going to ask, okay, is to accept
13 where I am coming from as a civilian attorney who is not
14 versed, okay, in the military system. And when I read the
15 military case law such as Curry, I understand, okay, that
16 military judges perhaps at times, okay, have to balance the
17 needs to preserve good order and discipline in the troops,
18 right, for military enlisted men, versus what would be
19 necessarily the constitutional demands that would be present
20 in a civilian trial.

21 But Mr. Bin'Attash, okay, is -- this isn't about the
22 order and good discipline of Mr. Bin'Attash, okay? This is a
23 capital case where the Supreme Court case law demands due

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1 process-plus, heightened reliability.

2 And the Constitution matters, okay, in this case,
3 Your Honor. And I would say to you that the Constitution of
4 the United States Supreme Court is clear that when any
5 individual, whether it's a judge; whether it's a convening
6 authority; whether it's a local mayor, which is the Tumey
7 case; whether it's a Plan B Medicare adjudicator, whatever the
8 person's role or title, if that person's exercising judicial
9 or quasi-judicial functions, then due process kicks in, and
10 what it requires is impartiality and the appearance of
11 impartiality.

12 And frankly, Judge, I would encourage you to start
13 with the Constitution and not 504. Because you don't have to
14 answer the question whether or not the convening authority in
15 this case actually has a judicial role or quasi-judicial
16 roles, because as we detailed in our brief, the military
17 appellate courts have already answered that question for you,
18 and they have said that the convening authority has judicial
19 roles to play.

20 I would say in this proceeding, in the 9/11
21 proceeding, the judicial and quasi-judicial roles that the
22 convening authority plays are even more paramount, because
23 it's not a base commander who's also struggling to navigate

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1 the duties and responsibilities that they would have to
2 maintain good order and discipline, to run a base, to fight a
3 war. This convening authority's responsibilities are one
4 thing and one thing only: This case. And his judicial roles
5 and his quasi-judicial roles are paramount. They're
6 delineated by rule, they're delineated by statute, and they've
7 been recognized and affirmed by the military appellate courts.

8 So once Your Honor recognizes and acknowledges that
9 there's a quasi-judicial and judicial role that the convening
10 authority upholds in this case, then due process kicks in,
11 Judge. And it doesn't matter what title he is, and you
12 certainly don't have to call him a judge, but if he exercises
13 those functions, partiality and impartiality matter. So the
14 standard is, I would suggest, appearance of partiality or
15 impartiality governs the disqualification.

16 If not, we've made those other arguments in our base
17 motion. We made the 504 argument, and we also made an
18 argument which -- and forgive me, you know, my ignorance of
19 military law, but there seems to be another independent basis,
20 which is the inelastic attitude which some of the courts refer
21 to, which doesn't necessarily fit under the accuser standard.
22 But regardless, and I -- you know, I -- if Mr. Trivett or if
23 the government insists on making this argument still, I would

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1 say that the accuser standard also has an appearance of
2 impartiality standard in it. I would cite to Gordon, but we
3 can deal with that on rebuttal. So I would say we're entitled
4 to it. I would say that we're entitled to it under an
5 appearance of impartiality.

6 Now, with that said, let me turn now to the
7 discovery, okay, that we seek. In the beginning, I think we
8 stood on strong ground that the convening authority in this
9 case, Mr. Reismeier, helped the prosecution prepare and
10 strategize on the question of hostilities, that he helped the
11 CA -- I'm sorry, that he -- that the convening authority
12 helped the prosecution by engaging in this moot court argument
13 on the Nashiri case, and that the convening authority has lent
14 his name, his position, his rank to an amicus brief before the
15 D.C. Circuit supporting the government on a critical issue
16 that still exists in this case. And I think that's the
17 appearance of partiality.

18 But after we received the recusal memorandum, like I
19 said, we asked the question: How does this man now become the
20 convening authority? We made a request five days later for
21 the four discovery motions; there were two of them, then we
22 supplemented the two other ones. They are in AE 643F.

23 Now, the prosecution responded to our question about

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1 how did or what role, if any, okay, did the prosecution have
2 in this man, Mr. Reismeier, becoming convening authority. And
3 their response was -- and it was very careful and it was very
4 deliberate. And if I could just read it.

5 MJ [Col COHEN]: Will you remind me what page you're on of
6 your motion? I remember seeing those, I just need to get
7 there myself.

8 DC [MR. MONTROSS]: Okay. Where the discovery motions
9 are, Your Honor?

10 MJ [Col COHEN]: Yeah, what you're going to read from.

11 DC [MR. MONTROSS]: Okay. Well, I'm actually reading from
12 their response.

13 MJ [Col COHEN]: Okay.

14 DC [MR. MONTROSS]: Okay. So it's AE 643F and it's the
15 line, "No one" -- and I'll get you to the exact page, Judge.
16 It's one sentence.

17 MJ [Col COHEN]: Okay.

18 DC [MR. MONTROSS]: "No one currently or formerly assigned
19 to the Office of the Chief Prosecutor was involved in any way
20 in the consideration, nomination, and/or selection of
21 Mr. Reismeier as Convening Authority."

22 MJ [Col COHEN]: I remember reading that.

23 DC [MR. MONTROSS]: And, Your Honor, I will get you the

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1 page -- the exact page cite for that in one second. But to
2 that line, I think any law professor would take delight and
3 certainly fully appreciate the careful parsing of language
4 that occurred. But as an advocate for Mr. Bin'Attash,
5 attempting to reconcile the reality of a convening authority
6 who in my case had been actively assisting the prosecution,
7 the response was less than helpful.

8 But shortly thereafter, and this is frankly through
9 some pure dumb luck, we were tipped off that a man named Jason
10 Foster, okay, was involved in the recruitment of Mr. Reismeier
11 to serve as the convening authority. So I want to take one
12 step back and talk about Mr. Foster and how he fits in
13 structurally to this inquiry.

14 There is the Office of the Chief Prosecutor; that's
15 Brigadier General Martins' office. Organizationally, and this
16 is by Regulation for Trial by Military Counsel [**sic**]
17 paragraph 8-6.b.1, the office directly above the chief
18 prosecutor is called the Deputy General Counsel (Legal
19 Counsel), okay. And a man named Ryan Newman is the person who
20 runs that office, okay?

21 That office, by regulation, is the chief prosecutor's
22 supervisor. So General Martins, by regulation, is supervised
23 by Ryan Newman. Does that make sense?

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1 MJ [Col COHEN]: It does.

2 DC [MR. MONTROSS]: Okay. Now, in that Deputy General
3 Counsel (Legal Counsel)'s office is a man named Michael Vozzo,
4 okay. Now, Michael Vozzo has been prominent in this
5 commission's history in the AE 555 series, which is the
6 unlawful or undue influence. Previously in this commission,
7 testimony was taken regarding the dismissal of Mr. Rishikof,
8 who was the former convening authority, okay.

9 The chief prosecutor is quoted, okay, as saying about
10 Mr. Vozzo, who is allegedly in the office that supervises him,
11 the following: "He told me that the Office of the Chief
12 Prosecutor, the Chief Prosecutor, would openly make comments
13 that Mr. Vozzo was an invaluable part of his team and was a
14 link to the intelligence community." That's at 20788-89.

15 Now, General Martins was not talking about some other
16 person in his office when he says that he was an invaluable
17 part of his team. He was talking about someone in the
18 supervisor's office, his supervisor's office, speaking about
19 him as if he was a member of his own team.

20 And lest the relationship between the two offices not
21 be clear, Karen Hecker. Karen Hecker is another attorney in
22 the Office of the Deputy General Counsel who is actually
23 detailed by General Martins to this very case. And that's

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1 AE 003K.

2 So for all intents and purposes, the Office of the
3 Deputy General Counsel (Legal Counsel) is the Office of the
4 Chief Prosecutor Annex A. And in Annex A is Jason Foster.

5 So we receive information that Jason Foster was
6 involved in the selection of Mr. Reismeier. So on July 11,
7 2019, we file another discovery request specifically asking
8 about Mr. Foster's and Mr. Newman's ties, okay, to the
9 selection of Mr. Reismeier as the convening authority.

10 On August 12th, so about a month later, at 4:55 p.m.,
11 the prosecution responded, and this is AE 643F Attach I, as in
12 India, the prosecution responded, "To reaffirm, there is no
13 prosecution role. 'No role' means no role."

14 Two hours later, we receive additional discovery from
15 Ms. Tate, and we received something called an action memo.
16 And it was prepared for the Secretary of Defense to sign
17 appointing Mr. Reismeier as the convening authority. And a
18 little line on the bottom, okay, said "Memo prepared by," and
19 it was Jason Foster. And Jason Foster prepared a memo that
20 said that Mr. Reismeier has the necessary background,
21 knowledge, and temperament to perform the duties of the
22 convening authority. And that's AE 643E Attach F.

23 And we take a number of odd turns. Mr. Reismeier's

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1 eventually ordered to testify in the Hadi al-Iraqi case.
2 Okay, that's another case before the military commissions. He
3 discloses additional information there. He says that he
4 actually applied two times for the position of convening
5 authority and that he secured the position the second time.
6 He said that Mr. Reismeier [sic] recruited him both times for
7 the position, okay, the first time and the second time.

8 MJ [Col COHEN]: Which name did you mean to use? I think
9 you said -- I heard you say Reismeier said that. I'm sure
10 Reismeier didn't say that about himself. Who recruited
11 Mr. Reismeier?

12 DC [MR. MONTROSS]: Mr. Foster.

13 MJ [Col COHEN]: Thank you.

14 DC [MR. MONTROSS]: Did I say Mr. Reismeier recruited
15 Mr. Reismeier?

16 MJ [Col COHEN]: If you did, either way I heard it that
17 way.

18 DC [MR. MONTROSS]: Wow, that would have been interesting.
19 That would have been another odd twist and turn in this case
20 that was completely unbearable.

21 MJ [Col COHEN]: That be would, Counsel, I agree. So
22 okay, Mr. Foster recruited him twice ----

23 DC [MR. MONTROSS]: Mr. Foster recruited Mr. Reismeier

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1 both times. Okay.

2 And that -- and to be honest, that struck me a little
3 bit, because I think one of the things that I anticipated that
4 the government might say is, look, we had some interaction
5 with him, okay, in 2014, 2015, 2016, but hey, this is 2019.
6 Three years have passed, okay, and now he is the convening
7 authority.

8 And I think what this actually means is that someone
9 in the supervisor's -- in the office that supervises Brigadier
10 General Mark Martins, 2014, 2015, 2016, Mr. Rishikof is
11 appointed in 2017. So they were trying to get him, okay,
12 Mr. Reismeier, in either late 2016 or 2017. So there's not
13 that time gap between his interactions with the prosecution
14 and when he becomes the convening authority, because there was
15 interest in having this man be the convening authority as
16 early as 2016.

17 Now, Mr. Reismeier, this is based on his testimony,
18 okay, that he offered in the Hadi al-Iraqi case, and he said
19 that Mr. Foster took him to the first interview and was
20 present in the general counsel's office while Mr. Reismeier
21 was being interviewed.

22 Now, I would -- if there's not a -- anything that
23 signifies to the general counsel that this person is appearing

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1 with the approval of the office that supervises the
2 prosecutor, it is certainly Mr. Foster's presence during that
3 interview, in the interview.

4 Now, Mr. Reismeier didn't get the job, as I
5 mentioned, and Mr. Rishikof is eventually hired. Of course,
6 Mr. Rishikof is then fired, okay, with the involvement or with
7 the -- well, for the AE 555 series, certainly Mr. Vozzo and
8 the Office of the Deputy General Counsel are interested
9 parties, okay, in the firing of Mr. Rishikof.

10 So when Mr. Reismeier -- the final thing, when
11 Mr. Reismeier decides to disqualify himself from the
12 al Nashiri and the Bahlul cases, he doesn't tell Secretary of
13 Defense first. He doesn't tell the general counsel first, the
14 person that interviewed him. He says the first person he
15 tells -- and he certainly didn't tell me. The first person he
16 tells is Jason Foster.

17 Now, if I might, five months ago, Judge, the
18 D.C. Circuit decided the al Nashiri case, and that issue was
19 Judge Spath's surreptitious and clandestine job applications
20 with the Department of Justice as he presided over the
21 al Nashiri case, and the defense represented that they had
22 credible reports that Judge Spath had been pursuing employment
23 as an immigration judge, and those teams filed discovery with

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1 the prosecution.

2 And I think you know what happened. The prosecution
3 refused to provide the discovery. They called the reports
4 unsubstantiated allegations and they argued that "The defense
5 offers no basis to believe that the former presiding military
6 judge had applied for a position with the Justice Department
7 or even contacted the Justice Department regarding
8 employment."

9 One week later the Associated Press publishes a
10 photograph of Judge Spath at a swearing-in ceremony with
11 Attorney General Sessions for new immigration judges.

12 And the D.C. Circuit in Nashiri said -- and it took
13 great pains to say this. The prosecution, upon receiving the
14 defense's request for discovery into Spath's employment
15 negotiations, refused to investigate the matter and instead
16 accused al Nashiri's team of peddling unsubstantiated
17 assertions. That was proven false, Judge, and I fear that the
18 response by the prosecution here and now rings a similar tone
19 that there's nothing to see here.

20 But the only reason Judge Spath's actions were
21 eventually revealed were not because of the prosecution's
22 forthrightness, Judge, okay, or a judge's decisions and
23 orders. Judge Spath and the appellate court certainly didn't

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1 grant that discovery. It was because Carol Rosenberg and *The*
2 *New York Times* had the ability and resources to file FOIA
3 requests.

4 But in a capital case where I just said that due
5 process matters so much, okay, we shouldn't be dependent upon
6 uncovering information because *The New York Times* took an
7 interest in this case.

8 We're entitled to this discovery. You've said
9 repeatedly yesterday and today that your -- want us to have
10 the opportunity to create a record and you're all about
11 fairness and transparency. This is a crystal clear
12 transparency issue, and I'm asking the court to order the
13 discovery that we requested in 643F.

14 MJ [Col COHEN]: All right. Thank you, Counsel.

15 DC [MR. MONTROSS]: Thank you, Judge.

16 MJ [Col COHEN]: I just want to make sure I understand
17 your argument just a little bit.

18 DC [MR. MONTROSS]: Yes.

19 MJ [Col COHEN]: I don't like to make assumptions, so I'll
20 clarify.

21 DC [MR. MONTROSS]: Yes, sir.

22 MJ [Col COHEN]: All right. Just because the
23 government -- I understand the government's position is

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1 doesn't meet the type -- doesn't meet the type three accuser
2 status. Are you in agreement with that, or are you just
3 saying that's their argument? We still believe that, not only
4 is he type three but this other level of due process applies
5 as well?

6 DC [MR. MONTROSS]: So ----

7 MJ [Col COHEN]: What position are you taking?

8 DC [MR. MONTROSS]: Regarding whether or not he's a type
9 three accuser?

10 MJ [Col COHEN]: Yes.

11 DC [MR. MONTROSS]: Okay. He is a type three accuser,
12 Judge.

13 MJ [Col COHEN]: Okay.

14 DC [MR. MONTROSS]: And the reason I'm saying that is that
15 where the type three accuser language comes from is
16 basically -- and it starts -- the whole accuser standard
17 starts in 1952, okay? And there's a case called
18 United States v. Gordon, Judge, and it was decided on
19 March 19th, 1952. And the cite, Your Honor, if I may?

20 MJ [Col COHEN]: Please.

21 DC [MR. MONTROSS]: 2 C.M.R. 161, United States v. Gordon,
22 G-O-R-D-O-N.

23 MJ [Col COHEN]: Okay.

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1 DC [MR. MONTROSS]: And it's actually a really important
2 case because what the case was deciding was there was
3 basically a new military code that was enacted during that
4 time period, and the code was enacted, according at least to
5 the Gordon court, to address what were apparent inadequacies
6 in military justice.

7 And what the court is talking about in Gordon, and
8 Gordon is actually the case where the -- it's -- the accused
9 was charged with burglarizing the general's house. The
10 general was the convening authority, okay? In a civilian
11 court, it would be pretty crystal clear that that person
12 probably could not exercise any judicial or quasi-judicial
13 functions, but in the military courts we actually get a very
14 detailed erudite opinion making plain why that person, the
15 general actually couldn't sit as the convening authority, and
16 it kind of establishes the accuser standard and what Gordon
17 talks about.

18 And I just want to read one line to you is there's a
19 type one accuser which I concede that Mr. Reismeier is not.
20 He's not type two. We are on to type three.

21 MJ [Col COHEN]: Right.

22 DC [MR. MONTROSS]: So what does it mean to have an
23 interest other than an official interest. One of the things

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1 that the Gordon case says is, "Congress intended that the
2 court should not be convened by anyone who had such interest
3 in the outcome." Then it says, two sentences later, "Such
4 being the case, the reasonable probabilities are that the
5 impartiality demanded by Congress was not present when the
6 selection was made."

7 Now, what happens here is post-Gordon. There are a
8 number of other cases in the military system that use this
9 framework to say that it's a reasonable probability that an
10 objective observer would not believe that the convening
11 authority had a personal interest. Well, to me, Judge, that's
12 the standard in Williams, okay, which is the United States
13 Supreme Court case dealing with the appearance of partiality
14 disqualifying judges.

15 They keep responding that Mr. Reismeier says, "I am
16 impartial. I am not going to favor either side." And that's
17 great, but I would suggest that even the type three accuser
18 standard, going back to 1952, has an appearance of partiality
19 basically standard written into it. And it's not just
20 these -- like, was he involved with the convening authority's
21 fiancée, or did he attempt to blackmail the convening
22 authority, or is the convening authority a victim?

23 But what the military courts are actually looking at

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1 is an objective determination about whether or not a
2 reasonable person could find that the convening authority is
3 not partial, and how is that any different than the appearance
4 of impartiality standard?

5 So I think we're having a fundamentally different
6 reading of what is a type three accuser, Judge, to be honest.
7 So to answer your question, no, I'm not surrendering the type
8 three accuser. In fact, I think he is a type three accuser.

9 But I also think there's a third and distinct basis
10 and that's the inelastic attitude, okay? Is he open to
11 considering at the end stage -- okay, so post-trial -- to
12 effectuate his judicial and quasi-judicial responsibilities?

13 One of the things that this person, this convening
14 authority can do is actually reduce the charges, reduce the
15 sentence. I mean, you're obviously familiar with this, Your
16 Honor. And if that's the case, there's case law that says you
17 can't have an inelastic attitude to considering information or
18 presentations that's going to be put in front of you for that
19 purpose.

20 Well, this conspiracy charge is certainly one of
21 them, okay. And if we lose on conspiracy, we will be arguing
22 to the convening authority that the international law of war
23 says that conspiracy is not a triable offense in front of this

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1 commission. And he's taken a concrete position 180 degrees
2 opposite in his amicus brief. And there is no way that he
3 could make that consideration that we are entitled to
4 present -- that's the third basis, Judge, and we'll get to
5 that for the underlining motion.

6 MJ [Col COHEN]: All right. Thank you.

7 With respect to specific items that you've requested,
8 let me just get to those real quick ----

9 DC [MR. MONTROSS]: So 643F, Judge, the discovery requests
10 themselves?

11 MJ [Col COHEN]: Right.

12 DC [MR. MONTROSS]: 643F, if you go to Attachment D ----

13 MJ [Col COHEN]: Thank you.

14 DC [MR. MONTROSS]: Thank you, Judge.

15 MJ [Col COHEN]: I appreciate ----

16 DC [MR. MONTROSS]: That's the first one.

17 MJ [Col COHEN]: Yes, okay. So in particular what I'm
18 looking at was -- well, maybe I want to look at the second
19 one. Yeah. It was the one dated 19 June 2019 that I want --
20 that I had some questions on, it's paragraph 11.

21 DC [MR. MONTROSS]: Yes, sir.

22 MJ [Col COHEN]: Do you see what I'm talking about?

23 DC [MR. MONTROSS]: There's two that are actually dated

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1 the 19th.

2 MJ [Col COHEN]: Oh, sorry. This was the one where it
3 says, "Therefore, Mr. Bin'Atash requests the prosecution
4 provide to Mr. Bin'Atash the following," and it lists a.
5 through e. -- a. through e.

6 DC [MR. MONTROSS]: Yes, sir.

7 MJ [Col COHEN]: All right. We're talking about the same
8 document. Great. It's page 39 of 72 of AE 643F.

9 DC [MR. MONTROSS]: Yes, sir.

10 MJ [Col COHEN]: So I -- in looking at the government's
11 response, what do you -- I mean, obviously General Martins
12 would know whether or not -- I guess the prosecution should
13 know whether or not they've -- they have had, themselves, any
14 conversations with anyone about the nomination process.

15 So out of a. through e., in light of their response,
16 I mean, what am I supposed to compel? Like, for example, b.,
17 now, I guess ----

18 DC [MR. MONTROSS]: Okay. So can we start with c., Judge?

19 MJ [Col COHEN]: You may, c. would be great.

20 DC [MR. MONTROSS]: So c. is the 2014 regarding the
21 jurisdictional matter in the al Nashiri case, right? So
22 that's the hostilities question.

23 MJ [Col COHEN]: Okay.

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1 DC [MR. MONTROSS]: That's still open in front of us,
2 okay, concerning issue regarding whether that proof was to be
3 offered pretrial or during the case in chief. And Your Honor
4 probably remembers, I mean, two days ago you were having a
5 very -- a very detailed conversation with Mr. al Baluchi's
6 team about hostilities, okay?

7 MJ [Col COHEN]: That is correct.

8 DC [MR. MONTROSS]: Okay. So that's still an issue in our
9 case.

10 Now, their position on d. is the 2015 amicus brief,
11 okay; e. is the mooted. Their position isn't that this stuff
12 doesn't exist, their position is that we're not entitled to
13 it.

14 MJ [Col COHEN]: I understand. Okay. Thank you.

15 Like I said, I'll go back and I'll read all of the
16 response and stuff. I just -- I was just trying to put
17 together the information and make sure I understand your
18 position. All right. I get that. Okay.

19 Thank you. That is very helpful.

20 DC [MR. MONTROSS]: Thank you, Judge.

21 MJ [Col COHEN]: Yes, ma'am.

22 ADC [MS. RADOSTITZ]: Good afternoon, Your Honor. Most of
23 my argument is actually on the underlying motion, so I'm going

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1 to set that aside ----

2 MJ [Col COHEN]: Okay. Great.

3 ADC [MS. RADOSTITZ]: ---- until that time. But I wanted
4 to make just a couple of points.

5 One is just a timeline point, which is that counsel
6 for Mr. Bin'Attash was talking about the fact that Jason
7 Foster recruited Mr. -- or Admiral Reismeier back in 2016, I
8 think is the year, and he wasn't hired because Mr. Rishikof
9 was.

10 Well, then what happened is not only did Mr. Rishikof
11 get fired, but we had a change in administration. So he was
12 first recruited under the Obama Administration, somebody in
13 the Obama Administration said, no, we're not going to get that
14 guy, we're going to get Mr. Rishikof. And then we have a new
15 administration, and -- I just think that the historical
16 context of things matters, and so I just wanted to remind the
17 court of that change ----

18 MJ [Col COHEN]: All right. Thank you.

19 ADC [MS. RADOSTITZ]: ---- there.

20 With regard to the motion to compel witnesses, as
21 Your Honor pointed out, we have a couple ways of finding out
22 the extent of Admiral Reismeier's involvement with the chief
23 prosecutor. And one would be to call the chief prosecutor as

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1 a witness. And that is not our request because that causes
2 all kinds of secondary effects. And so the better way to
3 approach that, in our opinion, is to call Admiral Reismeier to
4 get that testimony.

5 The government in their brief argues that we don't
6 need his testimony because he already testified in Nashwan --
7 Hadi al-Iraqi's case ----

8 DC [MR. MONTROSS]: Judge, could I just -- I'm sorry,
9 ma'am.

10 MJ [Col COHEN]: Yes.

11 DC [MR. MONTROSS]: I didn't argue 643F about whether or
12 not Mr. Reismeier should testify or not because I was asking
13 for the discovery first.

14 ADC [MS. RADOSTITZ]: Okay.

15 DC [MR. MONTROSS]: I'm more than prepared -- I would
16 actually like the discovery first before ----

17 MJ [Col COHEN]: Okay. I understand. This is one of
18 those ----

19 DC [MR. MONTROSS]: I understand we're kind of wading
20 into ----

21 MJ [Col COHEN]: This is one of those positions where you
22 all don't have to be completely aligned, I guess, because
23 they're joined to your motion.

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1 DC [MR. MONTROSS]: I would just ask if you give me an
2 opportunity later on to deal with the witness issue and
3 whether or not he should be called, I'm just -- thank you.

4 MJ [Col COHEN]: Okay. No, I understand. Thank you.

5 ADC [MS. RADOSTITZ]: And I apologize. I didn't mean to
6 step on my colleague's toes there.

7 MJ [Col COHEN]: No. No, I understand.

8 ADC [MS. RADOSTITZ]: So I just want to make a small
9 point, which is, that we're entitled to individualized
10 determination. We are not stuck by whatever the counsel for
11 Mr. Hadi al-Iraqi thought was the important issue. And so
12 that's as much as I wanted to really say about that.

13 MJ [Col COHEN]: Thank you.

14 ADC [MS. RADOSTITZ]: With regard to the discovery motion,
15 the government's full focus is on whether this discovery is
16 relevant to whether Admiral Reismeier is a accuser or not.
17 And they don't even address whether it would be relevant,
18 material to the issue of -- of him as a quasi-judicial
19 officer. And our position is -- which is well briefed, so I'm
20 not going to go into it -- is clear and is supported by the
21 case law that he is -- he has a number of roles. Some of his
22 roles are administrative, some of his roles are
23 quasi-judicial. If you read the transcripts of the AE 555

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1 series, we had a lot of arguments about that. But I think the
2 case law is pretty clear that he has at least some
3 quasi-judicial role.

4 And the question, if I were you, that I would be
5 thinking is, okay, so we've got all of these nitpicky things
6 about discovery here and there, but why does it matter in the
7 end? Why does it matter? And the reason it matters is
8 because the role of the convening authority, which you're very
9 familiar with because you've been both a judge and a
10 prosecutor and a defense attorney, but some people in -- who
11 are watching these proceedings might not be, is the extent to
12 which the convening authority is involved on a day-to-day
13 basis on these -- in these cases.

14 We're about to have a -- the beginnings of
15 suppression hearings. There are witnesses who will need to be
16 brought. One of the things that the convening authority has
17 the authority to do is, if there is a huge expense for a
18 witness that you have deemed necessary, the convening
19 authority has the authority to say, ah, we're not going to pay
20 all that money; instead, we're going to do this or we're going
21 to do that. That's a pretty big role that doesn't happen in
22 most criminal cases.

23 Another role is just deciding the -- any requests for

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1 resources by the defense or the prosecution. And so that's
2 another day-to-day intricate role.

3 And then, of course, there's the role involving the
4 charges. And Admiral Reismeier, of course, came in after
5 these charges had been both preferred and referred, but he
6 still has a major role in selecting the members who will be
7 assigned to this case. He has an obligation not simply to --
8 like in a regular federal case or a state case where you just
9 pull names off of a list, he has an obligation to go through
10 and make sure that they're qualified to sit in this case. And
11 that causes a judgment that wouldn't normally be in a clerk of
12 court or somebody else who might be calling the members.

13 And then, of course, something that Mr. Montross
14 already addressed, which is his obligations after the -- any
15 verdict, and those are significant. And like Mr. -- counsel
16 for Mr. Bin'Attash, counsel for Mr. Mohammad would certainly
17 be going to the convening authority.

18 And I know that some people sometimes confuse this a
19 little bit with a clemency application, but it's quite a bit
20 different than that. Because, as you know, the convening
21 authority has the obligation to make a finding that the facts
22 and the law are true. And so he has -- it's sort of like a
23 second bite at the apple, and we would certainly take

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1 advantage of that.

2 So it matters a lot that the convening authority is
3 somebody who can be trusted to be completely impartial, and
4 that's why we believe that we need this discovery, and we need
5 ultimately to have him testify, and then we'll address the
6 merits of the matter.

7 MJ [Col COHEN]: Okay. All right. Thank you.

8 Any additional argument?

9 Trial Counsel? Mr. Trivett.

10 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

11 MJ [Col COHEN]: Good afternoon.

12 MTC [MR. TRIVETT]: To quote Admiral Reismeier when asked
13 about his previous involvement in military commissions, he
14 said, I quote, It is what it is. The record is amply clear
15 that he had involvement in the 2006 Military Commissions Act
16 drafting, the revision in 2008, the amicus brief that we heard
17 Mr. Montross speak about in reference to an inelastic attitude
18 toward the law. He received a briefing from the Office of the
19 Chief Prosecutor on the al Bahlul case. He was a moot court
20 judge on the al Nashiri case in a presentation that was made
21 to him prior to an appeal that was taken by the Office of the
22 Chief Prosecutor.

23 In his testimony, he goes into detail on how it is

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1 that he was asked to do the job both during the Obama
2 Administration and during the Trump Administration. He made
3 clear that Mr. Jason Foster was the person who asked him to
4 come for an interview.

5 Now, a convening authority is a creature unique to
6 military justice, and sometimes part of the frustration that
7 we have on the right side here of the court, is that there's
8 never a recognition of any previous rulings of the commission.
9 I'm certain I heard Mr. Montross say that the issue of
10 hostilities is still before you. Only in that they continue
11 to file motions to reconsider, but the law is pretty settled.
12 The law of the case is that hostilities exist as a matter of
13 law for jurisdiction, and we're going to instruct after -- you
14 know, with some tweaking maybe after the evidence, the Tadic
15 standard to the members.

16 But I'll point you to AE 091D and AE 091B, when
17 Judge Pohl, who had been a member of the military for probably
18 close to 40 years by then, held that a convening authority is
19 neither judicial nor prosecutorial, and that it's actually
20 part of the Executive. He is not a judge.

21 If Congress or the Secretary of Defense in the
22 Manual for Military Commissions wanted to impute a higher
23 disqualification standard, they would have done so, and it

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1 would have held them to the same standard that you yourself
2 have to hold yourself to in matters of recusal for
3 disqualification.

4 They did not do so. And they did not do so because
5 there's a recognition that convening authorities are not
6 judges, and that ultimately, at least for the last almost 70
7 years following Gordon, the standard for disqualification of
8 the convening authority has always been the same.

9 The Gordon case is one of the few military justice
10 cases that just continues to be the seminal case on the issue.
11 It continues to get cited.

12 And as set forth in United States v. Dinges, which
13 was a 2001 CAAF case that's cited in our brief, the basic test
14 for determining whether the convening authority is an accuser
15 is whether he is so closely connected to the offense that a
16 reasonable person would conclude that he has a personal
17 interest in the matter. So despite that being the Gordon test
18 from 1952, that's the most recent jurisprudence that we have
19 reaffirming that that's the standard.

20 So our position on the discovery -- and I believe
21 Mr. Montross argued that he liked that you started with the
22 rule. Respectfully, sir, I think you can start and finish
23 with the rule on this issue. Our position is that even

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1 assuming everything that Mr. Montross said and alleged was
2 true, it still doesn't get them there. It still doesn't
3 constitute an accuser.

4 He disagrees, and quite frankly, sir, you may
5 disagree, but you have all of the facts you need now. The
6 facts are what they are. To quote Admiral Reismeier again, it
7 is what it is. He didn't hide from it. He sua sponte
8 disclosed it. He held himself, quite frankly, to a higher
9 standard than was required, which nothing prevents him from
10 doing.

11 If his concern is about the appearance and
12 impartiality and transparency of the system, good on him for
13 doing that. But he didn't make law when he did that. He
14 didn't all of a sudden transpose the accuser standard into the
15 standard for disqualification of a military judge simply
16 because he decided out of an abundance of caution to recuse
17 himself in al Bahlul and al Nashiri.

18 And just so you're clear from our position, and this
19 will flow into the discovery request, but you have to
20 understand what our legal position is first and why we don't
21 think they're entitled to the discovery under 701; that even
22 if he was held to a standard, a judicial standard, he would
23 not have to recuse himself from this case. If he were still

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1 over the al Bahlul case and the al Nashiri case, and he didn't
2 disqualify himself under the judicial standard, that would be
3 a problem, but he did. He sua sponte did.

4 The case law that we cite, and I believe it's
5 U.S. v. Gibson, that even a former U.S. Attorney who is now
6 sitting as a judge, sitting in judgment over an individual who
7 had been previously prosecuted in his court, need not have
8 recused himself from a case for a subsequent prosecution in
9 which he sat as a judge.

10 And the principle is because you needed to be a
11 participant. We litigated this extensively in the motion to
12 recuse Judge Parrella, and all of the motions to reconsider
13 the recusal issue of Judge Parrella. We've cited it before
14 the CMCR and now before the D.C. Circuit. So if he need not
15 have done it under what is unquestionably a broader standard
16 for recusal of a judge, he certainly need not do it for a
17 convening authority whose standard is solely whether he's a
18 type one, type two, or type three accuser.

19 Now, it's important to note when this convening
20 authority came into this process. He is not a type one or a
21 type two because he came in seven years after the fact. He
22 didn't make any decision on whether or not it was a capital
23 case. He didn't decide whether or not to refer or not refer

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1 charges. That was done by Admiral MacDonald almost nine years
2 ago.

3 We also do not know, nor is the issue ripe, whether
4 or not he's even going to be the convening authority by the
5 time Mr. Bin'Attash or Mr. Mohammad would actually be in a
6 post-conviction posture. And although we're confident in our
7 case, it's not inevitable that they'll ever be in a
8 post-conviction posture. So the issue as to whether or not he
9 has got an inelastic attitude really isn't ripe at this point.
10 Most of those issues come up post-conviction on appeal.

11 So what real role does he have in this case where,
12 even if he did have an inelastic attitude, he would prejudice
13 the accused or a right of the accused? And while every
14 accused is entitled to a neutral, disinterested convening
15 authority, the reality is he's dealing with resource requests
16 that are only, to quote Ms. Radostitz, the first bite at the
17 apple.

18 He doesn't make any final determinations on
19 resources. You do. Any request that he denies comes to you
20 anyway. So there is no right that's going to be harmed of the
21 accused.

22 There is also no right, which we litigated
23 extensively in 555, and I would refer you back to our filing

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1 papers on that -- there is no right to enter into a pretrial
2 agreement either. You never have a right to a pretrial
3 agreement. So even if he had some kind of inelastic attitude
4 towards a pretrial agreement, it still wouldn't be grounds for
5 disqualification.

6 So in the end, there's going to be no prejudice
7 whatsoever even if the government's wrong, and even if somehow
8 he was an accuser, at least not until a point in time where
9 we're dealing with a post-conviction record of trial that he
10 has to approve.

11 We take issue with the entire argument about the
12 convening authority not having a good order and discipline
13 aspect. That is exactly why we're here. That's exactly why
14 commissions are set up. Commissions are set up to vindicate
15 the laws of war and to discipline those enemies who, in their
16 war effort against the United States, would flout or thwart
17 the law of war. This is a disciplining function. This is
18 done in order to vindicate the law of war and send a message
19 to anyone who would violate it that you will be punished
20 harshly if you do.

21 So we take exception to that comment, and we want to
22 try to reorient the commission to why we're here and what
23 we're doing. There's a reason why these attacks are before a

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1 military commission.

2 We would point Your Honor to United States v. Dinges,
3 which is the 2001 CAAF case that I earlier reference. It has
4 a great rundown and a great string cite of cases where they
5 did determine that someone was, in fact, a type three accuser;
6 what it means to have something other than an official
7 interest.

8 One example is when the convening authority was the
9 victim of the accused's attempted burglary; that's the Gordon
10 case. One example is where the accused tried to blackmail the
11 convening authority by noting that his son was a drug abuser;
12 that's the Jeter case. When the accused has potentially
13 inappropriate personal contacts with the convening authority's
14 fiancée; that's the Nix case.

15 But even in Nix, even in a situation where everyone
16 would say, well, yeah, if the guy was trying to make time with
17 the convening authority's wife, he probably shouldn't be the
18 guy to decide he's going to trial -- even in the Nix case, it
19 says this is why there is no per se rule. There is no
20 appearance of conflict rule. There is simply the accuser
21 rule. And whether or not you have an other-than-official
22 interest is going to be the sole determining factor as to
23 whether or not you should have disqualified yourself as the

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1 convening authority.

2 So the convening authority in this case by statute is
3 the Secretary of Defense. If you look to the Uniform Code of
4 Military Justice, there's some 20-odd convening authorities
5 that are by name referenced that have the power of convening
6 authority per Congress. Here there's only one.

7 Now, the Secretary of Defense is free to delegate,
8 but there are no other named convening authorities. So if the
9 Secretary of Defense determines that he does want to delegate,
10 because this probably is another full-time job that he can't
11 take on, those people don't just fall out of the sky. There's
12 going to be a process that's put in place by someone in the
13 Office of the General Counsel to put nominees in front of the
14 Secretary of Defense who ultimately has the final say as to
15 whether or not he wants to designate that person as a
16 convening authority.

17 We're not contesting that Jason Foster had a role,
18 but Admiral Reismeier discussed the role that Jason Foster
19 had. I would invite you to the some 70 pages of testimony he
20 has given in the United States v. Hadi al-Iraqi case that
21 discusses in detail how it is that he got hired.

22 And to paraphrase, he was retired, sitting fat, dumb,
23 and happy with a new defense practice that he won, and he was

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1 asked to serve. He was not in any way bucking for this job or
2 asking for the job, or promoting himself from the job, but he
3 felt service.

4 And it is important to note in that aspect that we're
5 talking about, at least from the Navy standpoint, probably the
6 single most experienced military justice litigator in the
7 history of the United States Navy. He had a completely unique
8 career where he was -- split time almost evenly between
9 prosecution, defense, trial judge. He was the Chief Judge of
10 the Navy Court Criminal of Appeals, and then he became the
11 Chief Judge of the Department of Navy. He specifically stood
12 up the military justice track because people like him were
13 having a hard time promoting. All of this is in the
14 testimony.

15 So we're dealing with someone who has dealt with
16 military justice matters for over 25 years. He's fully aware
17 of the recusal standard that applies to him, whether it be as
18 a judge or whether it be as a convening authority. He went
19 over and above and held himself to a higher standard in the
20 al Bahlul case and in the Nashiri case for the purpose of
21 making the commissions as transparent and fair as possible.

22 It's important to note that that's the individual
23 that you're dealing with when you're getting requests for

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1 discovery of information that, quite frankly, he has already
2 spoken about. He has two different memoranda for file, one
3 that he wrote initially, one that he followed up after there
4 were certain allegations. We would invite your attention to
5 those. Between those two statements and the 70-page
6 testimony, the prosecution feels like the facts that the judge
7 needs to decide the issue are already before the commission.

8 Convening authorities are presumed to be not biased;
9 that is the presumption. And it has to work that way. The
10 defense has to have the burden of showing why a convening
11 authority is biased in his role, because otherwise every
12 single one would be challenged, and military justice would
13 grind to a halt.

14 What I think the most important question to answer
15 is: What is it that the defense thinks they're going to get
16 from any additional discovery or any additional testimony of
17 Admiral Reismeier or any additional testimony of Jason Foster
18 that they don't already have in the record? I think that's
19 the analysis that the commission has to take in determining
20 whether or not this additional testimony is relevant, relevant
21 and necessary.

22 We cite to the Ruth factors. There's four specific
23 factors under the Ruth case for why testimony might be

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1 necessary. I'm not suggesting this isn't an important issue,
2 but this isn't a witness on the case in chief or a sentencing.
3 Part of it is whether or not it would be cumulative with other
4 information; from a pretrial standpoint, hearsay is
5 admissible. All of the documents that you need to review, you
6 can review without the testimony.

7 So we really stand here before you on principle. If,
8 in fact, the convening authority is presumed to not be biased,
9 and, in fact, he has provided all of the information he needed
10 to provide -- and quite frankly, we would be in a different
11 spot here if he didn't give those memoranda for file, and
12 maybe even if he hadn't testified in the Hadi case. But based
13 on the fact that there is an ample record before you, I would
14 ask the commission to inquire specifically on what it is that
15 the defense thinks they need that they don't already have to
16 be able to make this argument.

17 I mean, Mr. Montross already made the argument. He
18 made the argument for why he thinks he's an accuser. We're
19 not contesting any of the facts. It's really before the
20 commission to decide at this point. But that's why we stand
21 before you, that's why we objected to providing the
22 information, and we're objecting to testimony despite the fact
23 that he testified only several weeks before because we simply

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1 don't think it's necessary.

2 In the end, if you disagree and you feel like he
3 needs to testify, we can make him available. We would ask,
4 though, to limit it to those matters which aren't already in
5 the record, just as a matter of judicial economy.

6 As you can see very quickly -- I know this is only
7 your third session here -- but seemingly simple issues can
8 take a lot of our time. And we have very important business
9 in front of us over the next 16 or 17 months to get to trial
10 in January 2021. I'm not suggesting this isn't important, I'm
11 just suggesting that you have all of the facts you need to
12 make your decision.

13 Subject to your questions.

14 MJ [Col COHEN]: Yeah, just -- not because I'm leaning any
15 way, but just looking at all kinds of options. What would be
16 the government's position -- I didn't get a chance to ask the
17 defense this yet -- what would be the government's position on
18 if I believe that there are specific issues that need to be
19 addressed of a written deposition where I could just appoint a
20 deposition officer, questions could be submitted in advance,
21 and we would just get specific answers to specific questions?

22 MTC [MR. TRIVETT]: More like an interrogatory, sir?

23 MJ [Col COHEN]: Yeah. Except -- except that the way they

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1 would have to work under the rules -- yeah, so normally we
2 would call them interrogatories; under the rules, it's a
3 written a deposition. Essentially I would have to appoint a
4 deposition officer and who then would take the questions that
5 are submitted by the parties and approved for the deposition.
6 They would actually be recorded in some way, either by audio
7 or they could then be transcribed, but it just wouldn't --
8 there wouldn't be questions and answers. It would just be
9 getting -- essentially it's a very unique way of doing written
10 interrogatories.

11 MTC [MR. TRIVETT]: Yes, sir. And we're not in opposition
12 to that if the commission believes that there's additional
13 information that it needs.

14 MJ [Col COHEN]: Right. I'm not saying you're in
15 agreement, but you would not oppose it?

16 MTC [MR. TRIVETT]: Correct. Correct. That said, we've
17 handled this issue before on when Mr. Rishikof and Mr. Brown
18 were terminated, and Judge Pohl at the time ordered
19 declarations from the Secretary of Defense and the Office of
20 the General Counsel.

21 MJ [Col COHEN]: Okay.

22 MTC [MR. TRIVETT]: That is an option for you. That is an
23 easier option for you, quite frankly. We are not going to

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1 oppose that in any way, nor would the convening authority
2 oppose answering those questions. We believe you have the
3 authority to do that anyway. But if you think it's not an
4 explicit authority, it's not going to be challenged by the
5 person who you are ordering, so we will comply with any order
6 of the commission on that issue.

7 MJ [Col COHEN]: Okay. All right. Thank you.

8 And then finally, I will not -- I will not veer from
9 my thing that proffers are not evidence, so evidence would
10 need to be submitted along these lines.

11 But maybe I just missed it, but the idea of Foster.
12 One question is I don't know exactly what happened in the
13 Hadi al-Iraqi case, I typically have enough to do in this
14 case, so I just know generally that Reismeier testified.

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

16 MJ [Col COHEN]: Did Foster also testify?

17 MTC [MR. TRIVETT]: He did not, sir. I believe he was
18 specifically denied ----

19 MJ [Col COHEN]: Okay.

20 MTC [MR. TRIVETT]: ---- as additional witness. The way
21 Judge Libretto did it, my recollection from reading the
22 record -- and we did at least attach, I believe it's
23 Attachment D to our recent filing on the discovery response.

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1 MJ [Col COHEN]: Okay.

2 MTC [MR. TRIVETT]: That Judge Libretto deferred ruling on
3 additional discovery or additional witnesses until he had an
4 opportunity to hear Admiral Reismeier, after which I believe
5 he then denied the additional discovery and the additional
6 witnesses.

7 MJ [Col COHEN]: All right. Copy.

8 And then the second question would be as a proffer
9 but something I may require evidence on is: What has been or
10 is Foster's relationship to OCP?

11 MTC [MR. TRIVETT]: So Jason Foster works for the Office
12 of General Counsel (Legal Counsel), and the Department of
13 Defense is overall responsible for the administration of
14 commissions, period.

15 MJ [Col COHEN]: Correct. I get that.

16 MTC [MR. TRIVETT]: So -- right. So he will be the
17 representative, not unlike Mr. Vozzo, who will work Department
18 of Defense-centric issues within the interagency process.

19 So in the event that the Office of the Chief
20 Prosecutor -- to the extent that the Department of Defense
21 needs help from the other interagency process, they would
22 assist.

23 MJ [Col COHEN]: Okay. So on a monthly basis, how much

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1 direct interaction is there between Foster and, for example,
2 your team? I know it's General Martins' team. When I say
3 your team, the team that's sitting in front of me here today.

4 MTC [MR. TRIVETT]: Between phone calls and meetings ----

5 MJ [Col COHEN]: Ballpark is fine. I'm not going to
6 consider it ----

7 MTC [MR. TRIVETT]: Half dozen, maybe.

8 MJ [Col COHEN]: Okay.

9 MTC [MR. TRIVETT]: General Martins would want to up that
10 estimate to about a dozen a month.

11 MJ [Col COHEN]: Okay. That's fine. Like I said, these
12 are all proffers ----

13 MTC [MR. TRIVETT]: I understand.

14 MJ [Col COHEN]: ---- unless the parties stipulate to
15 this. So I'm just -- these are just things that I may come
16 back, and if I needed additional information, I may ask for
17 specific documentation of this in some form. Because I will
18 stick to the proffers are not evidence.

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

20 MJ [Col COHEN]: All right. Asking you some more
21 questions about the same discovery request that I addressed
22 with the other counsel. One second, please.

23 And what I will do, unless there's a strenuous

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1 objection -- but given that both sides have cited the recent
2 testimony, I don't think there will be. I'll go back, and I'm
3 actually going to consider that 70 pages of testimony in
4 conjunction with this motion. If the defense -- if you
5 vehemently disagree, but it seems like it would be relevant to
6 at least see what the gentleman said under oath with respect
7 to these matters. But you don't -- I'll give you the
8 opportunity for the defense to be heard. The government's
9 asked me to do so, so I'll take them that they're okay with
10 it. Okay.

11 So we're on page 39 of 643F. I don't know if you
12 have a copy of that in front of you.

13 MTC [MR. TRIVETT]: I don't, but I ticked off the specific
14 requests that they had.

15 MJ [Col COHEN]: Okay. Great. All right. So the
16 question that I would have with respect to, for example c.,
17 which is all communications, records, and documentation
18 related to convening authority's contact and/or consultations
19 sometime in 2014 with -- they are reminding me when I read, I
20 do so quickly -- with General Martins regarding a
21 jurisdictional matter that arose in Nashiri.

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

23 MJ [Col COHEN]: I'll paraphrase a little bit. And

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1 concerning an issue that's in quotations, regarding whether
2 that proof was to be offered pretrial or during the case in
3 chief.

4 Once again, we can kind of go back to what I asked
5 you once before with a different matter is, is the
6 government's position that those communications no longer
7 exist, not because I was expecting them, or that you just have
8 deemed them not to be discoverable under 701?

9 MTC [MR. TRIVETT]: We don't believe them to be
10 discoverable under 701.

11 MJ [Col COHEN]: Okay.

12 MTC [MR. TRIVETT]: Because we believe that the fact of
13 the participation is what's relevant to the analysis. Exactly
14 what it is that he looked at is not.

15 MJ [Col COHEN]: Copy.

16 MTC [MR. TRIVETT]: Now I will say -- and if Your Honor
17 will give me some leeway here.

18 MJ [Col COHEN]: I will.

19 MTC [MR. TRIVETT]: There was one thing I wanted to
20 address, and it's related to this issue. This inelastic
21 attitude ----

22 MJ [Col COHEN]: Okay.

23 MTC [MR. TRIVETT]: ---- on the issue of conspiracy.

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1 Admiral Reismeier's testimony -- and I keep referring
2 back to the testimony, so -- because it is in the record. But
3 his testimony indicates that he was asked to sign on to a
4 brief as a former flag officer who had military justice
5 experience with other flag officers on the issue of whether or
6 not, under the define and punish clause of Article I Section 8
7 of the Constitution, that Congress had the authority to define
8 conspiracy as a violation of the law of nations.

9 His testimony was clear, though, that he had not --
10 he had not read the prosecution's brief on the issue, and that
11 he signed on to it but wasn't a participant in the drafting of
12 the amicus brief. That's all in the record.

13 But this concept of an inelastic attitude, it
14 wouldn't be -- you wouldn't be having an inelastic attitude
15 towards what is now the law. The D.C. Circuit decided that
16 Congress did, in fact, have the authority to define conspiracy
17 as a violation of the law of war. Mr. Bahlul sought a writ of
18 certiori to the Supreme Court, and that was denied. So that's
19 the law of the land.

20 Admiral Reismeier happened to be right, he was on the
21 right side of it, but this concept that because he took a
22 legal position he can have an inelastic attitude towards the
23 next time he considers the issue is simply not part of the

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1 judicial standard. I'm sure all the time, I'm sure that you
2 have made a determination as a military court-martial judge
3 that Article 92 of the code is a valid constitutional charge.

4 You might have to deal with that at some point if you
5 were to ever become an appellate judge. You're not going to
6 recuse yourself because you had an inelastic view. You're
7 going to simply reiterate whether or not that is, in fact, the
8 law. So there was no inelastic attitude that was developed
9 simply because he joined an amicus brief that happened to be
10 right and that the D.C. Circuit happened to adopt and which is
11 now the law of the land.

12 So this concept that if he were the convening
13 authority post-conviction and they challenge Charge I as not
14 being valid under international law, he wouldn't have the
15 authority as a matter of law of disagreeing with that. He
16 might have other clemency powers and those types of things,
17 but it wouldn't be -- he -- he would be acting ultra vires to
18 determine that it wasn't a violation of the law of war if the
19 D.C. Circuit had said it was. So I did want to address that.

20 That loops me back to the issue of the information he
21 received. We have reviewed it. It does exist both for the
22 al Bahlul case and for the al Nashiri case.

23 MJ [Col COHEN]: Okay. Thank you. What about e.? Does

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1 that even exist?

2 MTC [MR. TRIVETT]: Can you just explain to me what e. is?

3 I don't have the ----

4 MJ [Col COHEN]: I'm sorry. It's the one that refers to
5 any records of or notes of the mooting of the OCP's argument
6 in the United States v. al Nashiri sessions where Brigadier
7 General Martins requested the advice and assistance of
8 Mr. Reismeier.

9 MTC [MR. TRIVETT]: Yes, sir. So the al Bahlul
10 information is a brief, PowerPoint brief. The Nashiri
11 information is simply the briefings.

12 MJ [Col COHEN]: Okay. But there's no additional like for
13 e. is talking about there's recordings. I mean, normal
14 practice would be if you did a moot court session, you just --
15 you present your case, and then there's some oral comments
16 that people kind of take under advice. But is there
17 anything -- is that beyond what happened in this case?

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

19 MJ [Col COHEN]: Okay. So there are no ----

20 MTC [MR. TRIVETT]: There are no recordings.

21 MJ [Col COHEN]: No notes, that kind of thing?

22 MTC [MR. TRIVETT]: No notes. There wasn't anything even
23 actually e-mailed to him, it was all hand carried. And it was

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1 just the briefings of the parties and the appendices of what
2 was before.

3 MJ [Col COHEN]: Copy. All right. Thank you.

4 So really what I would be looking at between c., d.,
5 and e. there is really -- contact exists in some form, but the
6 government's position is not discoverable under 701. With e.,
7 there are no additional notes or recordings of this moot court
8 session -- or moot court discussion.

9 MTC [MR. TRIVETT]: Correct. We -- just to be clear,
10 because we're talking letters and I don't have the letters in
11 front of me ----

12 MJ [Col COHEN]: That's all right.

13 MTC [MR. TRIVETT]: ---- but when you say contact, can you
14 expand?

15 MJ [Col COHEN]: Well, they talk about communications. I
16 guess that's a better way, communications, recordings. I
17 mean, I don't know, I don't know whether they are like just
18 e-mails back and forth like, hey, can you help us out on this,
19 or, you know, that kind of stuff. I mean, I'm just thinking
20 how I would normally contact people. But that can't be --
21 obviously wouldn't be a telephone call unless it was recorded
22 somehow surreptitiously, I guess, but ----

23 MTC [MR. TRIVETT]: Right. Yeah, the extent that those

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1 exist, we argued under 701 they were not discoverable.

2 MJ [Col COHEN]: Thank you. That's all the questions I
3 have for you, Mr. Trivett. Thank you very much.

4 Defense, final thoughts, if any?

5 ADC [MS. RADOSTITZ]: I'm back to talk about the idea of
6 the judicial officer.

7 MJ [Col COHEN]: Okay.

8 ADC [MS. RADOSTITZ]: Because Mr. Trivett -- or the
9 government says that Judge Pohl has already decided that
10 there's no judicial acts.

11 But I want to go back to the rules because I know
12 that you like the rules. And I will draw your attention to
13 949 -- 10 U.S.C. 949b(a)(2)(B). And it says that unlawful
14 influence happens, the actions of any convening, approving, or
15 reviewing authority with respect to their judicial acts. And
16 so clearly the statute contemplates that the convening
17 authority can engage in judicial acts.

18 In AE 555, Judge Parrella relied specifically on
19 this -- this in finding what was or was not a judicial act of
20 Mr. Rishikof. He ultimately made a finding that the things
21 that he was fired for were not judicial acts so they couldn't
22 fall within the UI statute. He relied on United States v.
23 Nix, which is N-I-X, 36 C.M.R. 76.

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1 And I would also draw the Court's attention to a case
2 that we cited in our briefing, United States v. Davis, 58 MJ
3 100, a CAAF case from 2003. All of those talking about the
4 judicial role of a convening authority. And so I -- that's
5 the only thing I wanted to respond to.

6 MJ [Col COHEN]: Thank you. I appreciate that.

7 I will say I don't -- I mean this with all sincerity.
8 When you guys cite me the rules, I actually really enjoy the
9 fact that you take me to the rules and the cases. That is my
10 methodology, so thank you.

11 DC [MR. MONROSS]: Thank you.

12 Regarding appearance of partiality, I just do want to
13 briefly emphasize there was a declaration, a signed, sworn
14 declaration that was attachment to AE 643 from two legal
15 experts, Yale Law School, regarding the fact that the
16 appearance of partiality applies to this inquiry. No expert
17 declaration was attached to the prosecution's pleadings.

18 I will note that their recitation of who
19 Mr. Reismeier is, chief judge, subject matter expert, a
20 brilliant jurist, 25 years, fully aware of the recusal
21 standard he is, they say. The recusal standard that he chose
22 was the appearance of partiality. The only party suggesting
23 that the appearance of partiality does not apply in this

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1 proceeding is the government.

2 There was indications by the government that the
3 general counsel's office had a role in the selection of
4 Mr. Reismeier, okay? It wasn't the general counsel's office,
5 it was the Deputy General Counsel's Office (Legal Counsel).
6 It was Mr. Foster. And I appreciate General Martins'
7 correction of the record that there's 144 times a year that
8 these two offices are interacting. Clearly that goes to an
9 appearance of partiality.

10 I say, Judge, that the Bahlul case and its effects in
11 this proceeding are not yet fully decided because AE 490
12 exists still. That being said, I'm shocked to hear that
13 denial certiori by the United States Supreme Court somehow
14 constitutes the law of the land for the entire nation.

15 Should different facts and different legal arguments
16 be presented to the D.C. Circuit, it is free to consider and
17 reconsider its decision in Bahlul, and the Supreme Court has
18 certainly not weighed in on it. And any certiori denial does
19 not constitute as a matter of law an affirmation of the lower
20 court's opinion. That's absurd.

21 The Davis decision. Mr. Mohammad's team discussed it
22 because it does have a particularly rich line where it says
23 the convening authority exercises judicial functions. But I

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1 just want to very briefly talk about what happened in Davis.
2 Davis is the case where the language of the inelastic --
3 inelastic attitude comes from. And what happened in Davis, it
4 was an enlisted serviceman who was accused and ultimately
5 found guilty of possession of marijuana and cocaine. And he
6 was sentenced and his case went to the convening authority for
7 review.

8 Now, prior to the case being sent to the convening
9 authority for review, the convening authority in that case was
10 the base commander. He ran a military base, and as part of
11 his responsibilities and duties, he gave a bunch of speeches
12 on that base about the dangers of drug use on the base. And
13 he talked to a number of people, and he said in apparently
14 what was an informal speech, was recorded, where he said, "I
15 don't want people come crying to me after they're convicted of
16 these offenses."

17 It's not a type one, certainly not a type two
18 accuser, and it's not a type three accuser. But still, the
19 CAAF in that case, the CAAF in that case found that that was
20 reversible; that he should have removed himself from the case
21 because he had an inelastic attitude. Not because he was an
22 accuser, but because of the things that he said made it clear
23 that he wasn't the person to ultimately decide.

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1 Mr. Reismeier's taken -- and I -- you know, the
2 government's position on the Bahlul conspiracy case and his
3 position on that is, well, he didn't really read anything or
4 he didn't do anything. He was asked during the testimony --
5 and yes, I do invite you to read his testimony. My -- I'll
6 tell you what ----

7 MJ [Col COHEN]: Thank you. I was going to ask you that.
8 I was hoping that you would ----

9 DC [MR. MONTROSS]: Here's my hesitation ----

10 MJ [Col COHEN]: Obviously, the parties have and I
11 understood why.

12 DC [MR. MONTROSS]: I want you to read it. But I also
13 want you to give me the opportunity to tell you why it's not
14 sufficient.

15 MJ [Col COHEN]: Okay.

16 DC [MR. MONTROSS]: Counsel for Hadi al-Iraqi did not
17 stand in Mr. Bin'Attash's shoes. And I can assure you that
18 the prosecutor in that case did not stand in Mr. Bin'Attash's
19 shoes. There's a slew of questions that I would have asked
20 Mr. Reismeier that were not asked in that testimony.

21 So I'd ask you to read it, but I would also give
22 you -- ask you to give me an opportunity to tell you what else
23 I would have done, okay, in that case, and how much more there

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1 was basically left on the table for whatever reason by the
2 counsel in that case that should have and could have been
3 asked.

4 And part of it is stuff that's really specific to
5 Mr. Bin'Attash, and certainly that counsel for Mr. Hadi
6 al-Iraqi should not or would not have been in a position to
7 know or to -- desired to ask.

8 But I invite you to look at Davis; we cite it in our
9 brief. I think it stands for the proposition that the
10 convening authority is a judicial officer; but it also stands
11 for the proposition that the things that you say before
12 matter, okay? He said something, and in his testimony in
13 Hadi al-Iraqi, Mr. Reismeier said, I adopt everything in that
14 brief. I wouldn't take a word back. Paraphrasing. Okay.

15 Well, you know, if we are going to make a clemency
16 application in front of this man, and we're going to argue
17 that the courts have a role to play and that the law of war
18 gives him a legal basis to actually reduce the sentence, we
19 can't do that with Mr. Reismeier because his position is
20 clear. He's not hearing it.

21 Thank you, Judge.

22 MJ [Col COHEN]: Thank you. Just generally, just thinking
23 about process as well and timing and really trying to get you

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1 guys information sooner rather than later, if I compel
2 anything or if I find some additional questions, what's your
3 position on the idea of essentially written interrogatories?

4 DC [MR. MONTRUSS]: My concern about that is I think once
5 you read the testimony of Mr. Reismeier, there's a lot of
6 times where he just slips away. He doesn't fully answer the
7 question. There's multiple times that I think if I had the
8 discovery available with me, I would have actually impeached
9 him on it.

10 He also says things that, frankly, for this man to be
11 the convening authority, he says he had -- he never read the
12 al Nashiri charge sheet. He has no idea what's in any of the
13 charge sheets. He also says, "I recognize that there is a big
14 debate about conspiracy and what it meant in the law of war
15 but I have no idea what the government's position on that
16 question is." That's certainly an area ripe for
17 cross-examination. I think just even that statement goes to
18 his credibility.

19 MJ [Col COHEN]: Understand.

20 DC [MR. MONTRUSS]: And I would have wanted ----

21 MJ [Col COHEN]: That's fine. If you guys aren't on board
22 in any way, then the rule is pretty clear ----

23 DC [MR. MONTRUSS]: I don't mean to be ----

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1 MJ [Col COHEN]: ---- that written depositions cannot be
2 done over the objection of a party.

3 DC [MR. MONTROSS]: And I don't mean to be difficult.

4 MJ [Col COHEN]: You're not being. No, absolutely not.

5 DC [MR. MONTROSS]: I need to examine this witness.

6 MJ [Col COHEN]: No, absolutely. I understand.

7 DC [MR. MONTROSS]: Depending on the discovery.

8 MJ [Col COHEN]: All right. Thank you.

9 DC [MR. MONTROSS]: Thank you.

10 MJ [Col COHEN]: Yeah. I'm not offended when you guys
11 say -- I'm okay. I don't want to do that, that's fine, you
12 don't have to. The rule is very clear. You don't have to.
13 No issues. Thank you.

14 Yeah, sometimes when I think outside the box, it's to
15 allow you guys the opportunity to get information in between
16 trips down here, so I'm always looking for ways to get you
17 guys information quicker, so -- but I understand. Thank you.
18 All right.

19 DC [MR. MONTROSS]: Can I just say one thing?

20 MJ [Col COHEN]: You may, Mr. Montross.

21 DC [MR. MONTROSS]: The one thing I do want to point out
22 is that in Rosslyn, we live in awful spaces. We live in a
23 basement. And to Mr. Reismeier's credit, he was the first

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1 convening authority that I remember who actually came to look
2 at our space where we live.

3 When he did, Ms. Bormann asked him if she could have
4 an interview with him about these actual incidents, these
5 events, I think hoping to see if we could actually kind of
6 move forward and forgot what our answers are. He refused.

7 So, I mean, I'm not opposed to an actual deposition
8 where I get to actually ask follow-up questions. We could do
9 that in D.C. if that speeds the process up. I'm also
10 prepared -- if you order the discovery and it comes quickly,
11 we can make an assessment. And we have two more weeks down
12 here, Judge.

13 MJ [Col COHEN]: All right. Thank you. I appreciate it.
14 That's also fair to bring up. I will take that under
15 consideration as well. Okay. All right.

16 Let's go ahead and take a comfort break. Here's what
17 I propose to the parties. 650 is -- I don't know how long 650
18 will take. We're going to wrap up today regardless around
19 1700. If we still have more argument to be had on that, then
20 we will reconvene tomorrow morning in an open session for
21 about two hours and then take a break and then go into a
22 closed session. But I will be able to alert the parties and
23 the guard force no later than 1700 tonight based on where we

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1 are at the time. But I want to make sure that we give that
2 issue sufficient time. All right.

3 We're in recess, 15 minutes.

4 [The R.M.C. 803 session recessed at 1459, 11 September 2019.]

5 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1532,
2 11 September 2019.]

3 MJ [Col COHEN]: The commission is called to order. All
4 parties present when the commission recessed are again
5 present.

6 All right. We're going to take up AE 650, as I
7 indicated to everyone. All of your issues are important. I
8 definitely don't want to -- after causing you all to brief
9 this issue, I definitely would not want to take it up. So we
10 will start here with argument on this matter.

11 We'll go -- actually, let me ask this, since
12 Mr. Mohammad is here as well as Mr. Ali, what is my window for
13 stopping and still allowing for prayer time? Mr. Sowards or
14 anyone? Ms. LeBoeuf?

15 LDC [MR. SOWARDS]: Sure, Your Honor. The time begins at
16 4:22 and go as late as 3:50 -- I mean, I'm sorry, 4:50.

17 MJ [Col COHEN]: Okay. So as long as we recess no later
18 than 1650, we ----

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

20 MJ [Col COHEN]: Okay. Like I said, that's only ten
21 minutes earlier than what I was looking at anyway, so we'll
22 make that happen. We'll recess right around 1650 this
23 afternoon.

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1 Unless I am shocked, I anticipate we'll probably need
2 some additional argument on this tomorrow morning, continuing,
3 which is fine. Like I said, we'll reconvene at -- I don't
4 know. We'll see. But if we do need additional argument,
5 we'll start at 0900 tomorrow morning in an open session. It
6 will be -- and it will only be to address the remainder of any
7 AE 650 argument.

8 Then we'll take a break, and then we'll come back in
9 a closed 806 session consistent with -- I know I sent out the
10 umbrella order. I have authorized -- I reviewed the closure
11 orders, I think those have gone out. If not, they will --
12 probably are while we're sitting here.

13 General Martins. Good afternoon, sir.

14 CP [BG MARTINS]: Good afternoon, Your Honor.

15 The government slides for this oral argument are
16 marked Appellate Exhibit 650L, copies of which have been
17 provided to the commission and to the parties.

18 MJ [Col COHEN]: Thank you.

19 CP [BG MARTINS]: They have been cleared for display both
20 in the courtroom and to the public, so request permission to
21 publish them to all the screens.

22 MJ [Col COHEN]: You may, sir.

23 CP [BG MARTINS]: As always, I thank the court information

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1 security officer, the clerks, and the security personnel for
2 clearing this. I know they've cleared a lot of material this
3 week.

4 MJ [Col COHEN]: Thank you, sir. I appreciate your
5 referencing them. I -- like I said, I agree, they -- once --
6 and I will go back to, I thank everyone for submitting all of
7 that information, but yeah, it's clear that this week everyone
8 is making a very good faith effort of moving things along.

9 CP [BG MARTINS]: Your Honor, the two issues the
10 commission specified for briefing and argument indicate that
11 the commission is engaged in a careful examination of a key
12 provision of the Military Commissions Act.

13 It is one of the provisions by which the law is
14 directing the commission and the government in their different
15 roles to find a way, to find a way to conduct a fair trial; to
16 do so without disregarding probative, reliable, lawfully
17 obtained evidence; to do so while in the context of
18 hostilities; and to do so without harming national security.

19 The provision that merits intensive focus is the one
20 you cite, and it states that trial counsel -- the military
21 judge shall permit trial counsel to introduce evidence,
22 including a substituted evidentiary foundation while
23 protecting from disclosure classified information identifying

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1 the sources, methods, or activities by which the United States
2 acquired the evidence.

3 Slide 2, please. The slide, of course, depicts the
4 two specified issues from the commission's order, depicting
5 the order itself.

6 Slide 3. The bottom line up front as to the first
7 specified issue is that ex parte consideration of motions for
8 substituted evidentiary foundations and associated protective
9 orders is not merely authorized, it is required. And this is
10 clear in light of the text, the context, and the history of
11 controlling law and rules on the matter.

12 The bottom line up front as to the second specified
13 issue is that following such ex parte consideration, the
14 military judge should enter findings, first, that the evidence
15 is reliable based upon specific circumstances of the evidence
16 demonstrating trustworthiness and authenticity; and two, that
17 the limited redaction of information and the limited
18 constraints upon cross-examination of foundational witnesses
19 in light of the substitutes provide the accused with
20 substantially the same ability to make his defense as would
21 disclosure of the specific classified information.

22 Slide 4, please. I'll address each specified issue
23 in turn. I'll note that the first issue directs that

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1 controlling authority for ex parte proceedings as to motions
2 for substituted evidentiary foundations and associated
3 protective orders be located; hence, the slides and the
4 emphasis on actual text here.

5 Slide 5, please. And the citations in the first
6 specified issue itself, to statutory sections within the
7 Military Commissions Act would seem to make review of the Act
8 for such authority a mandatory rather than optional endeavor.

9 Slide 6. And, in fact, it is the position of the
10 United States that the Military Commissions Act codified at
11 Chapter 47A of Title 10 of the United States Code is clear and
12 controlling authority along with rules that have been duly
13 promulgated in accordance with the Military Commissions Act.

14 Slide 7, please. To interpret these provisions, the
15 Supreme Court tells us to look to text, context, and history.
16 One of the more recent precedents affirming such an approach
17 to interpretation is the unanimous Supreme Court decision in
18 2016 in Musacchio v. United States.

19 Slide 8, please. So let's start, then, with text.
20 Here is that provision from the Military Commissions Act to
21 which I referred at the outset quoting part of it, and to
22 which the commission cites in the first specified issue of
23 Appellate Exhibit 650.

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1 Slide 9. Looking just within the four corners of
2 Section 949p-6(c)(2), it is plain that there is textual
3 authority for the commission to consider government
4 trial counsel requests for substituted evidentiary foundations
5 and protective orders on an ex parte basis, and it is within
6 the phrase, quote, while protecting from disclosure, end
7 quote.

8 Giving just this phrase its commonsense meaning, it
9 would be a violation of 949p-6(c)(2) were the military judge
10 to consider such a motion make findings and so on in such a
11 way that causes an unauthorized disclosure of specific
12 classified information identifying sources and methods.

13 And if the accused and their counsel are not
14 authorized access to such information, then the military judge
15 must utilize an ex parte procedure, something that is a staple
16 of modern national security trials, and is authorized as one
17 of the judicial tools when dealing with classified
18 information.

19 Slide 10. The commonsense meaning of, quote, while
20 protecting from disclosure, end quote, is reinforced by the
21 technical legal definition. The term "disclosure" is not
22 limited to exposing a piece of information to the general
23 public. The Executive Branch, to which Section 949p-6(c)(2)

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1 expressly defers on such matters, defines an unauthorized
2 disclosure to be a communication to any unauthorized
3 recipient. The slide depicts this definition which is
4 contained within Executive Order 13526.

5 And there is nothing in 949p-6(c)(2) or in any other
6 authority, for that matter, which suggests some kind of
7 defense counsel exception to that definition. I would add it
8 doesn't suggest a trial judge exception or a trial counsel
9 exception, either. To the contrary, there is ample reason to
10 include accused persons and their defense counsel within the
11 class of those who may be denied access to specific
12 information.

13 Slide 11. It is sometimes suggested by defense
14 counsel that because they've been granted security clearances
15 there can be no unauthorized disclosure to them from which the
16 military judge must protect classified information. Such
17 suggestions with respect ignore that a favorable determination
18 of eligibility for access through a background check and
19 adjudication process -- that is, a security clearance -- is
20 not the only general restriction on access. Only persons
21 having a need to know -- that's a technical term -- can be
22 granted access to specific classified information.

23 Slide 12. Meanwhile, need to know is a determination

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1 made exclusively within the Executive Branch, as stated
2 expressly within the definition for that term within Executive
3 Order 13526.

4 Lawyers denied access because they lack a need to
5 know, Your Honor, sometimes claim that denying them access on
6 that basis must mean that someone is concluding they are not
7 engaged in a lawful and authorized government function, keying
8 upon language in the last portion of the need to know
9 definition.

10 No one is saying defending a client in the military
11 commissions process is not a lawful and authorized government
12 function and this definition does not impugn defense counsel,
13 military judges or trial counsel, for that matter, as there
14 are lots of types of things, types of classified information,
15 to which we can and should be continued to deny -- to be
16 denied access. It's a truth, though one that perhaps is not
17 often enough reflected upon, that a secret becomes less of a
18 secret with every additional person who knows it.

19 Slide 13. It is also a truth that none of us here in
20 this courtroom are in the best position to know what details
21 about our sources and methods of intelligence gathering can be
22 gleaned by our nation's adversaries from information we might
23 regard as innocuous.

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1 The United States Court of Appeals for the District
2 of Columbia Circuit famously recognized this 30 years ago in
3 the Yunis case, as indicated in the quoted passage: "For good
4 reason, and wise persons recognize this. Those officials who
5 are designated to be gatekeepers over classified information
6 need to be technically qualified in that job."

7 Slide 14. And we're still now in the text piece of
8 the Supreme Court's three-piece analysis in Musacchio,
9 ensuring that we have the best possible understanding of
10 "While protecting from disclosure" in Section 949p-6(c)(2),
11 the provisions cited by the commission in the first specified
12 issue.

13 If the commission seeks further confirmation that
14 Congress is using the term "disclosure" in a manner that
15 tracks how disclosure is treated in Executive Order 13526, it
16 can find such confirmation within a statute, if the commission
17 prefers statutory sources, and specifically within the
18 definitions section of the Military Commissions Act. The
19 statute itself defines classified information as information
20 or material determined by the United States Government's
21 Executive Branch to require protection against unauthorized
22 disclosure.

23 Slide 15. The statute also strongly reinforces this

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1 idea of specially designated Executive Branch gatekeepers
2 whose job it is to spend all of their time learning and
3 knowing when disclosure of certain information would be
4 detrimental to national security. This reinforcement includes
5 a flat prohibition upon even the military judge purporting to
6 override that determination.

7 Now, there are certainly other provisions in the
8 Military Commissions Act, including the provision that a
9 military judge shall preside over each military commission,
10 and others that give the judge powers to serve the interests
11 of justice, but this statutory language depicted here must
12 also receive its due. And, in fact, CIPA states that federal
13 judges need to give the same prohibition in the Classified
14 Information Procedures Act of 1980 its due.

15 Slide 16. It's also important to point out, Your
16 Honor, that the law of this case, namely, Protective Order #1,
17 fully recognizes that the phrase "while protecting from
18 disclosure" means while protecting from disclosure from any
19 unauthorized recipient, including at times defense counsel.

20 Understood in the most straightforward manner then,
21 the phrase "while protecting from disclosure" in
22 Section 949p-6(c)(2) does provide direct textual authority for
23 the military judge to consider a motion for a substituted

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1 evidentiary foundation and associated protective order on an
2 ex parte basis.

3 Slide 17. But there is more textual authority yet,
4 and that's just within 949p-6(c)(2).

5 Slide 18. And that's because Section 949p-6(c)(2)
6 incorporates by reference the entirely separate and procedural
7 provision of Section 949p-6(d), as in delta.

8 One way of appreciating what Congress is doing here
9 in these two subsections is that it is expressly and
10 substantively authorizing in subsection (c) the introduction
11 of a substituted evidentiary foundation, which is just one
12 type of alternative for protecting classified information to
13 what might ordinarily be done in a criminal case not dealing
14 with such information. Then in subsection (d), it is
15 prescribing the general steps by which all alternative
16 procedures to protect classified information will follow.

17 Slide 19. So the whole of subsection (d) is thus a
18 part of the text of subsection (c). And under the analysis
19 used by the Supreme Court in Musacchio, subsection (d) as well
20 can and must be mined for direct textual authority.

21 Now, there is much good guidance in subsection (d),
22 but the point to be made here is that part of that guidance
23 includes consideration expressly on an ex parte basis of

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1 declarations provided by trial counsel certifying that
2 disclosure of classified information would cause damage to
3 national security.

4 So it would be incorrect then to say that
5 subsection (c) fails to speak in terms of ex parte
6 proceedings. Probing directly down into the text, including
7 provisions incorporated by reference as we must, one does find
8 the words "ex parte."

9 Slide 20. The contrarian move to make at this
10 juncture is to point out perceptively, aha, hey, that specific
11 mention of ex parte relates to declarations certifying damage
12 to national security. And that's undeniably true. However,
13 it takes only a moment of reflection to discern that a
14 military judge cannot protect from disclosure classified
15 information identifying sources and methods requiring ex parte
16 discussion if what he must consider ex parte also is an
17 inextricable part of trial counsel's motion containing the
18 proposal for a substitute and for the desired protections.

19 Such a motion inevitably has to explain why the
20 proffered substitutes are going to protect those equities, and
21 why the substitutes will omit and redact only the information
22 that is irrelevant or cumulative or not helpful to the
23 defense.

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1 To consider the attachment to a motion that is the
2 declaration ex parte and not to consider the motion and the
3 proposed protective order that way would be to protect nothing
4 at all, and that, of course, contravenes "while protecting
5 from disclosure" in 949p-6(c)(2).

6 All of that said, I don't want to be understood as
7 overlooking neither p-6(c) nor p-6(d) include magic words that
8 perhaps the military commission would love to see, such as
9 that the commission is authorized to consider a government
10 motion for a substituted evidentiary foundation and associated
11 protective order on an ex parte basis. I'm not overlooking
12 that at all.

13 Rather, I focus thus far only on the text piece of
14 the Musacchio analysis. We still have context and history to
15 analyze of this very first provision which, of course, is only
16 one provision of the Military Commissions Act. There are also
17 many more provisions whose express terms, their text, whose
18 meaning with reference to provisions around them and the rules
19 implementing them, the context, and whose prior treatment by
20 the courts and legislature as to drafting them make clear what
21 I stated as the bottom line up front.

22 Slide 21. And besides, the Musacchio line of cases
23 adheres to the longstanding maxim, Congress doesn't have to

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1 use magic words anyway.

2 So let's turn now to subsection (c)(2)'s statutory
3 and related context. The only other subsection within p-6(c)
4 and also the subsection just before, p-6(c)(2), and these are
5 all under the heading of "Substitutions," expressly authorizes
6 in camera pretrial hearings.

7 Slide 23, please. The accused Ali Abdul Aziz Ali
8 interprets subsection (c)(1) to mean in camera proceedings are
9 authorized, but such proceedings may never also be ex parte.
10 The position of the United States is that the accused's view
11 is incorrect logically and legally. I've tried to depict that
12 with a Venn diagram. I know that the Ali counsel is fond of
13 those; I thought this might be helpful.

14 The position of the United States is that
15 in camera -- and this just goes to the definitions -- in
16 Latin, literally in a chamber, in Anglo-American legal
17 tradition, having the traditional meaning of in the judge's
18 private chambers, that's the big circle that's red, of all
19 proceedings or communications with the judge not open to the
20 public.

21 Ex parte in Latin, outside of a party, is the smaller
22 oval of all proceedings or communications with the judge
23 excluding the presence of a party. These domains are not

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1 mutually exclusive; and indeed, ex parte proceedings are
2 virtually almost always in camera.

3 Subsection (c)(1)'s express authorization of
4 in camera proceedings thus supports trial counsel's efforts to
5 introduce evidence, including a substituted evidentiary
6 foundation, while protecting from disclosure classified
7 sources, methods, or activities by which the United States
8 acquired the evidence.

9 The United States concedes only that (c)(1), like
10 (c)(2), does not itself contain a complete set of magic words
11 on its own authorizing ex parte consideration of motions for
12 substituted evidentiary foundations. But again, you know,
13 examining (c)(1) is only the start of examining relevant
14 context.

15 Slide 24. And this is because these provisions must
16 be understood also in conjunction with Section 949p-2 which
17 authorizes ex parte pretrial conferences to the extent
18 necessary to protect classified information from disclosure,
19 and which expressly authorizes the military judge to consider
20 any matter which relates to classified information. This is
21 edging very close even to magic words, which are not required.
22 Surely, at the least, it's strong contextual authority.

23 Slide 25. The protective order provision in the

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1 statute recognizes the common use of such orders to protect
2 classified information. Now, it is true that the scenario
3 envisioned by the statutory provision highlights only a
4 situation in which the accused has received such information;
5 and again, this is important statutory authority, but not --
6 not magic words in itself.

7 Slide 26. But we're also required to look to
8 implementing rules, and the duly promulgated Military
9 Commission Rules of Evidence are themselves grounded in strong
10 statutory authority, as Your Honor knows. This source of law
11 must be made while attentive to the unique circumstances of
12 military and intelligence operations during hostilities or by
13 other practical need consistent with the Military Commissions
14 Act. This is additional context within which one must
15 consider 949p-6(c)(2).

16 Within the express authority granted by Congress, the
17 SECDEF has issued additional rules that are only implicit in
18 the statutory ones explaining what "while protecting from
19 disclosure" means in the provision that we are still
20 analyzing.

21 Slide 27. And here we actually get to something that
22 should count as magic language, I would submit, again, even
23 though it's not required. In Military Commission Rule of

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1 Evidence 505(h)(3)(A), which is the rule aligned with
2 949p-6(c)(2) under the substitutions heading, and immediately
3 preceding the substituted evidentiary foundation provision,
4 this expressly requires -- and that's a "shall," not a
5 "may" -- ex parte conferences to the extent necessary to
6 protect classified information. So it's not just limited to
7 in camera in this rule implementing by SECDEF.

8 Slide 28. Meanwhile, in the rules in Military
9 Commission Rule of Evidence 505(e), which is the rule aligned
10 with statutory Section 949p-3, expressly directs the entry of
11 protective orders that can help introduction of a substituted
12 evidentiary foundation, for instance, while protecting sources
13 and methods, namely, orders limiting the scope of direct and
14 cross-examination.

15 Slide 29. There's one last piece of context I'll
16 highlight as to the meaning of Section 949p-6(c)(2), and what
17 I'm providing, Your Honor, truly are highlights as there are
18 many other contextual indicators of Congress' clear intent
19 throughout the Military Commissions Act.

20 The last piece of context is Section 949p-7. This
21 section proved important to this military commission in
22 denying a defense motion to reconsider its ruling and
23 protective order in the Appellate Exhibit 524 series, and

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1 Appellate Exhibit 5 -- I'm sorry -- 574. In Appellate
2 Exhibit 574L, the ruling denying the motion to reconsider,
3 Judge Parrella led with 949p-7 in the section of the ruling
4 titled "Law," and laying down the commission's legal
5 reasoning. The ruling also cites to the provisions that I've
6 covered before in this discussion.

7 So Appellate Exhibit 574L recounts the statutory
8 protections in p-7 available as to classified information
9 during the actual taking of testimony. And Your Honor has
10 fastened upon the rule aligned with this in the Military
11 Commission Rules of Evidence, 505(i), you've been speaking
12 about this these last couple of days.

13 So these rules in 949p-7 and in the aligned verbatim
14 equivalent in 505(i) permit government trial counsel to object
15 to any line of inquiry -- any question or line of inquiry that
16 might result in the witness disclosing classified information,
17 and authorizing the military judge to take suitable protective
18 action in light of such objection, and then it also authorizes
19 the receiving of a proffer from trial counsel as to what might
20 come out that would damage national security.

21 Here's the key contextual point that bears upon how
22 we must read 949p-6(c)(2), and that is that the military judge
23 can take the government's proffer and can consider the

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1 objection and how to tailor suitable action ex parte. It
2 would make no sense to authorize such ex parte consideration
3 at the point of testimony, but to preclude such consideration
4 at an earlier pretrial point, namely, the point addressed by
5 949p-6(c)(2). And, in fact, I would submit there's no honest
6 way to read 949p-6(c)(2) that way in light of the ex parte
7 authority contained in p-7.

8 CIPA and the classified information provisions of the
9 Military Commissions Act empower judges to get ahead of
10 dilemmas. It would be completely counter to the entire
11 statutory framework and its contents to allow measures to deal
12 with an urgent situation at trial but not give the military
13 judge a tool to deal with it earlier. And that tool is
14 949p-6(c)(2).

15 Slide 30. And that brings us to history. A
16 particularly relevant category of history is the history of
17 federal court treatment of CIPA provisions, particularly
18 provisions that most closely track the classified information
19 procedures of the Military Commissions Act. The Military
20 Commissions Act specifically tells us that's the key source of
21 history.

22 Slide 31. I'll highlight for the commission just a
23 few federal court decisions that help settle the first

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1 specified issue conclusively. In the Fifth Circuit's 2011
2 decision in El-Mezain, this is sometimes referred to as the
3 Holy Land Foundation case because the defendants were
4 convicted of providing financial support to the terrorist
5 organization Hamas through the Holy Land Foundation, which
6 held itself out as charitable.

7 In El-Mezain we see clear federal court recognition
8 that defense counsel's security clearances alone do not
9 entitle them to access. This is important history as to the
10 meaning of what is now in p-6(c)(2) in the phrase "while
11 protecting from disclosure."

12 Slide 32. Further history that illuminates p-6(c)(2)
13 is contained in the Sixth Circuit's 2012 decision in the
14 appeal of Muhammad Amawi and his co-defendants for providing
15 material support for terrorism in making themselves available
16 for jihad and associated terrorist training. The Amawi court,
17 like the El-Mezain court, roundly rejects the notion that a
18 clearance alone should earn defense counsel entrance to
19 ex parte hearings.

20 Slide 33. The Amawi decision explains that all
21 federal courts are in agreement in permitting ex parte
22 hearings; more specifically in focusing on Section 6, it
23 quotes a portion that doesn't directly mention ex parte

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1 hearings. Still, it is settled, the Amawi Court says, that
2 this provision authorizes such hearings.

3 Slide 34. And what is so interesting about this
4 passage, Your Honor, in the Amawi decision is that the court
5 was interpreting the counterpart within CIPA Section 6 to
6 949p-6(c)(1), the commission has surely noticed by now that
7 p-1 through p-6 align closely with CIPA 1 through 6. So
8 Section 6 -- Section p-6, these are comparable provisions.
9 These are the provisions that are aligned between the statute
10 we're supposed to look to for history, and our own provisions.

11 Both p-6(c)(1) and the provision quoted by the Amawi
12 court actually only mention in camera, not ex parte, and still
13 the Amawi court found the CIPA Section 6 provision to
14 specifically authorize ex parte hearings. This, we would
15 submit, is decisive history.

16 Slide 35. The Amawi decision further reasons that it
17 must be authorized to conduct hearings in addition to merely
18 receiving papers because hearings enable the judge to ask
19 probing questions, ones that benefit the defense, which is
20 itself not present, and that enable the judge to determine
21 relevance and helpfulness to the defense of any classified
22 information.

23 Slide 36. The Court, the Amawi Court, that is,

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1 provides further insight into its thinking by stating that it
2 should act as if it were in essence standby counsel for the
3 defendants. No, this is not the instinctive thing for a judge
4 to do, but it is required by CIPA and by the D.C. Circuit's
5 decision in Yunis.

6 Slide 37. The Ninth Circuit in the more recent
7 Sedaghaty case looked across all of the case law that has
8 resoundingly rejected what the defense seeks here; namely, to
9 deny the United States the ex parte forum it needs so as to
10 genuinely protect from disclosure information identifying
11 sources and methods. And in that case, the court said,
12 Sedaghaty's challenge to ex parte proceedings is a battle
13 already lost in the federal courts.

14 Slide 38. With respect, this commission must respect
15 this settled law, which together directly and strongly answers
16 the first specified issue. Failing to do so just reintroduces
17 the very situation of graymail that CIPA was intended by
18 Congress to prevent.

19 Slide 39. And also that the Military Commissions Act
20 specifically had as one of its purposes to prevent as well.
21 The slide depicts a piece of our brief, which quotes from key
22 legislative history of the Military Commissions Act.

23 Slide 40. So that brings us to the second specified

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1 issue. Appreciate the commission's patience in going through
2 that methodically. I wanted to lay out the government's
3 position using the highlights of text, context, and history.

4 The second issue directs that we identify correct
5 factors by which the military judge should make findings
6 regarding the reliability of evidence and the fairness of
7 permitting its introduction through a substituted evidentiary
8 foundation.

9 Slide 41. Now, at the outset, it's pertinent to
10 point out that the defense motion seeking that the commission
11 adopt Crawford and the defense's expansive Sixth Amendment
12 claims in whole cloth is Appellate Exhibit 601. The United
13 States seeks to reintroduce the commission and the parties to
14 the statutory provision that gives the accused the right to
15 cross-examine witnesses who testify against him.

16 This is something that is definitely being preserved
17 in the substituted evidentiary foundations and the protective
18 orders that are being sought in this case. We have a
19 statutory authority to go to. I think the commission has
20 indicated the desire to look to those protections in the
21 statutory text.

22 Slide 42. In brief, Your Honor, as we turn to what
23 your finding as to reliability should consider, the law in

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1 this area stays away from what the Supreme Court has called in
2 Florida v. Harris, quote, rigid rules, bright-line tests, and
3 mechanistic inquiries, end quote. Rather, the law requires a,
4 quote, more flexible, all-things-considered approach, end
5 quote. So strict evidentiary checklists are not what should
6 be use the by this commission, we would submit, in that first
7 prong.

8 Slide 43. In the evidentiary context, reliable
9 generally means trustworthy. And this is from the analysis in
10 one of the Supreme Court's landmark cases involving the Rules
11 of Evidence, Daubert v. Merrell Dow Pharmaceuticals.

12 Slide 44. As to nontestimonial evidence, and that is
13 evidence other than pretrial statements that declarants would
14 reasonably expect to be used prosecutorially, as to
15 nontestimonial evidence, concerns about reliability and, thus,
16 trustworthiness are generally addressed through the process of
17 authentication; namely, the preliminary condition of whether
18 an item is what the party offering it claims it to be. And
19 this is reflected, for instance, when you look at evidentiary
20 foundation textbooks and see the recommended foundations
21 practitioners should use for original physical evidence, for
22 photographs, for audio recordings, video recordings and the
23 like.

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1 Evidence that is nonfungible, and that is, it has
2 unique characteristics or other particularized guarantees of
3 trustworthiness, are even further from the kinds of core
4 testimonial hearsay that Crawford brought under a strict
5 constitutional test of confrontation.

6 The process by which the military judge receives
7 enough evidence to enable him or her to conclude that a
8 reasonable person would find an item authentic typically gives
9 sufficient indicia of reliability to admit that type of
10 evidence.

11 Slide 45. Here the commission should carefully
12 review the government's declarations as the facts that make
13 sources, methods, and activities so vulnerable to compromise
14 often overlap with indicia of reliability of the evidence
15 acquired by those sources, methods, and activities. The
16 commission can also ask questions during the ex parte
17 conference, including how have federal courts dealt with
18 similar evidence.

19 Moreover, the government intends to lay the
20 foundation, including approved substitutions. We actually
21 want to lay it with witnesses. And the witnesses through
22 which it does so may be cross-examined so long as the
23 protective order is complied with, and questions that might

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1 expose sources, methods, or activities are not asked, answered
2 or, commented upon in a way that compromises them.

3 Slide 46. Key context associated with what
4 "reliable" means in 949p-6(c)(2)(B)(i). I realize saying that
5 ten times fast would get us all twisted up. But key context
6 is again to be found in the considerations that must inform
7 SECDEF's establishment of evidentiary rules. And he has been
8 so informed in the making of Military Commission Rule of
9 Evidence 901, which is our authentication rule.

10 Slide 47, please. That rule requires evidence to go
11 to the panel if the military judge determines that there is
12 sufficient basis to find that the evidence is what it is
13 claimed to be and if the judge instructs the members that they
14 may consider any issue raised as to authentication or
15 identification in determining what weight, if any, to give the
16 evidence.

17 Slide 48. The fair trial prong of 949p-6(c)(2)(B), I
18 think careful analysis of the statute shows, is the same.
19 It's the same -- substantially the same ability to make a
20 defense standard that is -- the commission's applied dozens of
21 times, and that is in 949p-6(d). And recall that p-6(c)(2)
22 incorporates by reference subsection (d), and that provides a
23 more extended form of the fair trial standard, one that comes

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1 directly from Yunis -- it's been discussed here already
2 today -- and before that, its origins are in Roviaro.

3 Slide 49. The United States believes it is
4 important -- nearing conclusion here -- to point out
5 respectfully that this standard should not be allowed to
6 mutate into something more stringent. We think the commission
7 may have tended to do that already -- with respect, it wasn't
8 a final ruling, but we think it was sort of mutating that
9 way -- in speaking to its consideration of Protective
10 Order #4.

11 Substantially the same ability does not mean
12 identically positioned in all specific categories of case
13 posture or preparation. The test is an overall test, one that
14 evaluates what is actually essential to a fair determination
15 of the cause. And the commission has helpfully spoken already
16 to looking for real impacts, what are those real impacts.

17 This needs to be done as Roviaro and Yunis instruct
18 with careful attention to the particular charges, to the
19 possible defenses, to the particularities of the evidence and
20 the evidence that is sought as against that evidence, and to
21 other case-specific factors. But in the end, make no mistake,
22 the court or commission must evaluate what is actually
23 noncumulative, relevant and helpful, and not just accept what

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1 the defense claims is such.

2 Your Honor -- slide 50 -- so subject to your
3 questions, that's how we recommend the commission treat the
4 two specified issues.

5 MJ [Col COHEN]: Thank you, sir. This afternoon
6 everyone's going right to the rules and the statutes, and I
7 appreciate that. I mean, that's what this specific issue was
8 meant to address. With respect to -- let me go back to -- I
9 won't use your slides, if you don't mind. I'll go back to the
10 statute because it's a little easier for me to remember that
11 than where your slides are.

12 But -- so if I -- if I accept your argument, then --
13 and the citations to the cases, then I think the court would
14 be -- I noticed even you cited that, that the court finds
15 itself in the precarious situation where essentially it's --
16 I'm not going to put myself in the place of the defense
17 counsel, but I have to at least consider the positions of
18 defense counsels and how they might defend this case -- I'll
19 say it more than I -- more than I might have to under
20 circumstances where we weren't dealing with classified
21 information, is probably the best way of saying that on the
22 fly here.

23 That being the case, I guess one of the questions I

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1 had, and I -- let me think of a hypothetical here.

2 Let's say the government had some evidence that it
3 was looking for summaries and substitutions about that dealt
4 with -- well, let's just say how it obtained physical
5 evidence. Let's just use it as that, just in general, all
6 right?

7 It's classified. I have -- and I think -- I don't
8 think anyone is going to get up here and argue to me that I
9 have the authority to declassify anything or to order it
10 declassified or even to order the disclosure of classified
11 information. The statute makes that pretty clear and I think
12 that's consistent with, like you said, the long history of how
13 CIPA has been -- been -- been addressed.

14 The question -- the precarious situation that I
15 potentially find myself in and most judges would be is -- if I
16 was looking at a -- at a proposed substitute evidentiary
17 foundation for potential -- a possible piece of physical
18 evidence, whatever that might be. Let's just say it's this
19 computer right here. For some reason it got seized and now it
20 is all classified. And you want to say how you got that or
21 where you got it from and those kinds of things.

22 Is there a way that the government envisions for the
23 court to -- I guess we're at that point where if the

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1 government comes to the court and says these are our proposed
2 substituted evidentiary foundations, and essentially the
3 government -- or maybe that's -- let me ask this question: If
4 the government comes in any situation, no reference to any
5 particular AE at this point. We're just talking about this
6 process.

7 If the government comes to me and says, we would like
8 to offer this substituted evidentiary foundation or this
9 summary and substitution for this particular -- whatever it's
10 marked as an AE at that point.

11 And you have given me the declarations. You've given
12 me the actual evidence and you are giving me either a summary
13 or a substitution or however you are presenting it -- they're
14 getting ready to hit me with the "slow down" sign here -- it
15 would -- and this may be just a difference -- I know I can't
16 disclose that to the defense because I don't have the
17 authority to disclose that, and until I have ruled that it is
18 authorized -- that I agree that it's authorized for
19 disclosure.

20 But at the same time if the government's willing --
21 I'm trying to find a balance of how I can properly assess what
22 the defense's needs are. Like I said, and it's that dilemma
23 that the court talked about in the case that you cited.

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1 It's anticipating what they might need do to have that
2 colloquy with you.

3 So assuming I accept the process, what is my way of
4 understanding what their concerns are going to be?

5 CP [BG MARTINS]: Your Honor, if I may?

6 MJ [Col COHEN]: You may.

7 CP [BG MARTINS]: Give me slide 24, Mr. Gibbs, please.

8 Your Honor, that pretrial conference rule is not
9 limited to the trial counsel, so either party can request that
10 you hold an ex parte conference, and they can provide you
11 their theories. This has been done in this commission in the
12 discovery process because, of course, Section 4, the discovery
13 statutory rule that relates to summaries and substitutions.
14 We're not yet into substituted evidentiary foundation because
15 we're not talking about the presentation of evidence ----

16 MJ [Col COHEN]: Correct.

17 CP [BG MARTINS]: ---- in trial. So -- but we have --
18 these have been held in this case, is our understanding, based
19 on things that have been said in court. So defense can
20 enlighten you ----

21 MJ [Col COHEN]: Okay.

22 CP [BG MARTINS]: ---- as to their theory.

23 And that clearly has to be part of your thinking.

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1 The law says you must stand in as standby counsel. If you
2 recall back in Roviaro, the Supreme Court is -- in that case
3 ruling for the accused because the informant, the information
4 the government wanted to keep, was the driver of the car and
5 someone who heard the defendant talking with relation to the
6 bag of cocaine that he had picked up.

7 So it was considering the defense -- potential
8 defense of entrapment, was one of the key things. But it was
9 a case-specific, a very case-intensive, fact-intensive
10 analysis. So what's really helpful, not what is potentially
11 helpful or theoretically helpful.

12 MJ [Col COHEN]: Would you see a -- and I agree with you,
13 so I think I made reference earlier that the defense had the
14 right to ask for some ex partes, and I think this was -- this
15 was 949p-2 was exactly what the section that I was looking at
16 as well.

17 CP [BG MARTINS]: Yes.

18 MJ [Col COHEN]: Until you all tell me, though, I can
19 never talk to the defense about something that the government
20 has filed with me. I mean, I just -- I can't do that.

21 And so the question then becomes is -- is there -- is
22 there a way to work into the process -- for example, let's say
23 it was this computer. And we're not disclosing any

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1 information about the computer other than there's a matter
2 before me dealing with this computer. Is -- is that
3 conceivable, where I could then say this is going to be
4 offered against Ali, so let me see if Ali -- I'm giving notice
5 that I'm addressing something that deals with this computer.
6 That's all I'm telling you.

7 CP [BG MARTINS]: Your Honor, the government's position is
8 that -- that provision we focused like a laser beam on.

9 MJ [Col COHEN]: And you did, and I get it.

10 CP [BG MARTINS]: It permits us -- it gives us the
11 authority to ex parte, and not hedging on that, not in any way
12 eroding it or undercutting it by kind of playing an
13 interactive ----

14 MJ [Col COHEN]: All right.

15 CP [BG MARTINS]: ---- exercise. I mean, and that -- that
16 can go down a slippery slope. We're entitled to present it to
17 you ex parte, ask you, admittedly in an unusual, traditional
18 position for a judge, but to stand in based on what you know,
19 and then consider whether this meets -- and we would submit
20 for this nontestimonial, nonfungible evidence of this
21 computer, whether it -- it is reliable evidence such that it
22 should get -- that you can grant our motion for the
23 substitute.

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1 And the substitute isn't going to be as simple as,
2 you know, a short summary. It's going to be a package of
3 things. It's going to be a witness -- witnesses that provide
4 some of the foundation. And the case law is clear, the
5 government doesn't have to bring in every evidence or prove
6 every -- the molecular structure of every thing associated
7 with something getting into court and before a witness. So I
8 mean, this is -- this is a foundation.

9 MJ [Col COHEN]: I understand.

10 CP [BG MARTINS]: And so we are asking you to look to
11 particularized guarantees of trustworthiness, to indicia of
12 reliability. But we are entitled to get that ruling.

13 MJ [Col COHEN]: Now, like I say, I may very well end up
14 agreeing with you on that based this -- status in the -- the
15 state of the text.

16 I'm just -- I'm just -- I'm just spitballing some
17 things here to make sure I address any issues that are in my
18 mind of what about this, or what about that?

19 CP [BG MARTINS]: If I may, Your Honor, I think the
20 Marzook case, which we give you the point cite at slide 49,
21 please, Mr. Gibbs. You know, that shows a court struggling, I
22 think, with what you're struggling with on how to consider in
23 that case the situation where identities of witnesses were

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1 being withheld; you know, how did the court deal with that.

2 And then the commission has had to deal with the
3 Moussaoui -- the Fourth Circuit's decision in Moussaoui, you
4 know, sort of an analysis they go through and how they deal
5 with this problem. If you go to 382 F.3d 453, that's the cite
6 to the Moussaoui case, Fourth Circuit 2004. The point cite is
7 477 through 478. And maybe I'll just quote from that to give
8 you the ----

9 MJ [Col COHEN]: Please.

10 CP [BG MARTINS]: "The conclusion of the district court
11 that the proposed substitutions are inherently inadequate is
12 tantamount to a declaration that there could be no adequate
13 substitution" ----

14 MJ [Col COHEN]: One second, sir. The interpreters -- if
15 you will just start over, please, sir.

16 CP [BG MARTINS]: Yes.

17 MJ [Col COHEN]: Go ahead. Go ahead, sir.

18 CP [BG MARTINS]: ---- "is tantamount to a declaration
19 that there could be no adequate substitution." In that case,
20 it was for witness deposition testimony. Fourth Circuit.

21 "We reject this conclusion. The answer to the
22 concerns of the district court regarding the accuracy of the
23 reports is that those... the witnesses have a profound

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1 interest in obtaining accurate information from" -- from the
2 deponents, and in reporting that "information accurately to
3 those who can use it to prevent acts of terrorism and to
4 capture other al Qaeda operatives. These considerations
5 provide sufficient indicia of reliability to alleviate the
6 concerns of the district court."

7 So the appellate court is directing the trial court,
8 again, find a way. Look at this evidence, assess based on
9 your own -- you're entitled to believe your own eyes and ears.
10 You know, is this information something a reasonable person is
11 going to rely upon such that it can go to the jury and then
12 let them decide. We can instruct them at some point if an
13 issue arises as to reliability or authenticity, instruct them
14 as to weight to give that evidence.

15 MJ [Col COHEN]: Understand. Last question that I had as
16 I -- as I have listened to your briefing and just thought
17 about this process in general. The law is very clear -- what
18 is the government's position on -- let me give you -- I'll
19 give you the background of how this came about.

20 Done lots of in camera reviews over the years. Not
21 completely unlike this, in the sense that you look at
22 something and you think you have an idea of what the parties
23 may need out of this or what a particular party may need and

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1 then you hand it to them. And then inevitably -- well, not
2 inevitably, but sometimes then based on changes in the posture
3 of the case or the way witnesses testify, what you thought was
4 sufficient, I've had to go back and do additional in camera
5 reviews.

6 Now, the law is very clear that once I make this
7 decision on behalf of the government, a party cannot ask for
8 reconsideration. But what is the government's position on
9 where I believe that it would no longer be in the interest of
10 fairness to say I need to go back and look at whether or not
11 this particular item should have some additional information?

12 CP [BG MARTINS]: Your Honor, of course, the commission
13 can reconsider any ruling. And that's in the Rules for
14 Military Commission, you know, sua sponte. And you're
15 pointing to the 949p-4(d) ----

16 MJ [Col COHEN]: Correct.

17 CP [BG MARTINS]: ---- rule that says no reconsideration.
18 Our understanding of what that means is that, you know, this
19 can't just be a superficial exercise. We're entitled to rely
20 on this process.

21 MJ [Col COHEN]: Oh, I agree.

22 CP [BG MARTINS]: Again, not to have this -- an
23 interactive exercise degrade our ex parte protection for the

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1 information. But, yeah, changed circumstances in the case,
2 something that is not just a way to get around, you know,
3 949p-4(d).

4 MJ [Col COHEN]: Right. That would never be my
5 intent ----

6 CP [BG MARTINS]: Yeah, I understand.

7 MJ [Col COHEN]: ---- just based on past practice with
8 in camera reviews.

9 CP [BG MARTINS]: No, I understand.

10 MJ [Col COHEN]: I mean, inevitably, you believe you
11 understood it, and then -- I mean, I had that recently in a
12 case where I thought I provided the proper documentation and
13 then, based on some expert testimony, I said, whoa, this is a
14 completely different issue than what I thought it was; and I
15 had to go back and reconsider and then provide some additional
16 information. In this case, I couldn't still order the
17 provision of information, but I think we -- we probably would
18 be in that situation more like an (i)(3), where I -- I guess
19 that's what my position is.

20 CP [BG MARTINS]: I think-- yeah, I mean, we would hope
21 there would be something of a bar there, because this can open
22 the door to ways to degrade the ex parte protection and ----

23 MJ [Col COHEN]: I agree.

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1 CP [BG MARTINS]: ---- and asking us in, we're entitled --
2 we could come in and give you -- answer questions. You ask
3 probing questions. Maybe you didn't grant us or provide an
4 ex parte hearing on something because you just thought it was
5 pretty clear, so allowing us to explain it. Maybe there's
6 some things in those declarations that, you know, kind of
7 went -- went past you a little bit at some point.

8 MJ [Col COHEN]: Okay.

9 CP [BG MARTINS]: So -- but we're not going to deny that
10 the commission can and must at times reconsider things that
11 it's ----

12 MJ [Col COHEN]: Okay.

13 CP [BG MARTINS]: ---- that the commission has done.

14 MJ [Col COHEN]: All right. And then the last question
15 that I've got just along procedures is: If I understand your
16 argument -- or at least your position based on the -- your
17 statutory interpretation of the information you provided is,
18 consistent with CIPA and federal district court and appellate
19 court precedents, in camera review can be -- can, more like
20 should, or at least definitely can be ex parte at the request
21 of the parties; therefore -- and the decision at that point
22 would be, do I grant what you're asking for or -- do I agree
23 with you or do I not -- do I disagree with you, and then we

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1 can have the going back or however we want to do it. But at
2 the end of the day, this is just something that I have to
3 decide, and then it either gets released or it doesn't.

4 CP [BG MARTINS]: Your Honor, we think the law is clear on
5 that.

6 MJ [Col COHEN]: Okay. Thank you. Thank you,
7 General Martins. I appreciate it.

8 Okay. It is 1626. Which defense counsel will be
9 making the initial argument on this matter?

10 Mr. Sowards. Sir, do you believe you could start and
11 then continue into tomorrow, or how -- what would you prefer?

12 LDC [MR. SOWARDS]: I can certainly start. I might need
13 to continue.

14 MJ [Col COHEN]: Which is perfectly fine. I ----

15 LDC [MR. SOWARDS]: My only concern is I thought that
16 asking someone to begin an argument on statutory construction
17 at 4:30 in the afternoon is its own sort of Eighth Amendment
18 violation.

19 MJ [Col COHEN]: You may be correct. That's why I was
20 just asking. I know what my inkling was, but at the same time
21 I don't want to waste the parties' time either.

22 So I think, given the hour, we'll go ahead and recess
23 today and come back at 0900. Like I said, I'm initially going

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1 to -- I'll make it -- given the hour and what we got through
2 today, I'm going to initially schedule two and a half hours
3 for defense presentations tomorrow, and we'll see -- we'll see
4 where we're at at that point. So to approximately 1130 hours
5 tomorrow in open session. And then we'll have a closed
6 session, which should be -- we should easily be able to get
7 through -- knock on wood -- we should be able to get through a
8 closed session tomorrow afternoon.

9 All right, we're in recess until tomorrow morning at
10 0900.

11 [The R.M.C. 803 session recessed at 1628, 11 September 2019.]

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