[The R.M.C. 803 session was called to order at 0906, 20 June 2019.]

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

Trial Counsel, are all the -- all of the government counsel who were present at the close of the previous session again present?

CP [BG MARTINS]: Good morning, Your Honor. Yes.

MJ [Col COHEN]: Thank you, sir.

Mr. Nevin, are all of your defense team members who were present at the previous session again present?

LDC [MR. NEVIN]: Yes, Your Honor.

MJ [Col COHEN]: All right. Ms. Bormann?

LDC [MS. BORMANN]: Judge, Mr. Bin'Attash is not here. Mr. Montross is here.

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

Mr. Harrington?

LDC [MR. HARRINGTON]: We're the same, Judge.

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

Mr. Connell?

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

MJ [Col COHEN]: Are all of your defense team members here with -- obviously, I see that your client is not here, but are all of your defense team members here?

LDC [MR. CONNELL]: Yes, sir, they are. Thank you.

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

And, Mr. Ruiz, I notice as well that Mr. al Hawsawi is not here, but are all of your defense team members who were previously present again present?

LDC [MR. RUIZ]: Yes, all defense team members are present. Thank you.

MJ [Col COHEN]: Thank you.

I note that the following accused are absent this morning: Mr. Bin'Attash, Mr. Binalshibh, Mr. Ali, and Mr. Hawsawi appear to be absent this morning. I recognize Mr. Mohammad to my right.

Trial Counsel, do you have a witness to testify as to the absences I just noted?

Mr. Swann.

TC [MR. SWANN]: Good morning, sir. We do. And if you would remind him that he's still under oath.

MJ [Col COHEN]: Okay. I recognize this to be the same assistant staff judge advocate that testified yesterday. I remind you that you're still under oath.

WIT: Yes, Your Honor.

MJ [Col COHEN]: Thank you.

[END OF PAGE]

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

DIRECT EXAMINATION

Questions by the Trial Counsel [MR. SWANN]:

Q. Captain, did you have occasion to advise Ali Abdul Aziz Ali of his right to attend today's proceeding?

A. I have, sir.

Q. I have what's been marked as Appellate Exhibit 638C, consisting of three pages. Do you have the original in front of you?

A. Yes, sir.

Q. What time did you do this?

A. About 6:29 this morning, sir.

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

A. I did, sir.

Q. Did you have the need to use an interpreter to talk to him this morning?

A. I did not, sir.

Q. Did he sign the English version of this form?

A. He did, sir.

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

A. I did, sir.
Q. Appellate Exhibit 638D, Mustafa Ahmed Adam al Hawsawi, consisting of three pages, do you have the original?
A. I do, sir.
Q. What time did you advise him of his right to attend?
A. Around 6:41 this morning, sir.
Q. Did you use the English or Arabic version?
A. English version, sir.
Q. Did he sign the English version in this case?
A. He did, sir.
Q. And do you believe he waived his right to attend today's proceeding?
A. I do, sir.
Q. Ramzi Binalshibh, Appellate Exhibit 638E, consisting of three pages, did he sign the English version or the Arabic version?
A. The English version.
Q. And did you read the English version to him?
A. I read the English version, yes, sir.
Q. Did he follow along?
A. He did, sir.
Q. Is that his signature that appears on page 2 of this

document?

A. Yes, sir.

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

A. I do, sir.

Q. And finally 638F, consisting of three pages. I see that the Arabic version is signed here. Is that Mr. Bin'Attash's signature?

A. Yes, sir.

Q. Did you have an interpreter this morning?

A. I did.

Q. Did you read the Arabic -- did the interpreter read the Arabic version?

A. No, sir.

Q. Did you use the English version?

A. I did, sir.

Q. And did he indicate he understood?

A. Yes, sir.

Q. Do you believe he voluntarily waived his right to attend?

A. I do, sir.

TC [MR. SWANN]: Subject to your questions, sir.

MJ [Col COHEN]: Thank you.

If I may have those exhibits, please.

WIT: Yes, Your Honor.

MJ [Col COHEN]: Mr. Connell, any -- I'm looking at 638 -- AE 638C, which is the statement from Mr. Ali. Do you have any questions of this witness?

LDC [MR. CONNELL]: No. Thank you, sir.

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

Mr. Ruiz, I'm now looking at 638D. It purports to be Mr. Hawsawi's signature. Do you have any questions of this witness?

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

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

Mr. Harrington, I'm now looking at Mr. Binalshibh's, which is Appellate Exhibit 638E. Do you have any questions of this witness?

LDC [MR. HARRINGTON]: I do not, Judge.

MJ [Col COHEN]: All right.

And, Ms. Bormann, I have what is marked as Appellate Exhibit 638F. It purports to be a statement from Mr. Bin'Attash. Do you have any questions of this witness?

LDC [MS. BORMANN]: I do not.

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

Captain, I have no additional questions. You are

temporarily excused. Please do not discuss your testimony with anyone on the prosecution or the defense while the case is ongoing.

WIT: Yes, Your Honor.

MJ [Col COHEN]: Thank you.

[The witness was excused.]

MJ [Col COHEN]: Based on the evidence presented this morning, the commission finds that Mr. Bin'Attash, Mr. Binalshibh, Mr. Ali, and Mr. Hawsawi have knowingly and voluntarily waived their right to be present at today's session.

The court acknowledges that we have a standing objection to the anonymity of the witness.

Before we continue with oral argument during this session, I would like to take a moment to summarize the content of a brief R.M.C. 802 session that was held yesterday afternoon at the conclusion of the closed M.C.R.E. 505(h) hearing.

During that session I indicated my intent to continue with unclassified oral argument at 0900 hours on Thursday, today, to be followed by a closed R.M.C. 806 session in the afternoon. I have issued orders accordingly.

I offered the parties the option of delaying the

unclassified oral argument until Friday to allow them more time to prepare. The general consensus from the parties, however, was to continue with the schedule as it was, and I concurred.

Ms. Bormann inquired as to potential changes to the remaining sessions and requested that I take into account the fact that one of her cocounsel had a conflict with the last week of the July-August session. I indicated that I would most likely be making some changes to the schedule as I finish up some of my Air Force cases and focus on this commission.

I also indicated that I would be amenable to traveling to the National Capital area in order to conduct classified 505 or 806 sessions prior to sessions at Guantanamo Bay, if that would be practicable, and assist the parties in framing issues, et cetera.

I also informed the parties as to my general understanding of the way in which we were proceeding with the issues arising out of Judge Pohl's ruling in 524LL and Judge Parrella's ruling in 524LLL. I informed the parties that as I reviewed 524LLL, it appeared to me that Judge Parrella's decision to hold an evidentiary hearing and suspend the remedy of suppression imposed by Judge Pohl was to allow for a more robust factual record to be created prior to

imposing such a remedy.

Judge Parrella had, therefore, set a schedule for suppression motions to be filed and evidence to be presented on the motions at which time specific findings of fact would be made on two issues:

First, based on the evidence currently available to the defense and presented at the hearing, is the court satisfied that the defense has been provided sufficient, relevant, and necessary information in discovery to properly litigate the motions to suppress, notwithstanding the fact that not all items and witnesses have been provided and some recent redactions have been approved over time by the commission.

And second, if the court determines that an individual accused has been provided sufficient evidence such that additional discovery on the suppression matters would be cumulative and unnecessary, should the statements of an accused be suppressed.

I informed the party that this was not a ruling by this judge but simply an effort to facilitate a discussion with the parties who have a significant interest in this matter, and give some guidance on how these matters could be handled moving forward. In short, the purpose of the

discussion was simply to reiterate to the parties the need to create an evidentiary record to allow for specific findings of fact and conclusions of law on this issue.

After I noted that it was my general intent to hear from some of Mr. Ali's suppression witnesses during the July-August session, Mr. Connell responded that there was a motion, AE 628G, pending classification review and some other matters that would need to be resolved prior to the taking of the testimony of those witnesses, and, therefore, he did not believe we would be able to hear from those witnesses until a September session. And we did not take that matter any further at that time.

Counsel, that's a general recollection -- my general recollection of the matters that was discussed during the 802; however, I will allow each of you the opportunity to supplement that.

Trial Counsel, do you wish to do so?

CP [BG MARTINS]: Your Honor, we believe that's a fair summary. Of course, in that discussion you're seeking on 524, we do have things we would like to add to that discussion in terms of how you're seeing the lay of the land, and I'm confident defense does too. So we have nothing on the 806 -- I would -- or the 802 conference.

I would say that before we get to 118, the government does have two matters in the nature of responses to the commission's queries and taskings that we'd like to take care of.

MJ [Col COHEN]: Yes, sir, I will give you the time to do so.

All right. Starting with you, Mr. Nevin, understanding -- and before you make your statement, I agree. That's why I said, there wasn't a ruling; I just needed to start the discussion, and we will decide how we are going to lay that framework, and I will issue rulings, et cetera, as necessary. But simply I think it was imperative for me given the matter of motions in front of me today, for example, of extensions of time requests, those kinds of things to say, okay, look, this is an initial look at this, but I am willing to hear from the parties.

Anything you would like to add to the 802 summary?

LDC [MR. NEVIN]: Yes, sir. Just as I think you're alluding to now, I told you yesterday that I thought the summary of your understanding of the framework for what brings us here to talk about 524, that I thought that was incorrect ----

MJ [Col COHEN]: Okay.

LDC [MR. NEVIN]: ---- and that I -- that the outcome of how you -- not necessarily the ultimate question but the way you think about it is what's at issue in the motion to reconsider 524 that Mr. Mohammad has filed, 524PPP.

So that's correct, Your Honor; and I assume that I'll have an opportunity to speak at more length about that today.

MJ [Col COHEN]: Yes, sir. Absolutely. And as I indicated, when I say that it's not a -- obviously I don't rule on 802s, period, but to the extent when I use that language, it is meant to say, look, these are some general thoughts, but I have not reached any conclusions.

So I look forward to both the prosecution and the defense in assisting me in making some rulings on what is the scope and what is the process based on 524LLL.

All right. Ms. Bormann, do you have anything you would like to add to the 802 summary?

LDC [MS. BORMANN]: Nothing at this point, Judge.

MJ [Col COHEN]: Mr. Harrington?

LDC [MR. HARRINGTON]: No additions, Judge.

MJ [Col COHEN]: Mr. Connell?

LDC [MR. CONNELL]: Your Honor, I have nothing to add to the 802 summary. I will note that yesterday, we forwarded a request that yesterday's 802 recording be prepared as a

transcript. I think that's still being worked, but ultimately they -- usually it has to be approved by the judge for us to do that.

Would you have any problem with us having that recording transcribed?

MJ [Col COHEN]: I -- no. Okay. I just wanted to find out what prior practice was.

LDC [MR. CONNELL]: Yes. Thank you.

In my experience, prior practice is most of them are not transcribed, but when somebody asks for it, generally they have been transcribed.

MJ [Col COHEN]: Okay.

LDC [MS. BORMANN]: Judge, if I may ----

MJ [Col COHEN]: I looked down to my staff to see what prior practice was.

LDC [MS. BORMANN]: I'm sorry to interrupt. If I may, we would join in that request.

MJ [Col COHEN]: Okay. Absolutely. It may be transcribed. I am not going to give them a direct time. I understand that the priorities are there, and I do realize the fact that we even addressed the 524LLL and 524LL that -- in some of those thoughts. But as you read that, I do ask that all of you take me at my word, which is I've made no

decisions.

This was simply an idea to facilitate a discussion with you all, which I think is important, because if we're not all on the same page addressing that issue, it's going to cause more consternation and wailing and gnashing of teeth probably than we need.

And so let's -- to the extent that we can use the limited 802s that I intend to have to focus on issues like this, I hope that you will join me in doing so.

LDC [MR. CONNELL]: Sir, I just want to say that I greatly appreciated you orienting us. I think it probably informs every parties' arguments today. And by asking for the transcript, I just wanted to study it; it is not that I disagreed with your approach in any way.

MJ [Col COHEN]: Well, like I said, I didn't take it that way, but I just wanted to reiterate, I think it's important for the public, who may see this as well, to understand that that is the way 802s will be used with me. I do believe that occasionally, the purpose is to do exactly what we did. Hey, here's some thoughts, but it's not a ruling. What do you all think about those thoughts? As opposed to -- and then that will be basically the extent of it. And then we can actually file formal matters and hear argument on those things and

issue rulings.

All right. Mr. Ruiz, anything that you would like to add at this time?

LDC [MR. RUIZ]: I have nothing to add to the 802 summary, Judge. We would also appreciate a copy of the transcribed portion of that.

MJ [Col COHEN]: All parties shall be provided a copy. All right.

There being nothing else, Brigadier General Martins, I will recognize you with some time.

CP [BG MARTINS]: Your Honor, I wanted to respond to the commission's request on Monday to gain status of what turned out to be three redacted unofficial/unauthenticated transcripts of closed R.M.C. 806 sessions of the commission that have occurred in calendar year 2019. And we have -- we have gained, we think, pretty precise status on them, and I wanted to just lay that out for you.

One of the transcripts was -- has been delivered to the Office of Court Administration and to the IT personnel essentially who post it on the web.

MJ [Col COHEN]: All right. Thank you, sir.

CP [BG MARTINS]: That should be -- should be getting up imminently. It had gotten through the process. That was

the -- the transcript for the 26 March 2019 session.

There are two others. One is a transcript from 29 January 2019. We note that it was delivered by the chief clerk essentially -- I mean, that's the official noted in the Regulation for Trial, but I don't know precisely who delivered it, because that's a process that I'm -- I'm distant from.

But we understand that it was reported to us that it was delivered to a clearance official on 4 February 2019, and it is still in review. And I would note -- so it hasn't -- you know, it's not been lost or anything by any means. These are hard -- by definition, these are things that involve classified equities, and, you know, they were closed for a reason, so they take longer to review.

MJ [Col COHEN]: Right.

CP [BG MARTINS]: The third one is the transcript for 2 May 2019, and that was delivered to a clearance official on 6 May 2019, and that is still in the process.

But I would like to note a couple of things that turned up for us in light of the commission's indication that it sort of wanted to receive notice of these things ----

MJ [Col COHEN]: Yes, that's right.

CP [BG MARTINS]: ---- if they're going to be late, because there is a 30-day rule that you put, and previous

military judges have put, in your 806 closure orders ----

MJ [Col COHEN]: Yes, sir.

CP [BG MARTINS]: ---- that a redacted unofficial/unauthenticated transcript be posted within 30 days. And here are a couple of notes that could go possibly to clearing up this kind of thing going forward.

In Appellate Exhibit 551I -- that's this commission's ruling from December of last year on issues of public trial -- there's a note in there, footnote 27, that describes that the conduit for clearance of all materials should be the Department of Defense Security Classification and Declassification Review Team. And this, the commission noted, was consistent with the Regulation for Trial and the process that's set up there.

I just want to note that although this -- the provision of these transcripts followed previous -- apparently followed previous lines of insertion of material into the clearance system, it didn't go through DoD Security Classification Review Team.

MJ [Col COHEN]: Okay.

CP [BG MARTINS]: And I think that's just partly because of muscle memory and just kind of other things. But that did make it a little harder to find status yesterday because a

different official had it.

And then that leads to the next sort of process point, which is under the Regulation for Trial, paragraph 19-4.c.2., the officer in charge of the Department of Defense Security Classification/Declassification Review Team is the official who is to report late stuff, stuff that's taking a long time to get posted in the nature of pleadings. There's a 15-business-day rule for pleadings; not these difficult transcripts but pleadings. And that's the official. And she has reported that since 551I came out, with the reemphasis on the DoD team, she has been making those reports.

So if the transcripts were to come through DoD's ----

MJ [Col COHEN]: Right.

CP [BG MARTINS]: ---- Security Classification/Declassification Review Team, she would then be able to make a report.

MJ [Col COHEN]: All right. Thank you, sir.

Do we know why they were not going through the D/SCRT **[sic]**?

CP [BG MARTINS]: I think there's a thought that maybe the equities were of a particular original classification authority, so let's start there.

MJ [Col COHEN]: Copy.

CP [BG MARTINS]: And I think that's possibly what did it.

But the commission's ruling and clear intent at this point is conduit, is this DoD clearance team within the intelligence and security community that then is going to be able to keep status and -- and report. Now, in ----

MJ [Col COHEN]: Yes, sir, I think that would help, if we can keep it back in the lanes that we anticipated.

CP [BG MARTINS]: The last point is, the rulings of the commission speak of 30 days, and the -- I want to just note the team is interpreting that to mean the same business-day rule that we have for 15 days.

MJ [Col COHEN]: Okay.

CP [BG MARTINS]: So as of now, for instance, that May transcript -- and this is in the nature of giving you notice that you would have otherwise gotten from the OIC of that team -- that transcript is at 33 business days. So it has exceeded the 30 days.

Nowhere in the reg that we could find is there a rule that these redacted unofficial/unauthenticated transcripts are to be -- are to be reported. Although it's in your ruling, and we certainly are endeavoring to comply with the commission's rulings, there is no notification requirement in there.

So that's the updated status on those three transcripts. They are being worked, and one of them should get posted imminently.

MJ [Col COHEN]: All right. Thank you, sir.

CP [BG MARTINS]: And because the commission indicated it was part of the commission's process of getting caught up, that you went to the website, we do want to confirm you do have a copy of the actual transcript for your preparation; is that correct?

MJ [Col COHEN]: Yes, sir, I do have access to all of that. This was merely just -- sometimes for facility of -- yeah, of access, I went and checked what was out there.

CP [BG MARTINS]: Oh, great. I understand.

MJ [Col COHEN]: I also wanted to get familiar with just what was on the website.

CP [BG MARTINS]: The second response to query, Your Honor, separate topic, is yesterday, in the context of nonsubstantive follow-ups that could be helpful to the commission, Ali Abdul Aziz Ali's attorney referred the commission to Appellate Exhibit 490 in its brief on its motion to dismiss the conspiracy, terrorism, and hijacking charges as ex post facto laws.

MJ [Col COHEN]: Yes, sir.

CP [BG MARTINS]: We would just like to say, our brief -- and I wanted to look up the right point cite for you. If you could look at pages 35 to 44, you'll see that the government's position as to why those charges would survive de novo review.

MJ [Col COHEN]: Okay.

CP [BG MARTINS]: The point of the defense was that a plain error review would be -- wouldn't be the standard. And if it's not the standard, the charges would survive de novo review as well.

MJ [Col COHEN]: All right. Thank you, sir. I appreciate the time. I appreciate the follow-ups. I'll take that matter under advisement and will see what, if any, clarity may need to be provided by the commission with respect to these -- publishing these in these matters as well.

As trial counsel has indicated, my understanding of the ruling as well was that there was an order of the commission to report back. If that's not happening, we'll figure out why that is and work with -- especially work with trial counsel with the knowledge and understanding of the defense to make those things available to everyone.

Are there any other administrative matters before we take up the motions themselves?

A negative response from all parties.

The next item on the docket order that I'd like to take up is Appellate Exhibit 524MMM, a defense motion to reconsider AE 524LLL, ruling on government motion to reconsider and clarify 524LL. Mr. Ruiz filed the motion and it is specific to his accused, so I expect, as I indicated yesterday, he will be the one arguing his motion on his -- on his specific matter.

Mr. Connell? All right.

LDC [MR. RUIZ]: Judge, I do believe -- I do believe this motion has been not unjoined by most of my colleagues.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: So -- and the past practice in that has been that they do have an opportunity as well to weigh in if they've not unjoined. I believe that's the -- that's the state of the record. And they can correct me if it's otherwise, but I believe that's correct.

MJ [Col COHEN]: Okay. This is the specific number that you provided for your motion to suppress, though; is that correct?

LDC [MR. RUIZ]: Yes. The specific number is 524MMM.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: I would also like to correct a previous statement that I think it was 524MMMM. That was clearly a

mistake that I made during our engagement, because I was actually looking at the first letter of the MAH, and so I looked at it as 524 --

MJ [Col COHEN]: No apology necessary.

LDC [MR. RUIZ]: Okay. Judge, as you've correctly pointed out, 524MMM is Mr. al Hawsawi's specific motion. 524MMM was filed by our team on 19 April 2019. And the essence of 524MMM was to object to the ruling by Judge Parrella, 524LLL.

Before I get into 524MMM, I do think that it may be helpful to just give a little bit of a background as to how we got to 524MMM. I don't know if you've had the opportunity to review the entire 524 series. I know that, on the record, you did indicate that you had the opportunity to review and study both Judge Pohl's 524LL and 524LLL, which was Judge Parrella's ruling.

MJ [Col COHEN]: And I have reviewed several of them; however, a brief summary of your understanding of what you believe are relevant facts will be fine and appreciated.

LDC [MR. RUIZ]: Great. Thank you.

So the 524 series was not initiated by Mr. al Hawsawi; it was initiated by the Ali team, and the base motion for 524 (AAA). That motion concerned Mr. al Baluchi's request to dismiss or, in the alternative, to compel the

government to produce witnesses for interview whose identities had been hidden. That was the essence of the genesis, so to speak, of the 524 series. Mr. al Hawsawi's team was joined by operation of the automatic joinder rule, and we continued to be joined throughout the litigation, and we have never unjoined the litigation.

The initial timeline of that litigation very much involved litigation around access to witnesses as well as the obstacles that were put in place by the government for the defense's access to those witnesses, in particular the CIA witnesses in this case; issues such as obstacles to investigative efforts were discussed. But at the core and at the center of that was really the question of whether there was meaningful access, adequate access to CIA witnesses, one that would comport with the heightened due process required in a capital case, our independent duty to conduct an independent investigation. And that really was the beginning.

As you can see from Judge Pohl's 524LL, he does give a summary of -- basically of the litigation history. And I think -- having reviewed that a number of times, I think it is a pretty good review of that history, but suffice it to say that those earlier, earlier instances of litigation all focused around what Judge Pohl characterized as evolving and,

at times, conflicting classification guidance by the government in terms of how to go about carrying out the business of our interrogation -- our interviews and our investigation.

Judge Pohl delineates that in his 524LL. He talks about the evolving guidance. He calls it "evolving" -- that's his language -- and he also says at times it was contradictory.

That litigation progressed over time, and I think Mr. Ali will maybe probably fill in a little more of those facts, but for our purposes, I am not going to do that. But that progressed to a point where the prosecution took the position on the record that if the defense was unwilling to abide by the guidance that the prosecution was putting forth in terms of how to engage these witnesses, then the prosecution would consider issuing or ask the commission to consider a protective order or issuing a protective order in this case.

On 16 March of 2018, in 524L (Gov), the government provided an unclassified notice of ex parte, in camera, under seal classified filing. In 524R, which was an order by the court on 29 March 2018, the court issued an expedited briefing order. And in 524S, the government provided notice of a

proposed protective order. That happened on April 2, 2018.

In response to that notice by the prosecution, our team, Mr. al Hawsawi, for the first time filed an affirmative pleading in this case, other than having joined by operation of the automatic joinder rule. That was on 9 April of 2018, and that was 524T. That was Mr. al Hawsawi's response to the government notice of proposed protective order requiring the defense to compel witness interview.

And in your analysis of 524MMM and the remedy that I'm going to get into in a few moments that we requested in 524MMM, I'm going to ask you to pay particular attention to our filing in 524T (MAH). And the reason I'm going to ask you to do that is because in 524T (MAH), we really tried to drill down for Judge Pohl, prior to the issuance of what would become 524LL -- I'm just giving you an opportunity to find it, Judge.

MJ [Col COHEN]: I am. I am going to try to -- as you reference things, to pull them up. And I have 524T. Thank you.

LDC [MR. RUIZ]: Okay. So 524T, as I said, was our response to the government's notice of proposed protective order. And for your purposes -- I'll get into it a little bit later as well -- but 524T essentially drilled down for

Judge Pohl and the commission what our problems were and what the obstacles that we thought were insurmountable obstacles with this proposed protective order.

It is significant that 524T preceded Judge Pohl's order, and it's significant because when you -- and I will later do a little bit of this. When you later analyze Judge Pohl's ruling itself, you will see that much -- or a portion of the language from 524T is language that Judge Pohl actually took from 524T and inserted into the ruling, at least as it provided analysis of the insurmountable obstacles that the defense had, in fact, identified, which he believed supported the ultimate remedy that he issued.

Judge, in 524T (MAH), the essence of our argument was that there was a fundamental defect with the proposed protective order, which as we now know has become Protective Order #4. We raised issue of violation of due process, violation of Sixth Amendment right to effective assistance of counsel and to participate in his defense of Mr. al Hawsawi, and we talked about violations of the Military Commissions Act as it pertains to the effective assistance of counsel.

And in particular, we emphasized the defense's duty to conduct a full and constitutionally required defense investigation in a capital case and pinpointed for Judge Pohl

specifically what the insurmountable obstacles were to those ends, to being able to meet those ends in a capital case with a heightened due process, with a heightened reliability that is required, and why we simply were not able to do that with any of the iterations of the evolving guidance but particularly with the proposed protective order.

In doing that, we talked to -- we keyed on the issue of an independent investigation into the background of the witnesses, right, the potential witnesses, we know them as UFI witnesses now, unique functional identifiers. And the question that we raised for Judge Pohl and the problem that we identified for Judge Pohl was how do we conduct a specific investigation into the background of such a witness if we do not know their names. Right?

And we raised a number of issues, including how can we -- how can we do, for instance, what an ethically and zealous defense attorney would be required to do in a run-of-the-mill case -- let's say not in a capital case -- where you have a witness that's identified as a witness that may be, in this case, as Judge Pohl recognized in his ruling, is a material witness, is an eyewitness to a significant event that is subject to litigation at a critical stage of these proceedings.

MJ [Col COHEN]: Let me ask you a question. And, like I said, it's just a question.

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: What is your understanding -- so purportedly, presumably there are statements made at various stages by various individuals, and I know there is the motion with respect to cleansing statements. I realize those are referred to by different parties as different things, but for just the vernacular, the cleansing statements by the FBI at some point in this case. If the government's -- is it your understanding the government's not using any statements against your client as proof of its case prior to the FBI cleansing statements?

LDC [MR. RUIZ]: The government's position is that it will not be using any of those statements, yes.

MJ [Col COHEN]: Okay. Then -- and, like I said, once again, not to challenge; I want to just understand.

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: If that's the case, even if the person who conducted the interrogations prior to the FBI cleansing statements was an absolute liar, for example, and you had multiple evidence of that, how would that be relevant to any statements that -- if that person is never going to testify as

to what was said, why is the background -- the background of that individual relevant as opposed to what that individual did prior to the FBI cleansing statements?

And that's meant in all sincerity. Help me understand kind of how you, as a defense counsel, see this issue so I can understand the relevance and necessity.

LDC [MR. RUIZ]: I do. I understand that.

The question that you asked presupposes, number one, that the witness is never going to testify. Right? And that's clearly a presupposition based on the government's assertion that they're not calling -- calling the witness. However ----

MJ [Col COHEN]: That is fair.

LDC [MR. RUIZ]: ---- there is a -- there is a circumstance where the defense may call one of these witnesses or many of these witnesses. By calling them, we are not necessarily vouching for their credibility. And they may very well be adverse witnesses. Right? And those adverse witnesses would be subject to the same type of cross-examination in terms of their credibility, their bias; put that at issue once they take the stand.

But the interesting issue that we always get into when we start talking about mitigation, when we start talking

about relevancy of these issues, is the distinction that I've drawn a number of times that is particularly important in a capital case, which is the fact that our investigation doesn't turn -- the scope of our investigation, the scope of our duty and our ethical obligations do not turn on the ultimate admissibility of a piece of evidence ----

MJ [Col COHEN]: I understand the discovery versus admissibility are two separate issues.

LDC [MR. RUIZ]: Absolutely. So what we're really -- what we're really keying on is our ability to conduct that ethical, zealous, thorough investigation; to then go through a process where we analyze what we have, determine whether, in fact, it is someone that we want to submit to the court for relevancy purposes, for testimony purposes. But we can't even get to that point because we're not able to make that thorough analysis, that ethical analysis that's required in a capital case.

So you -- you can't really jump ahead and say, Well, this particular piece of evidence may not ultimately be relevant. I mean, I guess you could. You can, you can do that. I'm not saying you can't, but you can do that. What I'm saying is you shouldn't do that any more than you should do it when we're talking about mitigating evidence. And this

is an argument that the government has made a number of times. Well, that's not going to be mitigating evidence, that's not going to be admissible.

What is monumentally important for us, what is constitutionally required, what is ethically required in a capital case is for counsel in this position representing a man who's facing the death penalty to have the ability to fully analyze witnesses, evidence, all of the information that is available to us so that we can do -- make that analysis, make learned and reasoned decisions about what we're going to do, and then decide if we're going to submit it, we're going to give it to a court for admissibility, and then cross those threshold issues. I absolutely understand the question that you're asking.

The second point is that these witnesses are not -- there's not this clear line of demarcation between the CIA and the FBI. Oh, I should say there was a clear line of demarcation. And in the prosecutor's response to our 524MMM, they start out in their response by referencing the dates on which they provided the LHMs to us.

The inference in their argument is that, look, the defense has had these statements for a very long time. And I'll tell you the date here in one moment.

MJ [Col COHEN]: That's fine. Take your time.

LDC [MR. RUIZ]: So the government's brief at 524000 says we provided these statements to -- the LHM statements -- to the defense on 12 November of 2013.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: On 28 December of 2016, they filed their intent to introduce these statements. And I don't quibble with those dates. I believe that those dates are accurate.

And so the inference that they seek to draw in that portion of their response is that we've had this for a long time. And so the third prong of our 524M, which is, we're not there yet, is one that you should reject.

But what I want to highlight for you is that while the prosecution references a 2013 date and a 2016 date, what they don't tell you is that the CIA-FBI connection was not made or was not disclosed to us until December of 2017.

So think about that. This case was arraigned in 2012. No discovery was provided to us by the prosecution until December of 2017 that confirmed what we thought and what we believed existed all along, which was a CIA-FBI connection, which is monumentally important when we start talking about the suppression of statements and whether, in fact, there is that attenuation; whether, in fact, there is a clear line of

demarcation. Right?

So when you look at their response in 524000, keep in mind that, yes, they provided the statements; yes, they provided intent to produce them in 2016, but it wasn't until 2017, in December, that we got the first piece. And let me make that very clear, Judge. It was not as though all of a sudden they pulled the truck up and let the guard down and gave us all these boxes full of FBI-CIA connection documents.

What happened was Mr. al Hawsawi's team decided that we were going to litigate 502, which was the hostilities issues that you talked about a little bit of yesterday. In doing that, we pressed for the testimony of two FBI agents -- two FBI agents that had testified -- that had actually interrogated Mr. al Hawsawi. And on the night -- the night before they testified, the prosecution dropped on us two documents that we now refer to as the CIA-FBI's rules of how to go about interrogating these detainees.

So it wasn't until that, like, late hour in the night before two agents testified that we got the first domino, that first tip of the iceberg that gave us the insight that there was this FBI-CIA connection. That discovery has continued, and we have continued to litigate that discovery to the present day.

So the important point I want you to take away from that is that -- like I said, it wasn't like there was a "here you go, here's everything we've got." That's not what happened. What happened is it's been a trickle, and that was the first domino.

So when the prosecution then wants to use that to say, "Well, Defense, you've had all this time, you've had all this information," that's not true. That's not accurate. The facts clearly indicate that that's not the case.

Additional facts that we've had in this case that are facts that are relevant, go into really preparing a motion to suppress and to mitigate, didn't come from the government. Again, I've given you the 2013 date that is referenced in 524000 by the prosecution, but a significant date was December of 2014.

In December of 2014, the defense, for the first time, received, really in my view, at least in my assessment, the most significant information that we've received about the Rendition, Detention, Interrogation Program and the extent of Mr. al Hawsawi's torture. It was then that the executive summary of the Senate's report on torture was released; this 500-page summary or so was released.

In that executive summary, we first learned about

some of the extent of Mr. al Hawsawi's injuries, the fact that he was sodomized, the fact that he was sleep deprived for excess of 72 hours, the fact that he was doused with ice water indistinguishable from waterboarding. That information did not come from the United States Government sitting on this side of the aisle, did not come from the prosecution in a discovery disclosure; it came from a public source document that was released in December of 2014.

So, once again, when the prosecution stands up and say, "Look at all the great information we've given them," it's not accurate. The facts simply do not reveal that that's the case. And much later, we also received additional and significant discovery, more significant than we had received from the government in CIA FOIA releases.

So I know I'm a little bit far afield from where we started, which was the question about the relevancy of the background of particular CIA witnesses, but what I want ----

MJ [Col COHEN]: I think it's all related. I mean, I understand the general guise of your motion is, "Look, I'm -- I still think I need more information and more time to prepare for this motion to suppress."

And to the extent that you're giving me some background as to why that is, I get it. I was the one who

interjected the question.

LDC [MR. RUIZ]: Okay. No problem.

So that brings me back to 524T. Just spend a little bit of time there. So what we said was how do we test for bias or inconsistent statements or even exculpatory evidence in the sense that we would do normal background on a normal witness. Right? A zealous defense counsel would, you know, maybe do some Google stalking. That's what we call it now. Right? Get on Google, do a social media search, look and see if people have said or done or said things.

In full disclosure, Judge, we did some of that on you, obviously, in preparation for the voir dire. Right? But it's part and parcel of what we do in any case, quite frankly, from the beginning from the -- I hate to say lowliest case, because I've been doing criminal defense, and there's no such thing. But from the, let's say, traffic case to this case, right, zealous defense counsel are expected to do certain things to represent that client and to do it properly within the bounds of due process and what we are required to do. And in this case, our laws are that there is the highest standard. Right?

So how do I do that when the United States Government refuses to provide me with the real name of the person who is

a potential witness or who I have to analyze to determine if it's somebody who I may want to call, either as a supporting witness or an adverse witness. Right?

Because in reviewing some of this information, there may also be favorable witnesses who can provide favorable testimony regarding Mr. al Hawsawi's conditions and his torture and his degrading treatment. The government, I would submit, may want to cross-examine that witness. And if there are problems with their background, problems that would reveal bias, they would certainly want to be aware of that, they would certainly want to know that, and they would certainly want to be able to cross-examine properly. And I would definitely want to know that before I put the witness on the stand so I can appropriately prepare and make sure that I am prepared to answer whatever examination they're going to do.

So as an example, in the 502 litigation, hostilities, we called an expert witness. Major Wilkinson referred to the expert yesterday who testified generally on that motion. Before that motion, Mr. Trivett, it became apparent during the cross-examination, was able to go and do some background research. He went on the Internet or wherever he went. He looked up the expert's publications. He looked up some of his writings. He looked up some of the things he had said and

done publicly, background, history, and experience.

He did all that and then he cross-examined him on it and then was able to test the expert witness' opinion, was able to test his credibility, the reliability of the matters that he was promoting for the court. And he was able to do that independently; he didn't have to ask us.

We cannot do that, no matter what happens, when you don't have the name of a witness. Right? Another way to illustrate that, aside from that illustration, is what I would call -- and tell me if you know this name -- Mark Fuhrman.

MJ [Col COHEN]: Yes, I am familiar with Mark Fuhrman from the O.J. trial, if that's who you are referring to.

LDC [MR. RUIZ]: Yes. I call it the "Mark Fuhrman problem." Right?

So suppose that Mark Fuhrman testified but we don't know it's Mark Fuhrman. It's just PS2. That's his functional identifier. We know what he looks like, but we can't take a picture of him. Right? We can't go out and we can say, Do you know this person? Have you ever heard this person to say X, Y or Z? Have you heard this person to say this or that?

More importantly, since we don't have their name, we can't do an independent background investigation on the witness and determine if, in fact, the person has made

repeated references to the N-word and is a bigot and a liar, and use that independent evidence to cross-examine, to question the veracity of a witness who testifies. Right? Can't do it.

And no matter how many evidentiary hearings we have, Judge, no matter how many people we put on the stand, that problem cannot be cured because we don't have their name. We don't have the independent ability to do what we would do, beginning in a traffic case and leading all the way to a capital trial.

That was the problem we identified -- one of the problems, because there are many, but that was one of the problems that we identified and put front and center before Judge Pohl in 524T and which then Judge Pohl took from 524T and inserted into his ruling as one of the reasons why he reached the balancing that he did, given the equities, given the problems that existed. He didn't have to hold an evidentiary ruling.

If you remember the Mark Fuhrman trial, Mark Fuhrman had actually testified, and he made a statement on the stand. If you look at Judge Parrella's 524LLL, one of the things Judge Parrella says in 524LLL is we can put a witness on the stand and we can conduct a cross-examination of the witness

and then determine if there is enough information there.

Well, yes, I mean, we could probably put a witness on the stand. We could probably question him as long as the court will indulge us to question that witness. But what we cannot do, no matter what, is to ever conduct our own independent background investigation of that witness the way it would have to be done, as I said, in the most simplest of cases to the most serious of cases.

And this is, as the government has indicated in their own brief, not an ordinary case. As we all know, it's a capital case. The finality of this case is that Mr. al Hawsawi would lose his life. And simply when Judge Pohl looked at that, he determined that there was only one way to strike this balance and to correct that particular issue.

So I'll move on from 524T, but I thought it was really important to give you that background.

MJ [Col COHEN]: No, no. I appreciate it. I guess, just generally, the question I have based on that argument is your issue seems broader than the motion to suppress. In other words, LLL -- 524LLL really just addresses the issue of should the statements made to the FBI following the cleansing statements be allowed or not allowed. Although the

implications may be greater than just that issue with respect to evidence that the government may or may not have, the actual ruling, itself, will be fairly limited: Were they voluntarily? Was there coercion? All those types of things.

The issue you're addressing though is more of -- okay. And that's still a pretrial issue. The issue, as I kind of hear you, is, this is more of something -- this will be trial on the merits. Okay.

And so then -- so the question then becomes is, are you -- although relevant to your motion to suppress, are you really laying the groundwork for -- really the ultimate issue is, look, we can't -- we need to be able to properly cross-examine these witnesses that they put up, if they put them up anonymously, light disguise, whatever they may do. I have no idea what the process will be. I haven't -- I'm unaware of a ruling that it is going to address the merits of the case yet.

So -- but that's -- your argument leads me is more of that issue, is, look, if we are going -- the government is going to seek a conviction as opposed to just the admissibility of evidence on this matter, I see a stronger argument for that than potentially -- and I understand that is as to how is that -- how is it as critical for this simple

issue of a motion to suppress and whether it was voluntary or involuntary. If you can help me understand that.

LDC [MR. RUIZ]: Absolutely. So I'm glad you used the word "critical" because the -- I'm going to point you to at least one case that we cited in our motion. It's the case of United States v. Ronald Hodge. It's found at 19 F.3d 51. It's a D.C. Circuit case of 1994.

MJ [Col COHEN]: You said that was U.S. v. Hodge?

LDC [MR. RUIZ]: Yes, sir.

MJ [Col COHEN]: Okay, thank you.

LDC [MR. RUIZ]: That's correct. H-O-D-G-E.

MJ [Col COHEN]: Thank you.

LDC [MR. RUIZ]: That particular case dealt with an issue of suppression and, in particular in that case, the scope of cross-examination that was permitted for the defense in cross-examination. At the heart of the court's inquiry was what due processes do during suppression.

And what the court opined and what the court ultimately decided was the defense had been impeded in their ability to develop cross-examination, was that this was a critical stage of the proceedings. And because it is a critical stage of the proceedings, the defense was entitled to that due process, equally as important as it would have been

at the trial on the merits.

So what you are describing now is exactly what the Hodge case addressed. We are talking about a critical stage of the proceedings now. Yes, it has been ordered as a suppression hearing in a pretrial setting, but the courts look at that as a critical stage of the proceeding where all of the same guarantees apply, including heightened due process. So I would commend that to your analysis.

MJ [Col COHEN]: I wasn't disagreeing. It is just I am trying to make sure I understand conceptually how all of this plays ----

LDC [MR. RUIZ]: We certainly think that case is instructive on that. And you are obviously free to look that at that.

We also cited to you Mickens v. Taylor. That's M-I-C-K-E-N-S versus Taylor. And ----

MJ [Col COHEN]: Do you have a cite for that?

LDC [MR. RUIZ]: Yes. It's 535 U.S.; it's a 2002 case.

MJ [Col COHEN]: Thank you.

LDC [MR. RUIZ]: So that particular case talks about effective assistance of counsel at a critical stage of the proceeding and again affirms the fact that there is a right to effective assistance of counsel at a critical stage of the

proceeding which, in fact, is a suppression hearing as we are envisioning here.

And, you know, I don't want to beat the fallen horse, but -- and again, in a capital case, we are looking at something that is different, and not just by my saying it but because the law views it as differently.

MJ [Col COHEN]: Right. And please don't take it that I don't realize that motions to suppress are critical.

LDC [MR. RUIZ]: Absolutely.

MJ [Col COHEN]: I mean, I ----

LDC [MR. RUIZ]: Absolutely.

MJ [Col COHEN]: I completely get that. I'm just -- part of your argument was about the idea that, you know, they could be convicted and those kinds of things. And I was like, okay ----

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: ---- that's almost merits as opposed to ----

LDC [MR. RUIZ]: I see.

MJ [Col COHEN]: ---- suppression. And to be honest with you, I don't -- until the factual predicate is laid out, none of us will know exactly what the evidence will be on -- on that matter, so...

LDC [MR. RUIZ]: So you're right. I think I didn't as clearly articulate that as I would have liked.

What I was trying to convey to the court wasn't just a merits -- a trial on the merits piece, but I view the preparation for a direct or a cross-examination at a suppression hearing as critical as anything.

MJ [Col COHEN]: I understand.

LDC [MR. RUIZ]: And I view my duty to investigate that witness, to do background investigation on that witness, to be indistinguishable from what I would do at a trial on the merits. And I submit that I think the state of the case law agrees with that. And so that's kind of how -- how I see it.

I think that's -- that's why -- that's why I wanted to start out, also, because of where 524 started out. Right? The base motion. And I hope my colleague, Mr. Connell, will pick up on some of this because I don't want to get into all of these acts, but that's where 524 began. You know, 524 began as a witness access issue. Right?

MJ [Col COHEN]: Right.

LDC [MR. RUIZ]: It has metastasized. And I think in order to -- my humble opinion is that if I were sitting where you're sitting, in order to ultimately rule on this motion, I would have to digest all of that ----

MJ [Col COHEN]: Right.

LDC [MR. RUIZ]: ---- as lengthy and as long as -- 524 is a beast, right, for lack of a better term; and it continues to -- it continues to expand.

And so that's kind of why I jumped in at the point where, hey, we -- you know, the protective order came into being and became a point of contention. That's when we kind of jumped into that -- you know, the rope was swinging, and we said, "Hey, you know, we have to go in and we have to file this motion" ----

MJ [Col COHEN]: Right.

LDC [MR. RUIZ]: ---- "because this has -- now this has gotten out of hand." Right?

The reason we're now talking about suppression in the context of this motion is because it's where it's taken us. Right? What began as a witness access issue has turned into a judicial mandate and order for us to litigate a motion that I think we certainly are not ready to litigate in the way that we need to do in a capital case.

Certainly I know that colleagues who have filed motions have made numerous statements in their motions. So I know Mr. Ali had a very lengthy footnote where they say we're filing this under protest. So the state of what we have now

is unprecedented. It truly is.

If you look at the prosecution's pleadings, if you look at the substance that the prosecution puts, it's very light on substance and heavy on argument. And I would tell you that that is a very dangerous place to be in a capital case, where you've got lots of argument, lots of bluster but very little substance.

Where we are right now is in an unprecedented place where we have a proceeding that has been mandated by the court to test, right -- to test out whether, in fact, the defendants are, in fact, getting due process. I've not seen that. I've not seen it in military regular courts, where I practiced for 23 years; I've not seen it in state courts, federal courts; I've not seen it in a capital case; I've not seen it in a small case. Right? And I would think it's -- it, quite frankly, is unprecedented what we're asking to do here.

And that brings us to the substance and the heart of 524MMM. So 524MMM essentially asks you to overturn 524LLL. What we're -- can I have one second, Judge?

MJ [Col COHEN]: You may.

Mr. Ruiz.

LDC [MR. RUIZ]: So let me just grab a swig of water here.

MJ [Col COHEN]: You were at 524 MMM; asked me to, I

guess, reverse of 524LLL.

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

MJ [Col COHEN]: Overturn.

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

So 524MMM was filed by our team in response to 524LLL. And the relief that we asked for at that time when we filed it, which was 18 April 2019 -- Judge Parrella's ruling came out 3 April 2019 -- was we asked for reconsideration of 524LLL. We asked to withdraw the deadline for the suppression motions. Right?

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: You have it?

MJ [Col COHEN]: I do. Yeah, I'm ----

LDC [MR. RUIZ]: Okay. So we asked for reconsideration of 524LLL, withdraw the deadline for the suppression of motions, and ultimately to reinstate 524LL, which was Judge Pohl's ruling forbidding the government from using the 2007 LHA **[sic]** statements by the FBI -- obtained by the FBI for any reason.

So effectively, we're asking you to overturn Judge Parrella's 524LLL and to restore us back to the procedural state that we were when 524LL was issued.

MJ [Col COHEN]: So let me ask you this question, and this references back to the general 802 discussion that we had. So

let's say Judge Parrella hadn't called these motions to suppress but he simply said, "Fine. If you want me to reconsider this, then I'm going to allow you the opportunity to present evidence. And the way we're going to present evidence is we're going to call some of these witnesses and we're going to finally find out, you know, how much information you have and how much you don't have and how much is still relevant and necessary and noncumulative moving forward."

Because typically in a motion to reconsider, there has to be some new evidence or some indication that -- some basis for the reconsideration of that ruling.

And it's an interesting ruling in the sense that it suspends but doesn't necessarily reverse the decision by Judge Pohl. It just defers further ruling on that until a factual predicate is the way. Like I said, that's my initial take on it. A factual predicate can be laid for the judge to make specific findings of fact and conclusions of law necessary to address that issue.

So then the question becomes is, is regardless of what we call it -- and maybe that's just -- I mean, maybe I choose to call it something else -- it seems to me that there still needs to be an evidentiary hearing then. For us to say

indefinitely that we're going to delay this process -- I mean, discovery could theoretically take forever. There has to be a certain point in time, whether this was an Article III court or whether it's an Article I court or whatever court you're in, there are trial scheduling orders, and we imposed discovery obligations. Then if a party fails to comply with the order, then the judge has the authority to issue rulings or sanctions, et cetera, depending upon what the law allows them to do.

So I guess the question then becomes is, is there reason why, at a minimum, we can't have an evidentiary hearing on this very issue with respect to what are the -- what are the implications to the defense of the protective order and the process, et cetera, moving forward?

LDC [MR. RUIZ]: Yes. Our position, Mr. al Hawsawi's position, is that that type of process, that type of procedure, whether you call it a motion to suppress, whether you call it a -- an evidentiary hearing, whether you call it -- whatever we want to call it, is violative of due process. The reason ----

MJ [Col COHEN]: In what way? I mean, if you're allowed to present evidence, how are you not being provided due process?

LDC [MR. RUIZ]: Okay. So let me -- let me backtrack a little bit.

So the reason that -- the reason that we referenced the motion to suppress data is because, obviously, Judge Parrella's ruling focused us on that.

MJ [Col COHEN]: I understand. I completely get that.

LDC [MR. RUIZ]: I take your -- yeah. And so I actually thought about this in terms of the analysis. What if you just remove the requirement to have a motion to suppress, which is what you've said; you've added an evidentiary hearing?

So the first part, just removing the requirement for a motion to suppress, would do a couple of things. Number one, it would solve the Williams issue that we've raised, right, which is what happens when you have a conflict between an existing rule in the manual and a judicially imposed timeline, say, with a Rule of Court or, as in this case, Judge Parrella's ruling.

So I think if you were to remove the requirement of a mandated motion to suppress submission, that would remove at least that problem. But it always leaves the fatal defect; and the fatal defect comes from Protective Order #4. And what Protective Order #4 is what Judge Pohl recognized.

Judge Pohl had the experience and the unique benefit

of having presided over this case for almost seven years. He also had the opportunity to litigate every one of the 524 series motions and to have that be informed, also, by his time on the bench where he had actually litigated many of these motions.

So what our position is, is essentially that an evidentiary hearing is not necessary and was not necessary for Judge Pohl to reach the conclusions that he did in his 30-something-page opinion.

The violation of due process for us comes in exactly where I identify with you something which is irreconcilable, regardless of how many evidentiary hearings we have, how many people you put on the stand. This is the Fuhrman problem, right? Put him on the stand. We don't know their name. We can't use their picture. We can't conduct an independent investigation.

That is the fatal defect, in my view, and the flaw that exists in Protective Order #4 that requires no further analysis, because it is a fact that we don't have their real name. It is a fact that we cannot use their picture. It is a fact that restrictions exist for what we can do as a defense, to go out and conduct an independent investigation. Nothing of putting a warm body in that stand is going to

change that. Nothing in terms of calling 1 or 50 witnesses is going to change that.

And that's what Judge Pohl recognized, and that's why, in his findings of fact, he keyed on the evolving -- what he called the evolving and contradictory classification guidance, because that, in itself, is the fatal defect.

The reason we're talking about a motion to suppress and the reason we're talking about what I view and what I think the law would recognize as a fatally defective due process exercise or a test run on due process is because this is the novel -- that's the best word I can use -- remedy that Judge Parrella thought that he would introduce in this case.

So your question was how is it violative of due process if you are allowed to call witnesses? I think I've answered as best I can. I'm allowed to call a witness ----

MJ [Col COHEN]: I understand. I guess as I look through this issue -- and, like I said, I understand what the rulings say here, but at the same time, the issue also hints of this idea of -- it all comes back to a motion to essentially compel more evidence in this case in the sense that I need access to these witnesses. If I don't know who the witnesses are, then I can't interview them. All those kind of things.

LDC [MR. RUIZ]: No, sir, that's not right. That's not

right.

MJ [Col COHEN]: All right. Then what is the problem? Why can't we -- why can't we argue a motion to suppress then? If the issue is that you haven't been provided discovery that you are required to, then why wouldn't you have sufficient evidence to argue?

LDC [MR. RUIZ]: That's the third prong, but I want to make sure I make it very clear.

If the prosecution were to give us the names of these witnesses, that would go a long way, I think, towards curing this issue. I think that's -- I think that's accurate. I think that's correct. But the issue here is not ----

MJ [Col COHEN]: Let me ask it this way.

LDC [MR. RUIZ]: Yeah.

MJ [Col COHEN]: Like I said -- and this is -- like I said, these are questions, and once again, not because I'm taking a position ----

LDC [MR. RUIZ]: No, I understand.

MJ [Col COHEN]: ---- but because it assists me in coming up with how I'm going to address the issue later.

Ultimately, the government is going to have to give me a witness list, even on a motion to suppress, because I understand where the burden is going to be to show

voluntariness in this case. So the government is going to have to provide a witness list or the exhibits that they are going to use to support this and those kinds of things because we know where the burden is going to be.

Consequently, you're going to be able to look at that witness list. Then we can argue about whether or not you have sufficient evidence or whether they provided you sufficient stuff about their particularized witnesses in this case.

However, you may have your own witnesses that you wish to call for whatever reason. For example, we want to talk about the interplay between the CIA and the FBI with respect to these cleansing statements and whether -- you know, whether -- who was present in the room when it occurred, all those other types of things, in which case it may be another issue before me that I have to rule on and say, You're right, you should or shouldn't have that; that is relevant and necessary. It is material to the matter, and so therefore I find that the government has the option to provide me -- provide a summary, do a stipulation of fact that's acceptable to the defense, or produce the witness, you know, to make them available for trial, theoretically.

But that's how -- at the end of the day, regardless of what the consequences are, the general process of a trial

and how we work our way through the issues does not completely change. I mean, even if we were in Dade County, Florida, and this was a capital case, while the concept of -- as the capital case is called super due process and those types of things and broad mitigation, even if those applied and all the rights of the Constitution of Florida and the rights of the Constitution of the United States definitely applied to this case, the procedural posture of the case, while having some interesting issues along the way, but the idea of motions practice is typically one side has evidence that they wish to present; the other side is given an equal opportunity.

What I'm asking at this point is whether you are the prosecution or the defense, you have a strategy. There are issues that you want to raise that you believe are relevant to that. And then typically you ask for the evidence, if it has not been provided, that you believe is in the possession of the other party that supports that theory or that strategy that you want to present.

So, for example, if your strategy is I believe that it was never a true FBI investigation, that it was always something that was being conducted at the -- you know, at the behest of the CIA and so therefore it was a continuous course of conduct moving forward, then the motion to compel should be

let me address that issue. And then either that evidence is provided or it isn't. And if it isn't provided and the court rules that that's relevant and necessary information and they fail to provide it, then there might be remedies or sanctions imposed at that particular time.

So what I'm trying to figure out is what are we -- where does this -- if I reverse it, where does it get us? How does it -- how does it move the posture of the case forward in the sense that it assists the defense in preparing its defense and then ultimately allows these gentlemen who have been here for a significant amount of time the ability to have their day in court?

LDC [MR. RUIZ]: If you -- and there's a lot to unpack there, and I'll try to do the best I can.

Where it leaves us is where we were when 524LL was in effect, which was, Judge Pohl had gone through his reasoned analysis in his ruling and had struck an appropriate balance.

And the reason I kind of resisted a little bit when you raised the discovery issue is because I want to make sure that I'm clear on this point, which is one of the points that the prosecution raises in their response.

What the prosecution tries to do in their response is to say, Look, the defense is really arguing discovery, and the

defense is really arguing that the national security privilege -- they take issue with that. They take issue with the fact that they're not allowed to have X, Y or Z. Right? And that's their argument. But that's not -- and that has been argument before, but the crux of argument now isn't that. What happened here was there was an appropriate striking of that balance. Right?

So I take no issue with the fact that there's a national security privilege. I take no issue with the fact that that at times will involve a process where you have to determine substitutions and whether it puts us in the same kind of positions with that. However, there needs to be a balance between that process and the due process that comes due to a defendant. That's the balance that Judge Pohl struck.

So when we file 524MMM, we were not saying we want more discovery. What we were saying is Judge Pohl struck that appropriate balance. He realized that the problem -- the Fuhrman problem that I have identified for you is irreconcilable and hasn't been reconciled with any other guidance.

And so what he did, he took national security privilege, due process in a capital trial, and he said this is

the best way to balance these equities. He did that based on the review of the record, based on the shifting and evolving and contradictory guidance, based on his knowledge and experience about the discovery process, the time that he had to consider substitutions for evidence that the government has provided. And after doing all of that, he said this is the balance that I can strike.

And I would submit to you that putting us back in that state, 524, which, again, was not about suppression issues; the suppression issue was brought about because the judge ordered us to do this. Right? Ordered us to file a motion to suppress on specifically voluntariness and to engage in this unprecedented test run to determine if, in fact, the well that Judge Pohl determined was poisoned is poisoned.

So what Judge Parrella has, in essence, asked us to do is to test the water, is to drink the water, and then let you know, hey, did we get sick, or are we having ill effects?

Only then can we determine if, in fact, the analysis that Judge Pohl went through determining that that water couldn't be drank was wrong. While you wouldn't do that to a human being, you certainly, in my view, can't do that in terms of the due process consequences that we have in this instance.

MJ [Col COHEN]: Right. I understand.

Any final arguments?

LDC [MR. RUIZ]: Actually, I just have a couple of more points that I want to make, just to make sure that I cover all my bases here, Judge.

So in 524, we raise the due process. Right? We also have the Sixth Amendment as well as the Eighth Amendment in terms of why we believe the procedure that's in place is violative of due process. I can't emphasize enough how it is this process of going forth.

Whether you call it a suppression hearing, whether you call it an evidentiary hearing, when you are forcing capital defendants to engage in a test run -- Mr. Nevin calls it a thought experiment; I agree with that characterization -- when you are ordering and mandating capital defendants, all who are telling the court and who are giving specific information and evidence -- as we provide a number of ex parte exhibits in MMM that clearly lay out for you circumstances that prevent us from doing this in a way that comports with due process -- but whether you call it a motion to suppress or call somebody on the witness stand, we believe that this process of mandating us to engage in this process to test an order -- which, by the way, continues to exist, it hasn't been vindicated; it hasn't been pardoned by Judge Parrella.

Judge Parrella left Protective Order #4 in place, right, the same protective order that Judge Pohl determined was defective and why he struck a balance between the equities. Right? That order remains in place.

And we are mandated to engage in some sort of test run -- let's just go back to that; we call it a due process test run in our briefing -- to find out if, in fact, there is due process. Right? So let's take this medicine and see if it has side effects. It's really the structural -- it's not the same thing, but obviously it's the same structure in terms of an argument. Let's do that and then determine if, in fact, there is ill that develops from there.

Just a couple of points on some of the government arguments, Judge, to address some of those arguments. The government takes issue with the Williams case, which we raised, that essentially stands for the proposition that the timeline can't be moved up. Again, the reason we focused on that because is that's the procedure that was mandated for us. Right?

I think if you were to remove the requirement to file a motion to suppress a particular timeline, the Williams issue, I think, would go away, quite frankly. Right? But we do think that that rule is clear. It's one of the clearest

rules that exists. These motions should be filed before the entry of pleas. The Williams case and the Kelson case that are cited in our brief clearly lay out for you the analysis. The prosecution takes issue with the fact that it's a 30-year-old case. Says it's not binding. Very well. It's the highest military court. At the same time they do want you to consider one of their cases, which is an unpublished opinion from an Army case.

I don't think you can balance those equities, but I think if you have to find something that's highly persuasive, I would say the Williams case, the Kelson case should definitely guide your path in analyzing that particular issue.

Ultimately, what they said was if there's a conflicting rule in this case, ones promulgated by the Secretary of Defense -- in that case it was the rules promulgated by the President -- you can't do it; the court can't raise that.

The prosecution says, "Well, that was 30 years ago. It would be evolution of trial practice orders and the realities of modern day court."

This is where I will do a Prosecutor Swann and say to you, Judge, I've been a JAG for 23 years. I have a unique experience in the fact that I've been a litigator all of those

23 years, either as a prosecutor or as a defense counsel, with the exception of three years when I had some -- banished to "FOIA-land." But besides that, I've had the opportunity to observe military practice and engage in it.

And what I would say about the -- the evolution of that practice is a couple of things. Number one, I think what drives a lot of the timeliness that I've seen in our courts is the fact that there is a very open discovery process. Right? So in discovery practice, it is very clean, very clear. I've had the great experience the majority of the time. When I was on the defense side of the house, I would just get the evidence and there was, quite frankly, many -- very little haggling; not to say it didn't happen, but certainly when I compare it to state or my federal experience, there's definitely a difference.

So to the extent that discovery drives the process and our ability to analyze, to go through a process, to create litigation and motions and meet court-imposed timelines, I see very little litigation -- or I've seen very little litigation in military courts over the timeliness of those motions. So I think drives a lot of that. But the rules exist and the challenge could be brought if necessary. Right?

The second reason that that argument should fail in

your analysis, Judge, is because when you look at the Williams case and you look at the Kelson case, they talked about local rules of court, they talked about other rules that were promulgated. But all those rules were really their own version of trial practice rules. Right? They talked about notice. They talked about when they would be served on counsel. They talked about timing of filing the motions.

So while they may not have had the heading of a trial conduct practice order, it had the same effect and it had the same purpose. And the court looked at it, nevertheless, and said you can't do it. And the language they used was even if it's a laudable goal or an objective that has benefits, like you've articulated about moving a prosecution forward, you can't do it. Right? So for those reasons, that argument should fail.

They also point you to Rule for Military Commission 801(a), 801(a)(3), which really deals with you, as the presiding officer, and -- as well as the reasonable control that you exercise over the proceedings in prescribing the manner and the order of presentation of the proceedings.

What I would simply say about that is it does not trump and does not allow you to ignore what's in the manual. And of particular significance, I would point that in their

brief, there was -- there's "subject to" language in the rule. Right? So the military judge can do the this, "regulate manner and order subject to." Right? That part of that "subject to" is the manual. That little piece was left out of the prosecution's brief, but it's clearly in the discussion and the rule, which is persuasive authority.

So yes, you can control the manner and presentation of a lot of things in the courtroom, but it's subject to the manual and some of the rules that are -- that are laid for the court in the manual.

May I have a moment, Judge?

MJ [Col COHEN]: You may.

[Pause.]

LDC [MR. RUIZ]: Judge, the prosecution's next argument is that you should -- you should set a date for entry of pleas. I would submit that that is an impracticable remedy that would create far more procedural issues than otherwise, because it doesn't just impact the timeliness of filing a motion to suppress but it also impacts the timing of a whole lot of other motions, and we would be right back to where we are.

Again, at the heart of this matter, the issue is -- extends beyond -- I think you identified that when you said this seems like a larger issue, and I think you did hit the

nail on the head when you said that; I just think you haven't had the benefit of the time to really get into -- get your hands into 524. But I think when you do, you will -- you will affirm, which I think you have already articulated, which is that this issue far outstrips the narrow issue that we're addressing today. Right? But it's all embedded within that issue.

So in that sense, I think that their proposal is impracticable, and I would urge the court not to -- not to do that as well.

Their argument about the amount of information that we've had in order to prepare, I've given you a couple of examples about the discovery process and what that really means. I ask you to look at our ex parte exhibits that clearly lay out our defense strategy and specific instances where we are continuing to do what we can, but we are beholden to other entities as well in order to do some of the work that we are required to do.

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

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

MJ [Col COHEN]: Defense Counsel, understanding that the scope of the MMM is a little bit larger than just a -- Mr. Ruiz's team's motion to move the suppression motions down

the line, I will allow any additional argument from other defense counsel; although, I do recognize that several of you have similar type filings for additional extensions of time, et cetera, that are out there.

But given that it is a 524 series that has been ongoing, if there are any comments, I will allow you brief argument.

LDC [MR. NEVIN]: Yes, Your Honor. And 524PPP is on the ----

MJ [Col COHEN]: It is.

LDC [MR. NEVIN]: ---- agenda for today as well, and it overlaps a good deal with this.

MJ [Col COHEN]: Which is one of the reasons why I initially indicated that I would take one counsel per cause or per argument, because of -- because of the nature of those. And I was treating them that way. But nonetheless, because there are arguments that may impact other -- the LLL ruling in and of itself, I will allow brief argument if you need to. But you will be given time to address PPP.

LDC [MR. NEVIN]: Yeah. And I was just going to suggest maybe that what we ought to do is take up 524PPP now as well and just do it all in one fell swoop, because so much of this -- as you will see, so much of this is interrelated.

That's point number one.

And point number two is to ask you whether this would be an appropriate time for the -- for a morning recess and a comfort break.

MJ [Col COHEN]: Okay. Mr. Trivett, with respect to government argument, is this something you can -- you feel -- the government would feel comfortable addressing all at once or would you like to take them up individually? I don't know how you have prepared.

MTC [MR. TRIVETT]: Yes, sir. I appreciate that. I actually stand to express my agreement with Mr. Nevin. I would prefer to answer all of the defense motions at once. I think I could save the commission a lot of time by doing that.

MJ [Col COHEN]: Okay. I think that's appropriate.

Mr. Connell, you did stand. I will recognize you.

LDC [MR. CONNELL]: Peace has broken out, sir. I concur.

MJ [Col COHEN]: Okay. Great.

Then let's go ahead and take a 15-minute comfort break, and we'll reconvene.

[The R.M.C. 803 session recessed at 1032, 20 June 2019.]

[END OF PAGE]

[The R.M.C. 803 session was called to order at 1048, 20 June 2019.]

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

Mr. Connell, you are standing there, so I will recognize you.

LDC [MR. CONNELL]: I have a lot of stuff to spread out, so I'm just waiting my turn, sir.

MJ [Col COHEN]: Okay. Did you want to address MMM? Is that what you wanted to do, or ----

LDC [MR. CONNELL]: No, sir. Mr. Nevin and I have conferred, and when you move to PPP, which is what I thought you were doing next, I will go first. But ----

MJ [Col COHEN]: Okay. That's fine. That is perfectly fine.

Mr. Nevin, is that why you were standing as well?

LDC [MR. NEVIN]: Yes.

MJ [Col COHEN]: Okay.

All right. Then, Mr. Connell, please proceed.

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

Never in history has any American court confronted such an extensive and intrusive restriction on the

investigative function of the defense in any case: capital, noncapital, speeding ticket, you name it.

The government has an absolute right to do that. It has been our position consistently that the government has an absolute right to impose classification information privilege between us and any particular activity or information. That comes at a cost. There are consequences to that decision when the United States chooses to make it. And in many ways, this motion is about what are those consequences.

Once the court has articulated what it considers to be the consequences, then it is left to the United States to make a decision as to what it wants to do once it has the costs and benefits in front of it. And that is not reviewable by you, sir; by me. It doesn't matter what I think. Those are decisions that they get to make.

This situation presents a limitation on the key duty of a capital attorney; that is, investigation. There are a number of witnesses associated with the CIA and with the RDI program. In some ways, those two circles overlap; in some places, they do not overlap. And there are two contexts in which those witnesses arise.

The first are the so-called UFI witnesses; 64 witnesses that the government has substituted summaries for

what they consider to be directed and substantial contacts of those witnesses with the defendants.

Many of those -- some -- the other context is witnesses that we, Mr. al Baluchi's team, developed independently through LinkedIn -- you wouldn't believe what people put on their LinkedIn -- through other social media; through identifications by our client; by other interviews, just ordinary, old-fashioned networking that works through investigation; through court cases that involve the RDI program that have had depositions and other things; and through, in one situation, the former interpreter who is at issue in 616.

There may be some overlap between those two groups. We don't know who the UFI witnesses are, so -- with very limited exceptions. And we -- but both the prosecution and we have unconfirmably suggested that one of the people who we had actually already contacted with these investigative restrictions came down falls into the UFI category.

Because until September of 2017, there was no -- no restriction on defense investigation. To this day, on 20 June 2019, there is no restriction on investigation in United States v. al Nashiri, in United States v. Hadi al-Iraqi, or in United States v. Majid Khan. The three other

military commission cases face no similar restriction.

Beginning in September of 2017, the government began imposing what Judge Pohl called a continual moving target of restrictions. In January of 2018, the government invoked classification information privilege and threatened criminal sanctions. At that time, I issued a memorandum, which is a matter of record in this court, to my team stopping our RDI investigation -- our domestic RDI investigation and almost all of its components.

This -- in this situation, hindsight is not 20/20. Judge Pohl had the opportunity both to review hundreds of thousands of pages of substitutions and underlying material but also to see how the government's investigative restrictions changed from moment to moment.

In February of 2018, the restrictions which were in place when -- on the first day of court were different from the restrictions that were in place on the last day of court. The parties engaged in an extensive iterative process over the scope of the appropriate investigative restrictions, and second, what would be the correct sanction under 10 U.S.C. 949p-6(f). That is the statute that controls this situation.

I, myself, suggested a number of remedies to the

military commission in pleadings and in oral argument, including compelled interviews, which would solve the whole problem or depositions, if you want to look at it in the that way: Suppression of statements made to the FBI and DoD in January of 2007 -- excuse me, which is what Judge Pohl ultimately adopted -- and striking the death penalty, which Judge Pohl decided against and Judge Parrella brought back as a possible remedy.

The question before the military commission today is what remedy should be imposed for these investigative restrictions; and second, how does the military commission decide. And what I hear the military commission saying is that essentially Judge Pohl thought he had enough information, Judge Parrella thought that he did not have enough information. And what confronts the military commission today is how is this military commission -- how is the military commission, Judge Shane Cohen presiding, going to assess what the appropriate remedy should be?

So just to give you a little overview, a roadmap of what I'm going to do here: First, I'm going to address the three major questions that you asked counsel for Mr. al Hawsawi; second, I'm going to make my AE 609 disclosures -- and we'll talk about AE 609 when we get there;

third, I'm going to lay out the history for you, including the -- orienting you as to what I see as the most highest-priority briefs; fourth, I'm going to give you my analysis of 524LLL; fifth, I'm going to tell you about the alternate procedures and what has actually happened, because there are a great number -- we put -- these are not just arguments of counsel, we put a great number of declarations into the record as to what is actually happening, facts on the ground; and then, finally, I'm going to propose a path forward.

So beginning with the questions, the first question that you asked counsel for Mr. al Hawsawi is if the government is not using any of the statements from the -- from the -- made in CIA custody and the FBI comes along in February of 2007, makes cleansing statements, what does it matter about these witnesses from before?

And so the premise of that question rests on what is the public narrative -- and I don't fault you for that. I mean, it's the public narrative about what happened here, which is there were dirty interrogations in the CIA and then there's a -- on September 6th or so of 2006, they are transferred to Guantanamo, and then a few months later, the FBI comes along and takes additional statements. Never the

twain shall meet. These are two separate events. That is neither factually nor legally our theory of what happened.

The military commission used the phrase, which I really liked, "continuous course of conduct." But our position is that from the beginning, the FBI was involved in the interrogations and that CIA involvement continued at least through January of 2007.

Everything that I refer to today is unclassified. There's enormous classified detail available to you in 628 itself, which has 170 pages of facts, which I know is a lot, but it's -- you know, the facts are very compelling on this.

MJ [Col COHEN]: I will never fault the parties for providing me facts.

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

The -- we have developed this theory over the course of this military commission because I came in thinking the same thing. All right. You've got a CIA period. You've got an FBI period. That has turned out not to be true.

That has been discovered through an iterative process of discovery, which the military commission talked about, but also investigation. Because there's a -- sort of a cycle that happens. You get some discovery. In this case, for example, there was one sentence in an informal document which provided

us a lead. We found that witness. We contacted him. He agreed to meet with us. We met at -- in a secure space. He told us some information. And that opened up an entire world of things that we didn't know before.

Another example counsel for Mr. al Hawsawi raised, which is that Special Agent Perkins, in her testimony, gave one answer, which was: Yes, before 2006, I submitted information -- questions to the CIA for them to put to the defendants.

I had never heard about that before. It's not in the SSCI Report. Nobody knew about it. But when we went out and investigated that statement, requested further discovery, what we learned through both of those processes -- in fact, there was an extensive indirect participation in black site interrogation by, among others, Special Agent Perkins and Special Agent Fitzgerald, the two people who took the statement from Mr. al Baluchi.

Other examples -- other unclassified examples, I will say, is that through documents obtained by BuzzFeed under the Freedom of Information Act we learned about the participation of FBI agents not just in the interrogation of Abu Zubaydah but also in the initial decision to use what became known later as enhanced interrogation techniques. Those documents

are found in the record at AE 538C and its two supplements, especially the supplements.

We learned of the -- we learned through an OIG report, which we had never seen before as a result of this, our investigation, that, I quote, In 2003, the FBI and the CIA entered into a memorandum of understanding concerning the detailing of FBI agents to the CIA to assist in debriefing certain high-value detainees at sensitive CIA debriefing sites. That's the declassified part. I won't go any further.

But we also learned that this cycle, input into FBI -- memorandum of understanding about FBI assistance also had a feedback loop on the back end, which is that we learned that the FBI had access to intelligence reports as they were coming in. So they were full-cycle participation in the interrogations.

We also learned through a Freedom of Information Act request that the CIA and DoD continued -- had a memorandum of agreement which governed the detention of Mr. al Baluchi and others in January of 2007, and the SSCI Report ultimately came out and described that although they were technically under DoD custody, the operational control of the CIA continued.

So that is our legal -- excuse me, that is our factual position. And the involvement -- the CIA witnesses

are going to be critical to establishing that because they were active participants in what we have described.

Legally, that's important because of the standards which apply in this military commission. Under 10 United States Code 949r(a), which implements 42 U.S.C. 2000dd, the Detainee Treatment Act of 2005 and Military Commissions Rule of Evidence 304(a)(1), statements are inadmissible if they are, quote, obtained by torture or other cruel and inhuman, degrading treatment.

It has been our position, it is our position in 628 and has been throughout the litigation that it was one continuous course of conduct to obtain statements by torture and other cruel and inhuman, degrading treatment, including incommunicado detention, that lasted throughout this entire period from 2003 to 2007 for Mr. al Baluchi.

Just to give you an example of that, of how that works, there is a very specific definition in the D.C. Circuit of torture. And it all derives from a case called Price v. Socialist People's Libyan Arab Jamahiriya -- with my apologies to the interpreters -- J-A-M-A-H-I-R-I-Y-A. And that is found at 294 F.3d 82, a D.C. Circuit case from 2002. And applying that standard, which that's the standard that the D.C. Circuit -- district courts apply, for example, in Kilburn

-- K-I-L-B-U-R-N -- v. Islamic Republic of Iran at 699 F.Supp.2d 136.

In that case, for example, the court held that beatings, unsanitary conditions, inadequate food and medical care, and mock executions were torture. So when you are -- we need this evidence that I'm talking about to address the actual legal standard in our controlling circuit for the implementation of 948r(a). Now ----

MJ [Col COHEN]: So help me understand. You addressed it, but I want to make sure I understand it conceptually.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: All right. So I understand showing a continuous course of conduct and the fact that the FBI then was theoretically tainted. I use "theoretically" because I don't want to make any conclusions.

LDC [MR. CONNELL]: Yes, sir. Of course.

MJ [Col COHEN]: All right. Theoretically was tainted by their involvement all along, and so, therefore, evidence was used. And so what the question then is, was it a true cleansing statement? All those other kinds of stuff down the road.

But now this new issue where you're talking about the torture and compulsion, all right, what would be the -- how

would you connect that with respect to, even assuming arguendo that the court adopted that -- that standard or even the government conceded and said: You know what? We're not going to contest that the -- that the conditions there would have constituted that the suppression of those statements made prior to 2007 should be suppressed or not used in this case in any way whatsoever.

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: Then even if those conditions existed at that time, how would those witnesses then be relevant to the issue of the FBI statements in 2007?

LDC [MR. CONNELL]: Yes, sir. And I see that I was not clear enough.

Our position is not that the CIA engaged in torture and other cruel, inhuman, and degrading treatment and then the FBI did something different; our position is that the United States, as a whole, had a plan, a scheme, or a program -- however you want to describe it -- to obtain statements from Mr. al Baluchi by torture and other cruel, inhuman, and degrading treatment.

One element of that overall program was the CIA -- were black sites. Another element of that were the specific policies which were put in place for the interrogation of

Mr. al Baluchi by the United States Government. You know, there was a -- there was a meeting in November of 2006 where representatives, all the IC, get together and decide how are we going to do these interrogations.

And when the -- what comes out of that is, well, we're going to give it to the FBI. And they set up rules for maintaining incommunicado detention of the defendants during that period of time so they couldn't get -- couldn't talk to their families, couldn't seek legal advice, prohibited lawyers from visiting them, and set up special rules which would not advise them of their right to counsel or to remain silent, and put that in place. And it was actually implemented by two FBI agents who interestingly had indirectly participated in the interrogations earlier.

But my actual point is that this is not two separate events, and it's -- I know that in the world, this has always been framed as two separate events. But when you actually look at the facts -- and I'm wholly committed to the facts, which is why investigation is so important -- when you look at the facts, you see that -- we intend to establish in an evidentiary hearing that this was one combined program of the United States Government, not that there was a separate -- a separation which would be subject to attenuation or derivation

analysis.

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

LDC [MR. CONNELL]: To the extent we do address involuntariness, its traditional derivation attenuation analysis and -- under the due process clause and under the statute, we really do that as an alternative position; that if our primary position of a single program to obtain statements by torture and other cruel and inhuman, degrading treatment is not -- the court does not find in our favor, we still think that we win under the attenuation analysis. But really that's an alternative position.

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

LDC [MR. CONNELL]: There are a couple of other elements to it. One of them -- and just to tie that back to what we're actually talking about here today, it demonstrates why it's so important for us to be able to investigate. Because the people who were administering that program, some of whom might be willing to talk and some of whom are not, some of whom have talked, our declaration explains that under one set of the restrictions -- not the ultimate Protective Order #4 but an earlier set of the restrictions -- we had already interviewed 75 people who would have fallen in within those restrictions who had agreed to speak with us.

Our success rate in having people speak to us is very, very high, something in the nature of 85 percent. That's not my opinion; that's all in the declarations. The -- that number would shrink -- and I don't have an exact number. That number would shrink under the -- under Protective Order #4, which has more limited investigative prohibitions because of overseas investigation.

But there are a number of other factors that go into that; one of those is brain damage. At 628 -- AE 628, Attachment I and Attachment J, we submitted and provided the government in discovery with all the underlying data that we have. We submitted the physical effect of the CIA's torture on Mr. al Baluchi, explaining how it actually caused him brain damage, affecting areas of the brain which would affect his ability to resist persuasion or make independent decisions that would be voluntary in deciding whether to speak or not.

I suspect that Dr. Mitchell will say something very similar when he testifies, which is one of the reasons why I consented to the idea of deciding our additional witnesses later, because I think that the witnesses who do testify will lay an important basis -- important groundwork for our overall argument.

With respect to our alternative argument about

voluntariness and derivation, I think there are two cases that illustrate the proposition. One of those is Mincey, M-I-N-C-E-Y, v. Arizona at 437 U.S. 385, a 1978 case that talks about how important it is to consider all of the circumstances in an interrogation, which includes things like the continuing effects of prior coercion, which we will document medically and otherwise; the length of the abuse; the severity of the abuse; the purpose of the abuse. All of those things matter.

In this case, the purpose of the abuse was in -- specifically to induce a state that the Department of Defense called interrogation compliance, which is that when you ask them things, will they tell you? And that's the state that Mr. al Baluchi was in in January of 2007 in -- when the FBI talked to him. The importance of the CIA program that induced that interrogation compliance, I think, is probably obvious.

I just have one example of where this analysis has prevailed and that I think that we have much stronger facts. But one example of where this analysis has prevailed is in Mohammed v. Obama at 704 F.Supp.2d 1, a District of D.C. case from 2009. Now, because that was on habeas, they used really a reliability -- their bottom line was reliability, whether the statement was reliable rather than whether it was

technically involuntary, but the analysis is exactly the same.

They ultimately concluded that it was unreliable because it was involuntary. And I think that it's a powerful roadmap. They don't have -- in that case, they didn't have anything like the evidence that I think that we can bring before the court if we can contact and interview the witnesses.

So the second question that you asked -- I hope that I've mostly just answered -- but is: How does all this fit into the posture of the case? Now, at this point, I don't think I'm being -- I'm giving away the farm if I say, listen, left to our own devices, this would probably not be the time at which we filed our motion to suppress. There are a number of issues, which I'm going to point out in the path forward, that I think should have been resolved first. But we've now filed the motion to suppress, right? So that's the posture of the case that we're in now. Whether I like it or not, I feel that we should go -- go with what we have.

And -- but I think it's a very good illustration -- both the strengths and the weaknesses of our 628 are a good illustration of the way that the process is supposed to work, with an iterative process between discovery on the one hand, input from the government, and investigation, the independent

activities based on the judgment of counsel into finding witnesses and talking to them. Because that's the core of what I do, is coordinating our investigative efforts.

And it always looks like what I do all day is write things and bring them here to the court and review discovery and stuff, but what -- the reason why the statute provides for learned counsel as opposed to just counsel who has been around for a long time is the key element of investigation into both the facts of the case, in this case meaning around suppression, but also into mitigation.

And because that's something that Judge Parrella addressed, I thought, substantially in his LLL ruling about -- and was one of the problems with Judge Pohl's ruling in LL, is how can these workarounds be adequate for us to put on an adequate case in mitigation but these workarounds the government proposes are not adequate for us to put on a motion to suppress?

I've always found that to be a fundamental contradiction in LL. It doesn't make -- that didn't make any sense to me. My reading of LLL is that Judge Parrella felt the same way, which is why, when he reconsidered the suppression, he also reconsidered the mitigation.

So the third question that you asked, sir, was, well,

doesn't this mean we should be having an evidentiary hearing anyway? Right? And this goes to the -- sort of the overall theme that I articulated of how do we know what the remedy should be? How does the military commission know what the remedy should be? And my answer is absolutely yes, we should be having an evidentiary hearing on the effects of the government's restrictions on investigation. I totally support that.

The problem with Judge Parrella's LLL is that it answers the wrong question. What we should be really doing is looking at a counterfactual. Set of facts A is what we have access to with the investigative restrictions in place; set of facts B is what facts we would have access to if we were not operating under investigative restrictions. And then the military commission would assess the delta between set A and set B and would make a -- decide does that make a difference.

That's what happens, for example, in habeas review when you have an allegation of ineffective assistance counsel, is you look at fact set A, here is the investigation that the trial counsel did; fact set B, here is the investigation that the habeas counsel did. What's the delta between A and B and does it matter? That's the prejudice inquiry: Does it matter?

The problem with Judge Parrella's analysis, in my view, is that it only analyzes the facts in set A, because we have no way to get to the facts in set B. And if we were to have an evidentiary hearing on what effects do these investigative restrictions have on us, it would be the closest we could get to assessing what do we think is in fact set B.

Now, this is not simply hypothetical. We actually asked for this. And if you look at -- or if I can refer the military commission to AE 524RR (AAA Sup) and AE 524HHH.

MJ [Col COHEN]: What was the second one, please?

LDC [MR. CONNELL]: HHH. 524HHH.

MJ [Col COHEN]: Thank you.

LDC [MR. CONNELL]: In those two briefs, we lay out, using declarations, the effect of the -- trying to use the alternative process that the government set up, the -- which I'll describe in detail a little bit more, but just to give you the highlights, the government set up an -- like an alternative workaround that is incorporated into Protective Order #4, and we tried to use it. Like if anybody gives us a tool, we try to use it. And it describes the actual effects, what actually happened when we did it, and what the effects of that have been on the defense.

And so HHH was our effort to bring witnesses, some of

whom were the FBI, some of whom were on our side, to describe the process as the government has set it up, so that instead of a hypothetical process, we could look at what are the actual effects of Protective Order #4 on the defense.

So to the extent that the military commission -- and I never take any question as foreboding anything, but to the extent that the question of, well, shouldn't there be an evidentiary hearing on the effects of the restrictions has been floated as an idea, I wholeheartedly endorse it.

Judge Parrella felt that the -- his solution meant that RR (AAA Sup) and HHH were moot. And I fundamentally disagree in that we still need that inquiry. It is just -- and I will tell you that 23 of the witnesses that we requested that are reflected ----

MJ [Col COHEN]: Why do you say that? What do you see in LLL as far as the ruling that -- like I said, it may be something that -- I've reviewed a bunch of stuff this week, so I just want to make sure if there's something you're seeing in LLL -- that along those lines.

LDC [MR. CONNELL]: Could I have the court's indulgence?

MJ [Col COHEN]: You may.

LDC [MR. NEVIN]: But, Your Honor, could I ask that you complete your question? I was interested in hearing what you

were going to ask.

MJ [Col COHEN]: Yeah, I was seeing if there was something -- he indicated that he had found that Judge Parrella's was -- I assumed you were referencing to LLL that somehow that then made it moot, and so I was wanting to make sure it was something that you saw explicitly in the ruling as opposed to something that may have been said in the record that I need to go back and review.

LDC [MR. CONNELL]: Fair enough, sir. Just one moment.

So if I could direct the military commission's attention to page 11 of LLL.

MJ [Col COHEN]: Is that the one -- you are on page 11. The first word at the top left corner is "consent"?

LDC [MR. CONNELL]: Yes, sir. Under Section 5.b.

MJ [Col COHEN]: I see where it says HHH is moot.

LDC [MR. CONNELL]: Right, HHH is moot. And then also in footnote 40, the military commission says, "In addition to being moot, the commission finds that the witness requests submitted by Mr. Ali in 524HHH is not ripe as the government has offered to propose edits to Protective Order #4 that may resolve some of the defense's issues with the procedure."

MJ [Col COHEN]: Copy. All right. Thank you. I just simply -- in reading that, but now that you give me context, I

appreciate it.

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

Well, you know, no one who read LLL thought that was, like, the focus of the ruling, but it is sort of an ancillary piece, and it's an alternative -- it's an alternative path to finding out how do you answer the question of what are the effects of these investigative restrictions.

All right, sir. With that said, I will move now -- and I'm just going to tell you -- footnote myself for a second and say that AE 609, trial conduct order, requires the parties to identify all relevant prior oral arguments when arguing a motion. And I'm prepared to do so now.

I don't -- this was a matter of concern to Judge Parrella, which is why he issued the order. Other than by our team, I have found it only to be honored in the breach. I have -- we, at some times, have tried to comply with 609 by filing in our proposed order of march, you know, these sort of long footnotes giving the prior argument. I don't know whether that's something the military commission wants to continue. If it does, then I will continue to comply, but I just want to tell you.

So I can tell you where these arguments have been argued before or I can skip that part. Your choice, sir.

MJ [Col COHEN]: I think for my benefit, in particular this week, that would be very beneficial. Thank you.

LDC [MR. CONNELL]: Thank you.

So the first relevant argument was with respect to AE 013FF on 20 August 2013 at transcript 4386 to 99.

MJ [Col COHEN]: Thank you.

LDC [MR. CONNELL]: Then the three motions which led to 524LL are 523, 524, and 525. The first argument was on 19 October 2017 at transcript 17023 to 73; then 20 October 2017 at 17179 to 223; then 10 January 2018 at 18521 through 61; then 26 February 2018, transcript 18803 to 35; then 1 March 2018 at 19028 to 124; then 20 April 2018, transcript 19246 to 451; then 1 May 2018, 19555 to 605; 3 May 2018, 19706 to 94; 23 July 2018, 19928 through 31; 25 July 2018, 20150 through 53; 15 November 2018 at 21583 through 752; 29 April 2019 at 22808 through 26; and 2 May 2019, 22995 through 3038.

MJ [Col COHEN]: Thank you.

LDC [MR. CONNELL]: Not the most scintillating argument I've ever made, Your Honor, but there it is.

MJ [Col COHEN]: Appreciate it.

LDC [MR. CONNELL]: When I said that the parties have been through an exhaustive and iterative process, I think the

number of times that this was argued really demonstrates that.

So let's move on to the history of this situation. What is the actual problem that the military commission is trying to address? Investigation is a process, and it's a process that is largely invisible to the military commission, because you don't know what we do when we're not here. You have -- unless we give you declarations telling you, you don't know what we're doing.

You give us the tools -- and this is true for every criminal case, every civil case across the United States. You make sure that the parties have the tools that they need, whether that's depositions in a civil case or an investigator in a criminal case, and then you trust them to do their job.

In 20 August 2013, the government explained that there were no restrictions -- this was actually briefed and argued. The government explained that there were no restrictions on defense investigation other than the ordinary criminal law of the United States. And the quote from page 4399 in the transcript is that, quote, The defense can interview any witness on any topic in any location on anything.

I always found that extra "on anything" to really sum up the situation, because it's not grammatically correct. But

Ms. Baltes was trying to make the point that we were unfettered and that our role in that process was to investigate however we chose. And if we did so foolishly, that was on us; if we did so wisely, that was on us.

For 64 key CIA witnesses, the prosecution produced a summary with a unique functional identifier, a UFI, for those witnesses with no identifying information. That's really the piece that counsel for Mr. al Hawsawi addressed.

But we made, on Mr. al Baluchi's team, an extensive commitment to investigation as the primary means of building a defense. And we extensively investigated the Rendition Detention Interrogation program as described in five declarations that we submitted to the military commissions. Those are AE 525C Attachment B, AE 524G Attachments C through E, and AE 525 (AAA Sup) Attachment B.

MJ [Col COHEN]: What was the last one, please?

LDC [MR. CONNELL]: AE 525 (AAA Sup) Attachment B.

MJ [Col COHEN]: Thank you.

LDC [MR. CONNELL]: And in those we explained that personal interviews are the key to consent, and we identified a number of factors. First, the witness can actually see you, right? Investigators are good at making a good first impression, right? That's -- whether they work for the FBI or

the defense or the DIA, that's their job, is to have -- is to look like a person you can trust.

It's critical to have personal interviews because they can show their identification. Look, I'm a real person. I really work for -- I have a legitimate reason to talk to you. It's important for them to build rapport. In the initial pieces of an investigation, you can talk to somebody, joke, you know, be just -- like a human being, and it builds rapport. It's worked for the FBI for the last 75 years at least.

The -- you can -- when we make personal interviews, we can reassure people of their safety. Look, I'm a person who -- we can make agreements with them. I agree not to tell anyone what you're about to tell me. I agree not to call you to court to -- reassurances of safety.

The -- they can also talk about -- work the old-fashioned social networks, who I know. "Oh, I know Joe. Joe told me that maybe I should talk to you," and that often helps. Demonstrating background knowledge helps in a personal interview; that you're not just some person who doesn't know what they're talking about; in fact, you know the topic.

And then perhaps most importantly for us, when someone needs to talk to us about a classified topic, we can

offer them a secure space. If they want to talk to us something secret, we can take them to a collateral space, whether that's at our office or we've used the military bases across the United States, or we can take them to a SCIF if they have something that is at the SCI level.

None of that can happen when a CIA and an FBI agent go out into the field to deliver a message that somebody asked you -- somebody asked to talk to you. And in my view, the difference between that personal investigation and a message delivered by a CIA and FBI officer accounts for the dismal rate of response that the government got; 5 out of 64 who agreed to talk to us -- well, 4 of those are dead. So 5 out of 60 versus the close to 85 percent rate that we normally get.

And so I think that this effort on -- my personal view, no one has to accept it, but my personal view as to the reason why we have these restrictions in this case and not in the other military commissions cases, which involve the exact same witnesses, is that that system was too successful on our part.

Because on 6 September 2017, apparently apropos of nothing, the government issued its first restriction prohibiting, I quote: Independent attempts to locate or

contact any current or former CIA employee or contractor regardless of that individual's cover status. And it required us to make a request to the government, and the FBI would approach. That's at 524 (AAA) Attachment C.

Now, at the time, this looked to me personally -- again, this is just me personally -- like a disaster; that it was going to really cripple us. And I sought the protection of the military commission in three motions: 523, the motion to compel the identities of witnesses hidden by pseudonym; 524, a motion to compel the government to produce the witnesses for interview or dismiss as a sanction; and 525, a motion to compel the locations of the black sites also hidden by pseudonym.

The importance of this was to place in sharp relief both our investigative efforts and what the government -- how the government was interfering, but it was also to propose some solutions.

Like the compelled interview underlying request in 524 would solve this whole problem. If we -- if we had compelled interviews using UFIs, which is what the government has put the classified information privilege over, then we would no longer have any complaints. If we had depositions, there would no longer be any complaints, which is why I keep

suggesting that as an underlying solution to this whole mess that we find ourselves in.

But then during closed argument on AE 525, on 20 October 2017, the military commission asked a question about what it means to confirm or deny black site locations. Basically by flying to a country and, you know, going around looking for things, are we confirming that we think that there was a black site there.

And on 17 November 2017, the government filed 525G, which prohibited almost all overseas investigations into black sites. That was argued on 10 and 11 January 2018, where, at transcript 18560, the government invoked classified information privilege for the first time and discussed criminal sanctions for not following those prohibitions at 18718 through 19. And that changed everything.

This was no longer posturing, in my view, by the government. This was now a criminal threat on one hand, but also the invocation of classified information privilege. So I implemented -- I stopped our RDI investigations, as required by the scope of the statements, and basically stopped developing that element of our defense.

During that January 2018, I continued to say: Look, I'm seeking compelled witnesses or depositions -- which I

still think is the best approach -- and the government directed me to brief it. And so that brings us to 524G. And that's the first thing that I want to flag and prioritize for the military commission as really summarizing both the law and the facts up to that point, up to 15 February of 2008 -- 18, excuse me -- that really summarizes, look, what are the -- what's going on here? What's the law that -- that governs it?

Again, on 28 February 2018, the government changed the restrictions. And they, at that time, said -- and this is important to how this all happened -- they said if the defense is unwilling to abide by those restrictions, they need to let us know. So in open court, I refused to agree -- to abide by the restrictions voluntarily, meaning you have to order me to do it or I need to be able to carry on around -- about my representation of Mr. al Baluchi.

And so that's how the ex parte protective order on 16 March of 2018 came into existence, which is 524L. The military commission ordered a draft to go to us, and that draft is at 524R. We responded at 524X.

At the same time -- so that's sort of the legal path that's going on. At the same time, we tried to work through the alternate procedures that the government proposed. We requested 44 interviews, and the government contacted 32

witnesses, and they got 28 refusals out of that and another 4 were dead. So we had a zero percent response rate at that time. And we put all of that into 524 (AAA 2nd Sup) to bring it before the military commission.

Skipping a whole bunch of other stuff, moving to July, by 23 July 2019, 5 of the UFI witnesses had agreed to interviews, but the government restricted the content of those interviews as well as the manner of those interviews by requiring that they be by phone. And that's laid out at 524 (AAA 3rd Sup) and 524JJ.

That brings us to 17 October 2018, when Judge Pohl issues 524LL and MM. And 524LL explained Judge Pohl's reasoning. He imposed suppression of the statements as a sanction because all of the workarounds, all the alternatives provided by the government, will not provide the defense with substantially the same ability, the CIPA standard, to investigate, prepare, and litigate motions to suppress as unrestricted investigation, but he held the contrary with respect to sentencing.

So this had -- I want to pause here and talk to you about the -- sort of the follow-on from this. This had second- and third-order effects.

The second-order effect of this was that the

convening authority determined that the statements were suppressed, and they stopped granting expert assistance to develop the strategies around the motion to suppress, whether those be subject matter experts or investigators or whatever. They stopped. They said: We are not giving any assistance because the statements are already suppressed, which lasted until April of this year.

The third-order effect is -- goes to Mr. al Hawsawi's point that much of the expert assistance that one would expect us to have we don't have at this point because the CIA was not entertaining requests for anything related to suppression because they said you don't need it anymore; it's already suppressed.

So the government asked to reconsider in 524NN. I think all of those briefs around the motion to reconsider are helpful, but ours is at 524RR, which we argued. And while that was going on, we continued to use the process in Protective Order #4.

And there are five -- there are a number of places that we described our experience by declarations at 524RR Attachment C -- actually, I think I gave you that list earlier, but just to give you a couple of examples.

First, one witness who voluntarily chose to speak to

us gave up -- we had the reliance of questioning that were within the scope of what the government would allow us to do, but we had to give up because it was too hard over the telephone. The person was not a speaker of English as a first language. And, you know, we had charts and stuff that we could show them or ask them to draw about the layouts of black sites and other things, but we just couldn't do it because it was too hard over the telephone.

There was another witness who said that she was perfectly happy to meet in person, that she trusted the defense. She knew that we were government employees or contractors, that we were TS//SCI holders, but the CIA had told her that it had to be by telephone; that was the ordinary way.

Once there was a video teleconference. The person had -- the government had told us that the person would agree to meet with us only in light disguise and -- but once we actually spoke to the person, she told us: No, I didn't want any disguise. I think this thing is ridiculous, and, you know, that's not what we do. That's like some kind of movie spy kind of thing.

And following up on that, we do have one additional interview left that is scheduled for later this month.

So skipping a bunch of other things that happened, moving forward to Judge Parrella issues 524LLL. And here's what I see LLL as doing. It keeps the Protective Order #4 restrictions in place. He did later modify it slightly on the government's request. I don't think that's really going to make much difference, but we can debate that.

He holds that Judge Pohl's remedy was premature. He reconsiders suppression. He also reconsiders the death penalty. And he ordered a motion to suppress on voluntariness grounds by 10 May 2019 to, quote: Assess the defense's ability to present evidence related to the voluntariness of the FBI clean team statements, and then by conducting an evidentiary hearing to fully explore the issue.

Now, in my view, this is a very strange posture to be in and this is why I think that you -- I am moving on to my next element as to why you should reconsider 524LLL.

First is, it is completely nonstatutory. We actually have a statute that governs this situation which is 10 U.S.C. 949p-6(f). And I know the military commission said that you are more familiar with CIPA, and this is the almost, almost exact equivalent of CIPA 6(e). 949p-6(d) is the equivalent of CIPA 6(c), except -- so that's about alternatives, right, the 6(c) in CIPA is about alternatives.

So except 6(d), under the military commission's statute, adds a line -- and that's the only difference between the two statutes on this point -- which is that that additional line is, there's a third option: Any other procedure or redaction limiting the disclosure of specific classified information.

And that's where we are operating, is -- 949p-6(d)(3) is -- this is an additional procedure. That's what Protective Order #4 is. It's not a statutory procedure but it's one authorized by statute, which is why I led with the government gets to make this decision, not me.

Now, when the government makes that decision, there are generally consequences. And those consequences are what are found in 6(f), in 949p-6(f) or CIPA Section 6(e), and that's my critique of Judge Pohl's ruling, 524LL; that Judge Pohl tried to balance the government's national security interest with the defense investigative interest when, instead, what he should have done is articulate the consequences.

Like, he doesn't get to second guess the government's decision on invoke classified information privilege any more than I do. And what he should have said is: The government's classified information is absolute, and it has the following

consequences. I impose this sanction, and then let the government decide which one it wants more.

But, instead, he undertook the balancing analysis that properly should have been the government's analysis with its own absolute classified information privilege and the decision -- and the consequences.

And that's why, for example, Protective Order #4 is actually narrower in scope than what the government asked for originally, than any of its sort of lead-up, negotiated, iterative decisions; and that is why, if the military commission had denied the government's motion to reconsider, it would have a right to an interlocutory appeal because it -- the military commission had denied elements of the protective order that it had asked for.

And so because what it asked for was this broad and what Judge Pohl gave them was this broad -- and I'm making a smaller gesture, for the record -- the government would have a right to interlocutory appeal. And that might have been a better way to proceed, but we are where we are.

And so Judge Pohl's partial relief was statutory, however. Specifically, in 949p-6(f)(2)(B), one of the alternatives -- so the primary -- one of the alternatives to dismissal, which is the primary sanction, one of the

alternatives is finding against the government on an issue to which the evidence relates, which is what Judge Pohl did, is he found against the government essentially on the voluntariness of the statement because we did not have access to the information that the government asserted classified information privilege for.

I felt that the default remedy was dismissal, which is right there in the statute. I sought that in 524 and developed it in 524G. But the alternative that I asked for was compelled interviews. Like let's find out what the people have to say, and then we'll know what they have to say. Right? Even in our current situation, compelled interviews would resolve the question of how do you decide the remedy because we would know ----

MJ [Col COHEN]: What would be my authority, though, to compel the interview?

LDC [MR. CONNELL]: Sir, that is laid out in 524G. Judge Pohl asked me the exact same question, and I briefed it. And so rather than wing it, I'm going to direct you there to 524G ----

MJ [Col COHEN]: I'll go there. Thank you.

LDC [MR. CONNELL]: ---- because I briefed the five military court cases that give you authority to compel ----

MJ [Col COHEN]: Copy. Thank you.

LDC [MR. CONNELL]: ---- this witness.

All right. So the second problem, we've already addressed. There's no control group for fact A. If we're assessing fact set A, there's -- there's nothing to compare it to under Judge Parrella's approach. There's no control group. There's no null hypothesis. You know, if you look at it in a scientific way, there's no -- there's no place to measure the delta.

What it essentially does is imposes a prejudice requirement on the defense. Please show that what you were able to develop was not good enough without giving us any mechanism to assess that prejudice. And it's like a ineffective assistance of counsel claim on habeas, where there was no ability for the second counsel, the habeas counsel, to do any investigation. You don't know what you're comparing to.

And so that leads to this kind of bizarre -- like the fundamental critique that I have of LLL is that it's so bizarre because facially, it's win-win for the defense. If we win the motion to suppress, the statements are suppressed. If we lose the motion to suppress, it shows that we didn't have enough information, and so we should win under 524.

And because that's such a facially ridiculous approach -- like if you were going to take that approach, you would just go ahead and grant the motion to suppress, which is what Judge Pohl did. But what that means is that, in my view, 524LLL cannot mean exactly what he said. Because, otherwise, if he was assessing that delta by how good fact set A was, we would always win because there's -- because fact set B is unknowable under these circumstances because of the government's indication of classified information privilege. It could -- it's potentially infinite, so that can't be right.

But what it does do is punish the defense for diligence, because normally a court rewards a party for diligence. But the fact that we scrape every summarized scrap of information and put it together with the results of our pre-2018 investigation and put it together into a 200-page written motion -- the government likes to call it 1200 pages -- a thousand pages of those are attachments.

But the government uses that in 628B as proof. Well, look, we had plenty of information because look at what a good job they did; well done. That's the exact opposite incentive that should be done, which is, the parties should be encouraged to be diligent whether it's in reviewing discovery, whether it's an investigation, whether it's bring their best

arguments before the court.

The -- it also, however, allows -- while all this is going on, it allows the government to continue to maintain to block access to the witnesses through a variety of ways. And I fundamentally have to part ways with the military commission in its description of this as being a question about discovery. I hope that I've illustrated through my conversations that this is fundamentally an issue about investigation, not about how good the discovery is.

But there is -- there is some small role for discovery in this. And that is, you know, the government has, through discovery process, limited our ability to know who the UFI witnesses are. That's separate from the witnesses that we could develop on our own. We can't interview them. And in 628C, the government refuses to produce any of them as witnesses. So essentially it allows the government to place an entire half of the relevant witnesses just completely outside the universe that the defense could have access to.

But it also means that potentially there would be no sanction whatsoever for the largest investigative prohibition ever considered by any court. The -- and there are, you know, a couple of cases. I just want to give you sort of the controlling D.C. Circuit precedent, which is

Gregory v. United States at 369 F.2d 185, a D.C. Circuit case in 1966 on equal access to witnesses, which is -- I'm, no doubt, very familiar to the military commission because it's the same standard that gets applied in the military.

In that 524G, we lay out -- we go through all the military cases about restrictions on access to witnesses. Whether it's analyzed as unlawful command influence -- you don't talk to the witnesses in your case -- or whether it's analyzed as a fundamental fairness question and equal access to witness questions, the military cases have considered it in a lot of ways, and on every situation, they have said that it is illegal to limit defense access to witnesses.

And then, finally, the issue with the -- 524LLL is that it offers no mechanism to test the adequacy of the mitigation investigation. Right? Because Judge Parrella's ruling raised two alternative possible remedies -- one, striking of the death penalty; one, suppression of the January 2007 statements that -- but offers no mechanism whatsoever to address the mitigation part of that.

When you look at 524RR, our original position on the motion to reconsider, we asked for reconsideration, too. And when we asked for reconsideration, it was to say, well, look. You should impose -- you should strike the death penalty. And

so with respect to mitigation investigation, the military commission would not have the opportunity to see fact set B that I keep talking about, but neither would it have the opportunity to see fact set A because the sort of context that we would put this information in to talk to the members about would never be before the military commission. So it strikes to me as a poor way.

Now, we complied obviously -- moving on to my next segment -- we complied, obviously. 628 is our motion to suppress. 628C is our motion to compel witnesses. And there are some witnesses who apply to multiple in defendants. Perkins and Fitzgerald, Mitchell and Jessen are all examples. And there are two changes that have happened that would, if it were necessary, justify a reconsideration since 524LLL.

One is that the government said that it might make changes; it did make those changes, amendment to Protective Order #4, and the military commission adopted it. And the government said it might produce a proposed stipulation.

On 6 June 2019, it did send us that stipulation, and we are working it. We have three people doing the analysis of that stipulation right now. And I will tell you, the early returns are that we will -- that some elements of a stipulation will be acceptable to us. We're working on what

parts we think we can stipulate to, what parts we think needs to be done live evidence.

There was a fear, I think, the government expressed that, Oh, they will never accept any stipulation. That's never been my position, but different parties have different things they want a stipulation, and so we're working on it.

MJ [Col COHEN]: Which is one of the reasons why I think we need to address the motions individually.

LDC [MR. CONNELL]: Yes, sir. That makes a lot of sense.

And there's one aspect of that that you should know about specifically, which is that the government's proposed stipulation downgrades an enormous amount of information. There are a lot of paragraphs, for example, which originally, when we received them in discovery, were marked TS//SCI, let's say hypothetically, with no paragraph markings. The government, in their proposed stipulation, has marked a large number of paragraphs UNCLASSIFIED. That came as a surprise to us.

So what we did was we submitted the government's proposed stipulation along with our 628 for classification review so that, for the guidance of the CISOs and for our own guidance, we can know what in this is classified and what is not. And so that when we return our stipulation, we can

properly mark it.

Under the military commission's order in 118M, they have 60 days to complete that. We received it on 6 June, and within a week, we had submitted for classification review, so...

MJ [Col COHEN]: How many witnesses have the parties been able to agree to produce?

LDC [MR. CONNELL]: They have agreed to 12 of our witnesses. I understand that 8 of those overlap with witnesses that they would call anyway; and that the government says that it expects there to be 18 witnesses that are either produced by the government for their own purposes or produced at defense request.

So it's my understanding -- and just so -- you know, Mr. Trivett approached me and we discussed -- like, he made the initial, like: Here is how I think that might work in September. He's given me a -- what is 628I, which I think you may even have.

MJ [Col COHEN]: Okay. Mr. Connell, one second. I saw Mr. Trivett stand.

LDC [MR. CONNELL]: Oh. I'm sorry, sir.

MJ [Col COHEN]: Mr. Trivett?

MTC [MR. TRIVETT]: Yes, sir. I just wanted to correct

the record. There are 18 witnesses. There's 2 that overlap, not 8.

LDC [MR. CONNELL]: Oh, I'm sorry.

MJ [Col COHEN]: Okay. But 18 witnesses in total, correct?

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: All right. Great. Thank you. Gentlemen, I appreciate that.

LDC [MR. CONNELL]: So, you know, for what it's worth, we're working on it.

MJ [Col COHEN]: Okay. No, and I'm pleased that the parties are working together.

LDC [MR. CONNELL]: So where does that bring us? To me, we have here a terrible problem, that the Military Commissions Act and sort of adversarial system generally, whether the due process clause applies of its own force or not, but that sense of an adversarial system allots roles to different parties, and the prosecution is supposed to do their investigation through the FBI or NCIS or whoever they're using, and the defense is supposed to do their investigation through whatever their means available to them are.

The second half of that, the defense -- in this area, this RDI area, the defense has been crippled from conducting

those investigations. So to me, the solution to this has never been obvious. I have my proposed solution, which is compelled witness interviews, or you could tweak that slightly and say depositions under R.M.C. 702.

The commentary to 702 actually says depositions are an appropriate solution when one of the parties has interfered with the ability of the other party to access the witness. And that's specific to the R.M.C. 702, not even the R.C.M. 702. So I think that even if the military commission doesn't agree about compelled interviews, a deposition is a very close approximation of that.

MJ [Col COHEN]: And have you addressed whether or not I have the authority to order a deposition in this case?

LDC [MR. CONNELL]: So I mostly addressed ----

MJ [Col COHEN]: You referred -- I believe you said 524G would be the one to look at.

LDC [MR. CONNELL]: Right. I mostly addressed the compelled interview question. I would be happy -- I didn't brief it specifically under R.M.C. 702. I would be happy to do that. To me, it's not going to be a tough brief to write because 702 is quite plain about the authority of the military commission to order a deposition. And, as I mentioned, the commentary even sort of seems to anticipate this situation of

where one party has interviewed with the ability of another party to conduct an interview.

MJ [Col COHEN]: Okay.

LDC [MR. CONNELL]: So I would be happy to brief that question.

MJ [Col COHEN]: I will take that under consideration. I am not ordering it at this time.

LDC [MR. CONNELL]: All right. So what is the correct approach? The default under 949p-6(f) that I have discussed is once you have distorted the adversarial process, it is impossible to know exactly what second- and third-order effects that has. So that's why I think -- that's why I asked for dismissal originally. I think that it would recognize the true cost of distorting the adversarial process, and I think that that would allow the government to weigh the true costs in making its decision as to how it wants to go.

Just to be clear, 6(f) puts in place that -- a specific process for that, where it is essentially you issue a sanction, but that sanction does not go into final effect until the government has had the opportunity to seek reconsideration or to conduct an interlocutory appeal.

So the statute really takes into -- that weighing function of the government into effect -- into account,

rather, by you propose a sanction and then they get to consult their -- amongst themselves and with their colleagues and then make a final decision as to what to do.

The alternative I think to that is to put the defense in the closest possible position to where we already would have been. I talked about 524G and the compelled interviews. I talked about depositions.

But for the non-UFI witnesses, right -- those were for UFI witnesses. For the non-UFI witnesses, the people who we have identified through social networking or otherwise, but the government may not even know exist, the -- I have proposed a solution to that, and I proposed that at -- on 2 May of 2019 at transcript page 22822 - 24. And in a nutshell, that solution that I proposed is for those witnesses who are not known to the government, that the government has already drafted a statement of rights and responsibilities that has to be delivered to witnesses who fall within this category when a request for an interview goes to them.

And so what I proposed is when we approach a witness who falls under this category, we would provide them with the government-approved statement of rights and responsibilities, and then we would file ex parte with the court basically a statement of: Here's the person we approached. We gave them

the statement of rights and responsibilities. And so the military commission could -- we wouldn't be out there operating entirely on our own.

The military commission would have oversight in case a problem arose -- there would be accountability for us -- and would accomplish the government's articulated goal of advising people of their rights and responsibilities. I don't mean to be flippant, but this advisement of rights strategy has worked for the government in Miranda cases in -- you know, since the '60s or before for Article 31, which goes back to 1950. So those are solutions in my mind.

And the last thing that I want to address is what's the path forward on this. And to be honest, I am going to describe some things that I think the military commission needs to do and some things that we need to do on the defense.

The first of those is -- and I briefed this in 628G. I mentioned earlier that I submitted it for filing on 13 June. It's not yet been -- not yet accepted for filing. I don't know if you are allowed to look at it on the side or exactly how that works exactly, but everyone else in the courtroom has seen it, and I put all the citations to this in there.

But the first thing that I think the military commission needs to do is to rule on 524PPP and MMM so that we

will all know -- everybody will be in a common place as to what the framework is.

And the second thing, and this is also sort of a high priority, is the military commission has before it a document called AE 538L/AE 561I. This is a substitute -- proposed substitution from the government about some information about the CIA-FBI connection.

The government submitted it sometime ago, has supplemented it twice and amended it once. So this ex parte pleading, I don't get to see it, but I do know what it's about because the government, in its discussion of the status of discovery, said we are almost complete in producing all the FBI discovery to the defense that we intend to except for this 538L, and so once that is complete in July, we can argue 538 and 561, themselves.

The process was we brought -- we negotiated with the government, got what we could get, brought these motions. The government agreed to produce additional information, and then we need to argue 538 and 561 as to the delta between what they have produced to us and what we think they should produce to us. And that will give us the information that we need to cross-examine the witnesses hopefully in September, if we all move with dispatch.

There are three other motions pending, which are fully argued and the -- unlike 538 and 561, which are not fully argued; these three are -- have already been submitted for decision and just need rulings from the military commission.

They are 523N, which is about the identities of witnesses outside the UFI framework. When the military commission ruled on these, there were some witnesses who sort of fell through the cracks of the order, and the military commission has not addressed them one way or the other. That's what that is about. AE 513, which includes, among other things, the 17 September 2001 memorandum of notification that sort of sets the framework for the CIA RDI program. And then 286, which is about the SSCI Report which contains a great deal of information about our clients.

So those five things are what I think the military commission can do on a path forward to move us toward being able to litigate this.

MJ [Col COHEN]: Let me ask you a question ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: ---- with respect to 524MMM and 524PPP.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: If I accepted your framework that there

needs to be some kind of evidentiary hearing where you can do -- where we can endeavor to find A and somewhat a B and then compare that delta. How do you foresee that that would impact the rulings on 524MMM and 524PPP from a defense perspective?

LDC [MR. CONNELL]: Yes, sir. The -- you could, in fact -- so one of the things that we know about 524LLL is that it is still under reconsideration, right? The reconsideration was merely deferred in some ways, and we don't have final rulings on what that reconsideration will be. So, to me, that kind of procedurally opens up options for the military commission because we already have a reconsideration, and we are just deciding how to implement that.

The -- if you were to pursue that option, to me, the main element that needs to be altered -- and if I could have the military commission's indulgence for just one moment?

MJ [Col COHEN]: You may.

LDC [MR. CONNELL]: I've gotten old during the course of this hearing, Your Honor, so I need reading glasses now. I was young when we started.

MJ [Col COHEN]: That's all right.

LDC [MR. CONNELL]: On page 11, the military commission says: The commission will direct evidentiary -- this is the

part of the ruling -- The commission will direct evidentiary hearings to address the voluntariness of FBI clean team statements.

The -- that is sort of the operative sentence. And if that sentence said, instead -- and there might be a little bit cleanup, but that's the key piece. If that statement said, instead, the military commission will direct an evidentiary hearing on the impact of these investigative -- the impact of Protective Order #4 on defense investigative efforts, then that would provide a framework by which we could propose witnesses, we could go through the ordinary evidentiary hearing process to bring before the military commission the elements that we see and whatever elements the government sees, of course, as impacting that decision.

So, to me, that's the sort of key part of the ruling that would need to be changed. You wouldn't really have to change all the reasoning; you would just need to change what the immediate direction would be.

MJ [Col COHEN]: Copy. Thank you.

LDC [MR. CONNELL]: And then as the final piece, I just wanted to give you sort of where we are today.

MJ [Col COHEN]: All right.

LDC [MR. CONNELL]: Which is that in connection with the

523 series and the 330 series, which we haven't talked much about.

On 17 April 2019, the government revealed the contact information for somewhere around 120 witnesses who have treated the defendants at JTF, the so-called medical witnesses. And we are working our way through interviewing those witnesses. Basically, every single one has agreed to meet with us that we've approached so far. Our goal is to do that within six months.

I don't think that is a condition precedent to the motion to suppress because the motion to suppress is going to take a while, and, you know, we could bring -- we could ask for additional witnesses as we discover them under this government framework.

The second thing is that we have submitted to the convening authority our request for the funding of expert witnesses. We did so -- we did not take advantage of the ex parte process. We thought these are expert witnesses for a hearing; the government is going to hear them anyway. We might as well, you know, give them the declarations and give them the CVs and just move forward with that discovery process. So that's pending before the convening authority right now.

There are three remaining discovery disputes about what needs -- about discovery for RDI. One of those before -- fairly minor but before the military commission in 635. It's not fully briefed yet but will be shortly.

A key discovery dispute is about dates. The government took out all the dates out of the substitutions, but then the classification guidance changed. And so since that time, the CIA has been issuing a large number of cables, some of which overlap completely with our cables or are the same cable but with the dates intact. So we're going to talk about the dates. We're preparing our motion and will file that by July 12th.

And then the relevance of the CIA treatment of Abu Zubaydah and Majid Khan has been an ongoing discovery dispute between the parties. And the government and I have scheduled a meeting tomorrow to try to bring some final resolution to that question where I'm going to bring -- here are the documents that I think that we should -- that should be produced, and they're going to consult with their authorities on that.

And so assuming that does not get to a satisfactory conclusion from our point of view, we will file a motion on that shortly.

MJ [Col COHEN]: Okay.

LDC [MR. CONNELL]: So those are the three disputes.

The fourth -- and I know this is long, but the fourth is AE 575 on which there's been a major shift in the government's position within the last two weeks. I can't say anything else about it because the underlying information is classified, but I think it will be covered by the closed hearing.

And we're working on a stipulation, fifth.

And with respect to any other grounds that we have for suppression, other than voluntariness, because we do have some other grounds for suppression of these statements, my goal is to get all those motions filed so that any evidentiary inquiry that needs to be made with respect to voluntariness will have substantial overlap with, say, a Miranda claim or an Article 31 claim.

MJ [Col COHEN]: Right.

LDC [MR. CONNELL]: And so we can -- my goal is to get all of those before the military commission so we just do -- assuming there's a suppression hearing, we just do them once.

MJ [Col COHEN]: Copy. Right.

LDC [MR. CONNELL]: And so, sir, you've been very patient with me. I greatly appreciate it. This is really the deep

end of the military commission's swimming pool, and I really appreciate your patience and attention.

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

So I will go ahead and just give -- explain probably the most likely way forward. I'll go ahead and hear Mr. Nevin's comments on 524PPP. We'll recess at approximately 1230 hours.

Mr. Trivett, if you -- I'll give you as much time as you need to argue. So if we need to come back after lunch and take up your argument, that seems the most likely way.

We're going to get through the open session motions today. If we need to push the closed session into tomorrow -- there was nothing on the schedule for tomorrow, so I don't think we're in violation of my order that we -- indicated that we would hear open session and then have a closed session, so I feel comfortable moving that way. But we will take care of all the issues we intend to take care of this week.

Is there any objection from the prosecution with respect to that way forward?

MTC [MR. TRIVETT]: No, sir.

MJ [Col COHEN]: Okay. Any objection from the defense with that way forward?

It's a negative response from all defense counsel, it

seems. Okay.

Mr. Nevin.

LDC [MR. NEVIN]: Your Honor, thanks for letting me address 524PPP. It overlaps with some of what you've already heard. And thanks, also, for asking the questions -- I'm thinking really of the ones you asked Mr. Ruiz -- because when you do that, you -- you know how that works; it gives us the opportunity to have a sense of where you're coming from and ----

MJ [Col COHEN]: Right. Yeah. Like I say -- like I say, it's never indicating that I'm ruling a way, but there are questions that I have, and I want to make sure that I understand the nuances ----

LDC [MR. NEVIN]: Right.

MJ [Col COHEN]: ---- application of the law to the facts is nuanced.

LDC [MR. NEVIN]: Right.

MJ [Col COHEN]: And we all recognize that as attorneys, and so -- I do the same thing for the government as I do for the defense, is help me understand the nuances. Make sure I grasp the true nature of what you're arguing.

LDC [MR. NEVIN]: Right. And it's useful for us, too, because there's no sense arguing about left field if what

you're interested in is in right field. And maybe we can convince you you ought to be interested in left field but ----

MJ [Col COHEN]: Exactly.

LDC [MR. NEVIN]: ---- at the very least, we can also talk about what's in right field, and so, you know, it's useful.

And it's magnified here because, as you can see, when I listen to Mr. Connell, as I frequently do, running down a list of all the places where this has been argued already and all these -- I didn't count them as we went, but it looked to me like probably something on the order of 500 pages of transcript.

And you have come here, and I -- we heard you during the voir dire process saying that you wanted to get all this under control and to go forward in an intellectually honest way, and I think in some ways, this illustrates how daunting a task that is.

So anyway, let me say something really basic that we've already talked about implicitly. Mr. Mohammad was in the CIA's RDI program. He was tortured, by any reasonable use of definition of the term "torture"; and that was something that lasted for three and a half years, including the period of incommunicado detention, until he was delivered here in September of 2006.

And it's about four months later that the 2007 letterhead memorandum statements that are at issue to a certain extent are -- actually are not at issue in the motion that's in front of you, but they would be at issue in a suppression hearing.

So the reason I mention this is not to -- although, I want to direct your attention to 630E, which is our reply on the motion to suppress, which lays out in some detail -- in really summary detail, lays out some of the details of Mr. Mohammad's treatment in the torture program, and also AE 628, the base motion, 628, which has a long statement of facts that Mr. Connell referred to. So that's where you can get a pretty good primer on what happened in -- at least as we understand it, in the RDI program.

The second thing to understand is that that treatment is a primary factor of -- is relevant in a number of ways to issues that are present here. And the first and most obvious one is it's relevant to mitigation.

And that's important in understanding Judge Pohl's decision to say I'm excluding these statements for purposes of -- I'm granting this remedy for purposes of litigation of a suppression motion but not for purposes of mitigation. You have enough -- you have enough information to make out a

mitigation case, not a suppression case; and I think that's something that we need to debate at some point, but it clearly is relevant for both things.

But it's also relevant in a speedy trial motion, which speedy trial deals with not only the extent of the delay but also the treatment of the person during the delay. And it's also relevant to motions related to outrageous government conduct, because activity like this -- concerted activity like this on behalf of the government against an individual defendant has really literally never occurred in the history of the country.

So I was happy to hear you say, when I was talking to you during the voir dire process, that you were a process person. And Judge Pohl said something similar; I think he said "process guy." But if I understand you correctly, and the term means that you follow a process and that -- and when you do it correctly, and when you do it the way that you do it for everybody, and what you get out of that is justice, to say it in very general terms.

But, I mean, you asked -- for example, you asked Mr. Ruiz, if you're having a hearing -- in other words, if we're going to have a hearing on this, how can that violate due process? And my answer was, it violates due process

because you have -- you've got a situation in place where we're not able to prepare for the hearing.

So we have something that looks like due process, the opportunity to be heard, but because we're not allowed to prepare for the hearing, it's, in fact, illusory, and it isn't, and it doesn't actually achieve due process. But it's not just due process either, it's the Sixth Amendment as well, it's effective assistance of counsel, it's fair trial, it's the opportunity to present a defense, and it's the Eighth Amendment as well, the right to be free from cruel and unusual punishment.

So for years and years -- I think maybe Mr. Connell said it pretty nicely when he stood up. The first thing out of his mouth was, "Never, in the history of this country, has there been a restriction like this on investigation." This is the first time in the history of the country.

And what he's saying, to connect it to what I'm saying is -- and for a process person -- the way you get to fair outcomes -- the way we've defined it in the United States of America over a period of 200 years, the way you get to fair outcomes is you follow this process. And so now, for first time in history, the proposition is let's don't follow that process; let's do something different. And that's where this

is the -- like the linchpin; this is the hinge point that you're sitting at right now.

So one of the things that we wanted to do to have -- so that it would be in front of you in a concrete way was to talk about where our obligation to investigate comes from, and we spoke of the ABA Guidelines for the defense of death penalty cases during the voir dire process. It's writ large and unmistakably clear in Guideline 10.7 but also in many other places within the ABA Guidelines. It's in the Rules of Professional Conduct; it's Rule 1.3, the requirement of diligence.

We address this in AE 525I, like India, and in attachments from expert witnesses who described the duty and the process of investigation. It's in Powell v. Alabama, really a case from long before -- long before the modern death penalty jurisprudence, saying that the right to counsel in the pretrial investigation stage, not at trial, is every bit as important as the work that's done at trial. Because that's what you see. You see the cross-examination. You see the objections. You see the arguments. But what you don't see is the work that's done beforehand, and you don't see, for example, the work that Mr. Connell is talking about having done in this case.

So -- but that -- but what Powell is saying is that that's every bit as important as the things that you do see at the trial. And you have been a defense lawyer for some period of time, and you know that the way you win cases is not to simply stand up and make an argument, it's the work you do beforehand.

So -- and we have also pointed you to the modern death penalty cases beginning in around -- well, I guess you could say they really begin in 1984 with Strickland v. Washington, the seminal ineffective assistance of counsel case.

And what they say is -- I mean, the government makes an argument -- in response to our motion, the government makes an argument that you're not entitled -- the defendant is not entitled to a perfect trial. And the Supreme Court is addressing that in Strickland. And you have to remember that Strickland and many of these cases are post-conviction cases.

So after there's been a conviction, the parties are coming in and saying: Well, here is what was wrong with that. And the court imposes certain standards on that, and they say things like: Well, you're not entitled to a perfect trial, you are entitled to one that's fair. But we are back here. We're back at the time when we can still do this right and get

it right, and that's an important distinction.

But these -- but these -- the modern death penalty cases that deal with these subjects with investigation beginning in about 2000 are Williams v. Taylor -- these are all cited in our brief, but you probably have seen some of these cases: Williams v. Taylor, Wiggins, Rompilla, Porter v. McCollum, Sears v. Upton.

This is case after case after case after case after case where the Supreme Court is saying: Wait. You didn't do an investigation. That's ineffective assistance of counsel, because we don't know what the correct outcome is, but we know that the way you get to the correct outcome is by doing the thing that you are required to do, to investigate.

So that's why it lit up -- at least this side of the room -- a lot, when the process that Mr. Connell described to you began fairly late in this case of saying: No. Wait. You can't talk to those people. You're not allowed. You have to come through us. You can't even walk up to them in the Piggly Wiggly, in a grocery store parking lot; you can't approach these people at all and talk to them. You have to come through us. And that's the part that Mr. Connell and that I'm saying has never happened in a court before. Okay.

So -- and, you know, the view from 10,000 feet is

that it leads to all the litigation in 524. And as counsel -- both my colleagues have pointed out is that this resolves into Judge Pohl saying: Here's how I'm going to resolve this. And he does this in 524LL. And he says: This does not put you in the same position that you would -- here, Government, here is your Protective Order #4 which you asked for, with some changes to it, but here is your Protective Order #4. But this doesn't put the defense in the same position they would be if they had access to the original, to access to what you're excluding them from, so I'm not going to let you use the letterhead memorandum statements. But it does put you in the same position you would be -- to be in to make a mitigation case. And you understand the quarrel that we have with that. But that's what -- that's what Judge Pohl did.

So let me start by saying, first, when Protective Order #4 crystallizes and comes into the picture, it's in 2017. It's under the Trump administration, and it's under the -- it's at a time when the matter is under the direction -- the CIA is under the direction of a new leader, of a new director.

And I respectfully direct your attention to the litigation in AE 579. I think we see some of the tailwinds of what is described in AE 579, much of which is classified and

so I won't speak to it directly, but I do ask you to review that and to give that some thought about how we end up with something that looks like Protective Order #4.

So the problem is -- or one of the problems with Protective Order #4, and Judge Pohl's reaction to it is that he refers to the suppression of the -- he calls them the clean team statements, which, in my view, begs the question that would be present in a motion to suppress, so it's not ripe for a judge to call it a clean team statement. That's the question. Is it a clean -- is it clean? Right. So anyway, I call them the letterhead memorandum statements.

But anyway, Judge Pohl says they're suppressed. And some prescient defense lawyer was quoted in the *Miami Herald* as saying it can't be suppression, we didn't file a motion to suppress. And that's right. We had not filed a motion to suppress. It wasn't a suppression in the traditional sense of analyzing suppression. And it was, in fact, a remedy under CIPA, under 505, under the military commission's version of CIPA. It was, in fact, a remedy -- a sanction, rather, for the government having taken the position of saying you're not allowed to talk to these witnesses.

And I agree with Mr. Connell; the government can say that. They can invoke the classified information privilege

and say you can't talk to these witnesses. And so -- I don't want there to be any confusion. I don't think the government should do that. I don't think it's right for the government to do that.

I think the reasons that -- and when I say "the government," I mean -- I don't mean the men and women sitting here to my right. I mean the government, itself. I don't think it's right for them to hide this information from the public and from -- and certainly not from the litigants in this case. But I agree they have the right to do that. And I agree that neither I, nor you, nor Judge Pohl, nor Judge Parrella have the right to tell them "I order you to change that."

But what you can do, and what Judge Pohl did, was say: Here is a remedy that I'm going to impose, a sanction I'm going to impose if you take this position.

And so we're not talking about suppression here; we're talking about ----

MJ [Col COHEN]: Do you agree with Mr. Connell, then, that the government should have been provided the opportunity to consider that before the actual sanction was imposed?

LDC [MR. NEVIN]: Well, and that is -- we addressed that extensively in our response to the government's motion to

reconsider 524LL. And my view was that, in effect, they did go through that process.

MJ [Col COHEN]: Okay.

LDC [MR. NEVIN]: They had a variety of even ex parte communications with Judge Pohl. And my sense was that the requirements of 505 had been satisfied. And that's laid out in more detail in that briefing, Your Honor.

MJ [Col COHEN]: Thank you.

LDC [MR. NEVIN]: Yeah. So -- so Judge Pohl excludes the letterhead memorandum statements and the government moves to reconsider, as I was just saying. And Judge Parrella, in 524LLL -- and this is where -- you remember I got up yesterday and -- at the 802 and I said: Wait, wait. That's -- I don't think you -- I want you to at least hear me out on why you're -- the way you're conceiving of where we are right now might be incorrect.

So ----

MJ [Col COHEN]: I took no offense by that.

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

And so, anyway, that's where we are. Because I take it that 524LLL is a mechanism for resolving the question in 524; otherwise, it would have -- otherwise, it would have been a freestanding order that just said here's the deadline for

filing motions to suppress. I've decided it's time to hear motions to suppress, and they'll be filed by X date and, you know, within Y date, there will be a response and so on. It would have looked like that. But that's not what it was.

It's in 524. It is designed to resolve the question of whether or not -- the restrictions that have been placed on defense investigation, what the impact of those restrictions are.

And so I heard you and Mr. Connell debating in some detail what a hearing -- what the correct style of hearing would look like, and I agree with him. If it had said -- if the judge had said: Let's have a hearing and talk about what the restrictions in Protective Order #4 -- what effect that has on you versus no such restrictions, that would have made perfect sense to me, because that would have allowed you to answer the central question in 524. But, instead, it -- the order is to litigate a motion to suppress.

So that's why I called it a trial run. And at one point during argument, Mr. Connell referred to it as a thought experiment. So you say, okay. 524LL said this keeps you from litigating a motion to suppress, and you obviously agree that it keeps you from litigating a motion to suppress. Let's do one and see how you do.

And everybody probably understands the idea generally of a trial run. You -- can you run five miles? I don't know. Why don't you give it a try. And I can either run five miles or I can't. And many other examples could be offered. And in each of them where something like that could happen, the test that you imposed would be capable of resolving the question that was unanswered.

The problem here, and it's the thrust of our motion to reconsider of 524PPP, is that arguing a motion to suppress now can't possibly resolve the question in 524. The question in 524 is: What effect does Protective Order #4 and the restrictions on investigation have on you? That's the question.

If we go and hold a motion to suppress, there are only two things that can possibly happen viewed in one way. One is that we marshal enough evidence so that you say: Yeah, I think you've carried your burden -- or I think you've kept them from carrying their burden -- actually, to say it correctly -- and the statements are suppressed.

The other option would be that you look at it and you say: Well, I think the government has carried their burden of showing that those statements are voluntary, so I'm not going to grant the motion to suppress because the defense didn't

present enough evidence to counter their evidence.

In that situation, there's no way for you to know whether our inability to do that is because there's just not any other evidence out there that we could have used to oppose their arguments or whether the reason that we don't have more is because of Protective Order #4 and the restrictions on our investigation. There would just be no way to sort that out.

So it's in this sense that -- it's in this sense that we argue that this is an exercise that cannot possibly resolve the question that's presented. And the only way you can resolve the question that's presented -- and, you know, short of living your life twice or, you know -- I mean, I guess we could litigate this case all the way to a conclusion with Protective Order #4 and then come back for another 10 or 15 years and litigate it all the way through without, and then you could compare the results, which is -- I mean, I'm being silly, obviously.

My point is, there's really no way, short of holding a hearing, taking testimony on the question of what does Protective Order #4 do to the defense, as -- just as Mr. Connell was suggesting; that if you do that, then you can get yourself into -- "you," meaning the military judge, can get -- the finder of fact could be in a position of answering

the question: What's the effect of Protective Order #4?

So you asked Mr. Ruiz: Why is this relevant to a motion to suppress? Why is this whole question of Protective Order #4 even relevant to a motion to suppress?

And I think this has been -- I think this has been touched on, but let me just say it directly: The treatment that Mr. Mohammad received during the torture program is directly relevant to the voluntariness of his statements in 2007, to the letterhead memorandum statements.

I think this was said a couple of times in -- somewhat in a glancing way, but I want to say it directly. The purpose of the program was to induce learned helplessness. It was to create an environment in which when someone asked these defendants a question, they just answered them. They understood that as their obligation. This is litigated in our -- this is addressed in our reply to the motion -- to the government's response to our motion to suppress.

So -- but it also touches on another aspect of something that we will perhaps get into when we argue 630A. We took Judge Parrella at his word that this was about voluntariness, and there's -- and, you know, 304(A)(B) -- (2)(B), just the question of whether or not these statements were voluntary. There are other grounds for suppression other

than that, which we do not address in our motion to suppress, but just on that question of voluntariness, what was done to Mr. Mohammad during the course of his treatment in the torture program renders his statements involuntary.

Now, there are a number of other cases, and you will see them in our reply in the motion to suppress, that deal with other aspects of that, but for our purposes here, it's important for us to be able to prove up every aspect of what was done to him in the black sites.

This is the language from the Old Chief case, a syllogism is not a story. So in other words, meaning -- I've always imagined that the government would like to say like President Obama did: We tortured some folks. Let's move on. We don't really need to talk about the details.

And there's a Palestinian poet, who's a famous poet, who says one of the ways you marginalize people is you tell their story beginning with the word "secondly." So you say, "Well, secondly," and you leave out all the stuff that is first.

In order for us to convince you that the torture program could have made statements made months later involuntary, we have to be able to tell you what happened in detail; and the more detail we can give you, the more likely

we are to convince you.

And so that's -- I know that when I say that, I'm speaking in terms -- I'm bumping up against the Rules of Evidence the way they define relevance, because the details of this are what are critically important. It's not enough just to stand back and say: Well, there was torture. And, of course, since there was torture, therefore -- whatever the proposition is we are arguing from. That's not the position we want to be put in. And due process requires that we not be put in that position, if that makes sense.

MJ [Col COHEN]: It does.

LDC [MR. NEVIN]: So I also had the observation that another counsel made, I think Mr. Connell, that you had said it all comes back to the motion to compel more evidence. And strictly speaking, that's true; but, again, the way it works in the United States is that it's done by way of investigation, and that we have this obligation independently and thoroughly to investigate the case and to develop our own evidence.

MJ [Col COHEN]: I do. I understand the nuances that the defense is presenting.

LDC [MR. NEVIN]: All right. Thank you.

So that leaves me just with, quickly, touching on the

government's counter arguments that were made in 524 -- in their -- in 524TTT. And I submit that in TTT, they don't address really what was the central issue in our motion to reconsider, which was the fact that you won't be able to tell if we don't -- if we don't overcome the government's evidence about suppression, you won't be able to tell whether that's because there is no evidence out there or because we were prevented from getting it by Protective Order #4. That just never really gets talked about.

Instead, I submit that what the government does in 524TTT is they go back over the reasons to reconsider 524LL. So, for example, they say that -- they make the argument that the court -- that the military commission may impose limits on defense activities in order to protect classified information. Nobody quarrels with that proposition. And they cite Dhiab v. Trump and Sedaghaty and Rezaq. And these are all noncapital cases; none of them involve torture, none of them involve restrictions on investigation such as what we have here. They argue that CIPA's manifest objective is to protect an accused's rights and also to protect classified information. Again, no quarrel with that. In fact, that's what Judge Pohl did in 524LL.

They say that -- then they make two arguments that I

think really are exceptional and, on their face, incorrect. One is that a court may limit mitigation evidence, and they cite Oregon v. Guzek for this proposition.

And you and I spoke about mitigation the other day briefly during -- during the voir dire process, and I would just say that the notion of limiting mitigation evidence up front to me, it's so bad that it actually becomes good, maybe; and it fills me with a kind of an uncertainty about how to proceed, because I think really, if we are going to go that way, then none of this is going to have any legitimacy at the end of the day.

I think just simply -- and I don't mean to say that I would sandbag the military commission, but I direct your attention to AE 367B, Bravo, which has an extended discussion of the scope of mitigation and AE 525I, which I mentioned before, which also contains a discussion of mitigation.

And just, you know, since Guzek was cited -- Oregon v. Guzek was cited by the government, it's a residual doubt case, by which I mean Guzek gets convicted of murder, notwithstanding his mother's alibi that she provides him. So she gets up and says, "No, he was with me," and the jury convicts him anyway, and he gets sentenced to death. He goes up on appeal or on post-conviction -- I don't remember, it's

not important -- but he gets a new sentencing hearing.

And in the new sentencing hearing, he wants his mother to testify live again that he didn't really do it because -- and he's relying on the idea that this could raise a residual doubt. And the residual doubt doctrine is one that's -- it's had a checkered history, let's just say.

But the Supreme Court says, no, you don't have to let her testify again, because now we are just talking about the sentence, we are not talking about guilt or innocence, but her testimony is going to be in front of the jury with the transcript of the original trial. So they are going to have that testimony anyway when this new jury decides the case. So, yeah, you don't have to let her testify.

And, you know, that is so unlike our case and going beyond the proposition that there's never been a case like our case in terms of the restrictions and in terms of the torture that the government imposed. That case has nothing to do with our case.

And then finally, the government's final argument is that Protective Order #4 doesn't actually restrict anybody from doing anything. And I -- you know, it almost boggles the mind to think how to answer that because, as we have said now repeatedly, no case has ever done this before.

There's never been a case like this. And it does hide the names. These are critical eyewitnesses, percipient witnesses to -- to the torture of our client, a central mitigating feature of the case. And we're not told their names; we're just given these -- we're given these unique functional identifiers. Their names are hidden. We're not allowed -- if we've figured out their names or their identities independently, we're not allowed to call them up on the phone and say, "Hey, could I chat with you?" So it is clear that -- that that argument, that Protective Order #4 doesn't really restrict anything is incorrect.

So -- but really, to return -- I mean, the central problem is -- with this is that the exercise of going through a motion to suppress for the reasons I've stated can't possibly resolve the question that 524 presents, and that's the reason that we filed our motion to reconsider it.

So thank you for hearing our arguments.

MJ [Col COHEN]: Sir, I understand your arguments. Thank you very much.

Given that we're going to continue today with unclassified, I'm going to go ahead and put us in recess until 1430. We'll return at that time.

[The R.M.C. 803 session recessed at 1244, 20 June 2019.]

[The R.M.C. 803 session was called to order at 1430, 20 June 2019.]

MJ [Col COHEN]: **[No audio feed.]**

Mr. Trivett, with your concurrence, you're going to address both 524MMM and 524PPP; is that correct?

MTC [MR. TRIVETT]: Yes, sir. I was informed by Mr. Harrington that he had to address the commission and Ms. Bormann may need to address the commission before argument.

MJ [Col COHEN]: That will be fine.

Ms. Bormann.

LDC [MS. BORMANN]: Thank you. It's actually on the matters. I have argument on 524PPP.

MJ [Col COHEN]: Okay. All right.

Mr. Trivett, I'll allow her to have brief argument before the government goes, then.

LDC [MS. BORMANN]: I don't want to say I feel like chopped liver, but I feel a little like chopped liver.

MJ [Col COHEN]: I apologize for that. Not the commission's intent.

Mr. Nevin.

LDC [MR. NEVIN]: I will say, Your Honor, I quoted our response to 5 -- AE 524NN, which is a government pleading. I

think I did it incorrectly.

MJ [Col COHEN]: Okay.

LDC [MR. NEVIN]: The correct citation is 524QQ.

MJ [Col COHEN]: Thank you.

LDC [MR. NEVIN]: Thank you for letting me in.

LDC [MS. BORMANN]: And I have the same problem with numbers that Mr. Nevin has, so forgive me if I misquote. But the good news is, I don't have any notes in front of me, so I intend to keep this brief.

When we began this argument earlier this morning, I -- the first thing that you said had to do with "Explain to me" -- and you were speaking to Mr. Ruiz -- "why it is that what happened here matters here." And then later on, you used the word "tainted" and then you used the word "cleansed"; and all of that is language involving the law on attenuation. And I get it, because as defense lawyers, when we have many motions to suppress, and the issue is involuntariness, that is often the issue. Here, it's not.

And I, like probably nobody else in this courtroom, have had some experience, because I come from Chicago, with dealing with statements that have been tortured out of people.

So -- and when we talk about 524PPP and why you need to reconsider it, I want to explain why that should be.

MJ [Col COHEN]: Please, ma'am.

LDC [MS. BORMANN]: So I had a case of a guy charged with murder, and it was in a downstate county. I started my career in Chicago, and the Chicago Police Department has an unfortunate history of torturing African-American men. I received the case after my client had been picked up by the Chicago Police Department.

So when he came into custody, he had some bruising about his body and had complained to me that he had been picked up by the Chicago Police Department and then five days, later turned over to the State of Illinois Police Department -- that is state troopers -- who eventually, as it turned out, took statements from him. Those statements implicated him in a series of two murders.

So I began my thought process about attenuation. How do I show that what happened in Chicago Police custody affected what happened with the Illinois State Police, these nice guys over here? And when I went to this downstate county to try to litigate this issue, the government refused to provide the discovery from the Chicago Police Department.

The Chicago Police Department fought the subpoena, because there, we had subpoena power. We, defense attorneys -- fought the subpoena, so I had to go in front of

the judge to ask for a motion to compel. In order to do that, I needed to have something more than just my client's word.

So I hired an investigator. And I had, thankfully, a client who could remember that general description of the lock keeper in the jail in Chicago where he was brought to freeze intermittently because they would leave the windows open, where he was hosed down and then he would be taken into an interrogation room where he would be hit, and then he would be taken back and denied food, and he was kept in isolation, so forth and so on. That happened for about five days.

So the lock keeper had a schedule. Because the way Chicago worked, is they work on three watches. So this particular lockup keeper was on a particular schedule. So I was able to put together a plan -- an investigation plan, and I sent my investigator to go stake out this particular police department. And sure as heck, there's a guy that fits the general description who comes out of that particular police district at the right time; and thankfully he was amenable to talking to my very experienced criminal defense investigator.

And they sat down, and they talked about whether or not he remembered my client, and he did. And what he remembered was that the Illinois State Police had been present watching the interrogation -- and when I say "interrogation,"

what I really mean is torture -- of my client at the hands of the Chicago Police Department. And my investigator said, "Well, how can you be sure?" He said, "Well, they were in uniform," state trooper uniforms.

And then I used that information in a motion to compel before the judge, who then ordered the Chicago Police Department to turn over the records.

What we got from the records was a treasure trove of more information that we began to investigate even further. Because at that point, the Chicago Police Department didn't want to turn over the background records of the detectives who had tortured my client, so I had to make the argument that there was significant evidence of torture.

So I was able to hire, and did early on, a medical doctor to review the photos of the bruising and talk to my client and give a medical opinion. And then I was able to send an investigator to go talk to other people who were on the shift at the same time as these detectives were beating my client. I was able to get corroborating evidence that, in fact, those detectives worked then. I got their duty sheets to show that they worked extra hours during the time period my client said they did. And I was able to find out that they used an evidence technician -- they don't call them that in

Chicago anymore but a guy who takes photographs.

So we then subpoenaed the evidence technician's photos and found that the detectives who had tortured my client had actually tried to cover it up by taking photos showing that, you know, my guy was in good shape when he was given over to the state police. But instead, they showed various portions of his body swollen.

After that happened, then we found out that the Illinois State Police officers had, in fact, signed in in that area and, more importantly, the Chicago Police had been present at the time that the Illinois State Police later interrogated my client.

So we had -- instead of two separate interrogations, we had Illinois State Police over here, who basically set up my client to be picked up on this bogus warrant, helping do the interrogation, which was only on the murder case; it wasn't on the underlying warrant at all. My client told me that. It was a robbery or something. He said, "They didn't even ask me about the robbery." They were only asking about this murder.

Then after the Chicago Police Department softened him up, I suppose, he was transferred to a different location where two different officers he had never seen but who had

viewed the interrogation over here came in and cleaned up.

We were able to prove every little portion of that. And as a result of our investigation, we filed a motion to suppress. It's the first motion to suppress that I put on that had nothing to do with attenuation. This will be the second, if we ever have to get there, because it's one long, continuous interrogation.

And I know you're new to the case, and I know you haven't read the discovery, and I'm sure you haven't read the 200-page motion that Mr. Connell was able to cobble together, but I'm here to tell you, please don't buy into the government's words on this. The words "taint," "attenuation," and "clean team statement" shouldn't be part of the vernacular in this case because they're not substantiated by the facts.

And without the ability to investigate what happened to my client in that case, I never would have -- what eventually happened is the government indicated that they were not going to use those statements because it became so bad, the judge put pressure on the prosecution to do so.

So this system doesn't allow for that, as far as I can tell, but what it does allow for is for you to make proper remedies and proper sanctions when the government prevents us from getting those photographs, from getting the name of the

lockup keeper, from interviewing the lockup keeper, from then filing motions to find out the names and get the complete discovery of everybody who was on the shift with those detectives who would have lied without our investigation.

Then their 524 protective order, Protective Order #4, would have barred me from then speaking to those shift people about what they saw and what they heard. Protective Order #4 would have barred me then from going to the Illinois State Police Department and asking them about whether or not they saw the Chicago Police officers there and whether or not they cooperated with them, all of which eventually resulted in an acquittal for my client.

So that's what we're looking at here, and that's why it's important. Subject to your questions.

MJ [Col COHEN]: No, ma'am. I thank you for giving me that context. I appreciate it.

LDC [MS. BORMANN]: Thank you.

MJ [Col COHEN]: Mr. Harrington.

LDC [MR. HARRINGTON]: Judge, labeling is very important in any kind of a message you want to convey. I think we've seen that from our President. I think we have seen it from Fox News and other news agencies.

But I don't know where the term "clean team" came

from or "cleansing statements" came from, but those are -- if they came from the prosecution, kudos to them, but the fact that Judge Pohl or Judge Parrella or you would use them I think is wrong. The fact that we have not -- as the defense, have not complained about this more vigorously is shameful.

But determining whether they're clean or dirty is a conclusion, and I think that it needs to be removed from the vocabulary of any orders or any other discussion about this. We're talking about statements. And right now before the court I believe is an issue of voluntariness with respect to those statements.

MJ [Col COHEN]: Yeah, I will just go ahead and address that issue now. The idea of cleansing statements is something that is routinely used within suppression motions within the military justice system. And whether that occurs or didn't occur, it should not be any indication from the court that I find that a cleansing statement actually happened or didn't happen. But I understand the request. But I just wanted to make that very clear.

It's just something that's in my general vernacular of the law related to this issue of involuntariness and whether or not -- if you have, like, for example, someone who did not get a rights advisement prior to making statements and

then they want to go back and do that. I would say that's not within the jurisprudence of the military justice system but other jurisdictions as well.

But it is not meant as a loaded statement that I have made any indication as to whether, one, a cleansing statement was ever given; or two, whether it would have been sufficient in any way, shape, or form. So whatever the vernacular is, it is not intended to indicate any ruling by this court or opinion as to what did or did not occur.

LDC [MR. HARRINGTON]: I appreciate your caution in making the record, Judge, and I didn't mean to imply that you had gone there. I just meant to imply that psychologically, when we start using those things, we fall into that pattern, and it's not right.

MJ [Col COHEN]: I understand.

LDC [MR. HARRINGTON]: Judge, when the Miranda decision came a few years after it came out, I was a puppy lawyer. That's how far back I go. So the detectives that I first dealt with were the ones who were very used to using roughhouse tactics to get statements out of people, and it took a long time for Miranda to take hold.

And we've progressed to the point in the United States where many states, including my own, now require video

and audio taking of statements. And it's not just the statement that the person gives; it's from the time that they come into custody until they finish their statement so that there's a record of it. And what has happened is that 90 to 95 percent of the issues with respect to voluntariness or rights waiver or anything like that is gone because of the videos.

In this particular case, we have a situation where we need to present to the court on the issue of suppression that is in front of you evidence of what happened to our clients at the black sites. And amazingly, this is a backward situation here. There were videotapes of some of our clients at the black sites and things that happened to them which have been destroyed or lost or hidden or whatever, but they're not available anymore to use, something that the legislatures and the courts in the United States have progressed to. We have a situation here where it existed, and our government has seen fit to take it away.

And then we have the situation where the argument is made by the government that the Constitution doesn't apply, Miranda doesn't apply, right, so now we're taking away the constitutional rights also. So that the situation is backward, and it has regressed.

And, Judge, there are many phases to what has happened to our clients in the black sites. It's not just a question of whether people were tortured, but, for example, my client was held in custody in those sites for four years. And it's not just an issue of what it was that was done to him; it's the fact of repetition of questions. And how do we present that to the court without witnesses?

And no court has ever said the burden for that falls upon the defendant to testify and to prove that. That's never been the way that our jurisprudence has done it, to say nothing of the fact that our clients were held in isolation, didn't have notes, didn't have records when the people that were doing this to them did have notes, did have records. So that you get the issue where the repetition of the same subject matter or the same question provokes a Pavlovian response.

So when our clients come to Guantanamo, and four months after they are get here, they are brought into rooms and asked by federal agents -- they think CIA and FBI is a big distinction; it's not a distinction to our clients -- and asked the same questions or the same subject matters, that goes to attenuation. It goes to the question of voluntariness. And so the reason that all of us have argued

so hard about being able to interview these witnesses, it's important to prove each and every one of those elements.

You asked a question this morning about connecting the conduct or the torture to the FBI agents who took the clean team statements. And again, I'm not accusing you of making some judgment or something like that, but that question presupposes the acceptance of the concept of attenuation here. Like starting off with the fact that there is attenuation and saying to us, the defense, you have to disprove that.

The government has the obligation to come forward for a voluntary statement. You have affidavits and pleadings in front of you that describe what happened to our clients. And the burden for voluntariness to the government should be coming forward, not just on what happened in these rooms here at Guantanamo and that. They should be coming forward to disprove -- or to prove attenuation -- I'm sorry, to prove attenuation, not to disprove attenuation. That should be a concept that they have to come through in these circumstances to affirmatively prove.

And so we are now in the position where the prosecution gets to be the gatekeeper of the evidence and the gatekeeper of the witnesses and the gatekeeper of who it is that we can call as witness to you where we have to prove

relevance and materiality with respect to each of these witnesses. I'm not saying it's a threshold we can't meet, but the system is totally unacceptable if you look at it from the context of the way that American courts would handle these situations.

Judge, I have told my friends who are judges -- I actually have some, many of them who are very conservative judges, many of whom have no problem denying my motions to suppress evidence -- just basic things about these cases. They just roll their eyes and say: What are you having a hearing for? These statements shouldn't come in.

I'm not saying that affects you in any way; I'm just saying that's the image of what this system is. And if there's going to be a light on a shining hill out of here, something has to change in terms of the way that this is set up.

Judge, and then with respect to the scope of the hearing, I know that Mr. Connell represented to you that he is going to file papers with you because he wants to litigate all the bases of suppression that he might have. I don't know what the other defense counsel have in mind with what theirs are. We're not prepared to do that. There are many other things that we need to investigate to be able to do that.

We filed a motion in front of you because Judge Parrella ordered us to do it. That's why we did it. But I would also say to the court that if you're considering expanding Judge Parrella's -- the scope of Judge Parrella's order, that would be modifying his order; and there's been no motion by the government to modify his order or to reconsider his order to the extent that it applies to more than just the issue of voluntariness, and I think that the court is limited by that in these circumstances.

Thank you.

MJ [Col COHEN]: Thank you, Mr. Harrington. I appreciate it.

I understand that I may do things a little bit differently than -- than the previous two judges. That's probably inevitable that I will do things a little bit differently. My style, as you have noticed, is to periodically ask questions to understand the nuances and understand the issues that are out there. I think it allows you to -- as suggested, to address issues that may be on my mind, questions that I may have.

As Mr. Nevin articulately put today, I may be looking pretty hard in right field on a particular issue, but that doesn't mean left field doesn't matter; and it would be

appropriate for you all to address left field and help me understand why something like that is significant.

But at the same time, this is probably the only time that I have, other than just going back and forth in briefs, to ask questions and to get the parties to address specific issues. And I would prefer to spend ten minutes addressing an issue now than spending the next, you know, two months going back and forth in brief and sending out specific issues for you all to brief and those types of things.

I may change my mind not because of anything that's been done here today, but just because it may not -- it may work out that a different method works better for this case given the complexity and the number of responses, et cetera.

What I am meaning with all sincerity is, is when I ask questions, I don't have a -- the reason is because I want to know. I want to know the issue. It's not because -- I want to understand the issue. I want to make the right decision in this case, period. And whatever the law and the facts tell me to be the right decision, that's what I want to reach. Whether that helps the prosecution or helps the defense, it's irrelevant to me, period. That is not my role in this process, and I understand that. And if I felt any differently, I would recuse myself right this very second.

So, please, if you will indulge me, we'll see if this can continue to work, but you're also welcome to do exactly what you did. And I don't -- I do not take offense by saying, "Hey, when you use this word, it presupposes."

You're right. Oftentimes questions have to -- there have to be some type of theoretical predicate upon which the question could be asked. So you probably heard me say at least a dozen times already, "Assuming arguendo that these are the facts, how would this -- how would this be related to something?" And the reason for that is, is that's because I haven't made a decision that those are, in fact, the facts.

But issues more -- and the last thing I want to do is be back there and trying to issue a ruling saying I don't really understand this nuance. And that's just me.

So to the extent that I work with the parties to reach the right decision, that's kind of the way I see this. I work with the parties to reach the right decision. That's the sole intent of asking questions. All right.

Are there any other comments by the defense?

That's a negative response from all defense counsel.

Mr. Trivett?

TC [MR. RYAN]: Your Honor, may I step outside for one moment, please?

MJ [Col COHEN]: You may, sir.

LDC [MS. BORMANN]: Judge, as a point of clarification. If one of the attorneys needs to step out other than me, do you want me to stop and ask you? Like sometimes -- as you can see, we're a little lean here today. Sometimes we need a document that we couldn't print off because the network was down this morning, things like that. So I don't want to interrupt ----

MJ [Col COHEN]: No, my -- I hold judicial privilege extremely close, but I have no problem disclosing this. I was told that I should expect there will be multiple moving pieces during this trial, and there have been, which is completely unusual for how I would be handling, indeed, the well of a courtroom in a normal case.

I appreciate you asking. Mr. Ryan just asked that question -- I think I got his name right. That was perfectly fine, too. But do not feel obligated to do so, especially if it's in the middle of an argument or something like that. I definitely don't want to interrupt arguments, those types of things, because someone needs to get up and get something.

LDC [MS. BORMANN]: That was Judge Pohl's ruling, and I'm going to abide by that. Thank you.

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

Mr. Trivett.

MTC [MR. TRIVETT]: Good afternoon, Your Honor.

MJ [Col COHEN]: Good afternoon.

MTC [MR. TRIVETT]: I want to reorient the commission to what 524MMM and 524PPP were, and they're simply motions to reconsider Judge Parrella's order in 524LLL.

They were filed by Mr. Hawsawi and Mr. Mohammad; by operation, they were joined by others. But really what happened for the last four hours was a redo of the argument they made in front of Judge Parrella. I would invite the commission's attention to those arguments. I think you'll find that they're remarkably similar to the ones that you just heard and ultimately were rejected by Judge Parrella.

All of the defense arguments boil down to this fact: They really don't like CIPA, and they really don't like M.C.R.E. 505. Once you get past that point, you'll understand that there is nothing constitutionally infirm or statutorily infirm about Protective Order #4. There are no new facts and there are no new law to justify reconsideration of Judge Parrella's ruling.

Counsel both stood up -- I believe it was Mr. Nevin and Mr. Connell -- and indicated that this was the first time any such limitation has ever occurred in the history of the

United States. That sounds pretty ominous; it's just not true.

So in the case of United States v. El-Mezain and others, which was a Fifth Circuit Court case in 2011 ----

MJ [Col COHEN]: How do you spell the last name?

MTC [MR. TRIVETT]: Sure. It's M-E-Z-I-A-N **[sic]**.

MJ [Col COHEN]: Thank you.

MTC [MR. TRIVETT]: It's cited in our briefs. And part of the struggle with preparing for today's argument was how broad and wide 524 can be if it's not circumscribed to just MMM and PPP. But it is in our moving papers; it's not the first time we've cited this case.

So in Mezain, the United States used two witnesses who testified under pseudonym from Israel. They were affirmative case-in-chief witnesses, and the defense was not given their names. So take that back for a second.

Everyone who's implicated by Protective Order #4, all of the unique functional identifier witnesses, they're not our witnesses, and it's not even accurate to call them witnesses at all. At most -- at most, they are potential witnesses.

There is also no right that I'm aware of under law that the defense has for pretrial interviews. So if you take those two things together and you compare it to El-Mezain, if

El-Mezain was found to not violate any constitutional provision, no Sixth Amendment rights were denigrated, then certainly Protective Order #4 under these circumstances do not violate any of the statutory rights that these accused have under the Military Commissions Act.

But I want to give a few facts just so the judge understands what was permissible in El-Mezain, which was denied cert. by the Supreme Court in 2012. So it's a Fifth Circuit case, 2011, cert. denied 2012.

A legal advisor for the Israeli security agency testified as an expert witness about Hamas financing and control of certain committees within finance -- within Hamas. The other witness who they called, Major Lior, which was a pseudonym, was employed by the Israeli defense forces and testified as a fact witness to authenticate documents that IDF had seized during a military operation known as Operation Defensive Shield.

The District Court ruled that the witnesses could use pseudonyms because revealing their true names, quote, would jeopardize national security and pose a danger to the safety of the witnesses and their families.

So what did the defense argue on appeal in El-Mezain? The defense argued that the use of pseudonyms violated the

defendant's Fifth Amendment due process right and their Sixth Amendment right to confront witnesses. That sounds familiar. The defendants contend that they could not verify either witness' credentials or investigate them for prior acts undermining their veracity. They could not present opinion and reputation evidence about their character for untruthfulness, and they could not develop other impeachment evidence. All of that sounds familiar from this morning as well.

The court ultimately held that a District Court's limitation on the scope of cross-examination is reviewed for an abuse of discretion. You have a right to cross-examine certain people, but it's not an unlimited right. They also considered that witness safety was a factor in another case involving the balancing of classified information regarding someone's identities. They cite to the Marzook case, which is at 412 F.Supp.2d 913. Marzook is spelled M-A-R-Z-O-O-K.

MJ [Col COHEN]: Thank you.

MTC [MR. TRIVETT]: So in reviewing this case, when the District Court conducted a balancing of the interests and concluded that there would be no disclosure of the witnesses' true names, it held that defendant's interest in obtaining the names of the witnesses is outweighed by the government's need

to keep the information secret. The Fifth Circuit said we agree.

First, we conclude that there was a serious and clear need to protect the true identities of these two witnesses because of concerns for their safety. Furthermore, the witnesses' names are classified under both Israeli law and American law; and as noted by the District Court, the true identities of the witnesses were provided to United States authorities with the expectation that they would be closely guarded and kept secret. When the national security and safety concerns are balanced against the defendant's ability to conduct meaningful cross-examination, the scale tips in favor of maintaining the secrecy of the witness' name.

So this is not the first time the United States has ever prevented the true names of certain people to the defense. But again, these are not prosecution witnesses. While we have Giglio and Jencks obligations for witnesses we intend to call, we have no such obligations for witnesses the defense tries to call. But they have been provided information within the 10-category construct that would help them develop cross-examination on certain issues going to bias, should they choose to do so.

In AE 397F, which is the original trial conduct order

from Judge Pohl, he ordered the prosecution to provide 10 categories of discoverable information. Amongst these 10 categories were the identities of medical personnel, guard force, interrogators -- and that includes psychologists, psychiatrists, mental health professionals, dentists, et cetera -- who had direct and substantial contact with each accused at each location.

He also ordered employment records of those individuals limited to those documents in the file memorializing adverse action and positive recognition in connection with performance of duties at one of the facilities.

So the defense has certain information because Judge Pohl ordered us to provide certain information, although legally, certainly under a Giglio or Jencks analysis, we would not have been otherwise obligated to do that unless they were our witnesses.

So much of what Mr. Connell argued had been in his previous filings, and I thought about objecting at some point just because we were far afield from the specific arguments made in 524MMM and PPP, but I thought better of it, and I said it looks as if the commission is thankful to get this background. And Mr. Connell always does a very good job of

procedurally summarizing what has occurred in the litigation.

But I think the best way for us to sort of give you the history of where we were at and why we did what we did is through an explanation of our understanding of the national security privilege and how we intend to assert it. And the best way to describe it is actually Judge Parrella's order in 523M, and that's dated 2 April 2019.

And if you'll indulge me for a minute, I want to read specific sections of it and then talk about how the privilege has to work if the privilege has any worth to us at all.

MJ [Col COHEN]: Counsel, just one moment. I want to make sure I have pulled that up.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: I have it.

MTC [MR. TRIVETT]: As background, while you pull that up, sir, 523M was the ruling that accompanied Protective Order #5, which allowed for the unique medical identifiers to be used in lieu of true names for the JTF-GTMO medical personnel.

In part of his ruling he states: The evidence offered by the government in support of its motion proves a real and substantive threat to the safety and well-being of medical providers should their true names or contact information be disclosed to detainees or the public. This

threat extends to the family members of those medical providers. Furthermore, the threat is persistent and unlikely to abate over the course of this litigation.

So he found that having true names, that there was a classified aspect of it that required protection for the medical providers at JTF-GTMO, which are qualitatively different than the covert officers implicated by the UFI order; that their safety required that their names be provided in such a way to uniquely identify them for purposes of court. There is a distinction because the defense had the real names of the medical providers. I don't want to mislead you on that.

But his second line, when I read it in April -- and we usually get opinions on Fridays. That's generally the way that the commission works. So on Fridays, we anticipate the rulings, and we know that we're going to have to act quickly on some of them. And when you have been through over 680 of them, you tend to lose your excitement a little bit when they come in.

But I was as excited as anything, for any order that I got, when I read 523M, and it's because of this line, because I believe this is the first time the United States Government was able to completely explain its position and

have it adopted by the military commission. And I quote: Current and former JTF-GTMO medical providers associated with detainee care are potential witnesses who possess knowledge of classified and sensitive official government information belonging to the Department of Defense and have signed nondisclosure agreements. These potential witnesses learned this classified and sensitive information in the course of their official duties. The government retains an important interest in maintaining control over the disclosure of some information and will be afforded an opportunity to advise these current and former government employees of their rights and responsibilities as potential witnesses and holders of classified and sensitive official information prior to disclosure to the defense.

Now, Judge Pohl ruled -- Judge Parrella ruled on Judge Pohl's order. This was the first time that Judge Parrella was considering the protective order in and of itself, but the guts of it, the legal guts of it and the need to protect the classified information, I submit to you, sir, are the same in Protective Order #4 and Protective Order #5.

He also examined our proposed advisement. He wanted to ensure that there was no inadvertent appearance that it was either encouraging or dissuading witness participation. And

he importantly said: Informing the potential witnesses of rights and responsibilities as contained in the commission's modified advisement appropriately protects the flow -- the flow of classified and sensitive information without unreasonably impeding defense access to witnesses or evidence.

Now, I know I took a little detour there from 524 to 523, but that encapsulates and is the best encapsulation of the government's position on how the national security privilege has to work if it's going to matter to us.

So I know Your Honor has worked in a bunch of courts-martial over the years as both defense counsel and prosecutor and judge for the last five. I suspect you may have had some involvement, but not a lot of involvement, with the national security privilege, but I'm certain that you're aware of the implications of the attorney-client privilege and the attorney work product privilege, the marriage privilege, the doctor's privilege.

I submit to you that although those privileges are important, and they are, they pale in comparison to the importance of the national security privilege. Because, in the end, the national security privilege, if violated, can have grave damage to the national security of the United States. And while if a privilege is violated anywhere, it's

wrong, there are remedies that can fix those privileges if those privileges are pierced. There are no remedies that can fix the national security privilege. If the damage is done to national security, it's done.

So we've always been able to convince the commission that we have a national security privilege over classified information that are in documents. And we've turned over 15,000 pages, I believe, to the defense, approximately, that have gone through an indication of the national security privilege and a request for substitutions or statements admitting relevant facts in lieu of whatever else is in those documents.

What we've had difficulty doing until now, until 523M, is convincing the commission that somehow the classified information that resides in someone's head who worked for the United States Government isn't also subject to the national security privilege. That's why we fought like dogs over the Touhy application.

And ultimately the damage to national security is the same whether it's coming out of someone's mouth or whether it's on a document. Judge Parrella understood that. He understood that they had and possessed this information through the course of their duties and that ultimately, we had

a, I believe, important interest in maintaining control over the disclosure of such information.

So when you look at it in that context and understanding how important our privilege is and the fact that it resides sometimes in documents and sometimes in knowledge of people, you start to better understand the breadth of where the privilege may reside.

But the second aspect of it, if a privilege is going to mean anything, it means that other people can't have access to it before you invoke. Right? As part of my investigation -- or part of the United States' investigation into 9/11 wanted to make sure that all I's were dotted and T's were crossed, but there were certain things that we know the investigation can't entail.

And the investigation can't entail us going to defense counsel's office, going into their filing cabinets, taking out correspondence indicating what their clients told them, going through it and then saying, "Well, you didn't invoke on this yet," or giving it back to them and saying, "Which ones -- which part of this do you want to invoke on?" That wouldn't work.

If the privilege is going to mean anything, it means that you have to get permission to use any of it before you

see any of it. That has to be the way it works.

MJ [Col COHEN]: So assuming that I agree with you ----

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: Once again, assuming.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: ---- then what would be the process -- there was much discussion -- and I may take you off exactly where you were going, but this seemed like a good place to ask this question, so you'll be given additional time to argue whatever points you have.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: So some of the discussion this morning dealt with this issue of the chilling effect of Protective Order #4 in the sense that investigations couldn't be done, or they -- it inhibited the ability of the defense to gain access to the intellectual knowledge -- let's call it, for lack of a better word -- apparently I will be hesitant to use words -- intellectual property of the United States Government related to national security. It's in someone's mind, like you said. It may not even be written down somewhere, but it's just what someone observed; it's what someone learned; and that knowledge, in and of itself, would be classified.

Once again, assuming that as a fact, how does the

defense under Protective Order #4, how do they -- how do you all foresee that that's supposed to work in the ideal world? Because at the end of the day, there have to be -- there's going to be competing interests.

MTC [MR. TRIVETT]: Sure.

MJ [Col COHEN]: And so from your perspective, as you read Protective Order #4, ideally what would happen if Mr. Nevin, for example, says, "Look, I need this particular type of information. I need the following witnesses who can provide me this information"?

MTC [MR. TRIVETT]: All classified information in this case should come through the government in some way. Now, with the documents, that's easy. Right? With the witnesses, it's more challenging. And that's what we've run into and that's why we're litigating what we're litigating. But, at a minimum, we have to remember the context here.

Everybody who worked in the CIA RDI program has signed a nondisclosure agreement. That's recognized in the Mezain case as well. It's not likely that they're going to talk to you because they're not supposed to be talking to you anyway if they have a nondisclosure agreement or if someone knows that they have -- whoever else they're talking about had a nondisclosure agreement.

So that's always been our position. And we actually touched upon this a little bit when we defended the fact that the defense at some point had unfettered SIPR access that allowed them to search for documents that resided on SIPR, and a decision was made at some point to cut that off. The defense then litigated; they wanted access to it.

This is the same position we took, is that if our privilege is to mean anything, we will do our job as prosecutors wearing the white hat. We will look through all of the information that's potentially discoverable; we will make those determinations. When the information is classified, we will determine whether or not we're going -- and it's discoverable -- we will then consider our options under M.C.R.E. 505: Are we going to summarize this? Are we going to ask for a statement admitting relevant fact in lieu of it? But it has to go through that process. That's for the documents.

For the people, it's really no different. But they're all either former or current covert officers, right? That changes the whole dynamic of everything. It's not as if we're hiding a name. We're hiding a name that's protected under the law. It's protected under the identities -- the Intelligence Identities Protection Act. They're not supposed

to be known. The defense is not supposed to figure out who they are.

And I don't -- and I was quoting -- I don't want to quote Mr. Connell incorrectly, but he said when they were doing it on his own, they were able to find one out of whatever number he looked for.

So Protective Order #4 was our way of facilitating the defense ability to ask these individuals if they wanted to meet with them for a pretrial interview. Some of them have taken up the defense on their offer. These have happened.

But there is no right and there is no authority for you, Judge, to compel a pretrial interview. They have no right to it and there is no right to compel it, but we facilitated the request.

I think as part of Mr. Connell's motion to reconsider argument, he thought the two things that justified the change that you need in order to have a reconsideration was the fact that we amended Protective Order #4 and that we also provided stipulations. But it's important to note that we amended Protective Order #4 in a way that expanded or broadened their ability to request these interviews. We didn't bring it down in scope.

So even if it's a change in fact, it's not a change

in fact that warrants reconsideration because it puts them in a better spot than they were before we amended it.

Same with the stipulation of fact. We proposed a stipulation of fact, as Judge Parrella had encouraged us to do in 524LLL. It's extensive. We're going to be doing that for each of the accused. And we're just doing it in order right now of when their suppression motions are due, but the next one to come -- and we'll be proposing it to Mr. Mohammad's counsel as well. Again, that puts them in a better spot than they were prior to the issuance of 524LLL, and it would not be grounds for reconsideration.

So if they all have signed nondisclosure agreements, by law they're obligated not to talk to them. If they're all covert officers or former or current covert officers, the defense shouldn't be able to find them. If they can find them, it was probably due to some poor operational security or trade craft that they were practicing. I'm not saying it's impossible; I'm saying it's going to be difficult anyway.

So once we identified those who had direct and substantial contact, we were able to set up a process by which they would be able to contact them. And we knew all along that this was the endgame part of the process; that we were never of the mind that we were going to give them UFIs, take

away their names and then not facilitate their ability to try to reach out to them and talk to them. That was never our goal.

So when Judge -- and we thought that Judge Pohl understood that, so that when he was granting all of our requests to substitute UFIs for true names, that he understood at the very end, we were going to be issuing a way for them to contact independent of independent investigation by the defense.

So all along that was our understanding of where the process was going. Evidently it was not for Judge Pohl, so ultimately we moved to reconsider his order, and we did it on the law. We had a -- we thought that he misapplied the law; that once he found, if he did find that Protective Order #4 doesn't put the defense in a substantially similar position as they would be in without it, that his job at that point was to come back to us and tell us how he thought we could get there. His job at that point was not to actually issue the protective order we asked and then provide a sanction against us.

So we moved to reconsider ----

MJ [Col COHEN]: Do you believe that I still have that authority?

MTC [MR. TRIVETT]: What authority, sir, exactly?

MJ [Col COHEN]: To do exactly what you just said, to take a look at the orders and the issues here and say: Look, I think they are not in substantially the same position they would be, and we need to talk about how you are going to get them there.

MTC [MR. TRIVETT]: I think that would have to be -- that would have to be the subject of the motion to reconsider. And at this point, they would need to be able to establish the standard for reconsideration.

MJ [Col COHEN]: I understand.

MTC [MR. TRIVETT]: If there was a change in fact or a change in law or the law was misapplied, I think you have the ability to do that.

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: Otherwise, I believe it's the law of the case, and that's the only way we are ever going to move forward.

This is a unique litigation posture for everyone because Judge Pohl issued his ruling shortly before he left. We filed a motion to reconsider I want to say seven or eight days before he left. He decided that he wasn't going to issue the decision on it, that he was going to leave it to Judge Parrella. Judge Parrella then decided the issue by

suspending it and by ordering the suppression hearing. And now we have a third judge who's hearing the motion to reconsider Judge Parrella's motion to reconsider Judge Pohl.

So it's unique and not ideal for anyone, but it is what it is, and we need to work through it with the statutory obligations that we all have. But I do believe you are bound by the ruling to the extent they can't assert proper grounds for reconsideration.

MJ [Col COHEN]: I understand. Thank you, sir.

MTC [MR. TRIVETT]: So oftentimes what will happen is in this joint trial, we will have five individual -- we have five individual teams. They all have their own strategies. They are all entitled to their own strategies. But when they make complaints that they can't do something and one of them is able do it well and fulsome with the same amount of information that we gave them, we call that to the attention of the commission.

And if you look at Mr. Connell's motion to compel -- and I apologize that I'm jumping -- this is all interrelated -- he ultimately figured out that there were 112 witnesses that he wanted to call in support of suppression. And we disagree vehemently over the relevance of many of those, but he was able to do it. And we didn't argue that he

didn't make a sufficient synopsis, that he hadn't talked to the witness; we don't know what they're going to say.

He was able to do it, and it's our position that all five are able to do it if they choose to. Now, it might not be the final witness list, but it's certainly a start. It certainly gets the ball rolling on suppression and it gets us towards trial.

So he was able to do it because of how much information we provided them. We provided over 15,000 pages of the classified information. They have the 499-page SSCI executive summary, which I will point out contrary to defense arguments, the Office of the Chief Prosecutor had involvement with that -- to get it down to an unclassified level so that it can be used by the defense. So there was a role that the chief prosecutor played in getting the SSCI Report released at the current level that it's released at.

And they have their clients, and their clients are an important part of the suppression hearing. And I don't want to delve too far into the suppression hearing, but Mr. Ali has provided a very detailed declaration explaining what occurred to him during the time he was in the RDI program. He's got a very good memory of it. It's a very compelling declaration. But Judge Pohl would always dismiss the "and they have their

client's argument," which, while in theory, I understood what he was saying, because of the nature of the RDI program, his belief, I respectfully submit, was more theoretical than actual.

I think you are going to hear a lot of theoretical arguments about their inability to say no to interrogators and their learned helplessness and all of those kinds of things. I think when you hear the actual factual arguments, that it will be a very divergent position.

MJ [Col COHEN]: Since you brought up, you know, the accused, in general, what is the government's position -- while you indicated that Judge Pohl dismissed those notions or whatever it was -- just a couple of issues. One is -- it that but whether or not an accused ever chooses to testify is completely up to the accused, correct?

MTC [MR. TRIVETT]: Absolutely.

MJ [Col COHEN]: So in other words, you put them in a position where if they wanted certain types of information, the accused would have no choice but to take the stand; is that correct?

MTC [MR. TRIVETT]: Now I am talking solely for suppression, sir ----

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: ---- for the limited purpose of suppression.

MJ [Col COHEN]: Got it.

MTC [MR. TRIVETT]: That's all I am talking about. I'm not meaning to make any reference towards their right to not incriminate themselves at trial; it's just it's very common practice, as you know from your court-martial practice, to have someone testify for the limited purpose of a suppression hearing or something like that. That's all I was talking about.

MJ [Col COHEN]: Right. I understand. Got it. We're seeing -- we are understanding the nature of what my comments was.

MTC [MR. TRIVETT]: Yes, sir. That is all I was talking about.

MJ [Col COHEN]: So then the question would be is, so they put their client on the stand for the limited purpose of a motion. The client testifies as to that. Ideally the defense counsel, like you would with any of your witnesses, would like to have evidence to corroborate those statements to give more validity to those statements so that the proper weight can be given them. Otherwise, you're left in the position, that's really great they say this, but what is the evidence to prove

that what they are telling you is actually true?

It could be potentially -- for example, I've heard prosecutors argue this, I may have even argued it back in the day when I was a prosecutor. It could be a completely self-serving comment; you know, in other words, of course they're going to say that. They're taking the stand, and they need to say that to take that.

So then how we put the defense in a position, then, where they have access to corroborating the statements of their client if the client takes the stand for purposes of the motion to suppress?

MTC [MR. TRIVETT]: We have done one better than that.

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: We've said that everything they say is true. For purposes of this litigation, everything they say is true and you should assume that it's true.

Because we don't want -- we're not going to create litigation positions that undermine our other litigation positions. And by allowing them to say anything that I -- I think we've termed it as to tethered to reality, and the way I describe that for either Judge Pohl or Judge Parrella is if one of them comes up and says that they cut my arm off and they are sitting there with both arms, that we might not

stipulate to. Might not; we still may.

But absent that, everything they say -- anything they say in the motion about what happened to them in the CIA RDI program -- it's limited to that -- but anything they claim happened at that point in time to them from the time they were captured to the time they got here in September 2006, the court should assume is true. We will concede the truth of it for purposes of the litigation. Any documents that we gave them as far as the documents detailing their treatment can be presented and we're not going to impeach them or rebut them, because our position all along has been focused on attenuation.

And we think that the circumstances of the January and February 2007 interviews and the case law, once you concede coercion, is the primary focus on the commission. It might not be the sole purpose, but they have so much information and such a -- and such a free hand to assert what they want to assert occurred, that ultimately it won't be an issue as to whether or not they lived in a coercive environment in the RDI program. By design, it was coercive. It was intended to get information to stop the next attack by whatever means that were determined to be lawful at the time. That's what it was.

We're not going to contest that; we're going to concede that. And we are going to concede that it was coercive up to the point in time when they got to Guantanamo in September 2006, even if it wasn't. Because there were very bad periods and then there were periods where they were in debriefing and might have even had better conditions of confinement than they do now. But we're not going to get into litigating this because we're not going to undermine our other positions.

MJ [Col COHEN]: I understand.

MTC [MR. TRIVETT]: So they have everything they need. It's never going to get better than this for the defense. It can't get better by logic than what we're offering them, but that's why, I think, Mr. Connell mentioned it. They're not going to take it. Or they might take bits and pieces of it, but they're still going to try to force the issue because all along, this is just about having the United States make a choice, a choice that we're not required to make under CIPA, that we're not required to make under 505, but that ultimately we have to weigh, hmm, is it really worth calling this many former covert officers? And how is that going to impact the CIA?

It's a practice known in the federal courts as

graymail. It's why CIPA was drafted. It was -- it allowed us to consider our options and have the time to propose substitutes. And one of the ways we're doing that now is just to say everything that you said happened to you happened to you. That's fine. For purposes of this litigation, have at it.

We're super confident, despite what the defense arguments may be -- and we'll let the evidence speak for itself -- but we're super confident of the factors in attenuation and voluntariness and how we can corroborate both the voluntariness and the statements that they made that we can withstand whatever facts they allege happened before that.

So that's been our position. I wanted to make that as clear as possible, because that's part of our argument, too, as to why certain witnesses are not necessary. But ultimately, Judge Parrella found Judge Pohl's ruling to be premature because it was based on suppression and not mitigation.

And I will say this to the commission: We're in agreement with the defense that it's an internally inconsistent ruling. And that's one of the grounds that you should consider that you don't want to -- there's no good reason for the commission to readopt that ruling because

there's things that all the parties agree with are wrong, and one of those is this issue of suppression vice mitigation.

And it's Mr. Nevin's position -- and I probably speak for all five of the defense teams -- that it's their position that the information that we have provided to them and the concessions and stipulations and all of the documents, it's their position that it's neither sufficient for suppression or mitigation.

Our position, the United States' position, is that it's adequate for both. But based on the legal standards, it would be more relevant for mitigation than it would be for suppression, which is the exact opposite of what Judge Pohl found.

So I just wanted to give you that caveat on it because if what they're asking you to do is to reconsider a ruling, that ruling still has implications for them that they don't want, and that's going to come back for you anyway. They're going to -- so there's no reason to go back to something that everyone agrees is flawed, even if it's for different reasons.

But ultimately, Judge Parrella hung his hat in his ruling on the motion to reconsider on the premature aspect of Judge Pohl's ruling. And he tied it to suppression

specifically and said that the defense are required to be able to present a rich and vivid account of their time in the CIA program.

Now, although we had certainly taken positions similar to that, I don't know that we did it as forcefully as I just did it for Your Honor as far as us conceding everything they could possibly want tethered to reality, plus the stipulations. Judge Pohl certainly didn't have the stipulation that we have proposed. He didn't have the witnesses that we have approved.

MJ [Col COHEN]: Question.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: Would it not be usual in motion practice for parties to stipulate to facts? I know that you've been working with that with Mr. Connell. But if the individual defense teams came to you under the guise and said, "Look, these are all things that we think happened to them during the -- during the thing," would the government then be willing to sign a stipulation for purposes of the motion?

MTC [MR. TRIVETT]: A hundred percent. But we've done one better. We've written it for them and said, "Take everything you want, cut what you don't, and add everything you want," primarily because -- and we had always argued with Judge Pohl

about this, is that theirs -- ours is based on our discovery, theirs is based on the discovery we gave them and what their accused said.

So we always felt like they were in a much better position to be able to do it than us, but after 524LLL, which I think charitably encouraged us to do it, we did it. And we're in the process of doing it. And it's painstaking and it takes a long time, because there's so many documents that we have provided to go through, but we have a team back there doing it right now. I believe Mr. Mohammad's is in the last stage of classification review, and then we'll turn next to Mr. Binalshibh's, and then Mr. Bin'Attash's, and then Mr. Hawsawi's.

So we're going to -- we're going to propose -- it's written well; it's a narrative. I think Mr. Ali's is over 120 pages, if I recall correctly. It's very dense, it's very specific, and we left it up to them about what they want and what they don't want.

So we're willing to stipulate. And that's what we say in our motions in opposition to the suppression, is that the facts really aren't going to be contested, right? I mean, that's why we have hearings when there are contested facts. But when there's facts that both parties agree upon, you then

focus on what the contest is. That's the only judicially economical way to do it.

So that's been our position. We make it as forcefully as possible before you now and in the motions -- in response to the motions to suppress.

MJ [Col COHEN]: Mr. Trivett, before you move on to your next point ----

MTC [MR. TRIVETT]: Yes.

MJ [Col COHEN]: ---- just to follow up real quick.

Several times this morning, early afternoon, individual defense counsel had indicated this issue of FBI involvement from an early on stage, continuing on; therefore, it's a continuous course of conduct; there was never an actual break. You brought up attenuation.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: As I indicated earlier, I have made no finding as to whether there was attenuation or even proper attenuation, et cetera. But, nonetheless, part of the argument for why it's premature to -- to have these motions to suppress, we should reconsider the ruling, put them back in the same -- put the defense back in the same place is, is that they do not have the ability of giving the finite details of who was present, who was involved, and kind of how all the

interviews at Guantanamo Bay actually occurred.

What is the government's response to that?

MTC [MR. TRIVETT]: There is information regarding that topic in the 538 and 561 series of motions.

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: We have provided a tremendous amount of information, including going out and interviewing certain individuals and providing those interviews to the defense. I think that there's a small handful of documents that we've sought 505 substitutes for that are before Your Honor now. I think Mr. Connell was referencing those and that those need to be done prior to the testimony. We agree with that.

We didn't disagree with anything that Mr. Connell indicated needed to be done prior to the suppression.

MJ [Col COHEN]: Okay. Thank you for letting me know.

MTC [MR. TRIVETT]: So they do have that information. They will have a little more information about that, and they will be free to ask the witnesses. And again, sir, I think if you can indulge me for a second.

MJ [Col COHEN]: I will.

MTC [MR. TRIVETT]: In talking through our position on the witnesses, you'll have an understanding of who we granted and why we granted them, and what position that will put the

defense in. This might obviate the need for me to stand up for at least as long if we talk about 628 and the way forward.

But in the 112 witnesses that the defense requested, we've granted 12 of them. We intend to call 8. So there's a total of 20 in issue, but 2 overlap, so there's 18. 18 total. Within that we provided everyone who was in the actual January 2007 interview, and that's 3 people, 3 special agents. We're only intending on calling one of those, but the defense wants -- and we have an understanding of why they would want to call other witnesses to that interview, so we provided that.

We also provided a witness who can testify specifically and is probably the single best witness to do it on the 538/561 issue. That will probably be a combination of open and closed, but the defense will have the opportunity to explore that fulsomely. We believe, in the end, it's legally dubious to the suppression issue and that it will probably be a thud, but the defense can thud away.

The other witnesses we gave, the defense had an investigator who went up to Camp VII. We agreed to produce that individual. There was the first psychologist, who was there at the time in JTF-GTMO, who is under a unique medical identifier now, but she was there at the relevant time frame

from the time they got there from September until -- through the statements, so they will have that ability.

We also agreed to produce Drs. Mitchell and Jessen. And after we did that, Mr. Ali immediately issued a press release saying that this was a huge, significant event and that it's going to be the first time that the architects of the RDI program ever testify. So to the extent they need to talk about what effects something was designed to have and what effect something might have had on the accused in the RDI program, they have both if the principal architects of the actual -- actual program.

So while that's not everyone, I just wanted to give the court a ----

MJ [Col COHEN]: It does give me a little bit of the context in ----

MTC [MR. TRIVETT]: ---- a flavor of the type of people that we've agreed to let them testify what they will be able to do, because I think that's an important part when considering whether or not Protective Order #4 is in any way impacting their ability to independently investigate. They have quite a bit of evidence that they can present that -- relevant legal evidence.

We'll put on our witnesses. They will put on their

witnesses. They'll argue for why they need more, no doubt, and then we'll go from there. But ultimately Protective Order #4 is really a null set. It's not going to affect the suppression hearing at all because they have enough information, as Mr. Connell has proven, to set forth why they believe someone needs to testify.

And as we speak, there are hundreds of defense counsel in state court and in district court, in federal district court right now cross-examining witnesses that they didn't get to talk to before they cross-examined them. It's a common practice. While I get why they might ask and why it might be better for them, it's whether or not they have a right to do it. And Judge Pohl recognized and I hope this commission recognizes that you don't have the authority to compel that, to compel the pretrial interview anyway, but you can compel a witness.

And so if a witness has relevant information, he can be called and the defense can cross-examine him. And while it may not be as clean and pretty as the defense would like if they had time to prep, it's all that's constitutionally required. It's all that's statutorily required. We know that because it happens over and over and over again.

So ultimately we'll argue against the need for

certain testimony, but even in opposing the UFI witnesses, we didn't say: Well, you don't know what they're going to say because you didn't get to talk to them.

We didn't say that. We simply said it's cumulative with everything else we've conceded, everything else that we would stipulate to, and legally, it's not the focus, at least -- the government's position is the focus is on the attenuation aspect, not the prior coercion when the coercion is at least conceded.

MJ [Col COHEN]: So how do you foresee this working? Let's say we begin to take testimony in September, as was suggested, and we spend at least a couple of weeks taking testimony -- I mean, I guess it's anyone's guess as to how long we are actually going to be taking testimony of witnesses.

But then -- so the parties -- and it sounds like that the government, at least with the AAA team, has reached some kind of consensus, say: Okay. Look. We are going to produce this number of witnesses, some will overlap; 20 in total, 18, 2 which overlap.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: We are going to have at least some level of stipulation of fact, presented evidence, documentary

evidence, if you've got it. We'll argue about whether it's going to be in the classified or unclassified environment, but, you know, we will get to that point later. And then we still have the remaining witnesses.

So are you envisioning as the chief prosecutor -- not the chief prosecutor ----

MTC [MR. TRIVETT]: I'm not the chief prosecutor.

MJ [Col COHEN]: Managing trial counsel.

MTC [MR. TRIVETT]: Managing trial counsel, yes, sir.

MJ [Col COHEN]: Thank you. I'm trying to get the -- General Martins, I wasn't trying to demote you in any way.

The managing trial counsel, that we are going to get to a point in that suppression hearing then where essentially this is the evidence we have, these are the additional witnesses we want, and why we believe they are still relevant and necessary based on this?

MTC [MR. TRIVETT]: Yes, sir. I think -- I mean, that's where we get, right? After we do our agreed 18, he argues for his other 100, we argue why they are not relevant; you make some decision, you order some testimony or not, and then we react to whatever your orders are. And that's why ----

MJ [Col COHEN]: Okay. And do you believe that that would then get to the alpha and beta, delta concerns that

Mr. Connell was talking about, about this is what you have and therefore I now know and you can argue about what B is, so now -- because as part of showing what relevant and necessary is, it kind of -- it seems like it would require a showing of the bravo portion of -- to make that delta there in a weighing of whether something is cumulative or not.

MTC [MR. TRIVETT]: We reject the alpha and beta binary ----

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: ---- and we do it because of this. If you had a right to alpha, then maybe you could compare the bravo ----

MJ [Col COHEN]: Got it.

MTC [MR. TRIVETT]: ---- but if you had no right to the alpha, the bravo is all you are statutorily required to have, then that's all you get. And ultimately that's your call. We are going to take the positions we take, the parties will argue about it, but ultimately if you feel like more testimony is necessary, like for whatever reason, you're going to order it.

And that's why there is no due process violation, because there is still compulsory process here. You can still order testimony if necessary. We're going to argue why it's

not necessary legally and logically, but it's not going to be up to you.

And that's why Protective Order #4 has always been -- it's -- it has no impact. It really needs to be viewed for what it is, a way to facilitate them being able to talk to covert officers who have signed nondisclosure agreements who they shouldn't be able to figure out who it is anyway. Right?

And we have never threatened criminal prosecution, and we have never threatened -- this prosecution team has never threatened that. We simply indicated their identities are not only classified but they're protected by law. That has to be part of the analysis that the judge has when saying: Okay. Well, is this reasonable then? Is it a reasonable way for the government to facilitate their ability to contact them when their identities themselves are protected by law under a criminal statute. Right?

It's also -- when we all train for our clearances and for our re-upping on the clearances, one of the things that is sort of an indicator of an insider threat is when someone keeps asking you for something that you know they don't have a need to know. Right?

And the problem with these covert officers is they don't know who these people are. They're coming up to them in

the parking lot or in their house -- I'm not alleging that they've done this; I'm just giving you theoretical. They don't know who they are. They don't know what clearances they have. They don't know if they have a need to know. And it's not their determination to make. It's the original classification authorities who makes the determination on the need to know.

So just by approaching them, you could be, and I'm not saying you always do, but it depends on how you do it. But it's very, very easy to start to spill classified information because of who they are and the fact that their very identities are protected. So there's no way for the defense really to do the investigation they want to do anyway, and it's not permissible under the protective order because of -- because of the classified nature of their identities.

So that was a long way of answering, you know, the choice, but that's why Protective Order #4 is just the way to facilitate. Once you agree that their names are protected from the judge, you have two choices. You either agree that the defense doesn't get to contact them at all before trial or you say: Government, figure out a way to let them at least ask them if they want to talk before trial.

Those are your only two choices once you decide to

allow for their identities to be protected by the unique functional identifier, and one is clearly better than the other for the defense.

So this is really just a 505 exercise. We have more than other cases because of the unique nature of the RDI program and the fact that the CIA staffed it, but in reality, from a CIPA standpoint, we're just executing the same procedures on a larger scale, and that's all we are doing.

And as the Mezain case did, as I started with with you, is if it didn't violate for actual government officers -- government witnesses that they called affirmatively in their case-in-chief, a Sixth Amendment right to investigate or to cross-examine, to confront, it certainly doesn't violate any statutory right that they have here when it's not even a witness that we intend to call, and we're going to stipulate to anything tethered to reality.

So subject -- well, that was my argument. I wanted -- if you can indulge me for a minute, sir, I want to go through my notes from each individual things they may have said. I just want to make sure that I've addressed everything that we intend to.

So some counsel have characterized this as either a test run or an ill-advised thought experiment. It's just a

suppression hearing. That's all it is. And I think that Judge Parrella recognized that until we actually put the prosecution to the test and we actually go through what evidence is presented and what evidence may be ordered and what is conceded, that there's no way to really determine if they are unable to prevent or to produce a rich and vivid account.

So this in no way is a test run. We want this to be the hearing; and from a judicial economy standpoint, it should be. We agree 100 percent with Mr. Connell. We don't have a -- we don't have a separate motion on this yet, although we did oppose this concept that they're going to get to continue to try to move to suppress these statements on other bases other than voluntariness after we have this hearing.

So we would encourage the court -- and we may file a motion to this effect -- to just order a deadline for which they file all motions to suppress under any ground they can think of. It can be one motion on any ground that they think of prior to us actually having the suppression hearing so that at the end of it, whatever the results of it, we can move to trial, and that we're done with the issue of whether or not the LHMs are suppressed.

MJ [Col COHEN]: While I understand your position on that,

I want to make -- go back to how the government envisions that this is going to take place.

So let's say I granted the government's position. I say, okay, fine. File your motions. Give us every possible theoretical legal theory you have. Because of the nature of this litigation, though, if you call witnesses that no one has ever interviewed, the government does recognize that that may lead to the need for additional witnesses or additional leads and all those other kinds of things.

MTC [MR. TRIVETT]: Sure.

MJ [Col COHEN]: So while we may be in a motion to suppress posture -- which one could argue that's good or bad, I guess; you know, it's at least another significant step in the pretrial process -- that this could go on for quite sometime with additional briefings as to whether or not something is relevant and necessary, all those -- material, all those kinds of things as we move throughout -- along the process.

Is that the way the government is foreseeing this?

MTC [MR. TRIVETT]: Sure. At some point -- we have a witness list from Mr. Connell of 112 people, and that's down from the 133 he requested for his jurisdictional hearing, which is how the whole suppression motion is sort of before

the court.

There was a jurisdictional challenge by Mr. Baluchi and Mr. Hawsawi. And we said as part of that, we're going to rely on the statements they made to the FBI to establish that they're alien unlawful enemy belligerents. Because of that, Mr. Connell moved for 133 witnesses and Mr. Ruiz moved for one. He based it solely on an international law argument, more of a legal than a factual.

So I don't know what other witnesses we are going to get, and we don't have those witness lists. Part of what we're litigating later, either today or tomorrow, is their need to request an extension of time for them to list their witnesses. And we believe that they're fully capable of doing that now. But that said, we don't know how many witnesses we're dealing with.

What I can say -- and we'll talk about this a little bit more in 628 because I have an actual diagram -- is that we've laid out a three-week plan for the September hearings. It's just a proposal. The order is going to be up in the air, and Mr. Connell is going to get back to me on his thoughts on it, but we wanted to at least start the ball moving on it.

But, of those, there are certain witnesses like Dr. Mitchell, Dr. Jessen, Camp OIC for Camp VII in the

2006-2007 time frame, I think Special Agent Drucker, they all have information relevant to all of them. So we would ask -- and that's why I think I stood up yesterday, or one of those days, and argued for why that's necessary, because we don't want to have to call them back four or five different times. So there will have to be some coordination, obviously, between the teams; and if that doesn't happen, some forced coordination from the court on that.

But we envision, at a minimum, calling everyone we agree to produce, because that will put them in a position to be able to argue for more. There's a lot of cumulative nature of it of a lot of these witnesses. So we would envision that at some point we call who we agree to produce, and then we'll have to see the witness lists from the other four. It might be that we will know that some of them, if they cross-examine the other witnesses, will be shorter than the 112.

And once we call everyone we agree to produce, then we should all argue about why they need additional facts. And I -- that's not going to happen in September, we obviously acknowledge that. Our initial proposal was going to be to start this in July, but based on the court's comments in the 802 yesterday, it's not likely we would have enough time where it would make sense to start it, and there's other litigation

I think that should predate it.

But ultimately let's call all the witnesses we agree to produce, then let's argue about all of the other witnesses they need. Rule. We'll adjust to the ruling, and then ultimately we'll argue for suppression. That's how we see it.

There will probably be an argument for suppression. That would be combined with an argument for why Protective Order #4 does or does not impact their investigation or their investigation for the suppression. It would seem like it would be one argument; you could maybe break it up into two. But ultimately that would be at the end of all the agreed-upon evidence, witnesses, and your rulings on any motions to compel.

That's how we see it going forward. We do want to use -- we thought we had nine weeks. We do want to use these eight weeks at the end of this year to almost solely dedicate ourselves to it, because we're glad to be talking about this. After six years, we're finally talking about evidence we want to use.

If you review a lot of the transcript, we can go weeks without even mentioning the 9/11 attacks. And so we're excited because this means we're moving and that we're closer,

but we know that this needs to be decided before we actually get there. So we want to utilize every minute of court time.

My proposal is going to have Saturdays, where we go Monday through Saturday; it's ultimately up to you, of course, but we want to push. We want to get this done and we want to know, up or down, do we have these statements available to us? And then we want to seat a jury and try this case.

MJ [Col COHEN]: I understand. Thank you, sir.

MTC [MR. TRIVETT]: Thank you, sir.

MJ [Col COHEN]: We've been going for about an hour and a half, and prayer time is at 1624, or roughly there, is what I'm being told.

I have two options. If there are very brief arguments from the defense -- I'm not saying you have to be -- I'll give you the opportunity to be heard. But if you actually do think, hey, I just got a couple points to make and then I think we've argued this one, then I'm willing to press for at least another 15 or 20 minutes and then recess.

If you think it's going to be pretty significant argument, then we probably need to discuss the way forward in the case.

LDC [MR. RUIZ]: Judge?

MJ [Col COHEN]: Mr. Ruiz.

LDC [MR. RUIZ]: For my purposes, I do not think that it will be a couple of quick points. Obviously, the nature of a joint trial is not only do I want to have the opportunity to make my argument on the points that Mr. Trivett has made but there are also some areas I need to cover based on what my colleagues have said ----

MJ [Col COHEN]: I understand.

LDC [MR. RUIZ]: ---- and so that I can clearly draw our lines in terms of where we are. So I think that for our purposes, it's going to be a little bit longer. And if experience is any guide to this, I would imagine that it's probably going to take a little while longer, and so we'll need extra time.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: My position on -- in terms of if you're looking for a way ahead is I'm here. I can be here as late as you need me to be to continue to argue this motion and to put it to rest.

MJ [Col COHEN]: Okay. Let me ask the government. As you all are in control of guard force, et cetera, what are our legitimate options -- or what are my legitimate options as a judge with respect to push -- taking a recess for prayer time and then continuing on for a while?

TC [MR. SWANN]: Sir, we can go as late as you want. I know the soldiers get -- well, a lot of times they don't get dinner in the evening sometimes, but they can figure it out. But in this instance, because this might be the last day of the week, I think we just press on as long as we need.

MJ [Col COHEN]: Well, I would want to make sure that they get access to food. So I tell you what. Why don't you all discuss it. We're going to take, at a minimum -- how long is prayer time, starting at 1624?

[The military judge conferred with courtroom personnel.]

MJ [Col COHEN]: I was just told that it was ten minutes, so we will be in recess until 1640 this afternoon to give the government some time to figure out what the logistics would be involved with making sure that our soldiers don't go hungry as well. All right.

We are in recess.

[The R.M.C. 803 session recessed at 1600, 20 June 2019.]

[The R.M.C. 803 session was called to order at 1640, 20 June 2019.]

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

Mr. Ruiz, the time is yours.

LDC [MR. RUIZ]: Judge, I appreciate that you have made it abundantly clear that your questions do not mean anything in terms of whether you made up your mind or not. I can tell you from my perspective, the question and answer back and forth is really not that different from what we engaged in with Judge Pohl for over six years, as well as Judge Parrella. It is a give-and-take, and certainly we want to focus not only on what we want to say but also to be responsive to the court.

Having said that, I will also confess to you that despite your many indications about the fact that your questions don't mean anything, it is the virtue of the advocate, and particularly, I think, defense advocates, that when the judge starts speaking, starts asking questions, our minds start racing and thinking, "What does this mean?"

MJ [Col COHEN]: Exactly. I understand.

LDC [MR. RUIZ]: Right. Where is the judge heading? And so to the extent that I am going to make some references to where I think you may be starting, it's not because I don't understand what you've said about the questions but it's basically my own issues in terms of worrying about maybe where you're going, so I want to address those issues.

MJ [Col COHEN]: No. Please do. And I would encourage you to do so.

LDC [MR. RUIZ]: One of the things that struck me -- and I get it, it's a pragmatic question -- is the reasoned approach to try to figure out the way forward if, in fact, the decision to proceed with this case or this procedural issue is to be had, right? The 524MMM issue really did not delve into the logistics of how to hold a suppression hearing, but I understood why the commission wanted to get into those aspects.

But what I want to suggest to you is another path forward, and it is one that is equally available to you, and it is one that I suggest to you is the right, lawful, and legal conclusion based on the facts that are before the court, and that is that when we show up in July, we take up whatever docket you've put together, and nothing in that docket includes anything having to do with suppression. There are no pending motions for suppression. There are no motions to be litigated having to do with witness issues. There are no motions timelines. We are back to the time and the place when Judge Pohl ruled that the statements -- the FBI LHA statements were suppressed for all purposes.

By putting us back and resetting back to what 005MMM **[sic]** and I think ultimately 524PPP also asked, because when you look at 524PPP and our 524MMM, they are really

aligned in all respects in the relief that we are asking, which is simply to take Judge Parrella's ruling in 524LLL and overturn it. And if you do that, which is an equally available option, one that, for a number of reasons, I'm going to tell you is the right legal option to take under these circumstances, where we are left is exactly where we were before.

We don't have to worry about litigating a motion to suppress. We don't have to worry about how those witnesses are going to be called. And I believe that that is the right legal conclusion based on the facts that we've addressed today and based on some of the other points that I'm going to make for you.

So I want to take you back mentally to that place where that is -- and I believe it is, right, where if that decision is made, then we start afresh. Now what did the parties do. How does this impact the progression of the case? That is one question you asked. It actually speeds it up. It allows us and frees us up to redistribute our efforts to continue to prepare the many, many other areas of this case that we have to prepare. And in 524MMM in the ex parte exhibits that we've submitted to you, we tell you in great detail what all these ongoing efforts are.

We also did indicate to you that one of the consequences of Judge Pohl's ruling in 524LL was that we stopped or we redistributed our efforts. We redistributed and made different strategic decisions based on the fact that the statements by the FBI were now suppressed. When that happened, it had consequences, second. Third, all kinds of consequences in terms of how we went after experts or not.

You saw that the convening authority determined that they were not going to fund expert requests that they deemed to be tied to this issue; that was a consequence from the convening authority. They did exactly the same thing that on our team we did, said that's no longer an issue that's in play. Let's go elsewhere. That's exactly what we will do.

It will not delay this case. We will not be wanting for work; I promise you that. We have been here -- I've been here over a decade in military commissions, and there is plenty of work left to do. There will be plenty of work left to do on your docket. There will be plenty of arguments to be made. And so I can feel real confident -- and if this week is any indication, I hope that you feel real confident that there is work we can do to move this case forward other than this particular motion. So I wanted to start with that because I think that's an important perspective to have.

The longer I have been here, the more this is like Groundhog Day. As I'm somewhat envious of you because this is the first time you've heard these arguments, but what you've heard today is basically a replay of many, many, many arguments where -- that goes to the heart of what Judge Pohl described in his ruling as "the tension," the tension between national security privilege and the due process requirements in a capital case, the heightened due process requirements in a capital case.

And time after time after time what the prosecution wants to do, the way they want to frame the issue for the judge is they want to frame it as the defense's disregard for CIPA or the defense's disregard for 505 process, and that's what Mr. Trivett started his argument with. And I think that reveals a lot; that's what he chose to make his first argument to you about, right?

The frame and the structure that they want to have you make this decision in is one that puts the defense in the light of a group of people who are not respecting of CIPA, who are not respecting of 505 and, as he said, they simply don't like it. Okay?

And I've gotten tired over time, but since you're new, to say it again and again and again: Like or dislike has

nothing to do with it. What has everything to do with it is the balance, and the balance that a court, a judge, a commission in this case has to strike between that privilege, national security privilege that the government completely holds and that we understand exists for legitimate reasons. So let me say that again for your purposes, I have said it plenty of times: We understand what it means, we understand why it exists, and we understand that there are legitimate reasons.

However, when you have a capital prosecution where you're asking the judicial process to potentially return a verdict that takes away a man's life, our Supreme Court, our superior courts have said certain procedural safeguards apply, heightened due process. That is the tension, right?

So when the government attempts to frame the issue -- and this is what they are trying to do, they're trying to frame the issue as Mr. Ruiz and Mr. al Hawsawi want us to provide the names of these operatives. They're not supposed to have them. They're not supposed to find them. We have national security privilege. That's what it means.

Have I asked you at any point during my motion in 524MMM to order the government to produce the names of these UFIs? I have not. That is deliberate. That is precise. I

am not asking the commission to do that. I am not asking the commission to make a determination that those names need to be provided to us.

What I am asking the commission to recognize is that Judge Pohl -- after six years on the bench, Judge Pohl, as Mr. Trivett indicated, who had provided a number of orders to them about production of information to be reviewed in camera, who had the benefit of looking at the entirety of the 524 litigation, went through a careful legal analysis, balancing those equities, and said: Government, you've got your national security privilege; you've got Protective Order #4. Defense, you've got due process concerns. Here's how I am going to balance those equities. You're going to get the protective order, but you're not going to get to introduce the FBI statements.

That decision is exactly the way the process is supposed to work. It respects, acknowledges, and understands the government's national security privilege and at the same time it balances the equities of the defense in a capital trial.

I would submit to Your Honor that the ones who do not like the process is the prosecution. They want the national security privilege to be absolute. They want the national

security privilege to be one that the court defers in every way to.

Now, Judge, can you order a classification change of a particular classified document? No, you cannot. You just simply don't have that authority. Are there instances where I don't like a document that is classified, believe it should be otherwise classified? Sure. Can I change that? No. I have to work within the system.

However, the tools that exist and now are at your disposal are the ability to balance the equities. And while you cannot change the classification description on a particular document, you can do exactly what Judge Pohl did, which was he said: Government, I've looked at this information. I've looked at the -- as he said -- evolving and oftentimes contradictory classification guidance in these series. I've considered the briefs from the parties, the evidence that we submitted, the declarations Mr. Connell has talked about, the information that I will refer you back in 524T, because 524T, as you remember, preceded 524LL. I've looked at all that, and this is the balancing, right? You'll have your protective order.

Another point I want to make is this motion, 524MMM -- and Mr. Trivett talked about focusing the issues.

And I suggest to you that he started out focused and then ended up, well, left or right field. Pick whichever you want to use, the analogy of the day, right? Talking about what we're going to do in suppression, all kinds of stuff like that.

But the -- talk about losing my train of thought.

MJ [Col COHEN]: That's all right. Take your time.

LDC [MR. RUIZ]: So nevertheless, the point is that he started off focusing on these particular issues, and then I think we ended up going a little bit far afield.

So what we're asking at the heart of this motion is to rescind 524LLL. It is not Judge Pohl's ruling in this instance, 524LL, that is subject to reconsideration, Judge. And you heard Mr. Trivett talking to you about the internal inconsistency of that ruling and saying that the parties agree that there is internal inconsistency and, therefore, that's not the ruling that you want to prevail.

524 is not at issue here. The pleadings that have been filed before this court in terms of reconsideration go to 524LLL, which is Judge Parrella's ruling, and Judge Parrella's ruling which implemented a new set of procedures that kicked off the entire process that we're talking about.

So as much as Mr. Trivett may want to shift the focus

to Judge Pohl's ruling -- and it is important to look at some aspects of Judge Pohl's ruling to inform 524LLL -- the fact of the matter is that what's at issue is Judge Parrella's ruling in 524LLL.

Judge, a couple of comments in terms of some of what my colleagues said. Like I said, we are joined to 524PPP. And as the motion is written and largely as argued by Mr. Nevin, we remain joined to that motion; however, there are a couple of areas where I want to make sure that our position is perfectly clear.

Now there was a statement by Mr. Connell during the argument on behalf of Mr. al Baluchi of 524PPP where he said that, in his view, compelled interviews with UFIs would solve everything. I part company with counsel for Mr. al Baluchi and Mr. al Baluchi's position with that particular statement. It is not Mr. al Hawsawi's position that compelled interviews with UFIs would solve everything.

Similarly, there was a statement in a give-and-take between yourself and Mr. Nevin where Mr. Nevin indicated, words to the effect, that if you had told us ahead of time we were going to do an evidentiary hearing, that would have made perfect sense to me. To the extent that statement can be interpreted to concede the same sentiment that Mr. Connell's

statement indicated, that is, that compelled interviews or depositions would solve everything, we part company with that statement as well.

And the reason we do that, Judge, is not because we don't think it would solve some issues. We do believe that compelled testimony, whether it's an interview or a deposition, would resolve some of the issues. Right? So, for example, the whole issue about how to -- how to initiate a meeting, how to establish rapport, how to, for lack of a better term, be more effective than government agents are at getting people to speak, to talk, to engage in a deliberate conversation about significant and important issues. Right? If you -- obviously, if you compel that interview or compel that deposition, it will solve that problem. Right?

The reason I -- the reason I part company is because I don't think it resolves the fundamental problem that I highlighted for you in argument and that we highlighted in 524T (MAH), which was what I called and what I referred to earlier today as the Fuhrman problem. Is would the problem when you have a witness -- now, this is a key, an important point -- a material witness, a material eyewitness, and that -- I will talk about that when I talk about the case that Mr. Trivett cited, right, the Mezain case. Right?

But when you look at Judge Pohl's ruling -- and I'm going to spend just a little bit of time tacking you back to some of the points in that ruling. He talks about material witnesses, and he talks about these witnesses being material witnesses or eyewitnesses to a significant portion of events in this prosecution.

The Fuhrman problem, of course, is how do you go about independently verifying or analyzing a person's background, doing the kind of investigation that I described for you earlier? Mr. Trivett in his argument said every day in the United States, state public defenders and federal defenders are cross-examining people that they've never talked to. Sure, they would've liked to cross-examine them, but they don't have the right to do that.

I think that that analogy is flawed. And the reason for that is because every day, those same state public defenders, me having been one of them, as well as a federal public defender, had the opportunity to receive a witness list with names from the government. When you get that witness list, we have some investigators in house. And what every federal public defender should do -- not saying everyone always does it; there is a big caseload -- but what they can, in fact, do is do that background check, is do that due

diligence; is go out, either ask an investigator or do it yourself, check out that background. Did the person say anything publicly that can be used against him? Did they make any statements? Did they have any writings? The same kind of things that they did when we brought our one witness to testify in 502.

That Fuhrman problem is not fixed either by compelled testimony or by a deposition because presumably, if it's still a UFI, we wouldn't know the identity of that witness.

Now, am I saying to you, Judge, that -- and this is an important distinction as well. I am not talking about a situation right now about a witness testifying in an open hearing using their own name. That's not what I'm referring to. Okay?

What I am referring to now is a situation where we -- let's compare it to the medical -- the medical witnesses that Mr. Trivett talked about. What we have for them is we have their unique medical identifiers, UMIs, and we have their names, and those are classified. And there are very deliberate ways in which we can handle that information. Right?

So we can't use it publicly. We can't use their names in certain forums. They're subject to certain

restrictions to protect the equities, right? It balances the interests. It gives us the ability to do background and research on these witnesses. We do not have that with respect to these witnesses. Right?

And so for the analogy to work, we would have to have their UFIs, their real names. Subject to -- if their real names need to remain classified, fine. If we can't talk about their real names in public, fine. If I can't go up to a person and say, "Joe Blow was involved in the CIA program, what can you tell me about him?" Fine. But can I go up to a person and say, "Hey, I know James Smith. Is there anything you can tell me about him? Have you ever heard this person make any statements about Guantanamo or military commissions or Guantanamo detainees? What can you tell me?"

"Why? Why do you want to know that?"

"Well, it's important for me. I'm a criminal defense attorney. I'm conducting an investigation as part of my case preparation."

I think I can do that. I think I can do that properly by protecting their name, right? I think I can do that properly without disclosing their classified name. But what we certainly could do independently, which we could do with medical providers, and I would submit have done it, is we

get on and we do a background search. We see what they've written. We look at their biographies. We see if they made any statements that may be related to Guantanamo. And we do that due diligence that's necessary in every case for the preparation of our defense.

That is what is missing. That is what is irreconcilable regardless of how many hearings we have, with how many witnesses we call, with how many questions we ask them. And that is the defect that Judge Pohl keyed on as one of the defects in his ruling.

And that is another reason -- actually, not another reason, but that is a reason why, for different reasons -- like the government, we part company with our colleagues when Mr. Connell talked about the control group. Right? Having the two groups and having the necessity to compare group A with group B. We agree with the government that that's not the analysis that should be applied for different reasons. Right?

And the reason is this: I look at this more as a black letter law application of the facts where we don't need additional evidence. Judge Pohl looked at the restrictions and the evolving restrictions from the CIA and what we would be able to do or not do. We didn't have to put a witness on

the stand for the witness to say, "I can't tell you your name" for me to know that I didn't know his name and I wasn't going to get his name.

And we didn't need to put a witness on the stand to understand the implication of the inability to have that name in our investigation. It was self-evident. And it was self-evident in Judge Pohl's ruling when you go back and you study the ruling. He goes through and he specifically talks about these issues.

So if you have 524LLL in front of you, I'd like to highlight a couple of points along those lines.

MJ [Col COHEN]: I will in one second.

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: I have it now.

LDC [MR. RUIZ]: Okay. Sir, if I can refer your attention to page 33 of 524LLL, and I'll tie all this in ----

MJ [Col COHEN]: LLL or LL?

LDC [MR. RUIZ]: I'm sorry. LL. Too many Ls.

MJ [Col COHEN]: No, that's fine. Give me one second, please.

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: Is that page 33?

LDC [MR. RUIZ]: Page 33.

MJ [Col COHEN]: I'm there.

LDC [MR. RUIZ]: Particularly paragraph 8.

MJ [Col COHEN]: Copy.

LDC [MR. RUIZ]: And I will just let you read the paragraph and then I'll maybe make some comments, Judge.

MJ [Col COHEN]: I've read it.

LDC [MR. RUIZ]: So particularly towards the end of the paragraph you will notice that Judge Pohl uses the word "closely related." So he says: "...closely related to the 3-4 years of alleged coercion used by the CIA participating in the RDI program..."

What Judge Pohl is, in essence, saying there is that they are material eyewitnesses. And the reason he uses "closely related" refers back to page 25. If we go back to page 25 of his ruling and take a look at that page, I can tell you why that is.

MJ [Col COHEN]: Okay. It appears he was citing the Roviaro case when he was ----

LDC [MR. RUIZ]: Correct.

MJ [Col COHEN]: ---- and El-Mezain.

LDC [MR. RUIZ]: In El-Mezain, which is also the case Mr. Trivett talked about, what is significant I think about pages 25 through 27 of Judge Pohl's ruling is that it clearly

indicates that he considered the very argument that Mr. Trivett made today.

One of the things Mr. Trivett said is if you look at the defense's arguments across time, they look remarkably similar. Well, right back at you. The same argument -- he made this today -- to you, on El-Mezain, he made before. And in 524LL, they lost, right, because the judge said: I have to consider that.

So towards the bottom of that, there are actually a few points. Number one, he says it's not a fixed rule to disclosure. Right? So contrary to what Mr. Trivett's presentation would have you believe, there is no fixed rule with respect to disclosure. It then follows that it has to turn on the facts of the case, right, the unique facts of each particular case.

And while, yes, in that particular case the facts went in one direction, one of the significant differences in that case was the connection of the witnesses. One was an authenticating witness, one was an expert witness. There were two witnesses at issue.

So the -- as Judge Pohl relates in his page 25 of his ruling, the closer the relation, the greater the materiality to the defense. The commission agrees with the

El-Mezain/Roviaro approach, and then he highlights what the distinction is, that I think is important. The 524 series involves the government's proposed protocol for defense witness interviews of CIA rather than witness testimony by pseudonym.

And if you could just read to the bottom, the end of that page.

MJ [Col COHEN]: I have done so. I have done so.

LDC [MR. RUIZ]: So he sets forth the Mezain/Roviaro. He gives clear indication that he has applied this legal reasoning. He talks about it not being a fixed rule for disclosure. He tells you that the closer the relation, the greater the materiality to the defense. And on page 33, I have shown you where he indicates that these were material witnesses, eyewitnesses to the event; that is distinguishable from the El-Mezain case where you have these other witnesses who are authenticating and not as closely related in this case.

In this case, of course, we have 64. You have an entire program. There was a U.S. Government program that took place over three years, so that close relation analysis weighed in favor of Judge Pohl's analysis of rejecting our same argument that the prosecution made here today.

But then Judge Pohl goes on further in his ruling and he says: The defense contentions that the failure to know the witness' true identities negatively impact the defense's ability to verify the witness's credentials or to investigate him for prior acts undermining their veracity, they cannot present opinion and reputation evidence about their character or untruthfulness, and they could not develop other impeachment evidence.

Right? That analysis is exactly what we raised in 524T, and that was the problem that we tried to drill down to Judge Pohl.

So in 524T, we made a strategic decision, I will tell you. As you know, the 524 series was very lengthy and talked about a number of different witness access issues. We decided to focus on the specific issue that was the most significant in our view for our ability to carry out our ethical duties and to comport with due process and briefed it in 524T, the Fuhrman problem.

On page 26 -- bottom of page 26 and page 27, Judge Pohl says as follows: "It also essentially prohibits the Defense from investigating potential lines of impeachment for these witnesses."

That's exactly what we've talked about here today;

it's exactly what we have briefed in 524T; and it's exactly what Judge Pohl considered in his ruling. And that is why what I'm saying to you, this whole narrative of we need to develop this body of evidence, we need to compare A to B, is false. It's a false narrative, and I would urge you to reject it.

Because what Judge Pohl did is he took the -- he took the classification guidance as it existed. He took Protective Order #4 as it existed. He applied it to the issues that we raised that did not require us to produce evidence to confirm them. And then he wrote about it in his ruling, and then he said given those equities, this is the relief. This is the balance.

There is nothing premature about that. He spent six years on the bench. He had thousands and thousands of documents, exceptions, and substitutions that he reviewed. He, in his own ruling, delineates the evolving and conflicting guidance that impacted on the 524 series litigation, right? Those are facts just as well.

And so that the government talks about documentary facts and individual, you know, personal facts, people. Right? There are plenty of facts. There was plenty of meat to that bone. And Judge Pohl issued this ruling after having

considered carefully all of these arguments, arguments in the record that did not need to be developed by engaging in some sort of due process test run, which is, in fact, what Judge Parrella's ruling did.

Now, Mr. Trivett said something along the lines that this is a reconsideration to a reconsideration to a reconsideration. That's actually incorrect. 524MMM was filed in direct response to Judge Parrella's 524LLL ruling. In Judge Parrella's 005LLL **[sic]** ruling, for the first time -- this didn't happen before, for the first time sets timelines for filing of a motion to suppress. He sets timelines for filing motions to compel witnesses, if necessary. For the first time, he directs us to engage in a process that forces us to file before we are ready, and that is a clear error of law. That is the basis -- and that's why we led with that. That was the basis for the reconsideration.

MJ [Col COHEN]: So when you say a "clear error of law," it's not to challenge you so much as to make sure, once again, I understand the nuance of what you're saying. Okay?

So you say before you are ready, it is typical practice within -- whether at least in the Air Force courts-martial or Article III courts, where the judge sets trial scheduling orders and says, We're going to have

discovery by this date; we're going to have, you know, motions filed by this date. And then it's up to the party to request an extension of that date ----

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: ---- and the judge can either approve it or disapprove it depending upon whether they find there is good cause, et cetera.

So when we say "clear legal error," in what sense do you mean that?

LDC [MR. RUIZ]: Let me -- I misspoke. It is true that we are not ready, and that is Basis No. 3 in 524MMM. But the clear legal error is him taking the existing manual timeline which says we have until the time a plea has been entered to file these motions and moving that up. Right?

So that's what the Williams and the Kelson case talk about. They talk about local rules of court cannot conflict with the rule in the Manual, ones that have been promulgated by the President; in this case, the Secretary of Defense. So Judge Parrella's ruling, taking that -- taking that timeline that's in the Manual and moving it up so -- to where he did clearly violates the rules and clearly violates the law. And that's what we briefed. That was 905 -- Rule for Military Commission 905(b)(3), right?

MJ [Col COHEN]: Thank you.

LDC [MR. RUIZ]: It's 905(b)(3). And we said, look, 905(b)(3) clearly conflicts with the military judge's ruling. We cited military authority from the highest military court. The prosecution responded and said: It's a 30-year-old case. Things have changed. But, by the way, you ought to consider our unpublished Army case for an authoritative reason.

Right? But the facts of the Williams case and the facts of the Kelson case are directly aligned, and it's why we say that that procedure was a clear error of law.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: The second reason that we think it was a clear error of law is because it set in motion this due process test run, which we believe is violative of due process. Right? And the reason that we believe it's violative of due process is all of the reasons I've stated.

But if I can try to summarize it, encapsulate it, it's the fact that -- it's the poisoned water analogy, right? Judge Pohl did a very clear, reasoned legal analysis based on information available to him, and he determined that that water was poisoned. What Judge Parrella asked us to do is to drink the water and see if we got sick; and only then could we then determine if, in fact, this well was poisoned.

That, as I say, would be unethical to do with a human being, but in the context of a capital case, setting up a process where he's asking you to engage in a test run with a protective order that's found to be defective is, in and of itself, a violation of due process. And why is that? Well, because we're at a critical stage of the proceedings.

The case I cited to you earlier, the Hodges case, says motions to suppress and the ability to cross-examine in that case were at a critical stage of the proceeding, due process applied, the defense was not given the opportunity to -- to do that well enough.

So two reasons: The Williams rationale. Secondly, the process he put in place was a -- self-violative of due process. We raised Sixth Amendment grounds in terms of violation of the right to counsel and effective assistance of counsel, right to counsel under the Military Commissions Act, and the effective assistance of counsel, Eighth Amendment and Fifth Amendment due process.

We raised all of these arguments as well in 524MMM. But the essence of that is a procedure's in place, right, which violates and conflicts with the provision in the Manual. Secondly is the process he put in place, itself, is violative of the due process because of what it forces us to do. And

the third piece of 524MMM was the other piece that I was referring to which just dealt with the practical realities of why we were not ready to proceed.

And I will acknowledge that that one doesn't necessarily go directly to the clear error of law. I am well aware of the practice that you described in military courts. I know that that is a practice, but that practice is subject to the provisions of the Manual. And to the extent that a trial conduct order would conflict with that in the timing of that, that would be an appropriate motion to be made before our military courts as well.

It's just -- like I said, pragmatically, it doesn't happen a lot because the discovery process tends to be so open. So the defense normally gets the discovery in a timely manner; we're able to assess it, analyze it. Normally don't involve these complicated issues where you have national security privilege; there are some.

But as I think you know -- and I don't know what your experience is, but mine is that it's nothing like the perfect storm of issues that we see here. So it never really becomes an issue.

But I would suggest to you that the rationale for setting off motions until the entry of pleas makes more sense

in this kind of a case than it does in many other cases. Because in this case, unlike those kinds of cases, discovery as I've described to you takes place over a number of years. Right?

And the one example I gave you was the 2013 date that the prosecution gives you as to when they provided us with the LHM statements. Presumably what they're -- what they're trying to communicate to the court is: Hey, we've had them. In 2016, they told us they were going to use them. Well, I will tell you, in 2013, I knew they were going to use them. I didn't need their notice in 2016 to tell me that.

But I ask you this question, Judge: What if I had been super fast and in 2014 I decided I was -- based on the information I had, I was ready to file? Now I had an inclination we didn't have all that information, right? But we didn't get that information until 2017, the tip of that FBI-CIA connection that we've talked so much about, why -- either one continuous course of conduct, right, Mr. Connell's description, why we have issues of attenuation. We wouldn't have even argued that intelligently until December 7th, 2017, and then, only then we only had two pages or maybe four -- I think it was maybe four or five pages. I'm not exactly sure what that was.

MJ [Col COHEN]: You may be right, but isn't that why courts provide relief based on the late discovery of evidence? I mean, the appellate history is replete with circumstances where the prosecution failed to disclose in a timely manner critical information to the defense, which then sometimes and sometimes not gets those cases sent back on remand for -- or the conviction is set aside for that very reason. I mean, Brady, in and of itself, deals with that -- with that very specific reason.

So that, once again, going back to the process, I mean, there's a process for dealing with that.

And then the other question I had for you, once again not to challenge ----

LDC [MR. RUIZ]: That's fine if you challenge me, Judge. It's okay with me.

MJ [Col COHEN]: Yeah. There will be times when both sides may find me actually challenging; this is just not one of those.

LDC [MR. RUIZ]: Sure.

MJ [Col COHEN]: You mentioned earlier waiting until the entry of pleas, but wouldn't motion practice potentially impact what those pleas are and whether negotiations for pretrial agreements take place, those types of things?

I mean, oftentimes shaping the battlefield, so to speak, impacts the decisions -- the tactical and strategic decisions that are made within a defense. So if we're waiting for all those decisions to be made until the entry of pleas ----

LDC [MR. RUIZ]: Okay.

MJ [Col COHEN]: ---- then you've already entered that plea. So ----

LDC [MR. RUIZ]: No. I see.

MJ [Col COHEN]: ---- how do those -- because I routinely see that as well, is that you file a motion to suppress so that you find out, okay, now I know whether this is coming in or not, which then impacts your trial strategy and potentially how you plead.

LDC [MR. RUIZ]: Understood. So let me say that -- I want to make sure you understand that we are not kind of waiting until the entry of pleas to file all these motions, and I think we said that in our brief. I do think you state a very practical reality. And the only reason I've talked about the timely aspect of it is because it goes back to our issue with the clear error of law. Right?

But what we've said in our brief, and what I'll say here today again, Judge, is that we were not waiting around,

sitting around waiting to file a motion. Certainly when Judge Pohl's ruling -- before Judge Pohl's ruling came in, we were actively working to perfect our suppression case. We, in fact, had a very lengthy draft that we had been working on, and we had continued to add discovery as it came through.

All we were waiting to do is figure out when all those dominos fell into place so that we can, in fact, file the comprehensive motion after we had done the analysis of the discovery and provided it to the court. Certainly was not a circumstance where we said: Hey, you know, there's no entry of pleas. We can wait X number of years.

At least for Mr. Al Hawsawi, I've always been clear that Mr. al Hawsawi is one that I believe would benefit from getting to a determination and adjudication on the facts and the merits of his case. We've sought to sever his case because we think not only would that help get that individual justice for him, but also because it would help expedite the process. Instead of five in one room and having the kind of hearing we've had today, it would be Mr. al Hawsawi presumably that would move us further along in the process. The prosecution fought very fiercely on that. We've lost, and so we're here.

But I don't want you to be left with the idea that

when I bring up that timeline is because that is -- that was ever a guide point in our strategy. In fact, that only became a focus of our attention when this motion came up and because of the dynamic that it created.

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

LDC [MR. RUIZ]: Yeah. And now I'm just going to try to talk quickly about some of the points Mr. Trivett raised that I may have missed.

I will -- you asked a question. I think it was of maybe Mr. Nevin. I think it was Mr. Nevin. And perhaps I think you had also asked it of Mr. Connell. The question was along the lines of: Did you think that the government should have had an opportunity to address the remedy? Or something along those lines, not perfectly clear. And I agreed with Mr. Nevin's answer but not Mr. Connell's.

So Mr. Nevin said that the government knew its options and, as far as he viewed it, they made those determinations and had made those decisions. Right?

I would like to point you to page 9 of 524MMM on that -- on that question that you raised.

MJ [Col COHEN]: I don't see that.

LDC [MR. RUIZ]: Sir, if you look at, there is a paragraph in the top, it kind of comes out of the text -- do you see

that? -- beginning with "The government has to decide"?

MJ [Col COHEN]: I have. I see it right now.

LDC [MR. RUIZ]: Sir, if you could take a look at that.

MJ [Col COHEN]: I've read it.

LDC [MR. RUIZ]: So that was in context of the 292 litigation, which was also incredibly expansive. Actually, it outstrips this and makes this one look meek and kind. That was related to the infiltration of FBI agents into one of the defense teams and subsequently providing intelligence on the defense teams' comings and goings.

In the context of that, Judge Pohl issued a ruling that put the government on notice, and it said exactly what it says on page 9. That's but one example. There are many other examples, and for a reference, if you need some nighttime reading, I would submit that you read the 367 series, 367 (MAH).

The 367 series is basically -- I wouldn't say our greatest hits, but it's a compilation of all of the violations of due process and all of the government's assertions of national security privilege. And the ultimate remedy that we asked in 367 was that there was this irreconcilable tension between due process and the repeated violations, right, such as informants on defense teams, such as people turning off the

courtroom or hitting that red light there when the judge didn't even know about them. Right?

So this is not a prosecution that was ignorant to the possibility and to the law that the judge had warned them about years before, that they have to make a choice. And that is their choice as we've said, right? And their choice is they want a protective order. They don't want to provide the names or mechanism for names that allows us to do what we need to do. Fine. I'm not asking you to for that. What I am asking is to restore the decision, to reject Judge Parrella's ruling that struck that balance and restore us to that place in time that struck the appropriate balance.

In terms of stipulations, just like I think Mr. Nevin brought up Old Chief, I don't have the actual site, but I remember the case. I have used it a number of times. Old Chief said that we could not, in the defense, stipulate away the government's case.

So we can't stipulate the government's right to put on a case on an element of a charge that they have the right or the duty to prove up, but conversely, the converse is the same. And really what the prosecution is trying to do here is to stipulate away our due process rights and to tell the commission that the commission should accept that stipulation

to stipulate away everything that -- the due process rights that exist independent of whatever the government chooses to do in putting on their case.

And I will tell you that the duty to investigate, the duty to represent a capital defendant, heightened due process exists independently of whatever the government chooses to do and they want to do and however and how they want to stipulate away our case. It doesn't work that way, and it shouldn't work that way. And I would urge you not to accept that dialogue because I simply think it's not a workable dialogue in a capital case.

There was a -- there was a discussion by Mr. Trivett where he talked about the exceptions and substitutions that were provided to Judge Pohl, and Mr. Trivett's position was that, well, Judge Pohl maybe just misunderstood us. Right?

So on page 27 of Judge Pohl's decision, Judge Pohl has a footnote at the bottom that I think addresses at least part of this contention, and I'm going to ----

MJ [Col COHEN]: Footnote 113, is that the one that you are referring to?

LDC [MR. RUIZ]: I am going to have to find it. I think you maybe found it faster because I'm working with paper here.

MJ [Col COHEN]: Not a problem.

LDC [MR. RUIZ]: Yes. That's correct. So I just commend that to your review. Obviously I think it was already on your radar, so.

MJ [Col COHEN]: Thank you.

LDC [MR. RUIZ]: Judge Pohl was well aware of what he was doing, what he had, and what he considered.

Now, I urge you to very cautiously accept what Mr. Trivett has said in terms of -- because what I wrote down, he said we say everything is true. To me, everything is everything, right? And -- but then he -- then he, I think -- also this says "obviously tethered to reality," right?

So, for instance, Mr. al Hawsawi's case, one of the points that we like to present is that Mr. al Hawsawi was brutally sodomized and that that sodomy led to rectal injuries that he's dealt with for many years. If Mr. Trivett is willing to stipulate to the fact that Mr. al Hawsawi was sodomized and that led to a number of injuries, then that's a dialogue we can have. But don't be fooled by the fact that that doesn't necessarily do away with the Fuhrman problem; it doesn't do away with the other infirmities of Protective Order #4. Right?

May I have one moment, Judge?

MJ [Col COHEN]: You may.

[Pause.]

LDC [MR. RUIZ]: So just to make sure that you are perfectly clear on our procedural history in 524MMM, it was, as I said, filed in direct response to the judge's ruling in LLL. The government responded to that.

Interesting -- the interesting wrinkle here was that Judge -- we've never argued this, so I mean that's -- I'm not sure what Mr. Trivett was referring to when he said we have argued the same issue. This is the first time I've ever argued 524MMM. Certainly never argued the issues having to deal with the timelines, the timelines and how -- that scenario of law, so I want that to be very clear.

The interesting wrinkle in this as well was that Judge Parrella ruled before we were allowed to provide our reply, which is highly irregular in any case. There's a Rule of Court that allows for certain timelines to be provided. In this instance, Judge Parrella issued a ruling -- actually, I'm sorry, no. I'm thinking of a different motion. Strike that.

MJ [Col COHEN]: Okay.

LDC [MR. RUIZ]: I don't have any other questions -- any other comments, Judge.

MJ [Col COHEN]: Mr. Ruiz, you've given me a significant amount of things to think about. I don't have any additional

questions at this time.

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

MJ [Col COHEN]: Thank you.

Mr. Connell.

LDC [MR. CONNELL]: Sir, it's the end of a long day. I will attempt to move with dispatch.

I began my argument by noting that at no time in American history has any court ever imposed restrictions on investigation such as those that are before the military commission now.

The government's response to that argument is to point to United States v. El-Mezain, a case in which the -- which involved a nongovernmental organization which was alleged to have a connection with Hamas in Israel and Lebanon, of course. The alleged error was that two witnesses in that case -- one a mere foundation witness but one an expert witness -- testified under pseudonym.

Two things are particularly instructive about that case. The first one is its use of the Roviaro and, by extension in this circuit, Yunis standards. At AE 524LL, page 25, Judge Pohl made his analysis of the -- sorry, my badge is on, not supposed to do that -- made his analysis, and he looked at Roviaro.

But I want to go one farther than the government. The -- it is not that unusual for the government to not provide the names of witnesses. In fact, Roviaro itself, which is found at 353 U.S. 53, a 1975 case, Roviaro itself is about informers. And in a number of cases -- think about a drug case, which I'm sure work very much in court-martial like they do otherwise. There's somebody working off a sentence or whatever, who acts as an informer, sets up a deal. Then an actual officer goes and makes the deal. They bust the defendant, and the defendant wants to know, "Well, who tipped you off in the first place? Or who did the earlier deal?" And the government invokes informer's privilege.

In that situation, unless it's closely related -- the fact is closely related to the defense or the charge, then ordinarily the government's informant's -- informer's privilege prevails and they don't have to provide the name.

What the D.C. Circuit has ruled in United States v. Yunis, 867 F.2d 617, D.C. Circuit case from 1989, is that the Roviaro analysis applies with classified information privilege because one can see an obvious parallel between the informer's privilege and the classified information privilege. That's the analysis that played a small part in El-Mezain but played a large part in

Judge Pohl's original ruling; that because the information we were seeking was closely related to the defense of the suppression motion and of the mitigation phase, that ordinarily -- under what the analysis in El-Mezain and under Yunis and Roviaro, we had made a sufficient showing.

Hold that thought for just one second.

But because the key distinction between El-Mezain and this case is the difference between two witnesses testifying under pseudonym and a complete prohibition on seeking any information about those witnesses, about anyone who knows those witnesses, and if you found them, you could not ask them a significant amount of information because there are contact restrictions.

So if you were to take El-Mezain as an example, in a case that is about conduct in Israel, because we're talking about support for Hamas, the -- if the court had prohibited the defense from conducting any investigation around the witnesses, anyone in the same government as the witnesses, and anyone who knew anyone in the Israeli government, then it would be the scope of the restrictions here.

The court -- to make the analogy correct, you would further have to say that if you were -- found a way to talk to one of those witnesses through requesting them through the

government, having a, in that situation, Mossad agent go and deliver an invitation to speak to you, then you would not be able to ask them about whether they were in Israel or not.

Because what we have here is not merely pseudonyms; it is a complete investigative prohibition, prohibition on investigating anyone who knows those people. And we haven't really talked about this, but that's the affiliated persons aspect of Protective Order #4. Not only does the prosecution -- excuse me, let me be more clear there.

The government just made an argument about persons whose identities are covert. This is largely a straw person, really unrelated to Protective Order #4 because, number one, there's no information in the record that anyone's -- any one of the UFI witnesses, much less either of the hundreds of witness who are non-UFI witnesses, that their identity is covert. There is information in the record that at least one of those individuals, their information -- their identity is not covert.

But Protective Order #4 doesn't just reach persons whose identities are covert, it sets up a four -- sort of a four-element test, and it includes restrictions on persons whose identities are overt, who have had some connection with the Rendition, Detention, Interrogation program. And it

includes all of what it defines as affiliated individuals. And I just want to -- and that's at paragraph 7.a. of 524MM.

I just want to read you what an affiliated individual is: People who, based on family, academic, business, professional, community, social, or other ties can identify CIA officers. This category of individuals includes but is not limited to family members, business associates, household employees, and neighbors. It excludes, however, foreign potential witnesses and the five accused.

So in the Washington, D.C., area, sir, the -- it is difficult to find someone who doesn't know a CIA officer, either overt or covert. The -- so much so that it's raised a family and friends -- Protective Order #4 has raised a family and friends problem for us in that we have family and friends who have been connected at some point in some way -- or some people do -- and so we had to write a letter to the prosecution saying, hey, we just want -- we don't think this is -- for people who are completely uncase-related, we're not asking them about the case, but just someone on the team happens to be related to them, they shouldn't be applied. But otherwise, they would fall under this affiliated individual.

It is a vast investigative prohibition that reaches far, far beyond the hypothetical case of a person whose

identity is covert.

Now, I asked you to hold the thought of Roviaro and Yunis in that example. Because the government's example of the distinction between AE 523M, the unique medical identifiers where we have received the names and identifying information but will refer to them as, you know, X937 or something in court, is an excellent -- versus what's happened in the UFI witnesses where we'll never know their identity is an excellent example of the difference between a qualified privilege like the informer's privilege and an absolute privilege like the classified information privilege.

The government has said that it invokes classified information privilege over the names of these 64 witnesses. We can never receive it. There's nothing that you could do to order them. There's nothing that I can do to convince them. It is an absolute privilege. And that's the place where I began my argument this morning about there are costs associated with the assertion of absolute privilege from Reynolds v. United States, the very first classified information case about the plane that crashes in Georgia. From that time on, the Supreme Court and other courts have recognized that such an absolute assertion of privilege comes with costs.

The -- and as sort of a sidenote, one of the arguments that the government made was that we fought like dogs over Touhy, and that was a quote. And I noticed the military commission writing down something at that time, maybe about Touhy.

So I just want to direct you to page 1,000 -- excuse me -- 18713 in the transcript of 11 January 2018. For a long time there was a big debate over how Touhy regulations applied to these interviews or interviews of any type. We had a whole -- whole motion series in 396 on Touhy.

But finally it was resolved on 11 January 2018 where the government finally gave up and said Touhy does not apply to -- to interviews because there's no formal demand which would trigger the CIA Touhy regulation. So I just wanted to not let Touhy be sort of a red herring that dragged us off in a different direction.

The government makes the argument that these people wouldn't talk to us anyway because they have nondisclosure agreements. I have the same nondisclosure agreements. And in general, what those nondisclosure agreements prohibit is releasing information that is classified to a person who is not authorized to receive it. There are a number of workarounds that can be used, and we have used them, such as

obtaining appropriate spaces, seeking information about need to know. Right?

We are genuinely concerned holders of classified information, and I consider myself a good steward of the government information and do everything that I can to find out what the rules are and to follow them. And that's what we've done here.

But this NDA argument, we went exactly through this with respect to the former CIA interpreter, who might have testified today if the CMCR had ruled. With respect to that person, we thought that perhaps there was a nonstandard nondisclosure agreement that imposed additional restrictions. Because we interviewed the former interpreter and we thought perhaps there was a situation of some nonstandard nondisclosure agreement.

And the government produced the nondisclosure agreement in discovery. And what we all learned was that they have the same Standard Form 314, or whatever it is, that the rest of us have. But it's just an ordinary nondisclosure agreement even when a person has formerly worked for the CIA. They use the standard forms that the United States Government uses. So that means that there are ways to appropriately and consistently with United States law interview witnesses.

Certainly we have done that with respect to the five witnesses who have UFIs who agreed to meet with us. We interviewed them. We did it over secure -- either in a secure space or over a secure line, using an STE phone. You know, we have DISOs, we have OSS who can all advise us how to do these things properly.

The government -- excuse me. The military commission asked Mr. Nevin a question about should the government have been provided an opportunity, so three observations that I wanted to make on that question.

The first is, for a person who is alleged not to like CIPA, I cling very closely to CIPA because it provides both protections for the government and protections for the defense, and one of those is 949p-6(f)(3). And this is what I referred to in the original argument, that any ruling shall not take effect -- that's the language of the statute -- until A, the government has an opportunity to appeal, or B, an opportunity thereafter, meaning after the appeal, to withdraw its objection.

That's exactly what has happened here. Even with Judge Pohl's order -- because it doesn't actually take effect. Nothing is excluded until there is a trial on a suppression order. The government has the opportunity to appeal today if

they chose to, maybe, depending upon how you count the days while the motion to reconsider is pending, and it certainly has an opportunity to withdraw its objection. In fact, arguably it modified its objection at least in its amendment to Protective Order #4, as Judge Parrella recognized.

The second point on that is that the government had six different versions which are recorded in AE 54 -- excuse me, 524LL of its restrictions in this extensive iterative process that took place. Judge Pohl did not hold the government to the position that they described as final. Judge Pohl did not hold them to the position that they described as, I quote here, final-final. Even after the final-final result, the government continued to introduce new variations on the restriction and was allowed to do so.

Third -- and this gets lost sometimes -- the whole reason that there is a Protective Order #4, as opposed to simply a series of letters from the government, is because in oral argument, the whole reason the government did that was to invoke the procedures in 949p-6(f).

On 1 March 2018, at transcript page 19076, when we were discussing what the appropriate remedy was, I pointed the military commission to M.C.R.E. 505(h)(6)(B). (h)(6)(B) is the same wording exactly as 949p-6(f)(3). Then the military

government discussed that process with the government, and that's at page 19160 in the transcript.

And Judge Pohl gave the government a choice. It says we can either do this, I can analyze this as an unlawful command influence -- an unlawful influence question, which some of the military cases do, or I can analyze this as a statutory question. You, Government, if you want to analyze this as a statutory question, you need to file a proposed protective order. And that's at transcript page 19168 through 70.

And the government chose the protective order route, specifically to invoke this statutory process; and that was AE 524L.

The government makes a number of arguments which are intended to say there are workarounds. The fact that we are completely restricting your investigation in this area is of no moment to the military commission because there are workarounds.

The government lamented in its argument that Judge Pohl never accepted its argument that, well, we can just ask the client. The military commission made some observations about some evidentiary difficulties that are associated with relying on one's client.

But there's also evidence within the record on why their memories are unreliable as a result of having suffered torture, and those are the declarations of Dr. Duterte, D-U-T-E-R-T-E, at AE 425E Attachment B, and the declaration of Dr. Morgan, who we anticipate will testify once we can compel our additional witnesses at AE 425NN.

The reason why I point this out is, there are -- this, like some of the other government arguments, like these witnesses will never talk to you, are merely that from the government; they're arguments. But we have -- and I have described to you today a number of declarations that we have placed into the record to actually create some evidence on these questions, evidence that Judge Pohl relied on and that the military commission can rely on if it wished to.

The government also makes an expansive argument that we're willing to agree to everything the defendants say is true. I have -- I have hoped for that, and one of the reasons why we're working so vigorously on the stipulation is to see what can we agree is true.

But when the rubber meets the road, the government always hedges, and I would like to point you to two places. One of those is AE 628C, footnote 6, where far from the government agreeing that everything that we said was true,

they, in fact, questioned our good faith in placing the representations in 628 but also in 628F, footnote 3, where the government says, yes, I know we've always said we will say everything is true, but there are some limits to that. And so I don't blame them for that.

The reason why we're working on the stipulation is to find out what the limits are. What is a stipulation that is acceptable to the government and the defense, and that's the process that's going on right now.

The government observes that it has produced evidence about -- and this is the 538/561 series, about the CIA-FBI connection, and I concur. What the government doesn't observe is the role of investigation -- of unrestricted investigation in bringing that to the fore in the first place, because we had exactly one sentence in the discovery that we pursued through investigation which ultimately led to the production of the evidence.

And, in fact, there were facts related to this topic that the government has, frankly, acknowledged that it didn't even know until we brought to their attention. They looked in appropriate places, found additional evidence and produced it to us. And that's the iterative nature of investigation.

But it also is remarkable that the government

rejected most of the witnesses that we requested from the FBI-CIA discovery. So one of the things that I expect the testimony of -- the examination of Special Agent Drucker to show is how much more additional information is available that we know about from the discovery.

That brings us to what in my mind was really the crux of the government's argument, which was the defense has no right to a pretrial interview; therefore, they have no right to investigate. That's their syllogism.

But the cases actually reject that premise and explain the difference between the right to have someone submit to an interview versus the right to seek an interview. And one case that really puts that very cleanly is United States v. Fischel, F-I-S-C-H-E-L, which is at 686 F.2d 1082, a Fifth Circuit case from 1982.

At page 1092, the court observes: We begin by noting that no witness is obligated to honor a defendant's request for an interview, but it is a different matter for the government to place a defendant at a tactical disadvantage by reserving to itself alone the ability to request an interview with a material witness.

Because of the distinction between a prohibition on investigation or, in this case, a broken mechanism to

request -- and the briefs in 524G talks a lot about the cases which talk about when the government tries to control the access to the witness. You can't find them yourselves; you have to go through the government. The distinction between the ability to investigate, the process -- in an adversarial process is radically different from the right to compel a witness interview.

But even in that situation, there are a number of cases which have addressed the question of this exact question. One of those is United States v. Tsutagawa, which is spelled T-S-U-T-A-G-A-W-A, 500 F.2d 420, a 19 -- a Ninth Circuit case from 1974, which in this context describes: A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense. Which is exactly the situation that we have here.

Because of that, there are a number of cases which have held where there is a -- some government effort to deny access to witnesses that a -- the court -- a court does have the authority to -- or a court-martial does have the authority to compel a witness interview.

In United States v. Stellato, S-T-E-L-L-A-T-O,

74 MJ 473, a CAAF case from 2015, the court-martial had denied an accused's request, deposition request, but sought to -- because he wasn't going to give a deposition, he said you can interview -- you can conduct an interview of the complainant.

The -- in that, there was no wrongdoing by the government -- they didn't try to hide her or conceal her in any way -- but the CAAF held that the accused in the instant case should have been provided with the opportunity to try the complainant, and, therefore, upheld court-martial's finding that the denial of the interview committed -- constituted a discovery violation because it violated R.C.M. 701(e), "No party may unreasonably impede the access of another party to a witness or evidence."

That same rule is provided -- that same right is provided statutorily in 10 U.S.C. 949j(a).

Similarly, in United States v. Killebrew, the Court of Military Appeals, so a slightly older case, rejected the government argument that a court-martial lacked authority to compel a personal interview where the government has concealed or blocked access to a witness. That case is at 9 MJ 154, C.M.A. 1980. That was a case where the government had PCS'd a witness away. And even in that situation, the court held that court-martial's refusal to compel a personal interview was

erroneous.

And last of the compelling cases I want to draw to your attention is United States v. Opager, O-P-A-G-E-R, which upheld the authority of a district court, not a -- the other two cases were court-martial cases, but district court is analogous, to compel a defense interview with a witness for whose identity the government asserted privilege. So it seems a very similar situation. And that is found at 589 F.2d 799, Fifth Circuit case from 1979.

The -- I want to address the analysis that I suggested in my original argument about what facts get compared, because two parties have said that they don't think it's a good analysis. It is only a valid analysis if there is a prejudice requirement.

In my initial argument in 524 for dismissal, my argument under the statute, my reason for dismissal is that it's really unknowable the impact of distorting the defense function by taking away its ability to investigate. And if it is unknowable, then the government and counsel for Mr. al Hawsawi are correct, that it's not -- it doesn't make sense to compare one set of facts to another if it's unknowable.

But what Judge Parrella was doing, as I read it --

and everybody -- you know, the fact that nobody can agree on what this order actually means says something about the order, I think. But what I think it means is that Judge Parrella was looking for a prejudice analysis. How did the denial of these investigative rights, which one would normally have, impact the defense?

And if you decide to apply prejudice analysis -- which I'm not suggesting is correct, but that's what Judge Parrella thought -- then you do have to compare fact set A and fact set B. And fact set A, for clarity, is everything that we know now.

The government made an argument that Mr. al Baluchi was able to put together a witness list of 112 witnesses based on two things -- two things: They said the client and the government discovery. They really forgot a third, which is the extensive investigation that we conducted up to 2017. But that's fact A.

And so that's the reason why it's not accurate to say that after the 18 witnesses testify, we would look at the other hundred witnesses or so and see if -- and those would be fact set B, because those are already part of fact set A. I mean, that's what we know under the restrictions that we're operating on right now.

Fact set B would be what we would learn if we were not operating under these restrictions. And that, of course, is unknowable because the government has an absolute privilege.

And that is why I suggested that if you find a prejudice analysis to be the proper analysis, then the evidentiary hearing which should be heard is to call the government's bluff on their claim that these evidentiary -- that these investigative restrictions had, I quote, no impact on the defense.

The -- that is a factual question that can be tested by an evidentiary hearing at which -- and we've identified a number of the witnesses already, 23 of them actually, that -- who have information about that question. And the -- we could have an evidentiary hearing on that question and get to the actual answer -- as close to the actual answer as is possible.

That's all I have, sir.

MJ [Col COHEN]: So although you are aligned with your colleagues to a certain extent, you apparently are also not aligned with your colleagues based on their own statements with yours.

So -- but Mr. Trivett talked about kind of how you all are potentially -- and I use this in kind of a pejorative

sense -- further along in pushing this motion to suppress witnesses than some of the others may be; maybe wrong, maybe right. But just --

LDC [MR. CONNELL]: No, sir. I agree with that characterization. I will tell you that it is driven by fear of default. I'm -- I have a great fear of defaulting any of our claims and was concerned that if we did not file according to the order, that an order of default might be applied against us; that we had defaulted on our claim of involuntariness. So that drove my actions and -- but that puts me where I am today.

MJ [Col COHEN]: I understand.

Mr. Trivett -- and, like I say, I can always go back and read the exact words -- but to the extent that the conversation was something along the lines of, look, we're going to call these witnesses for this motion to suppress, and most likely, as the commission indicated, although there may be -- there will be opportunities for multiple defendants to question these witnesses as they appear, let's assume that I have to issue an individualized ruling on your case.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: So let's say that that motion to suppress goes forward.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: We call those witnesses. Then the government has conceded that, well, but that doesn't mean that we're done with that motion; that the defense is then going to get to argue as to why there are additional witnesses that need to be called. And, in fact, the testimony of those witnesses could theoretically lead to the justification for why you would need additional witnesses.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: Theoretically those witnesses could lead to the necessity to produce additional discovery ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: ---- with respect to that motion.

LDC [MR. CONNELL]: I agree with all that.

MJ [Col COHEN]: And then even with respect to -- I mean, those witnesses could produce evidence as to why you would have a greater argument for why Protective Order #4 is, in fact, prejudicing your client.

LDC [MR. CONNELL]: Yes, sir. And if I could develop on that last point for a moment. The -- what would really make sense to me, and what I would suggest, if you determine that Judge Pohl's ruling is not the approach that you want to take and that a prejudice analysis of some type is required, there

are really two ways that we can do this.

One of those is we can have five multi-week suppression hearings that don't end the question, right? Because there are multiple other steps to it as you just described. Or we can have -- with the idea that eventually there will be an argument, right?

So there's really three stages to it: There's suppression motion, there's argument for the additional witnesses that we request in 628C, and then there's perhaps maybe at the end of that in this hypothetical an argument about we have now demonstrated, we believe, based on this additional evidence, that either Protective Order #4 had an impact or it didn't have an impact, depending on which side you're on. Right? That's the way that -- what I understand you to have just described.

What would make a lot more sense from both a legal and, I respectfully suggest, a judicial economy point of view would be if we're going to test prejudice, let's do it by hearing on the question of whether this Protective Order #4 has an impact or not, which is what I was suggesting earlier.

Now, there will be some overlap, and I'll give you an example. So I made a reference earlier to the witness who said that they were told by the CIA that they had to appear in

light disguise. The government made multiple on-the-record and in-writing representations to us that that was the witness who was saying they wanted to be in light disguise, but when we actually got to the witness, the witness said no, I don't want to be in a light disguise.

It may be that that particular witness, for example, would have to testify so that we can get to the bottom of this question, right? You don't have to accept our declarations on it. You don't have to accept the 302s on it. We probably have to get to the question of what is -- you know, is someone distorting this process, whether that's CIA Office of General Counsel or somebody else. Right?

Because the government's claim is that the process that they set up to request interviews in Protective Order #4 is an adequate substitute, for lack of a better word, for ordinary defense investigations. So we would have to investigate that question.

And the second question that we would investigate is the non-UFI witnesses, right? What -- and that's where we would probably call our investigators to testify to here's what we were doing, here's the results that we saw empirically, and here's what we had, you know, we were working on when the order stopping investigation came down. Here's

what we expect would have happened. And you can give their testimony whatever weight you consider appropriate.

That would be -- to me, it seems that you could have that hearing which would be substantially smaller and more economical and then decide the question of prejudice if you decide that prejudice is a question that has to be decided.

MJ [Col COHEN]: And I have not.

LDC [MR. CONNELL]: Right.

Did I answer your question, sir?

MJ [Col COHEN]: You did. I'm just trying to figure out. Everyone uses different terminology ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: ---- and, of course, people have asked me not to use certain terminology today, which is fine. But what I'm trying to figure out is underneath whatever terminology is being said, how far apart are we on certain issues moving forward?

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: The other question I've got is just for you in general, since you're there, is, and as Mr. Ruiz just argued -- I mean, they filed a motion to sever in this particular case. I am not soliciting that; I'm not going back and reconsidering, you know, that motion at this point

sua sponte or any of that kind of stuff ----

LDC [MR. CONNELL]: Sure.

MJ [Col COHEN]: ---- but my point is this: Theoretically, how P.O. #4 impacts a particular accused could be different ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: ---- based on what evidence is available, what witnesses are already known, what has been disclosed, all of that kind of stuff.

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: That's why R.M.C. 812 exists.

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: There are unique equities with respect to each of the clients in this case. That is inevitable. So I have got to try to make sense of my responsibility then to make sure that each of the accused get their own individual fair trial.

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: And so I look at something like 524LL and 524LLL and just ask the general question, is a blanket ruling like that, either way, sufficient to address the individual needs of each accused, and based in -- with particularity on the facts and circumstances related to the discovery, access

to witnesses, and all those kinds of things?

LDC [MR. CONNELL]: I'll give you my observations on that, if that's what you're soliciting, sir.

The first observation is, it really depends -- the answer to your question depends, in my view, on at what level of generality you're operating.

Now, the government's fundamental claim is summarized I think quite well by Judge Pohl when they let -- they lay out a number of items, which I call "workarounds" -- I think they would probably call them "adequate substitutes" -- of discovery, extensive open source, the ability to request interviews under Protective Order #4, the ability for some witnesses to testify, et cetera, those things which they identified today, a stipulation that we'll say everything is true, all those things, are those a sufficient substitute or workaround for the ability to investigate?

Judge Pohl did a very nice -- in his two paragraphs where he found that those things would not give the ability to do a suppression but would for mitigation, I think did a very nice summary of the government, putting all their points together in one place.

Now, the answer to your question depends on whether you are comparing that to the principles of the American

adversary process where the -- ordinarily the defense might have all of those things plus the ability to independently investigate.

If you are looking at a framework level of the -- taking away one of the core, not only rights but, in fact, duties of capital counsel, distorts the adversary process, then a single answer applies to all, because looked at at that level of generality, which is, I think, the level that Judge Pohl was looking at it, it makes a lot of sense that the -- we have an adversary system. That adversary system is not functioning in this situation because of an assertion of classified information privilege, and that's pretty much true no matter who the advocate on what side is.

On the other hand, one could look at it at a very granular level in that, for example, I have argued against the government's several arguments of the government today because it's nothing but their argument whereas we produced evidence about the witnesses that we had located and cooperated with us before the imposition of the restrictions about the ability of Mr. al Baluchi to accurately recall events after having been subjected to a course of torture techniques and a number of other factors that we laid out through evidence to the military commission.

The -- if you look at it at that granular level, then yes, there would be different answers for different parties in the same way that when we were arguing 502, one team took a sort of small evidence -- evidentiary, international law approach that the government described, whereas we wanted to talk about U.S. policy. Was U.S. policy at the time hostilities or not? And so in order to do that, you need the policymakers or at least the policy implementers to testify. And so depending upon what framework approach, I think you can get a different answer.

If you go down the path of there has to be a prejudice analysis, then I think you're more likely -- you're really more in the sort of granular case-by-case analysis. But I still suggest -- even acknowledging that, I still suggest that that is a more legally sound and traditionally economical path than having a series of suppression motions because in many ways, there's a common nucleus of operative fact.

The 64 witnesses -- the 64 UFI witnesses are the same for everybody. The 5 witnesses -- when I say "everybody," I mean all 5 defendants. The 5 witnesses who agreed to some form of telephone or other interview with the defense are the same for all 5. In fact, some of those people were not listed

as UFI witnesses for Mr. al Baluchi, but we wanted to know about the conditions of confinement at a certain place anyway, so we went and talked to them. And so with respect to the UFI witnesses, there is -- the universe is basically the same for all 5 defendants, I suggest.

With respect to the non-UFI witnesses, that's where you get a really substantial difference because different teams may have different -- they certainly have different strategies -- they have -- and I'm not speaking for anyone else here, but they also have different resource allocations to investigation versus other things, to foreign versus domestic and could have other factors.

So I guess that's kind of a free-ranging reaction, but I hope that I have addressed some of your concerns in my reactions.

MJ [Col COHEN]: You have. And I'm not necessarily looking at that. It was just part of the discussion I had with the government during their response obviously dealt with the fact that if we come back in September -- not if, when we come back in September, it may involve, you know, three weeks of witness testimony primarily based on your witness request, although others may have obviously the same desire to talk to those witnesses, et cetera.

LDC [MR. CONNELL]: Sure.

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

LDC [MR. CONNELL]: Thank you.

MJ [Col COHEN]: Mr. Nevin.

LDC [MR. NEVIN]: Your Honor, I'm aware of the hour, and I'm not going to repeat what others have said, but there are a couple of things that are important ----

MJ [Col COHEN]: Please.

LDC [MR. NEVIN]: ---- that I did want to be heard on.

Just on that last point, as counsel put it, the principles of the American adversary process was the way I approached it with you previously. I don't disagree that at a granular level, there could be different -- this could affect different people differently, but at least some of this will not be -- can't be ascertained with precision.

This is why you have -- this is why you have this process in place. And you see this again and again in the cases, saying there is not a one-size-fits-all answer to this. We have to take each case on its merits.

And so -- but what we do have is this general way of proceeding, which is that we -- we have defense counsel. And if the person can't afford counsel, we appoint counsel to represent them. And we say, both generally and specifically,

go and investigate.

And the defense lawyer goes and investigates. And then at the end of that long process, you have justice. And it is that -- at that level of analysis that the restrictions on investigation here short-circuit the principles of the American adversary process.

And when you -- of course, when you do that in any case, you're on dangerous ground. And if it's a -- now, if it's a shoplifting case in Boise, Idaho, you're on dangerous ground. But, of course, there's a lot more volume. The knobs are turned up a lot higher in a case like this with the whole world watching and judging the American adversary process. What will it do? How will it work? And so there's a lot more riding on it, I guess I would say, even though it's really the same problem.

And so, I mean, at the end of the day -- and I'll come back to this in just a minute when I say the last thing that I want to say. But, I mean, at the end of the day, the question is: Is there a sanction for not following the traditional American adversary process?

And so -- I mean, everybody is sensitive when they get up and tell the judge there's never been a case like this and then their opponent gets right up and says, Oh, yes, there

was. That doesn't make you look good.

And counsel addressed the Holy Land Foundation case, El-Mezain. I pronounce it Mezain. But just a couple of other things let me say to defend the position that there has never been another case like the one you're dealing with right here and now, and it's definitely not El-Mezain.

You know, I had a little bit of experience with the Holy Land Foundation case. And I can just add that that was a noncapital case. That was -- those were witnesses who were not percipient witnesses to any of the things that the defendants did or that were done to the defendants. In fact, there was nothing done to the defendants. There was no torture in that case. There was no effort to go out and interview witnesses who had extensively mistreated the defendants.

Those witnesses didn't have any affirmative evidence in support of a defense. They were not talking about Brady evidence. All the evidence that we're -- that we're focused on here, the UFI witnesses, the black site witnesses, all of that is Brady evidence; and the government has an obligation not only to not conceal it but to -- but to bring it forward and turn it over. And none of that -- none of those things applied in the El-Mezain case.

So if there's a case out there somewhere that's like this one, then I'll stand corrected, but I can assure you it's not El-Mezain.

Another issue that counsel returned to several times was the need to protect classified information. It's government information. We have a right to protect it. The national security privilege is the most important of the evidentiary privileges. And I think you can debate that point. But as I tried to say the first time I was here, no one quarrels with the proposition that the government can classify evidence.

Now there is a provision in the executive order that says thou shalt not classify evidence for the purpose of covering up illegality or embarrassment. And as I have said to you -- I believe I have said to you previously, the torture program constituted the commission of crimes under domestic law and under international law, 20-year felonies, violation of the Torture Act and of the War Crimes Act. So -- and those -- this evidence is, in part, being suppressed to protect the people who did that. So -- but still, that's not my point. I'm not asking you to order them to declassify the evidence, assuming that you would have that power.

All I'm saying is that the law is equally as clear

that -- and it begins with the Reynolds case that counsel cited -- the law is equally clear that if you want to assert your privilege to classify information, it is the right of a judge looking at what must be provided to assure due process -- fair trial, right to counsel, freedom from cruel and unusual punishment -- it's the right of a judge to say, "I'm going to impose a sanction on you for doing that. Can't stop you from doing it, but I'm going to impose a sanction."

And, you know, in some ways, I think that's really -- that in a nutshell is where we are here.

MJ [Col COHEN]: Okay.

LDC [MR. NEVIN]: It's what Judge Pohl did and it's what's still on the table in front of you.

Just to add a couple of things to -- counsel said that these people shouldn't be talking to us, and Mr. Connell made the point about the nondisclosure agreement, it's not what their nondisclosure agreement provides. And if you read the litigation that Mr. Connell referred to previously, you will see that many of them have talked to us.

There was a pleading in the original round of military commissions in 2008 called D-95 in which an investigator working for our team apparently determined the identities of certain persons who had been involved in the RDI

program, and it led to -- it led to many things, including a long investigation that resulted in prosecutions in D.C. District Court. And that's a complicated issue, but the point is, we -- various teams have been able at times to actually identify people.

Your Honor, several of the people involved in the RDI program have written books, so it's not as if at least some of these people couldn't be contacted or at least, if we couldn't -- that we might not be able to get somewhere if we could make the effort.

And again, it's not so much the question of classifying the information; it's the fact that it's a capital case. And if you want to keep all that information -- if it's more important to protect the privilege than it is to provide a fair trial, then you -- then fine. Then classify the evidence, keep it under wraps. But there's got to be a price for that or else the system is not working the way it was designed to work.

I do call your attention to Mr. Trivett's concession that this evidence is more relevant for mitigation than it is for suppression, and that -- I don't know that that is something that needs to be decided today or, I mean, in the course of resolving these motions to reconsider. But that

will come up again, and I flag it for you.

MJ [Col COHEN]: Thank you, sir.

LDC [MR. NEVIN]: I ask you to take note. Because the 800-pound gorilla in the room, Your Honor, one of them -- one of them is torture and the other is that it's a capital case. And if you -- if you -- if it's not a capital case anymore, almost all of the struggling that we're doing here goes away. And so the fact that this evidence is, indeed, relevant to mitigation and that we are, indeed, being prevented from having full access to it is an extremely important fact.

So then I just wanted to speak, also, to the question of the stipulations. And I haven't seen the stipulation, but I don't doubt that it will be voluminous, and I don't doubt that there will be many things in it that I will look at and say, yeah, I think that's probably right. And there may be -- just as Mr. Connell said, there may be -- there may well be some things that we can't agree about.

But I know this. If I stipulate before I've done my investigation, I am a walking violation of the Sixth Amendment. That's not how this works. I don't go -- or the prosecution doesn't come to me or I don't go to them and say: Why don't we agree to the following five things or ten things or a thousand things?

That's not how it works. How it works is that I do what I'm obligated to do under the ABA Guidelines and under all the cases. I investigate. I talk to the witnesses. I ask them what happened. And at the end of that, then I go to the government, maybe, and I say, Will you stipulate? Here's what I know as a result of an investigation. Will you stipulate to these things? Maybe I decide to do that.

But also remember I want to convince you of something, and just as the Old Chief case says, I may well come to the conclusion that I can be more persuasive to you by putting the actual witness on the stand rather than a dry stipulation, a stipulation that's just black ink on white paper, a witness sitting there saying it.

And if you've -- I know you've tried criminal cases on both sides of the bench, and you know that there are times when a witness has a great deal of power, and what's in a dry transcript may or may not convey the guts of what the witness had to say.

So as much as I appreciate the process or the idea of stipulation, it's not an answer to the problem that is presented to you by these motions to reconsider.

So last, I was really -- I mean, I knew that Mr. Trivett at some point would compliment Mr. Connell on

AE 628 and tell him that's a really terrific motion to suppress you wrote there, and -- because it is. I mean, it is.

We have been down this road before, Your Honor, many times. We say we are prevented from doing a particular thing, but like, let's say, filing motions because we're laboring under a conflict. And if we just stop working, nobody likes that very much. And if we keep filing motions, pretty soon someone is saying, Look at all the nice motions you filed. You must not have been really having any problems.

So it's -- on the one hand, there's this kind of an idea of being whipsawed between two competing ideas, let's say.

But -- but I also listened to see if Mr. Trivett finally would deal with the argument that I make in the motion to reconsider. Remember that? The argument I made in the motion to reconsider was this exercise of litigating this motion to suppress cannot resolve the question of -- that's presented by AE 524. It can't do it.

You know that discussion of the -- you asked Mr. Connell and Mr. Trivett what's the way forward? Well, we would have some witnesses, and then we would have an argument about whether more witnesses would be necessary. And then if

we called some more witnesses, why, then, we would put them up. And then after all that, we would -- then we would just -- why then we would just argue about whether the evidence should be suppressed, and then we'd know. But my point is, then we wouldn't know.

If you decided that the evidence had to be suppressed, of course you would make that finding. But suppose you didn't. There would be no way for you to know whether the reason that the evidence looked to you like it didn't support suppression -- there would be no way for you to know whether that was because there just wasn't any evidence out there or because we were prevented by Protective Order #4 and by the restrictions on investigation from finding it.

Now we are at the end of this -- it's gone on for months -- and still no one -- the government hasn't addressed it. No one has said to me: Why is that wrong? And how -- how can a motion to suppress possibly resolve the problem presented in AE 524? The reason no one has answered that question is because you can't answer it.

A motion to suppress is -- I mean, by all means, clearly a motion to suppress is coming some day in this case. Everybody recognizes that. But that's a separate matter. That happens after you've done your investigation, after

you've fulfilled the principles of the American adversary process. Then you litigate your motion to suppress. And -- but that's a different question from the one that's presented in 524.

And so we're -- we're here in response to 524, to the L's, the LL and the LLL. But they're both in 524; they're not standing independently. Not today, not on this motion.

So anyway, that's my argument, and thank you for hearing me out.

MJ [Col COHEN]: Absolutely, sir. And I understand the points you were making. Thank you.

LDC [MR. NEVIN]: Thank you.

MJ [Col COHEN]: Ms. Bormann?

LDC [MS. BORMANN]: I have three different things I would like to point you to, so I will endeavor to be brief.

One is -- and I'm going to take issue with Mr. Nevin here, is the timing of this entire situation. Of course there would be no motion to suppress if 524LLL hadn't been issued by Judge Parrella, because 524LL removed the concept of a motion to suppress from all of our vernaculars. So the reason I want to bring that up is to talk a little bit about what Mr. Ruiz said, what Mr. Trivett said, what Mr. Connell said, and then what Mr. Nevin said.

The beginning of the tip of the iceberg -- I think is what Mr. Ruiz called it. We started getting discovery basically because a witness testified to it in December of 2017 that, to put it in an unclassified way, connected the FBI and the CIA and the interrogation issues. That little tidbit eventually became a much larger trickle, and it's still trickling. I'm being kind. It's actually being dumped in large quantities. We got about 350 pages the other day.

But that also coincided with the restrictions on our investigation, because if you will remember back -- and you are at a disadvantage here, so I'm going to point you to it.

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

LDC [MS. BORMANN]: In November -- or, I'm sorry, in September of 2017, so just a few months before we began learning about a lot of this RDI stuff, we received the first notification from Mr. Groharing, one of the prosecutors, and it's in a letter titled Memorandum for Defense Counsel of Khallad Bin'Attash. That's my client. And it's attached -- it's already in the record at 524 (AAA), the original motion; it's Attachment C. It's two pages, and it lays out the beginning of what will eventually become the 524 series of motions.

Because, as Mr. Connell told you, then what happens

is we come to court -- and this is the fall into winter of 2017 -- and the government says on the record: We want to -- you know, we want you to swear that you'll abide by this.

And nobody does. And so then Judge Pohl begins a series of conversations with the prosecution, which eventually results in their first asking for a protective order.

Now, when we received the September 6th, 2017, memo from Mr. Groharing, it didn't stop us. We didn't say, "Oh, my God. We're going to get arrested." You know, it chilled us. We were like, "Okay. We have to investigate this. We have to find out what's going on." But we were still getting in a large volume of discovery on the RDI program and trying to fashion an investigation at the same time.

Then what happened -- and I'm going to now directly contradict what Mr. Trivett told you. Mr. Trivett told you that there was never any threat of criminal liability, and au contraire. On January 11th -- 10th and 11th of 2018, Brigadier General Martins is on the record doing exactly that. I'm going to direct you to the transcript pages involving that.

On January 10, in the context of oral argument on the original motion, 524 (AAA), Chief Prosecutor Brigadier General Mark Martins claimed national security privilege over defense

interviews -- that's the first time that ever happened -- of current and former CIA employees. He actually -- and that's found at the transcript at 18559 and 560. And, I'm sorry. I never get a slowdown, and I got one, so I'm going to slow down.

Brigadier General Martins invoked the Touhy regulation. He eventually had to concede that that was incorrect. And then the next day, in pressing by Judge Pohl about this issue -- and this can be found at the transcript at page 18715 through 18717 -- Brigadier General Martins invoked the specter of criminal prosecution of defense counsel for approaching and interviewing current or former CIA employees. When pressed by Judge Pohl for a basis to charge defense counsel with crimes, the Chief Prosecutor specifically alluded to the Intelligence Identity Protections Act. And that can be found where I directed you.

The prosecutor, Mr. Trivett, also led you to believe that Protective Order 4 had something to do with just covert CIA agents. So I'm going to direct you -- because you don't have enough reading material -- to another filing completely, and that's AE 528. And the particular filing is (WBA 2nd Sup), filed on the 4th of May, 2018. It involved a motion to compel a witness. The witness is a former CIA agent named

John Kiriakou.

And what happened in that case was so illustrative of this very issue. We -- our investigator, doing his due diligence, had reached out to Mr. Kiriakou to secure an interview about a variety of subjects. They exchanged e-mail information and telephone call information. We set it up. It was set up for February 15th of 2018.

We got to Guantanamo Bay, and on January 11th of 2018, three weeks prior to the scheduled time of the interview, General Martins brought up the Intelligence Identities Protection Act and raised the specter of criminal liability for defense counsel.

We got back from those hearings, back to Washington, D.C., and we sat down with our investigator, and we said, "We can't do this interview because you might get arrested."

We then drafted a letter, which is attached to AE 528 (WBA 2nd Sup), to the prosecution asking for -- the letter is drafted and submitted to the prosecution February 5th of 2018, right after we returned from the hearings. It asks for assurances from them and other U.S. prosecuting agencies that we will not be arrested for doing our job.

We didn't receive a response prior to the scheduled interview of Mr. Kiriakou. Instead, the prosecution waited until the end of April -- all of these are attachments to this motion -- to write to us. And instead of providing assurances, Mr. Trivett writes in a memorandum dated April 27th, some two and a half months after the scheduled interview, that they read our request for assurances as a request to interview the witness under a protective order. We didn't ask for that; we hadn't asked for it. That's how they construed it.

And what they did was, as a result of that, they sent a letter -- well, they sent the CIA General Counsel notice that Mr. Kiriakou had agreed to be interviewed. And then the CIA General Counsel sent a letter dated April 13th, 2018, some two weeks prior to the notification by Mr. Trivett, the CIA general counsel letter arrived to Mr. Kiriakou, and, not surprisingly, on May 2nd of 2018, when we contacted Mr. Kiriakou again to find out what was happening, he said he had received the -- and all of this is attached to 528 (WBA 2nd Sup) -- Mr. Kiriakou said he had received the letter from CIA General Counsel, and his lawyer had advised him that he could no longer participate in any interview.

So there are a myriad of examples in the record

already of the negative effect of Protective Order 4. I wanted to point you to that.

The timing of all of this is important because it stopped us cold in the middle of when we were getting the majority of the discovery. So here we are. We can't interview. We have an interview set up in February and now it's the end of April, and finally we're allowed to at least contact him. And now we can't interview him at all because he's declined. So we're struggling, we're struggling, we're trying to figure out how we're going to do this. And then in July of 2018, Judge Pohl issues 524LL.

So now the question is: Okay. We have 524LL. Do we -- what's our focus on now? Are we now interviewing CIA agents again? Because now the statements are gone; we don't have to worry about it. So we're not having to deal with the black sites. There's no more tortures really, other than a mitigation issue. You know, we're not focusing on that anymore. So now we've stopped interviewing a lot of the witnesses we would otherwise interview in preparation for a motion to suppress.

So July comes and, as you've heard, the convening authority denies funding; says stop funding your experts for purposes of challenging the admissibility of the 2000 -- in my

client's case -- 2008 FBI statements. Okay. So now we don't have any experts on that issue anymore, and we're -- you know, the investigation is stopped.

The next thing that happens is in April of 2019, we receive a ruling, 524LLL, basically reinstating the status quo of what had been the case in May of 2018. So almost a year has passed, and we're given five weeks to put together the proper investigation, preparation, get our experts together, and file. That's the timing of this. It is implausible. And I want you to consider that when you're considering the requests here in 524PPP.

One more issue. And you noted that the defendants here are different. See, Mr. Bin'Attash takes a different position than Mr. Mohammad here. Mr. Nevin said that arguably the proper investigation of what occurred in the black sites and the information surrounding the interrogation was less important than mitigation.

But with respect to Mr. Bin'Attash, the case is very different. Because without those statements that were taken as a direct result of torture, the government's case against Mr. Bin'Attash is very weak, and there is a decent likelihood that we may not even get to a capital sentencing, in which case the mitigation issue would take a back seat.

Now, I'm a capital defense lawyer, so we never take anything for granted. We never look at a case as a not guilty; we always have to prepare for mitigation. But the government's argument to Judge Parrella in asking to reconsider Judge Pohl's ruling said this is our most important evidence, those statements. And with respect to Mr. Bin'Attash, it's almost all the inculpatory evidence they have against him.

So we believe and concur with all of the defense counsel here, that for purposes of this case, a motion to suppress is maybe the most critical stage for Mr. Bin'Attash.

I have nothing further if you don't have any questions.

MJ [Col COHEN]: No, but I thank you for giving me that context. Thank you very much.

LDC [MR. RUIZ]: Judge?

MJ [Col COHEN]: Mr. Ruiz.

LDC [MR. RUIZ]: We need a break. It can be a short one, but some ----

MJ [Col COHEN]: Okay. Mr. Harrington, I believe you'll be the last one to be heard from. Do you wish to be heard?

LDC [MR. HARRINGTON]: I do not, Judge.

MJ [Col COHEN]: Okay. Then that will make this much

easier.

We will be in recess. We are going to take up the closed hearing tomorrow, as much as it -- as I'm realizing that my docketing orders are not necessarily always going to be able to be completed while we were here. At a minimum, I think it's imperative that we have the closed, the 806, while we're here to address some of those issues. Given the hour, I'm not inclined to make you all stick around for an 802 to kind of discuss that, so.

All right. We'll be in recess until 0900 hours tomorrow morning. We will go for two hours in an open session tomorrow, just two, or until -- we will start at 9:00, no longer than noon. At noon, we'll break, and then we'll have our closed hearing -- our 806 hearing afterwards.

All right. We are in recess until tomorrow at nine.

[The R.M.C. 803 session recessed at 1842, 20 June 2019.]

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