

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0906,
2 13 September 2021.]

3 MJ [Col McCALL]: The commission is called to order.

4 Trial Counsel, please account for all the government
5 counsel who are present both here and at the RHR.

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

7 MJ [Col McCALL]: Good morning.

8 MTC [MR. TRIVETT]: Representing the United States are
9 Mr. Clay Trivett, Mr. Robert Swann, Mr. Edward Ryan,
10 Mr. Christopher Dykstra. Major Jackson Hall has joined us and
11 is no longer in the Remote Hearing Room.

12 Also at counsel table are paralegals Mr. Dale Cox,
13 Mr. Rudolph Gibbs, and Ms. Carissa Grippando. Also present in
14 the courtroom from the Federal Bureau of Investigation,
15 Supervisory Special Agent Rami Nimri and Supervisory
16 Intelligence Analyst Kimberly Waltz.

17 These proceedings are being transmitted via closed
18 circuit television to sites in the continental United States
19 pursuant to the commission's previous orders.

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

21 Learned Counsel, please account for all defense
22 counsel who are both present here and at the Remote Hearing
23 Room.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Sowards.

2 LDC [MR. SOWARDS]: Thank you, Your Honor. Good morning.

3 Gary Sowards appearing on behalf of Mr. Mohammad, who is here,
4 along with David Nevin and Rita Radostitz. I'm also joined in
5 the courtroom by Samantha Kennedy, and I'm unaware of anyone
6 presently in the Remote Hearing Room.

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

8 Ms. Bormann?

9 LDC [MS. BORMANN]: Present today in court are
10 Mr. Bin'Attash, Major Jay Peer, and myself.

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

12 Mr. Bruck?

13 LDC [MR. BRUCK]: Good morning, Your Honor. David Bruck
14 for Ramzi Binalshibh. Present with me are Mr. Wyatt Feeler
15 and Major Szonja Johnson. Present at the Remote Hearing Room
16 are Ms. Donna Cline and Lieutenant Clayton Lawrence. And I
17 believe that Major Johnson has to go on the record for the
18 first time.

19 MJ [Col McCALL]: Okay.

20 DC [Maj JOHNSON]: Good morning, Your Honor. My name is
21 Major Szonja Johnson of the United States Air Force. I have
22 been detailed by Brigadier General John Baker, Chief Defense
23 Counsel, Military Commissions Defense Organization. My

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 detailing letter was AE 004DDD, which was filed last Friday
2 electronically, 10 September 2021. I am qualified and
3 certified under Article 27(b), sworn under Article 42(a) of
4 the Uniform Code of Military Justice. I'm qualified and
5 certified under the Rules of Military Commissions 502 and 503.

6 I've not acted in any ways that would tend to
7 disqualify me, and I've read all the relevant protective
8 orders and signed all the relevant MOUs.

9 MJ [Col McCALL]: Thank you. If you could please raise
10 your right hand.

11 [Counsel was sworn.]

12 MJ [Col McCALL]: Thank you. You may have a seat.

13 Mr. Connell?

14 LDC [MR. CONNELL]: Good morning, Your Honor. Present in
15 Courtroom 2 are myself, James Connell, and Lieutenant Corey
16 Krzan of the United States Navy. Present in the courtroom at
17 the Remote Hearing Room in Virginia are Alka Pradhan and
18 Lieutenant Commander Leah OBrien of the United States Navy.

19 MJ [Col McCALL]: Thank you.

20 And Mr. Gleason?

21 DC [MR. GLEASON]: Good morning, Your Honor. Present in
22 the courtroom for Mr. Hawsawi is Sean Gleason, Ms. Suzanne
23 Lachelier, Lieutenant Colonel Jennifer Williams. Major Joseph

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Wilkinson II is present at Guantanamo, but he is currently
2 absent from the courtroom. And Mr. Hawsawi's learned counsel,
3 Mr. Ruiz, is absent from the courtroom and the Remote Hearing
4 Facility as he has been excused by the commission.

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

6 And I note that Mr. Hawsawi, it appears, is absent.
7 The other accused, Mr. Mohammad, Mr. Bin'Attash,
8 Mr. Binalshibh, and Mr. Ali are all present.

9 ADC [MS. LACHELIER]: Judge, I would like to put something
10 on the record regarding Mr. al Hawsawi.

11 MJ [Col McCALL]: Sure. Please step forward.

12 ADC [MS. LACHELIER]: We had agreed with Mr. al Hawsawi
13 that he would come to court in meetings on Saturday. And this
14 morning we got a message that he was not coming because he was
15 in pain. We were told that -- and this is from him. We were
16 informed that he was not able to get the shot, the pain
17 medication that he takes; that he was told he might be able to
18 get it when he comes to court; that the person who administers
19 it, because it is an injection, would be here. And he was in
20 too much pain to move.

21 His blood pressure was very elevated, 172 over 125.
22 And he did not feel disposed to be able to come to court.

23 Upon arriving in court, my fellow counsel was informed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 by the government that Mr. al Hawsawi had now received a shot,
2 apparently, and we -- that's essentially the words -- the word
3 we have. I -- I hesitate to -- and I believe the prosecution
4 was probably informed by the JTF. At this point, we have
5 conflicting information and there's been a pattern of
6 conflicting information from JTF. So Mr. Hawsawi would like
7 to come to court, is our understanding, but because of the
8 pain that he's in -- and we don't want to trigger an FCE here,
9 but because of the pain he's in, he's unable to make it.

10 I don't know how long it takes for the injection to
11 take effect and I don't know, you know, whether he will feel
12 disposed once it does take effect. I don't know when it was
13 administered either. He -- yeah.

14 So that -- I mean, we've got a pattern with JTF and
15 this is my concern. I was going to address this afterwards,
16 but I'll address it now just so to give Your Honor a context.
17 The JTF has gone from -- in the last week, telling us on a day
18 when we had agreed to have meetings, telling Mr. Hawsawi that
19 we had cancelled and telling us that he had cancelled. Then
20 an hour later, telling us, oh, yeah, there's a meeting and we
21 rush over to Echo II only to find out that he's been there and
22 he was told we had cancelled.

23 Another time when we had agreed with him not to have a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 meeting, this was just on Friday, September 10th, we were told
2 in the morning, oh, Mr. Hawsawi wants to meet this afternoon.
3 Counsel went over there and then was told he's not here.
4 Counsel was kept there for several hours with the impression
5 that messages were being exchanged back and forth to JTF to
6 verify whether or not Mr. Hawsawi wanted to show up.
7 Ultimately, he never did show up. And when we spoke with him
8 later, we found out there never was any communication with him
9 on Friday about a meeting and he never requested a meeting on
10 Friday.

11 So my point, coming back to this morning, is even
12 though we have word that he supposedly got this injection of
13 pain medication, it's difficult for us to really believe
14 what's happening on the ground. And the -- my understanding
15 right now is Mr. Hawsawi would like to come, and my
16 understanding from him is that he has been in too much pain to
17 make it here. And I say this with full understanding that he
18 does not want to trigger, I hope Your Honor's full
19 understanding, he does not want to trigger an FCE but he would
20 like to come.

21 MJ [Col McCALL]: A forcible cell extraction?

22 ADC [MS. LACHELIER]: Sorry.

23 MJ [Col McCALL]: I'm just trying to make sure I'm

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 understanding.

2 ADC [MS. LACHELIER]: Yes, sir. Apologies for using the
3 acronym, forcible cell extraction.

4 MJ [Col McCALL]: All right.

5 ADC [MS. LACHELIER]: So I just wanted to give you the
6 background that we've had with JTF and the difficulties in
7 communication. They have an SOP to walk -- how to walk a
8 straight line over there, but they can't somehow develop an
9 SOP for how to communicate to counsel and to Mr. al Hawsawi
10 whether or not we have a meeting. It's -- it's beyond me why
11 it's still so complicated after 13 years.

12 MJ [Col McCALL]: Okay. I appreciate you bringing that to
13 the commission's attention. I want to see if perhaps the
14 government has a witness that can address some of these issues
15 and then we'll go from there.

16 Mr. Trivett? Or Mr. Swann?

17 LIEUTENANT COLONEL, was called as a witness for the
18 prosecution, was sworn, and testified as follows:

19 DIRECT EXAMINATION

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

21 Q. Please be seated. Are you an Assistant Staff Judge
22 Advocate with the office of the Staff Judge Advocate here at
23 Guantanamo Bay Cuba?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. I am.

2 Q. All right. Lieutenant Colonel, Colonel, did you have
3 advise -- did you have occasion to advise Mr. Hawsawi of his
4 right to attend today's proceeding?

5 A. I did.

6 Q. And do you have in front of you what's been marked as
7 Appellate Exhibit 838F?

8 A. Yes.

9 Q. This document consists of three pages?

10 A. Correct.

11 Q. On the second page of that document, there appears to
12 be a signature. Is that the signature of Mustafa Ahmed Adam
13 al Hawsawi?

14 A. Yes.

15 Q. And did you advise him of his rights using the English
16 version of this form?

17 A. I did.

18 Q. And did he indicate that -- well, first of all, did he
19 indicate that he wanted to attend today's proceeding?

20 A. Not to me.

21 Q. All right. Now, you've heard what Ms. Lachelier has
22 said this morning.

23 A. Correct.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. First of all, did Mr. Hawsawi get his shot this
2 morning?

3 A. He did.

4 Q. And did he get that shot after he signed this waiver
5 to attend today's proceeding?

6 A. He did.

7 Q. All right. Drill down into that a little bit. What
8 time did you go to see him this morning?

9 A. Approximately 0607.

10 Q. And was he in bed or what?

11 A. No. He was -- he was up, moving around.

12 Q. And what did you do next?

13 A. I asked him -- I asked him if he wanted to attend the
14 session here today, and he said -- he said no, he was in pain.

15 Q. All right. Did he indicate what kind of pain he was
16 in?

17 A. Not at that time.

18 Q. Then did he indicate -- what did you do with respect
19 to this waiver at that time?

20 A. At that point in time, I told him I'd have to read him
21 this waiver. He went over, grabbed a chair, sat down, and
22 listened to me read this waiver verbatim through to him. And
23 then after I was finished reading the waiver, he motioned for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 me to hand him the document so he can sign the document, and
2 then he signed the document.

3 Q. All right. Do you believe his waiver this morning was
4 a voluntary waiver?

5 A. I do.

6 TC [MR. SWANN]: Nothing further, sir.

7 MJ [Col McCALL]: Defense, would you like to question this
8 witness?

9 **CROSS-EXAMINATION**

10 **Questions by the Assistant Defense Counsel [MS. LACHELIER]:**

11 Q. Good morning, Major -- sorry. Good morning, Colonel.
12 At what time did Mr. al Hawsawi sign the waiver?

13 A. He signed the waiver approximately 0607.

14 Q. And it's your testimony that he got the shot after he
15 signed the waiver ----

16 A. I saw ----

17 Q. ---- correct?

18 A. ---- him receive the shot after he signed the waiver,
19 correct.

20 Q. And what time did he get the shot?

21 A. Approximately 0730.

22 Q. Did he -- you did not ask him how he was feeling?

23 A. I did not.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. You did not have a discussion with him about his
2 health or anything, any details about his health?

3 A. Not at -- not at the time when he signed the waiver.
4 Afterwards I overheard the nurse discuss his health with him
5 as she was giving him his shot.

6 Q. Okay. So you don't know how long it takes for that
7 shot to take effect?

8 A. I do not.

9 Q. Were you there when he was praying this morning?

10 A. I believe -- I believe -- I was there when prayers
11 were happening, correct, this morning.

12 Q. So you -- but you weren't there when -- you weren't
13 there when he fell next to Mr. Mohammad during prayer this
14 morning, were you?

15 A. I did not see that.

16 Q. And you said he sat down when you read him the waiver;
17 isn't that correct?

18 A. That is correct.

19 Q. And that was at approximately 6:00 or 6:30 you said?

20 A. 0607.

21 Q. Okay. Was he asked again after the shot? After the
22 shot would have had time to take effect, so not right at 7:30
23 when it was given, but was he asked again whether he wanted to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 come to court?

2 A. Yes. When I -- when I arrived here, I called back to
3 the watch commander and asked if they were asking him if he
4 wanted to come back, and that was probably at -- approximately
5 an hour after he received the shot. And they stated that when
6 they tried to get -- to ask him if he wanted to come back to
7 the commissions, he was asleep and he wasn't coming to the
8 door.

9 Q. Okay. So you actually did not talk to him after the
10 shot. You -- you -- the information you just conveyed is from
11 the watch commander, correct?

12 A. That is correct.

13 Q. So you do not have personal knowledge, actually, of
14 what his state was after the shot this morning?

15 A. No.

16 Q. Okay.

17 ADC [MS. LACHELIER]: Thank you.

18 MJ [Col McCALL]: Mr. Swann, anything further with this
19 witness?

20 **REDIRECT EXAMINATION**

21 **Questions by the Trial Counsel [MR. SWANN]:**

22 Q. Colonel, did he ever tell you that he wanted to come
23 but for the pain that he claimed that he was in?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. He did not say that to me.

2 MJ [Col McCALL]: All right. What I'm going to do is I'm
3 going to go ahead and take a recess and consider this issue.
4 Again, as I mentioned on Friday, this past Friday, I'm trying
5 to be flexible here where we're not requiring the accused to
6 come to every hearing. And yet I don't want to proceed when
7 there's a cloud over whether or not it was a voluntary
8 decision on the part of an accused not to come, even though
9 with Mr. Hawsawi we're not getting into necessarily matters
10 where his counsel are -- you know, they've deferred until
11 Mr. Ruiz is available. So we're not really getting into
12 matters dealing with him.

13 But I'm going to consider this and figure out what
14 options we have. And again, what I would like counsel to
15 consider is if they're requesting that we -- again, one luxury
16 we have this week is that we do have some matters that we're
17 taking up, some ex parte hearings. We were going to have the
18 ex parte briefing from Mr. Mohammad's team this afternoon. We
19 could flip-flop and have continued argument this afternoon and
20 perhaps hear the ex parte briefing this morning. I'm going to
21 consider that as an option. And -- but I will ask counsel if
22 that's something they are interested in. But for now, we're
23 going to go ahead and just take a short recess.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Commission is in recess.

2 [The R.M.C. 803 session recessed at 0922, 13 September 2021.]

3 [The R.M.C. 803 session was called to order at 0933,
4 13 September 2021.]

5 MJ [Col McCALL]: The commission is called to order. The
6 parties are still present with the absence of Mr. al Hawsawi.

7 So this is what I'd like to do going forward.

8 Mr. Swann, you know, I'm not comfortable with the state of the
9 testimony on Mr. al Hawsawi's desire or not to be here. So if
10 you can -- you can go ahead and leave the courtroom and if you
11 can find out from the JTF whether the shot has taken effect,
12 whether Mr. Hawsawi wants to be brought here, because there
13 are some matters we can take up outside of his presence that I
14 need to put on the record. But if you can find out more
15 information on whether or not he wants to come now that he has
16 received his shot back in -- around 7:30.

17 TC [MR. SWANN]: I've done that already, sir.

18 MJ [Col McCALL]: Okay. Perfect.

19 TC [MR. SWANN]: I sent folks to make the inquiry. I
20 should have an answer shortly, assuming that Mr. Hawsawi
21 decides to wake up. But that's in -- that's in the works.

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

23 ADC [MS. LACHELIER]: Judge, I would ask that they present

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 a new form to Mr. Hawsawi if there is a waiver.

2 Just to draw the court's attention, I don't know if
3 you noticed, but the form was doctored. Mr. al Hawsawi signed
4 it at 6:00 in the morning per the SJA's testimony and then
5 there was a 9:00 time entered on the form, and the SJA's
6 testimony verified that Mr. Hawsawi was not asked later
7 whether he wanted to come or not. So the form -- the time on
8 the form was changed after Mr. al Hawsawi signed it and we
9 would like to see -- if he decides not to come this morning,
10 we would like to see a form that is signed by him at the
11 appropriate time ----

12 MJ [Col McCALL]: I'm not ----

13 ADC [MS. LACHELIER]: ---- not doctored.

14 MJ [Col McCALL]: I'm not going to get into whether it was
15 doctored or not. I'll just say a new form, given that there
16 was a question as to his -- whether it was a voluntary waiver.
17 Let's go ahead and get that.

18 All right. While that is working, we'll go through
19 some other procedures, matters I want to take up. All right.
20 So first of all, just some housekeeping. Just for the record,
21 I did not conduct a conference pursuant to Rules for Military
22 Commission 802 on this past Friday. Instead, we recessed for
23 lunch and for the commission to receive an ex parte

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 presentation from Mr. Binalshibh's defense team as to their
2 defense theory of the case.

3 And then I want to go ahead and make a ruling on the
4 challenges that are before the court. So the first item we're
5 going to take up is the court's ruling as to the defense
6 motion for the judge to disqualify or recuse himself from this
7 commission. I've reached a ruling on this issue and will
8 state the salient points on the record this morning. This
9 will be followed shortly by a written ruling.

10 By way of procedural background, on
11 6 September 2021 ----

12 LDC [MS. BORMANN]: Judge?

13 MJ [Col McCALL]: Yes.

14 LDC [MS. BORMANN]: We're getting a notice from the
15 interpreters to slow down because they can't keep up with you
16 when you're reading.

17 MJ [Col McCALL]: I appreciate that. Thank you,
18 Ms. Bormann. I will try to speak slower. When I'm reading, I
19 know that that causes strain for the interpreters.

20 All right. By way of procedural background, on 6
21 September 2021, I invited the parties to ask voir dire
22 questions of me pursuant to Rule for Military Commission
23 902(d)(2). I also released a 2006/2007 officer performance

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 report and a letter of evaluation in AE 001Q and a 2015
2 officer performance report and two letters of evaluation in AE
3 001R.

4 Counsel for Mr. Mohammad, Mr. Bin'Attash,
5 Mr. Binalshibh, and Mr. Ali questioned me. Counsel for
6 Mr. Hawsawi requested to defer voir dire due to the absence of
7 learned counsel, Mr. Ruiz. The commission granted the
8 deferral.

9 The commission did not schedule proceedings on 9
10 September 2021 to allow the parties to prepare any challenges
11 that they had to my service as presiding judge and to consult
12 with their clients, the accused.

13 On 10 September 2021, the government advised that they
14 had no challenge. Counsel for Mr. Mohammad and Mr. Bin'Attash
15 made challenges to my qualifications. Counsel for
16 Mr. Binalshibh joined the challenges. Counsel for Mr. Ali did
17 not. Counsel for Mr. Hawsawi did not take a position as they
18 had, as previously mentioned, deferred voir dire.

19 The first challenge, which was made by counsel for
20 Mr. Mohammad, was essentially that I am disqualified under
21 R.M.C. 902(a) because of my discussions with Chief Judge
22 Watkins regarding my decision to -- whether or not to recuse
23 myself after the Assistant Secretary of Defense clarified that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the chief trial judge did not have the authority to waive the
2 two-year experience requirement in paragraph 6-3.d. of the
3 Regulation for Trial by Military Commissions and that this
4 creates an appearance, to a reasonable person, that I have
5 knowledge of facts that give me a personal interest in the
6 litigation, creating an appearance of partiality, even if no
7 actual partiality exists.

8 Specifically, counsel for Mr. Mohammad assert that
9 notwithstanding the 7 September 2021 decision by the U.S.
10 Court of Military Commissions Review on this issue, my
11 decision to recuse myself was premature and is evidence of, or
12 at least creates the appearance of, that I had taken a side in
13 the AE 811 litigation prior to affording counsel for the
14 accused an opportunity to argue that paragraph 6-3.d.
15 conflicts with the judicial eligibility requirements in 10
16 U.S.C. Section 948j(b) and R.M.C. 503(b).

17 Findings: Based upon the evidence before the
18 commission and the voir dire by the parties, I make the
19 following findings:

20 One, I was initially detailed to this case on 16
21 October 2020. On 19 October 2020, the government filed AE 806
22 setting forth their position that I was not qualified to serve
23 as the judge in this case because I lacked the two-year

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 judicial experience requirement set forth in paragraph 6-3.d.
2 of the Regulation for Trial by Military Commissions.

3 Two, on 26 October 2020, the Chief Trial Judge,
4 Colonel Douglas Watkins, sent an action memorandum to the
5 Secretary of Defense requesting him to clarify that the chief
6 trial judge had the authority to waive the two-year judicial
7 experience regulatory requirement. I was aware that
8 Colonel Watkins had requested this clarification.

9 Three, on 16 November 2020, the Deputy Secretary of
10 Defense advised the chief trial judge that he did not have the
11 authority to waive the two-year requirement.

12 Four, shortly after receiving notice of the 16
13 November 2020 decision by the Deputy Secretary of Defense, I
14 decided to recuse myself from this case, as I did not have the
15 required two years of judicial experience. Sometime in
16 November of 2020, I communicated this to the chief trial
17 judge. Colonel Watkins relayed to me that he would detail
18 someone else to be the military judge, so I didn't feel a need
19 to move forward with recusing myself.

20 Five, on 8 December 2020, the government filed AE
21 806A, a motion for me to recuse myself because I didn't meet
22 the two-year judicial experience requirement. I had already
23 decided to recuse myself before the government filed this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 motion and communicated this to -- and I had communicated this
2 to Colonel Watkins. As such, the government motion had no
3 effect on my decision.

4 Six, on 14 December 2020, Chief Judge Watkins detailed
5 himself to this case, effectively ending my service as the
6 presiding military judge at that time.

7 Seven, at some point after 14 December 2020, the
8 defense filed AE 811 in this commission alleging unlawful
9 influence by the Secretary of Defense upon the Chief Trial
10 Judge, Colonel Watkins. Counsel for Mr. Bin'Attash and
11 Mr. Ali also filed a writ with the U.S. Court of Military
12 Commissions Review alleging the same.

13 Eight, on 31 July 2021, I had been in place as a
14 military judge for two years.

15 Nine, on 19 August 2021, I was renominated by The
16 Judge Advocate General of the Air Force to the pool of
17 military commissions judges.

18 Ten, on 20 August 2021, the new Chief Judge, Colonel
19 Lanny Acosta, detailed me to be the presiding judge over this
20 commission.

21 Eleven, on 7 September 2021, the U.S. Court of
22 Military Commissions Review issued a decision on the defense
23 writ, A, vacating all decisions issued by Judge McCall while

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 he had less than two years of judicial experience because he
2 was not qualified to sit as the accused trial judge in the
3 military commission due to the lack of two years of judicial
4 experience and, B, holding that the Deputy SECDEF did not act
5 improperly, in that he did not unlawfully influence Chief
6 Trial Judge Watkins' decisions or Judge McCall.

7 Twelve, the U.S.C.M.C.R. decision is binding on this
8 court unless overruled by that court or a superior court.

9 Thirteen, the gravamen of the challenge is that I have
10 taken a position regarding whether paragraph 6-3.d. of the
11 R.T.M.C. conflicts with 10 U.S.C. Section 948j(b) and
12 R.M.C. 503(b), and I have an interest in the answer. I do
13 not. As to the question of whether my handling of this matter
14 creates an appearance of not being impartial, a judge has a
15 sua sponte duty to recuse himself if he determines that there
16 is a proper reason to do so. Once I was aware that Colonel
17 Watkins did not have the authority to waive the two-year
18 requirement of judicial experience, I properly decided that I
19 would recuse myself. There is no reason that such a decision
20 would cause any appearance of partiality or bias.

21 Fourteen, I now meet the eligibility requirements of
22 10 U.S.C. Section 948j(b) and R.M.C. 503(b) and also the
23 two-year judicial experience requirement in paragraph 6-3.d.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of the R.T.M.C. Whether the regulation conflicts with the
2 statute is irrelevant to my qualifications to preside over
3 this military commission.

4 Ruling: The challenge from counsel for Mr. Mohammad
5 is denied.

6 The second challenge was made by counsel for
7 Mr. Bin'Attash and it asserts that I am disqualified from
8 presiding because I cannot meet the standards set out in the
9 Air Force Rules of Professional Conduct Rule 1.1 regarding
10 competence, CANON III of the -- to the Air Force Uniform Code
11 of Judicial Conduct regarding diligence, and Chapter 3 of
12 Standard 6-1.1 of the Air Force Standards for Criminal
13 Justice, which provide that the military judge should give
14 each case individual treatment and base their decisions on the
15 particular facts of the case.

16 Collectively, the challenge is that I don't have the
17 time to digest the voluminous record that this case has
18 generated and that I don't have sufficient qualifications to
19 preside over a capital case. However, at the end of the
20 challenge, counsel for Mr. Bin'Attash stated that they don't
21 object to me absorbing information, but ask that I delay
22 litigation on matters that require me to adjudicate objections
23 and arguments when I'm not yet prepared.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Findings: One, I meet the statutory and regulatory
2 qualifications to preside over this case.

3 Two, Rule for Commissions -- Military Commissions
4 505(e)(1) provides that before assembly, the military judge
5 for a commissions case may be changed by the chief trial judge
6 without cause shown on the record. This commission has not
7 been assembled.

8 Three, this challenge isn't only directed at me.
9 Taken to its logical conclusion, it alleges that any newly
10 detailed military judge would be unqualified to preside over
11 this case given its complexity and the volume of filings and
12 rulings that have already been completed.

13 Four, as Congress established, the Military Commission
14 Act in part for the -- established the Military Commissions
15 Act in part for the express purpose of trying this case and
16 these accused. This commission can reasonably infer that
17 Congress, and subsequently the Executive Branch agencies
18 charged with implementing the Military Commissions Act,
19 specifically considered the requisite qualifications for a
20 military judge knowing the possible complexity associated with
21 trying a high-profile capital case involving international law
22 and the handling of classified evidence.

23 Even with all these issues in mind, Congress and the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Executive Branch established the qualifications that we have
2 before us, without exception, for the particular nuances or
3 difficulties of this case.

4 Five, while I am aware of the challenges of assuming
5 the role of military judge at this stage in the proceedings,
6 having considered my obligations under the Air Force Rules of
7 Professional Conduct, the Air Force Standards for Criminal
8 Justice, and the Air Force Code of Judicial Conduct, I do
9 believe that I possess the requisite skill to diligently and
10 competently perform the duties of the military judge in this
11 commission.

12 Six, I have tried to expedite my learning curve by
13 requesting ex parte presentations from the defense regarding
14 their theories of the case and an ex parte presentation from
15 the government to understand what has taken place in
16 classified discovery and what summaries and substitutions are
17 currently pending.

18 Seven, at a bare minimum, we are at least one year
19 away from trial. I will ensure that I am fully apprised of
20 the procedural history and the background of any motion before
21 I -- prior to any ruling. I am not bound by any particular
22 timeline to get to trial.

23 Eight, at the conclusion of counsel for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Bin'Attash's challenge, she asked that I delay litigation
2 on matters that will require me to adjudicate objections and
3 arguments while I am not in a prepared state and while I am
4 not acting consistently with -- with my legal requirement as
5 an attorney for the United States Air Force and as a judge. I
6 can affirm that I will not act immediately on matters that I
7 believe I am unprepared to adjudicate.

8 So my ruling is the challenge from counsel for
9 Mr. Bin'Attash is denied. I can preside over this case in
10 both a competent and diligent manner in compliance with all
11 Air Force professional responsibility mandates. And again, a
12 written ruling will be forthcoming.

13 All right. Moving on to some more procedural matters.
14 I see -- yes, Mr. Connell.

15 LDC [MR. CONNELL]: Sir, may I ask for one clarification?

16 MJ [Col McCALL]: Yes.

17 LDC [MR. CONNELL]: Sir, in your findings regarding the
18 first challenge, you stated that the defense filed AE 811 and
19 that Mr. al Baluchi and Mr. Bin'Attash had filed a writ. In
20 your written follow-up, will you be sure to clarify that
21 Mr. Bin'Attash and Mr. al Baluchi have a separate position
22 stated in the AE 811 series which is in AE 811A? I ask solely
23 because the positions of the parties and the trial court are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 so important to the appellate court.

2 MJ [Col McCALL]: I will do so.

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

4 MJ [Col McCALL]: I'll make sure to clarify those
5 positions.

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

7 MJ [Col McCALL]: All right. The commission also issued
8 five rulings over the weekend that I wanted to bring to your
9 attention. Four of the rulings, AE 697E, AE 776D, AE 775D,
10 and AE 785G were rulings pursuant to Military Commission Rule
11 of Evidence 505(h) and Rule for Military Commissions 806(b)(2)
12 regarding closed hearings.

13 The fifth ruling was AE 833RR, a ruling on
14 Mr. Hawsawi's motion to defer briefing ordered in AE 833FF and
15 objection to proceeding in the absence of learned counsel
16 dated 12 September 2021.

17 Before we proceed -- so Mr. Trivett, I do have a
18 couple of questions in regard to AE 833DD, the government's
19 notice of non-objection to certain defense notices.

20 So on page 2 of AE 833DD, in its discussion of
21 materials noticed in AE 775C and 776C, the government only
22 addresses two of the three classified items which were
23 noticed, that being the classification guidelines in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MEA-FBI-0022584-89.

2 Mr. Mohammad's notices in AE 775C and AE 776C,
3 however, also referenced a third item. It's the memorandum
4 dated 1 July 2021. Appears to be the same document as AE 628
5 with six -- E times six Attachment B. So my question for you,
6 Mr. Trivett, is: Was -- was that an oversight or did the
7 government intend that its discussion of Mr. Mohammad's notice
8 in AE 785F, would it cover that 1 July 2021 memo?

9 MTC [MR. TRIVETT]: Sir, I -- I think it's an oversight.
10 If I can have one minute to confer.

11 MJ [Col McCALL]: Please. Take your time. So I'll just
12 go ahead while you're looking, but in issuing the closure
13 orders, I presumed that to be the case. I know counsel had
14 mentioned on the record that they didn't object to any of the
15 505 notices. But before actually having the closed session, I
16 wanted to give you the opportunity to review that and confirm.
17 So take your time. Let me know.

18 [Pause.]

19 MTC [MR. TRIVETT]: Thank you for the commission's
20 indulgence, sir. We don't have an objection to that. It was
21 an oversight.

22 MJ [Col McCALL]: Okay. And it's addressed in a footnote
23 in my rulings, so I think it's covered with it being on the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 record. Okay. Thank you.

2 All right. One other matter. Over the weekend, I
3 also reviewed what has been filed so far in AE 833CC, that's
4 Mr. Mohammad's motion to defer the government's ex parte
5 presentation. I've reviewed the filing, the government's
6 response, along with the case law and prior rulings that were
7 referenced therein. At this time, unless I see something in
8 the written replies that are due today that changes my
9 inclination, I'm no longer inclined to hear oral argument on
10 this issue. I feel comfortable with the law and what I'm
11 allowed to do. I just wanted to let the parties know that.

12 So for the other matters, before we move into the
13 other AEs that I do want to hear oral argument on for sure,
14 Mr. Swann, did you get any further clarification or do we need
15 to take a recess?

16 TC [MR. SWANN]: The latest clarification is, is that the
17 witness has returned to the camp and he's going to redo the
18 waiver. Probably will require to wake up Mr. Hawsawi, but
19 we'll do that. And then the witness will inform me exactly
20 what happened.

21 MJ [Col McCALL]: Okay. Well, so what we'll do is -- we
22 don't need to rush to this issue. So we'll go ahead and take
23 a recess and -- open-ended. And if the government can let my

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 team know when we're ready to go back on the record with some
2 clarification of this issue, and then we'll go forward at that
3 point.

4 TC [MR. SWANN]: We can do that, sir.

5 MJ [Col McCALL]: All right. Thank you. The commission
6 is in recess.

7 [The R.M.C. 803 session recessed at 0957, 13 September 2021.]

8 [The R.M.C. 803 session was called to order at 1107,
9 13 September 2021.]

10 MJ [Col McCALL]: The commission will come to order. I
11 notice the accused are still present, except for
12 Mr. al Hawsawi. And it also appears that Mr. Binalshibh has
13 stepped out.

14 LDC [MR. BRUCK]: We expect him to be back momentarily.

15 MJ [Col McCALL]: Okay.

16 All right. Mr. Trivett or Mr. Swann, does the
17 government have any further evidence regarding Mr. Hawsawi's
18 absence this morning?

19 REDIRECT EXAMINATION CONTINUED

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

21 Q. Colonel, have a seat, please. I remind you that you
22 are still under oath.

23 In the last hour or so, did you return to the camp and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 revisit Mr. Hawsawi?

2 A. I did.

3 Q. And do you have a three-page document in front of you
4 which is marked Appellate Exhibit 838H?

5 A. I do.

6 Q. Is there a signature on the second page of that
7 document?

8 A. There is.

9 Q. Did you follow the procedure that you used earlier
10 this morning in advising Mr. Hawsawi of his right to attend
11 today's proceeding?

12 A. I did.

13 Q. And what did he say he wanted to do?

14 A. He -- he asked if there was a closed session in the
15 afternoon. I informed him at 1400. And he said he didn't
16 want to attend. So he -- he did not want to come.

17 TC [MR. SWANN]: I have no further questions, sir.

18 MJ [Co] McCALL: Thank you, Mr. Swann.

19 Ms. Lachelier, do you have any questions for this
20 witness?

21 ADC [MS. LACHELIER]: Yes, briefly, Judge.

22 [END OF PAGE]

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 RE CROSS-EXAMINATION CONTINUED

2 Questions by the Assistant Defense Counsel [MS. LACHELIER]:

3 Q. Hello again. I just wanted to clarify, was he
4 informed that he could come this morning? You said -- because
5 you mentioned he asked about a closed session.

6 A. Yes. I told him if he wanted to come now, we would
7 bring him now.

8 Q. Okay. And he asked if there was a closed session or
9 he was interested in coming this afternoon?

10 A. He asked if there was -- he asked me if there was a
11 closed session this afternoon.

12 Q. Okay. So as if to confirm whether there was or was
13 not a closed session coming?

14 A. Correct.

15 Q. Okay. Understood.

16 ADC [MS. LACHELIER]: I have no further questions, Judge.
17 Thank you.

18 MJ [Col McCALL]: Thank you.

19 All right. The witness can step down, leave the
20 courtroom.

21 [The witness was excused, and withdrew from the courtroom.]

22 MJ [Col McCALL]: The commission finds that Mr. Hawsawi
23 has knowingly and voluntarily waived his right to be present

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 at today's session.

2 ADC [MS. LACHELIER]: Judge, I did want to add -- sorry, I
3 apologize ----

4 MJ [Col McCALL]: No, please. Go ahead.

5 ADC [MS. LACHELIER]: ---- I didn't realize you were going
6 to make your findings right away. We already had marked
7 Appellate Exhibit 838G and we provided a copy to the
8 government. I just wanted to put that in the record, and
9 we'll provide copies to the co-accused's counsel. And it's
10 just -- it just makes a record of a special request we sent to
11 JTF that explains the scenarios that I gave you this morning
12 of what occurred. I won't go into it again, but that way it's
13 on the record for the commission to understand exactly what
14 happened with the miscommunications.

15 And I wanted to emphasize to the judge we don't have
16 the ability to call back by phone. I don't know if you were
17 aware of that or not. We've asked in the past for that
18 ability. They're now in Camp V. Camp V does have telephonic
19 ability that habeas counsel uses the telephone. And even if
20 it was just for the purpose of confirming these kind of
21 morning sessions, do you want to come to court or not, a
22 simple direct phone call with us would avoid this telephone
23 game and the delays we had this morning. It seems like it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 would be something fairly simple to institute. There is the
2 capacity to do it at Camp V, and habeas counsel calls from the
3 U.S. to their -- to their clients.

4 So I just would mention that to the judge. It seems
5 like we could get around all this nonsense, quite frankly.
6 But I would like to admit AE 838G to explain to the commission
7 exactly what happened with the meetings.

8 MJ [Col McCALL]: I appreciate that, Ms. Lachelier. And
9 just to make sure, but at this time you're not asking for any
10 particular relief from the commission, correct? This is just
11 a note on the record of what you had gone through and ----

12 ADC [MS. LACHELIER]: Correct. It's a pattern. I think
13 what we want to try to show the judge, both this current list
14 of events but also in the past, this is a recurring pattern,
15 unfortunately, and that's why I mentioned the phone calls. We
16 don't want these delays for an hour each morning, each time
17 there's a confusion about what Mr. Hawsawi said. And so some
18 way to get around that would -- so that we have a direct
19 ability to communicate and find out.

20 He has -- he does have significant pain issues. His
21 situation does change from one day to the next. So it's
22 difficult for us to have a word the previous day that will be
23 confirmed the next morning. He was previously on two pain

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 medications, now he's graduated to a third pain medication.
2 He takes all three, including this injection I mentioned this
3 morning. So this is a recurring problem with us,
4 unfortunately, because of Mr. Hawsawi's health conditions.
5 And we're just trying to both alert the commission to it and
6 note that there was -- there are ways around it and to try to
7 resolve it.

8 MJ [Col McCALL]: Okay.

9 ADC [MS. LACHELIER]: Thank you.

10 MJ [Col McCALL]: And I appreciate that, and the
11 commission is going to look into, you know, what options we
12 have on improving this process so that this isn't a continual
13 issue.

14 ADC [MS. LACHELIER]: Okay. Thank you, Judge.

15 MJ [Col McCALL]: All right. It is 11:12, almost 11:13.
16 Let's go ahead and we'll move into oral argument on AE 766.
17 That's Mr. Mohammad's motion to compel discovery of all
18 documents related to Mr. Mohammad's ICRC requests. Mr. -- oh,
19 Mr. Nevin?

20 CDC [MR. NEVIN]: Your Honor, if I could, Ms. Radostitz is
21 going to argue this motion.

22 MJ [Col McCALL]: All right.

23 CDC [MR. NEVIN]: I just wanted to say that, before we do

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that -- it will only take me a moment. I heard you say this
2 morning that you had decided that there would be no oral
3 argument on 833 unless we changed your mind ----

4 MJ [Col McCALL]: That's my inclination. That's right.

5 CDC [MR. NEVIN]: ---- with our reply. Yeah. And I just
6 wanted to ask Your Honor, I imagine you know what I'm going to
7 say, but if you would -- if you would kindly give us the
8 opportunity to be fully heard before you make decisions on
9 the -- even on a matter that's collateral to the -- to the
10 final ruling, like holding an oral argument. This is -- this
11 is actually, I guess, the basis of our challenge that I
12 understand you've denied. And I mean no disrespect, but --
13 but I do request that you give us an opportunity fully to be
14 heard before arriving at conclusions about the case.

15 MJ [Col McCALL]: I understand. I will look at the
16 replies. I will consider it some more on whether or not to
17 have oral argument. I know this is a discretionary area.

18 CDC [MR. NEVIN]: Yes.

19 MJ [Col McCALL]: I understand the linkage that you're
20 seeing between that and the challenge.

21 CDC [MR. NEVIN]: Yeah.

22 MJ [Col McCALL]: I'll take it under consideration.

23 CDC [MR. NEVIN]: Thank you, Your Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: Mrs. Radostitz.

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

3 MJ [Col McCALL]: Good morning.

4 ADC [MS. RADOSTITZ]: In AE 766, Mr. Mohammad asks the
5 commission to compel the government to provide discovery
6 regarding communication facilitated by the International
7 Committee of the Red Cross, the ICRC. I'm going to limit my
8 oral argument to the items that we -- were not fully addressed
9 by the government in their reply, instead of going through the
10 back-and-forth. I will also start with saying we do not see
11 this as a motion for reconsideration. The information that
12 we're asking about and that has not yet been received is not
13 information that was already decided in other motions.

14 We have -- I want to acknowledge we have received some
15 of the information that we requested. We have received a
16 variety of SOPs. They are from various years and time
17 periods. But what we -- what I'm going to focus my argument
18 on is what we haven't received and why we need it.

19 So I want to give a little bit of background. The
20 government has conceded that the Geneva Conventions require
21 that the ICRC be allowed to facilitate communication between a
22 detainee, our client, charged with a war crime, and his or her
23 family. And since 2007, when Mr. Mohammad was brought to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Guantanamo, that has happened. I will note for the record
2 that it did not happen prior to 2007. The ICRC made numerous
3 requests about the location of people who had been reported as
4 disappeared, and our government refused to disclose where
5 those people were, including Mr. Mohammad.

6 But since 2007, the government has grudgingly
7 fulfilled their obligation through allowing Mr. Mohammad to
8 write to his family, although the number of letters is limited
9 to two letters per month and four postcards per month. And
10 then he is allowed to have calls on a semiregular basis.
11 Those have been interrupted because of the pandemic. And so
12 I'm going to talk about what was normal prior to the pandemic,
13 because everything has been disrupted, and that's not really
14 what our argument is about.

15 Mr. Mohammad has a wife that he's been married to for
16 30 years. Since he was brought to Guantanamo he has not had
17 the ability to communicate with her. He has eight children,
18 five boys and three girls, one of whom was born after he was
19 captured. He's attempted to maintain not just a relationship
20 with his family in general, but a relationship individually
21 with each of his children, just like everyone would like to
22 do.

23 He also has seven living sisters who he tries to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 maintain relationships with. And, as is common with his
2 Balochi heritage, he has dozens upon dozens of nieces and
3 nephews, many of whom he is very close with, others of whom he
4 has tried but failed to create and maintain relationships.
5 And that is through the assistance of the International Red
6 Cross and the United States and also the IC -- International
7 Red Crescent Society in his family's home country.

8 And how this works is the letters, he's provided the
9 paper that the ICRC creates. He sends it through the system.
10 It then goes to a censorship office. They read them, redact
11 things. This part of the process is what we don't know much
12 about and have asked for more information about. And then
13 those letters are sent on to the family through the ICRC in
14 the U.S. and the Red Crescent Society.

15 We don't know what is censored in those letters. And
16 then the same happens in reverse. His family members are
17 allowed to write to him. They are only allowed to do that at
18 -- they can write whenever they want, but they are only
19 delivered when the ICRC in their home country provides them to
20 the ICRC here who then physically brings them to Guantanamo.
21 They then are taken to a -- through a censorship process.
22 Again, we don't know much about that and that's what we're
23 asking for more information in. And then the censored letters

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are provided to Mr. Mohammad. They are never provided to
2 counsel.

3 So there's been significant litigation about who is --
4 okay. So that's the letters part.

5 The second part is the calls. And a lot of how I have
6 to describe these is limited because of classification
7 guidance, so I'm going to be very careful in how I talk about
8 this. And Mr. Nevin is actually going to handle the
9 classified argument on this piece because of my travel
10 schedule, and he'll be able to explain that part a little bit
11 more in depth.

12 MJ [Col McCALL]: Okay.

13 ADC [MS. RADOSTITZ]: But for now, I'm just going to call
14 them "calls."

15 So Mr. Mohammad is told that a call is scheduled with
16 his family and he gives a list of ten people who he would like
17 to be -- to participate on that call. That list is then
18 provided to someone in the U.S. Government who makes a
19 determination on some basis -- we don't know what -- as to
20 which of those ten people -- names will be provided to the
21 ICRC, who will then set up the visit.

22 We don't know how that decision-making is made.

23 That's one of the things that we're asking for more

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 information about. But what will happen is that that list
2 may -- it will start with ten people, but by the time it gets
3 to the ICRC, it will have fewer than ten people on it. And
4 Mr. Mohammad is never allowed to add more people. So he
5 doesn't know how many have been stricken by the censors. So
6 now what should have been a family call with ten people could
7 be only with three people because maybe the seven people that
8 were approved by the censors have scheduling conflicts and
9 they're not able to go on -- on whatever day it's scheduled
10 for.

11 So without any clarity about how that process works,
12 we're unable to assist Mr. Mohammad or his family in figuring
13 out how to take full advantage of what the government says is
14 the process for these family calls.

15 And so that's really what we're -- those are the
16 things that we're really concerned about. So we're not
17 seeking to relitigate who is stricken from those. What we
18 want to know is the process for how they're restricted. We're
19 not saying that we want to know why Mr. Mohammad hasn't been
20 allowed to visit with his wife since he's been to Guantanamo
21 or since his capture. We want to know the process for
22 determining who is and who isn't. And I think that that isn't
23 as clear in the government's response as -- as we want it to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 be.

2 So I want to step back for a minute and say this about
3 this process of discovery. As you noted in the AE 833
4 scheduling order, there are at least 33 separate discovery
5 motions currently pending before this commission. I think
6 there's actually probably more than just 33, but that's the
7 part that we're talking about right -- right now. And that
8 kind of leads to the question of why.

9 And the process for discovery is the government has
10 provided a bunch of discovery. We look through that discovery
11 and we try to figure out what is missing, and we make a
12 discovery request. If you're seeing -- if the government
13 says, oh, yeah, we missed that, here it is, then you don't
14 hear anything about it. But if you did -- but if they say,
15 no, we're not going to give that to you, then we make a motion
16 to compel discovery.

17 And every time we make a motion to compel discovery,
18 in their response the government uses boilerplate language
19 that says, and I'm going to quote it, prosecution takes its
20 discovery obligations seriously and will produce any
21 documentation or material requested by the defense that is
22 material to the preparation of the defense.

23 And I'm not trying to infer that they don't take their

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 obligations seriously, but the volume of discovery litigation
2 in this case suggests there is a fundamental misunderstanding
3 of what that obligation means and what those -- what the
4 language of the rules requires. And there's -- there's a
5 difference between taking an obligation seriously and
6 fulfilling the obligation accurately, and that's really what
7 is the basis for our motion here and other motions that we'll
8 be arguing over the next few days. Here, we believe that the
9 government has a fundamental misunderstanding of what their
10 obligation is, what mitigation means, and what is material to
11 the defense, and that's why we're standing before you with a
12 motion to compel.

13 In this motion, we're seeking information that could
14 and will assist the defense to meet our ethical obligations in
15 this capital case to develop a robust mitigation case as well
16 as to better understand what the government's interests are in
17 interfering with our ability -- our client's ability to
18 communicate with his family. We seek discovery in order to
19 understand what decisions are being made, how and why and
20 what, if anything, we can do to change those decisions. And
21 maybe we can't change the ultimate decision, but our job is to
22 advocate on behalf of our client and, in order to do that, we
23 have to understand what the rules are, what the guidelines

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are, what the guardrails are.

2 And so we believe the information that we're seeking
3 to -- can lead to further discoverable materials and may lead
4 to other opportunities for investigation, et cetera. And also
5 to be clear, we're not asking that this commission get
6 involved with legitimate security operations of the JTF, nor
7 are we asking them, as I said, to order any specific person to
8 participate in the family calls or to receive unredacted -- or
9 uncensored letters, that our client receive uncensored
10 letters. We believe we should receive those so that we can
11 make a mitigation case.

12 So what we're asking the commission to do is compel
13 the government to provide an explanation of how the decisions
14 are made. What's the process? Who are the decision-makers?
15 Who makes these individual requests? So that then we can
16 advocate based on that. Maybe they'll give it to us and maybe
17 they -- maybe they will change their minds and they won't.
18 But if we don't know how that process works, we can't do our
19 job as advocates.

20 One of the reasons that we need this information is
21 because we have an ethical obligation, it's in the ABA
22 Guidelines, to develop a relationship with our client's
23 family. And we can't do that after the trial has commenced,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because it's not only relevant to sentencing if there is a
2 sentencing phase. So this is -- this motion is really to help
3 us create -- or help us gather more mitigation evidence.

4 In AE 824 -- I'm sorry, I don't have the letters, but
5 it's our response to the government's -- or our reply to the
6 government's brief. At pages 23 through 26, we explain in
7 length -- at length the government's misunderstanding of what
8 the mitigation evidence is. And so I'm not going to go into
9 it again here because I think we well briefed it. But I will
10 note that way back in 2013, Judge Pohl noted, without any
11 objection from the defense that -- and this is a quote -- As a
12 general rule, mitigation is in the eyes of defense counsel.

13 If you believe something is mitigating, regardless of
14 what the government may believe, my instinct is that it will
15 be treated as a mitigating factor for counsel to argue.

16 Well, in order to develop that mitigation, we have to
17 have the discovery that leads to it, and that's exactly what
18 we're looking for here.

19 What we believe is included in this is the opportunity
20 to know who -- what witnesses we might want to go talk to
21 and to understand the relationship building. I mean, that's
22 really what mitigation is all about. If we talk -- look at
23 the Supreme Court case of Skipper v. South Carolina. What

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that case revealed is that the Supreme Court believes that how
2 it -- how a defendant is -- is maintaining relationships while
3 still incarcerated is relevant to mitigation and is evidence
4 that would -- would be allowed to be presented.

5 And so some of this evidence might be Skipper
6 evidence, some of it might just be witnesses that we would
7 want to call in a mitigation case. In order to do that, we
8 need to have the underlying discovery of these -- these
9 letters.

10 MJ [Col McCALL]: Ms. Radostitz, let me just make sure I'm
11 understanding. So I get from your motion what your team is
12 saying is some of the mitigation evidence that you would want
13 from these ICRC requests. But walk me through -- connect the
14 dots on -- I mean, so you have access to your client. I
15 assume from your client you're able to get contact information
16 for this large, extended family that you've kind of listed
17 out. So the defense team is able to go straight to them to,
18 you know, find out their relationship and their -- some of
19 that mitigation evidence, correct?

20 ADC [MS. RADOSTITZ]: Correct. This is complicated with
21 regard to Mr. Mohammad, because our U.S. Government has
22 precluded us from visiting the country in which his family
23 lives. We are precluded by State Department rules, and so we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 can't do that.

2 MJ [Col McCALL]: Okay.

3 ADC [MS. RADOSTITZ]: And so one of the ways -- things
4 that we have to do is narrow who we would want to talk with,
5 and one of the pieces of evidence that helps us narrow that
6 are the letters that are coming in to him.

7 And I think a follow-up question that you might be
8 asking is: Well, why don't you just get those from
9 Mr. Mohammad? And the answer to that is what he receives and
10 what was actually written are two different things. And so we
11 want the original letters on both sides versus -- and also to
12 know what the -- what has been censored out of his letters,
13 because we have access to, and the government has provided,
14 the original letters that Mr. Mohammad has written. But what
15 we don't have is the censored letters that go to the families,
16 if that makes sense.

17 And one piece of this is that the government has given
18 notice that they are going to seek to introduce some of these
19 letters into evidence, and they have picked which letters it
20 is that they want to put into evidence. We want to see all of
21 them so that we can just see the whole gamut of the letters,
22 rather than just the ones that they're seeking. And I also
23 want to be clear, we don't think they're admissible and we'll

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have -- we'll make that argument and fight that fight down the
2 road. But before we get to be able to fight that fight, we
3 need to see what the evidence is.

4 MJ [Col McCALL]: Understood.

5 ADC [MS. RADOSTITZ]: Subject to your questions.

6 MJ [Col McCALL]: All right. No further questions at this
7 time.

8 ADC [MS. RADOSTITZ]: Thank you.

9 MJ [Col McCALL]: Government? Oh, again, I'm trying to
10 get used to this process, Government. So any other defense
11 counsel? I'll go ahead and cycle through. That was from team
12 Mohammad.

13 Ms. Bormann?

14 I see negative responses from the defense teams.
15 Government, go ahead.

16 DMTC [MR. DYKSTRA]: Thank you, Your Honor. I probably
17 jumped the gun a little myself.

18 MJ [Col McCALL]: No. I'm getting used to this process of
19 having a number of defense teams. But go ahead. Proceed.

20 DMTC [MR. DYKSTRA]: Sir, I would just like to start off
21 with saying what we have provided them, so that you're aware.
22 As of this time, we have provided all ICRC communications that
23 Mr. Mohammad wrote to his family, to defense counsel, much of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it display -- displayable to the accused. We have also
2 provided all JTF-GTMO standard operations procedures related
3 to ICRC communications relevant to these accused.

4 In addition, and to answer a question that
5 Ms. Radostitz raised about not knowing what is, quote/unquote,
6 censored, we've also provided comprehensive classification
7 guidance regarding family communications that specifies what
8 the accused must refrain from saying in ICRC communications.

9 I was reading myself.

10 And that's contained at Appellate Exhibit 360Q. And
11 that was done at the behest, or at the order of Judge Parrella
12 earlier in this case in the AE 360 series, which is exactly
13 where we have litigated all of this stuff prior.

14 Your Honor, I'm not going to get up here and brief too
15 long, because I think the precedent in this case is well
16 established and well briefed. But as far as where we've
17 litigated this case, I would draw your attention to Appellate
18 Exhibits 093, 321, 360, 399, and 473.

19 360 is the discovery series that we dealt with this
20 issue before and ultimately which is what gave rise to us
21 disclosing all ICRC communications with the accused, going
22 from 2014 going forward.

23 And 473 deals with, in that series Mr. Binalshibh's

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 defense counsel were seeking to have a phone call with one of
2 his brothers, which was denied. And ultimately, in that case,
3 the commission ruled that managing outside contact with
4 detainees is self-evidently a legitimate penological interest.

5 And beyond that, Your Honor, I would -- subject to
6 your questions, I don't have anything further.

7 MJ [Col McCALL]: No questions.

8 DMTC [MR. DYKSTRA]: Thank you, Your Honor.

9 MJ [Col McCALL]: Ms. Radostitz.

10 ADC [MS. RADOSTITZ]: Yes, Your Honor. Just briefly.

11 So if they've provided from 2004 going forward, we
12 would ask the court to -- or the commission to at least order
13 from 2006 to 2014. Because if that's already been decided
14 that that's a -- you know, an unobjectionable, I don't know
15 why years before that would be any different. And counsel did
16 not address the letters that are received by Mr. Mohammad that
17 we have also requested.

18 And one thing that I probably should have said, and
19 it's not in direct rebuttal but if you'll give me just a
20 little bit of leeway, what I should have said is ----

21 MJ [Col McCALL]: Sure.

22 ADC [MS. RADOSTITZ]: ---- that Mr. Mohammad's memory -- I
23 mean, Ms. Bormann spoke about this the other day, is that his

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 memory has been incredibly impaired by the torture that he
2 endured. And so relying on our clients for information about
3 how to reach their family, about who is the most significant
4 person in the family that would be the great mitigation
5 witness is a really hard thing to do. It's hard in any
6 capital case. We rarely in a capital case want to rely on our
7 client's memory because most of our clients have experienced
8 trauma. But in this case, that trauma was exacerbated by the
9 torture that Mr. Mohammad endured. And so getting these --
10 the letters from the family to him is very important to our
11 mitigation case.

12 MJ [Col McCALL]: Thank you.

13 ADC [MS. RADOSTITZ]: Thank you.

14 DMTC [MR. DYKSTRA]: Sir, I was corrected, that we have
15 actually gone above and beyond what the commission has
16 ordered. We have turned over all the communications from 2006
17 going forward, not 2014 is what was ordered in the AE 360
18 series.

19 MJ [Col McCALL]: And this was the communication going
20 from Mr. Mohammad going out?

21 DMTC [MR. DYKSTRA]: Correct, Your Honor.

22 MJ [Col McCALL]: So let me ask this, if you could step
23 back to the podium for the government.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So trying to make sure I'm understanding. I'm not
2 sure this was covered in either of the briefings or the
3 response, but -- so for letters that are coming in to
4 Mr. Mohammad, if they are censored for some reason, a
5 classified reason, is the -- I mean, even the fact that it's
6 coming from a certain person, is that information as well
7 censored? Like, so that -- I understand that counsel may not
8 be allowed -- or Mr. Mohammad may not be allowed to know that,
9 let's say, a certain brother has written him, what the
10 substance of that letter was for some classified reason,
11 perhaps. And maybe we'll get into this more tomorrow. But is
12 even the fact that that brother reached out -- is -- I mean,
13 can that information -- is that information not given to the
14 defense?

15 DMTC [MR. DYKSTRA]: Sir, as this issue wasn't -- and I
16 looked back at the original request in their -- in their
17 motion. I was not absolutely tracking this is what they were
18 seeking at all.

19 MJ [Col McCALL]: Yeah, I don't know that it was
20 necessarily raised.

21 DMTC [MR. DYKSTRA]: Yeah.

22 MJ [Col McCALL]: But I believe it came up in argument
23 that, I mean, if they're trying to figure out these

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 connections and who is reaching out and still seeking a
2 relationship with their client, that that then plays into
3 perhaps building the mitigation defense.

4 DMTC [MR. DYKSTRA]: And -- and part of that is the actual
5 reach-out from the ICRC on that -- that side. I can't speak
6 necessarily to that. All I can speak is to what actually ICRC
7 hands to the Department of Defense.

8 Now, obviously, the detention facility has force
9 protection concerns and so forth like that, so some of the
10 information -- and personally, I have not seen any of this --
11 may or may not get censored. I don't know. And the
12 commission certainly nothing has been proffered from defense
13 counsel about what kind of information has been censored. So
14 I don't -- I -- I'm -- I'm kind of -- I -- I don't know what I
15 don't know at this point in time. And I don't -- I haven't
16 seen any letters from defense counsel about what -- what has
17 made its way through the process.

18 MJ [Col McCALL]: Well, and maybe we're speaking past each
19 other.

20 DMTC [MR. DYKSTRA]: Yeah.

21 MJ [Col McCALL]: So that gives me concern. Maybe I'm
22 misunderstanding but, you know, my understanding of how the
23 process would work would be the ICRC receives some type of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 correspondence from a relative. They then send it to the JTF
2 who are making some initial redactions based on their process.
3 But, I mean, the government needs to know what is being
4 redacted and what is not going through, correct? Because,
5 again, the government has discovery obligations to let the
6 defense know whether this was a proper redaction, whether this
7 was something that should have been given over in discovery.
8 I mean, because the defense is not going to know that. They
9 have no way of knowing that, correct?

10 DMTC [MR. DYKSTRA]: Correct. If I could have one moment,
11 Your Honor.

12 MJ [Col McCALL]: Take your time. Yeah.

13 [Pause.]

14 DMTC [MR. DYKSTRA]: Thank you, Your Honor.

15 MJ [Col McCALL]: Sure.

16 DMTC [MR. DYKSTRA]: As far as how we've -- obviously, in
17 the AE 360 series, we were ordered to turn over statements of
18 the accused, and that's why we turned over what we did. We
19 did not feel we had an obligation, a discovery obligation, to
20 turn over what the accused were actually receiving. Now, if
21 there's actual redactions in those documents and the -- and
22 the defense want to know that, we will certainly consider that
23 on a case-by-case basis.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Obviously, some of it may be classified or -- or other
2 reasons why the defense can't know, but we will certainly dig
3 into that and engage in the process if that is needed. We
4 just never felt the need to engage in that process, because
5 ultimately, the defense -- defense counsel and the accused get
6 that mail. Or the accused at least get that mail and can
7 provide it to their defense counsel.

8 MJ [Col McCALL]: Well, they get some of that mail. I
9 mean, some -- it sounds like -- and again, it's hard to argue
10 in -- I get that this is going to be a recurring theme in this
11 case, but it's hard to argue what is going through when
12 some -- we don't know, right?

13 DMTC [MR. DYKSTRA]: Correct.

14 MJ [Col McCALL]: Where some stuff isn't where -- the
15 defense isn't going to be aware of whether something came
16 through and it sounds like if the government wasn't tracking
17 whatever that process was for incoming, then, again, the
18 government isn't aware. And so if defense is making a -- and
19 I'm not saying that they have, but if they're making a showing
20 that this is discoverable material and once it's received by
21 JTF, it's in the government's possession, it seems like it
22 might be problematic to just ignore that.

23 DMTC [MR. DYKSTRA]: And like I -- like I said, Your

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Honor, if -- if defense counsel notify us or provide that
2 with -- with that information of document X was redacted, we
3 would like to know why it was redacted, we will certainly dig
4 into that process. But keep in mind that the ICRC
5 communications are a constant -- we're constantly turning this
6 stuff over.

7 So if we're -- if we're digging into -- if -- if you
8 want us to engage in the entire process, we are certainly
9 willing to do that. I will just say it's going to be -- it's
10 going to be a recurring kind of obligation as well because
11 this -- I think we turned over 19,000 pages of the -- of this
12 stuff, just what the accused wrote, because that's -- that's
13 what Judge Pohl determined was obligated under R.M.C. 703 --
14 or 701, I should say.

15 We're more -- we're willing to dig into that. I'll
16 just say it's -- it would be better if it was more -- if the
17 defense counsel provide a particularized, hey, this -- this
18 is -- we're interested in this and obviously because it's
19 redacted, if we disclose that to defense counsel, it cannot go
20 back to the accused because obviously it was redacted for a
21 reason.

22 MJ [Col McCALL]: Understood. Okay. I understand your
23 position.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Ms. Radostitz, I'll let you -- if you have anything
2 further to say based on my questions.

3 ADC [MS. RADOSTITZ]: Yes, Your Honor. Just to say that
4 this kind of underscores my earlier argument, that they don't
5 understand what mitigation is and that what we're looking for
6 is -- I mean, I went and looked and it's in paragraphs F, G,
7 H, and I where we asked for all communication back and forth
8 facilitated by the ICRC. They only read that as communication
9 from our client to his family, but we did request
10 back-and-forth. So it is in the request.

11 And -- and that also underscores that this is -- we're
12 not litigating what was litigated by -- and decided by
13 Judge Pohl. That's why we had to file this, because it's
14 different. So thank you.

15 MJ [Col McCALL]: Understood. All right. I think I've
16 heard enough. I'll dig into some of the material that was
17 mentioned during the oral arguments and go from there.

18 All right. It's 11:43. I think still based on what
19 we mentioned last week, you know, I'd like to end at 12:00
20 today to make sure that the accused are able to have prayer
21 and lunch and then that's it for the open hearings today. We
22 are moving in then to having the ex parte briefing from team
23 Mohammad this afternoon at 1400.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Let's just do a little bit of housekeeping, then,
2 because I -- I don't see the point of starting an AE and then
3 cutting you off immediately. So what I see happening in the
4 rest of this week is -- all right. The AEs that are still
5 pending based on what we've discussed in earlier sessions
6 was -- so the next AE would be AE 783, which is the motion to
7 compel discovery in a form releasable to Mr. Mohammad.

8 Now, if I'm tracking correctly, I believe
9 Ms. Radostitz was going to argue that and I thought things
10 were falling into place where she could argue it this morning.
11 I know she's been excused and is leaving.

12 Ms. Radostitz, are you able to argue that from that
13 RHR or is this something we can slide to later in the week
14 perhaps or somebody else from the team able to argue this?

15 LDC [MR. SOWARDS]: Your Honor, we -- we have some
16 concerns about the RHR in terms of communications and security
17 issues which sort of back up behind discussing with you the
18 pending 811. I don't want to raise that -- that issue all
19 over again, but those are sort of tied up, so I think it would
20 kind of put us in an awkward position of maybe looking like
21 we're stepping on our own issues by agreeing to do this -- do
22 that at this time, and I apologize for that.

23 What I would suggest -- or just offer to you, however

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you want to proceed, is I am -- we are prepared to do our
2 ex parte, although it may interfere with something that
3 Mr. Trivett had to do in terms of checking out some equipment.
4 We're happy to push that either as late in the day today as
5 will accommodate the commission or if you want to put it over
6 to tomorrow morning or another day, we can do that.

7 Unless anyone think that I'm trying to get out of
8 work, I have -- I have a motion on the -- on the calendar
9 today as well.

10 So if you want to take those AEs that we had teed up
11 for this morning and then see what we have left for the day,
12 I'm happy to -- to move that around.

13 MJ [Col McCALL]: To go ahead and progress with the AEs
14 today ----

15 LDC [MR. SOWARDS]: Yes.

16 MJ [Col McCALL]: ---- and then this afternoon, it sounds
17 like?

18 LDC [MR. SOWARDS]: Yes, sir. Either -- either the
19 ex parte either later today than we thought, beyond 2:00, or,
20 you know, first thing tomorrow morning or -- or Wednesday
21 afternoon -- Tuesday afternoon.

22 MJ [Col McCALL]: That's fine with me.

23 LDC [MR. SOWARDS]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: I mean, this was the last one that
2 Ms. Radostitz was going to be arguing, correct?

3 LDC [MR. SOWARDS]: Correct.

4 MJ [Col McCALL]: Let's just go ahead and we'll move into
5 that and just see where we go. So we'll go ahead and hear
6 argument on -- it's AE 783. It's a motion to compel discovery
7 in a form releasable to Mr. Mohammad.

8 Ms. Radostitz.

9 ADC [MS. RADOSTITZ]: Thank you, Your Honor. I really
10 appreciate the willingness to move things around so I can
11 hopefully get on that flight tomorrow and hopefully it will
12 actually just go home ----

13 MJ [Col McCALL]: Right.

14 ADC [MS. RADOSTITZ]: ---- rather than back and forth a
15 couple times ----

16 MJ [Col McCALL]: Those are a lot of ifs.

17 ADC [MS. RADOSTITZ]: ---- like yesterday's.

18 So as you said, this is AE 783, discovery in a form
19 releasable to Mr. Mohammad. And it's sort of hard to know
20 where to start with the saga of the circumstances that created
21 the need to file this motion to require the government to
22 allow Mr. Mohammad to see and review all of the discovery, all
23 of the evidence the government has, the constitutional and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ethical obligation to provide to him.

2 So I'll start with this premise. We're just past the
3 20th anniversary of the attacks of September 11th, and
4 consistently in these proceedings, both inside the hearing
5 room and outside, the government has blamed the defense for
6 the delay. And it's -- it's frustrating to hear that all the
7 time, because the vast majority of the delay in this case has
8 been caused by the government's decision to spend more than
9 three years torturing Mr. Mohammad in black sites around the
10 world, and then another two years holding him here in
11 incommunicado detention without the services of an attorney.
12 And the vast majority of litigation has been around their
13 efforts to conceal the details of those decisions.

14 From the first day of his capture, Mr. Mohammad was --
15 has been willing to be tried. And as soon as the government
16 provides him the most basic of rights guaranteed to any
17 criminal defendant in the United States justice system, a fair
18 trial, that's what he's been asking for. From the very
19 beginning he said, "Take me to New York, give me a lawyer, and
20 I'll be happy to talk to you." But instead of doing that,
21 instead of taking him up on that offer, they -- the government
22 made a choice to do a -- to take a different path.

23 Mr. Mohammad was captured at the beginning of March of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 2003. United States law enforcement agents were present.
2 They could have immediately taken him, put him on the next
3 flight back to the U.S. and begun pretrial proceedings.
4 That's what happened with Ramzi Yousef who was arrested in
5 Pakistan for the World Trade Center first bombing. He was
6 arrested in February of 1995. His trial started in 1997, and
7 he was sentenced the following year.

8 That's what happened with Richard Reid, the so-called
9 shoe bomber. He was arrested in December of 2001, tried,
10 convicted, and sentenced in 2002.

11 Zacarias Moussaoui, charged with conspiracy to commit
12 the very same acts that Mr. Mohammad is charged with. He was
13 charged in 2006, some back-and-forth because of intermediate
14 appeals, was tried ultimately in 2006 -- I'm sorry, he was
15 charged in 2002, tried in 2006, convicted and sentenced that
16 same year.

17 The government chose not to do that for Mr. Mohammad
18 and the codefendants here. So that's part of the delay.
19 That's a lot of the delay, and it's also a lot of the
20 arguments that we have about discovery.

21 I'm sorry. I'm trying to condense things a little bit
22 so that we can -- get us out of here.

23 MJ [Col McCALL]: I appreciate that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. RADOSTITZ]: So this is not a discovery motion
2 that seeks to disclose to Mr. Mohammad classified information
3 that he doesn't already know about because of the actions of
4 the government. We're not asking for the blueprints to the
5 Pentagon or the FBI agency, either literally or figuratively.
6 We're not asking in this motion for the names of the covert
7 agents who participated in Mr. Mohammad's torture. That's
8 being litigated elsewhere.

9 What we're asking for is the ability to talk to our
10 client, with the evidence sitting in front of him, let him go
11 away and digest it, come back to us and provide further
12 details, and so that we can help build the case in his
13 defense. We're not able to do that because of the
14 classification that the government has done with the evidence
15 regarding the torture program, regarding other items that
16 we're requesting. Sorry.

17 MJ [Col McCALL]: Well, let me ask you this.

18 ADC [MS. RADOSTITZ]: Sure.

19 MJ [Col McCALL]: So just to make sure I'm understanding.
20 And I did appreciate -- I thought this briefing actually was
21 useful, the -- between the motion, the response, and the
22 replies, I felt like it actually did boil down some of the --
23 what was actually in dispute.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So you're seeking 12 categories, correct ----

2 ADC [MS. RADOSTITZ]: Yes.

3 MJ [Col McCALL]: ---- of discoverable material that
4 you've already received, but it's been classified so you can
5 see it, you can't necessarily share it with your client,
6 correct?

7 ADC [MS. RADOSTITZ]: Correct. And I want to be clear.
8 Some of it we can show to our client but not give to our
9 client. So it's -- there's a category that's called display
10 only, and that means that I can review it with him if I'm in
11 the room with him. And that's something we litigated in the
12 783 series during COVID, that we couldn't do any of that
13 because of it. So ----

14 MJ [Col McCALL]: Right.

15 ADC [MS. RADOSTITZ]: So I just don't want to say no, we
16 can't show him anything ----

17 MJ [Col McCALL]: Sure. I appreciate that distinction.

18 ADC [MS. RADOSTITZ]: ---- because we can.

19 MJ [Col McCALL]: And this is, I mean, thousands of pages
20 of documents still ----

21 ADC [MS. RADOSTITZ]: Yes.

22 MJ [Col McCALL]: ---- that we're talking about. All
23 right.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So I mean, in -- it seems like the -- there was a
2 little bit of a disagreement. But the defense is not
3 disputing that the government -- the case all seems clear
4 on -- the CIPA case law, that the government can classify --
5 say certain documents is -- are classified. We will give it
6 to the defense counsel, but not allow the accused to see it.

7 And it -- it seemed like the defense's response, then,
8 is accepting that's the state of the law, but this is a death
9 penalty case. And that's the difference, in your view, is
10 that heightened level of due process. There should be maybe
11 some type of work-around.

12 ADC [MS. RADOSTITZ]: Right. Yes. So it is different
13 because death is different, capital cases are different. But
14 it also, sort of the next phase is the government gets to make
15 the choice. They can choose to provide all the evidence to
16 Mr. Mohammad or they can choose not to. But if they choose
17 not to, there are consequences for that, and those are set out
18 in 505 in the rules and in 906P and Q [sic].

19 So that's what we're saying, is that you want to use
20 this evidence -- and that's one of the things that's really
21 interesting is that in -- in the response to our motion the
22 government says -- and I want to quote -- I want to get my
23 glasses back on and quote so I don't misquote them:

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 "Prosecution has no intention of attempting to admit any
2 evidence during its case in chief that will" be -- "not be
3 provided to the accused."

4 And I read that to mean they're going to seek to
5 declassify anything that they want to present in evidence. If
6 they're going to do it later, why don't they do it now?
7 Because if they do it later and we say, oh, wow, we would have
8 liked to have been able to talk to Mr. Mohammad about that in
9 the middle of trial, we're going to be asking for a
10 continuance so that we can have the opportunity to do that,
11 and he says, oh, wait, that's not right. Go talk to this guy.
12 He'll tell you that that's not right. We now have to go do
13 investigation. So if they're going to declassify it later,
14 why don't they declassify it now?

15 When I was preparing for this, I realized that one of
16 the things that would have been helpful, and maybe we should
17 do this as a supplement, is to go through their list of
18 evidence that they seek to -- and talk about the evidence that
19 we're trying to go get copies of from Mr. Mohammad in that
20 overlap, that they want to put this in but there's really five
21 other pieces of that -- you know, so they want -- I'm making
22 this up. But say there is a document that they're saying now
23 that they're going to present at trial.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: Okay.

2 ADC [MS. RADOSTITZ]: It is -- they're going to declassify
3 it before trial. But they're only going to declassify that
4 document. We know that there's 12 other documents in that
5 same series that are relevant to the now-declassified, but are
6 classified still and we can't discuss them with Mr. Mohammad.

7 So we're going to then have this challenge that you
8 shouldn't be able to use this document if these six don't come
9 in, but they're not declassified, so how do we -- how do we
10 handle that? This motion is really trying to clear that up a
11 little bit so that we can have all the evidence, discuss it
12 with Mr. Mohammad, be able to get his input on it so that we
13 can go out and investigate as needed, and be prepared to rebut
14 the evidence at trial, if that's the appropriate manner.

15 The first six -- I'm sorry, the first -- yeah, the
16 first eight categories of information that we're seeking all
17 are about the torture program, about the RDI program. They
18 are -- they fall within the ten-category construct plus one,
19 because there was a -- there's some litigation in the AE 0013
20 series or 013 series, and so that is also about the rendition
21 program.

22 In those categories some of the information is display
23 only to Mr. Mohammad or even releasable to Mr. Mohammad, but

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 there's other information, for example, about where he was
2 held, that we can see where he was held but what we can't see,
3 what we can't show him is where Mr. al Baluchi was held, or
4 Mr. Binalshibh was held, because that is only -- that -- that
5 piece of discovery is only releasable to someone else.

6 And so we can't talk with him about that overlap and
7 what might have happened that we can then talk to the other
8 counsel in terms of how we can rebut some of the information
9 if it's not accurate.

10 MJ [Col McCALL]: Well, all right. So let me ask you
11 this. And again, this may just be showing my ignorance on
12 this area as I'm continuing to get up to speed.

13 So, you know, the government's response to the -- your
14 12-category request with thousands of pages was, if you can
15 give us a particularized request regarding a specific
16 document, we will look at that and determine whether or not we
17 can get that reclassified so that it can be provided to
18 Mr. Mohammad.

19 So it would seem -- and so I guess my question is
20 going to be: Have you tried this approach of doing a
21 particularized request for one document, if that is then
22 reclassified going back to the government and saying, here are
23 our -- in that category other documents that would have the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 exact same -- fall in the exact same way, can you reclassify
2 those? And again, I don't know because I haven't dug enough
3 into the discovery that has gone on in this case to know if
4 that approach has been tried.

5 ADC [MS. RADOSTITZ]: So we did ----

6 MJ [Col McCALL]: Because I have two extremes between the
7 defense and the government, and it seems like that would be a
8 normal process.

9 ADC [MS. RADOSTITZ]: So we have done that with some of
10 this discovery and we just never heard back. So we asked for
11 specific items within these categories, we never heard back.

12 MJ [Col McCALL]: Okay.

13 ADC [MS. RADOSTITZ]: The -- the larger picture is it's
14 really not our job to figure out what is and isn't their
15 obligation. We try and we often say, hey, we got this and it
16 seems like it should be releasable to Mr. Mohammad but it's
17 not. Can you get it releasable? And sometimes they do. I
18 mean, there's been quite a few instances where we could not
19 move forward with something that we needed to do unless this
20 one piece of paper was declassified and we could talk about it
21 with Mr. Mohammad and the government was able to do that.

22 But what we're saying is these are -- we narrowed this
23 down to categories that were very specific to information that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Mohammad would have experienced. Again, we're not asking
2 for classified information that he was not exposed to himself.
3 That's really, I think, the difference between the approach of
4 the government of we can't just give them everything. We're
5 not asking for everything. We're asking for classified
6 information that Mr. Mohammad is aware of only because the
7 government tortured him and put him in the torture program.

8 And so that's, I think, the difference between a
9 broader request for all discovery to be given to Mr. Mohammad
10 and these categories because they're very specific to him, so
11 that's the narrowing that we did.

12 [Pause for technical difficulty with VTC.]

13 MJ [Col McCALL]: I'm not sure if that was someone from
14 the RHF? Oh.

15 ADC [MS. RADOSTITZ]: I think that may have been
16 Ms. Pradhan.

17 MJ [Col McCALL]: Okay.

18 ADC [MS. PRADHAN]: Yes, sir. I apologize for the
19 interruption. We have a hot mic.

20 MJ [Col McCALL]: Okay.

21 ADC [MS. RADOSTITZ]: Okay.

22 So one other piece of this that I want to talk about
23 because one of the categories is in the MEA-STA, which is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 statements, and those are statements of Mr. Mohammad, some of
2 which are not releasable to Mr. Mohammad. And I also -- I
3 think you already know this, but what the government calls a
4 statement of Mr. Mohammad is not really what anybody who's
5 practiced criminal law would call a statement of a defendant.
6 It is a summary by one person of something somebody else wrote
7 in a cable or maybe five different people wrote in a cable.
8 We don't know because we're not privy to that information.

9 But it's not something like if I have a robbery case
10 in Texas where I used to practice, I'd get a piece of paper
11 that said Mr. Jones said A, B, C, D, and Mr. Jones has signed
12 that at the bottom. That's not what this is. These are
13 statements that are -- they're gone through some process and
14 provided to us.

15 Some of those -- and not all of them, because some of
16 them have been releasable to Mr. Mohammad. Some of those we
17 can't talk to him about, even though they're his own
18 statements. And that seems to me something that even if
19 you're only going to do a narrow, that seems to be an area
20 that is ripe for -- for discovery.

21 And I think I want to say again what I said earlier,
22 which is that Mr. Mohammad cannot help us discern when
23 statements were made when they -- what was happening to him

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because of the damage to him due to the torture. So I think
2 that one of the things that we have asked for in other
3 motions, and maybe Ms. Pradhan, because she's done a lot of
4 this litigation will address this, is we've tried to put
5 together a timeline of what was happening to Mr. Mohammad and
6 what statements he allegedly made and what happened next and
7 what happened next. Because of the way we get discovery, we
8 have not been able to do that.

9 And some of that also has to do with a motion that's
10 not on the calendar that has to do with the fact that we don't
11 have a -- we don't have a discovery -- an electronic discovery
12 tool. That's been litigated for the last three years. We
13 still don't have it. That would make -- maybe make it easier.
14 Our analysts are amazing and they do a great job of trying to
15 suss this out, but the opacity of the discovery makes it
16 almost impossible to do that.

17 Okay. So I think we already talked about the fact
18 that this is a choice that they can make. We hope that
19 they'll make the right choice. We hope that they'll make the
20 choice that they want to go forward with this trial rather
21 than suffer the consequences of not providing the information
22 that Mr. Mohammad is entitled to have. Thank you.

23 MJ [Col McCALL]: Thank you. All right. It's 12:03.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We'll go ahead and take a recess for lunch to allow for, you
2 know, prayer times, and we don't have quite as much
3 flexibility on when we break for lunch. So we'll be back on
4 the record at 1330. And again, we'll be -- change of plans.
5 We'll be in open session and continuing with this AE.

6 Once we get through with it, then we'll decide if
7 we're going to break for the day and move into the ex parte
8 briefings, but commission is in recess until 1330.

9 [The R.M.C. 803 session recessed at 1203, 13 September 2021.]

10 [The R.M.C. 803 session was called to order at 1335,
11 13 September 2021.]

12 MJ [Col McCALL]: The commission is called to order. The
13 parties are present, with the exception of, I believe, Mr. Ali
14 is in the restroom but coming back shortly. All right.

15 ADC [MS. RADOSTITZ]: Your Honor, I just wanted to correct
16 something that I had said in response to a question, I think,
17 from the commission. And that I said that all of the Bates
18 numbers that we've requested that are classified, Mr. Mohammad
19 was present for the experiences, and that's not entirely true.
20 MEA-2C is a OIG report. He wasn't present -- the information
21 is something I think that we need to talk to him about, but he
22 wasn't present. And the same would be true of 2G. It's about
23 training materials for the people who were involved in the RDI

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 program. Obviously, he wasn't there.

2 So I just feel like I overstated that and I didn't
3 want to overstate.

4 MJ [Col McCALL]: Appreciate the clarification.

5 All right. We'll move on.

6 Ms. Bormann, is there someone from your team that
7 wishes to be heard on this?

8 LDC [MS. BORMANN]: It would be me, and not right now, no.
9 Thank you.

10 MJ [Col McCALL]: All right. And we'll keep cycling back.
11 I see Mr. Bruck saying no.

12 Mr. Connell?

13 LDC [MR. CONNELL]: Yes, Your Honor. Ms. Pradhan will
14 argue from the RHR.

15 ADC [MS. PRADHAN]: Sir, are you able to hear me?

16 MJ [Col McCALL]: I am.

17 ADC [MS. PRADHAN]: Thank you. And I apologize, again,
18 for the interruption earlier. We're still trying to figure
19 out the logistics here.

20 MJ [Col McCALL]: Exactly. And that's fine.

21 ADC [MS. PRADHAN]: Thank you, sir. I wanted to rise to
22 give the military commission a little bit of further
23 background on Mr. Mohammad's request in 783 and really just

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 supplement a little bit of what Ms. Radostitz said, because
2 it's really intimately connected, as I think you're finding
3 out, Your Honor, to other long-running very large discovery
4 disputes.

5 So, you know, the government and some of the other
6 teams gave you a little bit of background last week and, with
7 your indulgence, I'll take a couple of minutes to do the same
8 and sort of place this in context ----

9 MJ [Col McCALL]: Ms. Pradhan, I'm getting the signal that
10 the interpreters are asking that you to speak a little bit
11 slower.

12 ADC [MS. PRADHAN]: Of course, sir. I think only I can
13 manage to raise the interpreters' ire from across the sea.
14 I'm very sorry. I'll slow down.

15 MJ [Col McCALL]: Thank you.

16 ADC [MS. PRADHAN]: I also wanted to -- so I wanted to
17 start sort of at an order of magnitude a little bit higher
18 than AE 783 and then come down and I think answer with maybe a
19 bit of specificity a couple of the questions regarding the
20 authority for releasing this information and examples of
21 individualized requests that -- that you'd asked about, sir.

22 MJ [Col McCALL]: Okay.

23 ADC [MS. PRADHAN]: So I just want to begin by giving a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 bit of background on two of the larger long-running discovery
2 motions, and those are AE 534 and AE 562. Those are both up
3 on a motion for reconsideration, and so I'm not going to argue
4 any of the points in those motions at this point.

5 But just for a bit of background, following the
6 establishment of the ten-category construct in AE 397F, the
7 government in 2017 began to produce some of the documents in
8 these categories. What they call a -- and they may have
9 produced some earlier than that, but, you know, the 2A
10 chronology, the 2D profiles, things like that, began to
11 arrive, as I recall, in 2017.

12 So, for example, what they call the 2A chronology for
13 all five defendants, actually Judge Pohl didn't seem to agree
14 with that because, despite its existence, he still exhorted
15 the government in 2018 to provide us with something that would
16 allow us to put together locations, code named, of course,
17 with dates and personnel, also code named, and the STA
18 discovery, the statements that these defendants,
19 Mr. al Baluchi and others, made at the black sites.

20 And then, of course, in I believe June 2017, we
21 received the 2D profiles which did not go through the 505
22 process, and some of the other categories that Mr. Mohammad
23 mentions in AE 783.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 In September 2017, as you've heard, the government
2 also gave us what I think all parties are now calling the RDI
3 index as part of their effort at the time that turned into
4 AE 524, to stop our independent investigation into the RDI
5 program. The RDI index was at the time marked TOP SECRET.
6 And in AE 534, and AE 534B in particular, we went through as
7 categorical an analysis as possible at the time of all of the
8 discrepancies between the information listed in the RDI index
9 and the 397F information that had been produced by that time
10 by the government, and particularly the 2A -- the charts, the
11 chronologies, what they call the chronologies, and the 2D
12 profiles of the CIA personnel that the government unilaterally
13 put together and sent to us.

14 In AE 534, the relief requested there was all of the
15 original RDI documents, mostly the underlying -- the documents
16 underlying the STA and the CIA medical records that had been
17 stripped of information that would confirm whether the
18 government's summaries were wrong, whether the RDI index was
19 wrong, or whether the original documents themselves had
20 inaccuracies that had been translated into these derivative
21 documents.

22 That motion, of course, as I mentioned, is still
23 active, pending oral argument on a motion for reconsideration,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 so I won't go into all of the recent developments on that.

2 I do just briefly want to say on AE 562, that is a
3 motion asking for all original documents underlying the 2D
4 profiles, which are still classified at the Secret level and
5 those are the ones that were turned over by the government
6 outside of the 505 process. And in those, we argued that
7 there -- again, there were too many inconsistencies and later
8 actually we found out through a handful of UFI interviews, the
9 CIA personnel who have unique functional identifiers,
10 basically code names, that there were too many inaccuracies to
11 fully rely on the 2D profiles on their own. And AE 562,
12 again, is up for reconsideration on changed facts.

13 So bringing this to 783. The crux of this issue as we
14 see it, sir, is the government really cannot tell us, rely on
15 your clients for information and then at the same time say,
16 you can't show your clients these important documents about
17 their torture.

18 Ms. Bormann noted on Friday that the government had
19 told us for, you know, all year -- nine years of pretrial
20 hearings that if we're missing any information, we can just
21 ask our clients. And she pointed out in some detail why it's
22 not really possible to rely solely on the memory of a tortured
23 detainee. And Mrs. Radostitz did so as well earlier.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Most recently I want to point out the government's
2 response in AE 827A makes that same argument again despite
3 sort of consistent argument and medical records to the
4 contrary. And they say in that, as an example, the defense
5 request -- this is at pages 11 and 12 of AE 827A: The
6 defense's request for additional discovery regarding, in that
7 case Mr. al Bayoumi, for the purpose of arming them with more
8 information is also rather ironic because they are in a unique
9 position of knowledge as to the inner sanctum of this
10 conspiracy. They are in the best position to provide
11 information to the commission to justify additional discovery.

12 So in that case, you know, as in these previous cases,
13 they're saying, right, we the government prosecuting this
14 capital case don't have to give you further discovery on a
15 credible theory that has now in that motion been moved forward
16 due to executive declassification of documents, as you'll
17 hear, sir, when 827 comes up for oral argument because you can
18 just ask your clients whom we've documented as psychologically
19 broken.

20 Now, here's the thing. The defense has never said no,
21 we're not going to talk to our clients or get information from
22 them. That would be malpractice. What we have said and what
23 Ms. Bormann said and what Ms. Radostitz said and what

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Connell and I and everyone else has said is that relying
2 on their fractured memories at this point would also be
3 malpractice.

4 You know, an imperfect analogy is the examples of
5 Drs. Mitchell and Jessen, who we took testimony from in
6 January 2020. Mr. Connell asked Dr. Mitchell, and I believe
7 this is in the unofficial transcript from January 21st, 2020,
8 at page 30228 [sic]. Mr. Connell asked Dr. Mitchell how he
9 had prepared for his testimony in 2020. This is 13 to 17
10 years after the events that we were asking about.

11 And he said he'd had to review, quote, a mountain of
12 paper over about two months in order to be able to sit and
13 testify. And we also had documents available in front of him
14 the entire time for his reference throughout the course of his
15 testimony.

16 I asked Dr. Jessen the same question. And despite his
17 ability to review documents that have real locations on them
18 because, of course, he has, you know, knowledge of where the
19 real locations were, whereas we do not -- and that issue is
20 briefed in AE 525, our motion to obtain the real locations of
21 the black sites -- Dr. Jessen actually, even despite that
22 access, told us that he had initially met Mr. al Baluchi at a
23 location where we don't have a record of him being.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The point is that making these matches decades after
2 the events was always going to be incredibly difficult. The
3 government's delay for nine years has not helped with that
4 task. But again, they always wanted to have it both ways.
5 They can't say first, we're not giving you more discovery
6 because you have your brain-injured client as a resource and
7 then say, second, we're not giving you even the flawed
8 documents you have in versions you can show your client,
9 trying to refresh whatever memory he has.

10 And this brings me, sir, to one of the questions you
11 asked Ms. Radostitz, which is about authority for releasing
12 this information. This is information about their own
13 torture, about people with code names who they spent time
14 with, were questioned by, were tortured by, places where those
15 events occurred, and conditions of confinement. And that is
16 all information that the U.S. Government, after the release of
17 the SSCI Report in -- or, excuse me, the redacted Executive
18 Summary of the SSCI Report in December 2014, said should be
19 declassified anyway, and that is, this prosecution filed AE
20 13RRR on the 30th of January 2015.

21 And if I may have access -- I'm not sure if this
22 works, but let's see. If I may have access to the document
23 camera, sir, from here.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: You may. Hold on a second as we work
2 this out.

3 ADC [MS. PRADHAN]: Sure.

4 MJ [Col McCALL]: It looks like it's working.

5 ADC [MS. PRADHAN]: Excellent. I'm just trying to get the
6 zoom just right.

7 So ----

8 MJ [Col McCALL]: I can read it.

9 ADC [MS. PRADHAN]: ---- this is page 5 of that document,
10 sir. And as you'll see at the top, this is a government
11 filing that says: "The following information is no longer
12 classified."

13 ADC [MS. RADOSTITZ]: Apologies, Your Honor, but we don't
14 have it on our cameras -- or on our screens.

15 MJ [Col McCALL]: Hold on for a second, Ms. Pradhan.

16 ADC [MS. PRADHAN]: Of course.

17 MJ [Col McCALL]: The court reporters, I believe, are
18 trying to bring it up down here. We're getting IT support to
19 assist us.

20 ADC [MS. PRADHAN]: No problem, sir. I'll stand by.

21 [Pause.]

22 MJ [Col McCALL]: While we're waiting to get that
23 resolved, just trying to make -- just trying to make sure that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 on any of these documents that you're planning on showing,
2 have they been reviewed as required?

3 ADC [MS. PRADHAN]: These are unclassified filings in the
4 record, sir. The only two documents I intend to show are
5 AE 013RRR and AE 013BBBB, both of which are unclassified and
6 on the military commission's website.

7 MJ [Col McCALL]: Okay. That's fine. All right. And did
8 we -- it looks like I got the thumbs up that counsel can see
9 your document, so go ahead. Proceed.

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

11 So again, this is AE 013RRR. And this is a government
12 filing in which they said in January 2015, the following
13 information is no longer classified. And I'll move you down
14 to the bottom of the page and that last paragraph that says:
15 "Information regarding the conditions of confinement as
16 applied to the 119 individuals mentioned in Appendix 2 of the
17 SSCI Executive Summary acknowledged to have been in CIA
18 custody."

19 The following page has an additional paragraph,
20 additional two paragraphs, listing, as unclassified, the
21 treatment of the 119 individuals, including the application of
22 standard interrogation techniques. And then finally,
23 information regarding the conditions of confinement or

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 treatment during the transfer, the renditions, of those same
2 individuals which, of course, include the five defendants.

3 Now, the government's motion eventually, after some
4 briefing, resulted in AE 013BBBB. And AE 013BBBB outlined
5 categories of information that still remain classified
6 pursuant to the release of the SSCI Report and guidance from
7 the original classification authority. And on page 5 of that
8 filing -- so the first several categories are -- cover
9 information that is marked CLASSIFIED and that has been
10 produced to the defense as classified.

11 Page 5 of that filing, I'll start at the top. So this
12 is information that remains classified, and that's information
13 that would reveal or tend to reveal details surrounding the
14 capture -- and I'll just put that on the record that that says
15 "capture" -- of an accused other than the location and the
16 date, information that would reveal, again, the real locations
17 of the -- of the black sites from capture until their transfer
18 to Guantanamo Bay in September 2006, the names, identities,
19 and physical descriptions of any persons associated with the
20 RDI program, which is one reason that we use unique functional
21 identifiers about those people that the government has
22 provided to us, and then documents or information obtained
23 from or related to a foreign government dealing with U.S.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 foreign policy.

2 So those three categories, the first three categories
3 are the ones that are relevant here. And, sir, I would submit
4 that when you look at the categories proposed to be
5 declassified by the government in January 2015 after the
6 release of the Executive Summary, and then the categories that
7 were outlined as still classified by then Judge Pohl in
8 July 2015, and you juxtapose that against the categories of
9 information requested by Mr. Mohammad in AE 783, which
10 includes several of the categories of discovery required by
11 the government under AE 397F, all of that information
12 requested falls into the categories of information that should
13 not be classified anymore concerning conditions of
14 confinement, concerning the techniques used on Mr. al Baluchi
15 and the other defendants, including Mr. Mohammad, and
16 information -- excluding, of course, identifying information
17 about the personnel -- about how those techniques were
18 applied, right, which is included in conditions of
19 confinement, conditions of interrogations, all of those
20 categories.

21 And so I think that those three documents together
22 might provide some assistance to the military commission in
23 assessing these different categories that Mr. -- of discovery

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that Mr. Mohammad has requested be produced in releasable
2 formats to Mr. Mohammad and, of course, to the other
3 defendants.

4 Now, there have been times in the past couple of years
5 when, you know, Mr. al Baluchi has said someone did something
6 to me at, say, Location Number 2, which is known publicly as
7 COBALT. And that's from the SSCI Report.

8 So we look at, for example, the RDI index for COBALT
9 for that period of time when he was there. And there are,
10 say, a dozen or so unique functional identifiers, CIA
11 personnel, associated with that period of time. We then go to
12 the 2D or 2G profiles for those UFI's. Some of them confirmed
13 that they were there and some of them don't list COBALT as
14 being in their -- as them having been there.

15 The STA discovery, as we represented to you before,
16 sir, are stripped of that context, and we've discussed that
17 numerous times at this point.

18 So we really can't take the 2D profiles, right, which
19 are still classified, in to Mr. al Baluchi and try to jog his
20 fractured memory regarding who some of these code-named people
21 were, what their attitudes were, what their general background
22 was, when and how and in which places they applied these
23 techniques because when and how and who makes a difference to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 creating a narrative which we still represent -- maintain we
2 don't have.

3 So it's sort of a dead end for us at that point. We
4 often can't confirm Mr. al Baluchi's account, even if it is
5 plausible. And if we do confirm a part of it, we can't build
6 enough details around it to form that independent narrative.

7 Now, in the briefing Mr. Mohammad points out that the
8 government has demonstrated their ability to easily have
9 documents remarked or even declassified. And a really good
10 example of that is the CIA OIG's report that we received based
11 on Mr. al Baluchi's allegations of torture at the black sites.
12 That was initially produced to us at the Secret level and we
13 could not share it with Mr. al Baluchi.

14 It's an extraordinarily important document as far as
15 discovery -- RDI discovery goes or has gone because it's the
16 closest we have to a narrative, albeit a very, very limited
17 CIA narrative, formed by the CIA's cables and attestations
18 from some of the UFI personnel who we've been denied access
19 to, of what happened to Mr. al Baluchi in a very limited way
20 at the black sites.

21 In the course of witness testimony on suppression in
22 January 2020, I asked the government, and they may recall
23 this, if they would consider asking for remarking of the bulk

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of the document. It's about an, I think, an 89-page document
2 and I asked if they would consider remarking the bulk of it
3 precisely because the bulk of it dealt with conditions of
4 confinement and applications of both standard and enhanced
5 interrogation techniques, including descriptions of personnel
6 and attitudes and behavior and backgrounds of personnel and
7 all of that.

8 I want to give the government great credit here,
9 actually, because they did take that part that I'd requested
10 and they came back pretty fast, as I recall -- they can
11 correct me, of course, but as I recall, it was within a day or
12 two -- with a remarked copy that's now FOUO that is in the
13 record at AE 628RRRRR Attachment C.

14 MJ [Col McCALL]: So Ms. Pradhan, let me ask you a
15 question, then, so ----

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

17 MJ [Col McCALL]: ---- and then you can get back to --
18 because this is -- your presentation has been useful for me.

19 So my question then is: That seems to go to exactly
20 the government's position in their response that they said,
21 defense, you're coming in asking for these 12 categories,
22 thousands of pages. We're willing to look at almost a
23 case-by-case basis if you can give particularized reasons on a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 more limited pieces of -- of discovery. And it -- you know,
2 and then here you're giving an example of one where you went
3 to them with that particularization and they came back quickly
4 with it reclassified.

5 Why is it too onerous on defense to come back and
6 break down this 12-category -- this large chunk that you're
7 asking for in more digestible pieces where, with some
8 particularization, that the government could then respond to?

9 ADC [MS. PRADHAN]: Absolutely, sir. And the answer to
10 your question lies in the nature of these documents in each
11 category. The OIG report was a single, you know,
12 80-some-page report that I could hand to the government and
13 say, look, I think these pages probably still need to stay
14 classified; could you please look at these particular pages?
15 It was one single document.

16 And I will say I have done that, given them sort of
17 particularized documents. I think at the same time as the OIG
18 report, I handed them a few pages of the JDM discovery that I
19 also asked them -- you know, requested remarking on, and they
20 were able to do that for me as well.

21 The problem, sir, comes when you start looking at the
22 categories under 397F of 2D profiles for dozens of people.
23 2J -- you know, 2F, and I, and J, sort of information for each

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 individual, and having to figure out which individuals are
2 most important to your client at this point and which are not.
3 And I will tell you, sir, you know, if the government's
4 proposal is that we take every page of the 2D profiles or the
5 2F and 2G and say, oh, this is important, this needs to be
6 releasable to Mr. al Baluchi, but this page isn't as
7 important, that's really a perfect example of perpetuating the
8 delay that everyone has been talking about.

9 And let me explain why. We know that the documents
10 pertaining directly to our clients that are perhaps listed in
11 the RDI ----

12 MJ [Col McCALL]: Ms. Pradhan, I got another message that
13 the interpreters are requesting if you could go a little bit
14 slower.

15 ADC [MS. PRADHAN]: Of course.

16 MJ [Col McCALL]: They're saying that the audio is not
17 that clear. I don't see anyone that close to you. If you're
18 comfortable, I'm -- I'll authorize you to remove your mask. I
19 can hear you, but I want to make sure that the interpreters
20 are able to properly interpret what you're saying for the
21 accused.

22 ADC [MS. PRADHAN]: Of course, sir. And I'll represent
23 that there are, I believe, four other individuals here with me

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 who are all more than 25 feet away behind plexiglas.

2 MJ [Col McCALL]: Okay.

3 ADC [MS. PRADHAN]: So we know, sir, that the documents
4 pertaining directly to our clients that are perhaps listed in
5 the RDI indices need to be releasable to our clients, but we
6 also know now and are still discovering that documents not
7 pertaining to them on their face may be just as important as
8 we've shown, for example, in AE 628, which is Mr. al Baluchi's
9 motion to suppress the LHM statements where we trace one
10 detainee's torture and interrogation by certain personnel and
11 link them to another's and another's and another's showing how
12 torture is embedded in all of the interrogation results and
13 statements.

14 And we also know that CIA personnel that don't seem
15 significant from their descriptions in the 2D profiles of
16 perhaps their contacts with Mr. al Baluchi or Mr. Mohammad or
17 any of the other defendants may turn out to be enormously
18 important years later. I've learned that personally from
19 interviewing a handful of the UFI personnel, the ones that the
20 government gave us access to, as well as receiving new
21 discovery over time, and we are still receiving discovery
22 for -- a good example again, of that, is the PRG discovery
23 that we started receiving a couple of years ago and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that discovery which is classified, of course, and is not
2 included in this request in 783, but that discovery highlights
3 certain black site personnel who, I'll be honest, I had
4 dismissed earlier as not being significant, as -- and that PRG
5 highlights the rules and responsibilities that actually are
6 very, very important to the defense.

7 And so this is -- this is sort of an ongoing process
8 as we get more information as we continue to discuss --
9 conduct investigation, we continue to learn more about what --
10 which of these documents is important.

11 And so given the government's relative ease and --
12 yes, I don't want to minimize the amount of information this
13 is. It is a large amount of information, but it also goes to
14 the very heart of the defense and it is something that we have
15 been asking for for a very, very long time.

16 And so every time the government comes back and says,
17 well, give me -- you know, pick out your top three pages or
18 ten pages, it just slows the process down when they could be
19 reviewing -- they know better than we do how much there is.
20 They could be reviewing this themselves and producing to us
21 what we know to be relevant either directly or derivatively.

22 You've heard many times that we don't know what we
23 don't know. And so, no, we cannot rely on our clients'

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 memories. But, you know, those fractured memories are one
2 resource that may lead to bigger pieces of the puzzle or at
3 least to asking more important questions. And if the
4 government is going to work with us in good faith, I think
5 they need to stop fighting a commonsense understanding of
6 that.

7 You've heard in other discovery motions, and
8 doubtless, sir, you will continue to hear that we -- you know,
9 we're asking, in many cases, for original or less redacted
10 documents with information that we need with dates, with UFI
11 personnel, with cable numbers left on them. But the other
12 part of that is give us versions of the RDI discovery that we
13 can show our clients which should be either declassified at
14 this point or, you know, certainly now six years after the
15 release of the SSCI Report, information pertaining to their
16 conditions of confinement and their torture should be
17 declassified.

18 And that might actually give us better opportunities
19 to shape the -- for example, the stipulations that the
20 government gave us two years ago. Mr. Trivett, I remember, I
21 think on Friday talked about how they're waiting on our edits.
22 Well, we've started, sir. Our team started, but we can't
23 complete it. We need more information, more witness

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 testimony, more ways in which to work with our very ill
2 clients. And this is one way for us to actually accomplish
3 that, to get facts that, as they say, are tethered to reality
4 that we might then be able to -- to help shape those
5 stipulations.

6 And so, you know, subject to your questions, sir. I
7 just wanted to give you that bit of context. We've all sat in
8 this RDI discovery for a very long time for the purpose of big
9 motion series like the ones I mentioned, 424, 525, 534,
10 et cetera. And, you know, it's been extremely difficult to
11 draw the connections that we need to move forward.

12 MJ [Col McCALL]: Okay. Thank you. No questions.

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

14 MJ [Col McCALL]: All right. I will turn it over to the
15 Hawsawi defense team. Obviously, you have until 1 October to
16 file something, but did you have any questions -- any
17 argument?

18 ADC [MS. LACHELIER]: We'll reserve until the presence of
19 learned counsel. Thank you, Judge.

20 MJ [Col McCALL]: That's what I thought.

21 All right. I'll then go to the government.

22 ATC [Maj HALL]: Good morning, Your Honor.

23 MJ [Col McCALL]: Good morning.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [Maj HALL]: Or afternoon. Sorry. So the -- it
2 sounds like from your questions you were actually tracking the
3 actual issue at issue with these motions. So I would say that
4 generally the prosecution would rest on its briefs. Just to
5 respond to a couple of the points that we heard in oral
6 argument, to start with, you know, this is one of the problems
7 with these motions to compel, and you'll probably see this as
8 we go forward, but it tends to devolve from what the actual
9 issue of the motion is to a larger argument about discovery or
10 about the rules and law around -- surrounding classified
11 information and classified litigation.

12 But what this seems to all boil down to, from what I
13 can tell, is an argument that the CIPA law, the rules around
14 classified information and disclosure or discovery shouldn't
15 be -- it just shouldn't be the law.

16 But it is the law. And as we, you know, showed pretty
17 clearly in our written response, when you provide classified
18 information in discovery to cleared defense counsel, that
19 satisfies the obligation for the government in discovery.

20 MJ [Col McCALL]: Let me -- let me stop you there and just
21 ask a follow-up question.

22 So I get that. I look at the CIPA case law. It seems
23 very straight forward as far as this area, that the government

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 can prevent classified information that might be normally
2 discoverable from being shown -- or given by the defense
3 counsel to the accused. So what about in a death penalty
4 case? I mean, so the case law doesn't seem to address that
5 and the government obviously -- if there is a heightened
6 standard, heightened due process, I mean, what is the
7 government's position on how you're going to accomplish that
8 in a case like this?

9 ATC [Maj HALL]: So a couple of things, I guess. First of
10 all, the idea that there's going to be evidence presented in
11 this case from the prosecution that the accused has not seen
12 or has not had is wrong. There is not going to be any
13 evidence of that. We've already -- we're already 99 percent,
14 if not more, complete with either declassifying or providing
15 the evidence the prosecution is going to use affirmatively in
16 a "Display To" or "Releasable To" format.

17 MJ [Col McCALL]: Okay.

18 ATC [Maj HALL]: You can go down through, I believe it's
19 AE 683 -- yeah, 683 is the prosecution's exhibit list and, you
20 know, there's not very much, honestly, that's classified
21 anyway. But to the extent that anything in there is, it is or
22 it will be provided, so we've covered that.

23 As far as discovery goes, the stuff that the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 prosecution -- which is basically all of this in these
2 motions, nothing that the prosecution is going to be using.
3 We're talking about discovery. There's no -- so I guess it's
4 just -- it's an issue of do the -- do the rules of evidence,
5 do the rules of discovery, do the rules of, you know -- the
6 military rules and the federal rules of discovery practice
7 change because it's a death penalty case?

8 And there's no CIPA -- the only CIPA case that was in
9 the death penalty case was the Tsarnaev case that just
10 happened in the First Circuit. That's at the Supreme Court
11 right now. But the First Circuit touched on it. It wasn't a
12 very large part of that case.

13 But there is no indication in the Tsarnaev case that
14 CIPA somehow is invalidated because it's a death penalty case.
15 They use the process, the court actually -- you may have seen
16 reference to it in the 833 briefing we filed, but the court --
17 the First Circuit actually pointed out the usefulness of the
18 CIPA process because, unlike in normal discovery practice,
19 even in a death penalty case, where the government makes the
20 determination of what's discoverable and the defense doesn't
21 see, you know, what goes on behind the scenes necessarily ----

22 MJ [Col McCALL]: Major Hall, if you can speak -- I
23 haven't gotten a signal yet, but I'm anticipating that the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 interpreters may have trouble with your speed.

2 ATC [Maj HALL]: Yes, sir.

3 MJ [Col McCALL]: Thank you.

4 ATC [Maj HALL]: So the court in that case did say the
5 benefit is, in the CIPA context, the court gets to look at the
6 original classified information, look at the summaries or
7 substitutions, and then make a determination. So there is an
8 additional set of eyes, you know, on the original information,
9 which is not the case in a normal discovery context.

10 So I would just say it's not a very well-developed
11 area in terms of is CIPA applicable in a death penalty case.
12 But what we do see is, you know, generally speaking in death
13 penalty cases the rules of evidence, the rules of discovery
14 don't change. The meaning doesn't change. It might be
15 broader because of -- mitigation might be a broader, you know,
16 situation, but the rule of -- the words -- you know, the word
17 "relevance" doesn't lose its meaning, for example. And then
18 the Tsarnaev is probably the only position.

19 So I would say in order to carry the burden on a
20 motion such as this, there's no support to say that we can't
21 do CIPA in a death penalty case, which it does seem like kind
22 of is what we have devolved to here in this argument on this
23 motion.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: All right. So -- and I get that, you
2 know, the government's position is that the evidence that the
3 government intends to use, they're going to get declassified
4 and -- so it's not an issue for this topic, but I mean,
5 doesn't that lead exactly to the defense's argument that
6 that's only one -- almost a smaller piece of the pie, that
7 typically it is going to be a broader area that the defense is
8 going to have to look into to try to build this mitigation
9 defense? And so walk me through that.

10 So, I mean, it seems -- and again, I'm not prejudging
11 this, but I -- just to get the government's position. But
12 when the government controls the keys to the evidence and
13 they're able and willing, apparently, to declassify their own
14 evidence that they plan on using -- and again, I understand
15 that it's -- it's not exactly an apples-to-apples comparison
16 as what we're looking at. But for the government to be able
17 to do that for their case and then the defense getting the
18 stiff arm, again, it -- when we're already in a position of
19 looking at a -- and trying to make sure that there is a
20 heightened level of due process for the accused based on what
21 they're facing, you know, walk me through how the commission
22 is supposed to make sure that the defense is -- has adequate
23 substitutes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [Maj HALL]: Yes, sir. Okay. So a couple points. I
2 would say that defense is not getting the stiff arm. They
3 have all of the information we're talking about. The counsel
4 has it. The counsel can do all of their investigation. They
5 can discuss with their clients their experiences.

6 I know we've heard argument that that's not as useful
7 as maybe the government suggests that it is. I would dispute
8 that. You -- we have in the record a filing from Mr. Ali
9 detailing, in very extensive detail, his experiences. That's
10 in the record and it's from -- from him. So it isn't
11 impossible.

12 But even to put that aside, the adequate substitute
13 piece, you know, that's why you're having these ex parte
14 presentations with the defense. That's why you'll have the
15 one with the government, to see why it is that -- you know, to
16 say that the government can just declassify a document if it
17 wants to, that's not true. It -- if it was, we wouldn't have
18 any classified documents and we wouldn't be doing this.

19 MJ [Col McCALL]: Understood.

20 ATC [Maj HALL]: There are things that remain classified
21 no matter what the prosecution would like to do. When we
22 provide it at a classified level to cleared defense counsel, I
23 mean, that's why the rule is what it is. That's why the In re

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Terrorist Bombings case, you know, had to make that -- that
2 decision that that satisfies the discovery obligation.

3 Now, if there's something -- again, and you -- you're
4 tracking this. So if there's something more specific that can
5 be resolved, we can resolve it, and, you know, that -- that's
6 something that we can work with.

7 The 534, the example that Ms. Pradhan gave, the 534 AE
8 series, you know, there is a ruling in that. There's a motion
9 to reconsider, but there's a ruling that's standing, 534M,
10 that basically said if there's problems with this -- the
11 example was the chronology. And that's one of the points I
12 wanted to make. You know, we heard earlier that the defense
13 can't make a chronology about where their accused was and what
14 happened. That's wrong. Yes, they can, and we've given them
15 this RDI index that shows in detail where they were and -- and
16 when.

17 There may be discrepancies, and that's -- it's going
18 to happen when there are so many documents documenting one
19 event that happened one time, but from different people at
20 different times, it's not going to always come out to be
21 100 percent, because it's just in the nature of it. However,
22 if something can be verified, we would verify it.

23 So 534M orders the parties to confer and try to hash

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 out if there is an inconsistency before filing a motion to
2 compel. It doesn't, unfortunately, happen as much as maybe it
3 could, and this, I think, is a good example. The narrowing
4 that happened here wasn't much of a narrowing in -- in
5 reality. The government could, in theory, try to go back
6 through and look at everything that's been given over at a
7 classified level and see if there's a difference, but that
8 would take an enormous amount of time and resources.

9 And, you know, we turned these over in -- starting in
10 2017. That was after the SSCI declass decision was already
11 made, so these already were made with that knowledge, so
12 they've already been -- that's already been considered and
13 they're still classified as the original classification
14 authority has determined. So, you know, they just are
15 classified properly under the current standards.

16 So maybe something could change in 2021 compared to
17 2017 and '18, unlikely that it will be very much, and the bang
18 for your buck -- you know, that's why we say -- that's why we
19 offer give us something more specific that we can use.
20 Otherwise, you know, it is just a never-ending churn.

21 MJ [Col McCALL]: Okay.

22 ATC [Maj HALL]: So -- and then specifically to your point
23 about how do we know if it's an adequate summary. Like I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 said, that's the point of the 505 process. You're hearing
2 attacks and challenges to the existence of CIPA or the 505
3 process generally. But unfortunately, you know, or
4 fortunately, depending on which side of the room you're
5 sitting on, that's the process and that's how it is supposed
6 to work and that is how it has worked in federal courts for 40
7 years.

8 The adequacy is something that you would determine and
9 then the government tries to make sure to meet your standards,
10 you know, every time we go forth. But I would say that three
11 judges now have looked at this material and have all found the
12 information that the defense has to be adequate, the summaries
13 or the classified information that has gone over with a
14 redaction or -- you know, one way or the other. If it
15 couldn't get down to a "Display To" or "Releasable To" level,
16 that's because the nature of the document didn't allow it.
17 But the defense has it and the commission has ruled, if it's
18 gone through the process, the commission has ruled it's an
19 adequate substitute. So we've -- we've covered this ground in
20 a lot of ways already. So I think that covers most of the
21 points, actually.

22 One second, Your Honor.

23 MJ [Col McCALL]: Sure.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [Pause.]

2 ATC [Maj HALL]: A couple follow-up points.

3 MJ [Col McCALL]: Sure.

4 ATC [Maj HALL]: So in addition to the Tsarnaev case, the
5 Moussaoui case and the In re Terrorist Bombings cases were
6 both death penalty cases to begin with. And again, no
7 indication that both of those cases were full of CIPA practice
8 or classified information litigation. No indication that
9 because it's a death penalty case, these rules wouldn't be
10 followed. They followed those rules.

11 Just to kind of reiterate, on the review or the --
12 something -- you know, a category of something may have been
13 declassified or is no longer classified, you know, in the same
14 way that it was earlier. We -- if we go back and look at a
15 document that has, you know, perhaps something that
16 Ms. Pradhan highlighted is no longer classified, that
17 doesn't -- that does not mean that the document becomes
18 unclassified and it does not mean that the information that is
19 in there they don't already -- they do already have that.

20 So if it's an unclassified piece of information, it
21 can then be treated as unclassified. To the extent that we
22 need to make that specific, you know, we could -- could do
23 that, but generally it doesn't change the classification of

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the document because there's lots of things in a document --
2 in a given document that make it classified.

3 And then just regarding, again, giving the defense
4 what they can use and provide and talk about with their
5 client, the stip of fact -- the proposed stipulations of fact
6 that we have given to the defense, each accused has one of
7 those from the government. We worked very hard to get those
8 down to the FOUO level so they could be shared with their
9 client and also, you know, used in an open setting so that the
10 defense, you know, could talk about it, and they have. They
11 have done that. Maybe not necessarily with the stipulations
12 but with the underlying information that went into those
13 stipulations, so it hasn't been for nothing.

14 Subject to any other questions, sir, that's all I
15 have.

16 MJ [Col McCALL]: Well, all right. Let's ask about -- and
17 I'm trying not to get -- we've already gotten far afield from
18 the actual, like, narrow scope of this motion, but I feel like
19 this will be useful for me for these other motions that -- as
20 was mentioned, there's quite a few of them pending.

21 So for the stip of fact, going back to, you know, what
22 I've heard from defense, and it makes sense that we don't know
23 what we don't know. And so if -- if I'm having to stand in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the shoes of the defense to make sure that the 505 process is
2 working properly and that any kind of substitution and summary
3 is -- summary and substitution is -- is working, I mean, how
4 is the commission able to do that, you know, for the stip of
5 fact? So are these stip of facts all -- having not seen the
6 document yet, is this -- does it show exactly where it comes
7 from in the various summaries and substitutions? I guess ----

8 ATC [Maj HALL]: It doesn't have, like, a footnote to
9 everywhere it came from, no, sir. It's more of a -- just a
10 document on its own, kind of a chronological description. But
11 it does come from -- directly from all of the discovery.

12 MJ [Col McCALL]: Okay.

13 ATC [Maj HALL]: Which the discovery, again, which was
14 viewed -- the originals were viewed by the commission and
15 approved, you know. Generally speaking, if you're going to
16 take a statement about one event that happened in one place,
17 the original might say some administrative data, might say
18 some names of people and some names of places, but the actual
19 thing that happens to the detainee is almost verbatim in --
20 from the original into the substitute.

21 That's, I think, what the commission has generally
22 been seeking, is to provide what happened to them, not, you
23 know, what the administrative data was or what the location

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 was because we've all -- that has been settled, you know.
2 We're not -- that's classified. It's not going to be
3 something that's going to be given over, so it becomes pretty
4 formulaic in some ways when the commission starts looking at
5 those types of things.

6 So there -- I guess there are some footnotes in -- in
7 the stipulations that goes to the substitute discovery.

8 MJ [Col McCALL]: Okay. All right. Thank you.

9 Back to team Mohammad.

10 ADC [MS. RADOSTITZ]: Thank you, Your Honor.

11 So I really appreciated my colleague, Ms. Pradhan's,
12 addition to what our argument was. And one of the questions
13 that you asked her was why can't we just identify within this
14 tranche that we want this one and that one. And one of the
15 reasons is work product, is that what that system would
16 require us to do is to tell the government what our -- what --
17 you know, we've got 25 documents, one of them we think is
18 really important, so we're going to tell them we want all 25
19 because we don't want them to know which one is most
20 important.

21 I know that's not necessarily something that you want
22 to be concerned with, but it is part of our theory of defense,
23 is that we're not always going to tell them ahead of time what

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 it is that we think is important. And that's ----

2 MJ [Col McCALL]: Well, and -- so let me ask you about
3 that.

4 ADC [MS. RADOSTITZ]: Sure.

5 MJ [Col McCALL]: And this is, again, as I'm trying to
6 work my way around some of these unique issues, but -- so
7 I'm -- as the commission, I'm getting the ex parte briefings
8 from the defense teams on the defense theories of the case,
9 which is useful as I try to stand in your shoes through this
10 505 process.

11 But just during the normal discovery process, there's
12 a -- understanding that the defense has no burden, but the
13 defense at a certain point has to show their cards if they're
14 trying to make the -- that basic, you know, show of relevance,
15 you know, materiality. So it's -- address that.

16 ADC [MS. RADOSTITZ]: Sure. And we do do that in -- all
17 the time. And we do that in our motion to compel because if
18 it's not relevant, we can't ask you to compel it anyway. So
19 we've already shown that. None of this -- none of the
20 discovery that we're requesting does the government believe is
21 not relevant. They wouldn't have given it to us in the first
22 place if it wasn't relevant. So the relevance and materiality
23 are not ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: Sure. For this motion.

2 ADC [MS. RADOSTITZ]: Exactly. And so it -- obviously, we
3 do have to give that broad strokes, but I don't have to --
4 when I'm making a motion to compel, I don't have to say this
5 is going to help prove this exact fact. I can say this is the
6 theory and here is the evidence to support that theory. I
7 think maybe that -- I don't know if I'm making too fine of a
8 point on that.

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

10 ADC [MS. RADOSTITZ]: Okay.

11 MJ [Col McCALL]: Certain categories ----

12 ADC [MS. RADOSTITZ]: Exactly.

13 MJ [Col McCALL]: ---- in the ----

14 ADC [MS. RADOSTITZ]: And that's what we did here, is we
15 narrowed it down to those categories that help us do as
16 Ms. Pradhan very carefully said. How do we go back and forth
17 between the discovery that we have that we can't share with
18 Mr. Mohammad and discuss with him evidence that we can? And
19 the stipulation is a perfect example. We were told that the
20 stipulations by themselves have all been declassified. But
21 those things in the footnotes, they weren't declassified.

22 So if my client says this isn't true, and I look at
23 the classified document, I can't say, well, yes, it is.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Here's why. It's in this document. I can't show that to him.
2 So that's one of the challenges with -- with that mix of
3 classified and declassified.

4 And the other thing I'd like to draw your attention to
5 is in the record at AE 658, which is the government's
6 overarching classification guidance that they put together
7 before the beginnings of Mr. Ali's -- or Mr. al Baluchi's
8 suppression motion. Because the government asserts that we --
9 the -- that the lawyers know everything, it's just certain
10 things we can't tell our client, and that's not true either.

11 There are major -- there are major categories of
12 information that they have invoked the national security
13 privilege around. They will not tell us. They will never
14 tell us. We don't -- we cannot talk about -- there are some
15 things we do know, but we can't talk about them in open or
16 closed session. So there is still evidence that's being
17 completely hidden from both us and our clients. The
18 government did ----

19 MJ [Col McCALL]: Let me ask you about that.

20 ADC [MS. RADOSTITZ]: Sure.

21 MJ [Col McCALL]: So for those areas, I mean, you're not
22 without a remedy, correct? I mean, obviously it's a severe
23 remedy, but the remedy if, honestly, the government is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 invoking a certain level of national security information
2 privilege and the defense can show that, no kidding, you need
3 this for your defense, I mean, there are remedies as far as
4 limiting the government on what they can seek as far as a
5 sentence, other ----

6 ADC [MS. RADOSTITZ]: Exactly.

7 MJ [Col McCALL]: ---- other remedies, right?

8 ADC [MS. RADOSTITZ]: And actually, that was the next
9 point I was going to make, is that the Moussaoui case, which
10 is the only death penalty case other than Tsarnaev and is in
11 this area, the -- what Judge Brinkema did was she said you --
12 you can invoke the national security privilege but you can't
13 have the death penalty. She was reversed on appeal, but she
14 wasn't reversed on the sanction itself. She was reversed
15 because she didn't follow the process to get to that sanction.
16 And then the case went to trial and he didn't get the death
17 penalty, so it became a nonissue on appeal.

18 But the one capital case that we know of that involves
19 the 9/11 attacks, the judge looked at the CIPA provisions,
20 looked at the evidence the government chose to not provide to
21 Mr. Moussaoui, because at that time he was representing
22 himself, and she said you can't have the death penalty. And
23 so that may be where you'll come to eventually down the road.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I don't -- I think that that could be avoided, but the
2 government's making that choice. That's not a choice that we
3 can make.

4 MJ [Col McCALL]: Right.

5 ADC [MS. RADOSTITZ]: I think -- unless you have other
6 questions, that ----

7 MJ [Col McCALL]: No other questions. Thank you.

8 ADC [MS. RADOSTITZ]: All right. Thank you.

9 MJ [Col McCALL]: And rolling back through the teams.

10 Yeah, Mr. Bruck?

11 LDC [MR. BRUCK]: I just had one thing I wanted to mention
12 when I heard the Tsarnaev case invoked for the proposition
13 that death isn't all that different. I was the trial lawyer,
14 one of them, in the Tsarnaev case. And I'd like to be able to
15 tell you exactly how CIPA came up in that case, but, frankly,
16 after six years, it played such a trivial role and involved so
17 little of the evidence that I can't even remember what it was
18 about.

19 Tsarnaev does not stand for the proposition that CIPA
20 fits comfortably in -- with the special requirements of a
21 death penalty case. I'm going to go back, hit the books
22 tonight and find out so that I have a more informed
23 recollection of that. But I just didn't want to see Tsarnaev

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cited for that proposition, because it just doesn't stand for
2 that.

3 MJ [Col McCALL]: Okay.

4 LDC [MR. BRUCK]: Thank you.

5 MJ [Col McCALL]: I appreciate that.

6 Ms. Bormann?

7 LDC [MS. BORMANN]: I wanted to follow up on the question
8 that you had of Ms. Radostitz about possible remedies
9 available. And this is in the nature of sort of informing the
10 new military judge of what you're in the middle of.

11 But -- so as a result of AE 524 and then Judge Pohl's
12 ruling, which was then reversed by Judge Parrella, then Judge
13 Cohen came on board ----

14 MJ [Col McCALL]: And this was tossing the letterhead
15 memoranda?

16 LDC [MS. BORMANN]: Yes.

17 MJ [Col McCALL]: All right.

18 LDC [MS. BORMANN]: What happened was exactly sort of what
19 you're -- what you envision. So Protective Order #4 invoked
20 national security privilege over the entire investigative
21 function of the defendants with respect to CIA personnel, RDI
22 black sites, et cetera.

23 When Judge Parrella reversed Judge Pohl, bringing the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LHM statements back into play, and then Judge Cohen took over,
2 what Judge Cohen said was, okay, I envision this giant hearing
3 where we're not just going to discuss the voluntariness of the
4 statements, which is what Judge Parrella had ordered the
5 defendants file, and Mr. Bin'Attash did file, but I'm going to
6 allow defense counsel to solicit for the record how they're
7 prevented by national security privilege from actually making
8 a case.

9 And so when we began the hearing, witnesses you will
10 never see, they -- there were really sort of formalized
11 invocations of national security privilege and records made of
12 that very thing. So Mr. Connell, for instance, would be
13 questioning a witness who was involved in the taking of
14 Mr. al Baluchi's statements at some point. And Mr. Connell
15 would say, now, I don't want you to answer this. We've worked
16 out a protocol here. But I'm going to ask you something and I
17 want you to stop because I expect that Mr. Ryan or Mr. Trivett
18 will invoke national security privilege, and then I'll be able
19 to make it for the record.

20 So there's already a record sort of being made of that
21 but we've only -- the tip of the iceberg. That will, I think,
22 be explored at length later on during witness testimony.

23 MJ [Col McCALL]: And I'm tracking that, those -- those

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 hearings. And I -- yeah, I'm tracking that that's the issue
2 in those. It's sort of a wide scope to those witnesses on
3 what exactly they're testifying about ----

4 LDC [MS. BORMANN]: Yeah.

5 MJ [Col McCALL]: ---- in regards to the suppression
6 motion, but then also ----

7 LDC [MS. BORMANN]: Whether or not the defense has
8 actually been provided enough information ----

9 MJ [Col McCALL]: Right.

10 LDC [MS. BORMANN]: ---- under all of the protective
11 orders, under the classification scheme, under the
12 M.C.R.E. 505 process, to actually even begin to have an
13 understanding of what happened to their clients. So that's
14 where we are.

15 MJ [Col McCALL]: Right. All right.

16 And then Ms. Pradhan?

17 ADC [MS. PRADHAN]: Just a few points to add to those that
18 my colleagues have made.

19 The government seemed to be -- if I understand them
20 correctly, the government seemed to say at several points
21 that, you know, information released in -- after the release
22 of the SSCI Report was, you know, still classified when it was
23 marked and produced to the defense, and it was still properly

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 classified in 2017.

2 And, you know, of course we're not necessarily
3 disputing that at the time that they produced this to us that
4 some of it was still considered to be classified, and some of
5 it may still be considered to be classified.

6 But they have, over time, been able to provide us,
7 right, and there's a difference between declassifying
8 information, and it's not always a clear-cut difference.
9 Because the difference between declassifying information and
10 providing information that is releasable, you know, in forms
11 that are releasable to our clients. It's not always clear to
12 us where that line is.

13 But -- but they have been able to provide the example
14 I gave you of the CIA OIG report. I think the government
15 said, you know, we can classify little bits of it, but that
16 doesn't necessarily declassify the entire document. That's
17 sometimes true.

18 INT: Your Honor, we're having a problem hearing counsel.

19 MJ [Col McCALL]: Okay. I believe that the interpreters
20 have -- I can hear you, but the interpreters apparently are
21 having a hard time. If you could try to speak up.

22 ADC [MS. PRADHAN]: Yes, sir. Sorry about that. I'll try
23 to speak more directly into the microphone, if that would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 help.

2 So of course, it's certainly true that when we ask for
3 little bits of information to be declassified, it doesn't
4 necessarily change the classification of the overall document.
5 But I think, again, the OIG report is a really good example of
6 that because the bulk of the document, it -- it's not that
7 certain paragraphs were marked UNCLASSIFIED, it's that the
8 bulk of the document came back remarked UNCLASSIFIED//FOUO,
9 which, you know, when you look at that example and some of the
10 examples of the JDM and other individual items that we have
11 given the government to -- to remark or, you know, to -- in a
12 request to remark does speak to the passage of time on this
13 case and the change in what the OCA considers to be classified
14 and unclassified.

15 And I know Ms. Radostitz pointed out the
16 classification guidance that we were given prior to the taking
17 of testimony on the suppression motions. And that, in and of
18 itself, those numerous iterations of classification guidance
19 were moving targets on what the OCA considered to be
20 classified and unclassified.

21 So I would just say again, sir, you know, we pointed
22 out the protective orders that date back to 2015 that, of
23 course, govern in this case, but I would also request the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 military commission to look at the many iterations of that
2 classification guidance that we were given sometimes, you
3 know, ten minutes before witness testimony was to begin over
4 the course of a very short period of months between 2019 and
5 2020 as an illustration of how quickly things can change in
6 this -- in this -- on this issue of classification.

7 At the same time, the government's ability -- and I
8 think he -- this may go to one of the questions you asked the
9 government. The government's ability to selectively
10 declassify information has, you know, often been wielded to
11 the detriment of the defense. And one example I can give you
12 in an unclassified session is better briefed in AE 692 in
13 which the government declassified the opinion of the former
14 Camp VII commander regarding the operational control of
15 Camp VII, but classified our cross-examination questions in
16 open session on that point to the former Camp VII commander.

17 You can imagine, sir, without my going into detail,
18 what the impression is to the public, what the result is when
19 that sort of selective declassification happens and our
20 ability to really provide, not just a full defense but, you
21 know, in some cases it goes to a public trial issue.

22 A couple of other points. The government, you know,
23 puts great faith in the 505 process and I think we've briefed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 elsewhere, you know, some of the issues and spoken to you
2 about some of the issues with the 505 process and its opacity
3 to us. But I want to point out that at least one of the
4 categories, one of the major categories that I talked about
5 earlier, the 2D profiles, never went through the 505 process.

6 These are -- you know, at the time that they were
7 produced to us, we considered them to be really, really
8 useful, frankly, and we were very grateful to receive them
9 because they were profiles of the UFI personnel that sort of
10 connected them to certain locations and certain actions taken
11 with respect to the defendants. We thought they were
12 enormously useful and then, of course, you know, we can still
13 consult them, but we found -- and this, again, is briefed in
14 AE 562, which we'll go into in some detail on when we argue
15 that, but then we found that there were a large number of
16 discrepancies.

17 And when the government says they can -- we can come
18 talk to them about discrepancies -- and I know that this is
19 contained in AE 534M and AE 562, I believe it's R, in the
20 rulings from Judge Parrella, when they say that we can come
21 and talk to them about the discrepancies, sir, we're not
22 talking about a handful of discrepancies. And this is fully
23 briefed in 534 and 562. We're talking about dozens, in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sometimes -- in some cases with respect to the RDI index,
2 hundreds of discrepancies that we are unable to resolve.

3 And again, several of those tranches of evidence were
4 outside of the 505 process, so it's not as if the military
5 commission has approved these sort of flawed summaries that
6 were given to us.

7 And the last point that I just wanted to make is that
8 the government -- the government stated that the stipulation
9 of facts that we are meant to add to is shareable with the
10 clients. And that's -- that's true, right? And then we took
11 a look at, you know, do they have -- does it have footnotes?
12 Does it not have footnotes? It does contain some footnotes.

13 But when the stipulation of facts says something like
14 A2Z, right, a UFI did X to Mr. al Baluchi in X location,
15 right, Mr. al Baluchi didn't know that individual as A2Z,
16 right? He didn't know that person's real name at all. What
17 we have to provide for Mr. al Baluchi to be able to give us
18 context on that is some sort of context around that
19 individual. What other sites were they at that Mr. al Baluchi
20 may have been at? What was perhaps, you know, a little bit of
21 their training? What was their role?

22 That's the information that's contained in those
23 categories that Mr. Mohammad asks for in 783 to be releasable

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to Mr. Mohammad and to the other defendants. And this goes
2 back to my point that I made in response to your -- your
3 question earlier, sir, about why we can't just pick and choose
4 what we want released, and that's because one UFI usually
5 leads us down the road to several others that we realize,
6 either through discovery or from Mr. al Baluchi or from
7 outside investigation, had a far greater role than we ever
8 knew initially.

9 And if we go back over months and years, it's just an
10 interminable process. We've seen their ability to do this
11 quickly with small amounts of information -- or relatively
12 small amounts of information. And if they would just -- you
13 know, if -- if they could start that process, instead of
14 spending months and years fighting about it, it would be, I
15 think, enormously useful to the defense and enormously useful
16 in moving these proceedings.

17 MJ [Col McCALL]: Thank you.

18 All right. I believe I've heard enough on -- on this
19 motion. We've been going for a while now. Give the
20 interpreters a chance to have a break. My plan is to go ahead
21 and take a recess for 20 minutes, so that would bring us to
22 1505, and then we'll go on to the next AE. Seeing as how
23 we're all here, we'll just press and we'll take up the next

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 one, which is -- at least start on it, which is AE 775. And
2 then we'll see how far we get. If we don't finish it, we'll
3 handle it later in the week.

4 At the end of the session, though, I'll -- I'll go
5 through a little bit of the housekeeping on rescheduling the
6 Mohammad defense team's ex parte briefing. I want to talk to
7 Ms. Bormann about when we can do their ex parte briefing. And
8 then we'll go from there.

9 I still plan on having a classified closed hearing
10 tomorrow morning, but we may have some time tomorrow afternoon
11 as well. But for now, court -- the commission is in recess
12 until 1505.

13 [The R.M.C. 803 session recessed at 1445, 13 September 2021.]

14 [The R.M.C. 803 session was called to order at 1507,
15 13 September 2021.]

16 MJ [Col McCALL]: The commission is called to order. The
17 parties are again present.

18 All right. We'll move into ----

19 ADC [MS. LACHELIER]: Judge?

20 MJ [Col McCALL]: ---- AE 775.

21 ADC [MS. LACHELIER]: Judge, sorry. If I may. I
22 apologize.

23 MJ [Col McCALL]: Oh, yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. LACHELIER]: Suzanne Lachelier for
2 Mr. al Hawsawi.

3 MJ [Col McCALL]: Yes, I'm sorry.

4 ADC [MS. LACHELIER]: I can do it from here. Just real
5 quick, I wanted to note the docket, when we informed
6 Mr. al Hawsawi of the docket today, his impression was today
7 was -- this afternoon would be a closed session. That's what
8 the SJA thought, that's what your docket had put out, that's
9 what we had informed him. And although I told him it was a
10 fluid situation, you know, I just wanted you to be aware that
11 when everything shifts around, it makes the voluntariness more
12 questionable because it's very difficult to know at this point
13 whether he would have wanted to be present or not.

14 MJ [Col McCALL]: I appreciate that. And I'll say I'm
15 trying to be flexible on that, but I do believe it was -- it
16 was on the docket that we were going to handle these
17 motions -- these AEs this morning, if at -- if possible. So
18 even though they shifted to this afternoon, I feel comfortable
19 that he's waived being present for those motions.

20 ADC [MS. LACHELIER]: We didn't object at lunchtime only
21 because we thought we were just coming back for the one motion
22 and we didn't want to have him disturbed to come all the way
23 back for a 20-minute session. Understood, Judge.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col McCALL]: Understood. I feel comfortable
2 proceeding.

3 All right. So we'll move into Mr. Mohammad's motion
4 to compel all information regarding the substance and
5 circumstances of Mr. Mohammad's interrogation in January 2007
6 at Naval Station Guantanamo Bay, Cuba. Mr. Sowards?

7 LDC [MR. SOWARDS]: Thank you, Your Honor. Good
8 afternoon. Gary Sowards appearing on behalf of Mr. Mohammad,
9 who is present. And thank you for that summary of the -- of
10 the motion by reading the title. And for those watching in
11 the gallery, what we're asking the military judge to compel
12 the government to give us is any witness accounts,
13 observations, or documentation of the substance and
14 circumstances of his interrogation in November 2007.

15 And I think, Your Honor, up until this point in the
16 afternoon, and from -- continuing from this morning, you may
17 have an idea of what I was talking about during our voir dire
18 conversation to say that in this case, torture is only always
19 in the room. And it -- it is the collision between the
20 torture, the incidence of torture in this case, and the
21 government's resistance to disclosure of the information
22 which, as Ms. Pradhan and Ms. Radostitz explained to you a
23 little earlier, are a large accounting of the time that has

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 taken to litigate this case.

2 And it sort of branches off in different directions
3 and has different permutations and all of that, but it all
4 comes back to this -- this question of torture.

5 And I recall that also during our voir dire you had
6 mentioned that in the context of your criminal practice as
7 both a prosecutor and a defense attorney, that it was fairly
8 reasonable and to be expected that something that would be
9 turned over would be a defendant's -- a criminal defendant's
10 statements, and then generally, the notes would follow. And
11 then generally after that, there would be some litigation
12 about the voluntariness of the statement.

13 And then you made the observation that a lot of that
14 has gone by the wayside with the advent of videotaping and
15 recording. And then you further explained -- or when I asked
16 you about it, you said that nevertheless, there's some
17 situations where when you get evidence of what happened before
18 and what happened after the videotaping, that can also change
19 the perceptions of what's recorded.

20 And I remind the -- or invite the commission to be
21 reminded of that because in this case, unfortunately, we do
22 not have any -- at least of which we're aware, we do not have
23 any videotapes of any interrogations, any statement taking,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 any interviews; most significantly, any torture. And while
2 the government spent -- gave over \$80,000,000 to the two
3 principal torturers, none of that money was spent on any kind
4 of recording devices to document this for purposes of
5 litigation.

6 And so what we are coming down to and in the middle of
7 right now is the litigation to test the admissibility of the
8 so-called letterhead memorandums, which you referred to
9 earlier. And again, just to bring up to speed the folks who
10 may be watching this for the first time, including visiting
11 family members, what we're talking about is that after
12 Mr. Mohammad was taken into the black sites in early March of
13 2003 and held incommunicado and tortured until his release
14 approximately three and a half years later in 2006, the
15 government then decided that they wanted to get incriminating
16 statements that they could use to introduce in a criminal
17 prosecution.

18 And so they devised a plan to have FBI agents whom
19 they would represent to the world had at that -- up to that
20 point been wholly divorced from and not involved in any of the
21 CIA torture program in general, or Mr. Mohammad's torture in
22 particular, they would have those FBI agents go to Guantanamo
23 and sit down with Mr. Mohammad and ask him questions that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 would elicit incriminating statements to his involvement in
2 9/11, and so that's what they did.

3 And unfortunately, what we got out of that, and what
4 they want to introduce into -- into the trial and what we're
5 litigating in the suppression motion is still not a client's
6 or a defendant's statement. What they want to introduce, as
7 the name suggests, is a letterhead memorandum. And that's
8 kind of a fancy way of saying someone has written a memo, or a
9 summary, in this case Francis Pellegrino, FBI Special Agent,
10 he or someone assisting him, we think probably under CIA
11 supervision, has authored a memo of his experiences going down
12 to Guantanamo and sitting with Mr. Mohammad during several
13 days between January 12th and 16th, 2007, while they asked him
14 basically to endorse their -- their view, their understanding
15 of Mr. Mohammad's involvement in the attacks of 9/11.

16 Neither Special Agent Pellegrino, nor anyone else, has
17 actually provided us with a statement that Mr. Mohammad made,
18 but what they have is this -- this summary of it.

19 And if I may just take a moment to step to the side
20 and talk about a couple of quick -- quick points that were
21 raised earlier today about the interplay between CIPA and the
22 classified information and some of these restrictions, which
23 really I don't think are all -- totally necessary per se to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this issue because we're asking for pretty much
2 straightforward discovery that would be available under 701 or
3 any kind of a prosecution, but always kind of lurking in
4 the -- in the wings is this notion of the government's
5 interest in classified information, protecting national
6 security, and, therefore, their reliance, almost reflexive
7 reliance, on summaries and memoranda rather than giving us
8 access to what really happened.

9 And you asked -- you were speaking with counsel for
10 the government earlier in response to Ms. Radostitz's motion
11 and talking about -- I thought very -- a very pertinent
12 question was the role of CIPA in death penalty cases. And I
13 think Mr. Bruck was able to give you some guidance on that,
14 the limited information we know to date, because it is the
15 case that there is no indication that says the United States
16 Supreme Court or the Eighth Amendment, certainly, or the
17 Sixth Amendment, would tolerate in a capital case withholding
18 from a defendant whose life is on the line information about
19 what he personally experienced in government custody when they
20 extracted a statement from him and the actual words he used.

21 That's where we find ourselves today. We do not have
22 access, for the most part, to the actual words that were used.
23 We have -- we have memoranda given to us. But I think the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 other thing is, going forward in this case, is the question,
2 while a very, very good one about how does CIPA-like national
3 security regulations and laws and procedures, how must those
4 be modified to protect the interests at stake in a death
5 penalty case.

6 The other question is: Has CIPA or any other
7 government privilege litigation -- provisions, been allowed to
8 limit the investigation of a pervasive program of
9 government-sponsored torture, which is the violation of
10 domestic and international law? And when I talk about
11 government-sponsored torture, that is not to be provocative or
12 to insult the government here in -- in court because I
13 understand they're not responsible for this. They just have
14 the job of trying to represent the court -- the government in
15 going forward with this prosecution.

16 But it has in large part -- first of all, the torture
17 itself has been acknowledged by two sitting U.S. presidents
18 and it has been documented by a select committee of the
19 United States Senate on Intelligence for which we have only
20 the Executive Summary.

21 And last Friday, I believe it was, Mr. Trivett was
22 explaining to you the notion of the forthcoming disclosure of
23 information that the government has given us, which I -- if I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 recall correctly, he estimated at approximately 600,000 pages
2 of discovery, only 20,000 pages of which relate to the torture
3 program, the government torture program. And what I was
4 struck by was, even if it had been 600,000 pages, the full
5 600,000 pages had related to the government torture program,
6 that would have been only 10 percent of what we know are the
7 documents underlying the Senate Select Committee's
8 investigation and documentation of what happened, particularly
9 to Mr. Mohammad.

10 And while that is -- is significant -- or the
11 significance of that is, going forward, as the government
12 proffers a stipulation, which we probably will not accept,
13 because there are many instances -- and I'll talk in a moment
14 about Mr. Mohammad's limitations of what he can and cannot
15 recall ----

16 TC [MR. SWANN]: Your Honor?

17 MJ [Col McCALL]: Stop for a second. Mr. Swann.

18 TC [MR. SWANN]: I'm going to object. I'm going to object
19 on relevance grounds. This motion is to be confined to a
20 certain area. That's our objection.

21 LDC [MR. SOWARDS]: Yeah. Thank you.

22 MJ [Col McCALL]: Objection overruled. I'll let you
23 continue.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. SOWARDS]: Sure.

2 The minor amount of evidence that we -- that we have,
3 we are not going to be able to litigate with them or -- or
4 oppose them when they say you must accept a proposed
5 stipulation or some other view of the evidence because we're
6 telling you this is what it is and this is all we're giving
7 you to counter that. That's in part why we're -- why we're
8 trying to get that -- that information.

9 I was struck also by, and this is to explain why we're
10 asking for the additional information which really isn't --
11 categorically, it's not that much. It is very limited. There
12 is a lot of it, and the government hasn't given it to us. But
13 the counsel for the government, in response to your questions
14 about the chronology having some discrepancies in it that
15 Ms. Pradhan pointed out, the spirit of the comments were,
16 sure, and anytime anybody undertakes to do a summary or
17 anytime anybody undertakes to do a chronology, there's going
18 to be some discrepancies. And, you know, that's just --
19 that's just the nature of the beast. But that is the
20 difference between a party who is affected by the information
21 and has a motive and an interest in making sure it's accurate
22 and thoroughly digging into it, versus someone on the other
23 side who is providing them with that, quote/unquote, summary.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And I -- and I can imagine anybody who -- again, such
2 as Your Honor's an experienced practitioner in both
3 prosecution and defense, if you heard a defense attorney say,
4 gee, there was lot of evidence in this case, so I asked the
5 prosecutor if they would loan me a paralegal to give me a
6 summary of it. You know, the obvious conflict and the obvious
7 question about the advisability of that, you know, speaks for
8 itself.

9 But then turning to -- to this particular case, this
10 particular motion, what it focuses on is the issue before the
11 commission in the suppression motion to determine whether the
12 government can meet its burden to show that whatever may be
13 documented in this memorandum, this summary of the interviews
14 of Mr. Mohammad during January 12th through 16th of 2007,
15 whether it can be said those are so attenuated, so removed,
16 from what happened to him in the black sites that they can be
17 deemed voluntary and usable.

18 And what we talk about frequently -- and as I said,
19 torture being always in the room, is we refer to torture. And
20 Lieutenant Berg mentioned to you some of the specifics of
21 Mr. Mohammad's torture last Friday. And I'm not going to
22 repeat all of those, but just -- just to take one or two
23 examples, what he said was at -- at one point -- and this is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 shortly after Mr. Mohammad's arrest, almost immediately after
2 his arrest, he was sexually assaulted, anally raped, and then,
3 among other things, forced to remain shackled by his wrists
4 and suspended from the ceiling of his cell naked, in his own
5 excrement and urine, for approximately one week.

6 That was -- that was, in part, to deprive him of
7 sleep. And during that time he was doused frequently with
8 cold water and subjected to loud heavy metal music to keep him
9 awake, keep him from falling asleep.

10 It occurred to me that, you know, we say things like
11 that and they just become almost routine in the case, the sort
12 of torture mentioned in the 9/11 Commission report and all of
13 that. And I was thinking as -- as Lieutenant Berg was saying
14 that is that -- that was on Friday. And the first part of
15 this contingent who are here for the hearings these two weeks
16 had come down to Guantanamo the Saturday before. A long trip,
17 got up early in the morning, went out to Andrews, did all
18 that, all that drill.

19 And I was just thinking that, you know, if instead of
20 being able to fly down and, you know, have the sack lunch and
21 get a nap and all that on the plane, somebody had shackled us
22 to the floor of the plane after, you know, anesthetizing us
23 and flown us someplace, and then when we came to they did all

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of those things to us, including the anal rape and suspending
2 from the ceiling. And then by the following Friday, when
3 Lieutenant Berg was making that argument we were still hanging
4 from the ceiling of some dank, dungeon-like cell, very
5 different experience. Very different sort of notion about
6 what these facts mean when we really stop to think about them.

7 And so after that happened to Mr. Mohammad, that and
8 so much more that we won't go into, for the very intense
9 period of several, several, several weeks during which his --
10 his captors -- because he had been arrested with his children,
11 and he could hear them crying in the next room at this foreign
12 police station with -- with American agents around. He was
13 being told by his principal torturer that if he didn't give
14 him the answers he wanted, he was going to slit his son's
15 throat.

16 And that's where Mr. Mohammad was for the entire -- I
17 mean, where his mental state was for the entire three and a
18 half years. No one ever came and told him don't worry. In
19 the meantime, we've released your kids. No contact with his
20 family. No nothing. And so suddenly in September of 2006,
21 they say come along, we're going to Guantanamo.

22 And then the other thing to consider is that everyone
23 knows, no one disputes, that the events to which Mr. Mohammad

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 were subjected are clinically known to produce traumatic
2 stress and post-traumatic stress, significant form of trauma.
3 And the only way -- the only hope that someone can recover,
4 can relieve themselves of that lingering effect, what they
5 call the sequelae of the trauma, is essentially three things.

6 One is to get to a place of safety, true place of
7 safety. The other is to have the opportunity to express your
8 narrative and talk to others. Not the oppressors, not the
9 torturers, but talk to others about what happened to you. And
10 then the third is return -- is to be able to return to your
11 community, the people with whom you feel safe.

12 And obviously, from the time of Mr. Mohammad's capture
13 until the time he arrived in Guantanamo in 2006 and to this
14 very day, none of those have been available to him. Foremost,
15 the sense of safety, because he's in the custody of the same
16 government that did this to him. He is, as we discussed,
17 barred by classification and other restrictions, barred by
18 having any kind of narrative or -- or speaking to anybody in
19 the outside world. Severe restrictions there. And then
20 there's also the very tight limitation on resuming any kind of
21 contact with the community, with a -- with a greater
22 structure.

23 And so that is -- that is the situation that he found

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 himself in when the FBI agents approached him. And what we
2 have asked the government is to tell us, in addition to just
3 giving us this letterhead memorandum, that an agent -- with
4 all due respect to Frank Pellegrino, I've only met the
5 gentleman a couple times and he's been very cordial and very
6 professional. But all we know is what he has summarized and
7 all we know is what he has jotted down in his notes.

8 Those are the -- those are the things they've turned
9 over to us. And they've also said that you have the logs of
10 some daily interaction between guards and Mr. Mohammad, you
11 know, jotting down when he went to the doctor or, you know, if
12 he asked for an aspirin or something like that. There's some
13 daily log entries. And then we have the names of some people,
14 if they'll talk to us, who have provided medical services for
15 him.

16 But what we're asking for and what we think we're
17 entitled to are the percipient witnesses who know how those
18 interrogations went, know what the circumstances were under
19 which they were conducted and -- and leading up to them, and
20 the substance -- the actual substance. Not the summaries, not
21 the impressions, but actually what was asked and what was
22 said.

23 And what we know is that the government in AE 630Y,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 their opposition to the suppression motion, what actually they
2 have indicated is this is how they're going to try to carry
3 their burden, is that what they're going to do is they're
4 going to base their defense on the details of taking the
5 statement. The substance of the statement, not the summary of
6 the -- of the memoranda, but they're going to base it on the
7 details of the manner in which to take -- the statement was
8 taken, including a purported change in the identity of the
9 questioners.

10 And this was written at a time when they were
11 sponsoring the narrative that the FBI had nothing to do with
12 the government CIA torture program. We've -- we've learned
13 quite a bit since then, that -- that that's not the case.

14 We also -- we also know that the government, again
15 quoting AE 630Y at page 9, we know that the government had
16 detailed, no doubt at, you know, regular taxpayer-sponsored,
17 individuals at least -- at least 22 special FBI agents, 7 FBI
18 analysts, and the original JAG -- Navy JAG camp commander of
19 the original camp where the -- where Mr. Mohammad and his
20 codefendants were held. Allowed all of them to either -- to
21 view and/or listen in to these interrogations over the course
22 of the interrogations from what they described as a remote
23 room. So either video with sound or at least audio transfer.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And I won't bother reading all of the names, but they
2 appear at page 6 of our reply. And again, citing 630Y at
3 page 9.

4 And interestingly, these individuals, we don't know
5 why they were invited or allowed to listen in to this what
6 must have been a fairly Top Secret classified proceeding being
7 conducted on Guantanamo, whether they were there or up in the
8 National Capital Region or someplace else, but somehow they
9 had access to this very, very highly classified event and, at
10 the same time, were told not to take any notes.

11 And the government says, in a typical euphemistic way,
12 they were told not to take any notes, write anything down
13 about what they were seeing, quote, to ensure recordkeeping
14 consistency in documenting the interrogation. Of course, what
15 that means from a litigation perspective is the government
16 didn't want a counter narrative or counter information. But
17 as we point out in the reply brief, you know, anytime you get
18 22 FBI agents observing something, it's unlikely that they
19 don't do something to document what they saw and their
20 impressions, whether it's after-action memos, whether it's
21 e-mails to friends, whether -- you know, I don't know if
22 Instagram was around then or TikTok. But there's probably
23 something going on where they are recording their impressions

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and certainly likely that they, you know, they saw something
2 and it will be -- it will be relevant.

3 Third, what we also know, and this is, again, at --
4 inviting the commission's attention to AE 630Y, the government
5 pleading at pages 12 through 13. At least two of the
6 prosecutors in this case, Mr. Trivett and Mr. Swann,
7 participated in investigating strategy discussions -- or
8 decisions, I'm sorry, made prior to the interviews occurring
9 and under which the FBI and CITF agents would be operating and
10 they were on hand in the event the special agents conducting
11 the interrogations had any questions about how to proceed.

12 And as we have explained in our main suppression
13 motion, part of the planning and the strategy decisions led to
14 a protocol by which Mr. Mohammad and the other people being
15 interviewed would be kept in the dark about their ability to
16 have counsel present and the other aspects that make a Miranda
17 warning, an indicator that the subsequent statement is in any
18 way voluntary. So critical, critical information, relevance
19 and materiality to whether there is an attenuation between the
20 horrific torture that had been discontinued in September and
21 the interrogations that were being commenced in January.

22 Fourth is they have provided us -- it's true, they
23 have provided us with some so-called DIMS records, which are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sort of these daily, you know, routine reports of activities,
2 comings and goings, whatever. But we also know that those may
3 very well be incomplete because just in June of this year, we
4 had an incident in which Mr. Mohammad's legal mail was
5 inappropriately seized from his cell. Interestingly, because
6 it reported some of the techniques of his torture. And it was
7 seized by the guard force out at Camp V and sent up to the SJA
8 or somebody and was supposed to be forwarded to me, which
9 didn't happen.

10 And when Mr. Mohammad reported this to me, I contacted
11 the prosecution for their assistance, because I understood
12 this to violate the protective order that the commission --
13 the commission has in place. And the first response from the
14 prosecution was nothing like that had happened. The only
15 thing that had happened was that there had been a cell search
16 of Mr. Mohammad's cell that day, and nothing had been seized.

17 I spoke to Mr. Mohammad, I got from him the pseudonym,
18 you know, code names for the various guard force members who
19 were involved in it, including the officer in charge, SJA, and
20 some others, and sent those back to Mr. Trivett in this case
21 who was helpful to run down the information. Oh, and lo and
22 behold it turned out, yeah, they had seized the letter.

23 And when Mr. Mohammad asked the -- asked the watch

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 commander how come this information apparently had not been
2 reported in his DIMS as it should have been, which presumably
3 is what the JTF or the prosecution consulted to see whether
4 what had happened had happened, so why wasn't it reported?
5 The watch commander kind of shrugged and said, "Well, I guess
6 we forgot to write it down."

7 So those sources of information, particularly
8 something happening, you know, across the island in the form
9 of -- of these high-profile, high-powered interrogations, is
10 not the best indicia that we have all the information that is
11 available or that is in existence.

12 And then the other -- the other complaint that the
13 prosecution makes -- and this is on page 5 of their -- their
14 response, AE 775 filed 20 March 2020, is to tell the
15 commission -- and this is, I must say, with all due respect,
16 I'm sorry to have to say it, this is a familiar refrain you
17 will hear, which is we have given them everything. You know,
18 sort of the disappointed parent sort of attitude. We have
19 given them everything. We just don't know what to do, why
20 they're never happy, why they're never satisfied.

21 And what we the prosecution think they're up to is
22 they just don't want to go to trial. They don't want to
23 comply. As they say in this case, they want to use this --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 utilize this motion to compel evidence they already possess as
2 a means to articulate a refusal to accept this court's order
3 providing an orderly process and pathway to bring this case to
4 trial.

5 And they refer to their statement in AE 676, a
6 government pleading filed 1 November 2019 which, honest to
7 goodness, assures the commission they have complied with all
8 of their obligations in this regard. And unfortunately, it
9 was in June of this year -- this year, 2021 -- that the
10 prosecution revealed that sometime in the past, we still don't
11 know quite when, some military judge had looked at the
12 summaries of statements they were giving us and noted that
13 they had taken upon themselves to remove disclaimers that had
14 been entered apparently contemporaneous with the reporting of
15 the statement way back when in -- sometime between 2003/2006,
16 which indicated the government interrogators, or the people
17 preparing the statement, had reason to question the
18 reliability or accuracy of the reported statement.

19 So we were getting statements that said on
20 such-and-such a date Mr. Mohammad said, acknowledged,
21 confessed, denied, whatever, the following. But -- and then
22 for reasons known only to those interrogators, maybe it's
23 because they were torturing him, maybe it -- you know, for a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 lot of reasons. They said, But, you know, we have to
2 acknowledge this may not be accurate. Maybe they had heard,
3 you know, denials the day before. Whatever.

4 Well, they put those disclaimers on there. And the
5 government, for whatever reason -- you know, we can imagine
6 from a tactical perspective what that might be -- had
7 eliminated those when they gave us the summaries. And so in
8 the characteristic nonchalant fashion in which they often
9 report these things, they said, oh, by the way, one of the
10 military judges mentioned to us that we probably shouldn't
11 have, you know, taken these off; should have told you about
12 those.

13 But rather than go back and tell you which statements
14 we took those off of, just assume that the interrogators
15 doubted everything. Okay, you can represent to the commission
16 that nobody believed anything this guy said. And, of course,
17 you know, as anyone who's practiced criminal law and has dealt
18 with statements and inconsistent statements and a series of
19 statements would know, it is of enormous significance when the
20 interrogator, when the government officials say this is a
21 statement we think we believe, and this is a statement we know
22 we don't believe because of what we did to extract it. And
23 what those statements may be, we don't know. How -- how it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 would help to compare them, we don't know. You know, we'll be
2 working with -- with the government and, you know, maybe have
3 to involve you in it.

4 But the point today, as I stand here, is that when
5 they were complaining in March of 2020, before the whole world
6 changed, that they can't understand why we're asking for more
7 information, they'd given it to us all, and gosh darn it,
8 didn't you see our November 2019 representation as officers of
9 the court, to the military commission, to exactly that effect,
10 why are you asking us for more information? Now you see why.

11 And so finally, the -- what I would suggest is even if
12 they believe in good faith that they have given us everything,
13 which we know they haven't, they could not have because of the
14 30 people who listened in and haven't been pulled to see if
15 they have everything in their e-mails or other documents.
16 That's just as a start.

17 But even if they thought in good faith they had, if
18 you were to issue an order saying, well, you know, just for
19 good measure, give them everything, give them everything, that
20 is all witness observations that document the substance and
21 circumstances of those statements. And if they don't have
22 anything and they come back and they report to you they don't
23 have anything or they're, you know, resisting an order to show

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cause because they don't have anything, then fine, no harm.
2 But the idea, it's not that you're ordering them to do a
3 futile act. What you're ordering them to do is to make a
4 good-faith effort to search their files, particularly in light
5 of this sequence of events, just to make sure that we have
6 what we should have.

7 Thank you, sir.

8 MJ [Col McCALL]: Ms. Bormann, does anyone from your team
9 wish to be heard? I see a negative response.

10 LDC [MS. BORMANN]: Not at this point, Judge. Thank you.

11 MJ [Col McCALL]: Mr. Bruck? And Mr. Connell?

12 Negatives from both. And I'll just throw it out to
13 Ms. Lachelier at ----

14 ADC [MS. LACHELIER]: Same. Same as before, Judge.

15 MJ [Col McCALL]: All right. Government? Mr. Swann, as
16 you've noticed with my approach to these motions, as I'm
17 getting up to speed on this case, I've given fairly wide range
18 for counsel's argument. I'll extend that same courtesy to
19 you.

20 TC [MR. SWANN]: Your Honor, counsel may believe that
21 torture is always in this courtroom, but in January of 2007,
22 it was not. Now, Mr. Sowards seemingly thinks that we're
23 going to just settle on a couple pieces of paper in order to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 explain what Mr. Mohammad said in January of 2007. Actually,
2 that interview was conducted over several days. It started
3 out on the 12th, it went to the 13th, it went to the 14th.
4 Mr. Mohammad had stomach problems and asked that he not have
5 to come that day, but came back on the 16th. He subsequently
6 went back in November to at least one of these same agents and
7 then confessed to the killing of Daniel Pearl.

8 Now, we're not going to offer any evidence in this
9 case regarding Daniel Pearl. He is not on the charge sheet.
10 And all that motion was addressed or withdrawn last week. The
11 reason it should have been withdrawn or never filed is because
12 we're obligated to provide every statement that these accused
13 have ever made regarding the offenses that appear on the
14 charge sheet. That's in 701. It has to be on the charge
15 sheet.

16 Now, we've provided all statements that they have made
17 during the RDI program because the judge, Judge Pohl, directed
18 that we provide all statements across the board, and we have.

19 Now, in this instance, we'll say the following: One,
20 Dr. Mitchell's testimony is -- from the witness stand over ten
21 days, he says that Mr. Mohammad had a rough three weeks. And
22 the defense has all that information provided to them. They
23 also say -- they said that Mr. Mohammad was -- was anally

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sodomized or raped or something. He was rectally hydrated,
2 because when he was first picked up he wouldn't drink enough
3 water and they were concerned about him.

4 Now, his first words out of his mouth were the
5 following: One, we can do it the easy way or we can do it the
6 hard way. Do you -- and we're not interested in what you did
7 with respect to the September 11th attacks. We want to know
8 what you have planned. And Mr. Mohammad at that point in time
9 then said: Soon, you will see.

10 Our nation had just suffered an attack that killed
11 nearly 3,000 men, women, and children. Now, he's fond of
12 saying that he can't make contact with his children. There
13 are eight of them, and that's the exact number he killed by
14 happenstance.

15 So let me go into what happened on the interview, 12th
16 to the 16th of January. You will hear testimony from Frank
17 Pellegrino, a Special Agent of the Federal Bureau of
18 Investigation, a man, quite frankly, who knows everything
19 about Mohammad. He knows everything about Ramzi Yousef, his
20 -- excuse me. He is the -- his nephew. He's his nephew.

21 Mr. Mohammad -- Frank actually was called to a foreign
22 country because they were looking for that man for his
23 participation in a Bojinka plot. Bojinka plot is a made-up

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 name that characterizes it. But he provided assistance to
2 Ramzi Yousef during the early part of the 19 -- well, 1990s.
3 They got word that he was hanging out in the United Arab
4 Emirates -- or Qatar. Excuse me, Qatar. And Frank was sent
5 there to pick him up just as soon as the indictment came into
6 the open, sitting on the tarmac, ready to take him back to New
7 York. But Mr. Mohammad disappeared. He was a water engineer
8 of some sort in that country at that point in time. Frank
9 Pellegrino was unable to pick up Khalid Shaikh Mohammad that
10 day.

11 And to this day, he still believes, as that -- that if
12 he had had an opportunity to get him that day, the
13 September 11th attacks would never have happened. But
14 Mr. Pellegrino will testify what occurred during those four
15 days in January.

16 Now, counsel has indicated that I was present. Never
17 in the room, although I did witness Mr. Mohammad come into
18 the -- his interview area. I wanted to see what a terrorist
19 looked like. And, quite frankly, I was disappointed.

20 Frank Pellegrino sat down with him for four days and
21 talked to him about this plot. So you have -- we have given
22 them the interview notes from that document.

23 The type of subjects that were talked about that day

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 were an extensive background. What was the turning point in
2 Mr. Mohammad's life that caused him to turn to terrorism? The
3 September 11th attacks, how he selected the hijackers, how he
4 sent them to various training locations.

5 Talked about al Mihdhar and al Hazmi reported to KSM
6 that they were asked a lot of questions when traveling to the
7 West Coast from Thailand. So it was decided people would
8 travel then from the United Arab Emirates.

9 Talked about the money that he had gotten back from
10 one of the other individuals in this case and how he had gone
11 to an ATM machine in Pakistan and withdrew the last remaining
12 funds from that account so, you know, we don't want to leave a
13 dollar around that al Qaeda can't possibly make use of.

14 Talked about his involvement with Atta and RBS.
15 Talked about the specific dates about when the 9/11 attack
16 would be taking place. What he did post-September 11th, the
17 shoe bomber, Richard Reid and another individual, because
18 there's more than one shoe bomber, another individual who we
19 expect to testify in this case.

20 Talked about his involvement with al Marri. al Marri
21 was a man in the United States who was going to school in the
22 midwest somewhere and he was involved in terrorist activities.
23 One of these individuals brought al Marri his computer and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 sent it to him. When that individual was picked up in a
2 round-up, al Marri still had the notes that he had received
3 from certain individuals, phone numbers and things of that
4 nature. What involvement he may have had in the anthrax
5 attacks. What involvement he's had with Hambali and the
6 others that are part of JI. How he trained Jubara, another
7 terrorist who engaged in that attack.

8 He talked about Majid Khan, and Mr. Khan is about
9 ready to face his involvement. He talked about Jose Padilla.
10 He talked about the Heathrow Airport. That was a plot that he
11 and at least one other individual in this room had involvement
12 in. This is the so-called Canary Wharf attacks.

13 He talked about the Djerba bombing, where his
14 involvement was in that. He talked about Iyman Faris, a truck
15 driver in the United States who pled guilty and received a
16 25-year sentence.

17 Then he talked about Bojinka, how he got involved,
18 where he met Walid Khan. He talked about his arrest and his
19 brother-in-law. He talked about other miscellaneous things
20 such as his involvement with al Qaeda and what happened after
21 the embassy bombings, and what did he do? That's all laid out
22 in these. And his other travel throughout the world.

23 He talked about the passport that began -- it began

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 from a series of events that led to his capture and his
2 identification. And I'll let Mr. Pellegrino show you that
3 photograph or that passport when the time comes.

4 He talked about what it means to perform bay'at. He
5 talked about the "Crippled Sheikh" video. The "Crippled
6 Sheikh" is a video where bin Laden in November of -- would
7 have been October/November of 2001 talks about the ownership
8 of the 9/11 attacks. The Crippled Sheikh is a crippled sheikh
9 that Mr. Mohammad found wandering the road with his son and he
10 brought him to a location, not sure the Crippled Sheikh even
11 knew what was going on, but he sat there and talked to him,
12 and it was the royalty of al Qaeda in that room, to include
13 Mr. Mohammad, who was greeted as he come -- as Zubaydah and
14 bin Laden come through the door and says to him, Abu Hamza,
15 father of Hamza, his first born.

16 That is the extent of that interview, a host of
17 subjects that he was talked to about. And Frank Pellegrino
18 will talk to us about that from the witness stand. This is
19 not a piece of paper that's going to go in front of the
20 members. The testimony of the witnesses on that issue would
21 do that.

22 Now, they make much to do about the fact that I was
23 somehow located near where all of these interviews were

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 conducted. I was. I was in charge of a group of -- well, I
2 wasn't in charge of the FBI, but I was kind of the master of
3 making sure interviews were conducted on time. We interviewed
4 all 14 of the high-value detainees that the President had sent
5 to Guantanamo. And that extended over a 45-day period I was
6 down there, okay?

7 I -- like I said, the only time I ever saw Mohammad
8 was he was coming into the room where he was being
9 interviewed. Mr. Trivett was there with me. And Mr. Trivett
10 and I both decided that none of us were going to go into that
11 interview room because we had the best of the best of the best
12 Federal Bureau of investigative agents that this land has.
13 They conducted the interviews. One set of notes was the
14 directive. They have that information.

15 They wanted -- again, it can be found at
16 MEA-LHM-00001430, which dictates or sets out how these
17 interviews were going to be conducted. The interview with
18 respect to Mr. Mohammad is MEA-LHM-1 through page 32.

19 There's more than 150 years of experience on this side
20 of the room. All of us have been prosecutors, defense counsel
21 on occasion, a judge on occasion for a number of years. We
22 understand our obligations and we understand them all too
23 well. For if we make a mistake, none of us will want to have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to try the case over again.

2 I have authenticated the first 32,000 or so records in
3 this case -- the record of trial in this case. It fell to me
4 because every time I turned around a judge was leaving and
5 it's the trial counsel's responsibility. So I have looked at
6 all that record and I am confident that there are no appellate
7 issues that we're going to have to worry about at some later
8 point in time.

9 I heard a little bit about KSM's kids. There were two
10 children that were picked up in a raid that scarfed up --
11 well, Mr. Binalshibh is not here with us right now. There
12 were two children that were picked up in a raid that scarfed
13 up Khalid Shaikh Mohammad -- when I said the first time there
14 were two children that were picked up in a raid, two of his
15 children were picked up in a raid in which Mr. Binalshibh was
16 captured, and then two more of his children were picked up in
17 a raid in which he was captured along with Hawsawi.

18 Who told the accused, the world's worst terrorist,
19 that he should bring kids with him every time he's wandering
20 out through the country of Afghanistan and Pakistan? Because
21 he's the world's number one man at that point in time. They
22 were picked up, they were treated well. We have resolved that
23 issue in another filing in this case, and the judge ruled in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 our favor.

2 Scintilla of trauma, that's a bunch of buzzwords that
3 the defense has used. The first time I heard it is when we
4 litigated the issue in AE 254, that female guards could not
5 touch the accused on his arm or his shoulder. That stopped us
6 for about a year, until we finally got testimony -- or got the
7 testimony, because of other issues that were ongoing. But
8 Mr. Nevin stood up here and it's a scintilla of trauma that
9 these individuals have to suffer through because they were
10 being touched in an appropriate -- in their words, in an
11 inappropriate way. And there is no evidence of that at all.

12 I ask that you take a look at 254, the female guards
13 issue. Read the judge's order and you'll see exactly the
14 words I've described that Mr. Nevin used.

15 Now, one thing I have learned today, based on what I
16 have heard, the chances of Mr. Mohammad ever taking that
17 witness stand: About slim to none. Should he, we'll be ready
18 for it. But, that said, I'll get back to the motion.

19 They want the LHM. They have it, all of it. They
20 want all interview notes. They have them, all of them. The
21 other people sitting in the room, not everyone could hear
22 those interviews. Given the nature of what was going on at
23 that point in time, these interviews were TS//SCI. Only a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 couple of people at any one time could listen and hear through
2 microphone. There were a couple of guards in the room. Those
3 guards couldn't hear what was being said because they didn't
4 have the requisite clearance or so.

5 Everyone was said: Don't take notes. Now, we do
6 know, and we have provided this information to the defense,
7 that a couple of those individuals wrote an e-mail back to
8 their -- their boss or something. We have turned those over.
9 Nobody else has any notes regarding this case.

10 Now, one of the things I noticed in here is that they
11 want medical records. I'll help them out right now. All the
12 medical records concerning the time period from October of '06
13 through and past the date of these interviews -- and I've just
14 got written down here 21 January '07, because that got us
15 through the entire period -- are found at MEA-0008607 to 8673.
16 These have been provided to the defense for well over two
17 years in an unredacted form. We've gone through several
18 iterations in the 523 series where we ultimately decided,
19 having obtained a protective order from -- from Judge Parrella
20 at that time, that we were just going to turn over the -- all
21 of these records. If they had a true name in there, if it was
22 the original record and a true name, the defense got -- got
23 the information.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And we have updated that thing, what, through last
2 week I think now. I think there's like 43 pages of true names
3 and time periods and all. Sure, there are names that we have
4 never been able to connect. The judge ordered us to provide
5 all known names. And we have spent thousands and thousands of
6 hours trying to figure all this out.

7 But they have all the -- they have -- the original
8 records are all in true name for the most part. They have
9 them. If they'd like me, I could tell them right now what
10 medications he was on, but I suspect they don't. So I'll -- I
11 just encourage them to go back and take a look at that
12 information for them.

13 Now, we've already heard testimony in this case, about
14 600 pages or so, from the testimony of Special Agent Mike
15 Butsch regarding the interview process that was conducted with
16 Ramzi Binalshibh. 160 pages or so of that is
17 cross-examination by Mr. Harrington. They have all of that
18 information. They will have an equal opportunity to talk to
19 the Special Agent Pellegrino when the time comes. And we --
20 all we need you to do is set the time and we'll have the
21 special agent down here to testify.

22 There is nothing else. This stuff about DIMS, they
23 have all the DIMS records. Now, there's a couple of times

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 over the years where we've had to go back and we missed a day
2 or two about DIMS, but they have those records for that period
3 of time. They have had an opportunity to talk to the Camp VII
4 first commander. He was on the witness stand, told them what
5 he viewed, both to the extent that he was in the room because
6 it was in and out, and that's the testimony. He testified --
7 he testified about what he told them in the morning in
8 getting -- in going over to these interviews.

9 He testified, as did -- as did Mike Butsch regarding
10 Binalshibh, that they had a choice to make each and every day.
11 They didn't have to come. And as you can clearly see from the
12 period with respect to Mr. Mohammad, he decided he'd stay home
13 a day, but he came back willingly the next and came back
14 willingly back in November.

15 That's -- I -- I know I'm not testifying. They'll be
16 getting an opportunity to hear from the very people
17 themselves.

18 So when I say we have nothing more to give them, we
19 gave them roughly about 77 pages, I think, of what we refer to
20 as Camp VII 10- and 30-day reports. When they first arrived
21 on Guantanamo because of the -- well, the heightened interest
22 in their presence here, the SOUTHCOM commander directed every
23 ten days I want to know a report on what's going on with the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 high-value detainees. He got the report. After about three
2 of these reports, they -- they were convinced that 30-day
3 reports after that would be sufficient.

4 And they have those reports, I believe, because they
5 ceased at some point in time into 2008, long -- about a year
6 after or more when these individuals were interviewed. So
7 they have all that information.

8 And subject to your questions.

9 MJ [Col McCALL]: No questions.

10 Mr. Sowards?

11 LDC [MR. SOWARDS]: Thank you, Your Honor.

12 First, I just wanted to address the Daniel Pearl
13 reference. I think it's important to talk about that since,
14 of course, it had nothing to do with the motion that -- that
15 we made today about circumstances and substance of the
16 January 7th interrogation.

17 But the commission should know, because I know there
18 is a lot to read and I'll just invite your attention to the
19 examination that Mr. Nevin conducted of James Mitchell, where
20 he established pretty clearly that the time at which -- in the
21 black sites where they got Mr. Mohammad to reference his
22 involvement in Daniel Pearl's unfortunate death, was after
23 they had softened him up with questions trying to get him to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 admit it and he declined. And then after a fairly arduous
2 course of torture, they talked to him about if he wanted
3 things to improve for himself and, ironically enough, in light
4 of the comments Mr. Swann made about the gentile treatment of
5 Mr. Mohammad's children, because it was Dr. Mitchell who
6 threatened to slit their throats.

7 Dr. Mitchell and -- it was a female interrogator said,
8 well, you know, if you could give us something really big, if
9 you disclose something, if you can admit something, you know,
10 that we could really, really use, we might be able to see our
11 way clear of letting you write to your family. And so he
12 called them back in and he said, you know, "I was responsible
13 for killing Daniel Pearl."

14 Oh, that's very interesting. Thank you very much.

15 And then he said, "Can I write to my family now?" And
16 they said, "Well, we'll have to think about that. We'll give
17 it some time." That's the genesis of that.

18 And we can talk about independent verification, all
19 that kind of stuff, but with due respect to Mr. Swann, I know
20 what then became sort of a mantra with every other witness
21 after that, including the camp commander, is of the purported
22 admission of being involved in -- in Mr. Pearl's death became
23 kind of a point of reference that, you know, sometimes when we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have police officers on the stand and they have some bad fact
2 they can't wait to get in, no matter what you ask them, it
3 relates to that. So a lot of witnesses -- Mitchell, the camp
4 commander, different people -- you know, you would say, "When
5 was the first time you met Mr. Mohammad?"

6 And they would say, "Oh, I think it was about three
7 weeks before he admitted killing Daniel Pearl."

8 So this kind of was a way to always get this in and
9 they hoped that the media picks it up and it does what it
10 does.

11 But turning the -- or inviting the commission's
12 attention back to the motion, the motion that we're asking --
13 or what we're asking in the motion is for the witnesses who,
14 as Mr. Swann admits, there were numerous of them there,
15 including Mr. Trivett, to give us all information they have
16 which would document, not just the substance if they can do
17 that, but the circumstances of his interrogation.

18 And what Mr. Swann has not disavowed, what we have in
19 our reply and he and I talked about it, he had an opportunity
20 to disavow it, is that he and Mr. Trivett met with prosecutors
21 to basically design the format and the style and the purpose
22 of the interrogation. And the purpose of the interrogation,
23 which the record to date also shows, was to get statements

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 from these men to use in this prosecution. And so the
2 question is what were -- is there documentation? There may
3 be. We don't know, but you give us the documentation you have
4 of the circumstances of this interrogation, how you designed
5 it, who you selected, what they were instructed, and that will
6 go to show how they were doing everything they could to make
7 sure there was no attenuation of their experiences in black
8 sites. There was no forthright full explanation that you as a
9 defendant have no need to talk to us. If you want to have an
10 attorney present, you can have one. All of those -- those
11 sorts of things.

12 Not only do they do that, but the agents were
13 instructed, perhaps at Mr. Trivett and Mr. Swann's urging, we
14 don't know, but if they don't have the documentation, they
15 know who do, to give evasive, incomplete, and misleading
16 answers so that when the defendants, in this case
17 Mr. Mohammad, said, "Am I being charged with something?"
18 Well, this is a military commission and there are no charges
19 pending right now.

20 The FBI knew that they had been sent in there to get
21 statements to use in the prosecution. They've admitted such.
22 They've given memos at least to that extent. We would like to
23 know what went into this -- planning the circumstances. Other

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 instances of the circumstances, we don't know -- and again, if
2 Mr. Swann, after you order -- order them to disclose this, if
3 he doesn't have any information that a photographic
4 documentation or otherwise of the condition of the -- of the
5 cells, the dress of the people, how many people were in the
6 room, what they looked like, how they may have reflected or
7 echoed the situation, the black sites, then he doesn't have
8 it. But that is all relevant to the connection between --
9 between Mr. Mohammad's black site experiences and torture and
10 what was going on in Guantanamo.

11 And I understand that -- and I'm sorry to upset
12 Mr. Swann. I know this is a case that, you know, is very,
13 very important to him and he feels very aggrieved by what
14 happened and we know that sometimes we get too close to the
15 issues in a case. But at this point, Mr. Mohammad is presumed
16 innocent. And the question is not what they got him to say or
17 what Mr. Swann thinks may be true about his conduct. The
18 limited purpose of the motion to suppress, which this
19 discovery motion is in service of, is to find out whether what
20 he said was involuntarily compelled.

21 And if I may just -- as I was thinking of, and
22 Mr. Swann talked about this, that in our -- in our papers we
23 had cited the case of Chambers v. Florida, which is 309 U.S.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 227, and the portion we had was at 238 to 239. And that was a
2 situation oddly similar in some ways to what we have here.
3 Although, as we mentioned, you have to go back to the first
4 half of the last century in America to find a case anywhere
5 near this and it isn't all that near.

6 But the United States Supreme Court was faced with a
7 situation they described as a group of codefendants who were
8 held for a protected -- protracted period of time. In this
9 case, one week. One week. Quote, without friends, advisors,
10 or counselors, and under circumstances calculated to break the
11 strong nerves and the stoutest resistance. And the
12 United States Supreme Court said, the very circumstances
13 surrounding their confinement and their questioning without
14 any formal charges having been brought, exactly what was going
15 on in this case, were such as to fill the defendants with
16 terror and frightful misgivings.

17 And the question is: Does that terror and do those
18 frightful misgivings dissipate by anything that happened
19 between the black sites and January of 2007? What can they
20 show to dissipate the terror and the frightful feelings? And
21 more importantly to us, what haven't they disclosed to us
22 which would indicate that there was no dissipation of the
23 terror and the frightful feelings precisely because of the,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 quote, circumstances surrounding their confinement.

2 Because as the United States Supreme Court said, to
3 permit human lives to be forfeited upon confessions thus
4 obtained would make of the constitutional requirement of due
5 process of law a meaningless symbol.

6 And when I listened to Mr. Swann, and I did listen to
7 him carefully and, as I say, I'm -- didn't mean to say
8 anything to so upset him, but I noted that when he was telling
9 you what Mr. Mohammad had purportedly said to Agent
10 Pellegrino, he kept looking down at -- I don't know, I guess
11 it was the letterhead memorandum. And I couldn't tell if what
12 Mr. Swann was saying was he was essentially representing to
13 you the substance of the statement from his memory of having
14 been there and seen the terrorists come in because he always
15 wanted to see a terrorist, I didn't quite catch whether he
16 left there and so had -- had no recollection of the
17 interrogation, or whether he was summarizing for you the
18 summary of the letterhead memorandum.

19 But in either event, all he was telling the commission
20 was what purportedly was said at the time. He said nothing
21 about why we would know -- we would think that it was
22 voluntary. And of course, the issue at this stage isn't is it
23 voluntary or what did he say. The question is: Are we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 entitled to the information in the government's possession
2 that will help us refute, that the terror and the frightful
3 feelings could have been dissipated under these circumstances?

4 He mentions that he was master of a group conducting
5 these interviews, so he's in a very good position to know who
6 else was doing the interviews and who else we should be
7 contacting to see if they do have documentations, notes,
8 observations that would help us.

9 I'm not going to -- I thought it would be helpful for
10 dramatic effect, maybe, I don't know, to read the names that
11 are on page 6 of our reply. I won't do that. But you see
12 this block of names. It's 30 names of FBI people. And again,
13 if you see what we're up against in trying to get a straight
14 answer out of people when they -- when they manipulate this
15 discovery, what he said to the commission was, yeah, there
16 were all these people in the room, they're all over the place,
17 but they didn't have the clearance to hear. So even though a
18 guard or two guards were in the room, they couldn't hear what
19 was being said.

20 And then to all these people who couldn't hear what
21 was being said, we told them not to take any notes. Well, why
22 would you not take -- why would you be told not to take notes
23 if you couldn't hear anything?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So again, it just -- there's enough ambiguity here
2 that we see that we have at least 30 potential percipient
3 witnesses who, at least at a beginning, should be -- should be
4 contacted to see what they have.

5 And then finally, when he was -- the complaint
6 about -- about the DIMS, we're not saying that -- that we want
7 more of the DIMS. What we're pointing out, it was a -- it was
8 their suggestion, their suggestion ----

9 MJ [Col McCALL]: I understood that point.

10 LDC [MR. SOWARDS]: ---- that they discharge.

11 And then finally, Mr. Swann says nothing to you about
12 the fact that -- that they acknowledged in June that as to
13 statements generally, and we don't know if it includes these,
14 statements generally that they have been stripping out
15 disclaimers that go to their unreliability.

16 Thank you, Your Honor.

17 MJ [Col McCALL]: Mr. Swann, I just have a follow-up
18 question for you, if you don't mind.

19 So you heard from Mr. Sowards as he's kind of focused
20 in on -- it looks like there's -- as he's focused in on, you
21 know, the heart of what defense wants out of this motion, what
22 they are -- they are concerned they still have not received
23 from the government going to the circumstances of the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 interview, some of these surrounding -- like the planning of
2 how the interview or interrogation, if you will, was set up.
3 Is there anything more that the government is in possession
4 of? And if so, I mean ----

5 TC [MR. SWANN]: They have a document which talks about
6 exactly how to do that. It talks about the situation that --
7 with respect to a couple of individuals in this room, they had
8 been to Guantanamo one time before to there. So we had to
9 modify the -- the rights advisement, so to speak, to them, in
10 saying that, now, you might recognize this room with some
11 earlier point in time. Therefore, we were -- we had the
12 agents caution them to make sure they included that particular
13 piece. Didn't apply to Mr. Mohammad. He had never been to
14 Guantanamo before.

15 Yeah, they have all those documents. It's a -- you
16 know, they keep talking about how I mastered it. I -- I
17 marshalled people, you know. I just got -- kept the wheels
18 running. The National Security Division of the Department of
19 Justice was the one and -- receiving guidance -- or giving
20 guidance to the Federal Bureau of Investigation. So, yes,
21 those -- they were involved in assisting or actually telling
22 the FBI where to be at a certain time and place.

23 There's nothing more. They've heard testimony from

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mike Butsch, 600 pages, as I have said. He testified about
2 all of this. And he just answered questions and questions and
3 questions and questions about all of this. Yeah.

4 The Camp VII commander, went and got him. The FBI
5 told me who they wanted to talk to. I went and got the
6 individual, put them in there, told them they didn't have to
7 come. If they came, they sat -- they came into the room, sat
8 down. And when you hear Special Agent Pellegrino testify,
9 you'll understand the setting and all of that and what people
10 were wearing and -- and the normal thing that you would expect
11 to see in a court-martial concerning how a statement was taken
12 from an accused.

13 MJ [Col McCALL]: Okay. All right. Thank you.

14 Mr. Sowards, I have more for you as well, just if --
15 so -- and you referenced this initially in your argument and
16 then it seems like it's the government's position that, I
17 mean, you have everything is their position. And I guess, you
18 know, as the commission, if I'm looking at a case like this
19 where, you know, you're trying to gather the evidence for a
20 motion to suppress -- I mean, obviously the government, as the
21 proponent of the letterhead memoranda, you know, at that stage
22 when the question of voluntariness and looking at all those
23 totality of the circumstances, I mean, any intentional

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 opaqueness of this program to gather these statements, I mean,
2 that's going to be on -- the government is going to have to
3 overcome that.

4 So it seems like if -- if they're saying that you have
5 what you have and that leaves questions of -- like, again,
6 that this is somewhat of a -- maybe possibly intentionally an
7 opaque process of gathering the information in the letterhead
8 memorandums, I mean, doesn't that give you enough on your
9 motion? I mean, that puts it on the government. They're
10 saying there's nothing more.

11 What would be the purpose of the commission stepping
12 in and granting a motion to compel when there's -- the
13 government says there's nothing else?

14 LDC [MR. SOWARDS]: Well, the -- because when the
15 government -- the government said there was nothing else in
16 November of 2019. The government said there was nothing else
17 in March of 2020. And then in June of 2021, they said, oh,
18 there is something else. And we don't -- we still don't know
19 what that something else is. That is to statements generally
20 that they altered.

21 MJ [Col McCALL]: All right.

22 LDC [MR. SOWARDS]: And the only reason we found out about
23 it is because a military judge, who -- by the way, we don't

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 know whether it was Watkins, whether it was Cohen, Parrella,
2 if it goes back to, you know, whomever, but they finally got
3 around to saying, oh, yeah, we actually did alter that stuff.

4 So all I'm saying is, it's not a matter of calling
5 someone dishonest. It's just we are not going to rest
6 Mr. Mohammad's life on the assurances that we, quote, have
7 everything else when we know there is something else.

8 Mr. Swann has not addressed the 20 FBI agents who were
9 in the room and listened to this stuff. He says now, in this
10 very kind of nonchalant aw-shucks way, he was just kind of
11 moving people around, like he was a carhop or something.

12 Again, I would invite the commission's attention to AE
13 630Y 12 to 13, where they acknowledge that the prosecutors in
14 this case, because they were preparing for this case, quote,
15 it's their language, participated in investigative strategy
16 sessions made prior to the interviews occurring.

17 So there -- there cannot be but a ton of information
18 among the participants in that as to how they design those
19 interviewing sessions and for what purpose. And when he says
20 maybe there were some disclaimers or there were -- or
21 modifications of the setting, you may recognize this room,
22 what he's talking about is Guantanamo was a black site.
23 People were tortured there. People who were being interviewed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 had previously been tortured there. That's what other people
2 knew. And when he says -- and I apologize actually -- if I --
3 through my mask, it's sequelae, not scintilla, a sequelae of
4 trauma and torture. It's the stuff you carry with you all the
5 time when you have been tortured. And when you see something
6 which is -- reminds you of it, you not only remember it, you
7 relive it. Your body reacts as if you were being tortured.

8 And so when you're sitting in the room and the nice
9 people across the way from you are Francis Pellegrino and
10 perhaps a couple of muscular guys who don't say anything, the
11 implication that -- that Dr. Mitchell left with these
12 gentlemen, that if you don't say what we need you to say,
13 we're going back to hard times doesn't have to be any more
14 explicit.

15 In fact, Dr. Mitchell -- it was either Dr. Mitchell or
16 Jessen, talked about how they would condition them through the
17 torture and through the use of walling, through the use of a
18 towel wrapped around their neck, slamming them against the
19 wall, which we think may be the source of -- of Mr. Mohammad's
20 clinically measured brain damage. All they have to do after
21 they -- they do that repeatedly for an intense period of time,
22 is reach over and pick up a rolled-up towel. All they have to
23 do. Sometimes they just have to have it resting on the desk

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 when the person is brought into the room, and that's enough of
2 a trigger.

3 So all of these things are, you know -- are nuanced
4 and their -- and their, you know, assorted views. They're
5 kind of a mosaic of putting this stuff together. But with due
6 respect, you can't -- no one can say they don't have any more.
7 They clearly do. They clearly do.

8 MJ [Col McCALL]: All right.

9 LDC [MR. SOWARDS]: You know, so we don't know who they
10 met with, we don't know who they consulted with. We know they
11 designed it. We know they worked with DOJ. We know there are
12 documents. We know it's all there, and we know we have at
13 least 30 named witnesses in their own pleading.

14 And the interpreter would like me to sit down or slow
15 down. So thank you, sir.

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

17 Mr. Swann, it looks like you had something more?

18 TC [MR. SWANN]: Yeah. When I say there's no more,
19 there's no more. But if he wants to prepare a statement, or a
20 request and I'll -- and we'll send it to these 30 people.
21 We've already done this. That's what discovery is, where you
22 go out and find is there anything that you kept notes or
23 anything. And that's where we came across a couple of e-mails

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that we gave them in discovery. Because in talking to one of
2 the individuals, he did send an e-mail back, and we provided
3 that to the defense.

4 I know this, and I trust you know it, too, is that
5 whatever Mr. Sowards says up here and I say up here about the
6 circumstances of his treatment or how he was treated in that
7 interview room, none of that is evidence. He talks a lot
8 about that. But the evidence in this case will come from that
9 stand, or something they offer in evidence to you, a written
10 document of some sort. But that's where it all begins.

11 So when Frank Pellegrino testifies, sir, you'll have
12 the opportunity to question the special agent as well, and we
13 encourage you do that.

14 MJ [Col McCALL]: Thank you, Mr. Swann.

15 All right. I think that's as far as we can get today.
16 It's almost 1630. So just going through the order of march
17 for the rest of the week, what I'd like to do is we'll have
18 that closed session for classified oral arguments tomorrow
19 starting at 0900, so that will be a closed session. Being
20 somewhat new to this bifurcated style of, you know, we've
21 already heard much of the unclass argument, I assume the
22 classified portions would be shorter. Hard to say, though,
23 so -- I see a lot of nodding. I still --

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Yes, Ms. Bormann?

2 LDC [MS. BORMANN]: I'm sorry. I just wanted to advise
3 you that after today's session and after last Thursday or
4 Friday, we pulled some old 505 notices. We realized that they
5 weren't in the record because of your previous trial conduct
6 order and we're filing them, an old 505 notice that was
7 actually ordered to be filed by Judge Cohen and then I think
8 your order did away with it because he never acted on it
9 because it was in March of 2020.

10 MJ [Col McCALL]: Okay.

11 LDC [MS. BORMANN]: So we're refiling that and it goes to
12 a couple of the closed hearings.

13 MJ [Col McCALL]: Okay.

14 LDC [MS. BORMANN]: When you guys -- it should land with
15 the trial judiciary like if it's not already filed, it should
16 be in your inbox in the next five or ten minutes.

17 MJ [Col McCALL]: This would be necessary for some of the
18 AEs that we've already handled?

19 LDC [MS. BORMANN]: Yes. And that's why -- 697 and also
20 785.

21 MJ [Col McCALL]: Well, let's ----

22 LDC [MS. BORMANN]: So I just want to let you know.

23 MJ [Col McCALL]: I appreciate that. Let's do this. So

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 we obviously have Mr. Mohammad's defense team, their ex parte
2 briefing that we're looking at doing. I'll ask this. And,
3 Mr. Sowards -- I see, Mr. Sowards, you're consulting with your
4 client, but just in regard to your ex parte presentation on
5 your defense theory, do you expect that briefing to contain
6 any classified information?

7 LDC [MR. SOWARDS]: No, sir.

8 MJ [Col McCALL]: Okay. Fair enough. And do you have an
9 estimate on how long you think that -- that briefing might
10 take?

11 LDC [MR. SOWARDS]: I was -- with Mr. Trivett I was
12 ballparking it at no more than two hours.

13 MJ [Col McCALL]: Okay. All right. And then Ms. Bormann,
14 I believe you had asked to do your presentation on Thursday or
15 Friday. Are you able to do it earlier like, say, tomorrow?
16 If not, that's fine.

17 LDC [MS. BORMANN]: I'm sorry, we won't be ready tomorrow,
18 but anytime Thursday or Friday we could do it. I anticipate
19 either a morning or an afternoon, no more than three hours.

20 MJ [Col McCALL]: Okay. We will push off the classified
21 hearing for tomorrow morning. We'll just go ahead and jump to
22 the -- Mr. Mohammad's defense team's ex parte briefing. We'll
23 do that tomorrow morning at 0900.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. SOWARDS]: Yes. That's fine, Your Honor.

2 MJ [Col McCALL]: Okay. So we'll do that. For the rest
3 of the parties, you can have the day to meet with your
4 clients. I know there's plenty of work to do on this case, so
5 we'll not have any open hearings tomorrow.

6 What we'll do is Wednesday, it's -- we're still
7 looking at -- Mr. Trivett, were you -- Wednesday, I believe,
8 you thought we could do the logistics briefing; is that
9 correct?

10 MTC [MR. TRIVETT]: Yes, sir. Wednesday for the logistics
11 briefing. And I think everyone who is going to be presenting
12 the ex parte, to the extent that you rule that we can, would
13 recommend -- or would request that it have to be on Thursday
14 for that one.

15 MJ [Col McCALL]: Okay. All right. And the length of
16 that briefing would be?

17 MTC [MR. TRIVETT]: Long.

18 MJ [Col McCALL]: All right. All right.

19 LDC [MR. SOWARDS]: Excuse me, Your Honor. Also, if it's
20 not ----

21 MJ [Col McCALL]: It's not a decided issue yet.

22 LDC [MR. SOWARDS]: No, no. If it's not horribly
23 inconvenient for your staff, if you wanted to do this even at

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 8:30, we could do that.

2 MJ [Col McCALL]: We'll do it at 0900.

3 LDC [MR. SOWARDS]: All right.

4 MJ [Col McCALL]: Yeah. My understanding is, yeah,
5 there's just some difficulties if we try to go too early in
6 the morning, even -- so I'm just going to leave it at that. I
7 know we still have a few AEs we haven't gotten to. I'll look
8 at when we think we can get to those. I'll touch base with my
9 team. And again, I don't want to be overly optimistic, given
10 the complexities on this case, and try to set things that are
11 almost a nonstarter. So we'll just leave off that -- I'm
12 giving the parties a chance to talk with their clients, have
13 some time off tomorrow while I get this ex parte briefing. We
14 look at doing the logistics briefing on Wednesday. After I've
15 reviewed the replies tonight, should have a decision on
16 whether or not I'm going to -- I feel comfortable going
17 forward with -- one, whether I want argument on that motion
18 and, two, whether I feel comfortable going forward with that
19 ex parte briefing on the 505 process, the summaries and
20 substitutions.

21 And then we will do, Ms. Bormann, your briefing. I'll
22 figure out when I think we can work it in on Thursday or
23 Friday. It sounds like Thursday may be busy.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Anything else to take up, just housekeeping while
2 we're discussing this? Mr. Connell?

3 LDC [MR. CONNELL]: Sir, I just want to make sure I know
4 where I need to be and when. On behalf of Mr. al Baluchi, I
5 believe we will be at Wednesday's logistics meeting ----

6 MJ [Col McCALL]: Yes.

7 LDC [MR. CONNELL]: ---- and then I should not plan
8 anything else for Friday because I'm sure we'll be doing
9 something on Friday; is that accurate?

10 MJ [Col McCALL]: That's accurate.

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

12 MJ [Col McCALL]: 0900 on Wednesday, we'll plan on doing
13 that logistics briefing.

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

15 MJ [Col McCALL]: All right. Anything else, Ms. Bormann?

16 LDC [MS. BORMANN]: Yeah, just a clarification. So with
17 respect to a closed session, you're going to figure out when
18 we can squeeze that in at some point later in the week?

19 MJ [Col McCALL]: Exactly.

20 LDC [MS. BORMANN]: Great. Okay. Thanks.

21 MJ [Col McCALL]: And then Mr. Nevin? Well, I mean --
22 y'all can ----

23 CDC [MR. NEVIN]: Your Honor, I was just going to say that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I heard counsel refer to us having withdrawn AE 770, which is
2 a motion to compel information related to Mr. Pearl.

3 MJ [Col McCALL]: Yeah, I believe you had just waived oral
4 argument ----

5 CDC [MR. NEVIN]: Correct.

6 MJ [Col McCALL]: ---- is that correct?

7 CDC [MR. NEVIN]: We withdrew 768, so ----

8 MJ [Col McCALL]: Yeah. I should have clarified that on
9 the record, but that's my understanding.

10 All right. And Mr. Sowards?

11 LDC [MR. SOWARDS]: Yes. And if you're going to get to
12 it, I apologize. But for the housekeeping, I just -- we had
13 asked for Mr. Mohammad to be able to attend our ex parte.

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

15 LDC [MR. SOWARDS]: Okay. Thank you.

16 MJ [Col McCALL]: Definitely. All right. The commission
17 is recessed for the evening.

18 [The R.M.C. 803 session recessed at 1635, 13 September 2021.]

19 [END OF PAGE]

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT