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1 [The R.M.C. 803 session was called to order at 0905, 1 May
2 2018.]

3 MJ [COL POHL]: The commission is called to order.
4 Mr. Mohammad and Mr. Binalshibh are present. The other three
5 accused are absent.

6 General Martins.

7 CP [BG MARTINS]: Your Honor, changes for the United
8 States since the last time we were on the record are that
9 Major Dykstra is back and Ms. Nicole Tate is absent.

10 MJ [COL POHL]: Okay.

11 Mr. Nevin.

12 LDC [MR. NEVIN]: No changes, Your Honor.

13 MJ [COL POHL]: Ms. Bormann?

14 LDC [MS. BORMANN]: No changes from yesterday.

15 MJ [COL POHL]: Mr. Harrington?

16 LDC [MR. HARRINGTON]: No changes, Judge.

17 MJ [COL POHL]: Mr. Connell?

18 LDC [MR. CONNELL]: No changes, Your Honor. I'd ask
19 permission for Ms. Pradhan to come and go without interrupting
20 the court with excusal each time.

21 MJ [COL POHL]: Sure. Permission granted.

22 Mr. Ruiz?

23 LDC [MR. RUIZ]: No changes from yesterday afternoon.

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1 MJ [COL POHL]: Thank you.

2 Trial counsel.

3 CP [BG MARTINS]: Major, could you please come to the
4 witness stand, remain standing, raise your right hand for the
5 oath.

6 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
7 was sworn, and testified as follows:

8 DIRECT EXAMINATION

9 Questions by the Chief Prosecutor [BG MARTINS]:

10 Q. Major, you are the assistant SJA?

11 A. That is correct.

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

13 Q. Major, do you have a copy of three documents in front
14 of you?

15 A. I do.

16 Q. And they're marked Appellate Exhibits 571, 571A,
17 571B?

18 A. That is correct.

19 Q. Let's take 571 first. Did you have occasion to
20 advise Mr. Bin'Attash of his right to be present this morning?

21 A. Yes. I met Mr. Bin'Attash this morning, advised him
22 that he had military commission this morning at 6:00, and
23 asked him if he would -- if he was going to attend the

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1 commission; and he indicated he did not want to attend the
2 commission.

3 Q. Now, you've done this many times ----

4 A. I have.

5 Q. ---- correct?

6 Did you use the form that's in front of you?

7 A. I did.

8 I asked him if he wanted me to read it in English and
9 then have it translated, and he simply asked for the Arabic
10 form and said he would follow along as I read the English
11 version.

12 So at 6:21 this morning, I started to read the
13 English version to him. And when I completed reading the
14 form, I asked him if he had any questions. He indicated that
15 he did not have any questions. And he completed the Arabic
16 version, signed and dated the Arabic version in front of me;
17 and then I signed and dated the Arabic version at 6:23 this
18 morning.

19 Q. Do you believe he understood his right to attend?

20 A. I do.

21 Q. And do you believe that he voluntarily waived his
22 right to attend?

23 A. I do. I believe he voluntarily waived his right to

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1 attend the commission.

2 I then offered him meetings at Echo II, and he
3 refused Echo II and said he wanted to stay in camp all day.

4 Q. With respect to Ali Abdul Aziz Ali, 571A, a
5 three-page document. Same procedure?

6 A. Yes. I met with Mr. Ali first this morning, advised
7 him that he had a military commission this morning and asked
8 if he would be attending the commission. He indicated he did
9 not want to come.

10 Q. He executed the English version of the document?

11 A. Correct.

12 I -- from my previous experience, I asked him if he
13 only wanted me to read the English version to him. He said
14 that's fine. So I simply read the entire English version,
15 both documents, page 1 and 2, and then asked him if he had any
16 questions.

17 He indicated he didn't have any questions. Then he
18 asked for the form to sign it. He signed and dated it in
19 front of me; and then I signed and dated that form.

20 Q. Do you believe he understood his right to attend?

21 A. I do believe he understood he had the right to attend
22 and that he voluntarily waived his right to attend.

23 I offered him meetings at Echo II with team members,

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1 and he said he did not want to come to Echo II either. He did
2 write a letter to his counsel and advised me that he wanted to
3 stay in camp today.

4 Q. With respect to Mustafa Ahmed Adam al Hawsawi, 571B,
5 a three-page document, did he execute the English or the
6 Arabic version?

7 A. Mr. Hawsawi normally executes both. I know he wants
8 it translated. So I met him this morning, advised him that he
9 had a military commission this morning. He thought maybe it
10 was a closed session because he left early yesterday before
11 that decision was made by the court. I advised him that it
12 was an open session and asked if he would be attending the
13 session.

14 He indicated that he did not want to attend, and he
15 asked for the Arabic version so he could follow along as I
16 read the English version. I read both pages, and then I asked
17 him if he wanted to have our translator read the Arabic
18 version to him, and he said yes; so the translator then read
19 the entire Arabic version to him.

20 And Mr. Hawsawi filled out the Arabic version, signed
21 it and dated it, and then he asked me for the English version;
22 and he signed and he dated that one as well in my presence.
23 So then I went ahead and signed and dated both the English

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1 version and the Arabic version.

2 Q. I believe he has meetings -- I believe he has
3 meetings at Echo II today?

4 A. That is correct. After he signed the voluntary
5 waiver form, I asked him if he wanted to attend meetings at
6 Echo II, and he indicated he did want to come to Echo II this
7 morning for a.m. and p.m. meetings.

8 Q. All right. Do you believe that he understood his
9 right to waive his presence?

10 A. I do believe he understood he had the right to
11 attend; and I believe that he voluntarily waived his right to
12 attend the commissions.

13 TC [MR. SWANN]: I have no further questions, sir.

14 MJ [COL POHL]: Ms. Bormann, any questions?

15 LDC [MS. BORMANN]: No questions.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: Your Honor, I object to the use of
18 anonymous testimony on multiple grounds. The first is the
19 Sixth Amendment, 10 U.S.C. 949a, and Rule for Military
20 Commission 806.

21 On behalf of the public, who has a right to see the
22 proceedings and understand who is testifying, I object on
23 behalf -- on the basis of the First Amendment, 10 U.S.C. 949a,

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1 and R.M.C. 806. With respect to the completeness of the
2 record of trial, I object on the basis of the Fifth Amendment,
3 10 U.S.C. 490, because there is no record of who this witness
4 is anywhere in the record.

5 MJ [COL POHL]: Objection overruled.

6 Mr. Ruiz, any questions?

7 LDC [MR. RUIZ]: No questions.

8 MJ [COL POHL]: Okay. Thank you for your testimony.

9 WIT: Thanks, Judge.

10 [The witness was excused.]

11 MJ [COL POHL]: Okay. Mr. Ruiz, where are we at with
12 530VV? Again, the government still has got its presentation,
13 but you had indicated that you had some additional discovery
14 that you were receiving.

15 LDC [MR. RUIZ]: Sure. So, Judge, I'm going to ask if we
16 can put off the argument on 530 until Thursday. The reason
17 for that is I've talked to the Staff Judge Advocate about
18 getting access to the materials that are in question.
19 Apparently they have been classified FOUO, display only to
20 Mr. al Hawsawi and to the other accused who are part of these
21 particular issue.

22 Apparently they will be able to bring that to us
23 tomorrow afternoon. I understood from the schedule that

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1 tomorrow afternoon may be off since you will be working on 505
2 issues. The intention is to go in and meet with
3 Mr. al Hawsawi and then have an opportunity to review the
4 materials with him.

5 As Mr. Ryan briefly indicated, they are substantial
6 in terms of number of pages. One is at least 67 pages. The
7 other in question for us is at least over a hundred pages.
8 They're in Arabic. So we need time to thoroughly go through
9 those as well with Mr. al Hawsawi.

10 MJ [COL POHL]: You think you will be able to address the
11 issue on Thursday?

12 LDC [MR. RUIZ]: Sure.

13 The other -- the other issue I want to talk to you
14 about is not substantive but just procedural in how you
15 approach this particular issue.

16 In terms of the evidence itself, in our motion we
17 indicated that these are OCR materials, and these materials
18 obviously are protected by 018U. Our concern here is that
19 Mr. Ryan will stand up and begin arguing about materials that
20 do have some degree of protection based on 018U.

21 So in our motion, we asked you to make an
22 admissibility determination because of the way this evidence
23 was seized. I think the facts are indicated in the motion in

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1 terms of how that evidence was obtained. The government has
2 not attached that evidence to its pleadings. I think that is
3 significant.

4 But before we get into that argument, I think the
5 court needs to address how, if at all, the government can then
6 be able to use that information. As I said, it is labeled,
7 properly labeled, was reviewed by attorneys on our team as OCR
8 material; and there are procedures that were established
9 within your rule as to how those materials are to be handled.

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

11 LDC [MR. HARRINGTON]: Judge, I need to be heard on that
12 particular issue also.

13 MJ [COL POHL]: Okay.

14 LDC [MR. HARRINGTON]: Judge, we are in -- all right?

15 MJ [COL POHL]: Sure.

16 LDC [MR. HARRINGTON]: Sorry.

17 MJ [COL POHL]: Okay.

18 LDC [MR. HARRINGTON]: We are in a similar situation in
19 that certain documents that were taken and other things were
20 taken from Mr. Binalshibh have to be reviewed by him. And I
21 don't know what -- doing it tomorrow afternoon depends
22 obviously on where it's done.

23 What we're requesting is if the court finished the

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1 hearings today, at some point in time that the documents be
2 brought here so Mr. Binalshibh could review them with us here,
3 if possible. I certainly don't want him to have to come to
4 just for the afternoon session tomorrow, or just for the
5 afternoon tomorrow to do that here, given the logistics of it
6 and all the rest of it.

7 MJ [COL POHL]: Well, let me ask you a question, is I was
8 assuming from what Mr. Ruiz was saying is that the documents
9 were going to be reviewed over at the camps. Was that a
10 misperception on my part?

11 LDC [MR. HARRINGTON]: I had no idea where they were going
12 to be done, Judge, so ----

13 MJ [COL POHL]: Mr. Ruiz?

14 LDC [MR. RUIZ]: Judge, I had spoken with the Staff Judge
15 Advocate for that procedure itself, and that's what they have
16 agreed to do for us tomorrow afternoon at the camp, Camp Echo.

17 LDC [MR. HARRINGTON]: Just a minute, Judge.

18 MJ [COL POHL]: Okay.

19 TC [MR. RYAN]: Your Honor, I think I can shed light on
20 it.

21 MJ [COL POHL]: Okay. Hold on, Mr. Harrington.

22 And something -- after we broke yesterday, there was
23 an issue about where the computers were.

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1 TC [MR. RYAN]: Yeah, that was my first point, Your Honor.

2 Good morning, sir.

3 MJ [COL POHL]: Good morning.

4 TC [MR. RYAN]: I said they were with the judiciary. They
5 are not with the judiciary. The new laptop that was in the
6 possession of Mr. Binalshibh before it was seized is in the
7 hands of the SJA. The laptop of Mr. Hawsawi's that was
8 seized, having been gone through the defense's certification
9 process pursuant to Your Honor's order in LL, is in the
10 defense's hands, as I understand it.

11 Addressing the point Your Honor made at the end of
12 the day yesterday, in light of the motion to reconsider, the
13 camp has essentially frozen anything from coming into the camp
14 before Your Honor rules.

15 MJ [COL POHL]: But physically, when you say it's in the
16 hands of the defense, it's not in the hands of the detainee?

17 TC [MR. RYAN]: That's correct, sir.

18 MJ [COL POHL]: Which one are we talking about?

19 TC [MR. RYAN]: Mr. Hawsawi's.

20 MJ [COL POHL]: Okay.

21 TC [MR. RYAN]: Mr. Binalshibh's is in the hands of the
22 SJA.

23 MJ [COL POHL]: Because, as I recall, those two were

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1 supposed to go through the review process, come back to me,
2 and then I would release it. I have not released either of
3 those. Okay. Got it.

4 TC [MR. RYAN]: Yes.

5 MJ [COL POHL]: Now, as far as enlightening us on the
6 procedure to review the discovery ----

7 TC [MR. RYAN]: Excuse me, Your Honor. Could I have one
8 moment, please?

9 MJ [COL POHL]: Sure.

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

11 MJ [COL POHL]: Okay. You were going to enlighten us on
12 the discovery process.

13 TC [MR. RYAN]: Yes. The documents that were seized, the
14 originals, in its most recent seizure in February are present
15 today; so if Mr. Harrington wants to review them again, that
16 will be made available, an OCA determination of FOUO showable
17 or displayable to each particular accused from whom the items
18 were taken.

19 MJ [COL POHL]: For Mr. Binalshibh, how much are we
20 talking about here?

21 TC [MR. RYAN]: Most of the items, themselves, Judge, are,
22 for the most part -- strike that.

23 Several of the items are discs, so it's simply a

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1 matter of seeing the disc itself. But there are a couple of
2 large manuals as well on how to use various programs.

3 MJ [COL POHL]: Okay. So you're saying that you can bring
4 them here at the close? If we ended a little early today,
5 they could review them in the courtroom here today?

6 TC [MR. RYAN]: They're here now, sir, yes.

7 MJ [COL POHL]: Okay.

8 TC [MR. RYAN]: As far as Mr. Ruiz's issue, we -- I don't
9 think it has to go to tomorrow. We'll be able to provide
10 copies with appropriate markings, I believe, today.

11 MJ [COL POHL]: Okay. But he needs to run it by
12 Mr. Hawsawi. And since he's not here today ----

13 TC [MR. RYAN]: Right. I understand that, Judge.

14 MJ [COL POHL]: Okay.

15 Mr. Harrington, will that work for you.

16 LDC [MR. HARRINGTON]: Yes, Judge. Doing it here would be
17 better for us.

18 MJ [COL POHL]: Okay.

19 LDC [MR. HARRINGTON]: Judge, just to correct the record
20 yesterday -- I talked to Mr. Ryan about this --

21 Mr. Binalshibh's computer is not with you. It was released to
22 us to have it ----

23 MJ [COL POHL]: Right.

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1 LDC [MR. HARRINGTON]: ---- go through the checklist. And
2 it's still with the IT people from our ----

3 MJ [COL POHL]: Okay. Okay. But they're -- just so it's
4 clear, as I understand the order is, it's -- you've got to
5 come back to me before it's released to him.

6 LDC [MR. HARRINGTON]: We understand that, Judge.

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

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

9 MJ [COL POHL]: Okay. That brings us to 566.

10 I will note, just -- I'm not sure whether the
11 Bin'Attash team has gotten it yet or not, but you had filed, I
12 believe, on this one a motion to file a supplement.

13 And did you get a response yet?

14 LDC [MS. BORMANN]: We did.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: Which I -- if I can paraphrase,
17 basically says we're going to go ahead, you can file your
18 reply out of time, but we're going to go ahead and argue it
19 today and ----

20 MJ [COL POHL]: Yes. Because it's Mr. Ali's motion, and
21 they want to argue it today.

22 LDC [MS. BORMANN]: Sure.

23 MJ [COL POHL]: And if you want to raise additional issues

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1 or feel further oral argument is necessary, we'll go through
2 it then.

3 LDC [MS. BORMANN]: Thank you.

4 MJ [COL POHL]: Go ahead.

5 ADC [Capt ANDREU]: Sir, AE 566 is Mr. al Baluchi's motion
6 to meet with his defense team. I have prepared a set of
7 slides that have been given to the CISO for review. They have
8 been marked by the court reporter as AE 566C. I request the
9 feed from Table 4 and permission to display the slides to the
10 gallery.

11 MJ [COL POHL]: Go ahead.

12 ADC [Capt ANDREU]: Your Honor, in AE 566, we're asking
13 that the military commission order the JDG commander to permit
14 Mr. al Baluchi to meet with members of his defense team --
15 cleared members of his defense team, regardless of their
16 profession.

17 The starting point, of course, is that this is a
18 capital case. And as we know, the government in the capital
19 case intends to and wants to execute Mr. al Baluchi. And we
20 know that death cases are different. Lead learned counsel
21 must thoroughly investigate the case for purposes of both the
22 guilt and penalty phase.

23 As part of that thorough investigation which was

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1 discussed at length yesterday, learned counsel assembles and
2 relies on its defense teams. That defense team includes
3 investigators, linguists, paralegals, psychiatrists,
4 mitigation experts. And it's important for the defense team,
5 each of those members, to meet with the client to build a
6 rapport. That requires multiple meetings with the client over
7 time and, at times, individual meetings with the client. It's
8 especially important in this case for individual members of
9 the defense team to meet with the client to build a rapport,
10 given the differences in cultural background between
11 Mr. al Baluchi and the majority of the members of his defense
12 team.

13 So we'd step back a second and look at the policy at
14 issue in this case. Since mid-December of last year, 2017,
15 the JDG commander began enforcing a policy that required
16 Mr. al Baluchi to only meet with members of his defense team
17 if there was an attorney or paralegal from the team present.
18 Now there's an exception that's available in the policy where
19 we can submit a special request to ask the JDG commander for a
20 different member of the defense team to meet with
21 Mr. al Baluchi without an attorney or paralegal present.

22 So it sounds as if there's an exception that still
23 allows him to meet with these defense members, but what we

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1 have seen is that, in reality, in practice, the overwhelming
2 majority of these requests have been denied.

3 So here's a visual representation of visit requests
4 and whether or not they have been approved or denied by the
5 JDG commander from August of last year through the present,
6 through April of this year. And these, of course, are
7 unaccompanied visits, unaccompanied visit requests which are
8 those which would not have an attorney or paralegal present.

9 We can see that from August to October things were
10 going smoothly. All of these requests were being granted, and
11 there was no issue with Mr. al Baluchi meeting with members of
12 his defense team. But then, in December, we see that
13 everything changes. And the green arrows indicate obviously
14 meetings that are approved; the red marks indicate meetings
15 that are disapproved. And from December of 2017 --
16 mid-December of 2017 through April of 2018, when this motion
17 was filed, 41 out of 43 visits were denied.

18 Interestingly, what's not reflected on that slide is
19 after this motion was filed, the JDG -- we did submit a
20 request for an investigator to meet with Mr. al Baluchi over
21 the course of this hearing. So there were ten requests there.
22 Out of those, nine out of ten were approved. So there should
23 actually be nine more green arrows and one more red mark for

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1 this hearing, indicating that in order to get this
2 accomplished, we had to file a motion.

3 Now, we agree with the military commission's position
4 that it stated on numerous occasions that it will generally
5 defer to the JDG commander regarding decisions that touch on
6 daily operations in the detention center; that's consistent
7 with the Supreme Court law, with Turner. But the military
8 commission has also stated that it will intervene with the
9 daily detention operations when the daily detention operation
10 adversely affects the accused's rights. And that's precisely
11 what's happening with this detention operation. This affects
12 Mr. al Baluchi's Sixth Amendment right to the effective
13 assistance of counsel.

14 So I talked about why it's important to have the
15 defense team in this capital case but -- or capital cases in
16 general, but it's especially important in this case. For
17 example, our linguist is one of the only team members who has
18 a similar cultural background with Mr. al Baluchi. When he
19 meets with Mr. al Baluchi one on one before this started
20 happening, when he was able to meet with Mr. al Baluchi one on
21 one, it's easier for them to relate and for him to gain the
22 information, socioeconomic background that is relevant and
23 necessary for purposes of mitigation.

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1 A psychiatrist perhaps is the most obvious example of
2 an individual who would need to meet with Mr. al Baluchi one
3 on one without the presence of an attorney or a paralegal.

4 MJ [COL POHL]: Has a meeting with a psychiatrist been
5 denied?

6 ADC [Capt ANDREU]: Yes, sir. Four of those red hashes
7 indicate a psychiatrist meeting that was denied.

8 MJ [COL POHL]: Go ahead.

9 ADC [Capt ANDREU]: Investigators, oftentimes we have --
10 in the course of the investigation, in order to get client
11 input before going out on these missions, the investigator
12 wants to come down and speak to Mr. al Baluchi. And to
13 require an attorney or paralegal to hold the hand of the
14 investigator, come down here with them for that specific
15 purpose, when the investigator's fully cleared, is
16 unnecessary.

17 In a case of this magnitude -- well, let me step back
18 for a second.

19 There are several attorneys and paralegals on the
20 team. And in a normal criminal case, that might sound
21 sufficient or sound like a lot. But in the case of this
22 magnitude, the attorneys and paralegals have quite a few
23 responsibilities: From investigations, to preparing and

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1 filing motions, responding to motions, to reviewing the
2 enormous amount of discovery in this case. So it takes away
3 from their other responsibilities if they have to come down
4 with these fully cleared individuals and -- just so that they
5 can meet with the client.

6 MJ [COL POHL]: Do these individuals bring material for
7 the client?

8 ADC [Capt ANDREU]: Pardon me, sir?

9 MJ [COL POHL]: Do these individuals bring material for
10 the client?

11 ADC [Capt ANDREU]: At times, yes, sir.

12 MJ [COL POHL]: That's been stamped "Case-Related
13 Material" or "Other Case-Related Material" or "Legal
14 Materials" or whatever the stamp is required?

15 ADC [Capt ANDREU]: Yes, sir.

16 MJ [COL POHL]: Okay. Go ahead.

17 ADC [Capt ANDREU]: So it's -- the fact is that this case
18 is happening here at Guantanamo Bay, that these clients are
19 imprisoned here at Guantanamo Bay. And that's a decision that
20 was made by the government, and that decision does have
21 consequences. It significantly impacts logistically the
22 ability for team members to get here.

23 At the end of the day, all we're asking for is the

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1 ability to meet with the client. At the end of the day, all
2 we're asking for is for this unnecessary obstacle to meeting
3 with the client to be removed. So we would ask that the
4 military commission grant this motion and order the JDG
5 commander to allow Mr. al Baluchi to meet with members of his
6 defense team.

7 MJ [COL POHL]: Thank you.

8 ADC [Capt ANDREU]: Thank you.

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

10 LDC [MR. NEVIN]: Your Honor, just to say what I think the
11 military commission knows, but to say it so that it's here in
12 the room with us. The ABA Guidelines require us to develop a
13 relationship with the client; that's Guideline 10.5. And I'm
14 talking now about the guidelines for defense counsel in
15 death-penalty cases.

16 And sub-guideline C. provides that we are to engage
17 in a continuing interactive dialogue with the client
18 concerning the -- all matters that might have something to do
19 with the case; and that is to occur at all stages of the case.

20 And counsel referred to -- just now to the fact that
21 the case is going on here at Guantanamo Bay. But as the
22 military commission knows, there is a lot of material at issue
23 in the case, and a lot of work on all fronts that is required

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1 to be done. So sub-guideline C.1. refers to -- to us engaging
2 in a continuing interactive dialogue with the client on the
3 progress of and prospects for the factual investigation, and
4 what assistance the client might provide to it.

5 So the way you go about achieving this is also
6 addressed in the guidelines because it says that one of the
7 first things that defense counsel is required to do is to
8 assemble a team. And these are teams of people who have
9 different expertise and different abilities and different
10 responsibilities.

11 And -- so it's important for us to have the option of
12 a member of the team who perhaps has a similar cultural
13 background, who can have an interactive dialogue with the
14 client on a different level than someone who is speaking
15 through an interpreter, or who is speaking partially through
16 an interpreter and who, in other words, perhaps doesn't have
17 the same linguistic and cultural barriers to communication.

18 And, of course, I think we've told you previously
19 that Mr. Mohammad has the ability to speak English, but I
20 think I've also mentioned to you on numerous occasions that
21 even people with native English fluency frequently have
22 trouble understanding the legal concepts that are at issue in
23 cases; and so when we are doing something other than having a

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1 casual conversation, it frequently is useful to have an
2 interpreter present.

3 But the ability for Mr. Mohammad to speak directly to
4 someone like that, to have a conversation with that person --
5 in other words, that person has -- may well have -- on
6 particular issues, on particular days, may have an ability to
7 communicate with Mr. Mohammad that the rest of us don't.

8 So -- also because all the parties on the team have
9 lots of other responsibilities, it advances our mission of
10 just doing the work that's necessary to defend this case, to
11 be able to have those kinds of meetings take place. And I
12 would say that we have had a similar experience to the one
13 that's described, that's up on the board now.

14 And we join the request that you direct that -- you
15 direct that this -- that a rule like this affects our ability
16 to come in front of you. It affects our ability to engage in
17 the military commissions and, thus, is within your purview,
18 and direct that we be permitted to -- that we have free reign
19 to conduct these kinds of meetings.

20 Just the last thing. You understand, these are
21 members of our team who are fully cleared, have full security
22 clearances. The materials that I believe you asked counsel
23 about would be materials that would have been passed through a

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1 Privilege Review Team. It's not as if there has not been a
2 substantial degree of vetting in this before these people ever
3 stand at the threshold of Echo II and propose to walk in.

4 So that's my argument. Thank you.

5 MJ [COL POHL]: Thank you.

6 Any other defense counsel wish to be heard?

7 Ms. Bormann.

8 LDC [MS. BORMANN]: A couple points. So the question I
9 think before you is, who ought to be determining which cleared
10 defense team member meets with each defendant? And the answer
11 is defense counsel. There's no additional burden here to the
12 government, whatsoever.

13 So the process works like this: A week or two prior
14 to a client meeting that we want to schedule, we submit a
15 request to JDG, and we ask their permission if we can have a
16 meeting with the client, and we list who we think may attend.
17 Sometimes that list is one, two, three, all the way up to
18 five. And sometimes not all of these people can attend.

19 Sometimes what happens is a client, for instance in
20 my case, who is -- for whatever reason, doesn't want to meet
21 with me but does want to meet with other members of the team.
22 Should he be denied the ability to still communicate with his
23 team even though he doesn't want to meet with me? Of course

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1 not. And it's incumbent upon me to make sure that that
2 communication continues. And that's what we try to do.

3 Counsel for Mr. al Baluchi was asked the question
4 about whether or not a psychiatrist had been denied the
5 ability to do an evaluation in a place, at a time, and in a
6 position where he could be most effective in doing that
7 evaluation. And the answer is no; he was denied that.

8 And I can tell you that we've been told -- and I'm
9 not going to disclose what area of expertise this is ----

10 MJ [COL POHL]: Just -- just so I'm clear, whether it's a
11 psychiatrist, psychologist, or a mitigation specialist, if
12 they were permitted to meet with the client, would that be in
13 the normal Echo II meeting room?

14 LDC [MS. BORMANN]: It would be. Of course.

15 MJ [COL POHL]: There's no other -- but I just want to
16 make -- what you said before, I just want to make -- there's
17 no other places that you expect them to meet at?

18 LDC [MS. BORMANN]: No, of course not. No, of course not.

19 So, you know, having done this for 30 years, I'm here
20 to say that I have yet to meet a psychologist or a
21 psychiatrist who says, "Yep, I really want to do a forensic
22 evaluation on your client, but I want lawyers to be present,
23 and I want a paralegal to be present." Of course they don't

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1 want that, because it interferes with the ability to do an
2 adequate and effective evaluation. And you're going to see --
3 that's the basis of our supplemental.

4 So you will see the more exacting standards that are
5 required. But ultimately when there's no burden to the
6 government, because does it -- let me just give you an
7 example.

8 We request permission for five people or four people
9 to attend a meeting. And then only one shows up, and that
10 person happens to be an expert. How does that less -- the
11 less number an additional burden to the government? They
12 already know about his clearance level because we have
13 submitted it two weeks in advance. They already have been
14 able to determine through JPAS, or whatever they do, that the
15 person has the proper clearances. They have already
16 determined that the person -- you know, JTF provides little
17 badges that we get here, so they've already determined that
18 that person has the proper blue pass just to get into the camp
19 itself.

20 What's happening here is an irrational and
21 unreasonable infringement upon counsel's ability to make
22 determinations about how best to communicate with their
23 client. And I would ask you, who is in the best position to

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1 make the determination about how client communication should
2 proceed, the JDG commander or defense counsel?

3 MJ [COL POHL]: This policy apparently has been in place
4 since 2015? Has it just not been enforced?

5 LDC [MS. BORMANN]: It is enforced back and forth. So
6 when I -- to give you a little example. So when I started
7 meeting with Mr. Bin'Attash in 2011 ----

8 MJ [COL POHL]: I'm just -- I used 2015.

9 LDC [MS. BORMANN]: I don't. I'm going to give you ----

10 MJ [COL POHL]: That's what's in the pleadings.

11 LDC [MS. BORMANN]: It's constantly changing. So it's one
12 of the constantly changing rules.

13 So in 2011 when I first started meeting with
14 Mr. Bin'Attash, we were told that paralegals could not meet
15 along with Mr. Bin'Attash; that a lawyer always had to be
16 present. And without having to file a motion, I went to the
17 SJA -- because back in those days, they provided us their
18 names, and I could just knock on his office -- and I said,
19 "Hey, this goes against everything in doing defense work
20 because the people who are to be determining who are meeting
21 with our client, you know, assuming everybody is properly
22 cleared and all of the dots are -- all the I's are dotted and
23 the T's are crossed ought to be defense counsel."

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1 And Commander, then-Captain Welsh said, "You're
2 right. That's right." And so they changed the policy. And
3 then some new JDG commander comes in or new SJA comes in and
4 then they change it back.

5 So we fought this thing on and off for years. And I
6 was relieved, actually, when Mr. al Baluchi filed it. And
7 that's why we want to supplement it, because it is essential
8 that the commission understand -- and maybe more essential
9 that the camp understand -- in pretrial hearings, who meets
10 with the client is dependent upon so many moving pieces.

11 You know, right now, we have in the works the
12 attempted clearance of a lot of different experts who will
13 eventually meet with Mr. Bin'Attash. Most of those experts
14 won't want the interruption and the interference of anybody
15 else in the room when they do that because it will invalidate
16 their results. And so ----

17 MJ [COL POHL]: Back to my question, though, is that is
18 this just a new commander enforcing a pre-existing policy that
19 nobody enforced in the past?

20 LDC [MS. BORMANN]: I think it's enforced on and off and
21 even -- yes. The answer to your question is yes, it's
22 sometimes enforced and sometimes not. They do a special
23 request. Sometimes they grant it; sometimes they don't.

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1 We had an expert here in -- to meet with
2 Mr. Bin'Attash in December or January, and we were told that
3 that person could not go in without the presence of at least a
4 paralegal. So we -- rather than coming to you in the middle
5 of the holidays to ask for an emergency order, we just
6 followed their rules. But, frankly, we shouldn't have to.

7 Frankly, we ought to -- that person is cleared. If
8 that person is cleared and defense counsel make the
9 determination that the best way forward for Mr. Bin'Attash's
10 defense is to have that person meet without the presence of a
11 paralegal or a lawyer, that ought to hold sway.

12 And I have yet to practice anywhere where I haven't
13 been able to determine what persons go and meet with my
14 client. You know, I often have mitigation specialists meet
15 with a client minus a lawyer. I often have a psychologist
16 meet with my client minus lawyers. I often have an
17 investigator meet with my client minus lawyers in 30 years of
18 practice. So this is the first time I've ever had this
19 problem.

20 And I'm asking that you grant Mr. al Baluchi's
21 motion. We've joined it. And I'm also going to be
22 supplementing it.

23 MJ [COL POHL]: Thank you.

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1 Mr. Harrington, do you wish to be heard on this?

2 LDC [MR. HARRINGTON]: Judge, obviously, I adopt the same
3 arguments that were just made, and I won't repeat those. But,
4 for example, on my team, we only have two paralegals that are
5 cleared. We have one that's been waiting for a year and a
6 half to get clearance that -- you know, that typical kind of
7 problem -- which means that when they can't come, we have to
8 have an attorney present.

9 And as the other lawyers have said, oftentimes the
10 issues that are discussed really are not legal -- legal issues
11 that the lawyers should be working on. So it's an incredible
12 burden on the defense team to have to abide by this rule. And
13 as an example -- we made a special request yesterday, and it
14 was granted, for two people to come, but all of them for the
15 past two or three months have been -- have been rejected.

16 And, Judge, I've never practiced in a place where
17 somebody from a defense team without -- with a letter going to
18 a jail saying this person is from the team and should be able
19 to see the person, and the jail vets the person for criminal
20 background. And every place I have practiced, any place,
21 whether it's a capital case or not, has always allowed that to
22 happen.

23 But, again, it is a very difficult burden on us, and

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1 especially in situations where, as you know from the 152
2 series and the other issues that we started to discuss
3 yesterday, that the constant interaction with the client is
4 extremely important, and it's extremely important from various
5 members of the team because each person has a different
6 relationship with the person and can help to alleviate
7 problems.

8 MJ [COL POHL]: Prior to recently, did you need to file
9 special requests or ----

10 LDC [MR. HARRINGTON]: No, Judge. There was a period of
11 time where it's gone back and forth, as Ms. Bormann said.

12 MJ [COL POHL]: Yeah.

13 LDC [MR. HARRINGTON]: But when it's eased up, we just
14 notified them of who the persons were that ----

15 MJ [COL POHL]: Who was coming.

16 And you don't have to frame it's a special request.

17 LDC [MR. HARRINGTON]: That's right.

18 MJ [COL POHL]: Did you tell them what these persons -- is
19 there a job description of what they're doing? What I'm
20 saying is, you give them a list of five names because they
21 know that none of them are a paralegal and none of them are
22 attorney?

23 LDC [MR. HARRINGTON]: Yeah, they don't, Judge. Yeah.

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1 MJ [COL POHL]: Okay. In the past, you've given them the
2 name and they let them in, and then some -- but now they're
3 saying you've got to put that in a special request?

4 LDC [MR. HARRINGTON]: Right.

5 MJ [COL POHL]: But a special request hasn't been required
6 in the past under those circumstances?

7 LDC [MR. HARRINGTON]: It is not. And -- and sometimes
8 the special requests are denied.

9 MJ [COL POHL]: Okay.

10 LDC [MR. HARRINGTON]: It's not like we have control that
11 we just say this is particularly needed for our team. That's
12 not enough. And then we get into the issue of what -- why
13 should we be disclosing anything that we need to talk to our
14 client about.

15 MJ [COL POHL]: Understand. Thank you.

16 LDC [MR. HARRINGTON]: Thank you.

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

18 Mr. Ruiz.

19 LDC [MR. RUIZ]: Judge, we adopt the arguments of
20 co-counsel and affirm their positions.

21 I think what this illustrates is how arbitrary and
22 capricious the application of this policy has been. Our
23 experience has been the same in that it has been arbitrarily

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1 applied. Sometimes a special request is required, sometimes a
2 special request has not been required. Sometimes we have had
3 team members allowed to go in without a paralegal or an
4 attorney, and sometimes we have not.

5 We have had instances where we were not able to
6 conduct work because we didn't have enough paralegals that
7 were cleared. As recently as two months ago, we only had one
8 paralegal that was cleared; we needed them for other work, and
9 so we were unable to get some of our experts into the
10 facility.

11 The only restrictions that would appear to me to make
12 any sense are that the members who meet with Mr. al Hawsawi
13 are members of his defense team and that they are properly
14 cleared. Those are two pieces of information that we always
15 provide to the JTF and we believe are the only two legitimate
16 requirements that should be asked of us in terms of the
17 ability to meet with Mr. al Hawsawi.

18 The policy to us makes no sense, and we really don't
19 understand why it exists. And I simply want to refer you back
20 to 018U, because I've been looking at that for quite a while,
21 particularly in light of the issue we have with the computer.
22 But in that ruling -- which is written policy in terms of
23 written communications -- you do indicate what tends to be the

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1 court's position, which is you will not normally interfere
2 with the duties of the commander in terms of the daily
3 operations of the facility.

4 But then you go on to say, "The commission is
5 responsible to ensure appropriate legal protections for the
6 accused and will intervene when it is established that the
7 daily operations of the detention facility adversely impact
8 the commission's ability to proceed or the accused's rights."

9 We think that that is squarely on point in terms of
10 this issue. There is really no legitimate reason for why they
11 should have this arbitrary application of this policy. And
12 we're asking you to grant the relief requested in this motion.

13 MJ [COL POHL]: Thank you.

14 Trial Counsel.

15 TC [MR. SWANN]: Your Honor, Joint Detention Group SOP
16 Number 11 governs counsel meetings. Now, I've seen in the
17 pleadings counsel points out the fact that this is a recent
18 change. It's not.

19 Since at least January of 2016 -- and we did attach a
20 copy of the SOP to our pleading -- the JDG has required that,
21 at a minimum, an attorney or paralegal must be present for
22 every meeting.

23 MJ [COL POHL]: Have they enforced that uniformly?

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1 TC [MR. SWANN]: Sir, it's been across the board -- no.
2 And the answer is no. And I'm going to point out some things
3 for you in a moment, and I'll tell you exactly why maybe this
4 period of time that we're talking about here was a bad period
5 of time for the camp.

6 Legal meetings requested without one of the
7 individuals required -- this is in the SOP, since 2016. So I
8 don't know about the eaches of what Ms. Bormann was talking
9 about, but it did require a submission of a special request
10 containing justification for why an attorney or paralegal
11 can't be present or why the requested meeting needs to take
12 place.

13 These have been approved routinely over a long period
14 of time. I know specifically of several of them involving one
15 of the teams where we have gotten involved and said -- asked
16 the JDG commander to approve it. The JDG commander is the
17 decision-maker -- or maker to approve or disapprove these
18 requests.

19 Now, the defense is now seeking an order from you to
20 the JDG that would permit Mr. Ali to meet with any cleared
21 member of his defense team without the need to have either an
22 attorney or lawyer present. The defense claims that this has
23 been -- their interference with their right to represent them.

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1 There's no evidence, none, that this requirement has
2 been an issue since its enactment until this filing. In fact,
3 Mr. Ali points to -- and I saw that nice, little chart up
4 there. They point to a 100 percent approval rate from the
5 period of time August to mid-December of 2017. Every request
6 they asked for got approved. It was 26 for 26.

7 Now, you have a declaration in front of you from the
8 JDG commander. He tells you why these meetings were denied.
9 They were made in light of operational reasons. See, a lot
10 goes into what the JDG commander has to factor in. And we've
11 heard many times in this courtroom, from testimony from
12 Colonel Heath and other commanders at the camp, that their
13 peak ability to deal with meetings is six a day.

14 You have five men sitting in this room, you have a
15 sixth capital defendant, you have another detainee, and then
16 you have a group of other detainees who are facing referral.
17 So at any one day, there could be as many as ten competing
18 interests to be able have meetings with these individuals.

19 If you've got to make a cutoff point, you've got to
20 think, "Okay, is it a legal meeting? The paralegal, the
21 lawyer, are they going to be present at that point in time?"
22 Because something's got to give. And at that point in time,
23 that's what we're dealing with here. Now, the JDG commander

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1 takes a look at every one of these things.

2 What's most important, though, what is counsel being
3 denied in this instance? So let's take a look at the April
4 meeting schedule -- excuse me -- the 1 to mid-April meeting
5 schedule for Mr. Ali. That's the only pleading that was in
6 front of me at the time. That's the only one that we could
7 develop. We didn't know what the fact circumstances as to
8 these other individuals might be, but I think I have a chart
9 to help Mr. Harrington, too.

10 You have attached to the back of our pleading 566A.
11 It's a chart showing all of the meetings requested by Mr. Ali
12 for the period of 1 January 2018 through 15 April 2018. I'm
13 actually going to take it a little bit further because in
14 light of what counsel indicated about another request that
15 they didn't show on their chart for you up there, I'll try to
16 explain that one, too.

17 Of the meetings requested by Mr. Connell and his
18 team, they have requested 118 meetings. 23 of those were
19 denied; 95 of them were approved. And for a variety of
20 reasons, coming across for the first 3 1/2 months of this
21 year, 66 of the meetings were conducted. That means somebody
22 was seeing the client over at Echo II practically every other
23 day.

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1 And included in this period of time are weekends,
2 where the camp has made another special opportunity for the
3 accused to see them. Remember, the SOP says you get meetings
4 the week before a commission on a weekend, you get them the
5 week after on a weekend, but the camp has gone ahead and
6 approved other weekends coming across the board.

7 So Mr. Ali has been afforded an opportunity to see
8 his -- to see some member of his team at least every other day
9 for the first 3 1/2 months of this year. If the issue is
10 right to access, that clearly indicates otherwise. I mean,
11 you didn't get this from the defense. So we put it into our
12 pleading to give you an overall picture of exactly what's
13 happening here.

14 Now, December was a bad period of time. I know we
15 have heard testimony about MRIs. We have heard other
16 testimony across the board. We have heard exceptions to
17 policies being made with these individuals.

18 One little dot that you didn't see on the fine chart,
19 the PowerPoint chart, was that the defense in the Ali case
20 requested meetings with their investigator for last week.
21 Every day was approved, Tuesday through Saturday. He never
22 showed up. In fact, I don't even think he was even on island,
23 based on what I know. He never showed up. And so in light of

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1 that, because defense counsel had paralegals on the island,
2 they were able to slip the paralegals in there to take care of
3 those meetings during that period of time.

4 See, the camp commander sees it as this way. He's
5 got to accommodate a broad brush of people, and he's got -- I
6 won't say "limited assets," but he's got assets. Six meetings
7 a day is the max that these individuals can deal with. And,
8 in fact, when you have -- even when we have this going on,
9 we're dealing with meetings at the camp over there by some of
10 these detainees.

11 So here's what I would say, sir. We have given you
12 more than ample information in our pleading and in our chart
13 that we have provided to you that the defense here is being
14 denied nothing. Then you've got to ask yourself, how
15 difficult -- how difficult with, what, six or seven attorneys
16 on the Ali team, four or five on the Bin'Attash team and the
17 paralegals that they had, how difficult is it for them to just
18 simply come down to the island and make those meetings happen,
19 even -- even when they can go in there with their investigator
20 or any other person like that?

21 MJ [COL POHL]: Mr. Swann, in your pleading, you refer to
22 Turner v. Safley and whose burden has odd challenge in a
23 prison regulation.

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1 And you also refer to the SAMs in various cases
2 where -- where the ----

3 TC [MR. SWANN]: In the Ghailani case, the SAMs.

4 MJ [COL POHL]: In the Ghailani case, they talked about
5 limiting the translator and the investigator, requirement of a
6 paralegal. But this is a different category here; and we're
7 talking about reasonableness of regulations.

8 When the defense gets expert assistance -- let's take
9 psychiatric expert assistance -- would you agree or do you
10 agree that it's highly likely that the psychiatrist doesn't
11 want other people there when he's talking to his -- the
12 client/detainee?

13 TC [MR. SWANN]: Yes. Here's what I say about that. In
14 this instance, I think they asked to have -- it's off the top
15 of my head now, but I think it was about 29 January 2018 and
16 they wanted Dr. Xenakis, who has been a frequent visitor with
17 Mr. Ali over a period of time. From what I understand -- I'm
18 just reading all of the things they submit -- apparently
19 Dr. Xenakis has exhausted whatever number of hours that he had
20 with respect to the convening authority.

21 That kind of tells me that Dr. Xenakis has been
22 seeing Mr. Ali for a great period of time and has been able to
23 see him. I'd also point out the fact of this. Despite the

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1 fact that it's in the pleading, if you go back and look at the
2 attachments that they have -- and I believe it's
3 Attachment G -- one of the attachments says they asked for
4 Dr. Xenakis to be able to come see the accused. It's
5 approved, but bring a paralegal or an attorney.

6 One of those was approved for Dr. Xenakis to attend
7 without either the paralegal or attorney being present. I
8 don't know if that was on that chart, but -- so Dr. Xenakis
9 has the ability to see the accused. I agree with you.

10 I agree that a psychiatrist, or whoever these other
11 people are, should have an opportunity to meet with the client
12 alone, but all it has to do is be in the special request. You
13 have to indicate.

14 In the past when these kind of things have happened,
15 it will be a special request that will say something to the
16 effect, "We don't have a paralegal or a lawyer available
17 because we're out doing whatever; and this is essential that
18 we be able to talk to this individual before the next set of
19 hearings, which might be three or four days." Then the
20 JDG commander can look at it. He can make a determination.
21 He's got all of these competing interests. And he says, "That
22 one there, move to the front of the line."

23 They have not been denying these things over time.

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1 The period of time that we're talking about -- we go 2 1/2
2 half -- January, February -- we go almost two -- two years
3 without any indication that this has become an issue for these
4 meetings.

5 If you look at simply the chart that we have given
6 you in Mr. Ali's case, you will see that they have had plenty
7 of opportunity to see Mr. Ali.

8 Now, Mr. Harrington brought it up. I just happen to
9 have a chart for Mr. Harrington as well. During the month of
10 April, Mr. Harrington has made 46 requests ----

11 MJ [COL POHL]: Mr. Swann, are you testifying?

12 TC [MR. SWANN]: I guess I am, sir. But I just want to
13 point out that ----

14 MJ [COL POHL]: Let's leave what's on the pleadings.

15 TC [MR. SWANN]: All right, sir. I'll go -- let's just
16 say that we believe in Mr. Harrington's case, that he has not
17 been denied meetings to meet with his client during the month
18 of April. That's all I would say.

19 MJ [COL POHL]: On your chart, Captain Andreu's chart
20 talks about approval or denial of visits without an attorney
21 or paralegal present. And your chart talks about approval of
22 visits, period.

23 TC [MR. SWANN]: And here's what I would say ----

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1 MJ [COL POHL]: Is there any -- no. Just let me finish,
2 please.

3 Is there any -- on the 23 denied ones, were those
4 because there was no paralegal present or attorney, or do you
5 know? I just want to make sure that we're not comparing
6 apples and oranges here.

7 TC [MR. SWANN]: Yes, that's what they are.

8 And I would say for this point, if you look at their
9 chart and if you look at the back of our chart that talks
10 about 29 January 2018 to 4 February 2018, there are 18
11 requests that week. 13 of those were denied. That's
12 Dr. Xenakis.

13 MJ [COL POHL]: And just to clarify here -- because it
14 seems to me I'm hearing two rationalizations -- is it a space
15 issue primarily? And then because there's limited space, then
16 there has to be a prioritization; and the prioritization
17 defaults to people with attorneys and paralegals as the
18 general rule? Is that how you ----

19 TC [MR. SWANN]: I think it's across the board. Some days
20 they may not have this problem, and so they go ahead and
21 approve all of those things.

22 As I pointed out last week, Mr. Connell's team asked
23 for the investigator to come. And this -- this is raised by

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1 their very pleading in one of the footnotes, so I am not
2 testifying. They asked for one of their investigators to
3 come. He asked for meetings twice a day Tuesday through
4 Saturday. Every last one of them was approved, and it was a
5 no-show.

6 There were other meetings requested by paralegals. I
7 think they had at least two of them down on island last week.
8 They got in to see Mr. Ali, except when Mr. Ali refuses for
9 some other reason. I think we've got a couple of times in
10 there on that chart that we have provided you for Mr. Ali, a
11 couple of them had to be cancelled because of operational
12 reasons. I think there was some water problem over at the
13 camp during those two times.

14 The real issue comes to this. If, in fact, that you
15 tell the JDG commander that he's got to let in anybody and
16 everybody, then there's no paralegals, where does the
17 JDG commander draw the line? Is it going to be when a
18 linguist wants to show up to talk to Mr. Mohammad about his
19 cultural issues? Or is it going to be that -- and another
20 attorney and a paralegal who wants to see another client can't
21 get in because -- there. It will all work out in the end.

22 I'm just telling you that this 66 number that appears
23 for Mr. Ali from 1 April -- excuse me, from 1 January to

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1 15 April, it is liable to be less only because the operational
2 issues are going to increase. So I would allow the
3 JDG commander to continue using his prerogative ----

4 MJ [COL POHL]: Back up a second, Mr. Swann, because I'm
5 not quite sure.

6 The problems will be less because the operational
7 capability will increase, or the problems will be more because
8 the operational capabilities will be less? I didn't quite
9 understand you.

10 TC [MR. SWANN]: I'm sorry. I apologize.

11 MJ [COL POHL]: Yeah.

12 TC [MR. SWANN]: What I was saying was this. If they
13 follow the rules, attorney/paralegal to get in, there's a
14 greater chance that they're going to get in. If -- for one
15 reason during a week that ten people are seeking to get in to
16 see an attorney or a paralegal, and then you have this one
17 that wants to go in with just an investigator or something,
18 where does the JDG commander draw the line? Okay?

19 Now, he may draw the line based on the rationale they
20 present to him. So more reasons within the exception to
21 policy. "We've got to see him. We have an issue that has got
22 to be resolved this week." Then he's got a lot of information
23 that he is weighing in order to accommodate all individuals

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1 here.

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

3 Captain Andreu?

4 ADC [Capt ANDREU]: Sir, just a couple of quick points.

5 The government spoke about Dr. Xenakis in that one of
6 the -- I indicated to you, sir, that all four of the visits on
7 our graph there that were requested for Dr. Xenakis were
8 denied. The government said that one of them was approved.
9 Attachment H to AE 566, our initial filing, sets forth the
10 e-mail back and forth from the SJA.

11 One visit was originally approved but then denied, so
12 in the end, all four visits for Dr. Xenakis were denied.

13 Secondly, you asked ----

14 MJ [COL POHL]: Let me ask you a question -- and again,
15 I'm trying to compare the two charts. On your chart, 566C,
16 you indicate that -- and I'm just going to go from January to
17 April because that's the time frame of the government's
18 chart -- that only two meetings were approved without an
19 attorney or paralegal present.

20 ADC [Capt ANDREU]: Yes, sir.

21 MJ [COL POHL]: So every other meeting requested without a
22 paralegal or attorney present was denied?

23 ADC [Capt ANDREU]: Yes, sir.

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1 MJ [COL POHL]: So looking at Mr. Swann's chart, then of
2 those 23 denials, he says there's 23 denials, and he doesn't
3 break it down with or without paralegals; and your chart, as I
4 count, has 29 denials, assuming each of your symbols means a
5 denial.

6 ADC [Capt ANDREU]: Yes, sir. So one, I'm not sure if
7 the -- it seems that the government's chart is not just
8 unaccompanied visits; it's all visits.

9 MJ [COL POHL]: I know. I know. But if you take the
10 government's chart and it says 23 -- 23 visits were denied,
11 and if you take your chart, you have 29 denials for the
12 paralegals. So ----

13 ADC [Capt ANDREU]: So the only other thing I could say, I
14 don't know how the government created its chart, but I can say
15 that for our chart, I -- take January 1st. If we requested an
16 a.m. and a p.m. visit on January 1st, that would be two
17 denials on our chart.

18 MJ [COL POHL]: Okay. Okay. I don't want to get -- you
19 maybe used different methodologies, because I'm sure you guys
20 didn't work on this together. That's okay. Go ahead.

21 ADC [Capt ANDREU]: Yes, sir.

22 The second thing I wanted to pointed out was you
23 asked -- can I have a moment?

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1 MJ [COL POHL]: Sure.

2 [Pause.]

3 ADC [Capt ANDREU]: All right, sir. Going back to the
4 previous question, one possible explanation also is if we had
5 requested an unaccompanied visit and that was denied, and we
6 then sent paralegals anyway. So we send a group, and we count
7 that as a denial, that would be a red hash, where I believe
8 the government would count that as approved because someone
9 showed up for a visit.

10 MJ [COL POHL]: I got it. I got it. Go ahead.

11 ADC [Capt ANDREU]: You asked a couple of the attorneys
12 about if this policy has been in place for a while or if it's
13 changed and whether there's always been a requirement for a
14 special request.

15 So the policy has been in place since 2015. From
16 Mr. al Baluchi's perspective, at least going back to 2016,
17 there has been this requirement for special requests; however,
18 they were routinely granted. So it's not that the special
19 request is new here in mid-December, it's just that whether or
20 not the special request was granted or denied has changed.

21 Lastly ----

22 MJ [COL POHL]: Your base objection is not to the policy;
23 the base objection is the -- is that where they were routinely

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1 granted in the past, the special requests are now being
2 routinely denied?

3 ADC [Capt ANDREU]: Yes, sir. That's exactly correct.

4 MJ [COL POHL]: I got it.

5 ADC [Capt ANDREU]: And the government argues that the
6 reason that the requests have been denied over this relevant
7 period is due to operational requirements.

8 And it's certainly reasonable that a reasonable
9 amount of visits, be them accompanied or unaccompanied, are
10 going to be denied because of operational requirements. We
11 get that. We agree with that.

12 But it doesn't make intellectual sense here that that
13 would be the case here, because as the government's chart
14 shows, over that same time period, accompanied visits are not
15 being denied; it's the unaccompanied visits that are being
16 denied. So in either instance, the JDG has to staff the camp,
17 has to escort someone back there. They still have to let
18 someone in the room, whether it's accompanied or
19 unaccompanied.

20 MJ [COL POHL]: Well, how do you respond to the
21 government's argument that there's not just these five people
22 involved, that there's also other HVDs who potentially need to
23 meet with counsel? Do you have habeas counsel involved? So

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1 it's -- and you have a limited amount of meeting space?

2 I mean, are you asking that -- that the policy be
3 changed, that all priorities to meetings go to these five
4 individuals?

5 ADC [Capt ANDREU]: No, sir. But I understand that
6 there's ----

7 MJ [COL POHL]: And how does the camp balance the
8 competing interests for the limited amount of space?

9 ADC [Capt ANDREU]: Well, if there's -- so -- in either
10 instance, we have a meeting room allocated where we can meet
11 with Mr. al Baluchi.

12 MJ [COL POHL]: Uh-huh.

13 ADC [Capt ANDREU]: And whether or not we -- what I don't
14 understand in their argument is whether or not they grant an
15 unaccompanied visit where we only send, let's say, a
16 psychiatrist or an investigator into the room, or whether or
17 not they grant -- or whether or not they force that individual
18 to go into the room with the attorney. The meeting space is
19 still being used either way.

20 MJ [COL POHL]: No, I understand. But the point being --
21 if the meeting space is -- what I'm being told and when I look
22 at the SOP or -- is that the meeting space, if it was
23 available, the special requests would be granted. The problem

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1 they run into is that when they have more requests than space,
2 and then the JDG commander has to make an operational decision
3 how to prioritize.

4 So your argument that, well, the space is available
5 anyway, regard -- I understand that, but that's not the point
6 here. The point here is that -- at least as I understand the
7 government's position, is that there's limited space, and that
8 this is a way for the JDG commander to prioritize the visits.

9 If an attorney comes down or a paralegal comes down,
10 that's more of a priority than if they're unaccompanied. It
11 doesn't mean that the unaccompanied -- when I say
12 "unaccompanied," unaccompanied by -- a paralegal won't be
13 there. But it's just the way, apparently, he's using to
14 prioritize the space when there's multiple competing requests
15 for the same space and there's not enough space to accommodate
16 them all.

17 ADC [Capt ANDREU]: Okay. Now I'm tracking you, sir.

18 So the problem with that argument is that it doesn't
19 contemplate the issues that we laid out, where there is a need
20 for Mr. al Baluchi to meet with individual team members in the
21 absence of an attorney or paralegal. And so for the JDG
22 commander to say that an attorney with -- that a meeting with
23 an attorney present is more important than a meeting without

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1 an attorney present is just not accurate.

2 Subject to your questions, sir, that's all I have.

3 MJ [COL POHL]: I have nothing further. Thank you.

4 Anything further from either -- Mr. Nevin.

5 LDC [MR. NEVIN]: Well, just to say, Your Honor, I
6 understand what you're saying. I heard your remarks to
7 counsel and ----

8 MJ [COL POHL]: Understand, I'm just -- what I think is
9 the government's position is not necessarily ----

10 LDC [MR. NEVIN]: Yes, sir.

11 MJ [COL POHL]: ---- is my position.

12 Go ahead.

13 LDC [MR. NEVIN]: I understand. I thought maybe there was
14 going to be some suggestion that there was a security problem
15 or something with not having a lawyer or a paralegal there.
16 And so it's just -- but I heard Mr. Swann saying something's
17 got to give; most we can have is six per day.

18 And, you know, my immediate thought was, "Well, why
19 does having an attorney -- why does it turn on whether there's
20 an attorney or a paralegal or not?" You still have to set
21 aside a meeting room either way, just as counsel was saying.
22 But I understood, then, you to say that they're just
23 prioritizing limited space in this way.

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1 And I just -- I imagine it's obvious to the military
2 commission, but it made me think of the discussion about a
3 second courtroom that we had. And I think as it has -- as has
4 been pointed out to you -- and I don't mean to be gratuitous
5 about this, but we are, after all, here in Guantanamo as
6 opposed to, oh, let's say, Boise, Idaho, because that's a
7 decision that the government made. It's not a convenient
8 place to handle any case, never mind the largest criminal
9 investigation in the history of the country. But that's what
10 the government chose to do.

11 And so when counsel says something's got to give, I
12 think the obvious question from my table is, "Why does the
13 thing that has to give have to be my team's ability to provide
14 a defense to Mr. Mohammad in a timely way?" And I don't think
15 it should be.

16 And so I ask you to consider that when you're looking
17 at 478, the request for trial setting, and other matters that
18 have to do with, you know, our general ability to go forward
19 here. We're probably -- I don't know if we're going to do it
20 this session, but there are housing issues that the military
21 commission has noted.

22 There are many practical problems that arise down
23 here. And set aside the faith -- or good or bad faith or

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1 anything else with respect to the JDG folks or with respect to
2 the prosecution. I'm not saying that. I'm just saying if --
3 please keep that in mind when you're deciding how quickly this
4 case can move forward.

5 Second, I ask you to bear this in mind when we're
6 talking about 555, the motion to dismiss because of unlawful
7 influence over the convening authority in connection with the
8 firing of the convening authority and the -- and his legal
9 advisor, because one of the things that was -- that the first
10 memorandum of the former convening authority indicated that --
11 was that he was actively working on plussing-up the
12 availability of facilities down here at Guantanamo Bay to
13 allow this case to go forward.

14 In fact, the military commission may recall that one
15 of the primary issues that was claimed as a basis for firing
16 him was that he had insisted on having -- something having to
17 do with an aerial photo being taken, and -- but that was -- as
18 we learned from the subsequent declaration that you
19 distributed to us yesterday that that was as a result of a
20 congressional request. And, as a result of it, 14 million
21 dollars was made available for -- to increase the
22 effectiveness and the availability of facilities here. So I
23 think these things interlock.

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1 I mean, I would say to you, yes, you should issue an
2 order saying don't exclude -- don't deny meetings on the
3 ground that the right personnel are not present. Just as
4 Ms. Bormann said, that's up to the defense teams to decide who
5 should be down seeing the client today. And -- you know, and
6 our goal is to have meetings every day with our client, and we
7 don't get there. We're not able to do that. But, frankly,
8 that's probably necessary in a case like this, in an unusual
9 case of this type.

10 So I would say that, from your standpoint, the thing
11 would be to say, "Do it. Make it available. And how you get
12 the facilities together to make it happen is not my problem.
13 It's somebody else's problem. It was your idea to be here,
14 and it should be your job to make it work."

15 So thank you, Your Honor.

16 MJ [COL POHL]: Thank you, Mr. Nevin.

17 Ms. Bormann.

18 LDC [MS. BORMANN]: I'm going to remind you of something
19 you probably don't want to remember, and that's AE 254 -- and
20 I'm not talking about the portion of it involving the female
21 guard issue. But 254 started with a series of motions. I
22 think the original one was in the 50s somewhere, where we were
23 being denied attorney-client meetings.

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1 And I don't know if you recollect, but a variety of
2 individuals got on the stand here to tell you what the
3 operational constraints that Mr. Swann was referring to were.
4 And they don't have to do with space; they have to do with
5 manning. You will remember there are 16 meeting rooms
6 available; there still are. It's about manning. The reason
7 that they cannot accommodate, as they say, more than six
8 meetings in a given day, is because they have chosen not to
9 man it properly.

10 So let's go on to the next portion of that -- of the
11 analysis of what Mr. Swann says. So we're supposed to now
12 make special requests laying out why it is we want a
13 particular meeting with a particular confidential consultant.
14 So not only do we have to name our confidential consultant in
15 a meeting request, but then we have to explain to the United
16 States Government via the JDG why it is and what we intend to
17 accomplish with that particular expert on a given day.

18 And it is quite clear from Mr. Swann's argument that
19 Mr. Swann can then go -- or any member of the prosecution, I
20 assume, can then go to the JDG commander and receive the
21 information about that particular consultant. So, for
22 instance, that's why we got to hear today about Dr. Xenakis,
23 and we also got to hear about Mr. Xenakis's request for more

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1 hours. God knows how that information got to Mr. Swann.

2 But at any rate, the bottom line is we don't want
3 that to happen with our confidential consultants. We don't
4 want to have to lay out to JDG why a particular expert needs
5 to see Mr. Bin'Attash on a particular day. That is matter
6 left to defense counsel and should not be exposed -- JDG
7 shouldn't have to second-guess it. They certainly don't have
8 the qualifications to do that. And maybe most importantly,
9 given where we went today, we ought not to have the
10 prosecution have access to that information. We'll address
11 that in a further motion.

12 But here, Judge, the beginning premise is incorrect.
13 They can man these meeting facilities so they don't have to
14 deny meetings. They've chosen not to. If more than 16
15 meetings are scheduled for each day, the United States
16 Government has the ability to build more meeting space or use
17 different meeting areas for different spaces, as has been done
18 in Mr. al Nashiri's case and some other cases.

19 You shouldn't buy into the idea that Mr. Nevin
20 shouldn't see his client because the JDG commander has decided
21 that they don't have enough manning to do it. That premise
22 should be rejected by you. But you don't have to decide that
23 here.

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1 What you should decide -- and this is where we part
2 with counsel for Mr. al Baluchi. Mr. al Baluchi -- Captain
3 Andreu got up and said we understand there are operational,
4 you know, restrictions. But we don't, because in any other
5 place where I've tried a case, I can meet with my client when
6 I need to meet with my client. There's not -- it's not denied
7 because they don't have the space. So we don't agree with
8 counsel for Mr. al Baluchi, that that shouldn't be -- that
9 that's a correct premise.

10 The other part that we -- where we part company with
11 counsel for Mr. al Baluchi is on the necessity for special
12 requests. In fact, we specifically object to having to do
13 them. Other than listing the personnel and making sure that
14 they have the proper clearances, JDG should have no say
15 whatsoever in who we choose to meet with our clients.

16 MJ [COL POHL]: Thank you.

17 Mr. Harrington.

18 LDC [MR. HARRINGTON]: Judge, just a couple of
19 clarifications on what Mr. Swann had stated.

20 One is that why this issue has come up now. And
21 obviously it has not come up before to you because all of us
22 have tried to accommodate what the problems were with the
23 camp. So if it came up rarely, we didn't come running into

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1 court immediately and saying, "I was denied one visit or two
2 visits." It's obviously increased significantly over the past
3 year.

4 And secondly, Judge, most of the time when a visit is
5 denied where we don't have a paralegal available or an
6 attorney available, we don't get a statement it's denied for
7 operational reasons. We get them sometimes, but we just get a
8 statement that says it's denied. So we're not even sure on
9 some of these occasions what the reason for it is.

10 And, Judge, on the policy issue, you asked Captain
11 Andreu whether this was a policy issue. And it is a policy
12 issue. We don't want to be in a position where our team has
13 to write a more important reason and spell out any reason at
14 all why it is that somebody from our team has to see a client,
15 and then be, for example, in competition with Mr. Nevin or
16 Ms. Bormann as to whose visit is more important than the other
17 person.

18 And when you look at this, you have to say to
19 yourself -- the comment was made before, you know, why should
20 an attorney being present be any more significant? Well, why
21 should a paralegal be present? Why should that elevate this
22 into a different category? There's not a rational basis for
23 it.

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1 Thank you.

2 MJ [COL POHL]: You're welcome.

3 Mr. Ruiz.

4 LDC [MR. RUIZ]: Judge, we -- based on our experience, we
5 do not believe that it is a space issue either. Clearly,
6 there have been times where our meetings have been denied for
7 Mr. al Hawsawi where we weren't competing with a plethora of
8 other people such as habeas counsel or other counsel. There
9 were actually very few people who were on the island at the
10 time.

11 I think Ms. Bormann hit the nail squarely on the head
12 in terms that it is a personnel issue. You may remember in
13 December of last year, there was a personnel issue that was
14 raised before the commission, and Mr. Swann guaranteed that
15 this would not be a problem going forward. I recall he gave a
16 number of guarantees, once again testified on the record, and
17 said that after December, it would no longer be an issue.

18 But here we are in 2018, six years almost to the day
19 of the arraignment, many years after the initial prosecution
20 of these men began, and we are still talking about the United
21 States Government, who has put millions and millions and
22 millions and millions of dollars into Guantanamo, standing up
23 and saying to you, "We can only do six visits a day, Judge.

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1 We've got six capital cases. That's all we can do. We can
2 only handle six cases in Guantanamo a day. That's what we're
3 able to do. That's what our taxpayer dollars pay for." We've
4 got millions and millions and millions of dollars invested in
5 Guantanamo, but, Judge, all we can do is six visits a day.

6 Ms. Bormann pointed out that there aren't just six
7 meeting spaces. In fact, one was just constructed for
8 Mr. al Nashiri. There are 16 different spaces that are
9 available, can be used for client meetings throughout the day.
10 So it's not a space issue.

11 And, Judge, I'm not sure if you've ever toured the
12 facilities where we meet with the clients, but it may be
13 something someday you may want to do, and see that it is a
14 larger space, in terms of the number of huts that are
15 available. There are 16 available.

16 As you may or may not know, they were renovated at
17 one point. We went through the whole litigation on the
18 monitoring of those huts, so there were some renovations that
19 were made to them. And some of them have been upgraded, I
20 think, based on what the government believes to be upgrades.
21 But the fact of the matter is, there are places where people
22 can go in and sit down and talk to the client.

23 Now, we can talk about the adequacy of that at

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1 another point in time, but there's 16 ----

2 MJ [COL POHL]: Let me ask you a question, Mr. Ruiz,
3 because -- and, again, I'm hearing from the government is that
4 basically this policy is a method by the JDG commander to
5 prioritize visits, as I'm gleaning the government's argument.

6 If there isn't sufficient space for all of the
7 requests, would he not have to have some methodology to
8 prioritize the space?

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

10 MJ [COL POHL]: I understand your argument about the --
11 spending all of the money, and we should have more space.
12 I've got all of that. But I'm just saying is -- is I'm trying
13 to understand -- I mean, the government's argument is this a
14 prioritization issue, and my question is: If there are more
15 requests than space, does he not -- should he just
16 prioritize ----

17 LDC [MR. RUIZ]: If we were ----

18 MJ [COL POHL]: ---- in some way, shape, or form?

19 LDC [MR. RUIZ]: If we were to accept that as being true,
20 yes, clearly. But it's not true. And I'm telling you it's
21 not true.

22 In the years and years that I have been coming to
23 Guantanamo, and my people have been coming to Guantanamo,

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1 there's a little red light that flashes on the huts when they
2 are being used. So when we walk out into this courtyard and
3 we see the little red light, we know that there's somebody in
4 that hut. Okay? Never, ever have I walked out into that
5 courtyard and seen all 16 huts flashing. Certainly, I can
6 guarantee you it's never happened. All right?

7 So the -- the proposition that it is a space issue, I
8 think is false. And I'm going to say that very clearly. It
9 is false. I can never -- and never have seen a time when all
10 16 huts were being used.

11 So I do believe, as Ms. Bormann said, it is a manning
12 issue. It is the number of personnel that are available to do
13 whatever it is they do to supervise these visits. Whether it
14 is to monitor them, whether it is to transport them, whether
15 it is to make the rooms available, it is a manning issue. And
16 if, in fact, it continues to be a manning issue, Judge, that
17 becomes our problem. It shouldn't be our problem, but it
18 becomes our problem.

19 And it goes back to what you said in the language
20 that I quoted -- and it wasn't 018U, it was -- 018T was your
21 ruling where you affirm the fact where you are not in the
22 business of getting into the business of the everyday ongoings
23 of the detention facility unless it adversely affects or

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1 impacts this military commission or the accuseds' rights in
2 this case. That's, in fact, what this does. That is, in
3 fact, what is happening.

4 In terms of the prioritization, I would also say that
5 that is also a false way of going about it. Because what I
6 can tell you is that every person that meets with
7 Mr. al Hawsawi, I know who they are. Every person that meets
8 with him, I know the reason and the purpose for their meeting
9 both before and after. And the fact that I can't be
10 physically present doesn't diminish in any way, shape, or form
11 the importance of that visit. Because oftentimes the people
12 who go in and talk to Mr. al Hawsawi carry my messages, carry
13 issues, carry information back to us -- to the attorneys --
14 who have other duties and responsibilities, Judge. And at the
15 end of the day, it becomes an efficiency issue.

16 And Mr. Swann stood up here and looked around and
17 said, "Well, how hard is it for an attorney to be present?
18 How hard is it for a paralegal to be present?" Now, I
19 understand that he obviously has a very myopic view of what it
20 is the defense does, and doesn't have the facts or the
21 knowledge to understand it. I get that.

22 But the fact of the matter, Judge, is that our
23 personnel are assigned to a team, are properly cleared, are

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1 under the guidance of our attorneys, and are going in to
2 conduct attorney-client visits -- attorney-client visits and
3 attorney-client business that is important to the case, just
4 as important if I was there, because the people are carrying
5 messages at times, issues, and bringing back information about
6 what is happening.

7 And most importantly, Judge, they're allowing us to
8 carry on the business of the case in other ways that further
9 the progress of this case. So if we constantly had to pop on
10 the plane and fly down here and do what sometimes our other
11 personnel can do, that could delay and degrade our ability to
12 do other things that pushes this litigation forward.

13 As we know, the prosecution continues to want to push
14 this litigation forward and push it and push it and push it
15 towards trial, and yet they don't have the infrastructure or
16 the ability to provide us with the access, with the manning,
17 to push the case forward. And when we ask for that access,
18 they complain that they can only hold six meetings a day.

19 So if they do, in fact, want us to continue to drop
20 the things that we are doing so that we can attend these
21 meetings, there will be other parts of this case that will
22 suffer, and the progress of the case will continue to be
23 degraded because they can't sustain more than six meetings a

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1 day.

2 So in this instance, Judge, I think it's a clear
3 instance of where you need to step in because it is affecting
4 the ability of our members of our teams to go in and speak to
5 Mr. al Hawsawi, as well as to carry on the business of this
6 case in a manner that is reasonable.

7 Thank you.

8 MJ [COL POHL]: You're welcome.

9 Mr. Swann.

10 TC [MR. SWANN]: Two points, Your Honor.

11 It's not me testifying. If you take a look at
12 paragraphs 7 and 8 of the commander of the Joint Detention
13 Group's declaration that's been submitted, you will understand
14 that he's making decisions based on operational reasons and
15 balancing what -- all of the interests he has.

16 The second point I want to make is Ms. Bormann.
17 Ms. Bormann tends to think that I know something about
18 Dr. Xenakis that is outside the record of trial. If she would
19 read the pleadings, she will see that everything that I said
20 about Dr. Xenakis is included in Mr. Connell's pleading along
21 with the attachments thereto. I don't know anything about
22 Dr. Xenakis other than what's in that pleading, period.

23 MJ [COL POHL]: Mr. Swann, let me ask you a question.

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1 Mr. Ruiz alleges there's 16 meeting rooms. Is that true?

2 TC [MR. SWANN]: Listen, I have heard testimony at various
3 times that there might be 16 over there, huts and stuff.
4 We've also heard testimony throughout these proceedings that
5 none of them -- many of them are just not operational, for a
6 variety of reasons.

7 MJ [COL POHL]: Well, of course ----

8 TC [MR. SWANN]: I don't know -- I don't know that 16 are
9 operational.

10 MJ [COL POHL]: Well, I mean, your argument is based on
11 this is an operational prioritization issue more than
12 anything.

13 TC [MR. SWANN]: My argument is based on the declaration
14 that's contained in the pleading.

15 MJ [COL POHL]: And I'm looking at the declaration. And
16 nowhere in there does it tell me how many meeting rooms there
17 are or anything else. He just has a conclusion that for
18 operational requirements, I have to prioritize. And this is
19 the -- one way I prioritize meetings, is by who's coming. I
20 see that. And if there is limited space, I see his position
21 that I've got to -- I can't grant every request.

22 But I don't know what the baseline is here. You tell
23 me you don't know how many huts there are. I'm hearing six

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1 meetings a day. What does that mean?

2 TC [MR. SWANN]: He can accommodate as -- you ----

3 MJ [COL POHL]: Six meetings at a time or six meetings a
4 day?

5 TC [MR. SWANN]: Six meetings -- six meetings a day is
6 what we're talking about. Most of these meetings go a.m. and
7 p.m. Okay?

8 MJ [COL POHL]: Okay. Let's -- let me -- I'm a simple
9 guy. Okay?

10 TC [MR. SWANN]: Six meetings a day. Six individuals a
11 day.

12 MJ [COL POHL]: Okay. So when you -- but as I understood
13 earlier, the request is not for -- the request can be for a
14 morning meeting or an afternoon meeting or for both, right?

15 TC [MR. SWANN]: It can be, yes.

16 MJ [COL POHL]: Okay. So there's a potential for -- I'm
17 not sure why I'm going down this road, but I'm going to -- for
18 12 meetings a day, it could be 12 different clients. It could
19 be 6 clients or a variation of the theme between them. Is
20 that your understanding?

21 TC [MR. SWANN]: Listen, I ----

22 MJ [COL POHL]: No. What I'm saying is there is the
23 possibility ----

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1 TC [MR. SWANN]: There is the capability for -- to
2 accommodate six detainees a day. It could be one will want
3 all day. What most often happens, based on what I've seen, is
4 that they go to the detainee the night before. They tell the
5 detainee you have legal meetings tomorrow. The detainee will
6 say, "I don't want to go in the morning. I'll go in the
7 afternoon." They have made arrangements. They can
8 accommodate.

9 MJ [COL POHL]: Assuming it doesn't require a classified
10 answer, what's the baseline of customers here? What's the
11 baseline of detainees that need to use this ----

12 TC [MR. SWANN]: Well, the baseline ----

13 MJ [COL POHL]: ---- facility?

14 TC [MR. SWANN]: The baseline will be anybody over in
15 Camp VII who has habeas counsel. The baseline is the ----

16 MJ [COL POHL]: So it's not just these -- it's not just
17 HVDs, then?

18 TC [MR. SWANN]: It is HVDs ----

19 MJ [COL POHL]: Okay. What I'm saying is ----

20 TC [MR. SWANN]: ---- yes. It is HVDs.

21 MJ [COL POHL]: The public will report there's 41 people,
22 give or take, over there.

23 TC [MR. SWANN]: Yes.

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1 MJ [COL POHL]: So -- what I'm saying, your baseline --
2 because I'm hearing -- we're talking about competition for
3 space. And I'm just -- you're saying, you've told me that
4 there's six meetings a day. I got that part of it.

5 TC [MR. SWANN]: Six detainees a day, back and forth.
6 They can meet all day long.

7 MJ [COL POHL]: Yeah. I got that. My question about the
8 baseline, is this a 41-person baseline ----

9 TC [MR. SWANN]: No.

10 MJ [COL POHL]: ---- or is it only the -- and, again, if
11 it's a classified number, you don't need to tell me -- I don't
12 think it is classified, but is it the numbers of the HVDs
13 only?

14 TC [MR. SWANN]: It's the HVDs only.

15 MJ [COL POHL]: Okay. So it's a number less than 41.
16 Okay. Thank you.

17 Do you have anything further?

18 TC [MR. SWANN]: No.

19 MJ [COL POHL]: Okay. Commission will be in recess for 15
20 minutes.

21 [The R.M.C. 803 session recessed at 1037, 1 May 2018.]

22 [END OF PAGE]

23

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1 [The R.M.C. 803 session was called to order at 1056, 1 May
2 2018.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties again appear to be present.

5 Any changes?

6 CP [BG MARTINS]: Ms. Nicole Tate is back for the United
7 States, Your Honor.

8 MJ [COL POHL]: Thank you. Okay. That brings us to 526D.

9 Mr. Sowards.

10 CDC [MR. SOWARDS]: Good morning, Your Honor.

11 MJ [COL POHL]: Good morning.

12 CDC [MR. SOWARDS]: Gary Sowards appearing on behalf of
13 Mr. Mohammad.

14 Your Honor, this is a fairly straightforward motion.

15 It's what in the words of the court in Ake v. Oklahoma is
16 called a request for meaningful access to justice. And in
17 this case we think that the record that is currently before
18 the commission including the acknowledgements made by the
19 government and disclosures to date, in light of the
20 controlling case law, would certainly make it appropriate and,
21 in fact, compel the commission to reconsider AE 526C and grant
22 the relief requested in 526E.

23 MJ [COL POHL]: What relief did you request?

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1 CDC [MR. SOWARDS]: We are requesting an order from the
2 commission to ensure the continued availability of the MRI
3 scanner here at Guantanamo until such time ----

4 MJ [COL POHL]: Okay.

5 CDC [MR. SOWARDS]: ---- as we can make appropriate
6 application for funding for additional services of the MRI for
7 Mr. Mohammad.

8 MJ [COL POHL]: Okay. What's the current status of the
9 MRI machine?

10 CDC [MR. SOWARDS]: That's an excellent question. The
11 most recent update, as it were, that we have from the
12 prosecution by way of an e-mail from Mr. Trivett on
13 April 20th, which is later than the discussion you referenced
14 in the 802 hearing ----

15 MJ [COL POHL]: Just to put it on the record, there was a
16 pleading filed in another case indicating the MRI machine was
17 going to stay here until 30 September, and I just notified
18 counsel that I was aware of that. I don't know whether it's
19 true or not. I'm just simply saying I was aware of the
20 pleading, and I just wanted to give it to counsel so we are
21 all on the same page.

22 Okay. Go ahead, Mr. Sowards.

23 CDC [MR. SOWARDS]: And we appreciate that heads-up, Your

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1 Honor, and I believe that was Colonel Rubin speaking with
2 Commander Flynn in another case, trying to sort out ----

3 MJ [COL POHL]: All right.

4 CDC [MR. SOWARDS]: And the information there in that
5 transcript indicates that they are apparently in the same
6 position we are in with the assistance of Mr. Trivett, and
7 that is that there's an indication that an offer has been made
8 by the -- I guess it's the Navy Medical Logistics Command to
9 surrender possession for inventory or for whatever purposes to
10 the Joint Task Force at Guantanamo of the machine.

11 And then the recent update by way of Mr. Trivett is
12 that the Joint Task Force-Guantanamo had at least agreed to
13 fund the maintenance of the machine through the end of
14 September, so ----

15 MJ [COL POHL]: So why doesn't that moot your request,
16 then? You asked me to order for -- the only thing you asked
17 me was to keep it here, and it's here.

18 CDC [MR. SOWARDS]: Well, that's debatable. Well ----

19 MJ [COL POHL]: Is it debatable whether it's here or not?

20 CDC [MR. SOWARDS]: Well, it could be debatable it's here;
21 it's really debatable whether it's going to remain here. And
22 let me speak to that, if I may. Because part of the issue and
23 the reason that I'm asking you to do this is because of the

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1 importance of the information and Mr. Mohammad's clear
2 entitlement to additional testing.

3 MJ [COL POHL]: Mr. Sowards, I know we're going to talk
4 across each other on this issue because I have read your
5 pleadings and reconsideration.

6 CDC [MR. SOWARDS]: Yes, sir.

7 MJ [COL POHL]: And you asked me to keep the MRI machine
8 here. And when I -- when I said I'm not going to do that,
9 because I have never ordered that type of expert assistance
10 because I've never gotten such a request ----

11 CDC [MR. SOWARDS]: Correct.

12 MJ [COL POHL]: Your reconsideration -- or the convening
13 authority, to my knowledge, has authorized it.

14 CDC [MR. SOWARDS]: Correct.

15 MJ [COL POHL]: Your response back to me for
16 reconsideration was twofold: One, that the convening
17 authority, by offering this, inferentially found it necessary
18 to the preparation of the defense; and, two, is your request
19 to keep it here should be considered a request for expert
20 assistance.

21 CDC [MR. SOWARDS]: Correct.

22 MJ [COL POHL]: So let's just get this -- because I think
23 we'll end up talking across each other quite a bit if I don't

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1 just -- okay.

2 In my view -- and this applies to perhaps other
3 people, too -- if you wish to have the expert assistance of an
4 MRI machine, you must request it.

5 CDC [MR. SOWARDS]: From whom?

6 MJ [COL POHL]: Well, from the convening authority, then
7 to me.

8 CDC [MR. SOWARDS]: Yeah. And that's ----

9 MJ [COL POHL]: And if -- and if -- the convening
10 authority has -- because they gave you the machine, and now
11 you're saying you don't like what they did. But again, none
12 of that was in a normal expert assistance request process.

13 CDC [MR. SOWARDS]: Sure.

14 MJ [COL POHL]: So that was when I -- when I denied your
15 request about keeping it here, to me, that was the cart ahead
16 of the horse. You've never asked me, in a proper way, to
17 provide this expert assistance.

18 CDC [MR. SOWARDS]: Sure.

19 MJ [COL POHL]: So I'm supposed to read your pleading as
20 that, because that's in the reconsideration.

21 Go ahead.

22 CDC [MR. SOWARDS]: Thank you, sir. And, by the way, I
23 meant to say "from whom" is the question. I didn't mean to be

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1 asking the commission to answer my question.

2 MJ [COL POHL]: Sure.

3 CDC [MR. SOWARDS]: Part of the issue is from whom. And
4 I'll explain that issue in just a moment.

5 But what we asked -- or tried to bring to the
6 commission's attention in the motion to reconsider is that we
7 were not asking the commission to authorize expert assistance.
8 The only thing we were asking the commission for -- and this
9 is actually at the advice or with the guidance of then the
10 individual we were coordinating this with at the convening
11 authority -- we were asking the commission's assistance to
12 ensure that the machine didn't leave the island until we could
13 go through the proper stages of requesting assistance from the
14 appropriate administrative authority; and if that was denied,
15 then to ask -- ask the military judge for you to fund the
16 assistance -- or the access and use of the MRI, so ----

17 MJ [COL POHL]: Have you filed -- have you filed such a
18 request?

19 CDC [MR. SOWARDS]: We have not filed such a request. And
20 let me address that by answering -- or discussing with you
21 the whom-do-we-ask issue.

22 When Mr. Trivett updated us on April 20th with the
23 information that JTF was going to take over the funding of

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1 the -- of the machine, Lieutenant Colonel Poteet sent an
2 e-mail to the litigation support section of Joint Task
3 Force-Guantanamo through the office of the Staff Judge
4 Advocate with -- appending Mr. Trivett's e-mail and saying
5 that "We understand that you are now funding the machine."

6 Because, in the meantime, Lieutenant Colonel Poteet
7 had also asked the convening authority, our point of contact
8 at the convening authority, that now that the machine is going
9 to remain on the island until the end of September, whom do we
10 ask to authorize the use of the machine, to include paying and
11 transporting down the technical staff who have to operate it?

12 The SJA informed us, through the lieutenant colonel,
13 that they were basically out of the MRI business. They didn't
14 know who we should ask; take that up with the SJA. We asked
15 the SJA, as I say, on -- through Lieutenant Colonel Poteet's
16 e-mail on April 24th. And as of today's date, my
17 understanding is they haven't been able to give us a response.

18 So as I stand before you today, what we know is we
19 don't know whom to ask to authorize services of the MRI
20 machine.

21 MJ [COL POHL]: Well, Mr. Sowards, I think I can help you
22 there.

23 CDC [MR. SOWARDS]: Okay.

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1 MJ [COL POHL]: If defense needs expert assistance -- I'm
2 going to use a different example -- for example, DNA testing,
3 and they go to the judge, and the judge says, "Convening
4 Authority" or -- "Convening Authority, this is necessary for
5 the preparation of the defense. I'm ordering it be done."
6 Okay. I don't tell you where to do it. I don't tell you what
7 lab to use. I just say, "Go do the testing."

8 Then the convening authority then has a choice. He
9 can choose to fund the testing or get it taken care of, or he
10 can choose not to. And if he chooses not to, there are other
11 remedies on my end.

12 So this is -- I think you've overcomplicated the
13 system. You simply put a request for expert assistance to the
14 convening authority, and the convening authority then says yes
15 or no. If the answer is no, then you come to me.

16 CDC [MR. SOWARDS]: Well, we can represent to you -- and
17 it's not -- we can file another pleading if -- but I think
18 Mr. Trivett may join us in representing to you that this is
19 the state of play.

20 We can represent to you that the convening authority
21 has already said no in terms of no longer being in the
22 business of controlling access to the machine. What they're
23 saying is the latest update they have that the -- is that the

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1 Navy Medical Logistics Command ----

2 MJ [COL POHL]: I don't deal with the Navy Medical
3 Logistics Command. I don't deal with the SJA. I don't deal
4 with Dr. Whomever over there. I simply say, "Defense, you
5 need this assistance. Government, you give it to them."

6 And I don't know what the convening -- I don't know
7 who you talked to at the convening authority, okay, and I
8 don't particularly care. But that's not the way it works.
9 You go to the convening authority and say, "I want expert
10 assistance, A, B, C, and D, and here's why I need it and
11 here's why I can't provide it myself," and he says yes or no.
12 And if he says no, it's got to be on those grounds. And then
13 if he says no, you come to me. That's it. That's done. We
14 don't start coordinating with all of these other people.

15 Now, once it's ordered, somebody's got to do that.
16 But that's not my problem; that's the government's problem to
17 make it happen. And that's -- but this is -- I don't quite
18 understand why this is such a complicated issue.

19 CDC [MR. SOWARDS]: Well, because what you just described,
20 Your Honor -- and perhaps it's my lack of familiarity with the
21 inner workings of Guantanamo and the Joint Task Force and all
22 of these bewildering agencies. But what you just told me is I
23 go to the convening authority. Even if they say yes, I now

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1 start going and knocking on different doors.

2 MJ [COL POHL]: No. You go to the convening authority and
3 you say, "I need the following expert assistance." And then
4 the convening authority -- if he says yes, then he provides
5 the expert assistance. And if the government -- the big G
6 Government says, "We're not going to do that," okay, then
7 treat that as denial of the expert assistance and come to me,
8 and I have remedies. Okay.

9 It's very -- you know, it's -- basically the
10 convening authority should provide this expert assistance as
11 required. For example, on the DNA issue. You know, you go to
12 the government -- let's say you go to a private firm to do the
13 DNA testing. The convening authority, "This needs to be
14 done." And they go -- now, in the military context, the
15 convening authority and the prosecution team are more
16 integrated together. So be that -- they may be slightly
17 different here. But you go to them and they would -- they
18 would get a contract, and they would go pay the bill, and the
19 guy would do it.

20 But, I mean, it's not -- it's not your job -- and
21 maybe I'm being too harsh here in that you're trying to
22 cooperate and graduate and get everybody to work on this
23 thing, but it's not your job to go to the Navy Logistics

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1 Command or the hospital or anybody else, hat in hand, "Tell me
2 what I need to do."

3 Once the expert assistance is approved, it becomes
4 the government's responsibility to implement it. Are we ----

5 CDC [MR. SOWARDS]: No, I'm following you.

6 MJ [COL POHL]: You're giving me kind of a puzzled look
7 there, like -- I just don't think this is any different than
8 any other expert assistance request.

9 CDC [MR. SOWARDS]: I'm actually reacting to this insect
10 flying in front of me. I didn't mean to attribute that to
11 you. And you're not being harsh.

12 What I'm saying is, in the Nashiri case, according to
13 the government's pleading, there was an April 2015 order by
14 Judge Spath very clearly saying not only do you get these
15 services, but the government has to provide an MRI machine on
16 the island to do it. And then it was October -- two years
17 later that the machine actually arrived, October of 2017.

18 My only concern -- and this is just -- you know,
19 again, if this is how the commission believes it is best
20 handled, I'm happy to follow the commission -- well, I'll
21 follow the commission in this regard.

22 MJ [COL POHL]: Let me put it this way. That's the only
23 way that I think I can handle it, whether -- because this

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1 process for you guys -- Judge Spath did what he did in
2 Nashiri. The machine shows up. And my understanding from
3 other representations is the government offered it to you guys
4 for your teams to use if you wanted to. Okay.

5 So I was never involved -- and this is where I think
6 the confusion came on the -- which generated the
7 reconsideration. I was never involved in giving a machine or
8 saying that testing is required or more testing is required
9 because you guys -- you had worked with the government, and
10 they said, "Sure, we'll go ahead and do this." Now you want
11 me to get involved. And that's the way I get involved.

12 CDC [MR. SOWARDS]: Correct. And you're also involved
13 because under the controlling law, we -- and I don't think
14 anybody is disputing this, Mr. Mohammad has a right of access
15 to the machine, either the current machine that's -- the
16 machine that's currently on the island or a machine that they
17 would make available.

18 MJ [COL POHL]: See, you're making the expert assistance
19 argument, which I invite you to make -- I got you.

20 CDC [MR. SOWARDS]: No, I'm sorry. The expert assistance
21 argument is a predicate to the requirement that the
22 commission -- or the necessity for the commission to tell the
23 government not to dispose of the machine until we can get that

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1 resolved.

2 MJ [COL POHL]: You know, Mr. Sowards, I'm glad you say
3 that, because that's exactly what I said in my ruling, is that
4 you want me to order the machine here, it stay here, when I've
5 never ordered that testing's required. And so you just said,
6 you -- if I order -- if I were to order -- let's say -- let's
7 assume Judge Spath ordered the testing be done.

8 CDC [MR. SOWARDS]: Yes.

9 MJ [COL POHL]: Okay. Then and -- and you wanted more
10 testing or the machine to stay here, then that's the time to
11 make that motion. But why would I order an MRI to stay here
12 when I never ordered on MRI to be done to begin with?

13 And that was all I said in my ruling. I didn't say
14 you can't file that. I'm just saying I never addressed that
15 issue, so I'm not going to address the presence of the MRI
16 machine until I address the need for the MRI to begin with.

17 CDC [MR. SOWARDS]: Right. And with due respect, sir, in
18 your actual order, 526C, you didn't say we had never asked for
19 you to have the machine here or get access to it. What you
20 said was, "The defense has never made an application to this
21 commission as to the need for MRI testing in preparation for
22 the defense."

23 And what we point out in our motion for

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1 reconsideration is 526B, specifically, all over the place,
2 talked about the need for MRI testing.

3 MJ [COL POHL]: It wasn't ----

4 CDC [MR. SOWARDS]: That was the application.

5 MJ [COL POHL]: I read your pleadings, and I stand by what
6 I said. Your pleadings was asking -- your remedy, you were
7 asking for the MRI machine to remain here. Okay.

8 You -- and then you -- you referred to the convening
9 authority, by giving us the machine, created an inference that
10 he found it was necessary and relevant for preparation of the
11 defense. Okay.

12 And I simply said -- and this is all -- all we're
13 talking about here, Mr. Sowards, quite frankly, is process.
14 And I know perhaps you guys don't like when I keep saying
15 this, but I'm going to say it until it gets home.

16 You never applied to me that you need MRI testing;
17 therefore, I was not in a position to order further testing or
18 the machine to stay here. And all I said -- that's all I
19 ruled in that thing.

20 Now, you may disagree with that, but -- I don't -- I
21 don't pull out of your 426 -- or, excuse me, your 526B
22 pleading -- I'm supposed to pull out of there that this
23 amounts to a request for expert assistance?

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1 CDC [MR. SOWARDS]: No, no, no, not at all. What
2 happened -- and I won't go into the belabored history, but you
3 are right. What happened, the run-up to the actual -- the
4 initial set of testing was that we had spent three and a half,
5 four months negotiating with the government on the testing
6 procedures. We had no reason to involve the commission.

7 MJ [COL POHL]: And I appreciate that.

8 CDC [MR. SOWARDS]: Well, and it's an example of where you
9 say, you know, peace breaks out. And I believe the term
10 they're always using is, "Why don't you pick up the phone and
11 call?" We had no objection. We had no criticism about the
12 government in this respect.

13 We all thought we had an understanding, including
14 with the convening authority, that these tests were going to
15 be run on January 31st. And they ran the tests, and they got
16 25 percent of the results they should have gotten; but even
17 those results showed significant and severe brain damage with
18 Mr. Mohammad, consistent with the torture in the black sites.

19 So we, as his attorneys -- and as Mr. Nevin talked
20 about yesterday, the significance of that kind of information
21 to -- not just to mitigation, which the government concedes in
22 their 526F. They say, "We understand that MRI results like
23 this, you know, potentially could be relevant to mitigation."

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1 It's also relevant to whether their statements are
2 inadmissible.

3 You spoke with Mr. Groharing yesterday. He said he's
4 going to introduce the clean team statements. All of that
5 stuff is implicated by brain damage, especially the
6 distribution that we have just with these preliminary results.

7 What we were saying to the commission is we
8 understand that if the convening authority or the government
9 now wants to dig in and say, okay, no more Mr. Nice Guy. No
10 more Mr. Kumbaya in developing this information. And, by the
11 way, they haven't said that. We don't know what their
12 position is. Maybe they will cooperate in arranging the
13 further testing.

14 All we were saying to the commission is when this
15 machine leaves the island, it could be two years, three years,
16 four years before we ever see it again. And we don't want to
17 be in the position of someone saying, "Oh, here's the defense
18 whining again about not being able to go to trial because they
19 have to do some other piece of investigation."

20 What we said in our motion for reconsideration is
21 that in an attempt to avoid foreseeable delay and unnecessary
22 delay, we had worked with the government to do at least the
23 minimal testing. And the other point is, we originally --

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1 they had told us we could do two days of testing, and at the
2 last minute, they had to cut it down to three hours.

3 Okay. Again, we're not objecting to that. We said,
4 "Fine, we'll prioritize the testing."

5 But the results we got under McWilliams v. Dunn and
6 under Ake v. Oklahoma is absolutely clear, that we have to
7 have the further testing. And if the commission feels on the
8 state of play of the record now, that it wants to say to us,
9 "Okay. File an application with me, and I will consider it in
10 due course and I will give you an order," and then you go and
11 see if the machine is still here on the island or something
12 has happened, we can do that.

13 We were just trying to avoid the possibility -- and
14 let me say without -- I don't mean to raise sore subjects, but
15 we had an order from the commission saying that the black site
16 wasn't going to be destroyed. And then somehow, you know,
17 without us knowing about it, the black site gets destroyed.
18 And then we, you know, look around and say, "Well, now what do
19 we do?" And we start talking about substitutes.

20 We shouldn't have to talk about substitutes because
21 MRI test results and testing is the modality of choice for the
22 type of brain injuries that have shown up already in these
23 preliminary results. And the only thing we're asking the

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1 court -- the commission -- and if you want me to do it,
2 absolutely happy to do it. If you want us to say, "All right.
3 Let's start from square one and go forward," we will.

4 I'm just saying, in the meantime, because we don't
5 even know -- at this moment, we do not know and the government
6 hasn't told us who actually has possession of the machine.
7 And even though Mr. Trivett -- and I take him at his word --
8 says that he has been told by somebody that it should --
9 should remain on the island until the end of September, we
10 don't know if that's going to change before we get an order
11 from you after we figure out who to go to to get testing and
12 use the machine.

13 But if Your Honor wants to take the risk, I just want
14 to make sure the record is clear that everybody understood the
15 material nature of the evidence in this case that has to be
16 developed by way of the MRI machine.

17 Thank you, sir.

18 MJ [COL POHL]: Thank you, Mr. Sowards.

19 Ms. Bormann.

20 LDC [MS. BORMANN]: I just have a process question, so in
21 your wheelhouse. So if I can ask a question here.

22 So assume for a moment that you or the convening
23 authority has found necessary a physician, an M.D., to do a

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1 full-on physical of my client. And so we have the doctor here
2 and -- or wherever, and he's going to do the physical. And
3 then we find out that there's no stethoscope, there's no EKG
4 machine, there's no ability to take temperature, there's none
5 of the tools that the doctor you found necessary needs in
6 order to accomplish his funded task.

7 Is it the commission's position that we should come
8 to you -- we should have to ask the convening authority for
9 the stethoscope, the thermometer, and the EKG machine in order
10 to do the testing that has already been found necessary
11 because the expert is obviously funded to do those things?

12 MJ [COL POHL]: Ms. Bormann, you asked for a physician to
13 help you with the MRI. You did not ask for an MRI. You want
14 an MRI? You ask for it.

15 LDC [MS. BORMANN]: Okay.

16 MJ [COL POHL]: Very simple. Your analogy doesn't follow.

17 LDC [MS. BORMANN]: Okay.

18 MJ [COL POHL]: I only respond to what you ask for.

19 The other pleading said order the MRI machine to stay
20 here, and then I get a reconsideration request of saying,
21 well, how come -- because nobody asked me to do the MRI.

22 LDC [MS. BORMANN]: I ----

23 MJ [COL POHL]: So I -- I understand your analogy. I

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1 don't think it applies. You did not ask in your request for
2 an MRI. You asked for a guy who could read an MRI, so that's
3 what I gave you.

4 LDC [MS. BORMANN]: Okay. I just wanted to make sure
5 that, like -- so I think I understand. Thank you.

6 MJ [COL POHL]: Okay. Anything further from the defense?
7 Trial Counsel, do you wish to be heard?

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

9 MJ [COL POHL]: Good morning.

10 MTC [MR. TRIVETT]: Just to update the commission,
11 currently the MRI machine is still in the inventory of the
12 Navy Bureau of Medicine, but the JTF-GTMO has expressed an
13 interest in purchasing it and having it remain.

14 In the interim, what they have done and have agreed
15 to do is to fund the maintenance contract until the end of the
16 fiscal year, so it will be here at least until 1 October.
17 We'll continue to assist the defense in the reasonable
18 requests that they make and -- to try to support and
19 facilitate like we did earlier in the year.

20 But that was the first I had actually heard of them
21 not knowing how to go about it right now, so I can only
22 clearly attempt to fix the problems I know about. So if they
23 want to get in contact with me -- and I'll work with them as I

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1 have since October on this issue, and we'll try to make all
2 reasonable requests accommodated.

3 MJ [COL POHL]: Okay.

4 MTC [MR. TRIVETT]: Subject to that, do you have any
5 additional questions, sir?

6 MJ [COL POHL]: No, I don't. Thank you.

7 Mr. Sowards, anything further?

8 CDC [MR. SOWARDS]: Thank you, Your Honor. I will speak
9 with Mr. Trivett and advise you accordingly.

10 MJ [COL POHL]: Okay.

11 CDC [MR. SOWARDS]: Thank you.

12 MJ [COL POHL]: Just to make it clear, I want to make sure
13 there's no misunderstanding here, is I encourage people to
14 work together, okay? But, you know, that's not -- but if you
15 want to get me involved, it's got to be done in the normal
16 process. That's all I'm really saying here. So okay.

17 Ms. Bormann, anything further?

18 LDC [MS. BORMANN]: No, Judge.

19 MJ [COL POHL]: Okay. That brings us to 330/523.

20 Mr. Connell.

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

22 I submitted, more than seven days in advance, for
23 review to the court information security officer three

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1 relevant documents. One of them was numbered, at the time,
2 AE 330/523 CISO Exhibit 1. It has now been given an AE number
3 of AE 330G. That is a set of slides.

4 The second document was a medical officer's note
5 dated 18 January 2007, to the CISO. It was AE 330/523 CISO
6 Exhibit 2. It now has the AE number AE 330I.

7 And then a handwritten set of medical records which
8 was submitted with the number AE 330/523 CISO Exhibit 3. It
9 now has an AE number of 330H.

10 The slides came back from the CISO with -- without
11 any changes. The other two documents came back fully redacted
12 in the matter of AE 330H, and redacted all except for the
13 words "Medical Officer's Note, 0900 hours EST, Thursday,
14 18 January '07, ISN 1008" with respect to AE 330I.

15 This is part of the ongoing problem with a public
16 trial issue in that documents which are only marked at the
17 FOUO level are denied to me to be able to display to the
18 public for -- as part of the argument, despite the provision
19 in Protective Order #2 which says that AE -- excuse me -- that
20 FOUO documents are allowed to be used in court.

21 MJ [COL POHL]: But let me -- let me -- and I can't speak
22 for the people who review these things, okay, but when they
23 receive medical documents, okay, I really don't think it's a

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1 classification issue; I think it's a PII issue. And how would
2 they know that -- and the idea is to protect the privacy of
3 the patient.

4 LDC [MR. CONNELL]: Well, the patient's lawyer is
5 submitting the documents for display.

6 MJ [COL POHL]: Yeah. Yeah. But what I'm saying is I
7 can't -- I'm not going to tell you what happened in this
8 because I don't know.

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

10 MJ [COL POHL]: Okay. But if they're trying to protect
11 the privacy interests of the patient -- I understand what
12 you're saying ----

13 LDC [MR. CONNELL]: And I mean to ----

14 MJ [COL POHL]: ---- but I -- but I -- but I -- what I'm
15 trying to say here is they get them in and they know it's --
16 they may even know it's from his lawyer, but they may say,
17 "Well, this is PII. We normally don't release it," even
18 though the privacy interest is basically being waived by the
19 patient involved.

20 LDC [MR. CONNELL]: Right.

21 MJ [COL POHL]: But that's where perhaps the ----

22 LDC [MR. CONNELL]: That makes sense to me.

23 MJ [COL POHL]: ---- the disconnect is.

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1 LDC [MR. CONNELL]: The next thing I wanted to say was I
2 have discussed Mr. al Baluchi's medical privacy interests with
3 him and am authorized to represent that he waives his medical
4 privacy interests in these two documents.

5 MJ [COL POHL]: Okay. Did you -- okay. Let me send
6 them -- let's make sure that I'm correct, that that's why they
7 were redacted, and then we'll pick this argument back up.

8 LDC [MR. CONNELL]: Okay. Yes, sir.

9 [The military judge conferred with courtroom personnel.]

10 MJ [COL POHL]: Okay. Mr. Connell, it's -- what I just
11 told you was my understanding -- is actually the understanding
12 that we were -- my CISO was told was the reason for it. And,
13 as such, you may use the unredacted versions.

14 LDC [MR. CONNELL]: In that case, I would request the feed
15 from Table 4 and permission to display the slides AE 330G to
16 the gallery.

17 MJ [COL POHL]: Do you have the unredacted versions
18 marked?

19 LDC [MR. CONNELL]: Yes, sir. They are H and I.

20 MJ [COL POHL]: That's the one that you gave. Okay.

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

22 MJ [COL POHL]: You wanted -- it was the redacted ones to
23 display, that the question was.

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1 LDC [MR. CONNELL]: So I have not marked the redactions,
2 have not made them part of the record. I represented what the
3 redactions were, but if you want them part of the record, I
4 can make them.

5 MJ [COL POHL]: I don't. I think we have resolved what
6 the redactions were and why they were redacted and -- but go
7 ahead.

8 LDC [MR. CONNELL]: Yes, sir. Go ahead.

9 TC [MR. RYAN]: Your Honor, may I step out for a moment,
10 please?

11 MJ [COL POHL]: Sure.

12 LDC [MR. CONNELL]: Sir, this issue comes back -- both
13 AE 330 -- AE 330 has been argued a couple of times. AE 523
14 has been argued once and then referred to extensively in the
15 AE 524 series as well.

16 What brings us back before the court on this issue is
17 your order in AE 525 -- excuse me -- 523F, in which you
18 directed briefing on a particular issue. That particular
19 issue is essentially from whence the government claims the
20 authority to use pseudonyms when those pseudonyms have not
21 been approved by the military commission.

22 This issue intersects substantially with the
23 arguments that we made yesterday in the 524 series and related

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1 series. This falls on the same spectrum of obstacles that the
2 government has erected an interlocking defense in depth
3 against defense investigation; and this comes at the left-hand
4 side of the spectrum that I have articulated, which is the
5 unilateral use of pseudonyms.

6 The use of the substitution for witness names, which
7 is what these are, witnesses, to material facts in the case
8 without military commission approval. So that's what I want
9 to talk about here.

10 The 523 relates to a discovery request, which we
11 discussed yesterday, which we made in July of 2017, which was
12 requesting the government's assistance in arranging interviews
13 of 50 witnesses or sets of witnesses. And I'm going to
14 talk -- those really break down into three baskets which I'd
15 like to talk about in a moment. But it implicates the
16 medical records issues in AE 330.

17 And just to refresh your recollection on AE 330, the
18 government has produced medical records. And since the last
19 time we have been before the military commission on this, the
20 government has made what seemed to me from the cheap seats to
21 be substantial, substantial efforts to fill in gaps on
22 medical records. They have gone -- I don't know where they
23 found -- they haven't found all of the medical records, but

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1 they found a lot more than the last time that we had. Many of
2 the gaps have been cleared. Many of the redactions have been
3 reduced. The few documents which were produced as SECRET are
4 now produced as FOUO. And we do appreciate the government's
5 efforts on moving forward on the medical records.

6 One -- and there are other serious issues which
7 remain, but one serious issue which remains is that all
8 identifying information for the witnesses in the
9 medical records is redacted.

10 Now, Mr. al Baluchi -- and this is documented in the
11 brief -- has requested the names of the -- the witness
12 information -- has requested generally as in all witness
13 information in the medical records, has requested it
14 specifically in terms of Dr. Shrek and Dr., you know, 8 and
15 all the different -- Hospitalman 32 and all of these different
16 people who -- of where the government mostly uses pseudonyms.

17 These pseudonyms -- these medical records, as far as
18 I can tell from my portion of the adversary process, have
19 never been submitted to the military commission. The
20 government has never made a claim under Rule 505 or Rule 506,
21 which means these have never been submitted to judicial
22 review.

23 Even when the government has produced the identities

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1 of certain witnesses such as Dr. 1, Dr. 10, and Dr. 21, the
2 government did not produce unredacted records. It simply
3 said, oh, whenever you see Dr. 10, that's a reference to this
4 person. That's going to become significant when we review a
5 couple of examples.

6 But there are -- there is one example in which the
7 military commission has already ordered the disclosure of
8 identities of medical personnel, and that was in the
9 government -- excuse me, Mr. Mohammad's pleading in the 200
10 series, the -- where the military commission ordered the
11 government to provide the defense with the identities of 12
12 identified medical personnel.

13 Separately in 152P, the -- in connection to
14 Mr. Binalshibh, the government disclosed three medical
15 providers without identifying their pseudonyms. It so happens
16 that we were able to figure out that one of those people that
17 they listed in the -- as a witness against Mr. Binalshibh was
18 also Dr. 1. So we were able to piece that together, but they
19 didn't say Dr. 1 is this doctor and -- until more recently
20 with respect to two of those, which we're going to talk about.

21 So let's talk about the baskets. The 50 witnesses
22 who are requested in DR-333-AAA break down into seven types of
23 witnesses, which essentially have three baskets. The three

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1 baskets are -- and this is just in the 523 discovery request
2 which is at issue. There are a lot of other witnesses which
3 are addressed as well.

4 But sometimes we -- sometimes -- the three different
5 sort of axes that the thing rotates around are: Is the
6 witness identified by pseudonym at all, or is it just somebody
7 that we have seen a reference to? Is it a person that is --
8 has a UFI? And is it a person who the government has
9 identified through some other type of pseudonym?

10 So just to go over these, for example, our witness
11 number one was an example of where we didn't know who the
12 witnesses were. We feel that the knowledge of conditions of
13 Camp VII between September '06 and January 2007 when the FBI
14 and DoD interrogated Mr. al Baluchi, that those were
15 important. We have some documentation of that, some DIMS
16 records and some other things, but clearly, we think that the
17 witnesses are important. Those are examples of somebody who
18 does not have a UFI.

19 There's a mixed bag with respect to the witnesses
20 referenced in the MEM discovery. Some witnesses -- and
21 obviously there's a classified version of this which gives a
22 lot more detail, but in an unclassified version, the MEM
23 discovery references some UFIs and some witnesses like

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1 "Attorney" -- an attorney said -- that do not have UFIs.

2 With respect to Dr. 10 and Dr. 21, the -- they do not
3 have a UFI. They were a unilateral nonjudicially reviewed
4 pseudonym. And those are the two that the government later
5 came back after -- after substantial litigation in the 502
6 series came back and told us who Dr. 10 and Dr. 21 are.

7 There are witnesses referenced in the XYM discovery
8 who do not have UFIs. There are a number of witnesses in the
9 2D discovery who do have UFIs. There's KM5, which is a UFI;
10 and there are the BOP witnesses who do not have UFIs.

11 The reason why I break these out is that the answer
12 to your question about what is the -- where does the authority
13 to deny access to witnesses or use pseudonyms -- or however we
14 want to frame the question comes from -- has slightly
15 different answers for different baskets of witnesses.

16 The -- I do want to -- so I want to focus -- oops.
17 Excuse me. Can you go back, please?

18 I want to focus first on the medical witnesses. And
19 so I want to give two examples of why we feel that it's so
20 important to have access to the medical witnesses, and that
21 the pseudonyms that the government is using unilaterally are
22 impeding our defense.

23 May I have access to the document camera, please?

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1 I'm going to show AE 330I, which is Exhibit 2 for the CISO.

2 [The military judge conferred with courtroom personnel.]

3 MJ [COL POHL]: Go ahead. You may publish it. Thank you.

4 Go ahead, Mr. Connell.

5 LDC [MR. CONNELL]: Thank you. May we have the feed from
6 the document camera?

7 MJ [COL POHL]: Go ahead.

8 LDC [MR. CONNELL]: So this is a medical officer's note
9 dated 18 January 2007. And if the date 18 January 2007 sounds
10 familiar, it may be because from 17 to 19 January of 2007,
11 Special Agent Perkins and Special Agent Fitzgerald, along with
12 Special Agent McClain, interrogated Mr. al Baluchi at Echo II.
13 The -- this record documents that on one of those days,
14 Mr. al Baluchi sustained some sort of injury to his head.

15 Now, the document itself says, "Detainee alleges to
16 have struck or bumped the top of his head last night during
17 movement to or from another location (Echo II)."

18 Now, this is -- this is the first day -- the last
19 night from January 18th is 17 January, which is the first day
20 of the Echo II interrogations by the FBI/DoD team.

21 "He reports having been briefly dizzy and nauseated
22 and he had a headache; all of these symptoms resolved 1-2
23 hours by his reckoning. He feels ok today." They go on to a

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1 general review of systems is intact, and, "My assessment is
2 that detainee likely bumped his head but did not sustain
3 significant blunt head trauma. He is cleared for movement
4 today."

5 One can easily see why, in a case with such extensive
6 history of head trauma in the black sites, when a person
7 sustains some sort of head trauma on -- when they're taken for
8 interrogation by the FBI and DoD, why it would be extremely
9 material to the preparation of the defense for us to
10 investigate this.

11 So the -- I suggest to the military commission that
12 it will support as part of an enormous constellation of issues
13 the parallels and significance of the -- how close the FBI
14 interrogation in January 2007 was to the CIA interrogations
15 which preceded it.

16 But -- so how would one go about investigating that?
17 Well, first what one would do is find out who Dr. 10 is,
18 because you see at the bottom of this document, above a
19 footnote, "V/R, Dr. 10."

20 And so one might wish to interview Dr. 10, which the
21 government produced the identity of Dr. 10 to us. We went to
22 interview Dr. 10. And I will proffer to the military
23 commission that the -- that he told us -- and you can just use

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1 that as a hypothetical if you prefer, "This is not my
2 handwriting. I don't know that I wrote this document. I
3 don't even know what -- I don't think I wrote that document."

4 Now, without a signature -- and there is one stray
5 line. But without a signature, it is impossible for us in an
6 interview capacity to say, "Hey. Well, is this your
7 signature?" And it is impossible in a testimony situation for
8 us to impeach a person with their signature.

9 MJ [COL POHL]: You lost me a little bit.

10 He says, "That's not my handwriting." The document
11 I'm looking at is typed.

12 LDC [MR. CONNELL]: Yes, that's my -- that's right. The
13 next document will be in his handwriting. He said, "I didn't
14 write that."

15 MJ [COL POHL]: Okay. Okay. But you referred to the
16 first document as "that's not my handwriting."

17 LDC [MR. CONNELL]: Right. What I meant by if there
18 were -- if it were in my handwriting, I would be able to say,
19 yes, I wrote that. But that document is typed. I don't think
20 I wrote that document.

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

22 LDC [MR. CONNELL]: I apologize for being confusing there.

23 The -- but, you know, originally, he would have a

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1 signature. But there's something else that's important about
2 that. It raises the question of, well, if Dr. 10 didn't write
3 this document, who else has information about the head injury
4 sustained by Mr. al Baluchi on the first day that he was taken
5 for interrogation by the DoD? Somebody in these
6 medical records does. Somebody on -- who was involved in the
7 transportation or the hospitalman who took the first report of
8 the injury, or someone who witnessed it, would be responsive.
9 And I suspect that those people fall elsewhere in these
10 medical records, which is why it's so important for us to have
11 access to the witnesses so that we can go and interview them.

12 Let me give a second example. Second example, which
13 I'm putting on the document camera, is in -- is found in the
14 record at AE 330H. It is also AE 330/523 CISO Exhibit 3.

15 So this -- I will represent to you that this arises
16 in the context of an ongoing dental issue that Mr. al Baluchi
17 had, because, you know, one could guess that for a number of
18 years in CIA custody, he was not allowed to visit a dentist,
19 and so he came -- in 2006, when he's here in Guantanamo, the
20 medical records show a lot of dental concerns.

21 So let me just walk you through, and let me start
22 with the important part, and then I'll show you why -- how the
23 investigation should unfold.

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1 So you will see here the second set of handwriting on
2 the page says Medical Officer Note. This conforms to a note
3 for the detainee shared by the Agency. Discontinue meds --
4 something -- and reasonable [sic]. Not a life-or-death issue.
5 And then a redaction, and "Dr. 10."

6 One can imagine, given the SSCI report's
7 declassification of the information, that the
8 Central Intelligence Agency maintained operational control of
9 Camp VII for some period of time, that it would be important
10 for to us determine, you know, what -- what does this mean,
11 note shared by the Agency? So we might go to look to
12 investigate.

13 Well, this statement by Dr. 10 in his handwriting is
14 a reaction to a previous note from Hospitalman 52. So it
15 would make complete sense for us to -- in investigating this
16 to try to find out what's this note from the agency that's
17 referred to here; that we would try to interview
18 Hospitalman 52, which is why, for example, that we requested
19 the identity of Hospitalman 52, the -- in 2013.

20 But then we go to the next -- so the next -- the
21 third notation, which has a different hospitalman note and has
22 a redaction of the identity of the person who was involved in
23 writing the note with no -- no pseudonym at all, no

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1 substitution, no person that we can request.

2 So when we -- you can see from just this one example
3 of how, when there's an issue that's important, like the
4 relationship between Camp VII and an agency, the -- when we go
5 to investigate it, how hampered we are by not having access to
6 the complete medical records, which would include the
7 notations as to, for example, at least the name of
8 Hospitalman 52.

9 So the hottest of those issues were Dr. 10 and
10 Dr. 21, which is why that they're the ones who are included in
11 DR-333-AAA. But AE 330 itself addresses all of these issues,
12 which is why we need a complete set of medical records.

13 That is the first major basket. The government's
14 response as to why they are -- have the ability to -- their
15 answer to your question at 523F as to why they have the
16 ability to redact this is that they are not relevant. And in
17 many, many -- in fact, certainly everyone through January of
18 2007, and many people afterward, the medical providers are
19 extremely relevant.

20 So that brings us to the second category. If we
21 could have the feed from Table 4 again. So the second
22 category is witness numbers 10 through 48 on DR-333-AAA, and
23 that is the so-called 2D discovery. The 2D discovery are the

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1 witnesses that the government has -- are summaries of the
2 statements of witnesses that the government has provided and
3 has marked with respect to each of those witnesses that they,
4 in their internal deliberations, have concluded that the
5 witnesses are relevant, necessary to the preparation of the
6 defense, and noncumulative. So this is the fourth time that I
7 have stood before arguing -- that one of us, Ms. Pradhan or I,
8 have stood before you arguing about the 505 status of the 2D
9 documents.

10 Now, when the government produced this -- these
11 documents to us, they sent us an e-mail which said, all of the
12 discovery is being provided under M.C.R.E. 505 with the
13 exception noted before -- below. The exception noted below is
14 2D00000001 through 2D00000152, which the government has
15 annotated as not M.C.R.E. 505. That document is found in the
16 record at 523C Attachment B.

17 Now, of course, the government's e-mails to us are
18 not what controls. Your orders are what controls. So we went
19 and looked at the order. Could we have the next slide,
20 please.

21 And your order in 308HHHH describes 64 sub-tabs which
22 I suggest is the 2D discovery. It's what -- it's the 64
23 summaries of individuals' testimony that we -- or information

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1 that we received. We only request 44 of those. 45 -- in
2 DR-333 ----

3 MJ [COL POHL]: Well, so just so I'm tracking ----

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

5 MJ [COL POHL]: ---- even though I wrote it myself ----

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

7 MJ [COL POHL]: ---- this -- on this slide refers to the
8 previous slides that were Bates stamped?

9 LDC [MR. CONNELL]: Yes, that's right.

10 MJ [COL POHL]: So we're talking about the same
11 information here.

12 LDC [MR. CONNELL]: Same set of information.

13 MJ [COL POHL]: So I'm simply telling you the same thing
14 that the government is telling you ----

15 LDC [MR. CONNELL]: That's right.

16 MJ [COL POHL]: ---- in the sense that they didn't ask for
17 a 505 summary from me.

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

19 MJ [COL POHL]: Got it.

20 LDC [MR. CONNELL]: Now, in each of the government
21 pleadings on this -- and this is -- just so the record is
22 super clear, this is out of 308HHHH. And this is the same set
23 of information, that 152 pages, 64 individuals, 44 of whom

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1 have some relationship -- direct relationship to
2 Mr. al Baluchi.

3 The government has said, without citation, over and
4 over in its pleadings, that you did approve these summaries.
5 And so given that this is the fourth time that we have
6 appeared before you on this question and that you requested
7 specific briefing on it in 523F, the government in its
8 pleadings simply repeated the claim the military commission
9 did approve these summaries.

10 The -- there's never been a citation. There's never
11 been a -- any further explanation of why they believe they get
12 to use the pseudonyms in this 2D discovery. And if I am
13 wrong -- right? -- if I am misreading 308HHHH, if I am
14 misreading the government's e-mail to us, I hope that you will
15 go ahead and tell me, because I am under a severe
16 misapprehension. Because all I have access to -- I don't have
17 access to the original ex parte filing.

18 MJ [COL POHL]: No, I understand.

19 LDC [MR. CONNELL]: All I have is what the government
20 tells me, what they give me, and what you tell me. So if I'm
21 wrong, you should let me know. And I'm sure that someone from
22 the government ----

23 MJ [COL POHL]: I'm trying to figure this out because I

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1 actually remember this one ----

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

3 MJ [COL POHL]: ---- with the deluge of the 308 materials.

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

5 MJ [COL POHL]: Where does the government contradict this?

6 Is it a generic, conflated saying all of the summaries have
7 been approved by the judge, and they don't carve out anything?

8 LDC [MR. CONNELL]: No, it's a little bit more specific
9 than that. There is a -- that sometimes happens, but it's not
10 that. It's that these -- the summaries have been approved by
11 the judge, and then they say -- and we keep saying no, it
12 hasn't; and they keep saying, yes, it has. So I can -- if you
13 will give me just a moment, I can find you the exact pleading
14 cite or give it to you after lunch or something.

15 MJ [COL POHL]: No, no, I'm good with that. I'm just ----

16 LDC [MR. CONNELL]: But in their position in their
17 response to 523F, is the military -- our authority, we have
18 two sets of authority for using these pseudonyms: either lack
19 of relevance -- which I suggest is within your province to
20 disagree with them on -- or the military commission has
21 approved the use of pseudonyms in these summaries.

22 MJ [COL POHL]: If they -- if they said it's lack of
23 relevance, okay, they're making their threshold discovery ----

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1 LDC [MR. CONNELL]: Right. Legal conclusion.

2 MJ [COL POHL]: ---- determination, and therefore, I
3 wouldn't see it. I don't generally see the discovery they
4 don't give you.

5 LDC [MR. CONNELL]: Yes, sir. But what you can do is make
6 legal decisions about relevance, and then the government has
7 to comply and give us the responsive discovery.

8 MJ [COL POHL]: But that doesn't mean that's the end of
9 the discussion. I didn't mean to say that.

10 LDC [MR. CONNELL]: That's right.

11 MJ [COL POHL]: If they give you some discovery and they
12 say this is all you're going to get because the others are
13 irrelevant and somehow you can glean what the other is, you,
14 of course, have the option to come to me and say, "Hey, we get
15 this here." But I'm just saying as a general rule, I don't
16 review what they don't give you.

17 LDC [MR. CONNELL]: You've explained that to me many
18 times, sir.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: But AE 330 is a perfect example of
21 that of -- the government produced medical records. We
22 thought they were incomplete. We thought they were redacted.
23 We thought they were missing important information. We filed

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1 a motion about it. The government produced additional
2 information to us but has never produced the information that
3 we consider most important, which is the identity of the
4 witnesses.

5 So it's a perfect example of you never saw the
6 redactions in the medical records because they were never
7 submitted to you for 505 review.

8 When we received them, we thought they were
9 inadequate. We filed a motion about it, brought it to your
10 attention. The government has taken some corrective action,
11 and we are requesting additional corrective action with an
12 order from the court.

13 The same thing is true, although a little more
14 convolutedly -- the same thing is true in the 2D discovery,
15 that the 2D documents have never been -- you have seen them.
16 I don't know that you have seen the underlying originals
17 because you also note in this order that the government simply
18 represents that it's based on other information that --
19 originals that you saw at a different time, but -- so I don't
20 know how -- never having seen that process, you have
21 infinitely before information about it than I do.

22 But for the government's position to be that they can
23 substitute these pseudonyms in the 523 series for these 44

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1 witnesses because you have approved these summaries is not
2 consistent with the text of AE 308HHHH and is not consistent
3 with the text of the e-mail that they sent -- the cover e-mail
4 they sent to us with the documents.

5 So what I am fundamentally trying to answer your
6 question in 523F is: What is the government's authority? One
7 is relevance; and second, they have claimed that you have
8 approved these summaries. The -- my answer to the next step
9 which wasn't exactly framed in your briefing order, but we
10 briefed it anyway.

11 The next question is: What does it -- what do we do
12 now? And my brilliant colleagues have just handed me a
13 citation that -- two places where the government suggests --
14 to answer your question, two places where the government
15 suggests that the military commission approved the 2D
16 summaries are in 524AA and 562A.

17 The -- the next question is: Well, what do you do
18 about it? And the answer to that is -- is fairly
19 straightforward, which is especially in the 330 series. In
20 the 330 series which has been pending for some time now, you
21 just grant the order. You just compel the government to
22 produce a complete set of the medical records and then we can
23 debate -- after they've done that, we can debate whether

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1 there's anything left out of that.

2 The same is true with respect to 523 itself, is that
3 523 doesn't have a dismissal sanction. It doesn't get us
4 tangled up in the 949p-6 problem. 523 itself is, "Government,
5 please produce the identifying information for witnesses for
6 whom you have claimed classified -- some kind of privilege."
7 They haven't claimed privilege for all of the witnesses in
8 523, but the UFI witnesses, apparently they have. That was on
9 January 10th of 2018.

10 What we are asking for is the identifying
11 information. That just brings us to a straight Roviaro/Yunis
12 analysis that we've argued many times. But with respect to
13 the specific argument that you asked us to make in 523F, the
14 fundamental answer is relevance; and authority of the military
15 commission is what the government claims. Neither of those
16 two reasons are sufficient to continue to withhold witness
17 information; first, because it is relevant; and second,
18 because you have not approved these 2D summaries.

19 MJ [COL POHL]: Thank you.

20 LDC [MR. CONNELL]: Thank you very much.

21 You can cut the feed from Table 4, please.

22 MJ [COL POHL]: And any other defense counsel want to be
23 heard on this particular issue? Apparently not.

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1 Trial Counsel? Mr. Swann.

2 TC [MR. SWANN]: Your Honor, I'd like to do this. I
3 misunderstood the specified issue as addressing Drs. 1, 10,
4 and 21. If you have any questions about the other 2D
5 materials, I'd ask that you allow Mr. Groharing to address
6 those questions.

7 MJ [COL POHL]: No, the -- and again, I -- the simple --
8 the point of the question was this, is that there are -- and
9 again, understand how it was worded. I said assuming the
10 averments of the defense counsel are accurate, what is the
11 basis for the government to substitute identifying information
12 that did not go through the 505 process?

13 TC [MR. SWANN]: All right. Let me address that.

14 MJ [COL POHL]: In looking at your pleading, you seem to
15 be saying it's just a 701.

16 TC [MR. SWANN]: That's exactly what it is.

17 Let me address that. I probably am the most familiar
18 with every medical record that's ever been written on any one
19 of these gentlemen, and we're talking probably combined total
20 maybe 15,000 pages at least, and labs and everything else.

21 I would say this. For the better part of a
22 decade-plus, you will never see a true name in any of the
23 medical records. The initial medical records for this period

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1 of time -- the reference made to Dr. 10 there, for instance,
2 that was an earlier period of time, December to -- excuse me,
3 September to probably January or February.

4 I suspect that what appears under Dr. 10's name, the
5 first document, is probably a stamp, you know, the typical
6 military stamp, Dr. X.

7 When counsel approach us -- and we've addressed it
8 twice, and he mentioned 200CCC [sic]. I guess it was actually
9 Mr. Mohammad asking for a number of about 12 witnesses, to my
10 recollection; and we denied them on relevancy grounds. He had
11 an alternative position that he wanted to take with respect to
12 identities, and the court simply told us to provide the
13 identities of the medical people that Mr. Nevin wanted to
14 them. We did.

15 Mr. Connell in this instance, the 502 series, asked
16 for the identity of three individuals, Drs. 1, 10 and 21. Not
17 sure that what 21 really had to do with much, but that said,
18 we did. In fact, we spent the better part of a month or so
19 trying to run down Dr. 21, who by that time had, you know,
20 gone on to another life and moved about three or four times.
21 And we tracked that individual down, provided the name, along
22 with contact information for Mr. Connell to be able to reach
23 out. As he's indicated he's already talked to Dr. 10, so he

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1 has that information.

2 And Dr. 1, he claims to have known, but we went ahead
3 and told him again who Dr. 1 was. We have done what we are
4 required to do.

5 The names of the rest of these individuals, you will
6 see throughout the medical records, you know, it might be, you
7 know, Dr. Blondie, Feelgood, whatever. They have been using
8 pseudonyms for better part of ten years. We don't substitute.
9 That's in the record. The first few records, because they
10 were real names, they -- they went through a classification
11 review. The names are, you know, quite frankly, protected in
12 the sense that we don't want to be giving names to the accused
13 of individuals that have provided them for fear of a number of
14 reasons.

15 When the defense makes the case -- and we say this in
16 our pleading -- when the defense makes the case for us to
17 analyze it under 701, they make the case. We provide the
18 name, as we did in this instance for Mr. Connell's request, as
19 we did when you directed us to provide the 12 names to
20 Mr. ----

21 MJ [COL POHL]: But let me back up a second here,
22 Mr. Swann. Is -- what's the basis -- okay.

23 As I understand what you're telling me is the

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1 medical records themselves do not have true names except a
2 long time ago.

3 TC [MR. SWANN]: I -- that's the one thing, when I get
4 these things -- and I just looked at medical records for the
5 last two months for these gentlemen. There are no true names.
6 There haven't been for years.

7 MJ [COL POHL]: Okay. So when the defense says, "I want
8 the true names," your basis for not giving them is they're
9 not -- at least initially is you don't believe they're ----

10 TC [MR. SWANN]: They're relevant.

11 MJ [COL POHL]: ---- discoverable.

12 TC [MR. SWANN]: That's right. They're not discoverable.
13 We don't redact.

14 MJ [COL POHL]: You believe the medical treatment is
15 discoverable as material to ----

16 TC [MR. SWANN]: Oh, absolutely. We have never redacted
17 medical treatment. Now, that said ----

18 MJ [COL POHL]: Okay. But how does -- no, let me finish.
19 You say the medical treatment is material to the preparation
20 of the defense, but the defense -- the treating individual is
21 not material to the preparation of the defense. That's your
22 position?

23 TC [MR. SWANN]: Most of these individuals are not

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1 treating officials. They're people like ----

2 MJ [COL POHL]: I didn't ask you that.

3 TC [MR. SWANN]: I got it. Yeah, that's our position,
4 sir. The treating physician's name is not relevant until you
5 make the case for why you believe that individual is.

6 MJ [COL POHL]: And when you say "make the case," what do
7 they have to do?

8 TC [MR. SWANN]: Well, they have to provide us with what
9 is it they ----

10 MJ [COL POHL]: Okay. Let's use this example here that we
11 had with Dr. 10. They say, "We want to talk to Dr. 10 based
12 on this note." Is that enough?

13 TC [MR. SWANN]: That's enough. That was enough. We've
14 already provided Dr. 10 based on the hostilities piece ----

15 MJ [COL POHL]: No, I understand that.

16 TC [MR. SWANN]: That may well be enough. And what it's
17 going to cause me to do in light of what Mr. Connell mentioned
18 this morning is where Dr. 10 says, "Yeah, I don't remember
19 that," I'm going to go back and look at the original document
20 to see if it, in fact, is Dr. 10, or did somebody make a
21 mistake. And if it's -- if it is not Dr. 10 -- well, I'll do
22 something with that one just to track it down.

23 MJ [COL POHL]: But you mentioned earlier -- you mentioned

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1 earlier one of the reasons you don't put the names down is for
2 safety reasons.

3 TC [MR. SWANN]: One of the reasons, yes.

4 MJ [COL POHL]: That sounds like a not material to the
5 preparation of the defense standard. That sounds like a
6 classification standard, almost, or a 506 standard.

7 TC [MR. SWANN]: Well, SC/DRT, the classification
8 authority, takes the position that the true names of any of
9 these individuals are classified, in fact, classified. I
10 think you found that in 200CC.

11 MJ [COL POHL]: Now -- but my point being is that -- we're
12 not talking about the ones that I've seen. We're talking
13 about the ones I have not seen. If your claim of the
14 pseudonym is ----

15 TC [MR. SWANN]: Sir, I am not talking about -- you have
16 never seen any of these medical records.

17 MJ [COL POHL]: I know, but let me finish, please.

18 My point is, is that if the claim of -- that we're
19 using the pseudonym is because it's classified, and we want to
20 substitute the true name for a pseudonym, would that require a
21 505 process?

22 TC [MR. SWANN]: No, sir. No. The pseudonym is put as
23 a -- the pseudonym is placed in there as a mechanism for the

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1 defense to be able to look at and say, "Hey, that is -- that
2 probably was a true name under there. Now, we've got Dr. 1."

3 All they've got to do is come ask and tell us, "We
4 would like to speak to Dr. 1," or, "We would like to speak to
5 Dr. 21," "We would like to speak to Dr." ----

6 MJ [COL POHL]: Let me ask this ----

7 TC [MR. SWANN]: They did it 12 times, and we did it for
8 them.

9 MJ [COL POHL]: You've given them, I assume, a plethora of
10 medical records.

11 TC [MR. SWANN]: About 15,000 total.

12 MJ [COL POHL]: That would be a plethora in my book.

13 TC [MR. SWANN]: It's a plethora in mine.

14 MJ [COL POHL]: They have gone and looked at them, and
15 they say, "Okay. I want" -- and you didn't put the true names
16 in or the -- at the start because you said they don't really
17 need that, because most of the true names are irrelevant to --
18 as you said before, some of it is not treatment. Some of it
19 may be something else.

20 So now they come back to you and say, "I want to get
21 all of these names related to this," and then you say, "Okay.
22 We're going to give them to you."

23 TC [MR. SWANN]: I will look at what they're asking for

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1 and -- and respond to that request in the appropriate way.

2 MJ [COL POHL]: But your basic -- to my question that I
3 sent to you guys, your basic position is at the point of
4 delivery of the medical records themselves, is that's not
5 material to the preparation of the defense of who created the
6 medical records.

7 TC [MR. SWANN]: That's correct.

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

9 Mr. Connell, anything further?

10 TC [MR. GROHARING]: Your Honor, can I have -- **[Microphone**
11 **button not pushed; no audio.]**

12 MJ [COL POHL]: Sure.

13 Mr. Groharing, you're standing, for some odd reason.

14 TC [MR. GROHARING]: Well, if you'd like to me to address
15 the other issue with respect to the UFI, I'm happy to. I
16 think I can clear it up.

17 MJ [COL POHL]: I'm sorry, which UFI are you referring to?

18 TC [MR. GROHARING]: The -- the references that
19 Mr. Connell made to the -- he called them summaries, but the
20 synopses of the UFI individuals that we provided directly to
21 the defense, not pursuant to judicial approval, I don't know
22 if you have any questions regarding that or not. There was a
23 significant discussion with you and Mr. Connell. I'm happy to

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1 answer questions regarding those if you have them.

2 MJ [COL POHL]: No, I'm good. Thank you.

3 LDC [MR. CONNELL]: The first issue I'd like to address is
4 the government's claim that all we have to do is ask and we
5 shall receive.

6 I'd like to direct the military commission's
7 attention to AE 330 Attachment G, which is our 2013 request
8 for the identities of certain medical providers, including
9 Dr. 10 and Dr. 21.

10 The government eventually ----

11 MJ [COL POHL]: Just a second. You asked me to look for
12 something.

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

14 MJ [COL POHL]: Let me go see if I can find it.

15 LDC [MR. CONNELL]: G.

16 MJ [COL POHL]: Is it your base motion?

17 LDC [MR. CONNELL]: Yes, sir, base motion.

18 MJ [COL POHL]: 12 December 2014?

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

20 MJ [COL POHL]: Attachment G. Got it. Go ahead.

21 LDC [MR. CONNELL]: So that was when we -- previous to
22 that, we had made a general request for all medical providers,
23 but that was when -- that's when we went through the

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1 medical records, the ones that were available to us at the
2 time, obviously, and selected the people that we thought were
3 significant, people like Dr. Spock and Dr. 10 and Dr. 1 and
4 Dr. Shrek.

5 The government says all you have to do is ask and you
6 will receive. And, you know, maybe that will eventually be
7 true, but four years elapsed between our initial request for
8 the identity of Dr. 10 and Dr. 21 before the government
9 provided us the identity of Dr. 10 and Dr. 21.

10 And as I pointed out in my initial argument, they
11 have never provided the medical records which have the
12 signature or the identifying -- you know, the actual marks,
13 the real records that show what the people actually did that
14 we can say, "Hey, Dr. 10, is that your signature?" then.

15 So even for the -- the government has not produced
16 the medical records even for -- complete medical records, even
17 for times when they have, in a separate document, provided us
18 the identity of Dr. 10 or Dr. 21.

19 And Hospitalman 32, for example, who we also
20 requested in 2013 and appears right above Dr. 10 in 330I, they
21 have never provided.

22 MJ [COL POHL]: So in your attachment at paragraph 5 ----

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

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1 MJ [COL POHL]: Okay. Now, you asked for unredacted,
2 unobscured, unchanged copies of already-produced records.
3 Okay. And then you allege that they contain -- the original
4 copies would contain the original name.

5 LDC [MR. CONNELL]: So -- and we ----

6 MJ [COL POHL]: It's in your request.

7 LDC [MR. CONNELL]: Yes. That's right.

8 MJ [COL POHL]: You don't know if it's not there. Okay.

9 So is this -- is this the list you're talking about
10 that you gave to them that you want the true names?

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

12 MJ [COL POHL]: Okay. Go ahead.

13 LDC [MR. CONNELL]: Thank you.

14 The other point that the government brought up was
15 that the reason ----

16 MJ [COL POHL]: Can I ask a question?

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

18 MJ [COL POHL]: See, you paused. That gave me ----

19 LDC [MR. CONNELL]: That's right. That's what happens
20 when I pause.

21 MJ [COL POHL]: Did you ever get a specific response to
22 paragraph 5?

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

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1 MJ [COL POHL]: Not a denial, not a ----

2 LDC [MR. CONNELL]: What we got was more medical records.

3 And I agree with the government, that they have been very
4 diligent in getting us redacted versions of medical records.

5 MJ [COL POHL]: Is the essence of the problem here -- just
6 so I can analyze it, is that you've got -- as Mr. Swann
7 alleges, you've got 15,000 -- I don't know if that's all you
8 or whatever -- 15,000 medical records, okay? You've gone
9 through those records, and you say -- they say now I want to
10 go through, and I want these named individuals. Are these --
11 not named, these unnamed individuals as shown by this record.

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

13 MJ [COL POHL]: Okay. Mr. Swann alleges you do that;
14 they'll give them to you.

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

16 MJ [COL POHL]: Or they may not.

17 LDC [MR. CONNELL]: They may not.

18 MJ [COL POHL]: But I'm saying is that -- have you used
19 that process at all, except for Drs. 1, 10, and 21?

20 LDC [MR. CONNELL]: Yes, sir. That's what's in front of
21 you. All I can do is make discovery requests.

22 MJ [COL POHL]: Yeah. No, but I'm -- but this document's
23 26 August 2013.

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

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: And it is one of ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: I can't tell you exactly how many, but
6 one of a lot. You can see that -- what its series number is,
7 that's 17 -- you can probably see it, 017D maybe. You know,
8 the medical records is a continuing issue. We've argued
9 AE 330 itself multiple times.

10 The -- you know, how many -- how much do I have to
11 beg, is really what this question comes down to, and how much
12 of my defense do I have to show to the prosecution to get the
13 basics of -- of ----

14 MJ [COL POHL]: But I just want to ----

15 LDC [MR. CONNELL]: ---- discovery?

16 And I'm not trying to cut you off, sir, but I do want
17 to say, other lawyers think I'm crazy for how much detail I
18 give in my discovery requests. They think I'm crazy for
19 showing you exactly how my investigations work.

20 But what I'm afraid of is that other people have a
21 preconceived notion of how this process works, and what I'm
22 trying to show is that's not how it works. It is not that the
23 government is providing all of this information and you can

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1 just rest on their relevancy determinations. It's not true
2 that every witness we go and talk to would refuse to talk to
3 us. That's not the way that it works in reality.

4 And so the reasons why I keep coming to you on things
5 like AE 330, the reason why I tell you about my conversation
6 with Dr. 10, which the government just used against me in
7 argument. The reason why I'm doing those things, showing
8 those cards, is to try to bring -- shine the light of reality
9 onto this discovery process to say what has actually happened,
10 how are they actually impeding our defense, and what would we
11 actually do if we had the real information.

12 So that's why I keep doing those things, sir. And so
13 that's why the idea of, well, if you would just call us one
14 more time and give us one more better description of what --
15 exactly what you want to do and where you think that person is
16 and why you want to talk to him and how it's going to fit into
17 your defense, I just have to decline that process because
18 that's not how discovery works. They give me discovery, and I
19 build a defense from it.

20 I don't build a defense and then ping them for the
21 individual witnesses to slot into a defense that is prebuilt.

22 MJ [COL POHL]: One moment, please.

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

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1 [Pause.]

2 MJ [COL POHL]: Okay. Go ahead.

3 LDC [MR. CONNELL]: The other observation on that topic is
4 the government says, for example, that -- this is the third
5 time I've heard them say, "Well, I don't see what Dr. 21 has
6 to do with it."

7 Dr. 21 is a dentist, right? Knowing what the CIA did
8 to Mr. al Baluchi's teeth, and they don't know why the dentist
9 who saw him as soon as he got to DoD custody is important
10 undermines the credibility of their relevance determinations.
11 And I have done -- gone to extreme lengths to illustrate the
12 relevance of these people.

13 The last observation that I want to make is the
14 government claims -- made a new claim today that the reason
15 that it puts in the pseudonyms for the names, at least in the
16 early records, is for classification reasons. If that's true,
17 if their names are classified, then that requires judicial
18 review.

19 The -- it could also easily be -- this is not a
20 question of releasing true names to the defendants in the
21 case. They could do exactly like they do in the DIMS
22 situations, which is present -- make two copies. Make one
23 which has greater information that they consider to be

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1 classified, and one which is releasable to the detainee.

2 The attorneys should not be held to the same standard
3 that the defendants in Camp VII are held with. It is not true
4 in many, many situations that the same information that I am
5 privy to that Mr. al Baluchi is privy to. There's a huge gap,
6 and that gap is classification.

7 So if the government wants to seek 505 authority from
8 you to hide the names of its witnesses, it can pursue that
9 process. But having chosen not to pursue that process, it has
10 to produce the actual information.

11 MJ [COL POHL]: Thank you.

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

13 MJ [COL POHL]: Mr. Swann, anything further?

14 LDC [MS. BORMANN]: Judge? Judge, if I may?

15 MJ [COL POHL]: Oh, I'm sorry. Yes. Go ahead,
16 Ms. Bormann.

17 LDC [MS. BORMANN]: Obviously we join Mr. al Baluchi's
18 motion. And I didn't see a need to respond earlier when -- or
19 argue earlier after Mr. Connell. But after Mr. Swann's
20 argument, I want to point out a couple of important things to
21 Your Honor that Mr. Connell did not.

22 So from the very beginning of this case, Rule 701 has
23 been cited to you by the prosecution for the purpose of

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1 describing their duty. They have a duty to make -- and
2 they've argued it -- determinations about what's material to
3 the preparation of the defense. And I'd like to point out to
4 you that they have failed miserably.

5 So what they did in this case is they handed over --
6 and what they've done with respect to Mr. Bin'Attash as well
7 is they hand over a large tranche of medical records, and they
8 unilaterally go through all of it, and they redact the true
9 names, or they fail to add them, depending on, you know,
10 whether it's the old ones or the new ones, and they cover up
11 whatever pseudonym that person uses.

12 They have not gone through those medical records to
13 determine whether or not a particular name is relevant or
14 material. And how do we know that?

15 Well, let's look at what Mr. al Baluchi marked as
16 AE 330I (AAA), that is the printed medical records that comes
17 from -- that has the signature taken out -- can we get the
18 feed from -- do you know -- do you know which slide I'm
19 talking about, Mr. Connell?

20 MJ [COL POHL]: Yeah. It's his first one on the overhead,
21 with Dr. 10 and the typewritten one.

22 LDC [MS. BORMANN]: Yes. It's dated January 18 of 2007.

23 Now, the government surely knows that Mr. al Baluchi

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1 was being interrogated in and around that date. He has a bump
2 on his head. He complains of being dizzy and nauseated in and
3 around the time of his FBI interrogations, the very
4 interrogations that the government seeks to utilize at a trial
5 against Mr. al Baluchi.

6 It is clear that the government did not do a
7 materiality determination in this case because even the most
8 basic, first-year law student would be able to determine that
9 a bump on the head and a complaint of nausea and dizziness
10 during a time of interrogation would, at the very least, be
11 material to the preparation of the defense. And the person
12 who diagnosed it, saw it, felt it, and made the diagnosis,
13 including that person's credentials and ability to make that
14 determination, would absolutely be material to the defense.

15 So what we're seeing here is just a microcosm of what
16 we have seen in this case overall. The government is failing
17 to make proper materiality determinations, and, instead,
18 giving us massive amounts of material and then expecting us to
19 do their work for them.

20 So now we have to go through and identify the
21 important parts of our defense for the government so that they
22 get an eye view into what we want to do. That's not what 701
23 stands for. And so I'm asking you to order them to do their

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1 jobs properly.

2 MJ [COL POHL]: Thank you.

3 Mr. Swann, anything further?

4 TC [MR. SWANN]: I don't -- after 40 years, I think I have
5 figured out what my job is.

6 But if you go back and you look at that paragraph
7 that Mr. Nevin made mention of, you see the following names:
8 Anes, Blondie, Bourbon, Ford, Cornbread, Deer, Rubin [sic].
9 That's how it appears in the record, okay? And that's how
10 they got the information. I don't even know what the true
11 names of these people are. So the starting point is we give
12 them the information. They come back to us, and then we go
13 and figure out who those five or six people.

14 We are not -- we are not holding back anything. I
15 mean, they asked for Dr. 10. They see some importance in that
16 particular statement. I read the whole statement. I might
17 come to a different agreement, but I didn't hold back on
18 anything. They got the report. And then all they got to come
19 back to us and say is, "I'd like to speak to Dr. 10."

20 They got it. We gave it to them. We located him,
21 and they have been able to talk to him. But we just -- I'll
22 leave it at that, sir. Any questions?

23 MJ [COL POHL]: No.

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1 Upon reflection in violating my rule of one counsel
2 per issue, I do want to hear from Mr. Groharing on the 308
3 issue. And I'll give you an opportunity to respond,
4 Mr. Connell, and anybody else. But it's kind of two separate
5 issues, and so I think it's appropriate that Mr. Groharing
6 responds.

7 Keep it just to the issue before me.

8 TC [MR. GROHARING]: That was my only intent, when I
9 stood.

10 MJ [COL POHL]: Okay.

11 TC [MR. GROHARING]: Turns out it wasn't that odd, but --
12 so the issue that we're talking about is with respect to the
13 paragraph d. individuals.

14 So in paragraph d., the summary that the government
15 proposed to Your Honor was a table of identities where we gave
16 the defense particular identities of people.

17 MJ [COL POHL]: Mr. Connell, put the -- put my ruling
18 on -- up, please, that you highlighted earlier.

19 LDC [MR. CONNELL]: You will need the feed from Table 4,
20 sir.

21 MJ [COL POHL]: Yes, that one. Put it on the overhead,
22 please. Okay. Go ahead.

23 TC [MR. GROHARING]: So -- and I don't know -- I'm not

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1 sure what references Mr. Connell is referring to, but while he
2 was speaking, I pulled up our 524AA filing where the
3 government describes this very information as an
4 identification table of individuals who had direct and
5 substantial contact with the accused. So that's the summary
6 that we provided in paragraph d.

7 MJ [COL POHL]: Okay. Just so -- let me just see if I
8 can -- okay. Because I think I heard something that the
9 government is saying I've approved all of the summaries.

10 Do you take issue that that highlighted yellow
11 language is not accurate?

12 TC [MR. GROHARING]: I think it is accurate. The
13 synopses ----

14 MJ [COL POHL]: Okay.

15 TC [MR. GROHARING]: So the table is the summary of
16 information for paragraph d. The synopses are the -- is the
17 information that we provided to the defense directly, without
18 the military judge's approval ----

19 MJ [COL POHL]: Okay. Okay.

20 TC [MR. GROHARING]: ---- that described the individuals
21 in the table.

22 MJ [COL POHL]: Yeah. I mean, Mr. Connell's -- I thought
23 he said that this -- this language is contradicted in other

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1 pleadings. And what you're saying if it is, implicitly it's
2 not meant to, because this is accurate as the government
3 recalls the process?

4 TC [MR. GROHARING]: Yeah. We never intentionally -- when
5 we provided the discovery to the defense, quite the opposite.
6 We highlighted the fact that these materials were not approved
7 by the military judge.

8 MJ [COL POHL]: Okay.

9 TC [MR. GROHARING]: So if it's implied in any pleading,
10 that's not correct.

11 MJ [COL POHL]: Okay.

12 TC [MR. GROHARING]: And so the names used in those
13 synopses track with the identities approved by the military
14 judge. It would be illogical for us not to use those.

15 So that's all, unless you have any other questions,
16 Your Honor.

17 MJ [COL POHL]: I have none. Okay.

18 LDC [MR. CONNELL]: [Counsel away from podium; no audio.]

19 MJ [COL POHL]: Sure.

20 [Pause.]

21 LDC [MR. CONNELL]: Sir, the -- I'd like to direct your
22 attention. And the delay was over the fact that we found
23 language in a -- unclassified language in a classified

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1 pleading that we just wanted to check on. We found the same
2 language in a -- word for word cut and pasted into a different
3 government pleading.

4 So I'd like to draw your attention to 524AA, which is
5 the one the government just referred to, page 9.

6 MJ [COL POHL]: Just a second.

7 LDC [MR. CONNELL]: And the date is 23 April 2018. It's
8 not -- it's in the base -- it's in the motion itself, 524AA,
9 page 9.

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

11 LDC [MR. CONNELL]: All right. The first full paragraph
12 reads, "To comply with AE 397F, paragraph 2.d., the
13 Prosecution identified individuals who, based on the
14 Prosecution's review of the materials, had direct and
15 substantial contact with the Accused. In lieu of providing
16 these individuals' names to the Defense, the Prosecution
17 sought judicial approval to replace the names with unique
18 functional identifiers (UFIs) to be provided to the Defense.
19 The Military Judge likewise approved the Prosecution's
20 proposed summaries that were ultimately provided to the
21 Defense."

22 So the military commission asked me earlier were
23 these just general averments by the government or were they

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1 specific to 2D talking -- to contradict this language in
2 308HHHH.

3 MJ [COL POHL]: Well, when you received -- you received
4 the e-mail from the government, correct?

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: Which is your previous slide.

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

8 MJ [COL POHL]: You received this order ----

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

10 MJ [COL POHL]: ---- from that.

11 LDC [MR. CONNELL]: Then we received the 64 summaries,
12 so ----

13 MJ [COL POHL]: Yeah. And then you have -- you have
14 this -- this averment.

15 LDC [MR. CONNELL]: Right.

16 MJ [COL POHL]: Okay. Got it. Thank you.

17 LDC [MR. CONNELL]: I mean, they aver the same thing.
18 It's word for word in 562A, but ----

19 MJ [COL POHL]: I understand. I got you. I got it.

20 LDC [MR. CONNELL]: But let me be clear about one thing.
21 I have nothing but humility when it comes to my understanding
22 of what you have seen, and all I can work with is what I have.
23 And so if I am wrong -- I don't think I am. If there is --

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1 like, there was a mention of a table. I don't know what they
2 mean by "table." If there is a spreadsheet somewhere that
3 says that A1A is really Jill Jones and that you signed an
4 order saying that you can tell the -- the defense A1A instead
5 of Jill Jones, then you should tell us that, at least.

6 Because we have never seen the slightest indication
7 that that's true. The ----

8 MJ [COL POHL]: They're not -- let's put the 2D one aside
9 for a second, okay?

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: But they're not alleging -- I mean, we're
12 talking about -- when you walked up here, we're talking about
13 these medical records, right?

14 LDC [MR. CONNELL]: No, sir. Your order arose in the 523
15 context. And 44 of the 523 witnesses ----

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: ---- are UFIs. So it's not just
18 medical records.

19 MJ [COL POHL]: Okay. But they're saying I didn't see
20 them, right? They're not claiming the privilege. They said
21 because -- because my question to them was not the ones that
22 went through the 505 process; it's the ones that didn't.

23 LDC [MR. CONNELL]: Right. And that is where we are at.

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1 Because the question: Is did the 2D summaries go through the
2 505 process? And what you say here is that they didn't. What
3 the government says in 524AA is that they did.

4 And so you need to tell us what the answer to that is
5 because, in my view, based on all of the information that is
6 available to me, which is only a very minor subset of all of
7 the information that is available to you ----

8 MJ [COL POHL]: Uh-huh.

9 LDC [MR. CONNELL]: So I say that with humility.

10 The -- in that situation, the only government basis
11 that remains for withholding the identities of, say, KM5,
12 super important witness -- of KM5 is relevance. And then when
13 you make -- that's why I'm making you -- asking you to make a
14 relevance and helpfulness to the defense analysis under
15 Roviaro and Yunis in 523. Because if you have not said that
16 they can use A1A instead of Jill Jones or the equivalent, then
17 all they have left to -- to withhold this information is
18 relevance, and -- which is an assertion of ----

19 MJ [COL POHL]: And that's what I'm hearing their answer
20 is to my question.

21 LDC [MR. CONNELL]: Yes, sir. And I'm done.

22 MJ [COL POHL]: Okay.

23 Mr. Groharing.

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1 TC [MR. GROHARING]: Very briefly, Your Honor.

2 MJ [COL POHL]: Okay.

3 TC [MR. GROHARING]: I feel like you might understand what
4 I'm saying, but this may be for Mr. Connell's benefit more
5 than you, Your Honor.

6 But what -- where I think the confusion comes in is
7 the difference between the summary and the synopsis. So the
8 summary that we provided, that you approved with respect to
9 paragraph d., 397F, paragraph 2.d., that summary is an
10 identification table. So the defense has that identification
11 table based on your ruling in 308HHHH.

12 So same motion. We described that on page 6 in
13 524AA. On page 6 we specifically described the identification
14 table that -- that we proposed to comply with our obligations
15 there. It's a couple pages later that -- where Mr. Connell
16 cites to the language about the summary. That language is
17 referring to the very same table that's cited just two pages
18 prior.

19 So the documents that Mr. Connell takes issue with
20 are synopses, not the summary that you approved. So I don't
21 see where we have ever indicated that you approved the
22 synopses, either, you know --

23 MJ [COL POHL]: Well, since I said I didn't in the order,

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1 I suspect I didn't. I gotcha. We got it.

2 TC [MR. GROHARING]: So ----

3 MJ [COL POHL]: We're getting wrapped around the axle, I
4 think, on an ancillary issue because the fundamental issue
5 deals with the -- the fundamental issue is not the 505
6 summaries; the fundamental issue as I understand in this now
7 is the government's 701 determination the defense doesn't need
8 various things and that that doesn't have to come through me.

9 Okay. So ----

10 TC [MR. GROHARING]: That has nothing to do with those
11 documents that we're talking about.

12 MJ [COL POHL]: No. That's the point I'm trying to make.

13 And Mr. Connell, I'm going to -- I know we're kind of
14 tag-teaming this thing.

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: As a general rule, do you dispute that 701
17 determinations need to come through me? If the government
18 says it's not discoverable, are they supposed to give it to
19 me? As a first impression.

20 LDC [MR. CONNELL]: As first impression, no.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: Now, I want to be 100 percent clear on
23 this point, because you and I have agreed to disagree on the

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1 point that they get to cherry-pick out of documents. You
2 always use the tear-line example. What if there's a
3 tear-line, and the, you know, top part is about Mr. al Baluchi
4 and the bottom part is about Mr. al Nashiri? Can't they, you
5 know, use the tear-line? Right? That's ----

6 MJ [COL POHL]: We don't need to revisit that discussion.
7 I know what you're talking about.

8 LDC [MR. CONNELL]: But that's what you're asking me,
9 which is, can the government just go through and cherry-pick
10 items and not turn them over to us? And the answer is, as a
11 matter of first impression, absolutely not. That's a 506
12 invocation if it's classified. It's a 505 invocation if it
13 does.

14 MJ [COL POHL]: You're misunderstanding what I'm
15 saying ----

16 LDC [MR. CONNELL]: Okay.

17 MJ [COL POHL]: ---- because I'm trying to get out of the
18 505 arena.

19 LDC [MR. CONNELL]: Me too.

20 MJ [COL POHL]: Because that's what we're talking about
21 here. Because if they had a 505, I mean, the basic issue here
22 was it was a 505 issue is -- then they'd have to get an
23 approved summary, and they didn't get one. So therefore,

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1 either they misused the 505 process or did not feel it was
2 necessary because it wasn't discoverable under 701.

3 LDC [MR. CONNELL]: Fair enough.

4 MJ [COL POHL]: Which I believe is their position ----

5 LDC [MR. CONNELL]: All right.

6 MJ [COL POHL]: ---- if I understand their pleading.

7 LDC [MR. CONNELL]: In this situation, I completely
8 understand what you're talking about, and I got it.

9 MJ [COL POHL]: Yeah. So that's what I'm simply saying,
10 is that on a non-505 substitution -- arguably 506
11 substitution, any type of substitution -- just normal
12 discovery, is that is a first impression; until an issue like
13 this comes up, I don't review what they don't give you.

14 LDC [MR. CONNELL]: On a document basis, if they want to
15 withhold certain information from an otherwise discoverable
16 document, you do review it. However ----

17 MJ [COL POHL]: That's ----

18 LDC [MR. CONNELL]: ---- you and I have agreed to disagree
19 on that point, and I understand. You're not going to get me
20 to ever agree to that point because it's just ----

21 MJ [COL POHL]: I'm not asking you to agree. No.

22 But what happens is -- and just so you're clear that
23 I'm not -- that there's no mistaking here, is that doesn't

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1 mean I have no role in a 701 type of determination.

2 LDC [MR. CONNELL]: You're just asking about the first
3 difference -- the first ----

4 MJ [COL POHL]: Yeah, because they have a whole bunch of
5 stuff that they've not given you.

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

7 MJ [COL POHL]: They've probably have warehouses full of
8 it.

9 LDC [MR. CONNELL]: All right.

10 MJ [COL POHL]: Okay, because they determined it's not
11 discoverable under 701. And I don't go to their warehouse to
12 look at what they didn't give you ----

13 LDC [MR. CONNELL]: I understand.

14 MJ [COL POHL]: ---- until it is -- but if it's raised in
15 a separate issue like this, then I will look at what they
16 don't give you. I just wanted to make sure there was no
17 misunderstanding of that.

18 LDC [MR. CONNELL]: I understand that, sir.

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

20 Rather than do another one, we're close enough.

21 We'll break for lunch until 1400. Commission is in recess.

22 [The R.M.C. 803 session recessed at 1233, 1 May 2018.]

23 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1404, 1 May
2 2018.]

3 MJ [COL POHL]: Commission is called to order.

4 General Martins, any changes from when we recessed
5 before lunch?

6 CP [BG MARTINS]: Your Honor, Ms. Tate is back and
7 Mr. Ryan is back. Ms. Tate may come in and out, if that's
8 okay.

9 MJ [COL POHL]: That's fine.

10 CP [BG MARTINS]: Thank you.

11 MJ [COL POHL]: Mr. Nevin, any changes for the attorneys?

12 LDC [MR. NEVIN]: No, Your Honor.

13 MJ [COL POHL]: Ms. Bormann?

14 LDC [MS. BORMANN]: No changes.

15 MJ [COL POHL]: Mr. Harrington?

16 LDC [MR. HARRINGTON]: No changes, Judge.

17 MJ [COL POHL]: Mr. Connell?

18 LDC [MR. CONNELL]: No changes, sir.

19 MJ [COL POHL]: And Mr. Ruiz?

20 LDC [MR. RUIZ]: No changes.

21 MJ [COL POHL]: Thank you.

22 That brings us to 555.

23 LDC [MR. CONNELL]: Good afternoon, sir.

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1 MJ [COL POHL]: Good afternoon.

2 LDC [MR. CONNELL]: AE 555 is our motion to dismiss for
3 unlawful influence arising from the fact that the Secretary of
4 Defense, on the advice of the acting general counsel of the
5 Department of Defense, fired the convening authority. And
6 Mr. Castle filed -- fired Mr. Brown because they were acting
7 to fix the problems with the military commission.

8 They acted within the scope of their judicial acts,
9 their judicial responsibility as the convening authority and
10 the legal advisor, and were retaliated against for it. That
11 has become -- it was clear before, but it has become even more
12 clear with the filing of yesterday's declaration. But I'm
13 going to go through the facts in detail.

14 Before I do so, I need to -- it seems that every time
15 that we address the UI issue, we have to talk about the
16 burden. It is more important this time than usual because the
17 government builds its entire brief on a fundamentally and
18 somewhat strangely mistaken view of the law.

19 If I may have access to the document camera, please.

20 Your Honor, first I will show page 2 from AE 555I.
21 It was previously submitted to the CISO under the label
22 AE 555 Exhibit 7.

23 [The military judge conferred with courtroom personnel.]

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1 MJ [COL POHL]: Go ahead. You may publish it.

2 LDC [MR. CONNELL]: Thank you.

3 So the government builds its claim, its brief, on the
4 claim of a three-part test for the proof of unlawful
5 influence. The three-part test that it identifies is, first,
6 the actual standard, which is facts which, if true, would
7 constitute unlawful command influence. But then it argues
8 that two additional requirements apply.

9 The first of those, that the defendant must prove
10 prejudice that the court-martial proceedings were unfair to
11 the accused; and second, that the unlawful command influence
12 was the cause of that unfairness, which is called in the case
13 the proximate cause test.

14 What is clear, however -- and Boyce itself cites the
15 cases which make it clear in the military case law -- is that
16 that test that they cite from Boyce is only the test on
17 appeal. United States v. Lewis at 63 MJ 405, a CAAF case from
18 2006, is absolutely explicit about the distinction.

19 Lewis holds -- and Boyce cites Lewis. Boyce is based
20 on Lewis -- that at trial, the test, and maybe -- I don't know
21 if you know how it's really pronounced or not. I will say
22 Biagase.

23 MJ [COL POHL]: Close enough.

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1 LDC [MR. CONNELL]: Okay. That the Biagase test controls
2 and that the more rigorous test is applied only on appeal.

3 Now, Biagase itself, which is found at 50 MJ 143 --
4 and I'm citing from page 150 -- a CAAF case from 1999 -- is
5 even more explicit. It says that steps two and three which
6 are -- step two is highlighted in green, the prejudice prong,
7 and step three, the proximate cause prong, and I quote here,
8 "Do not apply to the responsibility of the military judge
9 during assessment of motions at" -- or prior to -- "trial,
10 where any impact of unlawful command influence is a matter of
11 potential rather than actual effect."

12 The proper standard -- and I'm going to show here a
13 segment of AE 343C which was previously submitted to the CISO
14 as AE 555 Exhibit 6 -- is what the military commission wrote
15 in the 343 series as the standard which it has applied
16 consistently since, which is "that the initial burden is on
17 the defense to raise the issue of" -- here, UI. "The burden
18 is 'low,' but it is more than mere allegation or speculation.
19 The quantum of evidence required to meet this burden and thus
20 raise the issue...is 'some evidence.' And "the defense must
21 show facts which, if true, would constitute UCI, and it must
22 show that such evidence has a 'logical connection' to the
23 court-martial at issue in terms of" -- its -- "potential to

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1 cause unfairness in the proceedings." "...if the defense
2 shows 'some evidence' of such facts, then the issue is
3 'raised.'"

4 The government is entirely wrong when it argues --
5 and it's the basis of its brief -- that we must independently
6 and separately at the trial phase show prejudice and proximate
7 cause.

8 Now, that brings us to what is the sum evidence of
9 unlawful influence which has been demonstrated thus far. The
10 two -- there are three particularly significant documents in
11 the record. The first of those is the declaration of
12 Mr. Castle, which is found at AE 555E Attachment B. For
13 purposes of the CIS0, we submitted it as AE 055 [sic] CIS0
14 Exhibit 2.

15 The third -- excuse me. The second is the
16 declaration of Mr. Rishikof and Mr. Brown, which is found as
17 Appellate Exhibit 555G, and we submitted as AE 555 Exhibit 3.

18 And then, most recently, the 29 April 2018
19 declaration of Mr. Rishikof and Mr. Brown, which I understand
20 has now been marked as AE 555L.

21 MJ [COL POHL]: That's correct.

22 LDC [MR. CONNELL]: Mr. -- and so the reason why I leave
23 out Secretary of Defense Mattis is not that he's not a

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1 significant part of the process, but rather that his
2 declaration essentially says that he acted on the advice of
3 Mr. Castle. And Mr. Castle provides the reason that the
4 government is claiming that these -- these two men were fired.

5 Now, I want to be clear that I don't think that
6 Mr. Castle's declaration tells the whole story, but it's what
7 we have in front of us right now. And it bases -- it sets out
8 two primary bases why, in his view, he recommended the
9 termination of Mr. Rishikof and that he terminated Mr. Brown.

10 The first of those is a management memorandum
11 submitted in December of 2017. The second of those is a
12 request for Coast Guard imagery, up-to-date imagery of the
13 Expeditionary Legal Complex in January 2018. I will address
14 those in turn.

15 First, with respect to the management memorandum,
16 Mr. Castle writes that "Mr. Rishikof submitted a memorandum to
17 the Deputy Secretary of Defense without an advance copy to the
18 Office of General Counsel." That's in his page --
19 paragraph 11 of AE 555 Attachment B. It seems, Your Honor, to
20 be the same reference that Mr. Rishikof refers to in
21 paragraph 7 when he writes that he had made, quote,
22 recommendations for reorganization of DoD's prosecutorial and
23 security process.

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1 Seeking the reorganization of prosecutorial and
2 security functions within the Office of Military Commissions
3 is unequivocally a judicial act. The convening authority and
4 the legal advisor are responsible for numerous prosecution
5 functions as part of their judicial and quasi-judicial duties.

6 In AE 555 (AAA KSM Sup) at page 4 and 5, note 12, we
7 include in the footnote the 37 different prosecutorial
8 functions which are assigned by the Regulation for Trial by
9 Military Commission to the convening authority. These include
10 the charging decision, the decision to invoke the death
11 penalty, the control of communications with the media, the
12 grants of immunity, and the plea-bargaining process.

13 In the civilian world, those would all be core
14 prosecutorial functions. Here, they are prosecutorial
15 functions but performed by the convening authority. And, in
16 fact, and still -- until the current chief prosecutor's
17 tenure, the legal advisor directly supervised the chief
18 prosecutor.

19 There are also many security functions which are
20 assigned to the convening authority. At note 13 of our same
21 pleading, 555 (AAA KSM Sup), page 5, we document the ten
22 different security functions which are assigned by the
23 Regulation for Trial by Military Commission to the convening

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1 authority.

2 We have seen in this case on the record already
3 convening authority responsibility for security functions and
4 organizations at least four times. The first of those is with
5 respect to DISOs, defense information security officers.

6 The first request for DISOs went to the convening
7 authority on 30 April 2012. That is found in the record
8 already at AE 118 Attachment G. That raised -- we also raised
9 the issue of convening authority appointment of DISOs to the
10 military commission itself in AE 009B. All five versions of
11 your Protective Order #1 have assigned responsibility to the
12 convening authority for appointing DISOs.

13 Our second request for a DISO, after Protective
14 Order #1, its first version, went into effect, went to the
15 convening authority on 11 December 2012 and is found in the
16 record at AE 118 Attachment L. The acknowledgement from the
17 DISOs -- that the DISOs came from the convening authority is
18 found in AE 118 (AAA MAH Sup).

19 With -- as well with convening authority
20 responsibility, the DISOs directly affect the trial, some
21 aspects of which remain unresolved for over five years; for
22 example, in AE 118, which is still pending before the military
23 commission. Unequivocally, that security is a judicial act, a

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1 judicial function of the convening authority.

2 With respect -- a second example already in the
3 record of the judicial impact of the convening authority's
4 security function are -- is the classification review
5 function. All five protective order certifications have
6 assigned the convening authority responsibility to provide
7 classification review to the defendant.

8 When I initially requested a classification review
9 process on 19 December of 2012, that request went to the
10 convening authority. It's found in the record already at
11 AE 118 Attachment M. When not Mr. Rishikof but Vice Admiral
12 Bruce MacDonald issued the convening -- the classification
13 review process on 20 February of 2013, he did so in his
14 authority as convening authority. That's found in the record
15 at AE 013HH Attachment C.

16 When not Mr. Rishikof but Mr. Oostburg Sanz revised
17 the classification review process, he did so also in his role
18 as convening authority. That document is found in the record
19 at AE 118 (AAA Sup) [sic] Attachment B.

20 This process directly affects the trial. As a couple
21 of examples, we clearly litigated the structure of the
22 classification review process in AE 396 when the government
23 sought to shift responsibility for classification review of

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1 documents marked "Pending Classification Review" to the
2 defense. There are motions currently pending in the 350
3 series, the 399 series, the 375 series, and the 478 series,
4 all having to do with the responsibility for classification
5 review and how it affects our ability to proceed to trial.

6 And third, in the 478 series, when you asked us to
7 brief the three main obstacles to setting a trial date in the
8 case, one of the three that you directly asked us to brief was
9 what documents are in classification review and what their
10 status is. There's no question that there's immense judicial
11 impact to this convening authority's responsibility for
12 security functions in the classification review area.

13 A third example of why decisions about the security
14 functions are a judicial act is found in the organization of
15 the Office of Special Security. When this case was arraigned,
16 Office of Special Security was a part of the Office of
17 Military Commissions.

18 On 21 December 2012, the current -- the then-legal
19 advisor, Michael Chapman, issued a memorandum transferring
20 responsibility -- the chain of command of the Office of
21 Special Security from the Office of Military Commissions to
22 the Washington Headquarters Service. That document is found
23 in the record at AE 013HH Attachment B.

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1 The -- clearly, the Office of Special Security has
2 had a great deal to do with the ongoing progress of this
3 trial. In December, for example, we had -- we spent
4 essentially the whole hearing debating the response -- the
5 structure of the responsibilities between the Office of the
6 Chief Prosecutor, the Special Trial Counsel, the Office of
7 Special Security, and the Central Adjudication Facility for
8 how referrals of defense alleged mis- -- wrongdoing affect
9 security clearances. Clearly, the organization of OSS and --
10 is -- has impact on the judicial process.

11 And fourth, the clearance of documents, the
12 classification review of documents for public release is a
13 matter that falls under the -- is a security function with
14 direct judicial impact that falls under the convening
15 authority. The -- we have been challenging the classification
16 review and public access issues since 12 July 2012 when we
17 first raised it in the AE -- in the AE 055 series. It's a key
18 issue in the AE 551, which is pending before the military
19 commission. And AE 551D articulates the convening authority's
20 position regarding security review, in our view, contrary to
21 the Regulation for Trial by Military Commission. But it
22 certainly is another example of how the security functions
23 assigned by the Regulation for Military Commission -- slowing

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1 down -- to the convening authority directly affect the
2 judicial process and are judicial acts.

3 Now, Mr. Castle says that Mr. Rishikof submitted a
4 memorandum in December of 2017 at one -- Mr. Rishikof actually
5 gives -- in his second declaration gives some more information
6 about that at 555L paragraph 1(b).

7 Mr. Rishikof writes, "The internal memorandum
8 concerning issues affecting the commission's process was a
9 response to a request that was made by the Office of Secretary
10 of Defense when we were initially hired. In the hiring
11 process, the CA was asked to compose an assessment of the
12 commissions and submit it directly to the Office of the
13 Secretary as a direct report to the Deputy Secretary.

14 The point of the assessment was to provide a frank
15 analysis of the state of the commissions with recommendations
16 from which leaders could draw in the future. As is standard
17 practice, the memorandum was a vehicle to begin discussions in
18 the OSD to ascertain the support that would be necessary to
19 move the commissions process forward in a coordinated manner."

20 In other words, what Mr. Rishikof explains -- and
21 Mr. Castle does not contradict -- is that this memorandum, the
22 management memorandum, which was one of the two reasons for
23 which he was fired, was not only proper, but was the direct

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1 exercise of his responsibilities over prosecutorial and
2 security functions.

3 And it's interesting that it was submitted in
4 December 2017. One might infer that it was begun before that.
5 But why would the convening authority be particularly
6 concerned with prosecutorial and security functions in
7 December of 2017? Because the first week was taken up with a
8 hearing about those functions and how it affected the
9 performance of the defense; how it affected the ability of the
10 military commission to proceed with a cloud hanging over the
11 security clearance of certain members of the defense; and it
12 was obviously a key issue. That, of course, was memorialized
13 in the AE 532 series.

14 So I -- the record that we have now rebuts the only
15 remaining claim of the government that the regulation of
16 prosecutorial and security functions is not a judicial act
17 within the scope of the convening authority and legal
18 advisor's duties. But what about the fact -- what if they do
19 it badly? What if the Secretary of Defense or the legal --
20 the acting general counsel disagree with the way the convening
21 authority are handling that, their responsibilities?

22 Independence -- judicial independence is the power to
23 take positions and make decisions, whether someone else thinks

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1 those decisions are wrong or not. In fact, Mr. Rishikof
2 writes in his declaration, "That is the nature of legal
3 decisions and leadership positions: one is sometimes not
4 popular."

5 MJ [COL POHL]: Mr. Connell, what was -- for what term was
6 Mr. Rishikof appointed?

7 LDC [MR. CONNELL]: Indefinitely, sir.

8 MJ [COL POHL]: Okay. Was that -- prior convening
9 authorities were appointed for a fixed term, correct?

10 LDC [MR. CONNELL]: I can't agree or disagree. I didn't
11 know that was true.

12 MJ [COL POHL]: Okay. But if he's -- I believe the
13 wording in the memo, though, is something to the effect you're
14 convening authority until I tell you you're no longer the
15 convening authority, or something like that.

16 LDC [MR. CONNELL]: Serve at the pleasure ----

17 MJ [COL POHL]: Of the Secretary of Defense.

18 LDC [MR. CONNELL]: ---- of the Secretary of Defense.

19 MJ [COL POHL]: Okay. Under your analysis and somewhat of
20 Mr. Rishikof -- and again, it's a joint declaration so I --
21 it's difficult to delineate it -- is he says resource and
22 staffing in the commissions context are judicial functions.

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

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1 MJ [COL POHL]: Is there any -- if that's true, basically
2 whatever they do has got a judicial component to it, is there
3 any way to terminate Mr. Rishikof?

4 LDC [MR. CONNELL]: Yes. So this is actually ----

5 MJ [COL POHL]: Absent personal misconduct. I'm going to
6 move that to the side.

7 LDC [MR. CONNELL]: We can't leave that to the side
8 because that's what the judicial immunity case I am going to
9 discuss -- I can move to that now, if you want.

10 MJ [COL POHL]: Okay. But what I'm saying is that
11 basically he's got lifetime tenure as long as he doesn't
12 perform -- like a federal judge?

13 LDC [MR. CONNELL]: Well, the military commissions might
14 end, right? He doesn't have lifetime tenure.

15 MJ [COL POHL]: Well, I -- well, at the rate this case is
16 going and how old he is, but that's a different issue.

17 LDC [MR. CONNELL]: And it's a good joke, but it conceals
18 a larger truth, which is that the -- you know, one of the
19 important things we can't lose sight of here is that a federal
20 court exists whether any cases come before it or not. A
21 military commission exists -- is called into existence only
22 for a limited time. And so when there are no more military
23 commissions, there is no more convening authority, which is

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1 different from if everyone in the Eastern District of Virginia
2 stopped filing suits or committing crimes, there would still
3 be federal judges.

4 MJ [COL POHL]: Well, I'm not sure that I would agree with
5 that because there was a convening authority when there
6 weren't military commissions, right? By definition, you
7 needed a convening authority to refer the first case.

8 LDC [MR. CONNELL]: Yes, to -- yes, that's true.

9 MJ [COL POHL]: So if all of these cases were tried, okay,
10 and there were still other potential cases out there, which
11 arguably there always are ----

12 LDC [MR. CONNELL]: That's true.

13 MJ [COL POHL]: ---- that would not necessarily mean that
14 there's no longer -- so your analysis of a military commission
15 is a one-off creature ----

16 LDC [MR. CONNELL]: Yes.

17 MJ [COL POHL]: ---- just like courts-martial are, I agree
18 with; but I'm not going to say I necessarily agree that if
19 there were no military commissions pending, that would
20 necessarily mean that the convening authority's job would then
21 automatically go away.

22 LDC [MR. CONNELL]: Well, here's the important part out of
23 that. If there were no military commissions pending and the

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1 convening authority were dismissed by the Secretary of
2 Defense, it would not be for performance of their judicial
3 duties.

4 MJ [COL POHL]: Well, it could be, but there would be no
5 remedy because there's no UI forum to litigate it in.

6 LDC [MR. CONNELL]: Well, that's true, but my -- both of
7 those statements are true. Your statement is true, but mine
8 is, too, because if there's no need for the person, then --
9 then their dismissal would not be for the performance of their
10 duties.

11 Now, on the other hand, if the Secretary of Defense
12 thought, you know, I think you should be bringing other cases
13 and you're not, you're not exercising your prosecutorial duty
14 to refer cases, then that would be firing them for the
15 exercise of their judicial duties.

16 MJ [COL POHL]: So let me go back to where I kind of
17 started this discussion, because you -- when I said on what
18 grounds could the Secretary of Defense fire the convening
19 authority, and I said absent personal misconduct, and you took
20 an issue on that.

21 LDC [MR. CONNELL]: Sure.

22 MJ [COL POHL]: And you said something about judicial
23 immunities?

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: So ----

3 LDC [MR. CONNELL]: Do you want me to skip ----

4 MJ [COL POHL]: Yeah, skip ahead to that. Tell me ----

5 LDC [MR. CONNELL]: All right.

6 MJ [COL POHL]: I got the facts. And we'll go -- we'll
7 pull up to the facts. But the question becomes, is the
8 convening authority like a federal judge in terms of the way
9 he's set up or is it analogous to something else?

10 LDC [MR. CONNELL]: Well, certainly not like a federal
11 judge in many ways. A federal judge has no prosecutorial
12 duties.

13 MJ [COL POHL]: No. I'm speaking only in terms of tenure,
14 of ability -- what would be the grounds to relieve the
15 convening authority of his duties?

16 LDC [MR. CONNELL]: Right. If you will give me just a --
17 I'm going to lead up to it. I'm going to answer that specific
18 question, but there's some groundwork we have to lay first.

19 So I'm skipping ahead from the facts to the text of
20 10 U.S.C. 949a(2)(B) [sic], which prohibits unlawful influence
21 over the convening authority's judicial acts.

22 And so the question really -- fundamentally the only
23 question left in this whole -- that is really worth debating

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1 in this whole thing, once the facts are fully understood, is
2 what is a judicial act. And the phrase "judicial act" first
3 entered military law in the Elston Act of 1948, which replaced
4 Article of War 88, and then two years later became part of the
5 UCMJ. It was intended at that time to distinguish in a
6 court-martial context between the operational authority of the
7 commander to bomb a certain target or handle personnel matters
8 and acts with respect to the judicial system, that is, the
9 court-martial system.

10 The phrase itself, however, comes from the
11 foundational law of the republic from the case of -- and it
12 has a funny name -- Den, D-E-N, ex, meaning E-X, dem., D-E-M,
13 Murray, v. Hoboken Land & Improvement Co., which is found at
14 59 U.S. 272 from 1856. Perhaps because that's such an
15 unwieldy name it has a more common name, which is "Murray's
16 Lessee." In certain circumstances, "Murray's Lessee" is as
17 familiar as Marbury v. Madison.

18 And the facts of the case were there was a customs
19 collector who was audited by the treasury. And the treasury
20 said, "You didn't turn over all of your money." You were
21 assessed a fine. There was a question whether the executive,
22 the Treasury Department, who is not part of the judiciary,
23 could deprive a person of property even though they had no

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1 Article III power. And the question that the Supreme Court
2 addressed was whether a judicial act necessarily implied
3 exercise of Article III judicial power.

4 This is where the phrase "judicial act" entered the
5 American legal lexicon.

6 And the Supreme Court noted that, quote, All those
7 administrative duties, the performance of which involves an
8 inquiry into the existence of facts and the application to
9 them of rules of law are judicial acts. They ruled that there
10 was no Article III violation.

11 And the reason why I say it's the foundational law of
12 the republic is that this is the foundation of the modern
13 administrative state. The fact that the Secretary of -- that
14 the Department of Health, Education, and Welfare can make
15 decisions, the fact that the SEC can issue fines, the fact
16 that the -- that any of the enormous alphabet soup of agencies
17 that we have can act in a way that looks judicial, it comes
18 down to this case. So that's where the phrase "judicial act"
19 comes from.

20 One thing that I -- before we get too far onto that,
21 one thing that I want to point out about it is that judicial
22 acts include some administrative duties. It is absolutely
23 clear that there is no administrative versus judicial divide

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1 because the Supreme Court's definition of judicial acts
2 includes, quote, all those administrative duties.

3 Now, that brings us to the issue of judicial
4 immunity. And all of the judicial immunity cases flow from
5 this wellspring of what is a judicial act. And the judicial
6 immunity cases -- and, as you know, judicial immunity has
7 spread far beyond judges. Prosecutors have judicial immunity.
8 Agencies have judicial immunity. A wide variety of government
9 officials have judicial and quasi-judicial immunity. And they
10 apply that phrase, quote, judicial acts to almost all acts
11 within the duty of a judge, a prosecutor, or an agency.

12 And let me just give you one example about that.
13 Imagine that I personally, James Connell, tried to sue
14 Mr. Rishikof for a Title III violation because I felt that
15 my -- I was being surveilled in Echo II. Clearly, the -- that
16 case would be dismissed on judicial immunity grounds because
17 he is acting in the capacity of convening authority in
18 whatever that he does in supervising and providing TSCM or
19 anything else.

20 But one example, and this -- I told you that you were
21 very patient and gave me some lead-up to this, but here's a
22 case that talks about what can somebody be fired for, and it
23 is Mireles v. Waco, M-I-R-E-L-E-S v. W-A-C-O, 502 U.S. 9, a

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1 1991 case. This goes to the question of what can a -- what is
2 a judicial act and what is not a judicial act.

3 So in this case, there was a judge who was sitting
4 not in a federal court, didn't have Article III power, was
5 sitting in a state court, and that judge was mad at a public
6 defender who had not shown up for whatever docket call it was.

7 The allegation in the suit was that the judge said to
8 the deputy, "Go out in the hall, grab that public defender,
9 and bring him in here with excessive force," right? Seems
10 hard to believe that a judge would actually use those words,
11 but that's the allegation that's pled. The decision of that
12 case shows how broad a judicial act is and what it means to be
13 person -- for personal misconduct versus a judicial act.

14 What the Ninth Circuit held in that case was that
15 while having people arrested is a judicial act, having people
16 arrested with excessive force exceeds their power, and it is
17 not a judicial act.

18 The Supreme Court reversed. The Supreme Court said,
19 no, it's -- there is a function test. And the -- if the
20 function is the sort of function that a person, whether that
21 be an agency administrator, a judge, a prosecutor, or
22 whatever, performs in the ordinary course of their duties, if
23 they're acting within their function, even if they do it

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1 badly, it's still a judicial act, and they still have judicial
2 immunity.

3 So to your question of a person who is protected in
4 their judicial acts in the way that the convening authority is
5 in 949a cannot be fired for the performance of those official
6 acts, cannot be unlawfully influenced at all. Firing is just
7 the most serious form of unlawful influence. The Boyce
8 case ----

9 MJ [COL POHL]: So is it your view that -- is there
10 anything that the convening authority does, wearing any hat,
11 that's not a judicial act, then?

12 LDC [MR. CONNELL]: The -- there are five, I believe,
13 duties that the Regulation for Trial by Military -- so the
14 government's first argument, like, back in the day -- their
15 first argument on this was -- and maybe that was in the 550
16 series. Their first argument was that, no, the important
17 distinction is between convening authority and director of the
18 OMC. So we went back and -- you know, they've abandoned that
19 now, but they're -- that was their first argument.

20 So we studied what was the distinction between the
21 convening authority and the director of the Office of Military
22 Commissions. And they're really only -- R.T.M.C. does not
23 assign any responsibilities to the regulator -- to the

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1 director of the OMC, but there are five responsibilities that
2 it assigns to the OMC. And one could imagine that sort of in
3 a respondeat superior kind of way, that the director is
4 responsible for the OMC duties. Four of those duties relate
5 to travel, like paying travel claims or making arrangements
6 for travel. One of them, interestingly, has to do with
7 custodianship of the website.

8 So the government's original argument was that the
9 correct -- that there was a hat analysis. And the hat
10 analysis had to do with director versus convening authority.
11 The -- if you went straight with that hat analysis, then both
12 of these responsibilities -- and I'm going to return to
13 them -- to the facts in a moment -- both of these
14 responsibilities have to do -- both a prosecutorial and
15 security function memorandum and the imaging of the -- of the
16 Expeditionary Legal Complex, both of those fall clearly under
17 the convening authority hat.

18 But even under that hat analysis, we have seen --
19 like look at the 551 motion, for example. That is, in some
20 ways, about the website. In 551D, the convening authority,
21 through staff, weighed in on the proper analysis of 17- --
22 R.T.M.C. 17-1 and 19-4. So the convening authority, even in
23 that website, which is an issue which is assigned to the OMC

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1 by the R.T.M.C. rather than to the convening authority, I
2 think that the proper function is not what hat does anyone
3 have on at any given time, the proper analysis is was it a
4 judicial act, that is, does it have -- is it one of those
5 administrative duties that involves inquiry into the existence
6 of facts and the application of law thereto?

7 Now, the -- the one other thing that I wanted to say
8 about -- going back to the management memorandum, the one
9 other thing that I wanted to say was that the --
10 Mr. Rishikof -- excuse me. Court's indulgence.

11 [Pause.]

12 MJ [COL POHL]: So back to your -- just to kind of tie
13 this up ----

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

15 MJ [COL POHL]: ---- basically, since he was not a term
16 employee, is Mr. Rishikof could basically -- the Secretary of
17 Defense, he wasn't -- did not really have authority to
18 terminate him for almost any reason as long -- within the
19 course of his duties, as he saw.

20 LDC [MR. CONNELL]: No, sir. No, he didn't have authority
21 to terminate for any reason related to a judicial act. That's
22 only the protection of the statute.

23 MJ [COL POHL]: But -- but -- but -- but -- but ----

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1 LDC [MR. CONNELL]: So let's say that he filled out an
2 improper travel claim.

3 MJ [COL POHL]: Okay. But -- okay. Again, I want to put
4 personal misconduct to the side.

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: But anything in the course of his duties,
7 anything, is not a grounds for termination is what you're
8 saying?

9 LDC [MR. CONNELL]: It's just like you, sir. That no one
10 can terminate ----

11 MJ [COL POHL]: Well, I ----

12 LDC [MR. CONNELL]: It's just like you. No one can
13 terminate you for the exercise of your judicial acts. No one
14 can terminate ----

15 MJ [COL POHL]: Well, I --

16 LDC [MR. CONNELL]: Yes. So if ----

17 MJ [COL POHL]: Analogize it to me. I got it. But I
18 don't think the analogy -- but -- but that's not my point. My
19 point is that he's not a judge. Okay?

20 LDC [MR. CONNELL]: No, he's not a judge, sir ----

21 MJ [COL POHL]: The convening authority ----

22 LDC [MR. NEVIN]: ---- but he has judicial
23 responsibilities.

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1 MJ [COL POHL]: With judicial responsibilities in your
2 analysis. But your analysis -- basically no matter what he
3 does as a convening authority, there could be no -- the
4 Secretary of Defense who appointed him has no responsibility
5 to relieve him, no matter what he does, as long as it's
6 within -- arguably within his job as the convening authority.

7 LDC [MR. CONNELL]: No, sir. That's not my position at
8 all. That's the third time you've said it and the third time
9 I've said no, that's not my position.

10 Our position is that he cannot be retaliated against,
11 or unlawful -- or influence or, in the extreme view, fired for
12 the exercise of his judicial acts.

13 The -- that's the phrase that -- so the places where
14 I part company with your characterization of our position or
15 questioning about our position is, first, arguably, right,
16 that -- I don't know where "arguably" comes into it. You are
17 the decider on this question. You are the decider of: Is the
18 exercise of his responsibilities as convening authority,
19 are -- is that -- that is not necessarily coextensive in all
20 situations with judicial acts. But is it a judicial act is
21 the question, not is it convening authority.

22 Even the government doesn't, in its latest pleading,
23 advocate for its director/convening authority idea anymore,

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1 and for good reason, because it's not supported by the
2 Regulation for Trial by Military Commission, which we pointed
3 out. What matters is, is the person acting -- is he
4 exercising judicial acts? That's the question, because that's
5 the language of the statute.

6 Now, in reality, as Mr. Rishikof points out -- if you
7 will give me just one moment.

8 In reality, independent judicial decisions informed
9 by independent legal advice are the core responsibility of the
10 convening authority. And so those -- the sort of things that
11 he was allegedly fired for are not -- are judicial acts.

12 Now, I don't want to leave your question without
13 satisfying you on it, so I want to -- if you have any more
14 specific questions, I want to answer them.

15 MJ [COL POHL]: No, I ----

16 LDC [MR. CONNELL]: But let me be clear about something.
17 There are lots of things that a person can do that can subject
18 them to discipline. And that's true for a judge. But I know
19 you don't like the judge analysis, so let's take it for a
20 prosecutor, right?

21 There are numerous cases in the -- out of the Supreme
22 Court assigning quasi-judicial immunity to prosecutors who act
23 in the course of their prosecution. The famous Harry Connick

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1 case out of New Orleans a few years ago, where a prosecutor
2 could not be sued for intentionally withholding Brady or
3 intentionally using perjured testimony testifies to the
4 strength of that quasi-judicial immunity because calling
5 witnesses is the function -- is one of the functions of a
6 prosecutor, and if they do it badly, if they do it even
7 illegally, that doesn't subject them to -- for responsibility
8 for their judicial acts. Now ----

9 MJ [COL POHL]: But they get -- and, again, it's an
10 imperfect analogy, because if their boss doesn't like the way
11 they're doing things, they can fire them ----

12 LDC [MR. CONNELL]: Well ----

13 MJ [COL POHL]: ---- which is what we talk about here.
14 But you don't have the UI issue with them that we have here.
15 Are you with me on this?

16 LDC [MR. CONNELL]: Yes, but -- but ----

17 MJ [COL POHL]: I mean, the ----

18 LDC [MR. CONNELL]: ---- judicial immunity is a pretty
19 good analogy to ----

20 MJ [COL POHL]: It doesn't prevent the U.S. Attorney from
21 firing him if he doesn't like the way he's doing his job.

22 LDC [MR. CONNELL]: From firing the -- so like the state
23 prosecutor, the prosecutor for the City of New Orleans?

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1 MJ [COL POHL]: Yeah. He doesn't like the way the
2 federal -- what I'm saying, your judicial immunity to
3 prosecutors would not prevent termination by his boss because
4 he doesn't like the way he's doing his judicial duties, if you
5 want to call it that.

6 LDC [MR. CONNELL]: Exactly. But what it would ----

7 MJ [COL POHL]: It would give him judicial immunity from
8 the outside.

9 LDC [MR. CONNELL]: Well, it would prevent him from being
10 retaliated against for his judicial acts, which means no one
11 can sue him, because the only protection for the judicial acts
12 of a -- or quasi-judicial acts for a prosecutor situation, but
13 they are the same, same analysis. The -- it's can they be --
14 what protection exists?

15 In the military commission system, just like under
16 Article 37, their protection for/against the retaliation for
17 the exercise of judicial acts, that judicial act protection,
18 the only context in which it exists in a civilian situation is
19 with respect to retaliation by a plaintiff who is suing them.

20 So, yes, you're right; they can be fired by their
21 boss because they're not protected in their judicial acts
22 against employment retaliation. They are protected in their
23 judicial acts by quasi-judicial immunity, and they can't be

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1 sued. That's where the analogy comes in.

2 MJ [COL POHL]: Go ahead.

3 LDC [MR. CONNELL]: Now, I want to talk about -- but let's
4 keep talking about is there anything that they can be fired
5 for.

6 MJ [COL POHL]: No. I -- I know I raised the issue, but
7 it seems to me -- let's bring it a little bit more to where
8 we're at.

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

10 MJ [COL POHL]: Can they be fired for what ----

11 LDC [MR. CONNELL]: What he actually did?

12 MJ [COL POHL]: ---- what are they actually fired for? It
13 seems to me we can speculate until the cows come home
14 about ----

15 LDC [MR. CONNELL]: That's right. In fact, that's the
16 only point I wanted to make, is that the far fringes of the --
17 of the judicial acts are not really the place that we're
18 operating. Where we're instead operating is at the core of
19 the responsibilities of the convening authority, not did they
20 take a box of paperclips home.

21 That first core responsibility that we just talked
22 about is the organization of prosecutorial and security
23 functions, but the other one, which Mr. Castle cites as the

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1 basis for the firing, is in retaliation for requesting
2 up-to-date imagery of the Expeditionary Legal Complex, or as I
3 like to think of this as the legal infrastructure issue.

4 Mr. Castle describes this as -- that Mr. Rishikof and
5 Mr. Brown were fired for, one, requesting an aerial image of
6 the Expeditionary Legal Complex from SOUTHCOM. And when they
7 said no, two, requesting an aerial image from the U.S. Coast
8 Guard without ensuring that the Coast Guard or somebody
9 ensured -- performed proper coordination.

10 Now, addressing the legal infrastructure of the ELC
11 is absolutely a judicial act. The convening authority in the
12 course of their judicial responsibilities has numerous
13 resourcing responsibilities. The military commission -- and
14 this is what we discussed earlier -- is unlike a courthouse in
15 this way, that in the federal courts, the Administrative
16 Office of the Courts -- or in a county court, the county --
17 supply a courthouse, really, because the court exists
18 independent of its cases.

19 Our primary interaction on the defense side with the
20 convening authority is over resourcing. And that has been
21 reflected numerous, numerous times in the military commission.
22 We have seen time and time again, even today, the -- you and
23 counsel for Mr. Mohammad were debating the role of the

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1 convening authority and the judge in obtaining the MRI.

2 But it has come up again. This is only the latest
3 time, not the most significant. In your ruling in AE 036D,
4 you set out procedures for requests of the convening
5 authority. When we were negotiating for the laptops that are
6 at issue in AE 182 and in AE 530, we went to the convening
7 authority. When we were seeking an MRI -- and I speak only
8 here for Mr. al Baluchi -- when we were seeking an MRI at
9 GTMO, the one that's now at issue in 526, we went to the
10 convening authority.

11 In numerous defense ex parte motions, you have
12 reviewed the resourcing decisions of the convening authority.
13 Now, this directly affects not just the progress of the case
14 and -- the judicial progress of the case.

15 And in the 478 series, Mr. al Baluchi cites the
16 massive understaffing by the convening authority, that the
17 convening authority has promised -- has found to be necessary
18 many more defense staff than it has actually provided. But as
19 you pointed out earlier today, the convening authority is not
20 the only party in resourcing.

21 The Naval Station Guantanamo Bay cancellation of
22 housing was at issue in 485C. The JTF cancellation of
23 transportation for the judiciary was at issue in 485D, which

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1 led to the cancellation of the July 2017 hearing. The
2 convening authority got directly involved in that one. In
3 485E, the government presented the convening authority's
4 position on how to ensure proper judicial segregation from
5 other parties in the case. And in AE 485H, the military
6 commission, in fact, approved one of those options.

7 Now, I say that to show how resourcing and
8 infrastructure decisions are not, quote, administrative. They
9 are directly affecting the heart of the trial process, which
10 is the exact phrase that the military commission used in 485D.

11 Now, there are several ongoing infrastructure issues
12 that were implicated directly by Mr. Rishikof's request for
13 up-to-date imaging of the Expeditionary Legal Complex. One of
14 those is the ELC expansion.

15 The government has a pending trial motion for trial
16 markers in the AE 478 series on which we conducted oral
17 argument on 24 March 2017. At that time, the military
18 commission raised the issue of an additional courtroom,
19 starting at unofficial/unauthenticated transcript of 24 March
20 2017 at 15452.

21 At the time, the military commission expressed
22 concern about conflicts with the Hadi case, and which seems
23 prescient now, given that I can represent that the Hadi case

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1 has a mid-2019 trial date. The government at that time told
2 the military commission not to worry about it, and
3 sometimes -- I quote here from page 15457, "new resources fall
4 out" -- "from out of the sky somewhere."

5 The government mentions specifically the role of the
6 convening authority in that Expeditionary Legal Complex
7 process as well as the role of Congress in funding it and said
8 that the government could not speak for them. That's at
9 15460.

10 The military commission raised the concern of
11 sufficient infrastructure separate from the courthouse at
12 15461, and the defense raised the issue of office space.

13 I don't know if you recall, but that was the day, in
14 fact, that we had to take our lunch break because the rain on
15 the top of Courtroom Number 2 was so loud that we couldn't
16 hear. That's reflected in the transcript at 15499.

17 Less than two weeks after that event, which was a
18 very significant event, we're talking about something that
19 matters a lot to a lot of people: The setting of a trial date
20 in this case -- less than two weeks after that, on 4 April
21 2017, Mr. Rishikof became the convening authority and
22 Mr. Brown became the legal advisor. That date is reflected at
23 AE 555 Attachment E. Clearly, legal infrastructure was at the

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1 top of their agenda. I myself made a presentation to the
2 convening authority on 30 May 2017 which included
3 infrastructure issues. I'm sure that other components made
4 similar presentations.

5 In June of 2017, many components, although not the
6 Military Commission Defense Organization, convened at
7 Guantanamo to discuss the needs, including the expansion of
8 the Expeditionary Legal Complex. Our written input to that
9 process is found at AE 555 (AAA MAH Sup) Attachment B
10 Enclosure 1. The chief defense counsel in that process
11 advocated for both an additional courtroom and for more office
12 space.

13 I'm now showing what was submitted to the CISO at 555
14 Exhibit 5. It's also found in the record at 555 (AAA MAH Sup)
15 Attachment B Enclosure 1. May I have the feed from the
16 document camera?

17 Item Number 3 in the chief defense counsel's
18 submission was about workspace that is within the
19 Expeditionary Legal Complex, which is the context in which
20 this was submitted. They said that -- talked about the space
21 which is necessary and the time which is necessary. But
22 the -- the chief defense counsel also advocated, as its Number
23 5 item, about courtroom facilities and represented that the

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1 existing courtroom is unworkable during periods of heavy
2 rain -- something which had recently been brought home to
3 us -- and stated that a second courtroom is a requirement as
4 are NIPR and SIPR drops at counsel table.

5 Around the same time -- you can cut that feed,
6 please. On 14 June of 2017, the chief defense counsel issued
7 a memorandum to us on the defense recommending that we not
8 meet our clients unless we were confident that we were not
9 being monitored. That document is found in the record at
10 AE 133RR Amended, Attachment B.

11 The next month, in July 2017, during the time that
12 the military commission was -- had cancelled its hearing for
13 the unilateral transportation decisions of JTF-GTMO, the
14 government filed AE 478 (Gov Sup), and said there would be no
15 Courtroom Number 3, no additional courtroom, because
16 congressional approval was necessary. In addition, at the
17 same -- during the same month, we filed AE 133RR seeking to
18 address the allegations of monitoring.

19 On 24 August 2017, the military commission held a
20 hearing on AE 478. And the government in that hearing said
21 that there was a plan in place to expand the Expeditionary
22 Legal Complex, but that there would be no additional
23 courtroom. And the reason that it gave was that the

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1 additional SCIF space necessary for an additional courtroom
2 would require congressional approval. That's found in the
3 transcript at page 16351. The government also said that that
4 represented the official Department of Defense view on the
5 next page, at 16352.

6 And so at that time, the convening authority had to
7 choose what to fight for, had to make resourcing decisions
8 based on -- after inquiring into facts and applying issues of
9 law, because the trial judiciary and the Military Commission
10 Defense Organization said that an additional courtroom was
11 necessary. The Office of the Chief Prosecution [sic] said an
12 additional courtroom was not necessary.

13 At the same time that the convening authority had to
14 make that judicial decision, it had to decide how to handle
15 issues regarding the Nashiri counsel crisis, which is
16 summarized in the record at AE 133RR (AAA Sup) Attachment B.

17 According to Mr. Castle, around that time, in
18 September 2017, Mr. Rishikof and Mr. Brown requested to meet
19 with Mr. Castle; that's paragraph 10 of AE 055 Attachment B.
20 And in response, Mr. Castle asked around about Mr. Rishikof
21 and Mr. Brown. Unnamed attorneys, according to Mr. Castle,
22 criticized their coordination.

23 At that same month, in September of 2017, the

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1 military commission participants, including this time, MCD0,
2 held the ELC expansion 35 percent design review meeting at
3 SOUTHCOM in Doral, Florida. The chief defense counsel
4 followed up with a memorandum representing his position at
5 AE 555 (AAA MAH Sup) Attachment C, again advocating for an
6 additional courtroom and additional office space.

7 On 21 November 2017, Mr. Rishikof issued a memo
8 regarding the finding of contempt for the chief defense
9 counsel in which he recommended for -- a path forward for
10 solutions on the monitoring allegations. That is found at
11 AE 133RR (AAA Sup) Attachment B.

12 Now at this point, we have a series of problems
13 regarding allegations of counsel monitoring which have led to
14 problems in the al Nashiri case. We have the need for an
15 additional courtroom. We have the need for additional office
16 space for prosecution and defense. And the prosecution has
17 represented that this is a congressional problem.

18 Well, it so happens that communication with Congress
19 is explicitly assigned as a function to the convening
20 authority by Regulation for Trial by Military Commission
21 2-3.a.16. And this function came into sharp play in January
22 of 2018.

23 January 2018, in the two weeks which led up to the --

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1 to the firing of the convening authority, is so critical to an
2 understanding that I'm going to map that out in some detail.

3 If you will excuse me for just a moment.

4 I'd like to show -- I'd like to use on the document
5 camera what has been marked AE 555M and what is AE 555
6 Exhibit 4 for purposes of the CISO.

7 The first thing that happened in this sequence of
8 events that led to the firing is that a request to re-program
9 14 million dollars in DoD funding was submitted to both the
10 House of Representatives and the Senate Committee on
11 Appropriation. Now reprogramming is, as I understand it,
12 taking savings from elsewhere in the DoD budget and applying
13 them somewhere else.

14 In AE 555J Attachment B, which is the reprogramming
15 request, it lays out the -- it lays out if we take money from
16 this savings and that savings and this other savings, we can
17 piece together 14 million dollars. So the first thing that
18 happens in this sequence is on the 19th of January, which is
19 the request to reprogram 14 million dollars ----

20 MJ [COL POHL]: Where did that come from?

21 LDC [MR. CONNELL]: Who did it come from? It came from
22 the Legislative Liaison Office within the Department of
23 Defense.

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1 MJ [COL POHL]: Who did it go to?

2 LDC [MR. CONNELL]: It went to the Committee on
3 Appropriations in the House and the Senate.

4 MJ [COL POHL]: Okay. Go ahead.

5 LDC [MR. CONNELL]: The -- that request for reprogramming
6 describes the expansion of the ELC as "a strategically
7 critical time-sensitive project" and discusses the highly
8 sensitive and secure mission scheduled to begin November 1st
9 of 2018.

10 Now, the reason why I mention that representation
11 about something significant's going to happen on November 1st,
12 2018, is that it comes into play later in the story.

13 Now, at 550 -- so we have that on the 19th. The --
14 at 555L -- and this is the piece of the story that we thought
15 we knew but we were not 100 percent clear on. On 555L in
16 paragraph 1(a), Mr. Rishikof describes what happened. The --
17 he states that "An issue of concern in the declarations
18 involves the OCA" -- meaning Office of Convening Authority --
19 "request to have an aerial image of the Expeditionary Legal
20 Complex at Naval Station Guantanamo Bay, Cuba. The need for
21 the image was in response to a congressional staff request by
22 the U.S. Senate Committee on Appropriations over the proposed
23 \$14,000,000 expansion of the ELC. The committee staff

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1 requested an up-to-date image of the facility post the recent
2 hurricane that had struck the island."

3 Now, we don't know exactly what date that happened,
4 but what we do know is that according to Mr. Castle, during
5 the week of January 22nd, 2018, Mr. Rishikof requested imagery
6 from the -- from SOUTHCOM and then later from the Coast Guard.
7 So we're just going to go with Mr. Castle's description
8 because we can tell that those happened in the same week.

9 So the week of the 22nd of January, we have
10 the Committee on Appropriations request to Mr. Rishikof for
11 up-to-date imagery and Mr. Rishikof's request for imagery.
12 Now, I'm just going to draw a line and blur that a little bit
13 because we don't know if it was actually on the 22nd or a
14 little bit later than that.

15 But what we do know is that on 26 January of 2018,
16 there was a Senate Committee on Appropriations meeting. And
17 we know that. Our support for that is found in the record at
18 AE 555 (AAA MAH Sup) Attachment D.

19 So during -- we also know that during this week, the
20 week of the 22nd, prior to the 26th, according to
21 Mr. Rishikof's declaration, the -- it -- Mr. Rishikof received
22 the imagery to take to that meeting on the 26th. What we know
23 that happened after that is that on the 29th -- so I do want

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1 to put -- focus on the 26th.

2 So on the 26th, Mr. Rishikof, Mr. Brown, and
3 General Baker go to the Senate Committee on Appropriations.
4 Mr. Rishikof has the imagery that he has obtained, and they
5 support the -- they meet with staff there, and they support
6 their request.

7 MJ [COL POHL]: Why was General Baker along?

8 LDC [MR. CONNELL]: Because the -- Senate Committee was
9 really -- the DoD was trying to sell -- I don't have evidence
10 of this. I know the answer. Do you want me to make a proffer
11 of what I understand the answer is?

12 MJ [COL POHL]: No. If it's part of the record, don't
13 make it.

14 LDC [MR. CONNELL]: All right. But what we do know from
15 the record is that -- and I'm going to show you that in just a
16 second, it is 555 (AAA MAH Sup) Attachment F, is that the
17 Senate -- the three ranking Democratic members on the Senate
18 Committee on Appropriations had serious concerns about the
19 military commissions and that they wanted to hear from the
20 defense. So that's what we do -- that's what is in the
21 record. That's what we know, that they wanted to hear from
22 the defense. A rational inference from that is because they
23 wanted to hear from the defense, General Baker was there.

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1 The -- what happens the next business day on the 29th
2 is twofold. First, the Senate Committee on Appropriations
3 approves -- if I can write here, -- approves the reprogramming
4 request. But -- and that's found at the -- in the record at
5 AE 555 (AAA MAH Sup) Attachment E. But we also know that
6 three senators write Secretary Mattis. And that's found --
7 that letter is found in the record at AE 555 (AAA MAH Sup)
8 Attachment F.

9 And when they write Mattis, they say, "Look, you told
10 us" -- and I'm summarizing here, of course. But they say,
11 "Listen, your reprogramming request said that you couldn't go
12 through the ordinary budget process. You had to use this
13 extraordinary process because these trials are scheduled to
14 begin on 1 November 2018. We have real doubt as to whether
15 that's accurate. And we're also very concerned about the
16 military commissions as a whole. And we're specifically
17 concerned about these allegations of monitoring of defense
18 counsel."

19 So it would be fair to say that three senators write
20 Secretary Mattis a very disapproving letter. And that letter
21 is in the record -- you can read it for yourself -- about --
22 on the 19th.

23 Now, what do we know what happens from there? We

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1 know that on 3 February 2018, Secretary Mattis signs the
2 revocation of Rishikof's designation as convening authority.
3 And then we know that on 5 February 2018, Mr. Rishikof and
4 Mr. Brown are actually fired, are told that they -- are fired.
5 They take their CAC cards, and they escort them out of the
6 building.

7 So when you look at this sequence of events, it is
8 easy to see how closely interconnected these sequence of
9 events are. Now the request for up-to-date imagery of the
10 Expeditionary Legal Complex was not some frolic that
11 Mr. Rishikof was on. He was not seeking art for his living
12 room.

13 What it instead was seeking to solve the problems of
14 the military commission, performing his judicial acts as the
15 convening authority. The reason he requested the imagery was
16 as part of this request for reprogramming from the Department
17 of Defense for 14 million dollars. And the -- essentially, he
18 was fired for doing his job. He was fired for trying to fix
19 some of the problems that we have discussed in this very
20 courtroom in the military commissions, performing the
21 resourcing responsibilities that he has.

22 Now, how does that relate to judicial acts? In fact,
23 there's evidence in the record on this now. And you can cut

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1 the feed from the document camera.

2 Would you, Your Honor, like me to submit the
3 written-on version of AE 555M for the record?

4 MJ [COL POHL]: Please.

5 LDC [MR. CONNELL]: Would you like me to make copies first
6 or submit it to the court reporter and ----

7 [The military judge conferred with courtroom personnel.]

8 MJ [COL POHL]: Just give it to the court reporter.
9 They'll --

10 LDC [MR. CONNELL]: May I approach?

11 MJ [COL POHL]: Yeah, sure.

12 LDC [MR. CONNELL]: Mr. Rishikof describes the
13 relationship between these resourcing functions and his
14 judicial acts in paragraph 1(d) of his second declaration,
15 which is 555L. After I have a drink.

16 Mr. Rishikof states, "It should be noticed [sic] that
17 resourcing and staffing in the Commissions context are
18 judicial functions, as evidenced by the frequent litigation
19 over resourcing and staffing issues, including the prior
20 finding of unlawful influence over the location of staff and
21 the abatement over resourcing for separate transport across
22 Guantanamo Bay for judiciary staff, among many other issues."

23 Skipping a sentence. "The Director position is

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1 assigned to the CA because it has proven to be impossible to
2 disentangle director duties from judicial function -- CA
3 judicial functions."

4 And then the final sentence, "In the case of both
5 positions, it has proven to be a 'Sisyphus-like' task to
6 separate the roles because in the end resourcing decisions,
7 which make up the vast majority of what might be argued to be
8 Director and Chief of Staff duties, have judicial impact."

9 Now, we have talked about our -- I talked a little
10 while ago about our interpretation of the phrase "judicial
11 act" and its origin in very substantial Supreme Court law.
12 The government's argument, however is that these
13 responsibilities, trying to solve the problems of the military
14 commission, trying to address the issues that we talk about in
15 this court, trying to address the issues that we write to the
16 convening authority about, that those functions are
17 administrative.

18 I mentioned a moment ago that the administrative
19 judicial distinction is not one which governs judicial acts,
20 and I -- in the definition of judicial acts from "Murray's
21 Lessee." But more important than that, that distinction does
22 not exist in 949a.

23 No case -- the military -- excuse me. The government

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1 has not found any case which has ever turned on a distinction
2 between judicial acts and administrative acts. In fact, the
3 few military cases which have addressed the phrase "judicial
4 acts" have always found that whatever was brought before them
5 was a judicial act.

6 The -- but more important even than that, this
7 distinction between administrative and judicial acts that the
8 government urges here and has urged on the military commission
9 before and has routinely been rejected, in the AE 44 -- excuse
10 me, 343 series, the administrative Change 1, a change which
11 would require the trial judiciary in the Guantanamo Bay cases
12 to move to the -- to Guantanamo is, on its face, only an
13 administrative change. But the military commissions -- and
14 not just this military commission -- uniformly found that it
15 was -- had an unlawful influence on the trial judiciary
16 because it -- that administrative act had judicial
17 consequences.

18 In 485C, you explained the importance of housing,
19 which is not even under the convening authority, to, quote,
20 the very integrity of the trial process. In 485D, you
21 addressed the commingling of trial judiciary, and the
22 government asked you to reconsider your decision because it
23 was only an administrative decision within the power of

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1 JTF-GTMO of how they were going to deploy their transportation
2 assets, but it was unlawful influence nonetheless.

3 555L, the most recent declaration from Mr. Rishikof
4 and Mr. Brown, clearly explains how the functions of the
5 convening authority involving resource and staffing have
6 judicial impact. We in this courtroom have seen it over and
7 over and over. In the dozen or so appellate exhibit series
8 that I have cited today, we have seen again and again that
9 this, as far as this military commission is concerned,
10 represents the core responsibilities of the convening
11 authority, to resource this case and allow it to move forward.

12 This fact's in the record. And at some point, we
13 were inferring, but we're no longer inferring. Now it is all
14 in the record in either representations of an officer of the
15 court or documents or a sworn declaration from Mr. Castle, is
16 more than -- infinitely more than some evidence of unlawful
17 influence and more than enough to justify the government to
18 have to come forward with a response.

19 But I want to briefly mention the other prong of UI,
20 which is the apparent unlawful influence. The media are
21 fairly good indicators of disinterested informed observers.
22 And they uniformly, as we initially -- cited in our --
23 initially 555, concluded that the firing related to ongoing

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1 controversies in the military commission. However, one does
2 not have to rely on the general media. One can go to the
3 specialty media as well.

4 In our brief, we cite Lawfare, which is an
5 organization with a national security specialty written and
6 read by people who are intimately confirmed with the military
7 commission and an organization with an editorial bias in favor
8 of the military commissions. I'm routinely disappointed in
9 their coverage of my arguments because I think that they have
10 a bias in favor of the prosecution, but no one could ever
11 argue that they have a bias in favor of the defense.

12 And Lawfare, in its substantial post, which I linked
13 in the pleadings, called "Something is Rotten with the State
14 of Military Commissions," addresses and discusses the firing
15 of Mr. Rishikof as part -- as the result of Mr. Rishikof's
16 advocacy in the government process for the institutional
17 legitimacy of the military commissions. In addressing
18 security problems ----

19 MJ [COL POHL]: Mr. Connell, that's just one reporter's
20 opinion.

21 LDC [MR. CONNELL]: Well, he's not a reporter, but ----

22 MJ [COL POHL]: Well, blogger, call him what you want to.

23 LDC [MR. CONNELL]: Yes. Absolutely. It is. But where

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1 else does one look for evidence what discharged observers
2 believe?

3 MJ [COL POHL]: Fully apprised of all of the facts.

4 LDC [MR. CONNELL]: Fully apprised of all of the facts.

5 MJ [COL POHL]: And ----

6 LDC [MR. CONNELL]: We're still not fully apprised of all
7 of the facts.

8 MJ [COL POHL]: Well, that's true. But I'm just saying is
9 that "fully apprised of all of the facts" is where most of
10 these things fall.

11 LDC [MR. CONNELL]: Sure. But the reason why ----

12 MJ [COL POHL]: Because he is surmising a connection, and
13 you're saying, well, that creates an appearance, because ----

14 LDC [MR. CONNELL]: Nope, that's not -- that's the exact
15 opposite of what I'm saying. I'm saying there is a clear
16 appearance. And we have some independent, objective evidence
17 of that, which is that someone, an informed person who has
18 more background knowledge than I have -- right? I don't know
19 the rest of the national security world. I don't know the
20 interagency process. I don't know how -- if I wanted
21 overseas -- I mean, if I wanted imagery of the ELC, I wouldn't
22 have the first idea how to get it.

23 You talked to Mr. -- to the counsel for Mr. Mohammad

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1 earlier about it's not our job to go from place to place and
2 make these -- and actually get things done. It is -- it is
3 our job to advocate with the convening authority.

4 The significance of that is -- and I'm not trying to
5 overplay it -- but that uniformly no outside observer has
6 looked at this and said, "Wow, he must have discriminated in
7 the hiring process. He must have faked a travel voucher."
8 Everyone who has looked at it has said, "Gosh, it looks like
9 with all of these issues which we're debating that are
10 directly within the purview of the convening authority, like
11 the additional courtroom, the monitoring of defense counsel,
12 the expansion of the ELC, that he got beat in the interagency
13 process."

14 So the last thing that I want to talk about is the
15 path forward. What do we do now? While there's an enormous
16 temptation to say that the evidence before the military
17 commission is so overwhelming that it can't decide otherwise,
18 I don't think that's the proper approach.

19 The proper approach is to now give the government --
20 to try to disprove the unlawful influence beyond a reasonable
21 doubt. That process will require three things, at a minimum.
22 First, it will require testimony from Mr. Castle.

23 Mr. Castle's declaration forms the bulk of the government's

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1 claim. In one of its earliest pleadings, in fact, it claims
2 that nobody even needs anything else because we have
3 Mr. Castle.

4 MJ [COL POHL]: Mr. Connell, why should you tell me what
5 the government has to present? Isn't it on them?

6 LDC [MR. CONNELL]: Yes, sir. But often you, you know,
7 are at least willing to listen to my opinion.

8 MJ [COL POHL]: No, I am. But I'm just saying, it seems
9 to me is you're saying we have shifted the burden ----

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

11 MJ [COL POHL]: ---- and therefore the government now has
12 to prove beyond a reasonable doubt one of the three ----

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

14 MJ [COL POHL]: ---- things and ----

15 LDC [MR. CONNELL]: Lastly ----

16 MJ [COL POHL]: ---- so who they choose, how they
17 choose -- if they deem to do that, how they choose to do it,
18 seems to me, is up to them.

19 LDC [MR. CONNELL]: Fair enough. But let me make a couple
20 of observations.

21 The first one is that the last UI claim that we
22 brought before you, you explained to Major Wareham, in some
23 detail, your views on how this UI burden-shifting process

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1 works. And Major Wareham was taking the position that, "Well,
2 we have shifted the burden, and we get to sit down now and the
3 government has to go."

4 What you explained was -- which was news to me, never
5 having litigated UCI out in the real world. What you
6 explained was that that legal burden-shifting processes
7 essentially gets applied in your mind -- in your judicial mind
8 at the end of the process where you parse out the different
9 evidence that the parties have presented. So I say that at
10 the risk of -- to me, that's one acceptable way to read these
11 UI cases. And the other way is, "Hey, I raised some evidence.
12 I sit down now."

13 But what I'm addressing to you now is, first, if you
14 were applying that process, why the government has not
15 succeeded; but second, I'm not telling you what they need to
16 do. I'm not providing a roadmap from them. I'm saying that
17 what you would need to know, at a minimum, for the government
18 to carry that burden. And those three things that you would
19 need to know for the government to carry that burden are
20 testimony from Mr. Castle, testimony from Mr. Rishikof, and
21 the documents that they -- that we briefed extensively that
22 they mention in their declarations.

23 Their declarations are rife with references to the

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1 management memorandum, for example. What does that thing say?
2 The sort of e-mails that were sent back and forth bashing
3 Mr. Rishikof. There's document after document that is
4 referred to by the principals in this that would be necessary
5 for the government to carry its burden.

6 And I'm done.

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

8 I'm going to recess in ten minutes to give
9 Mr. Harrington time to discuss his issues. Any other defense
10 counsel want to use that ten minutes up, understanding that if
11 you're not done in ten minutes, you can pick it up first thing
12 on Thursday morning?

13 Mr. Harrington?

14 LDC [MR. HARRINGTON]: Judge, which issue are you
15 referring to?

16 MJ [COL POHL]: I'm sorry. 555.

17 LDC [MR. HARRINGTON]: Judge, we already did it.

18 MJ [COL POHL]: I'm sorry?

19 LDC [MR. HARRINGTON]: We did what we wanted to do at
20 lunchtime.

21 MJ [COL POHL]: Oh, you already -- okay. Well, good.
22 We'll take a 15 -- well, no, we won't take a ten-minute --
23 let's keep going.

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1 Okay. Anything -- any other defense counsel on 555?

2 We're going to go for about another hour.

3 LDC [MR. NEVIN]: And then recess for the day?

4 MJ [COL POHL]: Yes.

5 LDC [MR. NEVIN]: And will we have open hearings tomorrow
6 or ----

7 MJ [COL POHL]: At the end. My plan is tomorrow we'll do
8 the 505(h) hearing, closed, classified session; Thursday, open
9 hearing; and then the 806 classified session on Friday,
10 understanding it's subject to change depending on events.

11 LDC [MR. NEVIN]: Yes, sir.

12 MJ [COL POHL]: When we get done today, Mr. Nevin, I'm
13 going to go over what I think is on the 505(h) calendar for
14 tomorrow.

15 LDC [MR. NEVIN]: Okay.

16 MJ [COL POHL]: Back to 555. Okay.

17 LDC [MR. NEVIN]: Right. Back on 555, and I just wanted
18 to point out that we have 555 -- excuse me, 555H, as in hotel,
19 a motion to compel discovery. And I think that should be part
20 of the discussion about whether the -- about how the
21 government carries its burden.

22 But even if you don't get to the point of arriving at
23 that decision of whether -- where the -- whether the burdens

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1 have been met and so on, it would be appropriate to grant the
2 motion to compel. And really what the motion to compel does
3 is -- I certainly agree with Mr. Connell, that the materials
4 he referred to are very likely to be present, and I think
5 they're clearly discoverable.

6 The request for discovery, however, is phrased more
7 generally, something like what I heard the military commission
8 say about leaving it to the government to decide what is
9 relevant, but -- or what is related. But the request for
10 discovery says: Give us everything that relates to that
11 decision, how it was made, who made it, who gave advice to
12 whom, and what advice they gave.

13 And really, the only reason I stood up was for --
14 just to say three things. What you really see here is
15 conflicting -- is conflicting reports from the Castle
16 declaration and those of Mr. Rishikof and Mr. Brown. And
17 those conflicts indicate that there is something else going on
18 here.

19 And you will see in Mr. Rishikof and Mr. Brown's
20 declaration that they refer to settlement of the 9/11 case and
21 that that was under discussion in an effort to resolve the
22 case for everyone, for everybody's benefit. And I can confirm
23 for you that such discussions were under way. And -- and I

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1 think those probably need to go on that calendar of
2 Mr. Connell's because I think that's an issue in this case as
3 well.

4 And so when you see -- and, you know, you might well
5 look at this and say that for these high-ranking officials,
6 the decision failure to correctly socialize the taking of an
7 aerial photograph leads to your being promptly,
8 unceremoniously fired, stripped of your credentials, and
9 marched out of the building is -- the proposition that that's
10 really what led to that is highly questionable. At the very
11 least, it's highly questionable. These are people who had the
12 authority to do many, many things that was conferred upon
13 them. And the idea that they have lost these positions for a
14 reason of that sort is, on its face, questionable.

15 But what you see, then, in the declarations is direct
16 contradictions, direct suggestions that these two parties are
17 seeing things in different ways. And that's exactly what
18 discovery is for, and that's why the -- that's what the motion
19 to compel discovery gets at.

20 So both with respect to the aerial photo and with
21 respect to the internal memorandum about commission
22 operations, you both see the parties reporting things that
23 really can't -- it's very hard, if not impossible, to

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1 reconcile those two positions. And so somebody's not seeing
2 it right. And the way you -- it seems to me the way you solve
3 that problem is to -- is to get to -- is to see the underlying
4 paper, to see what's in the memoranda and so on.

5 Now, I recognize that it's possible some of this
6 material would be protected by the attorney-client privilege;
7 and there might need to be a privilege log, and there might
8 need to be -- there are procedures, in other words, for
9 dealing with that. But that's like a process problem for
10 dealing with -- for dealing with the overarching idea that we
11 need additional information to get to the bottom of this.

12 Finally, I -- I thought I heard -- I thought that I
13 was seeing you and Mr. Connell talking across each other --
14 and I don't want to speak out of school, but I just -- my
15 understanding of the issue, the example -- for example, of the
16 New Orleans prosecutor was not that the New Orleans prosecutor
17 can or can't be fired, and the convening authority can or
18 can't be fired. The point is that the determinative issue, in
19 one case, the New Orleans prosecutor can't be sued; in the
20 case of the convening authority, he can't be unlawfully
21 influenced.

22 But what turns -- what causes both of those things to
23 be true or not true is whether or not there is a judicial

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1 function being exercised.

2 MJ [COL POHL]: No, I understand that.

3 LDC [MR. NEVIN]: Okay.

4 MJ [COL POHL]: I was kind of conflating two issues, but I
5 understand the UI component doesn't necessarily impact a
6 hiring or firing decision by the U.S. Attorney.

7 LDC [MR. NEVIN]: Yeah. And then just the last thing is
8 that you see in both of the Rishikof/Brown declarations a
9 footnote that refers to the possibility of a conflict of
10 interest within the organization. And they took special care
11 to submit their declaration in a particular way because they
12 wanted to make sure -- I take it because they wanted to make
13 sure that it got through to you and that it arrived in -- you
14 know, completely intact and so on.

15 I think that's another -- I think that -- the
16 existence of that in both of those declarations is an
17 important fact; and I think it -- it tells you more that
18 the -- the convening authority of the military commissions
19 suspected that there was at least the possibility of a
20 conflict of interest within the organization that required
21 that to be said out loud.

22 MJ [COL POHL]: Well, there clearly is a conflict of
23 interest in the sense that -- or at least a conflict --

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1 whether it's a conflict of interest -- between the --
2 Mr. Rishikof and the Office of the General Counsel because the
3 Office of the General Counsel just basically got him fired.
4 So absent more information, that's what I think they're
5 referring to. I'm just reading the footnote in the second
6 declaration.

7 And the prosecutor who there is defending the
8 termination action similarly -- I think that you'd have a
9 similar conflict. But you're saying this may mean some other
10 conflict of interest?

11 LDC [MR. NEVIN]: Well, I mean, you -- if I'm -- if I
12 remember correctly, you had directed that the prosecution was
13 to confer -- convey to Mr. Rishikof and Mr. Brown that you
14 were requesting, but not demanding, that they provide a
15 declaration. And they submit it through the Office of the --
16 sorry, through the Office of the Convening Authority as
17 opposed to submitting it through the prosecution.

18 Now, if there is behind the scenes of that -- I mean,
19 I -- I will acknowledge that there could be an innocent -- or
20 let's say a reason that doesn't relate to the question of
21 unlawful influence that would account for that footnote, but
22 there are some other implications as well that would cut the
23 other direction. And I'm, as I said before, standing up to

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1 speak on the motion to compel discovery, really.

2 MJ [COL POHL]: I got you.

3 LDC [MR. NEVIN]: So I bring that to your attention.

4 Thank you.

5 MJ [COL POHL]: You're welcome.

6 Any other defense counsel wish to be heard on this?

7 Ms. Bormann.

8 LDC [MS. BORMANN]: Judge, we adopt the arguments of

9 Mr. Connell and Mr. Nevin.

10 MJ [COL POHL]: Okay. Mr. Harrington?

11 LDC [MR. HARRINGTON]: Judge, I know that in your decision
12 on this, it's going to be based on legal principles, but these
13 commissions have been criticized rightly or wrongly by many
14 people from many different political sides and many
15 organizations, news media, everybody else. And none of us
16 are -- have been immune from those criticisms.

17 And that's not something that should determine how
18 you decide in this, but there's a real smell in the air here
19 about Mr. Rishikof and Mr. Cohen's being terminated. And they
20 gave in their second response a pretty simple, it seems to me,
21 explanation for the bases that were used to dismiss them.

22 I agree with Mr. Connell, that the burden here, I
23 think, has shifted. And unless the government can be

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1 overwhelming in their response to you now about why that
2 burden hasn't shifted, that you have to make them come
3 forward -- and I don't think that this case can be resolved
4 without having a hearing in the original response of the --
5 Mr. Rishikof and Mr. Cohen. There's obviously many, many
6 documents that they ----

7 MJ [COL POHL]: You say "Mr. Cohen." You mean Mr. Brown,
8 right?

9 LDC [MR. HARRINGTON]: Mr. Brown, I'm sorry, Judge.

10 MJ [COL POHL]: No problem.

11 LDC [MR. HARRINGTON]: They made reference to many, many
12 documents and diaries, other types of information that kept
13 track of things that were going on, and which will include, I
14 suspect, the efforts that they made to try and settle this
15 case, which is something that may well be the underlying cause
16 of what happened to them here. So I think that clearly the
17 burden has been shifted here, and this case requires a
18 hearing.

19 MJ [COL POHL]: Mr. Ruiz.

20 LDC [MR. RUIZ]: No, thank you.

21 MJ [COL POHL]: Trial Counsel? Mr. Swann.

22 TC [MR. SWANN]: Your Honor, this motion is another motion
23 of UI that has come before this commission. I think we're

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1 probably on 10 or 11 at this point in time. I would tell you
2 that this motion has no legs.

3 Now, once again, I refer this commission back to
4 footnote 6 in its ruling in AE 031BBB dated 5 April 2016
5 wherein the commission recites to at least nine other motions
6 alleging of unlawful influence that had arisen at that time.

7 The commission will recall that with respect to that
8 motion, we spent more than 15 hours on the record with the
9 convening authority who referred the charges. We listened to
10 how the defense tried and failed to undermine a decision based
11 on reason. They implied that the convening authority was
12 doing the bidding of others, listening to those outside the
13 process. And we addressed the issue of pretrial publicity,
14 all of those matters well addressed in your ruling.

15 Add then to that rulings in AE 254JJJ -- JJJJ, excuse
16 me, dated 28 April 2016; AE 343C and 344 dated
17 25 February 2015 -- AE 343 of course, in that case, involving
18 the commission's determination that, as you labeled, an errant
19 convening authority's attempt to move judges to Guantanamo,
20 344 involving housing issues -- and the AE 363 series
21 involving General Gross, and it becomes evident that I need
22 not and will not have to repeat the burden-shifting or even
23 what the law in this arena is.

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1 So for at least the tenth time, counsel once again
2 seek dismissal on all charges with prejudice, this time based
3 on an unfounded belief that something sinister must be afoot
4 because a convening authority and his legal advisor are no
5 longer employed by the Department of Defense, their
6 designations having been rescinded.

7 Now, the defense seeks a reward, a windfall that
8 certainly they're not entitled to, for if murdering thousands
9 can be stopped because of a personnel or labor issue, there is
10 no justice.

11 Now, once again, we're running down allegations of
12 unlawful influence, this time with the termination of two men
13 whose terminations have no effect on this case. None. The
14 reasons for their determinations are innocuous, maybe not for
15 them, but they were let go for good reason and justified
16 reason.

17 Put simply, when the Secretary of Defense and his
18 senior legal advisor tell you they just didn't understand that
19 coordination, judgment, and the proper temperament are
20 essential to key mission success, very little more needs to be
21 determined.

22 So the question is: Does rescinding one's
23 appointment as a convening authority, standing alone, enough

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1 to shift the burden to the prosecution to prove there is no
2 actual influence or apparent influence beyond a reasonable
3 doubt, or if it had any effect on the fairness of the
4 proceedings. Now, the defense here has offered nothing but
5 supposition, speculation, hypothesis, innuendo. They say as
6 much in their pleading.

7 So what does the statute say? Well, Mr. Connell
8 pointed out that the statute that addresses this is 10 U.S.C.
9 Section 949b(a)(2) Part B, "The action of any convening,
10 approving, or reviewing authority with respect to their
11 judicial acts."

12 Now, based on prior rulings of the commission, I'm
13 not going to question that Article 37 -- the statute is much
14 broader than Article 37. I think that's well settled. I also
15 think that the analytical framework that we used within
16 manual -- within the military justice system is the framework
17 to use when you analyze this particular issue in this case.

18 Here I would say that the defense has provided no
19 facts, some evidence of actual manipulation -- excuse me.
20 Here, once again, the defense has failed to provide facts,
21 some evidence of actual manipulation, which, if true, would
22 constitute unlawful influence, or that the alleged unlawful
23 influence has any logical connection to the commission in

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1 terms of its potential unfairness to these particular
2 proceedings.

3 When your brief sets out that you have a hypothesis,
4 or you throw out the following wild assertion, quote,
5 Superiors within the Department apparently disapproved of some
6 of the convening authority's actions, likely involving issues
7 before the commission and retaliated against them, unquote,
8 you are saying that you have nothing but a claim in the air.

9 Without any evidence, they do a disservice. They do
10 a disservice to the Secretary and to the general counsel who
11 had to make a tough decision in this particular instance.
12 They do a disservice to those who provided declarations from
13 the Department. And they cast aspersions, something I think
14 that is not uncommon in this case.

15 Now, no one likes to tell you, if you are employed,
16 that you're just not the right fit. But for the defense to
17 throw out these wild ideas about why they were let go under
18 the guise of unlawful influence and not have a single,
19 plausible argument of why it has an effect on the fairness of
20 these proceedings, this search for what does not exist should
21 be over. The declarations you have should be enough.

22 Now, Congress gave the authority to the President to
23 establish military commissions, and the Secretary of Defense

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1 or his designee -- his or her designee the authority to
2 convene commissions. The Office of the Convening Authority
3 for military commissions is established under the authority,
4 direction, and control of the Secretary.

5 Mr. Rishikof was designated by the Secretary, and the
6 power to designate includes the power to rescind that
7 particular appointment. The legal advisor is likewise listed
8 in the Regulation for Trial. It's an official appointed by
9 the authority of the Secretary of Defense who fulfills the
10 responsibilities of the position as delineated in the
11 Manual for Military Commissions. The legal advisor's direct
12 supervisor is within the Office of General Counsel. Here his
13 appointment was rescinded by that proper person, and others
14 were designated to fill it.

15 You asked about Mr. Rishikof's position. And, quite
16 frankly, Mr. Brown really plays very little into this. It's
17 Mr. Rishikof that we ought to be talking about. Mr. Rishikof
18 was hired by the Department in April of 2017. Mr. Brown was
19 Mr. Rishikof's designated or requested legal advisor. Both
20 men were hired as highly qualified experts, and as such, both
21 were terminable at will. They had no term of employment -- of
22 appointment. They were terminable at will.

23 They were changed out in February of 2018 because, as

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1 the Secretary and Mr. Castle has indicated, they did not meet
2 the expectations, and I quote, of management, corporate
3 decision-making, professional judgment, and temperament. They
4 were let go to effectuate a more cohesive effort by the
5 Department for the administration of military justice. No
6 judicial or quasi-judicial acts were considered.

7 We seem to be turning on what are judicial acts.
8 Well, judicial acts are found in 10 U.S.C. 949b(9)(2)(B)
9 [sic]. Judicial acts, like any other convening authority that
10 I have been associated with for a lot of years, is referring
11 charges in R.C.M. 407; granting immunity in R.C.M. 704;
12 pretrial agreements in R.C.M. 705; detailing of members in
13 R.M.C. 503; ordering a deposition in R.M.C. 702; convening a
14 commission, R.C.M. 504; and actions on findings and sentence
15 at R.M.C. 1107.

16 We seem to be confused at least on one side of the
17 room when counsel say that judicial acts equate to actions
18 that have some sort of judicial impact. That's not the way
19 it's read. That's not the way it should be interpreted or
20 understood.

21 In both the declarations by Mr. Castle and by the
22 Secretary, they relate an incident as described to them, or by
23 me now, as the last straw, where Mr. Rishikof, needing an

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1 aerial photograph of the Expeditionary Legal Complex, tried to
2 get an airplane to fly over the ELC to snap his pictures. Not
3 satisfied with the answer that he had received, Mr. Rishikof
4 then sought out and received a meeting with the combatant
5 commander who told him he was not going to approve that
6 request.

7 Now, that should have been the end of it, but
8 Mr. Rishikof or his team did an end-around a four-star
9 officer. He went around that leader to the Coast Guard,
10 without coordinating all the necessary -- with all of the
11 necessary parties, to include the appropriate security
12 personnel. He got a helicopter rather than a plane.

13 Now, the desirability of any appropriate initiative
14 for any Defense Department officer does not erase the
15 attendant requirements that officers appropriately coordinate
16 their actions. And this applies most importantly to our
17 senior officers. Going around the chain of command is not
18 what we expect of those that we place in charge. Unity of
19 effort on all aspects of this case is not just expected, it is
20 required. And if the leadership doesn't understand that, then
21 they should not be in charge.

22 Now, the accused has the burden of raising the issue
23 of unlawful influence. And they do this by showing facts,

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1 which, if true, constitute unlawful influence, and that the
2 unlawful influence has a logical connection to the commission
3 in terms of its potential unfairness to these proceedings.

4 Now, while that burden is low, it is not without
5 definition, for it must be more than mere allegation or
6 speculation before the issue is even raised. Their brief
7 states that, quote, the adverse employment actions against
8 Mr. Rishikof and Mr. Brown bear the hallmarks for retaliation,
9 unquote.

10 But what was anybody retaliated against for? They
11 offer up that because these two gentlemen proposed to build a
12 separate meeting space or perhaps, better yet, the fact that
13 Mr. Baluchi does not know which convening authority's decision
14 the Secretary of Defense retaliated against only demonstrates
15 the importance of the burden of proof on this motion. Their
16 allegations are based on the word "hypothesis," their word,
17 and in their supplement, the word "inferences," their word.

18 There's got to be more than that. Inference and
19 hypothesis do not equate to evidence, but it does equate to
20 speculation, something the case law makes clear is not enough
21 to put the issue of unlawful influence front and center.

22 They cite to Lewis. I heard that today. Lewis is a
23 case involving the removal of a judge and how that can

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1 constitute unlawful influence. But the facts here are not
2 even remotely close to what happened in Lewis. I mean, Lewis
3 involved a coordinated effort by the trial counsel and the
4 Staff Judge Advocate to have a judge removed from a case where
5 the judge may have known the civilian defense counsel.

6 While it's not entirely on all points, I suspect I
7 should say this: Can a superior convening authority take away
8 or even limit an inferior convening authority's powers to do
9 things? The answer is yes. Brigade commanders take away the
10 powers of a subordinate. I want you to send all drug
11 offenses, I want you to send all DWI offenses to my level.

12 MJ [COL POHL]: But in that scenario, the superior
13 convening authority is pulling activities to his level?

14 TC [MR. SWANN]: Yes.

15 MJ [COL POHL]: Okay. But could the superior convening
16 authority tell the interior convening authority how to
17 exercise his discretion?

18 TC [MR. SWANN]: Absolutely not. And that's not what
19 happened here.

20 MJ [COL POHL]: I didn't say that. I'm just saying ----

21 TC [MR. SWANN]: He cannot tell him how to exercise his
22 discretion.

23 MJ [COL POHL]: Or if he exercises his discretion in a

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1 certain manner, that he were to take a negative personnel
2 action against him, could he do that?

3 TC [MR. SWANN]: No. That's the Boyce case. That's the
4 Lieutenant General Franklin who ----

5 MJ [COL POHL]: I know. I --

6 TC [MR. SWANN]: That is the not the situation you have
7 here, and I'm not trying to -- not trying to indicate that
8 it's even remotely close to any of them.

9 MJ [COL POHL]: Let me ask you another question,
10 Mr. Swann, because this sometimes is unclear to counsel who
11 appear before me. And I'm not saying you are unclear or the
12 other side is unclear.

13 The Biagase shifting burden framework sometimes leads
14 counsel to believe that -- the prosecutor, for example, that
15 the burden hasn't been shifted and, therefore, choose to
16 present no evidence to rebut a shifted burden, with the
17 apparent expectation that they're going to get piecemeal
18 rulings from the judge; that ruling number one will come in
19 that the burden has shifted, and then, government, now that
20 you know that you lost your first argument on UCI -- or I know
21 this is UI -- now you can come back and try to rebut it.

22 Is that your perception of what we think we're doing
23 here?

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1 TC [MR. SWANN]: That's not my perception.

2 MJ [COL POHL]: Okay.

3 TC [MR. SWANN]: My perception was to address this entire
4 issue in its entirety.

5 MJ [COL POHL]: Okay. So -- and what I'm hearing you tell
6 me is that you do not believe there's sufficient evidence at
7 this time that raises any burden shift to the government, and
8 therefore, the government does not intend to present any
9 evidence to rebut a burden shift if one were to be so found.

10 TC [MR. SWANN]: You've already got the evidence. You've
11 got the declarations from the Secretary and from Mr. Castle.
12 That is enough to indicate or clearly to show there's been no
13 actual influence in this case.

14 You know, when individuals of that level put pen to
15 paper and tell you that there's no impropriety going on here,
16 then that ought to be the end of it. I mean, the Secretary
17 has control over, what, two million people. And although he
18 never met Mr. Rishikof or Mr. Brown, he told you that
19 much ----

20 MJ [COL POHL]: I'm not impugning anybody.

21 TC [MR. SWANN]: Sir, I never want to say that you did.

22 MJ [COL POHL]: How many -- how many cases where we have
23 unlawful influence or unlawful command influence has the

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1 influencer said, "Oh, yeah, I did this for the wrong reason"?
2 Look at -- and I forget the cite. Look at the one about the
3 Change 1 thing. Did Mr. Work or General Ary say, "Yeah, we're
4 doing this to influence the judges to make sure that they move
5 the cases along faster"?

6 TC [MR. SWANN]: No, they had that tertiary ----

7 MJ [COL POHL]: No.

8 TC [MR. SWANN]: ---- that was the tertiary effect. If
9 they had asked me if I had been their legal advisor ----

10 MJ [COL POHL]: That was the direct effect of what they
11 wanted to do, and I so found.

12 But I'm saying they're not the ones that are going to
13 say that, so the idea that anybody involved -- and again, I'm
14 not making a ruling here that the lack of admitting that I'm
15 doing it for the wrong purpose is somehow evidence that I'm
16 not doing a wrong purpose just strikes to me as a -- not
17 really a realistic approach because nobody says that -- nobody
18 when you found in Lewis, Salyer, Biagase, you find me a case
19 where the person said, "Yeah, you're right. I'm doing this
20 for the wrong reason." They all have a rationale why it's for
21 the right reason, right.

22 TC [MR. SWANN]: But it shouldn't have to in this instance
23 turn into a personnel action. It shouldn't have to be that

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1 we're going to go find out whether the Secretary didn't have
2 enough information about what he was doing or what he wasn't
3 doing. You've got it presented to you in the declarations
4 that it was coordination, it was temperament.

5 Let me get to the coordination piece because, quite
6 frankly, this is not the first time that we have seen a lack
7 of coordination in this particular case. You brought up that
8 very issue. If people had just sought out input from the
9 judiciary: Would you be interested in moving to
10 Guantanamo Bay? Okay. Or gone over here to the TJAGs and
11 said, "Hey, listen, you would think about assigning a judge
12 over there to the -- to there?"

13 We probably -- with that proper kind of coordination,
14 we never would have come to the conclusion or even the thought
15 process of trying to move the judges down to Guantanamo Bay.
16 But no, it was, as you said, an errant convening authority who
17 didn't go through the coordination process, who just didn't
18 ask all of the questions. And look what he was left with.
19 Nothing. Okay.

20 What that did do at that point in time is it required
21 the DEPSECDEF to come back and say, "That was bad." And, in
22 fact, going forward in this case and in other cases, full
23 coordination is expected on all of these actions. And you

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1 don't bypass the Office of the General Counsel with some of
2 your bright ideas because those bright ideas may not be as
3 bright as you think they are.

4 MJ [COL POHL]: Are you testifying that there's been some
5 change in policy of how coordination ----

6 TC [MR. SWANN]: There is a change in policy, Your Honor.
7 I think it's in the 2015-'16 memo that require all of those
8 things to be able to do it. If you will take a look at
9 Change 1 to the regulation ----

10 MJ [COL POHL]: Talking about the 26 February rescission
11 memo?

12 TC [MR. SWANN]: Yeah, and it also required a coordination
13 issue in there going forward.

14 MJ [COL POHL]: Got it. Go ahead.

15 TC [MR. SWANN]: Let me stay on the coordination piece
16 first because that's why -- that's why they were terminated.

17 Now, I know that Mr. Nevin and others may be new to
18 the concept of a chain of command, but none of us who have
19 worn the uniform or wear it today misunderstand what it means.
20 The former convening authority and his legal advisor had to
21 rely on others to get their jobs done. And in those
22 positions, you can't just ignore others, particularly in this
23 instance when a four-star officer tells you no on a logistics

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1 issue. And then worse yet, to go around that four-star and
2 end up doing an end-around on him, then -- there's a
3 consequence to both your reputation and possibly your job
4 security.

5 In June of 2017, this commission published an order
6 abating and cancelling the commission proceedings for the week
7 of 17 to 21 July. Why? The proceedings were cancelled
8 because of a unilateral change, meaning no coordination. They
9 took away a means, a separate boat, that had provided you and
10 your staff for years with a way to prevent -- to prevent the
11 unacceptable commingling between the judiciary participants
12 and victims.

13 The commission's order in AE 485I dated 2 August '17
14 pointed out that prior coordination of logistical issues that
15 impact multiple stakeholders is a preferable way to proceed;
16 and that unilateral change, without notice, creates only
17 needless delay in litigation. The unity of effort -- the
18 unity of effort that Mr. Castle and the Secretary were talking
19 about is required, and going it alone is simply a path to
20 nowhere.

21 Now, if you would allow me to go back to what I
22 wanted to say about actual and implied -- or actual and
23 apparent influence.

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1 MJ [COL POHL]: Go ahead.

2 TC [MR. SWANN]: The courts have wrestled with what some
3 evidence is, where it has been found. It is something other
4 than a coincidence that directly involved the accused on
5 trial. It must be something more than an appearance of evil,
6 and proof of unlawful influence in the air will never do.
7 Never has.

8 The facts must be tied to having an effect on this
9 particular case. All you have here are these two men were
10 fired. The defense has offered nothing tying the events to
11 having any effort on this case or having any effect on these
12 accused or any of their rights.

13 Now, while Mr. Connell talks about those on the
14 outside, while others may engage in rank speculation, it's not
15 any evidence of wrongdoing, particularly when the Secretary
16 and Mr. Castle have laid pen to paper. Personnel moves made
17 within the authority of those who make them do not constitute
18 actual or apparent unlawful influence. And we believe that
19 the declarations make clear that their terminations for
20 failing to coordinate, for failing to appreciate that leaders
21 in their positions should have understood that coordination is
22 the key. That's enough.

23 As with other cases that we have seen in this

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1 commission where they raise unlawful influence, they say if we
2 can't prove actual influence, well, we've got evidence of
3 apparent influence. Because in this instance, as Mr. Connell
4 pointed out, a few newspaper articles question the
5 circumstances and firings, and have written that the firings
6 might be connected to judicial acts such as, again, this
7 concept of the new meeting space, the handling of Brigadier
8 General Baker's contemptuous conduct, the failure to do
9 something about the pace of trial. That's not enough.

10 How does Mr. Rishikof or Mr. Brown's removal have any
11 effect on the fairness of the proceedings? Building a new
12 meeting place is a prerogative of the JTF and their
13 headquarters, and yet we know it's not needed in this case for
14 there's never been any evidence of eavesdropping on
15 attorney-client meetings.

16 And if I follow correctly the judge in the Nashiri
17 case, he has said, at least eight times, it didn't happen in
18 that case. But that has fallen on deaf ears. He went on to
19 say that their actions were nothing but a defense community
20 strategy to avoid confronting a cooperating witness.

21 Papers have reported what they want to hear or write,
22 something sinister is afoot, rather than what a judge in that
23 case has heard the evidence and found. This group and Nashiri

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1 don't even meet in the same locations together. One would
2 have to stretch reason to conclude that the proposed building
3 is even a judicial act. It sure sounds like a logistical
4 issue.

5 And if I recall in the defense pleading the
6 discussion between Mr. Rishikof and General Baker, he said he
7 would approve it, but he also said, "Well, I really don't have
8 the authority to do it. I need to talk to the JTF commander
9 about doing all of those -- those kind of things."

10 As to the contempt ruling in General Baker's case,
11 why is that unlawful influence? So what has it even got to do
12 with this case? Judge Spath made a decision. There's always
13 a loser. Sometimes neither/either side is happy. But they
14 also expect their decisions to be followed. We know how the
15 convening authority thought about that and issued a finding
16 upholding the judge.

17 The pace of trial. There's only one person that
18 decides that. It is not the convening authority or his legal
19 advisor; it is you. And you have made that abundantly clear
20 to us. While they can give -- meaning the convening
21 authority -- can give you the tools or not, the judge sets the
22 trial date. And despite our many pleas, you have seen fit to
23 wait until you believe it is time.

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1 So I guess I would say now with respect to apparent
2 influence, the objective test for determining if apparent
3 influence exists is to focus on the perception of fairness in
4 the military commission system as viewed through the eyes of a
5 reasonable member of the public.

6 All said, the central question there is whether an
7 objective, disinterested observer, fully informed of all of
8 the facts and circumstances, would harbor a significant doubt
9 about the unfairness of the proceedings. There is no
10 intolerable strain on the public's perception. All you've got
11 to do is read the declarations to provide -- and the
12 declarations are on the public website.

13 There's always going to be a few, those unwilling to
14 set aside their ill-informed notions. The declarations
15 obtained by the Secretary lay waste to any notion that what
16 occurred here was sinister; instead, it was a leadership
17 acting to fill a void where they found that leaders were
18 lacking.

19 Granted, the case law requires us to avoid even the
20 appearance of unlawful influence, but taking away the job
21 can't possibly be the starting point there. It can't be that
22 we need to hear from any other decision-makers all the details
23 about why they acted.

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1 Now, I can't do much with the examples that
2 Mr. Connell cited, but the crowd they have cited to are really
3 not the objective and disinterested observers who are
4 informed, knowing all of the facts and willing to be open
5 minded about these things. Most of their opinions are formed
6 solely by what the defense tells them.

7 A couple of final points, Your Honor. The defense
8 says that Mr. Rishikof or Mr. Brown weren't told that their
9 performance was not measuring up. If the complaint is no one
10 ever told them they were off-track, then that's an employment
11 issue best left for another process. It is not the unlawful
12 influence issue that you have before you.

13 What is clear from the declarations from leadership,
14 that they were careful to separate judicial responsibilities
15 from those of the daily running of the commissions. And from
16 the declaration of the former convening authority and legal
17 advisor, we learned that no one ever tried to get them to act
18 in a certain way, and no one ever meddled in any judicial act
19 that arguably might have impacted the fairness of the
20 proceedings. Both say so, and so do those that acted. There
21 is nothing that suggests their independence was ever
22 compromised.

23 Subject to your questions, sir.

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1 MJ [COL POHL]: I have none. Thank you.

2 Mr. Connell.

3 CP [BG MARTINS]: Your Honor, if I could just note Patrick
4 O'Malley of the Federal Bureau of Investigation has joined us
5 in the room.

6 MJ [COL POHL]: Thank you.

7 Mr. Connell.

8 LDC [MR. CONNELL]: Your Honor, one good argument that the
9 government made was that they can't do much with the examples
10 that we gave, which is true.

11 The government in its argument relies on Mr. Castle's
12 declaration in which Mr. Castle states that he fired --
13 coordinated the firing of the convening authority for
14 submitting a memorandum suggesting certain changes in the
15 prosecutorial and security functions. The government doesn't
16 address that at all.

17 I spent substantial time in the argument walking you
18 through the actual facts, not the rhetoric about unity of
19 effort and coordination but the actual facts of what happened
20 in the request for imagery. And the government doesn't do
21 much with that either.

22 The actual facts are that Mr. Rishikof acted entirely
23 within his judicial duties as convening authority in

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1 addressing the many resourcing and staffing issues that haunt
2 this military commission.

3 The government asked what logical connection does the
4 firing of the -- Mr. Rishikof and Mr. Brown have to the
5 military commission. Numerous. One of those, an example
6 offered by the government, is about the building of meeting
7 spaces. It was a remarkable argument given that even today
8 there has been an argument about the Echo II meeting spaces
9 within this military commission.

10 The government told us earlier -- the same attorney
11 who just argued this told us earlier that despite having
12 claimed to have personally supervised or witnessed the 2017
13 interrogations of Mr. al Baluchi and others, that he doesn't
14 know how many huts there are at Echo II, that he doesn't know
15 what the capacity of Echo II is. And we heard probably half
16 an hour of argument earlier from both the defense and the
17 prosecution upon what effect the limits of meeting space at
18 Echo II should have upon the decision -- the policy decision
19 to deny meetings between Mr. al Baluchi and members of his
20 defense team who are not attorneys or paralegals.

21 I raise that because the idea that the resourcing
22 issues do not impact the military commission is not borne out
23 by the history of this military commission.

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1 MJ [COL POHL]: There's a thread in Mr. Castle's
2 declaration, which is also a similar thread that's in the
3 Rishikof declarations, about lack of coordination.

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

5 MJ [COL POHL]: And it kind of hits both of the issues.

6 LDC [MR. CONNELL]: Yes, sir. It is the thread. I agree.

7 MJ [COL POHL]: Okay. If they fired him -- and let's just
8 focus on Rishikof, because I think Brown's collateral damage.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: I don't mean to minimize Mr. Brown.

11 LDC [MR. CONNELL]: I understand. I understand what you
12 are saying.

13 MJ [COL POHL]: He happened to be standing next to
14 Rishikof when the action was taken.

15 LDC [MR. CONNELL]: Right.

16 MJ [COL POHL]: But if they feel that -- if Secretary
17 Mattis concluded, based on advice from Mr. Castle, that
18 Mr. Rishikof just didn't get it on how to properly coordinate
19 actions prior to doing things, would that be a legitimate
20 basis to terminate him?

21 LDC [MR. CONNELL]: With respect to his judicial acts, no.
22 That's the point that I made to you earlier about when the
23 function of a judicial or quasi-judicial officer involves

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1 taking certain actions; the fact that they do those poorly or
2 wrongly in the -- in some views does not mean that that's the
3 subject for liability.

4 MJ [COL POHL]: So the fact that -- well, let's just take
5 Mr. Brown's declaration, that he says Mr. Rishikof went to the
6 SOUTHCOM commander to ask for this imagery.

7 LDC [MR. CONNELL]: Castle, you mean.

8 MJ [COL POHL]: I'm sorry. Mr. Castle.

9 Mr. Castle says that Mr. Rishikof went to the
10 SOUTHCOM commander and said, "I want this imagery taken."

11 Okay. SOUTHCOM's part of DoD ----

12 LDC [MR. CONNELL]: Sure.

13 MJ [COL POHL]: ---- and the SOUTHCOM said no.

14 LDC [MR. CONNELL]: We don't know why they said no.
15 Probably lack of assets, but we don't know why.

16 MJ [COL POHL]: Yeah. Yeah. And according to
17 Mr. Rishikof, it's because Congress wants it. And so for
18 whatever reason, SOUTHCOM says no.

19 LDC [MR. CONNELL]: Right.

20 MJ [COL POHL]: Then according to Mr. Castle, he goes to
21 the Coast Guard -- who does not belong to the Department of
22 Defense, belongs to the Department of Homeland Security -- and
23 basically tasks them to get the imagery done with no

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1 coordination of the DoD.

2 LDC [MR. CONNELL]: I would say request rather than task,
3 which is what the actual ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: Because Mr. -- the convening authority
6 can't task the Coast Guard to do anything. He can make the
7 request, which is ----

8 MJ [COL POHL]: No, I gotcha.

9 LDC [MR. CONNELL]: ---- which is a thread in here, too,
10 that everything that Mr. Rishikof is accused of having done is
11 making requests and either receiving affirmative or negative
12 answers, negative answer from SOUTHCOM, from ----

13 MJ [COL POHL]: But you don't think it's possible -- and
14 again, don't take anything from my questions -- that the
15 Department of Defense may have been concerned that
16 Mr. Rishikof is going outside the Department of Defense, who
17 he works for, who had already told him no, to get an answer
18 from somebody else in a different department altogether
19 without coordinating ahead of time?

20 LDC [MR. CONNELL]: The -- a few things about -- now we're
21 getting down to the facts, right? Your first question which I
22 wanted to answer was -- is -- was a theoretical one: Can one
23 be fired for the way one does one's job, exercises one's

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1 judicial acts, as opposed to the results or something like
2 that?

3 MJ [COL POHL]: Uh-huh.

4 LDC [MR. CONNELL]: And so I want to be sure to answer
5 that question. But if we want to talk about the facts, then
6 the portrayal that the government just gave is not actually
7 what is contained within the -- within the declarations.

8 The declarations -- so we don't -- we have zero idea.
9 I mean, the government says they're not putting on any
10 evidence. They think that every gap is filled. But we have
11 no idea why DoD said no. They could have said, "You need it
12 tomorrow. We're too busy. We can't get to it until next
13 week." They could have said, on the other hand, "No one can
14 ever take a picture of the ELC." We just have zero idea what
15 that is.

16 Now, could we speculate that Mr. Castle had in his
17 mind interagency rivalry between Homeland Security and the
18 DoD? Sure. We can speculate about all kinds of things.
19 Mr. -- excuse me, the counsel for the government, you know,
20 picks up on the word "inferences" at some point because we had
21 so few facts early in this briefing that we had to argue -- we
22 had to say, these are the facts.

23 And then so, for example, we can look at the timing

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1 and see all of these things that happened in January in 2018
2 and can infer from those -- like an ordinary court process,
3 that we can infer from those what happened. Now, it turns out
4 later, direct evidence was presented by Mr. Rishikof, but we
5 didn't know that. We were just looking at what we thought was
6 going to happen.

7 But the lack of coordination could be anything from
8 the pilot forgot to request overflight rights, right, which
9 doesn't have anything to do with Mr. Rishikof at all. The
10 description of that that Mr. Castle gives is "should have
11 ensured that someone undertook the proper coordination." The
12 description of that by Mr. Rishikof is assumed that -- let me
13 just make sure I get it here -- "assumed that required and
14 appropriate procedures would be followed."

15 We have zero idea -- despite the government's
16 characterization, we have zero idea of what level of lack of
17 coordination took place. The, you know ----

18 MJ [COL POHL]: Let me ask -- let me ask ----

19 LDC [MR. CONNELL]: ---- if I was going to fly my plane
20 over Guantanamo, I would call -- you would call GTMO, but it
21 wouldn't be the convening authority talking to the commanding
22 officer of Naval Station Guantanamo; it would be people,
23 staff. The process would be the staff communicating to each

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1 other.

2 MJ [COL POHL]: Let me ask you -- this is leading to
3 another observation.

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

5 MJ [COL POHL]: Okay. Is that on the 29 April
6 declaration, the -- Mr. Rishikof and Mr. Brown are responding
7 to the declaration from Mr. Castle and Secretary Mattis.

8 LDC [MR. CONNELL]: Right, sir.

9 MJ [COL POHL]: All right. Does it cause you pause at all
10 that in paragraph 1(a), that they never mentioned the SOUTHCOM
11 denial of the request. That they never mentioned -- I mean,
12 they're saying they coordinated appropriately, and they have
13 Mr. Castle's declaration, but they don't say anything about
14 SOUTHCOM's role.

15 LDC [MR. CONNELL]: Sir, I'm reading the sentence, "In a
16 routine call to the Combatant Command about logistics issues,
17 we discovered they had no recent image. The" ----

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: So they do mention. I mean, they
20 both -- neither of them call it SOUTHCOM. Both of them call
21 it a combatant command, but we all know they're talking about
22 SOUTHCOM.

23 MJ [COL POHL]: And it says, "In a routine call to the

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1 Combatant Command about logistics issues, we discovered they
2 had no recent image. The CA," Mr. Rishikof, "requested the
3 Coast Guard..."

4 Where's the -- there's no addressing one of
5 Mr. Castle's major points that they were told no by SOUTHCOM.

6 LDC [MR. CONNELL]: Well, I think because that's not
7 controverted that they were told no by SOUTHCOM. I mean, this
8 is a ----

9 MJ [COL POHL]: It didn't stop them from explaining
10 everything else.

11 LDC [MR. CONNELL]: No, they don't. There's tons of
12 things. They don't explain why did people in Mr. Castle's
13 office say mean things about them. They don't talk about --
14 they say ----

15 MJ [COL POHL]: This is a specific. They're addressing a
16 specific point here.

17 LDC [MR. CONNELL]: And they point ----

18 MJ [COL POHL]: The document speaks for itself.

19 LDC [MR. CONNELL]: They are pointing ----

20 MJ [COL POHL]: I'm just saying is they don't address the
21 issue that when they asked the DoD entity, according to
22 Mr. Castle, for permission for the overflight, the DoD entity
23 to which they belong to DoD, said no. They chose not to

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1 address that.

2 LDC [MR. CONNELL]: Okay. First thing -- two things.

3 First -- and this is the global view that I think
4 that you want -- is this short declaration addresses places
5 either that they disagree or that a fact has been left out.
6 And that's what this is. I don't think -- but second, it is
7 not that Mr. Castle says we didn't -- they were denied
8 overflight; it's that Mr. Castle says that Mr. Rishikof
9 requested SOUTHCOM to obtain additional imagery, and they said
10 no. There could be a -- tons of reasons for that, including
11 the commander just thought it was too much trouble and didn't
12 want to bother with that.

13 MJ [COL POHL]: But -- and just -- and we don't need to
14 beat this to death because we're -- but I'm just saying is
15 that Mr. Castle makes a point of saying that they went to
16 SOUTHCOM, and the answer was no.

17 LDC [MR. CONNELL]: Not to overflight, which is what you
18 said a moment ago. The answer was to ----

19 MJ [COL POHL]: No, no ----

20 LDC [MR. CONNELL]: ---- for additional imagery, which
21 sounds like an asset situation to me.

22 MJ [COL POHL]: And the answer says no, and if -- which
23 was a big thing in Mr. Castle's mind, apparently, about the

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1 lack of coordination, again, because they got a no from
2 SOUTHCOM and then they went over to the -- to the Coast Guard
3 without coordinating. And if they had this innocuous
4 explanation, you don't think Mr. Rishikof would have put it in
5 his declaration, "SOUTHCOM said they couldn't do it because
6 they just didn't have the assets"?

7 LDC [MR. CONNELL]: I have had a grand total of two
8 conversations in my life with Mr. Rishikof. I don't know
9 what's in his mind.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: But what I do know is that the
12 overflight description we just heard, like, "No, you can't
13 have that," is not what's in Mr. Castle's declaration.

14 What Mr. Castle's declaration says is that
15 Mr. Rishikof asked for SOUTHCOM to generate additional
16 inquiry, and they said no to that. Which, if we're just -- if
17 we're picking the most likely, it sounds like an assets issue
18 to me.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: The -- we -- the more significant
21 issue is that the government argued about the logical
22 connection between the firing of the convening authority ----

23 MJ [COL POHL]: Mr. Connell, I don't want to cut you off

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1 in mid-sentence, even though I'm about to. How much more do
2 you have? I don't want to limit you ----

3 LDC [MR. CONNELL]: Five minutes.

4 MJ [COL POHL]: Okay. You've got five minutes? Okay. If
5 you want to, we can pick this up on Thursday, if you want.
6 You don't ----

7 LDC [MR. CONNELL]: You know, we'll go ahead and do that
8 only because of the rest of the counsel have to talk, too. So
9 it's not like when I sit down that the issue is done. If I
10 was the last one, I would say yes.

11 MJ [COL POHL]: Okay. Let's do that. We'll pick this up
12 the first thing on Thursday.

13 Tomorrow -- yeah, Mr. Harrington?

14 LDC [MR. HARRINGTON]: Yes.

15 Judge, for Thursday, I have a special request to the
16 court. We are going to have argument, I believe, on 530 on
17 Thursday, and I want ----

18 MJ [COL POHL]: 530VV?

19 LDC [MR. HARRINGTON]: Yes.

20 MJ [COL POHL]: Yeah, okay.

21 LDC [MR. HARRINGTON]: I would request permission for the
22 guard force to bring a bin from Mr. Binalshibh's cell, which
23 contains other books or magazines of the same type that were

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1 seized from him. It's important -- it's important for the
2 court to see to put this in context. I'm not going to offer
3 them into evidence. Just for -- they're not going to ----

4 MJ [COL POHL]: Well, how do we do that, Mr. Harrington?

5 LDC [MR. HARRINGTON]: Judge, it's the same thing that
6 Mr. Connell did when he showed the quantity of medical records
7 that he had and the quantity that was requested. That's all
8 it is. It's just a visual thing.

9 MJ [COL POHL]: Okay. Okay. Well, let me do this, is I'm
10 much more comfortable when I do something like that, I'll have
11 the court reporters take a picture of it. You're talking
12 about the outside of stuff, right?

13 LDC [MR. HARRINGTON]: Yes.

14 MJ [COL POHL]: Okay. Just to preserve for the record.
15 Yeah.

16 You know what you're talking about, I'm assuming. Go
17 ahead and coordinate that. You have my permission to do it.
18 Coordinate it with the SJA. If there's an issue, we can raise
19 it tomorrow, if necessary, at the end of the 505(h) in an 802
20 matter.

21 LDC [MR. HARRINGTON]: And I also request that no one from
22 the guard force touch it or anything other than transport it.

23 MJ [COL POHL]: It's case-related materials ----

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1 LDC [MR. HARRINGTON]: Yes.

2 MJ [COL POHL]: ---- we're talking about? Okay. Yes.

3 What I have listed for tomorrow's classified session
4 are -- and again, these are the base motions: 399, 524, 538,
5 562, and 530. Any additions or subtractions? No. Okay.

6 Just so everybody knows, since tomorrow will be a
7 classified session, the public will not be -- and the
8 closed-circuit TV will be turned off. The public will not be
9 allowed to watch because we're just going to be talking about
10 classified information, and no detainees will be present.

11 The detainees may stay in the courtroom with their
12 counsel who are here until 1700 hours.

13 Anything else before we recess?

14 LDC [MS. BORMANN]: Yes, Judge, quickly. Did you ask for
15 subtractions for tomorrow?

16 MJ [COL POHL]: Yes.

17 LDC [MS. BORMANN]: 399, we finally received the
18 classification level of the evidence.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: It's unclassified.

21 MJ [COL POHL]: Okay. So there's no need for any 399
22 issue?

23 LDC [MS. BORMANN]: So no need for 399, but now we're

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1 supplementing it with that information.

2 MJ [COL POHL]: I would expect nothing less, Ms. Bormann.

3 LDC [MS. BORMANN]: Sorry about that.

4 MJ [COL POHL]: No, don't be sorry. You're doing your
5 job. I'm fine.

6 LDC [MS. BORMANN]: I'm grateful we got it back finally.

7 MJ [COL POHL]: Okay. Okay. The commission is in recess.

8 [The R.M.C. 803 session recessed at 1618, 1 May 2018.]

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