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1 [The R.M.C. 803 session was called to order at 0906,
2 12 November 2018.]

3 MJ [Col PARRELLA]: This commission is called to order.
4 Trial Counsel, please identify who is here on behalf of the
5 United States.

6 CP [BG MARTINS]: Good morning, Your Honor. Representing
7 the United States are Brigadier General Mark Martins,
8 Mr. Robert Swann, Mr. Edward Ryan, Mr. Clayton Trivett,
9 Mr. Jeffrey Groharing, Ms. Nicole Tate, Major Christopher
10 Dykstra.

11 Also present in the courtroom are paralegals Mr. Dale
12 Cox, Mr. Rudy Gibbs, Staff Sergeant Antony Kiser, as well as
13 Special Agent Ghailan Stepho and Ms. Alicia Dorman of the
14 Federal Bureau of Investigation.

15 Your Honor, these proceedings are being transmitted
16 by closed-circuit television to locations in the continental
17 United States pursuant to the commission's order.

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

19 Mr. Nevin, if you could please indicate for the
20 record who is here on behalf of Mr. Mohammad.

21 LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet,
22 Ms. Radostitz, Mr. Sowards for Mr. Mohammad.

23 MJ [Col PARRELLA]: Thank you.

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1 Ms. Bormann.

2 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,
3 myself, Mr. Edwin Perry, Mr. William Montross, Captain Brian
4 Brady. Out of the courtroom this morning is Major Matthew
5 Seeger. He is attending to other -- he is attending to the
6 cleaning of the AV-34 with the rodent feces.

7 MJ [Col PARRELLA]: Thank you, Ms. Bormann.

8 Mr. Harrington?

9 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
10 James Harrington, Navy Lieutenant Mishael Danielson, and
11 Alaina Wichner.

12 MJ [Col PARRELLA]: Thank you.

13 Mr. Connell?

14 LDC [MR. CONNELL]: Your Honor, on behalf of
15 Mr. al Baluchi is myself, James Connell; Lieutenant Colonel
16 Sterling Thomas of the United States Air Force; Alka Pradhan;
17 and Benjamin Farley. Previously excused by the military
18 commission is Captain Mark Andreu. I would request permission
19 for Mr. Farley to come and go from the courtroom.

20 MJ [Col PARRELLA]: He may do so. Thank you.

21 Mr. Ruiz?

22 LDC [MR. RUIZ]: Judge, Ms. Suzanne Lachelier, Major
23 Joseph Wilkinson, Lieutenant Colonel Jennifer Williams,

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1 Commander Dave Furry, Mr. Sean Gleason, and myself on behalf
2 of Mr. Hawsawi.

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

4 Okay. I will now advise the accused of their right
5 to be present and their right to waive said presence in the
6 courtroom.

7 You each have a right to be present during all
8 sessions of the commission. If you request to absent yourself
9 from any session, such absence must be voluntary and of your
10 own free will. Your voluntary absence from any session of the
11 commission is an unequivocal waiver of the right to be present
12 during that session.

13 Your absence from any session may negatively affect
14 the presentation of your defense. Your failure to meet with
15 and cooperate with your defense counsel may also negatively
16 affect the presentation of your case. Under certain
17 circumstances your attendance at a session can be compelled
18 regardless of your personal desire not to be present.

19 Regardless of your voluntary waiver to attend a
20 particular session of the commission, you have the right at
21 any time to decide to attend any subsequent session. If you
22 decide not to attend the morning session but wish to attend
23 the afternoon session, you must notify the guard force of your

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1 desires. Assuming there is enough time to arrange
2 transportation, you will then be allowed to attend the
3 afternoon session.

4 You will be informed of the time, date -- and date of
5 each commission session prior to the session to afford you the
6 opportunity to decide whether you wish to attend that session.

7 Mr. Mohammad, do you understand what I have just
8 explained for you?

9 ACC [MR. MOHAMMAD]: Yes.

10 MJ [Co1 PARRELLA]: Mr. Bin'Attash, do you understand what
11 I have explained for you?

12 ACC [MR. BIN'ATTASH]: Yes, but I would like to put my
13 opposition on the record for my attorneys.

14 MJ [Co1 PARRELLA]: Mr. Bin'Attash, I understand your
15 position. It's been an ongoing position with respect to your
16 attorneys, so I understand that for the record.

17 ACC [MR. BIN'ATTASH]: I want to put the objection on the
18 record. I want to read it. It will not take more than half a
19 minute.

20 MJ [Co1 PARRELLA]: Okay. I will allow you to do so.
21 Please proceed.

22 ACC [MR. BIN'ATTASH]: My situation with the attorneys, as
23 it's known, it is still the same. I have submitted many

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1 concessions during the past periods, but the team is happy and
2 content with the situation that is. They have all the
3 freedom, or full freedom to take matters without my knowledge
4 for their own interests.

5 Of course, there is no legal visits during the past
6 years, but I was meeting with the -- or I used to meet with
7 the interpreter and the paralegal for the necessity. But the
8 new attorney is exploiting me right now ----

9 ACC [MR. BIN'ATTASH]: **[Speaking in English]** Blackmailing
10 me.

11 **[Interpretation Resumed]**

12 ACC [MR. BIN'ATTASH]: ---- or blackmailing me. If I want
13 to meet with the interpreter or the paralegal, the attorney
14 has to be present. This is an exploitation issue.

15 ACC [MR. BIN'ATTASH]: **[Speaking in English]**
16 Blackmailing. That's all.

17 MJ [Col PARRELLA]: I understand the objection and I
18 believe that my predecessor, as we discussed last time, has
19 presented you with the options that you have at your disposal.
20 I understand your objection. It's noted for the record, but
21 in light of those options that were presented, do you wish the
22 commission to revisit those? Understanding that that may
23 result in you, if you decide not to use your attorney, that

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1 may result in you not receiving a new attorney or do you wish
2 to just note your objection for the record?

3 ACC [MR. BIN'ATTASH]: Currently, I just want to put my
4 objection on the record. When I want the judge to reconsider
5 the issue, I will let him know.

6 MJ [Co1 PARRELLA]: Thank you. I understand.

7 Mr. Binalshibh, do you understand what I have
8 explained for you?

9 ACC [MR. BINALSHIBH]: **[Speaking in English]** I cannot
10 answer your questions because I don't see you as a qualified
11 judge. That's all.

12 MJ [Co1 PARRELLA]: Mr. Binalshibh, do you understand the
13 rights that I have explained to you with respect to your
14 ability to waive your presence here in this commission?

15 ACC [MR. BINALSHIBH]: **[Speaking in English]** I will
16 repeat, I cannot answer your questions because you are not
17 qualified, Judge. That's all.

18 MJ [Co1 PARRELLA]: Mr. Ali, do you understand what I have
19 explained for you?

20 ACC [MR. AZIZ ALI]: Yes.

21 MJ [Co1 PARRELLA]: Mr. Hawsawi, do you understand what I
22 have explained for you?

23 ACC [MR. AL HAWSAWI]: Yes.

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1 MJ [Col PARRELLA]: On 7 November 2018, this commission
2 conducted a hearing pursuant to M.C.R.E. 505(h) in the
3 National Capital Region, at the conclusion of which I
4 conducted a brief R.M.C. 802 conference to discuss the timing
5 of Mr. Castle's testimony in relation to the AE 555 series.

6 On 10 November 2018, I also conducted an R.M.C. 802
7 conference here in Guantanamo Bay with trial -- with both
8 trial and defense counsel. The accused were absent. At this
9 conference we discussed the following:

10 First, I asked counsel not present at the prior
11 September session of court to introduce themselves.

12 Second, we discussed the order of march. I indicated
13 that in developing the order of march, the commission
14 attempted to first take up those AEs which we were not able to
15 get to during the September session; to accommodate
16 Mr. Castle's testimony on Tuesday morning and to afford the
17 parties an opportunity to digest this testimony before
18 presenting oral argument on AE 555; and finally, to allow for
19 a closed session pursuant to R.M.C. 806 on Friday.

20 Accordingly, I proposed the following order of march:
21 350C, 3500, 360C, 399, 528, 588, 568, 579, Mr. Castle's
22 testimony, 534, 538, 561, 562, 551, 604, 555, 524, and a
23 closed session on Friday.

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1 In response to the proposed order of march,
2 Mr. Connell inquired about argument in the 555 series,
3 specifically whether the commission expected oral argument in
4 just 555GG or as to the base motion as well. The commission
5 indicated that it would not anticipate scheduling further oral
6 argument in the 555 series unless it became necessary as a
7 result of Mr. Castle's testimony.

8 Mr. Connell also pointed out that the briefing cycle
9 in AE 604 is not complete. In that he is correct, as he has
10 until Thursday, 15 November, to reply to the government's
11 response to that motion.

12 The commission inquired with counsel for
13 Mr. Bin'Attash regarding the status of AE 350L, and
14 Mr. Harrington inquired about the status of his filing in
15 AE 595L, which the commission indicated would become moot
16 based on the commission's ruling on the defense pleading in
17 AE 595H.

18 Additionally, Mr. Connell informed the
19 commission ----

20 **[Voice heard over speaker in courtroom.]**

21 INT: My apologies, Your Honor.

22 MJ [Co1 PARRELLA]: Additionally, Mr. Connell informed the
23 commission that he would be asking to delay the proceedings

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1 until Tuesday, 13 November, because the attorney-client
2 meetings he had previously coordinated for Sunday, 11
3 November, were unexpectedly canceled by the JTF during the
4 afternoon of 9 November. In response, I directed the
5 government to discuss this issue with the JTF and report back
6 to the commission as soon as possible.

7 Finally, Ms. Bormann informed this commission that an
8 air conditioning malfunction in a portion of her defense
9 workspace resulted in extensive mold damage to the workspace
10 and the material contained therein.

11 Her team immediately informed the government, as well
12 as the chief defense counsel, of this issue so that potential
13 remedial action could be taken. Nevertheless, Ms. Bormann
14 expressed concern about her team's ability to prepare and
15 conduct this week's hearing. As a result of this revelation,
16 the commission ordered another R.M.C. 802 conference to occur
17 24 hours later, that being at 1700 Sunday, 11 November.

18 On Sunday, 11 November, this commission held that
19 R.M.C. 802 conference wherein we discussed the following:
20 First, Mr. Connell indicated that the JTF reversed course and
21 was able to facilitate meetings between his defense team and
22 Mr. Ali. As such, his request to delay the proceeding was
23 withdrawn.

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1 Second, Ms. Bormann provided the commission a
2 detailed synopsis of the state of the mold in her office
3 spaces, to include photos which were provided to the military
4 judge as well as to the parties. Based on her stated
5 inability to access her office and the printed materials, she
6 requested this commission delay proceedings in this matter.
7 This request was joined by Mr. Nevin, Mr. Harrington, and
8 Mr. Ruiz.

9 The government, in turn, informed the commission of
10 several possible options that they were exploring in order to
11 assist Ms. Bormann's team in mitigating this issue. Since it
12 appeared to the commission that the parties still had not had
13 an adequate opportunity to coordinate these potential
14 remedies, the commission ordered an additional R.M.C. 802
15 conference for 0-8 Monday, 12 November, that is this morning,
16 so the parties could have more time to discuss these possible
17 solutions, such as making additional space available to
18 Ms. Bormann's team.

19 Additionally, I informed the parties that I still
20 intended to go on the record as originally scheduled but would
21 adjust the order of march as necessary to maximize the amount
22 of team -- time Ms. Bormann's team has to reprint any
23 necessary materials and prepare for the hearing. These steps

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1 would include moving the Bin'Attash motions to the end of the
2 week and allowing his defense team to offer argument at the
3 end of this week's session as necessary. I also asked the
4 government to coordinate with the JTF about the possibility of
5 supporting evening sessions in order to allow the commission
6 to make up for any time lost due to this mold issue.

7 With respect to AE 604, the commission indicated it
8 would defer to Mr. Connell as to whether he desired to take
9 this motion up during this week's session since the briefing
10 cycle doesn't expire until Thursday.

11 And finally, in relation to AE 350L, Ms. Bormann
12 confirmed that this motion is now moot.

13 Earlier this morning, before coming on the record, we
14 conducted an additional R.M.C. 802 conference wherein we
15 discussed the following:

16 Ms. Bormann indicated that with the court reporters'
17 assistance, the Bin'Attash team was able to reprint all
18 materials relevant to the motions the commission now intends
19 to take up today. Further, the team was able to move their TS
20 classified materials to a space in ELC-7 provided by the court
21 reporters. Additionally, the Bin'Attash team now has access
22 to workspace within AV-29, a building located nearby the ELC.
23 Ms. Bormann indicated that her team continues to print

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1 materials and prepare for the other motions on this week's
2 docket.

3 In light of the issues presented by the mold, the
4 commission indicated it would rearrange the original order of
5 march in order to move any motion initiated by the Bin'Attash
6 team to the end of the week in order to allow the team
7 additional time to prepare.

8 As such, the new order of march will begin with
9 AE 568, 579, 534, 561, 562, 551, 555, and 524. Mr. Castle's
10 testimony will remain at 0-9 tomorrow, that is Tuesday. And
11 the commission will take up the remaining AEs at the
12 conclusion of the ones I just listed so that the Bin'Attash
13 team has the maximum amount of time to rebuild any binders or
14 prepare for those motion series.

15 The commission will also afford the Bin'Attash team
16 the opportunity to defer any oral argument on the AE series we
17 address today to the end of the week.

18 And finally, Ms. Bormann requested the commission end
19 early today in order to allow her time to prepare for
20 Mr. Castle's testimony, and the commission will consider doing
21 so.

22 With respect to AE 604, Mr. Connell indicated he is
23 still working on a reply and will inform the commission if

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1 they -- if and when they are prepared to present oral
2 argument.

3 Finally, Mr. Connell requested access through the
4 Colorado gate vice the Washington gate since the defense teams
5 are working at both AV-34 and AV-29 due to the mold issue.
6 While I asked the government to look into the feasibility of
7 this, the commission will ultimately defer to the JTF in this
8 matter as it views it as an internal security matter.

9 In response to the mold issue, the commission would
10 note the following:

11 While several defense teams indicated they have
12 detected the presence of mold in their spaces, only the
13 Bin'Attash defense team is significantly impacted for the
14 purposes of this week's session. As such, this commission's
15 focus relates only to the Bin'Attash team's ability to be
16 prepared for items on this week's docket.

17 Nevertheless, the commission directs the parties to
18 immediately begin working together and, as appropriate, with
19 the Military Commissions Defense Organization and the Office
20 of Military Commissions to resolve the larger long-term issue
21 presented by the mold issue.

22 The commission also notes that the vast majority of
23 the motions scheduled for this week, to include those filed by

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1 the Bin'Attash defense team, were previously scheduled for
2 oral argument during the September 2018 session of court.
3 That earlier session was cut short due to Hurricane Florence.

4 As such, this commission is confident that since the
5 Bin'Attash team was prepared to present oral argument in
6 September, it remains prepared to do so this week. In fact,
7 the commission would note that most of these motions have been
8 pending before this commission for months, if not years.

9 Do counsel for either side have any additions or
10 corrections to the commission's summary of the R.M.C. 802
11 conference?

12 CP [BG MARTINS]: Your Honor, the government does not.

13 MJ [Col PARRELLA]: Mr. Nevin?

14 LDC [MR. NEVIN]: Your Honor, only to add that we consider
15 that our workspaces in ELC-3 are also significantly impacted,
16 and I've directed our team members not to go into those
17 spaces, except for very minimal, brief periods of time. And I
18 just ask that the record reflect that as well.

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

20 LDC [MS. BORMANN]: We do, Judge. We have a supplement to
21 the record on the 802 conference.

22 MJ [Col PARRELLA]: Mr. Montross.

23 DC [MR. MONTROSS]: May I?

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1 MJ [Col PARRELLA]: You may.

2 DC [MR. MONTROSS]: Your Honor, to add to the record, the
3 ELC-3 is the defense trailer located at Guantanamo Bay Naval
4 Station. It is our office. It is where we house not only our
5 computers and our workstations, but our pleadings, our notes,
6 our attorney-client information, as well as our clothes.

7 On the 10th, when we arrived on island, we went to
8 ELC-3 to prepare for the 802 hearing that was going to be
9 conducted at 5:00 on the 10th. When we arrived at our office,
10 it was more than simply a mold situation. There was mold on
11 the table. There was mold on the chairs. There was mold on
12 the keyboards. Mold on the carpets, mold on the walls, mold
13 on our clothes, which explains why until at least potentially
14 for the balance of this week I am going to appear in front of
15 you like this because my two suits are covered with mold. I
16 am wearing a pair of green chinos, a blue shirt, and a Harry
17 Potter tie that miraculously survived. That's the clothes
18 that I have for the balance of the week.

19 But most importantly, all of our binders, our
20 pleadings, our notes were also in that office as well, and
21 they had mold on them, too.

22 When we disclosed this to Your Honor at the 802 on
23 Saturday, I believe, and you professed to hear what we were

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1 saying, and you indicated that you were, therefore, going to
2 hold another 802 on Sunday so that we could see where we were.

3 On Sunday, our efforts to deal with the mold started
4 at 7:30 in the morning when we were informed that two cleaners
5 from an organization called Centerra, which apparently
6 provides housekeeping and cleaning services here on
7 Guantanamo Bay, were prepared to go into our unit to, quote,
8 spray and wash the mold away. I needed to be present for that
9 because there's privileged information in that trailer. So I
10 arrived on site, as did members of other teams.

11 At that point there had been no assessment done about
12 the mold, no containment plan, no identification for what the
13 source of the problem was, Judge. So we went into the --
14 well, first, we met with General Baker and an individual by
15 the name of Mason Jefferson from SOUTHCOM, I believe, a deputy
16 director of SOUTHCOM, who indicated that it was his intent to
17 have two individuals who were third-party nationals who were
18 carrying literally, that I saw, a bucket and a spray can to go
19 in and spray and wash our office.

20 I indicated hesitation with that course of action
21 because there had been no assessment and there has been no
22 containment plan. We had the opportunity -- we were given the
23 opportunity to talk to who Mr. Jefferson had previously

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1 conferred with, an industrial hygienist. And we went outside,
2 and Mr. Nevin and myself and Mr. Thomas and Mr. Jefferson
3 talked to him on the phone and eventually encouraged him, and
4 he eventually accepted our invitation to please come over and
5 see our workspace. That occurred at approximately 11:00 on
6 Sunday morning.

7 This is all occurring during time when I would
8 actually be preparing, okay, in addition for the hearings that
9 are coming up this week. Instead, I put a mask on and I
10 walked in with approximately 10 to 12 other individuals to do
11 a walkthrough of our office.

12 We were told that at this point there is no source
13 identification. And I do appreciate Your Honor issuing the
14 order at the end of -- very recently, a couple of minutes ago,
15 saying that this needs to be dealt with, but right now we
16 still don't know the source of the mold contamination. It's
17 possible, or more probable, that it's a question of humidity
18 and a lack of air conditioning in our office.

19 We were told on Sunday that the humidity index can be
20 no higher than 60. Ours in our office was between 72 and
21 72.5. They were lower in the other offices, Your Honor, but
22 they were still above 60.

23 Also, in our office the air conditioning wasn't

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1 working. So it was described by the gentlemen who walked
2 through our office, which included the industrial hygienist
3 and the director of public health here at Guantanamo Bay, that
4 it was a perfect incubation site for the mold.

5 At that time when I was dealing with that inside
6 ELC-3, the rest of the team went to AV-34 because it was their
7 belief that they could start preparing for the hearings in
8 AV-34. That doesn't have as many workstations. We only have
9 two keyboards there. We don't have the SIPR access, but at
10 least it was a place where we could go and work.

11 We entered. There had been a -- I guess an attempt
12 by maintenance to prevent rodents in that building in our
13 space. We went in and there was a decaying rodent on the
14 ground that was leaking fluid that was spilling across the
15 floor. There were rat feces in desk drawers, under desks.
16 There were rat feces on bookshelves. There were rat nests,
17 which were basically chewed-up paper and plastic, located
18 throughout AV-34.

19 What became a potential, though inferior, possibility
20 of working to develop our time to prepare for these hearings
21 in AV-34 was gone at that point. And that has not been
22 cleaned up until -- I believe it is ongoing this morning
23 starting at 9:00, but I am not sure of that yet.

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1 So that afternoon we eventually secured space with
2 the assistance of General Baker with two work areas in AV-29,
3 which were only listed up to SECRET in terms of the materials
4 that we could store there, and they were -- it took a little
5 bit of time to upload and to get actually operable in that
6 space.

7 We returned for the 802 that Your Honor set last
8 night. I believe that was at 5:00. At that point we had
9 pictures. We had been able to secure a SECRET camera. We
10 provided pictures to Your Honor. We provided pictures to four
11 co-counsel and we provided pictures to the government as well
12 of the degree of mold that was present in our office. But I
13 will tell this court that the pictures were almost uniquely of
14 what was present in our office.

15 When I was there for the walkthrough on Sunday, we
16 did enter other offices escorted by appropriate team members
17 in the presence of General Baker. There was mold outside on
18 the walls as soon as you enter ELC-3. Our office is at the
19 far end of that trailer. There was mold on the walls as soon
20 as you entered on the left, right outside Mr. Nevin's and his
21 team's office.

22 We entered other offices where the floorboards were
23 squishy, I guess is the best way I could describe it. The

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1 individuals lifted up the carpet, the floorboards were wet
2 underneath. It was infected with mold. We not proudly
3 profess that we are ground zero for the mold infestation, I
4 would respectfully suggest, and I defer to their
5 representations. It is throughout that trailer at this point.

6 When we returned to 802 hearing on Sunday, we
7 informed Your Honor of all this. We provided the pictures.
8 At that point there was a concerted effort to try and provide
9 us an alternative space, and that was a smaller RASER which I
10 believe used to hold evidence. My understanding, and this is
11 hearsay, is that that itself may have had a mold problem but
12 it was cleaned up, with the assistance of primarily the court
13 reporters who did incredible work for us. They were able to
14 reprint the UNCLASSIFIED and the SECRET level materials for
15 the motion series that is being heard today that Your Honor
16 identified previously at the 802. We still don't have the
17 pleadings for the balance of the week.

18 I appreciate Your Honor's moving some of the motions
19 around; however, we have lost an entire day yesterday dealing
20 with mold on my end and rat feces and decaying rat bodies on
21 Ms. Bormann's end. One of my team members was in the ER last
22 night because of breathing difficulties. I have another team
23 member who has been instructed not to go anywhere near the

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1 mold because of his history of asthma. I have another team
2 member whose arms are completely red now after spending
3 40 minutes in the ELC-3. Those are all consequences to this
4 team's ability to be prepared.

5 Ms. Bormann requested that we not proceed forward
6 today, to allow her the opportunity to have all the materials
7 printed out, particularly the 555 series, in which she is
8 conducting the cross-examination of Mr. Castle tomorrow.

9 I hear Your Honor when you say that the motion has
10 been on for months. I can also tell Your Honor that all of
11 Ms. Bormann's materials were in that office, ELC-3, and she
12 doesn't unfortunately do digital, and she unfortunately
13 doesn't do electronic, and unfortunately she doesn't do
14 computer. She does hard copies, and she writes by hand, and
15 her notes and preparation for not only the 555 series of
16 Mr. Castle, which obviously is critical because it's a live
17 witness that's going to be here, but in addition to all the
18 other motions, her notes are in that office and she does not
19 have access to them. And I credit her memory and I credit her
20 ability, but I don't credit her ability to be prepared for the
21 balance of the hearings this week with her work prep in ELC-3.

22 I'm renewing our request not to proceed forward with
23 hearings today. I understand Your Honor's position, but I

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1 suggest that we still cannot be prepared. I am also troubled
2 by the fact that one of Your Honor's solutions is to go into
3 the night. That would be time, hopefully, that we would have
4 time to prepare and resurrect what has been lost. That time
5 is apparently being taken from us.

6 I have nothing further, Judge.

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

8 With respect to your point about the clothing, this
9 probably goes without saying, Mr. Montross, but I will assure
10 the Bin'Attash team and any other team that the commission
11 will in no way infer any negative -- any negative or
12 disrespectful by anybody's appearance in light of this mold
13 issue in court.

14 With respect to the points about the materials in the
15 office, we've obviously discussed this extensively, discussed
16 it in my summation; and the commission will continue to do
17 what it can to mitigate as best as possible to afford
18 specifically your team as much time as possible to maybe
19 recreate any written, handwritten notes of that nature.

20 But I am also aware of the extensive lengths to which
21 other teams, the court reporters, and to some extent the
22 government have assisted, continue to assist, have printed
23 materials for your team. And in light of what I have already

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1 articulated about the history of this case and the fact that
2 these pleadings were already on the September docket, I am
3 confident that we can take those up. Thank you.

4 Mr. Harrington?

5 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
6 we are in essentially the same position as Mr. Nevin. As I
7 indicated to the court in the 802 conference, our office in
8 the ELC is in between Mr. Bin'Attash's and Mr. Nashiri's.

9 I don't think it has been placed on the record here
10 yet, but Mr. Nashiri's office -- and I personally saw that
11 this morning -- has extensive mold damage underneath the
12 carpets. Our carpets have not been ripped up yet and I don't
13 -- there was no real detailed inspection done of our office
14 yesterday, but we have many, many black spots that have
15 appeared recently which lead us to believe that that's
16 probably mold.

17 We also -- with my team, Judge, I have advised
18 everybody on the team that if they wish to go in there
19 voluntarily, they can. I recommended and directed that they
20 not do that except for emergency purposes. So the court is
21 aware, the air conditioning that we have in that building
22 comes through vents at the top; we assume that those are
23 carrying mold spores there. And we also in our office have to

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1 use a fan because whenever the building is populated with a
2 lot of people, the air conditioning works very poorly, which
3 means we're generating more air blowing around which
4 potentially could be harmful to everybody.

5 We have one of the members of our team who has gone
6 to the emergency room at the hospital this morning because of
7 breathing problems. And this situation is putting a
8 tremendous strain on us to be able to be properly prepared.
9 So we're in not quite as an acute situation as Ms. Bormann,
10 but we have a very, very challenging road ahead of us trying
11 to be prepared this week.

12 MJ [Co] PARRELLA]: Thank you, Mr. Harrington. I
13 understand.

14 Mr. Connell, any additions or corrections to my
15 summation of the 802 conference?

16 LDC [MR. CONNELL]: No. Thank you, Your Honor.

17 MJ [Co] PARRELLA]: Mr. Ruiz?

18 LDC [MR. RUIZ]: Judge, this is not in addition to the 802
19 conference. I know that's where you are right now, but for
20 purposes of the record, I feel that it's necessary at this
21 point to once again state our objection to your continuing to
22 preside over this military commission.

23 As the commission is aware, Mr. al Hawsawi has

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1 exercised his independent right and filed a motion challenging
2 your presiding over these hearings primarily based on your
3 previous affiliation with the Department of Justice and the
4 work that you did there and your affiliation with one of the
5 current prosecutors, Mr. Jeff Groharing. That has been
6 briefed in 595I.

7 Although I've not seen it make it onto the docket, it
8 continues to be our position that, based on your previous work
9 with the very same arm of the government that has been
10 consistently prosecuting Mr. al Hawsawi, materially supporting
11 the prosecution of Mr. al Hawsawi, and your personal -- close
12 personal affiliation with Mr. Groharing, that you should
13 recuse yourself from these proceedings.

14 So before addressing any other matters this morning,
15 we continue to state that position. I know that the
16 commission issued a ruling to Mr. Nevin's previous challenge.
17 However, as I think you have recognized in that ruling, each
18 of the parties has an independent right. Mr. al Hawsawi's
19 motion continues to be pending before this commission, and
20 that is our position.

21 MJ [Col PARRELLA]: And I can speak to that, Mr. Ruiz. I
22 appreciate your bringing that up. The commission has reviewed
23 your motion in 595I, and I do anticipate a ruling will be

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1 coming out shortly. And it's not on the docket because after
2 reading the motion as well as the government's response, the
3 commission did not deem oral argument necessary, but we will
4 address it.

5 LDC [MR. RUIZ]: I understand that, Judge. And we expect
6 that the motion will be denied. And I will let the commission
7 know that we are prepared to appeal that decision and will be
8 asking you to abate the proceedings pending the review of that
9 decision by a higher court, as I am sure we will go as far as
10 things play themselves out.

11 Having said that, Judge, in relation to the 802 and
12 the issue pertaining to the mold, the -- what I'd like to
13 state for the record is that Mr. al Hawsawi's spaces have been
14 materially impacted and significantly impacted.

15 We have not led the charge on this issue primarily
16 because we made a balance decision based on what we have on
17 the docket this week. Mr. al Hawsawi's team this particular
18 week has a relatively light docket, and we are able to work
19 around the logistical issues that have arisen. But I don't
20 want the commission to walk away with the impression that our
21 office is not impacted.

22 This is a circumstance where Ms. Bormann's office is
23 so bad and so nasty that in comparison to hers, ours just

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1 doesn't rise to the level of nastiness. But that shouldn't
2 be -- the takeaway from that shouldn't be that our office is
3 by any chance or stretch of the imagination not impacted
4 either. Seeing is believing. The office is impacted, and our
5 personnel does not have access to those workstations. Like I
6 said, for this commission session we are doing a work around
7 that. We will be able to carry on the business of the mission
8 that we need to do.

9 However, what I want to let the commission know is
10 that from this point out, unless this condition is remedied,
11 my personnel will not be working in that office, and it will
12 impact our ability to carry on the business of the commission.

13 As we have litigated a number of times -- and I know
14 you are relatively new to this issue -- one of the things that
15 we have said is we didn't choose the venue for this military
16 commission. It was chosen for us. However, the
17 responsibility that goes along with that decision is to make
18 sure that we have proper spaces that we can work. We have no
19 problem working. We have no problem working late. We have no
20 problem working early. That's the reason we come to this
21 island, is simply to work.

22 It is not beyond -- too much to ask that the
23 facilities be properly cleaned and maintained so that our

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1 personnel can do so without concerns to their health, and they
2 are legitimate concerns to their health.

3 I believe the commission is taking this seriously. I
4 do think that it will be something that needs to be remedied
5 and impacted down the road. But for our purposes, our
6 personnel are not using that office, which does create
7 logistical challenges that I want you to be aware of that are
8 not going away, that are significant, and that need to be
9 remedied.

10 That's all I have, Judge.

11 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. As I stated
12 previously, just in follow-up to your comments, Mr. Ruiz, the
13 commission certainly does agree with a lot of the points that
14 you made, that this is a long-term issue that will require a
15 long-term solution. Hence, the direction by the commission
16 for the parties to work together with those entities that have
17 a stake in this to ensure that we don't encounter the same
18 issue when we come down here the next session of court.

19 If any party believes that adequate progress in this
20 respect is not being made, I would invite that party to bring
21 that to the commission's attention to avoid any subsequent
22 time where we come down and just are unable to work
23 productively.

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1 Okay. At this time we're going to go ahead and
2 start.

3 CP [BG MARTINS]: Your Honor, I didn't hear whether there
4 was a finding relating to the knowing, voluntary, intelligent
5 waiver -- or correction, the way forward with regard to
6 Mr. Binalshibh in the discussion of the understanding of the
7 rights to waive presence.

8 MJ [Col PARRELLA]: Yeah, with respect to --
9 Mr. Binalshibh obviously refused to answer the court's
10 question as to whether he understood the rights articulating
11 that he didn't recognize the military judge as, I guess, a
12 lawful entity to be here today.

13 I do find that in light of all of the previous
14 sessions, including the last session where I presided, where
15 he answered that question in the affirmative that he did
16 understand, the commission is confident that as he sits here
17 today, he does understand that right as he has executed it,
18 demonstrated his ability to execute it on numerous occasions.
19 And so the commission will proceed. Thank you, General
20 Martins.

21 Okay. Mr. Connell?

22 LDC [MR. CONNELL]: Sir, the commission may be getting
23 there, but may I inquire: Did the military commission

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1 actually hold an ex parte hearing with the prosecution on
2 9 November 2018 or 8 November?

3 MJ [Co1 PARRELLA]: It did. It was -- I believe it was
4 the 9th -- the 10th of November. The commission did hold an
5 ex parte presentation in accordance with the order, and I
6 couldn't tell you off the top of my head what that order is --
7 I'm sorry, I'm being told it's the 8th of November. The 8th
8 of November -- in accordance with the order that was issued by
9 the commission, and it was a revised order.

10 Just for the record, I know there was an objection to
11 the initial order of the commission regarding that ex parte
12 presentation. The commission did revise it and it did, in
13 fact, hold that hearing.

14 CP [BG MARTINS]: Yes, Your Honor. That was Appellate
15 Exhibit 542Q (Amended). Pursuant to that, we did hold the
16 ex parte presentation on 8 November.

17 MJ [Co1 PARRELLA]: Thank you. Okay.

18 We will go ahead and start with the first item on the
19 docket, that being 568.

20 DC [MR. GLEASON]: Good morning, Your Honor.

21 MJ [Co1 PARRELLA]: Good morning.

22 DC [MR. GLEASON]: Sean Gleason on behalf of
23 Mr. al Hawsawi. I will be arguing AE 568.

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1 Your Honor, in AE 568 the defense seeks an order from
2 this commission compelling the government to provide the
3 defense with all communications involved in soliciting and
4 obtaining business records and certifying business record
5 declarations from the government of the United Arab Emirates,
6 which the prosecution plans on using in their case against
7 Mr. Hawsawi.

8 Now, I would like to provide you some procedural
9 background for your edification, sir. This motion originated
10 with the testimony of Special Agent Perkins of the FBI. She
11 testified in December of last year on the motion regarding
12 Mr. -- the motion to dismiss the defense filed claiming that
13 the government had no personal jurisdiction over
14 Mr. al Hawsawi.

15 As part of their offer of proof on that motion, the
16 government had Special Agent Perkins testify, and as part of
17 the evidence that she testified about were these business
18 records that were obtained from the UAE, United Arab Emirates.

19 What Special Agent Perkins testified was that the FBI
20 had obtained records from the government of the United Arab
21 Emirates and that this occurred sometime in 2001. She then
22 testified that later on, several years later, the FBI put
23 together documents that -- records that they wanted to use in

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1 their prosecution against Mr. Hawsawi.

2 It then sent those records to the government of the
3 United Arab Emirates requesting that they be authenticated,
4 and the UAE government at some point in time sent the records
5 back with declarations saying that they are business records.
6 This was discussed on the transcript at pages 17578 and 17579,
7 and again at the record at page 20002.

8 Following Special Agent Perkins' testimony, the
9 defense sent a discovery request to the prosecution and in
10 this discovery request we requested all FBI Form 302s, notes,
11 letters, e-mails or other material memorizing [sic] or
12 containing the requests or the response between the
13 U.S. Government and the government of the United Arab
14 Emirates, as well as any communications that were sent to the
15 businesses within the United Arab Emirates seeking these
16 declarations. That is attached at the record as Attachment B
17 to our motion, Your Honor.

18 And in response to our discovery request, the
19 prosecution has provided three FBI administrative notes or
20 FBI 302s. These three notes total 12 pages, and I just want
21 to summarize the three sets briefly for your benefit,
22 Your Honor.

23 The first set of FBI notes are dated May of 2005,

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1 which was four years after the date of the underlying records.
2 This -- FBI notes indicates that a legal attache at the U.S.
3 Consulate in Abu Dhabi received certified records from the
4 United Arab Emirates government and forwarded those records to
5 the FBI.

6 This administrative note implies that there were
7 earlier written communications from the U.S. Government that
8 were sent to the United Arab Emirates government, but those
9 records were not provided in discovery. Also not provided
10 were the records documenting what response the United Arab
11 government had when it sent these records to the U.S.
12 Consulate in Abu Dhabi.

13 The second and third set of FBI administrative notes
14 are dated February and May of 2008, seven years after the date
15 of the underlying records. These notes indicate that the FBI
16 received additional certifying business record declarations
17 from the government of the United Arab Emirates. And again,
18 these notes imply that there was outside written
19 communications between the U.S. Government and communications
20 back from the government of the United Arab Emirates, but
21 those communications were not provided in discovery.

22 In addition, the defense had asked for contact
23 information for the people who had signed these business

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1 record declarations from the prosecution, and the
2 prosecution's response back to the defense was that they have
3 no known contact information for any of the individuals who
4 signed these declarations and that they have no independent
5 facts outside the four corners of the declaration about who
6 the declarants are or where they are located. This is in the
7 transcript at page 20001.

8 So noticeably absent from the prosecution's discovery
9 response thus far has been any communication or any of these
10 correspondence that went from the U.S. Government to the
11 government of the United Arab Emirates, and also absent have
12 been the correspondence back from the government of the United
13 Arab Emirates.

14 This motion was initially filed on 9 April 2018 at
15 AE 568. The prosecution's response was filed 23 April in
16 AE 568A. The motion was initially argued on 3 May 2008 [sic]
17 and again on 23 July 2018.

18 And during the 23 July 2018 argument, the prosecution
19 indicated that the communications that the defense is seeking
20 actually exist, the records that the U.S. Government has sent
21 to the UAE and records that the UAE government has sent back
22 to the U.S., but the prosecution asserts that they have
23 reviewed those records and they find that they are not

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1 material to the preparation of the defense in this case.

2 That's in the record at page 19999.

3 The applicable law for this motion, Your Honor, is
4 Rule for Military Commissions 701 and the Fifth, Sixth and
5 Eighth Amendment of the U.S. Constitution. Rule for Military
6 Commissions 701 provides that each party shall have an
7 adequate opportunity to prepare its case and that no party may
8 unreasonably impede the access of another party to a witness
9 or evidence.

10 It also provides that the government shall permit the
11 defense to examine any books, papers, documents, photographs,
12 tangible objects, buildings, or places so long as they are
13 material to the preparation of the defense -- under the
14 control of the government and material to the preparation of
15 the defense or intended for use by trial counsel as evidence
16 in the prosecution's case-in-chief.

17 Also, due process requires that the government
18 disclose evidence that is material to the guilt or punishment
19 of Mr. al Hawsawi, or evidence that may be used to impeach the
20 credibility of a government witness, to include a government
21 declarant.

22 The cites for that, Your Honor, is Brady v. Maryland,
23 Giglio v. United States, and also Military Commission Rule of

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1 Evidence 807 which governs attacking or supporting the
2 credibility of declarants.

3 The U.S. Supreme Court has also emphasized that in a
4 capital case, which this is, Your Honor, that the Sixth and
5 Eighth Amendments require that defense counsel perform a
6 thorough investigation of the case to provide effective
7 representation. In this case the defense has an obligation to
8 investigate the business record declarations that the
9 government intends on using as evidence against Mr. Hawsawi.
10 And in order to do so the defense requires all communications
11 that surround how they obtained those declarations.

12 So applying the law to the facts in this case
13 demonstrates clearly that the defense has demonstrated that
14 these records are in the possession of the government and they
15 are material to the preparation of the defense. We have an
16 obligation, obviously, to perform an investigation, to look
17 into this evidence that the government is going to intend on
18 using to try to convict Mr. Hawsawi and sentence him to death.

19 In this case the prosecution has already stated in
20 the record at 20001 that they intend on using these records
21 and these declarations from these out-of-court witnesses as
22 hearsay evidence against Mr. Hawsawi, and they plan on
23 authenticating records with the declarations themselves; they

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1 don't plan on calling a live witness. They've also indicated
2 that they don't know who these declarants are or how the
3 defense can contact them.

4 Your Honor, the facts, as this motion has played out
5 and we have received responses from the government and it has
6 been argued on the record, demonstrate that the manner in
7 which these business records were obtained and the
8 declarations to support them were obtained are very -- highly
9 unusual.

10 Currently they lack transparency. The defense has no
11 idea what the U.S. Government said to the UAE government, what
12 the UAE government said to the people who signed these
13 declarations, or what the UAE government sent back to the
14 government regarding these declarations.

15 Also, add in the fact that it was very unusual that
16 these declarations were done several years after the fact.
17 This isn't the normal case where the FBI sent a subpoena to
18 Verizon and Verizon sent back telephone records with a signed
19 declaration. This is a case where the FBI gathered records in
20 2001, and then in 2005 and in 2008 they sent the records back
21 to a government who is a -- let's say they're a total
22 monarchy, Your Honor, so they are not a government -- a
23 democracy that's governed by the rules of law that we would

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1 expect in the United States.

2 The government of the U.S. sent a request to this
3 total monarchy saying, hey, here are the records. Do you want
4 to authenticate them? And in response, declarations were
5 signed and sent back. In order to weigh that and evaluate a
6 potential motion challenging the admissibility of these
7 declarations, we need to investigate all those facts, sir.

8 And that's what this motion to compel is attempting
9 to do. It's trying to get all the records in the government's
10 possession that pertain to these declarations so that we can
11 evaluate them and go from there with our case, sir.

12 So, sir, the defense requests that the commission
13 order the government to turn over all communications regarding
14 the solicitation and obtaining of these declarations.

15 And unless you have any questions, sir, that's all I
16 have.

17 MJ [Col PARRELLA]: So since the pleadings there's been
18 oral argument, and probably this argument has evolved since
19 the filing of the initial pleadings. Just so I understand,
20 Mr. Gleason, it's specifically what you believe is material
21 that has not been turned over is the correspondence between
22 the United States and the UAE that led to ultimately these
23 records being certified or turned over?

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1 DC [MR. GLEASON]: Yes, sir. What we have not seen thus
2 far is in 2005 and 2008 we know from the FBI 302 or the
3 administrative notes that the U.S. Government had sent records
4 to the government of the United Arab Emirates. We have not
5 received any of those communications.

6 We also know that the UAE government went to these
7 businesses, if they actually did go to the businesses instead
8 of actually having someone in their own office sign these
9 declarations; we don't know that. So we would like to see any
10 correspondence that the UAE government had with any businesses
11 and any correspondence back.

12 And we also have not seen any correspondence ----

13 MJ [Col PARRELLA]: So with respect to that second item,
14 the correspondence between the UAE government and those
15 outside businesses, you had earlier indicated that you had
16 received representations that the government did have this
17 material. Does that also apply to that material that you just
18 described?

19 DC [MR. GLEASON]: That I don't know, sir, because we
20 don't know what the government has or what they reviewed.
21 They said they've reviewed communications regarding these
22 declarations, but they did not believe they were material to
23 us in ----

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1 MJ [Col PARRELLA]: In the government's response they
2 indicated, at least in their written response, that they would
3 provide any known contact information pertaining to
4 individuals within the UAE. So if I understand it, they
5 agreed to do that but there was no -- that was able to be
6 turned over; is that correct?

7 DC [MR. GLEASON]: Yes, sir. So the response on the 23rd
8 of April, they actually said, hey, we're going to provide the
9 defense everything that we have that pertains to these
10 declarations and we are going to provide contact information
11 for the declarants.

12 Since last April the government's position has
13 evolved where they no longer wanted to provide us the
14 information they have regarding these declarations, and now
15 they are claiming that they have no contact information for
16 the declarants.

17 MJ [Col PARRELLA]: Okay. I understand. I don't have any
18 further questions.

19 DC [MR. GLEASON]: Thank you, Your Honor.

20 MJ [Col PARRELLA]: Thank you. Okay.

21 Would any other defense counsel care to be heard?

22 Mr. Nevin?

23 Ms. Bormann?

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1 LDC [MS. BORMANN]: Briefly, Judge.

2 While Mr. Bin'Attash has no dog that's in this
3 particular fight, the issue will be revisited over and over,
4 and that is the lack of evidence or foundation provided either
5 by way of substitute or summary or, in this case, direct
6 evidence pertaining to the underlying.

7 So obviously in a normal court of law a business
8 record would be self-authenticating, but you would have a
9 certification from somebody you would go interview, determine
10 whether or not they would be held in the ordinary course of
11 business, and whether it was the ordinary course of that
12 business to make the record.

13 In this case we are barred from doing so. And when
14 we ask the government for the information that would allow us
15 to even get a hint or a peek at it, they deny us the ability
16 to do it.

17 MJ [Col PARRELLA]: So what -- you said you're barred from
18 doing so. I guess what bars ----

19 LDC [MS. BORMANN]: Well in this ----

20 MJ [Col PARRELLA]: ---- bars you from doing your own
21 defense investigation?

22 LDC [MS. BORMANN]: Well, in this case most of those
23 businesses don't exist. So a Western Union in the UAE that

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1 existed in 2003, that's not particularly helpful. There are
2 documents that underlie almost all of this. It's the
3 government's duty to provide them. Although we don't have a
4 dog in this fight, we will have dogs in fights coming forward.
5 So we would ask you and join in the effort for Mr. al Hawsawi
6 to get whatever information exists that allows him to begin
7 the investigation.

8 You can't begin an investigation unless you at least
9 have some -- some beginning information that allows you to
10 start the process. In this case they don't even have that.
11 The government is now saying they have some information, they
12 are just refusing to turn it over. We are asking that you
13 allow the defense to begin their investigation.

14 Now on to something completely different. On the
15 802, I wanted to correct the record.

16 MJ [Col PARRELLA]: We're not going to take that up right
17 now. Thank you. Let's go ahead and finish this motion
18 series.

19 LDC [MS. BORMANN]: All right.

20 MJ [Col PARRELLA]: Mr. Harrington?

21 LDC [MR. HARRINGTON]: We have nothing further, Judge,
22 other than we are in the same position with respect as
23 Ms. Bormann described for future evidence questions.

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1 MJ [Col PARRELLA]: Thank you.

2 Mr. Connell?

3 LDC [MR. CONNELL]: Your Honor, I rise principally to
4 point out that this motion, while it was important when it was
5 filed, has become much more important in the light of the
6 military commission's decision in AE 524LL. The government
7 describes in AE 524NN that the statements of the defendants,
8 which were obtained by interrogation in January of 2007, are
9 its single most important piece of evidence. I agree with
10 that assessment.

11 There is a somewhat subjective question past then
12 whether it's 60 percent of their evidence or 70 percent of
13 their evidence or something, but it's a lot. And I expect
14 them later today or later in the week to be arguing that point
15 as it's one of their five main points in AE 524NN.

16 But the converse of that situation is that evidence
17 such as the business records obtained from the UAE become
18 correspondingly more important and a more important focus of
19 defense investigation and of government discovery as other
20 evidence in the case moves out of the case.

21 The -- our position is different with respect to
22 Mr. Bin'Attash and Mr. Binalshibh, who I understand were
23 addressing really other issues. The UAE issue -- these

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1 business records are the, after the statements, the most
2 important piece of evidence against Mr. al Baluchi and we have
3 conducted extensive and diligent investigation in both Dubai
4 and Sharjah in the United Arab Emirates using the information
5 which has been made available to us by the prosecution.

6 The reason why I tell you that is both to show you
7 that we are diligently performing our role in the criminal
8 justice system, but also to show you that as additional
9 evidence is made available by the government, we act upon it
10 and go and investigate it.

11 So information like the correspondence between the
12 United States Government and the UAE Government is very
13 valuable especially where the underlying businesses, the
14 Western Union, the UAE Exchange, which originally generated
15 the records, are no longer operating. Thank you.

16 MJ [Co] PARRELLA]: Thank you.

17 Trial Counsel?

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

19 MJ [Co] PARRELLA]: Good morning.

20 MTC [MR. TRIVETT]: So there's principally two different
21 types of business records that the government seeks to use,
22 and I want to explain both of them to the commission so you
23 can understand what it is the government has and what it

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1 doesn't and why it doesn't.

2 Obviously, you have domestic business records mostly
3 being generated from the investigation shortly after
4 September 11th into the 19 hijackers, their involvement, and
5 money that moved to and from the hijackers from overseas.
6 Those are domestic business records. We seek to admit some of
7 them. We have a pending motion to preadmit certain of those.

8 MJ [Col PARRELLA]: That's 491, Mr. Trivett?

9 MTC [MR. TRIVETT]: Correct, sir.

10 So ultimately, with those domestic business records
11 we had contact information for the declarants that were fairly
12 recent because of recent declarations we got from them.

13 And to step back for a second, it's important to note
14 that it never matters when the declaration is dated, it
15 matters what the date of the actual record is. And so these
16 records predate in almost every instance the September 11th
17 attacks. The fact that they are certified later by someone
18 who can declare under the four requirements of 803(d) that
19 they are, in fact, business records doesn't matter to the
20 equation as long as they are competent declarants.

21 But for the declarants of the domestic business
22 records on 13 April, just four days after this motion was
23 originally filed, we provided the contact information for all

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1 the known declarants that we had. And we did that because it
2 was fairly recently that we had reached out to them. We don't
3 feel like we had an obligation to do that, but we did it as a
4 matter of courtesy to the defense so they could contact them.
5 Some of the declarants are going to be older declarants, some
6 of which may not even be alive anymore. Obviously, these
7 records are over 18 -- they are over 17 years old at this
8 point.

9 So with that being said, when we had that
10 information, although not required to provide it, we did; and
11 we were happy to do so and will continue to do so for that
12 information.

13 But that said, the foreign documents are obtained
14 under completely different circumstances than the domestic.
15 Obviously, the FBI doesn't have the same authorities to
16 operate in the UAE as it does in the United States. The
17 UAE Government was cooperating with the FBI and consistent
18 with the testimony from Special Agent Perkins in December of
19 last year.

20 Ultimately, the Central Bank, which is an organ of
21 the United Arab Emirates Government, went out and requested
22 the declarations from various different banks. Ultimately,
23 those banks were Citibank, Wall Street Exchange Center, Dubai

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1 Islamic Bank, Emirates NBD, HSBC Bank Middle East Limited, and
2 Standard Chartered Bank.

3 Those were returned to the FBI with an administrative
4 note indicating that they had received them, but the actual
5 declarations are from the declarants themselves from every one
6 of those businesses, not unlike the domestics. We do not have
7 that contact information because the UAE was the one who
8 facilitated those declarations. But that said, the defense
9 has all of those declarations, they have all of the names of
10 those individuals.

11 We do not intend to call them. We believe that the
12 evidence is self-authenticating based on both 80 -- Military
13 Rule of Evidence 803(6) and Military Rule of Evidence 902,
14 none of which directly apply to military commissions, which of
15 course allows for hearsay to the extent that it's deemed
16 reliable. But also the military commission specifically
17 states that if it would otherwise be admissible as evidence in
18 military court-martial context, that it would be admissible as
19 well in the military commission context.

20 So we don't have that contact information for those
21 declarants. As Mr. Connell indicated, he has already done
22 some investigation. Certainly nothing we're aware of prevents
23 the defense from investigating as they would typically those

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1 names and who they work for.

2 Now, it's important to note that Mr. Gleason
3 discussed the 302 forms that we have. And I spoke with
4 Mr. Gleason this morning. We're going to turn over two other
5 documents to him, which are the responsive administrative note
6 from the Central Bank indicating that they were sending to the
7 FBI the information that was sought.

8 Ultimately, however, those 302s that we've already
9 turned over -- we have turned over one in 2014 and then two
10 recently in November of 2017 -- has that same information
11 documented. It was the FBI in receipt of it. They documented
12 exactly what was said in that administrative note from the
13 UAE. That said, we re-reviewed the UAE notes that came back
14 to the FBI and we will disclose those to the defense hopefully
15 by the end of this week before we get off of island.

16 But ultimately we think they are administrative in
17 nature; that they are not required to be discovered under 701;
18 that the defense has the information that they typically would
19 have from a declarant, meaning the name of the declarant and
20 where they worked at the time they signed the declaration, to
21 allow them to do whatever investigation they deem is necessary
22 to challenge what we believe are self-authenticating
23 documents.

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1 So with that, subject to your questions, sir.

2 MJ [Col PARRELLA]: So just to -- so I understand it, the
3 government has turned over -- I think you said four 302s?

4 MTC [MR. TRIVETT]: Three, sir, yes.

5 MJ [Col PARRELLA]: And your intention is to turn over a
6 responsive note from the Central Bank essentially indicating
7 that they were sending back the material to the FBI?

8 MTC [MR. TRIVETT]: The ones dated 2008, correct.

9 MJ [Col PARRELLA]: Okay. So what is it -- is that the
10 document that the defense referred to that in previous
11 discussion the government had said we're not turning it over
12 because it's not material, or is there other material out
13 there?

14 MTC [MR. TRIVETT]: That would be any administrative --
15 any administrative requests made throughout the pendency of
16 the investigation we don't believe are discoverable under 701;
17 that the FBI went and asked for certain documents.

18 Now, based on Ms. Perkins' testimony in December,
19 generally how this happened was, certainly in regard to money
20 transfers or banks, once they identified those 19 hijackers,
21 we were able to get certain domestic -- the domestic side, so
22 to speak, of any of those transfers. But obviously if any of
23 the transfers originated from a UAE business, we wouldn't have

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1 the ability to do that.

2 So there was coordination and cooperation in the days
3 after September 11th certainly between various different
4 countries and the United States to assist us in getting those
5 documents. Ultimately we reviewed the documents we intended
6 to use and what was discoverable. And at some point, both for
7 the Moussaoui trial and then for this pending commission and
8 when this commission was going to the Southern District, we
9 then asked for certain records to be certified.

10 So that's the background on how it was we identified
11 whatever documents that we received from the UAE. But every
12 administrative communication that may have occurred between
13 FBI and UAE, it's the government's position that is not
14 discoverable under 701.

15 Ultimately, they have the certified records. The
16 records are self-authenticating. And to have to turn over
17 every piece of the investigation that resulted in the receipt
18 of those documents is not necessary under the Rules of
19 Evidence.

20 MJ [Co1 PARRELLA]: Is that material generally
21 correspondence between the FBI and the Central Bank, I would
22 think; is that correct?

23 MTC [MR. TRIVETT]: It would probably be within the

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1 UAE Government, and the UAE Government would then funnel it to
2 whatever appropriate organ of their government they felt was
3 the right principality to do that.

4 MJ [Col PARRELLA]: Is there anything contained in that,
5 what you are deeming to be administrative material, that would
6 assist the defense in locating the declarants who are named on
7 the foreign business records?

8 MTC [MR. TRIVETT]: They shouldn't. It has -- the
9 declarants came back with the certification. So the
10 administrative -- you know, to the extent -- and I don't know
11 that I know the entire universe. This obviously was the
12 largest investigation in the history of the FBI, so I don't
13 want to speak as to the entire thing.

14 What I will say is that the declarants weren't known
15 to the U.S. Government and weren't necessarily communicated to
16 the U.S. Government by the UAE until we got the, sort of the
17 declarations back. Right?

18 So we asked for certain documents from those
19 companies that I just named to be certified. They didn't say,
20 okay, you know, John Smith and Jane Doe are the ones to do it.
21 They went and got them. When they turned them back to us is
22 when we knew who the declarant was.

23 MJ [Col PARRELLA]: I understand that. But I think the

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1 question is a little bit broader than that, and maybe in some
2 of the responsive information coming back to -- from the UAE
3 to the FBI, is there anything on that administrative material
4 that would provide points of contact, phone numbers?

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

6 MJ [Col PARRELLA]: Thank you. I have no further
7 questions.

8 MTC [MR. TRIVETT]: Thank you.

9 MJ [Col PARRELLA]: Anything further from the parties on
10 568?

11 DC [MR. GLEASON]: Your Honor, I just have a few comments
12 based on Mr. Trivett's remarks.

13 The one thing we weren't aware of until Mr. Trivett
14 got up here and spoke was, we had assumed that the FBI had
15 obtained these records in 2001 from the United Arab Emirates
16 Government. What Mr. Trivett is saying is that they did not
17 obtain the records at that time from the UAE.

18 Instead, they went back years later, according to the
19 302s we have, four years in some cases and seven years in
20 another case, with a request to the UAE Government from the
21 prosecution saying here is a record we want to have certified.
22 Here is a copy of a blank certification we need signed. Get
23 them signed and send them back to us.

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1 One thing we don't have is the communication that the
2 prosecution sent, which I think is critical to properly
3 evaluating how these declarations were sent and how they were
4 signed, what instructions were given to the UAE Government
5 from the prosecution.

6 And it's not clear to us what the government is
7 trying to hide. If they want to be so transparent about this,
8 why don't they turn these communications over to us? It's
9 obvious there's something in there that hurts their case, that
10 will be helpful to the defense, which is the definition of
11 being material to the defense.

12 Therefore, Your Honor, again, we request that you
13 order the prosecution to turn over the communications to and
14 from the UAE Government that were sent that pertain to these
15 declarations because they are critical to our preparation.

16 And as Mr. Trivett -- or, I'm sorry, Mr. Connell
17 mentioned, this isn't just some random evidence in the case.
18 This is evidence that is a key piece of evidence of the
19 prosecution's case, and this evidence could mean the
20 difference between whether Mr. Hawsawi is convicted or
21 acquitted, or whether he's sentenced to death.

22 So the prejudice for Mr. Hawsawi in this case is
23 huge. If these documents come into evidence, the defense does

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1 not have an obligation -- or not an obligation, the ability to
2 fully investigate these declarations and everything
3 surrounding these declarations.

4 I have no further argument, sir, unless you have any
5 questions.

6 MJ [Col PARRELLA]: No further questions. Thank you,
7 Mr. Gleason.

8 Let's go to Mr. Connell and then, Mr. Trivett, I will
9 give you an opportunity to reply.

10 LDC [MR. CONNELL]: Sir, I would like to draw the military
11 commission's attention to the evidentiary rules that the
12 government cited as a basis for its ultimate attempt to
13 introduce these documents. I think they shed some light on
14 this discovery dispute which weighs in favor of the defense.

15 The government makes the claim that it will
16 ultimately attempt, and in 491 does attempt, to admit evidence
17 under Military Rule of Evidence 902. And I can only imagine
18 that they are referring to Military Rule of Evidence 902(3),
19 which governs foreign documents.

20 That provision specifically speaks to the importance
21 of investigation in the admissibility of those documents.
22 Military Rule of Evidence 902(3), the last sentence before the
23 breakout, establishes as a precondition to admissibility that

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1 all parties have been given a reasonable opportunity to
2 investigate the document's authenticity and accuracy.

3 So obviously there can be a debate, and at the
4 appropriate time there may be a debate over what constitutes a
5 reasonable opportunity. But it's clear that the rule
6 anticipates, even in foreign document situations, the parties
7 have all the information which is reasonably available to them
8 to try to get to the bottom of who these people are and
9 whether what they say in their declaration is accurate.

10 That becomes important because the other basis that
11 the government cited for its -- for its attempt to introduce
12 these documents, is Military Rule of Evidence 806, which is
13 about declarations. It actually did -- that rule did make it
14 into the Military Commissions Rules of Evidence as M.C.R.E.
15 807 and provides that the parties may attack the credibility
16 of a declarant.

17 The reason why I bring that to your attention is the
18 government is speaking as if self-authentication is a process
19 rather than an endpoint, but also because they are speaking as
20 if the self-authenticating nature of a document insulates it
21 from challenge, when, in fact, the exact opposite is true.

22 The idea behind self-authenticating documents is that
23 all parties get to go out, satisfy themselves in advance of a

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1 trial that, you know, a phone record is what the phone record
2 appears to be, and for reasons of prudential judicial economy,
3 allowing that to go forward without the actual witness being
4 called.

5 But the underlying idea behind M.R.E. 902 is that the
6 parties have the opportunity to go out and satisfy themselves
7 as to the authenticity of the record and both the credibility
8 and the knowledge of the declarant. That's why this type of
9 information is quite important.

10 Thank you.

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

12 Mr. Trivett?

13 MTC [MR. TRIVETT]: I just stand again, sir, to clarify I
14 don't believe I said, and to the extent I did, it was not
15 intended to state that we got the records for the first time
16 seven years later. The records were obtained shortly after
17 the attacks. Ultimately, once it was determined what records
18 wanted to be used in a prosecution, we went back for
19 certifications.

20 So I believe that that's what I said. But to the
21 extent I did not, I wanted to make sure that that was clear
22 for the record.

23 MJ [Col PARRELLA]: Thank you.

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

2 MJ [Col PARRELLA]: The commission is going to go ahead
3 and take a 10-minute recess. The commission is in recess.

4 [The R.M.C. 803 session recessed at 1029, 12 November 2018.]

5 [The R.M.C. 803 session was called to order at 1048,
6 12 November 2018.]

7 MJ [Col PARRELLA]: This commission is called back to
8 order. All parties present when the commission recessed are
9 again present.

10 At this time we'll go ahead and take up AE 579.

11 Ms. Radostitz.

12 ADC [MS. RADOSTITZ]: Thank you, Your Honor. This morning
13 before the proceedings began Mr. Swann reminded me that
14 there's actually two motions before the court in AE 579: The
15 base motion, which is on the docket, but also 579J that is not
16 on the docket because it is not done with the briefing cycle.
17 That is our motion to compel witnesses, and we are prepared to
18 argue on that and will, if the government chooses to argue on
19 it. If they want to wait, that's fine with us as well.

20 MJ [Col PARRELLA]: That would be great and I would
21 appreciate you going ahead and just arguing both. Thank you.

22 ADC [MS. RADOSTITZ]: AE 579 is Mr. Mohammad's motion to
23 dismiss due to the unlawful influence of the CIA Director,

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1 Gina Haspel. This motion was originally argued in an
2 unclassified setting in July, and I'm not going to repeat any
3 of the arguments I made then because I assume that the
4 military judge has reviewed the transcripts from that. But I
5 want to give a little bit more context just to set the stage
6 for the arguments of why we are doing this again, why we are
7 here on a supplemental oral argument.

8 Part of it has to do with classified matters that we
9 will deal with in the 806. After we had a 505(h) hearing in
10 July the government provided some discovery that we had
11 requested, I think, perhaps in March or April and also gave
12 another memo that impacted our ability to argue. And so it
13 was set over until September and then, as you have noted,
14 there was a hurricane, so we didn't argue it then.

15 Also, what happened in the interim was that the Court
16 of Appeals for the Armed Services -- or the Armed Forces
17 issued an opinion in United States v. Barry, and that changes
18 the landscape a little bit on all unlawful influence cases,
19 but this one in particular. And so mostly what I want to
20 address is how Barry impacts the considerations in this case,
21 and it also goes to whether there should be witnesses or not.

22 So 10 U.S.C. Section 949(a)(2) [sic] says that no
23 person may attempt to coerce or attempt to influence the

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1 judges or the members in Section (A); the convening authority
2 in Section (B), and we are going to be dealing with that in
3 555; or the professional judgment of defense counsel.

4 In July we argued mostly about the impact on the
5 members and the military judge, and so I'm not going to repeat
6 those arguments. What I want to focus on here is our argument
7 regarding the influence on the professional judgment of
8 defense counsel.

9 In United States v. Barry, the CAAF basically lays
10 out that their reading of the statute is that there is an
11 intentionality requirement on the first part of the
12 prohibition of unlawful influence, but on the second prong
13 there is not. And so what that means essentially is that if
14 you're arguing that somebody actually coerced the defense
15 counsel, there has to be an intentional act to show that
16 coercion; but if you're arguing that they attempted to
17 influence the professional judgment of defense counsel, there
18 is no requirement of intentionality.

19 So if the person who you are alleging was involved in
20 the unlawful influence made an action, but it didn't matter --
21 but they didn't intend it to have a consequence, it's of no
22 concern under the Barry decision. As long as there was an
23 improper manipulation of the process, the intent of the actor

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1 is not -- is no longer required to be shown.

2 And here, as Judge Pohl pointed out in 524LL, there
3 has been a change in position based on the classification
4 guidance for defense counsel. So I want to just briefly talk
5 about sort of the timeline of events that are relevant.

6 Public documents show that Ms. Haspel was a -- has
7 been working for the CIA for more than 30 years, but the
8 relevant date is February of 2007, because that's when she was
9 appointed as deputy director of the CIA, and that's when she
10 was put in a position that would have some leadership over
11 items regarding CIA programs. And so that's one date I want
12 to set over here.

13 The second date is that since -- between 2013 and
14 September of 2017, the classification guidance given to the
15 defense regarding the investigation of CIA torture sites
16 overseas and contact with CIA agents involved in those sites
17 was basically you can talk to anybody, you can go to anywhere,
18 you just can't disclose any classified information.

19 In September 2017, that changed, and it changed
20 significantly in a way that deeply impacted the ability of
21 defense counsel to do their jobs, to meet their ethical
22 obligations, and to exercise their professional judgment in
23 the way required by this capital case.

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1 So Ms. -- Director Haspel was appointed in February;
2 in September the rules change. We can't say that that's
3 causation, and that's actually why we want to have witnesses.
4 We believe that Director Haspel can explain things that we
5 don't know about how -- about her involvement in those changes
6 to policy.

7 The government's response to this argument is that
8 "she doesn't have anything to do with the classification
9 guidance in this case. We talk to the classification guidance
10 person all the time and we know it's not her."

11 And so my response to that is twofold: One is, well,
12 tell us who it is and then we will go talk to that person.
13 The second is it kind of doesn't matter, and it doesn't matter
14 for two reasons. One is that currently Director -- Gina
15 Haspel is the Director of the CIA and she is ultimately
16 responsible for every decision made by everyone in the CIA.
17 She testified about that during her testimony before the
18 Senate Select Committee on Intelligence. She admitted there
19 that there were classification guidance, and she was
20 responsible for them. So her role as the director makes it
21 necessary.

22 But the second is that the statute, in 949(a)(2), it
23 says "any person." So if the person who actually made the

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1 change of guidance wasn't Director Haspel, we could file
2 another motion to dismiss for unlawful influence. Right now
3 we don't know who that person is, so it's hard for us to
4 articulate that in a motion. But in a way it doesn't matter
5 because the motion before this court is whether the defense
6 professional judgment has been impacted by this change in
7 classification guidance.

8 We believe that Director Haspel is responsible for
9 that. Whether she did it personally or whether it is because
10 of her role as the director, we believe that both -- either of
11 those two prongs are met here, at least in terms of the first
12 burden, which is that we have to show that there is some
13 evidence of unlawful influence before the burden then shifts
14 to the government to prove beyond a reasonable doubt that
15 there has been no actual or apparent unlawful influence.

16 So I want to also point out that in
17 United States v. Barry that the court points out that an
18 attempt to coerce is a separate violation. I think I talked
19 about that a little bit, but our position is that the changing
20 classification guidance, because it has the actual impact
21 because it does, in fact, influence the defense exercise of
22 their professional judgment, that we don't have to show that
23 that was intended. All we have to show is that there was, in

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1 fact, an impact.

2 We believe that that meets our original -- our burden
3 of showing some evidence. However, as we articulate in 579J,
4 we believe that Director Haspel's testimony would assist the
5 court in making that finding -- or if Director Haspel's
6 testimony would assist the military judge in making that
7 determination of some evidence or if the -- whoever it is that
8 does make the decisions, whoever is the actual original
9 classification authority, if their testimony would help us
10 meet that burden in the eyes of the military judge, then we
11 are entitled to have them called as witnesses and we would be
12 requesting that as well.

13 MJ [Col PARRELLA]: Thank you.

14 LDC [MR. RUIZ]: Judge, I just want to for the record
15 indicate that Ms. Lachelier is not present. She is attending
16 to other team business. I neglected to put that on at the
17 onset.

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

19 Ms. Bin'Attash -- or, I'm sorry, Ms. Bormann, would
20 you care to be heard on this issue?

21 LDC [MS. BORMANN]: Judge, at this point I would ask -- I
22 would defer to the other counsel to go first. I have
23 additional argument, but if they cover it, then I don't need

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1 to defer argument until later.

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

3 Mr. Harrington?

4 LDC [MR. HARRINGTON]: We just join in the motion, Judge.
5 Nothing further.

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

7 I think you are up.

8 ADC [MS. PRADHAN]: Thank you, Your Honor. Good morning.

9 MJ [Col PARRELLA]: Good morning.

10 ADC [MS. PRADHAN]: Your Honor, we join, of course, in
11 team Mohammad's arguments on this motion. But just briefly,
12 the classification guidance that we received from the
13 government a couple of months ago and the information
14 contained in that guidance changed the landscape of this
15 motion I think fairly considerably.

16 And it's important, I think, to -- to take into
17 account that in assessing whether Director Haspel's comments
18 constituted actual or apparent unlawful influence on the
19 members in particular, we need to remember that the comments
20 didn't occur in a vacuum, but as part of a systematic pattern
21 of undermining the presumption of innocence for these
22 defendants.

23 In 579, and as Ms. Radostitz just outlined, it is

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1 public, of course, that Director Haspel was involved in
2 destruction of evidence from the black sites. We also know
3 that she was a senior official at the CIA during the RDI
4 program. She was the chief of staff for Jose Rodriguez, whose
5 hand in developing the torture program is infamous.

6 We know from the Senate Select Intelligence Committee
7 report at pages 159 and 160 that, "On September 6, 2006,
8 President George W. Bush delivered a public speech
9 acknowledging that the United States had held al-Qaida
10 operatives in secret detention, stating that the CIA had
11 employed an 'alternate [sic] set of procedures'" -- slowing
12 down for the interpreters, sir -- "an 'alternate set of
13 procedures' in interrogating these detainees, and describing
14 information obtained from those detainees while in CIA
15 custody.

16 "...the speech, which was based" -- and I still quote
17 here, Your Honor -- "the speech, which was based on CIA
18 information and vetted by the CIA, contained significant
19 inaccurate statements, especially regarding the significance
20 of information acquired from CIA detainees and the
21 effectiveness of the CIA's interrogation techniques."

22 That same speech announced the creation of the
23 military commissions to try the men the President deemed

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1 terrorists in his speech. As a senior CIA official,
2 Director Haspel at that time would certainly have had
3 knowledge of the content of that speech and of the President's
4 speech eviscerating from the get-go the presumption of
5 innocence and irrevocably affecting the public's perceptions
6 and therefore the members' perceptions of the men, most of
7 whom they had never heard of until that day.

8 The emptiness of the presumption of innocence in the
9 Military Commissions Act has been repeatedly reinforced since
10 2006, and we've litigated before the military commission, for
11 example, the CIA's involvement in the passing of classified
12 information to the filmmakers of the Hollywood film *Zero Dark*
13 *Thirty* which portrays the torture of Mr. Baluchi as central to
14 the search for Usama Bin Laden.

15 It is unlikely that Director Haspel, as a senior CIA
16 official at that time, lacked knowledge of that PR endeavor by
17 the agency as well, then being, as I mentioned, still senior
18 and rising at the agency and formally involved in the RDI
19 program.

20 The impunity with which the government operates when
21 it comes to dismantling the presumption of innocence in the
22 public domain with an impact, indubitable impact on the
23 members, has not gone unnoticed either by international

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1 observers.

2 In January of this year the United Nations Working
3 Group on Arbitrary Detention, which is the official group of
4 international legal experts applying the conventions to which
5 the United States is a party and whose provisions by the
6 United States to include the International Covenant on Civil
7 and Political Rights, issued a major opinion regarding the
8 illegality of Mr. al Baluchi's detention at Guantanamo and
9 treatment by the United States. They commented specifically
10 on the issue of presumption of innocence in which Director
11 Haspel is implicated.

12 They stated that the material portrayed in the film
13 *Zero Dark Thirty* is highly prejudicial to Mr. al Baluchi's
14 ability to obtain a fair trial. Information placed in the
15 public domain about a criminal matter must not undermine the
16 presumption of innocence. In these circumstances, the working
17 group considers that there is a serious and ongoing violation
18 of Mr. al Baluchi's right to be presumed innocent under the
19 Universal Declaration of Human Rights and Article 14 of the
20 International Covenant on Civil and Political Rights. They
21 also stated that that opinion was to apply to all of the five
22 defendants.

23 So Ms. Haspel's statements -- excuse me, Director

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1 Haspel's statements under oath before the Senate were just the
2 latest, but a significant step forward, in an intentional
3 campaign to unlawfully influence the military commissions, the
4 military commission members eventually, by ensuring the public
5 perception of the guilt of the defendants is a foregone
6 conclusion.

7 It is impossible that Director Haspel did not know
8 the import of her words, and it is equally impossible that the
9 President did not intend the achieved result.

10 Thank you.

11 MJ [Col PARRELLA]: Thank you, Ms. Pradhan.

12 Mr. Ruiz?

13 LDC [MR. RUIZ]: Nothing. Thank you.

14 MJ [Col PARRELLA]: In light of the arguments,

15 Ms. Bormann?

16 LDC [MS. BORMANN]: Judge, we would adopt the arguments,
17 and I have nothing additional.

18 MJ [Col PARRELLA]: Thank you.

19 Trial Counsel?

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

21 MJ [Col PARRELLA]: Good morning.

22 TC [MR. SWANN]: This series kicked off on 14 June 2018
23 when a motion to dismiss for unlawful influence was filed by

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1 the defense. We said in AE 579A that what Ms. Haspel said in
2 her confirmation proceedings in response to a question by
3 Senator Burr did not amount to unlawful influence; that even
4 if the evidence -- if there is evidence of an appearance of
5 unlawful influence, then the only object of the statement that
6 could be affected would be the court members -- or the
7 commission members in this case, and that would be a time for
8 voir dire.

9 The members would then -- could be asked about
10 whether they had ever heard that statement and whether they
11 had ever heard any other untold number of statements made by
12 Mr. Mohammad taking credit for the September 11th attacks, or
13 even D, when -- their response to the nine accusations by the
14 Shura Council. There have been a whole lot of statements made
15 out there. And I think probably during the argument on 555
16 you are going to hear some mention where Mr. Nevin might even
17 say that his client tried to plead guilty in this case,
18 although we have never seen any evidence of that pretrial
19 agreement.

20 So our argument then was that what she said was not
21 unlawful influence. And even if it raised to the level of an
22 appearance of unlawful influence, it could be addressed when
23 the members are seated in this case.

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1 Now, on 24 July, a 505 session was held. On 25 July
2 the judge heard what classified information the defense wanted
3 to present, and he determined that there would be an 806
4 session to be held, and that the evidence that they presented
5 was relevant for a fair determination of the issues before the
6 commission and would be heard in an 806 proceeding. We end
7 July with not having done anything.

8 So on 7 September '18, one day before the September
9 hearings, the defense filed a supplement to their original
10 motion citing to discovery that counsel mentioned, that
11 actually had been provided to them nearly a month and a half
12 earlier.

13 We didn't argue that supplement at that time because
14 the government believed it needed to file a response, which we
15 did on 20 September. We informed all that Ms. Haspel has
16 never been an OCA in this case; that Ms. Haspel does not
17 decide -- and this is extremely important: No OCA decides
18 what we believe to be the discovery in this case.

19 The only thing the OCA does is it, if it is
20 classified, it tells us that it is classified. If there is a
21 way through a process, 505, through you. If we can get a
22 summary of that material to get it down to the lowest possible
23 classification level, we do that.

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1 In this case we have turned over to the defense Top
2 Secret information, display only to individuals like
3 Mr. Mohammad with the consent of the OCAs. But we determined
4 that material was discoverable. We decide. They can't tell
5 us no. They can only tell us how best to do it, and we do it.

6 Now, our response at page 2 of 579G lays out what we
7 see as our discovery obligations in this case, and we have
8 never wavered from those. On that side of the room there is a
9 combined total of nearly 130 years of trial experience. And
10 we all know what the law says our discovery obligations are.
11 And again, we've never wavered from those.

12 Now, on 29 October -- and I will take on the issue of
13 the production of Ms. Haspel and the other OCAs, despite the
14 fact that the United States really would have until
15 19 November to file a response. But on 29 October, six weeks
16 after the September hearing, and only a few days before this
17 hearing, we received a request for the production of
18 Ms. Haspel and other OCAs unknown.

19 We responded to that within two days, and we informed
20 the defense that we would neither produce Ms. Haspel or any of
21 the OCAs because they have not demonstrated the relevance of
22 any of that testimony.

23 On 5 November, the defense filed their motion to

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1 compel both Ms. Haspel and any and all original classification
2 authorities. There is no reason to produce Ms. Haspel or any
3 of the other classification authorities that have been on this
4 case over the years.

5 Ms. Haspel has never been an OCA in this case. And I
6 can say with some confidence that none of us on our side of
7 the room have ever seen or met Ms. Haspel, and we know all the
8 OCAs over the years that have been and done extremely,
9 extremely credible work on behalf of the United States.

10 Now, counsel mentioned United States v. Barry. I
11 find those facts have no application to this particular
12 instance in any way. Barry was decided on a unique set of
13 facts, and they had facts in this case.

14 If they want to call a witness like Ms. Haspel to
15 come in here and say I have never been an OCA on this
16 particular case, then I will, on behalf of the United States,
17 tell you that that is the case. She has never been an OCA on
18 this case. Again, our discovery obligations guide us, not
19 what an OCA says.

20 So notwithstanding all of this, the defense has
21 argued that an objective observer would harbor significant
22 doubt as to the fairness of any resulting proceeding because
23 of Director Haspel's position as original classification

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1 authority. You find that at AE 579 (KSM) at 7 to page 8.

2 Defense counsel alleged that because
3 Director Haspel's previous involvement in the destruction of
4 evidence -- and there is no evidence of that, there is no
5 evidence there has ever been any destruction of evidence in
6 this case at all. They say that she would not hesitate to
7 withhold evidence either by destroying it, withholding it from
8 the prosecution or over-classifying it.

9 Now, while defense counsel have no evidence to
10 support what amounts to an outrageous speculation and
11 allegation, it is important to note that Director Haspel again
12 is not the original classification authority in this case and
13 never has been.

14 I had a difficult time following counsel's argument
15 about how Director Haspel's statement at her Senate
16 confirmation hearing and this imaginary position as an OCA,
17 that somehow defense counsel's judgment has been impacted.
18 That argument carries no water and it is simply not true.

19 Now, given that the commission should find no
20 appearance of unlawful influence by her initial statements at
21 her Senate confirmation hearing, and the fact that she is not
22 an OCA in this case, never has been, the court should deny
23 this motion and deny the motion to compel witnesses.

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1 Subject to your questions.

2 MJ [Col PARRELLA]: No questions. Thank you, Mr. Swann.

3 Ms. Radostitz.

4 ADC [MS. RADOSTITZ]: I am tempted to respond to the
5 government's assertions about the timing of who filed what,
6 when, where, but I kind of think it's irrelevant. So unless
7 the judge -- unless Your Honor would like to hear more on
8 that, I think I will just set it aside to say that had they
9 provided the discovery that we requested in March, we would
10 have been able to argue this in July and be done with it.

11 But the government pointed out that Mr. Mohammad has
12 tried to plead guilty a number of times in this case, and that
13 is true, it's in the record. It's not something that we have
14 disputed. But what they don't point out is that he is not
15 going to be released ever. The government has said that on
16 numerous occasions, that even if the members were to find him
17 innocent, even if they were to find that the government had
18 not proven their case, Mr. Mohammad would not be released from
19 custody.

20 So what we are talking about here is his life,
21 whether the government should be allowed to try to execute
22 him, and that that brings a gravity to these situations and it
23 also, the reason that there are classification guidance in

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1 this case is because after he was taken into custody, the
2 government chose to do something we have never done before in
3 American history: They tortured him for three-and-a-half
4 years.

5 And there is a big incentive to hide that torture,
6 and it's done every single day in this courtroom and it's done
7 through the classification guidance, and it's done through the
8 threats of the government that if I stand up here and say
9 something I'm not supposed to say, they're going to seek to
10 put me in jail. That is the impact that the classification
11 guidance has on this case.

12 And I'm sorry that Mr. Swann doesn't understand the
13 argument that the director of the CIA is actually responsible
14 for the people who work underneath her, but I think the
15 military judge does, because that is how our organizations
16 work.

17 And just like in the military, whoever the general
18 is, you listen to what they say and they are responsible for
19 the actions of their privates, General Haspel -- or Director
20 Haspel is responsible for the people who work for her, and if
21 it is the OCAs who are not her who are making classification
22 guidance decisions, they are making it impossible for me to do
23 my job, for the defense counsel in this case to do their job,

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1 that is unlawful influence.

2 And we don't have to prove that she wanted to do
3 that. We just have to prove that it has had that impact.
4 That's the holding of Barry. And it doesn't matter that the
5 facts are a little bit different in Barry because the decision
6 is a conclusion of law, it's not a conclusion of fact. It's a
7 conclusion of law that there is no requirement of
8 intentionality on the second prong of an unlawful influence
9 claim.

10 MJ [Col PARRELLA]: Thank you. Okay.

11 Any other counsel? Ms. Bormann?

12 LDC [MS. BORMANN]: Although Ms. Radostitz didn't want to
13 address it, I'm going to.

14 In July we were scheduled to argue this. The night
15 before the arguments were set, on July 25 of 2018, I received
16 a phone call from my DISO who said, "We just received
17 discovery -- it was dropped by the government -- that impacts
18 on the hearing tomorrow." I gave up what I was doing, drove
19 over here, looked at it and we fashioned a 505(g) notice. It
20 was filed on July 26.

21 On July 25, in the evening, we requested an AE
22 number. We filed it on July 26 because the government
23 provided it literally less than 12 hours before the hearing.

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1 So when we talk about timing and the reason why this
2 is being heard today, it's because two things: One, the
3 government failed to provide it to us despite the fact -- and
4 we will address this in a classified setting -- they knew
5 about the discovery and should have been providing that
6 information a long time ago; and two, a hurricane. So I'd ask
7 you to take that into consideration.

8 I have nothing further.

9 MJ [Col PARRELLA]: Thank you. Okay. In light of the
10 time right now, and in an effort to give you, Ms. Bormann,
11 additional time to prepare for tomorrow's examination of
12 Mr. Castle, we'll go ahead and take a recess now, reconvene at
13 1300 where we will take up beginning with 534.

14 This commission is in recess.

15 Please hold on one moment. Mr. Ruiz, did you have
16 something?

17 LDC [MR. RUIZ]: Yes, Judge. I am going to ask that Mr.
18 al Hawsawi be allowed to return to the camp after the lunch
19 hour.

20 MJ [Col PARRELLA]: Certainly.

21 LDC [MR. RUIZ]: If the guard force can be directed to do
22 so.

23 MJ [Col PARRELLA]: Okay. I'm not going to direct them,

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1 but this is normal procedure, correct?

2 LDC [MR. RUIZ]: Very well. You don't have an objection?

3 MJ [Col PARRELLA]: No objection. Everyone please carry
4 on.

5 [The R.M.C. 803 session recessed at 1121, 12 November 2018.]

6 [The R.M.C. 803 session was called to order at 1306,
7 12 November 2018.]

8 MJ [Col PARRELLA]: The commission is called back to
9 order. Trial Counsel, are all the government counsel who were
10 present at the recess again present?

11 CP [BG MARTINS]: Yes, Your Honor.

12 MJ [Col PARRELLA]: And, Defense Counsel, are all of the
13 counsel who were present at the last session again present?

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

15 LDC [MR. HARRINGTON]: Yes, Judge.

16 LDC [MS. BORMANN]: Judge -- I'm sorry. I didn't know if
17 you wanted Mr. Harrington to go first or me. We have
18 everybody, plus Major Matthew Seeger back. And I have some
19 information for the commission on the situation in AV-34.

20 MJ [Col PARRELLA]: Okay. Is everybody else? Mr. Ruiz?

21 LDC [MR. RUIZ]: Judge, Ms. Lachelier and Mr. Gleason are
22 absent attending to other team business.

23 MJ [Col PARRELLA]: Okay. And ----

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1 DDC [Lt Col THOMAS]: Your Honor, for Mr. al Baluchi, all
2 parties that were present before are again present, except for
3 Mr. Farley, who remains absent.

4 MJ [Col PARRELLA]: So I will note that Mr. Hawsawi is
5 absent. Trial Counsel, do you have a witness to testify as to
6 the absence?

7 I'm sorry, since he was already -- yes, we have
8 already gone through that. So I will note for the record that
9 I find his absence to be knowing, voluntary, and we will
10 proceed. All right.

11 Ms. Bormann, you said you had an issue with respect
12 to 534?

13 LDC [MS. BORMANN]: Not 544. AV-34. I also have an issue
14 with respect to 538. So I can address both in one fell swoop.

15 To keep the commission informed on the state of the
16 office issue, this morning Major Matthew Seeger, United States
17 Army, was supervising the cleaning of the area in AV-34. And
18 he just finished right before we came back to session.

19 During that time period one of the file cabinets was
20 firmly stuck to the floor. And when the cleaning people
21 sought to move it, it pulled up tiling off the flooring.
22 Normally, it would not be of concern. But the commission may
23 not know this: In late 2015 and early 2016 there were two

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1 studies done by the Navy/Marine Corps ----

2 MJ [Col PARRELLA]: Ms. Bormann, I just want to stop you
3 right now, because right now it's not my intent to take this
4 up. You represented, I think at the 802 yesterday, that your
5 party has not used AV-34. So I don't see that as pertinent to
6 this week's issue. And I know you intended to request an AE
7 and have requested an AE to brief this, so ----

8 LDC [MS. BORMANN]: Judge, it affects everybody here.
9 They found asbestos in the flooring. Mr. Ruiz, Mr. Connell
10 all share that space. It just happened.

11 I notified the chief defense counsel and the Navy
12 medical people, so that's where we are.

13 MJ [Col PARRELLA]: Okay. Thank you.

14 LDC [MS. BORMANN]: You're welcome.

15 MJ [Col PARRELLA]: And with respect to 538?

16 LDC [MS. BORMANN]: Ah. The government provided discovery
17 to us at the break. It's in a TS disc. I don't know what it
18 says. We have issues here in Guantanamo. We don't have the
19 ability to upload discovery onto a point-to-point; our team
20 doesn't. We have to go through some IT machinations. We have
21 attempted to do that. There are problems with it. We can't
22 do that. We tried all over the lunch period to read it.

23 It affects our ability to go forward on 538 because I

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1 don't know what it is. We were only told it was related to
2 538. I can't tell you whether it will affect until I read it.

3 I have people working to print materials right now so
4 we can prepare. I don't know, and I don't want to waste
5 resources. If we're not going to go forward, then I'd like
6 not to waste my team's resources on printing 538.

7 MJ [Col PARRELLA]: Okay.

8 LDC [MS. BORMANN]: So we have a problem. And I don't
9 know what it is because I can't open it. But assuming that it
10 affects our arguments in 538, since it's related to 538, I
11 would need to review it before we could argue 538. And 538 is
12 on the call for later this week, so if we are not going to do
13 538, I don't want to have my paralegals sitting there printing
14 that when they could be printing other materials.

15 MJ [Col PARRELLA]: Trial Counsel, is it -- I'm not sure
16 the breadth of the information that was provided. Is it
17 possible for the government to print this material and provide
18 the Bin'Attash team a hard copy?

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

20 MJ [Col PARRELLA]: Okay.

21 LDC [MS. BORMANN]: How extensive is it? I don't even --
22 we can't open it, so I don't even know how much there is.

23 MJ [Col PARRELLA]: I think we will find out shortly, and

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1 then you can let the commission know.

2 LDC [MS. BORMANN]: Okay. Terrific. Thank you.

3 MJ [Col PARRELLA]: Thank you. Okay.

4 We will now turn to AE 534, and as you approach,
5 Ms. Pradhan, I assume you are arguing on behalf of Mr. Ali?

6 ADC [MS. PRADHAN]: Yes, sir.

7 MJ [Col PARRELLA]: I will just note for you and for the
8 record that I have reviewed the transcript the last time this
9 was argued, which I believe was between the 26th of February
10 and the 1st of March ----

11 ADC [MS. PRADHAN]: Yes, sir, I think we had classified
12 argument on the 1st of March.

13 MJ [Col PARRELLA]: ---- 2018. So to the extent you can
14 please keep your oral argument this afternoon to new
15 information that's arisen since you argued this same issue
16 before Judge Pohl.

17 ADC [MS. PRADHAN]: Absolutely, Your Honor. And the
18 military commission is, of course, correct that we have had
19 oral argument once before on this.

20 Since we have had oral argument in March of this
21 year, there have been two major developments that have
22 propelled the two supplements to AE 034 [sic] and the request
23 for witnesses. One of those developments is classified and we

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1 can discuss it more in closed session, but the other is the
2 production by the government of a second RDI index.

3 And just to briefly recap, Your Honor, if I may:
4 AE 534 was initiated as a motion to compel documents under
5 category 2.h. of AE 397. AE 397, of course, being the
6 government's motion to produce documents related to the RDI
7 program in ten broad categories, and category 2.h. was
8 statements obtained from interrogators, summaries of
9 interrogations, reports, logs, notes of interrogations from
10 interrogators.

11 The government's response initially was first that
12 there was nothing to produce under 2.h., and instead they gave
13 us the RDI index, what we now refer to as the first RDI index,
14 which was a collection, a spreadsheet, if you will, of --
15 excuse me. Two days away from my germy children have not
16 cured my cold, Your Honor.

17 The first RDI index was an Excel spreadsheet
18 purporting to put in chronological order the summaries that
19 had been produced by the government of statements and SOPs and
20 other documents related to the defendant's time in the RDI
21 program. There were 700-and-some entries in that index.

22 The first RDI index was characterized by trial
23 counsel as a chronology. When they were asked about it by

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1 Judge Pohl in January, why they actually had not assisted us
2 with the chronology that we require for this case of
3 Mr. al Baluchi's time in CIA detention, they responded that,
4 "We have produced the RDI index at AE 534A."

5 So that was held out and represented by the
6 government to be the chronology that we needed; that all 700
7 of these documents were in approximately chronological order.
8 They, the government, represented that the index put together
9 personnel with the summaries that had been provided, allowed
10 us to place those in the locations.

11 Because as we have said for a very long time,
12 Mr. al Baluchi's time in CIA detention and our ability to
13 create a detailed chronology of where he was, who was in the
14 room with him, what he was being asked, and what his
15 conditions of confinement were all at the same time are key,
16 are at the very heart of the defense, Your Honor, the very
17 heart of these statements that he made at that time and
18 whether or not the 2007 statements, which are a thread running
19 through this motion and several other motions, are the fruit
20 of those tainted interrogations.

21 The government's response in January was to refer to
22 the RDI index and say, "We have provided to the defense that
23 chronology in the first RDI index."

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1 Now, contrary to those representations we outlined,
2 as you are aware, Your Honor, in March dozens of areas in
3 which the government provided either incorrect or misleading
4 information in that index. There were gaps between direct and
5 substantial contacts, between personnel and detainees that
6 were described in the 2.d. profiles, which we will talk about
7 with AE 562. There were discrepancies -- there were
8 discrepancies among the entries. There were wrong locations,
9 dozens and dozens of gaps that we discussed in -- both in oral
10 argument and in AE 534B.

11 For 435 of those entries, there were no personnel
12 listed at all, making cross-referencing with the 2.d. profiles
13 absolutely impossible.

14 Now, in response the government said in March, in
15 oral argument, that they would be, quote, happy to look at
16 what the defense has claimed and provide a response to them
17 that will clear up any perceived discrepancies. And so in
18 March, Your Honor, and I think -- excuse me, on 16th May, the
19 government produced to us the second RDI index.

20 Now, the second RDI index has some differences. It
21 improves dates to the extent that some entries now include
22 months and years rather than the convention that they had used
23 earlier of early, mid, late, and then the year, what we call

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1 the date-learning convention. The index also add a few
2 personnel to some entrees.

3 But there are some tricks used as well in this index.
4 Just looking at the first page of the document, 12 of the 28
5 entries changed position between the first and the second RDI
6 index despite the government strenuously insisting to Judge
7 Pohl that it was an accurate chronology. And we will see in
8 562 that fairly often the government's protestations regarding
9 the accuracy of its discovery productions are betrayed by when
10 you drill down into the facts of the summaries.

11 Where the government has produced a single summary
12 stating on -- for example, on 100 occasions Mr. al Baluchi
13 cooperated with interrogators, which is a significant
14 statement to us, they've now included a hundred references in
15 the index to that summary -- excuse me, a hundred references
16 to that summary in the new index, which may tell us roughly
17 what season of some year those hundred interrogations took
18 place, but doesn't necessarily connect us to all the personnel
19 involved, doesn't tell us the conditions of confinement, and
20 continues to give us code names for locations that doesn't
21 allow us to assess where and which prisons he was actually
22 being held.

23 And as Your Honor knows, from the second supplement

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1 to 534 and 534H, we have plenty of examples that we can
2 discuss in closed session about how the government hasn't
3 actually cleared up any discrepancies in the second RDI index;
4 in some areas it's actually added to them.

5 Even more than the conflicting information in the RDI
6 index -- and this brings me, Your Honor, to 534G, which is our
7 request for witnesses. The central question has become how
8 the government is defining RDI, to decide what to include in
9 the RDI index and, critically, what to produce to the defense
10 in discovery. In other words, what are the parameters of the
11 RDI program, in the government's view.

12 On the 3rd of May of this year we had an 806 hearing.
13 And this is -- I'll quote to you now briefly from the
14 unclassified or redacted transcript of the 806 hearing that is
15 posted on the military commission's website, where Judge Pohl
16 asked the government, asked trial counsel about what they
17 considered to be the parameters of the RDI program.

18 And he asked, Well, the accused was apprehended and
19 there is a period of time when he is not in U.S. control.

20 Trial counsel said, Yes.

21 Judge Pohl said, "Mr. Connell proffered that during
22 that period of time there was some CIA questioning of them."
23 This is before they enter a CIA-controlled black site, when

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1 they are still in government custody.

2 Trial counsel said, "Correct."

3 Judge Pohl said, "Okay. Would that be considered
4 part of the RDI program?"

5 And trial counsel replied, "No."

6 Trial counsel went on to say, "When he was rendered
7 to the...CIA, that's ----"

8 And Judge Pohl concluded, "Okay. So just so I'm
9 clear, the RDI program begins with the R...the rendering. Not
10 the detention, not the interrogation, but the rendering,
11 right?"

12 And trial counsel replied, "Yes."

13 That was the first time, Your Honor, that we became
14 aware that the government's definition of the RDI program
15 didn't include these enormous gray areas when Mr. al Baluchi
16 and the other defendants were nominally outside U.S. custody
17 but still being interrogated and still, for all intents and
18 purposes, entered in the RDI program.

19 Now, we believe, from the Senate Select Intelligence
20 Committee report at page 243, that Mr. al Baluchi was
21 kidnapped on the 29th of April 2003 in Pakistan. We know that
22 the CIA was participating in his interrogations in Pakistan.
23 For example, at footnote 1378, the report says, "Given the

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1 threat to U.S. interests, CIA officers sought to participate
2 in the interrogations. CIA officers were observing the
3 foreign government interrogations of Ammar al Baluchi via
4 video feed."

5 We also know, Your Honor, that Mr. al Baluchi was
6 tortured while he was still in Pakistan. And a very brief
7 unclassified example of that is provided in the record at
8 AE 534B Attachment F at Bates number -- for the government,
9 Bates number MEA-STA-1886. And that is marked
10 UNCLASSIFIED//FOUO. At the very bottom of that summary
11 states, "After the interview Ammar was not allowed to sleep
12 for the next 24 hours." That's one brief unclassified example
13 of the treatment Mr. al Baluchi received while in Pakistan.

14 We also know that information from the interrogations
15 in foreign government custody that were overseen by the CIA
16 were sent to interrogators at the CIA-controlled facilities
17 for use in other detainee interrogations and to headquarters
18 for analysis and for further facilitation of the RDI program.
19 And we know that information from all the sites and from other
20 CIA reporting was also sent to the FBI. That's also in the
21 SSCI report.

22 For example, at page 92 of the SSCI report it states
23 very briefly, "That evening, the detention site," and they are

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1 referring to COBALT, "received two reports. The first
2 recounted the reporting of Majid Khan, who was still in the
3 custody of a foreign government, on" two meetings. "According
4 to Khan, his meetings with the two were facilitated by Ammar
5 al-Baluchi."

6 So these are not abstract references, Your Honor.
7 These are references that not only place all of these
8 detainees, if not strictly in U.S. custody, then at least
9 under U.S. control of their interrogations, and intermingles
10 their interrogations to the point where it makes that
11 chronology, our need for that chronology much more -- much
12 more pertinent, much more germane to the question of whether
13 or not the -- ultimately the 2007 statements are going to be
14 admitted in this case.

15 The only functional difference between
16 Mr. al Baluchi's interrogations in Pakistan and those at
17 COBALT, or any other site, was nominal custody. There is
18 still U.S. agents present, there is still torture apparently
19 inflicted by U.S. agents, if you look at the wording of 1886,
20 which I just quoted to you. It strongly implies that they
21 were the ones imposing those conditions. And there are still
22 questions regarding U.S. interests in other CIA detainees.
23 They are directing the questioning.

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1 So clearly the Senate considered those interrogations
2 to be part of the RDI program and included them in the RDI
3 report, and so did the CIA. But the government here in this
4 room wants to pull a curtain on all of the detention and
5 interrogation parts that they can, and severely restrict, in
6 doing so, RDI discovery.

7 So over two years after the government was supposed
8 to disclose all RDI discovery to the defense, we are still
9 here arguing about what discovery they are legally mandated to
10 provide to us and what the parameters of that discovery is.

11 And that brings me briefly to 534G. Now, obviously,
12 Your Honor, I can address the particulars of 534G more
13 fulsomely in closed session, but I just want to highlight that
14 534G is a request for two witnesses, both former U.S.
15 officials who were involved in detainee interrogations and
16 whose testimony, we believe, would be dispositive -- would be
17 critical to completely rebut the government's artificial
18 presumption -- or artificial parameters on the RDI program,
19 and illustrate the enormous amount of relevant and material
20 information that the government has obscured or entirely
21 stripped from the RDI indices, both the first and the second,
22 as a result of that definition.

23 We can, and we certainly have through our pleadings,

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1 illustrate the government's manipulation of the definition
2 through discovery and other documents. But witness testimony,
3 again, for reasons that I can address in closed session, would
4 place that argument beyond all doubt.

5 Subject to your questions, Your Honor.

6 MJ [Col PARRELLA]: Not at this time, Ms. Pradhan. I
7 would like to hear what the government says, and then in light
8 of that I might have some questions for you.

9 ADC [MS. PRADHAN]: Thank you, sir.

10 MJ [Col PARRELLA]: Lieutenant Colonel Poteet.

11 DDC [LtCol POTEET]: Good afternoon, Your Honor.

12 MJ [Col PARRELLA]: Good afternoon.

13 DDC [LtCol POTEET]: In the AE 534 pleadings, Mr.
14 Al Baluchi has done important and thankless work that piece
15 together the unreliable and misleading nature of the summaries
16 and substitutes for classified discovery pertaining to
17 Mr. al Baluchi.

18 We intend to file a similar motion pertaining to
19 Mr. Mohammad once we've completed our analysis of these
20 inconsistencies. But we have an interest in the reliability
21 of discovery -- slowing down.

22 We have an interest in the reliability of discovery
23 provided to a codefendant and provided to us as well

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1 pertaining to that codefendant. Actually incorrect and
2 misleading substitutes for discovery would not and should not
3 be allowed in any case. But I rise to simply ask you to keep
4 in mind, of course, that this is a capital case and the
5 Supreme Court has ruled that a capital case requires a
6 heightened requirement for reliability.

7 And this substitute and summary of discovery that's
8 been provided does not meet that standard, and accordingly
9 Mr. al Baluchi's motion to compel should be granted.

10 MJ [Col PARRELLA]: Thank you.

11 Ms. Bormann?

12 LDC [MS. BORMANN]: Judge, we are asking to defer comment
13 on this until Friday. We actually have some notes on this
14 very issue. We sent somebody in to try and retrieve them,
15 because we were hoping to be able to do it now, and we can't.
16 So we might have them later today, we might have them tomorrow
17 once they are de-molded, but we will have comment on this.

18 MJ [Col PARRELLA]: I will allow you to defer that oral
19 argument to the latest possible time. I will note that Friday
20 I'm still planning on being a closed 806 session, so it may be
21 Thursday at some point.

22 LDC [MS. BORMANN]: We should have it by then, certainly.
23 I hope we have it by the end of today.

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1 MJ [Col PARRELLA]: I understand.

2 Mr. Harrington?

3 LDC [MR. HARRINGTON]: We just join the other motion,
4 Judge.

5 MJ [Col PARRELLA]: Mr. Ruiz.

6 LDC [MR. RUIZ]: No argument. Thank you.

7 MJ [Col PARRELLA]: Trial Counsel.

8 TC [MR. GROHARING]: Thank you, Your Honor. A lot of
9 counsel's argument was quite similar to the argument we heard
10 back in March, so I won't repeat the government's argument,
11 absent questions from the military judge.

12 I do want to start, though, by addressing counsel's
13 comments. I believe Ms. Pradhan referred to the government's
14 efforts as tricks used with respect to preparing the second
15 RDI index; that's how I heard it. And Colonel Poteet said
16 that the government is intentionally misleading in our
17 efforts. I reject -- the government rejects any assertions of
18 that nature. No one on behalf of the United States has ever
19 intentionally misled the defense through our efforts.

20 The summaries at issue here are summaries that were
21 approved by your predecessor. Every document in question that
22 they're taking issue with was a document that we brought to
23 Colonel Pohl. He reviewed it and determined that the proposed

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1 summary for the defense was an adequate substitute. So there
2 was no trickery involved.

3 It simply -- we are protecting certain classified
4 information, but protection of that doesn't have any impact on
5 the defense's ability to make a defense in this case. And
6 that's a determination that Judge Pohl made over and over and
7 over again with these summaries.

8 I think, you know, in the March hearing, after much
9 of the same discussion, Judge Pohl commented that essentially
10 what Ms. Pradhan was asking would turn the whole 505 process
11 on its head, and I think Judge Pohl had it right. The
12 summaries in question were approved after considerable review
13 by the military judge taking into account everything that he
14 needed to to approve the summary. The defense has given us no
15 occasion to revisit those decisions.

16 With respect -- first, I'll address the witness
17 request. It's not clear from the defense pleading or anything
18 that counsel argued how a witness would possibly help you
19 answer this motion and rule on the motion pending before the
20 commission.

21 The military judge, your predecessor, had the actual
22 documents and approved summaries of those documents. It's not
23 clear how these witnesses would help in that analysis at all.

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1 Whatever information is in the documents is in the documents
2 or it's not, and it's up to the judge at that point to
3 determine whether or not the substitute provided to the
4 defense is adequate. So I can't see how a witness would
5 possibly aid in the military commission's analysis of that
6 question, so the witnesses certainly are not necessary in
7 deciding this motion.

8 MJ [Col PARRELLA]: Mr. Groharing, to the extent that you
9 can do so in open court, can you comment on Ms. Pradhan's
10 argument that the government is taking a narrower view
11 regarding the breadth of the RDI program than, say, other
12 agencies?

13 TC [MR. GROHARING]: I think her comments are accurate
14 with respect to what was said during the May hearing, as far
15 as how we looked at -- when we were trying to analyze for
16 purposes of determining with respect to AE 397 paragraph 2.d.,
17 what individuals interacted with the accused in such a manner
18 that they had direct and substantial interactions such that
19 they should be identified by a unique functional identifier.

20 Our analysis looked at individuals who interacted
21 once the accused had entered the CIA RDI program, which we
22 looked at as the CIA having custody of the accused or them
23 being rendered to the CIA. And so to the extent it's a

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1 discrepancy, that explains what Ms. Pradhan is talking about.

2 Prior to Mr. Ali being rendered to the CIA, there
3 were interrogations of him, while -- we've turned over
4 summaries of those interrogations that were approved by the
5 military judge to the defense. And to the extent that there
6 were individuals involved in those interrogations who also
7 were involved in the CIA RDI program with respect to Mr. Ali,
8 the defense is able to connect them up to the extent there is
9 any overlap between pre-CIA-RDI interrogations, anything that
10 happened prior to Mr. Ali being taken into United States
11 custody, if that answers your question, Your Honor.

12 MJ [Col PARRELLA]: It does, but that linkage you are
13 talking about they would be able to connect would be through
14 the UFIs?

15 TC [MR. GROHARING]: Yes, Your Honor. That's correct. We
16 have given other discovery, and it's mentioned in our response
17 and as far as information regarding those pre-RDI
18 interrogations where we have given the defense discovery such
19 that they are able to identify people who are associated
20 whether we have identified them with a unique functional
21 identifier or otherwise.

22 It's correct to say that, as Ms. Pradhan said that
23 the RDI index or indices as applied to all five teams, there

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1 are gaps on the indices where you will have a Bates number for
2 an event and there's not a unique functional identifier
3 associated with that. That's simply because there weren't any
4 personnel involved in that particular event that warranted
5 identification with unique functional identifiers. That's not
6 an error from the RDI index, that's just the government did
7 not, and the military judge agreed, Judge Pohl agreed with our
8 assignment of UFIs for the folks that we did assign UFIs.

9 So in that instance it doesn't mean that the whole
10 RDI index needs to be revisited. What we've said and what we
11 said in the guidance we gave the defense in September 2017, is
12 that in those instances they need to come to the government.
13 And if they want to identify someone who is present for some
14 discovery reflected on that index, they can make a request in
15 the same manner that we've suggested requests are made through
16 the witness contact protocol, but they are not presently
17 identified with a unique functional identifier.

18 MJ [Col PARRELLA]: What's the relationship between the
19 summaries my predecessor approved and the second -- what's
20 been referred to as the second RDI index?

21 TC [MR. GROHARING]: So the second RDI index was provided
22 to the defense after we reviewed certain of their comments
23 that were made and then basically scrubbed the -- all of the

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1 RDI indices to see if there were any errors, date errors and
2 things to that effect, that we had missed the first several
3 times going through.

4 The main difference is that on the first RDI index,
5 we had summaries that we called collective summaries where --
6 where an accused was presented with a photo or some other
7 information and cooperated in the interview but didn't have
8 any information. We wanted to summarize that in a way that
9 just captured that they cooperated so the defense could get
10 the benefit of, for mitigation purposes or otherwise, that
11 they cooperated, but it didn't result in any information of
12 value.

13 So when those incidents happened, it didn't generate
14 an intelligence report that went out typically where, you
15 know, if the accused said something substantively it would go
16 out to the community. We would summarize that in a way that
17 the defense would have access to a summary of what they said.
18 These would be grouped together in quarters. So there was a
19 collective summary for each quarter of the accused's
20 detention.

21 Those interviews -- and it caused some confusion, I
22 believe, in both the synopses which Ms. Pradhan mentioned that
23 were associated with the d. products, as well as the other

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1 discovery, because in certain times on that index you have
2 multiple individuals identified by a UFI on the first RDI
3 index that that document actually referenced a whole bunch of
4 different events.

5 So on the second RDI index, we broke it into every
6 separate time when they were shown a photo, for example, and
7 it got its own line. And so in that case you would have -- if
8 there was a person identified by a UFI, you would have someone
9 attached to that particular event. So that created several
10 hundred additional lines on the RDI indices for each of the
11 accused, and that way I would say is the major change with
12 respect to the RDI index.

13 Otherwise, there were dates, I would say, here and
14 there, which in certain cases the date of the actual report
15 was -- sometimes a report would be issued significantly after
16 the date of an event. Our methodology was to put the date of
17 the event on the RDI index so it's chronological as to the
18 event, not the report date. There were instances where just
19 through errors the wrong date was put on -- in our database
20 and then reflected on the RDI index.

21 In certain cases -- there were very few -- the wrong
22 year was put on. So an interview inappropriately said
23 June 1st, 2003 instead of June 1st, 2004. So those types of

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1 edits, quality control measures were, you know, put in place.
2 That review resulted in the second RDI index.

3 With all of that work, there certainly -- I don't
4 dispute that there could still be some -- I would say
5 proportionally very minimal number of mistakes on the RDI
6 index. And to the extent there are, the government regrets
7 that.

8 But what the government would propose to the
9 commission is that if the defense perceives a mistake or
10 something that doesn't make sense with their other discovery,
11 that could be handled through a discovery request. A lot of
12 times, I think in almost every case, those matters can be
13 easily explained just with the general back and forth that
14 counsel have in cases, and wouldn't need to involve the
15 commission to resolve those. Obviously, if they couldn't be
16 resolved, the defense could at that point raise it with the
17 commission.

18 But it is now though -- what the defense is asking is
19 for the commission to throw out all of the work that was done
20 before by Judge Pohl in reviewing and approving summaries, and
21 instead give the defense the actual original documents for all
22 of those summaries.

23 MJ [Col PARRELLA]: Mr. Groharing, by your comment about

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1 the defense could simply come and ask about discrepancies, is
2 it fair to assume, then, that that has not taken place to
3 date?

4 TC [MR. GROHARING]: That has not, Your Honor, no.

5 MJ [Co] PARRELLA]: Okay.

6 TC [MR. GROHARING]: Those are all the comments I had,
7 Your Honor, and subject to any more questions from the
8 commission.

9 MJ [Co] PARRELLA]: I have no further questions. Thank
10 you.

11 Ms. Pradhan?

12 ADC [MS. PRADHAN]: Thank you, Your Honor. I just have a
13 few points. The first is, we addressed this in March, but
14 trial counsel's statement that we could have just come to them
15 with the discrepancies we talked about in March -- and as
16 Your Honor is probably aware, after reviewing the documents,
17 it would be absolutely impossible to go through every single
18 discrepancy identified in both the first and the second RDI
19 index in one or a series of dozens of e-mails between us and
20 the prosecution.

21 And this sort of brings me to trial counsel's
22 statement, acknowledgment really, that they have, in fact,
23 taken a narrower definition of RDI than other documents,

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1 because that is something that wouldn't be resolved.

2 MJ [Col PARRELLA]: Ms. Pradhan, let me just ask the
3 question. To the extent that some of these discrepancies
4 could be explained, like there may be a system, a way that
5 they viewed it that perhaps would provide explanation on it,
6 why hasn't the defense attempted to do that?

7 ADC [MS. PRADHAN]: Your Honor, the opportunity for the
8 government to explain those discrepancies would have been in
9 November of 2017 when they filed a response to our initial --
10 to our initial motion to compel 2.h. documents. They didn't
11 file a response. Instead they threw the RDI index at us.

12 Again, we gave them an opportunity in 534B. Now, we
13 did it through litigation because, A, the number, the sheer
14 number of discrepancies pointed to not just a series of errors
15 on the part of the government, but intentional
16 mischaracterizations of some of the summaries; intentional
17 misleading of where these summaries belonged; in what order;
18 what the conditions of confinement were for Mr. al Baluchi at
19 the time; who the personnel were at the time; how they went
20 from one site to another; what the continuity was. There were
21 several examples provided, Your Honor, in 534B of how it could
22 not be anything but intentional.

23 Now, I don't dispute trial counsel's representation

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1 that perhaps a few of them were errors. But it is impossible
2 that every single discrepancy, where you have discrepancy
3 between pieces of discovery, you have discrepancies between
4 the RDI index and pieces of discovery; and now, as we'll talk
5 about in 562, there are discrepancies between the entries in
6 the RDI index, items of discovery, and statements from
7 witnesses that we've taken interviews from. It is absolutely
8 impossible, impossible, given the volume of discrepancies,
9 that this can be explained by simple error.

10 The one acknowledgment though, Your Honor, that is
11 really important from trial counsel is that they have defined
12 RDI. They have taken it upon themselves to use a definition
13 that is much narrower than the CIA used in their carrying out
14 of the RDI program. It is much narrower than Congress used in
15 their investigation of the program.

16 I'm not sure what the impetus was for the government
17 to use such a narrow definition, but that in and of itself
18 should be enough to spur the military commission to review the
19 documents underlying the RDI index, in terms of the
20 materiality of the information that they stripped.

21 That brings me to trial counsel's next point, which
22 was that -- which was that the summaries went through the 505
23 process, a lengthy 505 process, and were approved by Judge

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1 Pohl.

2 The first point on that, Your Honor, is that the RDI
3 index itself was never approved by Judge Pohl. The RDI index
4 was simply handed to the defense, both of them.

5 MJ [Col PARRELLA]: Was the RDI index something that the
6 commission -- in other words, was there anything that required
7 the government to provide the defense with an index? Judge
8 Pohl had approved substitutions.

9 ADC [MS. PRADHAN]: Yes.

10 MJ [Col PARRELLA]: Was the index not in some sense
11 gratuitous?

12 ADC [MS. PRADHAN]: No, Your Honor, for two reasons. The
13 first is pursuant to category 2.a. of AE 397, the government
14 is mandated to provide a chronology of Mr. al Baluchi's
15 detention, and that chronology is, in fact, what we had in
16 mind, something that marries the locations he was held in with
17 the personnel involved, any documents pertaining to the
18 interrogations, and any other relevant or material
19 information. That's the first reason.

20 The second was stated by Judge Pohl himself in March
21 when he asked trial counsel why they hadn't been able to
22 provide us such a chronology. And trial counsel felt
23 obligated to respond that they had, in fact, provided this RDI

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1 index.

2 So certainly there was an understanding on the part
3 of at least Judge Pohl -- I don't want to infer anything from
4 that, but certainly on the part of Judge Pohl, that there was
5 certainly a requirement for the government to produce a
6 chronology here. So that RDI index was never approved by the
7 military commission, never went through the 505 process.

8 Now, the underlying documents did go through the 505
9 process. And trial counsel quoted Judge Pohl's question to me
10 in March. What I think trial counsel forgot was his reaction
11 in July when we put before him -- let me step back.

12 We have long been frustrated with the quality of the
13 summaries of the CIA documents that the government has
14 produced to the defense, long prior to the production of the
15 RDI index, where lengthy interrogations have been boiled down
16 to one sentence.

17 In March -- I know Your Honor has reviewed the
18 transcript in March, but we provided an unclassified example
19 of an interrogation of Mr. Mohammad, whose government-produced
20 summary implied that he made incriminating statements sua
21 sponte, whereas comparison with the SSCI report revealed
22 that -- an account of that same interrogation, that he had
23 been tortured and confronted with torture-acquired evidence

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1 that led to those statements.

2 We provided another example that I believe trial
3 counsel may have forgotten in July -- in the July hearing, in
4 AE 579 -- excuse me, 573, Your Honor, in which a journalist
5 received by FOIA a CIA cable describing an interrogation of
6 Mr. al Baluchi that was far less redacted and included much
7 more context, relevant context about the conditions of
8 Mr. al Baluchi's interrogation, including exact dates, than
9 the summary that the government had given to us. And this is
10 just one example that we can provide in an unclassified forum.

11 When we presented that example to Judge Pohl in July,
12 his reaction was, and I quote from the unclassified transcript
13 at page 20012 and 20014 of 23rd July, "Why should I sit here
14 now and have any confidence that the 2016 declarations were
15 accurate...I spent a lot of time on this, but a lot of it is
16 based on the government's representations, okay?...why should
17 I have faith that the thousands of other ones I looked at
18 don't have the same problem?"

19 And I submit to you here that, of course, in the
20 classified pleadings it's crystal clear that thousands of
21 other summaries do have exactly the same problem of
22 inappropriate stripping of information that is detrimental to
23 the government's case under the guise of national security.

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1 Now, the government refers often to the 505 process.
2 And again, our submission is that the index itself did not go
3 through the 505 process. But to the extent that those
4 summaries did go through the 505 process, the motion before
5 you now, Your Honor, motion AE 534, is a motion to compel
6 additional information.

7 That -- the military commission can decide on its own
8 sua sponte whether or not to reconsider the summaries that
9 were given, and here we are asking you to do so. We're asking
10 you to consider the fact that the dozens, if not hundreds, of
11 discrepancies that we have provided to Your Honor in lengthy
12 pleadings cannot possibly be resolved by a second or third or
13 fourth iteration of the government's RDI index.

14 And we heard trial counsel admit just now that there
15 could certainly be additional errors, as he put it. I submit
16 to you that additional errors are not acceptable at this point
17 in time. We are two years past the deadline for the
18 production of RDI discovery, a discovery that we have been
19 requesting and requesting and requesting for a very long time.
20 We have been very clear about the quality and the parameters
21 of the discovery that we have requested.

22 I'm forgetting the exact number now, but we have
23 dozens of discovery requests to the government on different

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1 aspects of the RDI program, so it cannot be anything but clear
2 to the government what we consider to be the parameters, the
3 relevant parameters of that program.

4 The final point, Your Honor, is that trial counsel
5 mentioned that there may still be gaps, as I said, in the
6 second RDI index. And he explained that there are gaps where
7 certain personnel are not listed in the RDI index, and that,
8 he explained, was because personnel certainly weren't
9 associated with those documents.

10 Now, we can talk about this a little bit more in
11 AE 562, and especially regarding the interviews that we
12 conducted with certain UFI witnesses that make clear that
13 there should be personnel associated with, certainly, some of
14 those documents in the limited information we have been able
15 to gather through those interviews.

16 But the last point I wanted to make, Your Honor, is
17 that Judge Pohl may have approved the UFIs that were provided,
18 and Judge Pohl may have approved the summaries, but Judge Pohl
19 did not approve the personnel who were not on the list
20 submitted pursuant to AE 397 2.d. He did not approve the
21 government -- anywhere that we have seen, the government's
22 narrow definition of RDI to exclude relevant and material
23 personnel who had significant and substantial contact with

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1 Mr. al Baluchi and the other defendants either at the sites or
2 in foreign government custody while they were being tortured.

3 Subject to your questions, Your Honor.

4 MJ [Col PARRELLA]: So just based on your last comment,
5 you would like this commission, just to be clear, to
6 reconsider the substitutions approved by Judge Pohl; but at
7 the same time as I read 536 and the prior argument, you're
8 also asking for the original documents that underline those
9 substitutions; is that correct?

10 ADC [MS. PRADHAN]: Your Honor, we consider those to be
11 one and the same. AE 534 initially started as just a request
12 for 2.h. documents because we didn't feel that we received
13 any. The government's response again was that, "Well, we
14 don't have anything under 2.h., but here's the RDI index."

15 The RDI index put together summaries that we have
16 received and so our request for remedy now, Your Honor, is
17 that we receive the original documents that are listed in the
18 RDI index so that we can have access to the relevant and
19 material information that was stripped from those documents,
20 and, of course, we've provided a few examples for you in
21 unclassified session and more in classified documents.

22 MJ [Col PARRELLA]: Suppose I -- suppose the summaries
23 represented a factual account of what was in those original

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1 documents. How would the original documents then better
2 prepare you to prepare your defense?

3 ADC [MS. PRADHAN]: Well, a good example, Your Honor, is
4 the summary that we referred to in AE 573, right, where we
5 received a summary -- and this is most of our summaries,
6 right? They have a blurred date that say something like, you
7 know, mid-2004, Mr. al Baluchi said X when asked about X,
8 right?

9 That doesn't tell us a lot of things. It doesn't
10 necessarily tell us -- it doesn't tell us at all on those
11 summaries where that interrogation took place. It doesn't
12 tell us which personnel were in the room. It doesn't give us
13 an exact date. It doesn't tell us what questions were asked
14 of him.

15 The FOIA cable that was released to a journalist,
16 Jason Leopold, earlier this year that was subject of 579 --
17 excuse me. I keep saying 579 -- 573, was a really good -- was
18 a perfect example of how they had exact dates, they had a bit
19 more context about what Mr. al Baluchi was being asked to make
20 a statement.

21 Because in most of these summaries -- and I'm sure
22 Your Honor has seen many of the summaries that we put into the
23 record. Most of these summaries make it sound like the

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1 defendants are making statements just sua sponte. They are
2 sitting in a room just making statements. We know that not to
3 be the case, right? We understand how interrogations work.
4 We know they are being asked questions. It is relevant what
5 questions they are being asked. It is relevant what
6 photographs and what other detainee information is being put
7 before them.

8 It is relevant whether or not a CIA official who
9 water-doused Mr. al Baluchi two days before is the same
10 official putting torture-acquired evidence before
11 Mr. al Baluchi to elicit that single statement that is in the
12 government's summary, and it is relevant how long a period of
13 time from Mr. al Baluchi's torture, or how long a period of
14 time into the three-and-a-half years of sleep deprivation he
15 endured those statements are being elicited.

16 And so what we learned from the FOIA cable is that
17 there is additional information. It may seem -- it may seem
18 small or immaterial to the government, but what all that tells
19 us is that they don't have a proper understanding of what is
20 relevant and material information to us after all this time,
21 which -- and the only solution to that is for us to have
22 access to the original documents so that we can take, after
23 saying over and over again, that material information and put

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1 it together into the kind of chronology we need in order to
2 carry out a proper capital defense.

3 MJ [Col PARRELLA]: Thank you.

4 ADC [MS. PRADHAN]: Thank you, sir.

5 MJ [Col PARRELLA]: Lieutenant Colonel Poteet.

6 DDC [LtCol POTEET]: Your Honor, the trial counsel in this
7 case, over the prosecution of this case, has made various
8 statements comparing the defense's duty to investigate to some
9 sort of thing that the defense has just dreamed up, as if they
10 think they are private attorney generals.

11 But, in fact, it is the first and foremost duty of
12 the defense to investigate, to conduct investigation. And
13 statements that, "Well, there might be some inaccuracies, but
14 it really doesn't amount to much," statements such as that
15 suggest that there is a failure to appreciate the gravity of
16 this exchange of information that happens in the discovery
17 process.

18 That -- when we are provided information in an
19 atomized format where it requires a careful piecing together
20 of information that more than likely is in an organic
21 underlying document, that's difficult enough in and of itself.
22 When it contains false or misleading information, that is
23 sending us, in properly fulfilling our duty to investigate the

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1 case, down rabbit trails that are completely wrong. And
2 that's what we are doing instead of developing a chronology
3 that is accurate and reliable.

4 For us to be effective as defense counsel, we need to
5 be able to fulfill that strong obligation to conduct a
6 thorough defense investigation, and that requires reliability
7 in the discovery that we receive.

8 I don't know whether I used the word "intentional" in
9 my original remarks. Counsel suggested that I had said that.
10 That wasn't the focus of my remarks. I did use the words
11 "misleading" and "unreliable," those two words.

12 And whether it's intentional or otherwise, when we
13 are receiving misleading and unreliable discovery information,
14 that directly impacts our ability to be effective in the case.

15 MJ [Col PARRELLA]: Thank you.

16 DDC [LtCol POTEET]: Thank you.

17 MJ [Col PARRELLA]: Ms. Bormann, I assume you want to
18 still defer?

19 LDC [MS. BORMANN]: Yes. We're still awaiting the
20 information we need.

21 MJ [Col PARRELLA]: Okay. Does any other counsel wish to
22 be heard on this? That's a negative response.

23 Mr. Groharing.

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1 TC [MR. GROHARING]: Judge, I just have a couple of quick
2 comments. But I think counsel has some confusion with respect
3 to the chronology required by AE 397F paragraph 2.a. That's
4 the pertinent category of RDI information that we are talking
5 about as far as a chronology. That's a chronology identifying
6 where each accused was held in detention between the date of
7 his capture and the date he arrived at Guantanamo Bay, Cuba,
8 in September 2006.

9 The government provided that proposed chronology for
10 the defense to the commission in AE 308C, and the military
11 judge approved that chronology in 308 -- AE 308V. And so
12 that's the chronology that's at issue with respect to AE 397F.
13 And the government has completely complied with its obligation
14 in that regard.

15 Ms. Pradhan made the comment that additional errors
16 are not acceptable. I respectfully submit to the court that
17 only someone who has never done this could make such a
18 comment. The amount of discovery that has been provided in
19 this case is enormous. We're talking about tens of thousands
20 of pages of discovery.

21 I think it is fairly characterized as an exceptional
22 product. We spent thousands of man hours. I'm proud of the
23 work that the government has done in that regard. But I don't

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1 think anyone could stand up with a straight face and suggest
2 that it's impossible that any errors could be in any of the
3 materials provided to the defense. And I'll leave it at that.

4 I think, Judge, what -- we're back to where we
5 started. And what counsel is asking for is for you to
6 reconsider the dozens and dozens of decisions by your
7 predecessor with respect to the adequacy of these summaries.
8 And the defense has given you no reason to reconsider those
9 decisions. There is an original report, a summary is provided
10 to the defense, and there's no reason to revisit that.

11 To the extent that the defense has additional
12 questions with respect to an index that we provided -- and we
13 provided that because we told the military commission up front
14 why we were removing certain dates, why we were removing names
15 and locations in original materials, or in the summaries that
16 were provided to the defense, and that what we were going to
17 do is to then give the defense these materials in
18 chronological order.

19 So that was what the government had promised to the
20 commission in providing all these summaries over the years to
21 the commission so that the defense could understand these
22 materials together once they're provided to them. So that's
23 why we prepared the chronology, and it's why we gave them the

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1 index that lists the documents chronologically. But it
2 shouldn't be mistaken with the chronology of detention that's
3 mentioned in AE 397F.

4 Subject to your questions, Your Honor, that's all I
5 have.

6 MJ [Col PARRELLA]: No questions. Thank you,
7 Mr. Groharing.

8 I'd like to go ahead and move on now to AE 561.
9 Mr. Connell.

10 LDC [MR. CONNELL]: Sir. AE 561 is a motion regarding the
11 channel by which the FBI might feed questions to the CIA to
12 be -- for interrogation of Mr. al Baluchi and others.

13 The history of this issue is that it was first
14 revealed in testimony by Special Agent Abigail Perkins on
15 7 December 2017, in which she testified under questioning of
16 Mr. al Hawsawi's team, that the -- she would write cables and
17 submit them through FBI channels and that those -- that
18 questions would then be asked to the detainees, including,
19 because she worked on the UAE and financial situations,
20 Mr. al Baluchi and Mr. al Hawsawi, which is how it
21 particularly came up.

22 This has been characterized by Judge Pohl as the FBI
23 feeding questions to the CIA, a form of indirect participation

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1 in RDI program, separate from direct participation, meaning
2 the people who were actually in the room.

3 This issue is fully briefed and, in fact, was already
4 argued once. And I won't repeat, but I will say that as we
5 went and were trying to -- so after May, when it became clear
6 that what we had thought was the RDI program was not
7 necessarily the RDI program, that there were facets beyond
8 what -- but what anyone had understood, we researched the
9 question of what might this actual channel be.

10 And in the course of our research we came across a
11 declassified document from the U.S. Department of Justice,
12 Office of Inspector General, called "A review of the FBI's
13 involvement in and observations of detainee interrogations in
14 Guantanamo Bay, Afghanistan, and Iraq." And we found that at
15 page 18 of this document, under a heading called "Interagency
16 Memorandums of Understanding," that the OIG had declassified
17 the following sentence: "In 2003, the FBI and the CIA entered
18 into an MoU concerning the detailing of FBI agents to the CIA
19 to assist in debriefing certain high-value detainees at
20 sensitive CIA debriefing sites."

21 I won't say more about that sentence or characterize
22 it, but it became clear there may have been channels for the
23 conveyance -- for indirect participation that we did not

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1 previously understand.

2 The -- it is clear that -- by sworn testimony already
3 in the case that such channels of information from the CIA
4 to -- excuse me, from the FBI to the CIA, known as
5 intelligence requirements, were conveyed by
6 Special Agent Perkins and others, and the -- it is clear that
7 those documents still exist. Special Agent Perkins testified
8 that they went through FBI channels and would ordinarily be
9 contained in FBI records.

10 This information is especially important for
11 combining the direct or indirect participation of people who
12 were involved in the 2007 interrogations, either from CITF or
13 from the FBI, connecting those with the CIA program of
14 rendition, detention, and interrogation.

15 It is clear now that that connection between the FBI
16 and CITF interrogation team and the RDI program is much closer
17 than we had previously realized. This is one of those
18 channels of connection. Clearly the government should produce
19 this information.

20 MJ [Col PARRELLA]: Thank you.

21 Mr. Nevin? Thank you.

22 Ms. Bormann?

23 LDC [MS. BORMANN]: Judge, we filed -- we requested the

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1 same information as Mr. al Baluchi did in this matter, and
2 Mr. Montross is going to argue this, but he had to step out of
3 the room to find the material that pertained to the earlier
4 matter. So if we can just hold off for a moment, we may be
5 able to address it.

6 MJ [Col PARRELLA]: Okay. Mr. Harrington?

7 LDC [MR. HARRINGTON]: Nothing additional, Judge.

8 MJ [Col PARRELLA]: Mr. Ruiz?

9 LDC [MR. RUIZ]: Nothing. Thank you.

10 MJ [Col PARRELLA]: Trial Counsel?

11 TC [MR. RYAN]: Good afternoon, Your Honor. Edward Ryan
12 on behalf of the United States.

13 MJ [Col PARRELLA]: Good afternoon.

14 TC [MR. RYAN]: Your Honor, this motion and 538 I tend to
15 treat the same. They are interrelated, and the matters that
16 are being sought are closely connected.

17 It has been -- both 561 and 538 were argued
18 extensively a couple of sessions ago, but really without any
19 great contention between the parties. The bottom line, Judge,
20 is the prosecution has agreed to provide discovery in regard
21 to both matters, 561 and 538.

22 Over the past few months we have provided a good deal
23 of information, into the hundreds of pages, including most

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1 recently literally today. As one of the counsels pointed out,
2 additional information at the Top Secret level was provided.

3 Sometime this week, before the closed session, we
4 intend to file a notice with the commission explaining the
5 discovery that has been provided thus far and just sort of
6 updating the commission on what is out there, and at that time
7 we'll also be able to advise the commission as to what still
8 remains or what we still intend to review and/or turn over.

9 Much of this is information I can't discuss
10 adequately in open court. So at this point, with the
11 commission's permission, I will defer any further argument
12 until the closed session.

13 MJ [Col PARRELLA]: Okay. Very well.

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

15 LDC [MS. BORMANN]: Judge, given what counsel -- oh.
16 Given what counsel just represented, I do have a few comments.

17 MJ [Col PARRELLA]: Okay. Ms. Bormann, just to be clear,
18 this relates to 561 and not 538?

19 LDC [MS. BORMANN]: I'm trying to find our discovery
20 request that we tendered to the government with relation to
21 561.

22 The issue in 561 is obviously a rolling ball, and it
23 continues to roll and collect more and more information. We

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1 are arguing it here today, but the issue I brought up to you
2 about the TOP SECRET disc prior to beginning this afternoon
3 relates very much to 561. In fact, the discovery was given to
4 me in hard copy form as I sat in here listening to the
5 arguments. And so I've had a few moments to review it. It's
6 about, I don't know, 75 pages or so of Top Secret material,
7 and it relates directly to the issue of looping or information
8 being fed during CIA questioning by other agencies.

9 I have no idea what additional information the
10 government is going to provide, but we requested this stuff --
11 we requested this stuff almost a year ago, in December of
12 2017. So the government has been aware of it, has known about
13 it, and we are still not getting it.

14 I don't want to dissuade them from giving it to us,
15 but I do think we are arguing and wasting resources here. I
16 mean, if they are going to continue giving it to us, what I
17 suggest we do is hold off further argument and ruling until we
18 actually get the material they say is a responsive, they say,
19 okay, that's it, and then we can argue about the small slice
20 or large slice, depending upon what the assessment is, that we
21 believe is missing.

22 Right now it seems like it's a moving target, and my
23 suggestion to you is that for purposes of judicial economy, if

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1 there's ongoing discovery being handled as we sit in court,
2 maybe the government ought to ask to hold something in
3 abeyance until they have fulfilled their responsibility and
4 then we can save everyone's time and resources.

5 MJ [Co] PARRELLA]: Thank you, Ms. Bormann.

6 Mr. Connell?

7 LDC [MR. CONNELL]: Your Honor, I agree with a few points
8 that the government made. One of them is that 538 and 561 are
9 interrelated although distinct. That critical distinction is
10 that 561 is much narrower than 538, which is about FBI policy
11 in general. 561 is much narrower about this channel of
12 communication between the FBI and black sites for requesting
13 intelligence requirements or particular questions to be asked
14 of the prisoners there.

15 The -- I did not know that further discovery was
16 forthcoming in the 538/561 area, and I have not seen the
17 discovery that was produced today, so it doesn't -- I really
18 can't speak intelligently to it at this time.

19 It does make sense if the government expects to be
20 producing more discovery on a rolling basis to take up these
21 issues once we know what the universe is, because it may be
22 that they have complied with our request and we don't have
23 anything further to say. On the other hand, it may be that

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1 there are gaps and then I could more intelligently address
2 those at that time.

3 MJ [Col PARRELLA]: I agree with the assertion that it
4 doesn't make much more sense to address this in an
5 unclassified setting. I will, however, give the government an
6 opportunity to explain further during our 806 session.

7 LDC [MR. CONNELL]: Thank you.

8 MJ [Col PARRELLA]: Thank you. Okay.

9 Let's go ahead, then, and move on to 562. But before
10 we do, let's go ahead and take a 10-minute recess. So the
11 commission is in recess.

12 [The R.M.C. 803 session recessed at 1415, 12 November 2018.]

13 [The R.M.C. 803 session was called to order at 1437,
14 12 November 2018.]

15 MJ [Col PARRELLA]: This commission is called back to
16 order. All parties present when the commission last recessed
17 are again present.

18 We will go now to AE 562.

19 LDC [MS. BORMANN]: Judge, Mr. Montross is back, and we
20 are prepared to argue on 534. I don't know if you want to
21 hear it now or sometime later. I just thought I'd let you
22 know.

23 MJ [Col PARRELLA]: We can go ahead and do that now.

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1 Let's go ahead and take the argument on 534.

2 DC [MR. MONTROSS]: Good afternoon. Thank you.

3 MJ [Co1 PARRELLA]: Good afternoon.

4 DC [MR. MONTROSS]: Your Honor, my argument will start
5 with a comment or a question that you proposed to counsel for
6 Mr. al Baluchi, and the question was: Have you attempted to
7 engage with the prosecution about the discrepancies or any
8 proposed defects or mistakes that you may have identified in
9 the series in an attempt to reconcile the discrepancies?

10 In January of 2018, Judge Pohl had been on this case
11 at that point for six years. He at that point understood that
12 it was critical for the defense to have an answer to certain
13 questions, a chronology so to speak: Where were our clients
14 interrogated? Who was there? What dates were they
15 interrogated? What happened to them? What were the
16 conditions of their confinement? Who asked them questions?
17 What answers were given?

18 And in January of 2018, Your Honor, Judge Pohl said,
19 Depending on whether you want to call it torture or you want
20 to call it enhanced interrogation technique, but it seems to
21 me that we have to rephrase that; that there should not be
22 difficulty in establishing a timeline -- I'm not looking
23 necessarily for you to do this, Mr. -- and I believe he was

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1 referring to Connell -- "of when he was in custody and
2 whether, day by day, each time an EIT was applied, each time
3 whatever was applied. "But we're going to see this over and
4 over again. We've tap-danced around how they were treated,
5 and it's all classified. I got that. But it's -- you know,
6 we're going to get there, so let's get there. That's my
7 point." And he says that at page 18444.

8 Then a little bit later, 18445, Judge Pohl says, I
9 know why the dates are what they -- what they are, okay,
10 that's a separate issue. But what I'm simply saying is the
11 treatment of each of these accused in confinement is the
12 big -- is the one major issue in this case. And we tap-dance
13 around it and we give it a little bit here, and a little bit
14 there, and it just seems to me as we could -- we could just
15 say, okay, Mr. Ali was captured on this date -- or was
16 captured, and we'll talk about the dates separately, but he
17 was treated on some day this way, this way, this way, and this
18 way. And the factual predicate for the entire EIT program is
19 all -- for each client is established instead of piecemealing
20 it to death and tap-dancing around it and finding out who was
21 there at a particular time.

22 It just it strikes to me that we're going to get
23 there. It's just a question of which road we are going to

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1 take.

2 Now, it took Judge Pohl six years to get there,
3 Judge, but he got there finally in January of 2018. My
4 concern about the proposition that you are advancing about
5 having each of the individual defense teams look at their
6 discovery, pick out discrepancies and go to the other side and
7 attempt to somehow reconcile this is going back to square one.
8 And we are going to be dancing again for another six years.
9 So that's why their motion is critical, and that's why it
10 should be granted.

11 And, Your Honor, I think it's important for you to
12 understand what it took Judge Pohl to get there after six
13 years. He spent six years, okay, looking at the original
14 evidence that was submitted to him for the 505 process and
15 approving the summaries, and it took him six years to realize
16 that it just was not working out.

17 So I'm going to ask you to actually go back and
18 review and read all the original documentation that was given
19 to Judge Pohl, the cables, the evidence, and to read the
20 summaries, because I think that's what it took Judge Pohl to
21 get there. And I'm urging you that if you don't want to
22 tap-dance for the next six years around this question, I think
23 it is important for you to get in your mind where Judge Pohl

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1 was in January of 2018.

2 My second comment is there was a lot of
3 back-and-forth between the prosecution on one side and the
4 defense on the other side about being misled, about intent to
5 mislead. A prosecutor stood up earlier today and said, "We
6 have never destroyed evidence." It is now an unclassified
7 fact that a black site was destroyed. CIA Agent Rodriguez
8 wrote in his book that he destroyed videotape evidence of
9 torture.

10 We have the government making representations of one
11 thing that they never misled, that they never destroyed
12 evidence here in this open room in an unclassified setting for
13 their benefit, for the benefit of the people behind the glass,
14 and the next day go to the closed session and a correction or
15 a concession of error is made. There's been repeatedly those
16 instances, Judge.

17 And I would suggest that one error is an accident,
18 and two is negligence. But we're past that at this point, and
19 it occurs over and over and over again, and that is evidence
20 of intent.

21 Nothing further, Judge.

22 MJ [Col PARRELLA]: Thank you, Mr. Montross.

23 Okay. We'll go ahead and proceed to 562, please.

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1 ADC [MS. PRADHAN]: I'll just grab a water, Your Honor.

2 Good afternoon, Your Honor.

3 MJ [Col PARRELLA]: Good afternoon.

4 ADC [MS. PRADHAN]: AE 562 is a motion to compel documents
5 regarding interrogation personnel, and specifically documents
6 underlying personnel profiles of 64 individuals who worked at
7 the black sites. Now, these are 64 profiles provided by the
8 government, handpicked by the government as having direct and
9 substantial contacts with the defendants, including
10 Mr. al Baluchi, pursuant to category 2.d. under AE 397.

11 Category 2.d. of AE 397 is one of the most important
12 categories of discovery, and that category includes the
13 identities of medical personnel, guard force personnel, and
14 interrogators, whether employees of the United States
15 Government or employees of a contractor hired by the United
16 States Government, who had direct and substantial contact with
17 the accused at each location and participated in the transport
18 of the accused between the various -- excuse me, between the
19 various locations.

20 And so our request in AE 562 is for the documents
21 that the government used in creating these profiles. These
22 were not profiles that existed previously, and the government
23 has befuddlingly stated in several of its pleadings that the

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1 defense is confused, that they were not original profiles. We
2 understand that. These are not profiles that existed
3 previously. What these are are profiles that the government
4 put together from source documents. What we are asking for
5 are the source documents, and there are several reasons why.

6 And I'll get into that in a minute, but I want to
7 first talk about the procedural history of these particular
8 documents, Your Honor. As we've established through multiple
9 rounds of written arguments, the military commission never
10 reviewed the profiles in the 505 process, and they stated --
11 Judge Pohl stated so in AE 308HHHH.

12 The quote -- he quoted the government's statement
13 from AE 308FF that, "The government will provide these
14 synopses directly to the defense to help them better
15 understand the potential relevance of the individuals
16 identified in this filing." And by "individuals identified,"
17 the government was referring to a two-page chart whose
18 contents are classified at the Secret level, but broadly,
19 literally just lists unique functional identifiers of the sort
20 (a) to (c) or some such and their titles or roles in the RDI
21 program writ large. That is a two-page chart.

22 Now, AE 097 2.d, as I said, is one of the most
23 important categories of this ten-category construct, because

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1 these individuals have the ability, and I know this harkens
2 back to our arguments in AE 534, which these two motions are
3 related. These individuals have the ability to marry
4 Mr. al Baluchi's statements under torture with the conditions
5 under confinement in which he was being held and the
6 procedures being administered in the administration of torture
7 techniques and the SOPs that would have governed the
8 administration of both the torture techniques and the
9 interrogations.

10 Those are relationships that cannot be made by
11 counsel just through examination of the discovery that the
12 government has provided, and as we discussed in 534, cannot be
13 made through examination of the RDI index that the government
14 has provided.

15 There are a couple of key phrases in paragraph 2.d.
16 The first is, as I mentioned, "direct and substantial contact
17 with the defendants." Now, these individuals had those
18 contacts. Also, that they participated in transports between
19 the various locations.

20 Now, in preparing the profiles, the government
21 included information that they deemed relevant and material to
22 the defendants, because that information illustrated that,
23 quote -- excuse me, quote, the vantage points of the personnel

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1 or the information provided, quote, context for other
2 personnel's contacts with the defendants, and the information
3 shed light on personnel observations for how the RDI program
4 impacted detainees. These are all phrases used by the
5 government in the 2.d. profiles as explanation of why they
6 included certain information in those profiles.

7 So these are what the government said was relevant
8 and material. So we are basing our argument and requesting
9 remedy on what the government itself seemed to consider
10 material to the defense.

11 And there are two major points that I would like to
12 make in open session, and obviously the bulk of this argument
13 will be conducted in closed session.

14 The first is that there are significant conflicts
15 between the 2.d. profiles and other discovery that has been
16 produced to the defense. And this is an area -- this is one
17 example of how this overlaps with AE 532. One good example is
18 that we cannot, even now, after two productions, two RDI
19 indices, and all the discovery that the government has
20 produced.

21 They quoted the figure of tens of thousands of pages,
22 although in complex litigation we have to deal with millions
23 of pages. And we know from the SSCI report that there are at

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1 least 6 million pages of documents in the RDI program to be
2 reviewed. But even with all of that discovery, we cannot,
3 standing here today, identify the personnel who were in the
4 room with Mr. al Baluchi during his early days of torture at
5 COBALT. We -- that is a critical period of time. It was
6 shortly after he was rendered into -- rendered to what the
7 government considers to be CIA custody at a CIA black site.
8 It was near the beginning of his tough three-and-a-half years,
9 and it was near the beginning -- not at the beginning, but
10 near the beginning of his hundreds of -- and thousands of
11 interrogations over the course of his three-and-a-half years
12 in CIA detention. But we cannot pinpoint who was there when
13 he was water-doused, who was there walling him, who was there
14 stripping him and forcing him to stand nude in freezing
15 temperatures. That information is critical, as Your Honor is
16 undoubtedly aware. So that's one major point.

17 The second major point that I would like to talk
18 about are the conflicts between the 2.d. profiles and the
19 interviews -- the limited number of interviews that we've
20 conducted with personnel given unique functional identifiers.
21 And I won't go into the details of those conversations, but I
22 would like to broadly characterize those discrepancies for the
23 military commission.

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1 Now, the government has had essentially four
2 responses to -- four different responses to our arguments in
3 AE 562. The first is that the profiles were voluntary, which
4 is similar to their argument regarding the RDI index, meaning
5 that the only evidence that they have produced so far pursuant
6 to this critical category of discovery and after years of
7 delay, is that two-page chart.

8 And I call your attention, Your Honor -- this is very
9 similar to trial counsel's answer when Your Honor asked about
10 the chronology. Yes, they produced a chronology of sorts that
11 is, I think, six lines long, under the category of 2.a. And we
12 discussed this in open session -- we discussed the quality of
13 that chronology with Judge Pohl in open session pursuant to
14 arguments pertaining to AE 114 in November of last year. And
15 I'm happy to provide a page number.

16 But it's a similar argument that the government is
17 making here, that we have given a two-page chart of unique
18 functional identifiers with zero other information about these
19 personnel, and that fulfills our discovery obligations. So
20 the 2.d. profiles and any mistakes in those profiles and any
21 information that is discrepant with information in the
22 summaries is somehow extra and we are not entitled to it
23 anyway.

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1 And I would take issue with that, Your Honor, because
2 AE 397 paragraph 2.d. is very clear about what it requires the
3 government to do. It says the identities of medical
4 personnel -- now, we can take the phrase "identities" to not
5 just mean the code name identification of an individual, but
6 what their actual contact was, the substance of that contact,
7 which that two-page chart does not provide. So then you have
8 the profiles. And so we would submit to you that the profiles
9 are mandated by AE 397 2.d.

10 And so the government's next response is that the
11 2.d. profiles are based upon information that is already
12 summarized elsewhere for the defense. And we have specific
13 examples to provide to the military commission in closed
14 session that are, of course, in our classified briefs.

15 But this is simply not true. If it is true, then
16 those documents, of which we have provided examples that
17 underlie those profiles, that are quoted in the profiles in
18 some cases, are wholly unrecognizable in the discovery and
19 are, therefore, completely useless for the purposes of
20 actually putting together a profile of an individual who spent
21 time in the black sites and had direct and substantial contact
22 with the defendants.

23 The other issue, Your Honor, pertaining to this is

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1 that there are clearly personnel profiles missing from the 64
2 profiles provided. Trial counsel said in argument just now on
3 AE 534 that the gaps in the RDI index is where they may have
4 determined, the government has determined that personnel
5 didn't necessarily have direct and substantial contact with
6 the defendants. Those gaps, therefore, are at the
7 government's discretion. It is their determination of what is
8 relevant and material, and those gaps were never approved by
9 the military commission.

10 So not only do you have the profiles that were not
11 approved by Judge Pohl, but you have the gaps, which are
12 equally significant, about what they chose not to include,
13 that were not approved by Judge Pohl. And we have identified
14 several categories of personnel who perhaps should have been
15 included -- who certainly should have been included among the
16 2.d. profiles.

17 And one of those categories that Mr. Connell just
18 identified pursuant to the OIG review on FBI involvement in
19 and observations of detainee interrogations in Guantanamo Bay,
20 Afghanistan, and Iraq, are FBI personnel. It is logically
21 impossible, pursuant to the paragraph that Mr. Connell read,
22 that said that in 2003 there was a memorandum of understanding
23 concluded between the FBI and the CIA concerning the detailing

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1 of FBI agents to the CIA to assist in debriefing.

2 It is logically impossible that those FBI officials
3 who were involved in debriefings of detainees would not have
4 had contact with any of these five defendants. And that
5 information and the profiles of those individuals are clearly
6 relevant and material to the defense and clearly should have
7 been included in RDI-related discovery.

8 The third response from the government has been in, I
9 believe, AE 562G, that 17 summaries are still pending approval
10 by the military commission, after which we will have summaries
11 of, quote, all original CIA information underlying the 2.d.
12 profiles.

13 And again, I just want to reiterate, Your Honor, that
14 it is nearly impossible now to determine what discovery the
15 government is referring to when saying that we already have
16 the summarized information. And unless the 17 summaries form
17 the basis for all 64 profiles, then the government is either
18 mistaken, or they're using their advantage of visibility on
19 all available documents to keep the defense in the dark, for
20 very specific reasons.

21 You heard trial counsel talk about their
22 determination, intentional determination. He didn't talk
23 about his reasons for that determination, but that

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1 determination to excise anything outside of the CIA black
2 sites from their production on the RDI program. That is a
3 massive, massive admission, and it has huge repercussions for
4 the quality and quantity of the discovery that we have
5 received so far, Your Honor. It goes quite a long way to
6 explaining those gaps.

7 Again from 562G in an unclassified paragraph, the
8 government states that, quote, while mistakes will occur, the
9 prosecution will always strive for complete precision in all
10 efforts and will admit and rectify issues when it falls short.

11 Your Honor, AE 562 was fully briefed by May of this
12 year. Across AE 562 and AE 562B we described multiple serious
13 discrepancies and information that appeared, based on
14 comparison with other discovery, which we went through fairly
15 scrupulously, to be completely wrong. The government admitted
16 no errors in its response or subsequently.

17 Then what happened was we conducted five interviews
18 with UFI personnel in September and October of this year, so
19 relatively recently. In every interview, every one of those
20 five interviews the witness identified large discrepancies,
21 conflicting information or missing items material to the
22 defense -- material to their entire -- the nature of their
23 contact with the defendants from the 2.d. profiles that the

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1 government had assembled.

2 And it was only after we filed declarations pointing
3 out that the first two witnesses themselves were pointing out
4 discrepancies -- it was only then that the government came
5 back in 562G and admitted a single mistake and an implausible
6 explanation for another that we can discuss in closed session.

7 So then we filed 562I, attaching the last three
8 witness interviews, and I would be very interested to hear at
9 this point from trial counsel whether the government intends
10 to admit further mistakes based on those witnesses' statements
11 that the government profiles were flatly wrong on major,
12 material points.

13 Again, Your Honor, the government has only managed to
14 produce five. I believe that there's potentially a sixth UFI
15 interview -- excuse me, UFI witnesses for these interviews out
16 of 64. Given the track record so far, we've got potential
17 major problems with every single 2.d. profile, plus internal
18 contradictions between the profiles and the discovery, plus
19 missing profiles altogether.

20 And we can't even drill down on all possible missing,
21 wrong, misleading information because of the passage of time,
22 because the witnesses don't always remember all relevant
23 details. And I know Mr. Connell is going to talk about this a

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1 little bit in relation to AE 524. And we can't attempt to
2 secure additional witness interviews because, again, of
3 Protective Order #4, which Mr. Connell is going to talk about
4 with regards to AE 524.

5 So there are two conclusions, Your Honor, from the
6 review of the 2.d. profiles. The first is that the profiles
7 simply cannot be relied upon. It would be an abdication of
8 duty in a capital trial for us to accept the information
9 contained in these without being able to reverify or repudiate
10 this information. And if we can't do it through interviews
11 with every single witness, the only way to do it is through
12 comparison with the original source documents that the
13 government refused to produce. And so we are asking the
14 military commission to compel the government to produce those
15 original documents.

16 I have nothing further, Your Honor.

17 MJ [Col PARRELLA]: Thank you.

18 ADC [MS. PRADHAN]: Thank you.

19 MJ [Col PARRELLA]: Mr. Nevin?

20 LDC [MR. NEVIN]: No, thank you, Your Honor.

21 MJ [Col PARRELLA]: Ms. Bormann?

22 LDC [MS. BORMANN]: Nothing at this time, Judge, although
23 we believe that the discovery given by the government would

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1 inform your -- today, that we just received a couple of hours
2 ago, would inform your decision on this and the closed session
3 argument, so we will be supplementing the record with a
4 classified filing.

5 MJ [Col PARRELLA]: Okay. Mr. Harrington?

6 LDC [MR. HARRINGTON]: Nothing further, Judge.

7 MJ [Col PARRELLA]: Mr. Ruiz?

8 LDC [MR. RUIZ]: No argument. Thank you.

9 MJ [Col PARRELLA]: Trial Counsel?

10 TC [MR. GROHARING]: One moment. Thank you, Your Honor.

11 First, I think counsel indicated that it was
12 befuddling that the government had responded that we had to
13 explain that these profiles were not original documents. And
14 the reason for that response is very clear in the pleadings,
15 is that was the motion to compel that started this all off in
16 the 562 series, the events requesting these original personnel
17 profiles of the 64 individuals, which don't exist. These are
18 documents that, as counsel all know at this point, the
19 government created.

20 I think it's important to talk about 397F paragraph 2
21 and the different paragraphs to understand how we got where we
22 are with this particular motion. 397F paragraph 2.d. requires
23 the government to provide identities of certain individuals

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1 having direct and substantial contact with the accused in this
2 case.

3 The government filed 397FF (Gov Amend) with the
4 military judge, Judge Pohl, who approved the index that
5 Ms. Pradhan talked about as satisfying our discovery
6 obligations with respect to paragraph 397F 2.d. The military
7 judge found that that was sufficient. So the 2.d. synopses
8 are indeed not required, noncompulsory discovery that the
9 government has provided to the defense.

10 The synopses were made using the same original
11 documents that the government summarized in different
12 productions that ultimately were provided to the defense.
13 Some of those were h. statements, paragraph 397F
14 paragraph 2.h., where certain individuals interrogated or
15 debriefed the accused. Some of them were conditions of
16 confinement summaries, documenting the conditions of the
17 accuseds' confinement. Some of them were statements made by
18 different CIA employees to the CIA Office of Inspector General
19 during investigations or during other investigations.

20 But this whole body of material is the same material
21 that the government summarized to comply with its discovery
22 obligations. We drew from that to create these synopses.

23 Originally in 308FF (Gov), the government intended

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1 for that to be part of our 397F paragraph 2.d. production but
2 subsequently withdrew that request in 308FF (Gov Amend) as not
3 necessary to comply with our discovery obligations.

4 The defense pointed out that they didn't believe
5 there were 64 profiles provided to the defense. One, that the
6 profiles aren't -- the government is not obligated to provide
7 them in the first place, but I do believe there were, in
8 fact -- there was, in fact, a profile provided for each of the
9 individuals identified with a unique functional identifier.

10 And I think we'll have to get into some of the
11 examples a little more detail in closed session, but generally
12 speaking, I think some of the confusion is caused by what the
13 defense believes these synopses are supposed to be or what
14 they want them to be.

15 At this point, Judge, the defense can take or leave
16 these profiles and use them as they see fit. If they don't
17 believe they are helpful, they are not obligated to use them
18 in any way.

19 We have -- as I have indicated before, to the extent
20 that individuals were identified with a unique functional
21 identifier, that individual, in discovery materials provided
22 to the defense, on that index that we have provided, that
23 we've talked about, that unique functional identifier is

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1 listed across the relevant discovery materials. The defense
2 has that information.

3 Counsel said she wanted to know whether particular
4 people were present at, you know, the accused being
5 water-doused or during some other interrogation. To the
6 extent that any individuals were identified with a unique
7 functional identifier, they have that information on the
8 index. If there's an interrogation or an event that doesn't
9 have someone listed, it's because, as I mentioned before, no
10 individuals were determined to be direct and substantial with
11 the accused for that particular event.

12 Judge, the defense also has -- and there could be
13 some confusion in that the government has provided the defense
14 with a hundred, well over a hundred, almost 200 statements
15 made to the Office of Inspector General during investigations.
16 Those materials are not on the index, as they're not -- they
17 are interviews that were -- that took place years later and
18 aren't in any way mapped to particular events on the index, so
19 that may cause some confusion from the defense.

20 But the index documents, reports, CIA reports that
21 resulted in summaries that we provided to the defense that we
22 took dates out and such to protect certain classified
23 information, but they would not capture the CIA OIG reports

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1 that may be related to the different accused.

2 So I think one of the issues that counsel addressed
3 is there are some individuals identified by unique functional
4 identifier that were not part of the 64. They were not part
5 of the group that had direct and substantial contact with the
6 accused, but their involvement in the CIA RDI program was
7 such, and the significance of their mentioning was such, that
8 they warranted the assignment of a unique functional
9 identifier.

10 For those individuals, if that's what counsel is
11 referring to, that would be correct. We didn't provide a
12 synopsis for those individuals or a paragraph 2.f. or 2.g.
13 product for those individuals because they didn't have direct
14 and substantial contact with the accused. Nevertheless, we
15 identified them in a unique manner so that the defense would
16 know who we are talking about when the same person is
17 mentioned repeatedly in documents. But they would not have
18 the other paragraph -- 397F paragraph 2.d. -- or 2.d., f. and
19 g. products, as the direct and substantial individuals would.

20 Judge, those are the only points that I want to make
21 with respect to AE 562. I guess I would add the same with
22 AE 534. If the defense has confusion based on discovery that
23 the government has provided, oftentimes that can be remedied

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1 with very simple explanations.

2 We're more than open. Notwithstanding the
3 characterizations made by counsel with respect to
4 government -- the government counsel, we remain willing to
5 listen to any concerns they believe there are with our
6 discovery and answer those the best we can when they bring
7 them to our attention. To date they have not brought any, but
8 we are more than willing to do that should they do so.

9 Absent questions from the military judge, Your Honor,
10 that's all I have.

11 MJ [Col PARRELLA]: No questions. Thank you,
12 Mr. Groharing.

13 LDC [MR. NEVIN]: Your Honor, could I interrupt for a
14 moment? We're at prayer time.

15 MJ [Col PARRELLA]: I understand. Mr. Nevin, do we
16 have -- do we have time to hear Ms. Pradhan's response or --
17 because what I would like to do is, if we can wrap that up, I
18 think we can terminate for the day to afford Ms. Bormann an
19 opportunity to prepare.

20 Okay. Ms. Pradhan.

21 ADC [MS. PRADHAN]: I told Mr. Nevin one minute, but I
22 just realized that's like three minutes if I talk slowly, but
23 no, I'll keep it very short, Your Honor.

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1 Just a couple of points, Your Honor, and I realize
2 that we can drill down more on this in closed session. But I
3 just want to -- I'm sure the military commission is aware of
4 this from the detail contained in our written pleadings. We
5 have exactly zero confusion about what discovery the
6 government has provided and what they have not provided, and
7 what the discrepancies are between what they have provided in
8 the 2.d. profiles and what they've provided elsewhere. There
9 is zero confusion about that.

10 The government, in its explanation just now,
11 sidestepped the large issue, which are those of the missing
12 personnel, those of the discrepancies between the witness
13 interviews and what is in those profiles, and the issue of the
14 RDI definition, the issue of the determinations the government
15 made that excised enormous amounts of relevant and material
16 information from what they were supposed to provide to the
17 defense two years ago. So we cannot, quote, take or leave the
18 profiles as we see fit. That is a gross misunderstanding of
19 how evidence and discovery works in a capital trial,
20 Your Honor.

21 When we need -- when something calls for direct and
22 substantial contacts with the defendants, that means we need
23 to know what the nature of those contacts were, and the chart

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1 provided didn't -- didn't give any of that information. What
2 did purport to provide that information were the 2.d.
3 profiles.

4 Now, counsel is correct that Judge Pohl approved that
5 chart. Judge Pohl also, as he made clear in January, in
6 March, in May, and in July of this year, fully expected the
7 government to provide additional information that would put
8 together the two-page chart provided under the -- under
9 category 2.d., the half-page chronology provided under
10 paragraph 2.a., and the nothing provided under category 2.h.,
11 to allow the defense to put together a proper chronology to
12 make a defense in this capital case. And that has not
13 happened. And not only has it not happened, but we are being
14 denied the tools to be able to do it ourselves.

15 Thank you, Your Honor.

16 MJ [Col PARRELLA]: Thank you. Okay. With that, what I
17 propose we do is go ahead and recess for the remainder of the
18 day. We will pick up tomorrow morning at 0-9 with
19 Mr. Castle's testimony.

20 This commission is in recess.

21 [The R.M.C. 803 session recessed at 1515, 12 November 2018.]

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