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1 **[The R.M.C. 803 session was called to order at 0935, 15 April 2024.]**

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

3 Good morning, Mr. Trivett. Could you please identify who is
4 here on behalf of the United States both in the courtroom and at the
5 Remote Hearing Room up in Virginia?

6 MTC [MR. TRIVETT]: Yes, sir. Good morning.

7 Representing the United States today in the courtroom in
8 Guantanamo is myself, Mr. Clay Trivett; Lieutenant Commander
9 Robert Baxter; Mr. Christopher Dykstra. Also present are paralegals
10 Karissa Grippando, Rudolph Gibbs, John Cox.

11 Present from the FBI today is Supervisory Intelligence
12 Analyst Christina Volker, Supervisory Special Agent Justin
13 Zuccolotto, and Ms. Katherine Eisenreich from FBI Office of General
14 Counsel.

15 Representing the United States in the Remote Hearing Room is
16 Major Neville Dastoor and Colonel -- also present is paralegal
17 Samantha Resendiz.

18 Your Honor, these proceedings are being broadcast to sites
19 in the continental United States pursuant to the commission's orders.

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

21 Mr. Sowards, good morning.

22 LDC [MR. SOWARDS]: Good morning, sir.

23 Appearing on behalf of Mr. Mohammad, who is present in the

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1 courtroom, are Gary Sowards; Kathleen Potter, Lieutenant Colonel,
2 United States Air Force; Ms. Denise LeBoeuf; William Xu, Lieutenant,
3 United States Navy. And we're joined by Elspeth Theis, Major, United
4 States Air Force; and Michael Leahy, Captain, United States Air
5 Force. And no counsel in the Remote Hearing Facility.

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

7 LDC [MR. SOWARDS]: Thank you, sir.

8 MJ [Col McCALL]: All right. Good morning, Mr. Engle.

9 LDC [MR. ENGLE]: Good morning, Your Honor.

10 On behalf of Mr. Bin'Attash: Matthew Engle, William
11 Montross, Tasnim Motala, Captain Marian Messing, and [REDACTED]
12 are in the courtroom.

13 And in the Remote Hearing Room, we have Lieutenant Austin
14 Ridgeway, Anisha Gupta, and Prax Kennedy.

15 MJ [Col McCALL]: All right. Thank you.

16 Good morning, Mr. Connell.

17 LDC [MR. CONNELL]: Good morning, Your Honor. On behalf of
18 Mr. al Baluchi, who is present, we have myself, James Connell; Alka
19 Pradhan; Rita Radostitz; Major Daniel Kim; Lieutenant Jennifer
20 Joseph, who will go on record today. And in the RHR we have Defne
21 Ozgediz.

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

23 Good morning, Mr. Ruiz.

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

2 Walter Ruiz, Captain Patrick Tipton, Captain Kerry Mawn,
3 Mr. Sean Gleason. And in the RHR, Ms. Suzanne Lachelier.

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

5 All right. Before we move on to the right of the accused to
6 be present during this session, I do just want to, again, as I
7 usually do for the first day of a session, just remind everyone
8 please be aware that we have interpreters that are outside of the
9 courtroom that are working to make sure that we're getting a good
10 translation of everything that is being said on the record so that
11 the accused can understand and follow what's going -- going on in
12 here.

13 And then, again, we also have the court reporters and the
14 stenographers. And, again, I just ask that everyone be aware of how
15 fast they're speaking and try to help them make sure that they're
16 getting a good record of our proceedings.

17 All right. I'll now advise the accused of their right to be
18 present and the right to waive said presence. I note that all four
19 are present today.

20 You each have the right to be present during all sessions of
21 the commission. If you request to absent yourself from any session,
22 such absence must be voluntary and of your own free will.

23 Your voluntary absence from any session of the commission is

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1 an unequivocal waiver of the right to be present during that session.
2 Your absence from any session may negatively affect the presentation
3 of the defense in your case.

4 Your failure to meet with and cooperate with your defense
5 counsel may also negatively affect the presentation of your case.

6 Under certain circumstances, your attendance at a session
7 can be compelled regardless of your personal desire not to be
8 present. Regardless of your voluntary waiver to attend a particular
9 session of the commission, you have the right at any time to decide
10 to attend any subsequent session. If you decide not to attend the
11 morning session but you wish to attend the afternoon session, you
12 must notify the guard force of your desires. Assuming that there is
13 enough time to arrange transportation, you will then be allowed to
14 attend the afternoon session.

15 You will be informed of the time and date of each commission
16 session prior to the session to afford you the opportunity to decide
17 whether or not you wish to attend.

18 Mr. Mohammad, do you understand what I've just explained to
19 you?

20 ACC [MR. MOHAMMAD]: Yes.

21 MJ [Col McCALL]: Mr. Bin'Attash, do you understand what I
22 have just explained to you?

23 ACC [MR. BIN'ATTASH]: Yes.

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1 MJ [Col McCALL]: And, Mr. Ali, do you understand what I just
2 explained to you?

3 ACC [MR. AZIZ ALI]: Yes.

4 MJ [Col McCALL]: And, Mr. al Hawsawi, do you understand what
5 I just explained?

6 ACC [MR. AL HAWSAWI]: Yes.

7 MJ [Col McCALL]: All right. So it is my understanding that
8 the -- there are two daily prayer times that are scheduled to take
9 place during our normal court hours this session. Those will occur
10 at approximately 1300 and 1620.

11 It's also my understanding that the dining facility is open
12 from 1100 to 1330 for lunch and from 1630 to 1900 for the evening
13 meal. So in order to accommodate the prayer time and meal time, I
14 intend to take a lunch recess from 1200 to 1330, as we've done in
15 past sessions, and then an afternoon break from 1630 to 1645.

16 If we're working late, an evening recess will happen
17 sometime before 1900, because I know there's another prayer time
18 after that. I assume that will adequately allow for prayers and
19 meal.

20 Any issues?

21 Apparently that's good.

22 All right. Let me go ahead and summarize the Rule for
23 Military Commission 802 conference that we had on Sunday.

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1 On Sunday, 14 February 2024 -- I'm sorry -- this was
2 actually 14 April 2024. I conducted a brief conference with trial
3 and defense counsel in accordance with the Rule for Military
4 Commission 802.

5 The accused were absent at this administrative conference.
6 We discussed the following scheduling issues: I began by reaffirming
7 my intent to make use of the majority of the next five weeks to hear
8 witness testimony. I noted that I was aware that the prosecution had
9 just filed a notice as to the anticipated unavailability of one of
10 the witnesses; it's the former Camp VII commander, and that he was
11 not going to be able to testify. He had originally been scheduled to
12 testify in the fifth week.

13 I asked the prosecution to elaborate on that witness'
14 unavailability and to suggest another witness to take his place.
15 Mr. Trivett indicated that he was exploring the possibility of
16 substituting Mr. Ali Soufan but that he is unsure whether or not he
17 would be available.

18 I also asked the defense teams to consider any witnesses who
19 they may -- might desire to have testify during that fifth week.

20 I also noted that another military commission case, U.S. v.
21 Nurjaman, is currently set to overlap with the first week of this
22 session, but noted that I do not think it would cause any issues for
23 this case as the other commission would be using a different

1 courtroom and would not need to make use of the Remote Hearing Room,
2 or as we call it, the RHR.

3 I then covered the expected schedule for this week
4 with -- we had planned to start at 0900 this morning. I know there
5 were some logistic hiccups this morning that caused us to start a
6 little bit later but that I did let the parties know that we were
7 going to start with the four accused going over attendance rights,
8 which would be the same as in past sessions; going over entry of
9 appearance and oaths for any new counsel that needed it; and then
10 moving into the cross-examination of Supervisory Intelligence Analyst
11 Waltz.

12 So some other administrative issues that the parties raised:
13 Mr. Connell informed the commission that Lieutenant Joseph would be
14 entering an appearance this session. Mr. Connell also noted that AE
15 551P was a priority for their defense team, and I indicated that we
16 would be sure to hear that oral argument this session.

17 Mr. Connell also noted that two other issues that he
18 believed needed to be addressed prior to hearing further testimony
19 from Ms. Waltz were the -- that there were certain defense
20 cross-examination questions over which the prosecution has asserted
21 the national security privilege, and we needed to discuss how that
22 would be accounted for on the record.

23 And then the second related to heavily redacted Rule for

1 Military Commission 914 discovery documents.

2 Mr. Engle, from the bin'Attash defense team, informed the
3 commission that he would most likely be unavailable if the commission
4 were to decide to conduct proceedings on Saturday, 11 May of 2024. I
5 did in the docket order just put the parties on notice that they
6 needed to be prepared if we went into the weekends or if we went late
7 to accommodate some of these witnesses that we're trying to account
8 for. But I did let Mr. Engle know yesterday that the commission
9 would not be in session that day.

10 Mr. Engle also informed the commission that the
11 prosecution's recent delivery of a revised classification guidance in
12 regards to Ms. Waltz's testimony has drastically reduced the amount
13 and scope of cross-examination questions that his team had prepared
14 for Ms. Waltz. Therefore, Mr. Engle requested to be heard in a
15 closed session before attempting any cross-examination in an open
16 session.

17 Additionally, Mr. Engle requested to be heard on AE 631BBB
18 and 631CCC, which are two of the commission's recent Military
19 Commission Rule of Evidence 505 orders.

20 Mr. Sowards, for Mr. Mohammad's defense team, informed the
21 commission about an issue involving the recent shackling of his
22 client and limited the fact that there was still no way for the
23 defense teams to call the Joint Task Force staff judge advocate to

1 discuss matters such as that.

2 And Lieutenant Colonel Potter then noted that the briefing
3 cycle in AE 925 and AE 929 had concluded and indicated that some of
4 the material covered in those AEs pertained to Ms. Waltz's testimony.

5 Mr. Trivett noted that the prosecution's motion in AE 885M
6 was still pending and involved summaries and substitutions that
7 pertained to Ms. Waltz's testimony as well. I responded that I had
8 reviewed the motion and had some questions that may be best resolved
9 at an ex parte hearing with the prosecution that we will look to have
10 perhaps today.

11 All right. I think I have covered everything that we
12 discussed during that R.M.C. 802 conference.

13 Any additions or corrections to my summary?

14 Lieutenant Xu?

15 DDC [LT XU]: Yeah. Your Honor, no additions to the 802
16 conference. But just for planning purposes, we would like to be
17 heard on the government's notice in 937A, so that's related to their
18 proposed new rules on 505 notices. So we think that could be -- that
19 should be heard in the open session before we go into the closed.

20 MJ [Col McCALL]: Okay. Understood.

21 All right. So let's go ahead and we'll take care of new
22 counsel. As noted earlier, Mr. Ali has a new detailed military
23 counsel, Lieutenant Joseph; is that correct? Are we ready to take

1 care of that now?

2 Lieutenant Joseph, if you can come up to the podium. And do
3 you have a preference on swearing or affirming?

4 DC [LT JOSEPH]: Affirm, Your Honor.

5 MJ [Col McCALL]: Okay. Go ahead. If you could state your
6 qualifications and detailing information.

7 DC [LT JOSEPH]: Thank you, Your Honor. I'm Lieutenant
8 Jennifer Joseph of the United States Navy. I was detailed to this
9 commission by Brigadier General Jackie L. Thompson, Jr., chief
10 defense counsel of the Military Commissions Defense Organization,
11 pursuant to R.M.C. 503.

12 I'm qualified and certified in accordance with Article 27(b)
13 and sworn under Article 42(a) of the Uniform Code of Military
14 Justice. I'm also qualified and certified in accordance with
15 R.M.C. 502. My detailing memorandum and notice of appearance are in
16 AE 004XXX filed on 27 March 2024. I've read all relevant protective
17 orders and signed all relevant MoUs. I've not acted in any manner
18 that might tend to disqualify me from this commission.

19 MJ [Col McCALL]: All right. Thank you, Lieutenant Joseph.
20 If you could please raise your right hand.

21 **[Counsel was sworn.]**

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

23 DC [LT JOSEPH]: Thank you.

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1 MJ [Col McCALL]: All right. Any other matters to take up? I
2 know we mentioned some of the ones that we're going to address this
3 morning.

4 Any other administrative matters before we move into those?

5 All right. Apparently not.

6 Let's go ahead and take up first the 505 notice, the change
7 in procedures, Lieutenant Xu. We can address that.

8 DDC [LT XU]: Thank you, Your Honor.

9 So, Your Honor, 930A, the prosecution has proposed rules to
10 make 505 notices more granular, more particular. And we just wanted
11 to take this opportunity to clarify the law surrounding this proposal
12 because we think the prosecution is misinterpreting the original
13 purpose of CIPA in 505 and the proposal, the new rules, may
14 ultimately have the effect of further frustrating Mr. Mohammad's
15 ability to effectively defend himself before the commission.

16 So I want to start with, for my own benefit and for the
17 benefit of the public -- talk about the original purpose of CIPA and
18 505, which is meant to stop graymail, as the commission knows.

19 And I find the concept of graymail easiest to understand
20 through an analogy, if you'll humor me, Your Honor. So if you could
21 imagine a poker game where the accused has a hand of cards to play,
22 and those cards are the classified information that the accused
23 possesses and may use in his defense at trial.

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1 And in this graymail situation, the government does not know
2 what this hand is. And so the accused -- that allows the accused to
3 effectively bluff. The accused can threaten to use the classified
4 information at trial in his defense and hope that the classified
5 information, if disclosed at trial, would have a cost to the
6 government in potentially harming national security.

7 And so that -- that bluff would effectively potentially get
8 the prosecution to fold their case, to say, "This cost could
9 potentially be too high, so we won't prosecute you." And because the
10 prosecution doesn't know what the cards are, they have no way of
11 assessing the equities, balancing what the potential cost to national
12 security is with the need to prosecute the accused.

13 And this is where the 505 notice comes in under CIPA. The
14 505 says, "No, Defense, you must show the prosecution your cards so
15 that they can weigh the equities and they can potentially mitigate
16 the damage to national security by replacing the classified
17 information with a summary," and so on.

18 And so that effectively gets rid of graymail, because the
19 defense can't bluff if the prosecution can see their cards. And this
20 entire concept is demonstrated in United States v. Collins, and this
21 is the case that the prosecution cited to in their notice. This is
22 where an airman threatened to use classified information that he had
23 accumulated throughout his military career during trial.

1 And in this case, the prosecution did not otherwise ----

2 MJ [Col McCALL]: Lieutenant Xu, if you could go a little bit
3 slower.

4 DDC [LT XU]: Yes, Your Honor.

5 And in this case, in Collins, the prosecution did not plan
6 to use any classified evidence. So I want to apply this logic to our
7 case.

8 In our case the overwhelming amount of classified evidence
9 we wish to use comes from the government themselves through the
10 discovery process. In other words, the government knows exactly the
11 hand we have to play, because they gave it to us. They vetted it.
12 And many times, this classified evidence, the merits of it, was
13 argued before the commission in motions to compel and discovery
14 motions.

15 And this goes to the other purpose of the notice, which is
16 505 wants to make sure that the classified information the defense
17 wants to disclose is material to their defense. In other words, they
18 want to make sure the classified information isn't just used to bluff
19 the government, isn't just used to sort of elicit that cost from the
20 government's prosecution. Rather, it must be related to the defense,
21 material to the actual defense of the case.

22 And here, again, because we've gone through the discovery
23 process, the classified information we have has already gone through

1 that vetting. We have it because it is material to the case. It is
2 necessary for a fair trial. This isn't just, you know, random
3 classified information that is out there. And it is what is -- would
4 be required for a fair trial to begin with. And so that vetting
5 process has already occurred.

6 And secondly, Your Honor, graymail exemplified by what
7 happened in Collins is -- is an instance where the accused is trying
8 to use classified information. And in Collins, the government was
9 not. So the only danger to national security sort of was just the
10 defense threatening to disclose classified information.

11 But that's not what's happening in this case either. The
12 government in their case in chief is using a significant amount of
13 classified evidence. So they charged this, for example, as a war
14 crime. So they have to prove that hostilities existed during 9/11,
15 which may touch on covert operations that's happening throughout the
16 world. They want to introduce LHM statements, which is entangled in
17 a web of covert activities by three-letter agencies. They want to
18 introduce telephone calls, which is really all I can say about these
19 telephone calls, right? And so really in this case it's the defense
20 that can't see what cards the prosecution is holding, not the other
21 way around.

22 And the defense now needs to use classified evidence to
23 rebut the classified evidence the prosecution is using. So it's not

1 that we're bluffing, it's that it's a necessity for the defense. And
2 the prosecution now seeks to make that process harder for the defense
3 by introducing new rules of granularity for the 505 notices.

4 This is not what the intent of CIPA was. This is not what
5 graymail is.

6 And lastly, Your Honor, I just want to touch on the
7 specificity and the granularity the government is requesting in their
8 proposal. I cite to Collins where the court criticized sort of the
9 inadequate defense notice there in Collins. The court said -- the
10 Eleventh Circuit said, I quote: Conceivably, the defendant and his
11 witnesses threatened to reveal classified information about any
12 sensitive government intelligence and military operations from the
13 creation of the nation until now conducted anywhere in the world.

14 I mean, of course that is too broad, but that is certainly
15 not what is happening here. That is certainly -- has not been the
16 practice of 505 notices up to this point.

17 When the defense points to a category of information they
18 wish to disclose, again, they're pointing to classified information
19 given to us in discovery by the government which they've already
20 thoroughly reviewed, which, again, often the materiality of which has
21 been thoroughly argued before the commission. Therefore, there's no
22 risk at all of graymail in these notices in this case.

23 So, in summary, the prosecution's notice in 937A, which

1 they've also backdoored into the new classification guidance, is
2 completely irrelevant to the purpose of CIPA and 505, which is to
3 prevent graymail of the prosecution. And really, it only serves to
4 frustrate further the defense ability to effectively mount our case
5 for Mr. Mohammad and we ask the commission to reject their proposal
6 and maintain the current practice of 505 notices that have been
7 working for us all these years.

8 Subject to your questions, Your Honor.

9 MJ [Col McCALL]: No questions at this time. Thank you.

10 Mr. Engle, did you want to go ahead and be heard on this? I
11 know you had raised the issue of some of the 505 notices that your
12 team had submitted.

13 LDC [MR. ENGLE]: Yes. Thank you, Your Honor.

14 That's actually the perfect segue to what I wanted to
15 address with the commission as well. And, in fact, I don't need to
16 repeat what Lieutenant Xu has already very capably said. I endorse
17 everything that he said and we adopt those arguments, particularly as
18 they pertain to the purposes of CIPA and how it's supposed to work.

19 So for us specifically, this is coming up -- coming into
20 play with our 505 notices for two of the witnesses, Special Agent
21 Zebley and Special Agent Gaudin, who are going to be testifying in
22 the next couple weeks here.

23 And we filed our 505 notices. The government objected that

1 they were not particularized sufficiently. And Your Honor entered a
2 pair of orders at 631BBB and CCC directing us to file more
3 particularized 505 notices by Wednesday.

4 And so I guess the way I was going to address this was in
5 the nature of an objection to those orders. And the basis of the
6 objection is very much related to what Lieutenant Xu was describing.

7 I have also gone and reviewed the statute, the case law
8 about CIPA that cited in Your Honor's order and elsewhere. I've
9 discussed it with members of my team and with other learned counsel
10 on other teams. And it seems to me that our notices that are
11 referenced earlier do exactly what the statute tells us to do. The
12 505 and CIPA are concerned with two things: Specificity of the
13 classified information that we're going to be using, and a brief
14 description of that information.

15 That's exactly what we've provided. And frankly, the
16 notices that we filed for those witnesses don't look dissimilar from
17 the notices we've been filing all along, as I go back and look at
18 what we've been doing throughout this process.

19 We are being extremely specific. We are providing Bates
20 numbers for the classified documents that we intend to use during
21 cross-examination. I don't know how we can be any more specific than
22 that.

23 These are -- as Lieutenant Xu stated, these are government's

1 we're receiving from -- excuse me -- documents we are receiving from
2 the government in discovery, and we are providing them exact Bates
3 numbers to those documents. So it is completely specific. It can't
4 be more specific.

5 So I have to imagine that the problem is elsewhere and I
6 have two hypotheses about that. One is that it's just the volume of
7 materials, and I don't know, you know, if there is an effort to put a
8 limit on the number of documents that we're noticing.

9 But I will say that Mr. Hawsawi filed a motion for leave to
10 file out of time notice under -- for 505 on 11 April, and that's at
11 AE 937-1. And he makes in there a number of the points that I would
12 raise as well, which is to say that we're given massive amounts of
13 discovery; we have to give notice of any information that we think we
14 might use that is classified; and that when we're dealing with
15 this -- frankly, I think this case is probably unique in the volume
16 of classified materials that we're dealing with, they're going to be
17 voluminous. There's simply a lot of documents that we anticipate
18 having to use when we're cross-examining these witnesses.

19 And, as I'm sure Your Honor knows, cross-examination is also
20 fluid. We're charged with trying to do our best to anticipate issues
21 that may arise during direct examination. Of course there are issues
22 that we affirmatively want to bring out but also what we might need
23 to respond to and what we might need to impeach on.

1 Many of the documents that we're noticing are classified
2 transcripts from prior testimony that we may need to use to refresh a
3 witness' recollection, we may need to use to impeach a witness to
4 confront them with prior statements. So we are necessarily having to
5 give notice of a lot of information.

6 So we would object to the extent that this is all sort of
7 based on a limit or a cap, an arbitrary page limit to what we can 505
8 notice, we would certainly object on that basis.

9 The other thing that I would simply point out is that the
10 documents that we are receiving, the vast majority of them, are not
11 portion marked. And we will get documents that are dozens of pages,
12 hundreds of pages long that are all marked, you know, SECRET or TOP
13 SECRET.

14 And so necessarily, we are noticing an entire document
15 because we can't zero in on precisely what information the government
16 is -- is classifying. And we are not in a position to make that
17 determination.

18 If the documents were portion marked, then perhaps we would
19 be able to pinpoint more precisely, you know, where within a larger
20 document the classified material information is, but we're not
21 in -- we simply can't do that in the context of the 505s.

22 And then the final point I really want to make, Your Honor,
23 is this eats -- I know this eats up everybody's time and is a real

1 drain on resources. It is an enormous drain on our resources to try
2 to put these 505 notices together, and we're doing the best that we
3 can with them.

4 But, frankly, I'm at a bit of a loss of how we can more
5 particularize the notices that Your Honor has instructed us to
6 revise. You know, if Your Honor orders us to do it, which you have
7 done, and presuming if you weren't to modify that order, we're going
8 to do our best to comply with it, obviously. But I don't, frankly,
9 know how we're going to do that. And so we would ask you to
10 reconsider that order.

11 In my view, where we are is we've given notice, we've done
12 exactly what the statute has required. We've been specific, we've
13 given brief descriptions. The way I understand, and maybe I
14 misunderstand, but the way I understand it now is that the ball is in
15 the government's court to say we're either fine with that or here's
16 what we're not okay with, here's what we object to.

17 And if there are objections, then they can request a 505(h)
18 hearing and that's the way we should hash these issues out. We
19 should -- we should -- once we've identified what we intend to use,
20 they should let us know what they think is not fair game and then we
21 can present relevance and materiality arguments to Your Honor and we
22 can go forward.

23 I think we can do that without wasting a ton of time, but

1 what we can't do is make all those arguments on the front end and
2 present relevance and materiality when all that we're required to do
3 is give that notice and that brief description, which I think we've
4 done.

5 So that is my objection, Your Honor, unless you have
6 questions.

7 MJ [Col McCALL]: All right. No questions at this time.
8 Thank you, Mr. Engle.

9 Mr. Connell.

10 LDC [MR. CONNELL]: Your Honor, given this opportunity, I want
11 to address a couple of points. The first one is the 937A itself only
12 does one thing, which is to -- the government is abrogating the
13 agreement that we had about topic set 505 notices.

14 And so I want to just -- I'm not sure the record is very
15 clear on that, on what the agreement was or what the effect of this
16 is, so I want to explain that.

17 MJ [Col McCALL]: I appreciate that.

18 LDC [MR. CONNELL]: Back in 2019, in the summer of 2019,
19 Judge Cohen was pushing for us to go forward on the suppression,
20 let's just start calling witnesses. The government wanted that.
21 Mr. al Baluchi's team wanted that. And so we were looking for ways
22 to streamline things. How could we get to these witnesses right
23 away?

1 One of the problems that we faced is that on relatively
2 short notice, there were a massive amount of classified documents
3 that would have to be addressed with the initial witnesses: Special
4 Agent Fitzgerald, Special Agent Drucker, Special Agent Perkins, et
5 cetera.

6 And so we came up with something of a -- we came up with an
7 agreement between the government and Mr. al Baluchi's team, which is
8 that instead of trying to list every single classified document that
9 might be used, we would describe what the topic -- the classified
10 topics were, and give examples of documents that would fall into that
11 topic.

12 The idea was that that would give the government enough
13 information to consult with OCAs, if they needed to, to come back to
14 us with more questions if they needed more specificity, et cetera.

15 And so some of our early 505(g) notices, especially the one
16 on the 505 -- excuse me -- on the FBI, CIA, DoD integration follow
17 that model. They give an explanation, they give examples, they give
18 a list -- an illustrative list. Now, over -- and so we also
19 identified these topics.

20 The additional advantage to topic sets was to organize a
21 massive amount of classified information into "here's what it's
22 relevant to," which is important for everybody.

23 Now, as it happened, as the litigation matured, it turns out

1 that we no longer needed to rely on that shortcut. And as it turned
2 out, we have given 505(g) notice for every -- the facts, the
3 classified facts contained within every single classified document
4 that we've ever relied on. So the idea, the original idea was topic
5 sets would be a shortcut, we don't necessarily have to list every
6 document, but it didn't work out that way. We didn't need it. We
7 were able to list every document, and every document that we've
8 relied on a classified fact for has been given in a 505(g) notice.

9 But we've continued to identify topic sets because of the
10 secondary purpose, which is, hey, what's this relevant to? What's
11 the importance? Why are we using this information?

12 So what I read 937A to do is to say that the government is
13 abrogating their agreement on -- which I was very surprised. Like,
14 we didn't have any conversation about this before -- is abrogating
15 their agreement on topic sets, but I don't see that that has any
16 actual impact on anything. We no longer relied on that agreement.
17 We still identify what things are relevant to, but we don't need that
18 agreement anymore.

19 So I was not surprised when the government, in its position
20 on the 505 notice, didn't object to any of our 505 notices, which
21 we'd done the way we'd always done them, because they're in
22 compliance with the statute; they give the government enough
23 information.

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1 So I don't really see 937A as doing anything other than
2 telling us that the government doesn't want to follow the agreement
3 that they had made.

4 The other sort of issue is that the government filed on
5 Friday 658M, a new government notice of revised classification
6 guidelines. I love the revised, because this is the sixth version.
7 And, in fact, there were more versions than that because some of the
8 versions were superseded so fast they never made it into the record.

9 But one of the things that's happened here, and the reason
10 why it keeps getting revised, is that every time that we find a way
11 to present unclassified information in a way that I think meets the
12 purpose of Press-Enterprise and R.M.C. 806 in a way that we slice the
13 information very carefully between classified and unclassified,
14 present the unclassified in open session, the government finds some
15 way to fill what it sees as a gap. You know, something it didn't
16 think about but is still unclassified.

17 And if you -- you know, it would be an interesting exercise,
18 which I haven't done, to trace all these changes. But here in this
19 sixth version, the government has figured out that it can also just
20 state it's position of the law and call it classification guidance.

21 And that's what it's done in paragraph 7, which is an
22 unclassified paragraph within 658M. It's found at page 5. And it
23 adds the additional -- what could be read as an additional

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1 requirement for 505(g) notices. And I believe that this is what
2 counsel for Mr. Mohammad was referring to in his argument about 658M.

3 And I think this really comes to the question of what is
4 a -- what is happening in a 505(g) notice. And there's been some
5 discussion of documents and, obviously, the whole document is
6 document based, right? 99 percent of the classified information we
7 have comes from the government originally in a document that they
8 provided to us. And so the cleanest way to tell them what documents
9 are at issue is to identify the documents by Bates number.

10 And the -- that -- but that's not really what is happening
11 from a technical-legal perspective. What's happening from a
12 technical-legal perspective in the 505(g) notice -- and I realized
13 how fast I just spoke. I'm sorry -- is that we're giving notice of
14 the facts contained within the documents.

15 And that's why the wording of our 505(g) notices is
16 Mr. al Baluchi expects to disclose or cause the disclosure of the
17 facts contained within the following documents. And that's where
18 it's actually at. So it's really about facts, although documents are
19 a very convenient organizing feature for those.

20 Now, what happens in cross-examination or examination
21 sometimes is that sometimes the question is: Does this document
22 contain the following fact? And sometimes it's: What does that
23 mean? How did that come into existence? What happened next? You

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1 know, the sort of necessary implied facts that surround a fact.

2 Sometimes those necessary facts are unclassified and can be
3 done in open court, sometimes they're classified. And I think that's
4 what paragraph 7 is trying to address.

5 And our position is that when we give 505(g) notice of the
6 facts, the classified facts that we intend to use, there is a small,
7 you know, necessarily implied number of additional questions that
8 surround that -- those facts.

9 And I think that's what the government is trying to do in
10 paragraph 7, is to -- is to attack that fact that there are
11 necessarily an implied adjacent facts to a classified fact. And
12 that's what I object to in paragraph 7.

13 I don't have any real issue with 937A. It is their
14 agreement, they can break it if they want to. It's not the first
15 time they've broken an agreement.

16 And the -- but paragraph 7, to the extent that it is an
17 interpretation of the law, it should only be treated as an
18 interpretation of the law. The government has a view of what's
19 happening. Somebody -- different defense teams have different views
20 of what's happening. It should not be read as classification
21 guidance itself. It's just the government's argument, which they
22 will have to apply to individual 505(g) notices. And if they had
23 objected to our 505(g) notices, we would articulate why there are

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1 compliance with 505(g) and the Military Commissions Act.

2 So I don't think much has changed, but I don't want a year
3 from now the government to say, "Oh, it's in 658M; it must be the
4 rule," simply because they say it's the rule. They get an
5 interpretation of the law, but it's really up to the military
6 commission to decide.

7 Thank you very much.

8 MJ [Col McCALL]: All right. Thank you, Mr. Connell.

9 Mr. Ruiz, do you need to be heard on this topic? And just
10 while I'm addressing you, I did notice that Mr. al Hawsawi left the
11 courtroom?

12 LDC [MR. RUIZ]: No, sir. He's still here.

13 MJ [Col McCALL]: Oh, I'm sorry. I can't see him from where
14 I'm sitting. I had gotten a passed note that he had left.

15 LDC [MR. RUIZ]: He's here.

16 MJ [Col McCALL]: All right. Sorry, Mr. al Hawsawi.

17 LDC [MR. RUIZ]: Just give me one second, Judge. I need to
18 confer with the RHR.

19 MJ [Col McCALL]: All right.

20 LDC [MR. RUIZ]: I believe Ms. Lachelier is walking up, Judge.

21 MJ [Col McCALL]: Okay.

22 ADC [MS. LACHELIER]: Good morning, Judge.

23 MJ [Col McCALL]: Good morning.

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1 ADC [MS. LACHELIER]: I just want to highlight a few
2 practicalities that arose with respect to our 505 notices that will
3 sort of highlight, I think, what really are the issues.

4 First of all, as you know, the government chooses the
5 trigraph, right? So when it says "Waltz," I don't know why we say
6 trigraph because that's not three letters, but when it says "Waltz,"
7 they know the document pertains to Waltz. So when we give notice of
8 a document, most of the time they know it relates to the issues that
9 we're going to address with a witness or in a particular motion by
10 virtue of their trigraph that they've chosen.

11 Camp VII, give notice of Camp VII documents, Camp VII
12 commander testimony, seems pretty obvious. I don't know how much
13 more particularity they need since they choose the trigraph. But
14 what it's really about is the page numbers, what we saw as a pattern
15 of the government objecting when the page numbers exceeded some
16 threshold ----

17 MJ [Col McCALL]: If you ----

18 ADC [MS. LACHELIER]: Am I too ----

19 MJ [Col McCALL]: Ms. Lachelier, if you could go a little bit
20 slower.

21 ADC [MS. LACHELIER]: Sorry.

22 The government seemed to object to our 505(g) notices when
23 they exceeded a certain number of pages. I don't know what their

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1 threshold was; we were guessing between 3- and 400 pages, which, as
2 you know, has nothing to do with the -- with what the notices are
3 for. It's not about volume.

4 When -- and so the example I want to give is we had to
5 notice the testimony of SIA Waltz, because she -- because it was all
6 classified at the time that we got it. After we filed our notice,
7 they apparently had the OCA review it. They returned the transcript
8 to us and parts of it were unclassified. So we gave notice, again,
9 modified notice, per your order, with less pages.

10 The government then said, well, you know, we're okay with
11 that, so we resolve the issue. But the point is they said we will
12 look at it again if you need in the future and maybe declassify some
13 further aspects if you can tell us which pages you're going to use.

14 To me -- to us, that -- the fact that they would review the
15 transcript again after already having reviewed it, one, is
16 disingenuous. If they already reviewed it, they know which pages
17 are -- or which parts they want to declassify.

18 So, in essence, it's a page number issue, I think, because
19 that's -- when, in our 505 notices, that's when they raised
20 objections.

21 One point I also want to note for you, Judge, is although we
22 don't object at all to the advanced notices and avoiding a 505(h)
23 hearing, the advanced aspect of these notices makes it harder for us

1 to particularize, too, because we're preparing weeks ahead for
2 testimony in the fifth or sixth week of the hearings. And so we're
3 trying to guess, and we may not be prepared enough at that point, to
4 identify with particularity what documents we're going to use.

5 So I don't know -- I know having multiple deadlines for
6 different witnesses on notices would be difficult but this
7 prophylactic all 505(g)'s are due on one date does make it a little
8 more harder for the defense, for at least our team, to give notice
9 early.

10 And that's all I have. Thanks, Judge.

11 MJ [Col McCALL]: All right. Thank you, Ms. Lachelier.

12 Mr. Trivett, or somebody from the prosecution, do you desire
13 to be heard on this topic?

14 MTC [MR. TRIVETT]: Yes, sir.

15 LDC [MR. RUIZ]: Judge, I just want to let you know that
16 Mr. Hawsawi has now left the courtroom.

17 MJ [Col McCALL]: All right. I appreciate that, Mr. Ruiz.

18 MTC [MR. TRIVETT]: While we had hoped that the agreement to
19 permit the topic sets would make it a more efficient process to
20 litigate not only witness testimony but also any oral argument we may
21 have on the appellate exhibit, it has turned out to not be the case.

22 That's why we're at where we are in our notice to say that
23 the topic sets is no longer workable. This was a courtesy that we

1 were trying to do, not only for the defense but for the commission
2 and for the prosecution as well, to have to work through this.

3 And I need to explain why it is unworkable. It's unworkable
4 in regard to witness testimony when Mr. Bin'Attash's team files
5 notices of 1100 pages of documents, 2,550 pages of documents, all of
6 which purport to be something they're going to ask a witness about,
7 right?

8 When you have a witness -- and oftentimes we also now have
9 witnesses that aren't necessarily even still part of the United
10 States Government. They might have clearances or they might have
11 exceptions to be able to review classified documents. If all of a
12 sudden, when you add up every possible document that the defense
13 intends to ask the witness -- I think we heard Dr. Mitchell testify
14 about it. He said, "I'm not even going to read this. You have four
15 notebooks that are this full. What is it that you want to ask me
16 about?"

17 We don't know, one, if the witness necessarily even has a
18 need to know the information if it's not particularized. Right?
19 They might have -- they might have been mentioned on a document.
20 They might not have been mentioned on a document. They might have
21 never seen that document. They might not even know that classified
22 information. We just do not know.

23 And when the numbers are this voluminous, it becomes

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1 impossible and unworkable. We're responsible for protecting
2 classified information. We're responsible for preparing the
3 witnesses on classified information, on what they can say, what they
4 can't say, what we're going to assert national security privilege
5 over.

6 And we cannot do it. We simply cannot do it when there's
7 thousands of pages.

8 So yes, we've abrogated our agreement. Unfortunately, it
9 didn't work the way we had hoped it would. It did in some instances.
10 It is not now working, and especially if you take this concept that
11 any 505(g) notice that has been filed at any point in time is
12 applicable to any of the witness testimony. Right? Because that
13 makes its not 4,000 pages but 15,000 pages.

14 We've turned over 175,000 pages of classified information.
15 Each witness doesn't have a need to know all of that information.

16 I believe Mr. Engle stated that it is an enormous drain on
17 resources for them to work through 505(g) notices. Well, when you
18 work through it in the way where you're just giving us thousands of
19 pages, all you're doing is you're taking all of your drain, which is
20 your obligation under the rule, and you're just giving it to us.

21 That's all they're doing, right? It's just a transfer of
22 burden to us, and it just became unworkable. Too difficult, too much
23 volume.

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1 All we did was we put it back in the rule. 505(g) says you
2 have to give particularized notice. All the information is in
3 paragraph 7 is the information from M.C.R.E. 505(g) and the
4 discussion.

5 I think Lieutenant Xu focused on the graymail aspect of the
6 purpose behind CIPA, and that certainly is a purpose behind CIPA.
7 We're not alleging this is graymail. We provided most of this
8 information.

9 We're not in the context of worrying about being graymailed
10 and not prosecuting the case. We're in the context of being able to
11 protect what is an unwieldy amount of information.

12 And I do sympathize with what Ms. Lachelier said in her
13 argument about having to give all of the 505(g) notices before a
14 five-week hearing, but it might just be that we have to do a 505(h)
15 before each witness where they have a very particularized set of
16 documents, not unlike the documents that we have to prepare before we
17 get to our witnesses.

18 I understand and appreciate the fact that you may not know
19 exactly what witnesses -- what documents you want to show to the
20 witness until shortly before they testify. And certainly, at least
21 not the way I work as an attorney, I don't know every document I want
22 to show to someone five or six weeks beforehand.

23 So I appreciate that, but there has to be some kind of

1 adherence to the rule under 505(g) for it to work. Like I said, we
2 wanted it to work. It was a courtesy to try to work this topic set,
3 so we -- and there were certain topic sets we were envisioning at
4 that time that wouldn't have been a problem, like the facility
5 photos. Like, we're not going to have one particular equity in a
6 facility photo that doesn't exist in one of the other equities,
7 right? But when you're dealing with documents and you're dealing
8 with documents that you purport to want to ask a witness about, we're
9 in an entirely different situation. That's why the rule is written
10 as it is. Unfortunately, we just have to go back to the rule. Not
11 blaming the defense counsel. I'm just saying that it's unworkable
12 from us. We cannot protect the classified information adequately and
13 still prepare a witness when the volume is in the thousands and
14 thousands of pages.

15 And so that's why we provided the notice, Your Honor. We
16 would ask that you simply follow 505(g) for the remainder of the
17 litigation and we'll work through it. And some of it might be more
18 painful than it would have been with the topic sets, but at the end
19 of the day it still allows us to protect the classified information
20 and prepare the witness the way it was envisioned so we can protect
21 the classified information prior to it being elicited from
22 the -- from the witness.

23 And subject to your questions.

1 MJ [Col McCALL]: No questions. Thank you, Mr. Trivett.

2 All right. No questions, but a few comments. So -- but you
3 can have a seat.

4 All right. So when I did see 937A, the notice that the
5 government was not going to be agreeing to topic set 505 notices, I
6 was curious how this was actually going to play out.

7 But -- and, again, as we mentioned during the last session,
8 under this commission's rules, when there's a notice, it doesn't spur
9 a briefing cycle. And so there weren't any briefs from the other
10 parties. I assume the defense teams were going to submit their 505
11 notices and see how it played out under any changes.

12 From reviewing AE 9370, which was the government's position
13 on the 505 notices that the defense teams submitted for the witnesses
14 for this session, I tend to agree with Mr. Connell. I didn't see
15 anything that was a dramatic departure from the government's previous
16 position on 505 notices.

17 There were some that the government did not object to, and
18 there were some that they raised -- a variety of issues. I think
19 Mr. Kohlmann's issue is unique to him. But for the ones on
20 particularity, there were four that I agreed with.

21 And, again, as Mr. Trivett mentioned, one was 1100 pages.
22 One was, I believe, 2500 pages, one was 1200 pages, and one was 4300
23 pages.

1 And this is not to say that there is a page limit on 505
2 notices. That's the wrong way of looking at it. The question is:
3 Is there particularity to show why those, let's say the 4300 pages,
4 are required for this witness?

5 And, again, I understand the -- the drain on defense
6 resources to have particularized 505 notices. But, as Mr. Trivett
7 said, that same drain then is on the government to review 4300 pages,
8 the witness to review 4300 pages, and the commission to review 4300
9 pages to make sure that this is proper material to be used in
10 questioning the witness.

11 Again, I'm not saying that those 4300 pages -- and I'm just
12 using this as a shorthand -- won't at some point be appropriate. And
13 maybe there is all 4300 pages that need to be used to question the
14 witness, but those need to be particularized.

15 That doesn't mean sentence by sentence. It means, I
16 believe, kind of what Mr. Connell had put out there, that rather than
17 relying on documents to say, well, here is a document I want to use,
18 even though it's 1,000 pages -- Counsel, when you're drafting your
19 questions for a witness, you know in that document where you're going
20 and why you're going there. That's the kind of particularized notice
21 that I need. I'm not sure about the government, but that's what I
22 need.

23 So we'll see how this plays out. Again, I've pushed back on

1 some of the these notices. I've asked the defense teams to revise
2 and maybe give a little bit more particularization on how they plan
3 to use those documents and to confer with the government.

4 If we have to have a 505(h) hearing and hash it out more, we
5 will. But, again, I think there's a balance to be made. I have
6 found that these notices, it's typically working where we haven't had
7 to have many 505(h) hearings while I've been the judge, and I would
8 like to continue forward with that.

9 But with the defense teams doing a little bit more work
10 rather than giving thousands of pages and a broad notice -- again, I
11 understand that we're going with a fast pace right now, as we
12 discussed during the last session. We're going to keep that fast
13 pace. That's why I'm being very liberal in allowing late 505
14 notices. I'm going to continue to allow that. And if we have to
15 slow things down, we can.

16 But that's my view on the 505 process right now. I believe
17 it is working. I asked the defense teams on the four that I pushed
18 back on to revise your submissions, and we'll go from there.

19 Anything else that anyone needs to be heard on?

20 Lieutenant Xu?

21 DDC [LT XU]: Thank you, Your Honor, for clarifying this
22 issue.

23 I think I just wanted to start out by saying that, of

1 course, our team will do our absolute best to follow the commission's
2 orders and to certainly accommodate the other side where we can.

3 But along the lines of the arguments that we have made
4 before Your Honor regarding sort of previewing our questions to
5 the -- to the prosecution by sending them beforehand to be reviewed,
6 similarly, I think if we were to give notices with such particularity
7 that it shows where we were going and why we were going there on
8 certain documents, that has the same effect of basically divulging
9 attorney work product to the other side and to the commission before
10 we ask the questions.

11 And I think that our concern is that that really hits a
12 point of fair trial that I think -- basically, I think it impacts our
13 ability to be effective defense counsel.

14 And Judge Pohl kind of touched on this point. We understand
15 that with national security litigation, sometimes, you know, a choice
16 needs to be made. And if we can't both have a fair trial and also at
17 the same time protect national security, then a decision needs to be
18 made, right? Or remedies given.

19 And I think we're kind of getting close to that line here.
20 We're getting to that point where the needs -- the verbalized needs
21 of the prosecution and the commission is getting to the point where
22 we can no longer be effective defense counsel; therefore, effectively
23 previewing our arguments and questions and our thoughts and our

1 strategy to everyone, to all parties before we get to ask the
2 questions.

3 MJ [Col McCALL]: Understood.

4 Mr. Engle?

5 And I note Mr. Mohammad just left the courtroom.

6 LDC [MR. ENGLE]: Thank you, Your Honor. Just a couple points
7 that I need to respond to.

8 So there's a fundamental disagreement here about what 505 is
9 about, because what I heard Mr. Trivett talk about was witness
10 preparation and Dr. Mitchell saying he's not going to review all
11 these documents.

12 It is not our job to provide 505 notice for the government
13 to prepare its witnesses. 505 has nothing to do with witness
14 preparation. And, in fact, this is, I think, exactly where the
15 government has been going with this, is they're trying to force us to
16 disclose our examinations ahead of time.

17 It's why I objected at the last hearing when Your Honor
18 suggested that we might provide our list of questions for the
19 government to edit. We don't do that. And that's exactly where this
20 505 process is going. We're just trying to get through through other
21 means. Witness preparation has absolutely nothing to do with it.

22 Now, where I do have some sympathy for Your Honor is the
23 point you make about we give you notice of the thousands of pages of

1 classified information, and you're up there trying to figure it out,
2 you know, what's permissible and what's not. I'm with you. I get
3 it. It's a problem.

4 But I do have a couple things to say about that as well.
5 The first is, it is not the case, as Your Honor suggested, that we
6 know when we're providing our notices where in the documents we're
7 trying to go with the witness. That may be the case in an ideal
8 world, but I will tell you how the process really works: Is we go
9 home and we sleep for 48 hours and then we start working on our 505
10 notices.

11 And the first thing we do is try to figure out what is the
12 universe -- because we have to meet these deadlines, what is the
13 universe of documents that we might need to use during
14 cross-examination, and we give that notice. And then we go back and
15 start preparing our cross-examinations.

16 At least that's the way I have to do it. Because there's no
17 time for me to write my cross, and I'm writing my crosses here on
18 island. I'm not writing my crosses in NCR. And so what I have to do
19 to meet the deadlines is give broad notices. And by "broad," I mean,
20 you know, a lot of pages. And that's just -- that's just the way
21 that it is. That's just the position that we're in.

22 And I don't agree that there is some problem with us
23 shifting the workload from our side to the prosecution side because

1 Congress has already made that decision. Congress decided how
2 they're going to allocate the workload. And what they said is the
3 defense has to give notice of specific classified information.

4 And I have to disagree with my colleague, Mr. Connell, on
5 this. Nowhere does the statute or the rule talk about classified
6 facts. It talks about classified information. And when we have a
7 document that's banner marked SECRET -- I'm fairly new to some of
8 this stuff, but, in my view, that entire document is classified
9 information.

10 And I am not in the position to say, well, certain parts of
11 it I don't need to give notice for and certain parts of it I do,
12 because I'm being handed a document that's labeled SECRET, and I have
13 to give notice of that document.

14 I think those are the main points that I needed to make. I
15 don't -- I'm not quite sure where we are, other than try to -- try to
16 streamline your notices a little bit. We will take a look at them,
17 but we are in a bit of a bind here because I don't know exactly how
18 we're going to satisfy -- first of all, I don't -- I'm not -- I don't
19 have a clear sense of what the target is. But, you know, we'll do
20 what we can. And if we have to, we'll resubmit notices
21 tomorrow -- or Wednesday, I should say.

22 MJ [Col McCALL]: All right. You make some fair points.

23 LDC [MR. ENGLE]: I don't want to move our deadline up.

1 MJ [Col McCALL]: Appreciate it, Mr. Engle.

2 All right. You make some fair points.

3 Mr. Connell?

4 LDC [MR. CONNELL]: Three points to make, Your Honor.

5 The first is that the government's attributing its
6 position -- I'm not even necessarily meaning shirk -- I'm going to
7 say change of position, but its current position to topic sets is a
8 little bit disingenuous.

9 First of all, this topic set agreement was only between
10 government and Mr. al Baluchi's team. Nobody else has ever even
11 ventured into this topic set world.

12 And, second, as I mentioned, the topic sets didn't turn out
13 to mean anything as far as 505(g). Since 2019, every document that
14 we've wanted to use or every fact that we've wanted to use has been
15 in a 505(g) notice.

16 The second thing that I want to say is that every time the
17 government has come to us and asked us for more particularity,
18 sometimes extreme particularity, we have provided it to them.

19 I find it interesting that the government used the example
20 of Dr. Mitchell, because both before Dr. Mitchell's initial testimony
21 and before his second testimony, the government came to us and said,
22 "Can you please carve out the documents that you think are important
23 for Dr. Mitchell because we want to have him review that?"

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1 I -- the first time around, I probably spent eight hours
2 doing that and sent them a notice of here's this document and this
3 document and this document. The second time around I spent four
4 hours doing it. And at the end, it turned out that it was the whole
5 PRG set, so I suggested the PRG set. But it wasn't that I just
6 tossed that off on five minutes. I spent hours and hours reviewing
7 it and then came up with that.

8 So, you know, when Dr. Mitchell testified that he didn't
9 want to read all those documents, it really wondered -- made me
10 wonder what is the government doing with these hyper-particularized
11 information that I'm giving them about he should read this document
12 to the exclusion of those documents.

13 Now, it's his decision; he can choose to read things or not.
14 But the government on this occasion -- you know, before this hearing
15 came to us and said, "Can you tell us what UFIs you want to use?"
16 And so we sent them that.

17 When they come to us and ask -- when they have a need for
18 something and they explain what it is, we send it to them. So to me
19 the process has been working and it ain't broke.

20 Two other -- the last thing that I want to say is that
21 Mr. Trivett made an argument about any 505(g) notice at any time.
22 And I do want to address that, because the limit has changed over the
23 course of the litigation.

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1 The original limit on 505(g) notices, when we were all
2 trying to figure out what it meant, was by hearing. And so if you go
3 back and look at the early, you know, in the double digits of AEs,
4 then we were given a 505(g) notice for a particular hearing, for the,
5 you know, September 2013 hearing or something like that.

6 And then I will be completely honest, I cannot remember why
7 it changed. And I think that it was a direction from the -- from
8 trial judiciary through the court staff, because I can't find an
9 order about it. But sometime around 2014, when things were being
10 continued because Mr. Binalshibh's team was under investigation and
11 there was a whole disruption in the military commission, you know, it
12 became clear that giving them by hearing was not going to work.

13 And even in this hearing if we'd given it by hearing, the
14 former Camp VII commander is now not testifying, right? And so it
15 demonstrates the limits of the by-hearing approach. And so the
16 military commission directed that 505(g) notices be filed by AE
17 number, which has a couple of things that are significant about it.

18 First, is that the -- that means that a whole bunch of the
19 505(g) notices are in the AE 628 series for us because we've been
20 having a hearing for five years about AE 628.

21 It is my understanding of the military commission's posture
22 that if I want to then use an issue -- a document or a classified
23 fact in, say, the 574 series and it's not connected to 628, then I

1 have to give separate notice. And so there are many times that we
2 give notice of the same classified information in multiple series
3 because that's the limiting factor.

4 The other complication around that, and I think what's
5 driving a lot of this is that there are -- by military commission
6 direction, there are five AE numbers for the five different motions
7 to suppress.

8 So in previous times, if Mr. al Baluchi, for example, had
9 given 505 notice of particular information in a series, then by the
10 automatic joinder rule, the other teams didn't have to then go and
11 give notice of it again because we're all going to be talking about
12 the same set of documents.

13 What changed was two things. The first is that
14 Judge Parrella's order that everybody -- every military commission
15 motion to suppress get its own AE number. So now, for example,
16 Mr. Bin'Attash has to double tap information that we've already given
17 notice of for Ms. Waltz, for example. They have to come back and do
18 it again because they're in a different AE number.

19 And second, at some point, the military commission, not by
20 order but by suggestion, said that it wasn't going to consider 505(g)
21 notices for automatic joinder under the automatic joinder rule.

22 And so that had the unintended consequence of everybody had
23 to double tap everything. So even if -- even if we're in, say, the

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1 574 series, which everybody is joined to together, if we give 505
2 notice for something, then every other team has to come along and
3 give 505 notice for it as well, which creates a lot of extra effort.

4 And so one possible solution to this problem is allow the
5 defense to piggyback off each other's AE filings on 505(g) notices,
6 which would reduce by close to a factor of four the number of 505(g)
7 notices that the government and the military commission have to look
8 at.

9 Because you're talking about the 4300 pages, it's almost
10 certain that every one of those 4300 pages -- and I haven't done an
11 audit -- but it's very, very likely that we have already given 505
12 notice for the vast majority of them and the military commission has
13 already reviewed and issued an 806 closure order on most of those
14 documents.

15 So, you know, we're all doing our best with a complicated
16 situation and a massive record, but sometimes small administrative
17 changes have an unintended consequence, so I wanted to point those
18 out.

19 MJ [Col McCALL]: No, I appreciate that. I'll take that idea
20 under consideration. I think there's some merit there.

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

22 MJ [Col McCALL]: All right. And, again, just as a closing
23 thought, I mean, the CIPA framework that is out there, obviously it

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1 works in cases where there is a classified aspect to a trial versus
2 this trial, I think as Mr. Engle mentioned, is so unique because of
3 the volume of classified material.

4 And so we've had to, me and previous judges, create -- and
5 counsel create these structures to try to -- this process to make it
6 work. So we'll continue to massage it and attempt to figure out a
7 way of protecting classified information, putting everybody on the
8 proper notice without divulging too much defense strategy, while at
9 the same time having a way for us to go forward. Because otherwise
10 we're going to be bogged down in these endless notices.

11 All right. So let's go on to the next topic. I believe
12 the -- let's go ahead and handle the 914 notice.

13 Mr. Connell.

14 Well, actually we've been going for a while. I know we
15 started a little bit late, but I know people were probably stuck here
16 in the courtroom during that delay.

17 I'm going to go ahead and take a recess.

18 Mr. Engle?

19 LDC [MR. ENGLE]: This is very brief, Your Honor.

20 Mr. Bin'Attash intends to leave at the break. We ask that he -- that
21 Your Honor instruct that he be taken back to the camp. He's
22 concerned about being stuck in the holding cell in the back for a
23 substantial amount of time.

1 MJ [Col McCALL]: Okay.

2 LDC [MR. ENGLE]: So can we have him sent back to the camp,
3 please?

4 MJ [Col McCALL]: All right, if possible. Obviously, anytime
5 that there's travel between the courtroom and the camp, it's outside
6 of my control, but if the guard force can support, if we can go ahead
7 for the accused who wish to leave, allow them to do that.

8 All right. Anything else before we take a recess?

9 All right. Let's be back on the record -- it's 1044 right
10 now. Let's be back on the record at 1100.

11 Commission's in recess.

12 **[The R.M.C. 803 session recessed at 1041, 15 April 2024.]**

13 **[The R.M.C. 803 session was called to order at 1103, 15 April 2024.]**

14 MJ [Col McCALL]: Commission is called to order.

15 Parties are present. I believe Mr. Ali is the only accused
16 present right now in the courtroom.

17 All right. Mr. Connell.

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

19 Before we address the 914 issues, I did want to take up your
20 invitation to suggest witnesses that we thought might make sense to
21 fill the gap.

22 MJ [Col McCALL]: Fantastic.

23 LDC [MR. CONNELL]: In order of priority -- this would be in

1 order of our preference. The first witness would be SG1. The second
2 would be Pasquale D'Amuro. Third would be [REDACTED] Fourth would
3 be [REDACTED]. Fifth would be Joan-Marie Turchiano. And sixth
4 would be Mary Galligan.

5 MJ [Col McCALL]: All right.

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

7 Moving on to the 914 disclosures issue. Obviously, both
8 parties in advance have made disclosures which qualify, in part,
9 under 914 as well as under 701.

10 But I think much of the dispute here arises from the fact
11 that under the military commission's rulings, different standards
12 apply in 701 and 914. So I just want to frame at the beginning the
13 issue is what the government describes as relevance redactions in
14 documents and when -- which may apply in 701. I've argued against it
15 many times. The government has -- I mean, the military commission
16 has ruled against me, but the rules in 914 are different. So that's
17 the core of what we're talking about here.

18 As far as procedure, back in 2017 we requested the 914
19 disclosures for any witness who was going to testify regarding
20 personal jurisdiction, which includes Ms. Waltz. And the military
21 commission issued an order on that in 502ZZZ, requiring production of
22 914 material 30 days in advance of a witness' testimony.

23 With respect to Ms. Waltz very specifically -- now,

1 Ms. Waltz, of course, was not listed as a witness back then.
2 Although the government, interestingly, has taken the position that
3 we should have known she would have testified about personal
4 jurisdiction in responding to 505 notices from other teams.

5 But we did formally request the statements of Ms. Waltz by
6 name under R.M.C. 14 on 8 February 2024 in DR-442-AAA. That is an
7 in-court submission, which has been marked at AE 942C (AAA). A copy
8 has been provided to all the parties, and we will catch up the record
9 with an electronic copy later.

10 Under 949p-7(d)(1) and R.M.C. 914, a formal motion for
11 statements has to take place after direct, and so this is our formal
12 motion.

13 The government's position is that use of statements obtained
14 in black sites under torture did not affect the government FBI
15 investigation. And we can rebut that position with appropriate
16 discovery, some of which is in our possession and some of which is
17 known to exist.

18 There are several documents of particular importance. You
19 know, this is a global issue. We should get 914 disclosures for
20 everything Ms. Waltz has said, but I want to focus on some which are
21 of particular importance. 100 percent I'm going to use these
22 documents in her examination, so there are a few that I want to
23 highlight, and I sent these to the government in advance.

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1 The first is MEA-FBI-20495, found within the record at AE
2 628DD. It is a redacted electronic communication drafted by
3 Ms. Waltz regarding evidence that she documented the gathering of,
4 dated 11 July 2007. It contains redacted information about the
5 origin of the evidence Ms. Waltz testified about in her direct
6 examination, including [REDACTED] financial documents and evidence from the
7 alleged search of Mr. Hawsawi's apartment. It also includes redacted
8 leads, which are quite important in the chain of how was information
9 acquired by torture used in the FBI investigation.

10 The second document has -- bears the Bates number
11 MEA-WALTZ-00000001. It's found in the record at AE 628RRRRRR (AAA)
12 Attachment F. It is a redacted electronic communication from
13 Ms. Waltz to Special Agents Fitzgerald and Zebley regarding the
14 [REDACTED] supplementary visa application that she
15 testified about, dated 30 January 2005. That document contains
16 redacted information, including unclassified information, or at least
17 information marked [REDACTED] about [REDACTED] evidence that
18 Ms. Waltz testified about, including evidence from the alleged search
19 of Mr. al Hawsawi's apartment. It also includes redacted leads.

20 Third is MEA-WALTZ-00000012, found in the record at AE
21 628RRRRRR (AAA) Attachment F. It is a redacted electronic
22 communication from Ms. Waltz to Special Agents Fitzgerald and Zebley,
23 about Mr. al Baluchi, [REDACTED] dated

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1 8 February 2005.

2 This is, you know, number 1 with a star of this document.

3 This is the most important document. It contains redacted

4 information, including unclassified information, [REDACTED]

5 [REDACTED]
6 [REDACTED] It contains

7 redacted leads, which are particularly important for this document.

8 Now, it may be, Your Honor, that the government decides to
9 assert national security privilege over some of the information which
10 is contained in these documents. But they have not done so so far.

11 And if they do so, with such importance of documents, it's important
12 that that be done in some kind of formalized way.

13 Because both 949p-7 and Military Commission Rule of Evidence
14 505(i) require a clean appellate record as part of the ordinary right
15 to a complete record of what information we have been denied access
16 to.

17 This is part of the problem, in my humble opinion, as to the
18 government's position that it can unilaterally, without judicial
19 review, redact -- make relevance redactions, which is what it has
20 done here. But given the significance of these documents and the
21 fact that this witness is on the stand testifying, it's important
22 that that be made formally in a way that is transparent to the
23 record.

1 The fourth document, Your Honor, is the witness testified
2 that in the summer of 2002, she made a -- while she was in Oregon,
3 she drafted a request [REDACTED] regarding seeking additional
4 financial records, including records of Mr. al Baluchi, that were
5 ultimately contained in 1B 4970.

6 She testified about -- that on 5 March 2024, starting at
7 page 43049. And that's the fourth document. We -- as far as we can
8 tell, we have not received that document in discovery and have asked
9 for that to be produced under 914.

10 That's the [REDACTED] information, right? There's two main topics
11 that Ms. Waltz testified about: One about [REDACTED] documents, one about
12 telephone calls.

13 And there are notes -- we think that they're her notes, but
14 we're not 100 percent sure -- found at MEA-WALTZ-00000080 at AE 9220
15 (MAH) Attachment B. These seem to be notes which form the basis for
16 her opinion testimony and have not been -- as far as we can tell,
17 have not been reviewed by the military commission for the substantial
18 redactions which are contained within the document.

19 Now, these documents really go to the heart of Ms. Waltz's
20 testimony. These are not side issues. This is, you know, what she
21 testified about about her gathering evidence [REDACTED]

22 [REDACTED]
23 Now, there's a second 914 disclosure issue regarding Special

1 Agent Fitzgerald's 914 disclosures. And the reason why it comes up
2 at this time is that there's significant overlap between the work of
3 Special Agent Fitzgerald and Ms. Waltz around the gathering of this
4 evidence, including his involvement in some of the anomalies in the
5 government's chains of custody.

6 We initially requested procedurally Special Agent
7 Fitzgerald's statements on 14 July 2017, and that's found in the
8 record at AE 502MM Attachment B.

9 The court subsequently issued 502ZZZ, which mentions Special
10 Agent Fitzsimmons **[sic]** in his statements by name in its order for
11 production.

12 There are three statements that -- of Special Agent
13 Fitzgerald that are important to the examination of Ms. Waltz. The
14 first is MEA-RAD-00002373, found in the record at AE 628LL. It is a
15 redacted electronic communication drafted by Special Agent Fitzgerald
16 of an interview [REDACTED] regarding a
17 search of Mr. Hawsawi's apartment, and the EC is dated 18 March 2010.

18 Ms. Waltz was present for the interview. The government has
19 asserted national security privilege previously over the identity of
20 EO1, [REDACTED]

21 But the redactions also include information about FBI investigative
22 activity over which the government has not asserted national security
23 privilege.

1 The second document is MEA-FIN-00015393, contained in the
2 record at AE 628AAAA Attachment C. It is a redacted cover sheet to
3 1B 4970.

4 The military commission will recall that, in fact, the
5 government even included this document in Ms. Waltz's PowerPoint
6 presentation, which is in the record at AE 885H, page 17. There are
7 some serious questions about this document, and there's an important
8 redaction regarding [REDACTED] the documents Ms. Waltz relied on
9 in her direct testimony.

10 The third document is MEA-FIN-00017314, contained in the
11 record at AE 628AAAAAAA Attachment B. It's a redacted electronic
12 communication which documents the receipts of [REDACTED] financial documents
13 allegedly in 1B 4970. The government also included this document in
14 Ms. Waltz's PowerPoint at page 17 and has a complex interaction which
15 the government addressed in its direct between -- with the 1B cover
16 sheet for 4970.

17 The redactions are not necessarily important as some of
18 these other documents. This would be at the bottom of the stack, but
19 still significant to the controversy over 4970. For example, it says
20 "see attached inventory" on it, and there is no attached inventory.

21 We did full due diligence on this issue. We reviewed
22 physical copies of 1B 4970 on 23 June 2017 at FBI Headquarters and
23 made copies. We did not find any 1B cover sheet or any inventory

1 when we did so. The -- we reviewed the document again yesterday,
2 thanks to the diligence and assistance of the FBI.

3 Now, as I mentioned, the military commission has actually
4 already ordered productions of these documents in 502ZZZ by name for
5 Special Agent Fitzgerald. I have argued this exact point a couple of
6 times and, in fact, flagged at it the November 2023 issue.

7 And the government relies on these documents in its direct
8 of Ms. Waltz to explain discrepancies in the chains of custody.

9 And I direct the military commission's attention to the
10 transcript at 43068 through '70, where they are talking about these
11 exact documents.

12 And I would suggest that 949p-7(d) is intended to prevent
13 just this sort of situation, or this sort of abuse, really, in which
14 the government relies on a witness or -- it goes both ways,
15 right? -- or the defense relies on a witness and their statements but
16 doesn't fully produce their statements.

17 So that brings us to the distinction that I flagged at the
18 beginning, which is the distinction between 701 and 914.

19 Now, the government has taken the position many times, over
20 our objection, that when it produces information under 701, it can
21 unilaterally redact information from it based on relevance. We've
22 objected to that; we've lost, right? We just the 701 redaction
23 issue.

1 But 914 just functions differently. Because 914, based on
2 the Jencks Act, 18 U.S.C. 3500, draws on the fact that the
3 testimonial sponsor of a witness such as Ms. Waltz takes on
4 additional responsibility for production of their documents. And
5 this -- so the production requirement to produce full documents
6 arises under R.M.C. 914 and its statutory equivalent.

7 And so there's different rules. 914(b) requires that if the
8 entire contents of a statement relate to the testimony, which they do
9 in this case, the military judge shall order that the statement be
10 delivered to the moving party, which is what the military commission
11 drew on in 502ZZZ. And I argued to the military commission on 13
12 November 2023, found in the record at 40238 through '40 of the
13 transcript.

14 But if the government wants to withhold things for relevance
15 or not -- you know, it relates to something else, then 914(c) comes
16 into play, which requires that if the calling party claims that
17 portions of the statement do not relate to the subject matter of
18 testimony, the statement must be delivered to the military judge for
19 review.

20 Most of the specific -- some of the specific documents, some
21 of these are classified and some are unclassified. And if they are
22 unclassified, then that's the end of the inquiry, right? That's the
23 rule.

1 But there's a different rule if they are classified. And,
2 strangely, when the Secretary of Defense wrote the rules, they split
3 part of p-7(d) out of Rule 914, and they put it in M.C.R.E. 505(i).

4 So the statutory requirement got split into two different
5 rules. And so there's some separate procedures for classified
6 documents, which are found in 949p-7(d)(2) and M.C.R.E. 505(i)(4).

7 But those also require judicial review of redactions when
8 the government seeks to withhold -- asserts a privilege over
9 information which is contained within documents which it would
10 otherwise have to produce under 914.

11 And that's especially important in this case, because, as
12 we've discussed many times, there's an issue of the cumulative effect
13 of the government's assertions of national security privilege on the
14 ability to present a complete defense.

15 Now, there's one procedural sort of footnote that I want to
16 give to the situation, which is that on 16 February 2024, the
17 military commission ordered in 574M -- or the government moved for an
18 ex parte hearing in 574M. And on 3 March 2024, the government had an
19 ex parte hearing.

20 Now, I can't actually know if the government submitted these
21 documents for judicial review during that ex parte, but I do know
22 that the military commission's order, 574P, did not make any finding
23 justifying redactions.

1 So I don't know what happened to the ex parte. I
2 understand, over my objection, I'm not entitled to know what happened
3 at the ex parte. But there is an order that came out of it that did
4 not address this issue. So I don't have any reason to believe that
5 the government has formally asserted national security privilege or
6 has otherwise sought redactions under -- for either unclassified or
7 classified information under either of the two branches of 914.

8 So that's my argument, Your Honor, and I'm happy to answer
9 any questions.

10 MJ [Col McCALL]: No questions at this time.

11 Government?

12 MTC [MR. TRIVETT]: So the parties continue to have a
13 fundamental disagreement between the interplay of R.M.C. 701 and
14 M.C.R.E. 914.

15 It cannot be that all of the work of an FBI witness during
16 the 9/11 investigation becomes their statement under 914. That's not
17 what 914's intended to do. If that were the case, 914 would swallow
18 all of 701. It would render it completely superfluous and
19 unnecessary, and we would not be able to avail ourselves of any
20 determinations under 701 if that were the case.

21 We are begging the commission to rule on the 914 motion that
22 it has before it. I know we argued this initially under Judge Cohen.
23 That would certainly provide the parties the clarity of the

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1 commission's position on this and allow us to adjust, but we believe
2 that ours is the correct interpretation.

3 It's difficult now, I'm standing here arguing the second
4 motion that was now filed just this morning. So I can't go through
5 every single document with specific granularity on what we did and
6 why we did it.

7 I can say that the one document that he cited as far as
8 WALTZ-00000080, I guess with five zeros before it, is the only thing
9 that even approaches 914 within the documents that they listed.
10 That's -- it is her notes and it was -- it's not substantially
11 verbatim. It was not signed. It was simply talking points that she
12 had for a 9/11 review commission that she wanted to address. All of
13 the redactions that we took of that were consistent with Protective
14 Order #3, which we are bound by as well and the commission has
15 already granted. So we have taken those of her notes just for
16 WALTZ-00000080.

17 All of the other redactions were taken under 701, because
18 these documents were discoverable in part under 701, but not in their
19 entirety. Plus, anything that we may have redacted from
20 MEA-FIN-00015393 was something we had asserted national security
21 privilege over but, importantly for 914 purposes, did not elicit that
22 specific information from Ms. Waltz. So it wouldn't fall under 914.

23 914's clear. It's a statement about the subject matter of

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1 the testimony. It's not the work that they did in the 9/11
2 investigation before that. Discoverable? Yes. Not 914. And I
3 think that the case law is clear as to what triggers.

4 Now, sometimes they can be both, but in these instances,
5 it's not. And when it is both, the later disclosure rules actually
6 apply under federal court. We haven't done that. We've disclosed it
7 all in advance, but we've done it under 701. We've taken 701
8 redactions of it.

9 So we believe, certainly under our 914 obligations to
10 Ms. Waltz, that we have more than satisfied them. We, in fact,
11 created a document for 914 specifically for the commission's
12 purposes.

13 We had her put everything down as far as what she did, the
14 background on it, and then her analysis. We had that done
15 specifically so the parties would have it and have the aid of being
16 able to cross-examine her on it. It did not exist before we asked
17 her to do it. We've turned over anything else that could arguably be
18 914 for Ms. Waltz.

19 I would ask leave of the commission to come back on this
20 issue of whether or not the personal jurisdiction ruling of 30 days
21 prior applied to Ms. Waltz.

22 Ms. Waltz was testifying primarily as a motion to pre-admit
23 information for us. I do not recall ever stating that her testimony

1 was a personal jurisdiction matter, but I might have. That's one of
2 those things, with now that I'm on my feet on arguing this motion,
3 where I'm not certain. But I would ask leave for us to at least look
4 at that. That is not my recollection at all as it applies to
5 Ms. Waltz and the personal jurisdiction argument.

6 MJ [Col McCALL]: That's fine. You can correct the record
7 later, if you have a change.

8 MTC [MR. TRIVETT]: And you have to listen to what Mr. Connell
9 says very carefully when he argues about the significance and the
10 government's position in regard to the use of RDI statements not
11 affecting the FBI investigation.

12 It is our position that it didn't affect any of the evidence
13 we intend to use in the case in chief, and it didn't affect the
14 questions that were asked of the FBI agents during the LHM
15 statements. That is our position.

16 Obviously, there's lots of interaction between the FBI and
17 the agency on -- for RDI purposes in getting certain information.
18 We've conceded that. It's the 538, 561. And we continue to build
19 this bridge on it, but it does not impact any evidence we intend to
20 use, and it did not impact any of the statements that were taken.

21 It was not used. There were no questions derived from any
22 of it. It was not used in any of those statements. That is our
23 position.

1 So to the extent our position continues to be communicated
2 to the commission through defense counsel, I wanted you to hear it
3 from us first, that that is our position. And that's all that
4 matters. For purposes of a legal trial, all that matters is that
5 none of the evidence was tainted by any of the RDI statements that
6 may have taken.

7 So I wanted to clarify that because I've heard it again and
8 again, and I want to make sure that the commission understands what
9 our position is.

10 MJ [Col McCALL]: I understand the government's position.

11 MTC [MR. TRIVETT]: Thank you.

12 In regard to the attached inventory, we obviously have not
13 been working with Supervisory Intelligence Analyst Waltz during this
14 five-week interim. Mr. Connell specifically asked us not to in
15 the -- both to the commission and then in the e-mail that we were
16 sent, but I'm sure we can get an answer to that question at some
17 point in time. Maybe she can actually provide the answer during her
18 either cross-examination or redirect.

19 So subject to your questions, sir, that's the government's
20 position on this oral motion.

21 MJ [Col McCALL]: No questions. I'm going to take this under
22 consideration.

23 Go ahead, Mr. Connell. Do you need to be further heard?

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

2 So there are a lot of points on which the government and I
3 are in agreement, including our agreement to fundamentally disagree
4 about the interaction between 701 and 914.

5 And the reason that I chose these documents to present to
6 the military commission is I -- like, I think, the government, I
7 wanted to frame this issue up very cleanly for you. I'll address the
8 scope argument that the government made in just a moment.

9 But 701 and 914 fundamentally address different purposes.
10 We call them discovery in, you know, in general parlance; but in the
11 federal courts, for example, they're fundamentally different things.

12 One -- you know, federal discovery is governed under Federal
13 Rule of Criminal Procedure 16, and then there's a separate statutory
14 overlay, the Jencks Act, which addresses different concerns.

15 The same is true in the military commissions. We have 701,
16 which is here's this vast amount of information that the government
17 has to turn over to the defense and sometimes vice versa, but then
18 when we have narrowed the funnel and we have gotten past here's the
19 general collection of stuff that is material to the defense and we've
20 gotten to the place where a party decides to testimonially sponsor a
21 witness, there are a different set of concerns which come into play.
22 And so there are a different set of rules. Those rules require
23 additional requirements whether it's a -- it's a scope question or

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1 whether it's a classification question, there has to be judicial
2 review. It's very clear in the statute.

3 There has to be additional findings that the military
4 commission has to make under -- if you're going to find a -- an
5 assertion of privilege valid, there are additional findings that you
6 have to make, including about consistency of the information with the
7 testimony of the witness. So you really have to know where we're
8 going and that kind of thing.

9 And then, perhaps most importantly, there has to be a clean
10 appellate record, which is right there in the statute, that the
11 question which -- the material to which the defense is denied access
12 has to be included in the record.

13 So it's a different set of purposes, different set of
14 standards. I'll be honest with you, I tried to import many of those
15 standards into 701, and I lost that argument, but in 914 it's
16 different. Congress has told us it's different, just like they told
17 federal courts that it's different in the Jencks Act.

18 The second thing is I do want to address the scope question,
19 because the government suggested that some of the -- made the
20 argument that all of the work on the military -- on the 9/11 case
21 can't fall under 914.

22 And as a general statement, I agree with that. But the
23 standard is set out pretty clearly, which is that any statement of

1 the witness that relates to the subject matter concerning which the
2 witness has testified.

3 And there can be an argument, I understand, about what is
4 the subject matter about which the witness has testified, but there
5 can't be an argument with these documents. The witness testified
6 extensively about gathering information in UAE, testified extensively
7 about the telephone calls, and that's what these -- all these
8 documents relate to is the -- there was also the question of -- the
9 government said only one of these, Waltz 00000080, was 914 material.

10 "Statement" is defined in 914(f)(1) as a written statement
11 made by the witness that is signed or otherwise adopted or approved
12 by the witness.

13 Now, for each of these documents the drafter is a government
14 witness, either Special Agent Fitzgerald or Ms. Waltz. And so this
15 is not a question of, you know, what was their relationship to its
16 creation. They are the person who made it and they put their name on
17 it.

18 Now, the FBI didn't use wet-ink signatures anymore by that
19 time, because this is, by definition, an electronic communication,
20 and those electronic communications are otherwise adopted or approved
21 by the witness. It says so on the document because it lists her or
22 Special Agent Fitzgerald as drafter.

23 And that brings us to, well, you know, what is a statement.

1 And the military commission has already ruled on the question,
2 separate from the 30-day requirement, has already ruled on the
3 question of what is a statement.

4 In 502Z, the military commission wrote, I quote ----
5 MJ [Col McCALL]: Probably ZZZ?

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

7 Statements include handwritten notes, e-mail communications,
8 cables, telegrams, or other electronically distributed statements
9 signed or otherwise adopted or approved by the witness that is known
10 to the prosecution or in the exercise of due diligence may become
11 known to the prosecution, regarding any subject matter about which
12 the witness will testify.

13 So we've already covered electronic communications, and the
14 military commission has already issued a scope -- has already decided
15 this scope question.

16 And so I think this issue is cleanly framed up. The
17 government probably would profit from a ruling as to whether they can
18 make redaction -- relevance redactions.

19 I will tell you that we have made extensive 914 disclosures
20 to the government. I've never made a single relevance redaction in
21 one of them, because I don't think that we could. If we ever had a
22 situation where there were a large section that were on some other
23 topic, say we asked a witness about two different topics, then I

1 would follow 914, come to the military commission, submit it, and ask
2 for the ability to withhold certain information.

3 So I think all the parties would profit from a ruling of
4 whether there can be relevance redactions, and when there are
5 national security privilege redactions, how the government has to
6 include those in the record.

7 MJ [Col McCALL]: Okay.

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

9 MJ [Col McCALL]: All right. I'll consider argument from
10 counsel, and I'll let the parties know what I decide.

11 All right. The next topic, I believe -- oh, go ahead,
12 Mr. Connell. Do you have more?

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

14 MJ [Col McCALL]: Okay. Perfect.

15 LDC [MR. CONNELL]: I didn't mean to cut you off, sir.

16 MJ [Col McCALL]: Oh, no. I was just trying to see where the
17 parties wanted to go next.

18 LDC [MR. CONNELL]: Right.

19 So, as I understand it, sir, the next topic is how we are
20 going to address particularly the records issues around the AE 937
21 questions that we submitted.

22 MJ [Col McCALL]: Right.

23 LDC [MR. CONNELL]: So let me just -- just very minor

1 background. On 1 October 2018, the government advised, at military
2 commission's order, the defense of Protective Order #3. That's found
3 in the record at AE 574F, after they had obtained Protective Order #3
4 ex parte.

5 We responded immediately. I mean, this was a serious issue.
6 The idea that the government could use evidence and then prevent
7 inquiry into the reliability of the providence of that evidence, I
8 mean, that's really unheard of. That's a very unusual situation.

9 And so we filed two motions. Four days later, on 5
10 October 2018, we filed AE 601, motion to dismiss or suppress the [REDACTED]
11 evidence which was based on the Sixth Amendment right to
12 confrontation. And then 11 days later, on 12 October, we filed AE
13 574G, a motion to rescind Protective Order #3 or to dismiss based on
14 the denial of the right to present a complete defense.

15 Really, I think because we're not at trial, that's the sort
16 of piece of it that is relevant here. Obviously, of course, for
17 trial the confrontation right comes into play, and at trial the
18 government's AE 885 motion to pre-admit comes into play.

19 But the place where we are right now is different from the
20 place we were in 2018, which is why I mention it. In 2018, we had no
21 idea how important this testimony would be to the government's
22 strategy.

23 You have to think back. And in 2018, the government still

1 claimed that the FBI interrogators were a clean team and were
2 independent of the CIA use of torture in black sites.

3 In contrast, at the last hearing the government used the
4 word, quote, obvious to describe the fact that the FBI contributed
5 questions to be used in CIA interrogation, and used the results of
6 statements obtained under torture for further investigation.

7 I was fascinated to hear the government argue today just a
8 moment ago that there was, quote, lots of interaction between the FBI
9 and the CIA about information obtained in the RDI program. I mean,
10 that's a very different position than we were -- it's 180 degrees
11 from where we were in 2018.

12 The -- that "lots of interaction" that the government just
13 described between the FBI and CIA over the Rendition Detention and
14 Interrogation Program includes Special Agent Fitzgerald and includes
15 Special Agent Zebley, who is going to testify this hearing, and
16 Ms. Waltz.

17 It includes the telephone investigations that she testified
18 about. It includes the U.S. [REDACTED] investigations that she talked
19 about. And I think the cross-examination will demonstrate all that.

20 I do want to flag that this Protective Order #3 question is
21 not simply a question about Ms. Waltz. A lot of the telephone
22 investigation was conducted either by Special Agent Zebley or in
23 coordination with Special Agent Zebley. So these questions are going

1 to come into play. Many of the questions are identical between the
2 two. So, you know, if we get a ruling on a Waltz question, obviously
3 I won't try to ask that of Mr. Zebley, but it is important.

4 So in March, Special Agent -- I mean, Ms. Waltz testified
5 extensively about the meaning and the significance of these telephone
6 calls. And the government is affirmatively using her testimony to
7 bolster its positions, which it just ably articulated for itself, on
8 the admissibility of statements in AE 628 and the admissibility of
9 telephone calls in AE 885.

10 It has taken -- previously taken the position that that
11 included personal jurisdiction. But I understand what counsel said
12 today; we'll just leave that alone.

13 At the same time that it's using this information
14 affirmatively, the government is seeking to categorically prohibit
15 the defense from asking questions about the reliability and the
16 significance of the telephone calls, as well as -- and this is really
17 important -- the accuracy and credibility of Ms. Waltz's testimony in
18 court about the telephone calls and her sworn declaration. There are
19 serious questions. This is not pro forma. There are serious
20 questions.

21 And this is exactly the situation that long ago the United
22 States Supreme Court in Reynolds v. United States said should not
23 happen; that the government should not use -- cannot seek to use

1 evidence against the defense while using its national security
2 privilege to prohibit inquiry into its providence. And that's true
3 in any situation. But given the anomalies which are present in this
4 case, it's especially significant.

5 That issue is addressed statutorily in the Military
6 Commissions Act in 949p-6(f)(2), which says that when the defense is
7 prevented from presenting classified information, which it would
8 otherwise be able to do, that dismissal or other alternative
9 sanctions are required.

10 Now, under Judge Parrella, there was a dispute over the
11 actual effect of Protective Order #3. And so in AE 936, the military
12 commission authorized the defense to submit questions to the
13 prosecution so the prosecution could veto questions it wanted to
14 prohibit under Protective Order #3.

15 And the military commission, as part of its order, page 2 of
16 AE 936, ordered that the submitted questions and the prosecution's
17 response shall be entered into the record as an appellate exhibit.

18 Now, we complied with the military commission's
19 authorization, as we documented that in AE 936A. What we expected
20 was a classification review and a redline back from the government,
21 which is not what we got. But it's up to them how to comply. So we
22 didn't get any classification review at all, so I'm really left to
23 myself to divide the questions between open and closed and classified

1 and unclassified, and I've done my best with that.

2 But the government in AE 936B submitted a redacted copy so
3 the military commission and the reviewing appellate court cannot know
4 what our questions were. And, you know, my colleagues thought
5 I -- may have thought that I was crazy for participating
6 because -- and they may have been right, because this whole process
7 turned out to be incredibly prejudicial.

8 The government actually used our questions to expand the
9 scope of Protective Order #3 in AE 658M. There are things which are
10 in 658M as under the scope of what we're not allowed to ask about the
11 telephone calls -- and I can't say exactly what that is in
12 open -- that are not in Protective Order #3 because they were in our
13 questions. So ----

14 MJ [Col McCALL]: I mean, is that expansion or is that
15 clarification?

16 LDC [MR. CONNELL]: I suppose that's your decision, sir.

17 MJ [Col McCALL]: All right.

18 LDC [MR. CONNELL]: The -- but what it is is it's use of our
19 questions to change the guidance. So let's not judge that for this
20 moment, but it is -- you know, it was not no big deal when I saw
21 ourselves quoted, essentially, in 658M based on information that we
22 had submitted.

23 And I would suggest that, actually, Protective Order #3 is

1 more restrictive now than when we submitted our questions precisely
2 because we identified discovery about the telephone calls that the
3 government hadn't focused on.

4 MJ [Col McCALL]: But, Mr. Connell, I mean ----

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

6 MJ [Col McCALL]: ---- isn't this just a written way of doing
7 pretty much what I see happen constantly when we're in the middle of
8 questioning a witness and counsel asks a question that draws an
9 objection from the government, the light goes off, counsel confer,
10 and there gets -- and the parties get clarification on this gray area
11 on what is off limits and what is not? I mean, isn't this the same?
12 It's just a -- but in written form where it's -- I mean, focus on
13 that.

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

15 MJ [Col McCALL]: Okay.

16 LDC [MR. CONNELL]: Yes, sir. It is. I agree with that.

17 What happened -- the reason why this was unusual to me is it
18 happened in a different order. What normally happens is I confer
19 with the government, I ask a question, and then they come along and
20 change the classification guidance.

21 The reason why it spoke to me, struck me and hit a little
22 different, was that this time I didn't even have the chance to ask
23 the question before they changed the classification guidance.

1 MJ [Col McCALL]: But ----

2 LDC [MR. CONNELL]: So I agree with you that it is the same
3 process in a different way.

4 MJ [Col McCALL]: But isn't the heart of the issue -- I mean,
5 because, again, I understand that you don't -- you're saying you
6 don't get a chance to ask the question, but given the way our
7 courtroom is set up with the delay in what is broadcast and the feed
8 being cut, I mean, you're typically not allowed to -- if a question
9 the government is invoking you're not allowed to ask that question is
10 asked and it's preserved for the appellate court review or
11 for -- but it -- it's going to be the same isn't it?

12 I mean, the question is what to do with those questions that
13 you have submitted and the government wants to make a change or to
14 say that you can't ask those questions at all. I mean, isn't that
15 the heart of the issue?

16 LDC [MR. CONNELL]: That's the heart of what we're talking
17 about right now. Yes, sir.

18 MJ [Col McCALL]: Okay.

19 LDC [MR. CONNELL]: And so the -- and so with that, I will
20 tell you that we prepared a redline copy with annotations to where in
21 the -- in the discovery, this origin of our questions, and I have
22 tendered that to the court and provided a copy to the parties as AE
23 574Q.

1 I wanted to do that in open court so the
2 government -- because the government in 936B objects to that, and I
3 wanted it to be heard and, you know, us to do this in an open and
4 transparent way.

5 So I do want to add, and directly in answer to your
6 question, one major difference between what typically happens when we
7 are conferring in court -- and I'll tell you, we conferred about this
8 argument before I spoke today, right? We do this all the time. But
9 one major issue is in this situation the government's assertion of
10 national security privilege exceeds its authority under 949p-1(a),
11 because the vast majority of the 175 questions that they fully or
12 partially redact is not based on classified information at all.

13 Now, I want to digress for just a moment and talk about what
14 is this national security privilege. You know, the government begged
15 for a resolution of 701 and 914, and I understand that.

16 What I have begged for is, what is it that we're doing here
17 exactly? What is this assertion of national security privilege? Is
18 it some common law privilege? Is it a broader scope?

19 And I will give you our position. Our position is that it
20 is an application of 949p-1(a), which says -- states the basic rule
21 that the government -- the military commission cannot order the
22 disclosure of classified information to persons who are not
23 authorized.

1 And what the government is doing when it asserts national
2 security privilege is that it is making a formal determination that
3 you and I and the rest of the people in the room, other than the
4 prosecution, are not authorized to receive that classified
5 information. That's what I think is happening.

6 Now, that contains within it a limit, which is the word
7 "classified information." The -- which is contained within the
8 statute, the same statute that empowers the government to make this
9 argument also limits their ability to do so.

10 And most of the questions that we ask -- most of the 175
11 fully or partially redacted questions arise from three unclassified
12 sources. And the reason we know this information is unclassified is
13 the government gave it to us in a document which is stamped
14 UNCLASSIFIED.

15 And that is MEA-FBI-00020986, found in the record at AE
16 628GGGGGGGGG (AAA) Attachment B; MEA-FBI-00020981, found at the same
17 place in the record; and MEA-FBI-00021129, found in the same place in
18 the record.

19 So the reason why I make this argument is you asked, "Isn't
20 this the same thing that's happening?" And in a way that it
21 is -- and I agree with that procedural characterization -- but in a
22 way that it's fundamentally different, in that the scope of
23 Protective Order #3, as the government is enforcing it, exceeds its

1 power under preventing disclosure of classified information under
2 949p-1(a).

3 And then the second argument that I want to make with
4 respect to the government's redactions is that there is a disruption
5 of the requirement, either statutory or constitutional, a fair trial,
6 which is inherent in the use of evidence while restricting inquiry
7 into its providence.

8 The military commission has ruled multiple times that the
9 government can designate what is classified under E013526 and can
10 restrict its use by the invocation of national security privilege
11 over classified information, but that's a decision that the military
12 commission -- that the government makes, and it comes with
13 consequences.

14 And that assertion of national security privilege in
15 Protective Order #3, I suggest, requires the sanctions which are
16 called for under the due process clause or 949p-6(f)(2) contained
17 within the military commissions.

18 And I just want to give the most obvious example. When you
19 go back and look at AE 936B, the government's brief, at page 7 we
20 have a question which is essentially reading a sentence from an
21 unclassified document. And the government prohibits us from using
22 those words in a question in an unclassified document to -- to
23 cross-examine the witness.

1 If it were not for this, that would take place in open court
2 with no restrictions whatsoever. We've done it 10,000 times. Here's
3 an unclassified document. Does it say this? What did you do in
4 response? Blah, blah, blah.

5 But they're restricting that. So that's what I'm saying
6 goes -- is different. That's what goes beyond the capacity of the
7 military -- of the government to restrict the distribution of
8 information.

9 And so I would suggest that, you know, on the issue most
10 specifically that we are dealing with here is that, at the very least
11 the military commission and an appellate court need access to the
12 information, the questions that we would have asked that you
13 authorized under 936 so that you can make an assessment of what does
14 all this mean.

15 Will our position in 601 and 574G ultimately prevail?
16 That's for another day. You've already ruled that you want to hear
17 from Special Agent Waltz first. But in order to make a meaningful
18 decision about that, you have to have access to the information which
19 is laid out in AE 574Q. So I would ask you to make 574Q a part of
20 the record.

21 MJ [Col McCALL]: All right. Thank you, Mr. Connell.

22 Government?

23 MTC [MR. TRIVETT]: Sir, we would object to that document

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1 being made part of the record. I'd like to reserve my argument. I
2 believe Mr. Engle was going to argue in closed. This is a much
3 easier argument for us to make in closed, especially in light of the
4 fact that it's not a filed motion.

5 MJ [Col McCALL]: Okay.

6 MTC [MR. TRIVETT]: So I would prefer to hear any closed
7 argument and then make one argument in closed.

8 MJ [Col McCALL]: Okay. That's fine.

9 All right. Anything else to take up while we're in this
10 open session?

11 Apparently not.

12 All right. So this is what we're going to do. As I
13 mentioned when I was summarizing the R.M.C. 802 conference that we
14 had yesterday, there has been a request and -- to have a closed
15 session to discuss some of these issues and rather than moving into
16 the open cross-examination of Supervisory Intelligence Analyst Waltz.

17 So that's what we're going to do. It's actually timing-wise
18 working out where we'll go ahead and take a recess for lunch. I want
19 the parties to be back at 1330. At that time we will be in a closed
20 session, and I anticipate we are going to be in a closed session the
21 rest of today.

22 So the next open session for the public is going to be
23 tomorrow at 0900. Obviously, if that changes for some reason, I will

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1 get that word out via public affairs or the government, how I
2 normally do when we have to make an adjustment at the last minute.
3 But, for now, the next public -- the open session will be tomorrow at
4 0900.

5 So this afternoon, 1330 we'll be back in here, closed
6 session to hear Mr. Engle's argument and the government's response.
7 And then I'd also at some point today like to take a chance to have
8 the ex parte on the 885 -- I believe it's M -- summaries and
9 substitutions that had been submitted.

10 We're having some technical difficulties for me to be able
11 to review -- I've already looked at it, but I wanted to review it
12 again, and so that's why I'm not setting a hard date on that ex
13 parte. Depending on where we can get with me being able to look at
14 that will determine whether or not we do that ex parte today.

15 And I know the government could give me a hard copy. I
16 already have notes on an electronic copy that I would prefer to
17 access that, but so we'll just -- we'll see where things go this
18 afternoon, and I'll let the parties know what we're going to do. But
19 the 1330 in a closed session.

20 Mr. Dykstra?

21 DMTC [MR. DYKSTRA]: Yes, sir. I just raised the -- it would
22 be preferable to do it today from our standpoint because
23 Major Dastoor is present at the facility. Obviously, it's up to your

1 schedule, but that would be our preference, Your Honor.

2 MJ [Col McCALL]: That's fine. And that's probably doable.

3 Okay.

4 And, Mr. Connell?

5 LDC [MR. CONNELL]: Your Honor, obviously there have been a
6 number of logistics issues this morning, but I did want to let the
7 military commission know that Mr. al Baluchi is -- has, you know, an
8 hour ago signaled his intent to leave the military commission, and
9 apparently there's a transportation issue, so he's sitting here
10 waiting.

11 It's a little bit like the prior situation. He doesn't want
12 to be sent to the holding cell to wait there. So can he sit -- wait
13 here in the courtroom until he can be transported?

14 MJ [Col McCALL]: Of course. So -- and, again, I didn't
15 mention that yesterday or today, but the same rules that we typically
16 use apply. So when we're in a recess, whether for lunch, a prayer
17 session, or even if we for some reason have to -- sometimes we run
18 into a legal issue that causes us to stop for the day, the parties
19 are always welcome to use the courtroom to either confer with their
20 client or for the client if he wants to sit in here as long as the
21 guard force can support, and I don't see why that would be an issue.

22 I see some more conferring.

23 Anything else, Mr. Connell?

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1 LDC [MR. CONNELL]: Yes, sir. We're trying to get
2 Mr. al Baluchi back to the camp by prayer time, so I think that's
3 consistent with what you've said. And obviously, we can't, you know,
4 bring a -- make a van appear where there's no van, but we'll keep
5 working with JTF and try to make all this happen.

6 MJ [Col McCALL]: Yeah, I know the guard force is working it.
7 Obviously, resources are probably somewhat constrained seeing as how
8 we have the other commission going on, and I don't know if there's
9 other, you know, movements that are being done. I don't have
10 information on any of that.

11 Typically when we're having a session, the guarantee is that
12 we can get the accused here in the morning and we can get them back
13 to the camp in the -- at the -- when we typically would be closing
14 for the day. But any movements earlier than that, it just depends on
15 whether they can support. I do know that they're working it.

16 All right. Commission's in -- yes, commission's not in
17 recess.

18 Go ahead, Ms. LeBoeuf.

19 CDC [MS. LeBOEUF]: Sorry, Your Honor.

20 MJ [Col McCALL]: No, you're fine.

21 CDC [MS. LeBOEUF]: Just another day and another new rule with
22 the extended facility. I haven't had a chance to bring it to
23 Mr. Dykstra's attention because it just arose, but the rule has been

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1 that we could have a meal with Mr. Mohammad in the extended facility,
2 and they're apparently saying a new rule that we cannot. So if we
3 could have somebody stand by to see if we could talk to them about
4 not imposing new rules on the ----

5 MJ [Col McCALL]: Sure. And that's something I'm not too
6 familiar with. If -- as soon as we break, if, Mr. Dykstra, if you
7 can hang around and then help coordinate this with JTF to see what
8 the issue is ----

9 CDC [MS. LeBOEUF]: Thank you.

10 MJ [Col McCALL]: ---- on them having a meal if they've been
11 allowed to do it in the past.

12 CDC [MS. LeBOEUF]: Thank you. Again, it involves timing for
13 prayer time. So if he could stay and then go. Thank you.

14 MJ [Col McCALL]: I understand.

15 All right. Anything else?

16 No.

17 All right. So we'll be back on the record in a closed
18 session 1330. Commission's in recess.

19 **[The R.M.C. 803 session recessed at 1157, 15 April 2024.]**

20 **[END OF PAGE]**