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1 [The R.M.C. 803 session was called to order at 1050,
2 16 October 2017.]

3 MJ [COL POHL]: The commission is called to order. All
4 the detainees are again present. There appears to be no
5 changes in the parties.

6 During the break -- my CISOs are still tracking down
7 the issue of General Baker's e-mail. And to say it's
8 conflicting guidance is conflicting guidance, so I'm just
9 saying this for now: Treat it as classified until I -- until
10 there's -- because depending who you talk to, some are saying
11 it is and some are saying it isn't.

12 LDC [MS. BORMANN]: It's just like every other classified
13 document we have; some say it is and some say it isn't.

14 MJ [COL POHL]: I'm saying this is more in the Nashiri
15 case than in my case. But I know the representations of that
16 information in the Nashiri case is one of the things that's
17 caused the problem in the Nashiri case of this can't be
18 communicated to him because it is classified and then I got
19 this e-mail saying it's not.

20 LDC [MS. BORMANN]: Right. But the content of the memo
21 that you have doesn't refer to what ----

22 MJ [COL POHL]: I'm referring only to the e-mail. And
23 again, the guidance says there is a memo with attachments, I

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1 don't know what the attachments were, but it's the e-mail I am
2 concerned about. But bottom line is this: We will get to the
3 end of this, hopefully, but just treat that memo, or excuse
4 me, the e-mail as a classified document.

5 LDC [MS. BORMANN]: The one that's redacted.

6 MJ [COL POHL]: That's the one that's got a concern. If
7 you look at how it's worded, it's -- I don't want to go into
8 the details of it, but just look at how it is actually worded
9 and then ask yourself, How can this be treated as a not
10 classified document?

11 LDC [MS. BORMANN]: While I am up here, we have MFLs,
12 motions for leave to supplement on a couple of motions this
13 week, so if your crack staff can order that, we can file
14 those, we can move ahead on those. And that's on 478, 445,
15 420 and one last one, 498.

16 MJ [COL POHL]: 420 is an ex parte expert request, so that
17 doesn't need to be addressed.

18 LDC [MS. BORMANN]: Right.

19 MJ [COL POHL]: Yes, 498 you have a motion to supplement
20 your pleading.

21 LDC [MS. BORMANN]: And 478 and 445. So you want to get
22 to 478 this week, which is the government's request for a
23 trial scheduling order.

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1 MJ [COL POHL]: Okay.

2 LDC [MS. BORMANN]: And we would like to ----

3 MJ [COL POHL]: You want to supplement yours?

4 LDC [MS. BORMANN]: Yes. It is an ex parte supplement so
5 I won't be publishing any part of it, but it is something you
6 need to know before you rule. So ----

7 TC [MR. RYAN]: Did I understand counsel to say it's an
8 ex parte supplement for 478?

9 LDC [MS. BORMANN]: Yes. About a resource that was
10 granted to us ex parte, yes.

11 TC [MR. RYAN]: 478 having been pending for a while and
12 due for argument this week, and because of it's importance, we
13 would object to anything being considered by the commission
14 ex parte for such an important issue such as the scheduling of
15 the trial date.

16 LDC [MS. BORMANN]: Well, Judge, we have resourcing issues
17 that affect our ability to go to trial.

18 MJ [COL POHL]: I understand. I understand Mr. Ryan's
19 position but, quite frankly, I can't really rule on it until I
20 know what I don't know.

21 LDC [MS. BORMANN]: It deals with an ex parte resourcing
22 issue.

23 MJ [COL POHL]: Okay. But it should not -- it should not

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1 impact your ability to argue 478 this week.

2 LDC [MS. BORMANN]: It doesn't at all.

3 MJ [COL POHL]: You want me to consider it before I rule
4 on it?

5 LDC [MS. BORMANN]: Before you rule on it. Exactly. It
6 actually affects four of the trial teams here. So it's an
7 ex parte resource you ordered that we don't have, so you need
8 to know that, and that's why we did it.

9 MJ [COL POHL]: I got it.

10 Do any other defense counsel want to be heard on
11 200MM? Apparently not.

12 Trial Counsel?

13 TC [MR. SWANN]: Nothing, Your Honor, subject to your
14 questions.

15 MJ [COL POHL]: That brings us to 336.

16 ADC [MS. LACHELIER]: Judge, where we left off at the last
17 session was that the government said that they would provide
18 us with DISPLAY ONLY marked DIMS that contain pseudonyms and
19 dates and times. We have since received a few sets of
20 discovery of DIMS and reports of observations which are data
21 kept with DIMS, I think, but they don't come -- just for the
22 court, I don't remember if anybody has ever filed any DIMS as
23 an exhibit, but so the court knows -- or the commission knows,

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1 sorry, the DIMS records are a spreadsheet.

2 Separately, when we get this spreadsheet -- or some
3 of the spreadsheet -- we also get reports of observation which
4 are guards' entries, things they observed, anything from
5 Mr. Hawsawi returned a plastic bottle to Mr. Hawsawi
6 complained about the van, the transportation issue.

7 In the small set of -- subset of DIMS that we
8 recently got that are marked DISPLAY ONLY, the reports of
9 observations have guard numbers and dates. The spreadsheet
10 does not. It just has the dates. I don't know if it is
11 based, and there is no redactions indicating that maybe those
12 badge numbers had been taken out.

13 So I'm no longer clear what the government is doing
14 with this spreadsheet. I never was, frankly, totally clear
15 because it's a document they don't let us see in full. I
16 believe that spreadsheet to be a large database in Excel, or
17 some software that contains a lot of data about detention, and
18 they are -- over time they have perfected their system for
19 their own use, but also in order to provide us less and less
20 redacted but selectively printed sets of data for us. Am I
21 making sense? So they have taken this large database and
22 selectively printed items that they think are relevant to our
23 request for detention records.

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1 At the outset, 336 was a request for detention
2 records. Over time we tried to narrow what the field of
3 issues were to help resolve this. And what's come to pass,
4 essentially, is that the government has just narrowed the
5 universe as though to say, this is all DIMS is and this is
6 what you get. And right now it doesn't have badge numbers in
7 it, guard numbers in it. The reports of observations do, but
8 that's a separate matter, in our view.

9 MJ [COL POHL]: Are those connected?

10 ADC [MS. LACHELIER]: I believe they may be generated out
11 of the same ----

12 MJ [COL POHL]: No, but I'm saying on X date on the DIMS
13 record refers to something and the other report says on X date
14 with the guard number ----

15 ADC [MS. LACHELIER]: They have been in the past. I'll be
16 honest, the latest small batches we received I haven't looked
17 at the spreadsheet to see if the report of observation is in
18 it.

19 MJ [COL POHL]: On the spreadsheet that doesn't have the
20 guard numbers, is there a column that's been redacted, or
21 can't you tell?

22 ADC [MS. LACHELIER]: I cannot tell. There is a column
23 that's always been redacted. And whether we see that or not

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1 will be a matter for later litigation probably. But right now
2 it doesn't appear there is any redactions of DIMS.

3 I apologize. I remember, I have given you I think
4 DIMS as attachments so you can see. But it was clear in the
5 past in the DIMS that we had where guard numbers were being
6 redacted. Now it appears they are not even being printed, so
7 there is no redaction necessary. Does that make sense?

8 MJ [COL POHL]: Yes. That column, that row, has been just
9 deleted altogether.

10 ADC [MS. LACHELIER]: The guard numbers were part of the
11 narrative, the small narrative entry. So it was just a small
12 black redaction in the narrative, and that's why it was easier
13 to tell there is a guard number. Right now there is no guard
14 number. I don't know if that's a change in policy in how they
15 retain DIMS. I don't know if they are selectively printing.

16 MJ [COL POHL]: What do you want?

17 ADC [MS. LACHELIER]: I didn't want to get to this. This
18 is one of the reasons the litigation has taken so long, but
19 this is, unfortunately, where we are. The universe of data
20 being kept as detention records -- I am not even going to use
21 the word DIMS anymore because I don't know what that means in
22 their language versus us. The universe of data that has at
23 times been referred to as DIMS that is being provided to us

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1 and has, in fact, detention records detailing the day-to-day
2 life of Mr. Hawsawi in custody for the last, and I lose track,
3 14 years, we want that. It's that simple. We want that.

4 We don't want the government to play around with what
5 they print, what they give us, how they maintain it different
6 days so that they can manipulate what they give us. We don't
7 want piecemeal production of it either, because that's
8 essentially what we got. I'll side step that issue for a
9 second, but we want that set of data. And if they don't want
10 us to see the whole universe of data they are maintaining,
11 then I'm sorry, Judge, you are going to have to see a sample
12 of it, at least, to determine, all right, if you are keeping
13 this universe, these items in that universe are relevant and
14 the defense has to get them.

15 There is just no other solution to it at this point
16 because it has just become too scattered, what they have given
17 us and what we have. And I've tried my best to try to track
18 it all, but at this point they said they were going to produce
19 everything again to us with guard numbers and dates, and they
20 have produced a few months here, a few months there. I don't
21 understand what they are doing, but we haven't gotten the
22 whole universe again.

23 MJ [COL POHL]: Maybe we could ask them what they are

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1 doing.

2 ADC [MS. LACHELIER]: Even if they continue to produce
3 with the little pieces they did, it's still not satisfying
4 what they promised and it's a different manifestation of the
5 DIMS that originally was being produced. So the universe
6 keeps changing. And I think at this point it really it needs
7 to -- you need to get a sampling of about 50 pages of what
8 these records are. Over the course of time, Judge, I would
9 have to specify, not what they are today, because that could
10 change tomorrow and that was different yesterday. They seem
11 to be changing a little bit -- I'm exaggerating -- day to day.
12 But over the period of years they've changed how they maintain
13 these records so it is no longer clear what the universe is
14 anymore.

15 And they are putting us at a disadvantage when they
16 print selectively and then tell us, You tell us what you need.
17 I don't know what you are maintaining and you don't want us to
18 know what you maintain so the judge has to look at it.

19 MJ [COL POHL]: Okay. I got it.

20 ADC [MS. LACHELIER]: Thanks.

21 MJ [COL POHL]: Any other defense counsel want to be heard
22 on this before I hear from the government?

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Sir, I just want to remind the
2 military commission that our position is set out in AE 336
3 (AAA) Supplement. It sometimes gets -- in some ways it's as
4 important and other ways less complex than the position of
5 Mr. al Hawsawi's team, but it is going to come up in the 502
6 series. So I want to -- even though I have mentioned this
7 before, I want to mention it again now.

8 One of the issues in the 502 series, in the personal
9 jurisdiction hearing, will be whether the statements that the
10 government attempts to introduce from January 2007 are
11 admissible in the military commission, and, if so, what weight
12 the military commission should give them.

13 As part of that, we submitted a number of, for
14 example, medical records in 502Y. We did not attach the DIMS
15 records to 502Y for the reason we do not have a complete set,
16 which is our position in 336 (AAA Sup). It is incomplete for
17 that critical period between September 2006 and January 2007
18 in two respects. One is the redacted column of witness
19 information that the military commission just referred to.
20 That column in later productions disappears; but in the
21 September 2006 through January 2007 it appears and is
22 redacted. And then there are a number of individual line
23 redactions that appear, especially in the first month after

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1 Mr. al Baluchi was transferred to Guantanamo Bay.

2 At the last hearing the government represented that
3 it permanently destroyed that information and no longer has
4 access to that information which is under those redactions. I
5 don't know if it has found any additional new information.
6 It's clear the government has made sincere efforts to produce
7 additional information, although it is going to require an
8 order of this military commission, I think, for us to get that
9 critical information which is under those redactions.

10 MJ [COL POHL]: Just reading your supplement, basically
11 you want all confinement records, including those not
12 maintained in DIMS, since 6 September 2006?

13 LDC [MR. CONNELL]: Yes, sir. For purposes of the
14 personal jurisdiction hearing, the ones which are most
15 critical are the records between September 2006 and January
16 2007.

17 MJ [COL POHL]: Where -- okay. You referred to a
18 statement of 2007?

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

20 MJ [COL POHL]: Who took the statement?

21 LDC [MR. CONNELL]: The FBI and the DoD task force.

22 The last thing that I just wanted to just point out,
23 because it is going to become significant on Wednesday, is

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1 that witness number 82 in 502J is a witness with information
2 about JTF policies between September -- for maintaining
3 information between September 2006 and January 2007. One of
4 the reasons why that witness is important is because of this
5 redacted information in the DIMS records that the government
6 has produced.

7 So I think that the answer to the solution, whether
8 it's Skipper based or whether it's personal jurisdiction based
9 or some other basis for use at trial, is for the military
10 commission to finally draw a line under this issue, issue an
11 order for the government to produce all the confinement
12 records in its possession, and then we will see if those
13 records have actually -- if the redactions have actually been
14 destroyed or if the information exists.

15 MJ [COL POHL]: But you would want the government to
16 produce the records; and any gaps in records, affirmatively
17 state they no longer exist or whatever happened to them?

18 LDC [MR. CONNELL]: That's right, sir.

19 MJ [COL POHL]: Got it.

20 LDC [MR. CONNELL]: Thank you.

21 MJ [COL POHL]: Ma'am.

22 Mr. Swann.

23 TC [MR. SWANN]: Sir, if you don't -- I will take up that

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1 last issue first.

2 I have been through all the DIMS for, what, September
3 '06 all the way through -- in fact, I had them for August and
4 September I had on my desk last night for this year. Those
5 gaps that he is talking about, it's about nine days in
6 September. I have gone back and double-checked and
7 triple-checked. There are redactions in those DIMS. What's
8 underneath that redaction will never be discovered because,
9 quite frankly, those don't exist. They had some sort of
10 malfunction with software or something. I can't resurrect
11 those things.

12 They have every date after -- I think it's about nine
13 days in September that he is talking about. Every date after
14 that, going forward, they have everything.

15 With respect to DIMS ----

16 MJ [COL POHL]: September?

17 TC [MR. SWANN]: 2006.

18 MJ [COL POHL]: '6, okay.

19 TC [MR. SWANN]: It's nine days, roughly, in September in
20 2006, and we have triple checked on that issue.

21 That said, we have given them now going on three
22 iterations of these DIMS. The first iteration was an
23 iteration given to them because they hadn't signed the MoU up

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1 to a certain period of time, but in order to address some of
2 the discovery issues we gave the DIMS to the defense counsel.
3 They are pretty much unredacted except for that far column.

4 MJ [COL POHL]: Go ahead.

5 TC [MR. SWANN]: They are pretty much unredacted except
6 for that far column, which is simply a person making an entry.

7 Then we went to the second iteration where they asked
8 for a copy for their client. We created a copy releasable to
9 the client, which got us to the third issue after your order.
10 We now have created a third iteration of DIMS that is DISPLAY
11 ONLY to the individual, to the accused. It has more than his
12 copy that he can keep in his cell and it complies with what
13 the court directed us to do.

14 Every one of the defense teams has received at least
15 one iteration of what those DIMS DISPLAY ONLY to the client
16 would look like. Because Hawsawi was the first in the
17 pipeline and, based on your order, all -- I can't even tell
18 you the number now, it's probably 5- to 6,000 pages, went back
19 through a classification review again to create this DISPLAY
20 ONLY iteration, and it -- as far as I know, the first
21 iteration is near complete. It will be turned over to the
22 defense in its entirety, to the Hawsawi team, and then we will
23 do it each one after that.

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1 There is nothing more that I can give them. If they
2 take the classified version they receive and look at the
3 DISPLAY version for their client, they will see that there are
4 guard numbers in there, there are dates and times, which is
5 exactly what this court wanted us to address. That
6 information is in these DIMS. There are no shenanigans going
7 on with respect to any of this. A close look at this stuff
8 will indicate that there is nothing missing.

9 Now, if they choose to not put a guard number in a
10 DIMS at the present time, that's the camp's SOP. And there is
11 an SOP that talks about how DIMS is the official version of
12 what goes on in this accused's life on a day-to-day basis
13 within the confinement facility.

14 MJ [COL POHL]: So if I understand you correctly, when
15 Mr. Connell asked for all confinement records since 6
16 September 2006, your position is they have either gotten them
17 or, once a review is done, they will get them?

18 TC [MR. SWANN]: That's correct, except for those nine
19 days in September which I can't do anything with.

20 MJ [COL POHL]: The ones that exist.

21 TC [MR. SWANN]: That's right.

22 MJ [COL POHL]: Okay. Thank you.

23 Anything further?

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1 LDC [MR. CONNELL]: Your Honor, I rise to note that there
2 was one more exception that the government correctly noted
3 earlier in its argument but didn't in its final answer to the
4 military commission, which is the witness information. The
5 Senate Select Committee on Intelligence report explained that
6 the CIA retained operational control over these men at some
7 point in -- after their transfer to Guantanamo in September
8 2006.

9 The witness information, the far right column, which
10 is the people who had sufficient information to make the entry
11 in the computer system, is critically important and it is
12 excluded from all versions of DIMS records that the government
13 has produced to us. It might be classified; it might not be
14 classified. I don't know. If it is classified, it should go
15 through the 505 process; if it is not, the government should
16 produce it unredacted.

17 MJ [COL POHL]: Thank you, Mr. Connell.

18 LDC [MR. CONNELL]: Thank you.

19 MJ [COL POHL]: Ms. Lachelier, anything further?

20 ADC [MS. LACHELIER]: I have a few more.

21 MJ [COL POHL]: Sure.

22 ADC [MS. LACHELIER]: Sorry, Judge, for the delay.

23 MJ [COL POHL]: No problem.

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1 ADC [MS. LACHELIER]: Just one -- one point of order with
2 what the government said, that they complied with the order to
3 show cause why dates and guard numbers can't be provided. I
4 would dispute that as to the piecemeal DIMS we have gotten so
5 far. And I recognize the government just represented that
6 they will provide us the whole set.

7 As to the piecemeal we have received, the guard
8 numbers are no longer in there. Again, they are alluding to
9 changes maybe in SOP, that it is JTF's maintenance of the
10 records. This is the issue, Judge. The maintenance of the
11 records have changed over time. Whether it is for their
12 strategic reasons or just because they are changing the
13 maintenance of the records over time, I don't really care what
14 the motive is.

15 The point is the universe is changing and is changing
16 in the face of litigation ordering them to produce data. And
17 ultimately that's the problem, is like we need to know what
18 the universe is that they are maintaining of records of
19 detention. So I will echo what my colleague, Mr. Connell,
20 said, which is ultimately this is about obtaining detention
21 records. Whether we call them DIMS, whether JTF has changed
22 how they name them, whether JTF is maintaining two sets of
23 records for all I know at this point. The original goal was

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1 to get Skipper evidence for us. And I don't see any other way
2 to get it except to get the universe that JTF is maintaining,
3 and for you to look at that, at worst -- sorry, at worst for
4 you to look at that, and at best for us to just get it.

5 MJ [COL POHL]: I'm just trying to figure out what am I
6 going to look at? Because Mr. Swann says you are getting
7 everything that they -- I quoted it out of Mr. Connell's
8 motion, getting all confinement records. It is just a matter
9 of getting them through the classification process. So what
10 am I to look at at this point?

11 ADC [MS. LACHELIER]: If what I got so far is what they
12 mean by confinement records, we're going to be back here.
13 That's what I'm saying.

14 MJ [COL POHL]: I will be here. I mean, what do you want
15 me to do?

16 ADC [MS. LACHELIER]: Actually look at what JTF is
17 maintaining, because we are not getting what JTF is
18 maintaining. It is clear they are selectively printing.

19 MJ [COL POHL]: How do I do that with what the government
20 gives me?

21 ADC [MS. LACHELIER]: They know what they are not
22 printing.

23 MJ [COL POHL]: I understand from your perspective you

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1 believe there is a difference between what they are giving you
2 and other confinement records, and you want me to look at that
3 delta, what you are not getting ----

4 ADC [MS. LACHELIER]: Right.

5 MJ [COL POHL]: ---- and they just stood up here and said
6 you are getting everything, so there is no delta for me to
7 look at. That's what I -- now, if there is something out
8 there they are not telling me about, they are not telling you
9 about -- I mean, I'm not sure ----

10 ADC [MS. LACHELIER]: I think the delta is what JTF is
11 maintaining versus what the prosecution may be asking JTF to
12 produce.

13 MJ [COL POHL]: Okay. Do you have any reason to believe
14 there is other types of confinement records being maintained
15 by JTF other than ----

16 ADC [MS. LACHELIER]: I don't, other than DIMS. We asked
17 for dims ----

18 MJ [COL POHL]: Mr. Connell is more expansive.

19 ADC [MS. LACHELIER]: It is more accurate because it is
20 clear DIMS may not be the whole universe.

21 MJ [COL POHL]: It seems to me if you, and I say this with
22 sincerity: Have you asked the confinement facility if there
23 is any other, or the JTF commander or the SJA?

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1 ADC [MS. LACHELIER]: At this point they have us
2 completely blocked off with communications with any of those
3 individuals. So the only way we can find out is through the
4 prosecution.

5 MJ [COL POHL]: Okay.

6 ADC [MS. LACHELIER]: So we can go back and start all over
7 again with the discovery requests, but that's where we are.

8 MJ [COL POHL]: I don't want to replot old ground. No, I
9 understand your issue.

10 ADC [MS. LACHELIER]: I think the order would be JTF
11 produce the database of detention records or the databases of
12 detention records and let me look at them and what you
13 maintain.

14 MJ [COL POHL]: But, of course, they are saying that's
15 what they are going to give you. If I understood Mr. Swann
16 correctly, you are going to get that, with some redactions. I
17 got that. Forget the redaction point.

18 ADC [MS. LACHELIER]: Right.

19 MJ [COL POHL]: You don't know what you don't know.

20 ADC [MS. LACHELIER]: Right. And all I keep getting is
21 these different versions, like they said, different versions
22 of the records. And sometimes they are better than others at
23 redacting, so you can see there is data.

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1 MJ [COL POHL]: Just so we are clear, Mr. Swann talked
2 about three iterations of these records. Let's talk about the
3 classified version that you can't show your client, at least
4 it hasn't been cleared yet.

5 ADC [MS. LACHELIER]: Right.

6 MJ [COL POHL]: Do you have a complete set of those?

7 ADC [MS. LACHELIER]: No. And not only because we get
8 them about three months behind ----

9 MJ [COL POHL]: Okay.

10 ADC [MS. LACHELIER]: ---- so we are behind.

11 MJ [COL POHL]: The time lag -- I got that. But ignoring
12 the time lag, do you have a complete set of those from
13 September '06 until ----

14 ADC [MS. LACHELIER]: I will never say complete, no.
15 There are definitely -- like Mr. Connell's situation, there
16 are days missing. We tried to fill most of the gaps and we do
17 that without litigation.

18 MJ [COL POHL]: In essence, for want of a better term, you
19 have 11 years' worth of those?

20 ADC [MS. LACHELIER]: Yes.

21 MJ [COL POHL]: So you know ----

22 ADC [MS. LACHELIER]: Subject to our culling possible days
23 here and there, but yes.

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1 MJ [COL POHL]: Okay. So you already have that
2 information. It's a question of what information you give to
3 your client?

4 ADC [MS. LACHELIER]: Right. That's always been, that's
5 always been the case, that's always been the issue with this
6 motion, with part of this 336 series.

7 MJ [COL POHL]: So let's use Mr. Swann's 5,000 pages, for
8 want of a better term. You have 5,000 pages of information,
9 DIMS records that are marked CLASSIFIED that you can review
10 and your client can't see.

11 ADC [MS. LACHELIER]: Uh-huh.

12 MJ [COL POHL]: They are now taking those same 5,000 pages
13 and seeing what's displayed to the detainee. You believe
14 there is something more than those 5,000 pages out there?

15 ADC [MS. LACHELIER]: I believe what they are producing to
16 us doesn't look like the 5,000 I got, if that makes sense, so
17 it doesn't just say -- I thought it would say DISPLAY ONLY at
18 the top, and that was it, and it would look exactly the same
19 otherwise. But it doesn't, it looks like a different
20 printout. And I don't have a side-by-side yet.

21 What they have given us in the DISPLAY ONLY world
22 that I have been able to decipher is time periods we didn't
23 have, so I don't have a classified version to compare it to.

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1 MJ [COL POHL]: How can you not have?

2 ADC [MS. LACHELIER]: Because they gave us gaps. They are
3 filling gaps with the DISPLAY ONLY version, gaps of data that
4 they had not given us. Does that make sense? So say they
5 hadn't given us -- to illustrate, say they haven't given us
6 February 2017 DIMS records. Today they gave it -- Friday
7 actually, they gave it February 2017 to us, we didn't have it
8 before. So that's my first copy.

9 MJ [COL POHL]: Right, at the end. But I'm talking
10 about -- let's go back 11 years' worth, or '06 -- September
11 '06 to September '16, ten years' worth, okay? Okay. Just so
12 I understand, you have got the classified versions of all of
13 those?

14 ADC [MS. LACHELIER]: Yes. Again, subject to possibly
15 missing a day here and there.

16 MJ [COL POHL]: Now, in that universe, in that ten-year
17 universe, they are working on ----

18 ADC [MS. LACHELIER]: Getting us --

19 MJ [COL POHL]: ---- DISPLAY ONLY to the accused.

20 ADC [MS. LACHELIER]: Uh-huh.

21 MJ [COL POHL]: Now have you got any, for that time frame,
22 the DISPLAY ONLY or is that check in the mail?

23 ADC [MS. LACHELIER]: Check in the mail.

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1 MJ [COL POHL]: Okay. So you have nothing really to
2 compare those against to. And then ----

3 ADC [MS. LACHELIER]: That's correct.

4 MJ [COL POHL]: ---- newer ones ----

5 ADC [MS. LACHELIER]: Don't look the same.

6 MJ [COL POHL]: ---- you got some DISPLAY ONLY but you've
7 not gotten the classified version.

8 ADC [MS. LACHELIER]: That's correct.

9 MJ [COL POHL]: Okay. Mr. Swann, do you intend to give
10 them the classified version too?

11 TC [MR. SWANN]: We have not changed any procedures here.
12 They are still going to get the releasable version to the
13 accused. The version that the defense counsel get, which has
14 all the tactics, techniques and procedures in it, and then
15 they will get the DISPLAY ONLY version, which they will be
16 allowed to go talk to their client about the dates and the
17 times.

18 MJ [COL POHL]: You confused me there, Mr. Swann. You
19 talked about -- there is the display version to the accused.

20 TC [MR. SWANN]: Right.

21 MJ [COL POHL]: There is the classified version to the
22 defense counsel, nondisplay ----

23 TC [MR. SWANN]: Right.

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1 MJ [COL POHL]: ---- is there a third category?

2 TC [MR. SWANN]: Yes, there's the one they were getting
3 all along before you required the DISPLAY ONLY, which had
4 everything in it, a releasable version to the accused, that
5 they could go in and talk to their client about, minus the
6 date and the times.

7 MJ [COL POHL]: Okay. Are you going to keep giving them
8 that one or has it been subsumed by the order?

9 TC [MR. SWANN]: No. We will keep giving them that one
10 because that's the way the procedures were. They have nearly
11 4 to 5,000 pages of that version.

12 MJ [COL POHL]: Now I will ask you a question which I am
13 not sure you will be able to answer, but I will ask it anyway.
14 You said you're doing the review of -- for the Hawsawi team.
15 And Mr. Connell referenced he needs that information for 502,
16 at least for that one-year period, approximately one year.

17 TC [MR. SWANN]: Yes, sir. He has all of that. That's
18 done. We will give him a display version that he can talk to
19 his client about for that period of time. I will just put it
20 up in the front there. But he has classified documents for
21 the DIMS. He has all of the DIMS, which also has a releasable
22 version to his client. It's the nine days that I can't do
23 anything with.

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1 MJ [COL POHL]: No, but we are talking -- just so I can
2 focus on here, is when do you anticipate the tranche of
3 documents to be completed review for the detainee? I
4 understand you have got to catch up. I am not talking about
5 that, I am talking about the historical documents.

6 TC [MR. SWANN]: To accommodate the 502 issue for
7 Mr. Connell, we will push up his DISPLAY ONLY version for that
8 one-year period of time that he mentions to the front.

9 MJ [COL POHL]: Do you know what date that statement was
10 taken by the FBI?

11 TC [MR. SWANN]: I do. I was present when it was done.
12 January 7.

13 MJ [COL POHL]: Just so, you know, Mr. Connell, as I
14 understand it, and now I got three people standing, which is
15 not a good way to run a courtroom, but anyway, as I understand
16 it, you want those documents from up to that date, correct, of
17 the statement? You want a bunch of other stuff too, but for
18 502 purposes -- I was hoping it would only be a yes, but
19 apparently it won't be.

20 LDC [MR. CONNELL]: Sir, it's not that it's not a yes,
21 it's that my focus is not the releasable-to-detainee version.
22 I understand that's an issue and I know the government has put
23 a lot of work into it, and I know that Mr. al Hawsawi has put

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1 a lot of work into that issue. My central concern, and the
2 reason why I rose to address this issue, is the delta that you
3 were talking about, and that delta consists essentially of
4 three items. And that's why I am asking for an order in the
5 language that appears in 336 (AAA Sup).

6 The first part of the delta is the September, there
7 should be an order for the September arguments, excuse me,
8 elements of DIMS that the government affirmatively redacted.
9 It's not missing documents, it's that these are actually
10 redacted. Somebody had to actually go in and redact these out
11 of the classified version. And when the government says we
12 have received all, they are included -- they are including
13 that element of redaction, which is the first part of the
14 delta.

15 The second part of the delta is the witness
16 information, which continues to be redacted in their all.

17 And the third part of the information is any non-DIMS
18 information, such as information generated by the CIA in their
19 operational control.

20 MJ [COL POHL]: We will come back, but -- I'm going to
21 come back to that when we talk about 502, because I think
22 that's your focus.

23 LDC [MR. CONNELL]: Yes, sir. That's my focus.

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1 MJ [COL POHL]: Okay. Thank you. Mr. Swann.

2 Ms. Lachelier, anything further?

3 ADC [MS. LACHELIER]: Since I did have the podium first, I
4 wanted to finish.

5 MJ [COL POHL]: You did.

6 ADC [MS. LACHELIER]: I am glad that 502 came up. I
7 wanted to point out is not a foregone conclusion that the
8 admissibility being litigated as part of 502, so I wanted to
9 make that clear. And we -- because our position on 502 is
10 that the hostilities is the issue, and that the admissibility
11 of statements is not relevant to 502. So I just wanted to be
12 clear that the admission of statements issue is not a foregone
13 conclusion as a whole and we ----

14 MJ [COL POHL]: We are conflating the two issues.

15 ADC [MS. LACHELIER]: As we said on 502, we reserve the
16 right to raise the admissibility of statements at some point.

17 MJ [COL POHL]: All right. Thank you.

18 Mr. Swann?

19 TC [MR. SWANN]: Just a clarification, Judge. To help
20 defense counsel, if they would take their versions that they
21 have and lay them down and look at them, the Bates numbers are
22 going to be the same. So they can take their -- their --
23 their diversion [sic] of the DIMS, they can take the version

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1 releasable to the accused, and then they can take the DISPLAY
2 ONLY version, compare the Bates numbers on the bottom, they
3 will see exactly what is or is not missing.

4 MJ [COL POHL]: Okay. I got it. Thank you.

5 That brings us to 350.

6 DC [MS. PRADHAN]: Your Honor, this is really just a
7 status update. AE 350C and 0, which are our motions to compel
8 information about the former CIA interpreter utilized by
9 Binalshibh's team were on the docket last session and we
10 deferred because the government promised us further
11 information about that.

12 Mr. Ryan has represented to us that that guidance is
13 still forthcoming and so it's not ripe.

14 MJ [COL POHL]: Concur, Mr. Ryan?

15 TC [MR. RYAN]: I do, sir. Thank you.

16 MJ [COL POHL]: Thank you.

17 LDC [MR. RUIZ]: Judge, may I have a moment?

18 MJ [COL POHL]: Sure.

19 LDC [MR. RUIZ]: Thank you, Judge.

20 MJ [COL POHL]: Okay. That brings us to 359, which
21 actually is a government motion.

22 TC [MR. RYAN]: Good morning, Your Honor.

23 MJ [COL POHL]: Good morning.

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1 TC [MR. RYAN]: Your Honor, the United States seeks
2 reconsideration of AE 359E, which was Your Honor's order
3 denying the government's motion to inquire into the
4 circumstances and provisions of a joint defense agreement
5 between, we believe, all five accused.

6 In 359E, Your Honor's order, this commission found
7 essentially two grounds for which to deny the government's
8 motion; the first one being that in Your Honor's opinion -- in
9 Your Honor's writing, that the defense counsel were in the
10 best position to navigate the conflicts and ethics associated
11 with any joint defense agreement; and secondly, Your Honor is
12 noting that the appearance was that the interests of the
13 various accused were, at that point, still in congruence, that
14 at that point there didn't seem to be any evidence that their
15 interests were diverging in any way.

16 We seek reconsideration on the grounds that new facts
17 have arrived justifying such reconsideration. Before getting
18 to the new facts, I would like to cite to and quote two
19 specific provisions, two quick quotes from the Stepney case
20 that we have cited throughout our pleadings. And I note up
21 front, Judge, that the Stepney case was, in fact, a United
22 States District Court case that is at the trial level, so it
23 is certainly not controlling, but the circumstances of it we

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1 believe warrant your consideration, those circumstances being
2 that it was a District Court judge, that is a trial judge, who
3 was in the process of managing a multi-defendant case, clearly
4 a very complex case, and a case in which a joint defense
5 agreement had, in fact, reared its head.

6 So that judge, that judge being Judge Patel, having
7 traveled this path, and for trying to control her courtroom
8 and the things that can go wrong in the course of a complex
9 case, we think is worthy of this commission's consideration
10 for whatever persuasive value it may or may not have.

11 The first quote. And both of these come from
12 page 1083, Your Honor. The first quote states as follows.
13 Judge Patel states as follows: Thus, the existence of a duty
14 of loyalty would require that the attorneys for all
15 noncooperating defendants withdraw from the case in the event
16 that any one participating defendant decided to testify for
17 the government. In this instance, Judge Patel is dealing with
18 the always distinct possibility that, in a multi-defendant
19 case, one defendant could decide, as the term goes, to flip on
20 the others in the hopes of achieving some reduced sentence
21 recommendation from the government.

22 And Judge Patel notes in this instance that if there
23 was this all encompassing duty of loyalty as a result of the

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1 joint defense agreement in that case, that as soon as that
2 happened, that is, that flipping, that everyone is in a
3 position of having to withdraw.

4 Now, I will state up front that there is almost
5 certainly no chance of that kind of an event happening in this
6 case, and I think all counsel would probably agree with that.

7 However, the second quote states as follows, again
8 from page 1083, A duty of loyalty would even require
9 withdrawal where a defendant sought to put on a case that in
10 any way conflicted with the defenses of the other defendants
11 participating in a joint defense agreement.

12 Now, that, Your Honor, we submit is always a
13 possibility, and we don't think anyone is in a position to say
14 that that couldn't or wouldn't and isn't foreseeable as a
15 possibility in this case as well.

16 And that brings me to 506 -- AE 506A, a pleading
17 filed by the Bin'Attash team, where that defense team at that
18 time was asking Your Honor to abate the case. The specific
19 sentence that we have quoted and which we bring to the
20 commission's attention is this: Because this is a joint trial
21 with a limited joint defense agreement among the codefendants,
22 if counsel for the codefendants are witnesses and take a
23 factual position adverse to that of Mr. Bin'Attash, actual

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1 conflicts might require their withdrawal as well.

2 In light of the -- in light of Judge Patel's
3 identification of things that might go wrong in a
4 multi-defendant case, I submit to you, sir, that that
5 particular quote might have made her head explode.

6 She was worrying about what would happen in her case
7 in her courtroom under her control. Now, what has been
8 presented to Your Honor in 506A is far different. And as I
9 understand the circumstances, they are as follows: This
10 disgruntled former employee of the Bin'Attash team has
11 determined that it's time to sue some or all of the attorneys
12 in that case on that team. I note that none of the accused in
13 this case in front of Your Honor are parties to it or in any
14 way significantly affected by this lawsuit. And its status at
15 this time I have no idea.

16 But the thinking apparently goes that in the course
17 of this lawsuit, it might be the case that Mr. Bin'Attash
18 would be in a position to render some testimony that would
19 somehow be of relevance in this lawsuit which takes place in
20 the Northern District of Illinois, probably based on things he
21 saw or experienced or heard involving his team members.

22 It further is apparently the case that it's possible
23 some of the defense attorneys who do not represent

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1 Mr. Bin'Attash may also be in a position, having seen things
2 or heard things and might be in a position to render testimony
3 as well, or give some sort of relevant information in regard
4 to that civil case in Illinois.

5 And, as it continues, if the attorneys representing
6 the co-accused were to take a position, that is if what they
7 saw and heard and experienced was somehow different than what
8 Mr. Bin'Attash somehow saw and heard and experienced, that,
9 according to that statement that I read, it would put the
10 other attorneys for the other accused in a position of
11 conflict, requiring to withdraw from representation of the
12 co-accused in this case before Your Honor back here in
13 Guantanamo.

14 Somehow these events going on in the Northern
15 District of Illinois come all the way back to this courtroom
16 before Your Honor. And that's where I submit this motion must
17 bring the court's attention with great discernment.

18 What is being proposed to Your Honor, that is, that
19 withdrawal would be required by the co-accused, by the lawyers
20 for the co-accused, I am aware of no legal principle that
21 would dictate such an extreme result, with the possible
22 exception that I can see only of being if a joint defense
23 agreement was written in such a way as to require that.

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1 MJ [COL POHL]: Mr. Ryan.

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

3 MJ [COL POHL]: Let's assume that the joint -- there is a
4 joint defense agreement ----

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

6 MJ [COL POHL]: ---- because it's somewhat nebulous, at
7 least it's not as clear, and let's assume all parties are part
8 of it and let's assume it's in writing, and let's assume that
9 I review it ----

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

11 MJ [COL POHL]: ---- what's the next step?

12 TC [MR. RYAN]: As Judge Patel did.

13 MJ [COL POHL]: I look at it -- Okay. Do I then talk to
14 each accused to see how they understand it to be?

15 TC [MR. RYAN]: Well, if it's in writing, and I think
16 that's a big if by the way, but if it is in writing, it would
17 make that inquiry a little bit clearer since it is in plain
18 language, but we would absolutely be submitting that Your
19 Honor -- Your Honor's proper next move would be to colloquy
20 the accused in an ex parte fashion to understand what their
21 understanding of what this joint defense agreement is. But
22 ultimately what we are submitting is Your Honor has power; you
23 have got a dog in this fight.

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1 So if it contains language in it that, for example,
2 amounts to what I am talking about right now, that language
3 which was contained in 506A, Your Honor has the power to
4 negate that provision, order the defense to comply with a
5 proper joint defense agreement. And they are not hard to
6 find. The American Bar Association, which is often cited to
7 by the defense, puts out a model of what could be accomplished
8 within the parameters of proper legal ethics.

9 Your Honor could order the defense to abide by proper
10 provisions of a proper JDA, come back, and then warn the
11 accused that this is now what is in place; whatever you were
12 told otherwise, and of course, sir, I am assuming now it is no
13 longer in place. And that protects you -- this case going
14 forward.

15 MJ [COL POHL]: That's assuming that my understanding of
16 the JDA and the accused's understanding of the JDA is the same
17 and that they agree with it. I mean, at this point what we
18 have is their lawyers are talking to them about the defense
19 strategy writ large.

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

21 MJ [COL POHL]: And you want me to peel behind that to
22 look about this element of that strategy and hopefully, in
23 your view, explain it to them and get them to agree to it on

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1 the record and, therefore, if something comes up later down
2 the road, the process is protected.

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

4 MJ [COL POHL]: If I have this same discussion with them
5 and they say, no, I didn't want to do that, or I didn't
6 understand it that way -- you are assuming I am going to get
7 one answer to my question. I try to assume I am not going to
8 get one.

9 TC [MR. RYAN]: No, I am not asking for you to ask them if
10 they're okay with this, what I'm saying is you can order them
11 that this is the law in this case and just do you understand
12 what I just told you.

13 MJ [COL POHL]: Wouldn't that also apply if there was an
14 issue that came up down the road with this third-party
15 lawsuit, that that's not a basis for withdrawal ----

16 TC [MR. RYAN]: Sure.

17 MJ [COL POHL]: ---- or creates the conflict? Didn't the
18 government argue it didn't create a conflict earlier?

19 TC [MR. RYAN]: Absolutely. And we stand by that, Judge,
20 completely. The lawsuit is -- the only reason it's even
21 mentioned is it's the vehicle by which this new information,
22 these new facts were brought into this courtroom.

23 MJ [COL POHL]: Got it. Okay.

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1 TC [MR. RYAN]: So as I said, I am aware of no provision
2 in the law independent, on its own, that would say lawyers for
3 co-accused are dependent -- or their status as lawyers for
4 co-accused could be jeopardized by taking a factual position
5 inconsistent with that of another accused. And the law
6 itself, anybody who has been through a joint trial would say
7 that's certainly true.

8 But the exception being, the only one I can see and
9 the only one I can be aware of, would be if a joint defense
10 agreement is written in such a way that it somehow binds them
11 all together far more. And beyond me just saying it, it's
12 also what the defense cites in that sentence that I read to
13 Your Honor.

14 MJ [COL POHL]: But if we got to that point, your position
15 is if I look at the joint defense agreement and there was some
16 clause in there ----

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

18 MJ [COL POHL]: ---- that led us down this road, that
19 somehow this is -- this causes problems with the entire
20 defense teams ----

21 TC [MR. RYAN]: Right.

22 MJ [COL POHL]: ---- that that is really unenforceable and
23 I ought to just say that, if I review the JDA, say that's

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1 unenforceable, don't worry about it and I'm not going --
2 that's not a basis to create any type of remedial action
3 within the defense team? That's what you are saying?

4 TC [MR. RYAN]: What I'm saying, Judge, is by Your Honor
5 getting involved now, you can stop this from becoming a
6 problem down the road.

7 MJ [COL POHL]: But if the same logic ----

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

9 MJ [COL POHL]: ---- of the unenforcability of that
10 provision were to apply, and then down the road I don't look
11 at the JDA now, down the road that comes up and they say,
12 okay, now we have this provision that the JDA requires this
13 thing, don't I reach the same result anyway?

14 TC [MR. RYAN]: I in no way want to give up my remedy at a
15 later point of arguing that Your Honor doesn't have to
16 recognize the enforceability of it. What I am suggesting is
17 it's a problem and a risk that you shouldn't take and you
18 don't have ----

19 MJ [COL POHL]: If it's unenforceable now, wouldn't it be
20 unenforceable then?

21 TC [MR. RYAN]: As said, we are absolutely going to argue
22 that if it were to come to pass.

23 MJ [COL POHL]: I got it.

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1 TC [MR. RYAN]: But what is important, Judge and you will
2 be deluged with all sorts of ethics opinions, especially now
3 having put it in front of you, if Your Honor allowed it to
4 continue, if Your Honor took no actions and if my worst fears
5 were to come to pass, then at some point one accused were to
6 testify, or simply based on the provisions of the language I
7 was reading from 506A was simply to take a position adverse to
8 another accused, that at that point they can be -- that an
9 argument can be made that the joint defense agreement
10 prevented other lawyers from challenging the accused.

11 MJ [COL POHL]: Couldn't I address the 506 issue narrowly
12 without looking at the entire joint defense agreement?

13 TC [MR. RYAN]: Sure. For the 506 -- all 506 wanted was
14 for you to stop the commissions from going forward.

15 MJ [COL POHL]: No, I understand, but is your concern the
16 language in 506 may create the impression that somehow this
17 will violate the joint defense agreement ----

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

19 MJ [COL POHL]: ---- so no one sees what it looks like.

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

21 MJ [COL POHL]: And your position is, I look at it now, if
22 there is such a provision, I say it's unenforceable. My
23 discussion earlier was, if I look at it later when they

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1 attempt to enforce that provision I say it's unenforceable.
2 But in between that time, couldn't I just issue an order now
3 saying that if this provision says X, Y, and Z, it is
4 unenforceable? And that would address your concern of the
5 newly discovered evidence and without requiring me to go into
6 the nuances and the -- of the -- because the joint defense
7 agreement could have all sorts of stuff in it once you open,
8 once you look at it, true?

9 TC [MR. RYAN]: Absolutely, Judge, but -- and the reason
10 we are asking ----

11 MJ [COL POHL]: But the issue before me is a
12 reconsideration based on this new evidence. And my question
13 is isn't there a way to address the new evidence without
14 revisiting the entire original ruling which I know you
15 disagree with? I got that.

16 TC [MR. RYAN]: I understand, Judge. If I was to be told
17 that you are unwilling, under the circumstances I am citing to
18 now, to engage and examine the joint defense agreement -- and
19 I am not done arguing that you absolutely should.

20 MJ [COL POHL]: I know. I know.

21 TC [MR. RYAN]: But if I was to be told that you weren't
22 going to do that, I would not be against asking Your Honor to
23 issue an order, comprehensive, outlining what is potentially

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1 acceptable in a joint defense agreement and what is not
2 acceptable in a joint defense agreement, and we would ask you
3 to follow that up with a colloquy of the accused.

4 MJ [COL POHL]: Okay.

5 TC [MR. RYAN]: Your Honor now has heard, throughout the
6 course of this litigation, three different descriptions of
7 what the joint defense agreement might require and/or allow.
8 The first one came from detailed military counsel for the
9 accused Ali; the second one came from learned counsel for the
10 accused Binalshibh, and those two were diametrically opposed;
11 and number three is what now has come in 506A. It is by far
12 the most troubling. And this goes back to Your Honor's
13 questions about the provisions.

14 What it entails -- and also to the language citing
15 from Stepney. What it entails, what it seems to dictate is
16 that there very well may be a full duty of loyalty spelled out
17 in a joint defense agreement by and between the five accused.
18 And that, we suggest, Your Honor, is a time bomb in this case.

19 We don't know why the three versions that you have
20 heard from various counsel in this case can be so -- can be of
21 such a wide range as to its interpretation of what this joint
22 defense agreement means. It might be that it's not written.
23 This goes back to what I said before about that it's a big if.

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1 We don't know that it's written. And to some extent, Judge, I
2 would suggest the difference in interpretations might be a
3 reflection that it isn't written down, that it simply is what
4 each of them decides what it is at any given time.

5 But that, Your Honor, is where I think the great
6 trouble and the great risk to the case is. It begs the
7 question: Since counsel can't agree on what it means and what
8 it is, what do the accused think? For example, this motion
9 506A for abatement of the commissions was filed in the name of
10 Mr. Bin'Attash. What does Mr. Bin'Attash think about this
11 line in a motion filed under his name? Does he think that
12 that statement is true? Does he think that no other attorney
13 in this case can ever take a position, a factual position,
14 adverse to him?

15 This is a real danger, Your Honor, because in this
16 case, regardless of the position of how close in agreement
17 they might be at this particular time, sooner or later the
18 risks will come that that will no longer continue. In fact,
19 we submit, as part of the new facts, that it's already
20 happening. But the different accused in this case had
21 different roles in the case.

22 One of the other accused can quickly point at
23 Mr. Bin'Attash and say, That guy was worse than me; he is the

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1 one who smuggled knives on an airplane; he is the one who sent
2 the first hijackers to the United States. Does he think that
3 no lawyer in this case can do that, as is suggested in 506A?
4 If so, it's something this commission has to intervene in and
5 investigate, and we suggest remedy if necessary.

6 As to the second basis for denial, Your Honor, that
7 the accused have cohesive interests and their interests are
8 not yet diverging, in our pleadings in 359F and I, we note a
9 total of three different instances of new facts where it
10 appears that that is no longer the case. I won't describe
11 them or belabor them, but they are there.

12 Your Honor, we submit that the cost-benefit analysis
13 of this particular remedy that we seek favors the government's
14 request strongly. We are asking for this to be done in an
15 ex parte fashion. We are not asking that the government be
16 involved, although it is certainly that we wish we would be
17 able to advocate because the risk is so high.

18 As Your Honor has noted, however, the defense is
19 quite content to have you privy to protected information when
20 seeking something from the commission, and we have heard more
21 references to it today. And also in the discussion section of
22 Rule of Military Commission 901(d)(4)(E), as Your Honor points
23 out in your order, there is an obligation on the part of the

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1 commission to sua sponte investigate anything that should
2 concern you as to a possible conflict of interest.

3 If you do conduct the inquiry, as we suggest, and
4 everything is appropriate within the joint defense agreement,
5 then no harm has occurred; no information has been disclosed
6 of a confidential nature. But if the worst fears are founded,
7 then, as I said, Your Honor, there is something in the case
8 that is just waiting to go off.

9 But it can be fixed. As we said, an appropriate
10 joint defense agreement can be ordered. And I refer Your
11 Honor to page 1085 of the Stepney case where a quote from the
12 ABA model of a proper joint defense agreement is cited.

13 That is my argument, sir, subject to questions.

14 MJ [COL POHL]: I have none. Thank you, Mr. Ryan.

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

16 MJ [COL POHL]: Defense. Mr. Connell.

17 LDC [MR. CONNELL]: Your Honor, the government's entire
18 legal argument is based on the hypothesis that counsel may
19 have entered some sort of agreement acquiring a duty of
20 loyalty to someone other than their own client. I can state
21 unequivocally that no counsel for Mr. al Baluchi has entered
22 any agreement requiring a duty of loyalty to anyone other than
23 Mr. al Baluchi. Other than that, I will rest on the brief.

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1 MJ [COL POHL]: Ms. Bormann?

2 LDC [MS. BORMANN]: Judge, we rest on the brief.

3 MJ [COL POHL]: Mr. Harrington, do you wish to be heard?

4 LDC [MR. HARRINGTON]: Judge, I also agree with
5 Mr. Connell's statement that I certainly and our team only owe
6 a duty of loyalty to our client. If there is any kind of a
7 joint defense agreement, it has nothing to do with loyalty to
8 any other, any other defendant. And having participated in
9 many, many joint defense agreements with many, many people,
10 leaving the joint defense agreement -- when they exist, people
11 know that when you leave, you are off on your own. You want
12 to cooperate, you want to do whatever you want, you want to
13 have a contrary defense, that's fine.

14 The main principle of it is what was said when it
15 existed stays there and nobody is authorized to spread it
16 around. And 99.9 percent of the information in a joint
17 defense agreement is attorneys talking. Certainly not lawyers
18 talking to other people's clients or getting admissions or
19 anything else like that.

20 MJ [COL POHL]: If there is a joint defense agreement and
21 somebody were to withdraw, would there be any notice
22 requirement to the court?

23 LDC [MR. HARRINGTON]: To the court? No, not that I am

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1 aware of. Nor is there any notice requirement to tell the
2 court that there is one.

3 MJ [COL POHL]: Okay. I am just asking.

4 LDC [MR. HARRINGTON]: That's all I have. Thanks.

5 MJ [COL POHL]: Mr. Nevin, do you wish to be heard?

6 LDC [MR. NEVIN]: Just to echo the remark that we
7 understand our duty of loyalty to be Mr. Mohammad only, and we
8 have not undertaken duties of loyalty to others. And I just
9 would also submit that I think you are being asked -- or
10 perhaps this was the remedy that the military commission
11 suggested was an advisory opinion, that if you think it's
12 going to go this way, think again, because that would be
13 improper.

14 I would just say I think it cuts again, and I have
15 heard the military commission say many times that it is
16 against giving advisory opinions, and I think this is just an
17 area of complexity. And I don't deny that in some unusual
18 circumstances it can be necessary for a court to inquire, but
19 this will become a significant -- and, you know, I had written
20 down shortly, at about the time you were -- you raised this
21 question, What do you do with this information? What do you
22 do with this? If there is a problem, in the unlikely event
23 there is a problem now, if you raise it now, do we all have to

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1 leave?

2 There is a reason that ordinarily these matters are
3 kept confidential. Because unless the presence of a problem
4 is so patent that a court has to deal with it immediately, the
5 problems outweigh the benefits. And I don't think we are
6 anywhere close to that kind of situation, so I also ask that
7 you deny the motion.

8 MJ [COL POHL]: Mr. Ruiz?

9 LDC [MR. RUIZ]: I don't have anything to add, Judge.
10 Thank you.

11 MJ [COL POHL]: Okay. Only because the other three had
12 said it, I will just put on the record: Ms. Bormann, do you
13 agree with your three colleagues that your duty of loyalty is
14 only to Mr. Bin'Attash and nobody else?

15 LDC [MS. BORMANN]: Of course. That goes without saying,
16 which is why I didn't say it.

17 MJ [COL POHL]: I know, but they did, and I just want to
18 get everybody on the record.

19 Mr. Hawsawi -- or Mr. Ruiz, the same question.

20 LDC [MR. RUIZ]: Yes.

21 MJ [COL POHL]: Thank you.

22 That brings us to 478, which is a scheduling order.
23 I don't know if this will take a long argument. I say that

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1 because we have heard a lot about it already. Before you
2 begin, Mr. Ryan ----

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

4 MJ [COL POHL]: ---- let me just kind of see where we are
5 at in this thing. Understanding there are some DIMS -- we
6 talked about some discovery still out there. From the
7 government's perspective, have you given all the discovery
8 which you -- I am not talking about requested discovery, I am
9 talking about that you have to give to the defense, have you
10 done that?

11 TC [MR. RYAN]: The affirmative discovery, Your Honor, has
12 been turned over to the defense. The only exception, and it
13 shouldn't be as to discovery itself, concerns certain areas
14 where we will have to come to the commission, on a 505 basis,
15 in regard to how to protect certain evidence in an open court
16 session. But I emphasize, the evidence itself, the underlying
17 evidence, has been turned over to the defense in that regard.

18 MJ [COL POHL]: Okay. And then we still have some
19 outstanding defense requests for discovery, and I am not
20 talking about those. Okay.

21 Do you have anything to add? That was kind of my
22 only -- that was the primary reason why I put this on the
23 docket. Also, just something we touched on the 802, just so

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1 we put it on the record, you indicated that if we had the need
2 to do a 505(h) and perhaps an 806 follow-on session, that
3 there would be facilities in the Washington, D.C. area that
4 would permit that rather than coming down here to do it.

5 TC [MR. RYAN]: Yes, Your Honor.

6 MJ [COL POHL]: I think when I left you last you said you
7 would look into that and you looked into it. And what did you
8 find out?

9 TC [MR. RYAN]: I did. I traveled within the National
10 Capital Region to where the convening authority told me that
11 we could potentially hold sessions. And at Your Honor's
12 urging, I went myself to see it. There was a conference room
13 that is full SCIF capable. It holds, according to the sign on
14 the wall, 32 people. It is essentially a conference room,
15 Judge, with a long table. There is a podium at one end and
16 there is, as I recall, a screen/monitor as well. The number
17 of seats that were there that day were 31, and they were
18 arranged -- aligned around the table, but also with some
19 against the two long walls of the room.

20 It is my estimate that you could probably fit another
21 five to ten seats in there as well that people -- where people
22 could be occupying and participating without it compromising
23 the ability of the commission to conduct the business it wants

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1 to conduct. That's my best guess on it, Judge.

2 MJ [COL POHL]: Total number of people?

3 TC [MR. RYAN]: My best guess, sir? Well, according to
4 the room, 32. If I am correct as to the numbers that we could
5 fit in as well, and I don't think there is a lot of risk in
6 this one, I would say at least five more, to 37.

7 MJ [COL POHL]: Including court reporter, personnel, and
8 everything else?

9 TC [MR. RYAN]: That would be everybody you could shoe
10 horn into the room. I will commit, Judge, that for the
11 prosecution purposes, we could attend sessions in such a room
12 with no more than three people.

13 MJ [COL POHL]: Okay. Before I want to commit to this,
14 tell the defense counsel where the room is. And, defense
15 counsel, take a look at it for yourself and see if there is a
16 logistical problem that makes it non-doable, and then we will
17 go from there. Okay. Thank you on that issue.

18 Anything else on 478?

19 TC [MR. RYAN]: Your Honor, back on the discovery, because
20 I want to be as clear as we can be ----

21 MJ [COL POHL]: Sure.

22 TC [MR. RYAN]: ---- the last time we discussed this
23 matter of 478, one of the subjects was the status of 308,

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1 which was, for the most part, the RDI discovery. What I told
2 you last time is that 308PPPP represented the final pleading
3 in that regard in the 308 series. That is still the case at
4 this point. The total number of material turned over in all
5 of RDI, not just 308, is in excess of 14,000 pages. So with
6 that, with PPPP, we believe we have closed out 308.

7 Now, there will -- we believe, Judge, that there will
8 be other matters that may, in fact, require us to come to Your
9 Honor as well on a 505 basis. And in this instance, what I am
10 talking about, Judge, is: A, discovery requests from the
11 defense where they point us at a specific subject or a
12 specific event and, after consultation and consideration, we
13 determine that we should turn it over. And I also have to
14 allow for the possibility that other matters, typically not
15 ten-paragraph construct, but other matters contained within
16 that large sphere of materials we may conclude become
17 discoverable under various other theories. And on that, I
18 can't really point you to exact ideas of what it will be
19 because, obviously, we don't know everything yet. But we are
20 always obligated to consider that discovery is an ongoing
21 process and our obligations continue throughout.

22 The last item I want to mention in terms of discovery
23 is relatively late in the whole court process there became

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1 this issue of hostilities and discovery of information
2 concerning what was the state of war between the United States
3 and al Qaeda at the time of the September 11 attacks and
4 before.

5 We have had to go through an examination of an awful
6 lot of material, mostly because the defense has requested it
7 from us, and properly so.

8 MJ [COL POHL]: But to be fair on the hostilities issue,
9 is the government -- it is part of one of the elements, isn't
10 it?

11 TC [MR. RYAN]: I'm sorry, sir?

12 MJ [COL POHL]: Down the road you were going to have to
13 address this on the subject matter jurisdiction part.

14 TC [MR. RYAN]: I think the way I should say it, Judge, is
15 we had -- coming into the case we had gathered our information
16 that we felt was clearly sufficient to prove hostilities as an
17 element of the offense. And that which we saw as sufficient
18 from way back when has long been turned over.

19 Now, as the case has moved forward and the 502
20 motion, and before that 119 was put on the docket, there were
21 -- there have been discovery requests identifying large caches
22 of information with the defense saying we want items, in some
23 caches very specific items from those caches, and in other

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1 caches we want everything in those caches that reflect on the
2 issue of hostilities or might be material to the preparation
3 of the defense.

4 We have dedicated significant resources to examining
5 the caches of information. We don't believe, I will say this
6 very clearly, sir, we have found nothing that we would
7 consider of an exculpatory nature in that regard as to this
8 issue of hostilities in terms of the status of the United
9 States vis-a-vis al Qaeda in the years '96 through 2001.
10 However, we have found items that we believe to be inculpatory
11 and beneficial to the government's case, and in those
12 instances we may very well have to come back to Your Honor on
13 that as well.

14 MJ [COL POHL]: Okay.

15 TC [MR. RYAN]: That's 505. Can I have one moment, sir?

16 MJ [COL POHL]: Yes.

17 TC [MR. RYAN]: One moment, Your Honor.

18 Your Honor, as you noted, we have argued this and
19 there have been significant pleadings on it for some time now.
20 I adopt and incorporate all previous arguments made. I wish
21 to make one point, sir, and that's this: Part of it was today
22 in terms of is there a room that we can do things up in the
23 National Capital Region. But in previous sessions, we have

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1 discussed an awful lot of matters concerning logistics, just
2 is there going to be enough resources available, whether it's
3 courtroom space or trailer space or vehicles or lodging space,
4 et cetera. We have tried to answer that as best we can
5 through the course of the arguments and in writing.

6 The prosecution is often the ones that, when the
7 sessions end, go out and speak to the many authorities in
8 place who are controlling those kinds of things, not only in
9 existence now but going forward. And based on an awful lot of
10 effort that's been put forth in these matters of making sure
11 the proper resources are available and the proper logistics
12 are in place, I would submit this to you, Judge, and this goes
13 on experience through decades as well.

14 The government responds well to deadlines and
15 responds well to schedules. We have heard this and seen this,
16 and that's why I bring it to your attention over and over
17 again, where when we cannot point to a schedule, there is a
18 reluctance, not an unwillingness, but a reluctance to sort of
19 move it to the head of the pack so to speak.

20 When there is, however, a schedule and a deadline, we
21 have found that mountains tend to move much faster than when
22 the prosecution itself is the only voice in the wilderness
23 saying that the mountain does have to move. I think Your

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1 Honor gets my point.

2 Subject to any questions, sir, that's all I wanted to
3 bring to your attention.

4 MJ [COL POHL]: I have none. None, Mr. Ryan. Any --
5 again, we have discussed the issues with the scheduling order
6 before. Any new points you wish to make?

7 Mr. Connell.

8 LDC [MR. CONNELL]: Your Honor, I just wanted to respond
9 to the specific points that the government made today. The
10 first is -- and I actually won't pull it up, but I was moved
11 by the government's argument about how many different
12 authorities there are who have information or power relevant
13 to the military commission. And the government correctly
14 argued that after these sessions it often goes out and speaks
15 to those people.

16 So does the defense. That is exactly the position --
17 the point that we were making earlier in the 200 series, is
18 how many fingers in the pie. Congress overruled one of your
19 rulings in 254. The Secretary of Defense interfered with your
20 judicial independence by trying to move you down here. JTF
21 interfered with your judicial independence by changing your
22 resourcing. All these different bodies, whether they be
23 national, international, or DoD or outside of DoD, are part of

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1 the advocacy that the government makes when it is advocating
2 around the military commissions and the defense makes when it
3 advocates around the military commissions. The same reasoning
4 that the government just articulated in this motion is the
5 same point that we were trying to make earlier in 200.

6 The second point that I will make is the government
7 says that the hostilities issue has arisen late in the case.
8 Barring the -- and I suppose that's a matter of perspective --
9 barring the question that the government was going to have to
10 prove hostilities at any point. In fact, our initial
11 discovery request, which is quite detailed in this, was made
12 on 10 April 2014. It's found in the record at AE 510,
13 Attachment B. As I understand it, and I suppose there can be
14 a legitimate debate over what is affirmative discovery and
15 what is in response to a defense request.

16 In fact, you know, in one way everything the
17 government has ever produced has been affirmative because very
18 little has been ordered, and in another way it's all been in
19 response to a defense request because we made requests for it
20 all. But in the hostilities situation, the government has
21 represented to us on a couple of occasions that it is -- that
22 the -- it is re-reviewing the documents, almost all of which
23 are redacted, which are produced to us in the hostilities

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1 discovery. And in my view, that is important affirmative
2 evidence that the government would seek to use.

3 The last point that I wish to make is we are going to
4 talk on Wednesday about what the personal jurisdiction -- I
5 hope that we are going to talk on Wednesday about what the
6 personal jurisdiction hearing is going to look like. And I
7 would have a position of hey, I have ideas on how we can
8 actually get this thing started. But I do want to point
9 out -- and in many ways the personal jurisdiction hearing is a
10 mini version of the trial. The government is going to get to
11 produce a lot of evidence of guilt, we are going to produce a
12 lot of evidence of lack of personal jurisdiction.

13 You know, and it draws on the resources, but I think
14 it also -- what we have seen already that demonstrates the
15 challenges that the military commission faces in setting a
16 trial date. The court actually issued an order in 502I which
17 set specific dates for things to happen in that. It ordered
18 argument on witnesses for July -- specifically for July of
19 2017, and the government to begin to present its witnesses in
20 August of 2017.

21 Of course, what happened then was the government
22 interfered with the judicial independence of the military
23 commission by interfering with its resources and the

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1 government refused to produce not -- in all but 22 cases, not
2 with specific objections, just refused, flatly refused to
3 produce the witnesses that the defense requested.

4 And so, you know, in a -- if the government had not
5 undertaken those actions, we would be currently, as we speak,
6 in the second week of the personal jurisdiction hearing. But
7 the government's idea that you should artificially set dates
8 because it will move things forward does not comply with the
9 actual experience of anyone who has been involved here.

10 The last thing that I want to say is that you have
11 heard that last argument that the government just made before
12 when you addressed the government and said, listen, there is a
13 severe problem around resourcing in the military commission
14 and the number of courtrooms. The argument -- the response of
15 the government was you -- from basically, Judge, from your
16 mouth to God's ears, and when you say it we will go out and
17 make it happen.

18 What in fact happened was that due to the powers that
19 be, and I don't even know who they are because the government
20 doesn't put it in the pleading, the powers that be decide that
21 they don't want to resource the military commissions in a way
22 that the military commissions need to move forward the way
23 that the prosecution would like them to. So the idea that you

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1 should artificially set deadlines that you don't think are
2 realistic in order to move the powers that be I think does not
3 comport with the way that the actual United States Government
4 works. Thank you.

5 MJ [COL POHL]: Thank you, Mr. Connell.

6 Anything further from the defense counsel?

7 Ms. Bormann.

8 LDC [MS. BORMANN]: It occurs to me there are three
9 specific areas that are relevant to what Mr. Ryan told you.
10 The first is discovery, and I want to remind Your Honor,
11 because it has been said over and over, but we requested
12 discovery on this case when I was detailed as learned counsel
13 in 2011. We have been requesting discovery pretty much
14 nonstop since then. And I'm glad that the United States now
15 says it's completed 308PPP in 2017, but I suspect that we will
16 also have to revisit that.

17 I want to draw your attention, for purposes of
18 argument, to one of the issues that you may see very shortly
19 and would have seen but for a conversation we had with
20 Mr. Trivett yesterday -- or Saturday. On 16 September last
21 year, one year ago to today's date, we sent the government a
22 request for discovery. The request was based upon reading a
23 book by a former CIA agent about the investigation into 9/11.

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1 And in that book -- because of course we have to do our due
2 diligence too, right? So we read everything that comes out
3 about this investigation, trying to pursue every possible
4 lead.

5 And so a year ago we requested some phone records.
6 There was a raid on a Taliban embassy in Peshawar way back in
7 2002 and so we requested those, because, according to the
8 former CIA agent, they contained phone records of phone
9 conversations between Taliban officials in Afghanistan and the
10 United States prior to 9/11.

11 For a year we didn't receive anything except for the
12 following statement: We are doing our due diligence.

13 Last Wednesday -- we finally had enough. We never
14 received any records; we never received anything. So last
15 Wednesday we drafted a motion to compel and we reached out to
16 the government for their position. And what we received was,
17 oh, wait -- basically, oh, well, we are going to work on it
18 some more. So a year after the fact, it takes us having to
19 file a motion to compel to get any action from the government.

20 So I don't know what affirmative use means for
21 purposes of this, but I am here to tell you if this were a
22 jigsaw puzzle, the government's version of affirmative use
23 discovery would be 25 pieces out of a 2500-piece jigsaw

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1 puzzle, because there is a lot more than what they consider
2 affirmative use.

3 It's easy as a prosecutor to look at what you need to
4 prove your case. The question is, what material do we have to
5 provide the defense so that a jury gets an entire picture, not
6 just for guilt/innocence, but also for sentencing, and you are
7 going to see a lot of motions to compel in the near and far
8 future, I suspect.

9 I also want to talk about resources. We are -- we
10 sought leave to file a supplement because we just received
11 information on it from the convening authority and so you will
12 see that, assuming our MFL is granted. But let me just say
13 this: When the court orders resources found necessary to the
14 trial of this case, and two years after the fact, we still
15 don't have them, there is a problem with the system. So I
16 can't talk about any more information than that, other than to
17 tell you you need to know what's going on behind the scenes
18 because there is a problem with the convening authority.

19 Lastly, let's talk about the resources in Guantanamo.
20 You know, you addressed Mr. Ryan and you said, How about this
21 conference room in Washington, D.C.? How about here? So
22 today -- I received an e-mail at 4:02 p.m. on Friday with two
23 sentences. It said can't hold attorney-client meetings in the

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1 place where we always hold attorney-client meetings, we have
2 to hold them back in the holding cells back here.

3 What you heard today and what I suspect we are going
4 to hear this afternoon is we don't have the resources to
5 provide meeting space for attorneys to meet with their
6 clients. If they can't do that during a pretrial hearing on
7 one case, how are they going to do that during trial of three
8 cases simultaneously? You have not heard a single
9 justification or change in the environment or milieu or any
10 evidence whatsoever that things are going to change, because
11 as Mr. Trivett I think said at the last time, there doesn't
12 seem to be political will to do that. And so ----

13 MJ [COL POHL]: I think he was referring to a new
14 courtroom.

15 LDC [MS. BORMANN]: But it's the same issue, right? I
16 mean, the new courtroom, a place where we can hear each other
17 when the rain comes down would be a good thing, right? But
18 how about just the infrastructure around it? I mean, if you
19 were playing the Super Bowl, would you just build, you know, a
20 hundred-yard thing with some goal post at the end? No. You
21 would have to build locker rooms, roads around it, stands, and
22 all that. I am here to tell you all of that stuff hasn't been
23 even been considered, which is why we had to file an emergency

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1 motion this morning.

2 So we are nowhere near setting a trial schedule. You
3 try and set deadlines. For what? For us being able to meet
4 with our client. And then we have to come back to you and say
5 we can't because they won't let us because they don't have the
6 resources. You say to us -- you know, they say discovery is
7 done and we say but we have 25 motions to compel in the
8 pipeline that they say they are conducting due diligence on,
9 and it takes a year for them to get back to us. That is not
10 the setting that any court, appellate or otherwise, would look
11 at as ready to try the maybe largest criminal case in American
12 jurisprudence.

13 And so I am asking you to wait until discovery is
14 complete, wait until we have the resources to actually work
15 with investigation and discovery.

16 MJ [COL POHL]: Ms. Bormann, a long time ago there was a
17 request from the defense, and I forget whose motion it was,
18 that we ought to wait on the referral decision until discovery
19 is complete so that we can submit our mitigation materials to
20 the convening authority and then to get the death penalty off
21 the table or another disposition. Of course, I denied it.

22 We are now six years into this case -- going on six
23 years. And there is affirmative discovery the government has

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1 to give, I've got that. But how much more discovery -- I
2 mean, if we wait until every piece of defense requested
3 discovery comes in, can this case ever be tried?

4 LDC [MS. BORMANN]: Well ----

5 MJ [COL POHL]: I know you are entitled to stuff, I've got
6 that, I have got it.

7 LDC [MS. BORMANN]: It is not just what I want, it's
8 what's constitutionally required. This isn't about Cheryl
9 Bormann wants 5 million pages of discovery. This is about an
10 investigation that is maybe the most complex ----

11 MJ [COL POHL]: But, Ms. Bormann, my point being is that
12 we have -- and you have got the absolute right to file this
13 stuff, I am saying that. But what I am saying is let's just
14 go with what we have talked about today, the DIMS records.
15 You know, we are now -- you know, we are now talking about ten
16 years' worth of confinement records that the defense has
17 gotten in one form; they want it in another form and it needs
18 to be done again, okay? What I am saying is there comes a
19 point where the case will never be tried if we don't move it
20 along.

21 LDC [MS. BORMANN]: Okay. And so ----

22 MJ [COL POHL]: What I am just trying to get to is the
23 government says they have given you all the discovery you are

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1 entitled to. You guys want additional discovery. I've got
2 that. But there becomes a rule of reason here too where the
3 case needs to be tried. And if the standard is when every
4 motion to compel is resolved, which that would result in the
5 case, quite frankly, never being tried because those motions
6 never stop.

7 LDC [MS. BORMANN]: Well, Judge, let me just go back on
8 something you said. You said, you know, the government says
9 they have given you everything you are entitled to. Oh, they
10 did not say that. They definitely did not say that. And in
11 fact the conversation that we had with Mr. Trivett about these
12 Taliban records from the seizure from the ex-CIA agent's book,
13 that information we are entitled to. They are reviewing it
14 finally, but it has taken a year to get there. So we are
15 going to be entitled to that.

16 So they are not saying we have received everything we
17 are entitled to. They are saying the check is in the mail.
18 And until they can prove that the check has actually landed,
19 we shouldn't be setting hard schedules.

20 The resource issue is -- I mean, it doesn't matter if
21 they get us all the discovery if we don't have the tools with
22 which to work it. So there are so many moving pieces in this
23 case that seem -- I mean, the courtroom is one, meeting

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1 facilities are one, living facilities, boats to get across the
2 water, there are so many moving pieces. This place is nowhere
3 near that.

4 Now, we are trying to get things to you, but, I mean,
5 you have the power of the pen. You can actually order things
6 to happen. We have a series of ex parte motions to compel
7 with you on necessary resources. One of them is going to deal
8 with the MRI that we finally got notified is over here. So
9 there are so many different moving pieces that until at least
10 some of those get into place where we can utilize them, it's
11 not appropriate to set a trial date.

12 Let me talk about, you know, the practice -- so the
13 State of Illinois where I am from, there were lots of innocent
14 people who were convicted and sentenced to death and death row
15 had to be cleared in part because of that, because of the
16 innocence of the men who were sitting there. And one of
17 the -- there was a blue ribbon panel that was put in place by
18 the then-governor to examine what caused that. And one of the
19 causes were courts not allowing defense counsel to do the
20 investigation and get all the discovery they need.

21 So the Illinois state legislature, when we had the
22 death penalty in Illinois, required certification by both
23 parties that both parties were ready to go before they set

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1 trial schedules. And we don't have that rule here, but it
2 should made a lot of sense.

3 We tried a ton of death cases in Illinois because
4 people signed certifications, including me, but it also made
5 judges tell prosecutors, Do a better job. Don't wait for a
6 year when you get a discovery request to come back to the
7 defense and say, you know, we are working on it.

8 So I am going to ask you to withhold any -- I am
9 going ask you to deny their renewed motion.

10 MJ [COL POHL]: Thank you, Ms. Bormann. Anything further?

11 LDC [MS. BORMANN]: No, Your Honor.

12 MJ [COL POHL]: Mr. Nevin.

13 LDC [MR. NEVIN]: And I wanted just to throw cars into
14 this, which arose as an issue here in the last little while,
15 and now suddenly transportation has gotten a lot more
16 difficult when the full body of us, as we say, have come down
17 here. Not to complain about it as such, at least not right
18 now, but just to say that this is still an evolving process
19 and I don't think there is any way to deny that. I'm not
20 saying there is any -- someone is doing something -- I am not
21 necessarily saying someone is doing something improper, I am
22 just saying it's a big, complicated problem.

23 So the reason I got up, though, was because I

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1 heard -- because others have spoken about these things. And I
2 am not going to touch on those again, but you used the term at
3 some point the case needs to be tried and the motions will
4 never stop. And I just want to say that it's a capital case,
5 it has great importance, the world is watching. Many people
6 are watching. And above all else, it needs to comply with the
7 Eighth Amendment and it needs to comply with due process and
8 with the Sixth Amendment as well, and these men have a right
9 to due process, they have a right to the assistance of
10 counsel, they have the right to present a complete defense,
11 they have the right to be free from cruel and unusual
12 punishment, which results from the denial of those previous
13 rights in the context of a death penalty case.

14 The case doesn't need to be tried until all of those,
15 all of those considerations have been satisfied. And the
16 motions will stop when all the material that has been
17 provided -- that is required to be provided has been provided.
18 And in that sense, the case is no different than any other
19 case. But there is no -- there is no -- there is no
20 supervening obligation to try this case or to take other
21 actions other than what is required by the Constitution.

22 MJ [COL POHL]: I don't disagree with you, Mr. Nevin.

23 LDC [MR. NEVIN]: All right.

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1 MJ [COL POHL]: That's not what I meant, if you thought I
2 meant that we ignore rights because the case needs to be
3 tried. I'm just saying is -- I'm saying what it is. I mean,
4 you will get -- we just need -- if you took it that way, that
5 wasn't what I meant. I just said the case needs to be tried
6 because it is a case that needs to be tried. Now, it needs to
7 be tried according to the law, I got it, and protecting the
8 rights of the accused and the defense and everything else. I
9 got it.

10 LDC [MR. NEVIN]: I didn't mean to accuse you of
11 everything.

12 MJ [COL POHL]: I wanted to make sure there was no
13 misunderstanding.

14 LDC [MR. NEVIN]: Well, I appreciate that. Because this
15 case needs to be tried, you know, I have heard that said in
16 courtrooms before too, and it means I understand what you are
17 arguing, but we are trying this case; this case needs to be
18 tried. And you know, in some kinds of cases that makes sense.
19 You know, in traffic court, yeah, we just need to get this
20 done. But I heard it that way. I apologize if I accused you.
21 I appreciate your reassurance, Your Honor.

22 MJ [COL POHL]: No problem.

23 Mr. Ryan.

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1 TC [MR. RYAN]: I only wish to say, Judge, that some of
2 the comments you heard I think reflect on the issue of
3 discovery and the government's tremendous obligations in this
4 and also our tremendous efforts.

5 I agree with counsel when they say there will be
6 motions to compel, and I welcome those because at that point
7 Your Honor will see how stunningly overbroad these requests
8 can be. There is no limit to the amount of imagination that's
9 put into what they think they want.

10 I think what you will see for sure is there will be
11 no Taliban telephone record that says Khallad bin'Attash
12 didn't do it. In the end, though, Judge, I can tell you this,
13 they will never give their permission to try this case, so I
14 stand on my arguments.

15 Thank you, sir.

16 MJ [COL POHL]: Not so fast, Mr. Ryan.

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

18 MJ [COL POHL]: Do you have some concept of how much
19 material that the government has promised to give the defense
20 that has not been given to them yet? We've talked about a
21 firm discovery earlier. We just talked earlier about the DIMS
22 records, that other category. Not things you say we are not
23 going to give to you. But you don't have a sense of that?

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1 TC [MR. RYAN]: I don't, Judge, only because there are so
2 many different categories of it in terms of DIMS which
3 concerns the camp, RDI.

4 MJ [COL POHL]: It just strikes to me is that if the
5 government says we are going to give this to you, I need to
6 kind of know what it is and when you are going to give it to
7 them.

8 TC [MR. RYAN]: We will take your point, sir, I
9 understand.

10 MJ [COL POHL]: You are going to take it in writing in a
11 second. I'm going to issue an order on that. Thank you.

12 From the defense perspective -- I'm done with you,
13 Mr. Ryan.

14 TC [MR. RYAN]: Sure.

15 MJ [COL POHL]: Well, for now. And this is just
16 generically, is there is a reference earlier that you have had
17 expert consultant requests approved and not acted on? Okay.
18 And again I am going to put an order out to this effect to
19 both sides, because it gives me kind of a time frame.

20 I am going to issue an order I want, obviously can be
21 ex parte because that is the nature of the request. When the
22 request was granted, what for and what its current status is.
23 Again, that gives me an idea of timelines on both of those

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1 items of where we are at, and then I can make an
2 intelligent -- reframe that.

3 I will do the best I can to make an informed decision
4 on an appropriate trial schedule when I have that information.

5 LDC [MS. BORMANN]: Judge, the supplement that we
6 requested to file ex parte will provide that with respect to
7 one.

8 MJ [COL POHL]: Yeah, but I want all. And again I'm going
9 to issue a trial conduct order to that effect. To the
10 defense, I want an updated issue of any ex parte request that
11 still needs to be implemented, whether that means just where
12 it is. There will be detail there.

13 The government will also get a similar trial conduct
14 order of the status of any discovery that they say they are
15 going to give defense but they have not yet given to them and
16 anticipate what date it would be. Perfect example is the DIMS
17 records we talked about earlier. That will give me an idea
18 kind of the lay of the land that I'm currently unaware of of
19 things that are going to be given but have not yet been given.

20 Okay. That being said, 517.

21 Well, before you get to that, let me ask defense or
22 the prosecution a question. Do we have a witness on this
23 policy issue?

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1 TC [MR. SWANN]: I have not confirmed it yet but I think I
2 do. I can tell the court it will be in a classified session.

3 MJ [COL POHL]: It will be a classified session.

4 TC [MR. SWANN]: A classified session.

5 MJ [COL POHL]: Okay.

6 DDC [Maj WAREHAM]: Major Wareham for Mr. al Baluchi
7 again.

8 Before I begin, Your Honor, it was raised in our
9 reply as provided by one of the government's cases that it is
10 actually the government's burden in this particular case to
11 show that the metadata requested in this specific instance is
12 objectionable.

13 Based on your prior discussions in previous hearings
14 about individuals who in shifting burden environments around
15 511, you had stated that the individual with the burden should
16 go first. So I would defer to the court whose presentation
17 should begin.

18 Specifically I cite Williams v. Sprint/United
19 Management Company for this basis.

20 MJ [COL POHL]: One moment.

21 DDC [Maj WAREHAM]: It is found on page one and two of our
22 reply. Specifically placing the burden on the producing party
23 is further supported by the fact that the metadata is an

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1 inherent part of an electronic document and that its removal
2 ordinarily requires an affirmative act by the producing party
3 that alters the electronic document.

4 MJ [COL POHL]: Trial Counsel, response on the burden
5 issue.

6 MTC [MR. TRIVETT]: A couple issues, sir. First, they
7 didn't receive electronic copies of these photos to begin
8 with. So to the extent that we didn't take an affirmative act
9 to take them out what we produced to them, we produced to them
10 hard copies. And the burden is the burden that is set forth
11 in the manual.

12 This Williams v. Sprint case certainly isn't binding,
13 certainly doesn't change the burdens that are articulated by
14 the Secretary of Defense.

15 MJ [COL POHL]: Well, since you filed the motion, go ahead
16 and go first.

17 DDC [Maj WAREHAM]: Thank you, Your Honor. Clarification
18 from the government's perspective that we have been provided
19 this in electronic form. We have been provided these photos
20 in electronic form, but after being converted to portable
21 document format otherwise known as Adobe PDF. In so
22 converting JPEG and/or PNG and/or TIF-style photographic files
23 it alters the raw data of the files by reproducing them.

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1 Whether or not it exists in actual digital form at that point
2 to PDF is analogous to printing the document on a printer,
3 thereby destroying the attendant metadata or electronically
4 stored information commonly called ESI, all of which are
5 synonyms for each other.

6 And so it is our position that while they exist in
7 electronic form, they do not exist in their unaltered digital
8 form. And we are now making this motion, similar to that
9 which we made in AE 306G, to produce the original raw
10 photographic files of the photos of Mr. Ali in various states
11 while in CIA custody.

12 This motion is in keeping with general federal
13 standards in DOJ standards of production for electronic data.

14 If I could have the feed from table 4. We have
15 preapproved slides in this area that I will note have not been
16 previously marked with an AE number we just realized, and so
17 we'd ask for the next AE number in series to be applied to
18 these.

19 MJ [COL POHL]: What would be the next, 517? That will be
20 517E. Go ahead.

21 DDC [Maj WAREHAM]: 517E. Thank you, Your Honor.

22 If I could have the feed from table 4 and publish my
23 first slide.

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1 MJ [COL POHL]: Go ahead.

2 DDC [Maj WAREHAM]: Thank you, Your Honor. We would note,
3 as we've just briefly covered, that the government's own case
4 places the initial burden with regard to disclosure of
5 metadata on the party to whom the request were ordered to
6 produce as directed.

7 The burden to object to the disclosure of metadata is
8 appropriately placed on the party to produce, because it --
9 the party is in the best place to evaluate the metadata and
10 move to object to it and/or seek a Protective Order.

11 In this particular case on 1 May 2015 the government
12 produced photographs in discovery MEA 1001800003823 through
13 73. These were photographs of Mr. Al-Baluchi in various
14 states in CIA custody.

15 As mentioned, these photographs were produced to the
16 defense in portable document format, effectively altering any
17 attendant metadata or ESI that was part of the original
18 photographs. Now ESI and photographs can be highly variable,
19 and we don't know what we don't know as far as what has been,
20 what was removed.

21 But in general ESI in photographs contains the date
22 and time of the photos, the camera settings, the aperture, the
23 resolution data, and for certain advanced photographic

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1 equipment, GPS information and user fields, as in who took the
2 photo and when.

3 This information is all normally automatically
4 recorded, and as the case law supports, is an inherent part of
5 the photographs. What metadata or ESI is not is separate
6 evidence. It is not a separate piece of evidence that is
7 subject to additional discovery rules, that is subject to
8 additional discovery requests, although we did do that in this
9 case once we discovered the ESI had been stripped out. And it
10 is not subject to different standards of production under 701
11 or any other rule. It is part of the original photograph
12 itself.

13 And the government's practice of taking the original
14 photographs and altering them without judicial review before
15 production should not be countenanced. And the law would
16 support me in this. The law in this particular case states
17 that we must be provided in discovery anything material to the
18 preparation of our defense. This is supported by the Due
19 Process Clause, by Brady, and by many other -- excuse me, I've
20 got -- pardon me one moment, I'm drawing accidentally on the
21 thing with my paper. There we go, all right.

22 An example of the lack of separate nature of this
23 type of information is best demonstrated in this photograph I

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1 took of an iguana outside at Marine Hill.

2 MJ [COL POHL]: So the metadata you want is the date and
3 time of the picture?

4 DDC [Maj WAREHAM]: Well, that is the most reasonable
5 guess as to what metadata would be available. But we want any
6 metadata that is relevant and material to our preparation. I
7 have given there as an example.

8 MJ [COL POHL]: Understand you are not dealing with the
9 most computer-literate judge in the world ----

10 DDC [Maj WAREHAM]: Yes, Your Honor.

11 MJ [COL POHL]: What other metadata would you want that's
12 helpful to the defense?

13 DDC [Maj WAREHAM]: Well, it is dependant upon the
14 equipment used. But the most likely metadata would be the
15 date and time. After that, depending on what equipment was
16 used at the time, there could be potential data that includes
17 geographic location through GPS coordinates. Now, this was a
18 while ago, so that would be pretty advanced equipment at the
19 time period. But potentially that exists.

20 Additionally there could be the potential, if this
21 was an evidentiary or forensics-based camera, that the
22 possibility exists that user information, the technician who
23 took that photo, might exist.

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1 This is guesses. But those are the type of things
2 that could be relevant.

3 MJ [COL POHL]: And now the government's pleading says
4 they are not using any of these pictures, if I read it
5 correctly. Correct?

6 DDC [Maj WAREHAM]: That is one of the pieces that they
7 rely on, yes.

8 MJ [COL POHL]: Okay.

9 DDC [Maj WAREHAM]: That is not the standard for
10 production under the 700 series.

11 MJ [COL POHL]: I didn't ask you that. I didn't ask you
12 anything yet.

13 DDC [Maj WAREHAM]: Yes, Your Honor.

14 MJ [COL POHL]: Okay. If you get a picture and you say
15 okay, I want to know when this was taken and who took it,
16 wouldn't you want that for all these pictures? How many are
17 we talking about here? How many are we talking about?

18 DDC [Maj WAREHAM]: In this particular case, Your Honor,
19 we are talking about approximately 50.

20 MJ [COL POHL]: Okay. Got it.

21 DDC [Maj WAREHAM]: But moreover, and I want to be clear
22 about this, the defense wants the evidence in its original
23 form, period.

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1 MJ [COL POHL]: Got it.

2 DDC [Maj WAREHAM]: Practice of stripping out the metadata
3 and actually taking affirmative acts to restrict information
4 that is otherwise produceable is not supported in the law and
5 is an extra step, extrajudicially avoiding review or any sort
6 of protective order before producing it to us.

7 So we object to the practice in total. We want the
8 evidence in its original form. We want the original data
9 files. And what we do with the metadata information to
10 construct our case is our own business.

11 MJ [COL POHL]: Okay.

12 DDC [Maj WAREHAM]: As far as the potential that
13 government use should restrict us whether or not the
14 government chooses to use these photographs, that is again not
15 the standard under the rules. The standard under the rules
16 have to deal with materiality and relevance to the preparation
17 of the defense.

18 Now I would note that in this particular case, the
19 materiality and relevance is quite high because for the types
20 of photos that these are, of various states of Mr. Ali in CIA
21 custody, there are photos that arise out of one of the most
22 opaque actions in U.S. government history. An action and
23 program that has taken all of our resources and several years

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1 to try to investigate, and we are nowhere near complete.

2 Thusly, the information, such as time and date or
3 geographic location, become essentially important and have
4 higher materiality than they would in otherwise photographic
5 evidence cases. On that basis alone, we believe that they
6 would be produceable under the 700 series.

7 The government has made some reference at this point
8 to the metadata itself somehow being separately objected to
9 under the national security privilege. I would note before
10 they make that argument that they have made no 505 process for
11 this data; they have not objected to the production of the
12 photos themselves. They handed over the photos without any
13 sort of attempts to make summaries of this information. And
14 in so producing these photos have conceded the relevance and
15 materiality of the photos themselves, yet want to make the
16 circumstances and the internal evidence that is part of the
17 photos somehow subject to a different and separate review
18 requiring an additional finding.

19 Whatever their argument may be, there is a national
20 security privilege process in place, and that is found in 505.
21 But that hasn't been followed here. All that has been
22 referenced is in their response.

23 So subject to your questions further, Your Honor,

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1 that is all I have.

2 MJ [COL POHL]: I have no questions. Tell you what we are
3 going to do -- go ahead and sit down. When we had the 802 the
4 other day one of the proposals, what if we got done early
5 today in the unclassified session, we could do the classified
6 session this afternoon.

7 My proposal is that we recess for lunch now and we
8 start the classified 505(h) session today at 1500. It usually
9 doesn't take very long. We will pick up the unclassified
10 argument on this issue at the next time we have an open
11 session, but that seemed to be a good use of time because we,
12 have to hear from the other person who is going to be
13 classified to begin with. And then we can decide after we do
14 the 505(h) today the way forward for the rest of the way.

15 So absent any strenuous well-placed objection, that
16 is the way we will proceed. So what we are going to do, we
17 will recess now. I got to give the court reporters time to
18 switch out and things like that. We will reconvene at 1500
19 for the 505(h) session, and then to take what classified
20 information we need to do. But before I can close the hearing
21 I need something from the government to justify an 806 for the
22 camp guy. Got me?

23 I mean, I don't -- I mean you want to have a closed

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1 806 session, right?

2 TC [MR. SWANN]: Yes, Your Honor.

3 MJ [COL POHL]: And to do that I have to make certain
4 findings still? I'm not saying it -- you with me there,
5 Mr. Swann? You understand where I'm at?

6 TC [MR. SWANN]: I'm with you, sir.

7 MJ [COL POHL]: Mr. Nevin.

8 LDC [MR. NEVIN]: Your Honor, can you clarify what will
9 happen tomorrow? Will it be an open hearing or a closed
10 hearing tomorrow, assuming we get through the 505 materials?

11 MJ [COL POHL]: We discussed this earlier at the 802, and
12 one of the issues that the government had was that they felt
13 the need was to do -- General Martins?

14 CP [BG MARTINS]: Your Honor.

15 MJ [COL POHL]: At the 802 you indicated that there was,
16 you felt we had to do some of the 806 closed sessions before
17 we come back to the open sessions?

18 CP [BG MARTINS]: Your Honor, we were going to propose, as
19 an approach to protect the information, that we do the closed
20 argument first when there is no dispute between the parties
21 that there is going to be some closed argument. And then
22 determining what is residual, that ought to be done in open.

23 MJ [COL POHL]: Here is what my -- okay. Because right

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1 now we are on my calendar, we have today to do the 505(h) and
2 I have to make certain findings before we can close the court.
3 We have a number of unclassified arguments still pending.

4 My suggestion would be is that we do -- tomorrow do
5 the unclassified ones we can, okay. Understanding that that
6 gives us still three other days to adjust schedules.

7 And if you -- if either side wants to do them in
8 different order we have time to do the 806 before them or not.
9 Are you with me on that? So kind of articulate it. To answer
10 your question, Mr. -- unless -- I want to make sure I
11 understand that tomorrow an open session will be useful, and
12 then we will do the closed session when we get to it. I
13 understand what you are saying, General Martins, but not quite
14 sure how ----

15 CP [BG MARTINS]: Your Honor, until we have the discussion
16 on use, relevance, and admissibility and give you the
17 materials to make your 806 rulings and findings, I wouldn't
18 want to speculate. I mean, I think we agree there is some
19 bifurcations of motions and some open session.

20 MJ [COL POHL]: Well, if we do the 505(h) today and we
21 don't do anything tomorrow, okay, that will give us time to
22 do, determine the way forward on the 806 point.

23 I mean what I'm telling you is that right now we had

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1 today's schedule for this, tomorrow the closed session, okay.
2 So my proposed way ahead is today we do, finish what we are
3 doing. Tomorrow we will not plan to have any session at all.
4 And then I will dictate -- I will send out a schedule for the
5 rest of the week when we do the 806. We probably can figure
6 it out today at the end of the 505(h).

7 CP [BG MARTINS]: Your Honor, I would just say too
8 starting at 1500, I guess we can go as late as necessary, but
9 we don't want to cabin, necessarily, the hearing because ----

10 MJ [COL POHL]: No.

11 CP [BG MARTINS]: ---- there may be significant
12 discussions in the 505(h) hearing.

13 MJ [COL POHL]: We've got all night. We have all night.
14 If we need to go into tomorrow, we can go into tomorrow.

15 LDC [MR. NEVIN]: The other is ----

16 MJ [COL POHL]: We will know for sure at end of today is
17 what I can tell you, Mr. Nevin. That is kind of the
18 parameters.

19 LDC [MR. NEVIN]: We can tell our client we won't be
20 holding a hearing tomorrow, and then he will be departing.

21 And may he remain -- may our clients remain in the
22 courtroom for prayer, which is at 12:47?

23 MJ [COL POHL]: Yes. They just need to be taken back in

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1 time. That is why I gave you the 1500. Not later than 1400
2 they can start returning them. That gives the time because we
3 have to switch out court reporters and everything else. And
4 we will start the 505(h) hearing at 1500. And if we do the --
5 and we will also tie in the --

6 LDC [MR. NEVIN]: We will advise them there will be no
7 court tomorrow.

8 MJ [COL POHL]: That makes sense.

9 TC [MR. SWANN]: I will take care of it if that is what
10 the ultimate determination is.

11 MJ [COL POHL]: If something changes. Right now, tell
12 them that there will be no court tomorrow. If there is court
13 tomorrow, they will be told tonight. The way the schedule is
14 now it seems to me that is a reasonable approach.

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

16 MJ [COL POHL]: Mr. Connell.

17 LDC [MR. CONNELL]: Just so there is no confusion on the
18 point, assuming there is no court tomorrow we will be meeting
19 in Echo II?

20 MJ [COL POHL]: As I understand the policy is when no
21 detainees are here, Echo II is available. When one detainee
22 is here, Echo II is not available.

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

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1 MJ [COL POHL]: Commission is in recess.

2 [The R.M.C. 803 session recessed at 1253, 16 October 2017.]

3 [END OF PAGE]

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