**[The R.M.C. 803 session was called to order at 0902, 15 November 2018.]**

MJ [Col PARRELLA]: This commission is called to order. Trial Counsel, are all previous government counsel who were present at the close of yesterday's session again present?

CP [BG MARTINS]: Yes, Your Honor.

MJ [Col PARRELLA]: Defense, are all defense counsel who were present at the close of the previous session again present?

LDC [MR. NEVIN]: In our case, Your Honor, yes, except for Lieutenant Colonel Poteet who is -- will be here shortly, but is attending to other duties.

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

Ms. Bin'Attash.

LDC [MS. BORMANN]: Judge, I am Ms. Bormann.

MJ [Col PARRELLA]: I'm sorry.

LDC [MS. BORMANN]: That's okay. We're easily confused. It's the beard.

At any rate, everybody is present. And we also have in court an addition, Major Matthew Seeger.

MJ [Col PARRELLA]: Okay. Thank you.

Mr. Harrington.

LDC [MR. HARRINGTON]: Judge, for Mr. Binalshibh we are

the same.

MJ [Col PARRELLA]: Mr. Connell?

LDC [MR. CONNELL]: Good morning, Your Honor. All counsel are present.

MJ [Col PARRELLA]: And Mr. Ruiz?

LDC [MR. RUIZ]: All counsel are present.

MJ [Col PARRELLA]: I note that the following accused are absent: Mr. Bin'Attash and Mr. Hawsawi. Remaining accused are present.

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

TC [MR. SWANN]: We do, Your Honor. It's the same witness that's testified this week.

MJ [Col PARRELLA]: Okay. Captain, I just remind you that you're still under oath.

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

**DIRECT EXAMINATION**

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

Q. Captain, did you have occasion to advise the accused of their rights this morning?

A. With respect to the two that did not choose to

attend, yes, sir.

Q. Okay. All right. I apologize.

Let's take Bin'Attash first. I believe that is Appellate Exhibit 608G. Do you have the original in front of you?

A. Yes, sir, I do.

Q. Three-page document?

A. Yes, sir.

Q. Did you advise him the same way that you have advised others throughout the week?

A. Yes, sir, I did.

Q. Using the form?

A. Yes, sir.

Q. Did he indicate that he wished to attend or not attend?

A. He indicated that he did not wish to attend.

Q. Did he sign either the Arabic or the English version?

A. Yes, sir. He signed the Arabic version, which is listed as page 2.

Q. With respect to Mustafa al Hawsawi, 608H, consisting of three pages, do you have that in front of you?

A. Yes, sir, I do.

Q. Did you advise him the same way, using the form?

A. I did.

Q. Was it in English or in Arabic?

A. I read it in English, and he signed the Arabic version as well as the English version, acknowledging his desire not to attend.

Q. All right. Do you believe that both of these individuals voluntarily waived their right to attend this morning's proceedings?

A. I do.

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

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

Do any defense counsel have questions for this witness?

That's a negative response.

Captain, thank you for your testimony. You may step down.

**[The witness was excused.]**

MJ [Col PARRELLA]: The commission finds that Mr. Bin'Attash and Mr. Hawsawi have knowingly and voluntarily waived their right to be present at today's session. We will now turn to AE 524.

Trial Counsel.

LDC [MS. BORMANN]: Judge, did you want to do 399 argument

first?

MJ [Col PARRELLA]: Yes, thank you. We do want to do 399 first. So with respect to that, I believe it's to Mr. Montross.

DC [MR. MONTROSS]: Thank you. In our pleadings there was much detail provided about the right to have meaningful contact and relationships with one's family as a matter of both domestic and international law. And for those citations, I would direct Your Honor to pages 5 to 15 of our brief, which is not dissimilar to the argument that Mr. Farley made yesterday on behalf of his client.

What I want to emphasize here is the critical nature in both capital litigation and in Supreme Court jurisprudence of the role of family in capital cases. And before I proceed, I acknowledge that there are families in this courtroom, in the gallery, who have suffered, but now I will speak of Mr. Bin'Attash's family.

Family in capital litigation plays, Your Honor, a unique and critical role. First, it is the prime exemplar in Supreme Court case after Supreme Court case of what constitutes effective mitigation presentation. There is four paramount U.S. Supreme Court cases: Williams, Wiggins, Rompilla, and Porter.

Wiggins v. Smith, numerous family members contributed to the history and the chronology of who that client was that faced the death penalty. Porter v. McCollum, a case you actually may be familiar with because it involved a Korean War veteran. The primary evidence or one of the best evidence in that case were testimony, powerful, from his brother and his sister.

In capital case after capital case after capital case what the United States Supreme Court dictates and it holds is that the most powerful evidence about who that person is that faces the ultimate sanction comes from those who knew him best; it comes from his family.

Second, we are told as lawyers -- never mind the prime force of that evidence in a courtroom, but we are told as lawyers that our primary obligation as capital defense attorneys is to find the family and to establish relationships with the family. Family, family, family is everything. And the conduit to the family is Mr. Bin'Attash, who has no contact with them.

Third is our relationship with the client. I think some journals and resources call it client maintenance. I hate that term, because it's really about the effect that capital cases have uniquely on capital defendants. Capital

defendants feel a panoply of emotions, particularly in a case that has gone on for this period of time. There are periods of hopelessness, of despair. There's periods of anger. There are periods of feelings of betrayal. In this case those feelings are even more complex because we are dealing with an individual who was tortured for three and a half, close to four years.

Family is what keeps capital defendants going. It prevents them from giving up. It prevents them from banning mitigation. It prevents them from dismissing counsel.

Family is critical for mitigation. It is also critical for our relationship with our client which informs the mitigation. So it is everything in this case, Judge, and right now we don't have it.

My last comment is about the evidence in this case. We received a number, which I cannot disclose, okay, of videos. We only received them two years, Judge, after Judge Pohl issued the order that we were entitled to get those videos because they were relevant to mitigation. We only received those videos, Judge, after we filed a motion to show cause why the government should not be sanctioned for failing to comply with Judge Pohl's order. So two years. We received those videos in July of 2018. Those are the videos that are

pending OCA review right now.

Judge, the government's defense -- or one of the government's defense in this 399 series is that they profess to remain "committed to continuing to facilitate efficient means of communication between the Accused and their respective families. To this end, the Government will continue to allow for near real-time communications with family members whenever and wherever possible." That's on page 2 of their response brief, Judge, on 399.

I am asking you, because I don't have the evidence to refute that because they waited two years to give me the videos, and now they are in OCA review that you cannot credit that argument; and that if you give it any credence, I am suggesting, with respect, that you are denying me the opportunity to fairly and equitably contest that defense at this point, because I cannot do that.

So subject to your questions, Judge.

MJ [Col PARRELLA]: I have no questions. Thank you, Mr. Montross.

DC [MR. MONTROSS]: Thank you, Judge.

MJ [Col PARRELLA]: Mr. Ruiz?

LDC [MR. RUIZ]: Judge, the question I want to speak to is the question you posed yesterday during your exchange with

some of the counsel during the presentation of this motion, which was "what is your authority." And you indicated that precedent will indicate that this was an internal guard issue. That's what I want to spend some -- a few minutes talking about, what your authority is, what Mr. al Hawsawi's view is about how the court should proceed in analyzing these types of matters.

We think the -- while there is a specific issue before the court here, this is a feature of much of our litigation, which is: What is the commission's role when it comes to the detention facility? What kind of authority and how far should the commission reach to impact things that may somewhat be a hybrid of an internal facility process? But it also impacts, in our view, the rights that these men have, that Mr. al Hawsawi has, in these military commissions.

So I want to give you three cases. I'm going to ask you to, when you have the time, to review those cases. We've talked about some of these before. In fact, I have as well. Turner v. Safley, 482 U.S. 78; Johnson v. California, 543 U.S. 499; Taylor v. Sterrett, 532 F.2d 462.

So while these cases are not obviously all the cases that are out there, certainly I think that this gives you the framework from which to begin when you have a question of

deference to the detention facility.

I would also refer you to page 20621, line 19, to page 20626. In those sections I have already touched on many of the features.

I think what I will do is allow me to streamline my comments now. That argument is also contained in some regard and with respect to a different issue is when we were talking about the attorney-client visits and the impact of denials on us and what the court should do, but it touches on many of the features that I want to highlight for you quickly.

And that is that the primary and overriding position is that the commission, the court does not owe unlimited deference to a detention facility. It is not an approach where the minute that the government asserts that there is an internal guard force issue or a detention facility issue, that the commission has to step back and feel as though it cannot interfere or cannot issue rulings that appropriately balance the rights of Mr. al Hawsawi with the facility's necessity to carry on everyday functions and operations.

And as I talked about Turner v. Safley, that was a post-conviction case, and in that case it was actually a split verdict for the prosecution. They only got -- it's not the prosecution because it wasn't that kind of case. There were

two prison regulations at issue in that case. One was a prison regulation that limited mail between prison facilities, and the second was a prison regulation that purported to limit marriage amongst inmates.

In that case the government won their argument with respect to the inter-prison communications. They presented sworn testimony in that case, even though it was a post-conviction case, that talked about the danger of rival gangs or gangs communicating about things such as hits on other gang members, inciting violence to other members in other facilities. So they were able to satisfy their burden in that sense through testimony of why they had a legitimate penal interest in restricting that right between prison inmates.

In regards to the regulation that limited the ability to marry, they lost, because they were not able to establish that there was a reasonable penological objective in that instance.

So the important point to draw from that was that there was a careful, reasoned analysis that drew on sworn testimony in each of those circumstances and arrived at striking a balance in what the detention facility could curtail and what it could not.

And the real important point of that is that we're talking about a post-conviction case. So these are prison inmates who have already been sentenced, already been adjudicated. And in that sense the prison authorities would stand in even a stronger position because they are now in the position where they have to house these prisoners safely for the remainder of their sentences. And in the balance there is what are the competing rights? And I've talked to you about the regulations.

In this instance we're talking about litigation -- pretrial litigation detainees facing a death penalty prosecution, who should rightfully still be protected by the presumption of innocence, who still have a vital and ongoing relationship with their counsel in pursuit of the defense that is guaranteed to them by statute and by Constitution, and that's the balancing that needs to occur.

So while in Turner it was a post-conviction case, even there they lost. In this case it's very different. In this case we have an ongoing capital prosecution, as we are all well aware and as we hear us talk about all the time. But that is a significant difference in the issues that the commission approaches when it is talking about a detention facility.

This is not a case where Mr. al Hawsawi has already been adjudicated and imprisoned. That would make the analysis a little bit different. This is a case where he has not been adjudicated, there has not been a determination of guilt, where we are in pretrial litigation, where his team is actively engaged in preparing his defense, and actively engaged in defending what, we believe, rights are granted to him by statute and also by Constitution.

And so, Your Honor, when you approach these issues of deference to the facility, we think it's critically important that you be well aware of that -- and I believe you are, but I wanted to highlight that -- and that you balance those fundamental rights that are at issue with the interests of the detention facility.

In Johnson v. California, one of the many salient points that they make is that some rights do not necessarily need to be compromised for the sake of a proper prison administration. In other words, Turner doesn't apply to every right. And they talk about a number of examples: For example, the right not to be discriminated based on race, the Eighth Amendment right against cruel and unusual punishment are not rights that need to be curtailed in the prison context in order to properly house or properly imprison prisoners. So

in that case they recognize that these rights need not be curtailed.

So that leads us to the analysis in this case: What rights are at issue now versus the interests of the facility? And I think Mr. Montross and, I think, other counsel have really -- that is, in essence, what they have been talking about, is about Mr. -- in their case their client, but Mr. al Hawsawi's right to effective assistance of counsel under the Sixth Amendment, his right not to be ultimately convicted and sentenced to cruel and unusual punishment, which would flow from a situation where we, as counsel, are forced into a situation where we cannot properly prepare and present all of the available best evidence before a military commission and before a fact-finder.

Were the commission to defer to that extent -- which it is not required to defer to that extent -- it would place us in a position where the commission really would be choosing between deferring to the prison facility and subverting a fundamental right that Mr. al Hawsawi has at trial, during the ongoing preparation of his defense, which is to be effectively represented by counsel and also not to be subjected to cruel and unusual punishment, which certainly would flow from being put in a position where he has not had access to best

available evidence that would allow us to present the best case for life before a fact-finder.

So I would like you to take that into account, Judge. And certainly when we talk about these issues of deference, I urge you to please consider that approach and that analysis and take a good, close look at those three cases. Thank you.

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

Mr. Nevin, did you have any citations you wanted to bring to the court's attention?

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

MJ [Col PARRELLA]: Thank you. All right.

With that we will transition to 524.

TC [MR. GROHARING]: Good morning, Your Honor. Jeff Groharing on behalf of the United States.

MJ [Col PARRELLA]: Good morning.

TC [MR. GROHARING]: I would just ask for the feed from the podium. Your Honor, I would like to display slides this morning. They've been previously approved. They're AE 524BBB. They've been provided to the court security officer in accordance with commission rules.

MJ [Col PARRELLA]: Okay. You may have the feed. You may bring those up.

TC [MR. GROHARING]: I believe all parties have copies of

the slides as well. Affirmative response from all defense.

MJ [Col PARRELLA]: I think we're good.

TC [MR. GROHARING]: Your Honor, an unnamed defense counsel perhaps said it best when expressing their reactions to AE 524LL to Carol Rosenberg: "Pohl couldn't have suppressed. We haven't filed a motion to suppress yet."

The government's reaction was similar, The United States respectfully requests the commission reconsider the commission's ruling and correct the clear errors and manifest injustice that would result if AE 524LL is left in place. AE 524LL contains both procedural errors and errors in the application of the law governing the protection of classified information.

Your Honor, CIPA is an enabling statute. It requires trial judges to adopt creative solutions that permit the government to protect classified information while ensuring the rights of the accused.

When addressing claims under CIPA, trial courts and what appellate courts have taught us is that a judge must engage in the iterative process and come up with a creative solution that allows both the government to proceed and that respects the rights of the accused. I respectfully suggest that that process failed in this case.

Judge, this morning I want to talk about some of the clear errors and manifest injustice that the government pointed out in its filings on this issue.

First, that the commission issued Protective Order #4 after specifically finding that the protective order failed to meet the requisite standard.

Second, I want to talk about that 524LL failed to indicate what classified information the commission had determined was noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal to the prosecution's case, or to sentencing; again, a requisite finding in order to get to the sanction that he imposed.

Next I'll talk about the fact the sanction was imposed prematurely and without the appropriate process contemplated by both CIPA and the Military Commission Rules of Evidence; that 524LL is inconsistent with dozens of prior rulings issued by the military commission to protect the identities of CIA persons; and that it was clear error to find that Protective Order #4 would not allow the defense to develop the particularity and nuance necessary to present a rich and vivid description of the accused's three- to four-year period in CIA custody.

I'll start, Judge, with the statute and the rules,

and of course we are talking about 10 U.S.C. 949p-4 and M.C.R.E. 505(f). Those were among the provisions the government invoked requesting a protective order in this case.

The first step of that process is the declarations required invoking the national security privilege, explaining the damage to national security that would be caused by the disclosure of the classified information. The government did that in AE 524LL, found that the government did that.

Next, Judge, the standard for authorization of discovery or access. That requires the judge to find that the proposed alternate relief or the proposed substitute for information puts the defense in a substantially similar position as if they had access to the original classified information that's at issue. And that's where this process broke down, with respect, Your Honor.

In 524LL, the military judge at no point indicates what specific classified information that he determined was noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case or sentencing. The government, our read of the ruling suggests, but we can't be sure that the specific classified information that's at issue is the identities of CIA persons that were at issue in the government's filing and that were largely the information

the government was trying to protect.

Judge, and I say that because I point to a couple of places in 524LL where the military judge at least points to those issues raised by the defense. That's at 524LL Ruling, 25 and 26. He talks about analyzing the circumstances of the case and the relationship between the CIA witnesses and the offenses the accused are charged with. And then later the judge is trying to determine whether or not Protective Order #4 provides the accused with substantially the same ability to make a defense as would access to the classified information.

Again, we are assuming for purposes of the ruling that the judge had to have found that the government was required to provide the identities of CIA persons to the defense. That's the only way, based on the statute, that you get to the sanction that the judge imposed. Again, though, it doesn't say specifically in the ruling whether or not that was a finding of the military judge.

Next, Judge, M.C.R.E. 505(f)(2)(C), it requires the judge to make a specific finding to issue a protective order. And protective orders aren't -- the ruling suggests that the judge's hands were tied and had no choice but to issue a protective order regardless of the consequences, regardless of

what changes he might have made to the government's requested protective order, and that's not accurate.

There's specific requirements that must be met to issue a protective order, and the judge in this case found the opposite. I would just point your attention to AE 524LL at 35, and there the judge found that "Protective Order #4 will not provide the Defense with substantially the same ability to investigate, prepare, and litigate motions to suppress the FBI Clean Team Statements," as described by the judge.

At that point, Judge, that's where the military judge should have stopped. He should have at that point rejected the government's protective order if he determined that it did not put the defense in a substantially similar position as if having the original classified information. Instead, he modified the order and then sanctioned the government after issuing the modified protective order.

That's not the iterative process that CIPA contemplates. That's where, with respect, the military judge clearly erred which would, and continued adherence to that order, an application of that order would result in manifest injustice.

Judge, as I said, once the judge found that the proposed protective order did not meet the standard, he should

have simply denied the protective order, and at that point he should have advised the government how the order was deficient. That process never happened.

And we've read the defense briefs on the issue, and we respectfully disagree with their characterization of the motions practice on the AE 523/524 series that took place prior to the government proposing the protective order in AE 524L.

At that point the military judge could have either advised the government directly, ex parte if necessary, if that's necessary to protect classified information, or at a minimum held a hearing to address the perceived deficiencies of the protective order. That didn't happen in this case.

To the extent there was a hearing about the protective order, it was addressing the application of the protective order. At no point did Judge Pohl, throughout the record, indicate to the government that this protective order -- one, did he indicate that he was requiring the government to provide classified information or a reasonable substitute for that information; or two, that the protective order failed to put the defense in a substantially similar position as if having access to the classified information.

So fundamentally that's the biggest fundamental error

with respect to AE 524L (Gov). And it's inconsistent with CIPA practice. It's inconsistent with what CIPA cases have taught us to do in cases involving classified information. It's at that point that the iterative process is essential.

It was premature -- premature to immediately jump to sanctions. At that point is when a judge's decision that classified information has to be disclosed to the defense, that triggers actions by the government. At that point the judge says you have to disclose classified -- you have to disclose the identities of CIA persons. The government then has options. We could certainly appeal, but more appropriately, we'd engage in the iterative process.

There had to be a way, short of suppressing some of the most critical evidence in this case, to protect this information while still allowing the defense to proceed and investigate where appropriate.

Judge, the defense won the lottery without even buying a ticket. They hadn't even moved for -- to suppress the statements. And certainly we might get to that point in this litigation, and we invite that motion and we invite that litigation as it would be appropriate to appropriately analyze the circumstances of these very important, very critical statements, to take testimony, to present evidence as

necessary, and then ----

MJ [Col PARRELLA]: Let me just ask a question about that, Mr. Groharing. So let's fast forward to that stage assuming that the defense were to file motions and we were to have that suppression hearing. How do you envision the defense having the ability to call witnesses, to cross-examine those witnesses in a meaningful fashion?

TC [MR. GROHARING]: And I'll speak to that in just a moment, if you'll allow me, Judge. I want to talk about some of the other alternatives the judge had at that point, but I will talk about how the defense counsel is presently armed and how ultimately they will be armed to make that very presentation that you're talking about.

But there are a number of alternatives, and at that point the commission could have explored, and these are only a handful. But the judge could have required affidavits or statements to be provided from witnesses, have interrogatories sent to witnesses, could have required concessions by the government to include limiting cross-examination of any of these individuals should they testify, could have ordered individuals to testify where the government has established they're relevant and necessary.

The judge could have -- could tailor jury

instructions as we have seen. We saw in Mezain that was one of the remedies that the judge used to allow the defense and the jury to put the witnesses in the appropriate context without disclosing their identities to the defense.

Again, the judge could have just denied the protective order and the parties would have been back to where we were before the protective order was presented.

The judge could have -- and even then -- and the government absolutely acknowledges that there were other issues that the defense had raised. In the AE 524 series, 548, 549, if at that point -- take the protective order out of it.

If the judge thought that the guidance that had been provided to the defense with respect to their activities somehow was limiting -- inappropriately limiting their actions, at that point the judge could have advised the government of that, and the government then could have come up with another alternative, even notwithstanding -- not necessarily a protective order, but to amend that guidance in a way that satisfies the court, that still allows the defense to do whatever investigation is necessary but still protects that very, very sensitive classified information.

And what respectfully just happened was Judge Pohl

found here that there was no possible way that the defense could be put in the same position as if having classified -- having the actual identities of CIA officers at all. And that simply cannot be the case; that the only solution in this case that would permit the government to attempt to offer admissions of the accused under these circumstances is to give the defense the identities of CIA officers, many of them covert officers.

And again, I've offered a number of different options at that point, and the government is always willing to engage in that iterative process to come up with the solution that satisfies the court's obligations under CIPA and military commission rules.

MJ [Col PARRELLA]: So I caught interrogatories, declarations, the court could order that they're relevant to testify. But let's say the court ordered that they were relevant to testify. How is it the government would propose that to occur while at the same time protecting their identities? Are they actually going to appear and testify?

TC [MR. GROHARING]: They would either appear in court or potentially via VTC, if necessary. The judge does not have the authority to compel someone to come to Guantanamo Bay to testify. I don't believe the commission has that authority.

But I think you'd have a couple of different scenarios. The witness would either be willing to come here, or the witness would be brought to a location in the United States to testify, willing or otherwise, and their testimony could be compelled.

Their identities could absolutely be protected at that point. There's any number -- they could testify in light disguise. That's something that's been done numerous times in federal court to protect the identities of individuals. That would still allow the defense to question them, to confront them as necessary.

And so that -- they would basically be situated like any other witness in this case, and then again, some procedural protections to protect their identities. They would testify under pseudonym, the same pseudonyms that we provided them.

And we may have witnesses that haven't been provided a pseudonym, and we've left that option open in our September 2017 guidance about defense requests to talk to additional people that hadn't been assigned a unique functional identifier. Again, we would assign them an appropriate identifier for purposes of the litigation that would still allow the defense to elicit whatever testimony

they needed to from the person and wouldn't disclose their true identity.

Your Honor, 524LL is also inconsistent with dozens and dozens of prior rulings issued by the commission to protect identities of CIA persons. And the government sought relief to protect these identities since the very inception of this case. That was a point made in both classified and unclassified pleadings, that the government had intended to protect this information. The government sought relief in all the materials that we brought to the military judge requesting substitutes, where we removed identifications or identifying information of CIA persons.

This slide reflects -- and it's contained in 524WW -- all of those rulings, 23 orders that approve 66 different government motions for substitutions and other relief, all protecting the identities of CIA persons.

AE 524LL effectively overturns that ruling. And the ruling does very little to explain the distinction between the relief being ordered in 524LL and the dozens and dozens of rulings that the commission had issued previously.

Judge, and I promise I'm getting back to your question about how this is going to work with respect to the presentation the defense will make, but I do just want to talk

a little bit about the history of the litigation in this case.

As I mentioned before, from the very beginning, where the government was protecting -- was coming to the court to seek protection of CIA RDI information, the government advised both the commission and the defense that it intended to protect the identities of CIA persons, and I cite to 397B. There we specifically, in an open pleading that was provided to all parties in the case, talked about our plan to facilitate defense requests to speak to CIA officers.

So this is not something that should have come as a surprise to anyone in September 2017, when we ultimately got to the point where we had discovery in a manner that we were able to index it and in a way that the defense could understand it and attach discovery to particular CIA officers that we identified with a unique functional identifier. That language is language that we included in multiple filings subsequent to AE 397B, both with the commission and with the defense.

This is not something that we were -- where it was trickery or anything like that, as suggested by the defense counsel. The prosecution came in the front door and we recognized at the very beginning that we needed to protect these identities and we sought the -- legally and

appropriately sought the military commission's assistance in doing so, and merely just followed through with what we had promised we would do.

Again, this is -- was contemplated to be looked at holistically, meaning it allowed the defense to appreciate their discovery that's being provided by the government and use that in their investigative efforts.

Again, that's something that the government had contemplated and expressed in 397B, a public pleading provided to all parties in this case, and that had been our plan throughout the course of the litigation as far as how we would protect these identities and still allow the defense to access CIA officers where appropriate.

That plan culminated in September 2017. Judge, that's when at that point the military judge had expressed -- had approved thousands and thousands of pages of discovery of CIA RDI information that the government had provided to the defense.

The government indexed that information chronologically, and on that -- those indices, provided the UFIs of persons who were present at certain discovery, at certain events that were connected to the Bates numbers of that discovery. That was the mechanism that the government

used and had always contemplated using, that would allow the defense to request through the government interviews with people who we had intentionally withheld from the government **[sic]**, for very good reasons as we have demonstrated and provided to the court consistently in this litigation.

MJ [Col PARRELLA]: As I understand, and I don't necessarily agree with -- I do think there is a distinction between the summaries and substitutions that were approved in the 308 series, but, I mean, is there any case -- because effectively what this does is it prohibits the defense from conducting their own independent investigation, which I think is the crux of a lot of their contention with this.

Is there any case that you're aware of where the government placed a similar prohibition upon the defense, which essentially said you can't do any independent investigation into this particular subject matter?

TC [MR. GROHARING]: A couple of cases, Your Honor. You know one, Mezain, that the commission relied upon. That was a case where the government called two witnesses affirmatively. They were members of the Israeli Security Services. And they were critical witnesses in that case where but for their testimony, the accused wouldn't have been convicted. And in

that case it was tried in Federal District Court, full confrontation clause rights to the defendants. Okay.

So in that case the government never provided any identifying information for those individuals to the defense. They never knew their names. All the way through the entire proceedings, the defense didn't know their identities.

MJ [Col PARRELLA]: But were they prohibited from attempting to discover those identities?

TC [MR. GROHARING]: They would -- they would have had no way to go and attempt to learn those -- no. To answer your question, Judge, there was not an order that said you shall not go and attempt to learn this information, but by the very fact that their identities were not disclosed, they were prevented from learning this information themselves.

Another example is Moussaoui. In Moussaoui -- and again, here is a defendant who was charged with his involvement in the attacks on the United States on September 11th. He wanted access to a couple of the men that are in this room that were being detained by the CIA. And in that case the government said, "No, you will not have access to these people. We're not going to tell you where they are. You will not have access." And I'll talk more about Moussaoui and how that -- what Moussaoui teaches us when we wrestle with

some of the same types of issues.

But I think it is -- the other piece of this, Judge, is the defense will struggle mightily if the government is not involved in some way to facilitate whatever request that they want to have. It will end up right back in the same place, I think; it will just be after many, many, many months.

We've intentionally withheld all this information from the defense. So -- and that was by design. It was intentional. It was with the permission of the military judge. So the idea that the defense can somehow investigate these covert CIA officers in a way where they're going to somehow out them and uncover them and find them and get their assistance is quite a stretch.

There really -- and to date we've had at most one example where the defense had found someone who was willing to speak to them, and then that same person, we believe, agreed, after the government passed along the defense request. So they would be very limited in their ability to do this.

And so I think what would happen, most likely, is they would come back at some point and say, hey, we need more -- when we still had 524 pending, they wanted the identities of all of these CIA officers. So at some point after failing, they would come back with a motion to compel

the identities, explaining how they are unable to locate all of these folks and interview them. So it's difficult to imagine them being able to do this successfully without some assistance from the government, some involvement from the government.

And another option that I didn't specifically mention earlier, if the concern is that the defense is having to show much -- too much information to do this, it's certainly possible to make those -- to set up a process to make those requests without specific prosecution involvement. You know, it would add another layer.

Frankly, I don't know that they have the right -- that that somehow is privileged; that if they are making a request to a third party to speak to them about, you know, matters that, frankly, it's obvious that they want to learn and that they want to present in this court.

But that's yet another option, short of suppressing critical government evidence, that the commission could explore if it found, and it doesn't necessarily -- we don't believe it needs to find that access to this classified CIA information, the identities of CIA persons is necessary.

Judge, one of the errors that we point out in our filing is that 524LL applies the wrong evidentiary standard.

In 524L, the commission found that Protective Order #4 -- again, this is the modified order; this isn't even the order that the government proposed. But after editing it, the military judge still found that it "will not allow the defense to develop the particularity and nuance necessary to present a rich and vivid account of the 3 to 4-year period in CIA custody the defense alleges constituted coercion."

That's not the standard that is applied when determining whether substitutes provided by the government are adequate. And again, Rezaq is directly on point. It's a D.C. Circuit case. That's our controlling circuit.

In that case the court found that summaries -- in that case the defense had complained of, you know, what they called dry and desiccated statements that were contained in summaries. Rezaq applied the relevant and helpful standard from Yunis and found no error in substituting bare statements of fact where the discoverable classified information. And in this case, I am about to show you what the defense could present, and it's anything but bare or dry desiccated statements of fact in this litigation.

I already talked a little bit about El-Mezain. I want to talk again both about Roviaro and El-Mezain, the two cases that the judge seemingly relied upon to analyze whether

or not the disclosure of identities of CIA officers was required.

MJ [Col PARRELLA]: Before you move off of Rezaq, doesn't Rezaq also state that a court applying this rule, and I'm quoting, "should, of course, err on the side of protecting the interests of the defendant. In some cases the court might legitimately conclude that it is necessary to place a fact in context in order to ensure that the jury is able to give it its full weight."

So I think the government -- you are giving me half of what Rezaq stands for, but perhaps not the entire opinion.

TC [MR. GROHARING]: Well, I don't disagree that Rezaq says that, Judge, but I don't think the defense in this case is going to have any difficulty putting the facts in context into however they want to argue it. And I assume the facts we are talking about is the treatment of the accused in CIA custody.

So they have many, many means to do that already, and obviously one of which would be calling witnesses, if necessary. And I'll get to all of those means in a minute to exactly how they would do that. But I don't disagree that that's an important consideration, but I do disagree that the defense won't be able to do that in this case.

With respect to Roviaro and El-Mezain, and again, this is where -- part of where the government gleans that what the military commission found was that we had to disclose the identities of CIA officers or face a sanction. Those cases are both about disclosing the identities of witnesses -- well, one witness and one witness to the offenses. So it's important to look at the facts of both of those. And there wasn't really an analysis in 524LL that actually applied the facts of this case looking at the facts of those cases.

But Roviaro was a case where you had a witness to the actual offenses. He was a government informant. He was in the car with the accused and witnessed all of the crimes that were ultimately prosecuted by the state.

In that case the government refused to make him available. They didn't -- John Doe was not a witness for the United States. The government made its case with other witnesses through other means but refused to provide John Doe's identity to the defense.

Ultimately, the court said no, that person was situated in such a way that you have to provide their information to the defense. There could be -- he could have helped establish an entrapment defense. He could have helped explain what Roviaro was saying at the time of these offenses,

any number of different things; and it was unfair to allow the government to withhold his identity, even though there were important interests in withholding his identity.

Those are entirely different facts than this case. We're not talking about anybody that was a witness to any of the offenses in this case. We're talking about, at the very best, individuals who witnessed some treatment of the accused during their time in CIA custody, something that the defense has in spades in the discovery that's been provided in open-source information and everywhere else.

But it doesn't follow that any of the reasons that are present in requiring the disclosure of Roviaro's identity in that case would require disclosure of identities in this case.

Mezain is even more interesting and, with respect, a strange case, I think, for the court to rely upon to require the government to disclose identities. Mezain was, as I mentioned before, two very important government witnesses. One of the witnesses was critical in establishing that Mezain was providing support to Hamas, and they did it through these committees that were set up to do this.

He was an expert witness explaining exactly how Hamas and the Holy Land Foundation operated to funnel this money for

terroristic purposes. So critical. Without that witness, the government doesn't make its case, and the defense was prevented from learning his identity. And so that's a far, far more critical witness than any of the potential people we are talking about here, especially considering everything that the defense has at its disposal to present testimony or information about the detention of the accused in CIA custody.

MJ [Col PARRELLA]: So, Mr. Groharing, you have made several references now to the ruling in 524LL essentially forces the government to give the defense the identity of the CIA individuals. Is this sort of -- I mean, I don't read that as being in the ruling.

Is that something where you are just saying as a practical effect that's what it requires the government to do?

TC [MR. GROHARING]: It has to. If -- I mean, if not, what is the classified information that the judge is protecting in the Amended Protective Order #4 and, in the process, sanctioning the government for?

MJ [Col PARRELLA]: Well, is it the information or is it the ability for the defense to go seek information and do their own independent due diligence?

TC [MR. GROHARING]: Well, and I think that's -- that's certainly not laid out in the ruling, and if that's the

judge's finding, I mean, again, part of the relief we asked for was for the commission to clarify its ruling so that we could properly understand it in a way to address what our options are.

But if that's the ruling, then the protective order should be rejected. The judge shouldn't modify an order in some way he sees fit, with respect, and then sanction the government in the process. That's not what the process contemplates. I think most would agree the clear text of the statute, the clear text of the rule specifically does not allow you to issue a protective order in that case.

So if that's what the judge was thinking, he should have rejected the protective order and told the government that, hey, the investigative prohibitions go back to where we were. This doesn't allow the defense to do the kind of investigation that the commission feels is appropriate for X, Y, and Z, here's the reasons why. At that point the government then is armed to understand what our options are. At that point we could modify, come up with some kind of other way to do this, short of disclosing classified identities.

And so again, it's not clear what the commission ruled. We did our best to glean it from what was in the ruling, but I agree that it's not crystal clear what the

commission's thoughts were in coming to its ultimate result. Again, all the more reason to clarify.

So, Judge, I next want to talk about the emphasis that the ruling placed on the first prong of Oregon v. Elstad. The government agrees when a proper motion to suppress is filed in this case, that the law that's laid out by the commission in AE 524LL is appropriate. But, with respect, the government believes that the commission placed too much emphasis on the first prong of Elstad.

So what I mean by that is, you know, we are conceding that the original statements were coerced. So Elstad deals with how you deal with the situation where you have a statement that was coerced, obtained involuntarily, and what do you do when you have a second statement, how do you address that? What do you look at to figure out whether or not you have removed the taint from that statement?

In this case we have agreed completely that the first statements at issue were coerced. That's not going to be a matter that's in contest during a suppression hearing in this case. So the defense doesn't need to spend, to try to satisfy that first prong, it doesn't need to spend a lot of time to establish that the statements were coerced.

What's important is the circumstances of the accused

at the time the statements were made, and that's really what you have to go and look at for Oregon v. Elstad. And that would not require information about, substantial information about how the accused were treated in CIA custody to get to that second part.

What effect it had on them, what it was still having on them in 2007, and was Khalid Shaikh Mohammad at that point a broken man, unable to possibly resist an FBI agent who came in and asked him if he wanted to talk? Is that where he was in 2007? You would look at all the factors that are applied in Oregon v. Elstad. But again, those are factors that are -- and again, the prior treatment, I'm not suggesting that that's not important at all. It certainly plays into it. The government doesn't suggest that these weren't harsh circumstances of detention in CIA custody. And while that's relevant, it's not the most relevant information that the court is going to have to wrestle with to decide whether or not subsequent statements are admitted.

Finally, Judge, with respect to this slide, even assuming, and we -- as I said before, you know, the rich and vivid standard that Judge Pohl brought into his ruling, we don't believe that's appropriate. But as far as addressing the substitute, but even assuming that it's important to

present a rich and vivid account of the accused 3- to 4-year period in CIA custody, the defense is able to prevent such an account. I am going to walk you through just a fraction of the information at the defense's disposal right now that they could use to make such a showing.

MJ [Col PARRELLA]: Are you going to come back to -- you have indicated you don't think that rich and vivid account is the correct standard. I don't want to distract you because it may be in the remainder of your argument here. Are you coming back to what the government thinks is the appropriate standard?

TC [MR. GROHARING]: Well, when -- when you're talking about substituting classified information, you have provided a summary or a substitute of classified information. What's not required is that that summary be a rich and vivid substitute for the original classified information. That's what Yunis teaches us and all of the CIPA case law teaches us. We're to put the defense -- the proper analysis is whether we put the defense in a substantially similar position, as if they had access to the classified information.

But even assuming, Judge, that -- and it gets -- you know, even assuming that the defense needs to present a rich and vivid account of their detention in CIA custody for

purposes of a suppression hearing, even assuming that fact, the defense is very well armed to do that, both with what they have now and with the means that they have at their disposal, in addition to the discovery that's already provided. And I want to walk through some of that information with the commission.

Judge, as we point out in our brief, and as the commission has acknowledged, the government has provided extensive discovery regarding the CIA RDI program. It's in the thousands of pages. And I'm sure the military judge has begun review of that information and is certainly familiar with some of it, but it's indeed a massive amount of information regarding the accused's detention in the CIA RDI program.

In addition to that, there's also extensive information available in open sources. The government's offered to stipulate, on top of that, to defense descriptions; and I will talk about each of these at some length.

The defense has access to the accused to create these descriptions beyond what they already have. The defense can request witness interviews and have successfully obtained witness interviews following Protective Order #4. And they have the ability to call witnesses that are required at an

ultimate hearing under R.M.C. 703.

MJ [Col PARRELLA]: What's the government's position on the defense's ability to identify those witnesses in anticipation of, you know, a suppression hearing?

TC [MR. GROHARING]: Well, some have been identified by a unique functional identifier already. Many, many witnesses have been identified, particularly with respect to the interrogation period, the most harsh period of the accused CIA detention.

So they have the ability right now to identify them by unique functional identifier. In all of our discovery with respect to the statements of the accused, conditions of confinement, if an individual has been identified by a unique functional identifier, the defense can simply say we want X to talk about this particular event. We believe that they would testify in a manner that's, you know, however -- that's beyond what they already have at their disposal.

And we would just take those as they come. But it is certainly understandable, it's certainly contemplated that the defense could make a case where you would need to have a live witness. But we're not at that point yet. At some point they may make a request for a witness and the government grants the witness or we may have to litigate it, but that should be part

of the process taking into account what they have at their disposal already.

In our motion we cite to a number of different reports. I'm only going to talk about a few of them, Your Honor. Those are found at Attachment C through -- C through GG. Again, these are summaries of official reports and other records, CIA IG reports of interviews, investigations into the RDI program, and legal memoranda written by DoJ Office of Legal Counsel are just some of the information I want to highlight to you.

So the first example is a cable that was summarized regarding Mr. Mohammad's conditions of confinement. It's a very detailed cable. I would submit to you it's representative of the discovery that we provided to the defense. And I'm just going to read, Your Honor, from the slides with respect to that information.

I would say, Judge, before reading, you know, something we've heard throughout the proceedings this week, and you probably have seen plenty of times in the record, is that the government is trying to hide the treatment of the accused. And the government rejects that entirely, and it completely is belied by the volumes of discovery that we provided to the defense regarding how the accused were

treated.

The treatment of the accused by and large is unclassified. What their conditions of confinement during their detention were is largely unclassified. There are certainly some classified pieces surrounding the edges of that, but the defense is free in open court to discuss the treatment of the accused.

And this is not something that the government is trying to hide in any way, and the government believes they could present a very rich and vivid account in open court of the CIA's -- of the accused's treatment in CIA custody.

Judge, this is just one example, and it's Attachment C. This is what -- a summary that the defense was provided regarding Mr. Mohammad's, one of his very early interrogations.

It reads, "Prior to the interrogation session, Mohammad was first stripped, photographed full body, back, front, and face. He was given a physical exam and was then moved to the interrogation room for the psychological interrogation assessment and questioned for medical history. Upon completion of the psychological interview assessment, he was taken to a separate room and had his head and beard shaved. After haircut, he was strapped to a medical gurney

and blood samples were taken. He made no attempt to resist these procedures. He was then taken nude to the interrogation room to meet his interrogator.

"The interrogation began by explaining the rules to Mohammad, i.e., he was there to supply information, and he was at a location where everyone talked. He was told that the interrogator had talked with many other brothers, all of whom talked and supplied the requested information.

"The interrogator told Mr. Mohammad that it was up to him whether or not he would supply the information the hard way or the easy way. The interrogator also said that whatever he promised Mohammad, either good or bad, would happen.

"The interrogator told Mohammad that he would not be allowed to talk about old historical information and would only be allowed to talk about subjects of the interrogator's choosing. Mohammad reluctantly responded that he understood. The interrogator then began to question Mohammad over current operations and the location of UBL. Mohammad refused to answer and instead moaned and looked at the floor.

"After a few minutes of attempting to get Mohammad to respond, the interrogator told him that he had chosen the hard way. The interrogator then applied a facial grab and then several facial insult slaps. Mohammad was clearly shocked by

this behavior and rolled on to the floor where the interrogator continued to apply facial slaps and abdominal slaps.

"Mohammad was then placed in stress positions, both on his knees and standing with his forehead against the wall. He reacted to the enhanced measure by whining, pleading, and chanting.

"The interrogator then had Mohammad taken to a room preheated to above 65 degrees Fahrenheit and placed on his back -- placed him on his back on a plastic sheet on the floor. Tap water was then poured on Mohammad while he was held on the floor. He was clearly distressed by the dousing and moaned and cried and chanted.

"After several minutes of dousing, he was returned to the well-heated interrogation room where he was made to stand nude. He then began to answer questions and provided some information.

"In session two Mohammad was cooperative in answering questions, but was evasive when pressed for specific current operation data and location data on UBL. The interrogator warned Mohammad not to be evasive -- to not be evasive, and when Mohammad continued to try and evade, the interrogator ordered Mohammad returned to the bathing room.

"Mohammad was water-doused and was again strongly affected by the ordeal. The bathing room was preheated to above 65 degrees. After several minutes of water-dousing, facial slaps and abdominal slaps, he was returned to the interrogation room where he began to provide threat information.

"The team then took another break and Mohammad was taken to his cell where he was placed in the standing sleep deprivation position for two hours with his hands above his head and feet flat on the floor.

"Mohammad was clearly weakened by two hours of standing and began to answer questions. As he provided more information, the interrogator provided him a blanket to wrap around himself and some tea.

"Later in the session the interrogator caught Mohammad in a lie. Mohammad tried to evade and switch the topic but the interrogator continued to press Mohammad with the lie. The interrogator took Mohammad's blanket away and placed him in stress positions.

"Mohammad was very upset and whined that he had broken his promise to treat Mohammad better if he answered the questions. The interrogator responded that the deal was that things would get better or worse depending upon whether or not

Mohammad provided information and did not lie.

"Mohammad was taken to another water-dousing, and the room again preheated to above 65 degrees. During this dousing Mohammad continued to moan that the interrogator had broken his promise to Mohammad. When Mohammad was taken back to the interrogation room he would only chant and not answer questions except to say the interrogator has broken his promise.

"The interrogator ordered Mohammad to drink water which he refused. Mohammad had been refusing water and food for several hours and there was concern over dehydration. The interrogator told Mohammad that he would follow his order to drink or suffer the consequences.

"The interrogator told Mohammad that if he refused to drink as ordered, he would be rehydrated rectally. When Mohammad again refused, he was taken back to the bathing room, placed on a plastic sheet and medical officer rehydrated Mohammad rectally. Mohammad clearly hated the procedure.

"When he was returned to the interrogation room, he then complied and drank water. However, he continued to refuse to answer questions since the interrogator had broken his promise. The interrogator stormed out of the room and ordered the team to make Mohammad talk by the time he

returned.

"Another interrogator then sat Mohammad down, gave him a blanket and began to talk to him in a soothing voice saying he was suffering the results of trying to deceive the other interrogator who was a very hard man.

"After a few statements, Mohammad began to talk, mainly whining about his treatment and the injustice of the other interrogator. The interrogator told Mohammad that there was a misunderstanding between Mohammad and the other interrogator and that Mohammad needed to be cooperative to stop any further actions from the first interrogator. Mohammad eventually began to provide more information."

The report continues, "The interrogation team is pleased with the progress that has been made in less than one day. Mohammad was left in his darkened cell in the standing sleep deprivation position with hands at head level.

"Prior to the interrogation, a psychologist met with Mohammad for initial assessment for an hour. Mohammad was fully alert and oriented to person, purpose, time and place (general-appropriate to context). Mohammad's speech (in English) was organized, goal directed and appropriate to context."

Judge, that is just one example of the summaries that

have been provided. There are dozens. They are all in the record. We provided a number of those to you in this pleading.

But of the summaries that we provided to counsel about conditions that their -- the accused faced while in CIA custody, I think most would agree those are extremely descriptive accounts. They are rich and vivid by any definition, any reasonable understanding of those terms, and those are at the defense's -- the defense has the ability to present those to the commission unrebutted by the government.

And the other examples I have I promise are short, Your Honor, but I do want to highlight just a couple that are in our pleading.

In AE 524WW Attachment W ----

MJ [Col PARRELLA]: Let me ask a quick question, Mr. Groharing. In the government's response where the government indicated a willingness to stipulate, is essentially what you're referring to, is stipulating to the approved acceptance of substitutions that have been provided to the defense?

TC [MR. GROHARING]: No, Your Honor, much more. I mean, for sure to those, without question. We've also invited the defense to tell us where we're wrong. We will stipulate to

any descriptions that are -- what we have described as tethered to reality.

We are talking about a very creative and talented group of lawyers here who certainly, you would think, could put together a description that would provide powerful evidence in a motion to suppress, or whatever other proceeding.

And again, absent something that is completely untethered to reality, the government would stipulate to that, and we wouldn't offer any evidence to counter it.

MJ [Col PARRELLA]: But absent -- aside from input from their clients, they would be very limited, if not completely limited, from gathering independent facts to add to those proposed stipulations?

TC [MR. GROHARING]: What I would submit, Judge, is there are many, many detailed facts already at their disposal, both in the materials we provided, in open-source information. It's really not a secret what happened to the accused in CIA custody. It's a matter of, you know, how it's shaded or flavored, if you will, and described.

But I think it -- you know, as you can see in the materials provided to the defense already, those details were not stripped from summaries provided to the defense. They are

exactly as they were in the original reports.

In the event that there is a portion of the accused's treatment -- again, it may not have to come from the accused. They certainly have access to the accused and the accused are in very good position to help them detail their treatment in CIA custody.

But in the event there are instances the defense believes we've missed or that are not adequately captured in either the summaries or some other place, the defense again could call a witness, request a witness to testify about a particular event, if necessary. So no, the door is not shut and their hands aren't tied to only use the information that we provided them.

We've given them 185 statements made to the Office of Inspector General of the CIA who were investigating the program, very, very descriptive statements, and that also provide details of the CIA's detention.

One is found at AE 524WW (Gov) Attachment W. This is coming from one of -- a debriefer who described a particular location as -- where Mr. Mohammad was -- as "it was dark, impossible to see. She said it shocked her and she considered it a terrible place.

"Khalid Shaikh Mohammad hung from the bar. It was

very cold and he had no clothes.

"She said she does not know what the point was. She got a lot more out of these people by talking to them like humans.

"The prison was a disgrace. She said she feels ashamed for participating, but there were not a lot of choices. It was a nightmare."

The same report, Your Honor, the same individual described a water-dousing of Mr. Hawsawi in vivid detail.

She said, "The senior interrogator believed Hawsawi would be more compelled to tell where UBL was if he heard women's voices."

And the same individual, "Thought women were good to be used in interrogations because it increased humiliation for detainees."

She described the bath going on for a long time. The water was very cold, freezing cold.

The report was very critical of CIA actions at location number 2, and described it as what teenage boys would think of for a really bad prison.

Another statement made to the office, CIA Office of Inspector General at 524WW (Gov) Attachment Y, this is from a senior interrogator who has been identified for the defense by

unique functional identifier.

It described Location 2 as being "good for interrogations because it is the closest thing he has seen to a dungeon, facilitating the displacement of detainee expectations.

"The detainees were left naked only if the temperature was high enough to avoid hypothermia. The detainees were also shackled in a standing position with wrists at the forehead level for no more than 72 hours at a time (the length of time was restarted only if the detainee was able to sit for four hours or more.)

"The interrogation team was responsible for monitoring the time. The purpose of having the detainee standing and naked, in addition to sleep deprivation, is to humiliate and make him uncomfortable because it is cold."

Again, these statements provide substantial detail of the conditions of the accused's confinement. And the defense has hundreds and even thousands of pages of these materials.

This is an additional statement made to the IG. It is the last one; although there were others that were attached to the filing, but it's the last one I will talk about.

"According to" -- a particular CIA officer -- "everyone, even Khalid Shaikh Mohammad, who is the worst we

have in custody, needs basic standards, including food, water, light, et cetera. He said we take detainees below standards for a specific purpose.

"At Location 2, there was no reason for the conditions detainees were in. He said the standard at Location 2 was absolute darkness, a bare concrete floor, the detainee shackled in one way or another, and loud music. He said some of the detainees literally looked like a dog that had been kennelled. When the doors to their cells were opened, they cowered."

I would say, Judge, it's hard to imagine a more rich and vivid description than those statements.

Among the resources available to the defense are numerous OLC memos, memos that went back and forth with the Department of Justice Office of Legal Counsel and the CIA regarding the program, describing the program in very detailed terms, describing approval of the program at the very highest levels of the United States Government. No details were removed from any of these -- no important details were removed from any of these materials, and the defense has them at their disposal to use, to argue however they see fit.

I'd mention briefly there's information available in open sources. Here you have just a picture of the Senate

Select Committee on Intelligence, their executive summary of the significant investigation they did into the CIA RDI program. The government has -- that contains detailed descriptions of the accused's confinement. And the government has previously indicated that we are willing to agree to the defense use of any of those descriptions in this case, and we don't intend to present any evidence to rebut those descriptions.

There are other open-source information out there. James Mitchell, who was one of the architects of the program, this is just one example of information that's out there. It's a book about the CIA RDI program, his experiences in the program.

Within that book -- and it's a matter that has been discussed in this case before -- there are matters relating to the interrogations of our particular accused. The defense is also free to use whatever portions of that or other open-source materials to present a description of the conditions of CIA detention.

Just one moment, Your Honor. I only have just a few minutes left, obviously subject to your questions, but just a couple more slides.

And I cannot reiterate enough that the government has

no interest in disputing the treatment of the accused. In our view, this case is about the accused killing 3,000 people. It's about the United States' ability to prove that beyond a reasonable doubt in this military commission.

The defense -- and we acknowledge that the defense wants to raise these issues on a number of issues. That's fine. But it cannot be the focus of this case. The CIA is not on trial. This is not a case where CIA officers are being prosecuted or we're investigating the program to attempt to prosecute CIA officers.

The defense is entitled to certain information. They have a lot of it. We have given them a lot of it. They're entitled to present it. But this commission should stay focused on the charges in this case and what this case should be about, and it's not -- it should not be about the treatment of the accused.

We have made these expressions to stipulate repeatedly for years now, and we stand by that agreement. Again, as long as it is tethered to reality, and we have a very broad view of what that means.

But we don't intend to dispute and get sidetracked by arguing about what happened to the accused. We think, frankly, it won't have an effect on the ultimate sentence in

this case with respect to the mitigation value. And we think that the procedures that were done with respect to questioning the accused once they arrived at Guantanamo were appropriate and were done in a way that produced voluntary and reliable statements of the accused.

Again, that's something that the commission doesn't need to decide today. I think it's far down the road, and the defense can decide how they want to frame that motion and what evidence they want to put on. But they have plenty of information available to do that.

I want to talk a little bit about in the ruling Judge Pohl made a comment about the protocol and the effect it had on chilling witnesses, and I don't think in practice -- and I don't think the record -- it would be error to suggest the record establishes that either the protocol or any actions taken by the government have, in fact, chilled any witness' willingness to speak to the defense.

Mr. Kiriakou came up a little bit in the AE 528 discussion. I encourage the military judge to actually look at those pleadings and take a very hard look at the facts surrounding Mr. Kiriakou's involvement. We pointed those out in the government -- the government pointed those out in 524; I believe it's HH in our response.

But, in essence, what is most important -- and it's Attachment B to the government's response to 524W (WBA Sup), is that Mr. Kiriakou categorically said that at no time did he ever agree to conduct an interview with anyone associated with this case.

And I think if you go back and really look at the exhibits that we submitted, you will see that the defense investigators -- there's a difference between the defense investigator's e-mail and their signature block.

I think quite noticeably the defense investigator initially doesn't include the fact that he is associated to the defense function, and only later, when he is canceling the interview, does he then add that information to his signature block.

So I would respectfully submit to you that that was intentional. That was because he hadn't probably identified himself with the defense function, and that, frankly, is the only thing that can explain the different information that's contained in that pleading where Mr. Kiriakou has said categorically he never agreed. And so that should not be relied upon in any way to suggest that the government efforts have chilled the defense.

The only mention of -- you know, at that point it was

the defense who went to Mr. Kiriakou and told him that we're threatening to prosecute the defense based on the comments made by the prosecution in the January 2018 hearing. So if anyone chilled Mr. Kiriakou, it was the defense by themselves in the way they communicated with him.

The other -- the only other basis to suggest that the defense has been chilled is information from the defense's own defense investigator, and I would respectfully submit that there is no credible evidence in the record that would suggest that they have, in fact, been chilled.

The record reflects the government at that point attempting to cross-examine the defense investigator, and that request being rejected by the military judge. We have no way to know who they are claiming agreed to be interviewed by them and subsequently will not. But what we do know is there appears to be a single individual that they had identified who agreed to talk to them who ultimately talked following the witness protocol.

So that's the evidence you have in the record, Judge, and I would respectfully suggest that there is nothing in there that says the government's efforts have chilled CIA witnesses from their willingness to speak to the defense.

It's very understandable why a relatively small

amount of these folks would agree to speak to the defense in the first place. As you know already in this case, the CIA RDI program has been investigated thoroughly over the course of many, many years.

Internally many of these individuals have been subjected to interviews by the CIA Office of General Counsel. We've provided the results of those interviews to the defense. This was a matter that was investigated by federal prosecutors in multiple cases. Grand juries were empaneled to look into the CIA RDI program. We've provided voluminous discovery to the defense regarding those investigations. But these are the same folks that have been interviewed throughout the course of all of these things.

The Senate Select Committee has conducted an exhaustive interview, and so it's understandable -- and certain folks were subject to potential prosecution based on the prior investigation. So it's certainly understandable why CIA officers would have very little interest in voluntarily participating in this process.

Of course, they could be compelled to testify on the witness stand. You have that authority and can exercise it as you see fit when that time comes, but it certainly is not -- it has not come at this time.

Moreover, the defense has referred to these individuals as torturers and criminals. It's very understandable why someone who has been insulted in that manner would decline to speak with them in an effort to help the defense.

And more than anything, perhaps, is they're representing men that conducted the worst terrorist attack in history. They murdered 3,000 people, and the people that they want to talk to are people who went to work on September 11th to stop them from killing more people, fully committed to that and worked in this program committed to that effort. So it's not unreasonable that they declined to speak to the defense in their efforts to help these men that are accused of some of the worst crimes ever charged in history.

Judge, the interviews can be successfully conducted. Even using the protocol, which we've asked the commission to adopt, assuming that the portion of the ruling with respect to suppression of the FBI statements is removed from the ruling withdrawn, but even assuming that Protocol #4 remains in place, this protocol can work and it has worked. The defense has conducted a number of interviews to date.

We, the United States, is simply a mailman for those requests. They are provided to the individuals in a

completely neutral manner. No effort at all is made to discourage them in any way from cooperating with the defense, and you have seen that by the individuals that have been willing -- despite what I have just said, still willing to talk to the defense.

And to the extent that the defense wants to seek to either interview folks who have been identified with the unique functional identifiers, or other people as identified in discovery, we're willing to continue to facilitate those requests.

The defense complains of conditions on those interviews. I think it's important to note that every single person who agreed requested that the interview be done telephonically. That was not a government request. That was not anything that was mandated by the government. They are free to meet with the defense in an appropriate place to discuss the classified information, if it is classified information they are discussing. We have done nothing to require that to be done telephonically.

Every single witness that agreed, though, expressed concerns about their safety, and because of those concerns said they would prefer to do the interview telephonically. So that's something that any witness has the right to put

whatever conditions they want on a witness interview, and they have exercised that right in this case. There is little that we can do about that.

We have agreed, and it's documented in the record, to help the defense, when we have telephonic interviews, to provide materials to them to make sure they have whatever materials they might want to discuss with them. They have done that.

And we have provided materials so that they can ask them telephonically about particular discovery materials. We've arranged to have it done on a phone that allows for classified communications. And those interviews have been accomplished.

And I would suggest that the court should continue and allow the parties to follow that practice to the extent that the defense wants to talk to additional individuals either identified or that they believe are present for certain matters in discovery.

We already talked about this before, but on top of all of this other information, Judge, that the defense has at its disposal, the defense can ultimately ask for witnesses if they believe it's necessary on a particular matter. 703 contemplates that. It's a rule that the military judge is

obviously familiar with, all the parties in this room that have practiced in the military are familiar with, and it's a tool that the defense has at their disposal if there are witnesses they believe are relevant and necessary to an issue before the commission.

Again, they may convince the government and we produce the witness or we may have to litigate that, and that would just depend on the facts of each case. And even concerning that the identities in many cases are classified, I think it can be done in a way that still protects those identities and allows the defense to get that substance before the commission if, in fact, it's necessary.

Judge, those are all of the comments that I wanted to make with respect to 524, the ruling in 524LL. The government believes the commission should reconsider to correct the clear errors and manifest injustice that would result from leaving that order in place.

There are a couple of options, we believe, for the military judge. The government would not object to rescinding just the portion of 524LL with respect to suppression of the FBI statements and allow that to be properly raised and litigated at a later point during this trial, but would have no problem following Protective Order #4.

It's not the protective order we requested, but the government would not object, has no interest in appealing Protective Order #4, assuming that -- or issuance of Protective Order #4, assuming that it's not tied to suppression of the key government evidence.

That would be the better option, to allow the parties to go forward. At a minimum, it's important -- it would be important for the commission to clarify AE 524LL, specifically as I've talked about before, what exactly classified information -- if it was classified information that the military judge was requiring the government to disclose, what that is -- is it the identities of CIA persons? -- and to clarify the various other questions that the government put in AE 524NN, in our initial pleading with the motion to reconsider.

Subject to additional questions, Judge, that's all I have.

MJ [Col PARRELLA]: I have no questions right now. Thank you, Mr. Groharing.

All right. The commission will go ahead and take a 10-minute recess. The commission is in recess.

**[The R.M.C. 803 session recessed at 1043, 15 November 2018.]**

**[The R.M.C. 803 session was called to order at 1103,**

**15 November 2018.]**

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

Mr. Connell, I see you're at the podium, so I'm guessing that the defense have conferred and you are going to present first.

LDC [MR. CONNELL]: I drew the short straw, sir.

MJ [Col PARRELLA]: Okay. I felt obligated to at least give Ms. Bormann the opportunity, given I keep calling her the wrong name. And with that, Mr. Connell, you may proceed.

LDC [MR. CONNELL]: Thank you, Your Honor.

Sir, I have provided to counsel for the parties and to the CISO a document in the record as AE 524CCC (AAA). I additionally provided a copy -- another copy for review this morning. I would request permission to have the feed from Table 4 and display the slides to the parties and the gallery.

MJ [Col PARRELLA]: You may do so.

LDC [MR. CONNELL]: And for the court's information, I will also on occasion be referring to the government's slides, which are AE 524BBB using the document camera.

MJ [Col PARRELLA]: Okay.

**[Pause.]**

LDC [MR. CONNELL]: There are technical consultations going on, Your Honor, so that will be resolved in just a moment.

**[Pause.]**

MJ [Col PARRELLA]: Mr. Connell, while they continue to work on the issue at your team's table, do you have a copy, a color copy of those slides and perhaps we can at least get started with the document camera there?

LDC [MR. CONNELL]: Yes, sir. We have given all teams a color copy, and I see that -- I have my color copy, and I see the CISO has one if the court ----

MJ [Col PARRELLA]: That would be great if you would proceed with the document camera, and then as soon as that issue is resolved, we can switch over.

LDC [MR. CONNELL]: Sure, Your Honor.

AE 524NN, of course, is the government's motion to reconsider. Every argument that the government advances, either in the briefs or in its condensed version today, is rebutted by the record.

The process outlined in 949p-6 is -- implements a substantial portion -- it's not exactly identical, but essentially implements most of -- well, in fact, a little more than the CIPA process in federal courts.

And from Reynolds v. United States forward, the treatment of classified information in a court of the United States has come down to one fundamental question, which is that it is the prerogative of the government to determine whether its classified information will be released to anyone.

Sometimes the exercise of its prerogative not to release information comes at a cost. And what 949p-6 does is sets forth a process -- the government on its brief calls it "interactive," today it calls it "iterative" and it sets forth a process by which a military judge in this case can determine what information should be released, what information cannot be released because of the exercise of the government's prerogative; and, most fundamentally, what this motion is about is what is the cost of the government's invocation of its classified information privileges.

Judge Pohl engaged over the course of between September 2017 and August 2018, a full year -- engaged in a long, one might say drawn-out process in which he repeatedly offered options to the government. On at least seven occasions the government took advantage of those options.

And at the end of the -- at the end of that long process, the Military Judge Pohl took all of the information that he had learned over the course of the case and the

government's proposed protective order, shrunk that protective order down to protect only privileged information and not others.

After he addressed -- gave the prosecution protection for all the classified information that it had a privilege to protect, he examined that protective order and looked at the question of do all the factors in the case, the government's willingness to stipulate, the government's discovery, the government's proposed alternatives, and many other factors -- taking all those factors into account, does the defense have substantially the same ability to litigate the motions to suppress as it would without the government's invocation of classified information privilege.

Judge Pohl concluded no, for very good reasons, after extensive open court and pleadings and multiple strategic decisions by the government. The government is here today to say that they do not like the result of that process. That's fine.

I don't like the result of the process either, because Judge Pohl made a decision about our ability to litigate the mitigation part of the case, which I think is wrong. But I do recognize that Judge Pohl, considering a vast amount of information and an extensive interactive process,

made a reasoned decision which this military commission should not reconsider.

So let's begin with the procedural aspects of a motion to reconsider. The government, on many occasions, has argued, and as has the defense, the appropriate standard for reconsideration under Rule for Military Commission 905(f).

I have listed here in this slide seven -- might not be exhaustive, but seven examples of when the military commission gave the same standard for the reconsideration under R.M.C. 905(f).

The government -- and the government cites that, which essentially changed circumstances, in some cases manifest injustice. But the government adds an additional position to its -- to its motion to reconsider, and the government's position comes from a case called United States v. All Assets Held at Bank Julius Baer, B-A-E-R, & Co., 308 F. Supp. 186, District of D.C. 2018.

And the government focuses on the idea of what it calls a, quote, error not of reasoning but of apprehension. And I think what that means is not that the military commission's reasoning was incorrect, but the military commission just didn't understand, it did not apprehend the government's arguments, and that is one of the fallacies in

the government's argument that I will endeavor to dispel today.

But more important than that, there is an additional paragraph that follows the government's citation of United States v. All Assets. After the paragraph that the government cites, the District of D.C. continued: "The efficient administration of justice requires, however, that there be good reason for a court to reconsider an issue already litigated by the parties. Where litigants have once battled for the court's decision, they should neither be required nor without good reason permitted to battle for it again.

"Motions for reconsideration cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier. Ultimately, the moving party has the burden to demonstrate that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied."

The District of D.C. could have had this court in mind when it wrote that paragraph. The litigants have extensively battled for the court's decision. They have extensively argued the facts and theories that the government just explained for what was probably the sixth time today, and

the parties should not be required to battle for it again.

MJ [Col PARRELLA]: Mr. Connell, you have to -- I guess would you agree it's somewhat disingenuous to say that the parties extensively battled for the remedy that the commission gave? I mean, it seems that, I think, the government's premise was that this took everybody by surprise. Would you agree with that?

LDC [MR. CONNELL]: I agree that that's the government's premise, and my -- I will point to exact places in the record with transcripts on the screen to demonstrate that I do not believe that premise is justified.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: The -- but I completely agree. In fact, that's going to be the focus of most of my argument today, because I completely agree that's their premise.

In this situation I suggest, with respect, that there is a certain horizontal deference which is appropriate. The Fourth Circuit has explained in Carlson v. Boston Scientific Corp. at 856 F.3d 320 in 2017, that where an "order was entered by one judge and then reviewed by another, courts have held that the latter judge should be hesitant to overrule the earlier determination."

I do not suggest that you, the military judge, do not

have authority to overturn this decision, but I do suggest that in a situation like this, where it is based on such an extensive review of the record, that it would be inappropriate. The -- or at least that the military commission should exercise caution in that area.

In that respect, this slide shows each of the motions which is implicated by some way -- in some way by Judge Pohl's decision in AE 524. There are 39 motions, by my count, and some of these motions, like the 308 series, span up into the quadruple and perhaps even quintuple digits -- of letters.

The government on Monday argued that the military commission should not grant AE 534 with respect to the 2.h. category of documents, because to review the 2.h. documents would require the military commission to review all the 505 substitutions.

The -- I understand the -- no, I'll be honest. I don't completely understand, because it was never transparent to us, but it certainly appeared from Judge Pohl's comments that the documents which he reviewed were extraordinarily voluminous. I don't have any insight into that, which is why I say that I don't -- I can't say that I understand exactly what he went through.

But from the government's description of a mammoth

effort, a massive effort, and the sheer number of iterative pleadings that we saw go back and forth ex parte, it certainly seems that there was an extraordinary effort that Judge Pohl put into reviewing, and knowing the relationship between the original evidence, cables, et cetera, and what the government actually produced.

But that's not all. There are an extraordinary number of other motions which are implicated. The protective order series, the destruction of the black site and the substitution of another document, the redactions of medical records, the redactions of DIMS records, the redactions of FBI records, the hostilities litigation, and a wide variety of other matters which come into play here.

I'm not going to argue AE 524XX separately, but I do want to note -- to touch on its subject for just a moment.

The government in its pleading in 524NN extensively relies -- on about four or five pages, on quotations from its prior ex parte pleadings. Now, these were pleadings that, when the government initially made them -- and we didn't see them at that time, that we objected to. But for example, the government cites AE 308FF, and it does so again today.

If I can have the document camera, please.

So, sir, I am displaying on the document camera AE

524BBB, the government's brief -- excuse me, slides, in which it cites to its own 524WW, citing AE 308FF.

It seems the height of unfairness -- and thank you. I'm done with the document camera.

It seems the height of unfairness that the government can both file ex parte pleadings, and then pick and choose from its own ex parte pleadings to reveal -- what to reveal.

So we filed AE 524XX objecting to that and citing Rule 506, among others, and -- the rule of completeness and Rule 106.

The government's response was telling. The government's response was, well, we picked out sections which were not classified from other sections of these ex parte pleadings which were classified; therefore, we didn't waive the classified information privilege.

I personally, sir, was delighted to hear this argument, because that is the precise argument based in the text of Rule 505(f)(2)(B) that I have been making for the past five years; that the government is only allowed to make ex parte pleadings, make ex parte presentations to the extent necessary to protect classified information.

And it has been my continuous argument over a somewhat ridiculous number of very similar pleadings that the

government has not adhered to that standard; that it has -- its ex parte pleadings are not only to the extent necessary to provide classified information.

So in many ways I agree with the government's position. Their position that their ex parte pleadings include material which is not classified and should not be protected under Rule 505(f) is actually correct.

So the government also makes a reference -- and I'm going to -- if I could have access to the document camera, I will show slide 12 of AE 524BBB and -- I'm sorry, I need slide 10. My mistake. It's slide 10.

So in slide 10 the government points to an open pleading, 397B, for the idea that it had early told the military commission and the parties -- and the defense that it intended to restrict our investigative authorities.

And what the government cites is a -- is something which says "the Prosecution's plan to facilitate Defense requests to speak with noncumulative, relevant, and helpful individuals identified in response to paragraph 'd.' of AE 308A (GOV) who had direct and substantial contact with the Accused without divulging their identities."

In AE 397B, and from what I can tell in AE 308CC and FF and all the other ex parte pleadings the government cites,

there was not a word about a restriction on ability to investigate. This sounds like if we make a request they will help us with it, sort of like a discovery request.

It has nothing to do, it flagged in no way that the government was about to, or had in some plan -- only in this case, by the way, not -- not for Nashiri, not for Hadi, but only in this case -- to restrict our ability to investigate.

May I have the feed from Table 4 again?

Now, the government's principal arguments today, in addition to the "caught by surprise" argument, all are an extremely well-trodden path within this military commission.

For example, the government argues on briefing today about the volume of discovery that it has produced. This has been a repeated theme of the government since at least 14 June 2013 in AE 175, when the government said that it was almost done with its discovery and look at the extraordinary volume. It has repeated that argument, in the context of 524 and elsewhere, numerous times since then.

The second argument that the government makes is that -- both on brief and today, is that we have access to the defendants. They have been making this particular argument since 18 January 2013 in AE 114A.

In fact, because we heard this argument so often, we

obtained declarations about its falsity. Those declarations can be found at AE 425E Attachment B, which is from torture expert Pierre Duterte; Attachment I, which is from Dr. Stephen Xenakis, who specifically examined Mr. al Baluchi; Attachment NN, which is from one of the leading psychiatrists in the country, whose practice lies among the SEAL community, so is one of the few people who has ever experimentally examined the impact of multiple stressors in an interrogation environment; and finally OO, from Dr. Shane O'Mara, one of the leading neurophysiologists in the world about the structural effect that trauma has on the ability to remember.

All three of -- all four of these declarations set forth the proposition that, in fact, trauma, and particularly torture, fragments memory. This should not come as a surprise to anyone who has, for example, been in a car accident, that there are some memories that are exceptionally sharp and some, as we heard from Mr. Castle when he was suffering the flu, some are exceptionally fuzzy, and that's -- that's normal human behavior.

The third argument that the government repeats today is the viability of defense investigation alternatives. That -- this one is the new one. The rest of these have been heard time and time and time again by Judge Pohl. This one is

a new one. It only started in October of 2017, and we're going to talk a little bit more about this later, but before that we were free to investigate in any way that we saw fit.

So what does the actual record -- not simply the argument of counsel, but the actual record on this point show? What it shows is a series of declarations which we have advanced on what actually happened in these -- in these defense investigation alternatives.

Those declarations are found at AE 524RR Attachment C, which addresses the logistical problems around the interview of NY7; AE 562 (AAA Supplement) Attachment B, which addresses the substantive -- slowing down for the interpreter -- substantive limitations around the phone contact with NY7 and D95; and AE 562I Attachment B, which relates to F1G, and Attachment C, which relates to Medical Provider #2, and I2F.

We will talk about these extensively in the classified session, but I want to point out that the government's arguments today are nothing more than that, argument, where the record contains actual evidence as to what happened.

But, in brief, Mr. al Baluchi has diligently attempted to interview all five CIA UFI witnesses which the

government made available -- there was supposed to be a sixth, but apparently that person is not being made available -- and there were extensive logistical problems.

Mr. Castle, I note, testified the other day that a speakerphone was such a difficult thing to hear over that he could not even tell whether Attorney General Sessions was angry or calm when he was saying "No deal," but that's the same sort of speakerphone that we are required to use, limited to in interviewing the few witnesses that the government allows.

Not an ordinary speakerphone, however, not the sort that sits on most people's desk, but a so-called STU or STI speakerphone specifically for use of Top Secret information, which is much less easy to use than even an ordinary speakerphone.

Particularly with NY7, who is not a native English speaker, the inability to use nonverbal communication, like hand gestures, to see how big was something or how small was something, or the relative distance or size or making one's self understood generally and the inability to use drawings because it had to take place over a telephone in a -- regarding a facility which was well known to Chief Warrant Officer Futrell, was very severe limitations.

And although NY7 was very cooperative, the parties ended four hours of interview without being able to cover all the information that the defense would like because some of it they simply had to give up because it was too difficult a logistical mechanism.

Some of these witnesses were cooperative, some were less so, which is the ordinary span that we address when we approach and investigate witnesses. But one thing that is clear from the declarations is that -- which are the only evidence on this topic, is that we got much less information than we would have gotten if we could have approached them independently.

The -- now -- I'm sorry, before we go on, the government talks about as one of its arguments in the brief but not so much today is the ease with which it will defeat a motion to suppress. The government began making that argument in July 2017 when we were arguing the hostilities witnesses list, AE 502J with respect to AE 502, the personal jurisdiction motion.

Repeatedly since then, Judge Pohl heard the argument that the defense has no hope of winning a motion to suppress and it will be easy for the government to defeat it. The -- that argument was very familiar to Judge Pohl.

And finally, the government's argument, which it repeats again today about the critical nature of the January 2007 interrogated statements to its case-in-chief, is also -- was also very familiar to Judge Pohl. The government began arguing that on 8 February 2013 in AE 119C and has repeated it on many occasions since.

So that's -- those are a good number of the government's arguments, and certainly they were extremely well known. They are very familiar to the record.

One thing that the government has not done before is read from the substitutions for cables into the record. Although the -- it's rare that the government -- the government has never actually read those before, although the parties have certainly read them. Judge Pohl certainly read them. I'm sure Your Honor has read them, at least some of them, on many occasions.

But it's important to note some of the details that are not included in these summaries of cables; that is, documents which were prepared for official reasons to begin with, to provide information to the CIA, and on many occasions probably somewhat slanted and sanitized in the first place and then undergoing a second chop by the government.

But details like when they're hitting him, where did

they hit him? In his head? In his ear? In his stomach? In his scrotum? How many times did they hit him? How does he look after he gets hit? When they douse him in cold water, is there steam rising in the air? Is he shivering? Is he shaking? What kind of sounds does he make when he's in a cold environment drowned in cold water? Does he flinch? Does he wince? Does he cough? Does he beg?

The strain of his arms and his shoulders when he is hung from his arms above his head, what does he look like, is he gaunt? Is he starving? His body is burning up all the energy that it has trying to stay alive in that cold environment, like some people in Location #2 did not?

What does it sound like when you administer an abdominal slap or a facial slap? What does it look like when a person is so humiliated? Do they cry? Do they whimper?

That's the kind of information that is a rich and vivid account. That's the kind of information that a woman who says that a dungeon looks like it was created by teenage boys who thought up the worst thing they could. That's the kind of information that those witnesses give us, and have historically given us. We're going to talk more about that.

But now I'd like to move off of that topic and talk about the MCA sanction procedures.

The next set of slides is also familiar to the record. It was first presented on April 30th, 2018, as AE 524CC Attachment -- (AAA). I am not going to go over that whole thing, but I just wanted to give you just a little taste of the argument that we already had on exactly this topic.

We talked about, and the government argued, the defense argued, everybody argued, with respect to what are the distinctions between the different parts of 949p. How is 949p different from p-4 different from p-6?

We talked about the standards that were necessary. And the government's argument seems to be that Judge Pohl applied a standard of whether we could make a rich and vivid presentation as the actual standard. And the military judge actually asked the government about this, and they never came back to that question. But Judge Pohl didn't apply rich and vivid as a standard. That was his reasoning for why the government did not satisfy the actual standard.

The actual standard that he found is found at page 34 and 35 in his findings, where "The Commission finds that the extensive discovery provided by the Government regarding the RDI program --" it was a huge footnote "-- the extensive information about the RDI program available in open sources --" another footnote "-- the Government's offer to

stipulate to 'verifiable facts regarding the Accused's involvement and treatment within the CIA's former RDI program,'" that's a quote, "and witness interviews of CIA persons who consent to a Defense interview pursuant to Protective Order #4," and this part is bolded, "will not," in bold, "provide the Defense with substantially the same ability to investigate, prepare, and litigate motions to suppress the FBI Clean Team Statements."

There's the substantially -- the same ability to prepare standard that the government puts up on its slide. That's what Judge Pohl applied. And that's no surprise, because we spent a lot of time talking about AE 949p in its various formats.

We talked about p-3, we talked about the substitution process -- excuse me, back one, please. The -- this is the slide from April where we talked about 949p-4(b), where we talked about the process for discovery of classified information and the substitution process.

Perhaps most importantly to the government's claim that it was subjected to surprise, we talked about 949p-6(d) in a slide where we talked about the alternative procedure for disclosure of classified information.

And this is where -- this is the one place where

949p-6(d) diverges from CIPA Section 6 because 949p-6(d) is even more expansive, more authoritative for the government than CIPA in one respect, that (d)(1)(C) provides for "any other procedure or redaction limiting the disclosure of specific classified information."

And despite some somewhat inconsistent references on the government part, this is really, it was analyzed under (d)(1)(C) as any other procedure limiting the disclosure of specific classified information.

And at that time, in April, I gave a slide which the government -- Judge Pohl even asked the government, "Do you -- is this -- do you have a problem with -- do you disagree with this procedure?" And it essentially is a six-part step -- a six-step process: There is a disclosure determination. There is a government motion for an alternate procedure. There is the denial of a government motion for alternate procedure. And then -- and this is the piece that seems to keep getting lost. There is an order under 949p-6(f)(1) that there has to be an order to prevent defense disclosure.

Now, I want to back up and say the first time that most people read that it's a little confusing because you would say if you decide that things have to be -- that for a fair trial, essentially, to substantially make the same

defense, that information has to be disclosed, why would you have an order to prevent disclosure?

The government showed that same confusion today in response to the military judge's question about is this really an order compelling disclosure or is this an order preventing disclosure?

Protective Order #4 is an order preventing disclosure under 949p-6(f)(1). And the reason why is that the government -- the military commission did not have authority to compel disclosure of classified information over a government invocation of classified information privilege, and that was supported by appropriate declarations.

That's why when the government begins with its -- the declaration process, that's where the declarations come into it, because the military commission -- in the same way that the military commission does not have the authority to, say, fix voting problems in Georgia or Florida, the military commission does not have the authority to order the government to disclose classified information. And that's what I actually began with today.

The classified information process from Reynolds v. United States forward has all about the government making choices, and they are the ones who get to make the

choice. In this case they made a choice that they would not disclose information about UFI witnesses, and in doing so have to -- but once they do that, there has to be an order to prevent defense disclosure.

Then, once there's such an order, there is dismissal or other relief under 949p-6(f)(2) or -- which then the government has the authority to pursue its remedies.

So let's just look quickly at that 949(f)(2) **[sic]**. The result of an order, that is an order like Protective Order #4, which prevents the disclosure of information, has certain -- has certain requirements, and that is that the military judge shall dismiss the case, except if another sanction is adequate essentially. Those additional sanctions, which may include, but need not be limited to, and then we come to subsection (B), "Finding against the United States on any issue as to which the excluded classified information relates."

Which is essentially what Judge Pohl did; he found against the government on the issue of the admissibility of the -- of the statements from the interrogations of January 2007, and which is a statutorily provided remedy. Not only is it a statutorily provided remedy, it's one that we collectively in this courtroom debated extensively.

So let us talk now -- let me now answer your specific question about the interactive process which led to AE 524LL.

It began in 2003, because when the issue of interviewing witnesses first came up, it came up in a different context, and it came up in the context of a person at the Office of Special Security had come to me and suggested that the secure area requirement of Protective Order #1 might prevent us from interviewing witnesses in the field who had information about the rendition, detention and interrogation process.

So we filed a motion about that. We thought -- we, the defense -- or I speak only for myself. We, Mr. al Baluchi's team, thought that OSS was wrong about that, but they are the ones who control our security clearances so we filed a motion about it.

The government took the position during that, that not only Protective Order #1, but nothing restricted from -- the defense from interviewing witnesses in any appropriate area on any topic that they determine to be appropriate.

This is my favorite quote from that, that "the defense can interview any witness on any topic in any location on anything" -- because Ms. Baltes had such a colorful way of putting things -- but the full testimony, which is cited in

the brief, the full argument was clearly that the prosecution's position was not that we were limited by anything other than the ordinary classification rules, but rather that our argument was unnecessary and superfluous because it was so obvious that we could interview whatever witnesses we needed to.

And so that -- the sort of, as Judge Pohl used to like to put it, peace breaking out between the parties on that, made its way into Protective Order #1 and survives there today in a section which provides that "nothing in this protective order shall be construed to interfere with the right of the defense to interview witnesses regardless of their location."

So what happened then? The government describes that, in the same argument that it made earlier, that in 308C, an ex parte pleading, the prosecution included an arrangement by which the prosecution will make best efforts to facilitate defense requests to speak with individuals deemed to have direct and substantial contact with the accused.

Nothing about a limitation, nothing about if we choose not to make requests to the government, which in the exercise of our independent legal judgment we probably would not -- or I would not, I put that on the record already --

but, rather, facilitating defense requests.

And the holistic -- the argument that the government made today about the holistic nature of discovery materials is the same one that they made, and interestingly they cited -- and I put the -- they used it again today. They cited 308FF for that.

But FF has a very dark history. 308FF is the brief in which the military commission found that "The government motion itself has numerous misrepresentations and mistakes, including to other references -- references to other motions that have been withdrawn, several references to an otherwise unidentifiable motion by misusing the designation for this motion (AE 308FF); and by referencing more materials than actually considered -- submitted for consideration. As such, it is not possible for the commission to decipher the references the government built its case upon."

But the government later resubmitted, put FF back together and resubmitted it, and it was ruled on in AE 308HHHH. AE 308HHHH is well known to this military commission because it is the argument at the center of some of the 2.h. material in 534 because the government made synopses, the 64 synopses of UFI witnesses which it said will be provided directly to the defense and did not request the

military judge approve the synopses as substitutes for the underlying classified information upon which they are based.

Now, why is that important? Because at the same time the military judge in AE 308HHHH recognized the government's offer to facilitate defense requests to speak with witnesses identified in 2.d., and then they advanced this as an alternate procedure -- this is in 308HHHH itself -- advanced this offer as an alternate procedure within the meaning of 10 U.S.C. 949p-6(d).

The reason why I took you through that 308 -- 308 detour is to show you that the government has repeatedly, in its private communications with the military commission, described this alternate procedure, which it misdescribed as not involving prohibition; but to the extent that it is an offer to facilitate, it is an alternative procedure under 949p-6(d).

Now, one of the arguments that the government makes on brief, albeit not in oral argument today, is that the -- well, I guess, yes, during argument today, that the government -- that Judge Pohl was being inconsistent with himself, like maybe he forgot or maybe he didn't understand his own rulings.

But the -- Judge Pohl actually addressed this

question of what does 308HHHH mean in this context in footnote 113, which provides that the summaries and substitutions approved there provide the accused with substantially the same ability to make a defense as would discovery of or access to the original classified intelligence information.

Judge Pohl goes on to explain that the issues in the 308 series did not involve government attempts to limit or control defense investigation or access to witnesses and evidence raised in the 524 series, which is exactly the distinction that I'm drawing for the military commission now.

The answer to the government's argument that, well, all these substitutions have been approved is that yes, they were discovery substitutions, document A was an adequate substitute for document B. It's an entirely separate question from what's addressed in 524LL, which is about defense investigation, not about discovery.

So what happened next is that the 502 litigation broke out. This was the question over hostilities. And the military judge ordered in 502I that we had to produce witness lists for the forthcoming hostilities litigation.

We produced those witness lists -- ours is found at 502J -- and those witnesses included approximately 45

witnesses who we could not identify by name. We could either, in most cases, identify them by unique functional identifier or by category in a couple of other examples.

This -- in our attempt to call these witnesses -- like the government's last slide is about 703. This was a procedure under 703. It is our attempt to call these witnesses in the first place that generated the September 6th letter from the government prohibiting our investigation, because obviously if we were going to try to call people as witnesses, we would want to talk to them first to find out what they would say.

Now, this is the first indication from the government in any pleading that they or we have -- that I have identified, the first time that the government raised its question -- or raised its prohibition that "The defense should make no independent attempt to locate or contact any current or former CIA employee or contractor regardless of that individual's cover status."

And at this point it's appropriate to address the government's argument that we could never find these witnesses on our own, which is simply not true.

The actual -- not the argument of counsel, but the actual evidence in the record on this is found at AE 524G

Attachment C, a declaration from Chief Warrant Officer Futrell, and Attachment D, a declaration from Investigator Canestraro about our extensive efforts and success in finding witnesses which fall either within this prohibition or the prohibition in 524G, which we are going to talk about in just a moment.

But the government identifies NY7 as a person who maybe agreed to meet with us and maybe we had found them anyway. There's no evidence of that in the record, and I have never understood the basis for that argument that the government makes. There is nothing in either the classified or the unclassified record which supports it. It might be true. I don't know. We couldn't ask him.

When we were interviewing NY7, we couldn't say, hey, are you that guy we talked to like in January right before this investigator prohibition came down? Because we couldn't ask him that question because that would be identifying him. It's specifically placed off limits by Protective Order #4.

But there are a couple of other examples. The former CIA interpreter who worked for Mr. Binalshibh's team is a person who we were able to interview in -- at the appropriate time, interviewed twice, actually. But now if that person were connected with the RDI program in any way, they would

fall within category 4.

There's another witness that we interviewed, which led to a lot of litigation in this court, that would now fall within category 3, and we'll discuss that person at some length tomorrow.

But category 3 itself demonstrates the weakness of the government's argument that we couldn't find these people, because category 3 includes specific -- is -- not just includes, but is witnesses whose identity is unclassified.

In this situation we are talking about people who put their CIA affiliation on LinkedIn. We are talking about people who have written books. We are talking about people who give book signings, people who may still be in the government. Certainly we could find them. And if we suspect prior to Protective Order # -- prior to this September 6 -- September '17 letter and its implementation by the al Baluchi team in January of 2018, we could certainly, and did go out and find those sorts of people.

Now, the next thing that happened in this iterative/interactive process is AE 525G, because the military commission gave the government in a closed hearing the opportunity to clarify what exact prohibition it was putting into place with respect to overseas investigation, which had

some overlap, but not complete overlap with its 6 September prohibition. The military -- the prosecution filed AE 525G, imposing a whole new range of prohibitions, which ultimately did not make their way into Protective Order #4.

But that brought us to the argument before the military commission on 10 January of 2018, where the government verbally, when the government -- excuse me, when the military commission was trying to give the government the opportunity to either retract or clarify or expand its prohibition.

The military commission summarized the government's position is "The 6 September memorandum for CIA people applies to everybody who worked for the U.S. Government as part of the RDI program regardless of which agency they happened to be working for."

This -- ultimately -- this thread which vastly expanded the text of the 6 September letter ultimately became part of the category 3 and 4 interaction of the military commission in Protective Order #4.

But there are some other important things that happened at the 10 January hearing which rebut the government's argument that it was surprised to find this process coming into play.

At that time -- and it's never 100 percent clear, but at that time the government was taking the position -- and this is well reflected in the 386 series -- the government was taking the position that Touhy principles, writ large, restricted our ability to contact CIA officials without their -- without the blessing of the CIA, even though the actual text of the CIA Touhy regulation said that it only came into play in response to a demand; that is, a court order that someone testify.

And so the government extensively made that argument and made this argument that we're not supposed to be going outside of this process, the Touhy process, to enlarge the scope of discovery. And then the government said, "If the commission were to grant this motion," being 524, "we would have to regard it as a denial of a protective order."

Now, that's significant because what that's a reference to -- without giving the actual text, that's the reference to 949p-6, which at the end of that process that we talk about, if there's a denial of a protective order, then there has to be -- there has to be an additional protective order prohibiting the defense from disclosing the information, a sanction if the military commission elects, and the government has remedies to appeal.

So that -- it's obvious that General Martins was very -- had a good understanding of that process at that time and was basically, you know, calling the bluff of the military commission as to, you know, we have appellate remedies, and if you invoke this 949p-6 process, then we're going to invoke the 949p-6 process.

They also at that time invoked national security privilege. I'm not going to go into the whole detail, but that became extremely important because that was the first time that the government told us that there would be sanctions against us personally if we violated their letters. That was the first time, and it was after this invocation of national security privilege that the al Baluchi team internally implemented the 6 September 2017 letter and 525G, because -- it was that when we stopped the investigation.

That's when we said, all right, the government is talking about criminal sanctions. The government has invoked national security privilege. This is no longer just posturing. This is for real. And that's -- so it was actually legally a very significant moment in this long litigation for invocation of national security privilege.

The government continued to the -- the military commission gave the government every opportunity to change, to

modify, to get further guidance in this long interactive and iterative process.

And one of those we argued again in February, on February 26 of 2018. At that time there was another letter that was produced by the government. That's found at AE 524I Attachment B, where they said, well, but maybe there is another category of officially acknowledged persons. This category eventually became category 1 in the Protective Order #4.

MJ [Col PARRELLA]: Mr. Connell, I apologize for interrupting. I just wanted to kind of make a decision here. We're at noon now, and I know that we're basically at the point of prayer time, so ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: I don't know how much time you have left. I am sort of judging by the number of the slides. How much time do you anticipate, and would you mind a lunch recess at this point in time and concluding your argument afterward?

LDC [MR. CONNELL]: I have about another half hour, and I certainly don't mind whatever break schedule the military commission deems appropriate, and I honor the need for prayer time.

MJ [Col PARRELLA]: So you have another 30 minutes. Okay.

So you don't mind a recess at this point?

LDC [MR. CONNELL]: No, sir. Certainly.

MJ [Col PARRELLA]: Okay. So at this time we will take a one-hour recess. The commission will reconvene at 1300. The commission is in recess.

**[The R.M.C. 803 session recessed at 1200, 15 November 2018.]**

**[The R.M.C. 803 session was called to order at 1305, 15 November 2018.]**

MJ [Col PARRELLA]: The commission is called back to order. All parties present when the commission last recessed are again present, unless counsel advise me otherwise.

CP [BG MARTINS]: Your Honor, Mr. Ryan is absent.

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

LDC [MS. BORMANN]: Major Seeger is absent.

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

Okay. With that, Mr. Connell, the floor is back to you.

LDC [MR. CONNELL]: Thank you, sir. When we broke we were talking about the process by which the government amended, changed, and sometimes tightened, sometimes broadened its prohibition on investigation. We talked a little bit about the 27 February 2018 letter in the record at 528I Attachment B. There was another one on 28 February in

the 505 -- excuse me, the 525 series, which I am going skip over for brevity sake because it didn't make it into Protective Order #4.

But all of that culminated into the serious beginning of conversation between the military commission, Mr. al Baluchi, and the prosecution about how, what sanctions would be appropriate, how was this procedure going to proceed, what were the sanctions going to be, and was this going to be analyzed as a protective order matter or a UI matter.

So just to begin that -- and we already talked a little bit about the April 2018 argument where I had slides on these topics and we went in detail. But all that sprang from the 1 March 2018 argument where Judge Pohl took the parties through 505(h)(6), which is the equivalent of 949p-6, to talk about exactly how this process worked and gave the government choices as to how it wanted to proceed, whether it wanted to proceed under the sanction framework or a different framework. I will explain.

So at the beginning of that process, Judge Pohl was trying to find out in this iterative process, meaning a process that repeats, were there going to be any more iterations, were there going to be -- on 28 February, the government had filed its fifth version of the prohibitions on

investigation and Judge Pohl wanted to know, you know, is this the playing field or should I expect more?

And Judge Pohl asked, "Just to clarify, your 27 February and your 28 February," which is why I mentioned to that one, "this is the government's final position on this?"

And the government responded, "Yes, Your Honor, but I don't make classification guidance," I guess leaving open the possibility that somebody outside of this courtroom would decide the government's position to be different than they had articulated it.

But that led to a discussion under M.C.R.E. 505(h)(6), which is the equivalent of 949p-6, about exactly what would happen then. And I argued, and this is on 1 March 2018, at page 19076, that "One of the possible sanctions would be finding against the United States on the question of the admissibility of the January 2007 statements, for example, would probably take care of a great deal of the issues. It would take care of the suppression motion issues. It would take care of most of the trial issues. We would have to find a different wording of a finding for any possible sentencing phase, but the government has a right not to have its witnesses interviewed except under unacceptable conditions.

"If it sticks to that right and invokes national security for it, it does so at a cost, and that cost is either the process of the case, which is dismissal, or it's going to lose the motion to suppress and certain aspects of the sentencing phase."

So what I argued on 1 March 2018, was I partially won and partially lost. The government attempted to use a colorful phrase of I had won the lottery without buying a ticket, but neither aspect of that metaphor is true. There was neither a lottery winning in the sense of some sort of undeserved windfall, but nor was there a lottery winning in that I got everything that I asked for.

Judge Pohl very carefully, from what I argued on 1 March 2018, ruled in favor of Mr. al Baluchi's position on the question of an exclusion or admissibility of the January 2007 statements and ruled against Mr. al Baluchi on the question of certain aspects of the sentencing phase or the mitigation.

And so that's what -- and the last sentence in this transcript clip is, "That's the example of how the rule, which is laid out at 505(h)(6)(B)(ii) could come into play." And when you read the full context, you will see that exactly what I was describing is what also appears in 505 -- no, excuse me,

that 505(h)(6) is exactly like -- is the same -- basically is an implementation of 949p-6, and that what I was referring to was finding against the United States as to any issue as to which the excluded classified information relates, which is in the 505 series at 505 -- excuse me, in the 949 series, 949p(f)(2)(B).

So that is -- this whole, you know, multiple pages of discussion of this topic on 1 March is why I pushed back against the suggestion of the government that they didn't know that any of this was coming, right? They never had the opportunity to weigh in.

Not only did they know that it was coming, because we discussed it, there is even a place -- and I wish that I had clipped it now where Judge Pohl said to Mr. Groharing, "Go get your rule book. I want to walk through this with you and talk about how it works." It's in this same area of the 19076; when you go back to check that transcript, you will come across it. Because it was very clear that the military judge wanted the position of the parties, of both parties, on how this process would work.

Now, Judge Pohl then gave the government a choice as to whether to invoke this process or not. And another clip that I have out of this extensive 1 March 2018 argument is we

had filed 548 and 549, and those were two different approaches to the problem in 524. 524 did not have dismissal proposed as -- well, it did have dismissal proposed as a remedy, but it didn't have the separate request for relief.

And so the reason why we filed 548 and 549 was because we were drifting along in this sort of procedural posture where the government kept chopping and changing. I wanted to make clear that we were asking for certain relief. We had already briefed unlawful influence as a theory of relief, but I wanted to specifically ask for that relief so we would have a clean record.

And so what the -- Judge Pohl did in 1 March 2018 is to offer the government a choice, and that choice very explicitly was you can -- we can analyze this as UI, which has more remedies available to the military judge, but also has a different procedural framework, including the burden-shifting, or we can analyze this as a 949p-6 problem.

And ultimately, after several pages back and forth with the government, Judge Pohl said, "What I'm saying is that if you," speaking to the prosecution, "want to trigger the 505 process," meaning the 505(h) that we had just talked about, "you have to file a protective order."

And Judge Pohl continued, "If we go the other

route -- and just because you triggered the 505 process doesn't mean that forecloses the other route, the UI route, okay? But I want to make this procedurally set up, so you decide, if you decide to file a protective order."

And so this is part of a context -- in the context of an argument where Judge Pohl was unbelievably explicit, and, in fact, put the decision in the government's hands as to whether they wanted to treat this as a 949p-6 problem subject to the three or four sanctions which are laid out in the statute, or whether they wanted to treat it more under the judge's more expansive powers under UI.

The government chose very explicitly the protective order route, and the government filed a proposed protective order on 2 April 2018; that is 524S. It initially filed it under seal ex parte. I had pre-objected to that process because I suspected it was coming, and then the judge ordered that they provide us a copy of the proposed protective order.

That's when the April hearing took place. No, no, I'm sorry. There is one more event before the April hearing, which is that even after issuing 524S, their sixth version of the prohibitions, the military -- the prosecution answered a request from me in an e-mail on 6 April 2018, giving a seventh tweak in this iterative process as to the question of showing

photographs.

Showing photographs -- you may know previous defense attempts to show photographs figure in -- there has been a lot of talk to Mr. Kiriakou in his complaint in the Eastern District of Virginia, defense attempted to show photographs, figures in there. And the FBI agent who swore out that complaint had said that it was okay for defense counsel to do double-blind lineups of suspected CIA officers because you weren't saying who in this lineup was a suspected CIA officer. So that was the one thing that we thought we were allowed to do.

But on 6 April 2018, in its seventh iteration, the government said that we would no longer be able to do that. That e-mail is found in the record at AE 524V Attachment B.

So in April, when we were arguing the 524S, the government's proposed protective order, we pointed out -- and there was an extensive argument in April in which I pointed out that the protective order that the government had proposed in 524S was far more expansive than the protective order -- than it's original 6 September 2017 letter, prohibition to a sentence or any of the previous six iterations of its request. Because it expanded to affiliated individuals -- that is the neighbors, we often find people by their neighbors or business

associates, household employees or family members. And it also reinstated the original -- they had kind of -- they had softened their prohibition a little bit, but it reinstated the original 6 September 2017 prohibition in an even stronger form.

It was also broader in the -- who it governed, the defense personnel, because previously there had been a proposal from the government. One of the interim proposals in 525G was that we could use sort of unclassified cutouts. We could use investigators who we insulated from classified information and allow them to do it. That was the unclassified investigator theory that the government had for a while, which they retreated from in 524S.

And they also expanded what contact meant; that it no longer meant just interviewing, it was much broader than that. It included approaching, questioning, surveilling, identifying, photographing, tracking, trailing, communicating with, or otherwise interacting with. So it was radically broader.

So it was at that time in April that I proposed this slide with the procedural path to resolution. Judge Pohl asked did the government have any problem with this format, and they didn't. At that time they seemed to understand it.

But now the government claims that it did not know -- and I loved this phrase -- "I did not know that there were looming sanctions." But if that is true, if it is true that the government did not know that there were looming sanctions, then it must come from not having paid perfect attention to the record.

Because in 524AAA, the base motion, our very first paragraph of legal argument is -- and if you were just to start at the beginning and read anything, this is essentially the first legal argument you would come to, is that we argued for sanctions. We argued that the government has gone out of its way to hamper Mr. al Baluchi's efforts to conduct a thorough investigation, including by locating the witnesses at issue here. If the government has -- slowing down -- invoked classified information privilege to prevent the disclosure of witness information, the military commission should dismiss the charges as a sanction.

The idea of sanctions for the invocation of classified information privilege comes from the very beginning, in September of 2017, of this.

Incidentally, I mentioned earlier that the 10 January 2018 invocation of government invocation of classified information privilege was particularly legally relevant,

that's a reference to this construct, which was briefed from the very beginning.

So that brings us to July. The government's position in July was that we are done with this issue, that they have had all the chances that they want, that they have nothing else to say, and that neither should the defense have anything to say.

The military commission asked trial counsel if they wished to be heard anymore, and the government responded, "There have been enough briefs filed. We've had enough argument on this issue. It's a very important issue for the commission to resolve, which I argued at the last session.

"So you have everything you need right now without any additional briefs that would only prolong this, to have another hearing in September before we get an order," a protective order, "in place that will allow everyone to move forward."

The government's argument that it was surprised and that it didn't have a chance to fully participate in this extensive iterative process just simply is not supported by the record.

So let's -- let's talk for a minute about what Judge Pohl did when he issued Protective Order #4 on

17 August of 2018. I know that this slide is almost unreadable, but there is a point that I'm trying to make.

We went through each of the different ways that the government had articulated its prohibition, and we assigned them each a color. And you can look at it in more detail later if you like, but this is the key to the next slide.

And then we went through -- and I was trying to capture graphically how many different descriptions of the interview procedures, the rules for contacting individuals, the classified information, the permitted questions, the RDI sites, and the prohibited questions that Judge Pohl had to sort through in coming to Protective Order #4. So this is an attempt to graphically illustrate all the various different questions, elements that were in different government iterations in this at least seven-step iterative process before Judge Pohl went to Protective Order #4.

So let's talk about what did Judge Pohl do in Protective Order #4. What he did was essentially cut away all the things that the government was trying to protect that were not actually classified. They don't have a right to invoke 505(h) or 949p-6 with respect to information which is unclassified; they can do that under Rule 506 if they choose. They did not choose to do so here. And so I basically cut

away everything except the classified information.

And then he did exactly what he was supposed to do, which is he imposed a sanction -- next slide, please -- under 949p-6, where he did -- he prohibited us from revealing the classified information at issue. Because, again, it's the government's decision as to whether we are able to access or disclose classified information, and then he entered an order under subsection (2)(B), "Finding against the United States on any issue as to which the excluded classified information relates."

Now, I mentioned earlier that we lost on the issue of mitigation, which is true. And -- but we also lost on the original, the primary and the secondary relief that we had requested in 524 way back in September of 2017 when all of this began.

What we did instead was we worked through, in opposition to mostly, and occasionally in collaboration with the government and the military commission, this procedural path to resolution that took us through a government alternative procedure, the denial of the government motion in part for the -- for that alternative procedure, an order to prevent the defense disclosure under 949p-6(f)(1), and then other relief under 6(f)(2). That's where we are now.

The -- before I yield the podium, I would like to raise, however, the issue of if the military commission does choose procedurally to reconsider this issue, the military commission should -- the one thing that Judge Pohl got completely wrong was drawing a sharp distinction between the mitigation function and the suppression function.

The military judge does need a rich and vivid account, supported by defense analysis of discovery, true, but also investigation in considering any motion to suppress that might ultimately be filed.

But that is even more true, not less true, when it comes to a members panel, who is making -- each of whom -- each of those individual people are making an individual moral judgment as to whether Mr. al Baluchi should be killed. And in making that judgment, the Supreme Court has been clear that they need access to as much information as is available. It's, in fact, the duty of defense counsel to obtain, through investigation, discovery, and other means, that information and present it to the members.

So if the military commission chooses to reconsider AE 524LL, which I argue that it should not, but if it does procedurally, then the answer that it should reach is to maintain the finding under (B)(2) -- or (2)(B), rather, that

the finding against the United States on the question of admissibility of the January 2007 statements, but it should also find against the United States on the issue of the eligibility of the defendants for -- or at least Mr. al Baluchi for the death penalty, because we will not be able to have a fulsome mitigation presentation to the panel members.

That's all I have, but I would be happy to answer any questions.

MJ [Col PARRELLA]: I do have a couple, Mr. Connell. Thank you.

So on page 12 of AE 524NN, the prosecution requests clarification on a number of points. So I'm going to take the easy route and I am going to push one of these questions to you.

LDC [MR. CONNELL]: Yes, sir. Would you mind if I grab my book with NN in it?

MJ [Col PARRELLA]: That's okay, or I can read it to you.

LDC [MR. CONNELL]: You can read it.

MJ [Col PARRELLA]: It is just going to be one question.

LDC [MR. CONNELL]: Yes.

MJ [Col PARRELLA]: What specific classified information is the defense -- you know, I understand the iteration process

and how we got to Protective Order #4.

But looking at Protective Order #4, what specific classified information is the defense unable to access by the operation of Protective Order #4?

LDC [MR. CONNELL]: Sure. So I can give -- I can give that in various levels of detail. So I will start with the broadest and you stop me when ----

MJ [Col PARRELLA]: And I did capture where you did discuss some of this already in your argument ----

LDC [MR. CONNELL]: Sure.

MJ [Col PARRELLA]: ---- but I just want to give you -- so stick with the broader sense and I will ask you if I need to.

LDC [MR. CONNELL]: Sure. In the broader sense, we are unable to access information about what actually happened to Mr. al Baluchi in the black sites. Now, there are various levels of specificity.

The government gave an extensive recitation of a document with respect to Mr. Mohammad, which in many ways -- I think the government's point was that there was a lot of detail there was, but it raised more questions than it gave answers.

Administration of a facial slap is not the same as -- the sort of bureaucrat-ese of that is not the same as what a

live witness testifies. I mean, just look at the difference between -- it was like a dungeon that teenage boys would come up with as a horrible prison, right, which is not a description of what happened to an individual. It's a general description of that person, that CIA person's experience of having had to go into this place, because we sent U.S. citizens into these places as well.

Imagine just as that one little example, if that level of metaphor or description or emotion were applied to the actual torture sessions, the actual interrogations of what happened. Instead of using the bureaucratic dodges of facial slaps and abdominal slaps and water-dousing, if we were really talking, if a human being -- if we could interview a human being who would talk about both the experience of what it is like to drown another person or to anally rape another person at the same time as what they saw the person that happened to experienced.

So the government, I think, doesn't like the phrase "rich and vivid," perhaps because that phrase is too rich and vivid.

But what Judge Pohl wrote here was the level of human experience that is important to decision-makers, whether those decision-makers be a military judge or military members on a

panel, that level of human experience is totally inaccessible to us now. And I say that now because it was not accessible to -- inaccessible to us before.

And when you -- you know, the declarations that we provided on this topic describe in some enormous detail. If you've read -- I hate to say it, "if you've read." When you read Chief Futrell's description of his investigation into the torture network, it turns the stomach in a way that bureaucratic statements of facial slaps and abdominal slaps just don't do that.

And that comes from live testimony. That comes from sitting down with people in a room -- sometimes a classified room, right? We invite people to our SCIF all the time if that makes them more comfortable, sitting down in a room with people and learning from their human experience what they saw, what they experienced.

MJ [Col PARRELLA]: So I obviously don't -- I don't know the complete extent of what the government has provided in terms of the documentation, but I believe it to be extensive based on what I do know.

LDC [MR. CONNELL]: I agree.

MJ [Col PARRELLA]: But I also understand the point about the difference of live testimony. And it may be a relatively

new revelation and I understand it probably wasn't -- it's sort of a vacillating position. But it seems, if I understood Mr. Groharing correct today, that they envision a possibility through 703 to have a session of court where we would hear live testimony that would afford the defense the opportunity to get into those details that you have commented about. So why would that be insufficient?

LDC [MR. CONNELL]: So interestingly because that's where we began. We began with -- the reason why I had this slide about 502J in there is we began with a defense request to call these UFI witnesses as witness in the 502 personal jurisdiction litigation. And the -- and it was at that point when we realized, look, we know there are witnesses.

We have like one-, two-page sort of what the government characterizes as summaries that they made up about these witnesses. That's so different from understanding their experience. And even the very limited UFI witnesses that we have been able to talk to under these difficult circumstances have revealed that. You're going to hear in rich detail about that in the classified session.

But they are doing things like saying, no, what's written here in that 2.d. profile that you are reading about me, it's wrong. That never happened. They're saying things

like, well, actually there was a lot more than that, and did you know about this other thing?

So by the interview process, which is both a relationship-building process, but it's also an information process. We know that with those 2.d. profiles, because as Mr. -- excuse me, as the government explained in detail on Monday, they don't come from an original document. They are sort of a compilation document, if you will.

And we know that -- we know 100 percent that there are serious mistakes in there because the witness, when we actually get to talk to them, contradicts that. But we also know that there is so much more outside that extremely narrow band that the government has applied the relevant, necessary, noncumulative, direct, and substantial filters to; that when we talk to those people -- and we've talked to a lot of people in the torture network prior to the imposition of these restrictions -- and we learned so much more, things that we never even imagined could be true.

That is, in fact, the reason why I push back so hard against the idea of, well, Mr. Connell, if you would just write up a story, just make up a story of -- tether it to reality in some way and we will stipulate to it, because my imagination fails when it comes to how badly these men were

treated.

I cannot -- the things that we learned this week that -- there was a declassified statement about use of truth serum that I never would have imagined. The things that these mental teenage boys did in this dungeon that they created defy my ability to imagine, much less to write into some sort of stipulation in dry legal prose.

So yes, the difference between -- I mean, this week we saw the difference between live testimony from a person and dry documents. And I'll just -- I'll speak just a minute about experience with Mr. Castle. We saw both Mr. Castle's demeanor that we never would have seen, but we also saw documents that were attached to 555DD that I thought and the government briefed as if they were a linear statement, right? There was a Management Memo on the December 12th. There was a plan for the disposition of detainees on the 15th. There was a request to -- there was a statement that we should -- that OGC should dismiss Mr. Brown on the 4th, and January 12th there was another one.

Once we get a witness on the stand who explains that -- and I would love to have interviewed him in advance, I would have done much better a job than I did -- the government did such a good job because they had 15 hours of interviewing

with him, I mean, demonstrating that the government understands how important it is to learn from witnesses, to impart information to witnesses.

Mr. Castle testified on several times that there were things about the case that he had known that the government had provided to him. I mean, it was a vivid illustration of the difference between dry documents, which -- and live testimony. We would never have known from the dry testimony that Mr. Castle had a crisis of conscience about two of those documents and withdrew them with egg on his face, in his words, from consideration by the Secretary of Defense.

The -- so the interview process of learning that, and not learning it, you know, the first time on the stand -- sometimes you have to do that, right? Somebody refuses to talk to you, the first time that you talk to them is on the stand. But the preferred process -- and this is illustrated throughout the military cases. I really respect the military justice system for its commitment to both sides having equal access to evidence and witnesses. Reflected throughout the cases is the idea that the defense, before we ask you to compel the government to produce the witness, that we will either talk to them or we will have tried to talk to them.

And so that's a number of different factors. But one

thing that has been illustrated clearly by this week is that live testimony or -- and especially the interview process that produces that live testimony, is not anything like dry, bureaucratic documents.

MJ [Col PARRELLA]: So even if the commission were to agree that Protective Order #4 doesn't put you in substantially the same position you would be were you able to do your own defense investigation, locate -- attempt interviews with these individuals, why is the timing of the sanction not premature?

I mean of the sanction not premature. In other words, why not wait until we get to that inevitable suppression motion, see what evidence, see what live witnesses, and then determine at that point in time whether the sanctions are appropriate?

LDC [MR. CONNELL]: I understand the question. And the reason is that we have been preparing for that suppression motion for years and years. And I don't speak for anyone else; I only speak for Mr. al Baluchi. But you will see in the declarations from Chief Futrell and Mr. Canestraro some of the process that we have been through in interviewing CIA witnesses, witnesses in other elements of torture network.

The -- all that leads to what presentation are we

going to make, all right? That informs the presentation that we are going to make to the military commission.

When we started, for example, I had thought that there would probably be a series of like eight motions to suppress, because there seemed to be a variety of issues, a variety of legal theories. And there is a general preference -- I know it's honored in the breach -- but a general preference, one issue per motion.

One of the things that I have learned from interviewing witnesses, many of which I have done personally, and interviewing -- and investigators, other team members who interview people, is how interconnected all of these different elements are. So now I think that there's essentially going to be two suppression motions, one about procedure, one about voluntariness, and then an outrageous government conduct motion. All of those are informed, however, by this interview process that we were going through up until January of 2018.

We've received an awful lot of discovery since January of 2018 by the government. There are an awful lot of witnesses that we would like to talk to. And many of those witnesses we could find. And I bet with the sort of humanity that comes with an in-person request as opposed to a visit from the CIA and the FBI jointly, I'm sure that a lot of them

would be willing to speak to us.

And so that's why it's not premature, because this is -- it's not like we are going to show up one day with -- and have a suppression motion and everybody will just, you know, throw up their witnesses and we will go from there.

This is a long process of building a case, building the pieces of the case, learning the evidence and -- just the 703 process itself, the fact that I don't have subpoena power demonstrates what a -- what a building process that it is, in that whenever I want to call witnesses and -- take 502J as an example, or any other example, whenever I want to -- take 555 as an example. I really have to prove the case to you first, and then I have to prove to you what elements of the case I haven't proved yet to make -- the first part to prove relevance and the second part to prove necessity, and then eventually, hopefully, I get to litigate it.

So this is not a question of I have issued subpoenas and we're here on a motion to quash; the government is going to tell us no, I think we can do a stipulation to that witness' testimony. I basically have to go through an extremely long -- and in the middle of a long process of building that suppression case to present to you. So that's the reason why this is, in fact, the exact appropriate time.

And it's no accident that this arose in response to the 502 litigation, because there were two issues in the 502 litigation: One, was the United States at war with al Qaeda, as defined in the Military Commissions Act between -- prior to September 11th of 2001? And two, were Mr. al Baluchi's statements admissible against him in that personal jurisdiction hearing?

And the reason why we requested these 45 UFI and other CIA witnesses in 502J was to try to begin to make that case for exclusion of the statements. And what Judge Pohl did here, essentially, was take that history and say I see what you're trying to do, counsel for Mr. al Baluchi, and I see how the government is interfering with it, and they get to do that. They get to interfere with your investigation, no matter how much you don't like it, Mr. Connell, but they do so at a cost; and that cost is the exclusion of the January 2007 statements.

It should be, in my humble opinion, also the exclusion of the death penalty as a sanction. But I acknowledge that Judge Pohl ruled against me on that point.

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

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

MJ [Col PARRELLA]: Mr. Nevin.

LDC [MR. NEVIN]: Your Honor, thank you. And I join Mr. Connell's remarks on behalf of Mr. Mohammad, and I'm not going to repeat all of that. I just want to say several of the things -- or perhaps emphasize them would be the right way to put it.

On that last question, though, if I could say, I take it that what -- and you asked the question about why not wait until we have a suppression hearing to rule on suppression. And I take it that what Judge Pohl was saying here -- in fact, I believe it's overtly stated in his order -- is that the problem here is that there is not -- you don't -- the defense doesn't have the information it needs to fairly litigate a motion to suppress.

MJ [Col PARRELLA]: And I understand that distinction. I think what I was saying was why not wait to see what evidence is actually available at the time we do the suppression hearing? Because I think that what was unknown is whether, even if I were to rule that those witnesses were relevant and necessary, whether they were going to be produced or what might happen or under what conditions they might be produced, and whether that would give the defense the same substantial ability to get meaningful testimony.

LDC [MR. NEVIN]: Yeah, I understand your point. And I

guess I simply would say, in fact, in some ways I think it's a mistake to call it suppression. I don't think that these statements were suppressed. I think it's something more like an order in limine.

This is not a motion to suppress invoking the exclusionary rule for a violation of the Fifth Amendment and the Fourth Amendment. It's something on the order of a motion in limine -- not a motion but an order in limine that simply rules that evidence out. And the connection to the motion is the one you just acknowledged, that he's saying -- he's saying it's not fair to make you litigate a motion to suppress.

I would say that the -- you could summarize what our moving papers on this subject said this way, that when we are having these technical discussions about what was raised and whether there was a surprise or not, we are tinkering with the very mechanisms of the case that result in it being legitimate or not. And I say that coming here with a background in defending capital cases, and this has been referred to previously.

But the -- we, all of us at this table, I think, have this long experience of seeing these cases and picking up these cases, let's say, on federal habeas, and going in to a federal habeas petition and then a hearing, and dealing with a

situation where the lawyer who represented the defendant in the state court, let's say, where the death penalty was imposed, failed to do a proper investigation.

And then when you go and you do the investigation, you find many things frequently that -- ground that was not turned over. And this becomes the basis for a petition for writ of habeas corpus and for relief, for a new trial, on the ground that you received ineffective assistance of counsel.

So all of us come to this process deeply schooled in this obligation, whatever else we do, to thoroughly investigate the case. And much of where we have gotten to so far has been us saying give us the ability to conduct an investigation. Do you understand the structural limitations that are imposed on us that prevent us from conducting the investigation that's necessary? And there are many apart from the ones that we're talking about here.

But I will say that -- and I have cited the chief prosecutor's remarks in open court several times in our pleadings where he said, "What do they think they are doing? I mean, what are they, like private Attorney Generals or something?" And there was this kind of almost like as if air quotes were put around "investigation." Why are you investigating?

And the idea that is conveyed repeatedly is that you get to litigate this case based on what we -- we're going to give you this bucket of information, and these -- because this is classified information and it's all the reasons that are laid out. These are the terms in which we're going to litigate this case, and in our opinion, there is plenty here for you to make all the arguments that you need to make.

Well, to some extent I hear Mr. Connell, and you have seen it in some of our writings -- and I'll say a word about it here in a minute -- it's not enough. And I can explain why, but the real point I am trying to make now is that what these -- what Rompilla v. Beard and the other cases, what they teach us is that the way that this process works is that you take a competent lawyer, you make sure that the defendant has a competent lawyer and then you require that competent lawyer to conduct a thorough investigation. And when you do that, that's due process.

That's really what the cases from the very beginning that start talking about ineffective assistance of counsel, Strickland v. Washington and all the cases that follow along, that's really when you read them what they say. And the point of all of this, I think, is that we're being prevented from doing that.

And so a big part of what we wrote points out that this connects to the right to counsel and the right to present a complete defense. We argue that the evidence of torture is Brady material. It's directly relevant to a number of issues that have been discussed for you. One that I think is important that tends not to get mentioned is denial of the right to speedy trial.

But in addition, obviously it's important to mitigation, and it's important on many different scores within the mitigation argument. And we've referred to this from time to time, that it implicates the moral authority of the government to execute; it has the effect of increasing the suffering -- the pushing it over, the prohibition on -- against cruel and unusual punishment.

And we've made the point, I think, or we have tried to, that mitigation is unlimited, that it's, I think, potentially infinite is the term that's used in Ayers v. Belmontes. And there are many ways that the court has expressed this, mitigation can't be subjected to a unanimity requirement, mitigation doesn't have to be connected to the actual offense of conviction and so on. It takes a number of aspects.

But you will see in 525I Attachments B, C and D,

these are expert declarations that we provided from persons who have spent a career defending capital cases who articulate this in some detail and with considerable eloquence, the necessity of conducting this kind of an investigation.

So I listened with interest as well as Mr. Groharing read these statements about Mr. Mohammad, and that -- referring to treatment that he was receiving at that time. And I -- I just in an illustrative way, will quickly point out to you several things about those.

One of those statements was part of a report of an investigation that is said to have lasted -- sorry, an interrogation -- that is said to have lasted for 15 hours, and it's contained on a page or a page and a half. You can read it in about ten minutes. And so you think to yourself what's not there. And, of course, no matter how eloquently the statement is worded, you can't know what's not written in the statement, and it is those kinds of details that we're getting.

The point that we're getting at -- and Mr. Connell made the point that these statements do not convey the actual events themselves well. And, I mean, there are numerous examples within what Mr. Groharing read to you, and this is -- I mean, this is literally an exercise.

I'm going to talk about one or two of these, but I could go on for the rest of the afternoon and into the evening citing examples of this. And I'm sure that the military commission will understand -- and that everyone will understand what I mean.

So this is slide 20 from -- from the government's slide deck. "Prior to the interrogation session, Mohammad was first stripped." That's the first line.

But wait, what do you mean, "stripped"? How was he stripped? Did someone come up and unbutton the buttons and take them off or were they ripped off or did somebody take a knife or a pair of scissors like they do in an ambulance and cut them away? In what way, if any, was he restrained while that was going on?

Next, he's given a physical exam. Wait, a physical exam? Who gave him a physical exam? What were their qualifications? What did they do? How was he restrained or held for the physical exam? Did it involve probing his body in some way? Did you look into his eyes, look into his mouth? These are fair questions when you're told he was given a physical exam.

He's taken to a separate room and had his head and beard shaved. How? Not a hot towel wrapped around the face

and then a shave that takes place like we see -- like we used to see in the old days and we still see in the movies. Not like that, but how? What are the details that surround that?

And, Your Honor, tap water is poured on him on the floor? He is -- Mr. Mohammad -- I'm sorry, "Tap water was then poured on Mohammad while he was held on the floor."

So why -- why from that is he moaning, crying, and chanting? Just because tap water was poured on him?

He's placed in stress positions. "Took Mr. Mohammad's blanket away and placed him in stress positions." What stress positions?

And I'm sure you see my point. I think it culminates just for purposes of these which, after all, I didn't select. But it culminates for purposes of these that he is taken back to the bathing room and he is placed on a plastic sheet and a medical officer rehydrated Mohammad rectally, period. Mohammad clearly hated the procedure.

Well, this rectal rehydration, as counsel said previously, is a polite way of saying rape with the insertion of -- with the insertion of a foreign object into the rectum. But how is it done? I'd like to know, how is it done? I mean, does someone hold his legs apart? Is he lying on his face? Is he naked? Is he lying on his back? Is some kind of

lubrication involved in this? How many people are there around? Who does the insertion? How did they do it?

I say these -- or I raise these questions, or I put it in this way really simply to illustrate that these materials that supposedly support this rich presentation don't do anything of the sort.

I suspect that Judge Pohl figured that these were not the outer limit of what we would be permitted to know, but rather the beginning. They were the beginning place from which we would go forward to try to conduct an investigation to fulfill the obligation that the case has placed on us.

I recognize that there were -- that we have the OLC memorandum, but we know that they were themselves a product of misinformation being provided.

I recognize that we have the SSCI report, but I know that the SSCI report was based on five to six million pages of raw materials and that we have a tiny fraction of that. I seem to remember .03 percent of that total has been provided to us, something on that order.

We don't have the names of witnesses who did these things. We have unique functional identifiers. We do not have a wealth of information with which to make these cases, both with respect to suppression and also, frankly, with

respect to mitigation. We don't have that, and I disagree sharply with the government about that.

And I will say in the process -- well, let me put it this way. Our desire to do -- to conduct this investigation is critical to whether this case is -- will be viewed in history as being valid and -- or as something much less than valid.

None of this is intended to play down the extent of suffering that people experienced as a result of September 11, and that they continue to experience. None of it is for that reason. None of this is for the purpose of putting the CIA on trial, as such. It's for the purpose of making out a mitigation and a suppression case, and that's all.

I don't know if the military commission, during the course of your practice -- and I tried to remember the discussion we had during the voir dire, but I've done a number of murder cases. And one of the things that the defense always does is they say, "We don't need to show those photographs. Motion in limine. Don't show those photographs, they will inflame the passions of the jury. I stipulate. I will stipulate that there was a death, that the victim was killed, because I don't want those pictures to be shown. I'm afraid they'll overwhelm the passions or the feelings of the

jury."

And the answer always is, you know, "Motion denied, Mr. Nevin. The Government, the State is entitled to put their case on."

And I will say this is the other side of the situation. But more fundamentally I would be a walking violation of the Sixth Amendment if I entered into stipulations -- and set aside the question of the -- of my imagination not being sufficient to contemplate all of the things that happened, fair enough; and -- and my client is not a reliable -- you don't have to read very far into these materials to know that he may have been there, but he is not a reliable reporter or interpreter for organizing all of the information about what happened.

I would be a walking violation of the Sixth Amendment if I entered stipulations without having conducted a thorough and appropriate investigation.

And so I guess I appreciate your hearing me out, first of all. And second, let me just finish by saying I think I have probably said many of the things that I just said here in much the same way on several occasions to Judge Pohl. Judge Pohl heard all of this in excruciating detail.

And I wrote -- when I saw the government's reply, I

think it's WW, I wrote at the top of it, "This is not a reply. This is just stating all the same arguments again." And I think really fundamentally at the bottom of this -- because it is a motion to reconsider, at the bottom of it, they haven't met the standard for reconsideration. So I join the others in asking that you deny the motion.

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

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

MJ [Col PARRELLA]: Ms. Bormann?

LDC [MS. BORMANN]: It will be Mr. Perry.

MJ [Col PARRELLA]: Thank you.

DC [MR. PERRY]: Good afternoon, Your Honor.

MJ [Col PARRELLA]: Good afternoon.

DC [MR. PERRY]: I apologize, I am dealing with a cold, but I will try not to -- to be too soft.

Certainly on behalf of Mr. Bin'Attash we join in all of the argument of Mr. Connell on behalf of Mr. al Baluchi and now the comments and argument of Mr. Nevin on behalf of Mr. Mohammad, so I'm not going to go through all of that either.

I'm going to highlight a few things in particular, in that our brief in response to the motion to reconsider focused particularly on the standard of review for Your Honor on this

motion to reconsider and how the government has failed to even reach that threshold for Your Honor to even get to the point of reconsidering 524LL.

And the first response I have to the government's argument today would be that they mischaracterize 524LL from the get-go as a suppression order. It is not an order on a motion to suppress; it's not a suppression order. It's -- it's written right on the document.

It's an order denying a motion to dismiss by Mr. al Baluchi and granting a request by the government for protective order, and fashioning a remedy therefrom based on, you know, the result of that protective order and the recognition that the government's request for that protective order would disallow the defense to exercise their legal and ethical duties to investigate and ultimately present a motion to suppress.

So when they filed this motion to reconsider, all right, it's -- we've dealt with several motions to consider before, and just in my time on this case, I think Mr. Connell in his slides pointed to a few of them. We took up one just yesterday in 360.

Not all motions to reconsider are the same, and R.M.C. 905 recognizes this and allows for different standards

to be applied, given the nature of the ruling that is being asked to be reconsidered, and given -- if that ruling is subject to interlocutory appeal.

And so in this instance, where an order, such as the one in 524LL, allows the government to do an interlocutory appeal for two bases basically, then that standard is not -- in our estimation it would not be a flexible reconsideration just for any good reason, but more a higher standard as justice requires.

The government disagrees. In their reply they say that that's actually a lower standard. Frankly, at the end of the day, our position is either -- on either standard the government fails to put forward a sufficient pleading to trigger reconsideration.

But what Your Honor may be asking is what does "as justice require" mean. Well, in the cases that came after the Sunia decision by Judge Reggie Walton in the D.C. District Court, it's been understood that that means the court patently misunderstood a party and made a decision outside the adversarial issues that were presented by the parties.

And I think Mr. Connell in his comments earlier today dispelled any notion of that and tracked it from the very beginning, which was the colloquy between the commission and

Joanna Baltes, way back, about our defensibility to locate, interview, and meet with witnesses. We could talk to any witness about any topic any time. That was the state of play. But over the course of time that state of play changed in a big way in September 2017. And as a result of that, we had a motion to dismiss filed by Mr. al Baluchi.

So -- and in the context of 524, these adversarial issues were brought to this court, were litigated thoroughly and presented to the court thoroughly, all to the culmination in July of 2018, where the government is saying, "No mas. We don't need to talk about this anymore. We got it." You know, so to suggest now to Your Honor in a motion to reconsider that somehow the party -- that the commission misunderstood the parties or made a decision outside the adversarial process is not supported by the record.

The other ways to describe "as justice requires" are that the commission made an error not of reasoning, but of apprehension. It's kind of another, just another way to say that and where there has been a controlling or significant change in the law or facts that have occurred since the ruling.

And, of course, the government does not cite any new law or controlling decision by the D.C. Circuit or any other

court that would have jurisdiction over these proceedings that fundamentally changed what we were doing in 524. There's been no change in the statute. There's been no change in case law.

So given that, our position is Your Honor should stop right there; that the four corners of that document, 524NN, do not provide a basis to reconsideration.

And so my other comments are more directed to what the government said today, and that is -- and we've heard this now from now Mr. Nevin as well, is that somehow the 2.d. documents that are a result of the 10-category construct of 397F are sufficient.

It's important to remember, Your Honor, that when you are looking at this record to see if the government has put forward what's necessary to trigger reconsideration, that it's not just 524. It's 397. It's 308. It's all these different appellate exhibits where the parties with the commission were hashing out exactly how discovery was going to be provided to us, and we were a lot of times fighting all the while.

The 10-category construct just by itself was not something that certainly Mr. Bin'Attash agreed to. We objected to that. But it was over our objection that the judge granted that proposal by the government and entered that order.

But given that order and the provision of those documents, looking at what they provided -- and you have seen that today in the presentation by the government. I'm not going to again go into just the detail there.

But from Mr. Bin'Attash's point of view, it's not just what do they mean when they say "Mr. Mohammad clearly hated it." It's being able to meet with those individuals that were there leads to more information and more individuals. We can't just take a 2.d. summary. As defense attorneys, under the ABA Guidelines for the appointment and performance of death penalty counsel and the Sixth Amendment to the Constitution, we can't just take a summary that's given to us and say that's the be all and end all of everything there is to know about this event.

Our duty, our legal and ethical duty, is to find out everything and anything we can about that event, not just who was there, but what other information those individuals would have that would lead to other information. It's a complete independent investigation. And as I think Mr. Connell -- Mr. Nevin said earlier, to do anything other than that is a per se Sixth Amendment ineffective assistance of counsel.

The idea that there could just be a stipulation that solves all this is something that has been talked about before

in this commission several times. And the point I'd like to make about that is you -- you cannot engage in drafting a stipulation with the government in a vacuum without any investigation or information that would be necessary to inform your ability to draft anything.

In other words, just based on the summary that is provided in 2.d. would not allow any sort of meaningful development of a stipulation. And as Mr. Connell said earlier, his imagination doesn't come close to what was going on in there, nor does mine. And again, to do anything other than a full investigation before you would even consider stipulating to anything would be a Sixth Amendment violation.

And the comment that there's no secret -- the government said there's no secret about what happened to these defendants, to our clients, to Mr. Bin'Attash, is just -- it's just not true. It's still a secret. It's still very much a secret. It's still classified, exactly what happened to him, by whom, how exactly, because clearly we don't have that information.

Even though we all have the highest clearances here, we have not been provided that information. And the government, through the use of their protective order, has made sure that that information will not be ever given to us

or obtained by us through our own investigation. So to suggest that it's just abundantly clear exactly what happened here is just patently false.

And so much like earlier this week when Mr. Montross was describing this in the context of another -- another series, I think the commission gave us a glimpse of perhaps his evolving process on this in January 2018, and specifically on 10 January 2018, in a discussion with Mr. Connell about the timeline, the detainee timeline. And so -- you know, and I'm going to quote it again because it makes perfect sense.

You can sense Judge Pohl's frustration that the understanding that he had previously where the state of play was yes, the government is going to be providing substitutions and summaries through the 10-category construct, but we would also, as defense attorneys and defense teams, have the ability to do our independent investigation, and through that we would have due process or at least the attempt at it at some point -- you could tell that Judge Pohl was realizing that that's not perhaps going to be the case.

In January 2018, and this is at 18444 of the transcript, "Depending what term you want, torture on one side, enhanced interrogation technique, but it seems to me" -- and this is line 10 of page 18444 of the transcript -- "but it

seems to me that we have -- rephrase that. There should not be difficulty in establishing a timeline. I'm not looking necessarily for you to do this Mr." -- I believe he was looking at Mr. Connell, but in the transcript it looks like it's Mr. Connell, but my recollection is he was looking at the government, Mr. Ryan or Mr. Trivett -- "of when he was in custody and whether day by day each time an EIT was applied, each time whatever was applied or am I mistaken?"

Down farther on line 17, "We're going to see this over and over again. We have tap-danced around how they were treated, and it's all classified. I got that. But it's -- you know, we're going to get there, so let's get there. That's my point."

It became clear in the government's proposal for the protective order -- and actually it was clear before that in September 2017 with the memorandum by Trial Counsel, Mr. Jeffrey Groharing, that we weren't going to get there. I think the defense teams probably knew that before Judge Pohl did.

But the moment Judge Pohl did, he gave the government the option. And Mr. Connell brought this out perfectly clear in his slides: "We can go down this road, Government, but there are -- if you go down the protective order route, there

are potential sanctions."

And so that's the choice they were given, it's the choice they took. They proposed the protective order. They got, I would submit, exactly what they wanted. They wanted to keep the secrets. They wanted to keep the secrets; they got to keep the secrets. They got to keep the defense stymied from ever learning truly what happened to Mr. Bin'Attash.

But there is a cost to that. And it became clear to Judge Pohl, through the development of the pleadings and the argument all through 2018, that the defense were incapable of getting the information necessary under the due process clause of the United States Constitution, under the MCA, 949j, which grants us the ability to have access to witnesses and evidence comparable to an Article III court, under international law, that we were not going to be able to get there any longer; and that a remedy had to be fashioned. And that remedy was the exclusion of the 2007 to '8 statements elicited by government agents.

Could I just have one moment, Your Honor?

MJ [Col PARRELLA]: You may.

DC [MR. PERRY]: Nothing further, Your Honor. Thank you.

MJ [Col PARRELLA]: Thank you, Mr. Perry.

Mr. Harrington.

LDC [MR. HARRINGTON]: Judge, for a number of years from our side of the room we have listened to the prosecution defend Judge Pohl in his decisions with respect to classified information.

And this morning Mr. Groharing put up slide number 9, which was an exhibit from AE 524WW, page 14, footnote 21, which listed a whole series of orders made by Judge Pohl which the prosecution apparently accepted. There were some instances where they presented classified information with summaries to him and Judge Pohl requested modified summaries or additional information in summaries, which they complied with.

But we reached a point where Judge Pohl didn't do what they wanted him to do, and so now it's treated in a different way. But rather than the argument Mr. Groharing made that this was an aberration, or something wrong with Judge Pohl, I think that the exhibit that he put up demonstrates the care and concern that Judge Pohl showed with each of these, and that he made an independent determination on each of these, including the decision that he made in this case. And that, coupled with the decision that he wrote, showed the care that he took in his thought, not only with the legal reasoning, but also the factual reasoning.

Judge, I just want to say a word about what's kind of hidden in the background here of the importance of some of this -- of what is going on here. The concept in the suppression of statements of attenuation, where when something is done improperly or wrong in one situation, which may make a statement taken from an accused suppressible, that a later statement can be admitted because it's attenuated from the first.

And that underlies the argument that the government wants to make here. They want to attenuate what happened in the black sites from the statements that were taken in early 2007.

And we have lived with, for years, this euphemism of what's called a clean team. And apparently that's to separate the agents who did the questioning in February of 2007 from those who did the questioning in the black sites, and I guess they would be called the dirty team.

But one of the -- one of the arguments here is that there really is no attenuation, and that's a decision that you're going to have to make, which means that you're going to have to hear things that happened in the black sites and make a determination of whether it was attenuated, whether it was even possibly -- could it be attenuated.

And we have a situation where you're going to hear about psychiatrists who examined our clients, certainly my client, where medication was given to him before the clean team statement, heavy-duty medication given to him by psychiatrists who never asked him one question about where he had been the four years before he came to Guantanamo or one question about what had happened to him before he came to Guantanamo.

And so we have a situation where Mr. Groharing says, bring it on. You make up whatever you want to bring on and bring it on, and we'll stipulate to it. But the purpose of that is to keep it as dry as he possibly can.

I listened to him this morning read the excerpts from the FBI -- or the CIA reports about Mr. Mohammad. And I said to myself, "Did you" -- to myself, "Did you get any kind of a visceral reaction from that?" And the answer from me was no. Now, maybe that's because I have been dealing with this stuff for a long time.

And you, as a judge, are not going to decide a case based on emotion. But emotion is important in this, because emotion helps for you to understand intellectually how you have to analyze this.

And I thought to myself, if I were going to write a

novel, is that the way I would write it if I wanted somebody to understand how it happened? If I was a plaintiff's lawyer and I went in front of a jury and I wanted them to award my client damages for the suffering that my client incurred in some accident case or whatever, is that the way I would present it to a jury? The answer is no. You have to be able to present the feelings to the jury.

And a couple of references have been made to Mr. Castle. And before Mr. Castle came, I saw that he was Acting General Counsel to the Secretary of Defense of the United States, an enormously important position. I read a declaration from him. Whether I agreed with it or not, written out logically and professionally and all the rest of that.

And Mr. Castle came in here, and after spending 8 to 12 hours with Mr. Ryan, couldn't remember anything. He had the ability to go look for things, get information from people to refresh his recollection and couldn't do it. On the witness stand he told us he was present when Attorney General Jeff Sessions called Secretary Mattis, got him out of this enormously important meeting, and he couldn't remember anything about it.

It's not just a question of trying to attack

Mr. Castle and his memory here, but we didn't know that he was in that meeting. We learned that when he was on the stand. We don't need to be learning things from witnesses while they're on the stand if there's an ability for us to find that out ahead of time. And it seems to me that it's an enormous waste of your resources and your time if we are doing discovery while we are questioning witnesses here in the courtroom.

MJ [Col PARRELLA]: But on the other hand, Mr. Harrington -- I mean, I know this has been discussed in the past, is -- obviously the commission can't direct interviews. I mean, it would be ideal, but I'm sure everybody is aware, given who these individuals are, that they probably are reluctant to agree to defense interviews for very obvious reasons.

So with that, I mean it seems to the commission that if they are relevant and necessary, ordering their production to testify may be the only way to get that testimony. Would you agree?

LDC [MR. HARRINGTON]: It can be, Judge, but the decision from Judge Pohl puts the burden for that right back where it belongs. Not with you, but with the government, to make this decision of whether they want to go back and revisit this

issue and see if they can talk to their client about a different way forward with this. And that's what Judge Pohl decided: You have a choice. If you want to claim this, then there is a price to be paid. And that's what he said.

And we have to go back to the premise of this. I mean, we talked -- I read the rules here and attempted to learn the rules about military courts and all the rest of this stuff. I'm trying to keep people on an equal footing, right?

But go back to the principles of the right to present a defense, to compulsory process, which doesn't exist here. It doesn't exist in this court. Those are fundamental Sixth Amendment Constitutional rights which should be the starting point, not something that we have to come in and argue for. They should be the starting point. And I think that's what Judge Pohl's decision does, is it validates that and it recognizes that.

Judge, what we have in front of you right now is we have an appeal from the government. Unlike us, when we lose a decision, we can't appeal. They have a remedy here. This is not a reconsideration motion; this is an appeal. And it's not placed in the right court. It belongs in a court that they have the ability to go to.

Thank you, Judge.

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

Mr. Ruiz, and before you start, I'd just like to make a comment. I mean, I don't want to inhibit the defense's ability to continue to get some work done while we're doing these oral arguments, but just as a reminder, to keep the distractions to a minimum. The in and out of court, it's frankly disrespectful, I think, to those who are up here at the podium.

So I understand that there is going to be some movement, some discussion, but it's starting to become a little bit of a distraction, at least for the commission.

Thank you, Mr. Ruiz. You may proceed.

LDC [MR. RUIZ]: Yes, Judge.

Judge, in the 524 series, the relevant pleading on behalf of Mr. al Hawsawi would have been 524T (MAH). It was filed on April 9th, 2018, and at the time was our response to the government's notice of proposed protective order.

In that pleading we set forth our relevant objections before the commission as to why we thought that those restrictions would irreparably impair our ability to prepare our case and to do the type of investigative function that we needed to do, particularly in respect to witnesses.

The way that we view this motion and this decision by

Judge Pohl is we view it as a long-running conclusion to what we on Mr. al Hawsawi's team tried to put before the commission as the problem of national security and the conflict of national security, the tension, for lack of a better term, between national security claim and due process.

And I would also direct your attention, Your Honor -- we cite this in the pleading that I have just referenced as footnote number 1 to our motion series 367 because we think that this ties back into the context, the nature, and certainly the history of this case.

So AE 367, very briefly, was in fact the motion series filed by Mr. al Hawsawi that placed at issue the tension, the inherent tension between national security interests and due process violations as we saw them time and time and time and time again.

Now, I would subject -- I would submit to you, please read it. It's a lengthy series. However, I think that the most salient point to come from that is that it was all about this tension. And time after time after time after time, different issues arose that we supplemented that motion with, but it was always essentially the same issue. Different facts, same issue: The conflict and the tension between national security interests of the government and the tension

between the due process rights of a defendant in a capital case.

And that is what this decision is. This decision by Judge Pohl is a solution, is somewhat of a resolution to that conflict and that tension between national security interests and due process rights of Mr. al Hawsawi. It didn't come in 367, but it came in some measure in this ruling by Judge Pohl.

And I understand your question. Counsel have, I think, responded to your question about the suppression issue and why not wait until we get to that suppression issue to see what's actually available. I'm not going to beat the fallen horse, but I do want to accentuate and affirm what my colleagues have said that this really is not a suppression issue that flows from an analysis based on coercion or torture or the attenuation of the statements.

There is certainly -- there was certainly that potential for that type of issue, but that's not what this is. It's not what it was. This was a remedy to resolve that inherent tension between the national security concern and a due process right violation, and Judge Pohl balanced those interests and came up with this determination.

The part that I want to focus on is one that we touch on in 524T, which is not so much the details that flow from

the witnesses. I think you've heard -- and I agree and concur with the argument about the rich and the vivid narrative. Those are the details that flow from the witnesses.

What I want to spend some time talking to you about is the witnesses themselves and why the witnesses themselves and the restrictions that we have for interviewing those witnesses cannot be ever reconciled. Quite frankly, it couldn't be reconciled even at a suppression hearing, and the reason for that is the prevalent and everlasting question of torture.

Now, I've heard the discussion of torture along a great spectrum. And I've heard some people say, "What does torture have to do with anything?" I've also heard people say, "Torture in this case is everything. It's the central issue in this case." For my purposes, my position, our position on Mr. al Hawsawi's team is that neither of those positions quite get it right.

It's not the central, it's not the only issue in this case, but it's also not an issue that lacks importance, the torture of the accused in this case.

As I looked at it, there are primarily a number of areas where it really becomes extra-important. One would have been the suppression of the statements of the accused, and the

question of, as Mr. Harrington has talked about, attenuation between CIA interrogations and what taint flowed to the FBI interrogations. So the suppression of the statements made themselves.

And then, of course, we have the mitigating aspect should Mr. al Hawsawi ever be convicted of anything, which is, of course, a question that will be settled perhaps one day if there is a trial.

And there may be others, but as I saw them, these were really the two areas where torture really entered into the equation, and therefore, the credibility of these witnesses as it related to each of these issues, and the extraction of vivid details from these witnesses.

But the problem that we identified for the commission and on behalf of Mr. al Hawsawi was the problem of investigating the background of these witnesses to test their credibility, to assess their bias, reasons they may have for why their testimony should be less credible, reasons why their testimony may be more credible, because when we assess a witness, we assess them across the wide degree of spectrum.

Are they likely to come across credibly? Is there evidence out there that supports that they will be a credible witness? Have they made public statements that would

undermine their credibility? Have they written books that would undermine their credibility or support their credibility? Have they posted statements on social media, been present at certain rallies, taken positions in public that would undermine their credibility when they come into this courtroom and testify under oath?

We can't do that in this case. It's an irreconcilable conflict. The restrictions that the government has put on our ability to analyze the background, the credibility of these witnesses before we engage them in cross-examination, to give meaning to the confrontation right in the Sixth Amendment promise, we can't do it under any circumstance.

I think Judge Pohl recognized that, and he recognized that necessarily in the context of these witnesses in the context of a suppression hearing and how the defense could possibly be in a position to really confront witnesses even in the suppression hearing to talk about their bias and their credibility or to support or to detract from that. There is no mechanism, and there was no mechanism in place for that eventuality.

And that is something that we -- that we certainly highlighted in argument to Judge Pohl, certainly something

that I think was a remedy and a balance. Because the important takeaway, I think -- and one of the important takeaways, at least from our perspective, Judge, is that I view this as a loss in a way.

I know the government looks at it as a loss in their respective position because their statements were suppressed, but the remedy we sought, Mr. al Hawsawi's team, all along was dismissal of the charges. The remedy we sought in the 367 series was dismissal of the charges because of the question that remains and will remain unsolved, which is the fact that national security interests, as they have been applied in this case -- and that's why we have seen all of the shifting, all of the shifting definitions of what is classified, what is not classified -- and that's why a careful analysis of all of Judge Pohl's proclamations throughout indicate that it was an issue that continued to grow and continued to impact the court's analysis of the issues that were before it.

We asked for a dismissal because our position is, has always been, and continues to be that this case cannot reconcile those differences. It cannot reconcile both interests. And it's not to say necessarily that the government doesn't have a legitimate interest in protecting what they view as classified evidence, but there is a

competing interest in the due process aspects of this case, in a capital case where you have heightened scrutiny that is required. Capital jurisprudence requires, as our highest court has -- and let me be clear about this, and so that becomes the question. That was the underlying climate and that was what was driving this analysis.

My colleagues have done a terrific job of laying out for you, I think, the progression and the analysis of the issues and the warnings, the repeated warnings that the government had, that if they chose to go down a particular path, there were going to be repercussions or there were going to be possible remedies that the court would adhere to in that sense.

And even General Martins at one point in open court said, "We are not going to provide the names of the witnesses. We are not going to provide the locations of the sites." And he told Judge Pohl, he said, "We're willing to absorb the appropriate penalties for not doing this."

Well, Judge Pohl issued what was an appropriate remedy in this case and in this issue, and it was a suppression of these statements. And in doing that the government, not true to his word, was not willing to absorb those appropriate remedies because here they are, once again

essentially saying, Judge, if we knew it was going to be this bad, we would have tried to do more things. We would have tried to come up with another set of conditions or tried to meet the defense halfway.

And the commission should just say this is it. There are no more second chances, there are no more third, fourth, fifth, sixth, seventh or eighth chances. Judge Pohl carefully considered all of the evidence, all of the issues before this commission, and arrived at what he thought was a balance, and we think struck an appropriate balance.

To some extent, granted, as I've said, we do think dismissal would be an appropriate remedy because of the irreconcilable conflict that we have with our ability to test the credibility of these witnesses in a cross-examination, confrontation, Sixth Amendment analysis.

That's all I have, Judge.

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

Does defense counsel who have their clients here -- it looks like if we break now we could take a 15-minute break and incorporate prayer into that; is that correct?

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: Okay. So we will go ahead and take 15 minutes and we will come back in. The commission is in

recess.

**[The R.M.C. 803 session recessed at 1439, 15 November 2018.]**

**[The R.M.C. 803 session was called to order at 1505, 15 November 2018.]**

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

Counsel, I'd note that the commission directed a 15-minute recess. We're now at 25 minutes. I did so on the representation of counsel. So I just please ask in the future that you accurately represent; otherwise -- I want to continue to accommodate, but there's limits.

LDC [MR. NEVIN]: Yes, sir. I apologize. It's really my fault. And I understood what you were saying, and I'll do everything I can to make sure it doesn't happen again.

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

Okay. So with respect to 524, just for the parties' edification, my intent is to allow the government their rebuttal argument since they have the burden, but we will not be doing any further argument because I understand that we still have -- we still have to get to 555. And I know the importance of how much that means to everybody to have an opportunity to oral argue that in open court, so I want to

afford the opportunity to do that. Okay.

With that, Mr. Groharing.

TC [MR. GROHARING]: Thank you, Your Honor, and I only have a few points to make. First, I apologize to the translators. I understand I was talking too quickly and wasn't paying attention to the light, so my apologies on that. I'll do better this time.

Judge, the first point I'd like to make is that I heard a couple of different counsel comment on the fact that it's the prerogative of the government to choose whether or not to disclose. What that fails to take into account is the whole purpose of why CIPA was enacted.

That's the exact dilemma that CIPA was enacted to fix, where we had classified information that the United States could not disclose, and there had to be a means to come up with another solution to still allow justice to be achieved in cases while protecting the rights of the accused when classified information is involved.

That requires judges to engage with parties in a clear manner to come up with a workable solution. That did not happen here.

What the judge must do is clearly state what the costs are; in this case, disclosing the identities of CIA

officers. It's at that point that the process starts, which really didn't happen here at all.

I agree with counsel that judges should be hesitant to reconsider, but in this case it's necessary to correct clear errors and the manifest injustice that would result from leaving 524LL in place.

MJ [Col PARRELLA]: Mr. Groharing, just to clarify, the government -- what's the government's position, are we under 949p-4 or p-6 here?

TC [MR. GROHARING]: The United States sought relief under 949p-4. We invoked 949p-4 to request the protective order, M.C.R.E. 505(f). We actually invoked M.C.R.E. 505(e), (f) as well as 701 in our 524L, the motion for the protective order.

What I would say is you have to look at all of the provisions of CIPA, all the provisions of M.C.R.E. 505 together, holistically, and protect information cradle to grave throughout the course of the case.

So there are certainly some protections that would overlap with different phases of the trial. I think you can make an argument that p-6 would apply under these circumstances. The authority the government, though, thinks is most appropriate is p-4 or M.C.R.E. 505(f).

MJ [Col PARRELLA]: But when we're talking about

inhibiting the defense's ability to investigate and the subsequent disclosure potentially of the identities, would that not be under p-6?

TC [MR. GROHARING]: I think you could get there eventually. What 701(f)(7) says is that once the government is aware of the classified information at issue, and the government seeks a protective order to propose a summary or substitute to put the defense in a substantially similar position, if that fails, that takes you to the sanctions that are held in M.C.R.E. 505(h)(6).

But that hasn't happened here. We are way before that process. We are still at the point where the judge has not even said what classified information is at issue that we are required to turn over. So that's how you look at this in the context of the government's request for a protective order.

Assuming you take the protective order out of the equation, the protective order goes away, at that point the judge could then advise the government of what effect, if any, there are on classification guidance that the government has given the defense to follow. Does any of that prevent the defense from, in the judge's mind, receiving a fair trial?

At that point, again, the United States would be

allowed to propose some procedure that would allow the defense to accomplish what the military judge believes is necessary while still protecting that classified information.

Our objections are that we fast-forwarded to the end of the sanction process without going through any steps -- or the appropriate steps along the way. And I think that goes to my next couple of points that I wanted to make.

Mr. Connell talked about both the March arguments and the April arguments. We -- and I think a careful review of the transcript doesn't support his argument that all parties agree that we were where Mr. Connell now thinks we were in the process.

That's a great position for the defense to take now, after they've received the windfall of a suppression order. But it certainly wasn't the clearly articulated position by anyone at that time, other than a few comments in arguments, but it certainly wasn't the position by the military judge that's reflected in the record, and it wasn't the position by the government. So I would ask the judge to take a very careful look at those transcripts, to the extent those arguments have been made.

Briefly, Mr. Connell mentioned 524V Attachment B. I would ask the judge again to review those pleadings. That

request for advice that was provided by the defense was very broad in nature. The government responded to that specific request in a very broad fashion as well.

There certainly are circumstances where -- and he refers to the double-blind possibility where there could be an identification used that wouldn't disclose classified. But in the context of how the question was asked, the response was appropriate and it would not reflect inconsistent guidance. So that's 524V Attachment B. It contains both the request from Mr. Connell and the government's response.

With respect to the inconsistency of rulings, that was addressed in a footnote in the ruling. This is a critical issue, a critical matter for the judge to resolve in squaring the order in 524LL in the ruling and all of the prior decisions. With respect to the judge, it warrants much more attention than a footnote reference in this very important order.

The protections that the government sought in all of those numerous orders that we achieved from the judge were based on declarations filed that explain the significance of the information in protecting the identities of CIA persons. It appears in 524LL that the judge threw that aside and decided that protection of identities is no longer required.

And the effect of that would be to reverse all of those prior rulings, and he appears to have done so without even mentioning it, without even acknowledging that that's the effect of his order.

And again, I go back to parties should not be guessing what judges are doing in orders. It needs to be clear. All parties need to understand, parties and appellate courts, what was done so they're able to analyze it and take appropriate actions.

The government respectfully disagrees with the level of detail. Again, we're talking about details that you would need, Your Honor, in deciding a motion to suppress. That's what is at issue here. That's what the military judge relied upon to issue his ruling.

And so there are tremendous details, and certainly of a nature that would put the military judge in a position to understand the circumstances of detention and the effects that detention has had. And as we heard from counsel, there will be plenty of experts coming in to talk about what those effects are in the present day.

And so even if they had no other information, which they certainly still have the opportunity to follow the Protective Order #4 protocol, to learn additional information

or call witnesses, if necessary. That's ample information and ample ability to present whatever evidence they need to present to file a motion to suppress and litigate that matter.

Counsel referenced -- they've said this a couple of times about, you know, some CIA officer who's written a book whose connection with the CIA RDI program is classified or some kind of suggestion that there are folks out there writing books who are the people that we're talking about. That's nonsense.

The identities that we are trying to protect here are not people who are out writing books. They do not want their identities disclosed. So that is a red herring, and, quite frankly, there has never been any evidence to suggest that anyone like that actually exists with respect to this case.

The government has never said no to live testimony. There was a reference to that -- that the military judge might believe that's a change in position from the government. I don't recall at any point ever the government indicating that we are opposed to live testimony at all costs. In pleading or on the record, I am not familiar with the government ever taking that position.

Judge, there's also some confusion on just the timing of certain matters. Mr. Connell represented that the

September memo, the September 2017 memo where we provided the RDI index and the protocol to contact witnesses was in response to AE 502. That's simply not the case.

That memo was the conclusion of approval of discovery, application of Bates numbers to that discovery, indexing of all of those materials, and assigning UFIs where appropriate to the particular discovery. It had nothing to do with 502 as far as when, why or how that was issued.

And our response in 502 was if you want to suppress these statements, you need to file a motion to suppress. That was the position that the government had taken. Mr. Connell had indicated he wanted to call these witnesses but had not filed a motion to suppress the testimony.

Our position is if we are going to have a motion to suppress based on the voluntariness and reliability of a statement, it needs to be done once. We're not going to do it every time that testimony would be necessary for every particular motion. That was our written response to his request in 502.

Mr. Harrington talked about the necessity to have a visceral reaction to anything presented. I would respectfully suggest that's inappropriate for a military judge. As you well know, these issues should be decided on the facts, not on

whether or not testimony or evidence is presented in a visceral manner to attempt to convince the judge of the merits of a position. It should be simply based on the facts, whether things happened, what effect that may have had on somebody; ultimately, with respect to the statements, whether or not any of the accused in 2007 could give a voluntary and reliable statement when questioned by the FBI.

Mr. Harrington also mentioned writing a novel. You know, he would want to write this more like a novel. We've asked him to. Go ahead and write your novel, Defense. We will likely agree with everything that's in it, agree that it's true, and let them use it for whatever benefit they feel it gives them in the commission. Again, the only caveat we've had is that it's tethered to reality, which is quite a lot of leeway for the defense to have.

Mr. Harrington mentioned the compulsory process does not exist. Obviously, that's not the case. The judge has the ability to compel witnesses. Defense can follow the 703 process and require witness production in this commission. It's happened a number of times already in this commission. You have every bit the ability to do that to make sure witnesses are here, if necessary.

Mr. Ruiz talked about witness credibility. Judge,

you need to remember that the witnesses that we're talking about are defense witnesses. These aren't government witnesses, none of them. We don't intend to call any of these people as witnesses, and so their bias really isn't in question.

They're very much situated like the witnesses in Mezain, I would suggest, and there are, you know, options for the judge. To the extent that the defense wants to show bias, they can do so. An instruction might be appropriate. If they become an adverse witness, cross-examination as opposed to direct examination, might be appropriate.

The government has no intention of undermining anything that these witnesses would say on behalf of the defense. Again, we're not contesting these matters, and so we don't intend to impeach them. So the idea that the defense needs to go and conduct extended background research or things of that nature on covert CIA officers because they are testifying on the defense's behalf is simply not required by the law.

Finally, Judge, Mr. Harrington mentioned that this motion to reconsider was in the wrong court; that it should be an appeal, not a motion to reconsider. And we respectfully disagree.

What we are trying to do is give the commission an option to correct what are clear errors that were committed by Judge Pohl, and I say that with no disrespect to Judge Pohl. Judge Pohl served on this case for a very long time, and he was fond -- and you'll see over and over in the record of saying that he was a process guy. And what I would say with respect to Judge Pohl is that in this case the process failed; that he didn't follow the required process.

When you look at the order and when you look at the arguments and all of the pleadings on this, the parties are grasping to try to figure out what the judge did in this order. That should not be the case, especially considering the significance of what's at issue in this motion.

It should not be the case that parties are grabbing a sentence here from the record or a sentence there from the record, a sentence from the order. The parties need to know exactly what the judge did, and you simply can't by looking at this ruling. And I don't say that meaning any disrespect to Judge Pohl. But the United States has a right to know what classified information is at issue so we can weigh our options, and we were just prevented from doing that in this case.

So I disagree that appeal is the correct place for

this motion. This is the place right now. It can be fixed. We have given you a roadmap to fix it, and we would ask you to do that and avoid the delay that would be associated with an appeal.

In reality they would -- the Court of Military Commission Review would have this order and they would be struggling to make sense of it just like we are. And the likely result of that, a likely result of that is to kick it back down here after many months and wasting valuable time for this commission.

So, Judge, you have the ability to fix this order. We would ask that you reconsider the order and issue Protective Order #4, rescinding the portion that suppressed the statements to the FBI.

Judge, those are the only comments I have, unless you have questions.

MJ [Col PARRELLA]: Mr. Groharing, with respect to your last point, Mr. Connell used the term "horizontal deference," and it's also, I believe, in Mr. Harrington's brief to the court, not that specific term, but the similar concept. Then you made the point that Judge Pohl served on this case for a very long time.

So from the government's perspective, does it make

any difference that this motion to reconsider is now before an entirely new judge?

TC [MR. GROHARING]: Well, I don't think so, Your Honor. I mean, I think it would be easier to, with the clarification portion of it -- again, I don't know what, if any, access the commission has to Judge Pohl. Obviously, it would be easier for Judge Pohl to opine on some of those particular questions that the government asked in 524NN.

MJ [Col PARRELLA]: I guess my point, though, is legally, under that concept of horizontal deference, should I afford horizontal deference, for lack of a better term, to Judge Pohl's ruling?

TC [MR. GROHARING]: I don't think so, Judge. I think you should look at it like any other motion to reconsider, whether it's by a prior judge or by a subsequent judge.

What -- part of what makes some of the errors most egregious, though, is Judge Pohl's time on the case and apparent disregard, or lack of consideration of many of the things that have happened throughout the course of the case, the history of the case, the inability to square all of these prior rulings by Judge Pohl with the present ruling. Some of that makes it more of an egregious error by the fact it's the same person that's issuing those two clearly contrasting

opinions.

So to answer your question, no, I think that the judge should look at it just like any other motion to reconsider, the same as if you would have issued the order in the first place.

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

TC [MR. GROHARING]: Real briefly, Judge, can I be excused from the courtroom? I have a matter to attend to elsewhere.

MJ [Col PARRELLA]: You may.

Okay. We will now take up the matter of AE 555. What I would like to do is just to focus counsel. This is obviously not the first time we've heard oral argument. There's been some on the base motion, some on some collateral motions, some orally here in court, some in writing.

So what I'd ask for, to the extent that you can focus comments, I'd ask they be focused specifically on Mr. Castle's testimony and how that relates to where we were prior to that ----

LDC [MR. CONNELL]: Yes, sir. We can do that.

MJ [Col PARRELLA]: ---- as opposed to just rehashing your earlier arguments.

LDC [MR. CONNELL]: Sir, I will be using slides that I prepared before, but I rewrote the argument entirely to focus

on Mr. Castle, to make him the focus.

MJ [Col PARRELLA]: Thank you, Mr. Connell. So we can go ahead, if you have those ready, we can bring up the document feed.

LDC [MR. CONNELL]: I would request that the military commission -- I proffer to the military commission AE 555JJJ (AAA), which are the unredacted version of the slides. The military commission and the parties have those. The redacted version of the slides is AE 555JJJ (AAA Sup), which is DISO Exhibit 555-42. Those are the ones that we will be displaying, the redacted slides.

I would request the feed from Table 4 and permission to display the slides to the parties in the gallery.

MJ [Col PARRELLA]: You may do so.

LDC [MR. CONNELL]: Thank you. I'll start while that's coming up, Your Honor.

Mr. Castle demonstrated the critical importance of witness testimony in understanding the facts which surround the termination of Mr. Rishikof. We learned from him a lot of thing -- confirmed a lot of things that we thought were true, and we learned that a lot of things that the government had suggested were true were at least not true in the way that they had proposed.

Mr. Castle confirmed some key propositions proffered by the defense over the course of this litigation. First of those ----

Do you need a copy, sir? I'm sure we have one.

MJ [Col PARRELLA]: If you have some, that will be great. Thank you.

As you were, Mr. Connell. I have them right here. Very good.

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

One of those, which we only had evidence from Mr. Brown via Lieutenant Newman, was that Michael Vozzo was the primary Office of General Counsel liaison to the Office of the Chief Prosecutor. We learned that at 21141, page 21151, page 21164 to '65 and page 21172 of -- all citations will be to the unofficial transcript.

We learned, as the defense had argued, that there was a, quote, constant flow of communication between the CA and the Office of General Counsel. In the record at 21183, 21205, and 21258.

We learned that various elements of the Office of General Counsel were briefed many times on the COAs, including the pretrial agreements that ultimately formed the basis for the 12 or 13 December Management Memorandum.

The way Mr. Castle described it at 21205 was that he was always talking about his COAs, including the possibility of putting that in a written document, which is also at 21205.

We learned a lot more about the call from Attorney General Mattis to -- excuse me, from Attorney General Sessions to Secretary of Defense Mattis on October 13th of 2013 **[sic]**. We didn't learn everything, but we learned more. And we learned that Deputy Secretary of Defense Shanahan had authorized Mr. Rishikof to consult the Department of Justice.

So let's back up a little bit, look at this timeline and what changed in the testimony of Mr. Castle.

We learned early in the case, from the testimony of Lieutenant Newman, that President Obama was frustrated and he wanted solutions -- that testimony comes at 20775 to '78 -- where Mr. Work looked and he found Mr. Rishikof.

Mr. Work asked -- the Deputy Secretary of Defense asked Mr. Rishikof to report directly to him. And it's easy to see how Mr. Rishikof did so. He was reporting straight to the department -- the Deputy Secretary of Defense. That's found at 20794.

From the beginning, however, this was a classic power struggle between the Office of the Chief Prosecutor and its

ally, the Office of General Counsel, and the Office of the Convening Authority. The convening authority's office, on its part, thought that the Office of the Chief Prosecutor, I quote here, was out of control. That's at 2078 -- excuse me, 20780. And that the Office of General Counsel was inappropriately influenced by the Office of the Chief Prosecutor, also at 20780, especially through Mr. Vozzo, but also through Mr. Easton and Mr. Newman.

One thing we learned from Mr. Castle that we never knew was that in the Office of General Counsel, in fact reviewing his declaration that he submitted to this is, Karen Hecker. Karen Hecker, who is actually a prosecutor in this case.

If you look at AE 003K, that is her designation, her detailing as a prosecutor in this case. She has appeared on the record. And it demonstrates how closely aligned the Office of the General Counsel is with the Office of the Chief Prosecutor, certainly not something that we knew before.

So there are -- the position that I am here to advance today is that the military commission has plenty of evidence to grant this motion, but it does not have sufficient evidence to deny the motion.

If we -- there are a lot of witnesses which are still

pending before the military commission in AE 555R and 555CC. There are two -- there's one if we check off Mr. Castle. The -- I'll try that again -- check off Mr. Castle.

Judge Pohl had ordered in AE 555P that Mr. Rishikof testify as well. There are a lot of other witnesses that need to testify, and I'm going to be talking specifically about the relationship of these other witnesses that are necessary at least to rule against us on this motion, and -- I know that I have a fly crawling on my forehead, I apologize -- as well as the need for Mr. Rishikof and Mr. Brown especially to testify.

Moving quickly through the -- through the organization chart that Mr. Castle laid out for us, in January -- the personnel changes over time. In January 2007, Ash Carter, Secretary of Defense; Mr. Work is DEPSECDEF; Jennifer O'Connor is general counsel; Mr. Easton is legal counsel; but there remains the same, the chief prosecutor, and the trial team coordinator, Mr. Vozzo. Over time it changes with the change of administration.

Secretary Mattis comes in. Deputy Secretary Shanahan comes in. Mr. -- the legal advisor is realigned from the acting general counsel to the convening authority, and Mr. Castle takes over as acting general counsel.

In January 2018, December-January time frame, there

is a transition from Mr. Easton to Mr. Newman.

Now, one of those items, Mr. Vozzo, makes a significant appearance in the testimony of Mr. Castle, and also in the 26 January 2018 statement from -- excuse me, memo from Professor Jenks to Mr. Castle.

Mr. Castle testified about this basis or this idea that Mr. Rishikof had not acted appropriately by revoking a GS-15 DoD OGC attorney's workspace. Mr. Castle testified at 21262 to '63 that this was Mr. Vozzo.

And it's significant because it links up with the testimony of Lieutenant Newman regarding what Mr. Brown said about Mr. Vozzo, which is found at 20788 to '89 in the transcript; that this person, Mr. Vozzo, used CA spaces even though he was an essential part or an invaluable part of the prosecution team. And he did so -- he used his access to make disparaging remarks about the attorneys in the case.

This is one perfect example of our central theory as to why Mr. Rishikof was fired, that he exercised too much independent legal judgment; that he -- this is not -- it has never been our claim that he was fired simply because he considered pretrial agreements. It is, rather, that -- and this is a theme which runs through all of Mr. Castle's testimony as well as Lieutenant Newman's testimony, as well as

the testimony of the witnesses to come, that he acted with too much independence.

This is simply one example of how he, Mr. Rishikof, and Mr. Brown, wanted independence from the Office of the Chief Prosecutor and the Office of General Counsel by separating CA spaces from OGC -- from prosecution-aligned OGC attorneys.

MJ [Col PARRELLA]: And your position would be that that would constitute his legal judgment, like a judicial action or a quasi-judicial action?

LDC [MR. CONNELL]: Sir, our position as to what is a judicial or quasi-judicial action is the application of law to facts. That's the decision that comes from -- that has been passed down from the Supreme Court from many of these times.

It may not be that that particular independent action was the application of law to facts, though it probably was. Assessing a conflict of interest is a classic thing for an attorney to do.

Our position, instead, is that the consistent exercise of a legal -- independent legal strategy by Mr. Rishikof is what led to his termination eventually.

One of those examples is -- or that was really -- there was another example that we learned about from

Mr. Castle at 21175, and he said that there was an event that the convening authority had tried to board an aircraft to Guantanamo and the Secretary had to call and stop him.

That actually demonstrates the need for other witnesses because Mr. Brown and -- I am certain, and Mr. Rishikof, I suspect, would testify that that event did not occur; that there was no time that he tried to board an aircraft without authorization and that the Secretary had to call and stop him. That was one of really only the two events which were initially briefed to Mr. Castle.

But the -- other than boarding, this somewhat mythical boarding of an aircraft and his plea exploration, the key event in September 2017 which was briefed to Mr. Castle was the fast boat incident.

If you will remember, he asked for opinions. There are really three things that come up: This boarding of an aircraft, he is exploring pleas, and the fast boat incident. That's found in the record at 21175 to '76. And it's a perfect example of the exercise of independent legal judgment which ran him afoul of the Office of the Chief Prosecutor and the Office of General Counsel.

This Lieutenant Newman described this same event that Mr. Castle testified about. Mr. Newman's -- Lieutenant

Newman's testimony is at 20781 through 20785, and what occurs is that, according to AE 555KK, is that Admiral Cashman cancels the independent trial judiciary transportation in late June, early July of 2017.

At that point the question arises what are we -- what are they going to do about this? And there are two independent legal entities who have opinions about that: The Office of the Chief Prosecutor has an independent legal judgment that they may exercise, and the convening authority is supposed to have an independent legal judgment that they may exercise. On this occasion those legal judgments diverged.

And so what happens is described in AE 555KK, which is DISO Exhibit 40.

May I have access to the document camera?

MJ [Col PARRELLA]: You may.

LDC [MR. CONNELL]: According to Mr. Brown, on 12 July 2017, at around 1000, Brigadier General Martins had filed a motion, AE 379A -- and this is in the Nashiri case, not the -- we attached it to our brief, just we put it in the record, but this is in the Nashiri case -- with the military commission that falsely stated the convening authority supported providing a utility boat to transport the judge across

Guantanamo Bay for hearings.

At 0630 that morning Brigadier General Martins had e-mailed me, that is he was, quote, prepared to change the language in the filing to reflect the CA's endorsement of his position, indicating that he knew he didn't have it at the time.

I'm slowing down for the interpreter.

At 0820 I replied to his e-mail -- this is Mr. Brown speaking -- indicating I was still sorting out the materials he sent me to fit into the range of available options. I also noted that he had failed to include information on the appeal. This is an appeal that the convening authority wanted in the 9/11 case. Without other coordination from the OCA, Brigadier General Martins has filed AE 379A at 1000.

The afternoon of 12 July '17, after we noted the filing had been completed with the inaccurate reflection of the CA's opinion, we had a teleconference to discuss this issue. Certain people were following -- were present. During that conference Brigadier General Martins apologized for filing the AE 379A with false information.

Brigadier General Martins then proceeded in the nearly 90-minute teleconference to plead for a utility boat to be provided to the judge for the Nashiri hearing on

31 July '17 so that the deposition -- Mr. al Darbi -- would not be lost. He asserted that the case was hanging by a thread and would fall apart without the deposition.

Subsequently, on 28 July 2017, was another teleconference, and the purpose of the teleconference was to discuss how to address the military commission's judge's concerns about preventing commingling during ferry crossings at Guantanamo Bay, Cuba, focusing on this issue in the 9/11 case.

It was our intent to have a rational discussion about a reasoned difference of opinion. Instead, according to Mr. Brown, the convening authority was treated to a series of disrespectful remarks and performance from an armory officer that would be inappropriate for any grade but was especially disheartening when exhibited by a general officer of the chief prosecutor's stature and experience.

During the telephone conferences, his anger, aggressive demeanor, singularly inappropriate comments and statements to the convening authority were unprofessional. They included comments such as: "You're trying to gratuitously aggravate the judge. You are acting out your authority. The most ridiculous thing causing the abatement is right here. You are being the unreasonable one. And why are

you busting my fucking balls?"

This is what Mr. Castle was testifying about. When he said that there had been a fast boat issue and he had heard that they lost testimony, this is what he was talking about. This was that -- and the testimony of Lieutenant Newman reflects this, the convening authority had one position, a legal position, that they thought that the relative power of the convening authority and the trial judiciary should be tested by appeal to the CMCR.

The chief prosecutor, in the exercise of their independent legal judgment, had a separate opinion. Those two opinions clashed. They clashed apparently in a -- at least a harsh manner. And it was after this that the Office of General Counsel spun up on how to get rid of Mr. Rishikof.

Now, that wasn't the only event that aggravated the Office of General Counsel. There was also the issue of the call from General Sessions, which beautifully illustrates both the importance of the witness testimony that we've had and the witness testimony that we need.

The first thing that we ever actually knew, other than testimony from -- the interview of Mr. Brown about this call, came in the 26 January memo from Mr. Jenks about how to fire Mr. Rishikof.

And what the -- what we learned here, among other things from Mr. Castle, is how often Mr. Rishikof's legal strategy was discussed in the Office of General Counsel. It sounds as if it were a daily matter of discussion, not to mention the many meetings for which we lack any documentation.

But at the same time that Mr. Castle learned what a CA was, he learned about pretrial agreements. And that's at 21174 in the record.

Now, Mr. Brown, when he was -- through the testimony of Lieutenant Newman, he said that he had heard -- Mr. Brown had heard from Mr. Castle that Attorney General Sessions was angry. And that's at 20804 to '05 in the record.

But what we learned from Mr. Castle was more detail about -- not all, but more detail about the Sessions/Mattis call.

We learned that Mr. Castle was physically present for the call that we didn't know; we learned that Sessions said "No deal" and something about terrorism. We learned that Mr. Castle repeated "No deal." And we learned that Mr. Castle remembers nothing else about that three- to four-minute phone call, other than a reference to the 9/11 military commissions.

That -- both the critical detail that we learned and the critical detail that is omitted demonstrates the

importance of the testimony of Secretary Mattis and former Attorney General Sessions, the other two people who were present for that call.

Now, Mr. Castle's staff may have known about the consultation with DoJ about the PTAs prior to Attorney General Sessions' call. He testified to that at 21196 to '97. But after that call, after mid -- let's see if we have the -- yes. After mid-October -- I believe it's October 13. After mid-October 2017, I quote here, We were constantly looking at this issue as to what was going on in the military commissions. And then he mentioned -- so Mr. Castle mentioned the fast boat again -- he said "and Mr. Rishikof," and he's referring to Mr. Rishikof here.

Quote, This is not working out and things are not going well, so we then spun up again on the possibility of terminating Harvey. And that's in the record at 21206.

We know that that occurred, that that spinning-up, meaning the detailed consultation and research on how to fire Mr. Rishikof began before Thanksgiving. And that's at 21208 in the record. And we know that it involved numerous meetings. That's at 21209 in the record.

We also know that they opened -- he widened the aperture, in Mr. Castle's words, and began brainstorming as to

OGC military strategy with respect to the military commissions -- that's at 21210 through '11 -- which resulted in the plan for disposition, which is in the record at AE 555DD Attachment L, the first principle of which is firing Mr. Rishikof.

Now, we -- before this, from the interview of Mr. Brown, we knew that there was extensive communication between the Office of the General Counsel and Mr. Rishikof and Mr. Brown about these -- about these COAs that became the Management Memorandum.

This is a slide -- this is a diagram that I prepared to demonstrate how many contacts there were. The X axis is the dates on which meetings or teleconferences occurred; the Y axis is the people who were involved.

There is one thing that we learned from Mr. Castle that we didn't know. What we didn't know was that in September of 2017, there was another meeting. So there was actually another red block in here somewhere in the September area. Mr. Castle didn't know exactly when, but there was another meeting at which Mr. Rishikof was always going on about his COAs.

Now, it was Mr. Work's view that a proposal like this should have gone to the Deputy Secretary of defense because he

didn't want chatter in the department. That's at 20800, '801. And that makes sense, because what actually -- one of the things that we learned from Mr. Castle we didn't know is what actually happened with this Management Memorandum.

First, we learned that he'd heard about it ad nauseam before, but second, we learned he received it simultaneously with the Deputy Secretary of Defense; meaning he was either cc'd or some other -- he said he received it in his e-mail. That's at 21245 in the record. But what he also said was that it was essentially no harm no foul, because the memorandum was rejected as an uncoordinated memorandum.

Mr. Work said that if this had occurred to him, he would have simply called a meeting to discuss -- discuss the memo if he wanted to. And that's at 21248 in the record. But instead it was a situation of the OGC resented that Mr. Rishikof was acting independently. They resented that he had gone initially to the -- to the Deputy Secretary of Defense Shanahan to get permission to go to the DoJ, and they certainly resented this memorandum. Mr. Castle was quite eloquent on the topic.

Now, this next -- the next event that we know about is the filing of the 15 December 2017 plan for the disposition of future unprivileged enemy belligerent cases. And it's

important -- it is extremely important to illustrate the importance of testimony from live witnesses, because we would have thought, and the government briefed it, and for that matter the defense briefed it, too, assuming that this might have been a reaction to the 12 or 13 December Management Memorandum. But, in fact, Mr. Castle testified that this had been started long before 12 December 2017, in fact, before Thanksgiving, and was prepared independent of the Management Memorandum. That's at 21221 in the record.

The next event which occurs is on 4 January 2018, when Mr. Newman sends a memorandum seeking to terminate Mr. Brown. And he knew to do so, Mr. Castle testified, because, quote, We were working the issues, meaning the issues of firing Mr. Rishikof and Mr. Brown. That's at 21250 in the record.

What we previously did not know -- another thing we previously did not know was the details of contact between Mr. Castle and Admiral McPherson. This memo, the 4 January memo from Mr. Newman, seemed to be -- you would think was part of a logical set of memoranda that were leading to the firing of Mr. Rishikof. But during this time Mr. Castle testified Admiral McPherson -- excuse me, contacted Admiral McPherson and told him, in his words, about the AG call. That's at

21241 to '43 in the record.

But then he had a crisis of conscience. And he told us that that crisis of conscience occurred before the next event, which is the 12th -- let's go ahead and take a quick look at that -- which is the firing memo on the 12th, because the memo on the 12th mentions Mr. Coyne and not Admiral McPherson.

This crisis of conscience, I suggest, was because of the obvious and apparent unlawful influence that he was considering committing. And he described that crisis of conscience for the military commission. And he said, quote, There were other theories as to why we could terminate Mr. Rishikof, and those are intertwined with the reason why I made this proposal. That's at 21230. "But the thoughts that we were having beforehand might not be correct." That's at 21231.

So he stopped the process of terminating Mr. Rishikof -- the same citation -- and pulled the memorandum, this one and the one from the 4th. And that's at 21234.

I suggest that this is an admission by conduct of what a reasonable person with knowledge of all the facts would think. The ultimate test of unlawful influence does not

involve whether Mr. Castle could square with his conscience after -- after extraordinary struggle the issue of whether he could think of a reason and could mentally set aside a different reason for firing Mr. Rishikof. Rather, this is part of a continuing struggle between the Office of the Convening Authority and the Office of the Chief Prosecutor and the Office of General Counsel over what level of independence can the convening authority have.

As Mr. Castle put it repeatedly, Mr. Castle wanted all their ships to be heading in the same direction. Pursuing that metaphor, Mr. Rishikof wanted to be the captain of his own ship and decide what direction he was going to go in, and that's what -- the authority he has both under the Military Commissions Act and the Regulation for Trial by Military Commission to exercise ----

MJ [Col PARRELLA]: You would agree it's not an unfettered right, I mean?

LDC [MR. CONNELL]: No, sir, it's not an unfettered right. The Regulation for Trial by Military Commission has a structure that is set up.

MJ [Col PARRELLA]: I mean, to take that to the logical extreme then, under no circumstance could the convening authority ever be fired by anyone because, you know, they

would be immune to any termination despite whatever lack of coordination, who they talked to, when they talked to them.

LDC [MR. CONNELL]: Well, with respect to exercise of legal judgment, all right -- like I -- I, for example, who I talk to, whether I coordinate, whether I don't coordinate, is not -- I cannot be terminated for that. I can be terminated if I falsify a bill. I can be terminated if I falsify a travel statement. I can be terminated if I discriminate on the basis of a prohibited ----

MJ [Col PARRELLA]: And I certainly understand that distinction and I think there is argument to be made about what constitutes that independent legal judgment what is or what is not, and I'm sure the government is going to come in and argue that certain things aren't and you are going to say that they are.

LDC [MR. CONNELL]: Sure.

MJ [Col PARRELLA]: But it seems to me from my takeaway of Mr. Castle's testimony is -- a consistent theme throughout, it was the lack of coordination. In the military we use the term "staffing," but the same basic concept. And the ships heading in the wrong direction was his analogy or not heading all in the same directions is an analogy for lack of coordination; is that -- was that correct?

LDC [MR. CONNELL]: Yes, but I would like to unpack that a little bit.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: There is an issue -- so there's really two kinds of coordination we are talking about here. There's staffing. And I understand staffing, right? That commanders have staff who -- work issues, coordinate with the staff of the other -- the ordinary English meaning of the word "coordination."

And one of the things that we learned, and I've talked about that a little bit with respect to the constant flow of communication, the constant discussion of the COAs and the many, many meetings between Mr. Rishikof and the parts of the Office of General Counsel, clearly in that ordinary English sense of the word "communication," those things were going on.

Now, there is a question as to did Mr. Rishikof think that if he went to the Office of General Counsel he was going to get shut down in his independent legal strategy, which turns out was correct. That -- I don't know why, and we'll have to hear from Mr. Rishikof as to why he got permission from the Deputy Secretary of Defense instead of the Office of General Counsel.

I suspect it was because, number one, the Deputy Secretary of Defense is a higher authority and could authorize him to talk to the Department of Justice, but also because he had been advised by Deputy Secretary Work that he should go straight to the DSD's office because of the problem of chatter in the department.

MJ [Col PARRELLA]: Well, I don't think that that's a fact necessarily in dispute, and I'll let the government correct me if I am wrong. But I think that he was given that authority, and that was ultimately clarified once they went back and spoke to Mr. Shanahan ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: ---- that he had that authority.

LDC [MR. CONNELL]: That's definitely right. But the point that I make there is not about his authority. The point that I make there is about his coordination in the ordinary small C sense of the word; that there is constant e-mails, e-mail traffic or message traffic in Mr. Castle's words. There is constant discussion.

The slide that I put up, it looks like there are something like 20 different meetings that take place. Mr. Castle talked about weekly meetings that took place.

And I'm going to talk later about staffing of the --

if you don't mind, I'm going to talk later about the staffing of the Admiral Tidd conversation and the Coast Guard overflight.

But the one piece of coordination that did not take place is the formal coordination in the sense of you have sign-off blocks where various commanders of various elements sign off around the December 12th or 13th memorandum. There's some confusion as to whether it's the 12th or 13th.

And that's true, right? As far as the evidence that we have so far, it's true that there was no formal communication -- no formal coordination around that, and Mr. Castle certainly saw that as a process foul.

But that has to be evaluated in the constant sense of that the convening authority was trying to do some things, and pretrial agreements were among them, that were not the same things that certainly the prosecution wanted and their allies, the Office of General Counsel, didn't want.

It's also certainly true that probably the Office of Special Security did not want to go back to pre-2014 and be under the convening authority again. We'll have to hear from them about that topic. But certainly that was also a constant source of discussion. According to Mr. Brown, there were, you know, Mr. Rishikof was constantly talking to people about that

and coordinating in the ordinary sense of the word.

I say that because that's the staffing process. Right? There is a formal process, and there is really one claim of a process foul here. But what are throughout this is Mr. Rishikof trying to exercise his independent legal judgment with his own legal strategy for what he saw as winning the case, right?

Mr. Rishikof saw convictions of these men and them spending the rest of their life in prison on Guantanamo as a win. People might agree with him. People might disagree with him. But that was his legal view and his legal strategy.

And many of these actions that we're talking about, including the coordination with the DoJ, including the attempt to set forth COAs were efforts on his part to achieve that legal strategy. Was he right, wrong or not? That is irrelevant, but as the convening authority he cannot be unlawfully influenced in his exercise of judicial acts, meaning his independent legal strategy.

Now, the next thing that occurs in the process is the January 26th, 2018 memorandum, which is found at AE 555DD Attachment E, which could be titled "How to Fire a CA and Get Away with It."

In the brief -- and I'm sorry that I don't actually

have a slide on this. In the brief -- I actually wondered how the government in their pleadings on this got the standard for unlawful influence so wrong in that they cited the appellate standard instead of the trial standard, which is quite clear in the military cases the distinction between the two. And I think that it may be in retrospect that Professor Jenks got it wrong and that he put the appellate standard in that brief and maybe the government drew from that brief.

But in any case, his advice, Professor Jenks' advice, was mostly of the what to put in writing and what talking points to use. It was not what to -- how to follow the law. It was, if you decide to do this, how to minimize the litigation risk of losing a UI motion.

Finally, Mr. Castle brings the issue to the Secretary of Defense, and in -- briefs to the chief of staff and the Deputy Secretary of Defense, although not the SECDEF, that as far as we know the only two things that the SECDEF knew were the 29 January memo, which is the one which is on the screen here, and the Attorney General call.

But one of the things that's -- that really reflected the -- something else that we didn't know -- and it shows the importance of witness testimony -- reflected by Mr. Castle was when he was talking -- is how often the issue of control came

up.

And according to Mr. Castle at 21200, Mr. Easton would say on many occasions, "We," meaning the Office of General Counsel, "own commissions." And that seems to be a power struggle which was at the heart of this firing.

And when Mr. Castle used his ship metaphor, he used, among other things, that he, the general counsel at that time, acting general counsel, wanted to know what Mr. Rishikof was doing, and Mr. Rishikof had reasons in the exercise of his independent legal strategy why he didn't want that to be known.

So let's go back to the issue of who the military commission needs to hear from. In addition to Mr. Castle, we have -- there's the pending issue in AE 555P and the witnesses in 555R and CC.

In a little bit more detail, the -- Judge Pohl was correct to argue that Mr. Rishikof should testify. He's obviously, other than Mr. Castle, the person with the most direct knowledge of what occurred.

His legal advisor, Mr. Brown, also has a great deal of detailed information that he can contribute, some of which we have been able to bring before the military commission in essentially a hearsay manner, but some not.

MJ [Col PARRELLA]: But he was also denied by Judge Pohl I believe as well, so that would be a motion for reconsideration?

LDC [MR. CONNELL]: No, sir. That's actually a little complicated. Let me explain.

That was not a motion. You know, this happened in the 350 series, too, that sort of emergency things sort of settled down -- emergency actions settled down into more normal actions otherwise.

So what happened was we had initially rushed into court to try to get this -- find out what was going on. And what seemed apparent to us at the very beginning was that Mr. Castle, Mr. Rishikof, and Mr. Brown, who were the people we knew at that time, would need to testify.

Without a request to the -- without a request to the prosecution and without any description of what they would say, Judge Pohl ruled that we had not shown enough to get discovery -- we didn't have a discovery request, right? We didn't go through the ordinary procedures at the beginning, because it was all kind of a crisis.

At that time, that was when Judge Pohl sort of sua sponte ordered that the declarations be provided and invited. And it was during that same time that, at the end of that

process, Judge Pohl also sort of sua sponte, not entirely, but in relationship to our request, but not in the ordinary process, ordered that Mr. Castle and Mr. Rishikof testify, but not Mr. Brown.

He dropped a footnote in that pleading where he said there has been -- there has obviously been a request from the defense to the prosecution for the production of witnesses, and -- but I'm not going to consider that, neither approving or denying witnesses at this point, because I'm really just acting on what had happened before.

So then we went through the ordinary witness production process. Those witness requests are attached to 555R and CC.

The reason why I'm bringing this to the military commission's attention is that it is not truly a motion to reconsider Mr. Brown, because that was a kind of on-the-fly event that didn't go through Rule 703.

On this occasion we went to the prosecution. We interviewed Mr. Brown. We knew -- we found out what he was going to say. We went and presented that information to the prosecution, and then after they denied it, requested the military commission to compel.

So the reason why I say it's not a motion to

reconsider is this is really the first opportunity the military commission has had to rule on an ordinary 703 motion to compel from the defense.

MJ [Col PARRELLA]: The pleading you're referring to that you said not a -- the footnote indicates this is not a denial, is that AE 555O?

LDC [MR. CONNELL]: I think it's -- if you will give me just one moment, I'll grab my stuff.

**[Pause.]**

LDC [MR. CONNELL]: Yes, sir. Page 3, footnote 8 is the footnote that I'm referring to. It's not that it says that it's not a denial; it says that that's not the issue that's before the military commission.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: Sir, the second set of witnesses that are important are the Office of General Counsel witnesses.

One thing that we've learned, both from Mr. Castle's declaration and from his testimony, is the general hostility in the Office of General Counsel toward Mr. Rishikof. And to be honest, I'm not saying whether it was justified or not justified, but he testified euphemistically to things like people didn't have a very high opinion about him, and in particular Mr. Vozzo, the primary liaison to the prosecution.

It's also clear that there's a lot of material that is there, and we will -- I will brief this at the appropriate time. But one of the things that we learned from Mr. Castle was how much written material there is about the firing of Mr. Rishikof. There are e-mails relating to Mr. Rishikof and Mr. Brown, and that's at 21178 and 21184. A lot of strategy documents and e-mails, which include terminating Mr. Rishikof. That's at 21211 to '12.

And the other thing which makes it significant -- one other reason that we didn't know that it's important to hear from the Office of General Counsel witnesses is the error in the government documents.

At AE 555DD Attachment C, there was a supposed tab to the 4 January 2018 Newman action memo. The government produced that with a signed version of the 5 February 2018 termination memo. And Mr. Castle testified that that was wrong, that that's not the way that it happened, that those two documents should not be connected to each other. And that's at 21256 through '57.

We also know that these witnesses will testify to the contents of these many meetings that took place, this coordination in the informal sense that took place.

Plea negotiation witnesses, on the other hand, are a

lot less important than they used to be. It seems pretty clear that plea negotiations were in progress, that they were on -- that they were on the minds of the Office of General Counsel. And so Mr. Romero, Ms. O'Connor, and Mr. Eggleston, I would withdraw those request for witnesses, they no longer being necessary.

Attorney General Jeff Sessions, on the other hand, his importance was only highlighted by Mr. Castle's testimony, which I won't repeat again.

Now, let's go, with respect to the base motion -- sorry, and of course the DoD leadership witnesses for exactly the same reason as the Office of General Counsel.

So I want to talk about one of the -- some of the things we learned from Mr. Castle with respect to the three reasons that he gave -- and what I would suggest are pretextual -- the three reasons that he gave for terminating Mr. Rishikof.

One is that Mr. Rishikof and Mr. Brown directly submitted the Management Memorandum without advance notice or coordination. Now, we can take the word "coordination" to mean that it's formal DoD signoff process, but "advance notice" is highly problematic as a statement. Because one of the things that we learned from Mr. Castle is that

Mr. Rishikof was in constant communication and was constantly talking about his COAs. It's not really possible to say that there was no advance -- including reducing them to writing -- that there was no advance notice of this situation.

There were -- on this slide I'd like to talk about the second part. There is post-memo meetings with Mr. Easton as quickly as the day after the submission of the meeting -- of the memo. Maybe it's two days after if it was actually on the 12th.

But Mr. Brown, through Lieutenant Newman, explained that there was a meeting as short as 14 December to talk about the memo with Mr. Easton, another one with Mr. Easton and the overlap with Mr. Newman on the 21st of December 2017.

Now, let's talk about what we learned from Mr. Castle about the SOUTHCOM teleconference. What we learned is that Mr. Castle did not have any actual evidence that the teleconference was inappropriate in any way. He testified at 2129 **[sic]** that -- and again, in other testimony, that he didn't do any independent investigation, he didn't talk to Admiral Tidd, he was told by Mr. Vozzo and others within his office.

Now, what did he know at this time however? We know there is a congressional process that's going on about the ELC

expansion, the ELC expansion which is going on right now, and that's at 20812 to '13.

We new that Ms. Kelly felt that -- Wendy Kelly, who is one of the requested witnesses -- felt the current imagery was needed for the process, for the congressional process, that's at 20814. And that the old imagery that they had was embarrassing and unprofessional, and that's at 20815.

We know that there was a conference call with Admiral Tidd. But what we know today, from AE 555 (AAA 3rd Supplement) Attachment B, that we never knew before this week, or last week, is that that staffing process that the military commission spoke to was carried out extensively.

Now, we know this not by any discovery produced by the government, but because I personally in Connell v. SOUTHCOM won a FOIA suit against SOUTHCOM and they produced these documents.

MJ [Col PARRELLA]: Let's say that everything you say in there is correct in that -- assuming arguendo that all the proper coordination was made. Does that matter? Or was what's important that Mr. Castle, if he honestly believed that there was not proper coordination -- in other words, there is a distinction between what he honestly believed and it being

pretextual.

LDC [MR. CONNELL]: Sure. The question is sort of is there some sort of good-faith exception to unlawful influence.

MJ [Col PARRELLA]: It's not a good faith exception. I mean, it's -- the fact that there was proper coordination might be relevant in some sort of personnel action if Mr. Rishikof and Mr. Brown are going to, you know, contest why they were fired, but it seems not necessarily automatically relevant here unless there is some indication that it was a pretextual reason to terminate them for some judicial action.

LDC [MR. CONNELL]: Well, there's lots of reasons, one of which it's not true. That's not the only reason. The real reason is -- as you know, you don't have to scratch the surface of Mr. Castle's testimony very deep to come up with his deep concern about not knowing what Mr. Rishikof was up to all the time. And there's a perfectly good reason for that, which is Mr. Rishikof's exercise of his independent legal strategy.

But the -- so the real question -- and what's also clear is that he wanted to fire him initially in September; he wanted to fire him in December, well before this event took place; he wanted to fire him on January 12, well before this event took place.

And then finally what I suggest appears to have happened is that sometime around January 28th or 29th, Mr. Vozzo or somebody else came into the office and said, "Hey, I've got something. We can use this SOUTHCOM teleconference as the reason for the firing."

The -- now, if you don't believe me on that, right -- and you don't have to believe me that that's what happened, let's hear from the witnesses. Let's find out what happened. But these e-mails themselves demonstrate that the actual reason given is not accurate.

MJ [Col PARRELLA]: But let's say I do believe you on all that. I guess what I'm looking for, where is the evidence that the real reason, the pretextual reason that Mr. Castle terminated or recommended the termination of Rishikof is some judicial action, some nefarious -- he didn't like the pretrial agreement terms, he didn't like his decision to refer, not refer charges, something along those lines.

LDC [MR. CONNELL]: So it's circumstantial at this point, right, and it probably will always be circumstantial as almost all intent-based questions are.

The circumstantial evidence is the constant flow of information to him about Mr. Rishikof, his pretrial agreements and his independence; the embarrassing -- and there is really

no other way to describe it, the embarrassing issue when Attorney General Sessions calls up and he is -- you know, he's almost struck memory-less about it because it was such a serious event, but the one thing we do know is that he is willing to repeat "No deal" when Attorney General Sessions says "No deal."

We have the constant spinning up, the constant churning of information within the general counsel's office as to how are we going to fire Harvey Rishikof, because he is not keeping his ship pointed in the same direction as us; he is exercising, he is off exercising his own independent legal strategy.

And so yes, that's our evidence. That's our circumstantial evidence for what's happening here. Does Mr. Rishikof **[sic]** say I fired him because he wasn't talking to the Department of Justice about pretrial agreements and because he acted independently? No.

In fact, what he says is that he had this crisis in mid-January or early January 2018 where he thought, you know, we're just not doing this right. And he has talked about his emotional anguish over the question of whether he could set aside those other theories for firing Mr. Rishikof and concentrate on just these theories for Mr. Rishikof.

This is not a race neutral reason-type analysis. This is not I can think of a legitimate reason to fire him, which is what this declaration would reflect. It is instead what's really going on here, and it's clear that the -- what's really going on here is that Mr. Rishikof was just too independent for the Office of General Counsel. They felt like they didn't know what he was going to say to Congress; that was Mr. Castle's testimony. They said that they -- that he simply was not keeping his ship going in the same direction.

So I do want to just finish my comments, if I could, about the SOUTHCOM teleconference.

MJ [Col PARRELLA]: Please. I apologize for interrupting.

LDC [MR. CONNELL]: No, no, sir. I wanted to say this earlier. I don't see those as interruptions at all, I see those as very valuable parts of an oral argument.

But the AE 555 (AAA 3rd Supplement) Attachment B, FOIA documents show an extensive pre-staffing process before the -- before the call with Mr. Tidd -- with Admiral Tidd, excuse me. Mr. Brown appears in that e-mail chain, Mr. Rishikof requested witness Samantha Chin, Admiral Cashman, requested witness Wendy Kelly, Michael McAndrew -- and I need to explain for just one second who Michael McAndrew is because he wasn't on my org chart.

Michael McAndrew is the one who escorted Mr. Rishikof and General Baker and set up their meeting, the third of the three meetings with Congress in January 2018. He is a person, a senior person at the Department of Defense who works on legislative and especially military construction issues.

But also, and we don't have the names here because they were all redacted out, but we know that SOUTHCOM J3 was intimately involved, sent many, many e-mails related to staffing this call, and SOUTHCOM J4 is in the same situation.

So there are 132 pages of e-mails about that, but I do just want to show you -- just one moment. Do you have (AAA 3rd Supplement) in front of you, sir? I can put it on the document camera not for the gallery, but just for you.

MJ [Col PARRELLA]: I can pull it up.

LDC [MR. CONNELL]: Thank you. All right, sir. It's -- SOUTHCOM put SC page numbers on the bottom of Attachment B. Do you see that? It's page SC 062.

One of the things that became clear from the interview of Mr. Brown that Lieutenant Newman testified to is that the imagery was not -- was really only a tertiary concern in this call. The main issues in the call were a congressional delegation that they wanted seats on and getting a facilities manager for the ELC expansion project.

But there was as a third issue, this issue of imagery, and on 24 January 2018 somebody from SOUTHCOM headquarters sent an image. And that image, you can't actually see it, but you can see where it would be in page SC133. That's the attachment to SC 062, a picture of JTF-GTMO AO Patriot, a PowerPoint.

And then after the call, after they had discussed it, they sent a follow-up to this e-mail, which is the one which is at the top.

The other thing that demonstrates how properly staffed this call was, that there were extensive talking points that were developed for Admiral Tidd based on conversations between Mr. Rishikof's staff and Admiral Tidd's staff in advance of the call.

So the one other place that I'll direct the military commission to in Attachment B is the last ten pages, SOUTHCOM 135 and forward. They weren't actually produced, but the title was produced that first notes on the Combatant Commander's phone call with Harvey Rishikof, Wednesday 24 January 2018 at 1400 hours. And then at page SC139 the TPs, or talking points, for the Mr. Rishikof phone call, reference to the MRI; and then what I think is probably a smaller version of the same material beginning at page SC143.

So there's no question that that call was staffed in the formal or informal sense of the word. And it certainly was not something which took place which was uncoordinated in any way.

Now, the -- that is why Admiral Tidd should testify about his experience, because the government even asked some questions in -- of -- excuse me, of Lieutenant Newman regarding what was said on the conversation. Lieutenant Newman knew nothing about it, and the government hasn't produced any evidence about it.

But the last thing that I want to talk about is the third pretext, the ELC imagery; that without notice to or coordination with the Combatant Command, Mr. Rishikof asked the Coast Guard to capture aerial imagery. There is no evidence whatsoever of lack of coordination in this record, and the only evidence is from -- the only information that Mr. Castle got was from Mr. Vozzo, which he stated at 21291 to '95.

Coast Guard District 7, however, the people who actually coordinated the flight, utterly rejected the view that the flight had not been coordinated with SOUTHCOM -- that's at 20827 -- and called it a ridiculous allegation.

They said that all of these requests are processed

the same no matter where they come from. That's at 20828 to '29. And we know that the CA coordinated with SOUTHCOM and JTF and security here at Guantanamo because of AE 555QQ (AAA Sup). The testimony about that was in the record at 20848 to '52, and it is DISO Exhibit 41.

If I may have access to the document camera.

MJ [Col PARRELLA]: Yes, you may.

LDC [MR. CONNELL]: This is one of the coordination e-mails that Mr. Parr was willing to provide to us, which -- and I just want to go over some of the -- it includes Coast Guard lines in its coordination, but also Mr. Bumpus, who was a requested witness, Mr. Parr, Mr. Imhof, but then also elements of Naval Station Guantanamo Bay, elements of SOUTHCOM, another element of SOUTHCOM, another element of Naval Station Guantanamo Bay, and two more elements of Naval Station Guantanamo Bay.

So the point is that the idea that this was not noticed or coordinated through what is relatively routine element, was not noticed or coordinated through JTF-GTMO -- through GTMO, the Naval Station GTMO, who is the relevant party here, and SOUTHCOM simply is not accurate.

So to conclude, Your Honor, the point that I began with is I think you have all the evidence you need to grant

the motion, but I don't think that you have the evidence that you need to deny the motion. And that brings us to the question of the burden of proof.

I'm done with the feed if you want to cut that.

And that brings us to the point of the burden of proof. And I know that there are schools of thought, and I'm barely qualified to even enter into this school of thought, having never done a military case before in my life, but I know there are schools of thought of what this burden-shifting means.

I think it's 100 percent clear that the defense has produced abundantly more than some evidence of unlawful influence. And that leads to the question of what happens next. And I know that some of my -- I may part company with my colleagues in some way because they feel that means the government needs to put on evidence.

To me it's up to the government whether the government puts on evidence, but it's up to the military commission whether I, on behalf of Mr. al Baluchi, can put on evidence.

We've more than satisfied the relevance and necessity standard that we just heard that was easily satisfied under Rule 703, and the -- we have either interviewed and produced

the results of that interview for the military commission, or have attempted to interview, without success because people have declined, each of those witnesses. They are important for gathering the evidence that the military commission would need to finally decide this question.

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

LDC [MR. CONNELL]: Thank you.

MJ [Col PARRELLA]: Mr. Nevin?

LDC [MR. NEVIN]: Thank you, Your Honor. We've cited in our moving papers in several places, and maybe you've read it as well, that when we first got into the unlawful influence discussions, Judge Pohl made the remark, look, nobody admits this, everybody has a reason; isn't that true? Words to that effect.

And I submit to you that -- I don't know if that's true. I mean, no doubt someone has admitted it at some point in the past, but that would probably be the exception that proves the rule. I mean, it does -- at least when I read the cases, it does seem to me to be that even in the face of fairly obvious unlawful influence, you see people having explanations that would seem to, or that seek to excuse it.

So as I looked at this I thought the question, first of all, was going to be what are the reasons that you say

you're excusing this person for, and do they make sense? Are they factually accurate? And if they're not, then is there another explanation for the termination lying there somewhere, just out of view perhaps, that accounts for the actual reason?

And I just would submit to you that if you look at Mr. Castle's testimony fairly, both look at it and listen to it, you see that it's full of strangeness, for want of a better way of putting it.

There is a -- just take, for example, what happens when he first gets to the Office of General Counsel. He hears within a week or ten days that Mr. Rishikof wants to meet with him to talk to him about the military commissions, and soon he is being briefed by his staff about what a convening authority is and what he might want to talk to him about.

And right away it's clear that what comes up is that Mr. Rishikof wants to settle the 9/11 cases. And the staff is telling him, telling Mr. Castle, that he can't intrude in that; that he can't tell Mr. Rishikof not to settle the 9/11 case. And Mr. Castle says that his danger antenna are up and he's in a high state of concern about having this conversation with Mr. Rishikof at all. And they do ultimately end up having the conversation.

But you have to think if your state of mind is that I

have some problems with this guy, some of his behaviors, the settlement issue is his clearly, and I don't -- I'm not going to -- I'm not concerned about that, there is no reason for your danger antenna to be up.

All you have to do is simply have the meeting with the guy and have a conversation with him and, you know, tell him don't settle the 9/11 case. Where's the danger in that? You know, for that matter have a staff member sit in with you so that there is a witness to the conversation.

But there is a high -- I submit to you just a fair reading or a fair review of Mr. Castle's testimony is that there's a high degree of concern that I will say is consistent with the proposition that what they want to do is get rid of him because of his decision to entertain plea agreements in the 9/11 case.

And the question is no longer -- the question isn't really go ahead and do your business like I think Weiss, the original kind of wellspring of the importance of unlawful -- of a prohibition on unlawful influence or unlawful command influence.

It simply says when you have -- when you have somebody in a position of a convening authority or they're in the position of a military judge, you may not like what he or

she does, but you have to leave them alone to do it.

They plainly -- the source of the tension here is that they are planning to interfere with that. They are planning to stop him from doing that, and they're intent on finding a way to do it that will avoid being called out for unlawful influence.

So I think you see -- I submit that you see the same thing in Mr. Castle's testimony about the call from the Attorney General, and I -- you now, I think you've heard already some remarks that you imagine this person in this meeting of high importance, and suddenly a very signal event is taking place; two cabinet officers are talking about something.

And you have so little recollection of this. I mean, you have the fact that the Attorney General is saying "No deals," is indicating that there won't be any deals, and it has something to do with terrorists; and you have Mr. Castle agreeing with that, saying that back, "No deals."

And you have him then going back to his staff and asking -- asking them what could he possibly be talking about. And I submit to you, again, that what's happening is that he is indeed thinking in terms of making this kind of a decision, but is trying to avoid letting that become apparent.

I think another thing that is clear from his testimony is -- or that keeps appearing in his testimony, is the close relationship and input that the Office of the Chief Prosecutor has into the process, and he -- there is a process of being heard there that is through Mr. Vozzo and through Mr. Easton and Mr. Newman, you see that the view of the Office of the Chief Prosecutor is controlling the approach that the Office of General Counsel is taking to a number of these issues, to the fast boat issue.

And when you read the -- when you read the materials and when you hear Mr. Castle's testimony, you see he has the facts wrong. Mr. Brown and Mr. Rishikof, if they're permitted to testify, have distinctly contrasting recollections of the way those facts developed.

The same is true of the congressional delegation. There is a considerable question whether Mr. Rishikof and Mr. Brown ever attempted to get on a plane that is apparently claimed to be part at the very beginning of what is driving the feeling that Mr. Rishikof doesn't have his boat -- his ship pointed in the correct direction.

Again, you -- if you can accept the idea that people don't generally admit that they have committed unlawful influence, then you go back and you look at what they're

saying their real reasons are. And again and again, when you look at the real reasons, the facts don't support what they're saying.

So -- and I -- I raised this in the most recent pleading we submitted, that we filed a request for discovery early on in the case, and we asked the government to give us everything that related to this issue, and they refused to do that, and you know the litigation that followed.

But at one point then Judge Pohl directs that, that Mr. Mattis and Mr. Castle prepare a declaration, and he directs that the government ask Mr. Rishikof and Mr. Brown to prepare a declaration; and all of them do. And the direction was that the declaration would attest to the facts and circumstances of the termination.

Now, there is a moment during the questioning of Mr. Castle by Mr. Connell, when Mr. Connell asks him: "And your declaration was intended to be accurate and truthful and complete?" And you see Mr. Castle hesitate, but he says, "Yes."

And then a few minutes later, while there is a pause in between a couple of questions on another subject, he says, "Well, now, I heard you ask about complete," and he provides some qualifications. And he actually comes back into the --

into the discussion again at a later time and says, "Well, I said everything that was really on my mind about why I was terminating them."

And we know that the declaration leaves a lot of the facts and circumstances of the termination of Mr. Rishikof and Mr. Brown -- the declarations leave a lot of those facts out. Both the declarations of Secretary Mattis and of Mr. Castle leave out the call from Mr. Sessions to Mr. Mattis; that's in the facts and circumstances.

They leave out the conversation that Mr. Castle had with Mr. Brown and Mr. Rishikof afterwards. They leave out the conversation with Candidate A. They leave out the formation of the group of nontestifying experts. All of these things are part of the development of this issue and are part of the facts and circumstances, so why aren't they included there? And I suspect that -- I, rather, submit to you that they should have been included.

So, Your Honor, I heard you ask -- I heard you ask about the question of -- and I think counsel referred to it as whether there's a good-faith exception to unlawful influence, and I just wanted to offer a slightly different perspective.

If the -- if the acting general counsel is being fed information that's false, and if he acts on it, there is

unlawful influence occurring. And you might want to stand back and talk about, you know, operative causes or supervening causes or try in some way philosophically to analyze what exactly is the cause of it; but at the bottom of it, it is somebody -- someone is influencing Mr. Rishikof and Mr. Brown, really Mr. Rishikof being the primary issue, by firing him.

Now, who is speaking to Mr. Castle? Who is providing him facts? And I asked him this question, and I know Mr. Connell asked him these questions as well, but I was particularly interested in this specific issue, so I asked him several times: "Who told you that?"

And you heard also the questions were there memos, were there -- was someone taking notes? Are there tape-recordings of these meetings, of these communications? What's being said to you about this? And he doesn't remember. I don't remember. I write down "IDK." "IDK" is written all over my notes. It appears five times on every page of the notes that I was taking of Mr. Castle's testimony. I don't know. I don't know. I don't know.

But someone is speaking to him, and it seems that it is the office -- the deputy general counsel for legal counsel or someone in that shop who is providing this information, and Mr. Vozzo as well, whom I think is not part of that shop, but

is -- as we know, is related and acts as a liaison with both the convening authority and the prosecutor's office.

So it doesn't -- at the end of the day, it probably doesn't make any differences if you put into the hands of the person who is going to pull the trigger the -- a weapon that is loaded for the wrong reason. The effect is the same.

The statute does not require -- it's not unlawful command influence, it doesn't require that a person in the direct line of supervision or of rating be the one who effects. It's any person who attempts to coerce or by an unlawful means influences. And so it needn't be Mr. Castle. It can easily be the people who are providing information, which, as we know, turns out to be inaccurate at the end of the day.

I also direct your attention to the Barry case, which I know you've already said you're familiar with, but it does indicate that intent, at the end of the day, is not a relevant consideration.

And I think, finally, that you can ask -- along these same lines, you can ask why do you need to empanel -- if you're firing somebody because they have just been messing these things up right and left, why do you need -- why do you need to put together a panel of experts, retired military

judges and a law professor?

You're firing this guy because he doesn't coordinate. You're firing this guy because of whatever. Why do you need -- why do you need to have somebody gather together and tell you about that? I submit that that act in itself raises questions about -- about his intent and about the way the process is going forward.

So I think also, Your Honor -- I certainly agree with Mr. Connell that there has been a showing of some evidence, and I believe that -- I happen to agree that I think that that would shift the burden to the government to make a decision whether they wanted to call, put on additional evidence in order to rebut the inference beyond a reasonable doubt.

And where it might go after that I suppose is another matter, but I submit to the military commission that you should at least find that there is some evidence.

And if the issue is still not resolved in your mind, then the hierarchy of witnesses that Mr. Connell described to you is one that we join as well.

MJ [Col PARRELLA]: Mr. Nevin, with respect to your contention that you believe there's been a showing of some evidence, is that specific to actual unlawful influence, apparent unlawful influence or both?

LDC [MR. NEVIN]: Yeah, I think it's both. And I appreciate that, Your Honor. Yes, I think it's both.

And in that respect, I should say that I -- we made this argument in our memorandum, and I'll articulate it again, that the forming of this group of nontestifying experts suggests that, at least in their mind, a person reasonably aware of all the facts could come to the conclusion that unlawful influence was occurring, and -- because really if you don't need to -- if that's not true, then you don't need to put that group together.

MJ [Col PARRELLA]: When you talk about actual unlawful command influence, what do you believe would be the showing of prejudice?

LDC [MR. NEVIN]: The prejudice would be that the case was in the process of working its way toward resolution, and that was -- and that was removed.

And I think that -- I believe it's the Lewis case that has analogous facts, in which a judge is removed by improper actions, and the government says, look, you've got another -- you have a qualified judge who took her place. You're not entitled to a particular judge.

And the court said no. The court said that's not correct. The government has achieved an improper result --

has achieved the result it wanted by improper means. And I think there's an analogy to the kind of stacking that I gather sometimes occurs in creating members panels as well.

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

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

MJ [Col PARRELLA]: Ms. Bormann, just for planning purposes, how long do you anticipate, to the best of your ability?

LDC [MS. BORMANN]: The best of my ability, it's going to be 20 minutes or so.

MJ [Col PARRELLA]: Okay. I would propose we go ahead and take your argument, and then at that point we will consider the schedule for the rest of the evening.

LDC [MS. BORMANN]: Good afternoon. It is kind of the perfect segue, because I wanted to talk about Lewis first.

So in looking at the government's pleadings in this case, in trying to decide how to focus my argument on what I heard from Mr. Castle yesterday, I looked at their cases.

And one of the things that I noticed was that they had argued this very strange argument, and that is it doesn't matter whether or not the removal was based on the pretrial agreement or anything else that was unlawful, because Mr. Coyne, the replacement for Mr. Rishikof, was never told of

the reason for Mr. Rishikof's removal.

And so I looked at those things and I thought to myself, okay, that -- there is no law on this topic. And so I went back to their pleadings, and I looked, and they cite to one case. And it's in -- so they make the argument in 555P, at page 32, paragraph 1, don't cite to any cases. They make the argument in 555WW, page 20, paragraph 3; they cite to Lewis there. And then they make the -- the final time they make it there is at 555YY, page 10, paragraph 2, again citing absolutely no authority for the position.

So I read Lewis again last night, and it really struck me, because it's so spot on here. The -- it doesn't matter -- and I will address the first issue first and then the second issue about why it's so spot on next.

On assessing whether or not it matters whether Mr. Coyne or any subsequent convening authority knew why Mr. Rishikof was replaced doesn't matter, is not supported by the law because it's not the law.

When a party seeks to improperly remove somebody, they cannot thereby benefit from their improper actions. There has to be some sort of judicial sanction for it, and that's what Lewis stands for.

So right -- in Lewis you have a Marine, case decided

in 2006. I'm pretty sure you're aware of it. This is a new area of law for me, unlawful influence. I've learned it in this case.

But Lewis was arrested for a drug case, and so Lewis went before a judge -- and her name is Major CW in the case. And Major CW is subject to voir dire at the Article 39 hearing. And at that hearing the trial counsel is, through innuendo and suggestion, with the apparent help of the base SJA, attacking the veracity of the trial judge, saying to the trial judge, "Isn't it true that you have" -- basically inferring that she has an ongoing dating relationship with another woman.

It turns out that all of that questioning, all of that smearing was information fed from the SJA to the trial counsel. And the trial counsel then took that false information and used it to smear the trial judge.

The trial judge said none of it's true, but you've put me in a position where I am now compromised because no matter how I rule, whether I rule for the defense or the government, the argument's going to be, well, I'm trying to please the government because they've, you know, smeared my reputation, or I'm friends with or lovers with the defense counsel who is representing the defendant, and, therefore, I'm

subject to criticism by the prosecution. So the judge recused herself.

Going on, the second judge recuses himself because he makes, I think, a proper decision that the prosecution in this case was committing unprofessional conduct and he can't be fair to the prosecutors. And so they wind up with a third trial judge.

And in the CAAF decision, the CAAF says, you know, there is nothing wrong with that third trial judge. In front of the third trial judge, there is an offer for a plea agreement. The plea agreement is reached and eventually approved by a convening authority, and then Lewis is sentenced.

The case goes up to the criminal courts, the Navy and Marines Criminal Court of Appeals, and they rule there was unlawful influence; but they rule that the unlawful influence doesn't matter because the replacement of the judge, having a new impartial judge, there's no taint, there's no harm, there's no foul. And then it goes up to CAAF.

And CAAF says that -- a lot of different things, but they hold on two different grounds. They hold both on actual unlawful influence and an appearance of unlawful influence, and they say -- and this is at page -- I think it's 413 --

hard to find these things here -- 414, "We are not convinced beyond a reasonable doubt that the effects of this actual unlawful command influence were ameliorated by later actions and remedial steps."

And then skipping ahead, "We do not doubt the qualifications and neutrality of the two subsequent judges" who eventually served as military judges in Lewis' case. We are also mindful of remedial measures ordered by -- the person who directed, the judge who directed that the SJA be disqualified -- and that the SJA be barred from sitting in the courtroom and that there be a new convening authority for post-trial actions. Nevertheless, a review of the command influence in this case is not limited to actual unlawful influence and its effects of mistrial.

So they ruled that the government did not disprove actual unlawful influence and they determined that there was actual unlawful influence.

They then go on, and I'm quoting again, "Whether the conduct of the government in this case created an appearance of unlawful command influence is determined objectively." And then there's a series of citations, which I won't repeat.

"We focus upon the perception of fairness in the military justice system as viewed through the eyes of a

reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective disinterested observer fully informed of all of the facts and circumstances would harbor a significant doubt about the fairness of the proceeding."

And I'm going to skip ahead, because there is a lot of assessment of the facts. But the next paragraph, "The government wanted to ensure that a given military judge properly detailed and otherwise qualified would not sit on Lewis' case. In the end, the government achieved its goal through unlawful command influence. To this point, from an objective standpoint, the government has accomplished its desired end and suffered no detriment or sanction for its actions."

And then they conclude that: "Neither actual nor apparent unlawful command influence had been cured beyond a reasonable doubt."

The facts in that case are so similar to these facts. Nothing can be quite exact. So we're not talking about a military judge here; we're talking about a convening authority. But in this case, if you listen to what Mr. Castle said, you will find the thread that compares the two cases. And so I want to go on to Mr. Castle's testimony.

He began in August of 2017, and from the beginning until his first meeting with Mr. Rishikof, Mr. Castle testified that he had numerous conversations with the Office of General Counsel legal counsel -- at that time that would have been Mr. Easton, Mr. Vozzo, and a man they worked with regularly, Professor Jenks -- and that during those conversations he was getting information, negative information on Mr. Rishikof.

He was being told about the pretrial agreements that were being pursued in the 9/11 case. He was being told about an airplane that supposedly Mr. Rishikof tried to board and had to be called off on. And they were being told about a boat incident that happened earlier in the summer. Those were the three negative pieces of information that the Office of General Counsel legal counsel staff were informing Mr. Castle about.

Because of that negative information, Mr. Castle testified that he was wary going into the meeting, and he testified -- Mr. Castle testified that he had been told not to discuss the pretrial agreement with Mr. Rishikof.

Of course, the one thing Mr. Castle didn't testify to, presumably because nobody ever told him, is that he shouldn't have been discussing it as negative information with

people from the General Counsel legal counsel's office at all. Nobody bothered to talk about the negative environment and the information being fed to Mr. Castle from people who were aligned with the prosecution.

There appears to be and appeared to be absolutely no ethical boundaries in that office about division of duties and a sort of what we used to call a Chinese wall, but an ethical boundary of limitations that prevent the influence of parties outside the office from interfering with the judgment of a person who is tasked with overseeing many different directorates.

They had conversations in the office. There were warnings to Castle. And then finally Mr. Castle, sometime in September, met with Mr. Rishikof. The idea of pretrial agreements came up. They discussed them, and so pretrial agreements were again part of the conversation. Mr. Castle couldn't remember the exact date and he couldn't remember exactly what was said, but he said yeah, we talked about them.

After that occurred, pretrial agreements continued to be part of the discussion. They continued to be discussed, Mr. Castle testified, in regular staff meetings, as part of discussions regarding removal of Mr. Rishikof. They were discussed in meetings that Mr. Castle had with Mr. Rishikof on

the dates of October 12th and October 14th. They were discussed in staff meetings with legal counsel. And I think maybe the most telling time here about the real motivation behind the firing of Mr. Rishikof was the conversation that Mr. Castle had with Admiral McPherson.

So I was thinking last night as I am putting together my thoughts, and I was thinking about the prompt complaint rule, you know, the rule that allows in hearsay when something -- the first thing that somebody blabs out when discussing an important issue. So somebody is assaulted, and the police come upon him and they say, yeah, you know, Mr. Nevin did it; and that's given some reliability because it's the first thing out of their mouth.

So the first time that, really, that Mr. Castle has an opportunity to explain to somebody why it is they want to remove Mr. Rishikof and he's explaining it to his probable replacement, he doesn't talk about management issues. He doesn't talk about a ship not going in one direction or the other. He's not talking about a cohesive movement of an entire organization.

He says to Admiral McPherson two things: One, he explains to him about the phone call with Attorney General Sessions and Secretary Mattis where there was

a demand of no deal by AG Sessions and an apparent agreement to no deal by Mr. Castle.

He also tells Admiral McPherson that -- Admiral McPherson that Mr. Rishikof has been -- and these are my words -- shopping around the pretrial agreement in the 9/11 case to the Department of Justice, has been bringing it over to the Department of Justice. That's what he tells Admiral McPherson.

Why is that important? Well, because if the real reason behind the removal of the convening authority and the legal advisor was something different, why weren't those reasons explained to Admiral McPherson?

Then we have a series of memos to the Secretary of Defense. None of them -- the December 15th memo -- I can't see what's underneath the redacted part, but I'm imagining that it does not say anything about ships moving in one direction.

There continues to be in the Office of General Counsel legal counsel meetings, staff meetings about how to get rid of Rishikof. And pretrial agreements, that is, the COAs, the courses of action, all seem to be -- are always talked about. And that is the testimony of Mr. Castle. We talked about the COAs all the time. We had regular staff

meetings with the Office of Legal Counsel, Mr. Vozzo, Mr. Easton, Professor Jenks, and we would talk about, you know, the COAs and what are we going to do and how are we going to do that? And meanwhile, there is a series of more memos coming out. We have a memo, two memos in January, and all of this happens.

And eventually, as Mr. Connell describes it, Mr. Castle has some sort of a reversal, and it's unclear from his testimony why that happened. Maybe somebody got ahold of a memo and said, "Wait, you need to put a brake on this. Whatever advice you are getting is bad." Because you remember Mr. Castle said, "I began to doubt the advice I was getting; I needed to get other advice."

And he should have doubted the advice he was getting, because he was getting advice from Mr. Easton, later replaced by Mr. Newman, and Mr. Vozzo, all associated with the prosecutor in this case.

He says after he had this crisis, he pulled the memos -- although he has no memory of ever telling Secretary of Defense Mattis that he was pulling the memos recommending firing Mr. Rishikof -- and he forms what I will call a CYA group, cover your derriere group.

So that happens in the middle of January, sometime

around January 14. And Mr. Jenks, Professor Jenks, who had been involved in the earlier staff meetings, along with Mr. Vozzo and Mr. Easton, is now going to be the head of the CYA group; and he's going to put together talking points and some form of other reason why they can get rid of Mr. Rishikof.

That is the very definition of pretext. It is like a police officer who sees somebody on the street, goes up to them, with no reasonable suspicion or probable cause, pats them down and finds contraband, then later says, well, they made a furtive gesture and I saw them drop something to the ground. The later explanation is pretext. That is exactly what happened here.

When -- it's funny, again going back to last night thinking about this. So I had a year of experience working for a civil rights firm when I was in law school, and I'm not -- I'm by no means a civil rights expert. But I want to draw your attention to the thinking that needs to go into your analysis of these facts.

If you take everything at face value that Mr. Castle says, there is more than enough to raise any objective concern about the integrity of these proceedings in an objective observer who is fully informed of what occurred.

If we take this out of the military context and we take it into a more normal process that people are used to, let's say that you have a work environment where you have an African-American employee, and you've got a new boss who comes in and the new boss says -- comes in and starts talking to the rest of the staff and they all say to the person, to the new boss, they say, new boss, you know, we don't like this person, and, oh, she's black, by the way.

And every time they talk about this person they don't like, they don't like her because she doesn't -- she is not always nice or her, her, you know, they don't like her shoes or she doesn't always treat people, you know, with respect that those people think they deserve, but boy, she's black, and oh, she's black. And if she weren't black, you know, if she weren't doing that black thing it would be a lot better.

So that goes on for several months. And they prepare termination memos. And when they do prepare the termination memos the new boss is speaking to the person who is going to replace the black woman. And he says to the replacement, you know, we're replacing her because she's black, but also there might be these other reasons too.

And then the new boss has a crisis of conscience, and he realizes that maybe firing her because she's black might

not fly. So he puts together a working group, and says to the working group, you know, I have concerns that I can't fire her because she's black, so can we come up with some better talking points, some real reasons to fire her? Oh, yeah, we can.

Sure, you might have told everybody that she was black, and you might have told one guy in particular, the replacement, that's why you were firing her; but now we're going to give you new reasons. And you're just supposed to forget the fact that she's black, and no one will pay any attention to the fact that she's black, and everything that you've considered for the three months prior doesn't matter.

That defense would be laughed out of a civil courtroom. Of course, she was fired because she's black. And you should laugh the government's excuses in this case out of the courtroom because they are nonsense. This is pretext.

The question you have to ask yourself, and the question that I can answer for myself is the following: If the convening authority, Mr. Rishikof and Mr. Brown, had not been pursuing pretrial agreements, removing the death penalty from the largest, most infamous murder case tried in American jurisdiction ever, do you think that talking to Admiral Tidd or, I don't know, sending a memo directly to the Deputy

Secretary of Defense would have had him removed? Of course not.

So the defense has shown some evidence of unlawful influence. The burden has shifted. The government must disprove it. They haven't. You should grant our motion.

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

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

MJ [Col PARRELLA]: Mr. Harrington.

LDC [MR. HARRINGTON]: In deciding how you're going forward, we were just told the next prayer time is 5:22 and our clients would like to return to the camp after praying, Judge.

MJ [Col PARRELLA]: Okay. Is that representation for all the clients?

LDC [MR. HARRINGTON]: I believe so, Judge.

LDC [MR. CONNELL]: For Mr. al Baluchi, yes.

LDC [MR. NEVIN]: For Mr. Mohammad, yes.

MJ [Col PARRELLA]: Okay. So then in that case what we'll do is we'll go ahead and recess -- General Martins?

CP [BG MARTINS]: Your Honor, could we, for the record, just get representations from all five just to nail that down, from counsel? Oh, that's everybody. Sorry.

MJ [Col PARRELLA]: Okay. So why don't we go ahead and do

this. We will go ahead and recess until 1830. That gives us about an hour and 15 minutes, I think, so it should be plenty of time. We will come back and we will finish this up. The commission is in recess.

**[The R.M.C. 803 session recessed at 1713, 15 November 2018.]**

**[The R.M.C. 803 session was called to order at 1834, 15 November 2018.]**

MJ [Col PARRELLA]: This commission is called back to order. All parties are present who were previously present when the commission last recessed with the exception of Mr. Mohammad, Mr. Binalshibh, and Mr. Ali, who have departed the courtroom. Is that correct, Counsel?

LDC [MR. NEVIN]: Correct, Your Honor.

LDC [MR. HARRINGTON]: Yes, Judge.

LDC [MR. CONNELL]: Yes, Your Honor.

MJ [Col PARRELLA]: Okay. The commission finds that they have knowingly and voluntarily waived their right to be present at this session, and we will continue now with 555, Mr. Harrington.

LDC [MR. HARRINGTON]: Judge, my colleagues have said most of what I had wanted to say, but just a few comments.

With respect to Mr. Castle, I think he -- a Shakespearian quote was, "He doth protest too loudly." He was

a defensive witness, he was an unclear witness. These are my assessments of him. Obviously, you will make your own.

And the only thing that he was definitive about was repeating the script that he had put together about the reasons for it. And I think it was very telling when Mr. Ryan got up and basically directed him what the answer was for -- that he wanted us to believe.

But I would like to highlight for the court, in your consideration here, two instances: One, Mr. Rishikof went to the Department of Justice. We know that. We know that Attorney General Sessions found out about it and called Secretary Mattis, and it happened during an important meeting, according to Mr. Castle, that happened on October 13 of 2017, and the only words that are remembered are "No deal."

And Mr. Castle said that he was not sure what that meant, but he repeated the words "No deal" to Secretary Mattis. And somehow mysteriously in this situation, which is obviously an important one for two extremely important men, Mr. Mattis **[sic]** cannot recall the Secretary asking him any questions about it or trying to get any explanation or saying to him will you find out what's going on? Nothing about it. It defies credulity.

But mysteriously -- and this is the important part --

Mr. Castle calls Mr. Rishikof in to complain to him about him going to the Department of Justice. Now, he didn't say that he asked him about the pretrial agreements, but he did say that he wanted to know why he went to the Department of Justice without clearing it with Castle first. And Mr. Rishikof gave him an answer, which was that he was given permission to do this by Deputy Secretary Shanahan to do it.

And the important part about this is the fact that Castle inquired about the one thing that had to do, which would be the subject of unlawful influence as we know it in this record, which would be the pretrial agreements.

Now, he said he was satisfied after he got the response from Shanahan. But he told the court that there were other instances that Mr. Rishikof had been involved in, such as the aerial photos and the boat and several other things, none of which he testified that he asked Mr. Rishikof about. And those are supposedly the reasons that were used for, in part, for the discharge of Mr. Rishikof. And it just seems to me that it's -- it's extremely coincidental that that would happen.

The second incident which has been talked about is the appointment of Candidate A, McPherson, as a replacement for Mr. Rishikof. And for some reason, Mr. Castle thought it

necessary to mention the subject matter here to Mr. McPherson.

He said he wasn't feeling well, he went home, and a magical moment came to him on the weekend when he had the flu and he decided, well, maybe this might be interpreted as unlawful influence, so he recalls McPherson.

And McPherson was not on the list of witnesses that we would propose to call, but based upon Castle's testimony about this, it's clear that he is an essential witness, just like Mr. Rishikof is an essential witness to the first incident -- incidence.

But I just ask the court to keep those two events in mind, because those are the two that really link Castle to unlawful influence.

And the standard here is that we have to come forward with some evidence. It doesn't mean we have to come forward with irrebuttable evidence. It means we have to come forward with some evidence, even if there's some evidence to the contrary. We have reached that burden, Judge, and we believe that the burden should shift to the prosecution.

Even if the court were to determine that we haven't reached that, I certainly think that we have given the court enough, it should allow us to bring some of the witnesses that are on the list in to amplify what was said or to discredit

what was said or discredit our arguments. But there's enough here. This is kind of like a situation where there's a smell test, and there's a stench here that needs to be excised.

Judge, you also mentioned -- you asked Mr. Nevin about what prejudice there were to the defense, and I would like just to repeat and maybe amplify what he said. But one of the prejudices is the chance to potentially settle this case. And you could sit there as a judge and say the next convening authority could settle the case, too, and we don't disagree with that.

But the real prejudice here with this case is we had a chance to settle the case with a convening authority who wanted to settle the case and who -- as came out in the testimony, the purpose of going to the Department of Justice was to see if an agreement could be reached that there would be no further prosecution of our clients within the United States.

But we have a convening authority here who is actively trying to settle the case. We all found that extraordinary, and I don't think it's going to come again. But we have suffered irreparable prejudice by Mr. Rishikof being discharged.

MJ [Col PARRELLA]: Just one question, Mr. Harrington. Is

there any evidence or indication before the commission that the current or the subsequent convening authority to Mr. Rishikof was unwilling to settle the case?

LDC [MR. HARRINGTON]: There have been several changes, Judge, interim convening authorities. And I can only speak for myself, but no efforts have been made by me so far to go to somebody else. But that, in part, was delayed because of this particular motion which was going on, which I thought was going to compromise the ability for any convening authority at this point in time to do it until this issue was resolved.

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

Mr. Ruiz.

LDC [MR. RUIZ]: Judge, I don't have any additional argument.

MJ [Col PARRELLA]: Trial Counsel.

MTC [MR. TRIVETT]: Good evening, Your Honor.

MJ [Col PARRELLA]: Good evening.

MTC [MR. TRIVETT]: The defense has not produced any evidence of unlawful influence or the appearance of unlawful influence, and the burden has not shifted to the government.

I stood up last time before you on our motion to reconsider and predicted that Mr. Connell was going to be able to present a tremendous amount of evidence surrounding the

terminations of Mr. Rishikof and Mr. Brown, but that ultimately, at the end of the day, none of it would constitute unlawful influence. We stand here today saying our predictions were correct.

There were three reasons given by Mr. Castle and Secretary Mattis for the terminations of Mr. Brown and Mr. Rishikof. One was the uncoordinated Management Consolidation Memo, otherwise known as the "King Me" memo; the uncoordinated phone call to the Combatant Commander; and the Coast Guard overflight without proper coordination. And I wanted to touch on a few points about these three instances.

The declarations never claimed that there was zero coordination, only that proper coordination was not done. It is the undisputed evidence in this case that the Regulation for Trial by Military Commission required the convening authority to coordinate with the Office of General Counsel before calling a Combatant Commander. That coordination did not occur.

It is undisputed that SOUTHCOM refused the request for updated imagery. It is undisputed that Mr. Rishikof did not tell the Coast Guard that SOUTHCOM had already refused the request when he used the BRO-NET to contact Admiral Lunday to ask him for the images.

It is undisputed that the "King Me" memo was an action memo, not sent in advance to the Office of the General Counsel or any other of the potential affected entities, who had zero opportunity to weigh in on the drafted proposal.

Now, Mr. Connell's argument is that these conversations somehow constituted coordination, and I would respectfully disagree with such a comment when it is based on communications going to the office of the Secretary of Defense or the Deputy Secretary of Defense.

You can have lots of conversations with people about things that you intend to do. You can have conversations with people claiming to take away authority that those people have. You could have a conversation and say I'm going to take over the control of the security function of the military commissions.

You can have a conversation to say and I'm going to take your parking spot. And you can have a conversation to say and I'm going to start dating your wife. And all along the person who you are talking to is probably thinking two things: One, this guy is a little off, and two, thank God I have the formal DoD coordination process where I'm going to get to formally concur or nonconcur before this proposal goes to the decision-maker, and that never happens.

And that is undisputed that it never happened. He may have had lots of conversations with lots of people. Those people may have completely disagreed with his course of action about consolidating authority, whether it be over the chief prosecutor or whether it be over the security function of military commissions.

But in DoD you have a formal chance to concur or not concur, and that chance was never given when the Management Memo was sent directly to the Deputy Secretary of Defense without OGC's coordination, without WHS's coordination, without anybody who may have concurred with those proposals.

It is also not disputed that that memo, which sought reorganization and consolidation of certain authorities, was sent by Mr. Rishikof as Director of the Office of Military Commissions, and by his Chief of Staff, Mr. Gary Brown. He did not sign it as the Convening Authority of Office of Military Commissions, it was not signed by Mr. Brown as the legal advisor to the convening authority. That is significant in that they clearly believed that they were operating under their director role and not under their convening authority role. That is not disputed.

Other things that are not disputed by the evidence.

There was a JTF-GTMO soldier on a helicopter flying over this very courtroom taking pictures of the ELC, and the commander of that soldier, the commander of JTF-GTMO, knew nothing about it.

In the testimony from Mr. Newman, in his interview with the JTF Commander, Admiral Cashman, he said, "I would have liked to have known about that. Requests for imagery have a very specific coordination requirement with SOUTHCOM. If someone was flying over taking images of the ELC, that's something I would have liked to have known." He didn't know it.

And we also heard testimony yesterday from Mr. Castle that phone calls came back to the Pentagon after the conversation with Admiral Tidd regarding the imagery complaining that Mr. Rishikof had been rude to a four-star admiral combatant commander.

All three of these instances are not judicial acts, and each one separately could have justified Mr. Rishikof's dismissal.

The defense is asking you to substitute your judgment for the judgment of the Secretary of Defense and his principal legal advisor at the time, and I would submit to you that that's not the standard. The standard is was it a judicial

act for which he was terminated? And if the answer is no, you don't go to the second part of the analysis where you say, "Would I have fired him for that purpose?"

They had reasons, Mr. Castle testified about those reasons, and ultimately made a decision that he wasn't the right person for the job. Once you make the determination that they were not judicial acts, those three reasons they gave were not judicial acts, the inquiry is over, the motion is over. There is no unlawful influence. A lot of what I said is actually supported by the defense's evidence that they put into this case.

In AE 555SS, which were the compilation of Lieutenant Newman's investigation, in his interview of Wendy Kelly, who is the Deputy Chief of Operations for the Office of Commissions Convening Authority, Ms. Kelly said, and I quote, "I think Harvey was naive about how you process actions in the Department of Defense. Multiple people in the office tried to steer him back to a more standardized process."

From her 12 years working for the convening authority's office, she described getting something to the Deputy Secretary of Defense as being a very routinized process that you have to staff through other offices.

She said that Mr. Rishikof, who she personally liked,

had angst using the slow process. She was the one who first described it as the "King Me" memo. So this is coming from someone who liked Mr. Rishikof personally, who had worked in the convening authority's office for a dozen years, and who had worked on that memo herself and she was the one who understood it to be an overwhelming expansion of authority that no convening authority had had before him.

When she was specifically asked about the firing, she said Mr. Rishikof was not respecting the DoD process and it came across like a, quote, bull in a china shop. That is echoed by Mr. Castle's testimony yesterday, that there was no coordination, and when the coordination was being done, it was being done in a less than proper and fulsome manner.

Ms. Kelly also indicated that guilty pleas had been discussed by nearly every convening authority and legal advisor in the last 12 years, yet none of them were fired.

There was also an interview of Rear Admiral Lunday, again, Appellate Exhibit 555SS put in by the defense.

So Mr. Rishikof reaches out to Admiral Lunday on what I believe Lieutenant Newman described as the BRO-NET, someone he knew, tried to get a favor done for him through that process. And Admiral Lunday says to Lieutenant Newman, "If someone had said they went to SOUTHCOM and they didn't want to

do it, I would have said we need to work through that, but that was never part of the discussion."

So despite going to SOUTHCOM and despite SOUTHCOM refusing his request, Mr. Rishikof reaches out to the Coast Guard, to a personal friend in the Coast Guard, and doesn't give him the background needed for even him to properly coordinate the issue with SOUTHCOM.

The declarations never said that there were zero coordination at all. After all, no one has alleged that Mr. Rishikof came down here to Guantanamo and got on an air -- a helicopter with Mr. Brown, flew himself and took pictures. There was obviously coordination. It didn't mean it was the correct coordination, and it clearly wasn't in accordance with the requirements of the regulation to have called the Combatant Commander to begin with. So these are easy process fouls, clear, undisputed, and part of the reason why ultimately they were terminated.

So again, ample reasons, nonjudicial reasons that they decided Mr. Rishikof was not the right man for the job and why they ultimately terminated him.

So that leaves the pretrial agreement consideration issue and, Mr. Connell I think said, "our central theory has been that he had too much independent legal judgment, and that

ultimately that bothered people."

We are seven, eight months into the litigation and this is the first time I have heard the defense's central theory, because it's gone all over the place. It started with rank and wild speculation that they never followed up on because they ultimately filed this motion shortly after the terminations with zero evidence and zero requests for discovery initially, but at some point it lands on this pretrial agreement piece.

I want to talk briefly about the importance of live witnesses, as Mr. Connell began his argument with. I would note that despite the fact that Mr. Castle didn't agree to meet with any of the defense counsel in advance, that ultimately the defense counsel were able, with the discovery we provided them, to do an ample cross-examination over many hours on this issue, something that I sat in court today and listened to as a claim of impossibility on the other issue.

But it was important with something we learned, that I even learned, and I believe it changes your whole analysis of this issue. When I stood here in front of you last session, we argued specifically that there were terms of an agreement that would necessitate the Attorney General being involved, that he had statutory and regulatory requirements

for coordination, and I assumed Mr. Rishikof believed he had a need to go based on those requirements, those regulatory and statutory requirements.

But it turns out that that's not exactly the case. For the first time we hear yesterday from Mr. Castle through his testimony that it was a mandated, required term that the Attorney General sign off on this pretrial agreement that they required. The defense required the Attorney General to approve of a deal. That's the evidence now, and that means game over on the pretrial agreement issue.

If they are requiring the Attorney General to approve of any deal, then ultimately, just because the Attorney General says no and communicates that to his cabinet counterpart, that's not unlawful influence. That's an answer to the defense request.

"No deal." "No deal." The Attorney General wasn't willing to make a deal for whatever term it was. And I want to peal back for a second some of the things that have been said.

I would submit to you, sir, that your findings of fact cannot include that there was a signed pretrial agreement from Khalid Shaikh Mohammad in this case. I will represent to you that after Mr. Nevin made his comments the last time about

having a pretrial agreement in this case -- he vacillated a little bit with the language he used -- but I went to the convening authority's office and I said can we see a copy of this? Because I believed there may be a term in this proposed pretrial agreement that would have required the Attorney General to have some legitimate lawful input. They had no record of ever receiving a proposed pretrial agreement from Mr. Mohammad.

So what we do is we then request discovery from Mr. Nevin to say, based on some of what you've argued, there may be a term in there that we would like to see. Can you please provide us whatever you sent to the convening authority?

Now, I have no doubt that there were some proposals sent, that there were some terms to be worked out; and I think in the end, at most it's going to be an e-mail. But ultimately, the defense counsel have to live with the strategic decisions they've made in this litigation. And often we have complained that they haven't been held accountable to that. They weren't held accountable to that when they filed their motion at the beginning with no evidence and we simply said there's no evidence, deny the motion. They need to be held accountable now.

If you're claiming to have a pretrial agreement when you don't, at least in regard, as you and I might know from a military justice standpoint, with an actual pretrial agreement, with actual terms that are signed by the accused, waiting for signature from the convening authority, and if you're requesting specific terms that demand Attorney General approval of something, or New York State approval, or Massachusetts approval, or whoever else may have had jurisdiction over the attacks of September 11th, and you don't put that pretrial agreement into evidence, then you can't claim that you had a pretrial agreement at all.

And that goes to the prejudice question that you asked specifically of one of the counsel: Well, what's the prejudice? You can at least plausibly make an argument, if you had a signed pretrial agreement that was ready to be signed by a convening authority, but there is no evidence of that at all.

So please hold them responsible for the strategic decisions they've made to not put that in front of the judge and not make a finding that there was any actual pretrial agreement. We haven't seen it. We've asked for it. Mr. Nevin claimed it was privileged in some way, then he claimed it was confidential in some way. And then he claimed

that he had plenty of time still under the trial conduct order to consider our request, knowing full well we were about to litigate it this week.

It's important as well to address the Attorney General's phone call, because the Attorney General never spoke to Mr. Rishikof. The Secretary of Defense never spoke to Mr. Rishikof. Mr. Castle did speak to Mr. Rishikof two days after.

Mr. Castle would have been understandably upset, after having about six weeks on the job, being pulled out of the most important meeting that he attended, with the Secretary of Defense, to be blindsided from the fact that the Attorney General is calling about something that the DoD did.

He very credibly testified yesterday that he really didn't even know what he was talking about at the beginning; that's how blindsided he was. He later figured out what it was, after doing the due diligence that was required in his office to figure out that indeed what he was talking about were the pretrial agreements.

So what does the testimony indicate that he said to Mr. Castle? He repeated over and over again, "All ships need to go in the same direction. I need to know where you're going so we're all going there at the same time." He didn't

discuss pretrial agreements. He didn't try to in any way influence those pretrial agreements.

And, in fact, he was adamant that every time he met with Mr. Rishikof, Mr. Rishikof brought up the issue of pretrial agreements, and that he would wildly gesticulate, waving his arms, saying, "This is your call. This is not something I want to know, this is in your sole discretion." Every time he met with him, Harvey tried to talk about it, Mr. Rishikof tried to talk about it. Every time, Mr. Castle tried to shut him down.

We only asked about five minutes' worth of questions, and that was the most important thing the prosecution felt we needed to clarify for the commission; that even in this call about the Attorney General's phone call, that it was still about coordination, and that he still went over and above what was required to make sure that Mr. Rishikof did not believe that he was trying to influence his decision on whether or not to accept a pretrial agreement.

Not being a judge advocate, never having been a commander, never having had that training, he -- Mr. Castle testified before his first meeting with Mr. Rishikof it was explained to him that that is something within his sole discretion and that the unlawful influence concern was very

real. So the danger antenna went up on him, because he was told that this was not something that he can influence in any way.

He carried that through all of his conversations with Mr. Rishikof, including that follow-on Attorney General phone call. But the Attorney General phone call, in the end, was precipitated by a defense requirement that the Attorney General approve something, and that changes the entire analysis.

If it were a close call as to whether or not that was unlawful influence before that revelation, it's not a close call now. It was a required term from the defense counsel themselves.

So I want to briefly discuss the military justice expert panel issue. It cannot be that the consideration of pretrial agreements inoculates the convening authority from ever being terminated. So there have to be lawful reasons to terminate a convening authority, and in this case certainly the director of OMC, even if they are considering judicial acts, even if you are aware of those judicial acts, and, quite frankly, even if you disagree with those judicial acts.

When Mr. Castle was asked specifically from Mr. Connell, "Well, what did you consider to be a judicial

act," he said two things: Pretrial agreements, decision to refer charges.

We're not saying necessarily that's every judicial act that a convening authority could take. There's a sort of quasi-prosecutorial decision that's infused within that request for a pretrial agreement.

But even assuming for this argument that that is a judicial act, Mr. Castle testified that he wanted to be extra careful, to make sure that he was considering only nonjudicial acts in making his recommendation to the Secretary of Defense to terminate Mr. Rishikof.

And I would submit to you that the military justice expert panel was not a crisis of consciousness as much as it was a very sound -- it was a sound legal decision from the top attorney in the Department of Defense to make sure he didn't do anything that would impact the most important case, hopefully, the Department of Defense will ever prosecute.

We ask judges to do that all the time. And with all respect to the military judge, judges aren't superhuman, and they're not super-lawyers. Mr. Castle is a lawyer, like all of us. We ask judges all the time, who know information about lots of things, to make determinations and disregard other parts, whether it be prejudicial evidence or evidence that was

later deemed inadmissible. Lawyers can do this, and Mr. Castle did it.

And ultimately once he got the military justice expert panel to say yes, you can still consider these three issues, these nonjudicial acts, and as long as the Secretary is only considering these three things, it would not constitute unlawful influence. Those three things are simply not acts that the doctrine of unlawful influence protects.

Mr. Castle did exactly what we ask judges to do all the time when he considered certain evidence and not other evidence in making his recommendation.

And ultimately the Secretary of Defense decided to rescind Mr. Rishikof's designation based on those three reasons, those three reasons alone, swore to it under oath, as did Mr. Castle, and there is no real reason to dispute that.

So I want to discuss briefly now the interview with Admiral McPherson. Mr. Castle mentioned that in one of his conversations with Admiral McPherson -- who was the former Judge Advocate General of the Navy and certainly presumed to understand the doctrine of unlawful influence, had just been confirmed as the Army General Counsel, had agreed to come on as the convening authority in these cases.

Mr. Castle mentions to Admiral McPherson that one of

the reasons why Mr. Rishikof was terminated was because he went over to the Department of Justice in an uncoordinated manner and that he wasn't aware of it. Now, ultimately Mr. Castle takes some time to reflect on that and doesn't want that to be misinterpreted in any way to be unlawful influence.

So last time I stood up and discussed briefly how commanders in the field are trained to avoid unlawful influence and to fix any unlawful influence that may have occurred intentionally or not.

I would ask for the feed from Table 3, please.

MJ [Col PARRELLA]: You may have it.

MTC [MR. TRIVETT]: So for the record, these documents are already in the record from last argument at AE 555RR. Copies have been provided to the defense.

So just to refresh the commission's recollection -- I won't spend much time on this -- but 2015 Commander's Legal Handbook, which is a publication of the Judge Advocate General's Legal Center and School for the United States Army where they teach their new commanders about the concepts of unlawful command influence, there is something called the Ten Commandments of Unlawful Influence that every Army JAG is trained on and everyone who is about to take command is trained on.

The next slide, please.

So we focused last time on Commandment 6 primarily, but I'd like to call your attention to Commandment 10. So Commandment 10 states that "If a mistake is made, raise the issue immediately and cure with an appropriate remedy."

I would submit to you that Mr. Castle, despite not having any training at the Army JAG School, despite never being an Army JAG or a JAG in any service, did a pretty good job on Commandment 10.

Ultimately not wanting it to seem as if he was trying to influence Admiral McPherson in any way on whether to accept the pretrial agreement, he decides, despite the fact that Admiral McPherson may have been as qualified to take the job as any candidate and certainly would have made a wonderful convening authority by all accounts, he decides to completely disregard him as the next convening authority and decides to hire Mr. James Coyne.

Mr. James Coyne, very qualified in his own right, was specifically asked to declare in this case what, if anything, was said to him when he was hired.

On 6 August 2018, he makes this declaration under oath.

Next slide, please.

"As of the date of this declaration, I have no discussions with anyone, to include personnel from the Department of Defense Office of the General Counsel, to include the Former Acting General Counsel, William Castle; the Office of the Secretary of Defense, to include the Secretary of Defense; the office of the Deputy Secretary of Defense, to include the Deputy Secretary of Defense; or personnel from the Executive Branch officials outside of DoD to include the Attorney General of the United States regarding the topic of entering into pretrial agreements in any present or future military commission case, to include the case at bar.

"When I assumed my current duties I had no awareness of whether there had been any consideration by my predecessor of plea agreements in the current case or any other active military commission case prior to my appointment."

Now, there were some conversations, some arguments made about the shifting burden and whether or not the prosecution has to present additional evidence. Our position all along is that there's no evidence to shift the burden, and ultimately if the burden is shifted, we're required to prove beyond a reasonable doubt that there was not unlawful influence or that it won't taint the proceedings.

We're not intending to present any additional

evidence. This declaration says it all. To the extent the military judge disagrees with the prosecution and believes that something that occurred during the termination of Mr. Rishikof was unlawful influence, it's clearly been cured by Mr. Coyne's appointment. We invited the military judge, if he needed to, certainly to solicit a declaration from Ms. Perritano, who is the current convening authority, if that was required to ensure the military judge that there is no active ongoing unlawful influence in this case.

So I want to discuss certain things the defense brought up specifically, and one of them was the Lewis case. I believe Ms. Bormann focused on the Lewis case. Here's how the Lewis case differs.

In Lewis, the court found that the SJA and the trial counsel had conspired to recuse a military judge that was otherwise qualified, and that's clearly not the trial counsel or the SJA's role in the military justice system, and that that constituted unlawful influence.

If you change the facts a little bit in Lewis, and if it's a senior judge of the trial judge in Lewis, and the senior judge believes that the trial judge was conflicted based on any type of personal relationship with one of the counsel, the senior judge could have removed him.

It was -- Lewis was a case about everyone understanding their proper roles in the military justice system. It wasn't about this concept that no one has accountability to anyone who is appointed properly over them.

And the Secretary of Defense is the sole statutory convening authority in this case. He clearly has authority over Mr. Rishikof. He clearly had the power to rescind his designation whenever he chose to do so.

And like we argued last time, providing he didn't try to influence Mr. Rishikof in his decision and providing he didn't try to influence Mr. Coyne or any subsequent convening authority on the issue of pretrial agreements, he could have removed Mr. Rishikof solely because he believed the case shouldn't be dealt out. If he did it in a way where he wasn't influencing anyone, he had the authority to do that. We're not saying that happened. We're simply saying that he had the ability to take the case from Mr. Rishikof and turn that over to another convening authority.

That's one of the ways that you remedy or ensure that there's no unlawful influence in the case. I believe that's the Boyce case -- let me make sure I have the right case -- yes, in the Boyce case where the Secretary of the Air Force had lost confidence in a convening authority due to his

previous handling of sexual assault cases while he had a pending sexual assault case on his desk for a referral decision.

And what the Boyce court instructed, and one of the reasons they found unlawful influence in that case, is because his superiors didn't remove that case from him; that they didn't order him to send it to an adjacent headquarters or send it to a higher headquarters.

But ultimately there are no adjacent headquarters here. The convening authorities and the military commission are unique statutory creatures. They are created by the Military Commissions Act, and really only if the Secretary of Defense decides to appoint one is there anyone other than him. There was no one else to send it to. And there was no reason, based on his lack of coordination as the director of OMC, to keep him in the position.

But ultimately what he did was similar to what the court in Boyce requested or said should have happened but didn't happen in that case. He gave the case to someone else. That person retained full authority to enter into pretrial agreements and was not influenced in any way.

So we have proven beyond a reasonable doubt that if there was any unlawful influence, it's been cured by the

appointment of a neutral convening authority with no awareness of the reasons why his predecessor had been fired.

So that's the actual command influence requirement. There's an appearance of unlawful command influence standard. It says the appearance of unlawful command ----

MJ [Col PARRELLA]: Mr. Trivett, just before you get to that, I do have one question on the actual ----

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col PARRELLA]: If you could address the discussion we had about sort of the pass-through unlawful command -- or unlawful influence.

So even assuming Mr. Castle honestly believed that there was a lack of coordination and that was the basis for his decision to fire Mr. Rishikof, or recommend the firing of Mr. Rishikof, had some of the individuals who worked for him fed him false information, could they have committed unlawful influence, and what would analysis be for the commission?

MTC [MR. TRIVETT]: Well, ultimately we believe all the information provided is backed up by the evidence in this case, so I think this is a hypothetical question.

But if someone was intentionally trying to get someone out of a position and telling a person of authority things that were intentionally incorrect, I think we would

concede that that was unlawful to do.

Whether that was the appearance of unlawful or actual unlawful influence, I think there's a scenario which that could be the case. But ultimately the evidence in this case supports that all of the reasons in the declarations were completely justified.

You can't have people -- you can't have puppet masters behind the scenes manipulating the process. That's the concern of the appearance of unlawful influence, that it would put an undue strain on the public's perception of the military justice system if they thought that someone could fix an outcome, or someone could intentionally -- that someone could influence someone's professional judgment in whatever role they were filling. But I would strongly suggest that the evidence in this case is the exact opposite.

There seems to be a lot of focus from the defense on Mr. Vozzo. But following Mr. Castle's testimony, it's important to remember that he said, at the very beginning, pretty much his entire staff had concerns with Mr. Rishikof. So this wasn't a personality conflict between one person and another person; this was an entire staff full of concerns who had worked very closely with Mr. Rishikof and Mr. Brown.

So ultimately, to answer your question, I think it's

possible. I just don't think that the evidence comes anywhere to support that finding in this case.

So ultimately, for the appearance of unlawful command influence, it will exist when an objective, disinterested observer, fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding.

In applying the test to our case, the prosecution believes that a reasonable observer would have no doubt about the fairness of this commission, in light of the government and defense evidence that was presented on this issue.

There was no signed pretrial agreement -- these are some of the facts, knowing all the facts a disinterested observer would need to know.

There was no actual pretrial agreement. The accused has no right to a particular convening authority. The defense specifically mandated, as part of the terms of one of these -- as one of the terms -- we haven't seen any of the other terms -- that the Attorney General approve and make a promise that he would not prosecute the accused either for this -- for these offenses or other offenses.

Again, I'm a little in the blind because of how the defense decided to litigate this issue, but I would

respectfully suggest that so are you; and, therefore, you can't make findings other than what we've heard from Mr. Castle regarding this requirement that the Attorney General approve whatever deal was made, and that this requirement was a defense-initiated requirement, not a Mr. Rishikof-initiated requirement.

We would also ask the military judge to look to the Villareal case, which ultimately indicates that any unlawful influence or taint is generally cured when the case is sent to another convening authority. That was the case, I believe, where a subordinate convening authority reached out to a superior convening authority for advice on the case.

May I have a second, sir?

MJ [Col PARRELLA]: You may.

MTC [MR. TRIVETT]: So the defense argues ultimately that anything that requires an application of law to facts is a judicial act. They rely on 120-year-old case law for that proposition. I would note that attorneys of all stripes every day apply law to facts, and that doesn't make them judges.

Ultimately we believe the correct standard is the Ayestas v. Davis standard, which is a little more recent. It's from the Supreme Court in 2017, so I think we've got them beat by about 128 years of jurisprudence. And ultimately it's

the best case that's the closest on point to our situation, where you have a director of the Office of Military Commissions that's responsible for resourcing and the administrative processes to make sure that these cases happen in Guantanamo Bay, and that ultimately there's a bunch of administrative decisions that have to be made by that person, none of which, according to the Supreme Court, would constitute a judicial decision for which they would have any jurisdiction over it.

So there is a recognition that judges make decisions all the time. Judges make decisions all the time that are nonjudicial in nature. Clearly, a convening authority is a step removed from a judge, and the Director of the Office of Military Commissions is miles removed from a judge.

I'm just going through my notes. If you could just bear with me for a second, there's a couple of points I wanted to make that the counsel had raised.

So Mr. Connell also made the argument that, based on Mr. Castle's testimony yesterday, that the decision started long before the Management Memo, which was written on 12 or 13 December.

The Disposition Memo, which was the first evidence we have of an actual recommendation that Mr. Rishikof be

terminated, occurred two or three days later but, as defense counsel correctly point out, that that started long before the Management Memo.

That fact is helpful to the prosecution's position, because then it's not a PTA issue, it's not an issue regarding pretrial agreements, which was COA 3, and the 12 December memo. It was based, as Mr. Castle said it was based, on a long concern that he had, over whether it be the CODEL instance, the fast boat instance, the general temperament of dealing with coordination.

If all of this occurred before the memo of -- before the "King Me" memo and the COA 3 that was announced for that, this wasn't about that memo and it wasn't about the PTA, at least initially. Mr. Castle explains why. He goes through the fact that he disregards that, and ultimately makes his decision on the three nonjudicial acts. But that's actually a fact that is helpful to the prosecution, certainly not harmful.

So Mr. Connell's FOIA documents, if you read through those, I would submit to you that they do not support a finding that JTF-GTMO was made aware of the overflight.

And specifically -- and I don't have the document in front of me, because I didn't know he was going to raise this

issue in argument, but it is definitely in the exhibits you already have, where SOUTHCOM is talking about how disappointed they are with OMC that they still don't seem to understand how to properly coordinate with the Combatant Commander, and that ultimately a request for imagery isn't something that should even rise to the level of the Combatant Commander.

That's one of those reasons when you look to the regulation as to why the general counsel has a legitimate role before they reach out to any combatant commander, who obviously have tremendous responsibility, are very busy people and need not be bothering themselves with whether or not Mr. Rishikof has an updated picture.

So I believe those documents do not show coordination at the places where the lack of coordination was the concern. And ultimately it shows again that the convening authority's office was not the very best at coordinating anything.

There were some aspersions cast at the prosecution, as there always are. We certainly don't concede that everything that Mr. Brown said was true.

Ultimately, we can concur that everyone had the unpleasant experience of having to coordinate with Mr. Brown and Mr. Rishikof on certain things, and that it was never a fun experience. That doesn't make it unlawful influence if

people are asserting their own statutory authorities to do things.

It's very clear in the manual that a decision to appeal any decision of the court is that of the chief prosecutor's and not the convening authority. So even if the convening authority had been upset that the decision of the prosecution and the chief prosecutor was to not appeal something, too bad. They didn't have that authority.

They were clear that they were trying to assert as much authority as possible over every aspect of the process, even if they were just learning where the bathroom was.

So with that, sir, subject to your questions, the prosecution's position is plenty of evidence, none of it unlawful; and ultimately we would have cured any unlawful influence that existed.

MJ [Col PARRELLA]: Do you believe there's been some evidence?

MTC [MR. TRIVETT]: We don't. Nothing -- there is no evidence -- it's hard to pin down the defense, right, because the defense's position is that it was all of his legal determinations. Every legal determination he made he was entitled to make and no one could say boo about that without causing unlawful influence.

But what I can say is that the main focus, the three reasons that were set forth in the declaration were clearly nonjudicial acts. So any evidence of what happened in the termination of nonjudicial acts does not constitute some evidence of unlawful influence. It constitutes evidence of a personnel action. And ultimately may be interesting in a federal court case called "In re: The Termination of Mr. Rishikof," but it's not unlawful influence.

So then the second issue comes down to, okay, but what about the pretrial agreement? What about the Attorney General phone call? Ultimately, if they required the Attorney General's approval of it, when he says no, that's not evidence of unlawful influence.

And when Mr. Castle gets in and talks about the failure of coordination and wildly throws his hands around like he did every meeting saying, "I don't want to discuss anything about pretrial agreements," then that's not evidence of unlawful influence. It's evidence of an answer to a term that they mandated as part of the deal.

And if that's a term that they were mandating as part of the deal, there was never going to be a deal, right? If the Attorney General requirement is required and he said no, the deal is over.

So ultimately Mr. Rishikof could try and try again, I suppose, but there was no deal to be had if they required the Attorney General to say yes and he said no. So communication of the fact that he said no to the guy who sought his answer cannot be unlawful influence. It cannot be any evidence of unlawful influence.

Unlawful command influence in the air, so to speak, is not enough. The courts are clear on this. We have a termination. We never conceded that we had a termination of employment, but we've always said that it was done for proper reasons, for nonjudicial reasons, and all of the evidence supports that.

The defense casts innuendo. They say it's a pretext. They have no proof of this, and all of the evidence suggests otherwise.

If you determine that they were nonjudicial acts, those three things, and that there is evidence supporting them, then you have to defer to the Secretary of Defense and the Office of the General Counsel -- the acting general counsel, rather, in that that was sufficient enough to terminate them as convening authority and to get a new convening authority in.

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

MTC [MR. TRIVETT]: Thanks.

MJ [Col PARRELLA]: Mr. Connell.

LDC [MR. CONNELL]: Nothing further, Your Honor.

MJ [Col PARRELLA]: All right. Mr. Nevin?

LDC [MR. NEVIN]: Your Honor, just to address a couple of things that I think should be addressed. The -- and I think of it as the "Way Forward" memorandum. It -- the "Way Forward" memorandum, the December 13 memorandum that Mr. Rishikof provided, just two things.

It was coordinated in the sense that Mr. Connell referred to during his argument; there's no question about that. I understand counsel to be saying that's not sufficient, but as we know from follow-on discussions, that was a memo that Mr. Rishikof had been directed to provide directly to the Deputy Secretary by the previous Deputy Secretary. I think Mr. Castle perhaps was not aware of that, but that was something that Mr. Rishikof was relying on.

So if instead of hearing a report from someone who was reporting to him, in other words, getting the information indirectly -- if instead he calls Mr. Rishikof on the phone and says what's up with submitting this directly to the Deputy Secretary, probably Mr. Rishikof at that point is going to say, "I'm just doing what Bob Work told me to do, the previous

Deputy Secretary. He directed me to proceed in that way."

So again, I mean, I think it's the same issue that we were discussing before of being behind this wall of saying I don't know anything. I don't know. All I know is what I was told. And that is -- excuse me, that's a way to proceed, of course, but it keeps you from knowing all the facts of the situation.

And so you -- I think the same thing is true with respect to the flyover. At the end of both declarations -- and let me say with respect to the "Way Forward" memorandum -- sorry -- I think it is interesting that Mr. Mattis does not rely on that in his declaration as a reason that he terminated Mr. Rishikof. I don't know why that is, but I think that's an interesting fact, and it could well be explained by what we're talking about now.

I still submit to the military commission that when you read the reports and the testimony of Mr. Newman, that what you find is that the descriptions of what people are saying about the overflight are very different from -- from what is reported in Mr. Castle's and Mr. -- and the Secretary's declarations.

Many of the factors that are mentioned there are just not borne out when you actually go and do an investigation and

get down on the ground and actually talk to the people, and when you view it in that way, it's really the same problem that we were just referring to.

Now, just a word about the pretrial agreement. I gather that -- I don't question that counsel called somebody in the convening authority's office and that whoever that person is said to him that they didn't have a record of receiving a proposed pretrial agreement, or a pretrial agreement offer I think is the way -- is what the regulation -- the term the regulation uses.

I represent to the military commission that we hand-delivered a pretrial agreement offer in the form of the -- that's in -- it's the form that's appended to the back of Chapter 12-1 of the Regulation for Trial by Military Commission; that we tendered a written pretrial agreement to and we hand-delivered it to Mr. Rishikof's office. I didn't personally hand-deliver it myself, and as I stand here I don't remember whether there was a signed -- whether there was a signed receipt, but I believe there was.

So where it went after it was delivered to the convening authority's office is, of course -- and whether they kept a record of it or whether something else happened to it, I don't know, but I have -- I represent to the military

commission that that was done.

Now, I didn't respond to the request for discovery because I don't think that it's discoverable under 701(g). And Rule 701(g) is the rule that covers disclosure by the defense, and it simply doesn't come within any of the four categories of information that are required to be produced.

If the mill -- and let me say as well -- let me say as well that this was -- I think this was offered in response to -- this is something in the nature of a -- maybe like a secondary or a tertiary argument, because I heard the government at one point say if they wanted -- if the real reason they terminated Mr. Rishikof was because they thought he was entertaining pretrial agreements, they had a simple remedy under Chapter 12-1. They could have simply taken away his ability to enter into pretrial agreements.

And my response to that was that after we made the pretrial agreement offer, the question of whether to accept it or reject it was entirely -- even according to the reg and according to the statute, was entirely within his right, and at that point you couldn't take it away.

You could not have taken it away from him at that point. And I would assume that if -- to the extent persons were contemplating doing that, that they would have

recognized, if they had known, that on August the 15th he had a pretrial offer in hand and that having been done and his right to -- his unfettered right to accept or reject a pretrial agreement offer, at that point -- the authority to enter into pretrial agreements not having been taken away, at that point now you would not be able to take it away, because when that was on the table it was entirely within his authority to accept or reject.

MJ [Col PARRELLA]: So, Mr. Nevin, I apologize if you mentioned it. What was the approximate time -- you have proffered to the court that you delivered this pretrial agreement. What is the approximate time you proffer that you delivered it; that it was signed, I guess?

LDC [MR. NEVIN]: The -- I don't know the answer to that as I stand here. It was in a responsive pleading in the 555 series, and I don't remember the exact day.

MJ [Col PARRELLA]: I mean, are we talking August of '17 or are we talking January of '18?

LDC [MR. NEVIN]: Oh, no. It would be -- I would guess it would be in the summer of 2018.

MJ [Col PARRELLA]: I'm sorry, I'm not referring to the pleading. I'm referring to you have proffered that there was a pretrial agreement. My question is: When are you saying

this pretrial agreement was presented to the convening authority?

LDC [MR. NEVIN]: Ah. August the 15th of 2017.

MJ [Col PARRELLA]: So your position is, then, from August the 15th forward, because the Secretary had not previously withheld that authority from the convening authority, then until that pretrial agreement was either accepted or rejected, they lacked the authority to remove Mr. Rishikof?

LDC [MR. NEVIN]: No, that they lacked the authority to withhold his authority to enter a pretrial agreement. So let me read from 12-1 of the Rule for Trial by -- Chapter 12-1 of the Rule for -- Regulation for Trial by Military Commission:

"Unless such authority is withheld by a superior competent authority, the convening authority is authorized to enter into, or reject offers to enter into, pretrial agreements with the accused."

And then the next sentence says that, "The decision to enter or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority who referred the case to trial."

So I read those two sentences to say that a superior competent authority may withhold the convening authority's

authorization to enter into or reject offer -- plea offers, but that the decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority who referred the case to trial.

MJ [Col PARRELLA]: I don't know that that's how it's typically applied in the military practice, but I don't know that that's really important because there's no indication here that the Secretary made any attempt to withhold the authority from -- or anybody else -- from Mr. Rishikof. So I think I understand your point, though.

LDC [MR. NEVIN]: Could I say just one other thing to make sure the record is clear?

This pretrial agreement, this PTA offer, was signed by me. It was not signed by Mr. Mohammad. And I understood that in order to be a pretrial agreement it needs to be signed by all the parties. But that's the -- we have sometimes in discussion referred to this as -- in different ways, and I think the record should reflect that.

I will also say that the record -- that the pretrial agreement offer, the PTA offer did require that the convening authority agree that Mr. Mohammad would not be prosecuted elsewhere, but it did not require that the Attorney General sign the document or give or not give his approval.

In fact, my recollection is that it -- the intention was to effectuate that agreement by an agreement that he would not -- that Mr. Mohammad would not be transferred out of the custody of the Department of Defense.

MJ [Col PARRELLA]: Okay. Well -- and I think I made this point during the last session of court when the government was attempting to argue why the commission shouldn't allow Mr. Connell to put Lieutenant Newman on the stand, and the essence being they had proffered the information, so why should the commission take evidence.

And I will just say that from the commission's standpoint, proffers are not evidence. So if the parties want the commission to consider evidence, they should present evidence. There may be times when a proffer of the party is appropriate. And it's not to say that I don't trust the veracity of any party. It's simply that that's just not the way the commission views the process to be designed.

So let's go ahead and move on to the next point, please.

LDC [MR. NEVIN]: Well, I'm at the end of what I want to say, Your Honor. But I will say that we have had -- there has been at times in the past an understanding that representations made by counsel were treated as having been

made under oath, or words to that effect.

MJ [Col PARRELLA]: Okay.

LDC [MR. NEVIN]: So -- but, yeah, I understand you.

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

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

MJ [Col PARRELLA]: Ms. Bormann?

LDC [MS. BORMANN]: Thank you. Just a couple of clarifications on what Mr. Trivett said.

Mr. Trivett argued that, incorrectly, that the witness, Mr. Castle, discussed going to DoJ with Admiral McPherson. That is not what the testimony was.

May I direct your attention to page 21338 of the unauthenticated transcript from yesterday, on to the beginning of 21339. I asked a question on line 21. "So not only" -- to the witness.

"So not only did you discuss with Admiral McPherson the phone call with Attorney General Sessions, but also the fact that the current convening authority, Mr. Rishikof, was socializing or somehow coordinating with the Department of Justice about pretrial agreements?"

His answer, "Yeah, I -- yes. I mean, that was... -- you know, I told him, you know, that he went over..." our "-- I had to say why he was going over to -- you know, talking to

the Department of Justice. So...you know -- so yes, I did."

So he told the person who would be replacing Mr. Rishikof before I guess he had a crisis of conscience that -- all about the pretrial agreement.

I also wanted to correct the misstatement that somehow legal counsel -- so let's go back to the testimony of Mr. Castle.

Mr. Castle testified that general counsel's office had a subdivision called Office of Legal Counsel. Office of Legal Counsel was involved in all of the military commissions stuff.

And if you go to page 21164 and 21165 of yesterday's unofficial/unauthenticated transcript, beginning at approximately line 16, Mr. Castle describes exactly who his team is, who he deals with on the commission stuff. They are Professor Jenks, Ryan Newman, Mike Vozzo. When asked who else would be parties, Jason Foster and Jerry D., and then he spelled out eventually a name that is D-Z-I-E-C-I-C-H-O-W-I-C-Z.

And then lastly, he -- Mr. Castle indicated that Ms. Karen Hecker, who is also a member of legal counsel, and who has filed appearances here in this very courtroom on this very case, were his legal counsel team.

The reason that's important is because when we were talking, you asked trial counsel about what happens when incorrect information is being provided to a decision-maker, or in some other way results in unlawful influence and that can happen.

And, of course, we know in the Lewis case it can because it did, because in the Lewis case what was happening, the CAAF called the trial counsel in that case the instrument -- on page 414 of the decision -- the instrument of the bad actor, the SJA.

And so what we have here is Mr. Castle either knowingly or unknowingly, maybe being the instrument of legal counsel, the very folks that are attached to the prosecution in this case.

And what we find, if we look finally at the transcript at page 21208 and 21209, is Mr. Castle describing exactly how much influence they had on the termination of Mr. Rishikof.

So I'm going -- this is Mr. Connell asking questions of Mr. Castle.

Top of page 21208, Mr. Connell's question, "And so when did you personally begin to look at that question again?" The question of course is the question of terminating

Mr. Rishikof.

His answer: "I began looking at that question during that period of time."

Mr. Connell: "Okay, was it before or after Thanksgiving?"

Answer: "Oh, oh -- I'm sure I was thinking about it before Thanksgiving."

Mr. Connell's question: "Did you ask someone to prepare memoranda or look into the legal questions?"

Mr. Castle's answer: "I don't -- I -- we were -- we were looking at -- we were -- there were a whole bunch of things that we were looking at when it came to military commissions, so I think I had -- you know, I had to ask the legal counsel team to see what they were thinking on these issues again."

Mr. Connell's question: "Okay. And excuse me. Specifically related to the one that we are discussing today, you asked legal counsel to look at the question of replacing or terminating Mr. Rishikof, correct?"

Answer: "Yes. Yes."

Question: "All right. How did you ask them to do that? Was that in a meeting, an e-mail?"

Answer: "I don't remember. I'm sure that I verbally

said it. That's usually how I handle things, verbally."

Question: "Okay. And was that at a staff meeting that you regularly have?"

Mr. Castle's answer: "No, we -- we -- there were -- there were a number of meetings that were going on about this issue."

Question: "Okay. How many meetings would you say?"

Mr. Castle's answer: "Oh, I honestly couldn't see, I mean, there were a number of meetings."

Question: "Okay. And who was involved in these meetings?"

Mr. Castle's answer: "The members of the legal counsel team, the -- myself, my military aides and -- and others."

The idea that the people who directly work with the prosecution in this case were not involved in the decision to fire and terminate Mr. Rishikof most likely for reasons put forward that were not true, that eventually resulted in Mr. Castle claiming to have a moment of conscience and then having to bring in a CYA group that involved some of the same people to create pretext is -- was not noted by the prosecution, and the prosecution's argument misstated the testimony.

And that's it. I have nothing else.

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

Mr. Harrington.

LDC [MR. HARRINGTON]: A couple points, Judge.

Mr. Trivett mentioned that there have been guilty pleas with every convening authority in the last 12 years. That may well be, but there were never any plea agreements with these five individuals, nor any discussions of it. And certainly we never got, until Mr. Rishikof came along, any idea that that was even possible.

And also, Judge, Mr. Trivett seems to think that there was some pretrial agreement. There's no pretrial agreement until it's signed by everybody and accepted by the court. They're always subject to negotiations, and that's what was going on.

Mr. Rishikof asked us: "What is your wish list for a plea agreement?" And that included all sorts of things, not just what charge you may be pleading guilty to, or the fact that you would get a nondeath sentence, but other conditions, such as nonprosecution, such as where you might serve your sentence, other things like that that are collateral and are taken up in many different types of plea agreements.

And, Judge, I was actively involved in these

negotiations, and I was asked by Mr. Rishikof to give him a proposed plea agreement. And I was in the process of putting one together and discussing it with my client, and then Mr. Rishikof was let go. And that was the end of it as far as I knew.

After Mr. Coyne took over, Judge, I had a meeting with him, and it was not about a plea negotiation; it was about some other unrelated issue. In the discussion I had with him, I asked him whether he was aware of negotiations between Mr. Rishikof and me, and he said no. When he took office, he found no evidence of anything with respect to plea agreements; not just draft of an agreement, no memoranda, no notes, no anything.

Now, from what we know about Mr. Rishikof's discharge, he was handed a document by the -- Mr. Castle, I believe, and he was escorted out of his office or escorted from where he was and never returned to his office, which means one of two things: Either he had notes, memoranda, and other things regarding this in his office, which are gone, or he kept them himself.

He said to me, and I think he said this to other people, he will not talk to anyone -- he is glad to come and testify, but he was not going to talk to anybody about this

before he came.

So -- and, Judge, one thing that Mr. Trivett said that I find really troubling, and I'm not quite sure what to do about it or what to say about it, but Mr. Trivett said he went to the convening authority and asked them for a copy of Mr. Nevin's plea agreement, and apparently they would have given it to him because they told him that they didn't have one there.

And my concern is how is it that the prosecution can go to the convening authority and get documents from them, which were confidential between the defense counsel on behalf of their client and the convening authority?

Now, obviously since all this thing has blown up with Mr. Rishikof, many things, including what I'm saying here now, are out in the public and out in the open; but that was never the intention or the agreement that was made with Mr. Rishikof.

And so now what position does that put us in with any convening authority going ahead, when we have a prosecution that apparently can go to the convening authority and ask -- and ask for documents?

Judge, we're still in a situation, I think, where we need Mr. Rishikof to testify about many, many, many of these

issues and to clarify it from his -- from his point of view.

And again, Mr. Trivett says that because there was a condition supposedly in Mr. Nevin's offer about the Department of Justice having to sign off, which Mr. Nevin says is not exactly what it was -- again, that's not a final agreement.

I live in a state, and I have had many cases where people are prosecuted for drugs in state court, and you know that waiting across the street in federal court is an Assistant U.S. Attorney who is going to charge a big drug conspiracy, and your client in state court is right in the middle of it. And you go to the prosecutor in federal court and say if my client takes a plea in state court are you going to go after him? And they can; it's not considered double jeopardy.

And oftentimes they say to me if your client gets 5 years or 10 years we won't prosecute them. Will you put that in writing? No. Will you make an agreement to that? No.

So I have to go back to my client, and I say here is the deal that's on the table. Do you want to roll the dice? Here is what my experience has been with them whether they'll do it or not, but you've got to roll the dice.

Well, that's the situation that Mr. Nevin was in in terms of the deal. So you can't -- Mr. Trivett can't say that

it was all over because Sessions said no, and that wasn't unlawful influence. That's not the case. There was not a plea agreement.

Thank you.

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

Okay. With respect to tomorrow, I still anticipate we will do a closed session.

LDC [MR. RUIZ]: Judge, if I may.

MJ [Col PARRELLA]: I'm sorry. Mr. Ruiz?

LDC [MR. RUIZ]: We don't have any additional argument. However, I would ask if you would permit me a minute on the record prior to recessing to put a matter on the record.

MJ [Col PARRELLA]: What does this pertain to?

LDC [MR. RUIZ]: It pertains to our pending motion for your recusal. I'd like to perfect the appellate record. I feel I must after four days of proceedings. It will take less than a minute.

MJ [Col PARRELLA]: Okay. Since you've saved us some time previously this morning, I feel I owe you at least a minute.

LDC [MR. RUIZ]: I'll make sure I don't use up much of this equity, Judge.

Today is the fourth day of proceedings. For purposes of the record I just want to make clear that, for

Mr. al Hawsawi's behalf, by engaging in this procedure we're not waiving any claim that we have for our motion before the commission.

The briefing cycle on this motion was completed on November 6. Of course, the commission chose, well within its discretion, not to put it on the docket. I believe you indicated that an opinion would be forthcoming. But here we are on the fourth day; we still do not have an opinion.

I see it basically as a formality at this point, since the commission's conduct seems to have denied us, in effect, if not in substance, the basis for our objection. Nevertheless, I do want to put forth that on the record and ask you to issue that ruling so it is unmistakably clear.

With every piece of evidence you take, with every argument that you take, while this motion pends, it does continue to impact the appearance of fairness and propriety that we've raised in the basis for our objection. So I incorporate by reference the arguments we've already made in both the motion and my brief argument on Monday regarding our motion that continues to pend before this commission, and I seek a ruling, Judge.

If you can tell me now if it's denied and a ruling is forthcoming, that will be great. Otherwise, I'm taking it as

a denial.

MJ [Col PARRELLA]: Absolutely, Mr. Ruiz, and I apologize. It's been the commission's intention to get it out and, as you know, I have been a little bit preoccupied.

LDC [MR. RUIZ]: I understand.

MJ [Col PARRELLA]: Yes. I don't think I am giving away the farm to say that the motion will be denied and then it will be followed up with written findings of fact and conclusions of law. So that way you can sort of prepare your next step.

LDC [MR. RUIZ]: Thank you. Appreciate that.

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

Just one final comment, just to circle back to the comment I made to Mr. Nevin is -- you know, I obviously don't know exactly what Judge Pohl's procedure or position was with respect to proffers before the court, and I'm not trying to dramatically change things, because, frankly, I will trust your proffer as to what his practice was, but I may, as you know, disagree with that.

So we do them all the time, proffers, but there's certainly a point, at least for the commission, where we're crossing that line. So I'm not going to give you an advisory opinion on when it's appropriate and when it's not, but I

would just -- you probably have noticed by now that evidence -- proffers are not evidence. Unless you can cite me something that says otherwise, it's just something to note for the record.

Okay. With that -- tomorrow at 0-9 we will take up the closed session. And with that, this commission is in recess.

One moment. Mr. Nevin.

LDC [MR. NEVIN]: I don't suppose you could tell us what your understanding of the order of march for tomorrow is? Is that possible?

MJ [Col PARRELLA]: We were working on that. So I would say absent -- for this evening, let's just plan on taking them up chronologically.

LDC [MR. NEVIN]: Start with the lowest number and go up?

MJ [Col PARRELLA]: Start with the lowest number and build our way up.

LDC [MR. NEVIN]: All right.

MJ [Col PARRELLA]: Mister --

LDC [MR. CONNELL]: Yes. Thank you. I just want to say we have a suggestion for an order tomorrow that we think might make it more efficient, like places where we can refer back and not repeat ourselves.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: But I'm happy to take that up in the morning.

MJ [Col PARRELLA]: Okay. Yeah, I will be happy to entertain it in the morning. All right.

With that the commission is in recess.

**[The R.M.C. 803 session recessed at 2002, 15 November 2018.]**