

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0904,
2 14 November 2018.]

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

6 CP [BG MARTINS]: Good morning, Your Honor. Mr. Ryan has
7 actually stepped out and will be returning. Mr. Groharing is
8 back.

9 MJ [Col PARRELLA]: Thank you.

10 Defense, are all the defense counsel who were present
11 at the close of the previous session again present?
12 Mr. Nevin?

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

14 MJ [Col PARRELLA]: Ms. Bormann?

15 LDC [MS. BORMANN]: Judge, in court is Mr. Perry,
16 myself -- everybody is the same. I'm sorry.

17 MJ [Col PARRELLA]: Thank you. Mr. Harrington?

18 LDC [MR. HARRINGTON]: We're the same, Judge.

19 MJ [Col PARRELLA]: Mr. Connell?

20 LDC [MR. CONNELL]: The same, Your Honor.

21 MJ [Col PARRELLA]: Mr. Ruiz?

22 LDC [MR. RUIZ]: Colonel Jennifer -- Lieutenant Colonel
23 Jennifer Williams and Commander Dave Furry are absent.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: Thank you. I note it appears all the
2 accused are absent this morning. Trial Counsel, do you have a
3 witness to testify as to the absences of the accused?

4 TC [MR. SWANN]: We do, Your Honor. And if you would
5 please remind the witness about the oath he took yesterday.

6 MJ [Col PARRELLA]: Yes. Good morning, Captain. I just
7 remind you that you are still under oath from your testimony
8 yesterday.

9 WIT: Understood.

10 MJ [Col PARRELLA]: Thank you.

11 CAPTAIN, U.S. NAVY, was called as a witness for the
12 prosecution, was reminded of his oath, and testified as
13 follows:

14 **DIRECT EXAMINATION**

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

16 Q. Captain, did you have occasion to advise all five of
17 these accused of their right to attend today's proceedings?

18 A. I did.

19 Q. Let us start with Khalid Shaikh Mohammad. I have in
20 front of me what's been marked as Appellate Exhibit 608B,
21 consisting of three pages. There appears to be a signature on
22 the second page. Is that the signature of Mr. Mohammad?

23 A. It is.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Q. And did you advise him using the form that you have
2 in front of you?

3 A. I did, sir.

4 Q. Did you deviate in any way?

5 A. No, sir.

6 Q. Did he indicate that he wished to attend today's
7 proceedings?

8 A. He did not.

9 Q. He did not wish to attend?

10 A. Correct.

11 Q. Khallad Bin'Attash, 608C, consisting again of three
12 pages, is that his signature that appears on the Arabic
13 version at page 2 of this document?

14 A. Yes, sir.

15 Q. Did he indicate that he wanted to attend today's
16 proceedings?

17 A. He did not want to attend today's proceedings, sir.

18 Q. Ramzi Binalshibh, 608D, consisting again of three
19 pages. Is that Mr. Binalshibh's signature on page 2 of this
20 document?

21 A. Yes, sir, it is.

22 Q. Did you deviate in advising him in any manner from
23 the form?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 A. No, sir.

2 Q. Did he indicate that he wished to attend?

3 A. He did not wish to attend, sir.

4 Q. 608E, consisting of three pages, is that Mr. Ali's
5 signature on the second page of this three-page document?

6 A. It is, sir.

7 Q. Did he indicate that he did not wish to attend this
8 morning's proceedings?

9 A. He did not want to attend today's proceedings.

10 Q. And finally, Mustafa Ahmed Adam al Hawsawi. Page 2
11 of that document has a signature. Is that Mr. Hawsawi's
12 signature?

13 A. It is, sir.

14 Q. And on page 3 there is also a signature.

15 A. Yes, sir.

16 Q. So he signed both in English and in Arabic; is that
17 correct?

18 A. He did.

19 Q. Did he indicate that he wished to attend this
20 morning's proceedings?

21 A. He did not wish to attend this morning's proceedings.

22 Q. Do you believe that all five of these men voluntarily
23 waived their right to attend today's proceedings?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 A. I do.

2 TC [MR. SWANN]: Thank you, Your Honor.

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

4 Does any defense counsel have any questions for this
5 witness?

6 It appears the answer is no.

7 LDC [MR. CONNELL]: Your Honor, objection to anonymous
8 testimony.

9 MJ [Col PARRELLA]: Thank you.

10 LDC [MR. CONNELL]: I'll accept a continuing objection if
11 the military commission wishes to grant it.

12 MJ [Col PARRELLA]: I will grant your continuing objection
13 and it is noted for the record.

14 LDC [MR. NEVIN]: And that will be for all of us,
15 Your Honor.

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

17 Captain, thank you. You may step down.

18 [The witness was excused.]

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

23 With that, we will now turn to the first issue to be

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 argued, AE 551. Mr. Connell.

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

3 MJ [Col PARRELLA]: Good morning.

4 LDC [MR. CONNELL]: Your Honor, AE 551 is Mr. al Baluchi's
5 motion to dismiss for the government's denial of a public
6 trial. On the docket this time is Mr. al Baluchi's third
7 supplement to AE 551, which contains updated data.

8 I think it is important to look at both the general
9 problem and then the specific problem for, say, this hearing,
10 and then talk about solutions, because those -- there are
11 solutions that are easily available to the commission.

12 The history of the case -- the history of the issue
13 is that early in the case we noticed that the government was
14 not releasing redacted versions of classified filings as -- as
15 the Regulation for Trial by Military Commissions seem to
16 indicate. We brought that to the military commission's
17 attention, and on January 29, 2013, the military judge ordered
18 the government to comply with R.T.M.C. paragraphs -- chapters
19 17 and 19. That's found at transcript page 1642.

20 AE 551 and its supplements document the government's
21 failure to follow that order and failure to provide the
22 government access to judicial records. There are significant
23 things that the government does do with respect to the public

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 nature of the trial. For example, it's my understanding that
2 the unofficial/unauthenticated transcript is produced either
3 at the request of the government or of the convening
4 authority; it's never been 100 percent clear to me. But that
5 is something that is very valuable and is not available in
6 every trial.

7 At the same time, however, judicial records are
8 exceptionally difficult to access for members of the public
9 who are concerned about issues of the military commission.
10 And judicial records are just as important an element of a
11 public trial as access to the courtroom itself, or access to a
12 transcript of the courtroom.

13 The original audit, which was prepared almost a year
14 ago now, in AE 551, showed that none of the 96 classified
15 filings in the year 2017 had been redacted and released to the
16 public as required. That was a rate of zero out of 97.

17 In 2017, the last complete year for audit, 182
18 unclassified filings were never posted; 26 were posted between
19 101 and 300 days delay; 135 were posted between 51 and 100
20 days delay; 66 were posted between 41 and 50 days delay; 101
21 were posted between 31 and 40 days; 201 were posted between 21
22 and 30 days -- which we used as a rough cutoff for 15 business
23 days, because 15 business days is approximately 20 calendar

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 days -- and 67 were posted between 16 and 20 days; and then
2 173 were posted between two and 15 days.

3 We used the government -- the numbers that I just
4 gave you are the government's numbers, because what happens
5 every time is because our audit necessarily happens earlier in
6 time than the government's audit, the government always comes
7 back and says no, no, they've made a mistake, in fact there
8 are more documents that have been released. Which is true
9 because, number one, we don't do -- conduct the audit on the
10 day that we file, and number two, we -- they have two weeks
11 afterward. So the numbers that I just gave you from 2017 are
12 the government's version of those numbers.

13 Redacted transcripts are an interesting story,
14 because at the time that we filed AE 551 on 2 February 2018,
15 only one of the 16 closed 806(b)(2) transcripts in the entire
16 history of the case dating back to 2012 had ever been
17 released. That is true even though all of the military
18 commission's orders for closing of trials always direct the
19 production of a redacted transcript and its release.

20 The lesson I will tell you to us, because all of
21 those -- the other 15 that were in 551 were put together and
22 released over a relatively short period of time in a redacted
23 format were providing a lot of insight to the public that they

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 didn't have for years and years, showing you the value of
2 bringing this sort of litigation -- or showing at least me the
3 value of bringing this sort of litigation.

4 Since filing AE 551, Mr. al Baluchi has continued to
5 update the record via supplements. In the third supplement
6 before the military commission today, I provided the following
7 updated data. From 2 June 2018, which was the end date of the
8 last audit, to 21 September 2018, there are 35 classified
9 filings and only one of which has been redacted and released
10 to the public.

11 From that same period there were 301 unclassified
12 filings, two were released to the public within one day; 12
13 were released to the public between two and 15 days; 44 were
14 released to the public between 16 and 50 days; 22 were
15 released to the public between 51 and 75 days from the date of
16 filing; 21 were released to the public between 76 and 102 days
17 from the date of filing; and 200 filings had not been released
18 at the time of the audit.

19 The government -- adopting the government's numbers
20 here, that 15 additional -- after we conducted our audit, 15
21 additional documents were posted and -- excuse me, 12 were
22 posted after the date of our audit, and then an additional 15
23 after the date of our filing. Using their numbers, meaning

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the best possible numbers, 97 of the 102 filings in that
2 audit. Date did not meet -- were not released within 15
3 business days.

4 So that's generally the problem, and that problem has
5 gotten worse over time. It was not as bad at the beginning of
6 the case. It has gotten much worse over time. But it brings
7 us to the situation of, for example, how little information
8 the public, including the victim family members who are here,
9 the observers who are here, the media who are here can have
10 about the proceedings here in this hearing.

11 In AE 602, the military commission listed 18 items
12 for argument or to put on the docket. Of those 18, ten of the
13 18, the base motion, like just the fundamental what is this
14 motion about, is not available to the public. That includes
15 ones which date back as far as 2013 in the case of AE 350C.

16 Of the eight motion series, which where the base
17 motion, is available to the public, in two of those, or 25
18 percent of those, the government's response, like their basic
19 position, their first position on the issue, is not available
20 to the public. And it's important for the public to have
21 access to all of the pleadings, but it's especially important
22 for them to have public access to the basic positions of each
23 of the two parties.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: Those pleadings you're referring to, I
2 do note that on this week's docket was a lot of classified
3 pleadings. Are these classified pleadings that have not been
4 redacted and posted or are these unclassified pleadings that
5 you're referring to?

6 LDC [MR. CONNELL]: They are both. I can go one by one if
7 you like.

8 MJ [Col PARRELLA]: No, just the general sense.

9 LDC [MR. CONNELL]: Right, but it's both. It's a mix. So
10 the -- some of them are classified that -- like, it's two
11 different rules which we are going to work through but it's
12 really, in my view -- and I know that Judge Pohl did not share
13 my view, and I will talk about that.

14 In my view there are really two separate, you know,
15 concerns. There are unclassified pleadings and how those get
16 processed and then there are classified pleadings which go
17 through a fairly sensitive redaction process before they can
18 be released.

19 MJ [Col PARRELLA]: And I have read the transcript and I
20 understand Judge Pohl ruled essentially there is only one
21 track and they all go through that one track, so we are really
22 talking about the 15-business-day rule applying to all of the
23 pleadings.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: That was his position, that's right.

2 And -- but -- that 15-business-day rule would apply
3 to both classified and unclassified pleadings, but for this
4 hearing we are talking about both classified and unclassified
5 pleadings. There's no clean break between the two.

6 The military commission issued 602E, which is a -- a
7 supplement, an amended docket order with four additional,
8 listing four additional motions for argument. Of those,
9 zero -- and all of those were unclassified, but zero of those
10 are available to the public.

11 What used to happen was that the government would put
12 pressure -- and they described this in their press statements,
13 when they used to give press statements -- they would put
14 pressure on whoever the decision-maker in this is to at least
15 get the documents available out to the public so that the
16 people who are traveling here at significant difficulty to
17 themselves for -- to observe an important event could at least
18 know, well, hey, here's the docket of what is expected to be
19 here. But that has not been released.

20 The -- so in order to address that problem, we -- and
21 I say myself and Mr. al Baluchi's team -- started unilaterally
22 producing an unofficial, annotated docket, where we would take
23 the clearly unclassified information about what motions were

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 going to be heard, and then we would put together -- we would
2 create our own document of it and label it clearly
3 "unofficial" so that nobody thought we were speaking for the
4 court or anybody else and put out to the public a document
5 which said here is what we expect to be argued, and then we
6 would put each of the pleadings that had been -- were
7 available, or each of the pleadings that had been filed, their
8 title, unclassified title under there, and then we would
9 hyperlink them to the website.

10 That was when there were enough pleadings that were
11 available for us to even -- for us to make that a meaningful
12 process. Now so few -- like I'm talking about -- I was
13 telling you earlier about what -- where the base motion is
14 available.

15 There are now so few pleadings which are available to
16 the public which are being argued that it became not a
17 valuable use of our time to produce that -- that unofficial,
18 annotated docket anymore. So now what we produce is what we
19 call a backgrounder, where we just basically generally
20 describe the issues which are expected to be heard by the
21 military commission, put links to base motions where, you
22 know, on the few occasions that they are available.

23 But what that means is that not only -- it's a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classic example of a second-order effect in that not only is
2 the amount of information available from the military
3 commission to the public declining over time, but the
4 second-order effect of that is that the amount of information
5 available from the parties to the public, unclassified
6 information from the parties to the public is declining over
7 time as a result of the degraded information that we are
8 getting from the military commission.

9 Now, what can be done about all of this? It is
10 entirely out of -- I don't know if -- I know it is out of my
11 control, I don't know if it is out of the military
12 commission's control or not -- to direct the government to put
13 more resources into compliance with the Regulation for Trial
14 by Military Commission.

15 It's obvious that that's a DoD function which doesn't
16 fall directly under the military commission. It's equally
17 obvious that the public nature of the military commission is
18 important to the proper functioning of the military
19 commission, and I would suggest that the military commission
20 would have authority in the same way that the military
21 commission already ordered the government to comply with the
22 regulation that it would have further authority to set
23 suspenses or sanctions or in some other way argue or order the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 government to comply with the regulation since it so
2 intimately touches on the legitimacy and public nature of the
3 military commission.

4 MJ [Col PARRELLA]: So on that, what are you suggesting
5 the commission do to incentivize, I guess -- because really,
6 we are not just talking about DoD equities, we are talking
7 about other equities -- so what authority does the commission
8 have to compel them to put additional resources against this?

9 LDC [MR. CONNELL]: Well, as in everything in the military
10 commission -- and this has been beaten into my head sir: The
11 military commission does not actually have authority to order
12 anyone to do anything. I understand that.

13 However, the regulations -- and I would like to walk
14 through those -- now actually include a sanction already in
15 them which is absolute authority. I want to answer the direct
16 question, then I want to walk through. But the direct
17 question is found in R.T.M.C. 17-1.d., and I'll -- and I'll
18 talk about that in its context right now.

19 So the military commission, the regulation for
20 military commission, which is in some ways delegation of
21 authority from the Secretary of Defense to different aspects
22 of, of the military commission system, there are delegations
23 of authority to the convening authority, a little bit we heard

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 about yesterday with their requirement that they coordinate or
2 talk to other elements of the DoD.

3 In 17-1 it talks about -- is delegation of authority
4 or creation of authority for different elements of the
5 military commission as well. For example, b. in 17-1
6 establishes a chief clerk and gives the chief clerk certain
7 responsibilities.

8 In c., 17-1.c., the Secretary of Defense directed
9 certain procedures, which I want to mention them here because
10 they are an important part of the public trial aspect of the
11 military commissions. And in c. the military commission --
12 excuse me, the Secretary of Defense directed that "For all
13 filings and orders other than those filed pursuant to Military
14 Commission Rule of Evidence 505," and then little 1. under c.
15 is "In which counsel know, reasonably should know or are
16 uncertain as to whether, the filing contains classified
17 information or other information covered by Chapter 19-3(b),
18 counsel shall submit the filing by secure means under seal
19 with the Chief Clerk and the filing shall be marked 'Filed in
20 Camera and Under Seal with the Chief Clerk of the Trial
21 Judiciary.'"

22 Now, the military commission does not follow this
23 regulation. In fact, it affirmatively abrogates this

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 regulation. A couple of examples.

2 The first one is that to me it seems an important
3 part, it's the entry into the public trial scheme which is
4 laid out here in the regulation for military commission that
5 there be an initial determination by counsel, and I mean
6 counsel for both sides, that things should be able to be filed
7 under seal. I'm not saying they can't be unsealed by the
8 military commission afterward, but there should be an initial
9 cut.

10 In fact, the whole reason -- one of the reasons in
11 Protective Order #1 why the defense got defense information
12 security officers is to assist with that initial cut, because
13 we all want to protect classified information. And both sides
14 should be saying, hey, look, to me this looks either
15 classified under what we know or we're not sure. That's where
16 the uncertain part comes in.

17 In fact, the military commission prohibits us from
18 filing -- will not accept unclassified filings using secure
19 means. So the military commission has entirely cut the "are
20 uncertain of" aspect, which also appears in Protective
21 Order #1, out of our ability to comply. So if we have a
22 pleading that we think -- you know, I'm 98 percent sure that
23 this thing is unclassified, but I don't always know how the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 words fit together, and I would like to file it marked
2 unclassified but filed on SIPR out of an abundance of caution,
3 that is not permitted.

4 We even saw an example of this in 555E from the other
5 side, from the government, where the government filed 555E,
6 the declarations from Secretary Mattis and Mr. Castle --
7 initially filed those under seal, which I considered
8 appropriate at the time because they didn't know what the --
9 what all the equities would be or what the military
10 commission's position on it would be, and so they were
11 uncertain of what protection needs to be happening, and they
12 filed it under seal.

13 They received a sharp rebuke from the military
14 commission for that, that they had not had permission to file
15 under seal. But, in fact, my sympathies were with the
16 government on that point. I thought that they were right to
17 file under seal, and then if the military commission wished it
18 could unseal, which it ultimately did. But it did so with the
19 implication that they had done something wrong in the first
20 place, which I did not agree with. And the reason is because
21 of this 17-1.c.1., because there is an initial cut that should
22 happen, an initial decision in good faith by both sides when
23 they file pleadings.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 The reason why that's important is that the -- it
2 is -- as I said, it's the entry point, but then we come to the
3 next sort of decision point in this process. And each of
4 these decision points in the process has become distorted over
5 the life of the case, with all due respect. And if we
6 comply -- if the military commission complied with the
7 regulation, I think an awful lot of these public trial
8 problems would go away.

9 So we've talked about the first one, that there
10 should be the ability to file -- when we're uncertain about
11 that, we should be able to file using secure means under this.
12 But if you go to item 3. under 17-1.c.3., the next part of the
13 regulation says that, "Once a filing is properly filed with
14 the Chief Clerk, the CSO for the Trial Judiciary shall
15 promptly examine the filing or document and, in consultation
16 with DoD Security Classification/Declassification Review Team
17 and any appropriate non-DoD federal department and agency,
18 determine whether the filing or document contains classified
19 information or any information covered by...19-3.b."

20 Now, this is the place -- this is the second place
21 where I believe the practice of the military commission and
22 certainly Judge Pohl's position diverges from the text. Judge
23 Pohl read this -- and I know that you've read the transcript,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 but I would like to make the argument anyway. Judge Pohl read
2 this to say that in consultation with DoD, with the SC/DRT, as
3 they say, in consultation with the SC/DRT meant that
4 everything had to be turned over to them for a full
5 classification review.

6 To me it seems that the intent, and really the text
7 of this document, when read in context of the rest of 17-1 and
8 19-4, is that there is essentially a second cut that takes
9 place. Counsel take their cut. They say, you know, we think
10 this is classified or we're not sure. I will tell you that in
11 actual practice, the classified documents receive very careful
12 scrutiny before they are filed. We often apportion several
13 hours for a filing, because they are very carefully
14 scrutinized before they are even, in the language of the -- of
15 the text, properly filed with the chief clerk.

16 But what does not seem to be happening then is that
17 the CSO can say yes, there is nothing of concern in here.
18 This is an order written by the military judge, not on a
19 classified topic, it is completely obvious that this is
20 unclassified, or the docket, which just lists other
21 information which is already clearly in the public domain and
22 was previously determined to be unclassified. There should be
23 able to be a cut of obvious unclassified material.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 If that were true, then that would radically decrease
2 the amount of burden on the SC/DRT for the documents that did
3 need classification review, because many documents do need
4 classification review. And I can imagine that there would be
5 a triage process where there are some that are obviously
6 unclassified, some that are obviously classified and need to
7 go for redaction and release, and then there are some that --
8 you know, it's a close call, or somebody doesn't know, and it
9 makes sense out of an abundance of caution for that middle
10 category to go to the SC/DRT as well.

11 But so many very obviously unclassified documents are
12 being, as far as I can tell, are being pushed to the SC/DRT
13 that they're overwhelmed and over time are not able to keep
14 up.

15 So the reason the support for that interpretation --
16 further support for that interpretation comes from
17 17-1.c.3.A., because c.3.A., let's say -- let me say for the
18 course of argument, for the purposes of argument that there is
19 ambiguity in the word "consultation with," but 3.A. tells us
20 that if it is determined -- and clearly that's a reference to
21 the CSO determination -- that the filing contains classified
22 information or information -- or protected information, the
23 filing or document shall be properly marked and provided to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the DoD Security Classification/Declassification Review Team
2 and any other appropriate agency who shall then review and
3 make appropriate redactions.

4 So it's clear -- that paragraph, Judge Pohl's reading
5 that there is no second category, that everything has to go to
6 the SC/DRT reads that paragraph out of existence. It's an
7 overly aggressive reading of the word "consultation," but it
8 leaves this part of the process that if it's determined,
9 meaning by the CSO, that it contains classified information --
10 and I'm willing to include uncertainty or abundance of caution
11 in that category -- then it should go to the SC/DRT, who then
12 under subsection b., that security classification review and
13 preparation of publicly releasable filing will be completed
14 within the timeline described in Chapter 19-4, and then under
15 Section 4 then posted on -- the publicly releasable version is
16 posted on the OMC website.

17 So that seems fairly clear, but it becomes even more
18 clear when we go to Chapter 19-4, referenced there in 17-1.
19 The subsection c. describes "...releasable filings and orders
20 shall be posted in accordance with the following timelines:
21 1. Filings and orders that do not require security
22 classification [sic] review under Chapter 17-1 shall be posted
23 within one business day of filing with the military

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 commission."

2 Now, what does that mean, "does not require security
3 classification review"? That's really a reference back to
4 17-1.c.3. that we just talked about, where there are two
5 tracks. There is an initial guess by the parties -- and it's
6 not really a guess by the government because they have their
7 own direct access to OCAs; it's not true for the defense, so
8 it's a little bit of a guess by the defense, but an informed,
9 educated guess. Then there is a cut by the CSO in case the
10 parties have made a mistake.

11 And at each point in that decision tree there should
12 be a separation between things which require security
13 classification review and those things that do not. Because
14 one of the ways that we know that is by 19-4.c.1., describes
15 the existence of a category of filings and orders that do not
16 require security classification review under Chapter 17-1.

17 The -- and then 2., 19-4.c.2., describes what happens
18 to the rest of the documents, that if it does require security
19 classification review, then that security classification
20 should be completed and posted within 19 -- within 15 business
21 days.

22 Now, the military commission asked me a question,
23 which is: What sanctions are -- or what options are available

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to the military commission given that -- its limited authority
2 to order people to do things. So I began this regulatory
3 argument with the reference to 17-1.d. And 17-1.d. provides
4 "Consistent with the requirement of Chapter 19-4 that filings
5 be publicly released, hearings on motions should not occur
6 sooner than 15 business days after the last of the filings
7 made in support of, or in opposition to, the motion. This
8 provision may be waived at the discretion of the military
9 judge if the interests of justice so require."

10 The clear implication of 17-1.d. is that it is within
11 the discretion of the military commission to decline to hold
12 hearings on motions where the pleadings have not been released
13 to the public. And there are -- I say "discretion," because
14 obviously this is a question in which the interests of justice
15 are a notoriously vague standard, and the military commission
16 would exercise its own judgment as to what that would involve.

17 If there's a situation where, you know, a pleading is
18 filed the week before, it might not be a situation in which it
19 would be appropriate to invoke this sanction, but if we're
20 talking about pleadings that have been around for well over
21 the 15-day business limit, and I'm not -- then it seems
22 that -- the one sanction which is obviously and textually
23 available to the military commission is to decline to hold

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 hearings on that particular motion.

2 I am sure that just like we see in other situations,
3 just like we saw with the filing of 551 and then the release
4 of 15 redacted classified transcripts, that that would
5 incentivize the appropriate parties to either resource the
6 SC/DRT more appropriately or, in conjunction with a direction
7 from the military commission, to follow the actual textual
8 regulatory process, that it would vastly reduce the burden on
9 the SC/DRT and they might be able to function more
10 appropriately within the resources that they have available to
11 them.

12 That's all I have, sir.

13 MJ [Col PARRELLA]: Okay. Thank you, Mr. Connell. I
14 don't have any questions for you at this time.

15 Ms. Radostitz?

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

17 MJ [Col PARRELLA]: Good morning.

18 ADC [MS. RADOSTITZ]: I'm not going to go into the kind of
19 finite little detail that Mr. Connell did, because he is way
20 better at that than I am. But I do want to address and
21 amplify a few points, and these are mostly really in response
22 to the government's pleading in AE 551G.

23 The government's essential argument is that it's the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 largest case in the history of the United States, and we're
2 doing the best we can, and we do it right 90 percent of the
3 time or maybe sometimes 95 percent of the time and even
4 98 percent of the time. But this is a capital case and
5 98 percent of the time is simply not enough.

6 The Supreme Court said in Gilmore v. Taylor, "the
7 Eighth Amendment requires a greater degree of accuracy and
8 fact-finding than would be true in a noncapital case." It
9 doesn't say that the Eighth Amendment says 98 percent is good
10 enough. It says that it requires accuracy. And in this case
11 the government's argument that they are doing the best they
12 can is not good enough because this is a capital case.

13 And I also would point out that that 98 percent is --
14 even if you use that percentage as a whole, but if you were to
15 drill down, what you would notice, it is that -- it is more
16 likely that a pleading that has anything to do with the thing
17 that they want to hide most, which is the torture committed by
18 the CIA and its allies, those are the motions that aren't made
19 public.

20 CP [BG MARTINS]: Your Honor, the government has no
21 notice, I don't believe, of any of -- do you have the filing,
22 Ms. Radostitz, where you have made these arguments and cited
23 these cases?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. RADOSTITZ]: I'm responding to your filing Mr. --
2 General Martins.

3 MJ [Col PARRELLA]: Let's go ahead and finish the oral
4 argument and, of course, government, you will have the
5 opportunity to present yours as well.

6 ADC [MS. RADOSTITZ]: Okay. Again, these arguments
7 directly come from a response to 551G.

8 They also in that pleading assert that these
9 proceedings are extraordinarily open to the public because
10 they have closed-circuit television proceedings around the
11 country, and that's a quote from their pleading. I'm from
12 Oregon, so a closed-circuit thing in Fort Meade and in
13 New York doesn't feel like "around the country" to me, and so
14 I think that that would be true for other people.

15 And I also would note that there are victim family
16 members and family members, and the public in general, around
17 the world who are interested in these proceedings, and the
18 barrier to them attending any -- any closed-circuit TV is
19 pretty high.

20 And I would also point out that to get to attend
21 those open hearings, the videoconference of those hearings,
22 you have to go to a military base and you have to present
23 government identification. And those are barriers, as we've

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 seen in a lot of the litigation around voting, those barriers
2 are higher for people of color and people who live in poverty.
3 And so that openness that the government wants to tout is
4 really not open to everybody, it's open to a narrow group of
5 people who have the ability to go to Fort Meade.

6 Another point that I would like to amplify is that
7 recently the court has -- the military judge has been deciding
8 motions just on the pleadings. Well, some of those motions
9 where the defense requested oral argument, they were decided
10 on the pleadings, but those pleadings aren't available to the
11 public. And so those pleadings in particular, the
12 government [sic] has no insight as to what happened because
13 they are not able to watch from the gallery, they are not able
14 to watch from Fort Meade.

15 The fourth point is that the website is actually zero
16 percent available for victim family members and others who
17 live outside the United States. You cannot reach the mcmil
18 dot -- wait, mc.mil website from outside the United States,
19 and that means that even those of us who travel
20 internationally and meet with witnesses, we cannot access the
21 website even on our government computers. It's blocked in a
22 way that makes it impossible for us to access the website, so
23 we can't go through a pleading with somebody unless we brought

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 it with us.

2 And one final note is that yesterday we had a witness
3 testifying, and he had before him a whole stack of documents
4 that he was using and looking at in order to talk about his
5 testimony. Many of those documents weren't available to the
6 people watching at Fort Meade or here in the courtroom because
7 they are not yet on the website. And so they were provided to
8 the witness presumably by the government, who has access
9 through different means, but they're not available to the
10 public.

11 MJ [Col PARRELLA]: Well, in a normal court there's
12 nothing that would require that documentation to be provided
13 the public either, would there?

14 ADC [MS. RADOSTITZ]: Well, but it would be available
15 through PACER generally in a federal case and through the
16 state court system the documents are available there for
17 anybody who wants access to them.

18 MJ [Col PARRELLA]: Well, you can refresh a witness'
19 recollection with almost anything, correct? So not always. I
20 understand your point, though. Thank you.

21 ADC [MS. RADOSTITZ]: Okay. And so finally, I want to
22 amplify around your question about the solution. And
23 Mr. Connell is right, you don't have a huge amount of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 authority to direct the government to do things, but you do
2 have two authorities.

3 One is you have the authority to abate the
4 proceedings. You could abate the proceedings and tell them
5 they need to catch up; and once they catch up, then we will
6 start proceedings again.

7 And as Mr. Connell suggested, you can also just say
8 here's the docket order that I propose, but anything that
9 doesn't comply with the rules won't be heard at those
10 proceedings, and so you issue a docket order. You usually do
11 it about a month before the hearing and that gives the
12 government three weeks to get in compliance. And when they
13 don't get in compliance, then you can just say we are not
14 going to have argument on those motions.

15 And I think, as Mr. Connell said, that would
16 incentivize and help the reviewers create a priority system of
17 what needs to be done, and hopefully then they can go back and
18 do the back -- the back work.

19 MJ [Co] PARRELLA]: So with respect to the -- you sort of
20 asserted that the government is purposefully not publishing
21 certain pleadings such as those related to the RDI program.
22 I'm not commenting on whether that's true or not. It seems to
23 me that a lot of that information has been made public by

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 other sources.

2 Has there been any attempt by the defense, by your
3 team, to specifically say we'd like this particular pleading
4 posted on the website, in other words, to set out a priority
5 list?

6 ADC [MS. RADOSTITZ]: There has not been, Your Honor.

7 MJ [Col PARRELLA]: Okay. And then understanding the
8 solution proposed by Mr. Connell, it seems that you're
9 endorsing sort of drawing a line, the court may be putting out
10 something that says these are the pleadings that we're going
11 to address at the next session of court, and, as such, the
12 government should focus their resources on that.

13 Should we -- should the commission then not also
14 prohibit I think what has been the current practice where
15 there's last-minute pleadings coming in from the parties,
16 because then the government -- the public wouldn't have access
17 to those?

18 ADC [MS. RADOSTITZ]: I think that there already is a
19 deadline and that can be enforced with regard to pleadings.
20 And a lot of times the supplements that are filed at the last
21 minute are filed because we get new information. And if that
22 information is coming from the government, then the
23 government -- then we can decide, should we move forward on

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 this or should we not? And so I think that there are already
2 rules about when the briefing cycle completes that can be
3 enforced in a way that maybe they haven't been before.

4 MJ [Col PARRELLA]: Okay. Thank you, Ms. Radostitz.

5 Ms. Bormann?

6 LDC [MS. BORMANN]: Judge, we join the arguments of
7 Mr. Connell and Ms. Radostitz.

8 MJ [Col PARRELLA]: Thank you.

9 Mr. Harrington?

10 LDC [MR. HARRINGTON]: No further argument, Judge, other
11 than joining.

12 MJ [Col PARRELLA]: Thank you.

13 Mr. Ruiz?

14 LDC [MR. RUIZ]: Judge, no additional argument. And my
15 understanding is that we are joined absent an affirmative
16 enjoinder, so ----

17 MJ [Col PARRELLA]: That's correct.

18 LDC [MR. RUIZ]: Thank you.

19 MJ [Col PARRELLA]: Trial Counsel? General Martins.

20 CP [BG MARTINS]: Thank you, Your Honor. And I apologize
21 for interrupting Ms. Radostitz. I was actually trying to
22 ascertain if she had a filing. Yesterday was the deadline for
23 any reply brief, and I simply want to make sure we can have an

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 opportunity to inform the commission of relevant responses to
2 new case law being cited and entirely new lines of argument in
3 the motion series.

4 Your Honor, this is now the third supplement to
5 Mr. Ali Abdul Aziz Ali's original filing. We have had -- this
6 is now the third oral argument, six total filings from the
7 main proponent of the motion, and by my gathering, no citation
8 at all to any binding authority or even persuasive authority
9 justifying the relief Mr. Ali seeks; and that is that the
10 proposition that a delay -- a temporary delay in the
11 publication of filings and transcripts entitles an accused to
12 dismissal or some kind of sanction.

13 I'm pleased to see Mr. Connell is now just deferring
14 to the government data. We have found more than just, you
15 know, cutoff-date-related errors in the -- in Mr. Ali's
16 filings, and find that there's an inflation and a skewing that
17 occurs in the way in which they compile them. We've gone back
18 and dutifully gone through all of this to try to find out
19 where delays that are happening are coming from.

20 We see as controlling authority the case law here,
21 Your Honor, Gannett Company v. DePasquale, the 1979 Supreme
22 Court case which held that a temporary delay in one of
23 multiple forms of access does not amount to closure of a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 proceeding.

2 The Supreme Court a year prior to that, in
3 Nixon v. Warner Communications, held that a public trial means
4 an opportunity for the public and press to observe and report.

5 And then in the Press-Enterprise II cases, which is
6 aligned with our Rule for Military Commission 806, is that
7 closure must be limited. There is a public trial requirement;
8 closure must be limited. And when closure happens, the
9 military judge must make specific findings and look for
10 alternatives and consider ways of limiting the amount of
11 closure to the minimum amount necessary with specific citation
12 in our Rule for Military Commission 806 to
13 classified-information-related closures.

14 Those are the main overarching cases.

15 The texts that are in our case with regard to rules,
16 we obviously have mentioned Rule for Military Commission 806.
17 A rule from the Regulation for Trial by Military Commission
18 Mr. Connell did not cite is paragraph 1.1, which states that
19 the Regulation for Trial does not create any substantive right
20 enforceable by the parties. There is a statement that the --
21 everyone should be seeking to apply the guidance and adhere to
22 the guidance, but it is important that there is no substantive
23 right. And this goes to your question of authority.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Your Honor, these are extraordinarily open
2 proceedings, by any measure. We use, as we go through this,
3 three different measures of openness. One is the percentage
4 of time in terms of hours and minutes, a fraction with the
5 numerator being the amount that are open and the denominator
6 being the total amount, open and closed; and that number is
7 over 98 percent. And we're getting up on 500 total hours of
8 sessions.

9 Another measure is number of -- percentage of words.
10 When you look at the transcripts and you do that same
11 fraction, the proportion is less than 98 percent, but it's
12 over 97 percent.

13 The area where we aren't as high as that is in the
14 area of transcripts and filings. And our last calculation of
15 that, based on the data we generated to respond to this third
16 supplement, is about 92 percent, and there are delays.

17 I'd like to turn to maybe some areas where there are
18 some agreements and, you know, kind of the way ahead. We do
19 see the need to comply. I think maybe one area of common
20 ground is trying to identify pleadings that ought to go ahead
21 of others. A lot of bandwidth has been dedicated to this in
22 the government, and I can state that there have been
23 additional resources just since I last orally argued a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 response to this on July 23, additional resources by the
2 classification review team.

3 But they've done -- you know, as of July they had
4 done a quarter million pages in this year, and the amount has
5 actually increased. That's anecdotal because I don't have the
6 precise page number, but that's what they report to me.
7 Trying to do things to use that bandwidth optimally, process
8 improvements, would be valuable.

9 The regulation does say there is a -- pleadings will
10 generally -- classification review will generally take
11 15 business days. And one source of the errors that we see in
12 the data that Mr. Ali offers is how you count that. The
13 classification reviewers, who have a lot of work to do,
14 measure that from when they get something in front of them;
15 and the chief clerk is the one to get that to them.

16 When that happens, that's when they start measuring.
17 And I'm not stating that they meet that even in a majority of
18 the time. You can see the specifics in our Attachment B to
19 this 551G. But if there were some way to make it not a
20 first-in-first-out effort with regard to these proceedings,
21 that could assist.

22 MJ [Col PARRELLA]: So, General Martins, I seem to recall
23 my predecessor was reluctant to be the one to step in and take

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 on that role. Do you have an alternate sort of solution on a
2 way forward?

3 CP [BG MARTINS]: Your Honor, I believe the docket is your
4 best, you know, check on what we're going to be doing the next
5 time, although you need to keep many degrees of freedom
6 because it is an adversarial process and things can push
7 different things to the front. I believe that is an
8 appropriate first-in -- or an ordering mechanism, priority
9 mechanism.

10 Again, I mean, there's this -- and I'm going to go to
11 another sort of process idea that relates to this -- this
12 handoff that's occurring and how to put things into the
13 system. But if that were ruled by the judge to be the
14 prioritization mechanism for this classification review team,
15 whether or not they get it in that order from the clerk --
16 that way, you know, the judiciary can be kept out of that
17 effort -- that could be a process improvement.

18 Your Honor, if I may, I'll direct you to the same reg
19 provisions that Mr. Connell was but sort of show you something
20 that could help here. The public access to commission
21 proceedings and documents chapter, Chapter 19 of the
22 Regulation for Trial, 19-4, talks about public release of
23 transcripts, filings, rulings, orders.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 This is -- and you've already mentioned this, but
2 paragraph 19-4.c.1. is a category that just isn't getting --
3 isn't populated right now, and this is again, this discussion
4 we have had with Judge Pohl over what that might be. So
5 filings and orders that do not require classification security
6 review shall be posted within one business day.

7 I'm thinking when I read that, you know, all of these
8 filings that are numbered 551-1, you know, the ones that are
9 purely administrative, yeah, you have leave to file out of
10 time, counsel, or you have -- you know, totally
11 administrative. Those kinds of things you would think are
12 part of that. Maybe even your dockets, other kinds of things
13 where counsel should pretty confidently know or with a quick
14 check with their security officer know that has no classified
15 in it. If you -- if you look at that category, we know from
16 the record of this motion that that's not being populated at
17 all.

18 And now I'm going to ask you to go back to
19 Chapter 17, which 17-1 is the motions portion of Regulation
20 for Trial by Military Commission. This category that's not
21 getting populated links in, Your Honor, with another paragraph
22 Mr. Connell was talking about, 17-1.c.3., and it's in that
23 first part of c.3. "Once a filing is properly filed with the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Chief Clerk, the CSO for the Trial Judiciary shall promptly
2 examine the filing or document and in consultation with the
3 DoD Security Classification/Declassification Review Team,"
4 et cetera, "determine whether the filing or document contains
5 classified information."

6 That -- that consultation process perhaps could be,
7 you know, it's not a formal clearance process the way the reg
8 is written, but it seems to me that could be a way to get
9 these administrative ones not using up bandwidth. Because if
10 it just gets fed in, it takes somebody's time up to look at
11 it.

12 Footnote 14 of our pleading has a -- what we think
13 may be a process improvement. This is not visible to us
14 because we don't see the interactions between the chief clerk
15 and, you know, handing off this stuff to the officer in charge
16 of the Classification Review Team.

17 But the -- that consultation in those 80 filings in
18 footnote 14, which we've heard from the Classification Review
19 Team were able to be done in one to two -- you know, very
20 quickly, because they, there was somebody who was
21 knowledgeable about the litigation weighing in and saying
22 this -- we're very confident this doesn't have anything in it.
23 That thing then isn't going through the entire apparatus of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classification review, which is everybody weighs in and it
2 takes up bandwidth through the whole chain.

3 MJ [Col PARRELLA]: So this footnote 14 I'm looking at,
4 this new, I guess, recently instituted -- when was that
5 instituted, General Martins?

6 CP [BG MARTINS]: Your Honor, we don't institute it, but
7 we think what it is -- what I understand it is, after talking
8 to the Classification Review Team, which I -- and I don't talk
9 to them about their interactions with the chief clerk unless
10 the litigation compels me to.

11 But the way I understand it is those are the ones
12 that are now not getting just put into the pipeline, those are
13 being given to the Security Classification Review Team OIC and
14 staff without going to what may be seen as the longest pole in
15 the OCA tent on a given filing, and that keeps them from going
16 sequentially, you know, sequentially through everybody.

17 And it's resulted in improvement. I don't know where
18 you slot that in terms of the regulation, whether it's in the
19 consultation or whether we have now started populating that
20 category that was not populated before, but it's promising and
21 it frees up valuable bandwidth that could be there.

22 Another -- another thought: Again, when I've talked
23 to the Classification Review Team, partly stimulated by this

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 motion here, is the filing of pleadings, all of them,
2 initially on the SIPR system that counsel have access to,
3 could prevent spills of the kind Ms. Bormann talked about
4 yesterday and happen and paralyze everybody because, you know,
5 then we're in a position of remediation and so forth.

6 If everything were to be filed on SIPR, it would
7 allow OCAs to move the stuff around quicker and review it. It
8 would -- so I think there would be economies and benefits
9 there, electronic movement of stuff, and it would prevent
10 those spills that are costly and difficult to deal with. And
11 I believe that could be a source of some -- some benefits in
12 the movement of these things through the system.

13 Your Honor, there -- there is a strange incentive
14 that can be created when we -- we focus on amount of things --
15 you know, percentages of things that are late and numbers of
16 filings that have not been provided. This has caused us to
17 look closer and go back and see if classified or closed
18 sessions have been reviewed, the transcripts have been
19 reviewed now and put up.

20 And as of just before this, 19 of the 20 had been
21 done. The last classified session we had was July 26, and I
22 just got word that that's about to go to the web posters to
23 post. There's value in us looking at this stuff.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 But there is a strange incentive, if you will, that
2 the more filings we put into this process, you know, the more
3 delays and more, you know, dings you are going to get on the
4 work of a lot of very fine people who are trying to get this
5 stuff up and to prepare these, what are extraordinarily open
6 proceedings, that right now are being looked at by
7 closed-circuit television in the United States, that are
8 subject here to a -- a compensating mechanism that Judge Pohl
9 emplaced with an order that is a 40-second delay that allows
10 us not to have to go into closed session more, that was one of
11 those measures that was duly considered with regard to
12 closure.

13 The transcripts that even Mr. Connell, granted, are
14 just not there. When you have same-day
15 unauthenticated/unofficial transcript that's a darn good
16 product, you know, we use it all the time and it's 90 to 95
17 percent or better accurate, tremendous people preparing that
18 every day. And then what's on the website is gratis. You
19 know, PACER is not.

20 This is an open proceeding. This is available. And
21 a perhaps shrinking or dwindling audience or interminable
22 pretrial proceedings, there were 60 media organizations that
23 covered the arraignment in 2012. That dwindling audience for

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 pretrial proceedings shouldn't be confused with a denial of a
2 public trial.

3 MJ [Col PARRELLA]: Thank you, General. I do have a
4 question for you. I mean, let's assume that I concur that
5 dismissal is not the appropriate remedy. I mean, the R.T.M.C.
6 is still there. I mean, I don't view the commission's role to
7 pick or choose which rules to apply. I mean, they should all
8 be applied.

9 So I certainly can appreciate, reading the
10 transcripts, the task that the government has in getting this
11 information through the security review team process, through
12 the OCAs, and understand that perhaps the 15-business-day rule
13 is somewhat aspirational but, on the other hand, it is the
14 rule.

15 So given how long this issue has been around, what's
16 the government's plan to get this thing closer to 15 days? In
17 other words, in terms of resource allocation, other than what
18 seems to be the solution, which really just shifts this burden
19 in large part upon the chief of the clerks, the trial
20 judiciary, and I'm not sure, you know, ability for additional
21 resources there.

22 But what's the government's long-term plan to sort of
23 maybe bring more people on to do this?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Your Honor, if I may, I mean, it
2 shifts -- these process things that I've talked about really
3 shift some of this triaging -- good word Mr. Connell used --
4 to people who are more knowledgeable of the case. Even
5 really, really good security classifiers/declassifiers who
6 have been around the case a lot can't do that with the way
7 litigants and the judge and his staff can do.

8 Again, I'm not talking about a very deep cut. If it
9 gets into any substance that you are a little concerned about,
10 don't use that category. So I just want to push back a little
11 on that. I don't think -- I don't think -- that's how you get
12 efficiencies, is you get comparative advantage and you look
13 for places where the people who are making the decisions are
14 better armed and have a better infrastructure of knowledge to
15 make it a much quicker thing.

16 And as I mentioned, Your Honor, there is an effort to
17 add more resources to this team, but it's not going to be just
18 numbers. It's got to be, you know, thinking about how to
19 apply these rules intelligently. It is something we take
20 seriously, although we have to note that it doesn't empower
21 anyone with a substantive right.

22 MJ [Col PARRELLA]: Can you be more specific, General,
23 about what that -- you said there is an effort under way. Is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 there any ability to provide specificity as to what that
2 effort is?

3 CP [BG MARTINS]: I've seen two additional individuals
4 where -- you know, directly applying themselves from the
5 Classification Review Team to this problem, and I understand
6 there are more. I just don't want to commit to that because I
7 can't get you numbers precisely, but it's going to need -- the
8 government's position is going to need to be a combination of
9 more -- more resources, but a better use of the ones we have.

10 And this can help. Because we want to stay away from
11 ex parte communications, and there are some things that make
12 this a little tougher than other things for us, as the United
13 States, to manage and to assist with. But I think we're,
14 again, achieving a lot of transparency.

15 And we are sometimes concerned about these
16 incentives, because, you know, you blow up the number of
17 pages, 400,000 in a year, you know, you're going to create --
18 you are going to self-engineer failure that way.

19 MJ [Co] PARRELLA]: Thank you, General Martins.

20 CP [BG MARTINS]: Yes, sir.

21 Mr. Connell.

22 LDC [MR. CONNELL]: Thank you, Your Honor. The
23 government, for understandable reasons, focuses on some

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 successes that have been had, and I think that I was honest in
2 my acknowledgment of some of those success. The stenographers
3 do incredible work. I'm sure that everyone in the process
4 works very hard. The government makes choices as to how it's
5 going to spend its resources, and I understand that.

6 One of those resources -- and I'm amazed every time
7 the government argues for -- that the public should not have
8 access to judicial records in a timely manner because they
9 have access to -- if they go to one of a limited number of
10 military bases they could watch. Because there is such a good
11 solution, right?

12 033A was our position on open trial, which is that
13 just put it on C-SPAN-4 or something like that. Just make it
14 open to the public. Let the public actually watch it if they
15 choose. But the government opposed that solution and they're
16 bound, and they have to live with what they came up with.

17 The government's primary legal argument is that a
18 temporary delay is not -- and access to judicial records is
19 not equivalent to a denial, which is true. But we're not
20 talking about an isolated or temporary delay. The government
21 has no refuge in the filings should generally take no later
22 than 15 business days to release, because we're not arguing
23 about technical compliance.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 We are talking about a collapse of the system, where
2 people who travel here to Guantanamo, or travel sometimes
3 across the country or even the world to view at a viewing
4 site, cannot know about the -- cannot read the pleadings. I
5 mean, you cut me off on 603 yesterday. Clearly within your
6 right to do that. You had already ruled on 603, though I
7 didn't realize it.

8 But that means that anyone who is interested in the
9 public trial issue of the identity of witnesses, which is a
10 First Amendment right as well as a -- of the public as well as
11 the defendant, can't even know as of this time either what we
12 argued, what the government responded or what you ruled.

13 It's a -- it's a series problem, and it's the answer
14 to the government's fraction argument that, you know, overall,
15 over the course of the past six years the government -- the
16 public has access to quite a lot of this material, which is
17 true. But they almost never have access to it at the relevant
18 time, which is critically important.

19 The judicial records themselves are just as much a
20 part of a public trial plan -- or the right to a public trial,
21 as the right to observe proceedings. And the government
22 strangely argued that we did not cite any cases.

23 I point the military commission to Nixon v. Warner

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Communications at 435 U.S. 589, a 1978 case which established
2 the principle that judicial records are part of the public
3 trial. We cited actually some of the GTMO cases in our brief
4 as well, regarding public access to cases regarding Guantanamo
5 detainees in the District of D.C.

6 The military commission asked a question earlier
7 about, well, what happens in a normal court? And even in
8 extraordinary courts, the process is that documents are
9 released to the public in a quite timely manner.

10 In the Manning case, with our esteemed colleague,
11 eventually the Army represented that it would post judicial
12 documents, what had been filed in the case, unless they were
13 classified within one to two business days, in an electronic
14 reading room. That's really the basis for the mandamus in
15 that case when it was -- when it was handled.

16 So this one-business-day rule, default rule that the
17 -- for unclassified information that the Regulation for Trial
18 by Military Commission establishes, although it predates that
19 decision in Manning, was not out of bounds. It was what the
20 Secretary of Defense thought was appropriate for
21 implementation of a public trial scheme.

22 The government, you know, for quite a long time now,
23 nine months at least, has talked about process improvements

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that it's working on. And I'm sure that it is. It says that
2 there have been some changes, and it does seem that the dash
3 number documents are being posted more quickly. And I'm sure
4 that that will have -- as I mentioned, I think that moving
5 obviously unclassified material into category 1 instead of
6 category 2 has a second-order effect of decreasing category 2
7 and using the same resources can move forward on that.

8 But they're wrong about the date of what should be
9 counted from, and they criticize our numbers for -- which I
10 accept only arguendo their numbers. But our numbers are
11 right, because they're count -- they are counting wrong.

12 19-4.c.1. says that the one business day is from, and
13 the government just read 19-4.c.1. to you, but they stopped
14 before they got to the end because they said within one
15 business day as if it were within the SC/DRT's discretion to
16 decide when that clock begins. But the regulation is actually
17 clear. The words after "one business day" are "of filing with
18 the military commission."

19 It is "filing with the military commission" that
20 starts the clock. And there is a reason for that. Internal
21 processes that are invisible within the DoD are no comfort to
22 the public when they can't follow the proceedings or even
23 understand what has happened in rulings that come without oral

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 argument.

2 The government makes the argument ad infinitum that
3 because I suggested that we should be able to file on SIPR in
4 accordance with 17-1.c.1. when we have uncertainty, which is
5 the same thing that the protective order says. I think
6 probably to try to oppose our argument because our argument
7 has such merit, they make the argument, well, you know,
8 everything should be filed on SIPR and that's an idea that's
9 been floated in the military commission since at least 2012.

10 I myself have been in, I don't know how many,
11 meetings with OSS and others, especially early in the case,
12 about going completely to SIPR as a solution, and it just does
13 not seem workable for a number of reasons.

14 But that doesn't take away the actual idea that we
15 should have authority to file on SIPR when we as officers of
16 the court or our DISOs as security professionals think that
17 there is uncertainty around a pleading, and the -- you know,
18 the close calls that we have to make, which happen
19 occasionally, is what generates those spills.

20 And if we had the opportunity, which is provided for
21 by the Regulation for Military Commission and Protective
22 Order #1 to file on SIPR when appropriate, I think that that's
23 a -- one important part of this public trial scheme.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 The last thing that I want to say, Your Honor, is the
2 military -- the government correctly noted that this is our
3 third supplement and we've filed a lot of pleadings on this,
4 and we will continue to make a record as long as such a record
5 needs to be made.

6 But if you don't agree with us, if you agree with
7 Judge Pohl's reading that there is no second category and that
8 this situation of lack of government access to -- public
9 access to judicial records is simply an inevitable result of
10 the work that we all have to do here, please just go ahead and
11 deny the motion so that we or the media or a nongovernment
12 organization can have exhausted our remedies in the military
13 commission and can seek appropriate relief from another court.

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

15 LDC [MR. CONNELL]: Thank you.

16 ADC [MS. RADOSTITZ]: Your Honor, just briefly I want to
17 talk really about the whole concept of filing only on SIPR
18 because it was raised by the government.

19 First of all, one thing I want to point out is that
20 the reason there are spills is because we don't have a
21 classification guide. We have asked for it for years. The
22 government refuses to give us it. Our DISOs do the best they
23 can with the information that they have, but if we had an

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 actual classification guide, that would solve that part of the
2 problem. And I am not saying it would solve it completely,
3 but I think there would be fewer spills if they would just
4 give a classification guide.

5 The second is that learned counsel for Mr. Mohammad
6 doesn't have access to SIPR. We have tried many times. He
7 does have a SCIF in Boise that he used to be able to go to to
8 look at documents. Recently the convening authority shut that
9 down and said he can't even do that. And so if all pleadings
10 were on SIPR, Mr. Nevin would have a barrier to being able to
11 read any of the pleadings. So that's not really a solution.

12 But I would also say that General Baker has been
13 working with the convening authority for months, probably
14 years to come up with a solution to help solve this, and a
15 solution that is secure and would reduce spills has been
16 proposed. They invited the government to participate in those
17 conversations regarding that solution, and the government
18 declined -- or the trial counsel declined. I guess the CA is
19 really part of the government, too.

20 So there are other solutions that would reduce that
21 aspect of it that are out there and that we have been
22 exploring on the defense side.

23 MJ [Col PARRELLA]: Thank you.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. RADOSTITZ]: Uh-huh.

2 MJ [Col PARRELLA]: Okay. At this time let's go ahead --
3 General Baker -- I'm sorry, General Martins, did you want to
4 be heard one more time?

5 CP [BG MARTINS]: Your Honor, two things briefly. Since
6 there was a request for relief that would be "don't have any
7 proceedings if you don't have the filings," I did want to
8 direct the commission, since you sought references in the
9 transcript pertinent to things you are deciding.

10 23 July 2018, unauthenticated/unofficial transcript
11 page 20075 to '76, Judge Pohl made the one ruling on this that
12 I recall, and it's reflected in there. He specifically waived
13 and said that he found the interests of justice required not
14 to wait litigation on this issue and, quite frankly, almost
15 any other issues that have been fully briefed simply because
16 it is not on the website.

17 And then I would just ask, Your Honor, please take a
18 look at the transcript of this and what Mr. Connell just said
19 about 19-4 and the government's interpretation of 15 business
20 days. I heard him say it. I was looking right at the words,
21 and I can't understand what he said because the business day
22 of filing with the military commission language attaches to
23 the one-day rule. The 15-day rule specifically does not have

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that in there.

2 And the government's position is that the reasonable
3 reading of that is when a security classifier gets the
4 document in front of them, that security review should take 15
5 days, business days, not the entire bureaucratic process of
6 getting it to him, getting it out of it. I think that's the
7 better reading. I just wanted to point out that his comment
8 actually misquoted what we were saying and the rule.

9 Thank you.

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

11 Mr. Trivett?

12 MTC [MR. TRIVETT]: Sir, I have an administrative matter
13 to deal with regarding classification guidance that you
14 sought.

15 MJ [Col PARRELLA]: Okay.

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

17 MJ [Col PARRELLA]: Good morning.

18 MTC [MR. TRIVETT]: So we have coordinated with the
19 original classification authority for the classification
20 guidance that you sought after the 505(h) hearing last week.
21 We have just provided a copy to the defense. We have not
22 filed it electronically. I do have copies, though, for the
23 commission if you would want us to give it to you for the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 record now.

2 MJ [Col PARRELLA]: Yeah, please.

3 MTC [MR. TRIVETT]: May I approach, sir?

4 MJ [Col PARRELLA]: You may.

5 MTC [MR. TRIVETT]: For the parties, that's going to be
6 350QQQ, which is unclassified/classification guidance
7 regarding the AE 350 series.

8 MJ [Col PARRELLA]: Thank you, Mr. Trivett.

9 Okay. At this time we will go ahead and take a
10 10-minute recess. The commission is in recess.

11 [The R.M.C. 803 session recessed at 1023, 14 November 2018.]

12 [The R.M.C. 803 session was called to order at 1043,
13 14 November 2018.]

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

17 We will now take up 528. Ms. Bormann?

18 LDC [MS. BORMANN]: It will be Captain Brady, Judge.

19 MJ [Col PARRELLA]: Thank you. Captain Brady, if you'd
20 just give me one moment.

21 Okay. Thank you.

22 ADC [Capt BRADY]: Good morning, Judge.

23 MJ [Col PARRELLA]: Good morning.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ADC [Capt BRADY]: I am Captain Brian Brady. I don't
2 believe I have appeared before you.

3 On AE 528, the issue that's pending before the
4 commission, it's an issue that is kind of an issue that we
5 have to address first before we can get to 528, it's 528F. So
6 Mr. Bin'Attash filed a motion to compel a witness, Mr. John
7 Kiriakou.

8 And, Judge, can I get the feed from Table 2? We had
9 slides that we provided to opposing counsel, all of the
10 parties, your CISO, and it has been cleared for court use. I
11 believe it has been marked as 528I.

12 MJ [Col PARRELLA]: You may.

13 ADC [Capt BRADY]: Thank you.

14 Judge, first on the motion to compel Mr. John
15 Kiriakou. Mr. Kiriakou is the chief of counter -- or was the
16 chief of counterterrorism in Pakistan back in 2002. In
17 February of 2002, Mr. Kiriakou and another individual went on
18 a raid to the Taliban embassy in Pakistan, Peshawar, Pakistan.
19 Mr. Kiriakou was there; they saw it was unguarded. They went
20 directly into -- they went directly into the embassy and
21 collected a number of records, a whole van full of records,
22 Judge.

23 And Mr. Kiriakou is relevant because -- well, first

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 we are going to talk about why he is relevant to the
2 commission; second, we're going to address the government's
3 filing and a number of the cases that the government cites to
4 actually support Mr. Bin'Attash's request for Mr. Kiriakou as
5 a witness; and third, we're going to address the difficulties
6 that our team has had and the interference of the government
7 in our investigation and our ability to get Mr. Kiriakou as a
8 voluntary witness, to avoid having to file this motion at all.

9 May I have the next slide.

10 In Mr. Kiriakou's book, *The Reluctant Spy*, this is a
11 photograph that's on one of the pages of his book. This is a
12 photograph of the van -- and actually, Judge, can I just
13 confirm that this is being broadcast to the gallery?

14 MJ [Col PARRELLA]: It is.

15 ADC [Capt BRADY]: I see someone's nodding their head.
16 Thank you.

17 Judge, this is a picture from Mr. Kiriakou's book *The*
18 *Reluctant Spy*. It is a photograph of the materials that were
19 seized from the Taliban embassy. And the text, or the caption
20 beneath the picture in Mr. Kiriakou's book reads that this is
21 one of the vans stuffed with materials. And it was the
22 materials -- in this material that Mr. Kiriakou found phone
23 bills showing dozens of phone calls from the Taliban embassy

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to numbers across the United States in the days and weeks
2 before September 11th. And in his book he highlights how
3 those phone calls continued up until September 10th, 2011
4 [sic], abruptly stopped just before the 9/11 attacks, and then
5 resumed in the days after September 11th, 2001.

6 Mr. Kiriakou is relevant to this case -- relevant for
7 our ability to argue 528 because he's one of two people who
8 can testify about what is contained in those phone calls, what
9 those phone calls were, how many of those phone calls, which
10 is in direct dispute by the government. Mr. Kiriakou ----

11 MJ [Col PARRELLA]: So how do you know that he would be
12 able to testify to all of this? Other than what he has said
13 in his book, have you had an opportunity to interview him?
14 Has he recounted that he has more information than what's in
15 here?

16 ADC [Capt BRADY]: That leads me to my next slide, Judge.
17 But before I get to the next slide, the government has
18 interfered with our ability to actually interview
19 Mr. Kiriakou. I'm going to get to that later in my argument.
20 But we did have an interview set up with Mr. Kiriakou to meet
21 with one of our investigators. But because of the guidance
22 provided by the government and the threats of prosecution from
23 the government, we had to cancel that interview based on the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 government not giving us assurances that defense counsel
2 wouldn't be arrested, prosecuted, thrown in jail. But ----

3 MJ [Col PARRELLA]: So the proffer you've made about his
4 expected testimony, is that just basically assumption then?

5 ADC [Capt BRADY]: I'm sorry, Judge, no. If I could have
6 the next slide, I think that will shed light on what his
7 testimony would be.

8 Now, Judge, he did an interview with C-SPAN. C-SPAN
9 does these book club or book interviews where they talk about
10 someone who has a recent book that's been released.

11 Mr. Kiriakou did this. He did this with C-SPAN TV. And this
12 is an excerpt from his interview that talks directly about
13 what Mr. Kiriakou would say if he were called to testify.

14 [Interview from AE 528I (WBA) played.]

15 ADC [Capt BRADY]: "That was the best lead we had while I
16 was in Pakistan," the quote from Mr. John Kiriakou, the chief
17 of counterterrorism in Pakistan for the Central Intelligence
18 Agency. Mr. Kiriakou has direct firsthand knowledge of the
19 bills, what the bills looked like, how many there were, that
20 they were in English, that the calls were to multiple cities
21 throughout the United States, the date ranges on which they
22 took place.

23 Mr. Kiriakou could take the stand and directly

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 contradict the government's counterargument to our pleading in
2 528, that there's not a lot to see, there's nothing to see
3 here, Judge. Mr. Kiriakou is necessary and relevant and is
4 one of the only witnesses who can testify to that.

5 It -- the Taliban phone records go to show the lack
6 of a thorough investigation that there are further leads out
7 there that could have led to more culpable people in the 9/11
8 attacks. It could be mitigating evidence, Judge. And as
9 well, it could show that the Taliban had a role in the 9/11
10 attacks, that they were a state actor, that Mr. Bin'Attash
11 could use to attack the personal jurisdiction of this
12 commission's jurisdiction.

13 But the calls and Mr. Kiriakou's testimony are
14 clearly relevant to this, Judge, but let's talk about the
15 government's pleading and the cases they cite to because they
16 actually help Mr. Bin'Attash.

17 One of the cases the government cites to is
18 U.S. v. Williams. It's a court of a military appeals case
19 from 1997 found at 3 M.J. 239. In that case the trial court
20 denied two witnesses to the defense. Now, the Military Court
21 of Appeals reversed holding that those witnesses' testimonies
22 about -- the witnesses' testimonies about their observations
23 and opinions formulated during those -- and this is a direct

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 quote -- that "their observations and opinions formulated
2 during those different periods of time is not cumulative in
3 any sense."

4 Mr. Kiriakou's testimony isn't cumulative. The
5 defense has been denied an opportunity by the government to
6 interview him. He is not cumulative with other evidence. He
7 is the evidence that refutes what the government says.

8 The government cites to Wagner v. U.S. It's a
9 federal court case. It's found at 416 Fed -- F.2d 558. It's
10 a Ninth Circuit Court of Appeals case, Judge, from 1969. In
11 that case the defense requested over 300 witnesses. We
12 requested one witness.

13 In that case the court instead permitted defense to
14 call 13 different witnesses and said that the others would be
15 cumulative. But the judge even allowed the defense to make
16 other requests for witnesses saying that if they made a
17 reasonable request, the judge would grant more than 13
18 witnesses for the defense. We are just asking for
19 Mr. Kiriakou, one witness, one of the only two witnesses who
20 has direct personal knowledge of what is in those phone bills.

21 The government also cites to Thompson v. U.S. It's a
22 Fifth Circuit Court of Appeals case from 1967. It's found at
23 372 Fed.2d 826. In there the court allowed the defense to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 subpoena two witnesses, but denied the third request. It was
2 the defendant's daughter in that case. But that was a very
3 unique situation.

4 The court denied it because the court had already
5 presided over the first trial. This is a retrial in the case,
6 so the judge already knew what the daughter was going to say
7 and already knew that her testimony would be cumulative with
8 the other two witnesses.

9 The defense in that case got two witnesses. The
10 government has denied us all witnesses, and by "all" I mean
11 the one witness we requested. And Your Honor hasn't heard the
12 testimony of Mr. Kiriakou, and clearly he's not going to be
13 cumulative with other witnesses in fact because we have no
14 other witnesses other than the one we have requested, Judge.

15 And let's talk about the defense -- the interference
16 with our investigation, Judge. This ties in with AE 524 that
17 you are going to hear about later today. But in January of
18 2018, our defense investigator ended up meeting and arranging
19 an interview with Mr. John Kiriakou. They met face to face.
20 They exchanged e-mails. They set up an interview for the 15
21 th of February 2018.

22 Based on Mr. Groharing's memos, the multiple changing
23 guidance on how we should approach witnesses who used to work

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 for the CIA, and based on General Martins' testimony in court
2 on Touhy regulations and citing to The Espionage Act and IIPA,
3 various federal statutes that we could be prosecuted for, we
4 sought assurances from the prosecution team that we wouldn't
5 be prosecuted, that we wouldn't be investigated, that our
6 clearances wouldn't be taken away, that we wouldn't be thrown
7 in jail.

8 You weren't a judge on this case at this time, but
9 last December all the members sitting in this courtroom, minus
10 a few new faces, were all investigated with our clearances
11 based on one filing that I don't think anyone in this
12 courtroom actually submitted. We all had our clearances put
13 in jeopardy, had a black mark on our record for our clearances
14 in future jobs. So Mr. Bin'Attash's team, probably almost in
15 direct conflict with Mr. Bin'Attash's best interests, sought
16 to have assurances from the government.

17 MJ [Col PARRELLA]: Captain Brady, I'm just going to,
18 because I want to stay in good graces with the court
19 reporters, ask you just to slow down. Thank you.

20 ADC [Capt BRADY]: Yes, sir.

21 Mr. Bin'Attash's team, Mr. Perry, sought assurances
22 from General Martins and from Mr. Trivett, the managing trial
23 attorney on the team, to ensure that we wouldn't be prosecuted

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 and to ensure that we wouldn't have our clearances taken away
2 from us. We received no answer from them.

3 As a result, after pinging them on the 5th and also
4 pinging them on the day or two before the 15th of February, we
5 had to cancel the interview with Mr. John Kiriakou. And as a
6 result of our memo being sent to the prosecution, they then
7 went to the CIA and had the CIA send Mr. Kiriakou a letter.

8 Now, Mr. Kiriakou has been -- served time in prison
9 because of a classification issue in his past, so
10 Mr. Kiriakou, upon receiving this letter from the CIA warning
11 him about potential penalties and warning him about disclosing
12 classified information, limited the scope of what he could
13 talk to us about. And then miraculously in May he canceled
14 any and all attempts to interview and meet with our defense
15 team.

16 And now we're in a position where the sole -- one of
17 the two witnesses to this event, someone who has direct
18 evidence that contradicts the government's -- what the
19 government's assertions are and someone who has direct
20 personal knowledge of this best lead we ever had while he was
21 in Pakistan, someone who could testify about that lead and how
22 the government never followed up on that lead, we can't have
23 access to that. And now we have to ask you, Your Honor, to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 compel this witness so we can talk to them on the stand cold
2 without any preparation in order to be able to prove our
3 motion.

4 MJ [Col PARRELLA]: Captain Brady, didn't the court or the
5 commission previously rule that the issue of hostilities
6 between the United States and the Taliban is not relevant? I
7 think it was 564E, and it was a relatively recent ruling from
8 August of this year?

9 ADC [Capt BRADY]: I can't speak to that directly, sir,
10 but certainly the thoroughness of the investigation is a key
11 issue. The government's ability to investigate to find other
12 individuals that could be more culpable than Mr. Bin'Attash
13 would be relevant.

14 And also certainly in mitigation. I mean, this is a
15 death penalty case, sir. Mr. Bin'Attash, the government is
16 seeking to execute him. And mitigation is very wide and very
17 broad under the rules.

18 The ability to show that a foreign government was
19 culpable and the United States Government had information
20 about the culpability of the Taliban's government and didn't
21 investigate that would certainly be something we could present
22 in mitigation.

23 Judge, may I have a moment?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: You may.

2 ADC [Capt BRADY]: And, Judge, I haven't specifically -- I
3 can't address 564E just because all our files have been
4 trashed because of the mold issue because our offices are
5 essentially uninhabitable.

6 If we could take a break, we could be able to go back
7 to our offices and print them. We have only printed the
8 motions that are on the docket call for this set of hearings.
9 I am happy to address your question directly on that, but
10 certainly there are other relevant issues from Mr. Kiriakou's
11 testimony that we can address.

12 MJ [Col PARRELLA]: Okay.

13 TC [MR. SWANN]: Your Honor, I can give him a copy of 564E
14 and he can take a look at it right here and now.

15 MJ [Col PARRELLA]: I think the essence of what I'm
16 asking is -- and you can just take me on my word on this --
17 the commission has previously ruled that hostilities between
18 the United States and Taliban is not relevant.

19 So that was the essence of the question is, is in
20 light of that, it's almost you are asking the commission to
21 reconsider, because that's at least a portion of the basis for
22 your requested relief in 528. Now, I understand there are
23 other bases as well, other theories, some that we don't need

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to get into right now. But that was the essence of the
2 question.

3 ADC [Capt BRADY]: And without having time to actually
4 read through the entirety of it, but for mitigation purposes,
5 Judge, we certainly could present evidence that there is a
6 foreign government, that there are leads from the United
7 States about -- that were obtained in 2002 about their
8 involvement, and the United States Government never chose to
9 follow up on that, never chose to analyze those calls, never
10 chose to look for the people who could potentially be in the
11 United States that assisted in the September 11th attacks.

12 And Mr. Kiriakou is a witness who could tell you,
13 Your Honor, what specifically was in those calls, how many of
14 them there were, and the dates they started and stopped.

15 But if I could just have an opportunity to review
16 this and get back to you, Judge. If we may have a five- or
17 10-minute recess?

18 MJ [Col PARRELLA]: I don't think that's necessary,
19 Captain Brady, so let's go ahead and proceed. And I am going
20 to sort of direct us kind of where the focus is, because I've
21 read all the pleadings in this.

22 As I understand it, the government has provided some
23 of these phone records to the defense; is that right?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ADC [Capt BRADY]: They have, Judge. They originally
2 provided copies that were illegible. They then subsequently
3 provided legible copies, but they are not the entirety of the
4 calls. There's only a couple or a few calls to the United
5 States. Mr. Kiriakou in the audio -- but if you were to grant
6 him as a witness would be able to testify to the number, and
7 that it's much more than the government is putting forward.

8 That's essentially the controversy in the case right
9 now. The government is saying we've given you everything
10 there is, there is nothing more to see here, and Mr. Kiriakou
11 is in direct conflict with that. That's why the judge --
12 that's why the cases cited to by the government in their own
13 pleading help us. They say that someone who has direct
14 observations and personal knowledge about what is at issue
15 should not be denied to the defense.

16 MJ [Col PARRELLA]: Okay. So as I read the defense's
17 request, it's -- what you're asking for are now the related
18 documents, the documents that, if they exist, indicate that
19 someone in the United States Government analyzed those phone
20 records, what came of that analysis. Is that a correct
21 statement?

22 ADC [Capt BRADY]: That is correct, Judge.

23 MJ [Col PARRELLA]: Okay. So given what you've received,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 what have you done with it? In other words, based on the
2 information you've received, has there been any sort of
3 analysis conducted by the defense that led you to believe that
4 there's relevant information still out there?

5 ADC [Capt BRADY]: And, Judge, we've been given four of
6 168 calls. Mr. Kiriakou in his book talks about 168 calls.
7 We've received four. Four is not the entirety of it.
8 Mr. Kiriakou would be able to dispute that.

9 And the defense is certainly in a posture where we're
10 low on resources, Judge. We don't have the hundreds of people
11 that work for the prosecution, the entirety of the FBI, the
12 entirety of the DoJ.

13 MJ [Col PARRELLA]: Well, since they only gave you four,
14 it seems like they've made it a somewhat easier task for you
15 now. So based on the four they gave you, have you analyzed
16 those four and has that analysis led you to believe there is
17 relevant evidence?

18 ADC [Capt BRADY]: Judge, we've given that to our
19 investigators, and they are in the process of doing that,
20 following up leads and looking into those calls. But they're
21 not the entirety of the calls. There is 168 of them and they
22 have given us four. And that's why Mr. Kiriakou is necessary,
23 because he is going to dispute the government's assertion that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 these are the entirety of the calls at issue.

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

3 ADC [Capt BRADY]: May I have a moment?

4 MJ [Col PARRELLA]: You may.

5 [Pause.]

6 ADC [Capt BRADY]: And, Judge, just to correct, we have
7 followed up on the four calls they gave us. The numbers
8 aren't in service because of the length of time. We requested
9 this discovery back in 2016. It wasn't until 2017, 13 or 14
10 months later, that we got the calls. But we did send a
11 defense investigator out to investigate. We are continuing to
12 do that, but the numbers are dead ends.

13 The 168 calls, if they were given to us -- or, excuse
14 me, the 164 remaining calls that Mr. Kiriakou would testify
15 about, we would follow up on those just the same and do our
16 due diligence that the FBI didn't do when the calls were given
17 to them.

18 Subject to your questions, Judge.

19 MJ [Col PARRELLA]: No questions. Thank you,
20 Captain Brady.

21 Trial Counsel?

22 TC [MR. SWANN]: Your Honor, I have every intention this
23 morning of grounding my argument in reality. I will address

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 both the discovery issue and the Kiriakou issue so that we can
2 finally lay to rest this entire motion 528. That's what I
3 believe that you require in your docket, and so I will
4 proceed.

5 AE 528 was filed on 23 October 2017, a little over a
6 year ago. Our response is dated -- 528C dated
7 8 November 2017. Mr. Bin'Attash's reply is dated
8 27 November 2017. Mr. Mohammad declined joinder, and no one
9 else has filed briefs in this case.

10 Now, this briefing cycle was complete as of 24 --
11 27 September 2017, and was ready for argument at that time.
12 On 2 February 2018, counsel for Bin'Attash filed a motion for
13 leave to supplement, again delaying the argument of this
14 motion, claiming that John Kiriakou had agreed to be
15 interviewed on 15 February 2018, but because of government
16 inaction, counsel for Bin'Attash had to delay their interview.

17 That supplement was followed up on 26 February 2018.
18 In it they sought assurances from the United States that they
19 would not be investigated or prosecuted for speaking with
20 Mr. John Kiriakou.

21 Then on 30 April 2018, counsel sought to receive
22 permission to file a second supplement. On 13 April 2018,
23 before that second supplement, an associate general counsel

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 wrote to Mr. Kiriakou, telling him that they did not want to
2 impede his investigation or his interview with the defense,
3 and simply reminded him that the discussion should be limited
4 to their inquiries regarding the phone calls and should not
5 stray into other discussions unless he received further and
6 appropriate guidance.

7 On 22 June, the defense requested that we produce
8 Mr. John Kiriakou after he declined to be interviewed by them.
9 We denied their request on 3 July, which is Attachment C to
10 AE 528F, dated 20 July 2018.

11 Now, their brief did not include, it did not include
12 the letter that Mr. Kiriakou had sent to the associate general
13 counsel and to the defense in this case. So we included that
14 letter in our response of 528G dated 3 August 2018. That
15 letter lays waste to what Captain Brady has told you this
16 morning.

17 The prosecution did not do anything to prevent their
18 interview. In fact, Mr. Kiriakou says, and I quote, This is
19 the first time I have heard that I agreed to be interviewed,
20 and I have never been contacted by anybody associated with
21 this case. I decline to be interviewed, and indeed have never
22 been contacted by anybody associated. And if any of the
23 attorneys concerned reach out to me, I decline their request

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 for interview. I am represented by counsel.

2 Now, our response to that led to a defense reply
3 dated 10 August 2018. And as best as I can tell, Your Honor,
4 based on your guidance earlier in this week, this matter has
5 not been previously argued; it has just been put off time and
6 time again.

7 Now, counsel suggests that these phone records that
8 tie directly to the crimes charged really give us no inkling
9 as to how, other than the Taliban harbored bin Laden, and that
10 on 10 September 2001, lasting until 16 September 2001, phone
11 calls from the embassy mysteriously stopped, so that others
12 must have been involved.

13 On page 2 and 3 of their brief they conclude that
14 these phone records, found five months after the deaths of
15 nearly 3,000, potentially implicates other individuals or
16 foreign governments in the attacks. There is no evidence of
17 this.

18 On page 3 of their brief, they show a picture of
19 material taken from the Taliban embassy; you saw that picture
20 this morning. And now citing to the book by Mr. Kiriakou,
21 they claim that the phone records were never analyzed. That
22 is not true. Counsel know that that is not true.

23 They were provided with an analysis by the Federal

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Bureau of Investigation for the records that we provided them.
2 We provided them records from the August 2001 time frame until
3 after this period of time when they claim that the phone calls
4 stopped.

5 There were at least two analyses of those records,
6 and in that analysis they did identify individuals in the
7 United States. These individuals, quite frankly, had been
8 identified and contacted by the FBI doing their work to
9 preserve the safety of our nation within days after the
10 September 11th attack. I did not hear Captain Brady tell you
11 that this morning. They have those records. They have that
12 analysis.

13 MJ [Col PARRELLA]: Mr. Swann, just so I understand, the
14 reason the government chose to give specifically those four is
15 that those pertain to the time frame; is that correct?

16 TC [MR. SWANN]: The time frame because of their -- their
17 indication that there was something sinister about the fact
18 that phone records -- the phone calls stopped from the embassy
19 from the 10th to about the 16th of September.

20 Now, I'll say this. Those phone records were not
21 given to the defense because we believe that they were
22 relevant. We believe that the best thing to do in this
23 instance, in order to avoid further delay and further

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 litigation on this particular issue -- because those records
2 were readily obtainable, we just went ahead and got them. We
3 went ahead and gave them to them at that point in time. We
4 went ahead and gave them the analysis of those records for
5 that period of time.

6 So I would say the following: The records are not
7 relevant. The law says that we've got to disclose to the
8 defense the existence of evidence known to the trial counsel
9 which reasonably tends to negate the guilt of the accused of
10 an offense charged, reduce the degree of guilt of the accused
11 of an offense charged or reduce the punishment, citing
12 United States v. Graner at 69 M.J. 104, 107 C.A.A.F. 2010.

13 "Relevant evidence means evidence having any tendency
14 to make the existence of any fact that is of consequence to
15 the determination of an action more probable or less probable
16 than it would be without evidence."

17 Now, we gave them a reasonable analysis of the phone
18 records produced. We did that with the assistance of the FBI.
19 And again I tell you that that analysis lays waste to this
20 notion that there were no phone calls during that six-day
21 period of time around 9/11.

22 There were -- my analysis -- there were at least a
23 couple of the Taliban phone calls during that embassy, and

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 while there weren't a lot, it might be, probably is -- but the
2 Taliban embassy was closed during that period of time, as were
3 most of the embassies around the world because of the attacks
4 that took the lives of 2,976 across this nation.

5 Now, no one -- with respect to the illegibility, they
6 have the records they wanted. They came back and said they
7 didn't find them to be particularly legible. We did our best
8 to make a second copy of those. And then we went so far as to
9 say, "Listen, if you want to bring your high-resolution camera
10 down and take pictures of these phone records, go for it." We
11 were willing to go that one step extra to give them what they
12 thought they were entitled to.

13 Nobody on this side misunderstands our discovery
14 obligations. We know what they are.

15 MJ [Col PARRELLA]: Mr. Swann, so -- and I understand the
16 government's position that they turned these over without
17 conceding that they are relevant. I've heard that there is
18 168; four were turned over.

19 Is the 168 the correct total number that the
20 government had?

21 TC [MR. SWANN]: What I heard -- what I heard based on
22 what was here and what Kiriakou wrote was that he thought or
23 claims, based on talking to another individual, that there

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 were 168 phone calls throughout the period of time prior to
2 the September 11th attacks. We gave them the month before,
3 the month after, around that time frame.

4 You know, if something sinister was going on by
5 people in the United States, it would have been during that
6 period of time as they built up to the actual attacks
7 themselves.

8 So we gave them what we believe that they were
9 actually seeking.

10 MJ [Col PARRELLA]: So with respect to the analysis that
11 you've referred to, you've indicated you did give them an
12 analysis. Is that ----

13 TC [MR. SWANN]: For that period of time, sir.

14 MJ [Col PARRELLA]: Is that made part of the record,
15 though?

16 TC [MR. SWANN]: No, sir, because it's a classified
17 document, rather than having to put another piece of paper in
18 there. We did not go through the 505 process. We went
19 through and conducted a relevance determination. My
20 recollection is what we removed was simply FBI case file
21 numbers.

22 But those -- that analysis lists the phone numbers
23 and who they talked to regarding why is it that you are

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 calling the Taliban in the United States -- or from the United
2 States, and it went back and forth. The defense has all of
3 that.

4 And like I say, with respect to those individuals
5 that were identified in the telephone records, the FBI had
6 already identified those folks and had actually conducted
7 interviews within days after the September 11th attacks, thus
8 proving that those individuals had already been set aside as
9 having no involvement in the 9/11 attacks.

10 LDC [MS. BORMANN]: Judge, I'm sorry. Mr. Swann seems to
11 be testifying. There is no evidence of that.

12 MJ [Col PARRELLA]: Okay. So -- hold on one second. So
13 this is oral argument. So, Counsel, if you have a basis to
14 object, I just ask that you stand up and object and state the
15 basis.

16 LDC [MS. BORMANN]: Sure. Objection. There's no basis
17 for the argument.

18 MJ [Col PARRELLA]: Okay. Well, it's argument, and I'll
19 take it for what it's worth, and Captain Brady will have an
20 opportunity to stand back up and clear up that point.

21 All right. Mr. Swann, anything else?

22 TC [MR. SWANN]: Yes, Your Honor, just a couple of more
23 minutes here.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 So 17 years ago men fly planes into buildings. A
2 national commission stands up to conduct an investigation.
3 And having read all of that and what's occurred over the
4 years, we have never seen anything that would indicate that
5 the Taliban were responsible for these attacks. It was these
6 men and their association with al Qaeda.

7 With respect to 564 that you addressed further, I
8 think the court has already addressed that issue. I won't
9 have anything to say about that.

10 So we request that you deny the portion of the motion
11 regarding the discovery.

12 Now on to the Kiriakou aspect of this. As for the
13 request for Mr. John Kiriakou, that should also be denied.

14 Who is John Kiriakou? Just after this interview that
15 was played this morning, Mr. Kiriakou was indicted. He was
16 the first person in 27 years convicted for violating the
17 Intelligence Identities Protection Act. His conviction was
18 actually triggered by events in this case.

19 The gist of his crimes were that he was convicted of
20 lying to the Federal Bureau of Investigation for having
21 contacts with a journalist and providing journalists with the
22 name of a covert CIA person.

23 At his sentencing hearing, Judge Brinkema of the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Eastern District of Virginia, and who is the same judge who
2 presided over the Zacarias Moussaoui trial, said of
3 Mr. Kiriakou that he, quote, was convicted of betraying a
4 solemn trust and endangering CIA personnel and the CIA's
5 ability to collect evidence.

6 On page 4 and 5 of their brief, the most recent
7 brief, we lay out what the law is with respect to relevant
8 testimony. His testimony is neither relevant and is certainly
9 cumulative, cumulative, again, by what he said on this
10 interview this morning. So that request for his production
11 should be denied.

12 One final note. We have done nothing to prevent the
13 defense from interviewing Mr. Kiriakou. The circumstances
14 that they describe, that somebody walks up to Mr. Kiriakou at
15 a book signing and somehow says, "Hey, I'd like to interview
16 you in the future," and then they subsequently reach out to
17 Mr. Kiriakou. And then the agency reaches out to Mr. Kiriakou
18 and says, "Yeah, you can talk about the phone records. You
19 can talk about what you did on that particular day. That's
20 all within your book. That's fine. Go ahead."

21 Yet when Kiriakou gets that letter, he sends a letter
22 back to us -- and it's in our pleading, not in theirs -- he
23 sends a letter back to us that is delivered to them that says,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 "I never agreed to an interview. I don't want to talk to
2 them, and I have an attorney." That clarifies that issue.

3 Subject to your questions.

4 MJ [Co] PARRELLA]: No questions, Mr. Swann. Thank you.

5 So I believe Mr. Swann pointed this out already, that
6 a few of the parties have disjoined from this pleading, but I
7 did not specifically ask whether the remaining parties had
8 anything to offer, so I will do so. I would assume that if
9 they had wanted to argue, they would have stood up.

10 But, Mr. Harrington or Mr. Mr. Ruiz, do you care to
11 make argument on this motion?

12 LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh,
13 we do not have any argument.

14 MJ [Co] PARRELLA]: Thank you, Mr. Harrington.

15 LDC [MR. RUIZ]: No, thank you, Judge.

16 MJ [Co] PARRELLA]: Thank you, Mr. Ruiz.

17 All right. Captain Brady.

18 ADC [Capt BRADY]: If I can just briefly clear some things
19 up, Judge. The reason why we didn't attach the letter from
20 Mr. Kiriakou to the CIA was because he sent it to the CIA, not
21 to the defense counsel, so it is impossible for us to actually
22 attach it.

23 Mr. Swann makes it seem like Mr. Kiriakou had no

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 intention of ever meeting with defense counsel. I'd direct
2 your attention, Judge -- and I know you read the pleadings,
3 but if you want to reread Attachment B to 528 (WBA Sup), it's
4 a declaration by our defense investigator Mr. Joe Bond.

5 He talks about how on January 8 he was -- he, at a
6 book signing, approached Mr. Kiriakou, talked with him, got
7 him to sign his book. He actually attaches a copy of that
8 signature page, where Mr. Kiriakou signs a copy of the book
9 that Mr. Bond bought that day. Mr. Bond then lays out the
10 numerous different times they communicated back and forth.

11 Mr. Bond identified himself as a member of the
12 defense team. He specifically says, "I'm Joe. I'm with the
13 defense team in the Office of Military Commissions." He
14 identifies himself as a defense team member.

15 He then has multiple times where he's communicating
16 with Mr. Kiriakou. They set up an interview to take place at
17 a coffee shop in D.C. on the 15th of February. And as
18 Mr. Swann said that this interview was then canceled after the
19 CIA kindly reminded him of all the statutes that he could be
20 prosecuted for and be imprisoned for. And then Mr. Kiriakou
21 then informed the defense team that he was no longer willing
22 to meet. This is the government interfering with the defense
23 investigative function.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Our team would never have had to go to the
2 prosecution and ask permission to talk to a witness. In no
3 federal or state court does the defense have to request
4 permission from the prosecution to go talk to a witness that's
5 relevant to the defense. In this case because of veiled
6 threats, comments about Espionage Act, IIPA, and various
7 things, us being worried about being put in jail ourselves, we
8 had to go to the prosecution and getting assurances.

9 And that's why Mr. Kiriakou ended up declining
10 interviews, because the prosecution then got the CIA involved,
11 which sent him this letter kindly reminding him of all the
12 statutes that he could be prosecuted for.

13 The July calls, Mr. Swann went through the timeline,
14 but I didn't hear him mention that the calls were given to the
15 defense, those four calls with the one call that was
16 analyzed -- not the 168 calls, but just the four, were given
17 to us in July of 2018. That's why we filed another
18 supplement, and that's why we asked for Mr. Kiriakou.

19 We now were given new information in the weeks before
20 a hearing that was set in July. We had to file a supplement.
21 And that's why we are here arguing this before you today,
22 Your Honor, because of this new discovery that was given to us
23 by the government. Just like they gave us new discovery on

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 520, 538, just like they do every set of hearings, giving us
2 hearing -- giving us more and more discovery in the middle of
3 a hearing where we're going to discuss a motion.

4 All of the argument between Mr. Swann and myself
5 about Mr. Kiriakou, what he would testify to, how he's
6 incorrect, how he's mistaken, how there's all this controversy
7 around these calls, demonstrates to Your Honor why he is
8 necessary to clear this up. Put him on the stand, Judge.
9 Let's hear from Mr. Kiriakou.

10 Mr. Swann wasn't there in Pakistan. I wasn't there
11 in Pakistan. You weren't there in Pakistan. Put him on the
12 stand. Let's hear what he has to say. How many calls were
13 there? How important were they?

14 Why does the chief of counterterrorism in Pakistan
15 for the Central Intelligence Agency, less than six months
16 after 9/11, say that this is the biggest thing he's found?
17 That's a huge fact, Judge. Why is he so adamant about this
18 that he puts it into his book, that he puts a picture in his
19 book, that he talks about it on C-SPAN?

20 This is a huge piece that can clarify the controversy
21 that's at issue in this case. We would ask for you to compel
22 him.

23 May I have a moment, Judge?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: You may.

2 [Pause.]

3 ADC [Capt BRADY]: And certainly, Judge, we want the
4 analysis for those 168 calls, not just the one call the
5 government has given us.

6 Subject to your questions.

7 MJ [Col PARRELLA]: No questions. Thank you, Captain
8 Brady.

9 ADC [Capt BRADY]: Thank you, Judge.

10 MJ [Col PARRELLA]: Anything further on this particular
11 pleading? Okay.

12 What I would like to do is let's go ahead and take up
13 360C.

14 Mr. Nevin?

15 LDC [MR. NEVIN]: Your Honor, this is not about 360C, but
16 I've been sitting here reading the guidance that the
17 government provided on 350. I know from your order of march
18 yesterday that that's what's next after 360.

19 I just wanted to give you advance notice that I would
20 like to ask for a little additional time to absorb that
21 information, and if that -- if 350 could be taken up after the
22 lunch break, that would be enough for me. But ----

23 MJ [Col PARRELLA]: Yes, absolutely. I don't anticipate

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 going any further than 360C before lunch break and, frankly, I
2 haven't had an opportunity to read it, so I will do so over
3 the lunch break as well.

4 LDC [MR. NEVIN]: Thank you, Your Honor.

5 MJ [Co] PARRELLA]: Thank you, Mr. Nevin.

6 Mr. Montross. Very good to see we're still sporting
7 Harry Potter, Mr. Montross.

8 DC [MR. MONTROSS]: I am still inappropriately attired,
9 Your Honor, so I do apologize. I took my clothes to the dry
10 cleaners, and they were going to try and attempt to save my
11 suit. And they told me it will be ready 4:00 on Friday. So
12 I'll be wearing maybe a suit on the way back on the flight,
13 and you could see me in all my grandeur and glory at that
14 time.

15 MJ [Co] PARRELLA]: As I indicated, no offense taken or no
16 apology necessary.

17 DC [MR. MONTROSS]: I appreciate that. I'm sorry. May I,
18 Judge?

19 MJ [Co] PARRELLA]: You may. Please.

20 DC [MR. MONTROSS]: Your Honor, this motion series, along
21 with AE 399, details years of frustrations and false hopes for
22 our client to minimally participate in a program that itself
23 is flawed and inadequate. The program I'm referring to,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Your Honor, is a video communication program associated with
2 the International Committee of the Red Cross, and it's a
3 program that purports to allow Mr. Bin'Attash to communicate
4 with his family members in Saudi Arabia.

5 Now, Your Honor, before you today is 360C, and that
6 deals with what seemingly is a discrete issue; but it's
7 actually one with broad potential impact. Specifically,
8 JTF-GTMO refused to transmit a video communication of
9 Mr. Bin'Attash to his family in Saudi Arabia.

10 Now, originally I could tell you what date that
11 communication was made. Then I could not tell you what date
12 that attempted communication was made. But based on new
13 classification guidance I could tell you that call dates back
14 from December of 2014. Now, this event, that failure,
15 obviously occurred years ago. But now today, years later, we
16 are still struggling to learn and to understand why that
17 happened, Your Honor.

18 Now, back in May of 2015, Mr. Bin'Attash sought the
19 video that was not transmitted. In addition to that, he also
20 sought all the documentation about why the government declined
21 to release the video to his family. And Judge Pohl's ruling,
22 which is 360B, Your Honor, grants Mr. Bin'Attash access to
23 those videos, as they are relevant, obviously, to mitigation,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 development of mitigation in this case. But at that time he
2 denied release of any information about why the video wasn't
3 transmitted, Your Honor, back in September. In July of 2016,
4 we actually get the video, and it's classified presumptive
5 TS//SCI pending further review.

6 So, Judge, the defense team at that point didn't have
7 any documentation or any explanation or could not understand
8 the rationale for why the video was not transmitted to
9 Mr. Bin'Attash's family. We thought perhaps, Judge, that it
10 contained classified information, so we endeavored to find
11 out. But, Judge, the endeavor to find out if there was
12 classified information in the video, it simply wasn't a matter
13 of intellectual curiosity.

14 The one thing that Mr. Bin'Attash has consistently
15 asked for from us, from the defense team, is "I want to be
16 able to communicate with my family." And this is a video that
17 wasn't sent to his family and he asked us what I thought was a
18 rather simple question or a simple proposition: "Can you find
19 out why the video wasn't sent to my family? What do I need to
20 do to make sure that it actually gets through in the future?"
21 So we were attempting to find out kind of what's the
22 explanation for that.

23 So we prepared -- we thought perhaps there was

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classified information in the words and what he was attempting
2 to communicate, what he was going to say to his family. So we
3 prepared the transcript and we submitted it.

4 In 2016, in November, the transcript comes back
5 unclassified. So we placed that transcript, Judge, on our
6 NIPR network. And shortly thereafter we said, well, maybe it
7 wasn't the words that were classified, but maybe it was
8 something that was shown in the video, something our client
9 did, or perhaps there was something in the room that was
10 classified. So we attempted to get the video itself
11 determined for classification status.

12 That unfortunately set off a year of what the witness
13 yesterday, Mr. Castle, would appropriately describe as a
14 kerfuffle. It was a mess for a year trying to get that video
15 determined to be classified or not.

16 Mr. Garber, who is seated at the end of the table
17 down there, was eventually designated as our DISO by General
18 Baker. He is also our intelligence analyst.

19 Upon that designation he starts firing off e-mails to
20 the OSS point of personal contact. That's our -- we don't
21 have direct contact with the OCA, so what we do in order to
22 find out the classification status or what's going on with the
23 classification status is we actually reach out to a person of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 contact at OSS.

2 So Mr. Garber starts firing off all these e-mails.

3 He becomes basically the bane of their existence.

4 January 23rd, January 26th, January 30th, he starts sending

5 out all these e-mails. He gets a response on the

6 30th of January saying "we can't classify the video because

7 you've never given us the transcript accompanying the video."

8 We said, "Yes, we did. You found that to be

9 unclassified."

10 They disputed that. It was unclear. So Mr. Garber

11 keeps firing off more e-mails. February 7th, February 16th,

12 February 20th.

13 Finally, we decide this has to stop. So on

14 March 16th we resubmit the transcript. We say, "Here it is.

15 Please count this as a separate submission."

16 We are then informed on April 13th by the point of

17 personal contact at OSS that both the transcript and the video

18 are unclassified. We are not surprised about the transcript,

19 we already had a classification determination, that it was

20 unclassified; but now we know that the video itself is also

21 unclassified.

22 So in April Mr. Garber goes to pick up the video. We

23 are excited. He gets the video and it has a Post-it on it,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Judge, and on the Post-it it says basically that it's
2 unclassified and it's signed and dated. There's no banner
3 markings. Nothing on the transcript is stricken and re-marked
4 properly.

5 Him, as the DISO, is concerned that basically what
6 he's looking at is a Post-it sticker that is supposed to now
7 provide classification status. So he sends an e-mail back
8 saying, "Is this really what I'm supposed to receive, this
9 Post-it sticker?"

10 So he e-mails them again April 18th. He e-mails them
11 again April 26th saying, "By the way, I just have a Post-it
12 sticker. I really want to put this transcript and video on
13 NIPR. Can I?"

14 On May 24, OSS contacts him and says, "Return the
15 transcript, return the video for proper marking." That's
16 great. We love proper marking.

17 We return the video in May of 2018, on the 29th.

18 He starts then following up, "Can we have the video
19 back? We just needed proper marking."

20 In July of 2018, OSS e-mails Mr. Garber and they say
21 that, "The video and translation are now under review status."

22 Mr. Garber, perplexed, writes back and says, "We
23 didn't ask for re-review. We don't know why there is review.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 We just need it marked properly. That's all we are asking
2 for."

3 On August 21st, we get another e-mail from OSS
4 saying, "Thank you for returning the transcript and the video
5 to us. It's going through OCA review process, and thank you
6 for resubmitting the documents."

7 The 22nd of August, Mr. Garber says, "We didn't
8 resubmit any documents. We are just looking for re-marking."

9 Then September 10th, about two months ago, we learned
10 that now both the video and this transcript is classified.

11 So why am I telling you this? So in the space of
12 years from the time the original video was not sent to
13 Mr. Bin'Attash's family to now, this video has went from
14 presumptive TSI [sic] to unclassified, now back to classified.

15 Why is it now classified? I'm going to explore that
16 a little bit more in the closed session, Judge, and I thank
17 you for giving me the opportunity to do that on the 505
18 notice. But I will say now that I can't figure out why it's
19 classified now. It's bizarre. It's absurd and it feels
20 wholly arbitrary.

21 But why does this matter based on 360C, which is in
22 front of you? What we are asking for in 360C is we are asking
23 for someone to please tell us why we couldn't send the video

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to Mr. Bin'Attash's family, okay?

2 Is it a classification problem? If it's a
3 classification problem, what's the problem? Because we still
4 don't know what that is, okay? Is it not a classification
5 problem or perhaps he somehow violated the standard operating
6 procedures that are provided by JTF? I looked at the standard
7 operating procedures. I looked at the video. I don't see,
8 Judge -- and I know I'm not JTF -- what the problem is.

9 But if someone could tell me what the problem is so
10 that Mr. Bin'Attash can continue getting these videos sent to
11 his family for the very reason that Judge Pohl identified in
12 his motion -- in his ruling back on 360B.

13 And the reason is I need them for mitigation, Judge.
14 I need him to have a relationship with his family. I need
15 what he is guaranteed by international law and domestic law to
16 occur in this case.

17 Judge, I know you know this because you referenced it
18 yesterday. You said that you read the 360 and the 399
19 proceedings in tandem, together. And I'll just simply remind
20 you that what I'm arguing today is going to have ramifications
21 to when we do get to 399.

22 But they're saying that he doesn't need to have
23 in-person contact with his family because the government is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 committed to continuing to facilitate efficient means of
2 communication between the accused and their respective
3 families through video messaging.

4 They're not facilitating, Your Honor. I can't figure
5 out why my videos can't get to my client's family. And,
6 Judge, going from 2014 to today, I would respectfully submit
7 that this process is not very efficient.

8 I'm asking just simply to please find out what I need
9 to do so that my client can contact his family. That's all I
10 have to say in an open session.

11 MJ [Col PARRELLA]: Thank you, Mr. Montross. I do have, I
12 guess, a question. So I understand the -- I think I
13 understand your argument as to why this is relevant because I
14 think certainly you understand -- and I appreciate you getting
15 to the question why does this matter, in essence, even if I
16 were to believe everything you say and be empathic towards it,
17 why is it relevant to an issue before this commission? And I
18 think you addressed and you indicated that you need this for
19 mitigation.

20 But as I see it, what you're asking for is the
21 documentation relating to the original video that was
22 vacillated between unclass, classified, back and forth, and
23 that now is a video that, I guess, dates back, if I understand

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 you correctly, to 2014? Is that it?

2 DC [MR. MONTROSS]: Yes, Your Honor. This specific one
3 that's the subject matter of 360C is the one that dates back
4 to '14, 2014.

5 There have been other issues with the videos that are
6 appropriately discussed in the 399 series about who they
7 actually get disseminated to and who is allowed to see the
8 videos among Mr. Bin'Attash's family, but that's really a 399
9 issue, Judge, and that's where it was briefed and pled.

10 This, openly and honestly, is only about the one
11 video in 2014, yes, Judge.

12 MJ [Co] PARRELLA]: Thank you. I appreciate it,
13 Mr. Montross.

14 Any other counsel wish to be heard on the 360C?

15 DDC [MAJ SEEGER]: Your Honor, only that these are really
16 important matters for all the defendants and, on behalf of
17 Mr. Mohammad, we join in the argument.

18 MJ [Co] PARRELLA]: Okay. Mr. Harrington?

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

20 MJ [Co] PARRELLA]: Mr. Connell?

21 LDC [MR. CONNELL]: Nothing to add, Your Honor.

22 MJ [Co] PARRELLA]: Thank you.

23 Mr. Ruiz?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. RUIZ]: No, thank you, Judge.

2 MJ [Col PARRELLA]: Trial Counsel?

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

4 MJ [Col PARRELLA]: Good morning.

5 ATC [Maj DYKSTRA]: I will just keep my argument very
6 brief. In 360C, defense are specifically requesting that you
7 reconsider denial of 360B on the basis that the video itself
8 is unclassified.

9 The prosecution will readily acknowledge that there
10 were some bureaucratic processing errors in how that video was
11 determined to be unclassified or -- classified, unclassified,
12 and classified again. But the reality is it's classified.

13 They have both a redacted version as well as the
14 classified version that allows them to determine what exactly
15 he said that allowed -- or did not permit it to go out. They
16 also have the SOPs in this case.

17 But the reality is their basis for reconsideration,
18 the fact that it's unclassified, it's classified now, so there
19 is no basis for reconsideration of this matter at this time.

20 MJ [Col PARRELLA]: So if I understand it, you're saying
21 that because they didn't have the -- both the unclass and
22 classified versions, that they should be able to, through
23 comparison, figure out on their own why they're currently

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classified?

2 ATC [Maj DYKSTRA]: Correct, Your Honor.

3 MJ [Col PARRELLA]: Has there been any discussion? I
4 mean, given the history of this particular issue, has there
5 been discussion between the government and explanation as to
6 what happened?

7 ATC [Maj DYKSTRA]: That, I don't know. It obviously went
8 through -- it went through the walled-off classification
9 review. I would say about the May time frame they brought us
10 into it to ask whether -- what was going on with it and so
11 forth.

12 At that time we discovered that there were some
13 issues going on relating to -- and I won't go into it. I
14 think it's covered in the defense's declarations that they've
15 submitted and so forth. But after that, it's -- we've largely
16 left it to the classification review and their interactions
17 between that process and their team.

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

19 ATC [Maj DYKSTRA]: No problem, sir.

20 MJ [Col PARRELLA]: Mr. Montross?

21 DC [MR. MONTROSS]: I appreciate counsel's brevity, and
22 I'm going to attempt to mirror him.

23 There were, obviously, more videos after 2014, Judge.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Some of those videos were actually sent to Mr. Bin'Attash's
2 family, but those videos now have been deemed classified. So
3 there's been transmission of videos to Mr. Bin'Attash's family
4 in Saudi Arabia that could be portrayed on a movie screen
5 there, but now those videos recently have been identified as
6 classified.

7 I will go in closed session -- and I appreciate
8 perhaps the government saying perhaps I could just look at the
9 two different redacted transcript and the unredacted
10 transcript. And I'm going to tell you what's in those two
11 different transcripts, Judge. It's bizarre is all I can say.
12 I can't make a classification determination based on what's
13 different between the two things, and I will attempt to
14 demonstrate why in the closed session.

15 But again, I'm not even sure now why that video
16 wasn't transmitted back in 2014, whether it was an SOP
17 problem, standard operating procedure problem, or whether or
18 not it was a classification problem. I want to tell my client
19 what he needs to do so that he can have communications with
20 his family. Just I'm asking for someone to give me guidance
21 on that, Judge.

22 MJ [Co] PARRELLA]: Thank you.

23 DC [MR. MONTROSS]: Thank you.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: Okay. Anything further on 360C? I
2 understand, of course, we're going to have argument in the
3 closed session. Okay.

4 With that we'll go ahead and recess for the lunch
5 hour. Please resume at 1300. This commission is in recess.
6 [The R.M.C. 803 session recessed at 1148, 14 November 2018.]
7 [The R.M.C. 803 session was called to order at 1306,
8 14 November 2018.]

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

12 Counsel, is there any changes to the parties, the
13 presence of counsel?

14 CP [BG MARTINS]: Not for the United States, Your Honor.

15 LDC [MR. NEVIN]: No change, Your Honor.

16 LDC [MS. BORMANN]: Judge, we're missing Captain Brady and
17 Major Seeger. Both are working on other things right now.
18 Captain Brady will be rejoining us shortly. Major Seeger will
19 be a little bit longer.

20 MJ [Col PARRELLA]: Okay.

21 LDC [MR. HARRINGTON]: Judge, no change.

22 LDC [MR. CONNELL]: Your Honor, no change.

23 LDC [MR. RUIZ]: Ms. Lachelier and Mr. Gleason are absent.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: Thank you.

2 I think the next item on the schedule here is 350,
3 and the commission's intent, unless any party sees a reason to
4 do so otherwise, would be to do 350C and 0 simultaneously.

5 ADC [MS. PRADHAN]: Good afternoon, Your Honor.

6 MJ [Col PARRELLA]: Good afternoon.

7 ADC [MS. PRADHAN]: And thank you, Your Honor. I was
8 intending to argue both 350C and 0 simultaneously.

9 MJ [Col PARRELLA]: Right.

10 ADC [MS. PRADHAN]: 350C is a classified motion asking for
11 the deposition of a witness known as "The Former Interpreter
12 Utilized by Mr. Binalshibh's Team." AE 3500 is an
13 unclassified motion asking for further information regarding
14 the former interpreter's employment and placement on
15 Mr. Binalshibh's team.

16 And this is an old motion; it was originally filed in
17 2015. But I believe it's worth going over the facts that led
18 to the situation, because they illustrate the exceptional
19 circumstances required by Rule 702 for the military judge to
20 order a deposition.

21 And in many ways -- in some ways, at least, this is a
22 good moment for this motion because both defense discovery and
23 investigation show the importance of the information from

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 former CIA employees during the years of the RDI program. And
2 if the former interpreter was indeed, as Mr. Binalshibh has --
3 believes him to have been at the black sites, then that would
4 place him in the same basket of relevance, importance to the
5 defense as the 64 individuals identified by the government
6 under AE 397 category 2.d. of people who would have
7 information as relevant and material to -- to the defendants'
8 time in the RDI program.

9 So harkening back, Your Honor, on the 9th of February
10 in 2015, Mr. Binalshibh interrupted the proceedings to
11 announce that he believed that the interpreter at his table,
12 part of his defense team, had been present at one of the black
13 sites. As Your Honor is aware, there are several classified
14 portions of this argument, and there is some significant
15 classified information in this argument, which of course I
16 will not go into at this time.

17 But at the end of that day, before adjourning for the
18 day on the 9th of February, Judge Pohl stated, and I quoted --
19 I quote, There may be a myriad of reasons why this individual
20 may or may not wish to be interviewed by the defense. I'm not
21 going to speculate on what that is, but he should be made
22 available to be interviewed.

23 And that's from the transcript of the 9th of February

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 at page 8257.

2 The next day the government filed AE 350, confirming
3 that the former interpreter was a former employee of the CIA.

4 Judge Pohl clearly had in mind that the defense teams
5 would be able to interview the former interpreter for the
6 purpose of obtaining relevant and material information about
7 two broad subjects. The first is any potential contacts with
8 the defendants at the black sites during the course of his CIA
9 employment, including conditions of confinement and
10 information about interrogations; and the second is more
11 information about the sequence of events that led this
12 individual to be placed on a defense team, including whether
13 any NDA he signed required him to lie about his previous
14 employment with the CIA and whether the government -- whether
15 the big G Government or the government in this room
16 representing the United States -- was involved in any way with
17 the interpreter being made available for the Office of the
18 Chief Defense Counsel.

19 Now, members of the defense actually did have a few
20 opportunities to speak to the former interpreter, and those
21 occasions cemented the need for a deposition under oath to
22 achieve the results that Judge Pohl and clearly the defense
23 believe are necessary.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Defense members first interviewed the former
2 interpreter on the 9th of February, the same day that
3 Mr. Binalshibh made his pronouncement. That interview is
4 memorialized in the record at AE 350II, the declaration of
5 Daniel Futrell, an investigator on Mr. al Baluchi's team.

6 That interview was not conducted under oath. And the
7 former interpreter told numerous lies during the course of his
8 interview, including that he had never been employed by the
9 CIA.

10 As I said it earlier, Your Honor, the next day the
11 government filed AE 350, which confirmed that the former
12 interpreter had indeed been employed by the CIA.

13 Now, over the next few days, back during this week in
14 February -- as you know, Your Honor, we are all down here at
15 Guantanamo for a period of time together -- the former
16 interpreter made statements to various members of the defense
17 that he had never worked for the CIA. He continued to make
18 this statement.

19 After returning to the National Capital Region on the
20 18th of February in 2015, members of the defense spoke to the
21 former interpreter again and asked him to make a formal
22 statement in light of his previous lies to members of the
23 defense. Doesn't sound tremendously onerous. And,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 importantly, the former interpreter said that he would be
2 willing to make a statement under oath, under penalty of
3 perjury, but he wanted to do so in the office of his
4 supervisor from his contracting company.

5 When the supervisor was approached, he told defense
6 investigators that he would call the police if they tried to
7 speak further with the former interpreter. The supervisor
8 also called Mr. Connell and told him that we could not
9 interview the former interpreter without an order from the
10 military judge.

11 And so that's how we commenced really and progressed
12 in the AE 350 series. And we are here today to obtain that
13 order to be able to depose him under oath.

14 We also asked the government for the additional
15 information regarding the sequence of events that led him to
16 the placement on Mr. Binalshibh's team, and that brings us to
17 today.

18 We actually proposed to argue AE 350 last summer, in
19 the summer of 2017. After receiving certain unrelated
20 discovery -- or at least discovery that was in a different
21 motion series -- or, excuse me, it wasn't attached to a motion
22 series, but it was additional discovery from the
23 government that we thought might be related to the former

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 interpreter.

2 We were stopped by the government at that point who
3 told us that our guesses regarding that discovery was wrong --
4 were wrong, and that we should stand by for discovery related
5 to the former interpreter that they had decided to produce at
6 this point in time, roughly two-and-a-half years after the
7 initial filing of AE 350. And of course, we can talk in
8 classified session about what that discovery ended up being.

9 But despite the production of that additional
10 discovery, the documents that the government has produced are
11 skeletal in terms of information. And so our motions for a
12 deposition under oath of the former interpreter and for proper
13 background information for him are still necessary.

14 Your Honor, these are exactly the sort of exceptional
15 circumstances contemplated by Rule 702. You have a defendant
16 identifying, in his view, in open court, someone he believes
17 to have had a role in his torture for several years by a
18 government entity; that individual had been placed in a pool
19 of available interpreters for use by the defense, and, in
20 fact, was, over at least a period of time prior to his
21 identification in 2015, used by several defense teams from
22 that pool of interpreters.

23 It's important to note that we don't just hire people

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 off the street on our own. There are numerous requirements
2 around the qualifications for hiring defense team members, and
3 so we are not at liberty to simply identify people we want to
4 hire. This individual was presented to the defense as someone
5 with the requisite qualifications.

6 And so -- and so, Your Honor, we believe that this
7 demonstrates exactly the sort of exceptional circumstances
8 that is necessary, especially taken together with the fact
9 that when we conducted those interviews, this individual
10 continued to stick to misinformation.

11 And so the only way to get the information that we
12 need to establish first whether or not he had a role at the
13 black sites and whether or not he was involved in the torture
14 of the defendants, and whether the government was involved in
15 a potential intrusion in attorney-client privilege -- this is
16 the only way to do it.

17 Now, that's under Rule 702. Regarding our request
18 for more information ----

19 MJ [Col PARRELLA]: Before you get to that.

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

21 MJ [Col PARRELLA]: What's the relationship here to your
22 request in AE 350X, where you're asking the court to, I guess,
23 compel him to testify in support of 350C? I mean, is it an

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 either/or proposition here, where I would assume one would
2 moot the requirement for the other?

3 ADC [MS. PRADHAN]: May I have a moment to confer,
4 Your Honor?

5 MJ [Co] PARRELLA]: You may.

6 ADC [MS. PRADHAN]: Thank you. Yes, Your Honor. And
7 again, because of the complexity of the sequence of briefing,
8 this has gone -- the issues involved in this matter have gone
9 back and forth for a while.

10 But you're correct, Your Honor, that we would be
11 asking either for a deposition under oath to be conducted by
12 the defense, or testimony in court.

13 MJ [Co] PARRELLA]: I understand. Thank you.

14 ADC [MS. PRADHAN]: Thank you, Your Honor.

15 With regards to our request for more information,
16 under Rule 701 it is worth recalling that the defendant is
17 entitled to all discovery that is material to the preparation
18 of defense, or that reasonably tends to negate the guilt of
19 the accused of an offense charged.

20 If Mr. Binalshibh is correct, again, and the former
21 interpreter was present at the black sites, then the military
22 commission's order in the al Nashiri case in AE 120AA, which
23 was an order issued by Judge Pohl when he was also the judge

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 in that case -- that order described some of the defense uses
2 of RDI information, and it outlines the scope of the
3 government's concession of materiality and helpfulness.

4 For example, the treatment of the accused could be
5 argued to mitigate the imposition of the death penalty. Also,
6 compliant behavior by the accused could be used as evidence to
7 argue he would not be a threat if sentenced to confinement
8 rather than death. Information about RDI would also be,
9 quote, helpful in articulating outrageous government conduct
10 in a motion for appropriate relief.

11 And finally, importantly, Your Honor, and this is the
12 thread that undergirds a lot of our motions, "The use of EITs
13 or torture on the defendants implicates the admissibility of
14 any subsequent statement of the defendants by directly
15 impacting," and these are Judge Pohl's words, "whether the
16 subsequent statement was tainted by the earlier statements."

17 And if Mr. Binalshibh is correct, if this individual,
18 the former interpreter, was in fact present at the black sites
19 and observed any of these conditions of confinement, or was
20 involved in interrogations, then those are exactly the sort of
21 details and the sort of information that that individual would
22 have, similar to the personnel who were already identified by
23 the government and some of whom have been produced to the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 defense for interviews.

2 Now, the difference is in this particular case we
3 have conducted a preliminary interview of this individual, and
4 we have shown -- or the government has helped us show --
5 excuse me, Your Honor, there are multiple flies in here
6 today -- the government has helped us show that this
7 individual was not truthful when he spoke to us the first
8 time. A deposition under oath is the only way to ascertain
9 the depth of the questions that are now before both the
10 defense and the military judge.

11 Now, I do expect that the government will stand up
12 and proffer that they didn't have anything to do with the
13 former interpreter's placement on Mr. Binalshibh's team and
14 they have not withheld anything on purpose. This is something
15 that they have argued multiple times through the course of
16 this series.

17 And these sorts of broad denials, Your Honor, are
18 tired, and neither the military commission nor the defense
19 should ever rely on them. And the reason for that is, there
20 have been a consistent pattern of well-documented government
21 intrusions into the defense.

22 A couple of examples: In January 2013, an
23 unidentified entity interrupted the military commission by

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 remotely turning on that red light, even though, as you know,
2 Your Honor, control of the red light is vested in the military
3 judge. It was discovered shortly thereafter that intelligence
4 agencies had access to an ungated feed from the courtroom,
5 including all communications picked up by microphones at the
6 attorney-client tables.

7 In March 2013, in an incident that has been broadly
8 reported, listening devices disguised as smoke detectors were
9 found in the attorney-client meeting rooms, where case
10 strategy and other privileged communications take place,
11 despite previous statements by the government, repeated
12 statements by the government that they had not installed such
13 devices, similar to the protestations that we expect to hear
14 shortly.

15 I am not standing here saying that the government did
16 or did not have a role in the placement of the former
17 interpreter on a defense team. What I am standing here
18 saying, Your Honor, is that we cannot take the government's
19 word that they didn't at face value; that further
20 investigation is absolutely necessary.

21 And there are multiple further examples of
22 attorney-client -- excuse me, of government intrusions into
23 attorney-client privilege, including seizure of legal

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 materials, and an acknowledgment just last year that the
2 government had unintentionally -- their word -- eavesdropped
3 on attorney-client communications here at Guantanamo.

4 Rather than accept the government's word, Your Honor,
5 the military commission should enable scrupulous fact-finding
6 on all issues that could further compromise the integrity of
7 these proceedings, including, as we saw yesterday, the
8 question of unlawful influence, and including exactly this
9 kind of potential conflict.

10 I just have one last note for open session,
11 Your Honor, as we work towards AE 524. The reason we filed AE
12 350C and 3500 is precisely because the former interpreter's
13 initial interview yielded such blatant falsehoods about issues
14 that may strike at the heart of the defense, that may color
15 the question of what happened to Mr. al Baluchi and the
16 validity of any statements he made to interrogators, along
17 with the other defendants.

18 His second interview, the former interpreter's second
19 interview, yielded the promise to speak to us under oath,
20 which would likely generate a lot more material facts. But
21 under Protective Order #4 we would now not be able to conduct
22 either of those interviews, because the former interpreter
23 may -- and we don't know for sure, but the former interpreter

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 may fall into either category 3 or category 4 of the
2 protective order.

3 It is a perfect example of individuals whom the
4 defense would and should be able to interview in any normal
5 capital defense investigation, but who have now been
6 officially cut off by the government.

7 That's all I have, sir.

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

9 ADC [MS. PRADHAN]: Thank you.

10 MJ [Col PARRELLA]: Mr. Nevin?

11 LDC [MR. NEVIN]: Thank you, Your Honor. Only to join
12 those remarks and just to say, as I believe we did at the
13 outset, that in our work we also had contact with the former
14 interpreter and we are -- our proprietary information and our
15 attorney-client privilege is also implicated by this motion.

16 But I adopt Ms. Pradhan's argument. Thank you.

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

18 Ms. Bormann?

19 LDC [MS. BORMANN]: Good afternoon. I was happy to hear
20 Ms. Pradhan recite some of the facts that led to the horror
21 that occurred when it was discovered that a former translator
22 who had worked for the Central Intelligence Agency was placed
23 on a defense team.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 As you know, because there are pleadings that attest
2 to this, that linguist also did translation, privileged
3 translation, which has been submitted to you in an ex parte
4 fashion, of privileged documents. So he worked intimately
5 with our defense team.

6 We should be permitted to, and are required to,
7 investigate to what extent that translator, the person named
8 here, either provided that information that he learned as a
9 result of his work for Mr. Bin'Attash to other agencies and/or
10 other individuals. We are required to investigate to what
11 extent our privilege was violated, and to seek remedies
12 thereof.

13 Ms. Pradhan mentioned that we did -- Ms. Pradhan was
14 not involved with the defense in those days, but I was. We
15 did conduct an interview of the translator at issue. He, I
16 think Ms. Pradhan said, miscommunicated. That is not exactly
17 correct. He lied. We didn't know it at the time.

18 And literally within a half an hour after listening
19 to the lies, we were provided with information from the
20 government which contradicted what that gentleman said to us.
21 That is when we discovered the depth of his lies.

22 We have not had an opportunity since then to conduct
23 a proper interview and hold him to account, to find out the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 information we need to find out in order to remedy the harm
2 that clearly flowed and to demonstrate later on to a panel or
3 some other individual reviewing a possible sentence in this
4 case the depths to which the United States Government may
5 utilize those involved in the torture program to wreak havoc
6 in the defense in this case.

7 So for all of those reasons, along with what
8 Ms. Pradhan argued earlier, we are asking that you permit
9 either in-court testimony of the translator at issue, a
10 deposition of the translator at issue, both under oath where
11 he can be confronted with his previous lies and asked about to
12 what extent he violated the privilege of Mr. Bin'Attash and
13 the others; and about his involvement in and placement on
14 defense teams on the 9/11 case.

15 We're also asking that you grant the motion for the
16 materials that surround the placement of that individual on a
17 defense team for exactly the same reasons.

18 Subject to your questions, I have nothing further.

19 MJ [Col PARRELLA]: No questions. Thank you, Ms. Bormann.

20 LDC [MS. BORMANN]: Thank you.

21 MJ [Col PARRELLA]: Mr. Harrington?

22 LDC [MR. HARRINGTON]: Judge, I am in a difficult and
23 unique situation with respect to this issue because, not only

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 does it directly affect my team, but I am probably one of the
2 primary witnesses in it since I was learned counsel at the
3 time that the former CIA interpreter became involved with my
4 team, and the government has filed in its response allegations
5 that he was not properly vetted by our team.

6 I would concur that he was not properly vetted, and
7 the reason he was not properly vetted is that he lied
8 extensively in the documents that were submitted to us when he
9 was hired; and we had no ability to investigate the accuracy
10 of what he put in because the software that was available to
11 us at the beginning of this case, which would have allowed us
12 to do a security investigation, was taken away from us by ----

13 MJ [Col PARRELLA]: Mr. Harrington, it's my
14 understanding that -- I understand that that was the
15 government's initial position, but they sort of withdrew from
16 that argument; is that correct?

17 LDC [MR. HARRINGTON]: Right.

18 MJ [Col PARRELLA]: Sorry to interrupt. You may continue.

19 LDC [MR. HARRINGTON]: Right. But, Judge, also pending is
20 350S, a motion that we had filed that Judge Pohl did not
21 address, which asked for independent counsel to be appointed
22 for our team so that we would have somebody outside of our
23 team, the persons on it, that may well be potential witnesses

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 in any sort of a hearing to actually further the investigation
2 and represent Mr. Binalshibh at such a hearing. So I'd ask
3 the court to take a look at that, also.

4 MJ [Col PARRELLA]: Mr. Harrington, do you feel, though,
5 that in light of the government withdrawing any allegation of
6 impropriety on behalf of the defense that he was not properly
7 vetted, that -- would that not moot the issue, the need for an
8 independent ----

9 LDC [MR. HARRINGTON]: That's only one aspect, Judge. The
10 other parts of what happened with this person, I'm a witness
11 to that. Because it's not only a question of the vetting when
12 he came on the team, it's a question of multiple, multiple
13 conversations and meetings that I had with him and being
14 present with him in conversations with our client that, I
15 think, make me to be an essential witness on the case.

16 And he really -- our client should have learned
17 counsel representing him at every aspect of this case, and
18 it's not really right for me to be that person if, in fact,
19 I'm going to have to testify about it in that circumstance.

20 And, Judge, Ms. Pradhan, she mentioned Judge Pohl
21 recognized in the Nashiri decision that she cited that
22 outrageous governmental conduct is a proper motion for us to
23 be investigating in this case and bringing it to the attention

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of the court. And in this situation we believe that there has
2 been outrageous governmental conduct.

3 And the prosecution can come in and say we don't know
4 anything about it, we had nothing to do with this, and it may
5 well be that they didn't. But they stand and speak for many
6 different agencies and some of those agencies are known not to
7 be forthright, I think even with -- even with the prosecution,
8 and would go to ends of imagination to do things that would
9 further whatever causes that they have.

10 And based on this, Judge, I think that we're asking
11 the court to reconsider the independent counsel appointment
12 and to grant the other relief that was just talked about.

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

14 Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, I just wanted to take a few
16 moments to accentuate and highlight what I think you probably
17 already know.

18 Despite the original caption of this motion, which is
19 "The Former CIA Interpreter Used by Mr. Binalshibh's Team,"
20 this is an individual who also had significant involvement
21 with Mr. al Hawsawi. And, of course, it has taken quite a
22 length of time for me to be able to stand up here and say that
23 the exact same title applies to Mr. al Hawsawi with the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 exception of changing out Mr. Binalshibh's name for
2 Mr. al Hawsawi, as we were not permitted to do that for some
3 time.

4 However, having said that, I want to accentuate the
5 comments of my colleagues in the requests for relief and
6 indicate as well that this is an individual who on numerous
7 occasions went in with cleared members of my team and had
8 attorney-client -- participated in attorney-client privileged
9 communications with Mr. al Hawsawi here in Guantanamo Bay at
10 the attorney-client meeting sessions.

11 We have provided for you in our pleadings, in our
12 portion of the pleadings, specific substance and details that
13 were discussed during those proceedings, during those
14 meetings, to give you an insight into the type of privileged
15 information that this individual had access to.

16 As has been indicated, this is an individual who
17 already demonstrated a propensity to lie and to mislead about
18 the true nature and extent of his involvement, so we have no
19 confidence that what we know to date is accurate.

20 For those reasons we think it is appropriate to put
21 him under oath and ask him additional questions to find out
22 the true extent of his involvement with Mr. al Hawsawi, what
23 led him to this position, how he came to be somebody who went

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 from the involvement that we know he's had to the involvement
2 that we know he had with our team which gave him access and
3 insight into the most confidential aspects of our case in this
4 capital litigation.

5 MJ [Col PARRELLA]: Thank you, Mr. Ruiz. All right.
6 Trial Counsel.

7 TC [MR. RYAN]: Good afternoon, Your Honor.

8 MJ [Col PARRELLA]: Good afternoon.

9 TC [MR. RYAN]: Your Honor, on 9 February 2015, the
10 commission session came to a very abrupt end at the very
11 beginning of the week based on circumstances as have been
12 described both in the pleadings and here at the podium.

13 On 23 February of 2015, the defense filed 350C,
14 seeking deposition of the former interpreter. As Your Honor
15 has noted, there have been other motions, including one
16 seeking information, which we treated for the most part as a
17 request for discovery.

18 But as to the critical issue -- and I think from this
19 everything else flows -- of a deposition, we are, of course,
20 guided by Rule for Military Commission 702(a), which provides
21 "A deposition may be ordered whenever, after swearing of
22 charges, due to exceptional circumstances of the case it is in
23 the interest of justice that the testimony of a prospective

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 witness be taken and preserved for use at a military
2 commission."

3 I submit that most of the case law regarding the
4 issue of when a deposition is necessary because of exceptional
5 circumstances usually comes down to will the witness be
6 available, if there is such a time that he is needed -- he or
7 she is needed at a later point in the proceedings.

8 The Rules for Court-Martial, which Your Honor I'm
9 sure knows very well, as well as Federal Rule of Criminal
10 Procedure 15(a), state that unavailability for trial justifies
11 a deposition.

12 I'll stop for the moment to suggest to you that much
13 of the argument that has been made to you today has been sort
14 an emotional claim that he's a liar, therefore, you've got to
15 pull him in here.

16 I would submit, Judge, that the issue of
17 untruthfulness on a prior occasion, especially when it's
18 considered under the circumstances of the allegations made by
19 the defense as to when such untruthfulness occurred, the
20 circumstances under which it occurred, the background under
21 which it occurred, should mitigate against the idea that that,
22 that issue of prior untruthfulness, somehow all by itself
23 rises to the level of exceptional circumstances. Rather,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Your Honor, again, I think, just as most of the case law and
2 the discussion and other rules would dictate, the emphasis
3 should be or the analysis should be on availability.

4 In fact, in 702, in the discussion section of 702 for
5 Rule of Military Commission that follows, it specifically says
6 that "Availability for trial is good cause for denial of a
7 motion or a deposition." So the question of unavailability
8 for trial becomes, I submit, the most significant thing for
9 Your Honor to consider at this time.

10 Now, this military commission has already established
11 a strict reading of the terms of likelihood of unavailability.
12 In AE 421, Your Honor -- and I believe this is the only other
13 time it's really come up in the long history of this case --
14 the prosecution asked to depose ten elderly witnesses who had
15 lost family members in the attacks of September 11th.

16 We asked to depose them, and we asked that that be
17 done down here in this courtroom from that witness box with
18 the accused sitting here, with the defense attorneys able to
19 cross-examine. We asked that it be done in accordance with
20 the dictates of Payne v. Tennessee in the sense that these
21 persons would be able to provide what's known as victim impact
22 testimony.

23 His Honor, Judge Pohl, denied our request for

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 depositions with very limited exceptions. And most
2 significantly, for purposes of your analysis, he ruled that
3 our statement that many of these witnesses had -- or were at a
4 point of advanced age and had general health concerns, Judge
5 Pohl ruled that such advanced age and general health concerns
6 were not enough to establish the possibility of
7 unavailability.

8 Further, Your Honor, I'll point out that in our
9 motion we were not saying that this was to take the place of
10 testimony, but rather it was as a sort of failsafe if at some
11 point the persons were no longer able to travel.

12 Judge Pohl's ruling denying that this was exceptional
13 circumstances was even as to those persons among the ten who
14 were of advanced age, to the point of being in their
15 mid-eighties. I'm very sad to say that of the ten that we
16 asked for, two of those persons have since passed away.

17 To meet the barrier of unavailability for purposes of
18 702(a), I submit to you, sir, that the defense barely tries.
19 In 350C, and then recounted in 350F, they state that, among
20 other things, quote, There is no reason to believe that the
21 linguist will appear at trial or a hearing in this case at
22 some undetermined point in the future, end quote. And
23 secondly, and the linguist, quote, may make himself

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 unavailable for hearings or trial, again end quote. Now, both
2 of these statements are conclusory by nature.

3 I will state that in other pleadings, specifically
4 350C, the classified, they make far more -- or they point out
5 far more ominous possibilities. Any statements that I have
6 seen in any of the pleadings as to unavailability are at best
7 rank speculation.

8 In short, sir, I submit to you there is no evidence
9 to support a claim of exceptional circumstances that would
10 require a deposition. On the other hand, proving in the other
11 direction, we do know this: As the defense has pointed out,
12 they were able to contact this person on their own on several
13 different occasions. More specifically, I'll say that the
14 prosecution, as part of its duties in this matter, was able to
15 contact him as well.

16 At this point we have no indication, none whatsoever,
17 in fact, just to the contrary, any reason to say that this
18 person, if needed, if justified, if required, would be
19 unavailable for trial or for a hearing as necessary. And,
20 Judge, that's even true now as we near four years from the
21 date that this all happened.

22 In sum, there is no exceptional circumstances for a
23 deposition under 702. Now, the defense makes much of their

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 need for him, saying why they want him and so on. All of that
2 is certainly interesting and may be taken up at another time.
3 If his testimony is relevant and necessary to some issue
4 before this military commission at some appropriate time,
5 including trial, including sentencing, they should request
6 him; and we would take it up from there pursuant to 701(a)(2)
7 in the normal course, when, in addition, Your Honor, I suggest
8 you would have the opportunity to not only weigh his value,
9 this person's value, but also in regard to other persons as
10 well with an analysis of whether it's cumulative, far better
11 than if we were just doing it in a vacuum as to an issue for a
12 deposition.

13 Now, an aspect of the matter that the defense latched
14 on to from minute one, and they have hung on to most tightly
15 ever since, is the claim that the interpreter was a plant by,
16 as they say, the big G Government, or, in their most
17 outlandish moments, the prosecution specifically. Variations
18 of these claims appear in 350H, 350FF, and several classified
19 pleadings.

20 Within a day of the event, the chief prosecutor,
21 Brigadier General Mark Martins, reported in plain language,
22 after conducting an inquiry across the United States
23 Government, that this person was not a plant by the United

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 States Government. The specific language, repeated over and
2 over again, was this: The "former CIA linguist on one of the
3 defense teams was absolutely not due to any action by any
4 agency of the Executive Branch to gather any information
5 regarding defense activities from any of the defense teams."
6 He could not be more definitive than that.

7 Furthermore, Your Honor, the prosecution filed a
8 classified pleading in 350 which contained a great deal more
9 detail as to this subject.

10 Now, the chief prosecutor's statement, as well as our
11 filing in 350, are accurate. As officers of this commission,
12 we would have an obligation to say so if it was not.

13 We would submit, sir, that any consideration of the
14 government plant theory should end right there, based on these
15 definitive statements. But if the military commission was to
16 seek more information about this episode, I would submit, sir,
17 that simply putting this person on the witness stand would not
18 be the place to do it; rather, the proper method would have
19 been to seek information from persons involved in the process
20 itself of how persons are assigned to the defense and so on.

21 And to that end, I can proffer the following: A
22 representative of the convening authority's office, with
23 knowledge, would say that for that February session, this

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 interpreter's position on the Binalshibh team came about
2 because of a request by the then-detailed military counsel for
3 the Binalshibh team. Now, I want to be clear about this.
4 This is about three detailed military counsel ago, so I'm not
5 talking about anybody at the table today.

6 Furthermore, Your Honor, this is going on, as I said,
7 four years ago. These events did not lead to any
8 investigation, any allegations, any further considerations
9 beyond what I have just said to you.

10 I raise it only for this specific purpose: Because
11 the defense keeps saying that somehow the prosecution or the
12 Government, as a larger entity, had some involvement in this,
13 might have done it for purposes of gaining an unfair
14 advantage, I let you know the information that is out there.

15 And because it's inconsistent with the positions they
16 have taken, both in writing and at this podium, I submit that
17 if any member of any defense team, because they're all joined
18 on this motion, knows this to be the fact, that they have an
19 obligation to inform Your Honor to negate this claim of
20 government involvement.

21 Subject to your questions, sir.

22 MJ [Co] PARRELLA]: Mr. Ryan, I do have a couple. I know
23 it's not on our -- it wasn't on the docket, so I know this is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 somewhat -- you may not be prepared to answer this. But the
2 essence of 350X, as you articulated, seems to be to produce
3 this individual as a witness.

4 So putting aside the deposition question for a
5 moment, what's the government's position as to whether -- the
6 relevance of his testimony, in-court testimony?

7 TC [MR. RYAN]: My memory of 350X, Your Honor, was they
8 were requesting, not only as a 3500, seeking information about
9 the former interpreter, but in 350X they sought the testimony
10 of the interpreter to support their claim that there must be a
11 deposition of the interpreter. So it's rather circular.

12 MJ [Col PARRELLA]: I agree. I think that was it, but I
13 think they -- I agree with that.

14 But I guess what I am getting at here is -- I think
15 it's in 350X the defense puts forth reasons why the testimony
16 would be relevant. And there's the issue of whether or not --
17 what, I guess, you referred to as the planted theory, and I
18 understand that your position is that the commission should
19 accept the chief prosecutor's representation.

20 But there is also, I guess, the facet of, as the
21 defense has articulated, various part -- he had access -- this
22 individual had access to material within the scope of attorney
23 work product within the various teams. So regardless of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 whether or not the individual was placed there, there's also
2 the question of who, if anyone, he may have shared that
3 information with since.

4 So what's the mechanism, I guess, the government
5 would suggest would provide assurances to the teams that this
6 individual hasn't shared any of that information that was
7 gathered while working with the various teams?

8 TC [MR. RYAN]: We can certainly look into a proper
9 statement on behalf of the prosecution that it had no further
10 contact with this individual other than to assure that he
11 would be available if ever needed and that no information that
12 was -- he obtained as a result of his work on parts of the
13 various defense teams was ever shared with any other
14 inappropriate individual, that is, anyone outside of the
15 defense teams. We could report back to Your Honor in that
16 regard.

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

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

19 MJ [Col PARRELLA]: Ms. Pradhan.

20 ADC [MS. PRADHAN]: Thank you, Your Honor. Just a few
21 points. The first is that as we discussed initially,
22 Your Honor, this is actually the very definition of
23 exceptional circumstances.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Now, Mr. Ryan is certainly correct that much of the
2 case law hinges on the availability of a witness, but the word
3 "exceptional" in and of itself means that unique circumstances
4 arise to compel a military judge to order a deposition; and
5 these are exactly, we would posit, those sorts of
6 circumstances.

7 MJ [Col PARRELLA]: Ms. Pradhan, I guess the question I'd
8 have for you is: If you believe his testimony is necessary,
9 why aren't you here before the commission simply asking for me
10 to compel his testimony right here in this courtroom?

11 ADC [MS. PRADHAN]: Your Honor, that is -- when I answered
12 your question earlier regarding either -- regarding whether
13 350C should be considered concurrently with 350X, that is, in
14 fact, what I meant. And I apologize if I wasn't clear about
15 that.

16 But indeed, we're asking for either a deposition in
17 which we can explore these subjects or testimony before the
18 military commission about both of these subjects. I mean ----

19 MJ [Col PARRELLA]: Wouldn't it be premature to go to the
20 deposition -- and I think the government is right. I mean,
21 your pleading in 350X is essentially asking the commission to
22 produce him in support of your motion for a deposition. So it
23 seems to be putting the proverbial, you know, cart before the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 horse to ask for the deposition before you ask to have him
2 appear here in the commission.

3 ADC [MS. PRADHAN]: With respect, Your Honor, I believe
4 our request in 350X was actually for testimony was to support
5 the -- excuse me, was to support a request for additional
6 information in 3500 regarding the nature of the
7 interpreter's -- excuse me, regarding the sequence of events
8 that led to the interpreter's placement on a defense team
9 where we certainly have suspicions and would need more
10 information to determine whether the Government indeed played
11 a role -- again, I'm not saying the individuals in this room,
12 but some Government agencies played a role in this individual
13 ending up having access to attorney-client privileged
14 information. And so those are the circumstances under which
15 we requested testimony in 350X.

16 And at this point in time, given the passage of
17 time -- the passage of time is really why I answered
18 Your Honor the way that I did, that either a deposition or
19 testimony, either -- either one is under oath, but under oath
20 is sort of the key factor in what we're asking for here,
21 because this individual has been proven to have lied on
22 several occasions before.

23 And on the subject of his lies, the argument actually

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 has no emotion to it whatsoever. It's a proven fact that he
2 lied. We were able to demonstrate that almost immediately
3 with the information that the government provided on the 10th
4 of February in 2015.

5 But what is important is not just that he lied on
6 numerous occasions and continued to do so despite evidence the
7 government gave to us, but that he may have lied pursuant to a
8 nondisclosure agreement he signed with the government, which
9 is, again, Government involvement in the lies that he told to
10 the defense. And the only way to really properly flesh that
11 out is by speaking to him under circumstances in which he
12 cannot lie. It's a fairly clear request, Your Honor.

13 And I just want to return briefly, if I may, to the
14 idea of exceptional circumstances. I think trial counsel is
15 aware, and certainly I'm sure the military commission is
16 aware, that there is no case law that has ever been similar to
17 this case, where state-sponsored torture could strike at the
18 heart of the government's primary evidence against these
19 defendants. And so when we talk about exceptional
20 circumstances, this is the literal definition of "exceptional
21 circumstances."

22 Now, we did hear, of course, the government's denials
23 in proffer regarding their lack of involvement in this

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 individual being -- the former interpreter being placed on
2 Mr. Binalshibh's team as -- I won't repeat everything that I
3 said earlier, but the government has on several occasions been
4 shown to have taken steps to gain an unfair advantage as
5 regarding the defense. That has been proven. It is a proven
6 fact on numerous occasions.

7 And so we cannot, standing here today, accept the
8 government's proffer on its face. We require further evidence
9 in order to remove that taint, if indeed what the government
10 is saying is true, and to remove that taint completely.

11 At the time that we filed AE 350C -- Your Honor, I
12 want to make one final point about unavailability because
13 trial counsel spent some time on this. At the time that we
14 filed AE 350C, we recounted the facts leading to the
15 conclusion that the witness -- our conclusion that the witness
16 would be unavailable, including that his supervisor made him
17 unavailable at that time.

18 We have not contacted him since 2015 because of what
19 his supervisor told defense investigators and Mr. Connell, and
20 we cannot contact him now to ascertain whether or not he is
21 even in the same place as he was earlier.

22 So the point about the government -- about, you know,
23 whether or not -- that this witness may very well be

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 available, the balance of facts actually indicates, and the
2 passage of time indicates, that he may very well not be
3 available. He may be beyond availability at this point, but
4 that risk is still out there until we get his testimony on the
5 record.

6 MJ [Co1 PARRELLA]: Thank you, Ms. Pradhan. I just want
7 to clarify, in looking at 350X, it looks like you're asking
8 for his testimony not just for 3500, but also for 350C.

9 ADC [MS. PRADHAN]: I understand, Your Honor. As I stand
10 here today, I would like to clarify that we are asking for
11 either a deposition or for testimony under oath.

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

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

14 MJ [Co1 PARRELLA]: Mr. Nevin.

15 LDC [MR. NEVIN]: Your Honor, the military commission has
16 to bear in mind that at the time we're litigating on
17 February the 9th of 2015, nine months previously we found that
18 FBI agents had made an attempt to infiltrate two defense
19 teams. And that's laid out in some detail in the 292 series,
20 which at the moment that Mr. Binalshibh stood up -- stood up
21 in open court that day, was still a good year or so away from
22 being resolved and from being fully fleshed out.

23 So you will maybe understand that this side of the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 room -- it doesn't have anything to do with not taking
2 Mr. Ryan or the rest of the prosecution at its word in good
3 faith about what it knows, but we have pretty clear indication
4 that at least on some circumstances the prosecution hasn't
5 been -- hasn't known everything about what the Government was
6 doing with respect to us.

7 It's interesting to me that 702(a) does not speak
8 clearly in terms of preserving testimony. And I'm familiar
9 with the cases in federal court that look at depositions as a
10 mechanism for preserving testimony for a trial for a witness
11 who's not going to be available. But it speaks more broadly
12 in terms of when it's in the interest of justice due to
13 exceptional circumstances.

14 And on the one hand, in the ten years I have been
15 working on this case, it's just one exceptional circumstance
16 after another, fair enough, but it certainly is an unusual
17 situation when you have a client who has been tortured at the
18 hands of the Government.

19 And when you have a witness of this type, a situation
20 of this type presenting itself -- I think this is what
21 Ms. Pradhan is getting at when she speaks in terms of this
22 being something like the quintessential definition of
23 "exceptional circumstances." I certainly hope that nothing

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 like this will ever happen again, and I doubt seriously it's
2 ever happened before.

3 So this is a one-off, very unique situation, and I
4 submit that this is what 702(a) -- this is why 702(a) was -- I
5 mean not this specific situation, but it's envisioned as a way
6 for you, or for the military judge, to fashion a remedy here
7 which will go some ways down the road toward putting the
8 parties back where they should have been.

9 And so we have this question of him being exposed
10 to -- this person being exposed to proprietary information.
11 And we need to know what information he's acquired. We need
12 to know what -- as you said, who he shared it with; and it's
13 not just a question of him sharing it with the government,
14 whether he shared it with someone else. And we also need to
15 know whether he had a purpose for getting himself placed on
16 one of the defense teams that very possibly the Office of the
17 Chief Prosecutor does not know about. Many of these things
18 need to be addressed.

19 And this -- in some ways I suppose you could say this
20 becomes something in the nature of a discovery deposition,
21 because, you know, you have to acquire information from this
22 man somehow, and he has been walled off from us, if by nothing
23 else by his employer.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 So whether you do it in open court or -- I submit
2 that a deposition is probably a more efficient way of doing
3 it, so that you don't -- you are not using court time and
4 you're not using -- you're not maybe flying him back down here
5 or doing it via a VTC, but rather in a more -- what do I want
6 to say -- a less-developed circumstance, a less-expensive
7 circumstance. But the point is to get him under oath and get
8 him in a position where at least he has to answer questions
9 fully and truthfully.

10 And I don't think that counsel's argument does away
11 with the need for any of that, respectfully. And thank you,
12 Your Honor.

13 MJ [Co] PARRELLA]: Mr. Nevin, I do have a question. Just
14 so I understand the argument of, I think, the teams,
15 collectively the defense teams.

16 Is it what you're asking the commission for, whether
17 it be deposition, in-court testimony, something in an open
18 session, in light of the class guidance that was given I think
19 today, 350QQQ? Or would this be something you're envisioning
20 in a closed fashion?

21 LDC [MR. NEVIN]: I think it's a good question, and
22 possibly it's another reason for a deposition taking place in
23 a SCIF as opposed to open-court testimony. But certainly some

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of it -- based on the guidance we received today and had
2 received previously, some of this would have to be done in a
3 closed session, for sure.

4 Probably some of it could be done open, although now
5 you have a witness who may or may not understand the guidance
6 fully and who might give answers -- it would be a complicated
7 problem. But I think through the 505 process we could work it
8 out. But I don't think you have to work it out if you order a
9 deposition in a secure facility.

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

11 LDC [MR. NEVIN]: Thank you.

12 LDC [MS. BORMANN]: Judge, I just thought maybe ----

13 MJ [Col PARRELLA]: If you could just hold on one second,
14 please.

15 I'm sorry, go ahead, Ms. Bormann.

16 LDC [MS. BORMANN]: Sure. I thought maybe it got turned
17 up just as I was stepping up as coincidence.

18 A couple of things. First, I think Mr. Ryan was
19 trying to argue the law of the case when he was talking about
20 the depositions that the government had requested from Judge
21 Pohl some time ago, but he got a little of the facts wrong.
22 So they did, in fact, ask for depositions, and Judge Pohl
23 granted four separate ones.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 In 422E, Judge Pohl ruled that Mr. Vigiano,
2 V-I-G-I-A-N-O, and Mrs. Dillard could be deposed. And then in
3 a subsequent ruling, 422I, at the government's request Judge
4 Pohl ruled that Mr. Hanson and Ms. Meehan could be deposed.

5 The basis for the extraordinary circumstances in
6 that -- in those rulings were age and illness. And in
7 consideration for that, the defense offered to hold the
8 depositions in the home states of those individuals. But it
9 was determined that it would happen here in a closed setting
10 in Guantanamo at the government's request. And then for some
11 reason, the government withdrew three of the names and we only
12 deposed one of those individuals. So that is -- those are the
13 facts surrounding 422.

14 With respect to the option of having in-court
15 testimony -- and I would imagine it would be closed, because
16 the name of the individual is classified -- is -- so I want to
17 explore that a little bit, so in-court testimony versus a
18 deposition.

19 And I want to talk about what the government filed
20 and what their position on that is. It's found in their
21 pleading, 350F, filed on the 9th of March 2015. If you look
22 to page 2 at the very top, it reads, "Although a deposition is
23 improper, the defense could seek to call the linguist to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 testify as a witness before the commission in the normal
2 course of litigation during a session or an evidentiary
3 hearing, provided that the defense establishes why the
4 testimony would be relevant to a legal issue properly before
5 the commission. The prosecution generally would not oppose
6 the linguist testifying at an evidentiary hearing, to the
7 extent the testimony would be relevant to a legal issue
8 properly before the commission."

9 The extent to which this linguist vitiated privilege
10 landed in the laps of the defense, interacted with and
11 accessed the files and privileged materials of the defense,
12 and then may or may not have disseminated further is
13 absolutely relevant.

14 So whether it is a deposition because it actually,
15 frankly, might be more expedient or whether it is testimony in
16 a closed or a partially closed session, the one thing the
17 government should not be permitted to argue is that this man's
18 testimony isn't relevant, because it is.

19 Subject to your questions, I'm done.

20 MJ [Col PARRELLA]: No questions. Thank you, Ms. Bormann.

21 LDC [MS. BORMANN]: Thank you.

22 MJ [Col PARRELLA]: Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, Mr. Nevin mentioned 292, and

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the court is probably aware of the background. I just want to
2 give you a couple of sentences about that.

3 A person on my team became an informant for the FBI
4 and worked with them for four months providing extensive
5 attorney-client information and materials to the FBI,
6 certainly with the acquiescence of the FBI, if not their
7 solicitation. That was only discovered when the FBI tried to
8 recruit a second member of our team and that person came
9 forward and told us about it.

10 And when that was announced back in April, I believe,
11 of 2014, the trial counsel here was as shocked as Judge Pohl
12 was, and obviously very quickly they removed themselves from
13 any further involvement in that case, and a Special Review
14 Team was appointed.

15 But I only mention that because it shows that the
16 lengths, again, that I alluded to before that some agencies in
17 the federal government may go. And that informs the belief
18 that we as defense counsel have, but also the belief that our
19 clients have, in terms of trusting the agencies of the
20 government. And you put that with our clients based upon the
21 way that they were treated for a number of years and you can
22 understand that there's -- there's little, if any, confidence
23 in that.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And, Judge, Mr. Ryan said that -- he tried to make a
2 point that our team had asked the convening authority for this
3 former interpreter to be brought down to the session when this
4 was exposed. At the time that request was made, he had not
5 been exposed as the person who was a former CIA agent. I
6 point that out. I would also question how it is that the
7 prosecution is able to get that information when it's
8 information that we filed with the convening authority, but
9 that's something to address on a different day.

10 But, Judge, we are in a position that we don't know
11 who this former interpreter working for the CIA really is, and
12 we need to find that out. And you mentioned before the cart
13 before the horse in one of your questions, and part of our
14 being able to formulate the proper motions to bring in front
15 of you is in part going to be based upon our ability to depose
16 and get information from this person. That will help to form
17 the basis of proper motions that we have to bring on behalf of
18 our clients, that we have to investigate on behalf of our
19 clients, and bring to your attention. So it's -- that's what
20 we need to do, and that's part of the reason that we're
21 requesting this deposition.

22 And, Judge, we don't know whom it is that this person
23 may have worked for. Maybe it's not somebody represented with

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the United States. Maybe it's somebody from another country.
2 We don't know. We just don't know. We don't know what
3 information we're going to be able to get out of a deposition
4 based upon the way that this person has refused to answer some
5 questions before and lied extensively about -- about other
6 questions.

7 But it's -- regardless of the format in which this is
8 done, it has to be done. And going along with Mr. Nevin's
9 suggestion, it may be more practical and more efficient to do
10 it in the form of a deposition rather than having it done down
11 here.

12 And we just -- Judge, we have had different guidance
13 about this person since the beginning of this episode, and at
14 first we were told the only thing we could say about this man
15 was the fact that he was a former interpreter working with the
16 Binalshibh team and he was formerly employed by the CIA. That
17 was all we could say about him.

18 And today we get guidance in which Mr. Trivett
19 advises us that we can't talk about things that he did before
20 September of 2006, which would have been the time when our
21 clients came here, but we can talk about his involvement with
22 our team and the things that he did after that.

23 And I assume, based upon the way the sentence is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 read, that we cannot talk about everything that he was
2 involved with when he was, in fact, associated with the CIA;
3 but based upon his resume, if any of it is true, he has a life
4 that was non-CIA related, which is also important for us to
5 verify, to get at the truth of, and to explore.

6 And I assume, since that's not related to the CIA,
7 that we would be able to talk about that and talk about it in
8 open session, but we can't find that out until we are able to
9 question him and do it under oath. Thank you.

10 MJ [Co] PARRELLA]: Thank you, Mr. Harrington.

11 Mr. Ruiz?

12 LDC [MR. RUIZ]: No, thank you, Judge.

13 MJ [Co] PARRELLA]: Mr. Ryan?

14 TC [MR. RYAN]: Nothing further, Your Honor.

15 MJ [Co] PARRELLA]: Mr. Ryan, I do have one request, if
16 you could, and I neglected to ask you this the last time. If
17 you could address Mr. Harrington's comments regarding 350S and
18 whether that should be something that the commission should
19 revisit.

20 TC [MR. RYAN]: Are we talking about the independent
21 counsel ----

22 MJ [Co] PARRELLA]: That's correct.

23 TC [MR. RYAN]: ---- request, sir?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 At the time it seemed to be an almost everyday
2 occurrence that there was a request for an independent
3 counsel. As we've said, Judge, and it's even more ripe now to
4 say it: As a result of this incident, there was no
5 investigation.

6 I understand 292, which is a completely separate
7 matter from which we are walled off. But as to this
8 particular circumstance, this event, there was no
9 investigation, there was no allegation, there has been no
10 charge, no nothing. So there is no circumstances under the
11 case law that would require independent counsel to advise the
12 client.

13 The counsel on the case should not feel -- should
14 have no reasonable basis to feel that they are conflicted in
15 any way.

16 MJ [Col PARRELLA]: Thank you.

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

18 LDC [MR. HARRINGTON]: Judge, could I just have one?

19 MJ [Col PARRELLA]: You may.

20 LDC [MR. HARRINGTON]: Judge, the conflict here is not
21 because I believe that I am under investigation or something
22 at this point in time. The conflict is because I am a witness
23 in this case, an essential witness in some hearings that may

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 come down the road. And it's not right for me acting as a
2 witness to also be acting as counsel for my client. Our
3 interests may diverge at some point in time.

4 While I am not under investigation now, you need
5 somebody independent to be able to do this. And the other
6 attorneys on my team, some of them have come after this
7 incident happened, but that's not the point. We still would
8 be without learned counsel on this particular issue.

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

10 Okay. We'll go ahead and take a 10-minute recess.

11 Be back here in 10 minutes. The commission is in recess.

12 [The R.M.C. 803 session recessed at 1416, 14 November 2018.]

13 [The R.M.C. 803 session was called to order at 1431,

14 14 November 2018.]

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

18 So what I would like to address next is AE 399, and I
19 know that there was some discussion yesterday that informed
20 the commission that, for some reason I think that we would get
21 into in the closed session, there is reluctance to argue that.

22 But what I'm interested in -- and I understand there
23 is going to be a closed argument on that motion series anyway.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 What I'm unclear about is, given my reading of the pleadings,
2 is there any reason why we couldn't do oral argument --
3 additional oral argument, because there's been previous oral
4 argument, on this to the extent that it's allowed in the open
5 session?

6 DC [MR. MONTROSS]: May I have one moment, Your Honor?

7 MJ [Col PARRELLA]: Of course.

8 [Pause.]

9 MJ [Col PARRELLA]: Mr. Montross.

10 DC [MR. MONTROSS]: Thank you, Your Honor. I will frankly
11 state two concerns. One is that I'm not fully prepared to
12 deal with this today because it was not on your list of what I
13 understood the motions that we were going to be dealing with
14 in today's session, but there is a more fundamental problem.

15 As I briefly alluded to, 399 surrounds or deals with
16 our request for our client to have in-person visitation. The
17 government's response to that request is not to deny that
18 there's an international right to it, not to deny that there's
19 a domestic right to it, but in effect to say there is a
20 substitute that's adequate and effective, and that's the
21 visitation -- that's the video program that's done through
22 ICRC; that it's equally effective; that it permits meaningful
23 relationships with his family; that it's efficient and it's a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 process that he can avail himself of.

2 I need to show the commission that I think that that
3 defense is completely wrong. In order to do that, I need to
4 talk to the military judge about the videos that have been
5 produced thus far. I don't know the classification status of
6 those videos. That's my evidence, Your Honor, for this
7 motion.

8 There is one that is currently pending now in front
9 of the OCA -- I'm sorry. I was just informed by Ms. Bormann
10 actually that there's two -- there are two that are currently
11 pending in front of the OCA right now; and there is two
12 pending translations, one that is just done and that needs to
13 be submitted, one that our translator hasn't completed yet.

14 So that's my evidence for this motion, Judge. And my
15 ability to actually refute the government's position or
16 defense that this video program is an adequate substitute for
17 in-person visitation, rests on my ability to talk to this
18 military commission about those videos. And I don't have them
19 right now, Judge, so I'm asking not to go forward on 399. I
20 don't have evidence. It is in front of the OCA.

21 MJ [Col PARRELLA]: I understand the concern, and I
22 appreciate you bringing that to my attention. What I would
23 like to see if you are prepared to discuss, and I would think

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 you would be given the time that this has been around -- I
2 don't think this is something new -- is putting aside what the
3 government's defense is, is this an issue -- why is this an
4 issue that the commission should involve itself with?

5 In other words, I think there has been plenty of
6 precedent for Judge Pohl in prior rulings on different AEs
7 essentially delineating a line between what is appropriate for
8 the commission to get into and what is internal guard force
9 procedure, JTF procedure. So why does this not fall into that
10 latter category?

11 DC [MR. MONROSS]: I don't believe that it falls into the
12 latter category because there's already been a determination
13 by Judge Pohl that it doesn't. And what I mean by that is,
14 very succinctly, is that Judge Pohl often evinced a desire not
15 to involve himself in the administrative running of a prison,
16 okay. And he would often step back and say that "I am not
17 going to become involved in that."

18 However, he did always indicate that he would become
19 involved in it to the extent that it began to impact our
20 ability to effectively represent our clients before the
21 military commission, or that there were legal consequences for
22 the capital case such that it became necessary for him to
23 avail -- or to intercede.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 So when he issued the ruling in 360B -- I know that's
2 not 399, Judge, but when he issued the rule in 360B, what he
3 said in 360B is that the videotapes are relevant and material
4 to the defense's ability to present mitigation evidence in
5 this case. That makes it a legal issue at that point that
6 affects our ability to adequately represent our client at the
7 penalty phase/sentencing phase of any proceeding that may
8 occur before this military commission.

9 Now, I would also say, Your Honor, that our client --
10 and this is pled in 360 as well, and therefore it has impact
11 in 399, is there is a right -- there is an international right
12 for pretrial detainees, and a domestic right, to have the
13 ability to meet with their family members pretrial. He's not
14 convicted at this point, Judge; he's a pretrial detainee.

15 And the question then is -- not only is that
16 administrative, but we are vindicating -- we are attempting to
17 vindicate due process, domestic and international law, by
18 asking for him to have the ability to meet with his family
19 members.

20 So I would suggest to you, okay, that this is not
21 some, you know, daily -- you know, what sandwich is he eating
22 or what's the type of, you know, daily administrative matters.
23 This goes to the heart of our mitigation presentation.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And I would say to Your Honor by the fact that the
2 judge ruled that we get to see the videos in 360, because it's
3 mitigating evidence in our case -- by that ruling he took it
4 outside of the daily JTF administrative responsibilities that
5 perhaps the military judge would be loath to intercede in.

6 MJ [Col PARRELLA]: Well, you would agree it's a little
7 easier for the military judge to order the defense to have
8 access to videos than it is -- I would, frankly, think it
9 would be beyond the authority of the commission to order
10 bringing in foreign nationals to Guantanamo Bay, Cuba. A
11 little bit more complicated issue; wouldn't you agree?

12 DC [MR. MONTROSS]: I have whispering from my left. May I
13 entertain?

14 MJ [Col PARRELLA]: You may.

15 [Pause.]

16 DC [MR. MONTROSS]: Thank you, Judge. I appreciate your
17 indulgence.

18 Two responses. And this is going to be my first
19 response, and I say this with respect: Yes, it's going to be
20 harder, but the ICRC video program isn't working, Judge. It's
21 not efficient, and it's not an adequate substitute.

22 Is it going to be harder for this court to order my
23 client's relatives to be able to have in-person visitation?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Absolutely. But that is a right that he is entitled to under
2 international law and domestic law. And if this court is in a
3 position where it cannot vindicate, okay, those rights,
4 guaranteed by international law and domestic law, then that's
5 a great appellate issue for me.

6 So I want you to be able to vindicate those rights.
7 My client is desperate to see his family. It's the mitigation
8 that we crave in this case. And frankly, it's been a basis
9 for some of the difficulties that we've had with our client
10 sometimes, is that we can't provide answers about why he can't
11 see his family.

12 And I'm not saying it's an easy solution, Judge, but
13 what I'm saying is I think we have a clear right to it. And
14 if this court can't vindicate that right, then that's a
15 failing of the military commissions system, and that would be
16 an appellate issue for me.

17 But if I can -- you know, the second response is --
18 you know, I wasn't prepared to argue 399 this afternoon. If
19 you want me to provide more detailed answers, I am more than
20 happy, and I would be pleased to do it tomorrow morning for
21 Your Honor if you wish to take it up then.

22 MJ [Col PARRELLA]: Okay. I'm happy to give you that
23 opportunity. But it sounds like, frankly, what you want to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 argue to the commission will be on Friday because, given the
2 class guidance that seems to be hampering your ability to show
3 the video in open session, you could do so in a closed
4 session.

5 DC [MR. MONTROSS]: But I don't have the videos yet,
6 Judge. They are at OCA right now. Two of them are pending
7 review. So I can't -- all I can represent to you is I don't
8 know if they're going to be classified or not.

9 My understanding is my obligation is if I have a
10 piece of evidence that I wanted or intended to present in
11 front of the military commission, my responsibility is to give
12 that through the appropriate process, through OSS, to the OCA
13 for a classification review.

14 I don't know what they're coming back as, Judge. I
15 don't know if they're coming back unclassified. And if they
16 are unclassified I would be happy, and I think the public is
17 entitled to have that hearing in an open session. If they
18 come back classified, then obviously I would need to do it in
19 a closed session. But what I'm respectfully telling
20 Your Honor is I don't physically tangibly have that evidence
21 in my hands right now because it's pending OCA review one way
22 or the other.

23 MJ [Col PARRELLA]: Okay. So what we'll do, Mr. Montross,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 and I will give the other counsel an opportunity to be heard
2 today, but I will also give you another opportunity to be
3 heard tomorrow, so that ----

4 DC [MR. MONTROSS]: I don't have the evidence, Judge. I
5 don't have the evidence that I need for 399 because it's
6 pending OCA review. I don't have that, Judge.

7 MJ [Col PARRELLA]: Okay.

8 DC [MR. MONTROSS]: Okay.

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

10 DC [MR. MONTROSS]: Thank you, Your Honor.

11 MJ [Col PARRELLA]: Mr. Nevin?

12 LDC [MR. NEVIN]: May I have a moment, Judge?

13 MJ [Col PARRELLA]: You may.

14 ATC [Maj DYKSTRA]: Your Honor, may I just add something?
15 At transcript 12249 Mr. Nevin, Harrington, and Mr. Ruiz all
16 waived oral argument on this series. So I don't see how they
17 should be able to add something as of right now.

18 LDC [MS. BORMANN]: Judge, so that I am clear on this --
19 because the practice has been we don't waive oral argument on
20 the series. When I didn't argue earlier following one of my
21 colleague's arguments, I didn't say I waive oral argument on
22 the series; we waive on a particular day so as not to repeat
23 what our colleague said, so ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: Yes, I understand. And because
2 these -- some of these motions have come up on multiple
3 sessions, I don't look at it as a prior waiver of oral
4 argument at a prior session of court, I guess, sometime ago
5 would forever preclude you from standing up. So I'll
6 certainly give you an opportunity to do so, because I think
7 that's significantly different from disjoining from a motion.

8 So with that, Mr. Nevin?

9 LDC [MR. NEVIN]: Your Honor, we were trying do some work
10 here quickly to address the military commission's authority to
11 issue orders in this way. And I think there is a mechanism
12 for this, but I didn't see this coming up right at this
13 moment, and so I'm not prepared to address it right now.

14 The only reason I'm standing up is just to say to you
15 that classically relationship with family is a critical part
16 of mitigation in a capital case, and at an absolute bare
17 minimum, understanding the relationship between a defendant
18 and his family and presenting it, if it's strong, if it still
19 exists, and if there is still family there, for example, is a
20 very well accepted part of what lawyers are supposed to do in
21 capital cases.

22 So I really only wanted to say that this is not --
23 just as Mr. Montross said, this is not what's for lunch, or

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 this is not even may female guards touch or not touch me as a
2 prisoner at Camp VII.

3 This goes to the fairness, potentially at least, goes
4 to the fairness of these proceedings if there is a conviction
5 and if we get to a penalty phase. And this is -- this
6 circumstance is handcuffing -- would handcuff all of us in
7 being able to develop the kind of evidence that I'm talking
8 about. And I ask that you consider this issue in that light.

9 So thank you, Your Honor.

10 MJ [Col PARRELLA]: Thank you.

11 Mr. Harrington?

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

13 MJ [Col PARRELLA]: Mr. Connell?

14 DC [MR. FARLEY]: Good afternoon, Your Honor. Ben Farley
15 on behalf of Mr. al Baluchi.

16 MJ [Col PARRELLA]: Good afternoon.

17 DC [MR. FARLEY]: I would like to address just briefly the
18 sort of domestic and international legal framework that
19 surrounds the right to family visitation.

20 It's clear that under both domestic and international
21 law, including both international humanitarian law, the law of
22 war and international human rights law, as well as Department
23 of Defense policy, that Joint Task Force Guantanamo must allow

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Mr. al Baluchi reasonable access to his family, including
2 through family visits.

3 I think it bears reminding that Mr. al Baluchi's
4 forced isolation began more than 15-and-a-half years ago when
5 he was captured and rendered to CIA custody as part of the
6 Rendition, Detention, and Interrogation program. Among the
7 numerous abuses Mr. Al Baluchi suffered in more than three
8 years of CIA custody at a variety of black sites, he was
9 disappeared and held incommunicado. Despite being transferred
10 to Guantanamo in September of 2006, the U.S. Government
11 continued to deny him access to the outside world, outside of
12 infrequent ICRC messages, until late 2014.

13 The U.S. Government even refused to provide
14 Mr. al Baluchi with a humanitarian family phone call when his
15 father passed away in February of 2013, and the
16 U.S. Government has denied Mr. al Baluchi any and all
17 in-person contact with his family since his capture more than
18 15, 15-and-a-half years ago.

19 This is emblematic of the U.S. Government's position
20 with respect to Mr. al Baluchi and the other defendants on
21 trial here today, that it may draw from the authorities found
22 in the law of war, in international humanitarian law without
23 at the same time adhering to its obligations found in the law

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of war.

2 The problem for the U.S. Government is that the law
3 of war is not a body of law that can be picked and choosed
4 from at the discretion of the detaining authority; it's a
5 package deal. You can't take the sweet without the bitter, so
6 to speak.

7 Common Article 3 which applies to the armed conflict
8 between the United States and al Qaeda requires that the
9 United States, among other things, treat all persons rendered
10 hors de combat, including through detention, humanely.
11 According to the Department of Defense's interpretation of
12 humane treatment during a non-international armed conflict
13 like the one between the United States and al Qaeda, humane
14 treatment requires allowing detainees appropriate -- this is a
15 quote now -- appropriate contact with the outside world,
16 including, where practicable, family visits. And that comes
17 from the Department of Defense Directive Number 2310.01E.

18 Likewise, the 2015 Department of Defense Law of War
19 Manual citing DoD's interpretation of humane treatment for
20 purposes of Common Article 3 explains that DoD practice has
21 been to allow detainee family visits where practicable. This
22 is all -- this is similar to the position that the United
23 States took in the so-called Copenhagen Practice identifying

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 best policies and practices and legal obligations respecting
2 detention in non-international armed conflicts.

3 And it may not surprise you to know that the
4 Department of Defense is not alone in this interpretation,
5 that humane treatment necessarily includes family contact as
6 one aspect of contact with the outside world.

7 The International Committee for the Red Cross in its
8 seminal Customary International Humanitarian Law Survey --
9 excuse me -- Customary International Humanitarian Law Survey,
10 determined that family visitation rights are an element of
11 customary international law with respect to non-international
12 armed conflicts.

13 The ICRC reached this conclusion after surveying
14 actual state practice in non-international armed conflicts,
15 domestic legislation, and decisions by disparate international
16 bodies such as the European Court of Human Rights and the
17 Inter-American Commission on Human Rights. Significantly, in
18 its survey, the ICRC was unable to identify any official
19 contrary state practice.

20 Similarly, both the so-called Mandela Rules, which
21 are the 2015 update to the United Nations Standard Minimum
22 Treatment Rules -- Standard Minimum Rules for the Treatment of
23 Prisoners, and the body of principles for the protection of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 all persons under any form of detention or imprisonment both
2 demand that a person subject to detention be granted family
3 visits. Thus, as a general principle, as a law of war
4 detainee and pursuant to the laws of war, Mr. al Baluchi is
5 entitled to family visits where practicable.

6 More to the point, however, contemporary law of war
7 tribunals outside of Guantanamo have universally afforded
8 pretrial detainees, like Mr. al Baluchi, who face war crimes
9 charges, family visitation. This is embodied in the ICTY's
10 rules, the ICTR, the Special Tribunal for Lebanon and even the
11 detention -- the Rules Governing the Detention Facility for
12 the International Criminal Court.

13 Thus, JTF-GTMO's failure to allow Mr. al Baluchi
14 family visitation violates DoD policy, the United States'
15 interpretation of its obligations under international law, at
16 least when it speaks authoritatively to the rest of the world,
17 and accepted international law and practice respecting both
18 detention and non-international armed conflicts and detention
19 of individuals like Mr. al Baluchi facing war crimes charges.

20 As Mr. Nevin said a moment ago, it's also standard
21 practice under international humanitarian -- or human rights
22 law -- or binding under international human rights law that
23 victims of torture are to be afforded a reasonable opportunity

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to obtain redress for that torture, including rehabilitation
2 provided by the state.

3 Family contact is a widely recognized prerequisite
4 for torture rehabilitation. So denial of Mr. al Baluchi's
5 ability to visit with family inhibits his rehabilitation for
6 the torture he suffered at the hands of the U.S. Government
7 and impedes his ability to participate in his defense.

8 Your Honor, you had asked a question of my colleague
9 a moment ago asking about the practicability of bringing
10 foreign nationals to Guantanamo to meet with detainees.

11 MJ [Col PARRELLA]: More specifically, it's what's the
12 authority of this commission to order, to overrule, to direct
13 the JTF to allow foreign nationals to come to the JTF
14 facility?

15 DC [MR. FARLEY]: So I believe that if you look at AE 1 --
16 excuse me, may I?

17 MJ [Col PARRELLA]: You may.

18 [Pause.]

19 DC [MR. FARLEY]: Your Honor, one answer to your question
20 is that the military commission lacks authority to order any
21 specific activity unless it affects specific cases and issues
22 pending before the military commission. And you can find that
23 in AE 093A and 254JJ.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 But more broadly, the military commission, as I think
2 we've discussed some earlier today, lacks the authority to
3 issue -- to order much outside of what occurs in the immediate
4 walls of this commission. However, the military commission
5 does have the ability to issue sanctions where appropriate.

6 And this is an instance where, although the military
7 commission may not be able to direct the Joint Task Force to
8 facilitate family visits directly, it does have the ability
9 to, for example, abate the case until Mr. al Baluchi is in a
10 position to fulsomely participate in his case. And at this
11 moment in time, because he is suffering the effects of torture
12 that he suffered at the hands of the U.S. Government years
13 ago, and he is being denied his ability to meet with family,
14 which would do some -- some benefit, assist him in recovering
15 from that torture, and because he is being denied his rights
16 under international law, domestic law, and DoD policy, the
17 policy that the U.S. Government upholds to the rest of the
18 world as the gold standard of detention, the military
19 commission can order the abatement or can otherwise sanction
20 the government until his rights are vindicated.

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

22 DC [MR. FARLEY]: Thank you, Your Honor.

23 MJ [Col PARRELLA]: Mr. Ruiz.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. RUIZ]: Nothing, Your Honor, thank you.

2 MJ [Col PARRELLA]: Trial Counsel.

3 ATC [Maj DYKSTRA]: Thank you, Your Honor. First of all,
4 I want to thank you for taking the time today to address 399.
5 Obviously, this has been on the docket for about two years.
6 AE 321, which is kind of related, has been on for close to
7 four years at this point in time. So the continuing of delay
8 of this motion series, as well as 321, is -- at some point in
9 time we need to put this thing to bed and just move forward.

10 In response to defense arguments, I'd just like to
11 briefly say that I adopt all the positions that we state in
12 our brief, obviously, but I just want to point out a couple of
13 the commission's rulings that directly pertain to the relief
14 requested; namely, AE 093A, which denied Mr. Ali's request for
15 the commission to direct that he be permitted to have
16 communication with his family via phone call, video
17 teleconference, or recorded video message; AE 200II, which
18 said this commission is thus without jurisdiction as
19 established in the MCA to rely on customary international law
20 to grant any relief.

21 Appellate Exhibit 303D, the MCA precludes alien
22 unprivileged belligerents from invoking the Geneva Conventions
23 as a basis for a private right of action. It also said, "This

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 commission finds --" and it was pertaining to Mr. Hawsawi --
2 "has had contact with his family. Defense has not cited any
3 law that has stood for the position that the contact with
4 family Mr. Hawsawi has received is legally 'inadequate.'
5 Communications have been made, and though logistics appear to
6 be an ongoing issue, the imperfections of these systems do not
7 rise to the level of inhumane treatment."

8 The commission also said, "This commission is further
9 not persuaded by Defense's argument that quality of life
10 effects of the detainees are also adversely affecting,
11 quote/unquote, the quality of engagement of representation."

12 And then finally, AE 473B, which was issued
13 subsequently to 360B, stated, "Managing outside contact with
14 detainees is self-evidently a legitimate penological interest.
15 Mr. Binalshibh has not identified any right relevant to this
16 litigation materially prejudiced by JTF-GTMO's denial of his
17 request for an ICRC facilitated video call to his brother.
18 Nor has Mr. Binalshibh shown that the denial adversely impacts
19 the Commission's ability to proceed."

20 So I just point out those rulings, Your Honor, to
21 pretty much answer every single point that has been brought up
22 by defense.

23 And with that, Your Honor, subject to your questions,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I have nothing further.

2 MJ [Col PARRELLA]: No questions. Thank you, Major
3 Dykstra.

4 ATC [Maj DYKSTRA]: Thank you, Your Honor.

5 MJ [Col PARRELLA]: Mr. Montross?

6 DC [MR. MONTROSS]: May I respond tomorrow morning at 0900
7 on the balance of 399?

8 MJ [Col PARRELLA]: You may.

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

10 MJ [Col PARRELLA]: You're welcome.

11 Any other counsel from the defense care to be heard
12 again?

13 LDC [MR. RUIZ]: Judge, I would ask to -- back here,
14 Judge.

15 MJ [Col PARRELLA]: No, I hear you.

16 LDC [MR. RUIZ]: I would just encourage you from time to
17 time, Judge, your predecessor ----

18 MJ [Col PARRELLA]: Hold on. Hold on a second. Hold on
19 one second just so we don't talk over each other. Mr. Nevin
20 was standing up, but go ahead, you're up. You're up, so
21 please stand up and please go ahead.

22 LDC [MR. RUIZ]: I was simply going to ask for the same,
23 to be allowed to make any remarks tomorrow. I also was not

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 expecting to address that issue today.

2 MJ [Col PARRELLA]: Okay. Anybody else?

3 LDC [MR. NEVIN]: The same request.

4 MJ [Col PARRELLA]: All right. So I'm willing to give
5 some flexibility. On the other hand, folks, this has been on
6 the docket order. You know, just because I have shifted the
7 order from last night, we all knew a month before we came down
8 here that we were going to argue 399. Not to mention it's
9 been on the -- it has been argued many times before.

10 So I will tell you that I will give you a minimal
11 amount of time, but we are not going to simply just get up
12 here and continue to re-re-hash these same issues. So I will
13 give Mr. Montross an opportunity.

14 Mr. Ruiz, you did not have an opportunity to speak.

15 Mr. Nevin, I would say that if you want to say
16 something -- you have already said some points to it, but
17 unless there's some compelling reason that you have to wait to
18 tomorrow morning, I think the commission -- we've got other
19 stuff we've got to get to.

20 LDC [MR. NEVIN]: Well, Your Honor, what I referred to --
21 excuse me. What I referred to when I stood up before was to
22 address the question of your authority to issue this order.

23 MJ [Col PARRELLA]: Okay.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NEVIN]: And I didn't understand that had been
2 briefed before, and so that's really ----

3 MJ [Co1 PARRELLA]: I will allow you -- if you want to --
4 I understand you want to do some research. If you want to
5 point me to some authorities tomorrow morning, that's fine.
6 So we will take up those three exceptions. Otherwise, I
7 remind everybody 399 is still on the docket for our closed
8 session as well.

9 Okay. With that, I believe we have 604.

10 Mr. Connell.

11 LDC [MR. HARRINGTON]: Judge, before you start 604, could
12 I put something on the record about 604?

13 MJ [Co1 PARRELLA]: You may.

14 LDC [MR. HARRINGTON]: Judge, we were not the original
15 filers of 604; Mr. Connell was. But in the government's
16 response on 604, they raised some allegations or factual
17 assertions with respect to our team. And we have prepared a
18 reply, which will be filed this afternoon. The date -- I
19 think tomorrow is the day when it should be filed.

20 I'm not asking for additional oral argument or
21 anything else, or any extension of time. I just wanted to
22 make the court aware of that and ask the court to consider
23 that filing in its decision.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Col PARRELLA]: I will consider it, and thank you for
2 bringing that to my attention.

3 Mr. Farley.

4 DC [MR. FARLEY]: Thank you, Your Honor. Your Honor,
5 AE 604 is Mr. al Baluchi's motion to compel inspection of
6 physical raid evidence obtained during overseas raids. Really
7 what this is, though, is Mr. al Baluchi's request to the
8 military commission that the military commission reinstate the
9 pre-30 September 2018 status quo with respect to
10 Mr. al Baluchi's access to physical evidence in the
11 government's custody.

12 As I think the military commission is aware, the
13 government possesses nearly 2100 items of physical evidence
14 obtained during overseas raids. The physical evidence itself
15 is located and continues to be stored at the FBI Headquarters
16 in Washington, D.C. And between April of 2016 and -- excuse
17 me, September of 2018, Mr. al Baluchi, along with
18 Mr. Mohammad, operating in teams, regularly traveled on the
19 nonholiday, nonfederal-holiday Mondays from their office in
20 Virginia, their offices in Virginia, to the FBI Headquarters
21 to review that physical evidence.

22 This travel required coordinating with the FBI two
23 weeks in advance, identifying what items of evidence

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Mr. al Baluchi's representatives and Mr. Mohammad's
2 representatives sought to review, processing through the
3 screening, the security screening at the FBI Headquarters, to
4 be treated like a visitor, waiting for the escorts to arrive,
5 coordinating with the Washington headquarters service office
6 of special security to obtain the technical equipment
7 necessary to conduct the review, and then returning that at
8 the end of each -- at the end of each trip.

9 And in total, Mr. al Baluchi's team alone has spent
10 nearly 800 person-hours over this time period, acquiring more
11 than 25,000 pages of copies and nearly 4,000 photographs of
12 FBI physical -- or, excuse me, the government's physical
13 evidence obtained during raids. This represents a review of
14 1,340 items of the nearly 2100 items, or 64 percent of the
15 government's physical evidence.

16 So I lay all that out for you, Your Honor, because
17 notwithstanding Mr. al Baluchi and Mr. Mohammad's steady
18 progress and diligent efforts, at the end of September 2018,
19 the government suddenly terminated Mr. al Baluchi's access to
20 the physical evidence in the FBI's custody.

21 The government has represented that it terminated
22 Mr. al Baluchi and Mr. Mohammad and the other defendants'
23 access to this physical evidence in some sort of effort to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 speed progress towards trial.

2 Unfortunately, the government's apparent zeal to
3 speed progress towards trial has done nothing but actually
4 delay our progress towards trial.

5 Mr. al Baluchi enjoys a statutory right, under both
6 the Military Commissions Act and the Rules of Military
7 Commission, to inspect or examine the physical evidence in the
8 government's custody.

9 If Your Honor looks at 10 U.S.C. Section 949j,
10 Your Honor will see that the Military Commissions Act
11 instructs that the defendant shall have an opportunity
12 comparable to the opportunity available to a criminal
13 defendant in a court of the United States under Article III to
14 obtain evidence. Now, in federal criminal court it's common
15 practice for criminal defendants to be afforded the
16 opportunity to review all of the physical evidence in the
17 possession of the government.

18 Under the Rules for Military Commissions 701,
19 Your Honor will note that upon a request of the defendant, the
20 government shall -- shall permit defense counsel to examine
21 tangible objects which are within the possession, custody or
22 control of the government, which are either material to the
23 preparation of the defense or intended for use by the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 prosecution in their case-in-chief.

2 In addition, Mr. al Baluchi's counsel face an ethical
3 obligation to review all the physical evidence in the
4 government's possession. The standard of care in capital
5 defense cases mandates that defense counsel undertake a
6 fulsome investigation, including a review of all of the
7 physical evidence in the hands of the government.

8 The government, in its response to Mr. al Baluchi's
9 motion, sort of hints that it's -- that the evidence that
10 Mr. al Baluchi and the other defendants have not yet reviewed
11 is either immaterial -- excuse me, immaterial or not
12 exculpatory, but it doesn't actually argue that it's
13 immaterial.

14 And one of the factors that the government ignores in
15 its response is that Mr. al Baluchi and Mr. Mohammad have made
16 a certain amount of progress through the review of the
17 physical evidence. In our case, approximately 64 percent of
18 the evidence is reviewed.

19 Among that progress is nearly all but not quite all
20 of the items that the government has identified as affirmative
21 use. So those are items that the government intends to use --
22 has communicated to the defense that it intends to use in its
23 case-in-chief. Other defendants have made different amounts

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of progress.

2 But notwithstanding our disparate progress towards
3 reviewing all of the evidence in the government's hands and
4 notwithstanding our disparate progress towards reviewing the
5 evidence that the government intends to use in its
6 case-in-chief, the government has arbitrarily cut off all of
7 our access to review the physical evidence as of a specific
8 date.

9 This demonstrates that the government's decision,
10 notwithstanding the sort of hints in its response to
11 Mr. al Baluchi's motion, has nothing to do with
12 Mr. al Baluchi's obligations or his rights to review physical
13 evidence and everything to do with setting an arbitrary
14 deadline and trying to jump start progress in this case.

15 Now, unfortunately the real effect of the
16 government's arbitrary date terminating Mr. al Baluchi's
17 progress -- or excuse me, access to evidence, physical
18 evidence, has been to just extend the amount of time that it
19 will take Mr. al Baluchi to conclude the review of physical
20 evidence.

21 It's been five nonholiday Mondays since
22 Mr. al Baluchi was last able to attend an evidence review at
23 FBI Headquarters. Had Mr. al Baluchi been able to attend

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 those evidence reviews with Mr. Mohammad and had he progressed
2 at the same rate that he's progressed up to this point,
3 Mr. al Baluchi would have reviewed instead of just 64 percent
4 of about all of the physical evidence in the government's
5 hands, but instead nearly 70 percent of all the evidence in
6 the government's hands.

7 And had he continued to progress at that same rate as
8 he had over the previous two-and-a-half years, Mr. al Baluchi
9 would have concluded his evidence review by early August of
10 2019.

11 Now, given the delay that has been imposed on
12 Mr. al Baluchi's progress towards reviewing this evidence and
13 given the two-week notice requirement imposed by the
14 government on Mr. al Baluchi and the other defendants before
15 they are able to go to the FBI and review physical evidence,
16 even if the military commission were to today order the
17 defense or order the government to reinstate the status quo,
18 conclusion of the evidence review, at least in
19 Mr. al Baluchi's case, would be pushed off until October of
20 29 -- 2019.

21 So, Your Honor, because it's a right that
22 Mr. al Baluchi enjoys statutorily and because it is an
23 obligation imposed on Mr. al Baluchi's counsel under the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Constitution and their ethical duties, Mr. al Baluchi is
2 asking you merely to restore the status quo as it was before
3 the 30th of September 2018 when he had access consistent with
4 the protocol developed and instituted by the government to the
5 physical evidence that the government continues to reserve the
6 right to use against him in its case-in-chief.

7 Subject to your questions.

8 MJ [Col PARRELLA]: No questions. Thank you, Mr. Farley.

9 DC [MR. FARLEY]: Thank you, Your Honor.

10 MJ [Col PARRELLA]: Mr. Nevin? Ms. Bormann?

11 LDC [MS. BORMANN]: I understand that the government
12 doesn't have any idea what happens on the defense team, but
13 let me just explain to you how difficult it is just on a daily
14 basis to even kick-start anything. So I am going to give
15 you that they note that the last time I think we were there
16 was on August 30 of this year, and prior to that it had been
17 August 15th.

18 I was there on August 15th. It takes me flying from
19 another location there and landing, and then we have to make
20 an appointment two weeks in advance. And so we go there, and
21 then we have to wait. And basically, I spend about 15 hours
22 to get approximately five hours of viewing done.

23 We have to take the photographs so that we can share

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 them with the rest of the team on a classified camera and then
2 courier it back to offices.

3 I still don't have those photos uploaded from
4 August 15. Why? Because the IT infrastructure in the defense
5 organization doesn't permit us to upload them onto our
6 computer system. We have literally asked that they be
7 uploaded since that day. It's been three months now, and
8 they're still not done.

9 Before we go back to continue more review, we would
10 like to review with various team members, investigators in
11 particular, who are cleared, what it is we're looking for.
12 But because we can't get past square two in the hopscotch
13 thing, it's hard to go on to square three.

14 Now, the government doesn't understand any of that,
15 and I get that they don't because, of course, I don't inform
16 them of that. So they can only draw whatever conclusions they
17 draw.

18 However, your job is to not permit them to do
19 arbitrary and capricious deadlines. There's no compelling
20 reason they need to cut off investigation, defense
21 investigation. There's no -- let me just give you an example.

22 So let's say that we are preparing for trial at some
23 point down the line and the government, oh, I don't know, does

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 what it did this week and gives us in the middle of the week a
2 batch of 100 pages of discovery that they just discovered is
3 material to the preparation of the defense; and it references
4 a piece of evidence that was recovered at some earlier point
5 and stored over at FBI Headquarters.

6 Do I have to come in now, because they've arbitrarily
7 cut off access to the evidence, and petition you, file a
8 motion to be able to go view evidence? It's crazy. In any
9 other courtroom, in any other federal court, state court,
10 defense counsel have access to evidence. It's simple.

11 Here it appears that the government is taking
12 advantage of a system designed to deny the defense -- excuse
13 me, I am losing my voice again -- you deny defense's ability
14 to properly investigate.

15 You're going to hear more about that in 524 when
16 Judge Pohl fashioned a remedy for one of those denials, series
17 of denials, history of denials. But in this case they don't
18 even pretend to make an argument about why it is compelling,
19 they simply don't.

20 So you should do with this motion what they've asked
21 you to do with all of the defense motions, which is not even
22 hear their argument. There's no basis for this in the fact or
23 the law. Why cut off evidence review when we continue to do

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 it at the best pace we can, and we have a Constitutional right
2 to it.

3 Subject to your questions, I'm done.

4 MJ [Col PARRELLA]: No questions. Thank you, Ms. Bormann.

5 LDC [MS. BORMANN]: Thank you.

6 MJ [Col PARRELLA]: Mr. Harrington?

7 LDC [MR. HARRINGTON]: Judge, we'll rely on our filing
8 this afternoon.

9 MJ [Col PARRELLA]: Mr. Ruiz?

10 LDC [MR. RUIZ]: No questions, thank you.

11 MJ [Col PARRELLA]: Trial Counsel?

12 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

13 MJ [Col PARRELLA]: Good afternoon.

14 MTC [MR. TRIVETT]: If the prosecution has not satisfied
15 our obligations under R.M.C. 701, after 150 separate visits to
16 FBI Headquarters to review what is 244 items of evidence that
17 the prosecution intends to use, including 85 visits by the
18 proponent of this motion, then I submit to you that no trial
19 counsel in the history of military justice has ever satisfied
20 their obligations under 701.

21 It's important for the commission to understand what
22 the defense already has that was provided by the prosecution.
23 For years they've had copies of every page of any affirmative

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 use document we intend to use as evidence. They've had a
2 forensic picture of any item we intend to use, that's a
3 nondocumentary item, for years. If there were digital pieces
4 of evidence, they've had forensic digital copies of every
5 piece of evidence that we intend to use, for years.

6 And now, over the last four months, because of how
7 long this was taking the defense to work through their
8 process, the prosecution asked the FBI to conduct an image
9 capture of every single page of every single raid item,
10 regardless of whether it was affirmative use or nonaffirmative
11 use; meaning everything that they've said about going and
12 making photographs or making copies they already have. We
13 have done that for them, in order to not to have to continue
14 to do what is a burdensome logistical and resource-driven
15 hosting of the defense teams at FBI Headquarters.

16 The defense reply doesn't acknowledge 85 trips that
17 they took, or that the prosecution extended the deadline at
18 their request over three times, or that they have every page
19 of every item that they hope to go to make photocopies of.
20 They don't challenge these facts at all in their reply.

21 It cannot be that the defense dictates the pace of
22 these proceedings by spacing out the reviews however they
23 want. Going once a week for several hours at a time perhaps

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 is just unreasonable. If there was 2100 documents or 2100
2 pieces of evidence that they wanted to look at, they clearly
3 couldn't say I want to go once a week and look at one item,
4 and that's going to take me the next seven years, and I'll be
5 ready for trial in 2025.

6 It can't be that. That can't be our obligation.
7 They can't dictate how long this process is going to take,
8 when we have already given them everything it is that they're
9 doing when they go there anyway.

10 Responding directly to Mr. Farley, who talked about
11 all of the logistics that are required to go there on Mondays,
12 we agree, and at some point DoD funded an FBI detail to go and
13 host the defense teams.

14 When you're dealing with the review of evidence, you
15 need people who are trained to do this. You need evidence
16 technicians to be able to make sure that the evidence is
17 preserved in a way where the defense can still look at the
18 evidence, but that the evidence is still intact for use at
19 trial. This isn't a simple thing as far as opening a door and
20 saying go take a look at it.

21 At some point we were using our own resources,
22 prosecution-assigned FBI resources to do it, and it was
23 impacting our ability to get ready for trial. So then we

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 detailed a specific FBI evidence tech detail for six months,
2 and we informed them that it was going to be six months. And
3 we said, "If you want to review anything that you've had the
4 opportunity to review over the last three and a half years,
5 now is your six months to make it happen."

6 After the end of six months we agreed to extend it,
7 because we had some additional documents that had come in --
8 or additional items, rather, the items deemed suitable for
9 shipping in another ruling that the military judge made, so we
10 extended that deadline out until the end of August.

11 Defense continued to schedule some things into
12 September, which the FBI continued to grant, and so we
13 extended that until the end of September. But at some point
14 this needs to stop. And we suggest that we have satisfied our
15 obligation, certainly when we turned over every page of every
16 item. And some of these are commercially produced items.
17 There might be a textbook that has no relevance to our case,
18 just happened to be found in one of the raid sites that might
19 be 500 pages long, and we had someone from the FBI take a
20 picture of every page of that textbook to provide to the
21 defense.

22 So in short, there is really nothing that they are
23 going to see that they don't already have. And we have said

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 if there is some kind of good cause they can show as to why
2 they want to see a particular item, usually a tangible item,
3 once the evidence is moved down to Guantanamo, we're happy to
4 set up a viewing or two to do that.

5 We're not precluding any future visits ever, but
6 we're simply asking that reasonableness be the standard that
7 we're held to, and not an indefinite amount of visits.

8 Ms. Bormann, I believe, made a hopscotch analogy,
9 where she can't really get past step two. We got her to the
10 end of the hopscotch board. They have everything they need.
11 They don't need to continue to go to the FBI Headquarters to
12 take pictures of things that we've already provided
13 higher-quality pictures than they can probably take.

14 She shouldn't worry about any of the classification
15 review, or whatever she said happened to the photos on her
16 camera, because we already provided those photos to them.
17 They have everything they need. We have satisfied our
18 obligations under 701, and we ask you to find so.

19 And subject to your questions, sir.

20 MJ [Col PARRELLA]: Mr. Trivett, so under your -- the
21 excerpt from your Attachment I, the procedure you are
22 intending to take, at some point this evidence will be moved
23 down to Guantanamo?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MTC [MR. TRIVETT]: Correct.

2 MJ [Co1 PARRELLA]: Is there any timeline or is that just
3 dependent upon the timeline of this trial?

4 MTC [MR. TRIVETT]: So the FBI Headquarters room where it
5 all is currently is being repurposed. So we're moving those
6 out to a different FBI facility that's not suitable to host
7 these trips like FBI Headquarters is.

8 So ultimately the evidence will be coming down here.
9 Some of it is tied to the evidence trailer project. But we do
10 have a certified evidence trailer right now in our trailer
11 that can be utilized as well. So the exact timing of that
12 hasn't yet been worked out. Some of it will, no doubt, be
13 determined on the 478 trial scheduling order.

14 But ultimately we have to get the evidence down here,
15 because this is where it's going to be presented in court.
16 The intention is to store it down here in advance of the
17 proceedings. When exactly that is is a little bit dependent
18 on some of the construction, I believe, and, quite frankly,
19 some FBI policies as to when they want to get it down out of
20 the facility that they're about to move it to.

21 MJ [Co1 PARRELLA]: So the government rationale is that
22 aspect of the resource component as well as its being -- has
23 to be moved to a facility that would not be suitable to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 continue to host these?

2 MTC [MR. TRIVETT]: Absolutely.

3 MJ [Col PARRELLA]: Okay. I have no further questions.

4 Thank you.

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

6 MJ [Col PARRELLA]: Mr. Farley.

7 DC [MR. FARLEY]: Thank you, Your Honor. Just a couple of
8 quick points. The first is that you've just heard from trial
9 counsel about the logistical difficulties associated with FBI
10 evidence reviews that the defense undertakes at headquarters,
11 and you heard from me about that as well.

12 For reasons that pass my understanding, trial counsel
13 seems to believe that moving evidence to Guantanamo is going
14 to somehow lessen the burden and the logistical difficulty of
15 undertaking evidence reviews.

16 If evidence technicians, who are presumably present
17 at the FBI anyway, are too onerous to provide -- to make
18 available to the defense in Washington, D.C., it seems to me
19 that forcing a detailing of FBI technicians, evidence
20 technicians down here on either a permanent or a TDY basis
21 when the defense wants to undertake an evidence review, would
22 be at least substantially more onerous. I mean, consider the
23 additional cost of housing these people, of their travel, of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 their MI&E -- MI&E.

2 So that's sort of, I think, an important point to
3 make. But it's beside the greater point that the trial
4 counsel seems to misunderstand both its obligation in this
5 realm and the purpose of physical evidence review.

6 It's -- the copies that trial counsel prepared may be
7 fine for their own purposes, but the trial counsel's eye and
8 their examination of evidence cannot substitute for the
9 defense -- the defense's eye, their perspective, their
10 examination of the evidence. It's the defense's obligation to
11 review that evidence.

12 And more to the point, it's not just looking at the
13 evidence. There are important factors, pieces of data that
14 are uncovered by the defense when they go and undertake the
15 physical evidence review. For example, there have been times
16 where the defense has requested a particular box of evidence,
17 and in that box are supposed to be certain items of evidence.

18 And when we get to the FBI, there's the box, but some
19 or all of the subset of items that are supposed to be
20 contained within that box are missing. They're not in that
21 box. They haven't been filed correctly.

22 MJ [Col PARRELLA]: I certainly can appreciate the
23 defense's desire to want to do their own inspection of it,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Mr. Farley, I guess. So, you know, your suggestion is that
2 the government's timeline that they have established is
3 arbitrary, but at the same time, I think the same could be
4 said of your timeline.

5 I mean, you have established a timeline of, you know,
6 a very precise timeline that will take us out somewhere
7 between August and October of 2019. So why is that not
8 arbitrary and now tying the hands of maybe this commission to
9 schedule a trial?

10 DC [MR. FARLEY]: So, Your Honor, first of all, that's not
11 a timeline that I have established. That is my projection for
12 the amount of time that it would take if we continue to
13 progress at the same rate that we have visiting the
14 FBI Headquarters one day a week.

15 Now, I believe that the one-day-a-week rule was
16 actually instituted by the government in its initial protocol
17 in January of 2015, right?

18 What you have here is the defense abiding by the
19 protocol and the rules as established by the government and
20 making steady progress, diligent progress, not drawing out
21 this process at all, but accumulating the evidence to satisfy
22 their ethical obligations and to vindicate the rights of their
23 clients in a reasonable amount of time.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Now, Your Honor ----

2 MJ [Col PARRELLA]: So just to make sure I understand,
3 Mr. Farley, so the reason you're saying it was one day a week,
4 is that was the protocol established by the government. So is
5 it the defense's position that you could not go any faster in
6 accordance with the government's own protocol?

7 DC [MR. FARLEY]: So, Your Honor, first of all, it's my
8 recollection that the one-day-a-week rule, it was government
9 instituted. There is a second consideration, and the second
10 consideration is the scarce defense resources.

11 The government represented here, and you'll see in
12 the pleadings in 575 that, you know, more or less had the
13 defense dedicated all of its manpower to do some task, that
14 that task would be over now, ignoring the fact that there are
15 other aspects of the case that need attending to.

16 You know, there are other aspects of the
17 investigation. There are motions to write, replies to draft,
18 arguments to prepare for and then, of course, investigations
19 to undertake. It's not feasible for the defense to dedicated
20 all of its resources to any one aspect of the case unless
21 there's some, you know, external intervening factor.

22 If you'll give me one moment.

23 MJ [Col PARRELLA]: You may. Take your time.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 DC [MR. FARLEY]: Thank you, Your Honor.

2 The better point is that the defense is making steady
3 and diligent progress. And the trial counsel's aspersions on
4 the defense aside, we're undertaking our function, we are
5 adhering to our ethical obligations, and we are vindicating
6 the rights of our client as they are guaranteed by statute and
7 by the Constitution.

8 It is -- R.M.C. 701(c) does not set an arbitrary
9 limit on the number of visits that the defense must make or
10 can make to review physical evidence, right?

11 The 72 visits that Mr. al Baluchi's team has made
12 with Mr. Mohammad's team have not been sufficient to review
13 all 2100 items of physical evidence, nor have they been
14 sufficient to review all 254 items of affirmative use evidence
15 that the government has identified. But they've been
16 sufficient to review 64 percent of those items of evidence and
17 almost 100 percent of the items of affirmative use.

18 Now, but for the government's interference in the
19 defense function, in contravention of the ABA Guidelines and
20 Mr. al Baluchi's rights under the Military Commissions Act and
21 the Rules of Military Commission, Mr. al Baluchi would be more
22 than five percent closer to the conclusion of the necessary
23 evidence review.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [Co1 PARRELLA]: Thank you, Mr. Farley.

2 DC [MR. FARLEY]: Thank you, Your Honor.

3 MJ [Co1 PARRELLA]: Ms. Bormann?

4 LDC [MS. BORMANN]: Just two things. One, this case is
5 big, so there's a lot of moving parts and very small defense
6 teams. So a lot -- very, very big case, very small defense
7 teams, and lots of moving parts.

8 Point number two. If the government is going to move
9 evidence down to a trailer down here, I am hoping that it
10 doesn't end up looking like my office, which is in a trailer.
11 So I'll leave it at that, but given the mold situation down
12 here and what we're discovering, the problems with the
13 trailers, that evidence is not -- may bode as well as
14 Mr. Montross' suits.

15 So I will leave that with that. Thank you.

16 MJ [Co1 PARRELLA]: Thank you.

17 Mr. Trivett?

18 MTC [MR. TRIVETT]: Sir, only briefly to state that there
19 is nothing in the protocol that limited their visits to once a
20 week. I would invite the commission to review all of the
21 correspondence between the prosecution and the defense, which
22 has been attached to our response, sir.

23 MJ [Co1 PARRELLA]: Okay. Anything else on 604? I

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 understand, Mr. Harrington, you're going to file a reply, and
2 the commission will consider it.

3 So we're now at 1530, and I had told the parties I
4 would revisit at, I think it was Mr. Connell's request, the
5 order from this point forward with respect to either 524 or
6 555. So I would invite any party to state their preference.

7 LDC [MS. BORMANN]: I prefer 524 before 555. We just made
8 copies of the transcript over the lunch, and I need to review
9 it. So if we can hold off on 555. We're down to one printer,
10 so we're doing our best.

11 MJ [Col PARRELLA]: Any -- Mr. Nevin?

12 LDC [MR. NEVIN]: Yes. If I could inquire, are there
13 other -- apart from our 806, are there other motions that we
14 have to take up? It seemed to me that we were at the end of
15 the ----

16 MJ [Col PARRELLA]: That's my accounting as well,
17 Mr. Nevin. I did indicate, as we just talked about, I will
18 give counsel a very brief opportunity tomorrow to wrap up 399,
19 but otherwise I think we're down to those last two, at least
20 in the unclassified portion.

21 It is the commission's intention -- we did do unclass
22 argument on 561, but it is the commission's intention to defer
23 unclass argument and class argument on 538 in light of the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 parties agreeing that that would be the prudent thing to do.

2 So the way I see it, we can -- well, absent any -- I
3 guess anybody saying a position to the contrary, we will go
4 ahead and take 524 first and then 555 after that.

5 LDC [MR. NEVIN]: And?

6 MJ [Co1 PARRELLA]: Mr. Nevin.

7 LDC [MR. NEVIN]: Not to interrupt, if we've only got two,
8 and if we're going to have to go tomorrow anyway, which it
9 seems we are for 555, then it would seem to me like it would
10 make sense to do them both tomorrow.

11 MJ [Co1 PARRELLA]: Yeah, that was sort of what I was
12 thinking.

13 LDC [MR. CONNELL]: Well, sir, I will make the obvious
14 point that 524 is a government motion, and I would love to
15 have the night to think about my responses to what they have
16 to say, but perhaps that's not entirely fair.

17 MJ [Co1 PARRELLA]: Okay. So what we'll go ahead and do
18 is, I think it would be a good time -- we have taken on a
19 substantial amount of material. Tomorrow I would say that
20 probably the two, the larger oral arguments, I do intend to
21 get them done tomorrow. So be prepared, if necessary, we'll
22 get through it, but we are going to do it.

23 We will start with 524 at 0-9 in the morning and then

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 we will take up 555 after that. So that should give everybody
2 an opportunity to get all their thoughts together, get wrapped
3 up and be prepared.

4 And with that does anybody have any other issues for
5 the commission before we recess for the evening?

6 CP [BG MARTINS]: Weren't there some hanging chads on 399?

7 MJ [Col PARRELLA]: I'm sorry. Yes, we will do 399 the
8 first, very first thing in the morning. Okay.

9 Absent anything else, the commission is in recess.

10 [The R.M.C. 803 session recessed at 1536, 14 November 2018.]

11
12
13
14
15
16
17
18
19
20
21
22
23