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1 [The R.M.C. 803 session was called to order at 0903,
2 11 September 2018.]

3 MJ [Col PARRELLA]: The commission is called to order.
4 Trial Counsel, are all the government counsel who
5 were present at the close of the previous session again
6 present?

7 CP [BG MARTINS]: Good morning, Your Honor. They are.

8 I have one other item relating to attendance, Your
9 Honor, before we finish accounting for the parties.

10 Your Honor, this morning is September 11th. I wanted
11 to advise the commission that family members of the 9/11
12 fallen, as well as one survivor of the attacks, will be moving
13 quietly from a point just outside the courtroom to their seats
14 in the gallery behind the glass and back between now and 10:28
15 this morning. Without in any way interrupting these military
16 justice proceedings, they understandably wish to observe in
17 relative quiet and privacy the different events of the
18 sequence of the morning of September 11th 17 years ago as
19 those impacts and moments of death occurred.

20 No disrespect is intended to the commission. We
21 don't request nor do they any pause in the proceedings, and
22 the security personnel have been informed.

23 MJ [Col PARRELLA]: Thank you, General Martins.

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1 Defense, are all the defense counsel who were present
2 at the close of the previous session present today?

3 Mr. Nevin?

4 LDC [MR. NEVIN]: Yes, Your Honor.

5 MJ [Col PARRELLA]: Ms. Bormann?

6 LDC [MS. BORMANN]: No, Judge. Major Seeger is attending
7 to other duties.

8 MJ [Col PARRELLA]: Mr. Harrington?

9 LDC [MR. HARRINGTON]: Same, Judge. We're all here.

10 MJ [Col PARRELLA]: Mr. Connell?

11 LDC [MR. CONNELL]: Good morning, Your Honor.

12 MJ [Col PARRELLA]: Good morning.

13 LDC [MR. CONNELL]: All same counsel are present.

14 MJ [Col PARRELLA]: Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, Lieutenant Colonel Williams is
16 attending to other duties this morning; otherwise, everyone
17 else is here.

18 MJ [Col PARRELLA]: Thank you.

19 I note that all five accused are absent this morning.

20 Trial Counsel, do you have a witness to testify as to
21 the absences of the accused?

22 CP [BG MARTINS]: We do, Your Honor.

23 Major, would you please proceed to the witness stand,

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1 raise your right hand for the oath.

2 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
3 was sworn, and testified as follows:

4 DIRECT EXAMINATION

5 Questions by the Chief Prosecutor [BG MARTINS]:

6 Q. Are you the assistant SJA, Major?

7 A. Yes, sir.

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

9 Q. Major, I have in front of me what has been marked as
10 Appellate Exhibit 597. Let's start with 597, the waiver by
11 Khalid Shaikh Mohammad. Did you have occasion to advise him
12 of his right to attend today's proceedings?

13 A. I did.

14 Q. What time did you do that?

15 A. At 0637.

16 Q. Did you use a form in advising him of his right?

17 A. I did. The form ----

18 Q. And that form is in front of you?

19 A. Yes, sir.

20 Q. And did you read the form in English or in Arabic?

21 A. I read the form in English, and there was no Arabic
22 interpretation because he did not want one.

23 Q. All right. I have that form in front of me. Did he

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1 indicate whether he wanted to attend this morning's
2 proceedings?

3 A. He indicated he did not want to attend the
4 proceedings this morning.

5 Q. All right. I also have a notation there that
6 apparently he will be attending his legal meetings at another
7 location this morning?

8 A. That's right. Yes, sir.

9 Q. All right. Do you believe that his waiver was
10 voluntary?

11 A. I do.

12 Q. Appellate Exhibit 597A, consisting of three pages,
13 the waiver for Walid Mohammad Salih Mubarak Bin'Attash. Did
14 you have occasion to advise him of his right?

15 A. I did.

16 Q. Did you use the English or the Arabic form?

17 A. I read it in English, and then he had an interpreter
18 read it in Arabic.

19 Q. Did he indicate that he understood his rights?

20 A. He did.

21 Q. And do you believe -- first of all, is his signature
22 on Appellate Exhibit 597A?

23 A. It is. It is contained on the Arabic version only

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1 because he did not want to sign the English version.

2 Q. Do you believe he understood his rights?

3 A. I do.

4 Q. And did he waive those rights?

5 A. He did.

6 Q. 597B, consisting of three pages, the waiver for Ramzi
7 Binalshibh. Did you read the form in English or in Arabic?

8 A. I read it in English only.

9 Q. Did he indicate that he did not need the form read in
10 Arabic?

11 A. He did. He indicated he did not need an Arabic
12 interpretation.

13 Q. Is his signature on Appellate Exhibit 597B?

14 A. It is.

15 Q. And do you believe he understood his right to attend
16 this morning's proceedings?

17 A. I do.

18 Q. With respect to 597C, consisting of three pages, the
19 waiver for Ali Abdul Aziz Ali. Did you read this form in
20 English or in Arabic?

21 A. This form was read in English only.

22 Q. Did he indicate whether he understood his right to
23 attend?

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1 A. He did.

2 Q. Is his signature on page 2 of this document?

3 A. It is.

4 Q. And do you believe that he waived his right to attend
5 this morning?

6 A. He did.

7 Q. And, finally, Mustafa al Hawsawi, three-page
8 document, 597D. Did you read the form in Arabic or in
9 English?

10 A. I read the form in English and he had an Arabic
11 interpretation.

12 Q. Did you read the form exactly as it appears in front
13 of you and me?

14 A. Yes, sir, verbatim.

15 Q. Did he have any questions?

16 A. He did not have any questions.

17 Q. Do you believe he understood his right to attend this
18 morning's proceedings and voluntarily waived his right?

19 A. I do, and I think he voluntarily waived his right.

20 Q. Okay. I understand he will be attending other legal
21 meetings this morning?

22 A. He will be.

23 Q. Thank you.

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1 A. No problem.

2 TC [MR. SWANN]: I have no further questions. Thank you,
3 Your Honor.

4 MJ [Col PARRELLA]: Thank you, Trial Counsel.

5 Do any defense counsel have any questions of this
6 witness?

7 LDC [MR. NEVIN]: Your Honor, David Nevin on behalf of
8 Mr. Mohammad. And I just will advise the military commission
9 I would like to ask this witness to state her name because I
10 object to the anonymous testimony.

11 MJ [Col PARRELLA]: Your objection is overruled.

12 Do you have any -- counsel have any questions for
13 this witness?

14 LDC [MS. BORMANN]: Judge, I have no questions, but I join
15 Mr. Nevin's objection.

16 MJ [Col PARRELLA]: Understood.

17 Mr. Harrington?

18 LDC [MR. HARRINGTON]: No objections, Judge. Join in the
19 request.

20 MJ [Col PARRELLA]: Mr. Connell?

21 LDC [MR. CONNELL]: Your Honor, I would further ask the
22 witness her unit under R.T.M.C. 20-7, and I'd like to be heard
23 on the anonymous testimony objection. I do that because this

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1 is the first time that you've heard it from us, Your Honor.
2 Normally it's a much more abbreviated process.

3 MJ [Col PARRELLA]: Mr. Connell, what was the citation
4 again, please?

5 LDC [MR. CONNELL]: R.T.M.C. 20-7.

6 MJ [Col PARRELLA]: Okay. What I'm going to ask you to do
7 is go ahead and, if you have an objection to -- I understand
8 this has been routine practice. I'd ask you to go ahead and
9 brief the issue.

10 LDC [MR. CONNELL]: I'm happy to do so, sir.

11 MJ [Col PARRELLA]: Mr. Ruiz?

12 LDC [MR. RUIZ]: No questions. We also join.

13 MJ [Col PARRELLA]: Okay. Thank you. You may step down,
14 Major.

15 WIT: Thank you.

16 **[The witness was excused.]**

17 MJ [Col PARRELLA]: The commission finds that
18 Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh, Mr. Ali, and
19 Mr. Hawsawi have knowingly and voluntarily waived their right
20 to be present at today's session.

21 The first item we're going to take up is the court's
22 ruling as to the defense motion for the judge to disqualify or
23 to recuse himself from this commission.

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1 The defense moves this commission to disqualify or
2 recuse myself as the military judge based upon four primary
3 claims:

4 One, my qualifications, which they argue are
5 insufficient in light of ABA Code of Judicial Conduct 2.5,
6 made applicable based upon JAG Instruction 5803.1E.

7 Two, that Canon 3 of the Code of Conduct for
8 United States Judges requires me to disqualify myself due to
9 my tenure as a Marine Corps Fellow at the Department of
10 Justice.

11 Three, the fact that my time at the Department of
12 Justice creates a situation wherein the military judge's
13 impartiality might reasonably be questioned.

14 And, four, the fact that I am slated to assume
15 command in the summer of 2019, and as a result it would be
16 inefficient for me to remain on the case.

17 Based upon the evidence before the commission,
18 including the lengthy voir dire of the military judge, I make
19 the following findings:

20 As to my qualifications, Congress and the Executive
21 Branch have expressly enumerated the requisite qualifications
22 for a military judge to preside over a military commission.
23 Those qualifications are set forth at 10 U.S.C.

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1 Section 948j(b), R.M.C. 502(c) and Section 6-3 of the
2 Regulation for Trial by Military Commission. As indicated on
3 the record, I possess the requisite qualifications as set
4 forth within the law and regulations applicable to this
5 commission.

6 Specifically, despite ample opportunity to question
7 the military judge, no evidence was presented to suggest that
8 I wasn't a commissioned officer of the Armed Forces serving on
9 active duty, a member of the bar of a federal court, or a
10 member of the highest court of a state or the District of
11 Columbia, certified to be qualified for duty under
12 10 U.S.C. 826, otherwise known as Article 26 of the Code, by
13 the Judge Advocate General of the Armed Forces of which I am a
14 member; in possession of a Top secret security clearance; and
15 with at least two years of experience as a military judge
16 while certified and qualified for duty as a military judge in
17 general courts-martial.

18 As Congress established the Military Commissions Act
19 in part for the express purpose of trying this case and these
20 accused, this commission can reasonably infer that Congress,
21 and subsequently the Executive Branch agencies charged with
22 implementing the Military Commissions Act, specifically
23 considered the requisite qualifications for a military judge

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1 knowing the possible complexity associated with trying a
2 high-profile capital case involving international law and the
3 handling of classified evidence. Even with all of these
4 issues in mind, Congress and the Executive Branch established
5 the qualifications that we have before us without exception
6 for the particular nuances of this case.

7 While I am aware of the challenges of assuming the
8 role of military judge at this stage in the proceedings,
9 having considered my obligations under ABA Model Code for
10 Judicial Conduct, I do believe I possess the requisite skill
11 and competence to diligently perform the duties of military
12 judge in this commission.

13 As also indicated to counsel, the commission will
14 ensure it moves at an appropriate pace to allow the military
15 judge to become fully apprised of the history and background
16 related to any issue before it before making a substantive
17 ruling. No outside entity has attempted to influence this
18 commission into abiding by any particular timeline.

19 I decline, however, to take the defense's suggestion
20 that I abate the proceedings until such time as I've reviewed
21 the transcript and pleadings related to this commission. I am
22 aware of no such requirement for a military judge to perform
23 this task and am confident in my ability to be prepared to

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1 address the issues before me as those issues arise.

2 I do not find that my prior tour as a Commandant of
3 the Marine Corps Fellow at the Department of Justice results
4 in a situation wherein my impartiality as a military judge
5 might reasonably be questioned pursuant to R.M.C. 902(a).

6 To mitigate any appearance issue, I provided the
7 parties my fitness report associated with the Department of
8 Justice tenure and attempted to candidly answer the defense's
9 questions for several hours in open court. Nevertheless, I do
10 not think that any of the answers to those questions might
11 result in a situation wherein my impartiality might be
12 questioned nor do I find that my tenure at the Department of
13 Justice meets any of the specific grounds for disqualification
14 set forth at R.M.C. 902(b).

15 In reaching this conclusion, I make the following
16 findings:

17 One, I do not have a personal bias or prejudice
18 toward any party, nor do I possess personal knowledge of
19 disputed evidentiary facts concerning this proceeding as a
20 result of my time at the Department of Justice.

21 Two, I did not act as counsel on this matter or any
22 other commissions case in any capacity while at the Department
23 of Justice. Additionally, I did not have professional

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1 interaction with any of the Department of Justice attorneys
2 assigned to this commission while serving as a Fellow at the
3 Department of Justice.

4 Three, I have not expressed an opinion concerning the
5 guilt or innocence of the accused.

6 Four, as already noted, I am qualified under
7 R.M.C. 502(c) and detailed to this commission pursuant to
8 503(b).

9 And, five, neither I nor any relation to me is a
10 party, a witness, or otherwise has an interest that could be
11 substantially affected by the outcome of the proceeding.

12 Further, I note the following additional facts
13 specific to my tenure at the Department of Justice:

14 First, I was never employed by the Department of
15 Justice, but rather worked there pursuant to a memorandum of
16 understanding between the Marine Corps and the Department of
17 Justice. My tenure was limited to an academic year and was
18 part of the Marine Corps' established Fellowship program which
19 involved sending senior officers to government agencies,
20 private corporations, and various think tanks in order to
21 observe, inform, and exchange ideas.

22 Second, I did not undergo any type of hiring process
23 or training within the Department of Justice.

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1 Third, I was not evaluated by any Department of
2 Justice employee, nor did I -- any Department of Justice
3 employee have the ability to influence my evaluation or career
4 in a negative way. The Fellowship fit rep, which has been
5 marked as Appellate Exhibit 595B, is what we term an
6 unobserved fitness report, meaning that although the DoJ
7 employee's name appears on the report, there are no markings
8 associated with the report.

9 Now, as is evident from Appellate Exhibit 595B, the
10 writer can still provide comments that become part of my
11 official personnel file, but those comments could not have
12 been made negative without a specific enumerated reason as set
13 forth in the applicable Marine Corps order.

14 Fourth, I was always co-detailed to Department of
15 Justice cases, meaning I always worked alongside another
16 Counterterrorism Section attorney.

17 And, fifth, to the best of my knowledge, I never
18 worked on any matter involving 9/11 or any other commissions
19 case.

20 Although not a specific ground for disqualification,
21 the defense has asked that I disqualify myself or, in the
22 alternative, abate the proceedings because I am currently
23 slated to assume command in the summer of 2019. As I

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1 indicated in my answers during voir dire, the Chief Judge's
2 decision to detail me to this commission was made after the
3 public announcement of my selection for command. I can
4 assume, therefore, that Judge Pohl took this fact into
5 consideration when making his detailing decision. As such, I
6 see no valid reason why I should not proceed to the best of my
7 abilities until such time that this case is concluded or I am
8 properly relieved.

9 As such, the defense motion for the military judge to
10 disqualify or recuse himself is denied. Likewise, the defense
11 motion to abate the proceedings while counsel submit written
12 pleadings in furtherance of their motion to recuse the
13 military judge is denied.

14 The commission will, however, pursuant to
15 R.M.C. 902(d) allow counsel to move the commission for
16 reconsideration based upon the discovery of additional
17 evidence. The commission is not, however, going to abate or
18 postpone this proceeding while the parties seek to gather
19 additional evidence.

20 Additionally, the counsel -- the commission will
21 allow Mr. Harrington, pursuant to his request, to submit
22 written matters ex parte related to his concerns in the AE 292
23 series as they relate to voir dire. It's my understanding

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1 that Mr. Harrington has done so; however, the commission has
2 been unable to, so far, review those documents.

3 LDC [MR. HARRINGTON]: Excuse me, Judge.

4 MJ [Co] PARRELLA]: Mr. Harrington.

5 LDC [MR. HARRINGTON]: We were advised that apparently we
6 didn't get the AE number on time yesterday, so -- but the
7 supplement that we filed has been filed, has been accepted for
8 filing this morning, so ----

9 MJ [Co] PARRELLA]: Thank you, Mr. Harrington. That's my
10 understanding as well. I did inquire just before coming on
11 the record, and it's my understanding they've been received.
12 So at the first opportunity, I will review those pleadings
13 that you've submitted.

14 Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, if you're finished, may I be
16 heard?

17 MJ [Co] PARRELLA]: You may. Mr. Ruiz, before you begin,
18 is your desire to be heard on the court's ruling?

19 LDC [MR. RUIZ]: Yes.

20 MJ [Co] PARRELLA]: Do you have a question about the
21 court's ruling?

22 LDC [MR. RUIZ]: I do not. I want make sure the record
23 correctly points out Mr. al Hawsawi's position, not in terms

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1 of relitigating it. But your recitation was framed in terms
2 of the defense motion, and I understand why you framed it as
3 such; however, because this is a co-accused case and there are
4 nuances in the positions that the parties take, I want to take
5 this opportunity to make sure that, following your recitation,
6 it is crystal clear what Mr. al Hawsawi's position is on
7 the -- on the issue.

8 As I indicated yesterday, we were not moving at the
9 time to recuse and have not actually moved on behalf of
10 Mr. al Hawsawi for your recusal. We did not also explicitly
11 join Mr. Nevin's or other counsel's motion to recuse you. So
12 to the extent the record may reflect to an observer in the
13 future or somebody reviewing this record that we did, in fact,
14 make such a motion, we have not.

15 That is not to say, as I indicated yesterday, that we
16 unjoined, simply that we were reserving our opportunity to
17 actually move to recuse you at a later time. Of course, that
18 is also contemplated by the rules. However, to the extent
19 Mr. al Hawsawi chooses to move to recuse you at a later time,
20 it would not be a motion for reconsideration in our view, as
21 we have not yet moved, and that's a -- that's a nuance that I
22 want to make sure is clear with the court.

23 While we all may sit on this side of the aisle, we

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1 all do have independent positions and procedural postures that
2 illustrates just such an event. So I wanted to make sure that
3 was clear on the record, and that that remains our position.

4 MJ [Col PARRELLA]: I understand, Mr. Ruiz. And I did
5 record that yesterday, that you reserved your right to
6 challenge the military judge. I do recall that you did
7 specifically join that we take up no additional matters until
8 taking this issue up.

9 LDC [MR. RUIZ]: That's right.

10 MJ [Col PARRELLA]: It is noted for the record. Thank
11 you.

12 LDC [MR. RUIZ]: Thank you.

13 MJ [Col PARRELLA]: All right. So before we proceed, my
14 intention to is take up first AE 591F; but before we do, there
15 is one administrative matter the commission needs to take up.

16 The commission was informed last night that, due to
17 current -- the current projected storm track of Hurricane
18 Florence, that the chartered aircraft that was originally
19 scheduled to take us back to Virginia on Saturday will likely
20 be unable to fly between Thursday and Sunday. As such, the
21 options would be to depart tomorrow, that being Wednesday, or
22 depart sometime next week after Monday. And departing next
23 week, I'm told, is contingent upon aircraft availability.

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1 I think that, given the practical considerations
2 associated with these options, the commission is leaning
3 towards option number one, a Wednesday departure. I will,
4 however, give the parties an opportunity to discuss this
5 matter during our first morning recess and to be heard when we
6 come back on the record. This is, however, I'm told, a
7 time-sensitive decision that needs to be made as soon as
8 possible so that if -- whatever decision is made, the aircraft
9 can be scheduled appropriately.

10 And additionally, if we go with the option the
11 commission is leaning towards, which is option one, that
12 brings up the subsequent decision of do we stay with the
13 original schedule of doing a closed session this afternoon or
14 just maintain taking up as many of the unclassified motions as
15 we can today.

16 So I'd ask you just -- at this point in time to
17 consider that. Again, after the first morning recess,
18 we'll -- I'll give everybody an opportunity to be heard, but
19 I'd ask that the parties discuss that among each other as
20 well.

21 All right. We will now turn to the first issue to be
22 argued, Appellate Exhibit 591F. The government's response to
23 this motion is marked as Appellate Exhibit 591J.

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1 Mr. Ruiz, would you like to be heard?

2 LDC [MR. RUIZ]: Yes, thank you.

3 TC [MR. RYAN]: Your Honor, excuse me. May I be excused
4 to retrieve a document from the trailer?

5 MJ [Col PARRELLA]: You may.

6 LDC [MR. RUIZ]: Judge, 591F asks the commission to abate
7 the proceedings as a natural consequence of the JTF's decision
8 to deny Mr. al Hawsawi's request for a special visit with a
9 properly cleared defense expert on September 5th and 6th of
10 2018.

11 On 14 August 2018, our team properly submitted a
12 special request form setting forth our bases for the request
13 for visit. Clearly, it was a visit on the 5th and the 6th of
14 September, the week prior to the military commissions
15 hearings. It has been an established pattern that our team
16 travels the week ahead in order to conduct the business of
17 getting ready for the commission hearings. And in order to do
18 that, we often send what I call an advance team to make sure
19 that we conduct administrative issues, meet with
20 Mr. al Hawsawi, and make sure that it simply expedites and
21 makes us more efficient when we do, in fact, bring the
22 second-tier group down to the commissions, which is typically
23 on Saturday.

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1 As a matter of course and practice, I typically
2 travel the week before, and I have done that without exception
3 for only a handful of times in the many, many years that I've
4 been here. On this particular occasion, I was not able to do
5 so due to personal commitments, which from time to time do
6 impact our ability to travel. Because of that, I think now
7 you, having experienced the first trip to Guantanamo,
8 understand some of the additional logistic issues associated
9 with coming down here. It's not as easy as going down to a
10 county jail or a local federal detention facility. It
11 involves a process of multiple days and that impacts our
12 people's ability at times to make themselves available for
13 that.

14 However, what I do want the military commission to
15 know, and I think the record would reflect this if push came
16 to shove, is that Mr. al Hawsawi's team, almost without
17 exception, we have been able to travel ahead of the week of
18 hearings. Almost without exception, I have traveled along
19 with my team in order to make that happen, in order to avoid
20 any of these kinds of issues. But as I said, from time to
21 time, there are issues that arise and make it impossible for
22 some members of our team to travel.

23 The other thing that is important to understand,

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1 Judge, is that not everyone on our team is qualified to meet
2 with Mr. al Hawsawi. This is a capital case, it's complex, it
3 involves sensitive issues, and it is not simply as easy as, at
4 times, the prosecution would have you believe or have the
5 commission believe, that if we have a number of lawyers, any
6 one of them can come in and speak to a client.

7 Certainly, anyone that has experience having defended
8 clients understands that there is a level of skill and
9 experience necessary in order to engage in those meetings, be
10 productive, to establish that rapport, be able to carry on the
11 legal work that is required of us ethically and legally. So
12 it's not that simple. We have to have that requisite skill.

13 In this instance, we had a properly cleared defense
14 expert, who has met with Mr. al Hawsawi for many years, who
15 has been approved by the convening authority, as I said, holds
16 the appropriate clearances, the JTF badges, has been on the
17 roster for quite a while. And we made the request, indicated
18 in that request, which has been submitted as an attachment,
19 Judge, for your consideration as Attachment B, that he is a
20 cleared member of the defense team sent at my direction in
21 order to participate in these meetings.

22 Now, checking back, Judge, one of -- one of the
23 historical aspects of this case is that the right of access to

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1 our clients has been litigated throughout time.

2 I just saw you leafing through your papers. I didn't
3 know if you were ----

4 MJ [Col PARRELLA]: Oh, please proceed. If you see me
5 look down, Mr. Ruiz, you can assume I'm listening.

6 LDC [MR. RUIZ]: Sure.

7 MJ [Col PARRELLA]: I'm just ----

8 LDC [MR. RUIZ]: So Attachment B, which has been
9 submitted, is the one that contains our special request form.
10 It's self-evident, I'm not going to read it, but it's there to
11 show you the procedural posture. We submitted the requisite
12 request.

13 The important thing to -- that I want you to take
14 away from this, Judge, there's nothing about this special
15 request form that is unique unto itself. In fact, in the
16 prosecution's response, they allude to four previous meetings
17 with Mr. al Hawsawi where an attorney or a paralegal was not
18 present where an exception to the policy was granted. And
19 what I would submit to you is that there was nothing different
20 about the submission of the justification for those meetings,
21 other than there was a cleared defense member who was there to
22 meet with Mr. al Hawsawi at Mr. al Hawsawi's request and to
23 carry on the business of the defense.

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1 Certainly, I could understand -- it would be
2 reasonable to inquire if a member or a person who was not a
3 member of our defense team wanted to meet Mr. al Hawsawi. I
4 would want to not only meet with them, but undertake the
5 onerous travel to Guantanamo in order to engage in a meeting.
6 But in this case it's almost self-evident that a member of our
7 defense team would meet with him for the purposes of carrying
8 on the work of our case. So that's Attachment B.

9 Attachment D to our motion sets forth for you in
10 specific detail the purpose for our expert's meeting. It's
11 submitted ex parte and under seal because it clearly contains
12 work product, attorney-client privileged information that
13 relates to the status of our expert, the qualifications of our
14 expert, and the reason why our expert would be meeting with
15 Mr. al Hawsawi.

16 And I would submit to you, Judge, that whatever
17 deference this commission has afforded to the JTF in terms of
18 a policy determination does not and ought not to extend to a
19 procedure whereby they determine the worthiness of an
20 attorney-client visit based on the details and the purpose of
21 that visit.

22 You would imagine the slippery slope that that would
23 take us into if the decision-making of the staff judge

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1 advocate and the JTF, the Joint Detention Group Commander,
2 would be based on detailed explanations. And I would submit
3 to you that's exactly what was asked for, because that's
4 what's included in our attachment. The e-mail from the JTF
5 requests detailed explanation of -- provide in detail the
6 purpose and justification for this meeting.

7 Reasonable reading of "provide in detail" for me is
8 something that goes beyond saying he's a member of our defense
9 team, he's there to meet with him, he's there to work on our
10 defense and support those efforts. The reading I had for that
11 is what is he going to talk about? What is the nature of his
12 visit? And clearly, Judge, those are -- those are
13 impermissible questions.

14 As you, I think, may be aware, there is a standing
15 ruling in regards to the protocol for how we request experts,
16 and that particular procedure is submitted ex parte to the
17 convening authority. And the reason that the court, after
18 litigation -- and agreement from the prosecution, mind you --
19 arrived at the procedure, it was an ex parte procedure, was
20 exactly to protect defense strategic efforts and so as not to
21 telegraph what the defense is doing.

22 And the commission determined that the very nature of
23 the expertise, what the expert does, is, in fact, privileged

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1 and confidential. And that is evident in the fact that the
2 procedure now exists that, when we request an expert to the
3 convening authority, it's an ex parte submission and it
4 requires de minimis notice to the prosecution. But the only
5 thing that notice requires is simply to say we have made a
6 request to the convening authority for expert assistance.
7 That has been the procedure in place. It remains the
8 procedure in place.

9 And were this procedure allowed to stand, where JTF
10 is allowed to deny us visits and access to our client --
11 because by extension this is a denial of counsel. This is an
12 agent of our team and in this instance was an agent of myself,
13 carrying forth information that was vital to Mr. al Hawsawi's
14 defense, to his preparation, to the business that was going to
15 take place this week. And everything else put aside, we had
16 made arrangements to get a defense team member on this island
17 that would meet with Mr. al Hawsawi and be able to put forth
18 our efforts to be prepared to carry on the business of this
19 week. It didn't happen because they made a determination that
20 he couldn't meet Mr. al Hawsawi.

21 If this policy is allowed to stand, it guts the
22 intent of the procedure we have whereby experts are submitted
23 under ex parte seal communications with the convening

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1 authority, whereby their expertise itself is preserved. It is
2 something that is vital to the defense. And certainly we
3 shouldn't be put in a position where, in order to have our
4 experts have access to our clients, will be made on a
5 case-by-case determination by some unknown entity in the Staff
6 Judge Advocate's office or the Joint Detention Group
7 Commander, because it's not clear who actually made this
8 determination. But that is simply a very, very dangerous,
9 slippery slope to go down.

10 Judge, in October of 2017, we addressed yet another
11 issue of access to our clients. All I will say about this is
12 that this has been a recurring issue through the course of
13 this commission, through the course of this litigation. But
14 back in 2017, the prosecution once again responded with what
15 tends to be their standard response, which is operational
16 necessities, operational necessities.

17 And that -- what that meant and what that translated
18 into at the time was they didn't have the manpower to support
19 more than six attorney-client visits. And Mr. Swann, the
20 representative for the prosecution, came up here and told the
21 commission that this was a one-time instance, that manning
22 issues, those type of operational necessities, would not
23 impact the commission's business from here on out.

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1 Now, the record that is before you, the
2 communications from the JTF back to us, LSS, do not have any
3 indication whatsoever that this determination was based on any
4 operational necessity. And what I would submit to you, Judge,
5 is that you reject the prosecution's approach of testifying of
6 facts not in evidence because they've submitted nothing in
7 their pleading and certainly they've opposed calling any
8 witnesses on this issue.

9 On 27 August 2018, Your Honor, we submitted a request
10 for witnesses on this issue to the prosecution. That request
11 remains unanswered as of today. I take that to be that the
12 prosecution has by its silence denied our request for
13 witnesses. But please do not allow the prosecution to stand
14 up here and testify about evidence that is not supported by
15 documentary evidence submitted in their pleading or by a
16 witness taking the stand.

17 So in October of 2017, this is what the commission
18 said: "The right of the defense to meet with clients is
19 fundamental to a fair adjudication of this case." Fundamental
20 to a fair adjudication of this case. "If similar issues arise
21 in the future, the commission will take appropriate action to
22 ensure that those rights are fully protected." The
23 fundamental right is, of course, right to counsel and

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1 effective assistance of counsel. The right of Mr. al Hawsawi
2 to participate in his defense. That's the fundamental right
3 that is at issue here.

4 In filing this motion, Your Honor, we sought to craft
5 an appropriate remedy to put us back in the position we would
6 have been in if we had been able to carry out those two
7 meetings. Abatement seemed appropriate because what we lost
8 was two days, two days of attorney-client meetings, two days
9 of work that was furthering our preparation for this hearing;
10 and that's why we asked for an abatement. We would have also
11 been open to talking about a one- or two-day delay.

12 But the reason we asked for an abatement is because
13 we thought that that would also send a message to the JTF that
14 these decisions cannot be made based on such arbitrary and
15 capricious reasons, such as you think that the details and the
16 purpose of our attorney-client meeting are worthy of giving us
17 an attorney-client visit in a capital case where the United
18 States Government has made a determination that these men
19 should be tried here under these laws and detained under these
20 circumstances. That's just simply not appropriate. That's
21 not -- that's not the appropriate way to proceed.

22 And as I've said, the prosecution misses the mark
23 here, when they guess or infer or suggest that this was a

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1 medical professional. But even if he were, so what? The
2 access to our clients cannot be based on the expertise of the
3 witness, the expertise of the defense expert. Would it be --
4 is it different if learned counsel is there? Is it different
5 if it's a nonattorney who's not on the record? Where does
6 that -- where does that discretion end and where is the
7 reasonableness in such an approach? It's simply not a
8 sustainable approach to access to our clients.

9 So to whatever extent the government will argue
10 judicial deference to the operations of the detention
11 facility, this procedure outstrips any reasonable deference
12 that the commission has previously granted to the JTF.

13 Just giving you a chance to highlight, Judge.

14 MJ [Col PARRELLA]: Mr. Ruiz, unless -- if I need time,
15 I'll ----

16 LDC [MR. RUIZ]: I understand.

17 MJ [Col PARRELLA]: ---- indicate such. Otherwise, please
18 keep going.

19 LDC [MR. RUIZ]: Sure.

20 So the interesting thing here, Judge, is that we did
21 not set out -- and I think when you look at our motion, we did
22 not set out to ask the commission to reconsider the litigation
23 in 566. We have simply set out to ask the commission to

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1 provide us a remedy for the exercise, we thought arbitrarily
2 so, of that policy. That's what we've asked for. We asked
3 for an abatement, we did not ask for a reconsideration.

4 And I will submit to you that on Mr. al Hawsawi's
5 team -- I'll speak for our team because very judicious about
6 that -- we say what we mean. We didn't seek to reopen this
7 litigation. We wanted an abatement so that we could continue
8 to carry out the business in support of our case. However,
9 the prosecution's answer reopened the entire 566 litigation.
10 If you look at the prosecution's response in this case,
11 they're the ones who seem to want to be keen on relitigating
12 566. Their response is essentially reciting everything that
13 went on in 566. To the extent that they have done that, I
14 feel that it is proper for me to respond at this time.

15 So I will make a couple of observations about some of
16 their statements and some of their arguments in response,
17 Judge.

18 The prosecution relies heavily on Turner v. Safley in
19 their response. In Turner v. Safley, they cite for the
20 proposition that this court and all courts should defer to the
21 daily operations of a detention facility, a prison facility.
22 However, the Turner v. Safley decision in ruling is not a
23 carte blanche. It's not a decision that says that the court

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1 should throw up its hands and let the detention facility do
2 whatever the detention facility wants to do.

3 Equally importantly is to understand that
4 Turner v. Safley was a post-conviction case, post-conviction
5 in Missouri that dealt with prisoners who had already been
6 adjudicated, who had been found guilty, and who were being
7 held and serving prison terms. That's not what we have here,
8 Judge. And that's a significant difference in the analysis
9 and I will go into that a little bit further.

10 Here we have preconviction detainees. We think, and
11 it ought to be, that the presumption of innocence still
12 applies. The detention facility is holding these men pending
13 the adjudication in this commission of their guilt or their
14 innocence. The difference there is, there is still a very
15 vital, a very vibrant, and an ongoing attorney-client
16 relationship because these men are facing the death penalty.
17 They will pay the ultimate price if one day a jury determines
18 that they should. That's not what they had in
19 Turner v. Safley.

20 In Turner v. Safley, they had prisoners that had been
21 convicted, were serving some long-term sentences, life
22 sentences, and there were two regulations at issue in
23 Turner v. Safley. One was one that had to do with the

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1 communications between prison facilities, mail between prison
2 facilities. The second one was a marriage regulation that
3 prohibited marriage between inmates in the facilities. And
4 the questions were: Were those reasonably related to
5 legitimate penological objectives?

6 And the way the court went about making that
7 determination, Judge, is the prison officials testified,
8 provided evidence, provided testimony as to why they believed
9 that those regulations had -- and carried forth their
10 interests of a legitimate penological objective.

11 Interestingly enough, Turner v. Safley actually
12 rejected one of the two regulations, the marriage regulation.
13 And this is what is said about the marriage regulation: It
14 was an exaggerated response to the objective of security.
15 There was no reasonable relation asserted to the goal of
16 rehabilitating female prisoners.

17 So Turner v. Safley itself was not a decision that
18 was a carte blanche for the prosecution. It was at best a
19 half victory. Their regulation that was, in fact, upheld,
20 which was the communications between prison facilities, was
21 upheld based on sworn testimony, testimony that was provided
22 by prison officials.

23 And the reasons they were given had to do with things

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1 such as the fact that there was a gang problem, and there was
2 verifiable evidence that gang-related communications were
3 being sent between different prison facilities. In some
4 instances, they were advocating violence. In some instances,
5 they were giving instructions on people to assault. And they
6 were able to testify that, by limiting, narrowly limiting
7 those communications, it would help the prison facilities
8 alleviate some of the gang violence and the gang problems. So
9 Turner v. Safley actually only gave the Missouri prison system
10 half of what it was asking for.

11 The other point that follows on the Turner v. Safley
12 is -- the case is Johnson v. California, 543 U.S. 499. It's a
13 2003 case. What Johnson said was that the Supreme Court
14 intended legitimate penological interest to apply to prisoners
15 where certain rights must necessarily be limited in the prison
16 context. That's important.

17 Certain rights do not need to be necessarily limited
18 in the prison context, such as the right not to be
19 discriminated against based on race, such as the
20 Eighth Amendment's prohibition against cruel and unusual
21 punishment. In those instances where fundamental rights do
22 not need to be curtailed to reasonably incarcerate prisoners,
23 they need not be curtailed.

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1 In this instance, that rationale would apply. You
2 have a Sixth Amendment. You have a statutory right to
3 counsel, to effective assistance of counsel, to participate in
4 your defense. And there is no legitimate penological
5 objective to curtail that to safely detain these men in
6 anticipation of trial.

7 Again, we have a vital, ongoing, fundamental interest
8 in the attorney-client relationship. It's not necessarily
9 present in the post-conviction context where you've been
10 adjudicated. While there may be ongoing appeals and legal
11 issues, it is looked at very differently.

12 So I'd like you to think about that, Judge, when you
13 hear the prosecution's arguments about giving of this carte
14 blanche deference to a detention facility, because they do not
15 stand in the same footing as a post-conviction prison facility
16 and they do not stand in the same position as a
17 post-conviction prison facility that is curtailing rights that
18 need to be curtailed to run an orderly prison facility.

19 And again, as I've indicated, certain rights the
20 Supreme Court has recognized need not be curtailed:
21 Fundamental rights, not to be discriminated against race;
22 fundamental rights, the Eighth Amendment right against cruel
23 and unusual punishment. There Turner would not apply. And

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1 here I think the same rationale is appropriate, Judge.

2 The prosecution's response also keys on the response
3 to the request from the JTF. And you have my response, Judge;
4 it's in Attachment B. And my response was exactly -- I mean,
5 basically what I've said here today, which was Dr. Ghannam was
6 the expert at issue, a properly cleared member of our defense,
7 they're under my direction to carry on the business of our
8 case, and I can't -- I can't tell you anything beyond that,
9 because I think to do so, as I've indicated to you, would have
10 revealed his area of expertise, which we think is privileged.
11 And to tell you the details and the purpose of his actual
12 meeting would reveal work product as well as attorney-client
13 privileged information.

14 And that's -- that's all I can say. I think we've
15 been reasonable in our response to the JTF. And again, based
16 on practice, past practice, and requests that they have
17 granted, seemed to have been enough. There was no reply to
18 that last request, simply a denial.

19 So again, I don't think that the argument that our --
20 that our explanation was not sufficient should carry any
21 weight, not only because we think it was appropriate, but also
22 because we think that what the JTF was requesting was
23 inappropriate and is inappropriate ethically and legally.

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1 Now, the -- for the first time in this -- in this
2 litigation -- because to the extent 566E and legitimate
3 penological objectives were litigated, it was -- they're only
4 litigated in the context of operational necessity based on
5 manning requirements. There was nothing in that litigation
6 that talked about a legitimate penological objective to
7 provide healthcare by the JTF or to prevent unauthorized
8 healthcare, which raises its head for the first time in the
9 prosecution's response in this motion, in their response
10 motion. It's the first time I have seen them claim that
11 legitimate penological objective.

12 There certainly is no basis in fact, no basis, no
13 evidence presented to you or submitted to you, documentary or
14 otherwise, that indicates that this is some issue at the
15 facility, that there is some type of unauthorized healthcare
16 ongoing in the facility.

17 And if there is, and if they have that concern for
18 which they need to have a legitimate policy or procedure in
19 place, then once again, Judge, I would tell you -- that I
20 would ask that you invite them to present the evidence and not
21 just get up here and testify, which I suspect maybe they --
22 because they've included it in their motion, I can only assume
23 that there may be a reason why they think this is an issue.

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1 Certainly there's no evidence on the record, none in their
2 motion, and they're not intending to call any witnesses.

3 That takes me to my witness request. Tracking back
4 to Turner v. Safley, which is one of the cases they rely on
5 heavily in their analysis, testimony was given in that case so
6 that the military -- so that the judge could base findings on
7 that testimony.

8 If, in fact, the prosecution's position here is going
9 to be that there is a legitimate penological objective in
10 preventing unauthorized healthcare, prove it. Put forth some
11 evidence as to why that is a concern. Because in the -- we've
12 been here ten years. That's a long time. And certainly in
13 this litigation since it began, the second round, that's never
14 been an issue that the prosecution has put forth until now in
15 their pleading.

16 I would ask you not to accept that just based on
17 their pleading or their word, but to ask and to demand that a
18 witness take that stand and testify under oath if that's, in
19 fact, what they want to base their denial on in this instance.

20 So it leaves us at a point where the question, I
21 guess, is what is the relief that we request? Well, it seems
22 that it may be overcome by events if, in fact, we are to
23 depart tomorrow, because it would give us the opportunity to

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1 regain some of the time that we have lost.

2 I will also comment on one aspect of our relationship
3 that is unique to Mr. al Hawsawi, is that because
4 Mr. al Hawsawi has -- it's been well documented that he has --
5 he was savagely tortured while in the custody of the CIA.
6 That torture, as we have talked about many, many times here on
7 the open record, including being sodomized, has led to a
8 number of physical manifestations and injuries that over the
9 years have continued to impact his stability medically, his
10 ability to sleep, his ability to concentrate, his ability to
11 engage with us in a manner that, at times, is sustained and
12 lengthy.

13 Because of that, we build in extra days into our
14 visits with him. When we come down, we come in early so if he
15 needs to cancel a visit because he's tired, because he's not
16 feeling well, he can do that, and we can still have the time
17 that we need in order to carry out the business of our case.
18 It has -- it has happened where he cancels visits because he's
19 not feeling well. That's one of the reasons that he leaves
20 court at the earliest opportunity. He wants to get back. He
21 doesn't feel well sitting for prolonged periods of time.

22 I say that only to you, because if the prosecution's
23 going to argue that we've cancelled visits and, therefore,

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1 don't need the time to meet with Mr. al Hawsawi, that's not
2 the case. Yes, we have cancelled visits. Those visits are
3 cancelled many times because he's not feeling well. But we
4 build that into the front end by coming down early, and we try
5 to account for that. And most of the time, we're successful
6 in doing that. But with this impediment, with this procedure,
7 it's simply not reasonable. It's not possible.

8 So I guess what I'm asking you to do is to grant our
9 motion for abatement. Like I said, in practice it may not
10 mean anything if, in fact, the operational necessities now in
11 terms of getting us off the island are such that we will have
12 that break built in anyhow and hopefully avoid this issue in
13 the future.

14 But I do need -- I do think there needs to be a
15 statement from the military judge and this commission as to
16 where exactly that deference lies. And it cannot be based on
17 a determination by the JTF when a meeting is or cannot be held
18 based on the reasons for that meeting or detailed reasons for
19 that meeting. That deference should not extend.

20 And, quite frankly, Judge, you are in a position
21 where you can revisit this ruling and the rationale of this
22 ruling, and I would ask you to do that, because I think the
23 Turner v. Safley decision, the rationale, and the cases that

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1 we cited for you actually -- actually mitigate in favor of a
2 different procedure and less deference than has been accorded.
3 Thank you.

4 MJ [Col PARRELLA]: Mr. Ruiz, I have a few questions for
5 you.

6 LDC [MR. RUIZ]: Sure.

7 MJ [Col PARRELLA]: The government averred in their
8 response and you seem to have acknowledged here in court that
9 there had been at least, I guess, four prior meetings with
10 this particular expert where they visited Mr. Hawsawi or he
11 visited Mr. Hawsawi without the presence of a paralegal or
12 attorney. Did I hear you correctly on that?

13 LDC [MR. RUIZ]: No, sir. The -- you are correct that
14 there have been four exceptions to policy in the month leading
15 up to this denial of visits. It was with a different team
16 member, however. However, this expert has met in the past
17 with Mr. al Hawsawi. He's been on our team for a number of
18 years, and in the past there have been exceptions to policy
19 granted for him to meet individually with Mr. al Hawsawi.

20 MJ [Col PARRELLA]: From your perspective, is there any
21 difference in the content of your requests from those previous
22 instances where the expert was approved?

23 LDC [MR. RUIZ]: No. The main difference here is the

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1 response from JTF in requesting detailed information.

2 MJ [Col PARRELLA]: I understand. I understand your
3 argument.

4 You indicated that these requests shouldn't be
5 influenced by the type of expert. You indicated a medical
6 expert. My reading of the SOP and specifically the paragraph
7 in question suggests that a concern of the JTF is that the
8 visitor may perform medical treatment, something that
9 obviously the JTF would want to monitor if it's an expert who
10 is there in a clinical capacity as opposed to a forensic
11 capacity.

12 Would you agree it would be appropriate for the JTF
13 to want some declaration, simple as it might be, to indicate
14 that the individual is not there in a clinical capacity?

15 LDC [MR. RUIZ]: I do not. I do not. I think they have
16 the opportunity to observe, and clearly the proceeding -- the
17 meetings are monitored. And in terms of medical treatment, if
18 they were, for example, to bust out a syringe, which would
19 never get through security, I would hope, or engage in actions
20 that seemed to those monitoring that they were providing some
21 type of medical assistance, then I think that they have the
22 appropriate means to observe and, if necessary, to raise that
23 question to us.

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1 The troubling aspect, of course, is that -- let's say
2 it were a medical expert that had been properly approved by
3 the convening authority based on a detailed submission of why
4 that expert needs to assist us in our defense. That's a
5 determination that's been made. As you know, there is a very
6 discrete body of case law in terms of the -- providing defense
7 services -- expert services to the defense. That
8 determination has been made and in some instances made by the
9 military commission after a motion to compel.

10 The JTF should not be in the business of asking us
11 what the purpose is of the visit. I guess a matter of degrees
12 as well, right? And I -- that's why it takes me to the --
13 they have the opportunity and we know that they observe our
14 meetings. But we are not -- and I'll tell you that on behalf
15 of Mr. al Hawsawi, I will never provide information to the JTF
16 in terms of a detailed explanation of why a properly-cleared
17 convening authority or a judge-approved expert on our team is
18 going to meet ----

19 MJ [Col PARRELLA]: I apologize to cut you off, Mr. Ruiz.
20 I understand that.

21 But my question, though, is that my reading of 566,
22 and I'm looking at paragraph (c) is, the very express
23 statement by the commission that "SOP # 11 is reasonably

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1 related to the legitimate penological interest of managing
2 detention facility operations with existing staffing and
3 resources."

4 And I understand your argument about the context that
5 perhaps led to this ruling; however, it appears to the
6 commission that what you're asking the commission to do is in
7 order to give you the relief you're now seeking, which it
8 seems to have switched from abatement to some sort of order
9 where the JTF cannot ask the purpose of the meeting, I have to
10 revisit my predecessor's ruling about the validity of SOP
11 Number 11.

12 But my question specific was given what's in
13 paragraph g. of the SOP, without a detailed explanation of the
14 purpose, do you think it would be inappropriate, just as an
15 assurance, to say that the medical professional is there to
16 perform the function of a consultant?

17 LDC [MR. RUIZ]: Well, the first -- the predicate question
18 there is whether he's a medical professional or not, right?
19 You have Attachment D, it's our ex parte submission, which in
20 this instance, I think, factually rebuts that issue. Of
21 course, if you see, the problem there is I do not believe that
22 the JTF should be in the business of knowing what our
23 expertise -- our expert's area of expertise is.

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1 And here's the fundamental problem with that as well:
2 If I had any confidence that the JTF was a silo unto itself, I
3 would perhaps be willing to meet them part of the way. But
4 here's the reality of this circumstance, Judge. We've been
5 here, like I said, for many, many years. JTF is a direct
6 conduit of information for the prosecution. They have a
7 direct line of communication, they share that information.

8 And for me to share that information with the JTF
9 would involve a leap of faith that I am simply not willing to
10 take based on the history of this case, which involves
11 interference, inappropriate interference, sharing of
12 information, and we're just not in a position where we can
13 take that leap of faith with the JTF.

14 I think what we do have are duties, responsibilities
15 as learned counsel and other counsel in this case, ethical
16 responsibilities. And I'm happy to come before the commission
17 and submit detailed explanations to you as to what our experts
18 are doing and why they're there, but this is how we're just
19 going to -- this is how we have to approach it.

20 MJ [Col PARRELLA]: So one last question, Mr. Ruiz. You
21 seem to agree that abatement is sort of a -- it's an extreme
22 remedy. Putting aside what -- weather may overcome events.
23 Aside from that, let's say we were going to stay here for the

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1 week. It's now Tuesday. I don't know exactly when members of
2 your defense team arrived. Has the defense now had an
3 opportunity sufficient -- the defense consultant, with the
4 arrival of attorneys and paralegals, to meet with Mr. Hawsawi?

5 LDC [MR. RUIZ]: Yes. Yes, I think we have. I think
6 we've been able to do that. In fact, Colonel Williams is
7 meeting with him today.

8 Again, as I say, when I set out to write this motion,
9 we wanted to put ourselves back in the position that we were
10 in before we've had two days of meetings. Dr. Ghannam would
11 have been able to travel and be here on the Wednesday before
12 the hearings. The rest of our team was only able to get here
13 by Friday, have first meetings on Saturday, and then carry on
14 the business of our meetings. So we did try to fashion a
15 remedy that was reasonable.

16 Abatement is a drastic remedy, but that's how --
17 that's how important we felt the issue was in terms of -- it
18 seemed to me that the JTF was taking this as a step removed
19 and now requiring more information from us than is ethically
20 or legally required or permissible. And so I wanted to make
21 the court aware of that issue. I wanted the court to be
22 sensitive to it and fashion a remedy that's appropriate. The
23 prosecution saw fit to bring forth 566E. It makes sense.

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1 It's an issue that is on point.

2 But I think it's -- as I pointed out to you, this is
3 a different context. We have an ongoing capital trial where
4 there's a fundamental attorney-client relationship that's at
5 stake that directly impacts the business of this commission
6 and ongoing court, unlike in the post-conviction context that
7 the prosecution has cited.

8 And I hear you in terms of the SOP. I would have
9 liked to have been able to do something as simple as to tell
10 the JTF what the purpose or what the purpose was not. We've
11 provided that information to you. But we just simply can't do
12 that, not based on history, not based on the lines of
13 communication that we believe and know to exist.

14 What we simply can ask for for the commission is to
15 fashion a remedy here that respects those boundaries, legal
16 and ethical, and balances that equation. And I think what we
17 know is that the JTF, the guard force, has the ability to
18 visually, and we think also via audio, continue to monitor our
19 attorney-client visits. Certainly the -- I think the visual
20 aspect is undisputed, right?

21 And I will tell you there have been times where the
22 guard force has come into our meetings and disrupted the
23 meetings or interrupted -- I won't say disrupted, but

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1 interrupt the meetings based on things that they were
2 concerned about. For example, an attorney removing his shoes,
3 right? They've come in and said, "Hey, please put your shoes
4 on," because that was an issue at one point. Or many, many,
5 many moons ago, an attorney had left a pen behind in the
6 meeting room. They came in and said, you know, "Take your
7 pens with you."

8 So they do have people who are actively monitoring
9 our visits. And I would submit to you that if there's a
10 legitimate concern that somebody is providing medical care,
11 that somebody has the ability to balance that concern by
12 visually observing it, maybe going into the meeting and
13 balancing it in that sense. But it should not be on the front
14 end. It should not be something that disrupts our ability to
15 meet with our client.

16 Certainly not short -- and I also think that just --
17 just stating it is not enough. I do think that if there is a
18 very real legitimate concern, particularly about the
19 medical -- provision of medical services, let's hear it. Have
20 there been instances of that? I don't know. Where -- wherein
21 does that concern come?

22 I know that we've done a great deal of litigation on
23 our team in terms of the propriety of medical care for

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1 Mr. al Hawsawi. And the commission has heard a great many
2 arguments from us on the impropriety or the lack of reasonable
3 or adequate medical care. We've litigated that. We've done
4 so openly before the commission. I never hide anything.
5 We've actually, you know, tried to litigate these issues a
6 number of times. But this is at least the first time that
7 I've seen that as you articulated.

8 That's all I have, Judge.

9 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

10 LDC [MR. RUIZ]: Thank you.

11 MJ [Col PARRELLA]: Any other defense counsel care to be
12 heard on this issue?

13 LDC [MR. NEVIN]: Yes.

14 MJ [Col PARRELLA]: You may, Mr. Nevin. Thank you.

15 LDC [MR. NEVIN]: I recognize, Your Honor -- thank you. I
16 recognize it's a motion that was unique to a situation with
17 Mr. Hawsawi, but I hear -- we all hear this discussion that
18 goes -- that could at least possibly go beyond this situation
19 and could affect the way that the military commission, the
20 military judge, sees this kind of problem going forward.

21 I just want to say -- I'm sure the military judge is
22 aware of this -- that one thing that's been constant with
23 Judge Pohl is that while he -- and I believe this is true --

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1 true with respect -- generally with respect to military
2 judges -- is that on the one hand, I'm not going to be in the
3 business of running a detention facility, but on the other
4 hand, the military judge or military commission clearly has a
5 right and a duty to intervene when it affects the fairness of
6 this proceeding.

7 And those -- this is a case in which those two things
8 frequently overlap and converge. And I simply ask you to be
9 aware of that as we go forward and to bear in mind that this
10 is a unique situation that we have here, because these men
11 were subjected to an extensive course of torture. And that
12 has a fallout that continues today with each of them. And
13 that directly affects their ability to participate in these
14 proceedings and to have these proceedings operate fairly.

15 And I understand what the military commission said
16 about 566C and the fact that SOP Number 11 is seen as being
17 reasonably related to the operation of the facility. And I'm
18 not asking you to consider or rule otherwise, but I'm just
19 saying that when it begins to affect the way these proceedings
20 operate, that does fall clearly within your bailiwick.

21 And there's another aspect of this, which is what we
22 have come to call -- we even have an acronym for it -- CCR,
23 constantly changing rules. And it's not uncommon for rules to

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1 change frequently in a lockup. All of us have had that
2 experience. But here, again because of the difficulty of
3 getting here and communicating with the client, the need to
4 have a high degree of communication and interaction in order
5 to get the case -- in order to provide the defense, there are
6 simply additional complications that present themselves. They
7 come up all the time.

8 I will say, just sort of in the way of stating the
9 obvious and bringing it to your attention, that, yes, we've
10 heard about Turner v. Safley a lot. I will point out that it
11 is not a -- it's a pure conditions case. It's after the
12 defendant has been convicted and is serving time and files a
13 lawsuit about conditions.

14 Here, we are in the pretrial period. And I commend
15 the language of Powell v. Alabama to you, which says that in
16 the period before trial, having the assistance of counsel for
17 thoroughgoing consultation is as important as having counsel
18 at trial, and that the imposition of a death sentence after
19 denial of this right would come perilously close to judicial
20 murder. The Supreme Court is willing to be that clear about
21 the need for counsel to have free opportunity to consult with
22 the client going forward.

23 We also have experts who meet with our client who are

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1 not lawyers and very much understand the limitations. We're
2 not bringing people here to practice medicine, to make house
3 calls, you might say, with respect to our client. But we do
4 have experts who are meeting with them and making forensic
5 assessments. And I heard the military judge make -- use the
6 term "forensic."

7 We do have them making forensic assessments that will
8 involve asking questions about physical condition and making
9 medical manipulations of the -- of the patient, of the client,
10 in order to assess what their condition is and to inform a
11 forensic opinion. And that's -- that is done in every case,
12 and we certainly intend to be doing that here from time to
13 time.

14 So just the last part of this is that it connects to
15 the litigation in AE 183, which was a motion for telephonic
16 contact. And I don't think that telephonic contact would have
17 resolved the problem that counsel described with respect to
18 the expert at issue in this motion, but this is something that
19 has come up again and again. We asked for telephonic contact
20 with our clients from the mainland so that we don't have to
21 get on a plane and come down here and do the kinds of
22 manipulations that counsel was describing to get down here a
23 week early and so on in order to have these kinds of meetings.

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1 And Judge Pohl ruled in 183L on May the 9th of 2017
2 that the communication mechanisms that we've been provided
3 here are minimally effective for doing our job. But he has on
4 a number -- he did on a number of occasions say that he was
5 willing to revisit that and that, in particular, depending on
6 how particular situations evolved, that might become
7 necessary.

8 Not to say that it would have resolved this problem,
9 but I ask that the military judge bear that in mind, that one
10 of the problems we have is that we do have to jump through a
11 lot of hoops to have a single face-to-face -- I guess what I
12 mean to say really is in real time, a realtime communication
13 with the client. And much of that -- much of that kind of
14 problem would have been relieved or would be relieved if we
15 had telephonic communication.

16 That's my argument. Thank you, Your Honor.

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

18 LDC [MS. BORMANN]: Judge, if you will permit me, I have a
19 few comments.

20 MJ [Col PARRELLA]: Sure, Ms. Bormann.

21 LDC [MS. BORMANN]: It dawns on me as I sit there that you
22 probably don't understand the logistical nightmare that is
23 this case in dealing with our clients.

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1 So just to give you a little bit of a background,
2 when Mr. Ruiz requested that his expert consultant attend a
3 meeting, he had to do so two weeks in advance, and he had to
4 list them on a piece of paper. That piece of paper and that
5 name gets run so that they determine -- JTF determines whether
6 or not that person actually has the proper TS//SCI Special
7 Access Program to meet with the defendant.

8 Then when a -- they have to plan the trip down here,
9 right? So there's not everyday nonstop flights that go to and
10 from Guantanamo Bay. So that has to be approved by the
11 convening authority and funds expended and travel orders
12 issued. And then somebody has to come down, like we did on
13 the plane the other day -- come down, and then you have to
14 present papers and orders to get onto the island and onto the
15 base. And your lodging has to be approved, so that has to be
16 taken into consideration. You have to check in.

17 And then when you actually go and meet with the
18 client out at what we call Echo II -- so there's a specific
19 area, and I don't know that you've seen it or not, where
20 defense counsel and expert consultants and anyone who is
21 meeting with the client goes.

22 And you have to go through -- first of all, all of
23 your paperwork that you bring in has to be run through a

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1 privilege review team. That is, somebody has to look at it
2 and it has to be packaged in an envelope and then stamped.

3 MJ [Col PARRELLA]: Ms. Bormann, I apologize for cutting
4 you off, but what I would like for you to do is, I'm not
5 inclined at this point in time to revisit the SOP or JTF's
6 sort of procedures. And I appreciate the background. What
7 I'd ask you to do is stay focused to the issue that's
8 currently before the commission, which is the application on
9 this occasion that Mr. Ruiz has described for the commission.

10 LDC [MS. BORMANN]: I will skip ahead.

11 So what I'm going to suggest to you, Judge, is if
12 you're considering requiring the kind of detail that it
13 appears JTF wanted in this case, then I'm going to compare
14 this situation to others where I've had expert consultants
15 going into a variety of pretrial confinement facilities.

16 Judges, when ordering consultants ----

17 TC [MR. SWANN]: Your Honor, I object. It's not relevant
18 to the issue the commission has before it.

19 MJ [Col PARRELLA]: I understand. I'm going to allow it.

20 Please continue, Ms. Bormann.

21 LDC [MS. BORMANN]: Thank you.

22 ---- they issue an order protecting the name and the
23 details regarding that information so it doesn't go to the

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1 prosecutor. So if you're considering, you know, going along
2 with what JTF seems to be requiring here, that would pierce
3 our ability to actually get ex parte consulting, that is
4 privileged consulting done, developing theories of defense.
5 In order to rectify that, at least in part, I would suggest to
6 you that you issue an order to JTF barring them from providing
7 that information to the prosecution or anyone except for
8 defense counsel without order of the court.

9 Do you have any questions based on that?

10 MJ [Col PARRELLA]: I do not. Thank you.

11 LDC [MS. BORMANN]: Thank you.

12 MJ [Col PARRELLA]: Mr. Harrington.

13 LDC [MR. HARRINGTON]: Mr. Ruiz didn't emphasize this but
14 I think it's important, is that the dynamics of visits and the
15 dynamics of relationships, so that there are occasions when it
16 is important for an expert to be able to meet alone with
17 somebody without a third party there because that expert may
18 well need either the relationship or to be alone with that
19 person in order to get the information that is -- that is
20 needed.

21 And I think that there's a simple remedy that would
22 be without defense counsel having to give detailed information
23 to JTF about what's behind it and what the expert is and all

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1 that stuff is for defense counsel to certify to JTF that it is
2 necessary in their legal opinion and in their expert's opinion
3 that this -- that this meeting take place with the expert
4 alone. And if there's some controversy or something about
5 that, it could be addressed at a later point. But that way,
6 everything is protected and the burden is on us in good faith
7 to -- not to abuse this and to do this and I think it can
8 accomplish what needs to be done here. Thank you.

9 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

10 As much as I hate to break stride mid-argument, given
11 the nature of our limited flight or time window to make a
12 decision on this flight, court is going to go ahead and take a
13 15-minute recess. And then as soon as we get back, we will
14 make that sort of final decision once I've given you an
15 opportunity to be heard.

16 Commission is in recess.

17 [The R.M.C. 803 session recessed at 1022, 11 September 2018.]

18 [The R.M.C. 803 session was called to order at 1037,
19 11 September 2018.]

20 MJ [Col PARRELLA]: The commission is called back to
21 order. All parties present when the commission recessed are
22 again present.

23 Mr. Connell, I think we left off with you. Would you

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1 like to be heard on Mr. Ruiz's motion?

2 LDC [MR. CONNELL]: Thank you for the opportunity, sir. I
3 have nothing to be -- to say.

4 MJ [Col PARRELLA]: Trial Counsel?

5 I'm sorry. Before -- before we start, Mr. Swann, if
6 we could take up the important issue of the return flight.

7 Have the parties had an opportunity to discuss it?
8 General Martins?

9 CP [BG MARTINS]: Yes, Your Honor. Would you like
10 the ----

11 MJ [Col PARRELLA]: Please.

12 CP [BG MARTINS]: ---- government's position? Yes, Your
13 Honor, the government defers to the military judge, number
14 one, first and foremost, on how you seek to handle the
15 proceedings and take this in and decide what to do.

16 Second, to the extent the commission intends to move
17 toward option one, which I understand to be, as you laid it
18 out, departure tomorrow ----

19 MJ [Col PARRELLA]: That is correct. And my understanding
20 is, is we don't at this point know when that departure would
21 be. It could be -- and obviously I'm the newest guy here --
22 but the morning or it could be in the evening.

23 CP [BG MARTINS]: I understand. And if -- and I think our

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1 response then would go to, regardless when it is tomorrow --
2 let's assume it's sort of the same timeline we would use on a
3 Saturday morning, a morning movement and then departure around
4 noonish or a little thereafter -- that we would -- we
5 recommend as much public proceedings as possible.

6 MJ [Col PARRELLA]: I understand.

7 CP [BG MARTINS]: And to the extent -- if we were to get
8 done in time, to then do what's necessary the night before a
9 movement, then do whatever we can get done in a 505(h).

10 MJ [Col PARRELLA]: I understand. Thank you. Mr. Nevin?

11 LDC [MR. NEVIN]: Your Honor, we recommend that the
12 military commission go with option one, departure on
13 Wednesday. And just on behalf of our team, we have meetings
14 scheduled at the beginning of the week that have been planned
15 for a long time that a number of people are traveling
16 considerable distances to get to. I'm also advised that one
17 of our observers has a childcare problem that would arise if
18 that person were not back in -- on the mainland by Sunday.

19 Just a word about this afternoon and the schedule for
20 the rest of the time and, of course, support using the time we
21 have. However, we have a problem with this afternoon, which
22 is, that when we left this with our client, with Mr. Mohammad,
23 and I think with the others as well, the understanding was

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1 that this afternoon would be a closed session. They would not
2 be permitted to attend a closed session. And the waiver that
3 was obtained this morning would have been for -- only for this
4 morning's session, because there was not the understanding
5 that the afternoon session would be available.

6 It will involve a fair amount of, let's say, jumping
7 through hoops to complete the record for waivers for this
8 afternoon, and I'd recommend to the military judge that we use
9 the time this afternoon on -- on a closed hearing to complete
10 those 505 matters as opposed to trying to do it open.

11 I understand the advantage of public hearings, but I
12 just think we are in a spot here that really is being forced
13 on us by things like hurricanes and the fact that we are
14 litigating this case at Guantanamo that really become beyond
15 our control. And so thank you.

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

17 Ms. Bormann?

18 LDC [MS. BORMANN]: Judge, one of our staff is -- has a
19 newborn at home in the path of the Category 5 hurricane, so
20 with that in mind, we recommend option one, along with a lot
21 of other reasons, and we also concur with Mr. Nevin on the
22 logistics.

23 So when clients are meeting -- and our client isn't

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1 this afternoon, but when clients have meetings during the day,
2 they're either at Echo II or they're at the camp; but either
3 way, getting them to a place where they could determine
4 whether or not they want to be here in a couple of hours is
5 probably not the best use of time. So we would recommend also
6 leaving it a closed session for this afternoon. Although we
7 do understand why the government made the pitch that it did, I
8 just think, given the logistics here, it's really hard.

9 MJ [Col PARRELLA]: I understand.

10 Mr. Harrington, would you care to be heard?

11 LDC [MR. HARRINGTON]: Ms. Wichner will speak, Judge.

12 DC [MS. WICHNER]: Your Honor, good morning.

13 MJ [Col PARRELLA]: Good morning.

14 DC [MS. WICHNER]: I'm Alaina Wichner for Mr. Binalshibh,
15 also known on the record as Major Alaina Wichner a few years
16 past in my capacity as a mobilized Army JAG officer.

17 We also vote for -- for Wednesday as well. A couple
18 of reasons in addition to what's been mentioned. We have
19 members, of course, living on the East Coast. They are
20 concerned about personal property and family and other
21 matters. We'd like to get them home to take care of those.

22 Secondly, I would -- I know this is your first time
23 coming to island. Important to also note in closing out

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1 matters when we leave island, I just request that -- I know
2 the prosecution has asked to kind of go until we can quickly
3 go get on the plane then, but I would like you to consider
4 there's a number of close-out procedures that are necessary, I
5 think, for all parties involved. For example, shredding all
6 materials. We only have one shredder for the whole defense.
7 Securing all -- I'm hearing grumbling. Is there more? Okay,
8 I thought there might be a secret one I didn't know about.
9 There's one for all the teams then.

10 Securing all of our materials. Particularly in
11 hurricane season, we are forewarned to make sure there is
12 nothing out. Everything needs to be properly secured so that
13 that is -- so that we are given the proper time to secure all
14 those materials prior to leaving island.

15 And also we request, if we do 505 this afternoon,
16 that we are given time somehow to get out to the camps to meet
17 with our clients, if possible, because this is having to be
18 quickly amended, to kind of advise them of the matters before
19 leaving island. Thank you, sir.

20 MJ [Col PARRELLA]: You're welcome. Thank you.

21 Mr. Connell?

22 LDC [MR. CONNELL]: Your Honor, I have to part company to
23 some extent with my colleagues. I do defer to the military

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1 commission on the logistics question and bow before
2 operational necessity as I so frequently must do.

3 I furthermore acknowledge the right of the defendants
4 to attend a public session in the afternoon, if there is one.
5 I'm in the perhaps unusual situation of being able to
6 represent to the military commission that Mr. al Baluchi
7 indicated his intent to me not to attend today's session
8 whether -- no matter what its configuration was, before it got
9 flipped or after it got flipped.

10 Furthermore, I do acknowledge the concerns of both
11 the government and the defense that pack-out is no light
12 matter, and especially when there's hurricane prep involved.
13 I know that this particular hurricane is not headed toward
14 Cuba, but there are four others in the Atlantic, and we are
15 frequently required to secure classified in case of damage to
16 the facility in a way that we -- that is even more secure than
17 the way that we would ordinarily do so.

18 That said, my argument to the military commission is
19 that the military commission should take up 555P, R and CC in
20 the time that remains to us. There are two reasons for this.
21 These are -- the first is that, unlike the other items which
22 remain on the agenda, the -- this is a sequenced motion. This
23 is a motion to compel witnesses which ideally would be acted

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1 upon by the military commission in advance of the two-week
2 November hearing because that would be a perfect time to have
3 witnesses here. Whereas, if this is slid to the next hearing,
4 then that slides the whole discussion of the 555 matter into
5 2019.

6 The second reason is that, you know, we put
7 extensively on the record that we've tendered Lieutenant
8 Newman as a witness. We first brought Lieutenant Newman to
9 the island to testify expecting him to testify in the
10 July 2018 hearing. We tendered him on the record at
11 transcript 19921. We produced discovery related to him on
12 8 September. The government interviewed him on 9 September.

13 But he is an activated Reservist, and he is currently
14 on orders which expire in mid-October of 2018, so we may
15 suffer prejudice -- there's the possibility of extension, but
16 we may suffer prejudice if we can't go ahead and call him as a
17 witness because he may no longer be within the immediate reach
18 of the military commission once he returns to civilian life.

19 So our suggestion is that, once the argument on 591F
20 is complete, that we move to the three -- they're sort of
21 combined, in my view -- we'll argue the three of them
22 together -- but the witness issues related to 555, we would
23 have an opening statement and then we would call Lieutenant

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1 Newman, and then there would obviously be some closing
2 argument.

3 So thank you, sir.

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

5 LDC [MS. BORMANN]: Judge, just as a matter of record, we
6 have no objection to Mr. Connell's suggestion.

7 MJ [Co1 PARRELLA]: Mr. Ruiz?

8 LDC [MR. RUIZ]: We have no preference, Judge.

9 MJ [Co1 PARRELLA]: Okay. Understanding the positions of
10 the parties, the commission is going to go ahead and go with
11 option one. Now, the caveat with this is, as I understand it,
12 no guarantees, but they're going to make now efforts to try to
13 secure an airplane for tomorrow. As soon as the commission is
14 aware of the time of that, of course that information will be
15 disseminated.

16 Should -- on the chance it be an evening flight
17 Wednesday, then we will revisit whether there is an
18 opportunity, understanding all the concerns you have about the
19 pack-out, to perhaps take up some issues in the morning.

20 As to the second portion, the commission is going to
21 go with the option proposed by the government and Mr. Connell.
22 We're just going to go ahead and maintain the unclassified
23 portion. I understand some of the concerns about the accused.

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1 I'm confident that given the time -- and this is really the
2 burden on the government -- we'll have an opportunity, should
3 the accused decide to attend the afternoon session, they will
4 have the opportunity to do so.

5 Any questions?

6 Okay. Mr. Swann?

7 LDC [MR. CONNELL]: Sir, I do have one question. Is it
8 your inclination to move to 555 after this? I ask because we
9 can go ahead and stage the witness.

10 MJ [Col PARRELLA]: It is, Mr. Connell. I would -- I
11 would just probably -- let's -- why don't we go ahead and plan
12 to have them stage for immediately after the lunch recess. So
13 about 12:30. If we have time between this motion and lunch,
14 we can take up some of the discovery motions, as I think those
15 will be much quicker than the 555 one.

16 LDC [MR. CONNELL]: Understood, sir.

17 MJ [Col PARRELLA]: Mr. Swann?

18 MTC [MR. TRIVETT]: Sir, just for the record, we oppose
19 the testimony of the witness, so we would have to address that
20 issue before he's tendered.

21 MJ [Col PARRELLA]: Understood.

22 TC [MR. SWANN]: Good morning, Your Honor.

23 MJ [Col PARRELLA]: Good morning.

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1 TC [MR. SWANN]: There are a couple of things that are
2 different about this motion. Something that's different that
3 Mr. Ruiz mentioned is this dialogue between his team and the
4 lit support section and some ex parte argument.

5 The first is he submitted that matter to you
6 ex parte, so what happened between his team and what happened
7 with the lit support section the government is not aware of.
8 Didn't reach out to ask the lit support section as to what
9 they did or what happened here. When I saw that it was
10 ex parte, that was the end of the discussion. Of course, he's
11 provided you with ex parte arguments certainly that I will not
12 be able to address.

13 Now, a couple of other things -- and I certainly am
14 not going to testify. In October, Mr. Ruiz mentioned that we
15 had some testimony about the inability of the detainees to
16 have meetings before the commission. If the court will look
17 at that, the unauthenticated transcript in October, you will
18 see that that had nothing to do with their ability to meet
19 with their client; it had everything to do with their ability
20 to meet at the same time commission is ongoing and their
21 ability to meet, if they choose not to come here, over at
22 Echo II.

23 And the JTF commander testified that he had some

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1 operational constraints that week, testified that he would do
2 his best. And ultimately his best was successful because
3 every meeting counsel asked for when their client was not in
4 this room that took place at Echo II was either accommodated
5 or the accused simply refused to go over to Echo II for that
6 planned meeting.

7 That set aside, this argument about Turner v. Safley,
8 I've heard a lot about how it only applies to pretrial
9 detainees. I point this court's attention to 254JJJJJ, the
10 order of the court that dealt with the female guard issue.
11 This commission found otherwise. And I would point out that
12 Footnote Number 10 in AE 566E addresses the Turner v. Safley
13 issue and also points out in that same footnote the case of
14 Hatim v. Obama and a case dealing with pretrial detainees, men
15 here at Guantanamo Bay, Cuba; that holding is that Turner
16 deference standard is applicable to military detainees.

17 That said, this motion to abate was filed on 24
18 August 2018. The United States responded on 31 August
19 following this commission's order on 29 August, setting out an
20 expedited briefing schedule. There is no reply. This motion
21 should be denied.

22 Now, counsel are quick to point out that they are not
23 seeking reconsideration of AE 566 dated 30 July 2018, a mere

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1 six weeks ago; but that's precisely what they are doing in
2 this instance. They claim that this was an arbitrary denial
3 and it was not.

4 In AE 566, this commission determined that a standard
5 operating procedure in place since at least
6 mid-September 2015, something that is not the ever-changing
7 rule that Mr. Nevin spoke about, that requires an attorney or
8 paralegal to be present for defense meetings unless there is
9 an approved special request, was reasonably related to a
10 legitimate penological interest of managing detention
11 facilities with existing staffing and resources. The
12 commission saw no reason to second guess the JTF commander or
13 his operation from operating that facility. Oral argument on
14 566 was held on 1 May 2018, and it's at pages 19474 to 19530
15 of the unauthenticated transcript.

16 Now, in the six weeks since the ruling of the
17 commission, in Mr. Hawsawi's case alone, four of six requests
18 for an exception to policy were approved. Hardly arbitrary.
19 And to argue that JTF acted arbitrary in this instance, when
20 it approved four of six, seems like a far fetch. The
21 commission should continue to abide by this commission's
22 ruling in 566.

23 So let's renew the bidding. There are at least six

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1 lawyers assigned to the Hawsawi team, five that are in the
2 room, one that was excused from these proceedings. They have
3 no fewer than three paralegals. They have an investigator, a
4 man who on four occasions during August, who is not a
5 paralegal, who is not a lawyer, asked to be able to consult
6 with Mr. Hawsawi without the lawyer or paralegal present, and
7 the JTF staff granted that request.

8 How difficult -- just how difficult is it for one of
9 ten individuals to be present on island to accompany the other
10 nonlegal member and simply meet the basic requirement of the
11 SOP?

12 Now, something we did not know but heard this morning
13 from Mr. Ruiz, the individual they sought to have meet with
14 Mr. Hawsawi last Wednesday and Thursday apparently must have
15 showed up on island sometime Friday or Saturday and has since
16 met with the client. And how did he meet with the client?
17 There wasn't -- there was no need for an exception to policy,
18 because there was a lawyer with him to be able to go in and
19 meet with the client. Again, how difficult is it for one of
20 ten individuals to simply show up a couple of days early and
21 get in there and sit down with the client? JTF did not deny
22 that request, they simply complied with their SOP.

23 Now, to avoid the holding in 566, Counsel now seek to

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1 blame the legal staff claiming that the information they were
2 seeking in order to justify a special request, an exception to
3 policy, was seeking out or was trying to invade the
4 attorney-client privilege. Again, having not seen the
5 document, I suspect that that's not correct. There are plenty
6 of ways for lawyers to be able to provide information without
7 having to relay attorney-client information. They could have
8 done that, but, no, they just simply stood up on their high
9 haunches there and said, listen, we're not going to give you
10 anything further than what we've already provided you.

11 We'd submit that their request here was insufficient,
12 but it wasn't insufficient enough for the defense to set up
13 this straw man that really has nothing to do with this
14 particular incident. So if you're not going to attack 566, a
15 commission ruling on which the ink is barely dry, then come at
16 it in a different angle. And the angle here is that they were
17 denied a right. Your Honor, we would tell you that that is
18 not correct.

19 The holding in 566 is a proper ruling, and this
20 commission should deny the request for an abatement in this
21 instance, and we should move out.

22 Now, if there's anything that I have missed, then I
23 refer you back to the excellent brief that Major Mills

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1 prepared in this instance and subject to your questions.

2 MJ [Col PARRELLA]: I do have a few questions for you,
3 Mr. Swann.

4 Assuming the commission agrees that 566 establishes
5 that the SOP as written where there's a legitimate penological
6 interest, it seems to me that part of the issue that's before
7 the commission isn't -- isn't necessarily the requirement to
8 provide a justification, which is what SOP 5 -- or
9 SOP 11-5.c. states -- specifically it states "prior submission
10 of a special request, including the justification for the
11 request."

12 It seems to me that the issue here is that the JTF
13 asked for something that went beyond a mere justification in
14 asking for the -- a detailed -- detailed explanation for the
15 purpose of the meeting.

16 TC [MR. SWANN]: Well, again -- so you have that document
17 in front of you. That's the ex parte submission,
18 Attachment B. I don't know what the JTF asked for.

19 MJ [Col PARRELLA]: Okay. So -- because I think it was in
20 Mr. Ruiz's non-ex parte portion of his pleading, so let's go
21 with the assumption that that's what it said. You would agree
22 that that goes beyond what's in the policy?

23 TC [MR. SWANN]: No, Your Honor. I wouldn't necessarily

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1 agree to that, no. It might be that they were simply asking
2 for what else can you tell us? Is he there?

3 Now, we -- there was some discussion about a forensic
4 versus a clinical evaluation of sort. Having followed that
5 discussion in the room, it appears to me that they were
6 concerned that this expert -- who, quite frankly, he mentioned
7 his name, so I know who he is -- was there to do something
8 other than a forensic evaluation; that he was -- that he
9 possibly could have been there to do a clinical evaluation.

10 They have doctors over at the camp, and it does no
11 good for doctors at the camp, who see this man every day, who
12 evaluate him every day, to have to get these constant
13 conflicting diagnoses ----

14 LDC [MR. RUIZ]: Objection, Your Honor. There's no facts
15 in evidence that this is an issue. There's been no testimony
16 to this event. Mr. Swann is speculating and testifying now.

17 MJ [Col PARRELLA]: Just please state your objection.
18 Your objection is overruled. This is argument. I'll listen
19 to it.

20 Go ahead, Mr. Swann.

21 TC [MR. SWANN]: ---- to get these -- to get a -- to get
22 the potential of a conflicting clinical evaluation, and then
23 the doctors have to go about addressing those things.

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1 MJ [Col PARRELLA]: So, Mr. Swann, what is your
2 understanding about who approves or disapproves the requests
3 that are submitted pursuant to this part of the policy?

4 TC [MR. SWANN]: These requests, pursuant to the SOP, they
5 go to the lit support section. The lit support section is
6 manned by experienced JAGs. You saw testimony from one of
7 them this morning. They then take a look at what the request
8 amounts to.

9 If they can't accommodate the request -- and,
10 remember, they accommodated four of six during August in
11 Hawsawi's case alone -- it meant then that they had the
12 resources, they had the staffing, they had the ability to
13 muster up whatever number of people it takes to go over to
14 Camp VII, to pick him up and take him to where he needed to
15 go.

16 Now, they don't have the final say. The final say as
17 to -- as to all of these requests rests with the JDG
18 commander, an experienced O-6, normally an MP.

19 MJ [Col PARRELLA]: Is anyone from the office of the
20 prosecution informed about the status of those requests,
21 whether they're approved, denied?

22 TC [MR. SWANN]: The only time -- well, the approval and
23 denials come about -- and there's been plenty of testimony in

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1 this case. That only comes up when the accused makes an
2 allegation that we're not getting an opportunity to be able to
3 see our client.

4 That said, there is occasion, and it didn't happen in
5 this instance that I'm aware of -- it could have -- that where
6 a request goes to the camp and the camp has disapproved it,
7 occasionally the counsel will reach out to us and ask us a
8 question, can you figure out what's going on here? Can you
9 assist us with that? And over time, I bet our success has
10 probably been better than 50 percent because we've been able
11 to at least say, hey, you know, we've got hearings next week.
12 What about this weekend or something? And they make an
13 accommodation in those instances.

14 MJ [Col PARRELLA]: Why, if -- given that you've already
15 articulated the past approval of the special requests specific
16 to Mr. Hawsawi, if you know, why was the request denied on
17 this occasion?

18 TC [MR. SWANN]: Well, it was denied, first of all, that
19 neither a paralegal or a lawyer were present.

20 MJ [Col PARRELLA]: No, I understand that.

21 TC [MR. SWANN]: So then it becomes a special request.

22 MJ [Col PARRELLA]: Correct.

23 TC [MR. SWANN]: Why it was denied in this instance,

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1 again, all I know is what happened in this room and having
2 heard it. It appears that they had some misgivings about ----

3 LDC [MR. RUIZ]: Objection, facts not in evidence.

4 MJ [Co] PARRELLA]: The objection is overruled.

5 TC [MR. SWANN]: They appeared to have misgivings about
6 what the purpose of the meeting was, was he there forensically
7 or clinically, and they never got an answer.

8 MJ [Co] PARRELLA]: Thank you, Mr. Swann. I have no
9 further questions.

10 TC [MR. SWANN]: Thank you, sir.

11 MJ [Co] PARRELLA]: Mr. Ruiz, would you care to be heard?

12 LDC [MR. RUIZ]: Yes, thank you.

13 MJ [Co] PARRELLA]: And in the interest of time, I'm just
14 going to ask all counsel -- and I'm not suggesting that you
15 would do otherwise, Mr. Ruiz; but when I say in the interest
16 of time, just please let's focus on comments related to
17 Mr. Swann's comments. I don't need to rehear the arguments.
18 I believe I have the defense's position on this.

19 LDC [MR. RUIZ]: Absolutely. So I'll start where he left
20 off, which was he said, "They never got an answer." I take
21 that to mean that Mr. Swann's position is that LSS never got
22 an answer from me once they inquired.

23 I think, as you pointed out to Mr. Swann, our

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1 Exhibit B, which is not ex parte or under seal, includes the
2 e-mail communications between the LSS. It includes the
3 specific language of their request, which was to provide in
4 detail the purpose and justification for the meeting.

5 MJ [Col PARRELLA]: I'm sorry, Mr. Ruiz. I'm going to
6 stop you because I believe that you did submit Attachment B
7 ex parte. So if you're saying now that it's not, then perhaps
8 it would be appropriate to provide a copy to the trial
9 counsel.

10 LDC [MR. RUIZ]: Let me make sure, Judge, if I did. I
11 believe it was Exhibit D that was submitted ex parte, Judge.
12 Oh. Okay. My apologies, Judge. I don't have this marked as
13 ex parte on mine. Okay.

14 Let me just check for a second.

15 MJ [Col PARRELLA]: You may.

16 [Pause.]

17 MJ [Col PARRELLA]: While Mr. Ruiz is checking, I just
18 want to clarify something I said. Mr. Connell, when you asked
19 about the timing of the witness, I just want to make it clear
20 that I said the lunch break would end at 1330, not 1230. So
21 we'll -- as I said yesterday, the normal lunch recess will be
22 from noon until 1330. Just to clarify that.

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

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1 LDC [MR. RUIZ]: Judge, that is a mistake. Exhibit B was
2 supposed to be submitted as a non-ex parte exhibit. It's not
3 marked as an ex parte exhibit on my copy. I apologize for
4 that.

5 Exhibit D was submitted ex parte. Exhibit B
6 contains -- and, Mr. Swann, if you want to come up and -- I
7 don't have an extra copy now.

8 TC [MR. SWANN]: Go ahead.

9 LDC [MR. RUIZ]: But I will represent to the commission
10 that the exhibit -- we will provide a copy to Mr. Swann --
11 does include, in fact, the question from the LSS, which was to
12 provide a detailed explanation, and a response from us that
13 basically is responsive to their requests and says he's a
14 member of our defense, he's fully cleared, he's there to
15 provide legal services. And that was the end of the exchange.

16 I do think you hit the nail on the head in respect to
17 the issue that is before the commission. It's also important
18 to point out that this issue of the request for detail was not
19 an issue that Judge Pohl addressed because he was not
20 concerned at that point and it was not brought forth before
21 him in terms of the actual nuances of the requests or the
22 procedures involved in carrying out these policy requests.

23 But in referring back to paragraph g. of the SOP

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1 which you've highlighted, the SOP only requests a
2 justification requirement for the request. It doesn't require
3 a detailed justification. And, of course, in our business,
4 words matter. We believe that the special request form that
5 we provided complied, provided sufficient information to put
6 JTF on notice that it was a member of our defense team, and he
7 would be carrying out the business of our defense.

8 And that is, in fact, the issue that is presently
9 before the court, that the fact that they've asked for
10 detailed justification clearly goes beyond what the intent of
11 the order was. And that's what we're asking the commission to
12 address in this specific instance and to fashion a remedy that
13 clearly puts all parties on notice of what is appropriate,
14 what is not appropriate in this instance.

15 Mr. Swann raised the issue of forensic versus
16 clinical interviews. Our team did not raise that issue. Our
17 position is not that there's a forensic or a clinical
18 interview, our position is simply that we have a properly
19 cleared defense expert who has been vetted by the convening
20 authority, or in some instances the military judge if we've
21 had to move to compel those experts.

22 I think as Ms. Bormann pointed out, there is a
23 vetting or a background process that JTF engages in when --

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1 for members of the team, where they check security clearances
2 to make sure that they're appropriately badged so they could
3 access that part of the -- of the detention facilities, and
4 that they are members of our defense team. So those are all
5 checks in place for JTF that already exist.

6 Mr. Nevin raised or used the language "medical
7 manipulations." We part company from that language. I'm not
8 sure what it means, but in Mr. al Hawsawi's case, there are no
9 medical manipulations or manual manipulations of any kind.
10 Our experts are intended to be there to speak with
11 Mr. al Hawsawi on issues that are -- have been approved by the
12 convening authority of importance and assistance to us. But
13 I've never approved or endorsed a manual or a physical or
14 otherwise manipulation that could be characterized as medical,
15 and I represent that to the commission -- I represent that to
16 the court in this instance.

17 In terms of your question about providing additional
18 information to the JTF, it makes sense. The curious thing
19 about Mr. Swann's argument was that he referred to the
20 exception to policy that were granted to Mr. al Hawsawi, and
21 he apparently knew that one of those was granted to an
22 investigator.

23 The question, of course, is, how did you know that

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1 the person who met with Mr. al Hawsawi was an investigator if
2 you did not obtain that information from the JTF? He's
3 indicated that there are no communications. Clearly our team
4 did not provide Mr. Swann any information or the prosecution
5 about the character or the nature or the assignment of the
6 person that met with Mr. al Hawsawi on those policy two
7 exceptions that he's referenced to.

8 So clearly there is a line of communication, as I
9 referenced earlier in my argument, between the prosecution,
10 the JTF. And clearly communication as to the nature and
11 character of our defense personnel has been communicated to
12 Mr. Swann by somebody in the JTF, which is the cause for our
13 concern and why I include -- indicated to Your Honor that we
14 were concerned about providing any such information.

15 The number of visits, Judge, is not dispositive.
16 It's not the type of analysis that the commission should adopt
17 in terms of the adequacy or access to counsel in a capital
18 case. It's not a numbers game. The rules, the statutes
19 require learned counsel for a reason, and it is our -- and it
20 is my judgment, my experience that it is not a quantifiable
21 number of visits that matters. It's the quality and the
22 purpose of each meeting that matters.

23 When I send a member of my defense team down here to

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1 meet with Mr. al Hawsawi prior to the week of hearings, there
2 is a reasoned judgment as to why that expert is coming here to
3 carry out the business of the team and what he is going to
4 accomplish that will help us further our efforts in
5 Mr. al Hawsawi's defense and the business of the commission.
6 Because ultimately, part of the reason we travel a week ahead,
7 sometimes two weeks ahead, is to make sure that there is
8 efficiency in the process, that we identify any potential
9 problems leading into the week of hearings, and that we take
10 care of those.

11 And Mr. Swann spends a great deal of time on the
12 numbers -- on the numbers issue. But I think him, more than
13 anyone, ought to know how often I travel down here and how
14 often I travel ahead of time, because he often sees me, as he
15 tends to travel the week before hearings. I would dare to say
16 if we did a numbers review, I've been down here 98 percent of
17 the time prior to the hearings; my lawyers have been as well.

18 But that's where the logistical obstacles and the
19 reality of Guantanamo comes into play. I have people that
20 have professional requirements, they also have lives they have
21 to attend to, people that depend on them, and there are times
22 where they all have conflicts.

23 But the important part is that in this case, in this

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1 instance, we had still managed to find an alternative, a
2 member of our team who would be able to carry on the business
3 of the case. We don't throw up our hands and say, well,
4 nobody can visit Mr. al Hawsawi.

5 And then we ran into somebody over at the JTF who
6 wanted a more detailed explanation of the purpose and reason,
7 which is the first instance that I've seen this happen. And
8 I'm asking the commission to fashion a remedy that prevents
9 that from happening from here on out, because that is a
10 dangerous path to follow. It's a slippery slope we don't want
11 to go down. And certainly I don't think it's necessary to
12 balance whatever legitimate penological objectives the JTF
13 has.

14 The whole discussion about Turner v. Safley was meant
15 to be a response to the prosecution's pleading, which was
16 heavy on Turner v. Safley, and it wasn't -- and I think your
17 reading of it will reveal -- it wasn't to say that it does not
18 apply. That's never the argument. It was simply to highlight
19 that the applicability of Turner v. Safley is different and
20 the analysis is different in the case where you have an
21 ongoing capital trial with ongoing representation, where you
22 have concerted efforts at litigation, and where the question
23 of life or death is still at issue.

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1 The question of the balance between deference and the
2 commission's reach into policies and the exercise of policies
3 that impact our ability to meet with Mr. al Hawsawi is fair
4 play and is full well within your authority and your right to
5 exercise in this circumstance, and I'm asking you to do so.
6 Thank you.

7 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

8 Any other counsel care to be heard? Mr. Nevin?

9 LDC [MR. NEVIN]: Thank you. And, Your Honor, I submit
10 that the government and counsel to some extent are operating
11 on the assumption that you can make a distinction between
12 clinical, quote/unquote, assessments and forensic assessments.
13 There will be many situations in which a clinical assessment
14 is necessary for an expert to form an opinion about a
15 particular situation related to the client.

16 You take -- and let's go back to the manipulation
17 question. Mr. Mohammad, for example, is known to have been
18 hung by his wrists for an extended period of time as part of
19 the torture program. I can well imagine ----

20 TC [MR. SWANN]: I'm going to object again. He's
21 testifying now.

22 MJ [Col PARRELLA]: Mr. Nevin, I would just remind you
23 that the issue before the court is very particular, so I'm not

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1 looking to revisit what's in the SOP at this point in time.
2 I'm looking to -- essentially I think the issue is whether the
3 SOP was followed. So let's not get back into whether the SOP
4 needs to be changed at this point, let's focus on the issue
5 that Mr. Ruiz has raised.

6 LDC [MR. NEVIN]: Well, and to the extent -- I mean,
7 Mr. Ruiz's issue is unique to their situation. I'm here at
8 all because -- speaking at all, because I think how the
9 military commission deals with this issue is important going
10 forward.

11 And I would simply say that it's a matter of
12 discretion that learned counsel are empowered to make, are
13 required to make, that sometimes an expert will need to meet
14 alone with the client. And there will be many forensic and
15 legal decisions that will have gone into that, to making that
16 decision.

17 But there are disclosures that a client may make,
18 there are medical situations that may arise that require that
19 to be -- a meeting that takes place between the expert
20 and -- and the client. And that -- and that can -- just as if
21 an assessment is being made as to a client's particular
22 condition, an expert may well say, show me what you're
23 referring to. Where did you receive an injury? Well, right

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1 here. And does that -- so what I'm saying is that all of --
2 the distinction between clinical and forensic evaluations is
3 ephemeral. Many times these things will overlap.

4 And I did hear Mr. Swann say that the government's
5 desire in this is to eliminate conflicting diagnoses by
6 controlling the access of defense experts. And conflicting
7 diagnoses are exactly what we're about.

8 We're talking mitigation here in a capital case, and
9 we absolutely have a conflicting -- the medical staff at the
10 camp will not take a torture history from these men. They
11 refuse to hear it. So this is all about a conflicting --
12 there is one huge conflict in the diagnoses that these two
13 sides are presenting, and it is our Sixth Amendment obligation
14 to develop a correct and, you may be sure, a conflicting
15 diagnosis.

16 So I think counsel, in that remark, speaks volumes
17 about what the government's intention is. At the bottom -- at
18 the end of the day, so to speak, it is to -- it is to prevent
19 this development of defense. And I ask the military
20 commission to consider that in ruling on this motion.

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

22 Ms. Bormann, anything further?

23 LDC [MS. BORMANN]: I have nothing, Judge.

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1 MJ [Col PARRELLA]: Mr. Harrington?

2 LDC [MR. HARRINGTON]: No, sir.

3 MJ [Col PARRELLA]: Mr. Connell?

4 LDC [MR. CONNELL]: No, thank you, sir.

5 LDC [MR. RUIZ]: Judge, I know this is unusual, but
6 when -- I sat down too quickly. And when I came back, I was
7 reminded of something I needed to correct the record on which
8 is factually incorrect.

9 MJ [Col PARRELLA]: Okay. You may do so briefly.

10 LDC [MR. RUIZ]: I'll just do it from here, Judge. And it
11 was in regards to the expert that was in question having met
12 with Mr. al Hawsawi. That representation was made by
13 Mr. Swann. That, in fact, has never happened.

14 That expert never flew into the island on Wednesday.
15 He never made it, because that was the only time frame that he
16 had available. So Mr. Hawsawi has not met that expert that
17 would have been available the -- on the prior dates.

18 MJ [Col PARRELLA]: I understand. Thank you.

19 TC [MR. SWANN]: Maybe I misunderstood, because I thought
20 that was the question you asked him prior to my argument,
21 whether they had occasion to meet. That was what I understood
22 he said, yes.

23 MJ [Col PARRELLA]: It's the commission's understanding

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1 from the question that was posed that at some point, maybe not
2 Wednesday-Thursday, but at some point, this individual has met
3 with Mr. Hawsawi.

4 TC [MR. SWANN]: That's how I understood it, sir. To the
5 extent that I operated on bad information, I apologize.

6 LDC [MR. RUIZ]: I'm sorry, Judge. The question was were
7 we able to conduct the preparation for the -- for the hearing.
8 My answer was yes, meant to be that the preparation that
9 otherwise would have been facilitated by this member of our
10 defense team, we were able to carry it out once we got on the
11 island and throughout the week. But I -- I did not mean to
12 imply that it was the same person.

13 But that just highlights the fact that this expert
14 was carrying instructions from me, communications from me,
15 that now on the island, I was able to -- to engage in through
16 other members of my team and otherwise. So that's -- that's,
17 I think, where the confusion is. My apologies.

18 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. I do understand.
19 Okay.

20 With respect to this issue, I think in light of the
21 fact that counsel has represented that members of the defense
22 team have had the opportunity to meet with Mr. Hawsawi, that
23 abatement is not an appropriate remedy at this time. So as

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1 such the immediate need for a decision, I think, is largely
2 moot, and the court will take this issue under advisement.

3 So by my calculation, we have approximately
4 30 minutes here before we're going to take a recess for lunch.
5 What I'd like to do is take up some of the discovery motions.
6 And before we go to a particular one, what I'd like to do is
7 just ask the counsel who has filed the pleading, it appears to
8 the commission that maybe some of these are moot and may not
9 require argument, or perhaps I'm reading too much into it.

10 So I'm going to start with AE 588. Ms. Bormann, if I
11 understand your pleading correctly, at the time that you filed
12 it, your team was waiting for an exception from the Military
13 Defense Organization; is that correct?

14 LDC [MS. BORMANN]: That's right, Judge.

15 MJ [Col PARRELLA]: And ----

16 LDC [MS. BORMANN]: I have an update on that.

17 MJ [Col PARRELLA]: Okay.

18 LDC [MS. BORMANN]: The -- in fact, there's a -- we sought
19 leave to file a supplemental pleading on that very issue to
20 inform you because it's been an ongoing issue, and
21 unfortunately, that has not yet arrived on your desk. There
22 are some classification issues with it. Nevertheless, the --
23 I can inform you orally.

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1 So trying to get the exception finally occurred, but
2 then the software necessary to -- how can I put this in an
3 unclassified setting? -- to review the material necessary to
4 be reviewed wasn't available to the Military Commissions
5 Defense Organization, so that just happened last week.

6 So last week, we finally received the software, and
7 our intelligence analyst who had to leave because of a death
8 in his family, who is not here today -- he left this
9 morning -- is -- reviewed it very briefly and it requires
10 translation. So we're in the process right now -- we can't do
11 it here because we don't have the USB exception here and we
12 don't have the software necessary here, so everything is back
13 in Rosslyn. The government has represented they've given us
14 everything, but we don't know that to be a fact until we
15 actually have an opportunity to review it. So that's where
16 we're at.

17 MJ [Col PARRELLA]: So it sounds to me that you don't know
18 whether it's moot or not because you haven't had a chance to
19 do it, to review it.

20 LDC [MS. BORMANN]: That's correct. We anticipate having
21 our translator look at it and give us, you know, some idea of
22 what it is, and then we can -- we can supplement the record
23 with whether or not this will be moot or whether or not we

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1 need to argue it further.

2 MJ [Col PARRELLA]: Okay. So given that, do you agree
3 that it's probably not appropriate for oral argument this
4 session of court?

5 LDC [MS. BORMANN]: I would agree.

6 MJ [Col PARRELLA]: Okay. Moving on.

7 Mr. Ruiz, with respect to AE 590, it's my
8 understanding that the government in their response has agreed
9 to give you what you're asking for. As a result, is this
10 moot?

11 ADC [MS. LACHELIER]: Judge, I'm sorry. I'm handling
12 that. We filed a motion to withdraw this morning, which you
13 may not have had an opportunity to see because we just filed
14 it. But we did file a motion to withdraw on that.

15 MJ [Col PARRELLA]: Thank you.

16 So that brings us to AE 589, also filed by
17 Mr. Hawsawi. Defense, do you care to make argument on this
18 motion?

19 ADC [MS. LACHELIER]: In 589, Judge, we moved for a
20 document cited in the Senate Select Committee on
21 Intelligence's executive summary of the CIA's RDI program.
22 Specifically -- so this -- as you probably already know from
23 general knowledge, this report details the treatment of

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1 Mr. al Hawsawi and some -- and the co-accused, as well as
2 other high-value detainees during the CIA's RDI program.
3 There are specifically as to Mr. al Hawsawi 35 references in
4 the Senate torture report -- references to Mr. al Hawsawi.

5 In AE -- and I'll draw your attention to AE 397F,
6 which is -- I think it's F -- the ruling from Judge Pohl which
7 began the process of ordering the government to produce
8 documents related to the RDI program. And he created a
9 ten-category construct, and that's the way we've
10 euphemistically referred to it in this litigation, that it's
11 essentially a baseline for what the government must produce
12 subject to later litigation from us as to whether -- what the
13 government has produced is adequate. And we're sort of
14 entering that universe at this point, I think, in AE 589 and
15 other discovery motions.

16 So what we requested is cited at the -- in the Senate
17 report on page 134 in footnote 796. And we provided that
18 excerpt of the Senate report executive summary to you as
19 Attachment B, I believe. That footnote is a string citation
20 of several different documents with a lot of redactions, so
21 we're sort of swiss-cheesing this together trying to figure
22 out what's there. But one of the salient pieces is that
23 there's an e-mail citing an al Hawsawi incident. That was the

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1 subject of AE 590, and the government has now turned over a
2 summary of that e-mail to us.

3 What's also cited right along with the al Hawsawi
4 incident is a cable, and the subject matter -- and this is
5 hard to describe orally without looking at it, but the subject
6 matter of that entire footnote is essentially about sleep
7 deprivation and a change in policy that the CIA implemented
8 related to al Hawsawi incident -- if you read the footnote and
9 read the context, related to an incident involving
10 Mr. al Hawsawi, a change in policy such that sleep deprivation
11 would no longer be what the CIA called an enhanced technique
12 or -- yeah, would become, sorry, an enhanced technique when
13 sleep deprivation exceeded 48 hours.

14 Prior to that, apparently, from the Senate report,
15 sleep deprivation in excess of 72 hours would be a torture --
16 an enhanced technique.

17 So where this is important to us in discovery -- I
18 hope it's becoming apparent -- is that Mr. al Hawsawi's
19 mentioned. There's an incident involving Mr. al Hawsawi.
20 There's a change in policy from 72 to 48 hours as to what
21 becomes an enhanced technique, as they euphemistically called
22 it.

23 In AE 397F, Judge Pohl, implicitly if not explicitly,

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1 says RDI program, absolutely relevant to mitigation for the
2 defense. Our ability to understand what happened to
3 Mr. al Hawsawi and why -- or not necessarily why for now, but
4 at least what happened to him, right, is imperative for us to
5 present his mitigation case. And what we have here is a
6 footnote that suggests that something that happened to him
7 resulted in a change in policy at the CIA.

8 What the government gave us, even though what we
9 saw -- see is a cable that talks about change in policy,
10 according to the Senate report -- what they gave us was an
11 instruction that goes to the field informing agents in the
12 field, hey, by the way, after -- if you exceed 48 hours of
13 sleep deprivation, you've got to seek approval from
14 headquarters.

15 Apples and oranges to us as far as they may -- they
16 may have given us this summary that talks about a change of --
17 to 48 hours in the field, but they don't -- actually, it
18 doesn't even talk about a change. It simply says, if you go
19 over 48 hours, you have to seek headquarters approval.
20 There's no discussion of a change in policy, no discussion of
21 what provoked -- that there was a 72-hour limit, but the
22 Senate report clearly talks about that in the footnote that
23 we're discussing. So what the government has produced to us

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1 in the summary is insufficient for purposes of our requests
2 and what we're entitled to get for mitigation purposes.

3 A couple of other references. So this cable -- oh, I
4 wanted to give you the timelines, because this is important.
5 And I apologize if some of this is information you already
6 know, Judge, but I want to make sure you have the right
7 timelines.

8 This cable is, according to the Senate report, again,
9 dated January 2004. Mr. al Hawsawi was in black site custody
10 with the RDI program from March 2003 until September 2006.
11 That information is available in one of our pleadings that,
12 again, Judge Pohl solicited from the teams, which I would also
13 draw your attention to and that's 1560 and 1560 (MAH Sup).
14 Both of those -- both of those are our defense theories. They
15 were filed ex parte.

16 And Judge Pohl requested to see those as he reviewed
17 specifically RDI information, but other discovery to
18 understand in the 505 process what discovery would be
19 particularly relevant to a given team. And in our case, our
20 team in 1560 explains how discovery might be relevant for our
21 case theory. Since we can't be part of the 505 process, this
22 was the solution that Judge Pohl came up with, was to consider
23 these defense theories as he reviewed classified discovery.

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1 So we draw your attention to that and the timeline of
2 Mr. al Hawsawi's time in custody, and then -- and then focus
3 on this cable that's from January 2004 and -- that discusses a
4 change in policy and, quite apparently, in relation to an
5 incident involving Mr. al Hawsawi.

6 MJ [Col PARRELLA]: Let me ask a question. How is this
7 not a request for reconsideration of the court's ruling in
8 308III?

9 ADC [MS. LACHELIER]: It isn't because the court's ruling
10 in 308- -- first of all, of course, we don't have the
11 background of what the court looked at. But the court's
12 ruling in 308III would not have -- because it was the product
13 of an ex parte proceeding with the government, would not have
14 looked at page 134, footnote 796 in the context of the cable,
15 if the court even looked at the cable, if the commission even
16 saw the cable itself.

17 Because I question with the attachment the government
18 provided as the discovery whether that is even the cable.
19 That looks like something that went out to the field as a new
20 instruction. And as a matter of fact, it was given to us
21 under paragraph 13.e., if you look at the Bates number, and
22 that's supposed to be, I believe, training records of CIA
23 personnel. What we're talking about is a cable communication

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1 within the CIA about policies related to sleep deprivation,
2 not about education and training of CIA RDI personnel in the
3 field.

4 So again, not having been privy to the 505 process,
5 what I see is Judge Pohl approving maybe a training record,
6 and it may be perfectly appropriate to approve that training
7 record, but he certainly didn't have the context of footnote
8 796 of page 134 of the Senate report, which has the context
9 which shows that there's an al Hawsawi, incident sleep
10 deprivation change in policy, and it appears to be very much
11 related to Mr. al Hawsawi's time in custody, because the time
12 period is very relevant.

13 So I don't know if that answers your question. It's
14 not reconsideration since we don't have the context and we
15 don't know what Pohl -- Judge Pohl looked at. And I'm not
16 questioning what we got, I'm -- in the sense of that may be an
17 adequate summary of what he looked at, but it's certainly not
18 a summary of what the Senate report refers to.

19 MJ [Col PARRELLA]: Thank you.

20 ADC [MS. LACHELIER]: I have nothing further.

21 MJ [Col PARRELLA]: Any other counsel care to be heard on
22 this issue? Mr. Nevin?

23 LDC [MR. NEVIN]: [Microphone button not pushed; no

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1 audio.]

2 MJ [Col PARRELLA]: Ms. Bormann?

3 LDC [MS. BORMANN]: No, thank you, Judge.

4 LDC [MR. HARRINGTON]: No, Judge.

5 LDC [MR. CONNELL]: No, thank you, Your Honor.

6 MJ [Col PARRELLA]: Trial Counsel?

7 TC [MR. GROHARING]: Good morning, Your Honor. Jeff

8 Groharing on behalf -- I'm sorry, Mr. Nevin, did you -- were
9 you not asked?

10 LDC [MR. NEVIN]: I didn't push to talk when I said, no,
11 thank you before, and I just was getting the microphone.
12 Thank you.

13 TC [MR. GROHARING]: Okay. Jeff Groharing on behalf of
14 the United States. Your Honor, I think where counsel for
15 Mr. Hawsawi are at a bit of a disadvantage is they don't
16 obviously have the cable in question.

17 What happened in this case was, as Ms. Lachelier
18 appropriately noted out, the government provided significant
19 information to the defense falling under AE 397F,
20 paragraph 2.e., standard operating procedures, policies, or
21 guidelines, essentially regarding the treatment and handling
22 of detainees while in the CIA detention interrogation program.

23 One of the documents that we provided was a summary

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1 of a cable that's regarding the change in policy from
2 January 2004 with respect to the sleep deprivation used in the
3 program. What's happened here is when that change was made,
4 the CIA sent cables to -- different cables out to make
5 everyone aware of the change in policy. They were the same
6 cables, so the same subject matter, but it went to --
7 separately to different sites where that's applicable. So in
8 our discovery process, we summarized one of those cables,
9 provided one of the original cables to the military judge, and
10 provided one summary to the defense regarding that change in
11 policy.

12 So all of the -- the actual cable that's at issue in
13 this motion is cumulative with respect to that cable that we
14 did summarize. It has the very same subject matter, it's
15 about the change in the sleep deprivation policy. So there
16 would be no need to provide a second cable to the military
17 judge and provide a second summary to the defense. And so
18 that's why in this case. It's not necessary to provide any
19 additional information to the defense.

20 And that's really all that's -- and it -- I
21 appreciate that it can be confusing to the defense based
22 on -- and this is something we're pulling out of a SSCI
23 footnote, and there are multiple citations within the same

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1 footnote. We've now provided one of the citations, the e-mail
2 to the defense, which I think sheds a little more light on it.

3 The commission doesn't have that e-mail. I do have
4 copies if the commission wants to review the e-mail in the
5 context of this motion. It was at issue in 590, not 589, but
6 I can get it marked and provide a copy now if the military
7 judge wishes so you have that for your review.

8 MJ [Col PARRELLA]: Yeah, let's go ahead and do that,
9 Mr. Groharing, if we could.

10 Okay, Mr. Groharing. I have a copy of what has now
11 been marked as 590D (Gov), and you may proceed.

12 TC [MR. GROHARING]: Okay. Thank you, Your Honor.

13 And I think maybe where the confusion comes into
14 play, that e-mail, the subject is "Al Hawsawi Incident." And
15 the al Hawsawi incident in question was regarding
16 water-dousing, not sleep deprivation. But within that e-mail
17 where it's CIA attorneys talking about changes in the
18 interrogation policy, the draft of the e-mail also references
19 this change at number 4 to the sleep deprivation policy.
20 That's unrelated to the al Hawsawi incident that's the subject
21 of the e-mail, if you follow that, Your Honor.

22 In the SSCI discussion, that piece of the SSCI
23 report, it's talking about the sleep deprivation change. It

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1 references this e-mail, but I believe -- and obviously I
2 didn't write it or anything, but the purpose of it referenced
3 in the e-mail is number 4, regardless of the fact that
4 number 4 didn't necessarily apply to Mr. Hawsawi. So I think
5 that's where the confusion comes in.

6 But the citation clearly that the defense is seeking,
7 though, is to the next sentence in the -- at footnote 796, and
8 that's where it specifically is addressing the sleep
9 deprivation policy. The citation is to the cable that I've
10 already described, which was virtually identical to the other
11 cable we provided the military judge and summarized for the
12 defense.

13 So subject to your questions, Your Honor, that's all
14 I have.

15 MJ [Col PARRELLA]: I have no questions. Thank you.
16 Defense Counsel?

17 ADC [MS. LACHELIER]: Judge, I think the government's
18 connecting dots that aren't in this document that they just
19 gave you, 590D, which was related to 590, as Mr. Groharing
20 mentioned. And that is they're telling you or us that
21 paragraph 4, which says they're considering a change in
22 policy, is unrelated to Mr. al Hawsawi. But the title of the
23 e-mail is the "Al Hawsawi Incident." The lead paragraph

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1 before the numbered paragraphs is, "I read the report relating
2 to Mr. al Hawsawi this weekend" -- or "the materials" -- I'm
3 sorry. "A couple of things I would like to discuss/ask, and
4 then decide." And then 1., 2., 3., and 4.

5 The structure of the e-mail -- and I don't want to
6 belabor the point, but the structure of the e-mail clearly
7 suggests that -- or indicates, frankly, that paragraph 4,
8 which talks about a change in sleep deprivation policy from 72
9 to 48 hours with respect to what becomes an enhanced,
10 quote/unquote, technique, that that change in policy was
11 implemented in relation to the al Hawsawi incident. I just --
12 I don't know how else to parse it.

13 Again, we're working with -- you know, in the dark a
14 little bit, but there's a change in policy discussion about
15 Mr. al Hawsawi somewhere. That's what we asked for. It's
16 absolutely relevant if it relates to Mr. al Hawsawi, which it
17 does. It's discussed here. And that's still what we continue
18 to request to see. And again, if it's classified, we're all
19 cleared and we can see it.

20 Thank you.

21 MJ [Co1 PARRELLA]: Thank you. Anything further on
22 AE 589? Okay.

23 I understand we haven't yet had an opportunity to

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1 discuss two of the other discovery motions, AE 528 and AE 592;
2 however, the commission is at this point in time -- I think
3 we're too close to the lunch hour.

4 So what we're going to do is we'll go ahead and take
5 our recess until 1330, at which time we will start by taking
6 up 555, and then if there's time left over in the afternoon,
7 we will then come back to the discovery issues.

8 The commission is in recess until 1330.

9 [The R.M.C. 803 session recessed at 1147, 11 September 2018.]

10 [The R.M.C. 803 session was called to order at 1334,
11 11 September 2018.]

12 MJ [Col PARRELLA]: This commission is called back to
13 order. All parties present when the court recessed are again
14 present. I will also note that Mr. Binalshibh is present.
15 The other accused are absent.

16 LDC [MR. RUIZ]: Judge, if I may -- back here. Major
17 Joseph Wilkinson is not present. He is attending to other
18 duties. I do expect Lieutenant Colonel Jennifer Williams will
19 be rejoining us at some point during the proceedings.

20 MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

21 CP [BG MARTINS]: Your Honor, as additional waivers were
22 received, we believe it would be prudent to put those on the
23 record.

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1 MJ [Col PARRELLA]: Okay. You may proceed.

2 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
3 was reminded of her oath, and testified as follows:

4 DIRECT EXAMINATION

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

6 Q. Major, sit down, please. I remind you that you are
7 still under oath. Do you understand?

8 A. Yes, sir.

9 Q. All right. Over the lunch hour, you were kind enough
10 to inform the accused that they -- a change in the proceedings
11 had occurred; is that correct?

12 A. Yes, sir.

13 Q. And you went back and talked to all four of the
14 accused that are not in the room presently?

15 A. Yes, sir.

16 Q. Now, I have in front of me and -- I have in front of
17 me what has been marked as 597E through H. Do you see those
18 documents?

19 A. I have.

20 Q. It might be that one or two of them are still being
21 marked.

22 A. I have 597F, 597E, and 597F, 597G, and 597 -- I can't
23 make this out, but I believe it's E.

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1 Q. I think the next one you'll see is 597H.

2 A. Okay. H. I'm sorry.

3 Q. All right. Let me make this simple. Did you go back
4 and obtain waivers from four of the five accused this
5 afternoon, all with the exception of Binalshibh?

6 A. I did.

7 Q. All right. Did you follow the same procedure that
8 you did this morning?

9 A. I did.

10 Q. All right. You told them that they could come to the
11 afternoon session?

12 A. I did.

13 Q. And these four gentlemen decided they had no interest
14 in coming?

15 A. Right.

16 Q. Did you deviate in any way from the form that you use
17 all the time?

18 A. No, no deviation from the form, but there was a
19 deviation from where I was located.

20 Q. All right. So you had to go -- you had to go to
21 Echo II for at least a couple of these men, right?

22 A. Right.

23 Q. They were having legal meetings with their teams?

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1 A. That's right.

2 Q. All right. I think in the Hawsawi case, you used the
3 Hawsawi interpreter to translate the document for him?

4 A. That's correct.

5 Q. All right. Any reason to believe that any of those
6 men did not voluntarily agree to attend this afternoon's
7 proceeding?

8 A. No, I have no reason to believe that.

9 TC [MR. SWANN]: I have nothing further, Judge.

10 MJ [Col PARRELLA]: Defense Counsel? Mr. Nevin?

11 LDC [MR. NEVIN]: Thanks, Your Honor. And, Your Honor,
12 may I have a standing objection to the anonymous testimony so
13 that I don't have to raise that every Monday?

14 MJ [Col PARRELLA]: Yeah, I understand that's a standing
15 objection, and it's noted for the record.

16 LDC [MR. NEVIN]: Thank you.

17 **CROSS-EXAMINATION**

18 **Questions by the Learned Defense Counsel [MR. NEVIN]:**

19 Q. Ma'am, counsel, I think, may have been speaking
20 euphemistically. Did Mr. Mohammad literally say to you that
21 he had no interest in coming?

22 A. He told me he did not want to come twice.

23 Q. Okay. And where did you have that conversation?

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1 A. I had it with him at camp.

2 Q. I'm sorry?

3 A. At camp.

4 Q. At Camp VII?

5 A. Yes.

6 Q. Yeah. Did you or did anyone else from the SJA's
7 office have a conversation with him at Camp Echo?

8 A. Yes. That was me. I had a conversation with him at
9 Camp Echo.

10 Q. And what did he tell you at Camp Echo?

11 A. He told me he wanted to come.

12 Q. He did want to come?

13 A. He did.

14 Q. And about what time was that?

15 A. I'm not exactly sure what time that was, but it
16 was -- it was during the 1100 hour.

17 Q. It was in any event earlier than the time at which
18 you ----

19 A. It was earlier than 1300 ----

20 Q. ---- had the conversation that led to 597E, correct?

21 A. Yes, sir.

22 Q. All right. And when you had the conversation with
23 Mr. Mohammad at camp when he told you he did not want to come,

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1 did he tell you that he had understood that he was going to be
2 transported directly to these proceedings from Camp Echo?

3 A. Yes, he told me he understood that that was going to
4 happen.

5 Q. Yeah. And that for whatever reason, the transport
6 diverted to Camp VII, and at that point he made a decision not
7 to come to court; is that correct?

8 A. I'm not sure if that -- I'm not sure.

9 Q. Apart from ----

10 CP [BG MARTINS]: Your Honor, this procedure for waiver in
11 the course of this litigation has been set up for counsel at
12 their preference. If Mr. Nevin seeks to call into question
13 the voluntariness of the waiver, the alternative has been to
14 bring the accused here.

15 MJ [Col PARRELLA]: So, General Martins, are you objecting
16 on the relevance of the questions?

17 CP [BG MARTINS]: I am objecting to the nature of the
18 questions. If there are questions associated with it, the
19 only way to resolve it is to bring the accused here if he's
20 got those.

21 MJ [Col PARRELLA]: Mr. Nevin, is it your belief that for
22 some reason that this is not -- that your client would like to
23 be here this afternoon?

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1 LDC [MR. NEVIN]: No. I simply want the record to be
2 accurate about the sequence of events, that's all. And I
3 don't know what testimony the witness will give. I mean, it's
4 possible. But the military judge will perhaps understand that
5 this has been happening -- there is a -- there is not good
6 communication between our team and the SJA's office, and the
7 result is that we don't always know what the sequence of
8 events is. And I can't learn that without -- without
9 questioning her.

10 MJ [Col PARRELLA]: Well, if your purpose in inquiring is
11 to just specify the sequence of events, I don't think it's
12 relevant. If at the end of the day his decision was not to
13 come, that's satisfactory for the court to make the ruling it
14 needs to make. But if you have any reason to believe that he
15 didn't knowingly waive his appearance here, then I'm happy to
16 either allow you to continue or we can bring your client here
17 so that he can make that pronouncement in court.

18 LDC [MR. NEVIN]: And, Your Honor, I'm not asking that you
19 bring -- or that the guard force bring my client here. I'm
20 asking that I be permitted to inquire whether there is
21 anything that bears on the voluntariness.

22 MJ [Col PARRELLA]: Okay. I'll allow you to do so.

23 LDC [MR. NEVIN]: Okay. Thank you, sir.

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1 MJ [Col PARRELLA]: Please proceed.

2 **Questions by the Learned Defense Counsel [MR. NEVIN]:**

3 Q. So was it -- was it your understanding that a
4 decision -- that he made a decision not to come after he had
5 left Echo II and sometime around the time he arrived at
6 Camp VII?

7 A. Yes, he did make an alternative decision than what he
8 originally told me.

9 Q. All right. And did you discuss that decision with
10 him?

11 A. No.

12 Q. Okay. You simply spoke to him and asked him, is it
13 your wish not to come? And he said yes?

14 A. Yes. And then I read the form verbatim.

15 Q. Yes, ma'am. Okay.

16 LDC [MR. NEVIN]: That's all I have. Thank you.

17 MJ [Col PARRELLA]: Any other counsel desiring to inquire
18 with this witness?

19 LDC [MR. CONNELL]: Your Honor, objection to anonymous
20 testimony. No questions.

21 MJ [Col PARRELLA]: Trial Counsel, any follow-up redirect?

22 CP [BG MARTINS]: Your Honor, if we might have a moment.

23 MJ [Col PARRELLA]: Okay.

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1 CP [BG MARTINS]: Your Honor, we have nothing further. We
2 just would seek a ruling from the commission as to
3 voluntariness. We would say that the evidence shows that it
4 was.

5 MJ [Col PARRELLA]: Okay. Being that there's nothing
6 further for this witness, Major, you may step down.

7 WIT: Thank you, sir.

8 MJ [Col PARRELLA]: Thank you for your testimony this
9 afternoon.

10 **[The witness was excused.]**

11 MJ [Col PARRELLA]: The commission finds that
12 Mr. Mohammad, Mr. Bin'Attash, Mr. Ali, and Mr. Hawsawi have
13 knowingly and voluntarily waived their right to be present at
14 today's hearing. I did glean from the witness' testimony that
15 it appears Mr. Mohammad changed his mind, but I'm convinced
16 that at the end of the day his decision was to knowingly and
17 voluntarily waive his appearance here today.

18 So that brings us to the important administrative
19 matter. I did receive information that a flight was secured,
20 and I think this information has been disseminated to some of
21 the parties already or may have been. The flight is currently
22 set for 2330 tomorrow, that being Wednesday.

23 So with that knowledge, it's my intent that we, as

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1 previously indicated, will go the remainder of this afternoon
2 in the unclassified setting and take up the 555 series as well
3 as, if time allows, the two remaining discovery motions. And
4 if we don't get to all three of those, given that that flight
5 is so late in the day, I do intend to reconvene in the morning
6 to complete those unclassified motions.

7 So with that, we will now proceed with the 555
8 series. I understand there's an issue as to the witness that
9 Mr. Ali intends to call in support of their motion. Trial
10 Counsel?

11 MTC [MR. TRIVETT]: Good afternoon, Your Honor. Is that
12 what you wanted to address first, is our objection to the
13 witness?

14 MJ [Co1 PARRELLA]: I take it you're here to discuss your
15 motion for reconsideration?

16 MTC [MR. TRIVETT]: Correct.

17 MJ [Co1 PARRELLA]: Okay. We can go ahead and proceed
18 with that if you'd like.

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

20 We have a series of slides we prepared ----

21 LDC [MR. CONNELL]: Objection, Your Honor. Our witness
22 goes to all three. I'm perfectly happy to answer counsel's
23 objection to the witness, but the witness has information

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1 relevant to all three motions which are before the court, P,
2 R, and CC.

3 MJ [Col PARRELLA]: I understand that. It's the
4 government's motion for reconsideration, so I'll allow them to
5 be heard first. So you want to put on evidence first before
6 we get to argument; is that your position, Mr. Connell?

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

8 MJ [Col PARRELLA]: Okay.

9 LDC [MR. CONNELL]: My thought on it was that we would
10 take up -- or my argument to the court is that we take up the
11 government's objection. If they wish to make an opening
12 statement, that makes perfect sense. I have an opening
13 statement. We would take the evidence and then make arguments
14 based on the evidence.

15 MJ [Col PARRELLA]: Any objection to proceeding in that
16 format?

17 MTC [MR. TRIVETT]: We do object, sir.

18 MJ [Col PARRELLA]: Okay.

19 MTC [MR. TRIVETT]: Based on our position is that the
20 record in front of you is sufficient to make a determination
21 either way on whether or not unlawful influence occurred in
22 this case and that ultimately no additional testimony,
23 including the testimony of Mr. Castle and Mr. Rishikof, are

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1 not necessary, so we'd like to be heard on that aspect of it.
2 Certainly we believe within our motion to reconsider, to the
3 extent that you accept our arguments, you would find that the
4 further testimony of Mr. Newman is not necessary.

5 MJ [Col PARRELLA]: Okay. I'm going to go ahead and allow
6 the government to make their -- called, for lack of a better
7 term, introductory remarks. Mr. Connell, I'll allow you to do
8 the same. I'll make a decision as to whether we're going to
9 take the testimony of the witness you have standing by, and
10 then we will proceed with another round of opportunity to
11 present oral argument in support of your motions.

12 So, Mr. Trivett, you may proceed.

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

14 So we have prepared a slide presentation, copies of
15 which have been provided to the defense and the court security
16 officer. The court security officer cleared on those last
17 pages today. We appreciate the court security officer's time.
18 We realize that we were a little late in our disclosures to
19 them and we appreciate the work that they did.

20 It has been marked as Appellate Exhibit 555RR. I
21 would ask to present that to the parties, to the military
22 judge, and to the gallery.

23 [The military judge conferred with courtroom personnel.]

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1 MJ [Col PARRELLA]: Trial Counsel, you may proceed.

2 MTC [MR. TRIVETT]: Thank you, sir. I'd ask for the feed
3 from Prosecution Table 3.

4 MJ [Col PARRELLA]: Okay. You may proceed.

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

6 So Judge Pohl granted reconsideration on the question
7 of whether or not testimony was necessary from Mr. Castle and
8 Mr. Rishikof. He had ordered their testimony earlier in
9 AE 5550. He did so with declarations, but with no actual
10 documents yet in the record.

11 As part of his order in AE 5550, he ultimately
12 ordered the production of discovery that was referenced in the
13 declarations by Mr. Castle and Mr. Rishikof and no other
14 information. Ultimately in AE 555P, we attached those
15 documents and sought reconsideration.

16 Now, under R.M.C. 703, testimony is necessary when it
17 would be relevant and necessary. It is not -- it is relevant
18 when it is not cumulative and it would contribute to a party's
19 presentation of the case in some positive way on a matter in
20 issue. In light of the extensive record before the
21 commission, including our exhibits now in AE 555DD (Gov),
22 which constituted an extraordinary waiver of the Secretary of
23 Defense's attorney-client privileged, deliberative process

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1 privileged, and attorney work product privileged documents,
2 any additional testimony is unnecessary and would be
3 cumulative with the declaration and all of the other documents
4 that are in the record.

5 Now, the essence of resolving the defense motion has
6 been difficult only because it's been a moving target.
7 Ultimately Mr. Rishikof was fired on 3 February 2018.
8 Mr. Coyne was designated nearly simultaneous with that. The
9 defense filed a UI motion six days later without any evidence
10 of any wrongdoing, just speculating what it is they believed
11 must have been unlawful influence in their termination.

12 They theorized that it may have been how the
13 convening authority handled Brigadier General Baker's contempt
14 proceedings. They theorized that it may have been a pace of
15 litigation issue or the fact that he ordered surveillance
16 measures to take place in attorney meeting rooms. They
17 theorized that it may have been the referral of the Hambali
18 case, which is a separate case, that was before the convening
19 authority at the time, before finally landing on where we're
20 at now, which is the latest defense theory that it was
21 Mr. Rishikof's considerations of pretrial agreements -- that
22 was the real reason for the firing of Mr. Rishikof -- and that
23 ultimately all of the other reasons that were given by the

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1 Secretary of Defense and the Acting General Counsel of the
2 Department of Defense were just pretextual.

3 So ultimately what the motion comes down to is why
4 was Mr. Rishikof fired and did his firing constitute unlawful
5 influence. And walking through the procedural background as
6 well as the evidence on the record should establish for the
7 military judge that further testimony is unnecessary; that the
8 record is sufficient to rule either way; that the monthly
9 status reports need not be produced. And that the testimony
10 of Mr. Castle and Mr. Rishikof are no longer necessary.

11 So on 27 February, the military judge ordered
12 declarations from the Secretary of Defense and the Acting
13 General Counsel. That was at the first session after the
14 defense filed their motion. That was supplemented on 26 March
15 from Ramzi Binalshibh's team. And on 28 March, Khalid Shaikh
16 Mohammad and AAA's defense team, meaning Ali Abdul Aziz Ali,
17 filed a motion to compel discovery, which is listed as
18 Appellate Exhibit 555H.

19 Both sides argued AE 555. The defense motion to
20 dismiss for unlawful influence was thoroughly argued on 1 May
21 and 2 May of this year. Mr. Nevin, Mr. Connell,
22 Mr. Harrington, and Mr. Swann on behalf of the government
23 argued for well over two hours on whether the firing of

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1 Mr. Rishikof constituted unlawful influence.

2 Mr. Connell got up and argued twice and was actually
3 five minutes from completing his argument completely when he
4 took a break for lunch, only to come back the next day -- I
5 believe we took a break at the end of the day -- to come back
6 the next day saying that their position had changed and they
7 had been contacted by a witness that had additional
8 information about the terminations of Mr. Rishikof and
9 Mr. Brown. Although that witness never materialized,
10 ultimately on 21 May, Mr. Connell's team filed their second
11 supplement, which for the first time focuses on the pretrial
12 agreement aspect of why they believed Mr. Rishikof was
13 terminated.

14 So the 23 May order from the judge following that
15 filing ordered the testimony of Mr. Castle and Mr. Rishikof
16 and then other certain documents that were referenced,
17 including an appointment memo for Mr. Brown, a 2015 memorandum
18 from the DEPSECDEF requiring coordination of changes to the
19 regulation, monthly written status reports, and what's called
20 the 13 December 2017 management memo. He denied all other
21 documents requested but did not rule on the outstanding nine
22 witnesses that Mr. Connell at the time had requested and has
23 since supplemented.

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1 25 May, Mr. Connell supplements for a second time,
2 focussing again on the pretrial agreement aspect of why they
3 believe Mr. Rishikof was terminated.

4 So on 6 June we filed what we're arguing now, a
5 motion to reconsider the testimony and the documents in light
6 of evidence on the record. Ultimately, the judge looked at
7 the monthly status reports in camera and made a determination
8 based on our motion to reconsider that the defense has not
9 established its burden on why those documents were relevant
10 and necessary. He also decided to defer whether or not
11 Mr. Castle and Mr. Rishikof's testimony was still necessary in
12 light of the record.

13 It is our position that no other evidence is needed
14 to rule on this issue. You have ample documents in front of
15 you indicating the reasons for the termination of Mr. Rishikof
16 and Mr. Brown. The facts as alleged and established in the
17 record, even as the defense alleges them, viewing them in the
18 best light, do not constitute unlawful influence and extra
19 testimony would do nothing to change those facts.

20 We have to discuss the defense runaway train theory
21 of unlawful influence because it's important to understand
22 that the parties could not be more divergent on what
23 constitutes unlawful influence. But the runaway train theory

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1 is that once the SECDEF designates the convening authority,
2 the convening authority can do anything he wants, judicial
3 acts, nonjudicial acts, administrative acts. And that even if
4 he was going to run off the tracks and everyone in the
5 Department of Defense saw that he was going to run off the
6 tracks, no one could lawfully stop him. Every act is a
7 judicial or quasi-judicial act in the mind of the defense
8 arguments.

9 It's important, though, to note that the first reason
10 given in a Secretary -- in the Acting General Counsel's
11 declaration is that the 13 December 2017 memo, which you do
12 have and which is attached to the record, is signed by
13 Mr. Rishikof in his capacity of the Director of OMC, not as
14 the convening authority. And we'll discuss the position
15 description a little bit later.

16 In a recent case, the Supreme Court in the case of
17 Ayestas v. Davis, which we briefed, stated very clearly that
18 decisions by federal judge, such as regarding facilities,
19 personnel, equipment, supplies, and even rules of procedure,
20 are not decisions or orders made in a judicial capacity. That
21 was in the context of whether or not they had jurisdiction
22 over a certain claim made by a defendant.

23 And ultimately, once you reject the defense premise,

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1 once you reject the runaway train theory of unlawful influence
2 that the defense pushes forward, the analysis really goes to
3 what reasons can you properly remove a convening authority for
4 without it constituting unlawful influence. And that inquiry
5 must start with the authorities of the Secretary of Defense.

6 So what can a superior convening authority do with a
7 case that was convened by an inferior convening authority?
8 I'd like to pull up the next slide. So the Army JAG School
9 puts out a Commander's Legal Handbook to discuss the legal
10 aspects of being a commander in a convening authority. This
11 is commonly trained, certainly with the Army JAGs, and it sets
12 forth what's a fairly famous -- it has become famous in
13 military justice, called the 10 Commandments of Unlawful
14 Influence. I'd like to pull up that slide, please.

15 So there are ten different commandments where the
16 Army JAG School pretty much says "Thou shalt not," and
17 specifically, Commandment 6 says, "Thou shalt not order a
18 subordinate to dispose of a case in a certain way." So it's
19 important up front to understand the prosecution's position
20 that, if the Secretary of Defense picked up the phone and
21 called Mr. Rishikof and said, under no circumstances are you
22 allowed to entertain or sign a pretrial agreement, without
23 having formally withheld that authority, would absolutely

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1 constitute unlawful influence. That said, there is zero
2 evidence and will be zero evidence of the fact that he did
3 that.

4 The Commander's Legal Handbook also discusses things
5 that commanders can do that are not unlawful command
6 influence. I'd like to pull up the next slide, please. So
7 this is on page 18 of that handbook. I'd like to call out a
8 specific section.

9 So the things that a superior convening authority can
10 do over an inferior convening authority, the Secretary of
11 Defense being the only statutorily recognized convening
12 authority for all the military commissions -- which is
13 different than the UCMJ, which lists specifically well over 15
14 specifically named convening authorities -- he can withhold
15 authority over types of offenses, types of offenders, or
16 certain commanders. He can reach down and take specific
17 cases. He can also send cases back down to other
18 subordinates. But if you send a case back down to another
19 subordinate, you cannot attach any strings. You cannot say,
20 I'll let you handle this case providing you at least give X,
21 Y, or Z.

22 This is how our military commanders are trained on
23 how not to commit unlawful command influence. And I would

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1 submit to you that this is exactly what the Secretary of
2 Defense did when he rescinded Mr. Rishikof's designation and
3 near simultaneously designated Mr. Coyne.

4 The issue of pretrial agreements is also governed by
5 Regulation for Trial by Military Commission. I'd like to pull
6 up that slide. Chapter 12 specifically deals with the Deputy
7 Secretary of Defense's rules and Regulation for Trial by
8 Military Commission and discusses the authority to conclude
9 the agreements.

10 Specifically 12.1 discusses at the very beginning,
11 "Unless such authority is withheld by a superior competent
12 authority, the Convening Authority is authorized to enter into
13 or reject offers to enter into Pretrial Agreements with the
14 accused." Ultimately "the decision to accept or reject a PTA
15 offer submitted by an accused is within the sole discretion of
16 the Convening Authority who referred the case to trial."

17 I want to discuss what sole discretion means. Now,
18 ultimately the CA is the only one who can enter into an
19 agreement that binds the United States and he alone may decide
20 to do so. He can determine whether to take the plea
21 agreement, the length of the sentence; but there are many
22 terms of those agreements when you're dealing with enemy
23 combatants that require coordination with outside entities,

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1 such as the place of confinement.

2 Obviously if it's going to be in a different country,
3 there's going to be State Department coordination. If it's
4 going to be lifetime confinement in a federal facility, there
5 is going to be Bureau of Prisons, Department of Justice, or in
6 this case even congressional requirements to permit that. So
7 in the end, he's not unlimited in his power to decide on every
8 aspect of the terms of the PTA and he can't bind the
9 U.S. Government to terms not agreed upon by other parts of the
10 executive. To give a drastic example, he can't agree that
11 they're going to be detained on the moon, and then NASA would
12 have to jump and figure out a way to make it happen. It
13 doesn't work that way.

14 There's lots of parts of the Executive Branch when
15 you're dealing with enemy combatants from other countries that
16 have a legitimate requirement to coordinate with the convening
17 authority, which he seemed to accept, because the record
18 indicates at this point that he went and spoke to other people
19 around the U.S. Government about the issue of possible
20 pretrial agreements.

21 The defense seems to argue that the SECDEF doesn't
22 actually have the authority to withhold pretrial agreement or
23 any other part of the inherent authorities of a convening

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1 authority. I would suggest to you that that's a complete
2 misunderstanding of how military justice functions with
3 superior commanders.

4 There will be zero evidence that anyone at all in the
5 United States Government tried to influence the discretion of
6 Mr. Rishikof on whether to take a plea in this case or
7 discouraged him to do so. And, in fact, he engaged -- he
8 continued to engage in plea agreements based on defense
9 filings well into December and well after any mentions were
10 made of pretrial agreements in any meetings he may have had.

11 So I want to turn now to the evidence now on the
12 record which renders the testimony unnecessary. So this
13 document can be found in the record otherwise as Appellate
14 Exhibit 555DD (Gov) Attachment L. It's a 15 December 2017
15 info memo. And it's important to note the difference between
16 the info memos and the action memos. People who have staffed
17 in the Pentagon -- it may be like this in other services --
18 info memos are done to convey information, not actually ask
19 for any action; whereas action memos are something where
20 you're asking a superior to take a specific action.

21 So in an info memo on 15 December is the first time
22 that we see in writing in the record that there is a removal
23 recommendation for Mr. Rishikof by the Acting General Counsel.

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1 I'd like to call out certain portions of this. We can see
2 it's on December 15th. It's part of an otherwise documented
3 memo for the plan of disposing of future enemy -- unprivileged
4 enemy belligerent cases.

5 So at the very beginning at the bottom, we see,
6 "Replacement of the Convening Authority and Legal Advisor"
7 with the reasons being "This will enhance the prospect for a
8 cohesive effort for the disposition of pending cases." Next
9 slide, please.

10 Same document, further down on page 2, proposes the
11 replacement of the convening authority. I'd like to call your
12 attention to the bottom, "As Convening Authority, Mr. Rishikof
13 serves at the pleasure of the Secretary and can be removed at
14 any time. Mr. Brown can be removed from his position by the
15 General Counsel."

16 So being that this is an info memo, it wasn't asking
17 for action from anyone, or the Secretary of Defense
18 specifically, lay out a plan to select an interim convening
19 authority, terminate the current convening authority and legal
20 advisor, and ultimately select a permanent convening authority
21 and legal advisor.

22 Next slide, please. Next slide.

23 So almost a month later, we have now the first action

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1 memo that's sent where we're actually -- the assistant -- I'm
2 sorry, the Acting General Counsel asks for a specific action
3 for the removal of Mr. Harvey Rishikof as convening authority
4 for military commissions. Again, the reasons, "To effectuate
5 a more cohesive effort by the Department of Defense for the
6 administration of military commissions, I recommend you
7 designate a new Director and Convening Authority." So this is
8 almost a month after the first info memo, a couple days short
9 of a month.

10 So like I said earlier, the military judge, Judge
11 Pohl at the time, ordered declarations of Mr. Castle, Mr. --
12 Secretary of Defense Mattis. Those can be found at AE 555E.
13 Mr. Castle's is Attachment C to AE 555E.

14 So on 19 March, declaration from Mr. Castle, he
15 ultimately gives three reasons under oath that I'd like to
16 call to your attention. Unlike the declaration -- the joint
17 declaration filed by Mr. Rishikof and Mr. Brown, the propriety
18 of a joint declaration to criminal practitioners
19 notwithstanding, was not filed under oath, did not swear under
20 penalty of perjury, they tried to file it as officers of the
21 court despite the fact that they were not parties to this
22 case. But the highest-ranking attorney in the Department of
23 Defense at the time and the Secretary of Defense at the time

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1 swore under penalty of perjury that this information was true.

2 Mr. Castle gives three reasons, including but not
3 limited to, as it clearly says, "As further explained below,
4 the reasons for my decision included." It was never meant to
5 indicate that these were the only things that they ever did
6 wrong, that those were the only things that upset the Office
7 of the General Counsel and/or the Secretary of Defense, it
8 simply indicated that these were the three that, after they
9 occurred, a decision was made.

10 The first one being -- which governs everything, is
11 that there was questionable decision-making, professional
12 judgment, and temperament that they displayed in
13 administratively managing the Office of Military Commissions.
14 Not in convening courts, not in their judicial or
15 quasi-judicial actions, but in administratively managing the
16 Office of Military Commissions.

17 He cites specifically to a December 2017 submission
18 of a completely uncoordinated internal memo that would
19 potentially impact the organizational structure and
20 responsibilities of multiple components, offices, and services
21 currently outside the Office of Military Commissions. He
22 points to an uncoordinated call to the Combatant Commander of
23 SOUTHCOM and an uncoordinated request for an aerial imagery of

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1 the ELC. And finally, the follow-up uncoordinated request
2 that the United States Coast Guard capture aerial imagery of
3 that same site.

4 He also specifically states under oath, "In making my
5 decisions during the week of 29 January, I did not consider
6 Mr. Rishikof or Mr. Brown's performance of any judicial or
7 quasi-judicial acts."

8 And it's important to point out that this December
9 management memo was sent under the signature of Mr. Rishikof
10 as the director of OMC, not as the convening authority.
11 Mr. Brown is referenced within that document as the chief of
12 staff, not as the legal advisor.

13 It talked about organizational structure changes
14 including supervision of the chief prosecutor, security
15 aspects being returned to OMC that had been given to
16 Washington Headquarters Services, and a host of other
17 administrative requirements.

18 It does mention that they are pursuing pretrial
19 agreements. That is not the intent of the entire memo, we
20 would submit. We would invite the military judge to look at
21 that aspect of it. Ultimately it does mention it, and I
22 believe that there's enough in the record that the ultimate
23 consideration of pretrial agreements may have been known in

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1 the Department of Defense as early as the summer. I believe
2 the record would indicate that, at least through his
3 conversations with Mr. Work. So ultimately, those are the
4 reasons that he gave.

5 I'd like to call out another section, please. So
6 these are pages 4 and 5. I just put them together to
7 understand because paragraph 10 actually is on both page 4 and
8 5.

9 So at the very beginning, in early September 2017,
10 Mr. Castle indicated that he had a meeting request for the
11 first time with Mr. Rishikof and Mr. Brown. What he did was
12 he spoke to attorneys within his office, asked for a briefing
13 to figure out what they might want to discuss, and he
14 solicited the view of the OGC attorneys on how they were doing
15 in their performance in managing the Office of Military
16 Commissions.

17 Mr. Castle attests to the fact that "Their general
18 view was that Mr. Rishikof and Mr. Brown alternated between
19 not coordinating administrative aspects of their jobs and
20 coordinating in a needlessly disruptive and divisive manner.
21 This caused me to question whether Mr. Rishikof or Mr. Brown
22 were the right individuals to manage the OMC and advise on
23 that management." So as early as September 2017, there's

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1 concerns about the management style of Mr. Rishikof and
2 Mr. Brown.

3 Paragraph 11, that same declaration, the Acting
4 General Counsel of the Department of Defense sees an action
5 memo -- a proposed action memo, not an info memo -- an action
6 memo sent by the convening authority, by Mr. Rishikof as the
7 director, asking that the Deputy Secretary of Defense take
8 action to consolidate authorities under his office. That
9 would have been a breathtaking expansion of the power that the
10 convening authority has ever had historically.

11 Clearly, Mr. Rishikof in signing it as the Director
12 of OMC did not believe he was doing it in his convening
13 authority role. And quite frankly, if it wasn't inherent
14 power of the convening authority, he wouldn't have had to do
15 it at all. He was clearly asking a superior officer, the
16 Deputy Secretary of Defense in this instance, for changes to
17 better effectuate the Office of the Military Commission. It
18 would -- clearly are not judicial acts that he was taking, he
19 didn't believe they were. He would have signed it as
20 convening authority if he did.

21 Mr. Castle only receives this after it goes directly
22 to the Deputy Secretary of Defense. He attests that his
23 office had no ability to chop it, look at it, or coordinate.

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1 And I suspect that there will be additional
2 information on the record that there's a belief that phone
3 calls or video teleconferences or meetings is the same thing
4 as being able to coordinate which is an over 60-page memo
5 asking for action from the Secretary of Defense.

6 But I would submit to you, based on Mr. Castle's
7 declaration, that they were surprised that they didn't get an
8 opportunity to chop it; that it was returned to them directly
9 from the Deputy Secretary of Defense's office asking them if
10 they had had an opportunity to coordinate with it; and that
11 this was more than a serious process foul. This was something
12 where he felt it was an end-around to the proper coordination
13 process that was required in the Pentagon.

14 So in paragraph 12, Mr. Castle attests that the
15 uncoordinated memo submission enhanced his concern that they
16 were not the right individuals to manage the OMC and then said
17 that the January 2018 actions reinforced his view.

18 He then discusses the combatant commander phone call
19 which was supposed to, by regulation, be coordinated through
20 the Department of Defense Office of General Counsel. That was
21 not done. Ultimately they asked for information regarding an
22 aerial photo that the Combatant Commander did not provide and
23 would not provide; a new one. They gave him the most recent

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1 one.

2 Ultimately Mr. Rishikof and Mr. Brown then decide to
3 go to the Coast Guard and ask them to do it with their assets
4 on island. That also was not properly coordinated, according
5 to Mr. Castle. And those were the final decisions that led to
6 his conclusion that the Secretary of Defense had to actually
7 take action and remove Mr. Rishikof.

8 The defense will get up and argue about a memo in the
9 interim between the 12 January action memo and the ultimate
10 action memo that happens later; that somehow going to a group
11 of experts to ask for how to do this properly in light of the
12 fact that they were aware of a possible pretrial agreement was
13 somehow improper. We would submit that it was completely
14 proper and logical to do so.

15 There's always going to be quasi-judicial acts and
16 judicial acts that a convening authority is taking all the
17 time that superiors are going to have an awareness of at some
18 point. So in making a decision to terminate for other
19 reasons, it was perfectly appropriate and prudent, quite
20 frankly, to go to military experts and ultimately ask to make
21 sure that it was done in what they believed was the correct
22 way so as to not constitute unlawful influence.

23 So I'd like to call out now Mr. Rishikof's

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1 declaration, which can be found in the record otherwise at
2 Appellate Exhibit 555G. So on 19 March 2018 -- or -- yeah,
3 2018, there is a joint declaration by Mr. Rishikof and
4 Mr. Brown, who must have gotten together and made sure their
5 stories were straight before deciding to file a joint
6 declaration. I wanted to call out paragraph 7 specifically.

7 At the end of it, they conclude that "It is unknown
8 to us if the decisions and recommendations in these cases
9 played a role in our removal." I think the evidence on the
10 record indicates that that was intentional and the reason why
11 it was unknown to them is because there were no -- there was
12 no desire to signal to the next convening authority what any
13 concerns were or whether or not there were any feelings
14 regarding pretrial agreements so as to not taint the next
15 convening authority. But by design, they did not know what
16 decisions were made.

17 That also, we believe, proves that he was not
18 influenced in any way. No one sought to influence him. No
19 one reached out. No one called him. No one said this is a
20 bad idea to consider pretrial agreements in this case. Again,
21 this is a pretextual argument that the defense is making. I'm
22 not saying that happened. All the evidence indicates it
23 doesn't and it didn't for that reason, but we have to take

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1 that on, because that's the best the defense can get, and even
2 that isn't unlawful influence, and we'll discuss that in a
3 little bit.

4 I'd like to highlight paragraph 10 for you. Again,
5 "As our declaration reflects, we know little about the reasons
6 that led to our dismissal." So not once but twice they
7 discussed the fact that no one discussed with them what they
8 believed they did wrong. No one signaled to them what their
9 concerns were.

10 They file a second declaration. Although not invited
11 by the commission, they ultimately reserved a right to respond
12 once they read Mr. Castle's and Mr. Mattis' declarations.
13 They did that. And specifically in the highlight they admit
14 to "a routine call to the Combatant Command about logistics
15 issues." Routine calls per the regulation, which is in our
16 brief, needed to be coordinated with the Office of General
17 Counsel.

18 Obviously, combatant commanders are very busy people
19 with a tremendous amount of responsibility, and before anyone
20 in the Department of Defense goes to them, it is not
21 unreasonable to require an Office of General Counsel
22 coordination aspect on that to make sure that the messaging is
23 clear and that the request is supported. So they don't

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1 dispute that the call was not coordinated. And specifically
2 in regard to the Coast Guard incident, they say that they
3 assumed that the required and appropriate procedures would be
4 followed. They do not say that they coordinated, they just
5 say that they assumed that the correct coordination would
6 occur.

7 So prior to the filing -- next slide, please --
8 Mr. Castle also sends an informational memo to the Deputy
9 Secretary of Defense. It includes a nonexhaustive list of all
10 of the convening authority actions that he considered to be
11 inappropriate and ultimately lead him to the conclusion that
12 Mr. Rishikof was not the right man for the job.

13 So in the second bullet point, you see specifically
14 that in order to have timely, fair administration of justice
15 in commissions, there is a number of different services,
16 office, and components that must be on the same heading, and
17 that Mr. Rishikof, after having been on the job now for over
18 nine months, was not the right person for the job.

19 The third bullet, "If we don't replace" Mr. "Rishikof
20 as convening authority, it is not a question of if he will do
21 something that jeopardizes the conduct of military
22 commissions, but when."

23 And he specifically says, "To mitigate our risks

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1 while contesting a possible unlawful influence motion, we are
2 advising the following: First, no one should speak to
3 Mr. Coyne about how he might perform the quasi-judicial
4 functions of the convening authority. Second, we need to make
5 clear when advising the Secretary that we considered" his
6 "professional judgment, temperament and decision-making and
7 that we did not consider how he performed any quasi-judicial
8 acts."

9 Now, the Office of General Counsel is well familiar
10 with unlawful influence as a mandate. Ultimately Deputy
11 Secretary Work had to rescind a change that he made to the
12 regulation in moving -- in purporting to order the military
13 judges to move to Guantanamo several years ago.

14 Ultimately that's what led to the requirement from
15 Deputy Secretary Work that any changes that are made to the
16 regulation, any types of changes that would require changes to
17 the regulation ultimately needed to go through and be
18 coordinated by, amongst others, the Office of the General
19 Counsel. Nowhere in this document do they indicate that
20 pretrial agreements were any part of the decision.

21 Next slide, please. Oh, I'm sorry. Stay on that
22 slide, please.

23 So in this chronological list, and I won't go over

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1 all of them, but it turns out that, even prior to starting his
2 duties on 4 April, the convening authority was insisting on
3 going to the House Armed Services Committee's congressional
4 delegation, or CODEL, down in Guantanamo. OGC guidance,
5 knowing that he probably didn't even know his way to the
6 bathroom yet said, "You cannot go on that. You are not yet an
7 employee of the Department of Defense." He continues to
8 follow their guidance, and that required actually elevating
9 the issue to the Department Secretary of Defense and the
10 Secretary of Defense's office in order to get him to not go to
11 this CODEL.

12 In June, the convening authority refused to validate
13 a resource request, which would have really only been several
14 hundred dollars, so that there could be a separate boat to
15 transport military judges in Guantanamo after JTF-GTMO decided
16 to no longer provide the fast boat that had been certainly in
17 place in this case since the arraignment in 2012.

18 Next slide, please.

19 So the Department of Defense obviously has
20 different -- different groups within it that are responsible
21 for certain aspects. There's a DoD Detainee Policy Group.
22 There's also an Office of Legislative Affairs Group.
23 Everything that goes up to the Hill on the legislative affairs

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1 side with the Department of Defense gets obviously siphoned
2 through the Office of Legislative Affairs.

3 So in July of 2017, DoD Detainee Policy instructed
4 the convening authority to not lobby the Department of Justice
5 for a seat on the Attorney General's flight to GTMO when he
6 came down to Guantanamo. I'm slowing down. Yet the convening
7 authority calls the Deputy Attorney General, gets a seat on
8 that flight.

9 There was a congressional proposal to amend the
10 Military Commissions Act that same month. The Department of
11 Defense Legislative Affairs instructed the convening authority
12 to coordinate any comments through Legislative Affairs, as is
13 typical for any statute that may implicate Department of
14 Defense equities. The convening authority sent the comments
15 directly to the Hill. Then we have the December memo, which
16 we referenced, and we have the combatant command issue.

17 But one example in the December 2017 memo is
18 important to note. Ultimately his failure to coordinate with
19 the effective services, if the action memo had been signed by
20 the Deputy Secretary of Defense, would have put the Army on
21 the hook, unbeknownst to the Army, for a seven-million-dollar
22 expansion project. That sort of underscored the importance in
23 the AGC's mind of why coordination is so important in these

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1 issues that impact various different services and various
2 different branches of the Executive Branch.

3 Next slide, please.

4 So ultimately this next slide is the position
5 description, which we provided in discovery, and I want to
6 call out a specific section for you at this time. So
7 Director, Office of Convening Authority, is a completely
8 separate position from that of the convening authority.

9 Now, traditionally, the convening authority has worn
10 both hats. But ultimately the Secretary of Defense
11 established this position out of whole cloth. It is not
12 statutorily required. It's not mentioned in the statute at
13 all. It was determined by the Secretary of Defense, whose
14 Department of Defense is responsible for every aspect of these
15 military commissions, that ultimately we needed a director of
16 the Office of the Convening Authority in order to make the
17 trains run.

18 Specifically, it describes the Director, Office of
19 Convening Authority, advising the Secretary of Defense on
20 issues such as employment personnel, court reporters,
21 interpreters, security personnel, bailiffs, clerks,
22 investigative resources, all deemed necessary for a full and
23 fair trial, including interpreters.

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1 Ultimately, this is a resource-specific,
2 logistician-specific position that was created by the
3 Secretary of Defense, and we submit to you that all of the
4 actions that were just listed in that chronology and
5 ultimately in Mr. Castle's declaration were in his capacity as
6 the director of the Office of the Convening Authority.

7 Next slide, please.

8 So Secretary Mattis also provides a declaration,
9 sworn under oath, subject to penalty of perjury, on 19 March.
10 Secretary Mattis began his time as the Secretary of Defense on
11 20 January 2017; on 3 April, designates Mr. Rishikof; and on 3
12 February 2018, rescinds that designation.

13 Next slide.

14 So specifically, paragraph 6 through 8 of what is a
15 nine-paragraph declaration by the Secretary discusses
16 Mr. Rishikof's management and corporate decision-making, his
17 professional judgment, and his temperament. The "more
18 cohesive effort" language which you have seen earlier in the
19 recommendations and action recommendations from the AGC also
20 make an appearance in this declaration, and he specifically
21 cites to the Combatant Commander imagery issue and the
22 U.S. Coast Guard issue, that he was told that Mr. Rishikof
23 failed in the most basic coordination to ensure that that was

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1 done correctly and appropriately.

2 Next slide. All right.

3 So ultimately testimony is no longer necessary, and
4 the defense can't meet its burden of some evidence of unlawful
5 influence. We have the reasons sworn under oath as to why the
6 Secretary and the Acting General Counsel said that they
7 terminated Mr. Rishikof, and then we have the defense theory
8 that it was all pretextual and it was a pretrial agreement. I
9 want to address the first, and then I'll address the latter in
10 a second.

11 But ultimately, and which is why I discussed the
12 authorities that the convening authority -- a superior
13 convening authority has, is that's the first question you have
14 to ask: Is the Secretary of Defense superior to Mr. Rishikof
15 as convening authority? The answer absolutely is yes. He's
16 the only statutorily-recognized convening authority. Okay.

17 Did he withhold authority over a certain commander?
18 What he did in terminating Mr. Rishikof ultimately was
19 tantamount to withholding the authority over that person.

20 Mr. Rishikof and the convening authority for
21 commissions as a whole is a unique animal. It's not like a
22 commander in the military, whether it be Marine, Navy, Army,
23 that actually has command over sailors and soldiers and

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1 marines and has a good order and discipline piece of requiring
2 that amongst his command. He exists solely to determine
3 whether or not to refer cases that are tried by military
4 commission. He doesn't command anyone. He doesn't
5 necessarily even have a good order and discipline aspect,
6 certainly over the accused.

7 But all of that being said, once it was determined
8 that he was no longer the correct guy for the job, termination
9 was the only way to go. He existed only for that purpose. If
10 he could not serve that purpose, the termination was the only
11 way to go, which is different, obviously, than just
12 withholding information -- or withholding authority over an
13 inferior commander in the military who has other aspects.
14 Convening authorities, usually that is a collateral duty for
15 commanders.

16 In this instance, between that and his other job of
17 director of OMC is his sole authority. That's all he has. If
18 he can't do that job, the only decision to make is that you
19 remove him from that job. He was hired and the record
20 indicates he was a highly qualified expert, terminable at
21 will. He knew that when he came in. His designation letter
22 specifically said you are hereby designated until I designate
23 someone else. So he did not come thinking this was a lifetime

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1 appointment like a federal judge. He knew fully well that he
2 was removable at the pleasure of the Secretary of Defense.

3 So ultimately in taking that case away and in giving
4 it to Mr. Coyne, he's withholding authority over Mr. Rishikof,
5 consistent with the Army's Commander's Handbook.

6 So ultimately did he attempt to influence
7 Mr. Rishikof before he rescinded the authority? There is no
8 evidence of that and there will be no evidence of that, that
9 in any way the Secretary of Defense or anyone in the General
10 Counsel's office attempted to influence him on his decision
11 regarding pretrial agreements.

12 If he did, like I started our argument with, that
13 would have been unlawful influence. There will be no evidence
14 of that because that didn't occur.

15 So ultimately, if he didn't attempt to influence
16 Mr. Rishikof, is the inquiry over? No, it's not, because he
17 gave the case to Mr. Coyne. So if the answer to whether or
18 not he influenced Mr. Rishikof is no, you have to go over to
19 the right part of your slide.

20 Ultimately Mr. Coyne has all of the cases -- or had
21 all of the cases at the time. There's been a new convening
22 authority designated now. But the analysis needs to focus on
23 Mr. Coyne for now. Certainly if the commission feels a need

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1 to ensure that there is no influence over the current acting
2 interim convening authority, the prosecution would not be
3 opposed to the commission ordering a similar declaration from
4 her.

5 But ultimately Secretary Mattis reached down and took
6 the specific cases, he took all of the referred cases. He
7 gave them at the time to Mr. Coyne. And then the question
8 becomes: Did he send the case back down to Mr. Coyne with
9 guidance or any strings attached?

10 If he did, if he said, I'll give you these cases,
11 Mr. Coyne. You're the new convening authority. And if he did
12 not formally withhold -- he said, you have full authority, I'm
13 not withholding your pretrial agreement authority; but
14 ultimately don't ever accept a pretrial agreement ever, that
15 would constitute unlawful influence. There will be no
16 evidence of that because that did not occur, as set forth in
17 Mr. Coyne's declaration.

18 So if he did not send the case back to Mr. Coyne with
19 any guidance or any strings attached to it, his actions fell
20 completely within his lawful authority as the Secretary of
21 Defense, as the superior convening authority. As such, there
22 would be no unlawful influence or appearance thereof.

23 Now I want to address the defense's pretextual

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1 argument. I'm sorry, I skipped ahead one.

2 So ultimately, the three reasons given by Mr. Castle,
3 the December 2017 uncoordinated management memo, the
4 communication with the Combatant Commander, and the request
5 for aerial imagery, and the uncoordinated -- slowing down --
6 Coast Guard request.

7 So the first question you have to always ask when it
8 comes to unlawful influence or unlawful command influence
9 inquiries are: Are the acts judicial or quasi-judicial in
10 nature? If the answer is no, it's full period, stop, do not
11 continue, not unlawful influence if he was being removed,
12 disciplined or in any other way any negative action was taken
13 against him.

14 Because in the end, UCI protects everyone within the
15 military justice system from their judicial or quasi-judicial
16 acts, but it doesn't somehow withhold appropriate
17 accountability for all of the other acts that they take that
18 are not judicial or quasi-judicial in nature.

19 We would point you to Ayestas v. Davis, which is a
20 2018 Supreme Court case where they go back through older cases
21 where they indicated that administering the judiciary requires
22 many decisions such as facilities, personnel, equipment,
23 supplies, rules of procedure, and that such administrative

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1 decisions are not decisions or orders made in the judicial
2 capacity.

3 We cite to the Supreme Court because, to be honest
4 with you, there is a dearth of information in the military
5 courts-martial jurisprudence on what actually constitutes a
6 judicial act.

7 But again, we're in a unique situation where we have
8 a convening authority that serves one purpose. And I submit
9 to you that if federal judges can be taking actions impacting
10 cases, including rules of procedure, and the Supreme Court
11 makes a determination that those are not orders made in a
12 judicial capacity, clearly the director of OMC not only is not
13 taking judicial or quasi-judicial acts, he has no authority to
14 do so. He's not even functioning as the convening authority.
15 So as such, the termination for those reasons given by
16 Mr. Castle do not constitute unlawful influence.

17 Next slide, please.

18 So ultimately if you were to buy the defense's
19 argument, that is, consideration of pretrial agreements in
20 this case was the real reason, it was an illogical, irrational
21 and ineffective pretext for firing Mr. Rishikof.

22 The record indicates that in October there was a
23 phone call from the Attorney General regarding his, what we'll

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1 call for purposes of this motion to reconsider, his opposition
2 to noncapital dispositions in this case. Understanding that
3 the Attorney General obviously is responsible for all federal
4 prosecutions, not military commissions, at some point, from a
5 policy standpoint, you decide not to -- you decide to take
6 death penalty off the table for those who are alleged to have
7 murdered 2,976 people, it becomes very difficult in every
8 capital case certainly going forward after that in federal
9 court to argue why it's a legitimate punishment.

10 So he's got authorities. He's got authorities within
11 the Military Commission Act. Obviously, Mr. Rishikof felt it
12 necessary to go over to the Department of Justice to discuss
13 pretrial agreements. There's nothing improper about the
14 AG voicing his concerns about pretrial agreements to the
15 Secretary of Defense.

16 But ultimately, if that's October, and then the
17 firing happens on February 3rd, 2018, that's approximately
18 110 days. And that's not counting the other evidence on the
19 record where Mr. Work indicated that ultimately he was aware
20 that they were going to be considering pretrial agreements as
21 early as April or May when he first met with Mr. Rishikof,
22 right? Even taking the best argument that the first time we
23 see it in documents being December 13th -- December 13th,

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1 2017, where the director of OMC, Mr. Rishikof, references PTA
2 as a possible course of action they're pursuing, that's 52
3 days until he gets fired.

4 If you are very concerned that the case is going to
5 be dealt out, and because of that you decide to fire the
6 convening authority, you don't wait 110 days, you don't wait
7 52 days, you do it immediately. Or you exercise your other
8 lawful authorities. You withhold pretrial agreements from
9 that convening authority, you take the case back. Even
10 cynically maybe you commit unlawful command influence by
11 sending it to another convening authority, a subordinate
12 convening authority, with strings attached that say under no
13 circumstances should you consider a pretrial agreement.

14 None of that occurred. The evidence will show that
15 none of that occurred, which would make it, if it were a
16 pretext, not a very effective one. Because any one of those
17 days Mr. Rishikof could have signed that pretrial agreement
18 and bound the United States Government to a pretrial agreement
19 of less than a capital disposition. So if that were the case,
20 if that were the reason, this was a pretty ineffective way to
21 make sure that didn't happen.

22 Next slide.

23 So ultimately in Appellate Exhibit DD (Gov), which

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1 was our reply to the defense response to our motion to
2 reconsider -- and I do agree with Mr. Connell that these are
3 really all intertwined, that the issues are intertwined,
4 inextricably intertwined, quite frankly -- we filed the
5 declaration from Mr. Coyne in response to these allegations
6 that this was somehow pretextual, and I want to call you to
7 specific aspects of this declaration.

8 So when he signed that declaration, he had already
9 been acting as convening authority. He attests that he had no
10 discussions with anyone, to include personnel from OGC, the
11 Office of Secretary of Defense, to include the Secretary of
12 Defense, to include the Acting General Counsel, to include the
13 Deputy Secretary of Defense, to include the Attorney General
14 of the United States, regarding the topic of entering into
15 pretrial agreements in any present or future military case, to
16 include United States v. Mohammad, et al.

17 When he assumed his duties, he had no awareness of
18 whether there had been any consideration by his predecessor of
19 plea agreements in this case or any other active military
20 commission case prior to his appointment.

21 So you figure once the new convening authority gets
22 to his new desk that there very well may be a pretrial
23 agreement waiting for him. No one said anything about it. No

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1 one mentioned to him that that was the reason, because it
2 wasn't -- that that was the reason why Mr. Rishikof was fired.
3 He maintained all authority he needed to maintain to engage in
4 pretrial agreement discussions the entire time he was the
5 convening authority.

6 Next slide, please.

7 Paragraph 3, "I retain the full independence and
8 authority to execute my duties as Convening Authority for
9 Military Commissions. There have been no limitations placed
10 on my discretion and authority to enter into pretrial
11 negotiations in accordance with R.M.C. 705 in any commissions
12 case."

13 Again, if this was the pretext, pretty ineffective,
14 because you're really rolling the dice when a new convening
15 authority comes in and has a pretrial agreement that you know
16 was probably waiting for him.

17 It's important to note for the record, too, that
18 there was never a signed pretrial agreement; that the accused
19 have no right to a pretrial agreement. The accused has no
20 right to a particular convening authority.

21 And certainly we believe that there was no unlawful
22 influence in this issue. We have the burden only if they show
23 some evidence. And I'll be honest with you, the defense is

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1 going to marshall a tremendous amount of evidence. It just
2 won't be evidence of unlawful influence, it will be evidence
3 indicating that there was a personnel action. There may be
4 disagreements about how well the coordination was done. But
5 in the end, whatever the defense can marshall through any of
6 their witnesses in our -- in our view still would not
7 constitute unlawful command influence.

8 If it did and you determined that there was an
9 appearance of it, the taint would have been cured when the
10 case was sent to Mr. Coyne under these circumstances. And
11 that's why we wouldn't oppose you going directly to the new
12 convening authority if you needed to assure yourself that
13 there's been no influence in this case.

14 So for purposes of deciding this issue -- and really
15 this is why we're here, as to why no testimony is necessary,
16 certainly not in light of the new records that are on -- in
17 the record, you can assume for this motion to reconsider piece
18 that the Attorney General called the SECDEF and expressed
19 disagreement. You can even assume the Secretary of Defense
20 was opposed to the pretrial agreement. You can even assume
21 the Secretary of Defense decided to remove the CA solely
22 because he disagreed with the proposal. That's the best the
23 defense testimony is going to show in the end, and in the end,

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1 because of the way he did it, it still wouldn't constitute
2 unlawful influence.

3 If he had disagreed with somehow where the case was
4 going, providing he didn't try to influence him in any way,
5 providing he didn't send a signal down to the next convening
6 authority, he was entitled to bring that case back. He was
7 entitled to give it to someone else. Providing he didn't
8 unlawfully influence Mr. Rishikof who, again, exists only for
9 purposes of military commissions in his judicial duties, he
10 was entitled, authorized by the statute and by his position to
11 take that case back. That's all the defense evidence is going
12 to be able to show on this issue, and it's not -- does not
13 constitute unlawful influence.

14 Next slide.

15 So I'm not going to belabor this. We discussed most
16 of these issues in walking through. But you can see from
17 March 31st to February 3rd, there's a series of incidents for
18 failure to coordinate properly in their administrative role at
19 OMC. The Office of General Counsel was completely entitled to
20 recommend that someone else fill this responsibility. The
21 Secretary of Defense was fully entitled when he -- if he lost
22 faith in Mr. Rishikof's ability to be the convening authority,
23 to rescind it. But the record speaks for itself.

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1 So even if there were a pretext, because there was no
2 influence and there will be no evidence of influence, it's
3 still not unlawful influence. But the pretext is just that;
4 it's a made-up defense theory. To be sure, they were aware of
5 pretrial agreements. But if they really cared about them as
6 much as the defense would try to convince you that they cared
7 about them, they would have done a bunch of different things
8 that were completely within their authority to do.

9 So as you'll soon see, this is a litigious bunch on
10 the left side of this courtroom, and they're just doing their
11 duty. I'm not trying to cast any aspersions towards them.

12 But ultimately the more reasons we had, meaning the
13 USG, Office of General Counsel, we had no role in that -- I
14 misspoke. The reasons that the OGC had and the Secretary of
15 Defense had for terminating Mr. Rishikof had the inverse -- as
16 the defense sees it, had a sort of perverse affect on how we
17 have to litigate this. It cannot be that the more details
18 there are and the more reasons there are for proper
19 termination, that they now get a full audit of all of those
20 reasons, and that we now march 18 different witnesses in that
21 might disagree with conclusions that were made by
22 Mr. Rishikof -- by Mr. Castle and the Secretary of Defense on
23 why they were not the right guy for the job.

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1 That can't be the case. They cannot have a full
2 audit of over -- all the government's decisions on the
3 termination of Mr. Rishikof's employment. It needs to work in
4 the inverse. The more reasons you see -- and I submit to you
5 that there's quite a few just on this page alone, and this is
6 a nonexhaustive list. Once you make the conclusion that they
7 have the authority to fire him and that they weren't judicial
8 acts, there's no need for further testimony. Mr. Castle has
9 sworn under oath why he did it. It's supported by the
10 documentary records, the other things that are in the record
11 as well; and Secretary Mattis did the same.

12 Ultimately care was taken to ensure that, while
13 terminating these individuals, they were not terminating them
14 for any judicial or quasi-judicial act. That's an important
15 principle for preventing even the appearance of unlawful
16 influence. We would submit to you that they did it exactly by
17 the book, by the Commander's Book. They sent no signals, they
18 made no fuss about it. Ultimately they just decided he wasn't
19 the right guy and they rescinded his authority. We do not
20 need now to march the second highest ranking Department of
21 Defense attorney in to explain every reason he gave when he
22 gave his reasons under oath.

23 The discovery provided in AE 555DD is an

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1 extraordinary waiver as to those documents specifically of
2 privileged information and predecisional information. It was
3 given because there is -- the United States recognizes the
4 importance of the integrity of this process, the importance of
5 being able to establish to the public which has an aspect to
6 this in the appearance of unlawful influence doctrine, the
7 reasons they gave, that they were all justified, and that
8 ultimately the record should convince the military judge that
9 no further testimony is necessary.

10 So Judge Pohl granted our motion to reconsider
11 whether the testimony was necessary. I appreciate you
12 allowing me to orally argue this motion. But while we believe
13 strongly that there was no unlawful influence, no appearance
14 of unlawful influence, the record before you, quite frankly,
15 you could decide otherwise. But there's no reason for any
16 additional record to be made.

17 We continue to assert the defense has not shown any
18 evidence of unlawful influence and that they can't and that
19 they won't, and that's why there should be no further
20 testimony.

21 Any testimony of Mr. Castle and Mr. Rishikof would be
22 cumulative to what's already in the record, wouldn't be
23 necessary under 703. And ultimately we ask that you

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1 reconsider as the judge was in the process -- as Judge Pohl
2 was in the process of reconsidering, in light of this ample
3 record, whether or not any further testimony is necessary.

4 Subject to your questions, sir.

5 MJ [Col PARRELLA]: Mr. Trivett, while you're at the
6 podium here, obviously some of the issues that we're here to
7 also decide is whether the court should produce witnesses at
8 the defense's request to testify on the motion. And as I
9 understand it, there's a witness here the defense would like
10 to have testify, Lieutenant, I believe, Doug Newman.

11 MTC [MR. TRIVETT]: Correct.

12 MJ [Col PARRELLA]: Who will, from the defense's -- if I
13 understand their proffer, and I'll, of course, allow them an
14 opportunity to clarify -- articulate for the court why those
15 witnesses are relevant, material, necessary for the defense to
16 prove the points that they're attempting to make in their
17 motion.

18 Understanding that it's the defense that has the
19 initial burden to show some evidence, why is the defense [sic]
20 in opposition to the court hearing from Lieutenant Doug
21 Newman?

22 MTC [MR. TRIVETT]: Okay. Some of it is a matter of
23 process, sir, right? He had his own investigator go and

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1 interview people, and it's hearsay; and understanding that you
2 can use hearsay in an interlocutory appeal.

3 But, quite frankly, Mr. Connell is an officer of the
4 court. I did have the opportunity to review his 914
5 materials. I had an opportunity to interview him, completely
6 professional and polite, but ultimately inappropriate.
7 Because as an officer of the court, I have no reason to
8 believe that those proffers are incorrect, right?

9 The proffers that Mr. Connell can give is all that
10 should be necessary for you to make a determination under 703.
11 And if there's anything in those proffers that you believe
12 would be evidence or some evidence of actual unlawful
13 influence, let's call that witness. That's fine.

14 But to have a defense investigator sort of as a
15 consolidated -- as a consolidated person, it becomes very
16 difficult to cross-examine them on different parts of what the
17 witness might have said. I mean, that's why hearsay is
18 generally, if -- with no exceptions, is such a suspect process
19 under the rules of evidence.

20 Our position is you can read all of the proffers, you
21 can read everything they said. None of it constitutes
22 evidence of unlawful influence, and therefore none of it is
23 necessary. But there's no reason why Mr. Connell can't in the

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1 record say, this is what my investigator said. I believe this
2 individual is going to testify consistent with this, and then
3 you make your decision on whether he testifies or not.

4 But our position is -- is that there's nothing in any
5 of those documents, and I've read them for hours on Sunday,
6 that in the prosecution's mind constitutes any evidence of
7 unlawful influence. To be sure, there's a lot of evidence
8 surrounding the termination, the -- the reasons for it,
9 whether or not the coordination was proper, every part of the
10 coordination chain for the Coast Guard, all of those things.

11 And we're saying you can short-circuit all of that,
12 right? Because in the -- in the end, you have to buy their
13 pretext argument, and there has to be some evidence of that.
14 And if you don't buy that, then all of this falls down as
15 completely unnecessary.

16 So we believe that you have the record to decide
17 either way at this point. Obviously, we strongly feel that
18 it's unlawful -- that it's not unlawful influence and that
19 they didn't meet their burden. Ultimately, because Mr. Coyne
20 was redesignated, we believe that even if we had the burden,
21 we've proven beyond a reasonable doubt that it won't taint the
22 proceedings because there's a new convening authority who has
23 no -- who has been given no limitations.

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1 And one point I wanted to make, too, is that it can't
2 be that the defense raises this issue as a pretext, it now
3 gets published to the world, and then that somehow becomes the
4 appearance of unlawful influence because the new convening
5 authority may read this, right? That can't be. They can't
6 create their own unlawful influence.

7 So I would just, from a process standpoint, object to
8 doing it this way. Take proffers like you normally do. We
9 don't need witnesses as to what the witness would say. The
10 proffers are sufficient. He's an officer of the court. I
11 have no reason, I've never had any reason to question his
12 credibility. But calling a witness that we can't really
13 cross-examine because he's not really the person is not the
14 way to do this.

15 That's our position.

16 MJ [Col PARRELLA]: I understand. Thank you.

17 MTC [MR. TRIVETT]: Thank you.

18 MJ [Col PARRELLA]: All right. We've now been going for
19 about an hour and a half, so we're going to take a 15-minute
20 recess. Court will reconvene at 1515.

21 This commission is in recess.

22 [The R.M.C. 803 session recessed at 1500, 11 September 2018.]

23

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1 [The R.M.C. 803 session was called to order at 1517,
2 11 September 2018.]

3 MJ [Col PARRELLA]: This commission is called back to
4 order. All parties present when the commission last recessed
5 are again present.

6 Mr. Connell?

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

8 I'm going to address the issue which is actually
9 before the military commission at this moment, which is the
10 government's objection to the testimony of Lieutenant Doug
11 Newman, but I have to start with pretty much the most boring
12 topic imaginable. I apologize. It's the slides question.

13 I find PowerPoint slides to be a valuable tool in a
14 conversation with the military commission, and apparently the
15 government does, too. We -- but this first time that we're
16 doing slides, I need to create a record of what we have done
17 with respect to the admissibility or presentability of the
18 slides. I normally don't go through this in such detail, I
19 normally abbreviate it, but since it's the first time, I think
20 it would be appropriate.

21 In accordance with Rule of Court 7.2.f.(1), Change 2,
22 we provided -- and this is going to apply to all of the -- not
23 just slides, but all of the exhibits that we present today.

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1 We provided AE 555 CIS0 Exhibits 1 through 42 to the CIS0 for
2 review. These documents were produced to the CIS0 in CD
3 triplicate as required by Rule of Court 7.2.f.(2)(a), Change
4 2.

5 These documents were marked -- specially marked in
6 accordance with the trial judiciary required naming convention
7 under Rule of Court 7.2.f.(2)(a), Change 2 with an electronic
8 version of a required spreadsheet under Rule of
9 Court 7.2.f.(2)(b), Change 2.

10 These submissions were timely made under Rule Of
11 Court 7.2.f.(2), Change 2 between April and August. On
12 7 August 2018, we provided notice of intent to the courtroom
13 technology under Rule Of Court 7.3.a.(1). And we -- the
14 government -- the CIS0 has returned to us on a rolling basis
15 redacted versions of our slides, most recently on 6 September.

16 At 0751 yesterday morning, I provided a fourth copy
17 of this material to the CIS0 under Rule of Court 7.2.f.(4)
18 Change 2, and we have provided the court reporter with both
19 the redacted and the unredacted slides.

20 Prior to argument, I -- well prior to argument, I
21 provided a copy to the government and all parties in
22 accordance with AE 465C.

23 The point that I make here is first that we have

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1 complied with all the procedural requirements to present
2 evidence visible to the galley; but second, that it's an
3 enormous lift to do so. And I was truly pleased to hear that
4 the government was able to short-circuit that process today
5 because I may make a mistake at some point in the future, and
6 when I do, I hope that I will receive the same consideration.

7 The redactions ----

8 MJ [Col PARRELLA]: Let me just cut you off right there,
9 Mr. Connell. I'm aware of the issue, and I understand that --
10 and I commend you for abiding by the Rule for Commission and
11 getting your materials in on time. I also am aware that in
12 the past perhaps parties, including the government, have not
13 done so. It's my intent until the maybe perhaps new chief
14 judge sees fit to change those rules to enforce those rules as
15 they are.

16 So perhaps by raising this issue, I'll just put all
17 the parties on notice that, between now and our next hearing,
18 I advise you to get the materials in and not to attempt to
19 short-circuit it. But I'm not suggesting that you would,
20 because it appears that you did it on time. But that we
21 will be -- I will be enforcing the Rules for Commission or the
22 Rules for Court as written.

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

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1 There are several sets of redactions that the
2 government made to the slides which are before the military
3 commission in AE 555JJ. Redactions of a Coast Guard captain
4 O-6 name, a redaction -- complete redactions of a flow chart
5 that I created, and the redactions of a commonly -- of a
6 commonly known helicopter used by the Coast Guard. I'm
7 actually going to let those go. I'm just going to use the
8 redactions the way they are because I think it's important to
9 get to the heart of the matter.

10 So with that said, I would request the feed from
11 Table 4 and permission to display the slides marked as
12 AE 555JJ to the gallery.

13 MJ [Col PARRELLA]: You may do so.

14 LDC [MR. CONNELL]: Thank you very much.

15 It takes a moment for them to come up on the --
16 there -- there's a separate feed there, so I'll just wait on
17 that, if you don't mind. Very good.

18 Your Honor, the week of 22 January 2018 was a busy
19 one for the convening authority's office. Mr. Rishikof and
20 Mr. Brown carried out their regulatory and administrative and
21 legal duties. They met with congressional staff, as they're
22 required to do by regulation. They sought updated imagery of
23 the Expeditionary Legal Complex through an interagency

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1 process, the -- and carried out all their ordinary activities.

2 On the following week, the week of 29 January 2018,
3 they were doing the same. Mr. Rishikof and Mr. Brown were
4 inspecting a victim family member viewing site when they
5 received a call for a meeting with the Office of General
6 Counsel on 5 February 2018.

7 They didn't know what it was about, but when they
8 arrived at the Pentagon on that Monday morning, on 5 February,
9 Acting General Counsel William Castle handed them a
10 termination notice without comment. They were relieved of
11 their CAC cards as if they had committed a crime and they were
12 escorted out of the building. This was very suspicious.

13 So initially we filed AE 555D on very limited facts.
14 We used the facts which were available to us, but there was a
15 certain element of which was res ipsa loquitur. It looks like
16 something suspicious had happened here.

17 Judge Pohl apparently felt the same way because on
18 6 March 2018, in 555D, he ordered declarations from Secretary
19 of Defense James Mattis and Acting General Counsel William
20 Castle. He also invited declarations from Mr. Rishikof and
21 Mr. Brown.

22 Around 19 March 2018, AE 555E was filed which
23 demonstrated declarations from Mr. Mattis and Mr. Castle. For

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1 the first time, Mr. Castle offered three justifications for
2 the firing. The first was a management memorandum of
3 sometimes called 12, sometimes called 13 December 2017; a
4 teleconference with Admiral Kurt Tidd on 24 January 2018 which
5 included, among other things a request for updated imagery;
6 and, third, for failing to ensure coordination of a 26
7 January 2018 imagery flight by AVDET GTMO, A-V-D-E-T, a Coast
8 Guard Tenant Command at Guantanamo.

9 The evidence will show that all three of these
10 justifications were pretextual. In a nutshell, the evidence
11 will show that the policies proposed in the management
12 memorandum had been socialized with the Office of General
13 Counsel extensively, including between the week and -- within
14 the week before the submission and within a short time
15 afterward; that Mr. Castle asked Mr. Mattis to fire
16 Mr. Rishikof as early as 15 December 2018 -- the government
17 just referred to that as AE 555DD Attachment L -- that
18 Mr. Castle commissioned outside counsel to opine how he could
19 fire Mr. Rishikof without losing a motion to dismiss for
20 unlawful influence -- that's AE 555DD Attachment E -- that
21 Mr. Castle told the first candidate that he tried to recruit
22 to replace Mr. Rishikof that he needed to fire Mr. Rishikof
23 because of Mr. Rishikof's approach to pretrial agreements.

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1 And even broader, the memoranda that the government
2 has attached to its pleading in AE 555DD are littered with
3 references to the need for unity of effort and criticism of
4 unilateral decision-making, which are code words for the
5 convening authority acting with too much quasi-judicial
6 independence.

7 The evidence will show that the decision to fire
8 Mr. Rishikof and Mr. Brown was made long before the imagery
9 process of January 24th through 26th, 2018, but also that that
10 imagery was completely and properly coordinated. The real
11 reason for the firing is that the convening authority acted
12 with independence, a legal disagreement with the Office of
13 Chief Prosecutor and Office of General Counsel legal views.

14 In this respect, the situation bears a certain
15 resemblance to United States v. Lewis, 63 MJ 405, a CAAF case
16 from 2006 in which the government argued that requiring one
17 judge -- convincing one judge to recuse herself and replacing
18 her with another neutral judge was not unlawful influence.
19 The Court of Appeals for Armed Forces rejected that theory
20 relied heavily upon by the government today.

21 So the evidence that we intend to produce both today
22 through Lieutenant Newman and ultimately, if the military
23 commission grants, through the actual witnesses, that the

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1 government has asked -- has thought that it needs to
2 cross-examine, which I agree with -- what it will demonstrate
3 is that, in fact, this is not a question of merely pretrial
4 agreements, although that's an important factor; but instead
5 of a fundamental legal disagreement between the Office of the
6 Chief Prosecutor and, by extension, the Office of General
7 Counsel because Mr. Michael -- Deputy Associate General
8 Counsel Michael Vozzo essentially acts as a pivot between
9 those two organizations.

10 There were a number of directly legal strategies, one
11 of which the government just adverted to in its argument,
12 that -- where the prosecution and the convening authority
13 disagreed. One of those disputes shown on this slide at the
14 bottom in the bar -- I thought I was slowing down, I'm
15 sorry -- is a dispute, a legal dispute between the convening
16 authority and the Office of Chief Prosecutor over the approach
17 to the utility boat, and that will be described at some
18 length; the -- a running dispute throughout the summer and
19 early fall of 2017 over the role of Associate Deputy General
20 Counsel Vozzo and his dual role as being involved with the
21 prosecution and with the convening authority; the second
22 interlocutory appeal that the government took; and then
23 most -- least most flashily or most significantly, the dispute

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1 between the convening authority and the Office of General
2 Counsel over Attorney General Sessions' call to
3 Secretary Mattis and the pass-down of that on October 16th of
4 2017 in -- and I'll just show you here -- the call occurs on
5 October 13th of 2017, and then initially -- immediately
6 Mr. Rishikof and Mr. Brown are called on the carpet on October
7 16th of 2017.

8 The significance of this in Mr. Castle's decision to
9 fire Mr. Rishikof and Mr. Brown is made apparent by the -- the
10 remarkable -- and I agree with government counsel there --
11 remarkable memoranda that the government has produced which
12 include the fact that Mr. Castle wanted to fire him on the
13 spot, except for the fact that he found out that Mr. Rishikof
14 had received permission to coordinate these pretrial
15 agreements with the Department of Justice from Deputy
16 Secretary of Defense Shanahan.

17 What we're actually -- what the military commission
18 is actually addressing right now is -- I'm sorry. Would you
19 go back one, LN1? Thank you.

20 What the government is actually addressing is a
21 relevance objection to the testimony of Lieutenant Newman.
22 Under Rule for Military Commission 402, evidence is generally
23 admissible. The Rules of Military Commission are rules of

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1 admissibility, a presumption of admissibility, not a
2 presumption of inadmissibility. I know that at some point
3 later in the trial, I might wish that that were not the case,
4 but that is the exact language of R.M.C. 402, and it shares a
5 certain relationship with Federal Rule of Evidence 401 on that
6 matter.

7 Rule for Military Commission 401 defines relevance in
8 the common way: "Making the existence of any fact that is of
9 consequence to a determination of the commission action more
10 probable or less probable than it would be without the
11 evidence."

12 The determination that the military commission is
13 making are found in AE 555P, R, and CC, and they're facts of
14 consequence in two respects. First, under Rule 703(b), the
15 expected testimony of the witnesses to demonstrate their
16 relevance and necessity under that rule; and, second, to -- as
17 a -- with respect to the government's matter of law argument,
18 to rebut the government's argument that there is no set of
19 facts under which the defense could prevail.

20 What the government has done in its argument today,
21 and what is perhaps the longest objection -- speaking
22 objection of all time, is to send out a straw person argument
23 and then make an attempt to demolish it. But relevance

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1 objections, of course, come on a case-by-case basis, usually
2 in question -- or answer-by-answer basis once the witness is
3 before the court. And given that this is a hearing before the
4 military judge alone, if there is an issue, the military judge
5 can give individual answers the weight they might deserve.

6 Now, the government's argument was essentially why
7 the military commission should skip far ahead in the process
8 and deny AE 055 [sic]. The government, of course, has the
9 luxury of picking through government files and producing or
10 not producing the documents that they choose. But both sides
11 have a right to present evidence, and that's both
12 constitutional under the due process clause of the
13 United States Constitution, and also statutory under the
14 Military Commissions Act, 10 U.S.C. 949j(1).

15 The government arguments -- argues extensively from
16 declarations, which is, in fact, a reason to produce the
17 declarants for cross-examination. The government made that
18 exact argument as recently as May of this year, that
19 defense declarations generate a right for them to
20 cross-examine.

21 I'll end my argument here with the government's last
22 argument, that it's simply too hard to cross-examine the
23 investigator who interviewed the witnesses, and that they

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1 should have access to the actual witnesses. I could not agree
2 more. If the Rules for Military Commission require -- allowed
3 the defense subpoena power, we would have subpoenaed witnesses
4 and brought them before the court. If it allowed deposition
5 power to the defense, we would have deposed them and brought
6 their transcripts before the court. If doesn't actually work
7 that way, whether I like it or not. The fact that I don't
8 like it is well documented in the AE 036 series, but I lost
9 that argument. And I do not -- the defense does not have
10 subpoena power.

11 In order to bring witnesses, to produce witnesses
12 before -- to have -- excuse me, I want to be specific.

13 In order to use the power of the government to
14 produce witnesses before the military commission, we have to
15 succeed in showing relevance and necessity under 703(b).

16 On this particular situation, Lieutenant Newman can
17 travel to Guantanamo and has traveled to Guantanamo with --
18 not under Rule 703(b). We did not have to have the -- the
19 power of the government to produce them. He is analogous
20 essentially to a voluntary witness who appears on behalf of
21 the defense or the prosecution.

22 The witness will testify with respect to the
23 statements of each of the witnesses that we have sought to

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1 call who have agreed to talk with us. I wanted to be clear
2 that a number of witnesses did not agree to speak with us,
3 particularly those at the Office of General Counsel.

4 The last -- so that ends my argument, but I do want
5 to orient you a little bit, because you said these were also
6 going to be in the nature of an opening statement. So let me,
7 in that case, orient you a little bit to who some of these
8 witnesses are, because it's going to be important in
9 understanding Lieutenant Newman's testimony to know who the
10 players are.

11 MJ [Col PARRELLA]: Mr. Connell, may I ask you a question?
12 I'm sorry to interrupt.

13 LDC [MR. CONNELL]: No, sir. You can interrupt at any
14 time. You're the judge.

15 MJ [Col PARRELLA]: So just to be clear, I made some
16 assumptions and I want to clarify that it's true. Lieutenant
17 Doug Newman is an investigator who's interviewed some of these
18 witnesses that you would like produced pursuant to these
19 motions?

20 LDC [MR. CONNELL]: That's correct, sir.

21 MJ [Col PARRELLA]: And his testimony relates to
22 conversations that he had with those individuals to the extent
23 that they are willing to talk to him?

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1 LDC [MR. CONNELL]: That is correct, sir.

2 MJ [Col PARRELLA]: Okay. And approximately how many of
3 these individuals that you've requested in these motions
4 agreed to speak to Mr. Newman?

5 LDC [MR. CONNELL]: Eighteen witnesses agreed to speak to
6 Mr. Newman. I believe that of the 22 that we requested, the
7 overlap between those two circles is 16 witnesses.

8 After we made these requests -- this is a continuing
9 investigation. After we made these requests, he has
10 interviewed two additional witnesses, which are not included
11 in our -- in the request that is before the military
12 commission. So I would say 16 out of the 22.

13 MJ [Col PARRELLA]: Thank you. You may proceed with -- if
14 you wanted to introduce ----

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

16 MJ [Col PARRELLA]: ---- to the commission who these are.

17 LDC [MR. CONNELL]: I just wanted to give you a little bit
18 of the wire diagram to show you how people are and who people
19 are. And the situation changes, of course, radically from the
20 beginning of January 2017 to the time of the firing in
21 January 2018 because of the change of administration.

22 So I have three slides to show you who people are.
23 The first is January 2017. Deputy Secretary of Defense Work

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1 is one of the witnesses. He was -- he holds the role which is
2 currently held by Mr. Shanahan. At that time, the -- he was
3 also the convening authority, because the -- because of the
4 unlawful influence which had been committed by Mr. Work
5 himself, the -- he was given the role of convening authority,
6 and at that time the chief of staff worked directly for him.
7 It changed later.

8 On the -- on the OGC side, which is the right-hand
9 side of the slide, the general counsel was Jennifer O'Connor.
10 She was the one who was involved in the process of plea
11 negotiations prior to the Trump Administration because of
12 a -- when Mr. Work briefed President Obama about the military
13 commissions, President Obama said, We need some solutions
14 here. That was passed down to Deputy Secretary of Defense
15 Work, and that was passed down to Jennifer O'Connor.

16 At that time, the Deputy General Counsel for Legal
17 Counsel, which is an unwieldy name but a very important
18 position, was Bob Easton, Robert Easton. That person is super
19 important, because the Deputy General Counsel (Legal Counsel)
20 is the supervisor of the chief prosecutor when the chief
21 prosecutor is an O-7 or above. At the time of January 2017,
22 he was the supervisor of the legal advisor to the convening
23 authority. That later changed.

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1 And then an important player in the -- in what
2 actually happened here is Associate Deputy General Counsel
3 Michael Vozzo, who has the -- I'm slowing down -- who has the
4 role of trial team coordinator. He is the link between the
5 prosecution, the Office of General Counsel, and the
6 intelligence community.

7 So it shifted around a little bit in the summer of
8 2017. We had a new Secretary of Defense, of course. By that
9 time, we had -- apparently I can't spell DEPSECDEF, but there
10 it is. We had a new DEPSECDEF, who is Mr. Shanahan. He is
11 the person that Mr. Rishikof coordinated with to get
12 permission to go to DOJ to talk about conditions of
13 confinement and other elements of pretrial agreements.

14 On the convening authority side, Mr. Rishikof was in
15 place by that time from April of 2017. And at that time, the
16 legal advisor, Gary Brown, had been moved from underneath the
17 Deputy General Counsel (Legal Counsel) to underneath the
18 convening authority, which makes sense that the convening
19 authority would supervise the legal advisor.

20 On the OGC side, Mr. Castle, the declarant upon whom
21 the government relies extensively, was in the position of
22 Acting General Counsel, having replaced Jen O'Connor. There
23 were a number of deputy general counsel underneath Mr. Castle

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1 who were involved in the process, the socialization process of
2 the management memorandum. And then Mr. Easton was still in
3 place as Deputy General Counsel for Legal Counsel.

4 Changes one more time and there's only one change in
5 this slide. The changes on the slides are shown in color. So
6 the one change on the slide is that in late 2017, Mr. Easton
7 was replaced by the Deputy General Counsel (Legal Counsel)
8 which Mr. Newman -- that is the reason why both of -- both
9 Mr. Easton and Mr. Newman are on our witness request list
10 because there was an overlap when that position changed, that
11 critical position changed.

12 These people, Mr. Easton and Mr. Vozzo, are the
13 people that Mr. Castle refers to in his declaration when he
14 says that, "I asked around and people told me bad things about
15 Mr. Rishikof." That's Mr. Easton and Mr. Vozzo.

16 So that's my opening statement. We would now tender
17 Lieutenant Newman as a witness on these three motions. You
18 can cut the feed when convenient.

19 MJ [Col PARRELLA]: Mr. Connell, the commission is going
20 to allow you to call Lieutenant Newman, so you may go ahead
21 and do so.

22 LDC [MR. CONNELL]: Sir, to be honest, I don't know the
23 procedure, but I understand he is in the radio room. So do I

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1 say, I call Lieutenant Newman?

2 MJ [Col PARRELLA]: He's on his way.

3 LDC [MR. CONNELL]: Very good. Thank you.

4 CP [BG MARTINS]: Lieutenant, if you would proceed to the
5 witness stand, raise your right hand for the oath.

6 LIEUTENANT DOUGLAS R. NEWMAN, U.S. NAVY, was called as a
7 witness for the defense, was sworn, and testified as follows:

8 **DIRECT EXAMINATION**

9 **Questions by the Chief Prosecutor [BG MARTINS]:**

10 Q. Will you state your full name for the record.

11 A. Douglas R. Newman.

12 Q. And your grade?

13 A. Lieutenant, United States Navy.

14 Q. And your unit of assignment?

15 A. I'm a military investigator assigned to the Military
16 Commission's Defense Organization, sir.

17 Q. And that's located where?

18 A. The National Capital Region.

19 CP [BG MARTINS]: Okay. Great. Your witness.

20 **Questions by the Assistant Defense Counsel [Capt Andreu]:**

21 Q. Good afternoon.

22 A. Good afternoon, Captain.

23 Q. Lieutenant Newman, today I'd like to talk to you

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1 about your investigation into the firing of Mr. Rishikof as
2 convening authority and Mr. Brown as legal advisor. Let's
3 first start, though, by talking a little bit about your
4 qualifications.

5 Are you a Reservist in the United States Navy
6 currently serving on active duty orders?

7 A. I am.

8 Q. Is this your first time on active duty?

9 A. It is not.

10 Q. Is this your first time mobilized as a Reservist?

11 A. No, sir.

12 Q. Can you tell us about your previous mobilizations?

13 A. Yes. In 2005 and 2006, I was a member of a Seabee
14 regiment attached to the Second Marine Expeditionary Force
15 deployed to Fallujah, Iraq, as part of the ground combat
16 element. My duties were to conduct antiterrorism force
17 protection operations in support of Marine Corps combat
18 operations.

19 Q. Now, when were you activated for this assignment?

20 A. January of this year.

21 Q. What is your civilian occupation?

22 A. I'm a law enforcement officer.

23 Q. And how long have you been a law enforcement officer?

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1 A. January will be 23 years.

2 Q. Okay. So I'm not going to ask you for everything
3 over the course of your 23-year career, but can you tell us a
4 little bit about your education and training?

5 A. Sure. Over my career, I've been fortunate enough to
6 have attended numerous courses and schools, everything from
7 the basic police academy, patrol operations, criminal
8 procedure, laws of arrest, search and seizure, investigative
9 courses, all the way up to management, supervision, and
10 leadership courses within law enforcement. Predominantly, I
11 hold a bachelor's of science in criminal justice
12 administration, I'm a graduate of Northwestern University's
13 School of Police and Staff Command, and I've graduated the FBI
14 National Academy.

15 Q. What are some of the positions that you have held
16 over the course of your career?

17 A. Very fortunate career. Everything from standard
18 uniformed patrol to specialized crime units, investigative
19 units at the local, regional, state, and federal level, to
20 include task forces, administrative assignments to include
21 internal affairs investigating officer misconduct, significant
22 uses of force, officer-involved shootings, and I've held
23 positions at the officer training supervisor, sergeant, and

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1 commander level.

2 Q. Over the course of your career, have you gained
3 experience in interviewing witnesses?

4 A. I have.

5 Q. How many interviews do you think you have conducted?

6 A. I can't give you an exact number, but it's been a
7 lot. Numerous.

8 Q. Hundreds?

9 A. That's fair to say, yes, sir.

10 Q. What is your current title?

11 A. Excuse me, Captain. I'm currently a police commander
12 within my civilian police agency, and my title is Commander of
13 the Criminal Investigations Division.

14 Q. Can you explain for us what that means, what you do?

15 A. Sure. Within my agency, for lack of a better term,
16 I'm the Commander of the Detective Bureau. I'm in charge of
17 day-to-day operations to include supervision of the detective
18 sergeants, detective supervisors, detectives, task force
19 officers, civilian staff assigned to the Criminal
20 Investigations Division. That includes operations plans,
21 administrative actions, personnel decisions, overseeing our
22 department's asset seizure forfeiture funds. I'm the
23 commanding officer of the -- of all the activities of the

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1 Detective Bureau.

2 Q. Outside from your civilian career, how long have you
3 served in the military?

4 A. Approximately 19 years.

5 Q. Were you enlisted prior to becoming a commissioned
6 officer?

7 A. I was.

8 Q. Can you tell us a little bit about your military law
9 enforcement career.

10 A. Yes, Captain. So I'm designated as a Naval Security
11 Forces officer, which would be the equivalent of being
12 branched MP in the Army or Marine Corps. I've held
13 assignments in the Reserve capacity as operations officer,
14 executive officer, and commanding officer of Naval Reserve
15 Security Forces units.

16 My enlisted background, prior to being commissioned,
17 I was a master-at-arms; that was my MOS, my job field, which
18 is the equivalent of military police. I was -- my last rank
19 was master-at-arms chief petty officer, E-7, where I held the
20 position of senior enlisted leader for Naval Security Forces
21 unit. And then the majority of my background was from the
22 expeditionary warfare community, predominantly the Seabees,
23 and I've held positions as company, battalion, and regimental

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1 master-at-arms.

2 Q. I can't help but notice that there is a component on
3 your uniform that appears to be a badge. Can you tell us
4 about that?

5 A. This is the U.S. Navy Security Forces badge.

6 Q. Is the wearing of that badge required?

7 A. If you're an enlisted member rated as a
8 master-at-arms, qualified as a master-at-arms, or a security
9 forces officer qualified as a security forces officer in the
10 Navy, it is a mandatory uniform component.

11 Q. Let's talk a little bit about your current tasking.
12 Which defense team are you detailed to?

13 A. I'm currently assigned to the al Baluchi defense
14 team.

15 Q. And who's learned counsel on team al Baluchi?

16 A. Mr. James Connell.

17 Q. Did Mr. Connell task you with investigating the
18 firing of Mr. Rishikof as convening authority and Mr. Brown as
19 legal advisor?

20 A. Yes, Captain.

21 Q. What did he ask you to do?

22 A. Well, originally I joined the team in January.
23 Shortly thereafter, he approached me and he asked me to look

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1 into the facts and circumstances of a Coast Guard overflight
2 that took place over the Expeditionary Legal Complex, ELC. In
3 doing so, my fact-finding, my information-gathering expanded
4 into the greater investigation of the firing of the convening
5 authority and his legal advisor.

6 Q. As part of that investigation, have you interviewed
7 witnesses?

8 A. Yes.

9 Q. When you would speak to witnesses, how would you
10 identify yourself?

11 A. I would identify myself as a naval officer assigned
12 to the Military Commissions Defense Organization, and then I
13 would explain what the mission of MCDO was, the acronym you
14 use for the Military Commissions Defense Organization.

15 I tried to make it as standard as possible. The
16 majority of the time I introduced myself over e-mail based on
17 the position and the rank of the individual I was requesting
18 to speak to, and to the effect of MCDO is the arm of the
19 Department of Defense charged with defending or responsible
20 with defending the rule of law, and in doing so, responsible
21 for -- pardon me -- responsible to provide legal counsel for
22 the accused perpetrators of the 9/11 attacks.

23 Q. Did you explain that on every single interview?

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1 A. Not every single one, not like that, I can't testify
2 to. But on every single interview, I identified myself as an
3 investigator from the Military Commissions Defense
4 Organization.

5 Q. Were your interviews conducted in person or over the
6 phone?

7 A. Depending on who I interviewed, it was both
8 telephonically and in person.

9 Q. So some were over the phone and some were in person?

10 A. Yes.

11 Q. For the in-person interviews, were you always in
12 uniform?

13 A. Yes.

14 Q. Let's turn now and talk a little bit about your
15 investigation and start with the hiring of Mr. Rishikof and
16 Mr. Brown.

17 As part of your investigation, did you speak with a
18 Mr. Robert O. Work?

19 A. I did.

20 Q. Who is Robert O. Work?

21 A. Mr. Work is a former Deputy Secretary of Defense.

22 Q. Which administration was Mr. Work a Deputy Secretary
23 of Defense under?

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1 A. Mr. Work served two administrations, predominantly
2 for the majority of his time the Obama Presidential
3 Administration, and then he also worked during the transition
4 and into the beginning of the Trump Presidential
5 Administration.

6 Q. How did you interview Mr. Work?

7 A. Telephonically.

8 Q. Did you speak to him about the hiring of
9 Mr. Rishikof?

10 A. I did.

11 Q. What did he tell you about that?

12 A. Well, he had to put it in kind of historical context.
13 He had told me that -- when I first mentioned Mr. Rishikof's
14 name, he asked me, you know, what happened with that, which
15 gave me an indication he wasn't really aware of the
16 circumstances of the termination.

17 He described Mr. Rishikof as tremendous. He said
18 things about him which led me to believe he had a high opinion
19 of him. He explained to me that January 21st was a date that
20 many people holding posts in the Obama Administration had
21 identified as a date in which they would depart, anticipating
22 the transition of a new administration.

23 At that point, the then-convening authority -- and

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1 I'm probably going to mispronounce this name, so I
2 apologize, ----

3 Q. Okay.

4 A. ---- Paul Oostburg Sanz had approached Mr. Work and
5 said that he was going to be part -- departing in that time
6 frame because of the end of the Obama Administration.

7 So he in conjunction with Jennifer O'Connor, who he
8 identified as the Department of Defense General Counsel, had
9 discussed a succession plan for the next convening authority.
10 The issue with that, according to Mr. Work, was that they
11 didn't know yet what the requirements of the Trump
12 Administration would be for convening authority.

13 So he had told me that not -- while it wasn't ideal,
14 that he was going to be the acting convening authority until
15 they could identify a candidate to become a permanent
16 convening authority, that being Mr. Work being the acting
17 convening authority.

18 Did I answer your question?

19 Q. You did.

20 A. Okay.

21 Q. Did he explain to you what was the issue with
22 selecting somebody from the Office of General Counsel?

23 A. Yeah, he did. Mr. Work explained to me that -- you

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1 know, he's -- as far as I know, he's not an attorney, and,
2 again, he said it wasn't ideal that he was the acting
3 convening authority. But in consultation with Ms. O'Connor,
4 they had thought that everyone in the -- anyone who was a
5 viable candidate in the Office of General Counsel in one way,
6 shape, or form had either a relationship with someone in the
7 prosecution, a professional relationship with someone in the
8 prosecution or the defense.

9 And the term he used was conflicted out. He had said
10 that they had come to the understanding that they really
11 couldn't find anyone who wasn't conflicted out, so he would be
12 that stopgap.

13 Q. And who becomes convening authority after Mr. Work
14 finished his time as acting convening authority?

15 A. Mr. Work had told me they had identified
16 Mr. Rishikof, that they were impressed with his background and
17 his knowledge on the issues. The term he used was that he had
18 met all of the Trump Administration requirements; that he had
19 met with Secretary Mattis, the current Secretary of Defense,
20 and that they were -- Mr. Work was at least happy to have
21 Mr. Rishikof in place at the time as the convening authority.

22 Q. Now, did you also talk to Mr. Brown about his hiring?

23 A. Yes, Captain.

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1 Q. Where -- and when I say Mr. Brown, is that Gary
2 Brown?

3 A. Correct, Gary Brown.

4 Q. Where did you interview Mr. Brown?

5 A. In the MCDO office spaces. At the National Capital
6 Region, our offices are located in Rosslyn, Virginia. I
7 interviewed him in person.

8 Q. Who was present for that interview?

9 A. Myself, Mr. Brown, and lead counsel, Mr. James
10 Connell.

11 Q. Did you ask Mr. Brown about his background?

12 A. I did. Mr. Brown, prior to being hired by the Office
13 of Military Commissions as the legal advisor for the convening
14 authority, was on the faculty at the Marine Corps University,
15 and then he spent a career in the Air Force. He retired as a
16 colonel, an O-6, a career attorney, was a JAG. Of his
17 assignments he listed several, but the one I took note of, I
18 believe it was his last one, he was the Staff Judge Advocate
19 for U.S. Cyber Command at Fort Meade.

20 Q. Who was hired first, Mr. Rishikof or Mr. Brown?

21 A. Mr. Brown was hired in, I believe, January of 2017,
22 and Mr. Rishikof then followed in April, I believe. I have
23 that in my report. From personal recollection, I believe it

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1 was January -- one was January and one was April.

2 Q. Both in 2017?

3 A. Yes, Captain.

4 Q. After speaking with Mr. Brown about his hiring, did
5 you have an opportunity to speak with him about his actual
6 time at the convening authority's office?

7 A. I did.

8 Q. What, if anything, could he tell you about the
9 relationship between the Office of the Convening Authority and
10 the Office of the Chief Prosecutor?

11 A. He described that relationship as -- I would
12 characterize it as not productive. He used the term to
13 describe the Office of the Chief Prosecutor as out of control.
14 Those were his words, not mine. But he didn't paint a
15 positive picture of that relationship.

16 Q. Did he talk to you about the Office of the Chief
17 Prosecutor's degree of influence?

18 A. He did. He had stated to me that he had felt that
19 the Office of the General Counsel was inappropriately
20 influenced by the Office of the Chief Prosecutor.

21 Q. Was he able to provide you any examples of this?

22 A. He did. He described to me an incident which
23 occurred in the summer of 2017. I've heard it -- I have heard

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1 it referred to as the fast boat incident. I had no knowledge
2 of it prior to starting this investigation, so he had to give
3 me kind of a historical snapshot.

4 And at the time, it's my understanding there was a
5 practice in place when an OMC flight came for a hearing, the
6 Coast Guard would provide a fast boat to transport the trial
7 judiciary, the judge specifically, from the airfield side to
8 the legal working side, the operational side of the island
9 where we are.

10 When the new JTF commander came on board -- I believe
11 that was Admiral Cashman -- that practice ceased. The
12 response -- and we're talking about two specific cases, if I
13 recall; one was the 9/11 cases and one was the USS COLE cases.
14 The response by the trial judiciary was to abate the cases,
15 was to cease legal proceedings at that time.

16 Q. With the cases abated, did Mr. Brown tell you whether
17 the convening -- whether the Office of the Convening Authority
18 and the Office of the Chief Prosecutor discussed possible
19 solutions?

20 A. They did. Mr. Brown had told me that the convening
21 authority did not support the use of a second boat, but the
22 Office of the Chief Prosecutor had submitted a motion to the
23 court stating otherwise, that the convening authority

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1 supported the use of a boat.

2 Q. What was it that the convening authority supported?

3 A. To separate -- to use the ferry that everyone else
4 uses, but to place the trial judiciary sequestered in a
5 vehicle; in a van, I believe it was.

6 Q. Now, you said that the Office of the Chief Prosecutor
7 submitted a filing saying that the convening authority did --
8 did support a separate boat?

9 A. I'm sorry. Can you repeat the question?

10 Q. Did you say that Mr. Brown said that the Office of
11 the Chief Prosecutor submitted a filing indicating that the
12 Office of the Convening Authority did support a separate boat?

13 A. According to Mr. Brown, that is what he related to
14 me.

15 Q. According to Mr. Brown, was that a truthful
16 representation?

17 A. No, not according to Mr. Brown. He felt that that
18 was a -- not a factual representation of the ----

19 MTC [MR. TRIVETT]: Objection, relevance.

20 MJ [Col PARRELLA]: Overruled.

21 Q. Now, following the filing of this motion, were there
22 any follow-on communications between the Office of the Chief
23 Prosecutor and the Office of the Convening Authority?

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1 A. Yes. Mr. Brown described to me a secure video
2 conference call, teleconference call, with the chief
3 prosecutor. The individuals he mentioned were the chief
4 prosecutor; the Convening Authority, Mr. Rishikof; and
5 Mr. Brown.

6 Q. What, if anything, could Mr. Brown tell you about
7 that conference call?

8 A. He did not paint a positive picture of that
9 conference call. He described it as being a -- it wasn't
10 constructive.

11 Q. Could you be more specific?

12 A. Well, again, I want to preface, this is according to
13 Mr. Brown, but he had said that the chief prosecutor was --
14 his actions were unprofessional, inappropriate, overly
15 aggressive. I believe the terms he used was that he showed
16 outward disrespect toward the convening authority, according
17 to Mr. Brown.

18 Q. Did Mr. Brown document this in any way?

19 A. He did.

20 Q. How so?

21 A. Well, after he had made these statements, I had asked
22 him if he had any evidence or proof of that. He had told me
23 that -- the term he used at the time was a -- a memo for

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1 discipline. Later it was referred to as a memo for record,
2 I believe. But he had told me that he had prepared a
3 memorandum for discipline to present through the convening
4 authority to the Office of the Chief Prosecutor. When he went
5 to his supervisor, Mr. Rishikof, Mr. Rishikof did not support
6 presenting that memorandum at the time.

7 Q. Did Mr. Brown provide you a copy of that memorandum?

8 A. What he provided me after the interview through
9 e-mail correspondence was what appeared to be a draft of the
10 memorandum, or he provided me a draft of a memorandum.

11 ADC [Capt ANDREU]: I'm now going to approach and show
12 trial counsel Appellate Exhibit 555KK. I've previously
13 provided them with a copy.

14 MJ [Col PARRELLA]: Okay. You may do so.

15 ADC [Capt ANDREU]: May I approach the witness?

16 MJ [Col PARRELLA]: You may.

17 MTC [MR. TRIVETT]: I object to this document, Your Honor.

18 MJ [Col PARRELLA]: Basis?

19 MTC [MR. TRIVETT]: Relevance, mostly. It was a draft
20 that was never used, so I don't know how it can be some
21 evidence of unlawful influence. It's just something that
22 Mr. Brown wrote as a draft that never got issued.

23 MJ [Col PARRELLA]: I understand your position, Trial

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1 Counsel, and I'll give it -- understanding it's a draft, I
2 will give it the consideration -- due consideration.

3 You may proceed.

4 Q. Lieutenant Newman, I've just provided you with what
5 is Appellate Exhibit 555KK. Do you recognize that?

6 A. Yes, sir.

7 Q. And is that the memorandum that we were just
8 discussing?

9 A. It appears to be at least a copy of it. It does look
10 familiar to me.

11 Q. How many pages is the memorandum?

12 A. I see one and -- just short of one and a half pages.

13 Q. What is the date?

14 A. Upper left-hand corner of what appears to be the
15 first page states Draft 3, August 17.

16 Q. I'm not going to ask you to read any of the language
17 out of that memorandum, but does it describe from Mr. Brown's
18 perspective the demeanor of the chief prosecutor on that call?

19 A. It does.

20 Q. You said the top of that memorandum says "Draft"?

21 A. Yes.

22 Q. I think you may have said this, but just to clarify,
23 did you say that Mr. Brown -- well, did Mr. Brown ever present

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1 that to the Office of the Chief Prosecutor?

2 A. According to Mr. Brown, no. He -- he presented it to
3 Mr. Rishikof, the convening authority, and Mr. Rishikof,
4 according to Mr. Brown, did not present that -- did not take
5 action on this.

6 ADC [Capt ANDREU]: May I approach the witness to retrieve
7 the document?

8 MJ [Col PARRELLA]: You may.

9 Q. Lieutenant Newman, other than this fast boat issue,
10 did Mr. Brown provide any other examples that included the
11 Office of the Chief Prosecutor?

12 A. Yes, he did. And it had to do with the attempted
13 charges -- or the charges on the Hambali case.

14 MTC [MR. TRIVETT]: Objection, relevance.

15 MJ [Col PARRELLA]: Defense Counsel, what is the
16 relevance?

17 ADC [Capt ANDREU]: Sir, the witness will testify that the
18 Office of the Chief Prosecutor attempted to submit charges to
19 Mr. Brown on the Hambali case; that those charges were sent
20 back to the Chief Prosecutor; that the Office of the Chief
21 Prosecutor was upset or unhappy about that. And that goes to
22 the motive on behalf of the Office of the Chief Prosecutor in
23 this case.

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1 MJ [Col PARRELLA]: Okay. Understanding that's a separate
2 commission, how is that relevant to influence in this
3 commission?

4 ADC [Capt ANDREU]: Your Honor, there will be evidence
5 that the Office of the Chief Prosecutor had influence over the
6 Office of General Counsel, and that even though these Hambali
7 charges come from a separate case, the Office of the Chief
8 Prosecutor was upset with Mr. Brown about those charges, who
9 was -- who obviously is the person who was, in fact, fired.

10 MJ [Col PARRELLA]: Okay. I'm going to let you ask one
11 question on this, and then let's go ahead and move on. Go
12 ahead and repeat your question.

13 Q. Did Mr. Brown ----

14 ADC [Capt ANDREU]: May I ask a different question, sir?

15 MJ [Col PARRELLA]: You may. You may.

16 Q. Did Mr. Brown describe for you the reaction by the
17 Office of the Chief Prosecutor when the Hambali charges were
18 not forwarded?

19 A. He did. There was two instances, my understanding,
20 according to Mr. Brown. The first was the charges were
21 submitted but there was an evidentiary issue with the charges.
22 Mr. Brown informed me that that was within the scope of the
23 legal advisor to examine the charges, and he sent them back

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1 because of the issue.

2 They were then attempted to be -- and this is my
3 term -- refiled. I don't know the commission's term for it,
4 but resubmitted. This time, they were not -- from what I
5 understand, the issue was the evidence submitted with it
6 wasn't appropriately organized to correspond with the charges,
7 the appropriate charges, and there wasn't a memorandum of some
8 sort, a verification, that is required to prove coordination
9 through the Office of the Director of National Security --
10 excuse me, National Intelligence, ODNI.

11 The second time the charges were rejected, the Office
12 of the Chief Prosecutor was not pleased with that and felt
13 that it was Mr. Brown's responsibility to have the appropriate
14 memorandum that I just referenced and the organization of
15 the case, and Mr. Brown described that as creating an air of
16 resentment and tension between the two entities.

17 Q. So aside from the fast boat issue and the Hambali
18 issue, did Mr. Brown provide any final example?

19 A. He did. He had told me about a member of the Office
20 of the General Counsel, who I believe was either an associate
21 deputy or a deputy counsel, by the name of Vozzo, Mr. Vozzo.
22 He had told me that the Office of the Chief Prosecutor, the
23 Chief Prosecutor, would openly make comments that Mr. Vozzo

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1 was an invaluable part of his team and he was a link to the
2 intelligence community.

3 I asked Mr. Brown, you know, the relevance of that,
4 and he had told me that during hearings, during the commission
5 hearings, that Mr. Vozzo had access to the convening authority
6 building or berthing, the lodging where they stay, and the
7 office spaces. From the office spaces, Mr. Vozzo, according
8 to Mr. Brown, would view commission proceedings and would make
9 open statements that just were disparaging, critical of both
10 members of the prosecution and the defense. Mr. Brown
11 had ----

12 MTC [MR. TRIVETT]: I'm going to object at this point.
13 We're at double hearsay at this point.

14 MJ [Col PARRELLA]: Overruled.

15 A. Mr. Brown then -- I'm sorry. I lost my train of
16 thought. Give me one moment.

17 Mr. Brown had told me about the incident in the
18 office spaces of the convening authority. Because --
19 according to Mr. Brown, because Mr. Vozzo was making these
20 critical statements, Mr. Brown informed me he felt that that
21 would jeopardize the perception of the independence of the
22 Office of the Convening Authority, and he just didn't feel it
23 was appropriate, so he had barred Mr. Vozzo from access to

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1 both the lodging and the office spaces of the convening
2 authority.

3 Q. Let's move on to another topic and talk about the
4 lead-up to plea negotiations in this case. Did you interview
5 a Mr. Neil Eggleston?

6 A. Yes, sir.

7 Q. Who is he?

8 A. Mr. Eggleston was the White House Counsel to
9 President Obama.

10 MTC [MR. TRIVETT]: Objection to this line of testimony.
11 It has no temporal relevance to the issue before the
12 commission.

13 MJ [Col PARRELLA]: Give me one moment, please.

14 Trial Counsel, taking a look at the proffer that's
15 provided within Appellate Exhibit 555CC, in other words, the
16 proffer of what former White House Counsel Neil Eggleston
17 would say, I mean, I understand your objection on relevance,
18 but do you have any reason to -- that this proffer is not
19 true?

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

21 MJ [Col PARRELLA]: Okay. Let's go ahead and move on.

22 ADC [Capt ANDREU]: Move on from Mr. Eggleston or ----

23 MJ [Col PARRELLA]: Correct.

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1 ADC [Capt ANDREU]: May I be heard on the objection?

2 MJ [Col PARRELLA]: You may.

3 ADC [Capt ANDREU]: Your Honor, it's our position that one
4 of the actual reasons for the termination in this case was
5 Mr. Rishikof pursuing plea deals. In order to fully
6 understand that, it's important to understand the context, the
7 lead-up to pursuing a plea agreement in this case. And to
8 understand that, it's important for the military judge to
9 understand what was happening at the end of the Obama
10 Administration as compared to what Mr. Rishikof was attempting
11 to accomplish.

12 MJ [Col PARRELLA]: Is this witness going to tell me
13 anything other than what's already in the defense's proffer?

14 ADC [Capt ANDREU]: Can I have a brief moment?

15 MJ [Col PARRELLA]: You may.

16 ADC [Capt ANDREU]: Yes, sir. There is one fact that's
17 not in the proffer. When we provided that -- at the time we
18 provided the proffer, we had not yet interviewed
19 Mr. Eggleston.

20 MJ [Col PARRELLA]: Go ahead. You can go ahead and ask
21 that fact that you're referring to, if the question is related
22 to that fact.

23 Q. Lieutenant Newman, could Mr. Eggleston tell you

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1 generally about the -- strike that.

2 Did Mr. Eggleston tell you about a meeting concerning
3 the military commissions in which President Obama was present?

4 A. Yes. Yes. So he -- actually it was more than one
5 meeting, according to Mr. Eggleston. At that meeting, he had
6 mentioned that the President of the United States was there,
7 Mr. Eggleston was there, Mr. Work was there, and Ms. O'Connor,
8 the General Counsel for the Department of Defense, was there.

9 The same meeting was -- I can't verify it's the same
10 meeting, but Mr. Work described a very similar meeting, and
11 the -- Mr. Eggleston described the President as being -- and
12 I'm trying to search -- I'm pausing as I'm trying to search
13 for the exact term, but something to the effect of being
14 seriously aggravated or agitated on several issues dealing
15 with the commissions. The cost was an issue, the protracted
16 nature of it, the perception that there wasn't progress.

17 So in that meeting, the instruction was to find paths
18 forward, go -- go find ways that we can kind of get this
19 going.

20 Q. Who was that instruction given to?

21 A. Mr. Work.

22 Q. You talked earlier about your interview of Mr. Work.

23 Did you also talk to him about a meeting with the President?

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1 A. I did. You know, as I stated earlier, I can't
2 positively identify that they're both talking about the same
3 meeting, but the descriptions were -- you know, Mr. Work
4 described Mr. Obama as being shocked at the cost of the
5 commissions and was even more shocked, according to Mr. Work,
6 when Mr. Work advised the President that the cost of the
7 commissions would increase 20 to 25 percent if moved to the
8 trial phase, and that the result of that meeting was, go find
9 paths forward. Go find ways that we can -- options that we
10 can move this along.

11 I asked Mr. Work about what time it was to try to
12 identify it, and he said it was around the time where the
13 President was making public statements about the closure of
14 Guantanamo Bay.

15 Q. Are you aware if -- are you aware if Mr. Work then
16 gave Mr. Rishikof any direction?

17 A. I am. According to Mr. Work, he did. He told
18 Mr. Rishikof to proceed forward with trying to find options on
19 how to move the commissions forward.

20 Q. Would that include potential plea agreements?

21 A. It's my understanding, yes, Captain.

22 Q. Why would Mr. Work be giving Mr. Rishikof these sort
23 of marching orders if Mr. Rishikof was a Trump Administration

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1 appointee?

2 A. I asked Mr. Work the same question because, you know,
3 the times didn't match up. Mr. Work had told me that -- the
4 term he used was no harm, no foul. He said that the next --
5 his replacement, the next Deputy Secretary of Defense, was
6 most likely going to run into the same issues, the same
7 problems with commissions would become apparent. And I'm
8 paraphrasing what he told me. So his -- his words were, "No
9 harm, no foul. The next guy was going to need this, so I told
10 Harvey, Mr. Rishikof, to proceed on, to press on."

11 Q. Now, did Mr. Work tell Mr. Rishikof who to report to
12 concerning plea negotiations?

13 A. Yes. According to Mr. Work, he had advised
14 Mr. Rishikof to report directly to him on this issue.

15 Q. Did he tell you why?

16 A. So this came up during our telephonic interview, and
17 just to -- I mean, it was very relevant to my scope of the
18 investigation. So then he later followed up with it in -- on
19 e-mail correspondence. And the way he described it was that
20 this was a very highly political, highly sensitive matter, and
21 that he didn't -- his words, he didn't want a lot of chatter
22 within the department. He wrote that to me after the
23 interview. And that it had to be, you know, dealt with in a

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1 small circle while they were socializing ideas before they
2 actually had finalized ideas, so he wanted -- because it was
3 effect -- you know, since this was an Executive-level issue,
4 he only -- he wanted the convening authority to report
5 directly to him.

6 Q. Aside from Mr. Work, did you speak to someone named
7 Ms. Colleen Kelly about plea negotiations while Mr. Rishikof
8 was convening authority?

9 A. I did.

10 MTC [MR. TRIVETT]: Objection, relevance.

11 MJ [Col PARRELLA]: One moment, please.

12 Defense Counsel, did you say Colleen Kelly?

13 ADC [Capt ANDREU]: Yes, sir.

14 MJ [Col PARRELLA]: Is Colleen Kelly part of the proffers
15 that you provided?

16 ADC [Capt ANDREU]: No, sir.

17 MJ [Col PARRELLA]: Okay. You may proceed.

18 Q. Who is Colleen Kelly?

19 A. Ms. Kelly is a victim family member. She is a
20 co-founder of an organization; I believe it's called
21 9/11 Families for Peaceful Tomorrows. Her brother lost his
22 life in the -- one of the towers in New York City.

23 MTC [MR. TRIVETT]: Sir, I'm going to respectfully object

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1 on relevancy only because that's not a witness requested.

2 MJ [Col PARRELLA]: Yeah. So, Defense Counsel, tell me
3 what the relevance of this is.

4 ADC [Capt ANDREU]: Your Honor, this witness -- Lieutenant
5 Newman will be able to talk about what Ms. Kelly told him,
6 which involves efforts that were being made between some
7 victim family members and the convening authority to pursue
8 pleas.

9 While she is not currently on our witness list, this
10 is an ongoing investigation. She is someone that we have
11 spoken to. And for purposes of judicial economy, we would ask
12 that you allow Lieutenant Newman to testify as to what she
13 told him.

14 MJ [Col PARRELLA]: Trial Counsel?

15 MTC [MR. TRIVETT]: Ultimately, these are witnesses to try
16 to establish unlawful influence by the Secretary of Defense
17 and the Acting General Counsel. The victim family members'
18 activities, whatever they may be, and we respect all of their
19 activities, has nothing to do with unlawful influence. I
20 don't understand the relevance of this testimony as to this
21 motion whatsoever.

22 MJ [Col PARRELLA]: Yeah, frankly, at this point, neither
23 do I. Defense Counsel, I'll give you one last opportunity to

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1 explain where you're going with this.

2 ADC [Capt ANDREU]: Yes, sir. So it's our position that
3 the reasons offered for the firing of the convening authority
4 are a pretext and that the actual reason that he was fired is
5 because pleas were being pursued. This will be actual
6 evidence of the fact that pleas were, in fact, being pursued.

7 MJ [Col PARRELLA]: Objection is sustained. Let's move
8 on.

9 Q. Lieutenant Newman, let's move and talk about the 12
10 or 13 December 2017 memorandum, sometimes called or referred
11 to as the management memorandum. Are you familiar with that?

12 A. I am.

13 Q. What is it generally?

14 A. It's -- and to be clear, I've heard it referred to on
15 both dates. Because of the copies challenging, in my reports,
16 just for the record, I refer to it as the 12 December
17 memorandum, I believe. And to answer your question, Captain,
18 it's a memorandum that was submitted by Mr. Rishikof to the
19 current Deputy Secretary of Defense, Mr. Patrick Shanahan,
20 describing the paths forward or courses of action moving
21 forward, COAs.

22 Q. Are you also familiar with a separate memorandum
23 titled the "Rescission to Change 1"?

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1 A. I am.

2 Q. What is that?

3 A. That's a 2015 memorandum that was the result of a
4 policy change by the then-Deputy Secretary of Defense,
5 Mr. Work. It was signed by Mr. Work.

6 Q. Were you able to speak to Mr. Work about that
7 memorandum?

8 A. I did.

9 Q. What did he tell you?

10 A. So I explained to Mr. Work that one of the reasons
11 provided for the termination of the convening authority was
12 something that he had written and submitted in one of his own
13 memorandums. I reminded him I believe over the phone -- I
14 read him a passage from it and he said he remembered it. I
15 asked him if he could give me background into why he wrote it.

16 So he described for me in 2015, in an effort to
17 expedite the commissions, to move them along, he was given
18 guidance, advice from the then-convening authority and I
19 believe through my own recollection -- I'd have to refer to my
20 reports -- it was a retired major general by the name of
21 Vaughn Ary.

22 So Major General Vaughn Ary was advising Mr. Work, he
23 implemented a change in an attempt to expedite the legal

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1 process. That change was to order the trial judiciary to the
2 island, to Guantanamo Bay, until the end of the legal
3 proceedings, until the end of the trials. Mr. Work told me
4 that was met with broad resistance, and he eventually had to
5 revoke that. And the vehicle to revoke that was the Recission
6 of Change 1, the 2015 memorandum that you just referenced.

7 LDC [MR. HARRINGTON]: Excuse me, Judge? Judge?

8 MJ [Col PARRELLA]: Mr. Harrington.

9 LDC [MR. HARRINGTON]: My client is requesting a break for
10 prayer, Judge.

11 MJ [Col PARRELLA]: Okay. How long do you anticipate you
12 will need, Mr. Harrington?

13 LDC [MR. HARRINGTON]: Between 10 and 15 minutes, Judge.
14 4:30, I guess, is the prayer time.

15 MJ [Col PARRELLA]: All right. We will go ahead and take
16 a 15-minute recess and reconvene here -- I'd like to be
17 precise on this -- at 1640. The commission is in recess.

18 [The R.M.C. 803 session recessed at 1625, 11 September 2018.]

19 [The R.M.C. 803 session was called to order at 1641,

20 11 September 2018.]

21 MJ [Col PARRELLA]: This commission is called back to
22 order. All parties present when the commission last recessed
23 are again present.

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1 CP [BG MARTINS]: Your Honor, Mr. Ryan stepped out and
2 was -- with the commission's permission would come in in a
3 couple of minutes.

4 MJ [Col PARRELLA]: That's fine. Thank you, General.
5 Defense Counsel, you may continue.

6 ADC [Capt ANDREU]: Thank you, sir.

7 [Lieutenant Douglas R. Newman, U.S. Navy, resumed his seat on
8 the witness stand.]

9 **DIRECT EXAMINATION CONTINUED**

10 **Questions by the Assistant Trial Counsel [Capt ANDREU]:**

11 Q. Lieutenant Newman, when we left off, we were talking
12 about a portion of your interview with Mr. Robert Work and you
13 said that he explained to you that the Recision to Change 1
14 was the vehicle for rescinding the requirement that the trial
15 judiciary would have to move down to GTMO; is that correct?

16 A. Yes, sir.

17 Q. Did you speak to Mr. Work about the allegation that
18 the management memorandum violated the Recision to Change 1?

19 A. I did. Mr. Work told me --

20 MTC [MR. TRIVETT]: Objection, calls for a legal
21 conclusion, and hearsay.

22 MJ [Col PARRELLA]: Overruled.

23 A. Mr. Work had told me that his 2015 memorandum would

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1 not have applied to Mr. Rishikof.

2 Q. Did he tell you why?

3 A. He -- yes. He both told me over the phone and, I
4 believe, in the follow-up e-mail he sent me. He had told me
5 that for -- the first reason was because Mr. Rishikof was two
6 convening authorities removed from the convening authority in
7 which that memorandum was implemented.

8 The second reason was because he gave direct
9 instructions to the then Convening authority, Mr. Rishikof, to
10 report only to him on paths forward on that particular
11 sensitive issue. Within the paths forward included the
12 suggested reorganization, the personnel reorganization of OMC.

13 Q. Did you say that Mr. Work followed up with an e-mail?

14 A. Yes, Captain, I did.

15 ADC [Capt ANDREU]: Your Honor, may I approach trial
16 counsel?

17 MJ [Col PARRELLA]: You may.

18 ADC [Capt ANDREU]: I want to show trial counsel Appellate
19 Exhibit 555LL (AAA Sup). I've previously provided them with a
20 copy.

21 For the convenience of the CISO, this document has
22 been submitted for review. It is CISO Exhibit 31. May I have
23 the feed to the document camera?

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1 MJ [Col PARRELLA]: You may.

2 Q. Lieutenant Newman, can you see what is now on the
3 document camera?

4 A. I can.

5 Q. Is this the follow-up e-mail from Mr. Robert Work
6 that you just discussed?

7 A. It appears to be, yes, sir.

8 Q. Could you please read just his response portion for
9 us.

10 A. "Redacted thanks. So to recap. After the judge
11 forced me to rescind change 1, the memo made clear that if the
12 CA had a formal recommendation to change some aspect of the
13 military commissions, he would give everyone in the Department
14 a chance to weigh in before doing so.

15 But things changed considerably since the memo. The
16 President had asked us to reduce costs. We also discussed how
17 long things were taking, and in the wake of the fervor over me
18 asking the judges to move to GITMO, were discussing ways to
19 try to speed things along that would not spark a backlash. I
20 spoke to Harvey at length about this. And no -- and on this
21 issue, I did not want a lot of chatter in the Department.

22 "If it is the case that the DSD asked Harvey to
23 provide options on the way ahead, I would not have expected

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1 him to discuss this across the department, given the political
2 ramifications. And if he had not discussed things with the
3 GC, I would have simply called a meeting to discuss."

4 ADC [Capt ANDREU]: Thank you. I'm done with the document
5 camera at this time.

6 Q. Let's talk about what efforts, if any, Mr. Rishikof
7 and Mr. Brown took to coordinate with the Office of General
8 Counsel, and let's go back to your interview of Mr. Brown.

9 According to Mr. Brown, did Mr. Castle feel that the
10 convening authority was keeping the Office of General Counsel
11 informed?

12 A. According to Mr. Brown, no.

13 Q. In your interview of Mr. Brown, did the Attorney
14 General or the Secretary of Defense come up?

15 A. Yes, it did.

16 Q. In what context? Or just tell us about that.

17 A. Mr. Brown described a meeting -- I believe it was
18 called by Mr. Castle -- in which Mr. Castle informed Mr. Brown
19 that the Attorney General, Jeff Sessions, had contacted
20 Secretary Mattis inquiring about the status of pleas within
21 the military commissions.

22 Q. Was he able to provide you any details about that
23 call?

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1 A. He was -- I had asked him when he informed this -- in
2 the context of describing this meeting, I had asked him how he
3 was made aware of this phone call, and he said that Mr. Castle
4 had told him in the meeting.

5 He described -- he used the word angry and had told
6 me that the Attorney General had called the Secretary of
7 Defense out of a meeting with, quote, three and four stars,
8 indicating flag and general officers, that that's the extent
9 of what he knew about the phone call, other than it was
10 inquiring about pleas according -- according to Mr. Brown.

11 Q. And when you say -- when you refer to he was angry,
12 who was that?

13 A. I would assume it was the Attorney General.

14 Q. Did Mr. Brown tell you whether or not Mr. Castle held
15 a meeting based on that?

16 A. Yes. It was the meeting in which he was informed,
17 meaning -- "he" meaning Mr. Brown, was informed of the phone
18 call. And then it's my understanding there was a follow-on
19 meeting with Mr. Castle and Mr. Shanahan, the Deputy Secretary
20 of Defense.

21 Q. Just let me make sure I understand the sequence of
22 events. So Attorney General Sessions finds out that pleas are
23 being discussed in the 9/11 case; is that right?

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1 A. According to Mr. Brown, it is.

2 Q. And your testimony was that, in response to that, he
3 then contacts the Secretary of Defense?

4 A. That is what Mr. Brown related to me.

5 MTC [MR. TRIVETT]: Objecting based on this is four levels
6 of hearsay now. This is a conversation about what the
7 Attorney General told the Secretary of Defense, who told
8 Mr. Castle, who told Mr. Rishikof, which Mr. Brown heard.

9 MJ [Col PARRELLA]: I understand. The objection is
10 overruled. However, Counsel, I've got these facts, so
11 let's -- I don't need the recap. Let's move on.

12 ADC [Capt ANDREU]: Yes, sir.

13 Q. What happens at the meeting that General -- or that
14 Mr. Castle then holds?

15 A. Well, there was two. The first one was with
16 Mr. Castle. Mr. Brown told me an individual by the name of
17 Bob Easton, who I believe was the deputy general counsel at
18 the time, and Mr. Rishikof were there. Mr. Castle was
19 concerned that the Office of General Counsel was not made
20 aware of this. Mr. Brown and Mr. Rishikof responded by
21 saying, "We tried to inform you of this in a previous meeting,
22 but you didn't want to hear it."

23 And then they, according to Mr. Brown, provided

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1 electronic documentation of that meeting that occurred to
2 refresh Mr. Castle's memory. And the gist of it that
3 Mr. Brown told me was that Mr. Castle had said, "Moving
4 forward, you're going to -- you need to keep us in the loop.
5 You need to coordinate -- you need to coordinate with us."

6 Q. You mentioned that there was a Mr. Easton at that
7 meeting?

8 A. According to Mr. Brown, yes, sir.

9 Q. And again, who is he?

10 A. I believe from memory he is -- at the time, he was
11 the -- I think he was a deputy within the Office of General
12 Counsel.

13 Q. Did anything of note happen with Mr. Easton at that
14 meeting?

15 A. Either during or shortly after the meeting, Mr. Brown
16 told me that Mr. Easton made a comment to him, and the comment
17 was, quote, We own the commissions. Mr. Brown made note of
18 that, made that comment several times to me in the course of
19 our interview. I asked him why that was concerning, and he
20 said, you know, based on the context of the conversation,
21 it -- he felt that was an inappropriate comment.

22 Q. What, if anything, could Mr. Brown tell you about
23 efforts that the convening authority's office was taking to

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1 keep the Office of General Counsel informed?

2 A. The predominant method to keep them informed,
3 according to Mr. Brown, was a weekly -- it was either Thursday
4 or Tuesday, I'd have to look at my report -- 10:00 o'clock
5 video teleconference.

6 Q. Did Mr. Brown have any proof of this?

7 A. I asked him that question. He said that he did;
8 however, when he was terminated from the convening authority's
9 office, he had lost his NIPR, the unsecure government e-mail
10 platform, and he shortly thereafter received a government job
11 working in the Pentagon. He was -- he expressed frustration
12 to me, because he has a TS//SCI and he has SIPR access, but he
13 didn't have NIPR access at the time.

14 In preparation for this hearing, I contacted
15 Mr. Brown days before we left the Washington area to ask him
16 if he had received NIPR access. He said he finally had NIPR
17 access, but all of his e-mails had been deleted.

18 Q. Now, although he doesn't have -- or he wasn't able to
19 provide you anything based on his NIPR account, was he able to
20 provide you any documentation of coordination with the Office
21 of General Counsel?

22 A. He provided typed notes that had -- you know, several
23 pages of notes that referenced meetings with individuals

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1 within the Office of General Counsel regarding the issues.

2 ADC [Capt ANDREU]: May I approach trial counsel?

3 MJ [Col PARRELLA]: You may.

4 ADC [Capt ANDREU]: I'm going to approach trial counsel,
5 Your Honor, with Appellate Exhibit AE 555MM (AAA Sup) [SIC].
6 And I've previously provided them with a copy.

7 MTC [MR. TRIVETT]: Your Honor, I object to the tendering
8 of these notes based on foundation, certainly inquired with
9 the witness on Sunday. It's unclear what these notes are,
10 whether -- they may have been transposed from handwritten
11 notes. We don't have the handwritten notes. We're not sure
12 what notes were included, what notes were not included. This
13 is simply something that Mr. Brown wrote, and we lack a
14 foundation to appropriately examine the witness about them.

15 MJ [Col PARRELLA]: The objection is overruled. The
16 commission feels it can give it the appropriate weight given
17 that I'm looking at the same thing. It appears to be, you
18 know, handwritten notes. I'll allow the witness to attempt to
19 provide the context or foundation to the extent he can.

20 You may proceed.

21 MTC [MR. TRIVETT]: Just to clarify, sir, these are not
22 the handwritten notes. These are the typed notes. I have no
23 objection to the handwritten notes.

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1 MJ [Col PARRELLA]: I may not have the entire exhibit.

2 ADC [Capt ANDREU]: May I approach?

3 MJ [Col PARRELLA]: You may.

4 ADC [Capt ANDREU]: Your Honor, just to clarify, this was
5 my mistake. I incorrectly stated that this was Appellate
6 Exhibit 555MM (AAA Sup). In fact, it's AE 555MM.

7 MJ [Col PARRELLA]: Okay. The commission's ruling is the
8 same. The objection is overruled. Let's go ahead and
9 proceed.

10 ADC [Capt ANDREU]: Your Honor, this document has also
11 been submitted to the CISO for review. It is CISO Exhibit 39.
12 May I have the feed to the document camera?

13 MJ [Col PARRELLA]: You may.

14 Q. Lieutenant Newman, it's somewhat difficult to show
15 you all these pages on the document camera, but did you review
16 the notes that Mr. Brown provided you?

17 A. I did.

18 Q. Okay. Do the notes describe meetings with the Office
19 of General Counsel?

20 A. To the best of my memory, yes, Captain, they do.

21 Q. I would like to ask you about a couple of the entries
22 in particular. The 26 May ----

23 MJ [Col PARRELLA]: Hold on right there, Defense Counsel.

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1 These notes, as I understand them, are simply notes that were
2 provided to the witness by Mr. Brown; is that correct?

3 ADC [Capt ANDREU]: Yes, sir.

4 MJ [Col PARRELLA]: Are you intending to ask the witness
5 questions about what's contained in here?

6 ADC [Capt ANDREU]: I would ask him -- there are a couple
7 of portions that I would ask him to read the same way I did
8 with the e-mail earlier. I'm not asking him to speculate
9 or -- as to what anything in the notes means.

10 MJ [Col PARRELLA]: Okay. I think you've indicated that
11 these were the notes that were provided by Mr. Brown. You've
12 now put them up on the ELMO. I don't think we need to read
13 them in the commission.

14 So we've got those, so you're welcome to point out
15 something if you want to point it out; or if there's something
16 about the discussion that this witness had with Mr. Brown
17 about a particular note, you may ask that question. But we
18 don't need to just read what's already up on the screen.

19 ADC [Capt ANDREU]: Okay. I can move on, Your Honor.

20 MJ [Col PARRELLA]: Thank you.

21 ADC [Capt ANDREU]: Please cut the feed to the document
22 camera.

23 Q. Lieutenant Newman, let's switch gears and talk a

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1 little bit about the events leading up to the 26 January 2018
2 overflight of the ELC.

3 Did you interview someone named Michael McAndrew?

4 A. Yes.

5 Q. Who is he?

6 A. I hesitate because I'm trying to recall his exact
7 title. He is an Assistant Deputy Secretary of Defense.

8 Q. Did you also interview someone named Chad Schulken?

9 A. I did.

10 Q. Who is he?

11 A. He is a U.S. Senate staffer. I believe his official
12 title is -- I apologize -- Democratic clerk.

13 Q. Were both of those interviews conducted in person?

14 A. Yes, Captain, they were.

15 MTC [MR. TRIVETT]: Object to this line of testimony.
16 These witnesses were not requested in the motion.

17 MJ [Col PARRELLA]: Defense Counsel, what's the relevance
18 of these witnesses or of these individuals?

19 ADC [Capt ANDREU]: Your Honor, these witnesses would
20 testify as to meetings that occurred on Capitol Hill leading
21 up to the request for the aerial -- updated aerial imagery of
22 the ELC.

23 So they will be able to talk about the fact that the

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1 Office of the Convening Authority was meeting -- meeting on
2 Capitol Hill, that the topic of ELC expansion was discussed,
3 and that's why they're relevant.

4 MJ [Col PARRELLA]: Okay. But these witnesses, if I'm to
5 understand, they're not being requested by any of the motions
6 that are currently before the commission.

7 ADC [Capt ANDREU]: They are not currently -- yes, sir, to
8 answer your question, that is correct. However, as I stated
9 earlier, there are a couple of witnesses that we intend to
10 discuss today that, while not contained in the motions, may be
11 added. And again, for the purposes of judicial economy, we
12 would ask to discuss those witnesses now while Lieutenant
13 Newman is available.

14 MJ [Col PARRELLA]: Trial Counsel, what is your position
15 on this?

16 MTC [MR. TRIVETT]: The fact that there was a meeting in
17 Congress is not in dispute. It's also not necessarily
18 relevant. We're -- it's hard to follow this sometimes based
19 on the fact that we're arguing an unlawful influence motion
20 and then a motion to compel witnesses that would come and
21 testify pretty much about the same thing.

22 So we don't contest and never have contested the
23 imagery issue. I think there's ample information on the

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1 record already about this, and most of this is cumulative.

2 But again, if it's not for a witness they're
3 requesting, I'm unclear why Lieutenant Newman is testifying
4 about it on this issue.

5 MJ [Col PARRELLA]: Defense Counsel, I again appreciate
6 the issue of the judicial economy, but at the same time, none
7 of this stuff has been briefed, so neither the commission or
8 maybe the government hasn't had an opportunity to even know
9 what the proffer of expected testimony is. So let's stick
10 with witnesses that are currently before the commission.

11 Q. Lieutenant Newman, let's talk about an interview you
12 conducted of Wendy Kelly. Who is Wendy Kelly?

13 A. She is a -- I believe a deputy chief of operations
14 for the convening authority. I could be mistaken on her
15 title, though, Captain.

16 Q. Well, are you able to tell us roughly how long she's
17 worked for the Office of the Convening Authority?

18 A. According to Ms. Kelly, she's been associated with
19 the convening authority in one form or another since 2005.

20 Q. What, if anything, could she tell you about the need
21 for current imagery within the Office of the Convening
22 Authority?

23 A. She felt that it was a need. She was -- she was the

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1 one who asked for it directly to the convening authority. She
2 had told me that the convening authority had needed imagery
3 for some time. Her words, that it's a 10-year-old image.

4 Q. Did she tell you why it was needed?

5 A. Well, specific to the scope of my investigation, she
6 had told me that there was a series of three meetings at the
7 U.S. Capitol. Two of them focused predominantly -- my
8 understanding, focused on a 14-million-dollar reprogramming
9 request to expand the Expeditionary Legal Complex, the ELC.
10 She felt that current imagery was needed in the event she
11 needed it to brief Congress.

12 Q. Aside from that need for imagery, was she able to
13 talk to you at all about her work in the convening authority's
14 office with Mr. Brown and with Mr. Rishikof?

15 A. She did, yes.

16 Q. What did she tell you?

17 A. Well, I asked her about both gentlemen. She spoke
18 very highly of Mr. Rishikof. She said that she would work for
19 him again. At one point, I think that she'd asked me if I had
20 met him, and I said no, and she had described him as very
21 gregarious and friendly.

22 She commented about his connections in D.C., that he
23 knows -- a lot of people he's known in the national security

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1 community. Then later on in the interview, she had indicated
2 that he was unaware or naive of certain bureaucratic processes
3 within the Department of Defense.

4 Q. Did she talk to you at all about Mr. Brown?

5 A. I asked her about Mr. Brown. She initially did not
6 want to comment about Mr. Brown, and then later in the
7 interview, she made a statement to the effect of -- and this
8 isn't a direct quote, I'd have to look at my report -- but it
9 was to the effect of I don't know how an O-6 with so much
10 supposed experience thinks that he can go VFR-direct to the
11 Deputy Secretary of Defense. There are processes in place
12 that you just don't buck.

13 Q. Did she talk to you at all about her own frustrations
14 within the office?

15 A. Can you be more specific?

16 Q. As it relates to obtaining more current imagery.

17 A. Yes. She felt that having a 10-year-old image -- and
18 she used the term "10 years old" -- a 10-year-old image was --
19 she used the term "embarrassing" at one point, and she said,
20 you know, it makes us look stupid. "Stupid" was a term she
21 used.

22 She had told me that it was something that was needed
23 for some time.

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1 She had also told me that it is -- I don't know if
2 standard practice is the right word, but it was a regular
3 practice that when SOUTHCOM had a new combatant commander, a
4 new commander and a new SJA, that they would tour affected
5 tenant commands, tenant units at the National Capital Region.
6 When the current commanding officer of SOUTHCOM, Admiral Tidd,
7 did his tour of the convening authority spaces, he had asked,
8 "Hey, is there anything that anybody needs?" And according to
9 Ms. Kelly, she said, "Yes, we need new imagery."

10 She said that the need for imagery, though, was --
11 became more urgent and more expedited when there was this span
12 of congressional meetings regarding this 14-million-dollar
13 reprogramming.

14 Q. Going back now to your interview of Mr. Brown, did
15 you speak to him about the events leading up to the
16 overflight?

17 A. Yes, I believe I did.

18 Q. Was Mr. Brown able to tell you anything about
19 interactions between -- or communications between the
20 convening authority's office and SOUTHCOM?

21 A. Yes, he did.

22 Q. What did he tell you?

23 A. He depicted a conference call that occurred

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1 between -- with Mr. Rishikof, Mr. Brown, and Ms. Kelly and
2 Admiral Tidd, the Combatant Commander of U.S. Southern
3 Command, SOUTHCOM. He had told me that that conference call,
4 there were other predominant issues. I believe it was the --
5 two predominant issues. One was, it had to do with -- I don't
6 want to say real estate, but the construction issues related
7 to the Expeditionary Legal Complex. The other issue had to do
8 with, I think, VIP flights to Guantanamo Bay, reserving seats
9 on a VIP flight.

10 He said that the SOUTHCOM imagery picture was kind of
11 a tertiary lower-level request. They had brought it up to
12 Admiral Tidd. Admiral Tidd had made the comment -- I think
13 that it was asked, you know, do you have -- we need imagery.
14 Do you have imagery?" Admiral Tidd's response was -- and,
15 again, I'm paraphrasing; these are my words, but this is what
16 was related to be my Mr. Brown. Admiral Tidd's response was,
17 We don't have current imagery.

18 I pressed Mr. Brown on that and I had asked him if
19 Admiral Tidd had said no, indicated that resources couldn't be
20 used, and he was adamant that that wasn't the case.

21 Q. Well, did you ask Mr. Brown if Admiral Tidd forbid
22 taking aerial imagery?

23 A. I did. And I asked it very -- very similar to what

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1 you just said. His response was something to the effect of,
2 I'm a military guy. I'm a retired colonel. Do you really
3 think I would go around a four-star admiral? No, there's no
4 way I would do that. I asked him how -- if he had evidence of
5 that, if he had proof of that, and he said, you know, that
6 there was other people in the room, one; and, two, that if
7 Admiral Tidd had said that, he certainly would have made
8 it -- written that down in his notes.

9 Q. Did he tell you that he was taking notes during the
10 call?

11 A. Well, when he said he'd written it down in his notes,
12 I said, "Well, you know, do you have those notes?" At that
13 point, he produced a small, bound notebook, opened it up to
14 two pages that were -- had -- appeared to have handwriting on
15 both sides. One side, from what I recall, appeared to be a
16 handwritten kind of agenda for the conference call. The other
17 side appeared to be bullet points on the result of the
18 conference call.

19 I'm sorry, Captain. To answer your question, yes, he
20 had notes.

21 Q. Did he allow you to make a copy of those notes?

22 A. I asked -- this was during the in-person interview in
23 the Rosslyn office spaces. As soon as he showed me those

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1 notes, I asked if I could take possession of his notebook for
2 just a few minutes. I didn't take the photocopy, Mr. Connell
3 ended up doing it, because I was in the middle of a question
4 and answer period, but I did incorporate a color copy of those
5 notes into my overall case file.

6 ADC [Capt ANDREU]: Your Honor, may I approach trial
7 counsel?

8 MJ [Col PARRELLA]: You may.

9 ADC [Capt ANDREU]: I'm going to show trial counsel
10 Appellate Exhibit 555NN (AAA Sup). I've previously provided
11 them with a copy. This document has also been submitted to
12 the CISO for review. It is CISO Exhibit 38.

13 May I have the feed to the document camera?

14 MJ [Col PARRELLA]: You may.

15 Q. First of all, Lieutenant Newman, do you recognize
16 this?

17 A. I do.

18 Q. How are you able to recognize it?

19 A. On the lower -- as I look at it, on the lower
20 left-hand portion of the page is, I guess, a light orange or
21 pink note block. That is my handwriting identifying it as an
22 attachment to one of my overall case reports to this
23 investigation and those are my initials in the circle above

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1 the date.

2 Q. I'm sliding it over to the -- so we can see the
3 bottom right-hand corner. Do you see a section on the notes
4 that says, "TELECON ADM TIDD"?

5 A. I do.

6 Q. Can you tell us what the last handwritten line says
7 there?

8 A. It appears to say, "Asked about new photos."

9 Q. Did you talk to Mr. Brown about this portion of the
10 notes?

11 A. I did.

12 Q. And what did he tell you?

13 A. I asked him to confirm the reference of that, and he
14 did, asked -- that he asked Admiral Tidd -- or Admiral Tidd
15 was asked about new photos.

16 Q. Did he say anything about why it stops there?

17 A. Because there was nothing -- they did -- Admiral
18 Tidd's response was they didn't have current imagery.

19 Q. Did he tell you whether or not he would have written
20 more had Admiral Tidd forbid taking imagery?

21 A. Yes, sir. He was -- he was very clear on that.

22 Q. And that is that he would have added that ----

23 A. I'm sorry.

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1 Q. ---- correct?

2 A. Yes. He told me that -- I'd asked him -- I had asked
3 him, you know, "Do you have -- do you have proof, do you have
4 evidence that Admiral Tidd expressly did not forbid to launch
5 an aircraft, an air mission?"

6 And he said, "I -- I would have written it down if he
7 said no. I'm -- I'm still a military guy. I wouldn't go
8 around a four-star admiral."

9 And I said, "Do you have proof of that?" And he
10 says, "Well, I would have written that down if he would have
11 said no. That's something I definitely would have noted."
12 That was the gist of the back-and-forth conversation.

13 Sorry, I didn't fully understand your question,
14 Captain.

15 Q. No problem. Thank you.

16 ADC [Capt ANDREU]: That's all I have for the document
17 camera at this time.

18 Q. We're talking here quite a bit about Admiral Tidd.
19 Did you -- well, have you talked to Admiral Tidd?

20 A. I have not, not as of this date, no.

21 Q. Have you made attempts to speak with Admiral Tidd?

22 A. Yes, sir, I have.

23 Q. What have you done?

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1 A. Well, I'm a junior officer in the Navy, so I'm aware
2 even when you speak to a Combatant Commander with four stars,
3 there's a protocol to follow. I, through my own contacts
4 within the Navy, tried to establish either a flag aide or a
5 protocol officer, and I was unable to do so.

6 So I request -- I requested official travel and was
7 granted official travel to the Tampa Bay -- excuse me, to the
8 Miami area -- that's the headquarters of U.S. Southern
9 Command -- to attempt to locate a point of contact, not with
10 the intent to barge into an admiral -- a four-star admiral's
11 office.

12 I was given the name of a deputy executive officer,
13 who that night from Miami I e-mailed and requested --
14 identified myself, requested guidance on how to adhere to the
15 appropriate protocols to request an audience with Admiral
16 Tidd.

17 Q. Did that deputy executive officer respond to you?

18 A. He did. He -- Air Force Major Schafer, I believe is
19 the name. Major Schafer responded to me. He told me he was
20 on leave, but he forwarded it to the executive officer,
21 U.S. Army Colonel [REDACTED], I believe the name is, [REDACTED].

22 Colonel [REDACTED] responded -- and this all happened
23 within a period of about 24, 48 hours. It was relatively

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1 quickly via e-mail. Colonel [REDACTED] didn't respond directly to
2 me, I don't believe, but he did cc me. He forwarded that
3 e-mail to individuals that he referred to by their first
4 names. I was later able to identify those individuals as
5 [REDACTED] -- again, I may be mispronouncing the name -- and
6 Coast Guard Captain [REDACTED]. [REDACTED] is the deputy staff
7 judge advocate for U.S. Southern Command. Captain [REDACTED] is
8 the staff judge advocate for U.S. Southern Command. That's
9 where the correspondence stopped at that point.

10 Q. When you say that's where the correspondence stopped,
11 does that mean that neither [REDACTED] nor Captain [REDACTED]
12 responded?

13 A. Well, [REDACTED] did not respond. Captain [REDACTED]
14 eventually responded, but not directly to me.

15 Q. Let's talk about [REDACTED] first. Did you take any
16 further efforts to contact [REDACTED], the deputy SJA for
17 SOUTHCOM?

18 A. I did.

19 MTC [MR. TRIVETT]: Objection, relevance at this point. I
20 understand that there was a protocol he tried to go through,
21 but if ultimately he didn't get to contact or talk to
22 Mr. Tidd, I don't know why we're spending time on that.

23 MJ [Col PARRELLA]: What is the relevance of this, Defense

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1 Counsel?

2 ADC [Capt ANDREU]: Your Honor, Admiral Tidd is one of the
3 key witnesses that we are seeking to have produced, and we are
4 attempting to show the numerous and thorough attempts we have
5 taken -- that Lieutenant Newman has taken to speak to Admiral
6 Tidd for purposes of the proffer.

7 MJ [Col PARRELLA]: Objection sustained. Let's move on.

8 Q. Lieutenant Newman, although you were unable to speak
9 to Admiral Tidd, were you -- were you able to determine who
10 conducted the aerial overflight?

11 A. Yes.

12 Q. Did you speak to anyone at Coast Guard District 7 in
13 Miami?

14 A. I spoke to several Coast Guard personnel at
15 District 7.

16 Q. First of all, what is District 7?

17 A. This is a Navy guy's summary of it, so I could be
18 wrong, but District 7 is the command and control area of
19 responsibility for the Caribbean area of the U.S. Coast Guard,
20 more or less.

21 Q. Who was present for -- who did you interview at
22 District 7?

23 A. Commander [REDACTED], who is the deputy staff judge

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1 advocate. Captain [REDACTED], [REDACTED], who is the chief of
2 incident management, and Commander [REDACTED]. I believe his
3 title is air operations manager, but I could be wrong on that
4 title.

5 Q. Captain [REDACTED], you say that he was the chief of
6 incident management. Did he explain to you what that meant?

7 A. He did.

8 Q. What did that mean?

9 A. Basically all operations that occur within
10 District 7's AOR, area of responsibility, that has an
11 operational execution component to it, he is -- he coordinates
12 and oversees it.

13 MTC [MR. TRIVETT]: Sir, I'm going to object to the rest
14 of the line of questioning here. The fact that there was an
15 aerial flight isn't in dispute. Who exactly did it shouldn't
16 matter for the unlawful influence motion.

17 MJ [Col PARRELLA]: Defense Counsel, I notice that Captain
18 [REDACTED] is not on the witness -- or is it Captain [REDACTED],
19 [REDACTED]? They are one of your requested witnesses, I see. Is
20 that correct?

21 ADC [Capt ANDREU]: Yes, sir.

22 MJ [Col PARRELLA]: All right. Given that the government
23 has already represented that the facts in your proffer are not

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1 in dispute, what is it that you need to get out from this
2 witness?

3 ADC [Capt ANDREU]: Your Honor, there's quite a bit to
4 discuss as it relates to the Coast Guard. The -- there's
5 an -- one of the allegations from Mr. Castle in his
6 declaration is that this overflight was not properly
7 coordinated. Lieutenant Newman will be able to speak to his
8 interview of the Coast Guard, the individuals who actually
9 were part of executing this overflight, and the degree of
10 coordination that occurred.

11 MJ [Col PARRELLA]: I think the government's conceded
12 that -- and, Government, correct me if I'm wrong, but in terms
13 of coordination with the Coast Guard, it was properly
14 coordinated. I think the issue is whether it was coordinated
15 with SOUTHCOM. Is that correct, Government?

16 MTC [MR. TRIVETT]: That is correct, sir.

17 ADC [Capt ANDREU]: And, sir, as part of this discussion
18 of the interviews with the Coast Guard, that will be discussed
19 as well, the actual coordination with SOUTHCOM or with --
20 well ----

21 MJ [Col PARRELLA]: Okay. So I'll let you ask questions
22 as they pertain to coordination specifically with SOUTHCOM,
23 but I don't think there's any dispute or need to delve into

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1 whether there was any lack of coordination with the Coast
2 Guard since that seems to have been -- it's not a fact in
3 dispute.

4 ADC [Capt ANDREU]: Okay. May I have a brief moment?

5 MJ [Col PARRELLA]: You may.

6 [Pause.]

7 ADC [Capt ANDREU]: May I proceed?

8 MJ [Col PARRELLA]: You may.

9 Q. Lieutenant Newman, in your interview of Captain ██████,
10 did you talk to him about the allegation that the overflight
11 violated SOUTHCOM procedures?

12 A. I specifically brought that up to the captain, yes.

13 Q. What was his reaction to that?

14 A. He used an expletive and told me that that was -- he
15 didn't feel that that was a -- a valid allegation, I'll put it
16 that way.

17 Q. I'm not going to ask you for the expletive,
18 obviously, but did he explain to you why that was not a valid
19 allegation?

20 A. So yes, I asked him about that. He said that was
21 stupid, that that -- basically, that's a ridiculous allegation
22 because Coast Guard aviation assets operate within SOUTHCOM
23 all the time and they work hand in hand. They conduct mutual

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1 aid for one another. When one aircraft is on a SAR mission or
2 on SAR standby, search and rescue standby, excuse me, and
3 they're pulled away for something else, a Navy or a Coast
4 Guard asset will cover one another.

5 He was pretty animated about his feeling that the
6 allegation violated some type of SOUTHCOM protocol.

7 Q. Other than individuals at District 7, did you speak
8 to anyone else in the Coast Guard?

9 A. Yes, I did.

10 Q. Okay. Specifically, did you speak to an
11 Admiral Lunday?

12 A. Yes, I did, Captain.

13 Q. Backing up, how did you come to know who
14 Admiral Lunday was?

15 A. Through the interview with Commander [REDACTED],
16 Commander [REDACTED], and Captain [REDACTED]. I had asked how this
17 request had come in. He had said -- or how do requests come
18 in? He had said -- Captain [REDACTED] had said they come in two
19 ways. They come in either through official channels, the term
20 he used, I think, was "by the book"; or they come in
21 through -- what he said was "BRO-NET." I said I'm not
22 familiar with the term BRO-NET. He said, "That's when a bro
23 calls another bro." And in this case, it appeared to be an

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1 admiral calling his admiral, meaning District 7 admiral.

2 He said, "But eventually if it's the BRO-NET or by
3 the book, it all eventually becomes by the book because they
4 have to be reviewed and vetted and ensure that they're within
5 statute and they meet mission requirements and resource
6 allocation." When he said an admiral to an admiral, the name,
7 I don't know if I asked or if the name was offered up, but the
8 commanding officer of District 7 is Admiral Brown. The
9 admiral that requested it, he had said an admiral from the --
10 excuse me, from Coast Guard Headquarters is how he put it, and
11 the name Admiral Lunday came up, Kevin Lunday, came up in the
12 course of the overall conversation.

13 Kevin Lunday, Admiral Lunday, was that Coast Guard
14 officer you just referenced that I did interview.

15 Q. How did you conduct the interview of Admiral Lunday?

16 A. Telephonically.

17 Q. Did you explain to Admiral Lunday what you wanted to
18 talk to him about?

19 A. I did.

20 Q. Was he willing to speak with you?

21 A. Yes, he was.

22 Q. First of all, what, if anything, could he tell you
23 about his relationship with Mr. Rishikof?

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1 A. He told me that they -- he considered Mr. Rishikof
2 a -- excuse me, Mr. Rishikof a friend. They originally met --
3 I don't have the dates off the top of my head, but they've
4 been friends for a decade. They originally met when
5 Admiral Lunday was a student at the -- I believe it's the
6 National War College where Mr. Rishikof was a professor. They
7 then established a friendship.

8 They also served together, I believe, on the American
9 Bar Association -- I should tell you, Admiral Lunday is also
10 an attorney. They served together on a national security
11 committee for the American Bar Association. He says that they
12 worked together there. They have -- so they've maintained a,
13 you know, quasi-professional and friendly relationship
14 throughout the years. He was open about that, but he also
15 prefaced it by saying that the call that he received by
16 Mr. Rishikof, he viewed that call as a call from one
17 professional to another.

18 Q. Did he talk to you about that call?

19 A. He did.

20 Q. What did he tell you?

21 A. He told me that he -- it was a conference call.

22 Mr. Rishikof was on the other end. I don't -- I don't feel
23 comfortable without reviewing my reports who else he claimed

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1 was on the other end of that call, but he depicted the call as
2 Mr. Rishikof calling, explaining that they needed current
3 imagery, and could the Coast Guard help out in obtaining
4 current imagery.

5 Q. Did he tell you when the call came in?

6 A. He did, but I don't recall.

7 Q. Would ----

8 MJ [Col PARRELLA]: Defense Counsel, let me interrupt you
9 real quick just for time purposes. How many more questions or
10 how much time do you anticipate needing?

11 ADC [Capt ANDREU]: Your Honor, 30 minutes.

12 MJ [Col PARRELLA]: All right. Trial Counsel, I expect
13 that you will have some cross-examination?

14 MTC [MR. TRIVETT]: I do intend to cross the witness, Your
15 Honor.

16 MJ [Col PARRELLA]: Okay. In that case then, the
17 commission will stand in recess until 9:00 tomorrow morning
18 and we will resume with this witness' testimony at that time.
19 This commission is in -- hold on one second.

20 Mr. Connell?

21 LDC [MR. CONNELL]: Sir, different judges have different
22 views of what happens on overnight breaks while a witness is
23 on the stand. Could you please give us your -- explicitly

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1 what your view of that is so that we can comply?

2 MJ [Col PARRELLA]: Yes.

3 LDC [MR. CONNELL]: I just don't want there to be a
4 misunderstanding.

5 MJ [Col PARRELLA]: Since you're still on the witness
6 stand at this point in time, I'd ask you to not discuss your
7 testimony until we are concluded with your testimony. So
8 during the overnight recess, not to discuss the substance of
9 your testimony until the conclusion of tomorrow's proceeding,
10 okay?

11 WIT: Understood, sir.

12 [The witness was warned and withdrew from the courtroom.]

13 LDC [MR. NEVIN]: Your Honor, could I ask, do you have an
14 intention at this point for how long to go tomorrow before you
15 recess?

16 MJ [Col PARRELLA]: So I am -- I don't have an exact time,
17 Mr. Nevin. I'm waiting for a little bit more information
18 about what our exact timeline and requirements are. Of
19 course, I'm sensitive to the fact that we all have to still,
20 you know, backward plan from departure, so all the check-in
21 process, all of the things that both parties have expressed
22 concern about with respect to the pack-out, of course, lodging
23 and checking out of lodging as well.

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1 So my goal is to, at a minimum, conclude the
2 testimony and oral argument related to this motion so we can,
3 as Mr. Connell articulated earlier, make a ruling before -- at
4 least as to the witness portion before we come back at our
5 next session in the November time frame.

6 So does that answer your question, Mr. Nevin?

7 LDC [MR. NEVIN]: Well, not exactly, but I think I
8 understand where you're headed with that. And obviously
9 you've -- if you appreciate the problems we have with packing
10 up and getting ready to get out of here, then we're fine.
11 Thank you.

12 MJ [Col PARRELLA]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: Judge, I'd just comment first that
14 your answer was very Nevin-esque, by the way. But secondly,
15 Judge, could we have some time to meet with Mr. Binalshibh? I
16 know they've got to get him back, but if we could have a
17 half-hour, 45 minutes?

18 MJ [Col PARRELLA]: If we could do half an hour, I
19 understand, because we're a little later than normal. Thirty
20 minutes, if that's possible, Mr. Harrington, please.

21 Okay. This commission is in recess until 9:00
22 tomorrow morning.

23 [The R.M.C. 803 session recessed at 1732, 11 September 2018.]

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