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1 [The R.M.C. 803 session was called to order at 0902, 19 June
2 2019.]

3 MJ [Col COHEN]: This commission is called to order. The
4 parties are present. I notice that some of the gentlemen who
5 are accused of crimes are not here. We will momentarily
6 discuss that as well. Also, I'll start with General Martins.

7 Sir, is everyone who was present here on Monday here,
8 or have there been substitutions or additions?

9 CP [BG MARTINS]: Your Honor, good morning.

10 MJ [Col COHEN]: Good morning.

11 CP [BG MARTINS]: Everyone who was here Monday is here.
12 Additionally, representing the United States this morning is
13 Mr. Edward Ryan.

14 MJ [Col COHEN]: Thank you, sir. I appreciate it.
15 Mr. Ryan.

16 Mr. Nevin, as for your team, it appears that everyone
17 that was here Monday is here; is that correct?

18 LDC [MR. NEVIN]: That's correct, Your Honor.

19 MJ [Col COHEN]: And Mr. Mohammad I also recognize to be
20 here.

21 Ms. Bormann, with respect to your team, it appears
22 that everyone is here; but it was a long day, so if I am not
23 seeing someone who was here, please let me know.

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1 LDC [MS. BORMANN]: Everyone is here, although a little
2 bit later I'm going to ask to excuse Mr. Montross, who has
3 other matters he has to attend to that are case related.

4 MJ [Col COHEN]: That will be fine, ma'am. And I
5 recognize that your client is here as well.

6 Mr. Harrington, it appears that Mr. Binalshibh is
7 absent today; is that correct?

8 LDC [MR. HARRINGTON]: That's correct, Judge.

9 MJ [Col COHEN]: With respect to the other members that
10 you announced, are they all here?

11 LDC [MR. HARRINGTON]: Yes, we're the same, Judge.

12 MJ [Col COHEN]: All right. Thank you.

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

14 MJ [Col COHEN]: Good morning, Mr. Connell. It appears
15 that Mr. Ali is also absent; is that correct?

16 LDC [MR. CONNELL]: That's correct, sir.

17 MJ [Col COHEN]: All right. With respect to any other
18 members that you announced, are there any additions or
19 subtractions that are present today?

20 LDC [MR. CONNELL]: No. The same composition, sir.

21 MJ [Col COHEN]: Thank you, Mr. Connell.

22 Mr. Ruiz, it appears that Mr. Hamzi is also absent
23 today; is that correct?

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1 LDC [MR. RUIZ]: Mr. Hawsawi? Yes, sir.

2 MJ [Col COHEN]: Excuse me.

3 LDC [MR. RUIZ]: No problem.

4 MJ [Col COHEN]: I apologize.

5 LDC [MR. RUIZ]: No problem. It took me a while as well
6 to verbalize.

7 Yes, he is absent today. We have Lieutenant
8 Commander Dave Furry, who I don't believe we put on the
9 record. He's joined us today.

10 MJ [Col COHEN]: All right. Thank you very much. And has
11 he been previously recognized on the record with respect to
12 qualifications, et cetera?

13 LDC [MR. RUIZ]: Yes, he has.

14 MJ [Col COHEN]: All right. Thank you. And I apologize
15 for having the wrong accused. All right.

16 Trial Counsel, with respect to the gentlemen who are
17 not here today, are there any written declinations to be here?

18 CP [BG MARTINS]: Your Honor, we do. And we have two
19 witnesses to present those waivers this morning.

20 MJ [Col COHEN]: You may do so.

21 CP [BG MARTINS]: Thank you.

22 Captain, could you please proceed to the witness
23 stand, remain standing, and raise your right hand for the

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1 oath.

2 CAPTAIN, U.S. AIR FORCE, was called as a witness for the
3 prosecution, was sworn, and testified as follows:

4 DIRECT EXAMINATION

5 Questions by the Chief Prosecutor [BG MARTINS]:

6 Q. You are a captain in the United States Air Force?

7 A. Yes, sir.

8 Q. And you are an assistant staff judge advocate
9 assigned to the Joint Task Force Guantanamo?

10 A. Yes, sir.

11 CP [BG MARTINS]: Thank you.

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

13 Q. Captain, I have in front of me what's been marked
14 Appellate Exhibit 638 and 638A, each consisting of three
15 pages. Do you have the original in front of you?

16 A. Yes, sir, I do.

17 Q. Let's take 638 first. It's Ali Abdul Aziz Ali. Did
18 you have occasion to advise Mr. Ali of his right to attend
19 today's proceeding?

20 A. I did, sir.

21 Q. Did you use the form that you have in front of you to
22 do so?

23 A. I did, sir.

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1 Q. Did he sign that form?

2 A. He did, sir.

3 Q. Did you -- when he signed that form, did he tell you
4 that he did not want to attend today's proceedings?

5 A. That is correct, sir.

6 Q. All right. Do you have any questions about him
7 signing that form voluntarily and making that decision not to
8 attend today?

9 A. No, sir.

10 Q. Was it voluntary?

11 A. It was voluntary, sir.

12 Q. All right. With respect to Mustafa Ahmed Adam
13 al Hawsawi, 638A, also consisting of three pages, did you read
14 that form to Mr. al Hawsawi?

15 A. I did, sir.

16 Q. Did he sign the form on the second page?

17 A. He did, sir.

18 Q. That's the English version?

19 A. That's correct, sir.

20 Q. Did he indicate that he wanted to attend today's
21 proceedings?

22 A. He indicated that he did not want to attend.

23 Q. Any questions about the voluntariness of his

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1 decision?

2 A. No, sir.

3 TC [MR. SWANN]: I have no further questions, Your Honor.

4 MJ [Col COHEN]: All right. Thank you, sir. I appreciate
5 it.

6 General Martins.

7 CP [BG MARTINS]: Your Honor, if you would -- are you
8 inclined to instruct the witness? I mean, we may have him
9 come back later this week. My intent would not to be given
10 the oath each time, but we would have him be excused
11 temporarily perhaps.

12 MJ [Col COHEN]: All right. One second, sir.

13 TC [MR. SWANN]: [Counsel away from podium; no audio.]

14 MJ [Col COHEN]: I would like to -- may I see the
15 originals -- or the copies that you have? I am looking at
16 AE 638 and 638A. They appear to be as described by the
17 witness.

18 Defense Counsel, in particular Mr. Connell, with
19 respect to your client, do you have any questions of this
20 witness?

21 LDC [MR. CONNELL]: I do not have any questions, but I'd
22 like to be heard briefly.

23 MJ [Col COHEN]: You may be heard, sir.

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1 Just bear with us for a moment.

2 WIT: Yes, Your Honor.

3 MJ [Col COHEN]: Thank you.

4 LDC [MR. CONNELL]: Sir, I just wanted to explain an
5 ongoing question in the military commissions which is about
6 the anonymous testimony of the SJA witnesses without complying
7 with M.C.R.E. 506. We have lodged an objection.
8 Judge Parrella directed us to brief that objection. That's
9 found in the record at AE 603. Judge Parrella ruled against
10 us on that objection, and his ruling is found at AE 603C.

11 The military commission granted us a standing
12 objection to anonymous testimony by the SJA witnesses on the
13 basis of M.C.R.E. 506, R.M.C. 806, and other authorities cited
14 in the brief.

15 MJ [Col COHEN]: All right. Thank you, Mr. Connell.

16 Are you asking me then to take a look at that again
17 or to just allow for the standing objection? I just want to
18 make sure I understand what you're asking of the court ----

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

20 MJ [Col COHEN]: ---- excuse me, the commission.

21 LDC [MR. CONNELL]: I am not asking for reconsideration of
22 that decision at this time. I do object to the anonymous
23 testimony of this witness, as the previous SJA witnesses. I

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1 really wanted to orient the military commission to sort of the
2 state of the situation there and explain my position with
3 respect to anonymous testimony.

4 MJ [Col COHEN]: Mr. Connell, I have done so, and I will
5 allow you to maintain the practice of having a standing
6 objection.

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

8 MJ [Col COHEN]: You're welcome.

9 LDC [MR. RUIZ]: Judge ----

10 LDC [MR. NEVIN]: Your Honor, could we ----

11 MJ [Col COHEN]: Mr. Nevin.

12 LDC [MR. NEVIN]: Just to say that we've joined that.
13 We're joined by operation of the Rules of Court to the
14 motions ----

15 MJ [Col COHEN]: Yes, sir.

16 LDC [MR. NEVIN]: ---- but to the extent this is an
17 additional or supplemental objection, I just want it to be
18 clear that we join that as well.

19 MJ [Col COHEN]: Okay. For those who have not elected to
20 not join the objection that was previously -- previously
21 filed, I will allow a standing objection to remain with
22 respect to all of those -- those teams.

23 Mr. Ruiz, did that address your concern?

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1 LDC [MR. RUIZ]: It does. Thank you.

2 MJ [Col COHEN]: It does. All right.

3 And Mr. Ruiz, as 638 -- AE 638A addresses your
4 client, do you have any questions for this witness before I
5 excuse him?

6 LDC [MR. RUIZ]: I do not. Thank you.

7 MJ [Col COHEN]: All right.

8 Captain, you will be temporarily excused. Please do
9 not discuss your testimony with anyone other than the
10 prosecution or the defense while the case is ongoing. You
11 will remain under oath if we call you back for additional
12 testimony.

13 WIT: Yes, Your Honor.

14 MJ [Col COHEN]: All right. Thank you.

15 [The witness was warned, temporarily excused, and withdrew
16 from the courtroom.]

17 MJ [Col COHEN]: General Martins.

18 CP [BG MARTINS]: Lieutenant Commander, if you could
19 proceed now to the witness stand and raise your right hand and
20 remain standing for the oath.

21 [END OF PAGE]

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1 LIEUTENANT COMMANDER, U.S. Navy, was called as a witness for
2 the prosecution, was sworn, and testified as follows:

3 **DIRECT EXAMINATION**

4 **Questions by the Chief Prosecutor [BG MARTINS]:**

5 Q. You are a Lieutenant Commander in the United States
6 Navy?

7 A. Yes, sir.

8 Q. And you are an assistant staff judge advocate for
9 Joint Task Force Guantanamo?

10 A. Yes, sir.

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

12 Q. Commander, do you have Appellate Exhibit 638B in
13 front of you?

14 A. I do, sir.

15 Q. It consists of three pages?

16 A. Yes, sir.

17 Q. This is the waiver for Ramzi Binalshibh?

18 A. Yes, sir.

19 Q. Did you have occasion to advise him of his right to
20 attend today's proceedings?

21 A. I did, sir.

22 Q. Did you use the form that is in front of you?

23 A. Yes, sir.

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1 Q. Did he indicate that he wished or did not wish to
2 attend today's proceeding?

3 A. Did not wish.

4 Q. And he signed that form, the English version of that
5 form, on page 2?

6 A. Yes, sir.

7 Q. Any question in your mind about the voluntariness of
8 his waiver?

9 A. No, sir.

10 TC [MR. SWANN]: Your Honor, I have no further questions.

11 MJ [Col COHEN]: Thank you.

12 Mr. Harrington, as this addresses your client, do you
13 have any questions of this witness?

14 LDC [MR. HARRINGTON]: No questions, Judge.

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

16 I will give you the instruction, you will be
17 temporarily excused. Please do not discuss with anyone other
18 than the prosecution or the defense while the case is ongoing.

19 WIT: Yes, sir.

20 MJ [Col COHEN]: Thank you.

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

23 MJ [Col COHEN]: And may I retrieve that exhibit. I would

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1 like to see Appellate Exhibit AE 638B, please. Thank you.

2 Mr. Harrington, I have had the opportunity to review
3 Appellate Exhibit 638B. It appears to be in proper form.
4 Sir, have you had the opportunity to review it or would you
5 like the opportunity to do so?

6 LDC [MR. HARRINGTON]: I have. I was provided a copy of
7 it. Thank you.

8 MJ [Col COHEN]: Thank you. I am handing this to the
9 court reporter.

10 I appreciate your indulgence. That was the first
11 time that I have had several accused in a trial not show up.
12 I understand that's the procedure. We will continue to
13 conduct that in the same manner, but thank you for your
14 patience while I went through that for the first time.

15 Based on the evidence presented, this commission
16 finds that Mr. Binalshibh, Mr. Ali, and Mr. Al Hawsawi have
17 all knowingly and voluntarily waived their right to be present
18 at today's session.

19 Any objection to that finding by either side?

20 CP [BG MARTINS]: None from the United States.

21 MJ [Col COHEN]: From the defense?

22 LDC [MR. HARRINGTON]: No, sir.

23 MJ [Col COHEN]: Negative response from all three learned

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1 counsel who are present.

2 I took the head shake as a nonverbal indication of
3 that response, which I was fine with. I just wanted to make
4 sure I recorded that for the record.

5 LDC [MR. CONNELL]: I just want to make sure, I know that
6 some judges prefer verbal responses. I think that we got into
7 the habit of nonverbal responses because there are five of us,
8 but if you prefer, I'm happy to give a verbal response to
9 those questions.

10 MJ [Col COHEN]: No. Mr. Connell, what I will do
11 typically -- because it's the same for me. Every time we get
12 multiple responses to everything, if what appears to me to be
13 a nonverbal response from you and I can ascertain what that
14 is, I will state that on the record.

15 If then you have a -- if you disagree, then it will
16 be your responsibility then to affirmatively state that I have
17 misconstrued a nonverbal response from the counsel, if that's
18 acceptable. That's an affirmative response from Mr. Connell.
19 All right.

20 Before we begin hearing oral argument this morning, I
21 want to address a few administrative issues. First, you are
22 all aware that I published an amended docket order AE 634
23 which I added several AEs and 505(g) notices to the docket for

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1 this week. It is my hope that we will be able to address all
2 of those matters this week before we return.

3 I did this for the sake of judicial economy to make
4 full use of our time on the island, even though some of the
5 505(g) notices were not filed technically within the time
6 frames that were allowed. But given the fact that we're only
7 here periodically, I think it's important for us to maximize
8 our use of time while we're on the island each and every time.
9 And that will be my intent moving forward.

10 Likewise -- and this is for the government's
11 information -- I've noticed that the website containing the
12 unofficial/unauthenticated transcript has not been updated in
13 a timely manner, it appears. Specifically, the redacted
14 versions of potentially the last two closed M.C.R.E. sessions
15 have not been posted in accordance with AE 523Q, I believe is
16 the right number for that.

17 Trial Counsel, although I'm not requiring you to post
18 that, if you would please check on that and then have someone
19 from your staff report back to the commission as to why that
20 is not being done. There may be a reason, and that's fine,
21 but I want to make sure that we're not overlooking the
22 responsibility for us to provide this notice to the public.

23 CP [BG MARTINS]: Your Honor, we will do so, and

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1 understand that to be the standing commission's requirement
2 under the 551 series.

3 And just so that I'm clear, the R.M.C. 806 closed
4 sessions is what we're talking about?

5 MJ [Col COHEN]: Yes, sir. In particular, I know that my
6 staff -- because I also wanted to see what was -- what had
7 been out there in an unclassified format. We were unable to
8 locate it. My understanding is it's supposed to be out there
9 within 30 days. I understand, depending on the length of
10 that, that could change. But if that's the case, then I would
11 ask that those who are under order to produce that would at
12 least come back to the commission and say here is the reason
13 why we need some additional time because of the volume,
14 et cetera.

15 CP [BG MARTINS]: Your Honor, we will get you an answer.

16 MJ [Col COHEN]: Thank you, General Martins. I appreciate
17 it.

18 LDC [MR. CONNELL]: Sir?

19 MJ [Col COHEN]: Mr. Connell.

20 LDC [MR. CONNELL]: I know that it takes a long time to
21 get all these numbers and stuff exactly. It's my
22 understanding that the order that the military commission is
23 referring to is 551I.

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1 MJ [Col COHEN]: Thank you very much. I appreciate that.

2 You are correct, it's going to take me a while to
3 become as familiar with all the numbers as you all are, but I
4 will take no offense if either side does exactly what just
5 happened, to say, "Actually, Your Honor, I think you are
6 referring to..."

7 I do have a computer here with everything on it, so
8 if I'm ever doubting what you're telling me, I can always
9 verify that. But I appreciate the candor from both the
10 government and the defense.

11 Additionally, I intend -- so that you all are aware
12 of how we'll proceed this morning and throughout the rest of
13 the week, I intend to follow the existing practice of
14 generally allowing only one counsel per team to argue an
15 issue. If you're going to have more than one counsel per team
16 argue an issue, I do ask for at least 24 hours' advanced
17 notice just so that there's no surprises.

18 Also, in familiarizing myself with the recent rulings
19 and orders, I noticed a typographical error on Appellate
20 Exhibit 617K that I wanted to correct on the record.
21 Accordingly, on the first page of 617K, the date should read
22 31 May 2019 vice 31 March 2019. I am -- I have -- I am aware
23 of the document. I have -- I am confident that Judge Parrella

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1 signed that document on 31 May and not 31 March 2019. That
2 appears to be entirely typographical in nature.

3 Moving forward -- and this is with respect to matters
4 associated with the motions to suppress, some of those which
5 we will address this week. And then also as we move forward
6 with that particular practice, I wanted to give you an idea of
7 kind of how I anticipate we're going to address these issues.

8 As noted during my voir dire by Ms. Bormann in which
9 I agreed with her, in R.C.M. 812 -- or excuse me, R.M.C. 812,
10 in joint trials and in common trials, in the case that each
11 accused shall be accorded the rights and privileges as if
12 tried separately. I take that to heart, and I realize that
13 not in every situation will every accused in this case have
14 the same interest or the same fact patterns or those types of
15 things.

16 Accordingly, with respect to these issues of motions
17 to suppress and motions to compel witnesses, et cetera, while
18 I will allow the continued practice of joining particular
19 motions, I also recognize that previously the commission has
20 ordered that each team will file its own motions with respect
21 to their individualized issues. I think that's appropriate,
22 because I will ultimately be required to make individualized
23 determinations with respect to each and every one of the

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1 accused and any evidence that will be presented with respect
2 to them and any statements they may or may not have made to
3 government authorities.

4 Consequently, as the parties know -- in the event --
5 let's restate that. In the event that a witness is called by
6 one party, however, in support of its motion, the commission
7 will allow all parties for whom the witness is relevant to
8 examine the witness. That only makes sense. I think, as a
9 matter of judicial economy, we shouldn't have to bring someone
10 back five or six times.

11 When it is time for argument, however, related to a
12 motion to suppress or something related to that motion to
13 suppress, each defense team will argue its own motion within
14 its number. If you are asking for permission to -- to join
15 that, please file that accordingly. So this will be a slight
16 differentiation from the previous where everyone is
17 automatically joined to a motion.

18 With respect to these motions to suppress and motions
19 to compel witnesses, I ask that you simply indicate that you
20 intend to join a particular issue or, if not, I will treat it
21 as you are treating your own motions as your own motions
22 because that's the way I'm going to have to rule. This will
23 assist me significantly in making specific findings of fact

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1 and conclusions of law in issuing individualized rulings for
2 each accused moving forward.

3 I understand there's going to be overlap. That's
4 inevitable. And that's why I want to make it clear that to
5 the extent there is, I expect both the prosecution and the
6 defense to inform me of when that is the case, and we will --
7 we will make sure that each and every one of the parties get a
8 fair opportunity to address issues, to call witnesses,
9 et cetera. But at the end of the day, I will have to make
10 rulings with respect to -- even with respect to some
11 discovery.

12 I anticipate, just based on my experience over the
13 years, is that each accused is going to be -- have different
14 interactions with different people. And so whether or not
15 someone is relevant and a necessary witness and/or
16 government -- particular discovery is relevant and necessary
17 for one person may not be the case -- I'm not making any
18 rulings but just may not be the case with respect to others.

19 And so as we move forward, I simply ask for your
20 assistance in making sure that I'm addressing the issues that
21 are related to each of your individual clients, and from the
22 government's standpoint as well, that your responses then get
23 the opportunity to address what evidence has been provided

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1 with respect to an individual person.

2 At the end of the day, although they're all facing
3 similar offenses and they're facing the same commission, each
4 of you all are, I'm sure, keenly aware that each of you have
5 individual clients and they have individual interests, and we
6 will address them as such as I believe the intent of the law
7 is under the general notion of due process for someone facing
8 a criminal trial and I believe in accordance with R.M.C. 812.

9 Mr. Connell.

10 LDC [MR. CONNELL]: Sir, first, thank you very much for
11 that. It's always very helpful to have expectations
12 articulated in advance so that we can comply as opposed to
13 violating someone's expectation without knowing that it was
14 there.

15 The second thing is -- is a clarifying question. The
16 military commission just articulated an exception to Rule of
17 Court 3.5.i. with respect to joinder. Am I correct that that
18 exception applies to essentially AE 628 through 632, the five
19 motions to suppress, which -- numbers which were allocated by
20 the military commission and not some other ----

21 MJ [Col COHEN]: I have -- I have not discussed this with
22 my staff, but I can tell you that that would be my generalized
23 intent. I just don't know how I can rule on, for example, a

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1 motion to suppress or even motion to compel discovery for your
2 particular suppression motion on a -- on a group basis
3 necessarily because you're going to have individual
4 circumstances and those kinds of things.

5 So I think to the extent that while it generally
6 works, I'm willing to discuss that with my staff and you all.
7 Like I said, I don't want to change too much, but I just -- I
8 want to make sure that everyone understands that these have to
9 be individualized rulings. And I think you -- it sounds like
10 you do not disagree with that; is that correct?

11 LDC [MR. CONNELL]: I don't disagree with it, Your Honor.
12 I just wanted to know the universe. The reasons ----

13 MJ [Col COHEN]: No, that's absolutely a good question.

14 LDC [MR. CONNELL]: We used to have a different rule. We
15 used to require notices of joinder in every motion, and it
16 really overwhelmed the military commission with, you know,
17 dozens and dozens of notices of joinder. So I just wanted to
18 make sure that I knew the scope of the rule.

19 MJ [Col COHEN]: This would be solely with respect to a
20 specific number -- AE numbers that you will have been provided
21 for the motions to suppress.

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

23 MJ [Col COHEN]: And only that, and only because of the

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1 necessity of individualized treatment of each of these
2 motions.

3 Any objection from the trial counsel on that general
4 guidance?

5 MTC [MR. TRIVETT]: No objection, sir. But as a point of
6 clarification -- and we'll discuss this a little bit later in
7 the week -- there are certain witnesses that we intend to call
8 that do have evidence relevant to all five.

9 MJ [Col COHEN]: Yes, sir.

10 MTC [MR. TRIVETT]: And I know that you said that you
11 would permit the other counsel to question them. And that
12 would be our preference, is that they be required to question
13 them at the time as opposed to just permitting to question
14 them; that if they're going to question these witnesses in
15 regard to their suppression motion, it should be done at the
16 time in which we call them.

17 MJ [Col COHEN]: I understand. Let's put it this way.
18 Under the law, I will -- the parties will be given an
19 opportunity to examine the witness at the time that the
20 witness is called for purposes of any confrontation within the
21 general notion of confrontation.

22 Mr. Ruiz -- and that is not a reference to whether or
23 not the Sixth Amendment right to confrontation applies; this

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1 is simply confrontation in a general nature.

2 LDC [MR. RUIZ]: Just to have the opportunity to be
3 perfectly clear, Judge, since we're taking the opportunity to
4 do this, the discussion does, in fact, presuppose that motions
5 to suppress will be filed by all parties at some point. As
6 you are aware in our 524MMM, we raised an issue in terms of
7 the timeliness and our ability to do that.

8 So as I am listening to you talk, what I am wrestling
9 with is: Have you given some thought to what happens, for
10 instance, if some of the parties are, in fact, filed -- move
11 forward with their motions to suppress and call witnesses
12 while we have not yet perfected or filed our motion to
13 suppress?

14 For instance, right now, our motion to suppress
15 timeline is July 15th. Mr. al Baluchi is due to argue some
16 witnesses that he believes are relevant to his motion to
17 suppress today because he has filed it and he has progressed
18 to that point. However, we also believe that if we were, in
19 fact, able to file our motion by the current timeline, that
20 many of those witnesses will also be witnesses that we would
21 want to question. And you've indicated that would be the
22 case. However, at this point we have not filed anything
23 before the commission that joins us to their witness request.

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1 So I guess my -- the problem I'm wrestling with is
2 what happens if we have some parties that have filed a motion
3 to suppress and move forward with that process and some that
4 don't. Right now, we do not. Ms. Bormann's team has not yet
5 filed one as well.

6 And so we're in that -- we are in that part of the
7 process now where we're looking at the witnesses that are
8 going to be litigated today and thinking, yes, definitely we'd
9 like to question those witnesses. Our issue really is
10 timeliness and preparation for doing that.

11 So I guess what I am asking is what are your thoughts
12 on that in terms of how to go about preserving our ability to
13 do that? Should we go ahead and file -- it seems kind of
14 weird to file a request to join in those witnesses when we
15 haven't even filed our motion to suppress. I'm not sure if we
16 will file a motion to suppress because we do have to weigh
17 whether we ethically think we can do that based on our
18 preparation level. So that's kind of where we are.

19 MJ [Col COHEN]: I understand, sir. I think generally I
20 will work within the rules for how that goes, but I think at a
21 general -- a simple -- filing a notice -- that whether you --
22 you are requesting, in other words, if Mr. Connell has --
23 well, I know that Mr. Connell has requested certain witnesses

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1 because I have looked at the filing, and I think we will
2 probably discuss that later this week, but -- or at least at
3 some point this week.

4 If we end up bringing, for example, 10 witnesses,
5 15 witnesses, whatever the number ends up being that were
6 going to be for purposes of his motion, if you all are then
7 aware that those witnesses are being produced, then simply
8 indicating to the court and the government that you intend to
9 question those witnesses, even if it's in a -- in the nature
10 of this may be related to our motion to suppress or it's a
11 generalized, you know, discovery for this motion to suppress,
12 and we may argue, you know, that evidence.

13 LDC [MR. RUIZ]: Okay.

14 MJ [Col COHEN]: That's what I'm getting at, is let us
15 know that you want to question them, because -- whether a
16 witness will be later available or not, but I will treat it
17 that if the witness is here on island or available for
18 testimony, then you have the opportunity to question them,
19 then I'm asking you to please do so.

20 LDC [MR. RUIZ]: Understood.

21 MJ [Col COHEN]: That's it. Nothing -- there's no -- no
22 ulterior motive. It is simply saying I think to address five
23 individual motions to suppress and the evidence related to

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1 those, there's necessarily going to be some overlap just based
2 on what I generally know about the case and what I've seen
3 over the last couple of days with respect to witnesses,
4 et cetera. But there is also going to be individualized
5 witnesses.

6 You may want specific witnesses that Mr. Connell, for
7 example, does not because of the individualized circumstances
8 of your particular client, and I'm willing to recognize that.
9 But when there is overlap, let's try to maximize judicial
10 economy.

11 LDC [MR. RUIZ]: I have no problem with that. The only
12 question I was wrestling with was if that presupposed that a
13 motion to suppress had been filed by our team or if -- even if
14 we have not yet filed or perfected our motion, if we could
15 still have the opportunity to question those witnesses.

16 MJ [Col COHEN]: Yes, I will still give you the
17 opportunity to question those witnesses.

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

19 MJ [Col COHEN]: Yes, for those that I have not issued
20 rulings on for requests for extensions, those types of things,
21 to the extent that I have, those have now been overruled or
22 they are still pending, so don't take that as a ruling on any
23 of the issues. For example, the 524SSS or the PPP or the MMM,

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1 those kinds of things, this is not a ruling. This is just to
2 kind of to help you all plan for the future as to how this may
3 proceed.

4 Mr. Nevin.

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

6 So I won't say that because you -- that was the point
7 I wanted to make, is that a lot of this discussion somewhat
8 presumes that there would be hearings on a motion to suppress
9 coming up immediately. And the thrust of our motion to
10 reconsider is to ask you or to suggest to you that that's not
11 an appropriate way to resolve the issues in 524, the motion to
12 compel black site witnesses. First.

13 Second, in 630B -- so 630 is our motion to suppress,
14 and 630A is our motion for an extension of time within which
15 to request particular witnesses. And in 630B, the government,
16 in responding, makes an argument that goes to -- that goes to
17 the scope of our motion to suppress.

18 And I don't know if the military commission has
19 reviewed this in depth, but our position was that
20 Judge Parrella said file motions with respect to the
21 voluntariness -- raising the voluntariness of these
22 statements. And we read that literally and filed our motion
23 on that ground and specifically excluded a number of other

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1 grounds.

2 And the government -- and I may have cited the
3 materials incorrectly, but the government generally has raised
4 this question of if a record is made related to a motion to
5 suppress on someone else's motion, that would be binding on
6 us. And I just wanted to alert the military commission to
7 that.

8 I don't think that issue is reached by what you've
9 said today. I wanted just to say that that issue is there
10 and will have to be resolved at some point.

11 MJ [Col COHEN]: Yes, sir, I know the issue that you are
12 referring to. I did have the opportunity to see it. And the
13 idea is what is the scope of these motions to suppress,
14 essentially. I understand that the government has taken the
15 position that this was -- this was all encompassing. The
16 defense may tend to disagree with that.

17 LDC [MR. NEVIN]: Right.

18 MJ [Col COHEN]: The commission is not prepared this
19 morning to define that scope.

20 LDC [MR. NEVIN]: Right. And I really -- I think
21 depending on how you resolve that question, that would bear on
22 to what extent testimony in someone else's motion to suppress
23 would be limiting or would apply at all to ours, so ----

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1 MJ [Col COHEN]: I understand, sir.

2 LDC [MR. NEVIN]: Yes. Thank you.

3 MJ [Col COHEN]: Thank you.

4 LDC [MR. HARRINGTON]: Excuse me, Judge.

5 MJ [Col COHEN]: Yes, Mr. Harrington.

6 LDC [MR. HARRINGTON]: Just a point of clarification,
7 Judge. You mentioned a few minutes ago that you talked about
8 the cross-examination and the right to confrontation, and you
9 made an allusion to the Sixth Amendment. I assume you are not
10 saying you have decided one way or another.

11 MJ [Col COHEN]: I have not, exactly. My intent was to do
12 just the opposite, of saying I have not made any rulings with
13 respect to the application of the Constitution and in the
14 scope of any application of the Constitution to these
15 commissions at this time. It would be premature for me to do
16 so.

17 LDC [MR. HARRINGTON]: Okay. Thank you.

18 MJ [Col COHEN]: Now, I wish I could come in on day two
19 and give you guys all the answers so that you knew everything.
20 Although I do believe I am prepared for this week and I am
21 well on my way to having a process for moving forward, I
22 realize that although we will address the bill of attainder
23 issue today, which is a constitutional issue, there are still

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1 issues with respect to the law moving forward that will need
2 to be resolved before we get to trial.

3 All right. And then I will give further guidance as
4 we move later on into the week into some of the 524 series
5 with respect to kind of my understanding of what
6 Judge Parrella's decision meant and how that might impact the
7 way we move forward. I've had the opportunity to read Judge
8 Pohl's decision.

9 I've had the opportunity to read Judge Parrella's
10 decision based on the motion for reconsideration, and I am now
11 going to have -- I was told to slow down -- I will then be
12 able to give you a little bit of idea of how I see that
13 process working, which may alleviate some your concerns, it
14 may raise additional concerns, but we will address those at
15 that time.

16 Are there any other matters to take up from an
17 administrative means before we actually take up our first
18 motion?

19 General Martins?

20 CP [BG MARTINS]: None from the United States, Your Honor.

21 MJ [Col COHEN]: Any defense counsel wish to be heard?

22 That's a negative response from all learned counsel.

23 All right, then. Trial Counsel, we will first take

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1 up 007I. Counsel, would you please state before you begin
2 your argument who you are so that the record is clear who is
3 arguing.

4 ATC [Capt HALL]: Yes, sir. I am Captain Jackson Hall,
5 United States Air Force. Good morning, Your Honor.

6 MJ [Col COHEN]: Good morning.

7 ATC [Capt HALL]: May it please the commission. In
8 AE 007I, the prosecution seeks three specific things: First,
9 the establishment of a new CCTV remote site at the Pentagon as
10 an extension of the courtroom here; second, the redesignation
11 of Fort Meade as a CCTV site generally, rather than just the
12 individual sites or buildings on Fort Meade specifically; and
13 third, an updated and consolidated trial conduct order
14 encompassing these changes as well as previous changes in this
15 motion series.

16 With respect to the first, this is the fifth time
17 that the prosecution has moved the commission for the
18 addition, subtraction, the establishment, or the modification
19 of one of the or several of the CCTV remote sites. Consistent
20 with the previous four, this is a relatively straightforward
21 request to add a new site at the Pentagon.

22 That site would be public, meaning anyone who has
23 access to the Pentagon would be able to attend. That would

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1 include the media, the press, who have actually permanent
2 stationed members at the Pentagon. Although because the site
3 would be public, that would mean they would have to abide by
4 the general rules of no electronic devices or recording
5 devices, which is a little bit different than the way the
6 press site at Fort Meade operates.

7 MJ [Col COHEN]: And you're not looking, then, to get rid
8 of the press' access at Fort Meade?

9 ATC [Capt HALL]: No, sir.

10 MJ [Col COHEN]: You're just looking to make it a more
11 generalized ----

12 ATC [Capt HALL]: Yes, sir.

13 MJ [Col COHEN]: ---- location; is that correct?

14 ATC [Capt HALL]: Correct, Your Honor.

15 MJ [Col COHEN]: So I have some questions about the
16 Pentagon, because the government has framed this in -- as not
17 mission requirements but public access is the tenor of your
18 motion.

19 So when you say those who have access to the
20 Pentagon, is this going to be some location where just a bunch
21 of general and senior officers can -- can access this
22 information? Or what is the vision of how the government is
23 going to do this so that the public actually has access to

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1 this?

2 ATC [Capt HALL]: Yes, sir. So first ----

3 MJ [Col COHEN]: For example, access to the Pentagon.

4 Escorted versus unescorted? How are they going to get there?

5 Those kinds of things. I mean, what are -- what am I actually

6 authorizing under the guise of "public access"?

7 ATC [Capt HALL]: Right. So again, it's a little
8 different than the public site at Fort Meade where any member
9 of the public can simply appear at the visitor center and
10 state that they are intending to go to watch the commission's
11 proceedings, and after a quick background check, they would be
12 given a pass to go watch. So that is the main public site,
13 and that's a pretty low barrier.

14 As far as the Pentagon goes, you're correct, there
15 would have to be a way for the person to access the Pentagon.
16 The convening authority would not be -- is not in a position
17 to offer escorts specifically dedicated, so the person would
18 either need their own access to the Pentagon or have an escort
19 that they can have with them that will take them to the CCTV
20 site within the Pentagon.

21 MJ [Col COHEN]: So who does that really open that up to
22 for the public other than those who are ID card-carrying, you
23 know, members of the United States Air Force and/or people

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1 with press passes?

2 ATC [Capt HALL]: So it's obviously going to be a smaller
3 realm than the public site at Fort Meade. But there are, of
4 course, many people who work at the Pentagon or who have
5 access to the Pentagon, not just in the military but
6 connected, or who know someone who could provide the escort
7 required.

8 There are still members of the victim family member
9 community or survivors, as the Pentagon was an actual attack
10 site of the September 11th attacks, who either still work at
11 the Pentagon or would have access to the Pentagon.

12 And then, as we said, the members of the press have a
13 permanent presence there as well, so it would be more
14 convenient than going out to Fort Meade.

15 So it is a smaller universe, but it is public,
16 subject to these restrictions, because the Pentagon is, of
17 course, the headquarters of the Department of Defense.

18 MJ [Col COHEN]: Absolutely. No, and I'm not asking for
19 the government to get rid of any security requirements for
20 access to the Pentagon. That would -- that would be well
21 beyond my purview here as the judge, nor does it make sense.

22 But because it's a public access argument and not a
23 mission requirement argument, then I'm just -- I want to make

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1 sure, because the responses from the defense teams is not
2 really that they oppose it so much, but is this -- is this
3 really reaching public access as we need -- as we potentially
4 need to in this case, given the remote location where we try
5 these cases?

6 ATC [Capt HALL]: Yes, sir.

7 MJ [Col COHEN]: So what do you say in response to that?

8 ATC [Capt HALL]: Well, I would say with or without the
9 Pentagon, this commission -- these proceedings are already
10 well beyond any legal requirements for public access, so that
11 is satisfied. This is simply a policy decision to open the
12 proceedings up additional -- to an additional set of people.

13 And as I'll explain perhaps a little bit later, there
14 are always ongoing considerations as a policy matter as to
15 additional sites that may be opened as well in the future. If
16 demand or/and technological limitations allow, the Department
17 of Defense is always considering that option. So this is ----

18 MJ [Col COHEN]: Right. And I understand the government's
19 need to balance potential for unauthorized disclosures versus
20 public access, and so I understand that. And so I'm -- and
21 I'm not a tech person who is going to be able to tell you how
22 you can -- how you can do all this.

23 So I'm just wanting to make sure that if I rule in

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1 your favor, that I feel comfortable that it is, in fact,
2 public access. Otherwise, I may just have -- would have had
3 you reframe your motion as this is a mission requirement, and
4 we need access to this information, so...

5 Nonetheless, I'll let you carry on. Let's hear the
6 other two points with respect to the other -- the other two
7 requests.

8 ATC [Capt HALL]: Yes, sir.

9 So, as I mentioned, the Fort Meade request is simply
10 to provide some additional flexibility to the convening
11 authority. Because, as it stands, the specific sites on the
12 base are the CCTV sites, but there are other buildings that
13 have been used in the past and could be used in the future.

14 If, for example, demand ticks up and as we get to
15 trial in this case, they -- we need to adapt to that, the
16 convening authority would be able to move to one of these
17 larger buildings without having to come back here and seek a
18 addition or a modification to the trial conduct order.

19 So this would just basically say Fort Meade is the
20 site, and then the ----

21 MJ [Col COHEN]: Would there be any objection to me
22 ordering that if you do provide those additional sites, you
23 provide notice to the commission of where those are?

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1 ATC [Capt HALL]: No, sir. The government would -- would
2 have presumed to have done so without the order, but, of
3 course, even ----

4 MJ [Col COHEN]: Okay. In other words, if I'm giving you
5 more of a carte blanche of anywhere on Fort Meade, it seems
6 like that the commission would still have an interest in where
7 those locations are.

8 ATC [Capt HALL]: Yes, sir. And there will be people
9 working obviously at those locations to direct the public to
10 the right buildings if it were to change.

11 MJ [Col COHEN]: Okay. All right. The third point?

12 ATC [Capt HALL]: The third point is very straightforward.
13 The -- as I mentioned, there have been several modifications
14 going back from 2012 through now, so the idea is just to make
15 a more simplified consolidated trial conduct order that
16 encompasses not only the previous changes but these current
17 requests as well, and so just to provide ease of
18 understanding.

19 MJ [Col COHEN]: Now, you mentioned earlier, and I'll --
20 your argument, because I guess you're always on the spot, but
21 I'm not trying to trick you here. One of these -- so I
22 looked -- took a look at the GAO report, or at least the
23 portions of that that were filed in this particular area with

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1 respect to where the predominant number of at least persons
2 who responded that -- of victims of 9/11, et cetera, or those
3 who may have significant interests in this are located, some
4 of those being on the West Coast, some of those being in
5 Texas. And I do believe that some of the -- even the filings
6 of the defense were along those lines of, is what about the
7 rest of the United States as opposed to the Eastern Seaboard?

8 Now understanding where the geographic -- you know,
9 where the geographic areas that were primarily impacted were
10 all along the Eastern Seaboard, there are clearly still other
11 folks spread throughout the United States.

12 So when you earlier referenced that the government is
13 considering additional sites, do any of those include, by the
14 time we get to trial, having access sites of CCTV in either
15 the central or western United States? Or do you know at this
16 time?

17 ATC [Capt HALL]: I can say, generally speaking, the
18 government does look for opportunities to put CCTV sites where
19 they would be most used, cost effective. I couldn't speak to
20 specific locations at this time.

21 But the department and the convening authority -- the
22 Department of Defense and the convening authority are, of
23 course, aware that as trial starts, interest may tick up. And

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1 taking all the factors into consideration, as I mentioned cost
2 effectiveness and technological feasibility, yes, those are
3 within the ambit of what the government would be looking at.
4 Yes, Your Honor.

5 MJ [Col COHEN]: Okay. And I'm not ordering that, nor
6 should you take from that that I'm encouraging it. But it's
7 something that is a matter before me, it's an argument before
8 me, and so I want to make sure that I understand where the
9 government is in response to the defense's concerns.

10 ATC [Capt HALL]: Yes, Your Honor. And so just -- as you
11 mentioned the GAO report. And as I stated earlier, the
12 proceedings of this commission are, under any definition or
13 conception of public known to the law, are open and public.
14 Whether that's R.M.C. 806 or any of the Supreme Court cases
15 that have talked about that that are mentioned in our brief,
16 the commission has found this to be the case as far back as
17 AE 007F and most recently in AE 551I.

18 So it is a matter of policy, not a question of law,
19 as to whether or not ----

20 MJ [Col COHEN]: No, I would agree with you there. I
21 mean, I think the idea here is that it is a policy decision.
22 The government is asking the court to approve that policy
23 decision essentially. And because you're asking me to approve

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1 the policy decision, you placed it in front of me. Otherwise
2 it's not my question, right?

3 ATC [Capt HALL]: Yes, sir.

4 MJ [Col COHEN]: Because you put it in front of me now,
5 now I have questions about that policy decision and making
6 sure that it actually accomplishes the intent that you're --
7 that you're indicating it should.

8 ATC [Capt HALL]: Yes, sir.

9 MJ [Col COHEN]: All right. All right. Thank you very
10 much, Captain. I appreciate it.

11 ATC [Capt HALL]: Any further questions?

12 MJ [Col COHEN]: No questions.

13 Ma'am? Just for my benefit, if you would please
14 remind me of your name so I make sure I start to learn
15 everyone.

16 ADC [MS. RADOSTITZ]: Sure. Rita Radostitz on behalf of
17 Mr. Mohammad.

18 MJ [Col COHEN]: Thank you, ma'am.

19 ADC [MS. RADOSTITZ]: And Your Honor, I'm not going to
20 address and ask to reconsider the question of whether this is
21 really an open trial, because Judge Pohl has already made that
22 decision, but I do want to point out that this is unlike any
23 other trial.

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1 If I want to go to a trial on a military base or a
2 federal courthouse or a state courthouse, I walk up to the
3 door of the courthouse, I knock on the door, and I walk in.
4 No one can do that here. I can't even do that here. I have
5 to get orders that authorize me to be able to come to this
6 trial, and everyone in the gallery has to do the same, and
7 they have go through a background check and all of that. So
8 this is not like every other case.

9 And because of that, the policy decisions are
10 important. And I really appreciate Your Honor framing it
11 properly as a public access question, because that's exactly
12 what it is. And the government has made the decision to hold
13 these trials 800 miles from the U.S. border on a remote
14 island -- sorry, not 800 miles, but 800 miles from the place
15 of the attacks. And that was a decision that they made, and
16 it's a decision that Congress has reinforced. And we're kind
17 of stuck with that decision, but the openness and the ability
18 of the public and Mr. Mohammad to have the right to an open
19 trial is what is at issue here.

20 And I want to remind the court, which I'm sure you
21 already know, that the public access is really imbedded in
22 Mr. Mohammad's right to have the access, not the right of the
23 public. I mean, it's a dual right. It's both a First

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1 Amendment right of the public but also the Sixth Amendment
2 right. And I would also indicate that the Eighth Amendment
3 applies here too because this is a death penalty trial with
4 heightened accountability.

5 So I would start by saying that we have no objection
6 to opening the Pentagon. And as the court has -- as the
7 military commission has noticed, it is not really for the
8 benefit of the public; it's for the benefit of the people in
9 this room and their extended staff because we have closer
10 access to the Pentagon than driving up to Fort Meade, and we
11 encourage that. We think that's a good reason. And -- but it
12 is limited. It is limited to those who have otherwise access
13 to the Pentagon.

14 The Fort Meade, I want to just make one point about
15 Fort Meade, is -- I have been there. Every time I have been
16 there, the people at the gate have no idea what I'm talking
17 about. And I usually know more than them, luckily, but it
18 isn't very accommodating to the public. If somebody wanted to
19 go to Fort Meade, they wouldn't know ahead of time what they
20 need to know because that is not very clear. And again,
21 soldiers are just doing their job. That's not necessarily
22 information they would always have, but it's not very open.
23 And that's documented in the GAO report.

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1 Your Honor asked the government about giving notice
2 to the military commission of where those places on Fort Meade
3 will be, and we would ask also that that be more broadly
4 interpreted to also make the public aware. As the GAO report
5 notices, they had a hard time finding out exactly what days
6 hearings were going to be held at Fort Meade, exactly where on
7 Fort Meade it was going to be.

8 If you go to the website that's supposed to give you
9 information about this, it doesn't tell you how to get to
10 those buildings on Fort Meade. And the -- as the commission
11 is well aware, we don't decide until Saturday what days are
12 going to be open and what aren't; and that is nowhere to be
13 found other than, as the GAO report notes, the Twitter feed of
14 Carol Rosenberg, that that's how people find out what days the
15 commission is going to hold open hearings.

16 That's not sufficient. People should be able to go
17 to the commission's website, know what days they can go to an
18 open -- to a CCTV site and watch open proceedings.

19 MJ [Col COHEN]: Ma'am, let's assume that the government
20 doesn't necessarily disagree with you either. I'm not saying
21 they do or don't, but let's just assume *arguendo* they say,
22 "Great. We agree. Public access. That's why we filed the
23 public access motion here."

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1 The remedies that you are requesting, are those
2 within my authority to do? Do you believe that I can put
3 those types of things into an order, as far as directing them
4 exactly how they are going to go about publishing these
5 things?

6 I only ask because I'm a big person on staying within
7 my lane of authority with respect to this. So that's why I
8 point out to them, well, typically policy decisions aren't my
9 decisions until you make them my decisions. And now it's made
10 my decision.

11 And then two is, how would I frame that order? I
12 mean, do you have any ideas that could assist me and my staff
13 on how we would even put that order to address -- assuming I
14 agree with you, how would I do that?

15 ADC [MS. RADOSTITZ]: Well, certainly after the 802
16 hearings on Saturday, generally Saturday, the court could
17 issue an order of march that show -- that is immediately
18 published. Because it certainly isn't going to have
19 classified information within it, so it could be immediately
20 published after review by your CIS0 that says on Monday, we
21 are going to have open hearings; on Tuesday, we going to be --
22 not have any hearings; on Wednesday, we're going to have open
23 in the morning and closed in the afternoon, or whatever the

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1 court decides.

2 MJ [Col COHEN]: Okay.

3 ADC [MS. RADOSTITZ]: So that is clearly within your
4 purview.

5 MJ [Col COHEN]: Thank you, ma'am.

6 ADC [MS. RADOSTITZ]: And as to the policy question, as
7 you said, the government has come to you to give your approval
8 of this policy decision. And if they said, you know, as a
9 policy matter, we've decided to close everything down and not
10 have any other CCTV sites, that would be an issue of public
11 access that is within your purview because it comes within
12 Mr. Mohammad's right to a public trial and the public's right
13 to these proceedings.

14 MJ [Col COHEN]: Yes, ma'am.

15 ADC [MS. RADOSTITZ]: As to geography, I just want to make
16 one -- a comment that I think that the court is already aware
17 of. With regard to -- the attacks all happened on the
18 East Coast, but all the flights were going to the West Coast.

19 MJ [Col COHEN]: Yes, ma'am.

20 ADC [MS. RADOSTITZ]: So that, I think, should be
21 acknowledged. And I don't want to pretend than I speak on
22 behalf of the public, of the victim family members, but they
23 have spoken. And they have spoke to the GAO. They have

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1 spoken -- and I think you'll hear more from Mr. al Baluchi's
2 team about information provided by victim family members.

3 I'm from Oregon. Nobody in my family can ever watch
4 these proceedings because they don't get permission to come
5 here. And I know that that's not really the role of the
6 court, is to make sure my family can watch me do my job, but
7 they used to. When I was a federal public defender, they
8 would come and watch the proceedings. And that is part of the
9 need, is to have these public -- have these proceedings
10 public, is to have it open to everyone.

11 The GAO report is pretty clear, and I think the
12 government, in their briefing, acts as if the defense -- they
13 use the word "shrill" to describe us, and yet everything that
14 both Mr. al Baluchi's team and our team has recommended was a
15 recommendation that came directly from the GAO report. That
16 was a bipartisan requirement from the House Armed Services
17 Committee and the Senate Armed Services Committee requesting
18 this, and so it isn't something that we have made up.

19 And what they say is that there is two problems, one
20 that the DoD can't control, which is that this trial is being
21 held on Guantanamo. But number two is something that is
22 completely within the DoD's control, which is the geographical
23 location of the CCTV sites and the ability to broadcast via

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1 the Internet, which is not prohibited by the rules, not
2 prohibited by the statute.

3 And the mechanism, as far as I understand -- I'm like
4 you, I'm not a huge tech person, but I can read what the GAO
5 report says -- it would be done in the same way that the
6 transmission is made to the CCTV sites. There could be
7 restrictions on that. There could be a password-protected
8 thing where somebody has to get access.

9 We're just asking the court to consider that the
10 policy issue is before you, and it's too narrow. We have
11 tried this. It's not really open to a swath of the public.
12 It's also related to decisions that are being -- have been
13 addressed by the commission in AE -- I always forget this --
14 561, I think, is the right AE number, the website access that
15 Mr. Connell noted to the court of -- earlier today.

16 One of the issues about why the public doesn't have
17 complete access is because the website isn't updated on a
18 timely manner. And so as the court -- the military commission
19 has already noticed, transcripts aren't put up in real time.

20 But maybe something that you are not aware of is that
21 that website is not accessible outside the continental
22 United States. If a victim family member is in Europe, they
23 do not have access to that website, so they can't read the

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1 transcripts. Internet broadcast of these proceedings would
2 allow that to happen.

3 The same is true for Mr. Mohammad's family and
4 friends and colleagues, they have no access. They have no
5 ability to come to the courthouse. They have no ability to
6 read the website. They have no ability to have access. And
7 this matters in a capital case because a lot of mitigation is
8 related to Mr. Mohammad's family and his colleagues and his
9 upbringing.

10 And I want to draw the court's attention to the
11 Supreme Court case which is Presley v. Georgia. And in
12 Presley, the Supreme Court in a per curiam decision noted that
13 a family member of the defendant was precluded from simply
14 observing voir dire, and the court reversed and remanded for
15 further proceedings because of that family member's right to
16 be in the courtroom. And it was a pretrial proceeding. And I
17 think that that matters here as well, is at this point, no
18 member of Mr. Mohammad's family has any ability to have access
19 to pretrial proceedings.

20 Another place I want to address is that the
21 government has said in their briefing that, you know, for
22 pretrial we're going to keep it small, but maybe when trial
23 comes around, then we'll expand it. And on a policy -- a

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1 policy aspect of that is it's sort of a Catch 22. The
2 argument is there's not enough demand to require us to open it
3 up more. But part of the reason there's no demand is there's
4 no ability to do it, and so it is really a Catch 22.

5 More victim family members, more of the public would
6 attend these proceedings, would attend the CCTV sites if there
7 was more knowledge about it and if they had more access to it.
8 And so I don't think that waiting till trial to figure out if
9 there's a demand is really an appropriate way forward. And we
10 would urge you to consider that.

11 If I may have a moment, Your Honor, just to make sure
12 I covered everything I had hoped to.

13 MJ [Col COHEN]: You may. Yes, ma'am.

14 ADC [MS. RADOSTITZ]: Yes, unless you have questions.

15 MJ [Col COHEN]: I guess the question I have is: Based on
16 the argument of trial counsel, they agree that -- that there
17 should be greater public access. They made a policy decision
18 to say, "Well, we're going to expand it at least by one site."
19 I understand that your position is, is, "Well, it should be --
20 it should be more sites," those types of things.

21 My initial inclination, to stay within my authority,
22 is is that my ruling should address -- even if I agreed with
23 you, let's say that, or assuming arguendo that I said I agree,

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1 why can't the government stream this? There may be lots of
2 reasons. I don't know. That's not before me right now.

3 But assuming for argument that I said that I agree
4 with you. What would be my authority to order the relief or
5 the recommendations that you are, as opposed to just saying,
6 Look, while I -- I could always put comments in an order.
7 While I recognize that you're increasing public access, you
8 know, the filings would indicate that there might be a greater
9 need for public access, and so I strongly encourage the United
10 States Government to consider, you know, moving forward and,
11 you know, to consider alternative sites where -- in these
12 geographic areas where there seems to be a large percentage of
13 impacted individuals.

14 That would seem to be the extent of what this court
15 could do, would be to highly encourage the government, as
16 opposed to order the government, because I'm not sure what my
17 legal authority would be for ordering them to stream it, for
18 example.

19 Can you help me out? Like beyond that, what could I
20 do legally?

21 ADC [MS. RADOSTITZ]: Well, Your Honor, I think there is
22 an inherent authority in the commissions to have open
23 proceedings. And if one of -- if you have said, Well, the

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1 government tried it this way and they said that that made the
2 proceedings open, you can say that actually doesn't. We've
3 tried that experiment. It hasn't worked. I have the inherent
4 authority to make sure that these proceedings are open; and to
5 do that, I order that you stream it via the Internet.

6 And I think that -- the government, I anticipate,
7 will say, Well, there has to be a balance between national
8 security interests and the right to a public trial. And the
9 Supreme Court has addressed that, and they have said that that
10 is a rare thing, and it should be narrowly structured.

11 We have a 40-second delay between what we say here
12 and what is both heard in the galley -- or gallery and what is
13 heard on the CCTV sites. The same thing could be done if it
14 was streamed in the Internet. There is the ability then to
15 cut off the feed if there is any concern about national
16 security. So the arguments that doing anything more raises
17 the risk of national security simply have already been
18 acknowledged by the military commission and resolved.

19 I also would like to say that the government's
20 briefing argues that the defense would -- could use it
21 differently if it were broadcast on the Internet. And I would
22 say that we have the exact same obligation to protect national
23 security as everyone on the government's side.

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1 I swore the same oath. I have the same security
2 clearance. And so it is, to be honest, kind of offensive for
3 them to say that at this point, I'm going to put all that at
4 risk merely to expand public access, because it's just not
5 true. And the military commission has already taken measures
6 to protect national security by having the delay, and that can
7 be done in other sites and through the Internet.

8 MJ [Col COHEN]: I understand, ma'am. Is that all that
9 you need to say?

10 ADC [MS. RADOSTITZ]: Yes.

11 MJ [Col COHEN]: All right. Thank you for your time.

12 ADC [MS. RADOSTITZ]: Thank you.

13 MJ [Col COHEN]: Ms. Bormann, did you all want to address
14 this matter?

15 LDC [MS. BORMANN]: I do not specifically wish to argue,
16 though I do adopt the positions of my cocounsel.

17 MJ [Col COHEN]: All right. Thank you, ma'am.

18 Lieutenant Colonel Thomas?

19 DDC [Lt Col THOMAS]: Thank you, Your Honor. Good
20 morning.

21 MJ [Col COHEN]: Good morning.

22 DDC [Lt Col THOMAS]: Your Honor, Appellate Exhibit 609,
23 trial conduct order, requires -- first, I'll introduce myself,

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1 at your request. I'm Lieutenant Colonel Sterling Thomas. I
2 rise on behalf of Mr. al Baluchi.

3 MJ [Col COHEN]: Thank you.

4 DDC [Lt Col THOMAS]: Appellate Exhibit 609, trial conduct
5 order, requires me to begin argument by identifying the dates
6 and transcript pages corresponding with any prior open or
7 closed oral argument related to the motion. In AE 007M, the
8 government's combined reply to the defense, the prosecution
9 requests that the military commission not consider any
10 additional proposals raised by the defense for the first time
11 in their response.

12 I note for the record that the issues presented to
13 you today in AE 007L (AAA) have previously been raised and
14 addressed in AE 007A (AAA), AE 022, and AE 033. These matters
15 were argued on 19 October 2012 and can be found in the
16 transcript at 12 -- 1204 through 1229.

17 Earlier this month, Your Honor, paralegals on my
18 legal staff submitted a set of slides to the trial judiciary.
19 They've been marked provisionally as Appellate
20 Exhibit 007N (AAA).

21 MJ [Col COHEN]: I have those in front of me now.

22 DDC [Lt Col THOMAS]: Thank you, Your Honor. We provided
23 a hard copy to the court security officer at 0800 this

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1 morning. We have provided a hard copy to the prosecution and
2 the other parties of this litigation.

3 MJ [Col COHEN]: Thank you.

4 DDC [Lt Col THOMAS]: We request permission to display
5 them to the gallery.

6 MJ [Col COHEN]: That will be acceptable.

7 DDC [Lt Col THOMAS]: Could we have the feed from Table 4,
8 please.

9 Between distance, delays, and cancellations, it has
10 been exceedingly difficult to closely follow the GTMO
11 proceedings. We made several attempts to attend CCTV sites at
12 military bases. Got credentials but never actually got to see
13 anything. Very little GTMO news gets reported on, and the
14 lack of transparency doesn't feel anything akin to justice for
15 the 9/11 families. Being able to follow the proceedings
16 remotely on our laptop computers would be a step in the right
17 direction.

18 That is from AE 007L (AAA), attachment -- at 1,
19 page 1, and that is a statement from Ms. Breitweiser,
20 Ms. Van Auken, and Ms. Kleinberg, whose husbands were killed
21 at the World Trade Center on 9/11.

22 Your Honor, the military commission should grant
23 counsel for Mr. al Baluchi's requested relief in AE 007L and

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1 order transmission of open hearings by the Internet on a
2 40-second delay, grant the government's motion adding the
3 Pentagon site, and modify its combined order to allow public
4 access to all viewing sites.

5 MJ [Col COHEN]: Colonel Thomas, let me just ask you this
6 question. In typical federal courts -- let's just call it a
7 federal court. In typical federal courts, we typically do not
8 see public transmissions of the inner workings of those; in
9 fact, most of the time, we don't even have photographs; they
10 are sketches, those types of things.

11 While I understand the unique circumstances of
12 this -- and obviously decisions were made before I ever got
13 here to allow for some transmission -- I'm trying to balance
14 also the issue with the public need to know and the general
15 interests that is there, the issue of a public trial, but also
16 avoiding, with respect to anyone in this case, any
17 sensationalization of this -- of this matter as well, because
18 I also believe that inures to the benefit of anyone who is
19 accused of a trial. So there is not a public trial, but the
20 actual trial occurs within the confines of this room.

21 So how do I match that up with the idea that we're
22 already having -- I understand geographics. I don't want to
23 debate the issue with you so much as just say, Okay. I

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1 understand the geographic limitations, the access limitations
2 to here. In many ways, they'd be the same if we were trying a
3 court-martial downrange in Afghanistan at this moment; there
4 would be limitations as to who the general public could be
5 that could access that trial, but it would still constitute a
6 public trial.

7 So how do I balance that with what they are asking
8 for, which is, Look, we are going to go with one more CCTV
9 location, although it's in a very secure location in and of
10 itself, with the -- not to inappropriately use any adjectives
11 or adverbs but a very expansive access program which would be
12 a live stream on international worldwide web. How do I -- how
13 do I balance -- I wouldn't say they are conflicting
14 necessarily -- no one is arguing that there shouldn't be
15 public access -- but where do I find the happy medium? Or why
16 is your position the only right result, I guess, so to speak?

17 DDC [Lt Col THOMAS]: Well, I think that the open general
18 public access through Internet option creates the greatest
19 amount of access by victim family members, given the obstacles
20 and the challenges that they face, both geographic, as we see
21 in the display here, and in the -- just in the realities of
22 life.

23 So imagine for a moment if you are at Fort Devens,

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1 Massachusetts or you live nearby but your childcare
2 obligations prevent you from being able to go to the week that
3 you heard there might be a hearing, or you get there and you
4 find out I've got to go back to the office, there's some
5 employment obligation that I have or a sick child that I have
6 to tend to.

7 Now those particular issues are addressed and removed
8 for those victim family members that currently are able to
9 attend at Fort Devens and for the general public who would
10 have had to gain that specialized access, that escort, that
11 pass to get across the base, and then figure out which place
12 to go and sit, and then perhaps later find out, sorry, the
13 schedule changed, there is no hearing today.

14 The way that you can control and balance this matter,
15 Your Honor, is found in -- the beginnings of it are found in
16 the orders that general -- excuse me, Judge Pohl issued.
17 007F, I think, is one of the ones that we can reference here.
18 And what he did was indicated that at the viewing site, the
19 same rules that apply to the gallery you see behind us, behind
20 those two levels of glass, the same rules that would apply in
21 a federal district court apply at the viewing site.

22 Now, I think one of the issues that the government
23 might have raised in their response, their reply, 007M, was

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1 that how are we going to control people at a general public
2 viewing site? Well, I submit to you, Your Honor, if you are
3 piping this through the Eastern District of Virginia
4 courthouse, where there is a large -- there are many
5 courtrooms that could be found to be available, or in Denver,
6 Colorado, where there are many courtrooms that could be found
7 to be available, or in Los Angeles, many courtrooms -- federal
8 courtrooms that could be found to be available, the same kind
9 of U.S. Marshals or local law enforcement can enforce the
10 protective order -- excuse me, the conduct order that's in
11 place on the other end. No recording, no excessive behavior.

12 And since what we propose also is that any viewing
13 site that the general public be allowed to have access as
14 well, the same compassionate consideration that we give to the
15 victim family members that are in the gallery here in most
16 cases or that are at the locations throughout the
17 United States' 600-mile span, that those considerations could
18 still be respected, even as we allow the general public to
19 come in and see what is happening at these proceedings.

20 I'll note for ----

21 MJ [Col COHEN]: With respect to the previous argument
22 by ----

23 DDC [Lt Col THOMAS]: Ms. Radostitz, sir?

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1 MJ [Col COHEN]: Yes. The -- her argument that I have the
2 inherent authority to do exactly what you say, you are asking
3 me to do.

4 DDC [Lt Col THOMAS]: Yes, sir.

5 MJ [Col COHEN]: Any thoughts on that? Agree, disagree?
6 And if so, inherent authority is always a potentially
7 dangerous thing. You know, it's much easier when you can
8 point to something specifically and say, "This authorizes me
9 to do what you are saying."

10 DDC [Lt Col THOMAS]: I think your authority is found at
11 R.C.M. 806C, which states that the military judge may, as a
12 matter of discretion, permit contemporaneous closed-circuit
13 video or audio transmission to permit viewing or hearing --
14 and I'll jump forward to the relevant portion ----

15 MJ [Col COHEN]: Give me one second. I actually want to
16 pull that up.

17 DDC [Lt Col THOMAS]: Yes, sir.

18 [Pause.]

19 DDC [Lt Col THOMAS]: Ms. Leatherwood, if you will move to
20 slide 7, please.

21 MJ [Col COHEN]: Counsel, I am there on page 2-76 of
22 R.M.C. 806.

23 DDC [Lt Col THOMAS]: Yes, Your Honor. And I have also

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1 brought up on screen a representation of that same language.

2 MJ [Col COHEN]: Thank you.

3 DDC [Lt Col THOMAS]: So within that R.C.M. portion of the
4 Rules for Court-Martial, military commission, excuse me, you
5 have the power to do exactly what we are describing. With the
6 appropriately worded protective order or a conduct order, this
7 proceeding, with the flip of a switch, could be accessible to
8 hundreds of thousands of more people.

9 And while that doesn't meet any legal standard -- we
10 acknowledge that -- the consideration that the GAO pointed
11 out, which is that the very population for which the viewing
12 sites is intended, they're being underserved by those. And if
13 we could go back to slide number 2, please, I'd like to point
14 out how that's happening.

15 So we note that the 600-mile span covers the
16 eastern -- the Mid Atlantic, basically, of the United States,
17 but we also note that there are lots of population centers
18 that were impacted by the allegations before this court, this
19 commission today, throughout the United States and even
20 throughout the world.

21 That slide shows the disconnect, the asymmetry
22 between the location of the sites where the victim family
23 members are and the intended users are and where the sites

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1 themselves are, but you also get a sense of how limited the
2 access is for the general public, because on there is only one
3 site where the general public can actually walk into, after
4 going through quite a few layers of trouble, a courtroom and
5 observe what's going on. So we're talking about we're down to
6 a straw view of trying to observe what's going on.

7 The General Accounting Office's report tried to take
8 a look at why those attendance numbers exist in the manner
9 that that they do. And I want to go through just a bit about
10 those attendance numbers. 2,304 attendees since 2011. In
11 19 October 2012, the government argued there is no evidence
12 brought forth by the defense that any members of the media or
13 the public have been excluded at the sites in the
14 United States. That can be found in the transcript at 1224
15 during the argument of AE 022 and AE 033.

16 In Appellate Exhibit 551I, the ruling at page 2, the
17 court said -- the military commission said, "Mr. al Baluchi
18 had not produced evidence of the difficulty of victims'
19 community and the public in observing the proceedings."
20 Before you and in the GAO report is that evidence, as well as
21 at Attachment C to AE 007L.

22 If we look at the data that's being discussed in this
23 particular slide, of the 2,304 recorded visitors, 64 percent

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1 of them were nongovernmental organizational stakeholders,
2 34 percent of them were victim family members, and 2 percent
3 were from the general public.

4 If we look at the past five years of victim family
5 member attendance at all five viewing sites for all military
6 commissions in all cases, the numbers range somewhere between
7 25 and 37 visitors per year. That can be found at
8 Attachment B, page 19.

9 Your Honor, if we estimate about 10 military
10 commission proceedings per year, then that average attendance
11 is less than one victim family member per site per hearing.

12 Why is that? Well, we submitted to you in
13 Attachment C to AE 007L a statement from September 11th
14 Families for Peaceful Tomorrows, which is comprised of victim
15 family members, and they explained that this attendance level
16 is due to obstacles, not lack of interest. Many live nowhere
17 near those viewing sites that we saw earlier. And even those
18 who are close to viewing sites face the obstacles of age,
19 infirmity, unpredictable court schedules, frequent closed
20 hearings, obligations of employment, bureaucratic obstacles,
21 security checks, traffic. When we compare all of that to the
22 attendance numbers and then compare that to the voiced
23 interests, they don't match up.

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1 Figure 8, which can be found in the record at
2 AE 007L (AAA), Attachment B, page 43, represents the results
3 of a survey done of the -- of 2,640 victims and family members
4 asking about their preferences for solutions for expanded
5 public access to military commissions proceedings, and they
6 supported six out of seven of the proposed options.

7 Figure 9 represents the opinions of nongovernmental
8 organizational stakeholders who responded to the questionnaire
9 of the General Accounting Office on potential options for
10 expanding public access to proceedings. They demonstrate
11 strong support for the CCTV general public option and the
12 Internet option. And we submit to you, Your Honor, that the
13 best of these options is Internet-based distribution of open
14 hearings on a 40-second delay.

15 An OMC technology expert -- an informational
16 technology expert said that it is simple and inexpensive to
17 transmit the existing feed through C-SPAN or the Internet, as
18 we propose, using the very same cyber security protocols in
19 place for the existing CCTV sites, the very same protocols
20 that are at this moment broadcasting this broadcast --
21 "broadcast" is not the word I want to use -- transmitting this
22 matter over CCTV to a site in Fort Meade, at Fort Devens, at
23 Fort Hamilton, at Fort Dix, and even into the gallery right

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1 behind us. Those same protections would exist, and they take
2 into account all the national security concerns that we have
3 acknowledged and that we bear the same burden as the
4 prosecution.

5 You might hear from the government that a general
6 distribution would then open us up to, well, manipulation of
7 the data that comes out on the end if someone snuck a camera
8 in or somehow recorded the proceedings. There are literally
9 thousands of images, ICRC photos of the individuals that are
10 facing the trial here, images from the media that have been
11 gathered lawfully about the men who are accused here, and any
12 one of those are just as subject to the manipulation by media
13 and by deep fakes to create any of these things.

14 But if we go down the direction that the government
15 will most likely ask you to go, saying, "Hey, we can't
16 transmit because someone could manipulate it," that's the
17 pathway to a total information blackout because any
18 information can be manipulated.

19 The protections we have in place are sufficient, if
20 operated properly, to assure that what we put out is a product
21 that does not make this some sensationalistic matter, that
22 doesn't have this become some opportunity for individuals to
23 jump up and down and try and make a big fuss here, but to have

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1 serious proceedings that reach the general public, the victim
2 family members, the media, and the nongovernmental
3 organization stakeholders that want to see what's going on.

4 I think it was the Richmond Supreme Court case that
5 said that if justice can't be seen, can you be sure it's
6 justice at all?

7 The GAO report referenced that there are many
8 challenges that are within DoD's control that fall within the
9 military commission's proceedings and states that the leading
10 practices for effective strategic planning show that agencies
11 should define strategies that address management challenges
12 and identify resources needed to achieve their goals.

13 MJ [Col COHEN]: Colonel Thomas, if you could just slow
14 down just a little bit.

15 DDC [Lt Col THOMAS]: Yes, sir.

16 MJ [Col COHEN]: Thank you.

17 DDC [Lt Col THOMAS]: The GAO indicates that the
18 government has not developed a strategy that explains how it
19 will achieve their goal of expanding public access. I submit
20 to you that today's proffer of restricted public access at the
21 Pentagon doesn't meet that.

22 Adding a Pentagon site adds more seats, but it
23 doesn't make it any easier for the general public or the

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1 victim family members, or the nongovernmental organizational
2 stakeholders to get there. It's going to be easy for members
3 of the prosecution, members of the defense to walk from their
4 offices or catch a shuttle over. The Department of Defense
5 Office of General Counsel can walk down a hall, make a couple
6 of turns, and they'll be there to watch it. But if someone
7 wants to travel from Raleigh, North Carolina to find out
8 what's being done in their name by their government, they
9 won't have that same access unless they have an escort, unless
10 they have preplanned access, et cetera; but if they wake up on
11 Monday morning, July 11th, and say, "I can see on this
12 schedule that the hearings are going to start at 11 a.m. with
13 open testimony," and log in and observe it, every one of those
14 obstacles is out of the way.

15 As I said earlier, R.M.C. 806 gives you the authority
16 to expand, and based on the current acting trial conduct
17 orders, creates the same controls that assuage all the
18 concerns and have addressed those concerns as previously
19 raised by the government and agreed to by the defense.

20 MJ [Col COHEN]: What about the qualifying language on
21 that that says when courtroom -- go back one slide, please.

22 DDC [Lt Col THOMAS]: Sorry. Could you go back one slide?

23 MJ [Col COHEN]: Is when courtroom facilities are

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1 inadequate to accommodate a reasonable number of spectators,
2 so ----

3 DDC [Lt Col THOMAS]: That originally was ----

4 MJ [Col COHEN]: Every word -- every word will always
5 matter to me.

6 DDC [Lt Col THOMAS]: Absolutely.

7 MJ [Col COHEN]: So when I look at that, that says --
8 okay, so is that a qualification on my legal authority? What
9 is -- I mean, I think it would appear to be.

10 DDC [Lt Col THOMAS]: I think it is a trigger for you to
11 say I need to do more when the courtroom access, the courtroom
12 facilities aren't enough. And if you look behind us, we have
13 a double layer, perhaps triple layer of access problems. One,
14 we've got a very limited gallery.

15 If there were only five seats in the courtroom,
16 that's just how it's going to be. But the additional layer of
17 the gallery being so limited is that it is also isolated. And
18 the additional layer on top of that is -- even the isolation
19 is not easily overcome because you've got to have permission
20 even to take a flight down here.

21 Your Honor, if I wanted to take a vacation on Naval
22 Station Guantanamo Bay, I've got to have permission to come,
23 and I'm an active duty military member. Just to get in this

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1 room and into the gallery, you've also got to do what's called
2 Space A to get a seat.

3 So the courtroom access question was addressed in
4 Judge Pohl's original order, and I think it remains. In fact,
5 it may even be exacerbated by the passages of time, but
6 technology can fix that.

7 MJ [Col COHEN]: And when you say his "order," you're
8 talking about 007F?

9 DDC [Lt Col THOMAS]: Yes, sir.

10 MJ [Col COHEN]: All right. Copy.

11 DDC [Lt Col THOMAS]: I wanted to also address one other
12 thing about access. When you asked Ms. Radostitz a question
13 about the ability to keep up with what's going on, I think you
14 were searching for some authority on how you could make sure
15 that that flow of information that might come out of an 802
16 moves to some place where the general public might be able to
17 access it.

18 Under R.T.M.C. 19-4, you are granted the authority to
19 control the flow of information from the court to the website;
20 I'm referencing mc.mil. And some of the recent rulings have
21 indicated that we're trying to get that website to act more
22 rapidly in response to updates here. That would be an
23 appropriate place for you to exercise that authority,

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1 Your Honor.

2 If, for instance, I wanted to go see what's happening
3 in the Eastern District of Virginia in two weeks, I could go
4 to the clerk's desk and say, "Could I have a court schedule?"
5 It may just be sitting on the desk. I could go to very likely
6 a website and determine, well, that's a hearing I'm interested
7 in. This same thing could be accomplished here with mc.mil
8 with 19-4.

9 I would note that, currently, the victim family
10 members are provided with updates on pending military
11 commission cases and notified of scheduled hearings through
12 the Victim Witness Assistance Program, and they still have
13 difficulty getting to these hearings, as indicated by the
14 numbers that we went through earlier. And you take away that
15 information and you put the general public into the mix, and
16 you can see why we're at 2 percent over the past seven years.

17 The government's proposed solution, while laudable,
18 does ignore the obstacles faced by the population that would
19 be served, the victim family members, the nongovernmental
20 organizations, the general public. It fails to do what's
21 permissible under 806(c) and what's feasible with the flip of
22 a switch. And after you consider all the national security
23 concerns, greater access by Internet distribution, whether

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1 that is limited or broad, is the best option for consistent
2 and increased viewing by the victim family members, by the
3 NGOs, and by the general public.

4 And thus, Your Honor, we ask that you grant our
5 motion under your authority under 806(c) authorizing
6 distribution of the hearings on a 40-second delay, authorize
7 the Pentagon viewing site, but we also ask that you open all
8 viewing sites to the general public.

9 MJ [Col COHEN]: And by that last one, what do you mean by
10 opening all viewing sites? I mean, for those that are on
11 military installations, that's well beyond my authority to
12 tell them how to run their installations, so...

13 DDC [Lt Col THOMAS]: Actually, Your Honor, the
14 delineation of who can go to which site was laid out much
15 earlier and not within a military commission's sense but the
16 five sites. And if we go back to the second slide with the
17 map, in the farthestmost northern east corner are the five
18 sites, and then we have one more at Norfolk Air -- Naval
19 Station, excuse me. Those are all reserved for victim family
20 members, whether they are first responders, whether they are
21 solely victim family members. Only VFMs can go to those.

22 And I ask that you make those permissible -- they
23 have go through the protocols of how to get onto base. They

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1 then make their way over to the proceedings. But the same
2 thing could be done by a member of the general public who has
3 sufficient time and interest and has your order behind him.
4 So that -- the same ability to give them -- the victim family
5 members the compassionate consideration they deserve is
6 preserved with your trial conduct order, but it also would
7 allow the general public more of these sites to be available
8 to them.

9 So we would go from one -- and with the government's
10 recommendation, 1.5 viewing sites to all viewing sites being
11 available to all parties who would be interested, as long as
12 they can make their way onto those installations and overlay
13 that, Your Honor, with either limited or open, as we suggest,
14 distribution of this closed-circuit TV by Internet.

15 MJ [Col COHEN]: Okay.

16 DDC [Lt Col THOMAS]: Thank you, Your Honor. Subject to
17 your questions.

18 MJ [Col COHEN]: I asked them as I went along. Thank you
19 very much.

20 DDC [Lt Col THOMAS]: Thank you.

21 MJ [Col COHEN]: Counsel, it's not meant to be an
22 appellate argument, but I just find that if I ask a question
23 as I go along, I am much more likely to remember to ask it, so

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1 I appreciate your indulgence.

2 Defense, are there any other arguments by the
3 defense?

4 LDC [MR. HARRINGTON]: We have none, Judge. We just join
5 the arguments.

6 MJ [Col COHEN]: All right.

7 Mr. Ruiz, just confirm, we're good?

8 LDC [MR. RUIZ]: We're good.

9 MJ [Col COHEN]: All right. Thank you.

10 All right, then. Trial Counsel, it's still your
11 motion. You may have the last argument.

12 ATC [Capt HALL]: Thank you, Your Honor. I'll be very
13 brief.

14 You asked a lot about authority, and we were hearing
15 some talk about R.M.C. 806. I would point you to
16 R.M.C. 806(c), the first three-quarters of that rule, which is
17 -- actually flatly prohibits the broadcasting or recording of
18 any proceedings. The CCTV discretionary option that you have
19 is done to ensure public access, but R.M.C. 806 is essentially
20 a corollary of Federal Rule of Criminal Procedure 53 which
21 also bans cameras and recording of all proceedings in criminal
22 trials and which has been in place since that rule was
23 initially promulgated in 1946.

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1 And I would point you to the Supreme Court case of
2 Estes v. Texas and specifically Chief Justice Warren's
3 well-known concurrence in that case discussing, as you had
4 mentioned earlier, the concerns about fair trial and turning
5 what is a solemn search for truth, what is a judicial
6 proceeding, into a platform for publicity as an end in itself.
7 And that discusses that in that opinion and ----

8 MJ [Col COHEN]: How do I match that up with the fact that
9 we are already broad -- I'll use "broadcast" in a sense.
10 These are disseminated somehow back to the United States of
11 America, so this idea that we are not going to -- I mean, you
12 mentioned the Federal Rule of Criminal Procedure 53, Supreme
13 Court case.

14 The bottom line is, we already are doing this. In
15 fact, we just -- if I accept the argument of counsel is
16 accurate based on the facts, then we broadcast this to five
17 different locations solely for a specialized group of
18 individuals.

19 So once you open the door, how do I -- where -- then
20 either the authority was there to initially do it at the
21 request of the government or it wasn't. So if it was there,
22 now you're talking about how wide I open the door, not whether
23 the door can be opened.

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1 ATC [Capt HALL]: Yes, sir. I think the rule makes the
2 distinction between the closed-circuit television feed, which
3 is protected and goes just into certain designated locations.
4 And that's similar to what federal courts have done in the
5 very rare instances they have also opened up additional
6 courtrooms, usually in the same building as the trial is
7 taking place.

8 In this instance, it goes through a fiberoptic cable,
9 but it is still a CCTV feed, which is what the rule
10 distinguishes. Other than that, you know, broadcasting on
11 C-SPAN or cable TV or the Internet, that would fall within the
12 flat part of the rule where it's just prohibited.

13 MJ [Col COHEN]: So what if it was audio only?

14 ATC [Capt HALL]: I believe the rule still discusses the
15 audio broadcasting.

16 MJ [Col COHEN]: Along with the contemporaneous
17 closed-circuit -- so in other words, like even the federal
18 courts would allow for, for example, oral arguments to be
19 recorded and then post it up on the Internet?

20 ATC [Capt HALL]: So when you are talking about in federal
21 court, the process in federal courts, the Judicial Conference
22 has had a number of pilot programs to test out those
23 processes. Every time that they've done the pilot program,

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1 they've come back and decided not to change the policy. And
2 they have only done that in civil cases as well. Again ----

3 MJ [Col COHEN]: What about the United States Court of
4 Appeals for the Armed Forces, which routinely posts audio
5 recordings of its oral arguments?

6 ATC [Capt HALL]: Sir, I think they would be operating
7 under a different rule, as we have our R.M.C. 806.

8 MJ [Col COHEN]: All right.

9 ATC [Capt HALL]: In addition, Your Honor, those are not
10 trials, of course. Those are appellate arguments, so ----

11 MJ [Col COHEN]: I understand. I understand the
12 distinction, but the idea that just generally that we don't
13 put criminal matters up on recordings and stuff.

14 I guess I will look at it. I don't -- like I said, I
15 ask questions. You should never -- neither side should take
16 that because I ask a question a certain way that that means I
17 am leaning a particular way. I try to ferret out the issues
18 on both sides before I make an informed decision.

19 My pet peeve is I hate to get back in chambers and
20 deliberate and say, "Oh, I wish I would have asked this
21 question." And so in an attempt to avoid specifying issues to
22 the maximum extent practicable, you will find that I will ask
23 periodic questions along the way, but they are not intended to

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1 give any indication as to how I will rule.

2 Thank you, Counsel.

3 ATC [Capt HALL]: Yes, sir. Thank you.

4 ADC [MS. RADOSTITZ]: Your Honor, might I be heard just
5 briefly in surrebuttal about one small point?

6 MJ [Col COHEN]: What is the point?

7 ADC [MS. RADOSTITZ]: Lieutenant Colonel Thomas talked
8 about the idea of opening the current sites to the public, and
9 I just want to address one small part of that.

10 MJ [Col COHEN]: I will allow you two minutes.

11 ADC [MS. RADOSTITZ]: It won't even take two minutes.

12 MJ [Col COHEN]: Okay.

13 ADC [MS. RADOSTITZ]: What I wanted to say is that the
14 definition that the government has come up with of who is a
15 victim family member is very limited. It's limited to
16 parents, spouses, children, and siblings. And so by expanding
17 those sites to the general public, you could allow cousins,
18 brothers-in-law, and other family members more broadly defined
19 that have been specifically victimized -- or, you know,
20 defined as victims in any other case where you don't have such
21 a narrow definition of victims. And so I want to just -- I
22 wanted to amplify that request.

23 MJ [Col COHEN]: All right. Thank you.

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1 Trial Counsel, is there any additional -- I will
2 allow you one to two minutes if you have the need to address
3 that matter.

4 ATC [Capt HALL]: No, Your Honor.

5 MJ [Col COHEN]: All right. Thank you. I appreciate the
6 arguments from both sides.

7 We've been going for approximately an hour and a
8 half. I think now would be a good time for a brief comfort
9 break. And I will not give an exact time, but let's try to be
10 as expeditious as possible, but I understand there may be some
11 reasons why some things take a little bit longer to -- first
12 to reconvene. As soon as we are capable of being back on the
13 record, I would ask counsel to be ready to do so.

14 We are in recess.

15 [The R.M.C. 803 session recessed at 1035, 19 June 2019.]

16 [The R.M.C. 803 session was called to order at 1052, 19 June
17 2019.]

18 MJ [Col COHEN]: The commission is called to order. All
19 parties present when the commission recessed are again
20 present.

21 Moving forward, absent something that interferes with
22 that, given the number of people that are attending this
23 hearing, you can expect that the general time frame for a

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1 recess will be 15 minutes. If there's a request for
2 additional time, all you have to do is ask.

3 I would now -- first, I'm going to hand back 007N to
4 the court reporter.

5 This has not been the first time in my career that
6 I've been told that I speak rather rapidly, and so I'm going
7 to try to help out the court reporters who are assisting me by
8 speaking a little bit slower, so...

9 All right. I'd like to take up Appellate Exhibit
10 0621, which is the defense motion to compel production of
11 discovery related to evidence provided by the German
12 Government.

13 Mr. Harrington, I notice your team filed the motion.

14 LDC [MR. HARRINGTON]: Yep.

15 MJ [Col COHEN]: It appears that you are ready to argue
16 it. Yes?

17 DC [MR. FEELER]: Sorry, Your Honor. I was on my way.

18 MJ [Col COHEN]: No, that's all right. You were
19 anticipating that since you filed it that you would have the
20 first opportunity, and so thank you for doing so.

21 DC [MR. FEELER]: I hope so. Good morning, Your Honor.
22 Wyatt Feeler on behalf of Mr. Binalshibh.

23 As you stated, this is a motion to compel discovery.

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1 It is a little different from other motions to compel that
2 I've filed before, but this case is very different, as you are
3 aware. But it is a critical motion for Mr. Binalshibh's
4 defense, both at what we would call a guilt/innocence trial
5 phase and potentially at a presentencing hearing, if there
6 should ever be one.

7 As you're aware, Your Honor, but just to reiterate
8 exactly what we are asking for, we seek the production of any
9 agreements, conditions, assurances, I'll say also
10 stipulations on the provision of evidence -- that accompany
11 the provision of evidence by the German Government to the
12 United States Government, specifically any of those agreements
13 that would have precluded the use of any evidence to seek the
14 death penalty or in an -- before an extraordinary court, and
15 that would be evidence that would be used either directly or
16 indirectly in pursuit of the death penalty.

17 As you're aware, R.M.C. 701 covers the obligations --
18 government's obligations in this case for discovery. And here
19 the evidence that we're seeking is under the control -- we
20 would contend, under the control of the government. They
21 certainly have not told us otherwise. And it is material to
22 the preparation of the defense. Under the rule, we would ask
23 that it be provided.

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1 I plan to go into kind of three areas to give a
2 little more detail on what we do know in terms of the basis
3 for this motion and then a little bit about what we're asking
4 for and why, and also, I think equally importantly, what we're
5 not asking for and why we are not asking -- or what would not
6 be reasons that we're asking for this discovery.

7 MJ [Col COHEN]: Copy.

8 DC [MR. FEELER]: But before we do -- sorry. Before I do,
9 I want to make clear exactly what stage this request is at
10 from our perspective. This is a request for discovery. I am
11 not arguing for the admissibility of any evidence. I'm not
12 arguing for the preclusion of any evidence. I'm not
13 attempting to introduce mitigating evidence, obviously, at
14 this stage.

15 What we're seeking here is information, information
16 that we need in order to prepare a defense for Mr. Binalshibh,
17 and information especially pertinent in this very
18 high-profile, complicated case that involved international
19 cooperation between governments in its investigation.

20 So what do we know as far as a basis for this motion?
21 I'll go through three things briefly. First, Judge -- and I
22 don't think it's necessary to reiterate a lot of facts about
23 this, but first is, how crucial evidence related to Germany is

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1 for the government's case against Mr. Binalshibh. And to get
2 a sense of that, all you have to do is look at the charging
3 sheet and look at the paragraphs that reference
4 Mr. Binalshibh. And I think we mentioned this in our reply to
5 the government's motion.

6 Germany is front and center. The government's
7 allegation, of course, is that Mr. Binalshibh was part of the
8 alleged Hamburg cell in Germany and that many, if not most, of
9 the actions they allege he took in this case took place in
10 Germany. So the ties between him and Germany are many.

11 The second thing we know is that evidence was
12 provided by the German Government, and the government says as
13 much in their -- in its response to our motion.

14 The third thing that we know -- and here's where our
15 knowledge begins to get a little more speculative and why we
16 need a discovery request in the first place -- is that the
17 provision of evidence, cooperation by the German Government,
18 was accompanied by some kinds of conditions, assurances,
19 agreement -- there's a reason I use all three terms because
20 I'm not sure exactly what it is -- that that evidence would
21 not be used directly or indirectly to seek the death penalty
22 against Mr. Binalshibh.

23 MJ [Col COHEN]: Mr. Feeler, let me ask you a question

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1 along those lines. I remember reading your brief. You
2 referenced Mr. Moussaoui, I believe, in your initial briefing
3 and any public statements that may have been made with respect
4 to agreements when his evidence was handed over; and then I
5 believe you indicated that as a result of that, you all were
6 then also provided some additional evidence that may have
7 impacted your client's interests in this case in particular.

8 When you -- and I understand because you said it was
9 speculative. I guess the question I have is: Are you simply
10 asking the government, is it -- does -- did you get a similar
11 agreement for the information that came with respect to my
12 client? Because potentially your relevance might be -- might
13 be greater there than give me agreements that you have that
14 don't address this issue of a conditional -- you know, in the
15 same sense that the Moussaoui may have, assuming the facts in
16 your motion are correct.

17 DC [MR. FEELER]: So stop me if I'm not getting directly
18 to the point of your question.

19 MJ [Col COHEN]: Fine.

20 DC [MR. FEELER]: What I would say is, you know, there's
21 kind of a long -- there's a long history to how we got here.
22 And one of the reasons why we talk about the Moussaoui
23 evidence is that that was referenced at the time back 17 years

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1 ago now -- certainly in the media and statements by the German
2 Government -- the difficulties, the negotiations that were
3 going on in 2002 to provide evidence against Mr. Moussaoui.
4 And much of that evidence was also related to Mr. Binalshibh.

5 So it appears to us that there were agreements in the
6 Moussaoui case. I don't know what the substance of those
7 agreements were. To the extent that that evidence that was
8 provided in the Moussaoui case may be used directly or
9 indirectly against Mr. Binalshibh, as we put in our discovery
10 request and our motion, I would also seek any agreements as to
11 Moussaoui. I mean, that would be one level removed from this
12 case, but if that's how they ultimately got the evidence.

13 We know that the German Government did its own
14 investigation. We have provided by the government a lengthy
15 summary of a German Federal Police investigation of
16 Mr. Binalshibh that was conducted in 2001. You can go online
17 and find press releases by the German Federal Prosecutors
18 announcing, you know, warrants against Mr. -- for
19 Mr. Binalshibh, and investigation of him, et cetera. So
20 that's public. We know that was happening very early before
21 the Moussaoui trial.

22 So what I would say is I -- I don't know what -- the
23 substance of any agreement. I believe that there was one, as

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1 it was reported, just like I believe that there was one for
2 Mr. Binalshibh. We would request both, to the extent that,
3 again, evidence from the Moussaoui case is going to be used in
4 any way -- evidence that was turned over for the Moussaoui
5 case is going to be used in any way for this case.

6 MJ [Col COHEN]: I understand.

7 DC [MR. FEELER]: Is that what you were getting at?

8 MJ [Col COHEN]: It was. I wanted to make sure I
9 understood the context of that portion of your motion. Thank
10 you.

11 DC [MR. FEELER]: Okay. On this third point about
12 agreements -- agreements, conditions, assurances, et cetera,
13 another thing that we know related to that -- and I won't
14 belabor a point about German law because we're not at that
15 point, but another reason certainly to believe that that would
16 have been done is that Germany, like all of the countries in
17 the European Union, prohibits the death penalty; like all the
18 countries in the European Union, as far as I am aware,
19 prohibits the extradition of someone who might face the death
20 penalty. And Germany, also by the statements of their own
21 Justice Ministry in this case and in the Moussaoui case, the
22 German Constitution would prohibit cooperation in securing a
23 death penalty, even to the point of not allowing evidence to

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1 be handed over if it could be used for those purposes.

2 So the government has not denied that there were
3 agreements, so at this point, our belief is that some sort of
4 agreement, assurances, conditions exist. And what we are
5 seeking now is to know exactly the lengths the government went
6 to and any ways in which it bound itself/stipulated itself in
7 order to gain evidence from Germany, whether -- now, the
8 government says, as you're aware -- and I assume Your Honor
9 would probably ask about it at some point, so I will go ahead
10 and bring it up.

11 The government says that they don't intend to use any
12 evidence they received from the German Government against
13 Mr. Binalshibh. And I'm glad to hear that, and we will rely
14 on that. The problem is, what is the use of evidence? They
15 don't intend to introduce evidence. That's fine; they can
16 know that. But without us knowing the agreements, anything
17 that they agreed to, that might not have been the full extent
18 of the agreement, whether they -- whether they were going to
19 introduce evidence in their case-in-chief. And the government
20 could be in violation of agreements in other ways, even if
21 they do not do so.

22 We know very early on they were provided a great deal
23 of information from the German Government. I don't know what

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1 the government did. Did they go and re-create all that
2 information? Did they go and get evidence, themselves, that
3 had already been provided so they could say it wasn't provided
4 by the German Government? I don't know. But until we know
5 what they agreed to, we can't -- we can't know what -- whether
6 any agreement was violated.

7 And I would point out that Rule 701 says -- covers
8 not only material intended for use by trial counsel as
9 evidence in the prosecution's case-in-chief, but also covers
10 information that is material to the preparation of the
11 defense. So whether or not the government intends to use
12 this, the agreements that they might have entered into are
13 material to the preparation of the defense both at -- again,
14 at what I would call the guilt phase of a trial and at a
15 presentencing hearing, should we ever get to that point.

16 MJ [Col COHEN]: Let's talk briefly about that.

17 DC [MR. FEELER]: Sure.

18 MJ [Col COHEN]: I tracked the issue and the fact that the
19 government took an opposite position as to how this court --
20 this commission should or should not read particular cases
21 with respect to whether or not an agreement to not seek the
22 death penalty in exchange for receipt of evidence may or may
23 not be relevant or binding, et cetera.

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1 But when you say "findings stage" -- so I understand
2 -- I understood your mitigation argument and how it might be
3 used there, but with respect to findings, what's --
4 potentially what standing, for example, in a finding site -- I
5 can see it perhaps in a motion to suppress, but what standing
6 would you have to enforce an international agreement between
7 two sovereigns?

8 DC [MR. FEELER]: So I will agree with the government on
9 one point, and that is, that we do not have the kind of
10 standing the court found people don't have in a case like Kwan
11 to specifically enforce an agreement. I don't -- I have not
12 found any law that would say we could come into court and, as
13 a party -- as if we were a party, enforce an agreement.

14 That doesn't mean that evidence -- that the
15 government violated an agreement that it made specifically in
16 order to get evidence that it used, let's just say indirectly,
17 against Mr. Binalshibh would not be relevant to us in mounting
18 a defense, that there would not be claims we could make. And
19 I don't want to box myself in for the future, but claims we
20 could make, due process claims, for example.

21 MJ [Col COHEN]: Right. So -- okay. That's what I'm
22 curious about. I am just trying to conceptualize what -- for
23 findings purposes, what those could be, understanding that you

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1 would not be bound by that decision at this point.

2 DC [MR. FEELER]: Sure. I understand.

3 MJ [Col COHEN]: And I was having a -- as I read the
4 motions -- a hard time understanding. In a findings stage, if
5 you can't -- if it is not going to be raised as standing, like
6 we have the right to enforce this international agreement, for
7 lack of a better term, if that's what it is, then how do
8 you -- how do you use it at a findings stage as opposed to the
9 mitigation stage?

10 DC [MR. FEELER]: Yes, understanding that some of that
11 would depend on what's in the agreement. And this is the
12 frustrating thing about discovery requests and motions to
13 compel, of course, is if you knew everything you are
14 seeking ----

15 MJ [Col COHEN]: You wouldn't need it.

16 DC [MR. FEELER]: ---- then you wouldn't need the
17 discovery. But I do understand we have to show it's relevant
18 and material, clearly.

19 So things this brings to mind, a due process claim,
20 for example, if the government flagrantly violated some kind
21 of agreement that they have claimed to bind themselves to in
22 order to gain evidence against Mr. Binalshibh, that could be
23 Brady material. It could be exculpatory, I think, even at a

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1 findings stage, depending upon what the agreement was and what
2 was done.

3 It would certainly help us, I think, in perhaps
4 impeaching witnesses, perhaps challenging evidence. You know,
5 obviously anytime an investigation is done sloppily or done in
6 a way that would violate the government's own principles, I
7 think that is ripe grounds for challenging the way an
8 investigation was handled or was done.

9 MJ [Col COHEN]: So essentially you're arguing that it
10 could go to the bias of a witness with respect to your
11 clients?

12 DC [MR. FEELER]: I think it could; impeachment of a
13 witness.

14 MJ [Col COHEN]: Okay.

15 DC [MR. FEELER]: That said, the mitigation arguments I
16 think are strong and perhaps stronger, that specifically when
17 we talk about avoiding the arbitrary imposition of the death
18 penalty -- and that's of course why -- the reason that we
19 cited the bin Laden case.

20 As I agree in our reply, this case is not exactly
21 like the bin Laden case, but what the court found there, as I
22 am sure you are aware from reading the motions, was that had
23 the fact -- the facts that had the Government of South Africa

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1 done what it was supposed to, the defendant would not be
2 facing the death penalty. That was a mitigating factor, not a
3 statutory mitigating factor but fell under the catchall phrase
4 in the federal statute. Of course, we don't have statutory
5 mitigating factors in the commission; we have more like a
6 single catchall in R.M.C. 1001 and 1004 is where you would
7 find those.

8 But now in that case, there were other defendants who
9 weren't facing it, but the court didn't stop -- the judge
10 didn't stop there. He didn't say that that was completely
11 controlling. What the judge said was, Well, okay. That's a
12 statutory factor, the fact that he's facing the death penalty
13 and others aren't; and if that could come in, how can it not
14 come in that had this government done what it was supposed to,
15 he wouldn't be facing the death penalty?

16 So I don't think the second is completely dependent
17 on the first. Those are the facts of that case, but every
18 case is going to be different.

19 In any event, more broadly, it is a reason -- it is a
20 factor, I think, to consider in avoiding the arbitrary
21 imposition of the death penalty, which is an incredibly
22 important consideration if we were to reach a sentencing or a
23 presentencing hearing in this case -- again, not confining

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1 myself obviously hypothetically for the future to any
2 arguments we may want to make depending on what happens with
3 this -- with this evidence.

4 MJ [Col COHEN]: This is motion practice. We're good.
5 I'm not going to bind you for a defense theory at this point
6 in time.

7 DC [MR. FEELER]: Understood, Judge. I am having
8 nightmares of someone pulling out an old -- an old transcript
9 and telling me I said something many years ago.

10 So what are we not asking for? And I think this has
11 been covered somewhat in response to your questions. The
12 government seems to -- as far as I can tell, spent a great
13 deal of time saying that what we are really asking for is
14 evidence that Germany would not seek to impose the death
15 penalty against Mr. Binalshibh. I will leave for another day
16 whether that kind of evidence could be admissible or not.

17 If that was what we were trying to do, I'm not sure
18 we would need to do this. Germany doesn't have the death
19 penalty. Germany would not seek capital punishment against
20 Mr. Binalshibh. He was never in Germany custody. It's
21 speculative, and it's not what we are trying to do here.

22 So to the extent that there are cases that say, Oh,
23 it's irrelevant whether another jurisdiction would or could

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1 seek the death penalty, without conceding that that is
2 controlling law in this commission, I don't think that that's
3 a reason not to give us what we are asking for here.

4 I think I already covered the fact that we are not
5 asking for specific enforcement of an agreement in the way
6 that, for example, Kwan discusses. I think if you look
7 closely at that case, you will see it's a lot different.

8 I'll wrap up just by saying quickly that one of the
9 news articles we cite in 2009 is from Der Spiegel. It quotes
10 the German Justice Minister at the time as saying that Germany
11 intended for its agreements to be followed, the assurances it
12 was given to be followed. And the article says that the
13 government intended to even send observers to Mr. Binalshibh's
14 trial should such a federal trial have happened in New York
15 City at the time, which was what was contemplated by the Obama
16 Administration in 2009.

17 Ultimately, I would say, Judge, that what we're
18 asking for here is that a foreign government not be in a
19 better position to know whether Mr. Binalshibh -- whether the
20 prosecution violated any agreement in securing evidence
21 against Mr. Binalshibh than his defense team is. And that
22 would be the position that we would be in were we not to be
23 given this discovery.

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1 MJ [Col COHEN]: Thank you, sir. I appreciate it.

2 DC [MR. FEELER]: Thank you.

3 MJ [Col COHEN]: Are there any other defense arguments?

4 Mr. Nevin.

5 LDC [MR. NEVIN]: Your Honor, just to add, and it may be
6 self-evident, but we are joined to this motion. This
7 information, depending upon its content and the way it
8 develops, would also be intensely relevant to Mr. Mohammad.
9 Among other reasons because the fact that -- if it is a fact
10 that the United States violated an agreement with the German
11 Government with respect to penalty in this case, would be
12 another factor; it would be a factor in mitigation.

13 So even though the evidence may not have been
14 directly pointed at Mr. Mohammad as opposed to Mr. Binalshibh,
15 it still is important to us.

16 MJ [Col COHEN]: Thank you, sir. I appreciate it.

17 LDC [MR. NEVIN]: Thank you.

18 MJ [Col COHEN]: Any final comments from the defense?

19 Ms. Bormann.

20 LDC [MS. BORMANN]: Judge, we simply join.

21 MJ [Col COHEN]: All right. Thank you.

22 Mr. Connell.

23 LDC [MR. CONNELL]: Sir, I'm not aware of any evidence

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1 obtained from the German Government that involves
2 Mr. al Baluchi, but I do have two points to make.

3 The first one is that it's, in fact, true that we
4 know that a great deal of the evidence and discovery that is
5 involved in this case was directly produced in the Moussaoui
6 case because the early generations of government discovery
7 still have Moussaoui discovery markings on them. They still
8 have the Bates numbers, and so we know that there was at some
9 point early in the case essentially a block copy of some of
10 the discovery produced in the Moussaoui case that was produced
11 to us, I'm sure for reasons of efficiency.

12 The second observation that I have to make is that
13 even if, say, Mr. Binalshibh or Mr. al Baluchi is not in a
14 position to seek enforcement of an agreement between the
15 United States and Germany in the military commission, those
16 are not its only remedies. There -- it's frequent that -- in
17 fact, sometimes we're encouraged to negotiate with other
18 government actors, and we sometimes negotiate with people
19 within the Department of Defense over conditions of
20 confinement, for example, negotiate with members of Congress
21 over what we think the appropriate approach is. You know,
22 there are other actors and other fora other than just this
23 military commission.

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1 So it appears to me that if, in fact, there were an
2 agreement between the United States and Germany and it were
3 not enforceable in this court, that doesn't leave
4 Mr. Binalshibh or someone similarly situated with no remedies
5 whatsoever. It's just that they have to seek those remedies
6 somewhere else through the political process rather than an
7 enforcement by the military commission.

8 MJ [Col COHEN]: I understand your position. Thank you
9 very much, sir.

10 LDC [MR. CONNELL]: Thank you.

11 MJ [Col COHEN]: Mr. Ruiz, any additional comments?

12 LDC [MR. RUIZ]: No additional comments, Judge. Just that
13 I know a couple of counsel affirmatively joined on the record.
14 My particular practice is I will typically only affirmatively
15 unjoin. So I would just say that that means I agree with all
16 colleagues.

17 MJ [Col COHEN]: I understand. I just wanted to make sure
18 I didn't -- I didn't overlook the ability for you to make
19 comments as you wanted to.

20 LDC [MR. RUIZ]: Thank you. I appreciate that.

21 MJ [Col COHEN]: All right. Trial Counsel, who will argue
22 for the government? Mr. Trivett.

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

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1 MJ [Col COHEN]: Good morning.

2 MTC [MR. TRIVETT]: Clay Trivett for the United States.

3 I rise really only to reiterate what's in the filing
4 regarding the fact that the United States intends to abide by
5 all the agreements it has made with the German Government;
6 that there is no exculpatory or mitigating evidence that we
7 have not provided to the defense; and that we will not be
8 using any evidence that was obtained by -- from the Germans
9 pursuant to any such agreement in our case-in-chief or in our
10 sentencing case.

11 And subject to that, sir, I'm certainly willing to
12 answer any questions that you may have.

13 MJ [Col COHEN]: If it's not proper for this type of
14 forum, you're always welcome to just tell me that. I
15 understand that I was -- as I work this issue.

16 I guess the first question is, I have a motion to
17 compel. I typically try to avoid compelling something that
18 doesn't exist.

19 MTC [MR. TRIVETT]: The agreements do exist, sir.

20 MJ [Col COHEN]: They do exist?

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

22 MJ [Col COHEN]: All right. Thank you. I typically don't
23 try to get involved in discovery, but I do -- would like to

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1 know the government's position with respect to an in camera
2 review of any agreements that may be related to the sharing of
3 that information.

4 MTC [MR. TRIVETT]: Generally we have not opposed that.
5 These are agreements between two different countries that we
6 believe are not enforceable certainly by any of the litigants
7 in this case. So I don't know if this is one of those unique
8 positions. I would certainly communicate back with the
9 Department of Justice to see if there is any such concern just
10 because of the treaty nature.

11 MJ [Col COHEN]: I understand. And I'm not ordering at
12 this time. I just want to make sure before I consider all of
13 the options that are out there kind of what the government's
14 position is.

15 MTC [MR. TRIVETT]: And this is one of those -- ordinarily
16 I think we would just say no, we do not object to that. It is
17 our job to make the discovery determinations, and we don't
18 often put those onto the court, nor encourage the court to
19 become involved in it unless there is a motion to compel.
20 This is a little unique because it's an intergovernmental
21 matter and treaty.

22 But that said, we can certainly communicate back to
23 the Department of Justice and the Office of International

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1 Affairs and determine if there would be an objection to that.

2 MJ [Col COHEN]: Okay. I'm not ordering that. But, if
3 you would, just close the loop with -- with me and then notify
4 the defense as to what the government's position is on that,
5 that would be fine. I agree with you. I -- to the extent
6 practicable, I prefer that trial counsel does its job in
7 regulating discovery. Occasionally, though, a motion to
8 compel comes up, and then I must consider, you know, what are
9 the options available to -- to the commission to address the
10 matter.

11 MTC [MR. TRIVETT]: I understand, sir.

12 MJ [Col COHEN]: All right. Thank you, Mr. Trivett.

13 MTC [MR. TRIVETT]: Thank you.

14 MJ [Col COHEN]: I have no further questions. Thank you.

15 MTC [MR. TRIVETT]: Thank you.

16 MJ [Col COHEN]: Mr. Feeler, any final comments?

17 DC [MR. FEELER]: Very briefly, Judge.

18 I appreciate that the government intends to abide by
19 all of its agreements. I'm not sure that we are in agreement
20 with the government on what that would mean. And I'll give
21 you a quick example based on the little bit I do know about
22 Moussaoui.

23 From what I can tell, the government's position in

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1 Moussaoui was if evidence was not being used in the penalty
2 phase or the presentencing hearing in that trial, it was not
3 being used to obtain the death penalty. We would strongly
4 disagree with that; that that would mean the evidence wasn't
5 being used not only indirectly but even directly in pursuit of
6 a death penalty. Clearly someone cannot face a sentence in a
7 death penalty case if they haven't been convicted.

8 So our position would be that any use of evidence
9 would -- would violate the agreement if there is an agreement
10 that says that.

11 I want to address the in camera review very briefly
12 as well. One issue I see or one problem I see with in camera
13 review on this issue is that much of what we're looking for is
14 an agreement so that we can tell when we get to trial, as the
15 case moves along, whether it was violated. And to have a
16 judge look at that, it would place a great responsibility on
17 the judge, one that I'm not sure we want to give up, further
18 down the line to realize, Oh, that agreement I looked at
19 before was violated by this, where the judge might not have
20 all the information that we have.

21 So if we are given any agreements, then we can take
22 the responsibility and have the ability to do that as those
23 issues arise. So that's what I would say.

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1 MJ [Col COHEN]: No, Mr. Feeler, I understand that
2 position. As I indicated to Mr. Trivett, to the extent
3 practicable, I want the parties to control the discovery
4 issues. It's just understanding what the parameters are of
5 what I could do, I think it was important to at least ask the
6 question.

7 DC [MR. FEELER]: I appreciate that, Judge; and I just
8 wanted to address our position on that.

9 MJ [Col COHEN]: All right. I appreciate it. Thank you.

10 DC [MR. FEELER]: Thank you.

11 MJ [Col COHEN]: Any final comments from any of the other
12 counsel?

13 Negative response from all. All right. Thank you
14 for the argument on that matter.

15 Mr. Ruiz, I'd like to take up your motion marked as
16 Appellate Exhibit 625, the defense motion to dismiss because
17 the Military Commissions Act of 2009 is a bill of attainder.

18 LDC [MR. RUIZ]: Thank you, Judge. Major Wilkinson will
19 be arguing that on our behalf.

20 DC [MAJ WILKINSON]: Good morning, sir.

21 MJ [Col COHEN]: Good morning.

22 DC [MAJ WILKINSON]: Major Joseph Wilkinson for
23 Mr. Hawsawi.

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1 This motion is partly, though only partly, a response
2 to some long-running jurisdictional litigation that happened
3 before you arrived. I wanted to say a few words about that
4 background before I proceed.

5 MJ [Col COHEN]: You may do so.

6 DC [MAJ WILKINSON]: In 2017, we filed AE 502, and we were
7 asking the commission to dismiss for lack of personal
8 jurisdiction because the 9/11 attacks were not armed conflict;
9 they were terrorism. And they didn't belong in a war crimes
10 tribunal; they belonged in a civilian court that could try
11 terrorism cases.

12 In December 2017, we had an evidentiary hearing on
13 the subject. We put on evidence. We called an expert to
14 testify as to law of war issues. And when I use the term "law
15 of war," I understand the Air Force uses the term "law of
16 armed conflict."

17 MJ [Col COHEN]: I understand what you're talking about,
18 though, sir.

19 DC [MAJ WILKINSON]: Right. Some sources use
20 "international humanitarian law." You know it's all the same
21 thing.

22 But anyway, we called that expert under
23 M.C.R.E. 201(a), which lets you use an expert for that

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1 purpose, and we brought other authorities and historical
2 examples to show what was and wasn't recognized as armed
3 conflict as of 9/11.

4 Judge Pohl received all the evidence, and he let us
5 make the record, and then he issued 502BBBB, and he agreed
6 there has to be armed conflict for a law of war military
7 commission to hear a case. And then he said, I'm not going to
8 consider any of the evidence that you just put on in front of
9 me because Congress decided for me in the Military Commissions
10 Act that this specific case, the 9/11 prosecution, has to go
11 to a military commission. It wanted this case in this forum
12 with whatever that may imply.

13 And in issuing that order, he based it on several
14 things. One was the part of the statute that says it applies
15 to actions taking place on, before, or after 9/11. He also
16 based it on a holding of the D.C. Circuit which said that --
17 it was in the al Bahlul case, the D.C. Circuit opinion saying
18 that supporters and opponents of the legislation agreed it was
19 designed to authorize military trial of the 9/11 case.

20 And if you look at that D.C. Circuit opinion, in
21 footnote 8, it cites a lot of legislative history, a lot of
22 quotes anyway, members of Congress saying it was very clear
23 they were aiming it at this case and Mr. Mohammad in

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1 particular. And, in fact, Representative Saxton in that one
2 said that we have carefully narrowed and crafted the
3 provisions of this bill to enable the United States to
4 prosecute, and he specifically listed the COLE bombing, the
5 African embassy bombings by al Qaeda, and the 9/11 attacks.

6 So the way Judge Pohl ruled in 502BBBB, the statute
7 deprived us of the ability to contest the forum by contesting
8 armed conflict. If Congress wants you here, simply you are
9 here. You might contrast that with a case like
10 Ex parte Quirin from World War II, where the accused contested
11 whether they belonged in a military forum. And while they
12 ultimately lost, the Supreme Court let them argue the merits
13 and considered it de novo.

14 So anyway, that was 502BBBB, and Judge Parrella
15 recently reaffirmed that in 502FFFF.

16 So as I say, this motion is partly a response to
17 that; and even what I told you so far tells you a few things.
18 Firstly, in challenging this act as a bill of attainder, we
19 are challenging the commission's exercise of jurisdiction,
20 which is why we say the government has the burden of proof in
21 all the issues.

22 In addition, you'll notice that every fact that I
23 just listed to you did not occur in the case against

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1 Mr. al Bahlul, which is one reason why we say that the CMCR's
2 opinion in al Bahlul, which does talk about bill of attainder,
3 doesn't control our case.

4 The D.C. Circuit in Kaspersky Lab v. Department of
5 Homeland Security said that each bill of attainder case has
6 turned on its own highly particularized context, and they cite
7 the Supreme Court in Flemming v. Nestor to that effect. So we
8 are asking that you consider this case in its particular
9 context and not simply look at what happened in
10 Mr. al Bahlul's situation.

11 That said, the bill of attainder clause is part of
12 the separation of powers under the U.S. Constitution and the
13 limitation on congressional authority. It simply isn't the
14 business of Congress to pick out certain people or certain
15 groups of people and take their rights away.

16 Under our Constitution, you can lose rights after
17 you're convicted of a crime; for example, someone convicted of
18 a federal felony might lose part of his right to bear arms or
19 his right to vote. Sometimes that's controversial. But they
20 can't take away the rights before the conviction takes place.

21 It doesn't matter whether Congress aims an act at
22 people who are widely hated or who are supposed to have done
23 something terrible; they simply aren't supposed to have passed

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1 bills of attainder at all. If they do, the government takes
2 the consequences.

3 You know the elements from the brief and maybe from
4 before of a bill of attainder, an act of Congress is a bill of
5 attainder if it applies with specificity, if it imposes
6 punishment, and if it does so without a judicial trial, again
7 meaning a trial before the rights get taken away.

8 So I'll talk first about specificity. I notice in
9 the government's brief they don't really contest specificity
10 very much, but I should talk about it anyway. As I've already
11 mentioned, this commission has twice issued orders, 502BBBB
12 and FFFF, saying that it's specific.

13 For example, page 3 of FFFF, Judge Parrella said that
14 the political branches in passing the Military Commissions Act
15 determined that military commissions were an appropriate
16 vehicle to try violations of the law of war associated with
17 armed conflict against al Qaeda to include this case
18 specifically. That's why we and Mr. al Baluchi's team were
19 barred from having the merits of our jurisdictional challenge
20 considered.

21 You can also look at the history of the act. We've
22 quoted to you the speech President Bush made before he
23 submitted the first version to Congress in which he said, "I'm

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1 announcing today that Khalid Shaikh Mohammad, Abu Zubaydah,
2 Ramzi Binalshibh, and 11 other terrorists in CIA custody have
3 been transferred to Guantanamo Bay; and as soon as Congress
4 acts to authorize the military commissions I have proposed,
5 the men our intelligence officials believe orchestrated the
6 deaths of nearly 3,000 Americans on September 11th can face
7 justice." So it was clear from that context, he was pointing
8 it at this specific case.

9 And we have attached as Attachment C to 625E some
10 correspondence we got from the government between the
11 White House and Congress showing that they were particularly
12 concerned, make sure this bill covers 9/11; and the Senate
13 Armed Services Committee writing back to say yes, we are
14 putting in language to make it cover 9/11.

15 There is a quote I already gave you from
16 Representative Saxton quoted in the al Bahlul case that they
17 have carefully narrowed and crafted the provisions of this
18 bill, in part, to cover 9/11. So Congress didn't just say
19 let's create a systems of commission to try war crimes in
20 general; they said we are creating this system for these men.

21 There's other legislative history that I'll talk
22 about later on under punishment, but a lot of it does likewise
23 point specifically to this case and what Congress had in mind.

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1 In addition to its history, you can look also at the
2 text of the statute. There is, of course, that language about
3 applying to before, on, or after 9/11, which this commission
4 has interpreted to mean with this case in this kind of
5 commission.

6 It also made hijacking aircraft into a war crime,
7 which it never was before under the law of war, showing they
8 were aiming at this case. That's an issue, by the way, that
9 we've been litigating in AE 490, which is a motion that's gone
10 for nearly two and a half years without being decided now.
11 There was oral argument on it I believe in May of 2017. We're
12 always happy to supplement or argue again if you need further
13 things on it.

14 MJ [Col COHEN]: I probably will have the parties do that
15 once I take a look at AE 490. Obviously I was not around two
16 years ago, so ----

17 DC [MAJ WILKINSON]: Right. It was, by the way, a
18 companion to 492, which is less relevant to this motion but is
19 also undecided and that we filed about the same time ----

20 MJ [Col COHEN]: Thank you.

21 DC [MAJ WILKINSON]: ---- saying some of the charges were
22 unconstitutionally vague. But that said, by retroactively
23 making hijacking planes and terrorism and conspiracy into war

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1 crimes, they're putting terrorism cases into -- and hijacking
2 cases into a war crimes commission with whatever rights you
3 use there; whereas before that, that kind of crime was always
4 tried in a civilian court.

5 MJ [Col COHEN]: Wouldn't the opinion by Judge Kavanaugh,
6 though, by the D.C. Circuit Court of Appeals where they
7 specifically addressed the issue of conspiracy being something
8 that has been historically part law of war, military
9 commissions, in holding up the actual conviction on that
10 counter that argument potentially? That that's an offense
11 that was brought as a traditional criminal law crime and only
12 now made part of the law of war?

13 DC [MAJ WILKINSON]: Well, for that, actually
14 Mr. al Baluchi argued that extensively in 490, but I can
15 summarize it easily -- and, of course, I did in the brief, I
16 think you saw, that in that concurring opinion and because
17 it's a concurring opinion, it's not binding authority yet.

18 Judge Kavanaugh mixed up what you would try in a law
19 of war military commission versus what you would try in a
20 martial law military commission. Because like he dealt with
21 the Lincoln conspirators, and since martial law was in force
22 in this area, then all kinds of civilian law could be tried in
23 that kind of commission because it was meant to replace

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1 civilian courts that weren't -- that weren't in force.

2 There's a similar issue that you have on 502
3 reconsideration, which I'm not talking about today, but it's
4 before you, with occupied territory commissions. There's a
5 case of Madsen v. Kinsella where the U.S. had commissions that
6 were enforcing German domestic law because those were the only
7 courts in force and in Kuwait. In commissions like that you
8 can try whatever kind of law there is locally.

9 But as the Supreme Court plurality noted in
10 Hamdan v. Rumsfeld, law of war commissions are a completely
11 different sort of creature from that. They're supposed to
12 enforce only the law of war. And that was the innovation that
13 Congress came up with in the statute, which helps to show that
14 it was aimed specifically at this case.

15 In addition, the statute says that persons who are
16 part of al Qaeda can be subject to commissions here. We had
17 some argument on 502 as to how to interpret that, whether
18 that's enough alone. But supposing it is, you're again taking
19 a specific group of people, a specific organization, and
20 saying by being a member of this, you can lose some rights.

21 MJ [Col COHEN]: You're -- as a military officer, though,
22 aren't you subject to the same kinds of restrictions? I mean,
23 there are restrictions put on your constitutional rights with

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1 respect to what you can and can't say. You're told that you
2 do not get the right to go to an Article III court necessarily
3 because you ----

4 DC [MAJ WILKINSON]: Yes, sir.

5 MJ [Col COHEN]: ---- because you're subject to the
6 Uniform Code of Military Justice; that you now, based on your
7 status as an officer, are subject to exclusive -- telling me
8 to slow down -- to exclusive offenses such as an Article 133
9 offense that is only based on your status as that. And so
10 there's a special course that Congress has enacted for
11 military members.

12 How is that distinguishable from what they've done
13 here? And I'm -- I mean that with all sincerity. How is that
14 distinguishable and the idea that there is precedent for
15 Congress saying this status of person, based on their
16 affiliations with this organization, shall be tried in this
17 type of trial?

18 DC [MAJ WILKINSON]: That has to do with the timing, sir.

19 MJ [Col COHEN]: Okay.

20 DC [MAJ WILKINSON]: Because when Congress, say, passed
21 the statute that says commissioned officers cannot criticize
22 the Vice President or the Secretary of Transportation -- I
23 guess that should be Homeland Security now, but that -- they

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1 didn't say anybody who five years ago criticized the Secretary
2 of Transportation can now be court-martialed. If they did
3 that, that might get into attainder territory.

4 MJ [Col COHEN]: But when they established the -- at least
5 the current version of the Uniform Code of Military Justice, I
6 mean, they established the specific tribunal system, for lack
7 of a better word. They took around certain rights to
8 unanimous jury verdict, all of those kinds of things. And all
9 of those would have been enacted for -- if the law of war
10 predated these acts, I'm making that assumption assuming
11 arguendo, then there is no ex post facto. So assuming --
12 because you're not arguing ex post facto at this point, we're
13 arguing bill of attainder.

14 So assuming arguendo, simply arguendo, that
15 ex post facto does not apply, so the crime itself existed
16 prior to this, why is a change of forum a bill of attainder as
17 opposed -- in the sense that you're arguing it?

18 DC [MAJ WILKINSON]: All right. Firstly, I want to
19 correct also part of what I said.

20 You might argue that when it comes to just
21 specificity, that the UCMJ is specific because it applies to
22 military members, but when you came to the issue of
23 punishment, the next element, it wouldn't be considered

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1 punishment because it is prospective.

2 There's an analogy with U.S. v. Brown where Mr. Brown
3 was being prosecuted because of an act that said if you were a
4 member of the Communist Party in the last five years, you
5 can't now be a union officer. The Supreme Court suggested if
6 you had made it prospective, if you had said in the future,
7 you know, you cannot be a current member and a union officer,
8 that might be carrying out a legitimate goal to stop strikes
9 or whatever.

10 But, in fact, they have the words "because it is past
11 conduct." When you take conduct that is past conduct and then
12 you lay a congressional punishment upon that, that you're in
13 bill of attainder territory if it's done to a specific group.

14 MJ [Col COHEN]: Do I need to find that an individual has
15 a right to an Article III trial at all times in order to find
16 that there's a loss of that right?

17 DC [MAJ WILKINSON]: I do not say at all times, sir. But
18 I do say -- and may as well talk about that exactly now --
19 that the defaults under the U.S. Constitution under
20 Article III that simply says the trial of all persons shall be
21 by jury, that the default -- not even the trial of all
22 persons, the trial of all crimes -- it doesn't specify what
23 kind of persons -- that the default is that everyone, whether

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1 a citizen or alien or belligerent or not, if he's to be tried
2 for a crime is to be tried by jury.

3 There is an exception for law of war commissions,
4 where if you do a war crime, you can go there. In fact, there
5 is specific language in Ex Parte Quirin that we quote often,
6 and I'll mention again now, that goes to that very point.

7 As you know, Quirin and almost all of his co-accused
8 were noncitizens. One may have been a U.S. citizen by birth.
9 They were accused of being saboteurs in support of the German
10 war effort, and what they were contesting was the jurisdiction
11 of a law of war commission.

12 And what the Supreme Court said was, very memorably,
13 that they were outside the constitutional guarantee of trial
14 by jury not because they were aliens but only because they had
15 committed acts or were accused of acts that violated the law
16 of war, which made their case constitutionally triable by
17 military commission.

18 In their case, they were contesting whether or not
19 sabotage was a war crime. In our case, we tried to contest
20 whether there was even an armed conflict to have war crimes
21 in. But unlike them, we've been prevented from contesting the
22 merits of that, which is part of the whole issue.

23 And in addition to that, I'll also say -- and I mean

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1 to say in some more detail -- that some of the rights that
2 have been taken from Mr. Hawsawi are not simply the right to
3 an Article III court but the rights that he should have in a
4 military commission under the law of war itself.

5 So, in fact, why don't I simply go to that. I think
6 you have my point about taking rights from members of
7 al Qaeda.

8 MJ [Col COHEN]: I do.

9 DC [MAJ WILKINSON]: It's very analogous from taking them
10 from members of the Communist Party.

11 MJ [Col COHEN]: I do. And I appreciate the responses to
12 the questions that I have provided so far.

13 DC [MAJ WILKINSON]: That's what it's for, sir.

14 All right. But the punishments that we're
15 complaining about are deprivations of right. And I do want to
16 be sure that I articulate this carefully. I noticed in that
17 CMC al Bahlul case, a big part of the decision against him is
18 he was not able to articulate how he had the rights he was
19 complaining about. We have articulated in the briefs and want
20 to do so again so there is no question about that.

21 Before the statute, before the first Military
22 Commissions Act came out, Mr. Hawsawi had rights under Common
23 Article 3 when it comes to military court and the Constitution

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1 in federal law when it comes to civilian trial; and he had
2 those rights both de jure and de facto.

3 I'll talk first about Common Article 3. If you've
4 read Common Article 3 of the Geneva Conventions of 1949, it
5 says that persons taking no active part in the hostilities get
6 certain rights at any time and any place whatsoever. It does
7 not say only privileged persons get these rights. It does not
8 say only prisoners of war get these rights. In fact, in a
9 noninternational armed conflict, there is no such thing as a
10 prisoner of war; that only applies to international rights.

11 But the point is, the act says it. If you are out of
12 the fight, if you're hors de combat because you're wounded or
13 captured or detained or whatever, you get those rights.
14 Mr. Hawsawi had them before this act was passed.

15 June 2006, also before this first act was passed, the
16 Supreme Court affirmed exactly that in Hamdan v. Rumsfeld.
17 They said if you are tried in a military commission, whether
18 it's international, noninternational armed conflict, whatever,
19 you get Common Article 3 rights. They do not impose a
20 requirement of privilege; you just get them.

21 In September 2006, also before the statute, the
22 Secretary of Defense reissued the DoD detainee program, which
23 is DoD Directive 2310.01E. And it reaffirmed what the

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1 Supreme Court had said and what was the law before, that
2 everybody captured and held by the U.S. military, by the
3 Department of Defense, gets his rights under Common Article 3.
4 They even used the phrase "regardless of legal status." No
5 requirement of privilege. No requirement of prisoner of war
6 status.

7 So before the Military Commissions Acts were passed,
8 Mr. Hawsawi's position -- Mr. al Hawsawi had full rights under
9 Common Article 3, no privilege required. And incidentally,
10 since I think this term of "unprivileged" is going to come up,
11 I will mention what's in my brief.

12 As I said, we had an expert testify on law of war
13 issues in December 2017. On page 18219 of the transcript, he
14 was being cross-examined. Mr. Trivett asked him about this
15 business of unprivileged enemy belligerents, and he testified
16 that in the law of war, there is no such thing. That status
17 is a creation of the statute and that has consequences, but it
18 is not a preexisting issue under the law of war. You simply
19 didn't need privilege or prisoner of war status in order to
20 have Common Article 3 rights.

21 So one of those rights, and the one that we
22 specifically deal with in this motion, is the right to a
23 regularly constituted court. And as the Supreme Court

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1 explained it in Hamdan v. Rumsfeld, a regularly constituted
2 court basically gives you the same rights as a servicemember
3 at court-martial of whichever power is doing the prosecution.

4 That's actually very logical, because court-martial
5 is something that's designed to be done during war or even in
6 combat zones. I think a lot of people in this room have tried
7 courts-martial in combat zones. So when setting some kind of
8 minimum standard for what rights you get trying people
9 detained in war, court-martial is a good minimum standard; and
10 that's what's required as the Supreme Court interprets Common
11 Article 3.

12 But they also said -- in Hamdan v. Rumsfeld, they
13 said not only the rules must be the same as those applied at
14 court-martial unless such uniformity proves impracticable, but
15 they don't allow the government to just hand wave the issue of
16 impracticality. They said, government, if you want to deviate
17 from court-martial procedures, you'd better be able to explain
18 why it's not practical.

19 And, in fact, that's why Hamdan ultimately prevailed.
20 They had very permissive rules of evidence. And when the
21 Supreme Court said, you know, why not just use the Military
22 Rules of Evidence, the government did not have a good enough
23 explanation for that, and this is why he prevailed.

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1 I might say one more thing on that. You could think
2 of this as a nondiscrimination requirement; it occurs to me
3 that's a good way to look at it. Just as on the battlefield,
4 when you're collecting and treating the wounded, you don't get
5 to distinguish between friend and enemy and say we treat
6 friendly before enemy. You have to treat them according to
7 medical necessity.

8 Likewise, when it comes to prosecuting people
9 detained in war, you don't distinguish between friend and
10 enemy, at least not in the generality, but you give them the
11 same rights. And none of this relies on any privilege such as
12 the statute imposes. It's just there.

13 Now, soldiers at courts-martial receive a lot of
14 rights, and this is, of course, relevant to a point you
15 brought up this morning: How much does the Constitution apply
16 here? We say, under Common Article 3, it applies every bit as
17 much as it would to a servicemember, but that's not a big
18 issue on this particular motion because -- it is partly, but
19 only certain rights did we talk about that the statute very
20 explicitly takes away.

21 One right that it takes away is a military-specific
22 enhanced speedy trial right under Article 10 of the UCMJ. If
23 you're confined before trial, you get these enhanced

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1 procedures for ensuring you have a speedy trial, in addition
2 to Sixth Amendment rights, which soldiers also get, but which
3 I didn't see the statute say anything about taking them away.
4 But the Military Commissions Act does take away this
5 Article 10 right quite explicitly.

6 There is also a military-specific right to rights
7 warnings under Article 31 of the UCMJ. If you are questioned,
8 you get a rights warning, including a warning that it might be
9 used against you; that you have the right to counsel, and
10 that's over and above Miranda rights which also apply in
11 military courts, though they're not often needed because of
12 Article 31. But the Military Commissions Act takes that right
13 away specifically.

14 There is also a right to equal access to witnesses,
15 and you know what that means. I mean, having practiced in
16 courts-martial, normally if you are a prosecutor, you
17 interview a witness, you say if the defense wants to talk to
18 you, talk as freely to him as you do to me. We do that all
19 the time. I won't go into a lot of details on that here. You
20 started delving into the protective orders and the business on
21 524. You can see that is not what is going on in this case.

22 Again, this is not just theory of what Common
23 Article 3 requires, but it was what the Supreme Court and the

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1 Department of Defense explicitly required before these acts
2 came out.

3 All of that is assuming even 9/11 was an armed
4 conflict, and I've already said, you know, and reaffirmed that
5 under Ex parte Quirin and under the Constitution, they're not
6 supposed to even take a case to a law of war commission unless
7 they can show they're dealing with real war crimes in a real
8 war crimes tribunal; and that we've been prevented from
9 arguing on the merits -- or we argued it, but the commission
10 then said Congress took that away from you.

11 MJ [Col COHEN]: Well, I guess just on that issue a little
12 bit.

13 DC [MAJ WILKINSON]: Yes, sir.

14 MJ [Col COHEN]: I understand what the elements of the
15 offenses are, and so you will still have the right to -- I
16 mean, one of the things that the government will have to
17 prove, that there was, I believe, with respect to most of
18 these offenses, not all of them, based on what I remember
19 looking at the elements, was that hostilities or things along
20 those lines were part of the elements of the offense. So the
21 government still has to prove that beyond a reasonable doubt,
22 and then you all get to demonstrate how the government has
23 failed to prove that.

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1 So -- but on a jurisdictional issue, whether or not
2 hostilities existed or did not exist, is that a true legal
3 determination? Or does the political branch and/or, I guess,
4 even the Executive Branch get to determine whether or not
5 hostilities exist?

6 I mean, that's the way I read those opinions -- those
7 rulings by the other judges in theory, was that they were
8 simply saying, Look, they have spoken. I am bound on a
9 jurisdictional matter with respect to that limited issue as to
10 what those -- the two branches of government have determined,
11 and therefore it's outside the scope of the Judicial Branch,
12 so to speak, although recognizing that this is -- that I am
13 part of the Executive but nonetheless in a judicial role.

14 DC [MAJ WILKINSON]: Right. And that very question is
15 something that we have argued extensively before. Most
16 recently in 617 and '20 -- I think 620 is still in front of
17 you -- Judge Parrella asked us to brief a set of issues about
18 the need to prove hostilities and what sort of requirement it
19 is.

20 Our brief on the subject was 617G, 620F. We take the
21 view that hostilities is not -- I mean, Congress could or
22 could not, if they wished to, make it an element of the
23 crimes, but that is not nearly enough to satisfy the

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1 Constitution, which requires that to put people in a military
2 commission in the first place, you have to have hostilities.

3 There were also constitutional -- there is case law
4 saying that jurisdictional issues like that are supposed to be
5 determined as a threshold matter as early as possible. And I
6 know I quote that in 617, '20, and also in the 488 and 502
7 series; and in 502, you have some reconsideration in front of
8 you also, which I think we quoted in.

9 MJ [Col COHEN]: Okay.

10 DC [MAJ WILKINSON]: And obviously it isn't threshold when
11 you say let's try you all the way to the end with this
12 military panel full of Global War on Terror veterans wearing
13 these Global War on Terror service ribbons who have been told
14 for 18 years you are the enemy, and then they decide if they
15 have the power to try you or not. In fact, we've argued that
16 that amounts to letting a group of military officers go off in
17 a secret room and decide for themselves do they want to punish
18 the 9/11 accused or not. That is not a substitute for a
19 judicial determination; and in reconsideration on 502, any
20 other reconsiderations, we do -- that issue is very much at
21 issue.

22 MJ [Col COHEN]: Copy. All right.

23 DC [MAJ WILKINSON]: But for this motion, the point being

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1 that by taking that from us, that it deprived Mr. Hawsawi by
2 direct congressional action of trial by jury as well as of the
3 civilian rights, including the full set of constitutional
4 rights that would apply in a commission, although most of
5 those are not ----

6 MJ [Col COHEN]: When you said a "trial by jury," are you
7 asserting that a panel of 12 members is not a jury?

8 DC [MAJ WILKINSON]: Absolutely. And I will say the
9 Supreme Court asserted that exact same thing in the case of
10 Reid v. Covert, which I know we've cited in our initial brief
11 and we have cited it before, and it's in the 502 stuff as
12 well, which said that, you know, above -- I mean, looming
13 above all the other defects of a military trial is the absence
14 of trial by jury.

15 In addition ----

16 MJ [Col COHEN]: That case is from the 1950s, correct?

17 DC [MAJ WILKINSON]: That is correct, sir.

18 MJ [Col COHEN]: How do you distinguish that from
19 Justice Kagan's recent opinion where she lauded the military
20 justice system and the implementations that have been taken
21 over the last six decades?

22 DC [MAJ WILKINSON]: Easily. Because regardless of all
23 the rights that are provided in military court -- and we have

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1 much experience with those, all who practice military
2 justice -- it still doesn't change the fact that a panel of
3 officers is not a jury.

4 The Sixth Amendment tells you what a jury is supposed
5 to be, and there's a lot of case law interpreting it; that
6 it's supposed to be representative of the community where the
7 crime is supposed to have taken place.

8 And in this particular case in addition, as I alluded
9 to a moment ago, there is an extra inherent bias that would
10 never pass muster in a civilian court; and that is, after the
11 government has spent 18 years telling us all we are veterans
12 of the Global War on Terror which began with 9/11, and, as I
13 say, we get, you know, ribbons and medals based on it, and
14 everyone has either gone to or been trained by people who have
15 gone to some part of a fight against al Qaeda or knows someone
16 who has, to then say this group will now give us a wholly
17 unbiased opinion about the 9/11 attacks, I don't see how that
18 would get past voir dire and striking in a civilian court, but
19 it's assumed in a military court. So that is a substantive
20 difference, sir.

21 MJ [Col COHEN]: But in your motion, you talk about how
22 these were originally -- that at some point, these were going
23 to be prosecuted in the Southern District of New York,

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1 correct?

2 DC [MAJ WILKINSON]: That is correct. They did an
3 indictment.

4 MJ [Col COHEN]: So wasn't that the actual site of -- you
5 know, that general area is the actual site of where these
6 allegedly occurred? So why wouldn't you have the same
7 concerns of the general public there that you would have of
8 military officers?

9 DC [MAJ WILKINSON]: Well, simply because the general
10 public has not received indoctrination firstly that this is a
11 Global War on Terror and that this day was the beginning of
12 it.

13 MJ [Col COHEN]: I understand. Thank you.

14 DC [MAJ WILKINSON]: Right. So, you know -- I mean, I
15 don't say there wouldn't be biased people; there very likely
16 would, and that would have to be fought. But just -- it's a
17 different order.

18 And I did want to say, also, that these rights --
19 jury trial and the other civilian rights -- are not just
20 theoretical either out of Article III, although Article III
21 would be good enough, that they were de facto. You have not
22 only the finding in Ex parte Quirin that I mentioned, but we
23 have pointed you towards Exhibits 502BBB through EEE, which we

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1 submitted they were part of the submissions on 502. And each
2 of them is an interview by the FBI of a suspect in the embassy
3 bombings or the COLE bombings. They all got their Miranda
4 rights. It's on page 1 or 2 of each statement, including that
5 the statements could be used against them, they would have a
6 right to counsel.

7 And when the embassy bombing suspects were
8 prosecuted -- and we cited you to the In Re Terrorist Bombings
9 case -- they were able to contest were the Miranda rights good
10 enough, were the jury instructions good enough. They lost
11 because they were. But the point is, that was a right that
12 existed and was actually being exercised before these Military
13 Commissions Act came in.

14 I should also say one other thing. As you see, this
15 motion is tailored to rights that are, on the face of it,
16 taken away by the Military Commissions Act. I've noticed that
17 in recent filings in the suppression area, the government, as
18 in 628C on page 22 and 630C on page 16, they seem to suggest
19 that the act takes away even more. They want to say the
20 accused have no Fifth or Sixth Amendment-based rights unless
21 the statute gives it to them.

22 We don't accept that. We didn't make that part of
23 this motion. If you were to accept that, that would intensify

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1 the punishment we're complaining about with respect to bill of
2 attainder.

3 MJ [Col COHEN]: I understand. Thank you.

4 DC [MAJ WILKINSON]: Right. Now that I've talked about
5 what the punishment is and articulated it in the way
6 Mr. al Bahlul could not, I can talk about the three tests for
7 punishment.

8 Firstly, the historical test, which is a very easy
9 one to understand. You look at whichever rights are being
10 lost; you look at other things that have been held to be bills
11 of attainder and compare.

12 So in Ex Parte Garland, for example -- that was one
13 of the post Civil War cases -- Mr. Garland lost one thing: He
14 lost the right to practice law in a federal court. He was
15 otherwise a free man, had the freedom of speech, the freedom
16 to do anything he liked except practice law there. That was
17 still punishment.

18 U.S. v. Brown, the only right he lost was the right
19 to hold office in a labor union. He could do anything else, a
20 free man, even join a union, just not hold office.

21 So compare that with what Mr. Hawsawi is losing here.
22 He is losing an enhanced speedy trial right in a death penalty
23 case. He is losing the right to a rights warning, both

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1 civilian and military, in a death penalty case. He is losing
2 stricter authentication of documents used against him in a
3 death penalty case. He is losing equal access to witnesses in
4 a death penalty case. And he is losing trial by jury in a
5 death penalty case.

6 Firstly, those do not compare in magnitude to the
7 rights I was talking about before in Brown or Garland. But if
8 you notice, this is actually conceptually much closer to the
9 original old world bills of attainder that the clause came
10 from, the ones where parliament might say, Thomas Cromwell or
11 George Duke of Clarence, you are to be executed. They didn't
12 order directly the execution of these men, including
13 Mr. Hawsawi; they just said you're going to a military
14 tribunal, and we're going to tilt the playing field in the
15 government's favor compared to other trials you would always
16 have.

17 But Cummings v. Missouri, one of the cases we cite,
18 says that what cannot be done directly cannot be done
19 indirectly. If they can't directly order the execution, they
20 can't order a trial and then slant it in the government's
21 favor. So under the historical test, that's a worse sort of
22 punishment than any of the historical U.S. cases that I've
23 seen.

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1 And actually, because I'm talking about the death
2 penalty, I want to say one aside to something the government
3 said. The government has asserted that there is a minimal
4 difference between this commission and a court-martial or a
5 civilian trial. I have to propose to you that in a death
6 penalty case, there are no minimal differences.

7 You have some familiarity with death penalty
8 standards where we, for example, have an enhanced duty to
9 research any little piece of evidence that might make the
10 difference between life and death. That being so, these
11 differences are magnified greatly when they could be used to
12 lead to the death penalty.

13 Also, the D.C. Circuit has said that you don't read
14 the bill of attainder clause narrowly, you read it broadly to
15 prevent Congress from coming up with newfangled ways to get
16 around it. That's what I wanted to say about the historical
17 test.

18 MJ [Col COHEN]: All right. Thank you.

19 DC [MAJ WILKINSON]: The motivational test is a test about
20 context. This is the one where you look at legislative
21 history. You look for congressional intent to punish. And as
22 the Nixon v. Administrator said, courts conduct the inquiry by
23 looking at legislative history, context or timing of the

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1 legislation, or specific aspects of the text or structure.

2 You're looking at the context.

3 So in a case like Foretich ----

4 [Chime sounds.]

5 MJ [Col COHEN]: I think it's telling us it's noon.

6 DC [MAJ WILKINSON]: Right.

7 MJ [Col COHEN]: I assume that's what that was.

8 DC [MAJ WILKINSON]: Yes, sir.

9 MJ [Col COHEN]: Okay.

10 DC [MAJ WILKINSON]: Anyway, Foretich v. United States,

11 they quoted a couple of congressmen from a subcommittee

12 hearing that was relevant. We have more punitive legislative

13 history than any historical U.S. case that I have found in

14 researching for this.

15 So I'm not going to quote all the things that we gave

16 you on pages 17 and 18 of both briefs, but I do want to quote

17 a few. So Senator Sessions talking about the 2006 Act said,

18 "Let's be sure that these extraordinary protections that we

19 provide to American soldiers and American civilians, that we

20 don't give them to people who have no respect for our law."

21 So he's not just talking about military jurisdiction, he's

22 talking about taking rights away; punishment.

23 Senator Cornyn, on the same act, "An American citizen

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1 accused of a crime, where certainly the desire and the order
2 of business is to protect that individual and to make sure
3 that the full panoply of the Bill of Rights applies to that
4 individual, different considerations apply when you are
5 talking about a declared enemy."

6 Again, talking about taking rights away, punishment
7 in the meaning of the bill of attainder clause.

8 Senator John Warner from Virginia said, "We have no
9 intention to try to accord aliens engaged as unlawful
10 combatants with all the rights and privileges of American
11 citizens." Again, punitive intent.

12 Now, in discussing the 2009 Act and in dealing with
13 it, Congress also showed that it was acting, not just as
14 individual speakers but as a whole, to try to impose this on
15 these accused. So Senator McConnell, talking about the
16 2009 Act, said Congress created the system on a bipartisan
17 basis precisely to deal with prosecution of al Qaeda
18 terrorists.

19 The Senate reaffirmed this view two years ago, voting
20 94 to 3 against transferring detainees from Guantanamo to
21 stateside, including 9/11 conspirators.

22 We reaffirmed it again when we voted 90 to 6 against
23 using any funds to transfer any of the Guantanamo detainees to

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1 the United States. Sometimes it seems like the only people
2 who do not believe men such as 9/11 mastermind Khalid Shaikh
3 Mohammad should be treated as enemy combatants are in the
4 administration. This was in response to President Obama's
5 effort to move this case to a civilian court with a full set
6 of civilian rights which led to that indictment that we were
7 talking about a minute ago.

8 Shortly after -- I'll give you one more quote.

9 Shortly after the 2009 Act was passed, Representative McCaul
10 gave a very telling speech. He said, "By the way, Ramzi
11 Yousef did not get the death penalty. Zacarias Moussaoui did
12 not get the death penalty because a lot of evidence was held
13 to be inadmissible in a federal court. The fact is you bring
14 them on American soil, give them rights under the
15 Constitution -- why does Khalid Shaikh Mohammad get
16 constitutional rights?" So it shows they are not just
17 interested in taking rights in a military trial but in making
18 it easier to get the death penalty, which is not just
19 punishment but the ultimate punishment.

20 That fits in with the signing statement that we gave
21 you as Attachment B to 625E in the aftermath of the 2009 Act.
22 Again, that was President Obama objecting strongly to how
23 Congress was forcing this case into a military trial instead

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1 of into a civilian trial.

2 I ought to say a word or two about why Congress was
3 doing this, actually. We gave you -- and I'm afraid I'll
4 break my promise and quote a couple more -- that
5 Representative Sensenbrenner said that the administration was
6 on track and Congress was to respond to the demands of the
7 American people who overwhelmingly opposed bringing Khalid
8 Shaikh Mohammad and cohorts to the U.S. for trial.

9 Representative Saxton that I quoted earlier from the
10 al Bahlul D.C. Circuit opinion said, "Importantly, this bill
11 allows, as all Americans believe it should, the criminal
12 prosecution of those who purposefully and materially supported
13 the 9/11 conspiracy."

14 As noted by those speeches, Congress was doing a
15 popular thing; they were pleasing the constituents back home.
16 Indeed, they were showing more bipartisanship than we often
17 have seen from them. It's effective politics. And they were
18 talking about these people and denouncing them on the floor of
19 Congress, that so many Americans hate, and saying, "We'll take
20 their rights." It's what you might expect from the incentives
21 Congress has, which is to please the people back home. And if
22 we had no Constitution, that would be that. If the people
23 want it, Congress does it. That settles it.

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1 But, of course, the whole point of a constitution, of
2 limits on congressional power, and particularly something like
3 the bill of attainder clause, is to stop the government from
4 doing things like this, that are popular but that damage the
5 rule of law and the Constitution of order.

6 Indeed, the Nixon case has a quote on that. The
7 Supreme Court said a major concern that prompted the bill of
8 attainder prohibition is the fear that the Legislature seeking
9 to pander to an inflamed popular constituency will find it
10 expedient openly to assume the mantle of judge or even lynch
11 mob. We don't need a bill of attainder clause to stop
12 Congress from doing popular things, the voters will stop that.
13 It's here for when the people that it's pointed at are
14 extremely unpopular, or at least controversial; that includes
15 these men, that includes Mr. Hawsawi, and it includes now.
16 What they did was popular, it wasn't lawful.

17 I will talk about the functional test. In the
18 functional test, you are supposed to compare the burden
19 imposed by the statute, which is the deprivation of rights
20 that I was talking about a while ago, with any alleged
21 nonpunitive administrative purpose. In Kaspersky Lab, the
22 D.C. Circuit said you identify the purpose, ascertain the
23 burden, and assess the balance between the two.

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1 In order to beat the functional test, the government
2 has to come up with a nonpunitive administrative purpose.
3 They have to be specific, and they have to establish it as
4 clear and convincing. And then even if they do that, that
5 does not mean they win because first, you must balance it
6 against the burdens; and then secondly, if we can come up with
7 less burdensome alternatives, then you have to compare it to
8 that to see could they accomplish whatever good purpose there
9 was with a less burdensome alternative that is not too heavy
10 on these important rights.

11 The government hasn't come up with one specific
12 nonpunitive administrative purpose for this act at all, but in
13 case they do, we have listed two less burdensome alternatives.
14 One of those is trial by a civilian court. We know that's
15 practicable because it's been done.

16 In Zacharias Moussaoui's case, he was accused of
17 conspiring to commit the 9/11 attacks, and yet he was indicted
18 in 2001 and convicted in 2005 with a full set of
19 constitutional rights, less burdensome -- a lot faster, also
20 less burdensome to his speedy trial rights than Mr. Hawsawi's
21 that have been violated for 16 years. And it worked.

22 Another possibility would be a military commission
23 that is regularly constituted; that simply gives Mr. Hawsawi

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1 all his rights under Common Article 3, including rights
2 warnings, Article 10 speedy trial, and so forth. And, you
3 know, it's still military. We still get to argue the merits
4 of whether it belongs in a military case but make it regularly
5 constituted.

6 Either of those things could have been done instead
7 of what we have here. Either would be a lesser burden on
8 Mr. Hawsawi's rights. And if the government comes up with an
9 administrative purpose, I suggest you must balance it against
10 that.

11 And I will also say, while they don't give a specific
12 purpose, the government does talk about there is the needs of
13 doing these trials in the middle of war, the exigencies of
14 war, battlefield needs, and so forth. But I will point out
15 not only the other cases that have been tried in this area but
16 that courts-martial, as I mentioned, are designed to be done
17 during war and often are.

18 So giving Mr. Hawsawi his rights would be quite
19 practical, and the government fails under the functional test.
20 So much for punishment.

21 I want to say a little bit about the requirement that
22 punishment be without judicial trial to violate the bill of
23 attainder clause. I alluded to this at the beginning. The

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1 important thing to understand is that if the rights are taken
2 before there is any trial, they're taken without judicial
3 trial. As I said, you can lose some rights if you've been
4 convicted, but, for example, you have the situation right now
5 in the suppression motions in front of you.

6 The government, on those pages that I alluded to, say
7 Mr. Mohammad, Mr. Binalshibh, Mr. al Baluchi don't get rights
8 warnings under Article 31 of Miranda because the statute takes
9 them away. They haven't been tried yet. They've had no trial
10 at all. Their rights are already gone.

11 If you have a right to trial by jury and the
12 government takes or the statute takes that away, it's gone
13 before you've been convicted, before you've had a trial, so
14 the deprivations are without judicial trial. Some of the
15 historical examples that we gave you illustrate that, and
16 we've said it in the briefs already.

17 Father Cummings lost his right to serve as a
18 clergyman in the state of Missouri. He got a trial to
19 determine whether he was violating that particular act, but
20 that didn't matter; he lost the right first, then he got the
21 trial. The same with Mr. Brown and holding union office.

22 So Mr. al Hawsawi has lost various rights. He hasn't
23 had a trial yet and hasn't been convicted of anything.

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1 Deprivations without judicial trial.

2 I ought to say just a little bit about the remedy.

3 We're asking for dismissal, of course. There are good reasons
4 for that. If the only thing the statute did was to take away
5 rights warnings under Article 31 and Miranda, potentially you
6 could say, all right, the remedy is I'm going to suppress the
7 statements that were taken without rights warnings.

8 Effectively, if not linguistically, that would be giving back
9 the right that's been deprived, and that can be done.

10 You might be able to impose a heavier authentication
11 requirement similar to M.R.E. 902 that, at the moment, they
12 don't have to obey and still have a trial. But one of the
13 rights that the statute takes away is the enhanced Article 10
14 speedy trial right under the military -- under the UCMJ that
15 he would have under Common Article 3. And the remedy for a
16 violation of that right is dismissal with prejudice. So if
17 the statute takes that right away, then the only way to remedy
18 what he could have had with it, especially after 16 years, is
19 dismissal with prejudice.

20 Likewise, when it comes to the deprivation of trial
21 by jury, without even letting him argue the merits of whether
22 it belongs here to the judge, that takes a right that is
23 considered structural. And we gave you authorities in the

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1 briefs, that when you lose that wrongly, you don't even test
2 for prejudice. If you should have had trial by jury and you
3 don't, reverse the conviction, dismiss the case.

4 As I said a minute ago, Congress definitely did a
5 popular thing when they denounced these accused in Congress
6 and passed this act to take their rights away. What we are
7 urging you to do is not the popular thing but the lawful
8 thing. And if you do the lawful thing, the case against
9 Mr. Hawsawi is over.

10 Have you any questions of me, sir?

11 MJ [Col COHEN]: No. I've asked them as I went along.
12 Thank you.

13 DC [MAJ WILKINSON]: Thank you, sir.

14 LDC [MR. RUIZ]: Judge, may we have a moment to confer?

15 MJ [Col COHEN]: You may.

16 Mr. Connell, while they're conferring, I'll recognize
17 you.

18 LDC [MR. RUIZ]: Judge, may I -- I'm not sure what
19 Mr. Connell is getting ready to address, but I will point out
20 that if he's going to argue on this motion, I will object.

21 MJ [Col COHEN]: Okay.

22 LDC [MR. CONNELL]: [Microphone button not pushed; no
23 audio.]

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1 LDC [MR. RUIZ]: And we object because Mr. Connell has
2 declined joinder.

3 MJ [Col COHEN]: I do have a notice that he -- that he
4 declined to join this one.

5 LDC [MR. RUIZ]: Yes, sir. So we object to any argument
6 on the substance of this argument.

7 MJ [Col COHEN]: Okay. I'll find out what the matter is.
8 Thank you.

9 LDC [MR. RUIZ]: Sure.

10 MJ [Col COHEN]: Mr. Connell.

11 LDC [MR. CONNELL]: Your Honor, as Mr. al Hawsawi notes,
12 we have declined joinder to this particular argument. I'm not
13 going to argue against it.

14 There are five questions that you asked over the
15 course of the argument which affect other motions on which
16 Mr. al Baluchi is the primary movant or is particularly
17 involved. And so since you asked those questions, I wanted to
18 just point you to where our positions are in the record in
19 case -- because I don't want us to be disadvantaged by you
20 ruling on some important questions without -- in this narrow
21 context without the advantage of at least knowing what our
22 position is.

23 MJ [Col COHEN]: Okay. I'll give you a couple of brief

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1 minutes to say, Okay, this issue is located in this location.
2 And I will not treat that as argument either for or against
3 this motion but just that I may want to consider context in
4 ruling on this motion.

5 LDC [MR. CONNELL]: Absolutely.

6 LDC [MR. RUIZ]: Judge, if it's just a reference to a
7 particular cite, we have no objection. If there is any
8 substantive argument, we do object.

9 MJ [Co1 COHEN]: Thank you.

10 I will not allow any substantive argument, just
11 simply if you want to point me to something, then --

12 LDC [MR. CONNELL]: I understand, sir.

13 MJ [Co1 COHEN]: I've asked both sides to tell me about
14 things in the record, so I appreciate it. Thank you.

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

16 The first is with the reading of AE 502BBBB.

17 MJ [Co1 COHEN]: Yes.

18 LDC [MR. CONNELL]: And our positions there are found at
19 AE 502EEEE ----

20 MJ [Co1 COHEN]: Okay.

21 LDC [MR. CONNELL]: ---- and AE 502HHHH.

22 MJ [Co1 COHEN]: Thank you.

23 LDC [MR. CONNELL]: HHHH is the motion to reconsider.

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1 It's still before the military commission right now, waiting
2 for a ruling.

3 MJ [Col COHEN]: Okay. Thank you.

4 LDC [MR. CONNELL]: And you asked about -- the other thing
5 I wanted to point out to you, which I know that you have --
6 are the disadvantage of, the only person in the room who
7 hasn't been able to see 628G yet because it was submitted for
8 filing last Thursday but it hasn't been accepted for filing
9 yet.

10 But in that, we lay out all the motions that we
11 believe have previously been argued but are pending decision
12 by the military commission as a -- as a -- sort of a proposed
13 assistance to the military commission.

14 MJ [Col COHEN]: I really appreciate that. That will be
15 great. I'll be able to work with my staff and the parties to
16 then address some of those outstanding issues. Thank you.

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

18 The second thing is, you asked about
19 Judge Kavanaugh -- then Judge Kavanaugh's position on
20 conspiracy in the Bahlul case at 767 F.3d 1, where he had a
21 concurrence in the judgment in part and a dissent in part.
22 And I just wanted to point out our position on that is at AE
23 490F at pages 12 through 24, where we explain the plain error

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1 context and which Judge Kavanaugh specifically addressed.

2 Both the judges who supported the ultimate conclusion
3 and who opposed it thought it did not provide additional
4 guidance going forward to military commissions because of its
5 plain error context.

6 MJ [Col COHEN]: Okay. Thank you.

7 LDC [MR. CONNELL]: The third question that you asked was
8 about retroactive disadvantage, whether a forum change is a
9 sort of constitutional event under at least the ex post facto
10 clause.

11 Our position on that question is found at AE 490F,
12 pages 8 through 12, in which we explain that the Hamdan
13 majority, Stevens plus four justices, sort of addressed that
14 in this particular context because the Detainee Treatment Act
15 of 2005 was a jurisdiction-stripping event. And said normally
16 that would not be a retroactive disadvantage, but when it
17 affects the ----

18 LDC [MR. RUIZ]: Objection, Judge.

19 MJ [Col COHEN]: Okay. I will look at that -- I will look
20 at that motion. I think he's objecting because it may be
21 substantive argument, so...

22 LDC [MR. CONNELL]: Thank you.

23 MJ [Col COHEN]: But I will look specifically at those

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1 pages. Thank you.

2 LDC [MR. CONNELL]: Sure.

3 Your fourth argument you asked was about the
4 application of the Constitution. Our view is narrower, and it
5 was initially articulated at AE 057. The military commission
6 ruled on that in AE 057C saying that we were going to have to
7 take it up on a right-by-right basis. And we will be
8 addressing the application of the due process clause and the
9 self-incrimination clause specifically in our upcoming filing
10 that's due on July 1st in the 628 series.

11 MJ [Col COHEN]: All right. Thank you, sir.

12 LDC [MR. CONNELL]: Finally, Your Honor, you asked about
13 hostilities as a political question. Our position is found at
14 617F/620E, which are a combined pleading, at pages 26 through
15 37, in which we explain the application of Hamdan and the more
16 recent al Nashiri decision ----

17 MJ [Col COHEN]: All right. Thank you.

18 LDC [MR. CONNELL]: ---- addresses those questions.

19 MJ [Col COHEN]: Thank you very much. I appreciate it.

20 LDC [MR. CONNELL]: Thank you.

21 MJ [Col COHEN]: Okay. It was a motion filed solely by
22 the Hawsawi team at this point.

23 Trial Counsel, would you like an opportunity to bring

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1 some argument on the matter?

2 TC [MR. SWANN]: Good morning, Your Honor. I am Colonel
3 Retired Bob Swann.

4 MJ [Col COHEN]: Good morning.

5 TC [MR. SWANN]: Your Honor, this case began well before
6 September 11th, 2001, when 19 men flew planes into buildings
7 and into what has become a field of honor. That day saw the
8 lives of 2,976 men, women, and children taken from their loved
9 ones by a senseless act of terrorism. The dead included
10 everyday Americans and citizens from more than 60 nations.
11 Since then, hundreds of others -- first responders and others
12 have died from the smoke, the carcinogens of the pile left by
13 these men and their well-laid plans.

14 Now all of those -- all of those who died that day
15 and those that continue to die lost one valuable commodity and
16 many others, but the one valuable commodity they lost was
17 time. This commission should not waste much time in deciding
18 this long-resolved issue.

19 There's not a single case that supports their
20 position that the MCA is a bill of attainder; and those courts
21 that have considered that issue have said that it's not.

22 The United States Court of Commission Review --
23 Military Commission Review decided this issue in

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1 United States v. Bahlul, cited in our brief, when it concluded
2 the following, and I quote: "The MCA lawfully establishes
3 comprehensive procedures for the impartial adjudication of
4 guilt required by the Constitution and the law of armed
5 conflict."

6 The MCA does not summarily impose punishment but,
7 rather, provides a system to determine guilt or innocence and
8 an appropriate punishment. Any attempt this morning to limit
9 the Bahlul holding that's been argued should be rejected.

10 MJ [Col COHEN]: Sir, as I take it, then, your position is
11 that the defense's attempt to distinguish by fact fails; and
12 if so, if you'd please just specifically address why you
13 believe that this court is still bound by the decision of the
14 CMCR.

15 TC [MR. SWANN]: Well, first of all, it's a superior
16 court; that would be one way ----

17 MJ [Col COHEN]: I understand. But I would have to be
18 able to distinguish it ----

19 TC [MR. SWANN]: Second would be -- was their view of what
20 a bill of attainder is skewed. It fails to appreciate what
21 the real definition of a bill of attainder is. It is an act
22 of the legislature that declares a person or group guilty of
23 some crime and then punish that person or group without

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1 benefit of trial.

2 Now, counsel's broad reading of the bill of attainder
3 clause would essentially cripple the very process of
4 legislating, because every person or group made subject to
5 legislation that that person finds burdensome as what they're
6 doing would complain that he or it is being subjected to
7 punishment.

8 Now, because a law regulates conduct or a part or a
9 designated group of individuals or classes, it doesn't get
10 transformed into a bill of attainder. This morning's argument
11 is just another attempt, as we have seen in the past, to
12 recast this argument into a denial of equal protection.
13 Moreover, nothing about the MCA inflicts punishment on those
14 who come within its purview.

15 The accused is presumed innocent until guilt is
16 established by legal and competent evidence beyond reasonable
17 doubt. And while this accused has made several statements
18 accepting responsibility, oftentimes owning up to a perverse
19 pride in having a major role in this case, leaving crumbs of
20 evidence scattered from one country to another, phone calls
21 with his co-conspirators before the attacks, video evidence,
22 accepting congratulations from Usama bin Laden, we
23 nevertheless must prove his guilt. And that's why this

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1 argument fails.

2 Now, who and what says what rights they're entitled
3 to? It's not these men. They don't get to pick and choose
4 what they would like to have happen to them after committing
5 an act like that of September 11th. Those who violate our
6 laws, violate the law of murder and maiming and deprive
7 families of companionship, get a trial established by our
8 elected leadership and ultimately approved by our judiciary.

9 Now, the debate -- and it's been a constant debate in
10 this room for the last seven years, that debate of whether
11 they go to New York and get tried in an Article III court or
12 they get tried here at Guantanamo with the rights that have
13 been provided them under the MCA, substantial rights under the
14 MCA, are the rights that they're going to get in this
15 courtroom subject to determinations that you may make going
16 into the future.

17 Two acts of Congress, two acts, the 2006 -- excuse
18 me, the 2008 and after that, two different legislatures or
19 different people in Congress signed into law by two Presidents
20 have determined what the rights in this courtroom are to be.

21 And their lists of complaints that I have listened to
22 this morning, Article 10, speedy trial right -- which I
23 haven't seen anybody say they want a trial. We're waiting for

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1 that. We'd invite that, quite frankly. We need a trial to
2 kind of put to end these motions that constantly crop up and
3 really have already been decided, some in this case seven
4 years ago.

5 Now you can't pick facets of a civilian court and a
6 military court and then say that because you didn't get some
7 of each, or others, that that illustrates that's a bill of
8 attainder. You can't pick a few statements from a group of
9 legislators and say they illustrate an unfairness.

10 The legislative record in this case, the legislative
11 record in the MCA does not support the conclusion that
12 Congress was motivated by a desire to punish this accused.
13 Isolated statements, such as those advanced this morning are
14 not sufficient to show a punitive intent or a congressional
15 vindictiveness.

16 There are legitimate distinctions between the
17 judicial process afforded United States citizens and alien
18 combatants, but nothing, absolutely nothing about the MCA is
19 divorced from institutional safeguards. Some of the rules are
20 different from what happens in a civilian court or what
21 happens in a court-martial. Even so, there is nothing unfair
22 about this system.

23 To wrap that up, I'd say this: Their argument that

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1 the MCA is an unconstitutional bill of attainder fails. In
2 any event, the MCA is not a bill of attainder. The MCA
3 contains none of the required elements of a bill of attainder.
4 It neither singles him out nor, and more importantly, it does
5 not impose punishment without trial.

6 Now, the MCA does not meet the specificity
7 requirements that counsel was addressing. The MCA does not
8 unlawfully single him out for punishment. It is a
9 jurisdictional statute that applies to an open-ended class of
10 individuals, aliens determined to be enemy combatants.

11 And in light of the fact that counsel addressed the
12 issue in Judge Pohl's ruling in 502, this court has already
13 determined that Hawsawi is an alien combatant, and it also
14 determined that Hawsawi is part of al Qaeda.

15 Subject to your questions.

16 MJ [Col COHEN]: Yes, sir. Just a couple of questions
17 along those lines. Let me just go look at my notes.

18 Most of the cases that are cited along these lines by
19 one and/or both parties to this motion series deals with the
20 issue of loss of employment, for lack of a better word, as
21 opposed to a loss of a forum.

22 Is there a distinction -- what distinguishes loss of
23 employment in your mind as recognized by Supreme Court

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1 precedent, for example, loss of forum ----

2 TC [MR. SWANN]: As best I can tell -- as best I can tell,
3 the Supreme Court has only determined on five instances that a
4 particular activity was, in fact, a bill of attainder. In
5 this instance, we're not determining anything about this
6 particular accused. He's not losing any employment. He's not
7 losing any of those things. He's going to have a trial to
8 determine in a criminal setting -- a criminal case now whether
9 he committed these acts. That's a major distinction.

10 There's nothing -- there's nothing that would say
11 that if you take those cases and compare them to what's
12 happening here, they're not even remotely close to one
13 another. Being a member of the Communist party, those kind of
14 things, that's not what we're talking about here.

15 MJ [Col COHEN]: With respect to the contention by this
16 defense team that they will not have a jury trial, would you
17 just, please, briefly address that?

18 TC [MR. SWANN]: Sure. The only reason I even addressed
19 the issue that I am a retired Army Colonel is the fact that I
20 am and have been familiar with the military justice system for
21 at least 28 years when I was on active duty. I sat in that
22 seat in a different context for four or five years.

23 My appreciation for court members is that they will

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1 do what you tell them to do. They will act as a jury. We've
2 always described the two differences being -- over my years,
3 I've never really seen a difference. They are being provided
4 instructions by you to determine whether this individual --
5 along with a host of other instructions. So that argument
6 fails right up.

7 MJ [Col COHEN]: What about the argument of just
8 community, in general? I mean, the idea is -- I mean, common
9 sense knowledge of human nature and the ways of the world
10 suggest that military members come from all walks of life, all
11 different races, all different religions, all those different
12 types of things.

13 So I guess the question then is: Is that
14 distinguishable from what you would get from a jury panel if
15 we tried this case in whatever district we decided to try it
16 in the United States?

17 TC [MR. SWANN]: It's not. And quite frankly, my
18 experience is that court members are far more sophisticated in
19 a lot of ways when approaching their responsibilities and
20 duties and will be in this particular case.

21 There's not a single member that will sit in that box
22 until you make a determination that, in your mind, they can be
23 fair and listen to the instructions that you provide them, and

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1 that they come into this room having no issues about guilt or
2 innocence until they've heard all of the evidence.

3 Quite frankly, if I were to ever commit an offense, I
4 would prefer to be tried by a military jury rather than a
5 civilian jury.

6 MJ [Col COHEN]: All right. Thank you, sir. That's all
7 the questions that I have. Thank you. I'll give the defense
8 three minutes.

9 DC [MAJ WILKINSON]: I beg your pardon. Did you say three
10 minutes?

11 MJ [Col COHEN]: Yes.

12 DC [MAJ WILKINSON]: All right. When it comes to a jury
13 trial, as we pointed out already, the deprivation of jury is a
14 structural error. Accordingly, you do not do a harmlessness
15 testing to see is it as good as a jury, is it similar, if it
16 isn't a jury, is wrong, leaving aside that every member of
17 such a panel sees himself as part of the war effort against
18 al Qaeda.

19 With respect to the al Bahlu case, I pointed out as
20 I went along the differences. I noted under the Kaspersky Lab
21 case, you're supposed to look at each case -- bill of
22 attainder case in its particularized context. But in
23 particular, that case, the CMC al Bahlu case noted there

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1 were no congressional statements denouncing him. We certainly
2 did have statements denouncing the 9/11 defendants. He was
3 not able to articulate the source of his rights. We have
4 articulated the source of Mr. Hawsawi's rights. We showed
5 less burdensome alternatives; they didn't. The other
6 differences are in the brief.

7 One thing we absolutely agree with that Mr. Swann
8 said is that we are against wasting time. We have often
9 asserted Mr. Hawsawi's speedy trial rights in this case,
10 including, for example, in AE 299 where we moved to sever
11 Mr. al Hawsawi's case from the other based, in part, on the
12 ongoing violation of his speedy trial rights. And that is why
13 I would also ask not to delay too long in deciding this
14 motion, however it goes, because if it ends the case, it
15 finally resolves it after more than 16 years.

16 The -- I did want one follow-up to a thing you asked
17 me about why the UCMJ is not a bill of attainder on top of
18 what I said. Congress has a right in the Constitution to
19 enact laws to govern the Army and the Navy, so it's not even
20 in that territory. But I think conceptually, you were after
21 some other things as well, so I answered those.

22 That -- I should say, then, that a large part of the
23 argument you just heard is exactly what I was warning you

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1 against before, saying let's get angry; let's get angry at
2 these men for the thing they're accused of doing, take their
3 rights because of that. And that is precisely what both the
4 Bill of Rights and the bill of attainder clause are in the
5 Constitution in order to prevent.

6 Any further questions of me, sir?

7 MJ [Col COHEN]: No. I appreciate it. Thank you very
8 much.

9 DC [MAJ WILKINSON]: Yes, sir.

10 MJ [Col COHEN]: Given the hour, we will take a 90-minute
11 break for lunch. We'll reconvene with the closed hearing, as
12 scheduled. We will take up the oral arguments on the
13 remaining motions first thing Thursday morning, if that's
14 acceptable to the parties.

15 LDC [MR. NEVIN]: Your Honor, I had a conversation with
16 Mr. Mohammad about this, and I wanted to ask you to
17 consider -- considering continuing with the open arguments
18 this afternoon since the detainees, or some of them, are
19 actually here, and perhaps starting with closed, with 505
20 arguments tomorrow morning. I haven't spoken to other
21 parties, but I think there could be some advantages in that.
22 And I throw that out as a ----

23 MJ [Col COHEN]: I will poll the parties and kind of see

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1 if we have a consensus. If not, I'll make a ruling
2 regardless.

3 Trial Counsel, what's the government's position?

4 CP [BG MARTINS]: Your Honor, we'd prefer to stick with
5 the docket.

6 MJ [Col COHEN]: Okay. All right.

7 Mr. Ruiz?

8 LDC [MR. RUIZ]: Judge, in terms of 524 and 530, we prefer
9 to argue that on Thursday.

10 MJ [Col COHEN]: Okay.

11 LDC [MR. RUIZ]: And that goes along with doing the 505
12 process before that as well. I think that should happen
13 beforehand on those two motions.

14 MJ [Col COHEN]: Okay.

15 LDC [MR. RUIZ]: Otherwise, we're okay if there are other
16 motions that can be done.

17 MJ [Col COHEN]: Okay.

18 LDC [MS. BORMANN]: Judge, we would -- if we're being
19 asked, we would prefer to do as much of the open session today
20 as we can, as long as Mr. Bin'Attash is already here, rather
21 than having them transported twice and breaking it up.

22 MJ [Col COHEN]: Mr. Harrington?

23 LDC [MR. HARRINGTON]: Judge, I concur with Mr. Ruiz.

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1 MJ [Col COHEN]: Mr. Connell, do you have a position?

2 LDC [MR. CONNELL]: Sir, my position is only that there be
3 some time after the 505(h) hearing. The military commission
4 has promised the media and the NGO observers that it will
5 provide them notice of any closed hearing, which means at
6 least some little time to which they could respond
7 hypothetically or object.

8 And so I do think there needs to be some space
9 between the 505(h) hearing and the closed 806 hearing. That
10 does not necessarily determine the order or the timing.
11 That's just my concern.

12 MJ [Col COHEN]: Okay. Well, I will not -- understanding
13 this is a court and not a democracy -- democracy in the sense
14 that all the votes, you know, are counted and then we will
15 poll, I think, though, there is enough dissent between the
16 various entities that I'm -- I'm just going to go ahead and
17 stick with the current marching order.

18 LDC [MR. NEVIN]: And with that, Your Honor, may -- would
19 it be all right for Mr. Mohammad to stay in the courtroom
20 until -- to consult with counsel until perhaps ----

21 MJ [Col COHEN]: Until we begin the closed session,
22 whatever is consistent with practices that would need to be
23 done, I ----

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1 TC [MR. SWANN]: 1:30 would be the appropriate time. That
2 would allow everybody to clear the courtroom so that we can
3 start at 2:00 with what you need to do, sir.

4 MJ [Col COHEN]: Okay. Then that sounds -- then, yes, he
5 may remain until 1:30.

6 All right. We're in recess until 2:00.

7 [The R.M.C. 803 session recessed at 1238, 19 June 2019.]

8 [END OF PAGE]

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