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1 [The R.M.C. 803 session was called to order at 0902, 21 June
2 2019.]

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

4 General Martins, are all of the government counsel
5 who were present at the close of the previous session again
6 present?

7 CP [BG MARTINS]: No, Your Honor. Good morning.

8 MJ [Col COHEN]: Good morning.

9 CP [BG MARTINS]: Everyone representing the United States
10 is the same except for Major Dykstra. Major Dykstra is absent
11 on commission-related work.

12 MJ [Col COHEN]: Thank you, sir.

13 I notice that all the accused are absent today.
14 We'll take that up momentarily.

15 With respect to the attorneys who were present last
16 night, let me start with Mr. Nevin. It appears that your
17 entire team is still here; is that correct?

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

19 MJ [Col COHEN]: And, Ms. Bormann, it appears that the
20 three who were present last night are again present?

21 LDC [MS. BORMANN]: Yes, the three; that would include
22 myself, Captain Caine, and Mr. Montross.

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

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1 And Mr. Harrington, it appears your team is also
2 present; is that correct?

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

4 MJ [Col COHEN]: Mr. Connell, I notice that there are four
5 individuals back there, at least three attorneys; is that
6 right?

7 LDC [MR. CONNELL]: Two attorneys, sir.

8 MJ [Col COHEN]: Two attorneys? Okay.

9 LDC [MR. CONNELL]: Yes, sir. Thank you. Good morning,
10 Your Honor. And all are present.

11 MJ [Col COHEN]: Good morning. Thank you.

12 And, Mr. Ruiz, is all of your team still present?

13 LDC [MR. RUIZ]: Judge, with the exception of Major Joseph
14 Wilkinson, we have the same team.

15 MJ [Col COHEN]: Yes, I do not see him. Thank you very
16 much.

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

18 MJ [Col COHEN]: Trial Counsel, is there any evidence to
19 present on the absence of the accused?

20 Captain, I recognize you're the same captain who has
21 testified previously. I remind you that you are still under
22 oath.

23 WIT: Yes, Your Honor.

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

4 DIRECT EXAMINATION

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

6 Q. Captain, did you have occasion to advise each of the
7 accused of their right to attend today's proceeding?

8 A. Yes, Your Honor.

9 Q. Do you have in front of you Appellate Exhibit 638G,
10 638H, 638I, 638J, and 638K, each consisting of three pages?

11 A. Yes, sir.

12 Q. AE 638G relates to Ali Abdul Aziz Ali. Did you
13 advise him of his right to attend this morning?

14 A. I did, sir.

15 Q. Did you use the form that's in front of you?

16 A. I did, sir.

17 Q. Did he indicate that he did not wish to attend?

18 A. He did.

19 Q. Did he sign page 2 of this document?

20 A. He did, sir.

21 Q. 638H, Mustafa Ahmed Adam al Hawsawi, did you advise
22 him of his right to attend?

23 A. I did, sir.

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1 Q. Did he sign page 2 of this document?

2 A. He did, sir.

3 Q. 638I, Ramzi Binalshibh, did you advise him of his
4 right to attend using this form?

5 A. I did, sir.

6 Q. Did he sign page 2 of this form?

7 A. Yes, sir.

8 Q. 638J, Walid Muhammad Salih Mubarak Bin'Attash, did
9 you advise him of his right to attend?

10 A. I did, sir.

11 Q. And I believe he signed -- or did he sign the Arabic
12 version of this form?

13 A. He did, that's correct.

14 Q. And finally Khalid Shaikh Mohammad, 638K, three-page
15 document, did he sign the English version of this form?

16 A. He did, sir.

17 Q. And when you advised each of these men, did you use
18 the form?

19 A. I did, sir.

20 Q. Did you have an interpreter with you in case they
21 need it?

22 A. I did have an interpreter with me.

23 Q. Do you have any question about them understanding

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1 their right to voluntarily waive their attendance this
2 morning?

3 A. No, sir.

4 Q. And did each of them do that?

5 A. I'm sorry, sir?

6 Q. Did each of them do that?

7 A. Yes, sir.

8 TC [MR. SWANN]: No further questions, Your Honor.

9 MJ [Col COHEN]: Okay. May I please have those exhibits.

10 WIT: Yes, Your Honor.

11 MJ [Col COHEN]: Captain, I will ask the defense if they
12 have any questions. Stand by.

13 Mr. Connell, with respect to 638 -- AE 638G, which
14 purports to be a declination to attend by your client, do you
15 have any questions of this witness?

16 LDC [MR. CONNELL]: No, thank you, sir.

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

18 Mr. Ruiz, with respect to 638H, which purports to be
19 a statement of declination to attend from your client, do you
20 have any questions?

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

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

23 Mr. Harrington, AE 638I purports to be a statement of

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1 declination to attend from your client, Mr. Binalshibh. Do
2 you have any questions of this witness?

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

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

5 Ms. Bormann, AE 638J purports to be a statement of
6 declination to attend from Mr. Bin'Attash. Do you have any
7 questions of this witness?

8 LDC [MS. BORMANN]: No, sir.

9 MJ [Col COHEN]: All right.

10 And finally AE 638K, Mr. Nevin, this purports to be a
11 statement of declination to attend from your client,
12 Mr. Mohammad. Do you have any questions of this witness?

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

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

15 I'm handing these to the court reporter.

16 Based on the testimony and the exhibits presented,
17 this commission finds that Mr. Mohammad, Mr. Bin'Attash,
18 Mr. Binalshibh, Mr. Ali, Mr. al Hawsawi have knowingly and
19 voluntarily waived their right to be present at today's
20 session.

21 Captain, you are temporarily excused. Please do not
22 discuss your testimony with anyone other than the prosecution
23 or the defense while the case is ongoing.

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1 WIT: Yes, Your Honor.

2 MJ [Col COHEN]: Thank you.

3 [The witness was excused.]

4 MJ [Col COHEN]: Counsel, thank you very much for your
5 willingness to stay a little bit later last night as we took
6 up two fairly significant issues with respect to 524MMM and
7 524PPP.

8 I appreciate the argument that was provided and
9 the -- obviously what was apparent to the court was that there
10 was significant work on both sides with respect to this
11 particular issue, and so I will take those matters under
12 advisement as I also go back and read all of the matters that
13 both the prosecution and the defense have asked me to read
14 prior to issuing a ruling in this case, and I will do so.

15 To the extent that you follow the rules and provided
16 me specific locations within the record of trial, I appreciate
17 you doing so, one, for complying with the order that I did not
18 issue but it remains the law of the case, but also for my own
19 personal benefit as I go back and I have access to all of the
20 transcript. And so I will go back and actually read those
21 pages as you asked me to do.

22 I also appreciate the fact that -- I indicated
23 earlier I feel no pressure to get this case to an abrupt end;

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1 however, I do believe that it's imperative in any case where
2 someone is facing trial that we -- we all endeavor to
3 expeditiously move this case forward, because regardless of
4 what you're accused of, you deserve the right to have some
5 finality at some point. And so that's why I've gone ahead and
6 had this open session here this morning, so we can continue to
7 move forward in addressing these issues.

8 That may not always be possible regardless of what we
9 endeavor to do with the docketing order, but that was my
10 intent today, was to set -- there are issues that you all are
11 prepared to argue. I wanted to give you the opportunity to
12 make those arguments today and then also to continue to have
13 the 806 session at some point later this morning or this
14 afternoon, understanding that we will need to take a break to
15 make that possible.

16 With that said, I would like counsel to, to the
17 extent they can succinctly, address the following motions
18 prior to breaking for a closed 806 session. We'll start off
19 with Appellate Exhibit 629-1, which was by -- filed by the RBS
20 team, was a motion for an extension of time to file a witness
21 list.

22 We will then take up AE 530TTT, which was filed by
23 the Hawsawi team, which is a defense motion for Joint

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1 Detention Group Commander to show cause and abate proceedings
2 pending compliance.

3 We will then take up -- Mr. Connell, I believe you --
4 you understand that the issue that we addressed in the 505,
5 that was declassified; is that your understanding as well?

6 LDC [MR. CONNELL]: Yes, sir. And I'm prepared to clean
7 that up now or at whatever time you want.

8 MJ [Col COHEN]: Okay. Why don't you go ahead and do that
9 now.

10 LDC [MR. CONNELL]: Sir, I have tendered to the clerk
11 AE 118R, which is an e-mail from the prosecution documenting
12 the statement of the OCA, that the portions of the e-mails
13 that we wanted to use are UNCLASSIFIED//FOUO. As a result, I
14 withdraw AE 118Q.

15 And just -- finally, there's a note in that e-mail
16 that the prosecution will be producing a U//FOUO version of
17 118Q to us; and they did so this morning.

18 MJ [Col COHEN]: Great. Thank you very much.

19 And then you will be prepared to argue 118N; is that
20 correct?

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

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

23 And then, finally, going back to you, Mr. Connell,

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1 based on discussions that we previously had, it appeared to me
2 that both the prosecution and the defense were wanting to
3 defer argument on AE 628B at this time. Is that my -- is that
4 a correct understanding?

5 LDC [MR. CONNELL]: Yes, sir. Although, in speaking to
6 the prosecution, I believe that they had some comments they
7 wanted to make.

8 MJ [Col COHEN]: Okay. I will allow some comments.

9 Mr. Trivett, what is the government's position on
10 that? Do we need a full-blown argument on this or just some
11 additional matters to bring to my attention?

12 MTC [MR. TRIVETT]: No, sir. Yeah, it was more along the
13 lines, sir, of understanding the logistics involved and where
14 we see the order, at least for the government, happening. And
15 then we'll continue to work with Mr. Connell's team to make
16 sure that the witnesses that he wants are in -- in the correct
17 order. But it won't be long; five to ten minutes at the most,
18 I anticipate.

19 MJ [Col COHEN]: That's fine. All right. Then I will not
20 consider that as formal argument but just a simple -- an
21 update by the parties with respect to the status of Appellate
22 Exhibit 628B. So we will not take up argument on that matter
23 this morning. Okay.

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1 Yes, General Martins.

2 CP [BG MARTINS]: Your Honor, if you're through with that
3 docket discussion, I was just going to report to the
4 commission that we received a report this morning that the
5 March transcript from 26 March, redacted
6 unofficial/unauthenticated transcript of an 806 session in
7 March, is up on the web.

8 And also received a report from the officer in charge
9 of the DoD Security Classification/Declassification Review
10 Team that the January 29th transcript and the 2 May transcript
11 are -- have been sent by that team to the webmaster.

12 MJ [Col COHEN]: Excellent.

13 CP [BG MARTINS]: They should be posted soon.

14 MJ [Col COHEN]: Sir, I appreciate the government looking
15 into that and reporting back. Thank you.

16 Are there any other administrative matters from
17 either side prior to us beginning our argument this morning?

18 That's a negative response from all parties.

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

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

21 LDC [MR. HARRINGTON]: Could I bring up an issue?

22 MJ [Col COHEN]: You may.

23 LDC [MR. HARRINGTON]: Judge, this is an issue about

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1 presence of detailed counsel in the courtroom, military
2 counsel.

3 MJ [Col COHEN]: Yes, sir.

4 LDC [MR. HARRINGTON]: We have a situation for the next
5 hearings within our team with some different assignments and
6 some personal matters that our military counsel have.

7 I talked to Mr. Trivett, and he agreed that if we get
8 waivers for the absence of somebody, that the government would
9 agree to it if our client agrees to it. And we're not asking
10 for a postponement, and we represent to the court that we're
11 prepared to go ahead on motions, that we would not have to
12 have military counsel here. I don't know if you have thought
13 about that or reached a conclusion on that, but that would be
14 a request that we made.

15 Obviously, we would file a motion in writing to do
16 that, but -- and for our planning purposes, we ask you to
17 think about that and consider that, so...

18 MJ [Col COHEN]: I will. Thank you.

19 I -- it was -- I am obviously familiar -- I received
20 several requests to approve a waiver of the presence of
21 counsel prior to coming here. With respect to whether -- I
22 will look at the rules and see if I have any concerns about a
23 military counsel not being present.

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1 Obviously, if a defense counsel is present, I
2 routinely allow -- even in courts-martial, if a civilian
3 counsel is representing them, then the military counsel could
4 be absent if it was waived by the -- by the client.

5 So I'll look at the rules, but I appreciate you
6 bringing it to my attention. And please continue to file
7 those extensions. If the government doesn't oppose them, it's
8 usually not my intent to interject myself into the process
9 unless there's some legal obligation for me to do so.

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

11 MJ [Col COHEN]: Thank you.

12 All right. Mr. Harrington, I will -- there being no
13 other comments, I will go back to you. Who would like to be
14 heard on the AE 629-1?

15 LDC [MR. HARRINGTON]: Judge, I think that yesterday in
16 the argument on 524 that you probably heard all of the
17 background and the arguments really from back and forth
18 between the defense teams and the prosecution with respect to
19 the difficulties with respect to timing and all the rest of
20 that. I'm not going to go through all of that with you right
21 now.

22 But you've heard the difficulties that we've had with
23 respect to Protective Order #4, the shutdown of experts and

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1 other things with -- because of Judge Pohl's decision and the
2 fact that there was never any time set for the filing of
3 suppression motions until Judge Parrella's order, so that --
4 and probably more important than that, the discovery starting
5 in 2017 and continuing up right until this week.

6 And, in fact, this week we received some more
7 classified discovery, which I obviously will not talk about
8 here, but in that discovery, it raised some issues that are
9 going to prompt us from -- to have to do more investigation
10 and seek either expanded expert witness or a new expert
11 witness to testify.

12 And I don't envy the job that you have here because
13 we've got, obviously, the fracture in the issues for
14 suppression, voluntariness, and others; and whether
15 Judge Parrella's decision with respect to voluntariness means
16 the other issues are open, which the defense argues and the
17 government does not; and whether -- and you've got five
18 different teams with different and sometimes competing or
19 contrasting interests; and a situation where, because of the
20 nature of this case, when these witnesses testify, it is
21 probably going to lead to more areas of inquiry,
22 identification of other people that are -- may be potential
23 witnesses.

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1 So, for example, Mr. Trivett is very careful when he
2 argues about this to talk about witnesses who were in the room
3 when these statements were given by Mr. Binalshibh and the
4 other accused. And it's our understanding that there are
5 other witnesses to this. And the government, I'm sure, is
6 going to oppose having any other witnesses testify. I assume
7 that they're only going to offer one of the multiple people
8 who actually did the questioning, and they're going to offer
9 anybody who was an observer.

10 But in the questioning that we do of whoever it is
11 that they produce, and in our request to them, there's
12 obviously the opportunity for this to lead on and on and on;
13 and this is multiplied by the having five defendants and the
14 nature of the case. So that -- as I said, I don't envy you
15 trying to manage this.

16 But it seems to me that while your comments are taken
17 to heart, what you said before, that you don't have a
18 timetable, but that you believe that the accused are entitled
19 to have a trial, and I'm sure that you feel that the victim
20 family members and the prosecution's entitled to have their
21 trial also, and so that you want to move as expeditiously as
22 you can.

23 But this is really a monster. And while I'm here

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1 asking for more time to supplement or to add witnesses to
2 these lists, I really think that either at the next session or
3 whatever, we need guidance from you for a plan forward with
4 sufficient time for everything that needs to be accomplished.

5 And I think that yesterday, you got a pretty clear
6 idea of all of the problems that are involved, and it will be
7 helpful to all of us if we get the sense of where you think it
8 should go. We offer you our comment about that and how we can
9 do it, and then we can move forward in a way that minimizes
10 additional delays.

11 I looked at the calendar that Mr. Trivett provided
12 yesterday for the -- potentially for the September hearings,
13 and it seems to me that that's very ambitious, especially with
14 some of the witnesses in there who are important to all of us.
15 But it also -- it kind of highlighted to me the fact that
16 those witnesses are clearly going to lead to, number one,
17 other witnesses necessary for a hearing; and number two, the
18 real possibility that some of those witnesses will have to be
19 recalled because in the process that we're in, we're going to
20 be obtaining more information all the time, and some of it may
21 relate back to witnesses who have already testified.

22 And I'm sure if you can -- like any judge, if you can
23 have a witness come once, you want it all done at once. And

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1 so I just caution the court that I think that the proposal
2 that's in front of you right now is ambitious even though we
3 are many years into this case. And you heard yesterday the
4 reasons for much of the delay here with respect to this issue,
5 but that it's -- it's a messy situation.

6 And the government is in control of discovery, it's
7 in control of the witnesses, and it seems to me that they want
8 to be in control of the testimony also. And so that's not
9 unusual in any case, and that's why you sit in the middle,
10 making the big bucks, to decide the controversy against us.

11 But I just ask the court to consider those things.
12 Thank you.

13 MJ [Col COHEN]: Mr. Harrington, thank you.

14 Just a couple of questions. One is that you are
15 correct. I think at every opportunity I get, I will remind
16 everyone that I understand both sides need the opportunity to
17 get to a resolution of this matter. And I think that is
18 important, and I appreciate your comments.

19 With that said, you said a plan from me. What would
20 you envision for your team as to what you would want from me,
21 as the judge in this case, to assist you in moving this case
22 forward, et cetera?

23 LDC [MR. HARRINGTON]: Judge, if I were -- had my wishes,

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1 I would, first of all, have the court give some period of
2 time -- and I don't mean a short period of time, a period such
3 as six months -- for the defense to do as much of their
4 investigation as they can with witnesses; at the conclusion of
5 that, to file any additional suppression motions that haven't
6 been filed; and then based upon that, the court then schedule
7 hearings to address all of the suppression issues.

8 And the government would be able to see in the
9 motion, then, what issues would apply to each of their
10 witnesses from their point of view, and we would be able to
11 identify to them which witnesses we believe applied to each
12 issue, and we could identify them to them with respect to the
13 issue that the witness would testify about.

14 So somebody may testify about voluntariness but not
15 about Miranda or some other issue that's going to be brought
16 up. But it just -- it seems to me that that's a much more
17 orderly way to do it. And even though it involves some delay
18 on the front end, I think it alleviates some of the issues
19 that I raised earlier about the piecemeal nature of it.

20 And, I mean, I've been in courts where judges have
21 said, "No, I've heard enough," or, you know, "You can't call
22 this witness" or "You had your opportunity to do this," but
23 it's always been one where there has been the sufficient time

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1 to do it. And if the defense counsel doesn't take advantage
2 of that, then it's on them. But the more structured and
3 orderly I think it is, I think actually in the long run, the
4 faster that it will be.

5 So if you come in in September and do some of these
6 witnesses and each of the five of us say in October we found
7 something else, we need to get this witness back again, then
8 you've got to make that decision whether that's sufficient or
9 not. And, of course, the logistics of our court make it
10 difficult. Even if we do some of the witnesses on VTC, even
11 if we do that, the logistics are still really hard for getting
12 witnesses back on multiple occasions, so ----

13 MJ [Col COHEN]: I understand. Thank you, sir. I
14 appreciate it.

15 Do the defense counsel -- what is the defense
16 counsel's position on whether or not this is a joint motion or
17 whether this attaches specifically to Mr. Harrington's motion
18 to suppress?

19 LDC [MR. RUIZ]: Judge, for Mr. al Hawsawi's purposes, the
20 way the appellate exhibit convention has been fashioned, it is
21 an individual motion that applies to Mr. Harrington; however,
22 it is a unique circumstance in the sense that we are
23 discussing timelines, and you just got into a colloquy about

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1 timelines that may impact all of us, even those of us who have
2 not yet filed a motion to suppress.

3 So to that extent I would ask to be heard on that
4 point, although not specifically on Mr. Harrington's request
5 for extension of time but on the discussion you had about the
6 logistics about how to go about that.

7 MJ [Col COHEN]: Okay. Yeah, I will allow the -- and the
8 prosecution as well on this idea of essentially a scheduling
9 order, establishing deadlines and those types of things, I do
10 think that would not be a waste of our time here on the record
11 this morning, to talk about the possibility of the commission
12 issuing a scheduling order.

13 So to the extent that we can -- we can keep it rather
14 brief so we can still get through our docket, I would give --
15 enjoy the opportunity to have each of the counsel kind of give
16 me an idea of what their preferences for what might be in a
17 scheduling order are.

18 Mr. Ruiz. Good morning, sir.

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

20 My first comment, Judge, is consistent with what my
21 comment has been all along, which is, I believe if you grant
22 5 444 MMM [sic] and 524PPP, which I believe are properly
23 grounded in law and procedure, none of this will be necessary.

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1 There will be no need for a scheduling order and there will be
2 no need for anything having to do with a suppression hearing
3 going forward, witnesses testifying or any of these issues.

4 However, in the event that that becomes a necessity,
5 in that regard, I do concur with my colleague Mr. Harrington's
6 comments. I agree with virtually everything he said in terms
7 of the efficiency, I think, of the process and the judicial
8 economy. Because what I see that we have now is we've got
9 multiple timelines -- multiple teams moving on multiple
10 timelines to do certain things.

11 In our motion -- actually, subsequent to 524MMM,
12 Judge Parrella issued an additional ruling, and this was the
13 additional aspect of the procedural litigation that I was
14 trying to get at but I didn't think it was relevant for
15 yesterday. And what Judge Parrella did was rather than ruling
16 on our 524MMM and our Williams objections, he issued an
17 additional ruling that ordered three of the parties, including
18 Mr. al Hawsawi, to file a motion requesting an extension of
19 time.

20 In our response to that -- and I'll provide you with
21 the AEs as soon as I can go back and get them, perhaps later
22 this morning, but in our response to Judge Parrella's ruling,
23 in order to -- seeking an extension of time, we said that

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1 there are a number of factors that are outside of our control.
2 For instance, the decision-making process in the convening
3 authority's office is not something that we control.

4 There are also other decision-makers, for example,
5 the Joint Detention Group, that control certain resources such
6 as what a number of parties have alluded to in terms of MRI
7 technology and testing that needs to be completed in order to
8 have a product to analyze moving forward. We don't control
9 those equities. We certainly have tried to get them to move
10 at a pace that is helpful to us, but it has not happened.

11 So when we replied to that commission's order, we
12 said, look, we think we can do this maybe by March 2020, but
13 quite frankly and honestly, Judge, we were just kind of
14 pulling that date out of the air. Six months, Mr. Harrington
15 says, sounds reasonable, but I cannot guarantee that all of
16 the other equities that need to come together to help us move
17 this process along will do so. And so I just want to commend
18 that to you.

19 But I do believe that not a piecemeal approach but an
20 approach that does bring all the parties to the same starting
21 line or the same starting point would make more sense; and in
22 that sense, the six-month timeline does make sense.

23 I do agree that yesterday, some of the -- one of the

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1 comments that was made, that 524MMM, obviously, and 524PPP
2 need to be ruled on first because the issue can and should
3 become moot. However, in the event it does, I do believe that
4 one starting line for all the parties, so that we can move
5 along on that same timeline and address these issues
6 contemporaneously, is a better use of time and energy for --
7 for the commission, rather than having, for instance, a
8 situation where Mr. al Hawsawi is trying to join witness
9 requests that another party is pushing forward because they
10 want to have a hearing in September. It would be much better,
11 I think, if we can all get to that first starting line; and I
12 think, in the long run, it would make for a more orderly and
13 efficient process, I think, for all involved.

14 Certainly we want to take advantage of the witnesses
15 that are called. We'd like to do that one time, because we
16 don't want to get into a situation where we're not prepared to
17 question them for a particular reason and then we have to
18 litigate having them come back a second time. We don't want
19 to be in that situation because we think it's better to do it
20 the first time around, do it right.

21 So in that regard, I concur with Mr. Harrington's
22 comments about trying to do that in one -- one movement rather
23 than five multiple movements, with all of these different

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1 movements and pieces that are out there right now and
2 timelines that are, in my view, just all over the place.

3 Thank you.

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

6 Mr. Nevin.

7 LDC [MR. NEVIN]: Thank you, Your Honor. The -- I hear
8 you this morning speaking to the defendants' need to have
9 closure and to, you know, come to an endpoint.

10 I will say, Mr. Mohammad, like the other defendants
11 in the case, was detained incommunicado for three and a half
12 years before he was brought here, and then another six months
13 or so elapsed until he was allowed to speak to counsel,
14 despite having requested the opportunity to do so from the
15 outset.

16 And normally when someone is arrested, as we know,
17 they're brought before a neutral magistrate within, you know,
18 72 hours, or whatever the McNabb-Mallory formulation is. So
19 this delay is, you know, really extraordinary. And, you know,
20 now I think the need to move forward and the need for closure
21 has to be tempered by the desire to do it right and to allow
22 the process to work in -- in these really unusual
23 circumstances. I just think we have to be very thoughtful and

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1 deliberate in protecting what's left of the right to a fair
2 trial.

3 And so maybe I'm making the same point that Mr. Ruiz
4 just did. We argued 524PPP to you yesterday. I ask that you
5 grant that motion to reconsider; that you go back to 524 and
6 decide it in whatever way is appropriate, and -- because I
7 don't think this motion to suppress should be like a
8 prehensile toe of 524.

9 I think that obviously there are going to be motions
10 to suppress in this case. Everybody can see that, that at
11 some point, there will be a time when we need to do that. But
12 I think it's a mistake, for the reasons I said yesterday, to
13 do a motion to suppress as a way of arriving at some sort of a
14 conclusion about whether the government's restrictions on
15 investigation are or are not appropriate. The motions to
16 suppress ought to stand on their own.

17 So my request would be go back to 524 and decide it.
18 And Judge Pohl decided it one way; maybe you'll decide it
19 another way, I don't know, but I think it should be decided
20 independently.

21 Mr. Connell talked yesterday about having a hearing
22 on the effect of 524. And we can put witnesses up on the
23 witness stand who can say, you know, here's why we

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1 investigate, here's what happens when we investigate, here's
2 the way this works, and, you know, expert witnesses, fact
3 witnesses, and so on. That can be litigated if that's -- if
4 that's the appropriate way to go. I think you can decide it
5 on the record that's there.

6 As I've said yesterday, I don't agree completely with
7 what Judge Pohl did in 524LL, but that's one resolution. But
8 however you resolve it, it can be resolved.

9 And I just -- again, I would say, let a motion to
10 suppress stand on its own, separate from the resolution of
11 that question.

12 Really, where we are now is we're saying -- you know,
13 we've come to you and said, "We can't litigate effectively
14 motions to suppress or mitigation"; and I mentioned to you
15 also speedy trial and outrageous government conduct. We came
16 to you and said, "We can't litigate those things under the
17 strictures of 520 -- of Protective Order #4."

18 And where we are now is, "Oh, yes, you can. Go ahead
19 and do it." And if that's to be the ruling out of 524,
20 okay -- I mean, we can do that. But -- but if you are -- in
21 other words, if the motion to compel or the motion to dismiss
22 in 524 is to be denied, then okay. But I'm just saying I
23 think it should stand on its own 2 feet, or not, and not be

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1 confused with the motion -- motion to suppress.

2 Really, still no one has explained to me why the way
3 I suggested of thinking about this is not appropriate. In
4 other words, at the end of the day, you won't know if we -- if
5 the evidence looks to you like there's -- there shouldn't be
6 suppression. You'll never know whether that's because of
7 Protective Order #4 or just because there's -- there's not
8 enough evidence out there.

9 And so the test of doing a motion to suppress will
10 not answer the question. It can't possibly answer the
11 question. I'm still waiting for someone to explain to me why
12 that -- that is incorrect thinking.

13 And if it's correct thinking, then 524 ought to be
14 dealt with separately, and then there can be a schedule for
15 motions to suppress, and by all means, we can go forward when
16 the time is right.

17 Just on that last question, just take 523, for
18 example. 523 is the order giving us contact information for
19 many medical witnesses. That order to provide that
20 information was issued in August of 2017 [sic]. The first
21 provisions of information occurred -- and I'll stand corrected
22 if I'm wrong, but something on the order of eight months
23 later, in April of 2019.

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1 And, you know, why did it take eight months to say --
2 I think there probably were really good reasons; I don't doubt
3 that. But now the idea is, "Tell us who your witnesses are
4 going to be. We gave you these names -- we gave you these
5 hundred names a couple of weeks ago. What's the problem?"

6 And it's just illustrative of the -- I heard -- saw
7 Mr. Connell say that he was going to make a genuine effort to
8 try to get every one of those witnesses interviewed within six
9 months, and I think that's pretty ambitious. But the idea
10 that we can have a real motion to suppress where both sides
11 are really fully equipped to give you what we need and what
12 you need to decide a motion to suppress right now I really
13 think is incorrect. But -- but, you know, as I say, I think
14 the fundamental problem is breaking out 524 and motions to
15 suppress.

16 So thank you.

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

18 Ms. Bormann. With respect to scheduling order,
19 should I issue that ----

20 LDC [MS. BORMANN]: I'm not going to reargue yesterday,
21 but I do want to make one correction, which is, if you were to
22 reverse Judge Parrella's order, we would not be likely to have
23 a motion to suppress. So short of that.

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1 MJ [Col COHEN]: And that may be the case, but a
2 scheduling ----

3 LDC [MS. BORMANN]: Right.

4 MJ [Col COHEN]: ---- order would address way more than
5 just a single motion.

6 LDC [MS. BORMANN]: A scheduling order. So you're about
7 to receive in the next day or so an updated motion for
8 extension of time from us. You have before you two motions to
9 compel for necessary experts who were defunded by the
10 convening authority after Judge Pohl issued 524LL. Those
11 people have not been able to work on helping us prepare a
12 motion to suppress. One of them is a medical expert.

13 Yesterday you heard from Mr. Connell that they have a
14 medical opinion. We don't have one yet because our expert was
15 barred from working on the very thing we need he or she to
16 work on in order to help us prepare a motion to suppress.

17 So we're still waiting to get the approval and the
18 funding. Once we get that, we can begin work again and then
19 hopefully get an opinion from our medical expert and then
20 hopefully file a motion to suppress like Mr. Connell did.
21 That's just one of the issues.

22 The government continues to provide discovery. So
23 they told Judge Parrella that it was a trickle. And so, you

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1 know, I don't know how they define "trickle," but in the
2 middle of hearings where we're in court every day, we receive
3 hundreds of pages of material that have been substituted and
4 summarized without going through a 505 process -- you've not
5 seen them -- and with no provenance of those records, no
6 description of how they came to be, and frankly with lots of
7 errors in them. And that's just me looking through the first
8 hundred pages while I'm sitting in court.

9 So they all relate significantly to the taking of
10 statements from the five men sitting in this courtroom, and
11 some of them are amazing in their -- in the -- helping to
12 fashion the cross-examination of some of the government's
13 witnesses.

14 So all of that being said, there is no way we could
15 ever fashion a witness list at this point. We haven't even
16 filed our motion to suppress. I don't even know if my medical
17 doctor will eventually end up issuing an opinion I can even
18 use. So we're in a spot where we're just up and running again
19 because Judge Parrella issued his order, I think, on May --
20 no, April 5th -- I think that's right -- and we're now two
21 months after that. But from August of 2018 on, we didn't work
22 on a motion to suppress. There had never been a deadline to
23 file a motion to suppress.

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1 I think Mr. Harrington's recommendation is a good
2 one. You know, rather than entertaining five separate motions
3 to extend time on motions to suppress and then five separate
4 motions to extend time on witness lists or, in Mr. Connell's
5 case, to amend witness lists based upon discovery that's still
6 coming in, being provided by the government, witness testimony
7 that the government proposes we take in September, which, you
8 know, may or may not lead to additional witnesses, it would
9 make sense to have an orderly process.

10 I agree with Mr. Harrington, that six months seems a
11 reasonable amount of time given the fact that there was a
12 six-month chunk of time between the August issuing of AE 524LL
13 and then Judge Parrella's reversal of it in LLL. So that
14 seems to be an appropriate period of time, and it is likely
15 that we would be able to get our ducks in a row, get the
16 funding we need back again for our experts, be able to focus
17 on that issue, do the investigations hopefully that we can do,
18 and then be able to file an adequate motion to suppress.
19 Right, now we are in no place to do that.

20 I do want to say that finishing discovery is maybe
21 not just taking the government's word that it's down to a
22 trickle but actually making them complete discovery before we
23 have to take those facts and investigate them might be the

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1 proper way to go.

2 The state where I'm from, Illinois, I used to direct
3 their death penalty defense division. They no longer have a
4 death penalty in Illinois. And one of the things -- my
5 position was created by a lot of innocent guys on death row
6 and a statutory committee that then looked into it.

7 And one of the things they required to help assist
8 judges in making sure that you had reliable findings that may
9 lead to a death penalty was certifications from both sides
10 that discovery was complete; and that was before anybody could
11 even set a trial date, because -- we're not even there.

12 So I suggest two things: One, you let the government
13 finish their discovery, and then you give us a significant
14 period of time in which to review the discovery, have our
15 experts review the discovery, have our experts funded, do
16 whatever remaining investigation we can do, and then file a
17 motion to suppress from the time the government finishes
18 discovery. You know, I would imagine six months would do the
19 trick.

20 And I also take very seriously what Mr. Harrington
21 said about -- and Mr. Nevin said about delay here. I wasn't
22 appointed on this case until 2011. My client was arraigned on
23 May 5th of 2012. He was captured in 2003. For nine years,

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1 the government delayed prosecuting these men.

2 So they are in charge of their bodies. They are in
3 charge of the system. They are in charge of the trickling of
4 discovery, little dribs and drabs. And so at this point,
5 let's do it right. That's what I ask you to do.

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

7 Mr. Connell.

8 LDC [MR. CONNELL]: Thank you, sir. With the court's
9 permission, I will go ahead and make whatever comments I have
10 to make on 628B at this time as well, since the issues are
11 very close.

12 MJ [Col COHEN]: Perfect. That will be great. Thank you.

13 LDC [MR. CONNELL]: Your Honor, initially I want to advise
14 the court that there might be an appearance that
15 Mr. al Baluchi is making an attempt to get out ahead of
16 everybody or, you know, to rush toward the suppression motion.
17 I just want to dispel that idea.

18 MJ [Col COHEN]: You did yesterday. I understood.

19 LDC [MR. CONNELL]: Right. In my view, when a judicial
20 body issues an order, you can either comply with the order or
21 you can ask them to change the order; and we chose to comply
22 with the order.

23 MJ [Col COHEN]: And I understood that. Thank you.

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1 LDC [MR. CONNELL]: So with respect to the order -- and
2 I'm not going to repeat myself from yesterday, but the order
3 of analysis, in my view, is, first, what is going to be done
4 under 949p-6(f), the statute about what happens when a -- the
5 government prohibits information that needs to be -- the
6 defense -- the court finds needs to be disclosed.

7 Yesterday, I laid out my position that because of the
8 distortion of the adversary process, dismissal would be the
9 primary; the second finding against the government on an
10 issue, which was part of 524LL; and then our third alternative
11 position, if there needs to be a showing of impact -- and we
12 would have to debate who would bear the burden of proof in
13 such a hearing, but if there needs to be a showing of impact
14 or a showing of lack of impact, then it would be appropriate
15 to set a hearing on that. So depending upon how you decide
16 the cascade of issues in 524MM and PP, these answers may be
17 relevant or not.

18 But the second observation that I wish to make is
19 that we, Mr. al Baluchi, will be proceeding with these items
20 that I see as necessary, whether the court issues any
21 scheduling orders or not, because I laid out yesterday a
22 number of items that we're working on, that we're moving
23 toward, having all the pieces in place that we see as

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1 necessary for a motion to suppress.

2 The -- a couple of items on that are, first, there's
3 been some discussion of the medical witness investigation.
4 The timeline that I've set requires the two people who were
5 working on it full time to do more than -- an average of more
6 than one interview per business day. And we're working on
7 that as fast as we possibly can.

8 Second, I mentioned yesterday we need a ruling on
9 523N, which is a few sort of leftover pieces from the previous
10 witness discussions.

11 I also want to point out with respect to this witness
12 question that unlike what happened in 502, the military
13 commission did not direct a witness list, and we did not
14 provide a witness list. What we did provide was a request to
15 the government for those witnesses that we needed the
16 government assisting in compelling.

17 The government -- the military commission may or may
18 not be familiar with this logistical piece, but some people
19 can travel to Guantanamo independently; a few people, our
20 investigators, for example, and we do not need the
21 government's assistance in compelling them. Those
22 investigators, for example, did fall on our 502 witness list
23 because that was a true witness list. Please tell me everyone

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1 you're calling as opposed to we needed the government's help
2 with. So I just didn't want those two ideas to be
3 equivocated.

4 Now, with that, here are my suggestions if the
5 military commission is going to issue a scheduling order
6 around the suppression 524 nested issue or ----

7 MJ [Col COHEN]: Not even just that. I -- you know, for
8 example, in every case where -- I get, I have an initial
9 scheduling conference. And I sit down with the parties, and I
10 say, "Okay. What are some of the general issues that we're
11 looking at here?" I understand that this is a much more
12 complex case than the case that I will probably try next week,
13 as far as just sheer volume, et cetera.

14 But at the end of the day, we have that initially,
15 and that's not unusual in most jurisdictions. The judge sits
16 down with the parties and says, "Okay. Let's look at this."
17 And the first thing the judge usually does is say, "Where are
18 we at on discovery?"

19 LDC [MR. CONNELL]: Right.

20 MJ [Col COHEN]: And then we set dates for discovery to be
21 completed.

22 LDC [MR. CONNELL]: Right.

23 MJ [Col COHEN]: And then if discovery is not complete by

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1 a certain date, the judge says, "Explain to me why you did not
2 comply with the court's order with respect to completing that
3 discovery. Show good cause."

4 LDC [MR. CONNELL]: Right.

5 MJ [Col COHEN]: So to the extent that -- I mean, the idea
6 is while a scheduling order does not absolve the United
7 States -- that's the people who I'm dealing with -- of ongoing
8 discovery responsibilities, it does set a deadline at which
9 point then remedies can be imposed or sanctions can be imposed
10 for failure to comply with that order.

11 So first and foremost, a scheduling order would be
12 essentially an all-encompassing scheduling order. It's not
13 just going to address the issue of a motion to suppress. A
14 scheduling order is going to be a scheduling order. This is
15 when we're going to have discovery, Government, provided to
16 the defense. We shouldn't be seven years in and just
17 trickling in information to them that's going to lead to
18 additional information that might impact the ability to file a
19 motion.

20 That's just the bottom line. I have no problem
21 saying that in open court right now. We cannot be -- we
22 cannot have significant discovery coming to light two years
23 from now in the middle of trial. That is not going to be

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1 workable, period. And the prosecution over there knows that's
2 the case. That is not the way they want to try their case
3 either.

4 So the realistic thing here is we have to have some
5 kind of orderly process for moving this case forward, and
6 that's where I'm at right now, which is what I am asking the
7 parties to say. This is bigger than a 524MMM or 524PPP or
8 524LL or 524LLL, because those address one particular piece of
9 -- particular area of evidence. What about motions to compel
10 experts with respect to mitigation, et cetera? Those are
11 issues that will still need to be addressed by the court
12 before we could go to -- before we could go to trial. All of
13 these issues need to be resolved.

14 So although I may be new to this particular case, I
15 am not new to the process of how a trial goes to trial. And
16 so I'm not -- to the extent I'm animated, it's because I want
17 everyone to understand I get this. And so it is my
18 responsibility as the judge to oversee the process; and
19 discovery is something I specifically have the authority to
20 oversee and to direct that it occur under the rules and under
21 the law, and I intend to do so.

22 And to the extent that you all received hundreds of
23 documents after you filed your motion to suppress that may be

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1 relevant to your motion to suppress, that is unacceptable.

2 And I'm putting the government on notice: That is

3 unacceptable, and it will not happen moving forward.

4 We are going to set a scheduling order. And if

5 that's something I need to get together with the parties and

6 talk this through and figure what the realistic thing is --

7 because the idea is I can pull numbers out of my back pocket.

8 I can throw dates, but that's not going to assist the United

9 States in getting its trial, and it's definitely not going to
10 assist you all in meeting your obligations.

11 To the extent that I may have to have five different

12 scheduling orders or different dates for different parties,

13 I'm not going to sit there and say that that's not a

14 possibility. As Ms. Bormann just indicated, she has unique

15 circumstances in her case that other individuals may not have,

16 which may impact her ability to be prepared to argue

17 particular types of motions.

18 I am aware of that. And I'm also -- as I have

19 indicated several times, although we may be in one joint

20 trial, there are six individual equities at play here, at a

21 minimum; and I have to balance those equities, and I intend to

22 do so.

23 So I understand what you're saying. I guess the

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1 question I have for you is: Do you have a recommendation as
2 to how I can then do what I just said that I want to do, which
3 is to make sure, first and foremost, that discovery ends at
4 some point?

5 LDC [MR. CONNELL]: Yes, sir. The -- and I very much
6 appreciate what you just said. Unfortunately, given that this
7 kind of came up on the fly, I'm not really prepared to
8 address, like, the larger issues of big issues.

9 Discovery can be divided, in my mind, in this case
10 into basically three categories: Category one is government's
11 case-in-chief type evidence. It is my belief that with the
12 exception of a few items that they keep finding here and there
13 and with one major -- the second exception of the 575 issue
14 that we will discuss, I believe that -- it is my understanding
15 the government has completed its case-in-chief type discovery.

16 The second major category of discovery is discovery
17 around RDI. The government has produced substantial discovery
18 around that, but that is where most of the trickle -- the
19 voluntary trickle from the government is coming.

20 And so because the issue immediately before us is the
21 motion to suppress, I'm not pushing back against the idea of a
22 global scheduling order. The government has actually raised
23 this several times in the 478 series, but always, in my humble

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1 opinion, in a not very realistic way; in a super rush, we're
2 going to do some truncated deadlines, and if you get -- we
3 waive our reply period and stuff like -- I mean, it wasn't a
4 very realistic view, but it was the idea of the government
5 asking for schedules.

6 The -- that RDI discovery definitely needs a deadline
7 and soon. Because once there's a deadline, the follow-on to
8 that is that it's possible for the military commission to set
9 a date certain by which all motions to compel discovery
10 relating to RDI would be due, and then we can basically close
11 off that area of the litigation. The -- as I told you, we are
12 working on what we see as the remaining gaps in the RDI,
13 independent of any scheduling deadlines, but the other parties
14 may feel differently.

15 The third area, large area of discovery, goes to the
16 category of what we might call defenses that the government
17 can't necessarily -- could not at the beginning of the case
18 anticipate, but over the course of the case, we've articulated
19 a theory of defense, asked for discovery related to that.

20 For Mr. al Baluchi, that principally relates to the
21 issue of hostilities, which was -- Judge Parrella ruled on
22 recently in the 617 series. That -- that is a defense which
23 will be allowed to go to the members. And his reasoning in

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1 617, assuming that it continues, which no one has asked to
2 reconsider it, will really govern a lot of the -- both the
3 already discovery motions that are pending before the military
4 commission and the remaining pieces that we have.

5 So I think the framework, the legal framework, is
6 there. It would seem that the -- that might be a separate
7 discovery deadline. That's just my view of how the discovery
8 deadlines might work.

9 After that -- so we've talked about a couple of
10 deadlines. RDI disclosure deadline and RDI discovery, motions
11 to compel, whatever's left, which probably want to be a
12 deadline for other bases for the motion to suppress
13 statements. We've talked about -- and it seems pretty clear
14 from the text of 524LLL -- that voluntariness was the -- was
15 what the deadline was about. There could be other -- you
16 know, we've heard McNabb-Mallory. We've heard Miranda. We've
17 heard other ideas that are out there. There should probably
18 be a deadline for other bases to suppress motions to suppress
19 statements.

20 There should probably be a deadline for R.M.C. 914
21 disclosures. There may need to be a discussion about that,
22 because the last time this came up in the 502 series, there
23 was a significant difference of opinion between the parties as

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1 to what constituted -- what was the scope of 914 and the
2 timing.

3 There -- and then finally, with -- I don't have any
4 objection -- and I've told the government and I've put it in
5 the briefings -- I don't have any objection to the
6 government's idea of trying to limit the number of times that
7 we call any particular witness.

8 So, for example, Dr. Mitchell, right? Dr. Mitchell
9 is important to all five of the defendants. It makes sense to
10 me that he gets called once and that everybody -- assuming the
11 discovery has already closed out and we've resolved
12 whatever -- we have whatever discovery we're going to get,
13 that the parties should be able to -- I don't speak on behalf
14 of anyone else, but it seems to me that everybody should be
15 able to examine him in whatever way is appropriate.

16 The -- and that makes the scheduling of any
17 suppression hearing itself -- and I am informed, Your Honor,
18 that -- by the government that AE 628I has been approved for
19 disclosure on a -- or shown to the gallery on a sort of
20 hurry-up basis.

21 MJ [Co1 COHEN]: That is the calendar?

22 LDC [MR. CONNELL]: The calendar.

23 MJ [Co1 COHEN]: That is correct.

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1 LDC [MR. CONNELL]: Okay. May I have access to the
2 camera?

3 MJ [Col COHEN]: You may.

4 Mr. Trivett, this -- this was something you produced;
5 is that correct?

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

7 MJ [Col COHEN]: All right. Any problems with him using
8 it?

9 MTC [MR. TRIVETT]: Negative, sir.

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

11 I see it on my screen.

12 LDC [MR. CONNELL]: All right. Your Honor, may I have
13 permission to display it to the gallery?

14 MJ [Col COHEN]: You may.

15 LDC [MR. CONNELL]: Well, it's not going to work that
16 great, is it?

17 MJ [Col COHEN]: It's not completely legible on my screen
18 either.

19 LDC [MR. CONNELL]: Let me see what -- let me just see if
20 this works at all.

21 MJ [Col COHEN]: I have better clarity at least.

22 LDC [MR. CONNELL]: Well, even if you can't really read
23 it, you can get the idea.

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1 This is -- I mean, and I fully appreciate the
2 government's work on this, and they were just throwing it out
3 there as a place to start the conversation, and that's the way
4 that certainly I treated it and am treating it.

5 And I will give a more detailed feedback to the
6 government on the views, but I just wanted to give you my hot
7 take on it while we are standing here, which is that there's
8 an important dividing line in this -- in this, which is -- I'm
9 just going to draw with a red line here -- that there's a
10 dividing line between what the government considers ----

11 MJ [Col COHEN]: You've drawn a red line next to --
12 between -- on the paragraph -- between Mondays and Tuesdays
13 beginning on the 12th; is that correct -- the 17th?

14 LDC [MR. CONNELL]: Between the 16th and the 17th, sir.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. CONNELL]: And once we are done marking on this,
17 I will ask the court reporters, and they can take a screen
18 capture.

19 MJ [Col COHEN]: Oh, perfect. Thank you.

20 LDC [MR. CONNELL]: But just to sort of give you a sense
21 of what we have here, Special Agent Fitzgerald, the first
22 person that the government has listed, is one of the three
23 people who took the January 2007 statement. The -- he is

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1 relevant to at least Mr. al Hawsawi's case as well. I'm not
2 speaking anything for Mr. al Hawsawi; I'm just giving you the
3 heads-up that he has already testified with respect to
4 Mr. al Hawsawi and is expected to do so again at whatever time
5 the military commission determines.

6 Camp VII OIC is somebody who is important to all five
7 defense teams. To some extent, then, there are some witnesses
8 who are not -- who have a much smaller end scope.

9 And then -- then after the 17th, it picks up with
10 Special Agent Perkins, who was another person who took the
11 statement from Mr. al Baluchi, and some other -- and then
12 Dr. Mitchell, moving on, Dr. Jessen, Special Agent Drucker,
13 and Special Agent Fitzsimmons.

14 So the hot take that I wanted to give you is that my
15 suggestion will likely be to the government that we split --
16 just say this were to happen in September. I'm not sure that
17 all the things that we're talking about here can happen before
18 then. But let's just say at some point, there are going to be
19 a series of long hearings where we are going to have these
20 special motions. So let's take September and October as an
21 example.

22 My suggestion will be, especially since they are
23 relatively balanced, to split this up, have one hearing where

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1 we take the government's witnesses and a second hearing where
2 we take the defense's witnesses, because this is actually --
3 one thing that probably the military commission has already
4 seen is that nothing happens in the military commission as
5 quickly as one might expect it to.

6 I was looking -- was making plans for what to do on
7 my day off today, and here I am. And I'm not saying it's not
8 my own fault, but I'm saying that everything takes longer than
9 we expect, especially once we start breaking up things into
10 closed hearings and open hearings, which is going to have to
11 happen for most of these witnesses, if not all.

12 So that's my sort of hot take on it. Special Agent
13 Drucker and Special Agent Fitzsimmons, for example, who are
14 listed here for one day on the 27th are actually going to be
15 quite extensive and lengthy and ----

16 MJ [Col COHEN]: Let me just ask you this. And I'm not
17 holding you to this, but give me an idea of what we are
18 talking about. So let's say Dr. -- is Dr. Mitchell your
19 witness or a witness for both?

20 LDC [MR. CONNELL]: So everything after the red line on
21 this, everything after the 17th is a defense witness.

22 MJ [Col COHEN]: Okay. So Dr. Mitchell, for example. If
23 you were ballparking how long, just you alone, might be --

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1 might have him on the stand, how long do you think that would
2 be?

3 LDC [MR. CONNELL]: Three days.

4 MJ [Col COHEN]: Wow. Okay. It's just-- okay.

5 LDC [MR. CONNELL]: He's very important.

6 MJ [Col COHEN]: No, no. Absolutely. So I guess the
7 question is: That's just you?

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

9 MJ [Col COHEN]: Then I have got four more defense counsel
10 potentially, plus the government.

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

12 MJ [Col COHEN]: So I think these are the things, as we
13 look through these dates for a scheduling order, because I
14 think the issue is, I am going to issue some kind of a
15 scheduling order. I have to control discovery. I have to
16 because that's my job.

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

18 MJ [Col COHEN]: But I need the parties -- and it's going
19 to be imperative that you all help me establish the scheduling
20 order that's realistic, and it's not just to address the
21 motion to suppress. Like I said, it's other motions. It's
22 like you said, it's motions to compel experts, it's all of
23 these issues that we need to address because that's what

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1 courts do.

2 And regardless of how someone else might think of it,
3 I see my role as a real judge trying to apply real law to real
4 facts, and so I will act accordingly. And the scheduling
5 order is the way that I follow a process. As Mr. Nevin has
6 indicated, I am a process person. That is a proper process
7 and one that will assist, I believe, everyone in making sure
8 this moves forward.

9 But this is great. This is great feedback. So this
10 proposal of perhaps doing this in three weeks, we may have a
11 witness on the stand for an entire week.

12 LDC [MR. CONNELL]: Yes, sir. There are witnesses who I
13 do -- between all the parties -- certainly not every witness,
14 right? People are of varying importance ----

15 MJ [Col COHEN]: No, I understand. But some witnesses
16 will ----

17 LDC [MR. CONNELL]: It would not be surprising for an
18 important witness like Special Agent Perkins or Dr. Mitchell
19 to be on the stand for a week.

20 MJ [Col COHEN]: I understand. And so this is exactly why
21 I probably -- I don't know how I am going to have a scheduling
22 conference with the parties. This is going to be something
23 I'm going to take under advisement probably with my staff and

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1 then propose some things to you all, and you will have to
2 decide how we do that. Video teleconference is a possibility.
3 We can do it in D.C. I heard Ms. Bormann just say D.C.; that
4 is another possibility.

5 But I do think it's imperative that we start getting
6 a little bit more of an orderly process to this so there
7 aren't major surprises. It's inevitable in litigation that
8 there will be surprises, but to the extent that you can
9 minimize those surprises by having a process and expectations
10 and managing those expectations, I think that's important.

11 LDC [MR. CONNELL]: Yes, sir. May I make a suggestion?

12 MJ [Col COHEN]: You may.

13 LDC [MR. CONNELL]: If the military commission were so
14 inclined, I would be happy within, say, two weeks from Monday
15 to file our proposals as to what might go into -- I mean, just
16 not telling you what to do, but you're asking for our
17 feedback. Here's my -- here's our feedback on this question.

18 MJ [Col COHEN]: Okay. I will allow the parties to do
19 that. Within two weeks from today, I would like the parties
20 to provide me a proposed scheduling order from now to get me
21 through the entry of pleas.

22 LDC [MR. CONNELL]: Yes, sir. Now to the entry of
23 pleas ----

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1 LDC [MS. BORMANN]: Judge, can I interrupt for just a
2 moment?

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

4 LDC [MS. BORMANN]: At the same time that we are doing
5 that, we have a July 1 deadline for a motion to suppress, two
6 other motions to compel, a motion for extension of time. Can
7 we do it -- give a little more than two weeks?

8 MJ [Col COHEN]: How about a month?

9 LDC [MS. BORMANN]: That will be great. Thank you.

10 MJ [Col COHEN]: Okay. That's fine. That's reasonable.

11 Like I said, you're going to find that if someone
12 has -- raises an issue and says you're right, and so that is
13 exactly what I want you to -- so four weeks from today.

14 LDC [MR. CONNELL]: -- yes, sir.

15 MJ [Col COHEN]: All I'm asking -- there's a bunch of
16 attorneys and I realize there's a bunch of different issues,
17 but just a general idea of these are your proposals, and then
18 I will schedule a scheduling conference for us in D.C. and we
19 will decide -- at least a representative from each team will
20 attend ----

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

22 MJ [Col COHEN]: ---- or we will arrange the logistics of
23 that, and then we are going to have a scheduling conference

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1 and I'm going to finalize the scheduling order in this case.

2 LDC [MR. CONNELL]: I understand, sir. Thank you. I no
3 longer need access to -- oh, sorry. I promised you I would
4 take a screen capture, so here we go. I would request the
5 court reporter take a screen capture.

6 MJ [Col COHEN]: She is doing so now.

7 LDC [MR. CONNELL]: That will be 628J; is that correct?

8 MJ [Col COHEN]: That is correct.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [Col COHEN]: Handing this back to the court reporters.

11 LDC [MR. CONNELL]: Your Honor, the final point I would
12 like to make while I'm standing here is Judge Pohl did his
13 absolute best in setting these dates; and the nightmare of
14 scheduling the use of this one courtroom, I do not envy the
15 military commission or anyone else.

16 If the military commission is accepting votes or
17 suggestions as to what to do with the July hearing, my
18 suggestion or request is that we continue with the week that
19 is scheduled 22 through 26 July and that the military
20 commission cancel the other two weeks.

21 MJ [Col COHEN]: Okay.

22 LDC [MR. CONNELL]: I understand it's not my vote -- I
23 mean, it's not my decision, but there is my vote.

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

2 All right.

3 Mr. Trivett, any additional comments you may have on
4 either 628B or with respect to 629-1, and the general question
5 of scheduling order.

6 I notice from the nods that it appeared that you were
7 not entirely opposed to the idea of a scheduling order.

8 MTC [MR. TRIVETT]: Oh, we have been begging for one, sir,
9 for years.

10 MJ [Col COHEN]: Okay. And that was made by the defense,
11 but --

12 MTC [MR. TRIVETT]: So I call -- and I will not be arguing
13 the aspects of 628.

14 MJ [Col COHEN]: Right.

15 MTC [MR. TRIVETT]: That's more logistical.

16 MJ [Col COHEN]: On 629, yes.

17 MTC [MR. TRIVETT]: I can combine both of them.

18 MJ [Col COHEN]: That will be fine. Thank you.

19 MTC [MR. TRIVETT]: So on 12 December 2014, the
20 prosecution filed AE 175F. That was our very first request
21 for a trial scheduling order. We subsequently have filed
22 several in the 478 series and are well into our draft of one
23 we were planning on providing you hopefully as early as next

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1 week.

2 MJ [Col COHEN]: Thank you.

3 MTC [MR. TRIVETT]: So that was certainly our plan all
4 along ----

5 MJ [Col COHEN]: And if you want to provide yours sooner
6 than four weeks, you're welcome to do so.

7 MTC [MR. TRIVETT]: We will -- we will certainly send it
8 to you as soon as it's ready.

9 What I can say about the 478 ones is that the dates
10 that we proposed are OBE because they're past, but that it
11 will be very similar in structure maybe with some additional
12 portions.

13 MJ [Col COHEN]: And one of the things that I will address
14 in the scheduling order, as I just indicated, and so I need
15 the government to think about this, is discovery needs to be
16 completed. And so to the extent that there are multiple
17 layers of this discovery to include the RDI -- in other words,
18 a decision has to be made by the government, this is all we're
19 going to provide without a motion to compel on the RDI
20 program, and what is the date of that going to be? Otherwise,
21 it's a moving target. And I believe that's probably why we
22 have not had a trial scheduling order up to this date, is
23 because it's the unknown, but there needs to be a known.

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1 MTC [MR. TRIVETT]: Yes, sir. And General Martins laid
2 where we're currently at in the transcript at pages 22678 to
3 22697, and this was in regard to oral argument on AE 286,
4 which was the defense request for access to the full
5 SSCI Report.

6 The trickling of discovery is nearly complete. What
7 Ms. Bormann referenced was part of the additional quality
8 control checks that we have done on the RDI program
9 information to make sure we're discharging our discovery
10 obligations.

11 MJ [Col COHEN]: Now -- and don't get me wrong. I
12 understand with classified information that even what
13 you're -- what you believe you were obligated to disclose and
14 what you are takes time.

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

16 MJ [Col COHEN]: What I'm asking for the government to do
17 in part of its scheduling order proposal is to tell the --
18 tell the commission, look, we believe that based on the
19 processes and the time that we can devote to this matter, we
20 will be -- we will be completed with this portion of discovery
21 by X date.

22 MTC [MR. TRIVETT]: Yes, sir. And we ----

23 MJ [Col COHEN]: And I'm not telling you what that date

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1 should be, but just a realistic -- say this is the deadline
2 we're setting for ourselves to meet our obligations.

3 MTC [MR. TRIVETT]: Yes, sir. And that's a deadline that
4 I'm not ----

5 MJ [Col COHEN]: You don't have to give it to me today.

6 MTC [MR. TRIVETT]: ---- able to announce now, but what I
7 can say is it's not a long time off. I can tell you that.

8 MJ [Col COHEN]: That is -- that is good news. I hope
9 that you are correct.

10 MTC [MR. TRIVETT]: And just for a little bit of
11 background, we had always intended to turn over the relevant
12 statements that the accused made while they were in the
13 custody of the RDI program and their conditions of
14 confinement. We believe that that would have discharged our
15 discovery obligations in regard to the RDI period.

16 When Judge Pohl issued a 10-category construct in the
17 Nashiri case, which later in our case we adopted, became 397F,
18 we believed that to be the widest classified discovery order
19 ever issued to the United States. We did not anticipate
20 having to turn over that information.

21 We ultimately, though -- because Judge Pohl was the
22 judge in Nashiri and who is now sitting in front of us, we did
23 not want to argue and litigate and take the amount of time it

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1 may have taken to try to convince him otherwise.

2 We felt like he had made that determination in a very
3 similarly situated case and that ultimately it was probably in
4 the interests of the United States Government to simply start
5 complying with it immediately, because we felt like if a year
6 and a half after the litigation, we would have had to have
7 done it, we would have been a year and a half further down the
8 line.

9 So that's a little bit of background on why the RDI
10 information took longer than we had anticipated at the
11 beginning of the trial.

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

13 MTC [MR. TRIVETT]: The second thing I will say is in
14 regard to the 538/561 information that we just provided, that
15 was based on a specific defense theory that they were able to
16 articulate that we had not anticipated that we agreed was
17 discoverable. So it wasn't information that we believed was
18 discoverable up front. They were able to articulate a theory
19 of discoverability that we conceded; and because of that, we
20 then had to gather that information.

21 So that may happen even after our deadline, but we
22 will be able to make -- stand up and make an affirmative
23 statement at some point in the not-so-distant future that we

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1 are done with all discovery we intend to provide absent a
2 motion to compel.

3 I do join Mr. Connell in having the scheduling order
4 be as specific as possible, especially in regard to 914
5 disclosures, all of those things that aren't in our mind
6 case-in-chief evidence and which the Manual sometimes doesn't
7 require provision of until after testimony; although that's
8 not generally anyone's practice. But having a date certain
9 for that type of information would be helpful for everyone, so
10 we do join him in that.

11 Where I'll part company a bit, especially in relation
12 to Ms. Bormann's request to have a month from now to issue it,
13 is that I think we need a separate one for the suppression
14 motion going forward, because -- and this is sort of part of
15 the 628 aspect of my comments. We have the burden both
16 legally and logistically for these commissions in a
17 suppression motion down in Guantanamo.

18 And I know Your Honor has been here now twice, so
19 you're starting to understand this -- unique aspects of the
20 travel, but a lot of times, we're tied to a flight, and
21 whether that be the rotator or an OMC flight. It's our
22 intention of the 18 that we've approved that all of them would
23 actually be present and testifying here, although there are

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1 limitations in subpoena power outside the United States.

2 So there is a VTC suite in the Mark Center where the
3 convening authority has some spaces. That is generally
4 where -- when we subpoena someone to testify who may not be
5 willing to testify absent that subpoena, they go to the
6 Mark Center.

7 But it's our intention to have everyone here. And
8 when everyone is here, the logistics are a little bit more
9 difficult. It's not just a flight where the commercial -- the
10 commercial air industry can service our court. There's a
11 piece of that where they get to Andrews or to wherever the
12 rotator is flying out. But that's my long way of sort of
13 saying that we need certainty on what witnesses are coming for
14 the suppression and when.

15 And Mr. Connell was right to point out that there are
16 competing interests at times for this courtroom. I'll note
17 that the week after the July hearings was actually open but
18 the week after the September hearings was not.

19 So what I can say is we would like to utilize every
20 day that we have in the court. And while I understand that
21 from a timing standpoint that certain witnesses that I put on
22 my proposal in 628 (Gov) -- I -- may take longer, I certainly
23 anticipated Dr. Mitchell taking longer than the other

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1 witnesses, but it may take longer than I anticipated.

2 But with all that said, I would -- I would oppose
3 simply ending our eight witnesses and then waiting until the
4 next time. I think that there are at least a certain number
5 of witnesses, even if it's not all of them, for the defense to
6 start to question right after that so we can take full
7 advantage of the time we do have in the court on the current
8 schedule we have for the rest of the year.

9 I'll also point out that because the attacks were
10 going on 18 years ago, many of the agents that have relevant
11 information are no longer employed by the government, so we
12 don't have the inherent flexibility, let's say, that we would
13 have when it's an active duty FBI agent and we can simply have
14 them sitting down here for weeks.

15 So I would ask in the scheduling order, whether it's
16 adopted -- and I do want to keep this, the order of the
17 witnesses that we intend, those first witnesses through the
18 Monday or Tuesday, I would like to keep those certain. And to
19 the extent that the trial scheduling order can indicate that
20 in some way, we can then issue subpoenas. And it might not be
21 that everyone has to fly down on the Saturday; it might be
22 that there's a rotator on Tuesday. It's those types of things
23 and the need to subpoena people that are no longer -- that are

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1 now civilians and no longer employees of the government.
2 That's an important aspect of our logistical requirements. So
3 I wanted to call that to your attention.

4 MJ [Col COHEN]: I understand.

5 MTC [MR. TRIVETT]: So I wanted to call that to your
6 attention.

7 I am going to turn my attention now to some of the
8 arguments made by Mr. Harrington, Mr. Nevin, and Ms. Bormann.

9 So while it is true that we turned over the
10 hundred-some-odd identities of the medical providers fairly
11 recently, our position all along had been articulate why you
12 need a certain identity from one of the people. And we'll be
13 willing to do that, and we had done that in the past. That
14 had been our position consistently.

15 The defense's position had consistently been they
16 wanted everyone. We litigated that, and it took longer to
17 litigate, quite frankly, than I think it should have, but
18 we're where we are at. But at least for purposes of
19 suppression, we're locked in time from 6 September '06 until
20 they take their statements in January and February of 2007
21 regarding what possible medical personnel may have relevant
22 information for the suppression.

23 So while the number may seem daunting and they may

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1 seem like they want to get through it in six months, the
2 reality is that we have provided the one staff psychiatrist
3 who is down there. So from a mental health standpoint, they
4 all have that person's identity; and we have already agreed to
5 approve to produce her.

6 So in that regard, the medical witnesses are a short
7 period of time. They've now been detained here going on
8 almost 13 years, but the relevant medical piece of it, for
9 purposes of suppression at JTF-GTMO, is September '06 until,
10 at latest, February of '07. And I think that's for
11 Mr. Bin'Attash. Most of the other individuals were
12 interviewed in January of 2007. So I wanted to call that to
13 your attention.

14 I also wanted to call to your attention
15 Judge Parrella's recent ruling in 632B, and that was specific
16 to a Mr. Hawsawi request for additional time to file his, I
17 believe, suppression motion, but it talks globally, because
18 everyone had received generally the same information at the
19 same time.

20 And Judge Parrella in his ruling states that: In
21 support of his request, Mr. Hawsawi has cited both the
22 inability to interview witnesses due to a denial of access to
23 medical and mental health providers who treated Mr. Hawsawi,

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1 and two, impediments in the discovery process.

2 The commission finds little merit in these arguments.
3 Counsel have had over seven years to prepare their case to
4 include this well-anticipated motion to suppress a key
5 statement of the accused.

6 While the commission recognizes that it previously
7 suppressed these statements in 524LL, that ruling was not
8 issued until August 2018 and was not anticipated by the
9 parties.

10 The defense teams, to include Mr. Hawsawi's, have had
11 significant time to anticipate and prepare for litigation of
12 the voluntariness of the accused's statements to the FBI.
13 Further, the government has provided tens of thousands of
14 pages of discovery related to this issue, and voluminous
15 relevant material has long been available in the public
16 domain.

17 The government has represented on the record that
18 discovery is largely complete and that the flow is down to a
19 trickle. Given the unique nature of this case, waiting for
20 100 percent assurance that discovery is complete prior to
21 addressing substantive issues would effectively foreclose
22 forward progress.

23 So these arguments had been considered by

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1 Judge Parrella, who had been the military judge from September
2 of last year until you were detailed. He's fully aware of
3 where we are with discovery, and he found the arguments that
4 were made again before you today to have little merit.

5 In addressing some specific things that were raised
6 by counsel, they may not know every single witness they want
7 to call. It is not a reasonable position for them to not know
8 any witness they want to call. And I think that that's where
9 we are at with Mr. Connell; I think we can be there for
10 everyone else.

11 And as part of the suppression trial scheduling
12 order, dates certain that the commission holds to for a
13 preliminary witness list -- and I did not understand
14 Mr. Connell's request for assistance in us providing certain
15 witnesses to not be his witness list until just now, so I
16 think it's imperative that the government know obviously who
17 the defense intends to call if there's people other than the
18 ones that they asked us to produce. So that would have to be
19 part of this trial scheduling order for -- the separate trial
20 scheduling order I'm asking for regarding suppression.

21 The facts are the facts, and they're frozen in time,
22 especially in regard to the statements that were given in
23 January and February. They've long had the discovery they

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1 need for that. That's going to obviously be the primary focus
2 of the commission, even if it's not the sole focus of the
3 commission, is the circumstances surrounding the taking of
4 those statements specifically.

5 At a minimum, their witnesses -- they know they're
6 going to call those individuals. So we think the only way to
7 not foreclose forward progress in the case is to make them
8 give the witnesses that they know they want to call now, and
9 then we'll argue about whether or not there is any additional
10 witnesses that they need in the future.

11 I don't want to rehash the arguments we made
12 yesterday regarding Protective Order #4 other than to say
13 unless the commission makes a legal determination that the
14 accused have a right to investigate people who have the
15 government's classified information and to seek that
16 classified information prior to us being able to assert our
17 privilege, then the issue of Protective Order #4 goes away
18 completely.

19 You have to find that fundamentally first, before it
20 has any impact, because if they had no right to do it to begin
21 with, then it certainly didn't impact any of their statutorily
22 either required or mandated investigative rights.

23 We're in a somewhat unique position, and the

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1 government agreed to take a position in regard to Rule 703 and
2 the notice that the defense was required to provide us for
3 experts, and we agreed that de minimis notice was adequate,
4 and thus far, I don't know what -- how many they've asked, but
5 I know the vast majority of what they have asked for has been
6 done in an ex parte fashion. The only way we really find out
7 about it is when they start to bubble up on witness requests
8 for production. Like Mr. Connell's request that he had asked
9 for 133 witnesses for jurisdictional hearing, that's when we
10 first started identifying some of these witnesses.

11 So we're not in a position normally, like you would
12 confront in a court-martial, where we can challenge the
13 allegations made by defense counsel regarding what they have
14 and how long they have, but you are. And I think we need to
15 be in a place, as a commission, where you trust but verify.

16 And the reality of the suppression -- and as
17 Judge Parrella just indicated in what I read to you in 628B,
18 the reality is that none of the parties were anticipating
19 suppression. They obviously were preparing for suppression.
20 We were as surprised as anyone when we got the order. But
21 within five days and in order to preserve an interlocutory
22 appeal at the end, we moved to reconsider. So the defense was
23 fully aware that we were moving to reconsider the suppression

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1 order of the LHMs.

2 I can't speak for what the convening authority did,
3 but what I can say is we don't know how many hours they had
4 left approved. Generally, what happens is the convening
5 authority, and for our experts as well, will approve a set
6 number of hours, whether it's 100 or 200 or whatever it is.
7 What we don't know is that -- when that suppression motion
8 hit -- or the suppression ruling hit, how many hours their
9 experts may have had left to work on suppression, because the
10 convening authority wouldn't have turned off. It's my
11 understanding they wouldn't have turned off any hours they
12 already approved.

13 So this concept that the second Judge Pohl made his
14 order and then the second we moved to reconsider, that they
15 have not had any experts working at any point in time on any
16 suppression-related things, we cannot verify that; and I would
17 be surprised if that were the case.

18 I can understand that maybe several months after the
19 fact, if they tried to justify additional hours based on
20 suppression, that may have been denied; I understand that
21 logically, how that might have flowed, but I would be
22 surprised if the reality is that all work stopped on the day
23 that order came through.

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1 So we can't verify it. We have taken a position on
2 703 that, quite frankly, we didn't anticipate having to
3 continue to do this late in the process, because at some
4 point, we do need notice and we need to be able to notify our
5 own experts. We would ask and will ask for in the update to
6 478 for disclosures of certain experts and whether or not they
7 intend to rely on certain mental health evidence.

8 Can I ask for one moment of your indulgence? I want
9 to speak with the chief prosecutor.

10 MJ [Col COHEN]: You may.

11 [Pause.]

12 MTC [MR. TRIVETT]: And I'll just end, sir. On those
13 transcript cites that I gave you describe in some granularity
14 the type of information that Ms. Bormann was referencing when
15 she said that we were providing the information. And there's
16 certainly no strategy for us to be providing -- we provide it
17 when it's finally prepared to go, whatever that date is, and
18 we want to get it out of our office and into their hands as
19 soon as possible ----

20 MJ [Col COHEN]: And I understand that. And I think
21 that's why I'm asking the government when you propose your
22 scheduling order, that you give us a little -- give the
23 commission and the parties some fidelity on what is a

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1 reasonable estimate as to when that's going to be done.

2 MTC [MR. TRIVETT]: Absolutely.

3 MJ [Col COHEN]: And understanding I think the
4 government -- it's imperative that the government build in
5 probably a little bit of wiggle room because things, as we
6 have recognized, take a little bit longer than we were
7 anticipating. But there has to be -- it doesn't sound like
8 anyone is in disagreement that for certain things, there
9 should be a date certain and, first and foremost, discovery.

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

11 MJ [Col COHEN]: That dictates so many other things that
12 happen in a trial, as you're well aware from, I'm sure, your
13 experience, you know, prosecuting cases.

14 So if the government can tell us, okay, look, these
15 are the different issues that are out there, this is when
16 we're going to provide this, and you build in a little wiggle
17 room into your scheduling order. It doesn't mean I'm going to
18 agree with it or disagree with it. I may say, well, I think
19 it's a little bit -- that's a little bit too much wiggle room.
20 I don't know what I'll do. But those are the kinds of things
21 that we need to discuss and see.

22 MTC [MR. TRIVETT]: Yes, sir. No one will be happier than
23 the people sitting to the right of me if we get a trial

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1 scheduling order. And that's just the way the government
2 works. When you have deadlines, you become the wolf at the
3 door, and the government feeds the wolf at the door.

4 With the last seven years of not having these
5 deadlines, we believe that it has perpetuated this cycle of
6 litigation that has grown so unwieldy and most of which would
7 have never occurred had we had these dates. Understand that
8 it's tied to discovery, and understand that the discovery
9 orders got a lot bigger than we thought they were going to,
10 but we will anticipate and give as much detail as possible to
11 the commission in our trial scheduling order about where we
12 are and what we have left.

13 MJ [Col COHEN]: Okay.

14 MTC [MR. TRIVETT]: Thank you, sir.

15 MJ [Col COHEN]: Thank you.

16 Mr. Harrington, are there specific points that you
17 would like to address in Mr. Trivett's comments? And if not,
18 then I will move on to a different counsel.

19 LDC [MR. HARRINGTON]: I don't think anything further.

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

21 Mr. Ruiz, you are standing?

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

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. RUIZ]: Judge, specifically with regard to
2 Mr. Trivett's reference to 632B, I just want to give you --
3 actually, that fits in right into the AEs that I owed you, for
4 one, when I spoke to you earlier.

5 524RRR and 524RRR (Sup) were Judge Parrella's ruling
6 directing the parties that remained that had not filed a
7 motion to suppress to seek an extension of time in which to
8 file the motion to suppress.

9 Mr. Trivett is incorrect when he says that we
10 requested an extension of time. We did not do that because we
11 thought that that would moot our Williams argument and the
12 fact that our position all along is that that timeline was not
13 appropriate. What we did, however, do was in 632C respond --
14 excuse me, 632, responded to the judge's order in 524RRR. So
15 here's where you see that separation of going from 524 to 632,
16 which is our AE number for suppression purposes that was
17 designated by Judge Parrella.

18 So I just want you to be aware of that; that while he
19 issued that ruling in 524RRR, we responded to it with our new
20 AE in 632 (MAH).

21 MJ [Co1 COHEN]: Thank you.

22 LDC [MR. RUIZ]: In the 632 (MAH), we titled that as our
23 response or our reply to the judge's order in 6 -- in 524RRR.

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1 And the reason we did that is because we took the position
2 that asking for an extension of time was not appropriate,
3 given the fact that we still have 524MMM pending before the
4 court, and we felt that the court needed to address that and
5 needed to address the issues and rule on that motion before it
6 asked us to seek an extension of time, since our position was
7 all along that the timing was off.

8 As you now are well aware, Judge Parrella avoided
9 ruling on that motion, even though -- and this is why it was
10 interesting to me during voir dire that you said that
11 Judge Parrella had to issue some rulings and then move on,
12 because he did, in fact, rule on that issue that was still
13 before him, but did, in fact, issue a ruling that said file
14 for an extension of time. So it was kind of odd for us.

15 We did that in 632 (MAH). And what we did in
16 632 (MAH) is we outlined, once again like we had done in one
17 of our previous motions, all of the different reasons and all
18 of the different equities, some of them which are beyond our
19 control; the convening authority, the Joint Detention Group
20 that controls -- the LSS that controls some of the MRI
21 equities, those kinds of things, we outlined that.

22 In 632, the government responded to that. And their
23 response was essentially the argument that you've heard, which

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1 is while they've had this information since 2014, they've had
2 this information for this amount of time, so they should be
3 prepared to argue it.

4 Of course, as we highlighted for you, we didn't have
5 much of the information until 2017, the very beginning, and
6 then the trickle of information on the CIA/FBI witnesses. The
7 actual information about medical witnesses we didn't have
8 until very recently, until April, right? So those are --
9 those are the facts.

10 But we also provided -- and what we were in the
11 process of working on was our reply to the government's
12 argument. And when our reply was going to provide the court
13 all of the different instances where we had actually sought to
14 contact witnesses, the impediments that were put on at that
15 time, the doctors that we reached out to had declined to speak
16 to us, to show that those efforts were ongoing but to show
17 that those obstacles existed and were very difficult to
18 overcome without the information that was later provided to
19 us.

20 However, the -- much to our surprise, before we were
21 able to submit our reply to the government's response,
22 Judge Parrella issued a ruling. And Judge Parrella ruled,
23 much with the language that Mr. Trivett highlighted for the

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1 court today, but he ruled before our reply came in. And I
2 will tell you that's the first time in this -- in the history
3 of this military commissions -- I've been here since they
4 began in 2012, and I've been here for over ten years -- that
5 I've ever seen the court violate its own Rules of Court which
6 gives certain timelines for accepting the filing of a motion,
7 the timeline for a response and a reply. First time it ever
8 happened in our case. First time I've ever seen it happen,
9 but the judge ruled before giving us an opportunity to reply.

10 We sought to submit our reply nevertheless. The
11 trial judiciary folks who normally accept those understandably
12 said, "Well, wait a minute. The judge has already ruled on
13 this, so what are you replying to?"

14 And what I submitted to the court was that, if
15 nothing else, we wanted the record to be clear and the record
16 to contain what our reply would have been and what the facts
17 and the circumstances were that obviated or countered the
18 ruling that Judge Pohl -- Judge Parrella had prematurely made
19 prior to giving us the opportunity that the Rules of Court
20 envision. And we did that, and I want to commend this to you
21 for review, is 632C (MAH), which was filed on 30 May 2019, a
22 day after Judge Parrella's ruling on 29 May.

23 Judge Parrella's ruling, by the way, came before our

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1 time for a reply had expired, making the conclusions and
2 drawing the conclusions that Mr. Trivett has, in fact, pointed
3 out today before this commission.

4 I will also submit to you, Judge, that while I don't
5 normally make it a point of talking about previous judges in
6 this light, Judge Parrella's bias and his unique position in
7 this case as having been a former prosecutor in the very same
8 office that these prosecutors work, in the very same section,
9 as well as his association with Mr. Groharing, who is a
10 prosecutor who works most of the national security issues, is
11 a subject that has been of great contention in these
12 commissions.

13 The fact that he, in fact, ruled and cut off our
14 replies -- an issue that we certainly raised -- 524 issue is
15 an issue that leads our litigation right now in federal court,
16 where we are litigating to vacate all of Judge Parrella's
17 rulings. So I think it is important to at least highlight
18 that it has been an issue of great contention for us, his
19 prior associations with this prosecutorial team.

20 The fact that he cut off our reply in this instance
21 and now put us in a position where the prosecution seeks to
22 maximum that advantage without the court having issued a
23 ruling that we never had an opportunity to actually reply to

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1 and have that considered and reply I think should be
2 considered in the context of what they seek to draw, the
3 inference that they ask you to draw. So I ask you to please
4 read 632C in context and put in context what Mr. Trivett
5 argued here before this court.

6 MJ [Col COHEN]: I will. I will look into the matter you
7 just brought up.

8 LDC [MR. RUIZ]: Thank you.

9 MJ [Col COHEN]: Thank you.

10 Any additional comments from any of the defense
11 counsel?

12 Negative response from Mr. Connell.

13 Ms. Bormann, do you wish individually or just allow
14 Mr. Nevin to make a response?

15 LDC [MS. BORMANN]: I don't know if Mr. Nevin wants to or
16 not [microphone button not pushed; no audio.]

17 MJ [Col COHEN]: All right, sir. If you will specifically
18 address anything that Mr. Trivett brought up.

19 LDC [MR. NEVIN]: Yes, Your Honor. Just several things.

20 The idea that discovery would be completed at some
21 point, I agree that's a watershed point, but the meaning of --
22 I think our dispute might not be should there be a time when
23 discovery is completed, it's going to be what equals complete

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1 discovery. And it's pretty easy to say we're going to
2 complete discovery by a particular date, but that might be a
3 little more difficult where the parties have big disagreements
4 about what complete discovery would be.

5 And, you know, one -- one aspect of this is that --
6 this most important mitigating evidence is -- has largely been
7 shielded from us. We haven't been allowed access to the
8 actual sites, for example. Protective Order #4, the thing we
9 were arguing about yesterday, we have been prevented from
10 reaching out to the people who were percipient witnesses to it
11 and so on.

12 So we can -- I don't think that's something that we
13 should try to resolve -- the details of that is something we
14 should try to resolve right now, but I want to say -- maybe I
15 put you on notice that's coming as an issue, as a global
16 issue.

17 MJ [Col COHEN]: No, sir. I fully expect, as in regular
18 practice, if the defense does not agree that the government
19 has met its obligations, there would probably be motions to
20 compel based on that, irrespective of what -- I mean, whether
21 or not the government believes it has complied with the ten
22 principles of discovery with respect to the RDI program,
23 et cetera. That does not mean that the defense will

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1 necessarily agree, and so I understand how that would work in
2 the process as well.

3 LDC [MR. NEVIN]: Thanks.

4 The -- I heard Mr. Trivett say that he believes the
5 only medical witnesses who might be relevant to a motion to
6 suppress would be -- to a motion to suppress the letterhead
7 memorandum statements would be those who encountered
8 Mr. Mohammad between the time he arrived at Guantanamo Bay in
9 September of 2006 and the time when he gave those statements
10 in January of 2007. And again, I don't think that's an
11 appropriate -- probably an appropriate thing to litigate
12 today, but ----

13 MJ [Col COHEN]: Right. I do understand based on the
14 earlier arguments that the parties do not see that issue the
15 same. Although they want it to be a specific period of this
16 time, the defense does not concur with that and believes that
17 it's more of an ongoing, continuous course of conduct and
18 therefore the doctors from the previous time would be
19 relevant.

20 LDC [MR. NEVIN]: Just as an example, the medical provider
21 who diagnosed Mr. Mohammad with torture-related symptoms did
22 so about two years after he -- after the letterhead memorandum
23 statements. And there's a neurologist who ordered a sleep

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1 study six months ago; and the sleep study, we believe, is
2 directly related to Mr. Mohammad's treatment in the black
3 sites.

4 And so these things don't come up, these sorts of
5 symptoms and diagnoses -- these medical providers, for
6 example, were forbidden -- apparently forbidden from taking a
7 history from Mr. Mohammad for long periods of time. So these
8 issues don't work on these kinds of schedules. They're a lot
9 more complicated than that.

10 Just one other idea we exchanged in litigation,
11 sorry, in briefing between the parties, this idea that we
12 could have come to the government at any time and asked them,
13 that we're interested in talking to Dr. X, and if we could
14 explain to them why Dr. X or Y or Z was someone that was
15 important, that they would at least consider making that
16 person available to us.

17 And this, again, is one of the things that I was ----

18 MJ [Col COHEN]: Mr. Nevin, put your badge away, please.

19 LDC [MR. NEVIN]: Oh, sure.

20 This, again, was one of the things I was talking
21 about yesterday. We are obligated to conduct a thorough
22 investigation and also an independent investigation, and we,
23 in some ways, have just been litigating for the right to do it

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1 in a correct way.

2 But our view was not that we go to the prosecution
3 and say, "Here's what we're thinking. Here's our theory.
4 What do you think? And are you willing to help us with that?"
5 That's not how investigation works. If defense investigation
6 worked that way, defense investigators would never get
7 anywhere.

8 So then counsel said that you -- and if I phrase it
9 wrong, forgive me, I'm not attempting to mischaracterize it,
10 but I think I heard Mr. Trivett say that you can't grant the
11 motion to reconsider, 524PPP and MMM -- you can't grant that
12 unless you find that the defendants have a right to obtain the
13 government's classified information, or words to that effect.

14 I just want to say, the information that we're after
15 here is not classified. The conditions of confinement and the
16 nature of the treatment, the torture, the cruel, inhuman, and
17 degrading treatment, that's not classified. There are other
18 parts of the RDI program that are classified, but that's not,
19 and that's what we're after. So -- and it is still very much
20 a bone of contention between the parties.

21 Take, for example, the 286, the motion to compel
22 production of the entire Senate Select Committee on
23 Intelligence Report as opposed to just the executive summary.

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1 99.99 percent of that is unclassified. There's no reason why
2 it can't be provided to us.

3 And the names of the people who participated in the
4 torture, the countries where it took place and so on, the
5 things that are still classified, that's redacted out of the
6 materials we get already, and there's not any reason on earth
7 why that can't be -- that related to classified information,
8 that that can't be provided to us.

9 Two final things, just to follow up on what Mr. Ruiz
10 said. Judge Parrella had a habit of ruling first and then
11 permitting you to be heard afterward. He did it twice or
12 maybe three times to us, and I know he did it to other parties
13 as well. And it's important because 632B, which counsel --
14 which Mr. Trivett mentioned, was an example of that. But it
15 happened in other places too, and we objected to it. I ask
16 you to just bear that in mind for -- to the extent that you
17 are reviewing materials that may fall into that category.

18 And the last thing is, I heard Mr. Connell propose
19 holding the hearings the first week of July only; and for a
20 number of reasons that would be having to do with the timing
21 of other stuff within our team, we join that vote, for
22 whatever it's worth.

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

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1 it.

2 LDC [MR. NEVIN]: Thank you.

3 MJ [Col COHEN]: Ms. Bormann, any final comments?

4 LDC [MS. BORMANN]: I feel old right now because I'm
5 looking up at the bench here and I'm looking at faces that
6 weren't around when we were litigating AE 397, which must be
7 exactly why Mr. Trivett thought he could say what he did
8 without any rebuttal.

9 So let's revisit AE 397, what's called the
10 10-category construct, what Mr. Trivett used to explain how
11 they didn't like it, they didn't want to comply with it, it
12 was overwhelming to them, and they never expected to have that
13 much discovery provided.

14 AE 397 was a government motion. It was filed on
15 28 December 2015. It's called Government Proposed
16 Consolidation of Motions to Compel Information Relating to the
17 CIA's Former Rendition, Detention, and Interrogation Program.
18 And in that motion, they specifically asked Judge Pohl to
19 impose the 10-category construct articulated in
20 United States v. al Nashiri, AE 120AA, paragraph 13.

21 We objected because we thought that it imposed
22 restrictions that were going to lead to this very issue, which
23 is discovery still isn't completed because we have no

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1 transparency.

2 The government also did not oppose the 10-category
3 construct, which Mr. Trivett now blames for the mess with
4 discovery in Mr. al Nashiri's case. On 24 June 2014, in
5 AE 120AA, an order issued by Judge Pohl, who was then the
6 judge in al Nashiri, at footnote 6 on page 7, it indicates --
7 well, I'll read the relevant portion, "The 10-category
8 construct, which the prosecution does not oppose," and then
9 the footnote cites to the prosecution's filing in that very
10 motion.

11 So I just want to correct the record. The
12 10-category construct was imposed over the opposition of an
13 objective -- objection of every defense team on this side and
14 at the specific request of the government.

15 With respect to discovery still coming, I think you
16 made the very good point, which is, please, let's not try to
17 say we're going to do it tomorrow. Let's have a realistic
18 version of when that's going to be.

19 When we did the arraignment in this case, the
20 government proposed a trial conduct order that had us on trial
21 within three months of the arraignment date. That's what
22 we've been getting ever since. So that wasn't reasonable,
23 given this case, and I would ask that you hold them to

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1 something reasonable.

2 On the issue of the medical experts, Mr. Trivett
3 profoundly misunderstands the concept of how medical expertise
4 and opinion fits in to people who suffer from trauma. So as
5 we've learned -- let's just take Muhammad Ali as an example.
6 Right?

7 He fought in a boxing ring for a period of time that
8 ended sometime, if I remember correctly, in the '80s, but he
9 didn't experience the trauma to his brain in ways that were
10 perceptible until much later than that. And we know soldiers
11 suffer from traumatic brain injury after they leave combat.
12 We know that people who play football experience CTE much
13 after they leave the football field.

14 So the medical records in this case -- in fact, quite
15 honestly, although the 2006 through 2008 in Mr. Bin'Attash's
16 case, because the government didn't get exactly what they
17 wanted in 2007, so they went back in 2008 -- so the 2006 to
18 2008 period of time for Mr. Bin'Attash is likely not the most
19 important time period; it is more likely later, as people
20 mature. And the brain trauma that was caused by the torture
21 between 2003 and onward isn't apparent until after the fact.

22 So with those corrections, I have nothing else.

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

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1 appreciate it.

2 LDC [MS. BORMANN]: Thank you.

3 MJ [Col COHEN]: Mr. Connell.

4 LDC [MR. CONNELL]: Your Honor, I wasn't going to say
5 anything, but counsel just attributed a position to us that
6 was not our position.

7 We moved in AE 308 for the military commission to
8 adopt the 10-category construct in December of 2015 in AE 397.
9 So initially the government opposed that. And then in AE 397,
10 in December of 2015, the government changed position, and then
11 the debate at that point was what did that mean going forward.
12 And so our position in that was in 397A.

13 MJ [Col COHEN]: Thank you.

14 LDC [MS. BORMANN]: I'm sorry. I misspoke on behalf of
15 Mr. Ali.

16 MJ [Col COHEN]: Not a problem.

17 All right. I think it's appropriate for us to take a
18 brief break. When we return, 530TTT is obviously the MAH
19 team's motion. With respect to the other defense counsel, it
20 would appear to me that this -- appear to be a very specific
21 motion related to his client.

22 Do the other defense counsel intend to make any
23 argument with respect to that?

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1 That's a negative from Ms. Bormann, Mr. Harrington.

2 From all other defense counsel, it's a negative response.

3 Okay. We'll take that up.

4 Mr. Ruiz, be prepared to argue that from your team.

5 And then, Government, I'll give you an opportunity to respond.

6 We're in recess for 15.

7 [The R.M.C. 803 session recessed at 1057, 21 June 2019.]

8 [The R.M.C. 803 session was called to order at 1115, 21 June
9 2019.]

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

13 For planning purposes, obviously we will take up
14 530TTT. I will provide as much time as we need. Looking
15 ahead into the day, Government, with respect to your -- any
16 arguments you may have on 118N, which I believe you did not
17 initially request oral argument on that, how long does the
18 government anticipate that it will argue?

19 ATC [Capt HALL]: Your Honor, maybe ten minutes or so.

20 MJ [Col COHEN]: Okay.

21 Mr. Connell, how long do you think you will argue on
22 that matter?

23 LDC [MR. CONNELL]: Your Honor, our position is very

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1 minimal, but this is the 16th argument on the security
2 infrastructure, so the history of it is very long. I suggest
3 that this will keep, this 118.

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: The government has its temporary
6 relief already in place. The real thing that we're doing is
7 trying to find out if this alternate process the government
8 proposes works and ----

9 MJ [Col COHEN]: And I do see the e-mail that's been
10 unclassified. I do understand why the defense would have some
11 concerns about how -- how well it will work.

12 LDC [MR. CONNELL]: But we're also willing to give it a
13 try.

14 MJ [Col COHEN]: Okay.

15 LDC [MR. CONNELL]: So it seems this is an issue that will
16 keep for a later day.

17 MJ [Col COHEN]: Is there any objection to tabling that
18 matter this week?

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

20 MJ [Col COHEN]: Defense?

21 Negative response. Okay. Then 118N will be tabled.

22 All right, then. That leaves us with one more
23 unclassified matter to address this morning, as we have

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1 already addressed 628B. That would be 530TTT. Mr. Ruiz.

2 LDC [MR. RUIZ]: Judge, 530TTT -- the heart of 530TTT
3 essentially revolves around how much time, how much access is
4 adequate for a judicially approved resource for Mr. al Hawsawi
5 to be able to meaningfully exercise his right to participate
6 in his defense, right to effective assistance of counsel, and
7 to be able to meaningfully review the voluminous amount of
8 discovery in this proceeding.

9 I think this is probably a good point to address this
10 issue. You've had certainly an introduction into the volume,
11 the breadth, and the depth of the information that we generate
12 in these military commissions just in terms of one series of
13 one motion. What I will ask you to accept at face value is
14 that we, in a co-accused case, provide to Mr. al Hawsawi not
15 only Mr. al Hawsawi's own pleadings but also the pleadings of
16 the co-accused. As you can tell, they obviously impact on our
17 strategy of proceedings, and we keep him abreast of all that.

18 Just like you have to store all of this material,
19 Mr. al Hawsawi also equally has to store this material;
20 however, unlike the military commission, he does not have the
21 access to the amount of space or storage that perhaps you may
22 have.

23 I visited the facility in Camp VII some time ago.

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1 One of the observations that I made was that there were these
2 legal bins. And you mentioned -- none of the accused are here
3 to demonstrate that, but you mentioned the other day a Gorilla
4 Bin, and we had to get some clarification on what that was.

5 But a legal bin is basically a storage container
6 where he's able -- it's about this wide and probably this
7 thick; you know, I will give you those dimensions later maybe,
8 if you need that. But the point of the matter is that one of
9 the ways that I described the manner in which these things
10 were being stored, when asked about the visit and the things
11 that I could discuss, I said it looked like an episode of
12 Hoarders, right, this television show where they go in and
13 they look at people's homes and they just hoard stuff and
14 everything is kind of piled up in boxes or storage containers,
15 and it's just obnoxious.

16 But that creates a practical problem in terms of
17 storing this material and then in terms not only of storing it
18 but of retrieving the material in a manner that makes sense,
19 in a manner that allows the person to digest this information
20 and to properly store it over what now has extended over --
21 well, the litigation on Mr. al Hawsawi's case began in 2008.
22 And as you will see from the litigation on this motion, some
23 of those rulings impact the arguments that we make to this

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1 very day. So we are talking about over a decade of commission
2 litigation, and you have seen what we have talked about just
3 in terms of one motion. Right?

4 So then the question I think that -- and the problem
5 that -- in 2008 -- in October 8 of 2008, Judge Kohlmann at the
6 time identified was that particular problem. And in the
7 ruling that we provided, Judge, which is Attachment B at
8 530TTT, is Judge Kohlmann's ruling, which at the time was a
9 different convention in terms of appellate exhibits. They
10 used a different convention. That ruling was D-35.

11 What Judge Kohlmann identified at that time -- I
12 think he had the foresight to see this -- was the amount, the
13 voluminous amount of discovery that would be involved in this
14 case.

15 He also indicated that the legal issues associated
16 with the case were complex; and that he found that having
17 balanced the operational security interests of the facility
18 and taken into account the amount of discovery as well as the
19 complexity of the legal issues associated, he found that -- I
20 think at the time the litigation was surrounding the number of
21 hours, and I think the government at the time was saying that
22 eight hours was sufficient, and I think the defense was taking
23 the position of unlimited access.

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1 What Judge Kohlmann said was I don't find that
2 unlimited access is appropriate or reasonable in balancing
3 these interests. So in doing that, he balanced the interests
4 of the detention facility.

5 But he also said given the complexity and the volume
6 of the issues presented and the need of the accused to
7 participate in their own defense and to do it in a meaningful
8 way, that that is an appropriate balance. So he found that
9 12 hours was the appropriate amount of time, and he directed
10 the facility to adjust its operations accordingly in order to
11 allow for that to happen.

12 From that time -- at some point in that time,
13 Mr. al Hawsawi was able to receive a laptop. And what I will
14 tell you is that over the course of time that Mr. al Hawsawi
15 has had access to that judicially approved laptop within the
16 parameters that were set by that commission -- and evolving
17 over time now, we're going on four judges that will have
18 touched this issue in one way or another.

19 So over that entire time, there is no evidence, and
20 there's never been any evidence that has been presented.
21 Judge Pohl was presented with the issue -- and I'll get into
22 that a little bit further in my argument -- about alleged
23 misuse of computers by some of the other accused in the case.

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1 But after going through litigation on those issues, after
2 taking evidence, after reviewing that evidence, Judge Pohl
3 determined that there was no evidence of misuse by
4 Mr. al Hawsawi, so that the laptop were to be returned to him,
5 and they were to be -- it was to be done in accordance with
6 certain protocols. Right?

7 And then the judge said you, Defense, are going to
8 have to issue a certification that says to me that certain
9 capabilities have been disabled, that there is no evidence of
10 misuse, and you have to have this forensically examined.
11 So -- and that applied to myself, Mr. al Hawsawi, and I think
12 also the Binalshibh team.

13 So we did that. We went to the IT personnel in our
14 office. We asked him to look at the computer so that we were
15 in a position to certify to the commission that the -- the
16 thing that the commission wanted certified. We did that,
17 submitted it to the commission.

18 And at that time, the prosecution objected, and they
19 said, "Well, wait a minute. Your certification doesn't
20 indicate that it had been forensically examined." And
21 "forensic" is a term of art. And that is correct.

22 And so we went back to the military commission and
23 said, look, we -- and the resource that we possess is we have

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1 our IT support personnel that is provided to the Office of the
2 Chief Defense Counsel, the Military Commission Defense
3 Organization. And we asked him to verify that these
4 capabilities have been disabled. We asked him to tell us if
5 it looks like anything has been -- but we did not do a
6 forensic analysis in the way that term of art is used. We
7 don't have those capabilities.

8 So we actually then had to go to the convening
9 authority, request funding for somebody who had those
10 capabilities. The convening authority denied that initially.
11 We went back to the judge and said, "Judge, we can't do the
12 certification because the convening authority is denying us
13 the funding for this issue." The judge ordered it. We were
14 able to obtain it.

15 Long story short, the forensic examination was
16 conducted. The computer was finally certified as forensic.
17 We did another certification. The commission accepted the
18 certification and issued a ruling that Mr. al Hawsawi's laptop
19 was to be returned to him forthwith.

20 We brought the computer into the courtroom. I went
21 up to the Staff Judge Advocate, provided him a copy of the
22 ruling and said, "Can you please have this taken to the camp
23 with Mr. al Hawsawi pursuant to the commission's ruling?"

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1 They said, "Well, we can't do it." And I said, "Well, why
2 not? We've got an order." And he said, "I can't tell you."

3 And, of course, I said, "I've got a judge's ruling.
4 We've litigated this for months now, going on a very lengthy
5 period of time. What is the problem?"

6 "I can't give you more information than that. I'm
7 just simply being told that at this point, we're not in a
8 position to comply with that ruling."

9 Understandably, I was perplexed and irritated by the
10 fact that I had an order issued by the commission and I wasn't
11 getting a straight answer. Right?

12 Now, I will tell you that the Staff Judge Advocate I
13 talked to, I think, was giving me the only answer that he had,
14 right? It wasn't a direct answer to the question, but it
15 appeared that behind the scenes, there were other issues that
16 were ongoing in terms of how the detention facility viewed the
17 computer being reintroduced into -- into the facility.

18 I was perplexed by it because I had known that the
19 course of conduct had been that the guard force transports the
20 laptop back and forth, takes it to the facility. The facility
21 then takes it and puts it somewhere where it's accessible to
22 Mr. al Hawsawi. As far as I was concerned, the judge's ruling
23 was pretty clear on its face.

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1 I brought the issue to the attention of the
2 commission. Said, "Judge, you've issued a ruling. The Staff
3 Judge Advocate, the detention camp is refusing to allow the
4 computer into the camp," which they were.

5 The prosecution had an opportunity to state their
6 position, which is they were not refusing to allow the
7 computer into the camp, but they just couldn't do it at that
8 time because they needed to have some kind of conversation
9 about how to do that because none of the -- as I understood
10 it, none of the people in Mr. al Hawsawi's tier had a computer
11 any longer. They had all been seized; and those had been
12 seized in October, October 18th of 2017.

13 That seizure occurred also really with -- once it had
14 occurred, we weren't really notified of why it was -- why it
15 had occurred. And then for purposes of Mr. al Hawsawi's
16 motion, it's not really relevant; although, over time we
17 struggled with trying to make that very clear. And Judge Pohl
18 ultimately did indicate and did an assessment individually
19 based on Mr. al Hawsawi's circumstance and said there's
20 nothing here.

21 What I've seen is attention and a constant desire to
22 continue, however, to utilize the concerns or the allegations
23 against other accused, other detainees, to sort of taint

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1 Mr. al Hawsawi's use of that computer, which is why I made a
2 point to very clearly articulate to you that there has been no
3 evidence, and Judge Pohl so found, that Mr. al Hawsawi had
4 misused that.

5 And that -- that order came in 2 February of 2018.
6 And I'm trying to look in here for the actual ruling, but if
7 you will take me at my word that Judge Pohl ruled the computer
8 should be returned to Mr. al Hawsawi and found no evidence of
9 misuse.

10 So where we find ourselves now is that the question
11 is how -- we're going back to the same question that
12 Judge Kohlmann addressed in 2006, right, which is adequate
13 access, except that -- excuse me, 2008; that between 2008 and
14 now 2019, we've gone from 12 hours to essentially 3 1/2 --
15 what I'm informed by Mr. al Hawsawi is 3 1/2, maybe 4 hours
16 that the computer is accessible.

17 Some of that time is in the late evening hours. So
18 it's from, I believe, as I understand it -- and it could be
19 different now because I understand they were trying to maybe
20 change some of these times, that it was from 2:00 to 4:00 in
21 the morning and then there's another time during the day which
22 I believe is 12:00 to 2:00 in the afternoon.

23 Again, if that's changed, I'm not certain, but I do

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1 know that the amount of time -- the aggregate amount of time
2 is at least four hours or less in which Mr. al Hawsawi is
3 allowed to have access to this laptop.

4 And again, we view this laptop, and I think the
5 commission has viewed this laptop from the very beginning, as
6 a part and parcel with legal materials and the ability to
7 review those legal materials that are contained within this
8 laptop. So we ----

9 MJ [Col COHEN]: Just one question along those very lines.
10 What about with respect to paper filings that are in those
11 bins, how many hours a day does your client have access to
12 those?

13 LDC [MR. RUIZ]: He has access to that at any time, per
14 the judge's ruling.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. RUIZ]: The judge issued a ruling that they were
17 allowed to have access to those at all times, so he has access
18 to that.

19 MJ [Col COHEN]: So this is just -- so I want to make sure
20 I understood the scope. So essentially the argument is that
21 he's being provided -- he has no access to his -- to his legal
22 materials essentially 24/7, but that the digital files is what
23 he's limited in accessing; is that correct?

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1 LDC [MR. RUIZ]: Correct. And the amount of time makes
2 it -- makes it very difficult. But the real issue is also a
3 retrieval issue, right?

4 How do you -- how do you retrieve hundreds, you know,
5 thousands of pages from multiple storage bins, right, as
6 opposed to maybe a computerized system where you can try to
7 organize the documents that are more important to your
8 litigation? Or how do you bring those to a meeting with
9 your -- with your attorney? Perhaps you load those up onto
10 your hard drive and you load them up onto the computer.

11 It does go to the heart of what Judge Kohlmann was
12 talking about when he said that the defendants should be able
13 to appropriately participate -- "intelligently participate," I
14 think is what he said, in his own defense.

15 So given the fact that Mr. al Hawsawi has never
16 compromised the right to have that resource that was
17 judicially approved, he's used it according to the rules and
18 the regulations, he's used it in a way that has advanced our
19 ability to carry forth the promise of effective assistance of
20 counsel and participation in his own defense.

21 The question you must balance now -- actually, I
22 think that this bus has already left the station. The
23 judicially approved resource is there. Our position is that

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1 Mr. al Hawsawi should have the very minimum back, what
2 Judge Kohlmann said, which was 12 hours of access to that
3 computer.

4 So what I've seen in this particular litigation is --
5 what you're going to get is the detention facility, and you're
6 going to get -- you should defer to the detention facility on
7 all these matters in matters of security.

8 And what we will discuss in the classified session
9 was the government's response which includes a declaration
10 from the camp commander and giving some of the reasoning about
11 why this is the state of affairs.

12 One thing that I know that I can tell you in an open
13 setting is that the original reasoning of Judge Kohlmann's
14 ruling hasn't changed in terms of the voluminous amount of
15 discovery. I think that's self-evident. I don't really think
16 I need to spend a lot of time convincing you of that. If
17 anything, from when the case started to where we are today,
18 there's been an incredible explosion of documents and
19 discovery. That certainly has not changed.

20 Mr. al Hawsawi's need to intelligently participate in
21 his defense, as Judge Kohlmann alluded in that order, has
22 absolutely not abated. We continue now, and as we get closer
23 to trial, we engage in critical stages of proceedings in the

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1 pretrial stage. As we discussed yesterday, a suppression
2 hearing potentially, if it happens, would be such a critical
3 stage of those proceedings.

4 So I did -- I had heard from Mr. al Hawsawi that
5 maybe there was a desire to find a solution that would balance
6 those interests I think a little bit better than they're
7 balanced now. I have been querying him on that up until the
8 time of this argument to see if anything had changed, but as
9 of today and as of the time I met with him on Tuesday, that
10 hadn't been something that had been achieved.

11 So our position, Judge, is that you have the
12 authority to do it. Judge Kohlmann certainly had the
13 authority. He did it, and he, I think, fashioned a ruling
14 that balanced both the equities at play and the access that he
15 perceived that the accused should have.

16 In terms of actual authority for that, I want to
17 point you to a couple of cases that we cited for you. Number
18 one is Bell v. Wolfish. That's at 441 United States 520, a
19 1979 case. The second is a case that is cited in, I believe,
20 the prosecution's brief is Turner v. Safley, and that is at
21 482 U.S. 78. These cases talk -- I will talk to you about
22 Turner v. Safley because this is one that is often cited by
23 the prosecution and discussed in this context.

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1 Turner v. Safley was a post-conviction case, which I
2 think is an important distinction, right? But
3 Turner v. Safley was a case where there were a number of
4 regulations that were at issue. The first one was the
5 inmate's right to correspond with inmates in another facility.
6 The second one was the right to marriage and the ability of
7 people to marriage. Both of those were subject to regulations
8 that prohibited either of those conducts.

9 What Turner v. Safley said was that prison walls do
10 not form a barrier separating prison inmates from the
11 protections of the Constitution. And applying the Bell
12 v. Wolfish analysis, they said there needs to be a reasonable
13 relation standard that cannot be an exaggerated response. And
14 they talked about a reasonable penological interest with a
15 valid and rational connection. The second factor was whether
16 there were alternative means, less restrictive, that would
17 also balance those equities.

18 And in applying that fact -- in applying that
19 structure to the facts, they upheld the restriction on
20 correspondence between prison facilities. Of significance
21 were the witness testified that there were messages that could
22 be passed between inmates that had to do with gangs or
23 violence or hits or threatening people with violence, so there

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1 was that real connection; there was no other way to really get
2 at that problem.

3 The marriage restriction was struck down, and that's
4 what they said. They said it was an exaggerated response and
5 that there were least restrictive alternatives.

6 In terms of what -- why I say that the
7 post-conviction context of that is important is because
8 clearly we have here a pretrial standing in a capital case,
9 right, when they analyzed the right at issue at that time, the
10 right to marriage or the right to correspond. Here, what we
11 are analyzing is the Sixth Amendment right, right? We are not
12 talking about due process, we are talking about the right to
13 be free from cruel and unusual punishment.

14 The Military Commissions Act clearly indicates that
15 Mr. al Hawsawi is entitled to learned counsel as well as a
16 military counsel. Embedded with that has to be the promise of
17 effective assistance of counsel and to participate in his own
18 defense for that to be meaningful.

19 So there is a very direct and substantial right that
20 you are considering in how these restrictions impact
21 Mr. al Hawsawi. More so than there was in a post-conviction
22 case where prison inmates that had already been convicted, had
23 gone through a due process that had got them to that point.

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1 They weren't facing a capital litigation or the death penalty,
2 as Mr. al Hawsawi is facing.

3 So the analysis here, while I think is still one that
4 requires you to balance, I think weighs far more heavily in
5 Mr. al Hawsawi's right to participate here, his right to
6 continue to intelligently participate as Judge Kohlmann
7 observed in this case.

8 And this very commission has also talked in certain
9 places about deference to the United States Government. And
10 I'll point you to AE 485D, and particularly -- well, it's a,
11 it's a three-page document, but page 2, I think, contains the
12 language that I want to highlight for you, so 482D.

13 482D -- excuse me, 485D, the 30 June 2017 order, and,
14 Judge, this is what we referred to in the commissions as the
15 "boat ride order." I'm not sure how you were ferried across
16 the bay when you got here, but if it was in an individual
17 boat, you have this order to thank. Right?

18 And in this particular instance, what was at issue
19 was the logistics of getting the judge across the bay and
20 separating him from all of the other parties. But what I
21 think is relevant about it is paragraph 5 on page 2. I don't
22 know if you have that in front of you, but I'll read a couple
23 of lines from that.

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1 "It is yet another example of how commission
2 proceedings are slowed or halted by external forces, making
3 decisions without full appreciation of consequences to those
4 decisions -- to those decisions have on commissions. Such
5 ad hoc decision-making goes to the very integrity of the trial
6 process. No court, military or civilian, would unquestionably
7 defer to the government's decisions regarding logistical
8 support when those decisions potentially impact the litigation
9 process," right?

10 So the obvious difference I would draw on this if I
11 were the prosecution would be, well, it's not a logistical
12 support issue. We're talking about a detention facility,
13 right? But the rationale I think equally applies and actually
14 applies, I think, with greater force because what we're
15 talking about is something that impacts a capital proceeding,
16 and we're talking about an external decision made by a
17 governmental entity.

18 So certainly when Judge Pohl ruled on this issue and
19 highlighted the deference owed to the government in terms of a
20 decision that impacted the litigation process, that is -- that
21 was and is and continued to be essentially what -- the thought
22 in the decision-making process -- what both for Judge Pohl and
23 I think Judge Kohlmann was when these decisions impact the

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1 litigation process. That's a factor that was not present in
2 Turner v. Safley or Wolfish, particularly in Turner.

3 These decisions impact the judicial process and these
4 ongoing proceedings, and they impact directly Mr. al Hawsawi's
5 ability to participate, the due process that he receives, the
6 meaningful exercise of the learned counsel and the counsel
7 that meet with Mr. al Hawsawi. And it's not enough, Judge,
8 and it hasn't been enough that we put these paper pleadings
9 before Mr. al Hawsawi because it becomes a volume issue, an
10 inability to properly retrieve those materials and transport
11 them in a way that is meaningful to meetings with his
12 attorneys.

13 This is a necessary resource. The use of it actually
14 advances rather than detracts from the efficiency of these
15 proceedings, an argument that I made a number of times, right.
16 And I think that's why there came a time where the prosecution
17 did, in fact, concur with our -- the accused having the
18 laptops. Of course, that changed after 2017 in the issues
19 that they raised at that time with respect to other
20 defendants, but not with respect with Mr. al Hawsawi.

21 We do believe that there are least restrictive
22 alternatives. We do believe that there is a better balance
23 that could be struck to allow Mr. al Hawsawi to have

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1 additional access, meaningful access, intelligent access, and
2 also to address any concerns that the facility has in terms of
3 any security issues.

4 I can tell you, then, from what I've seen and what I
5 will be prepared to discuss in the closed session later this
6 afternoon, I do believe there are reasonable alternatives.
7 And I think if the government and the detention facility would
8 just meet us halfway, we could get at that balance without
9 having to continue to litigate this excessively.

10 Thank you, Your Honor.

11 MJ [Col COHEN]: Thank you. Mr. Ruiz, I just have one
12 quick question.

13 LDC [MR. RUIZ]: Okay.

14 MJ [Col COHEN]: In looking at the order that was issued
15 by Judge Kohlmann back in 2008, at that time your client was
16 representing himself as a pro se defendant. Should that
17 have -- should that have any bearing as to whether or not,
18 with respect to this particular laptop issue, that at that
19 point he was the sole defense attorney on his case, so to
20 speak, as opposed to having a team of defense attorneys,
21 paralegals, et cetera?

22 LDC [MR. RUIZ]: No.

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. RUIZ]: Actually, if you go back -- and I commend
2 you to go back and look at the order, because I do think the
3 order is a little bit confusing. I had to look at it a number
4 of times. And I will tell you I actually was not involved in
5 the 2008 version of these commissions. I only stepped into
6 the fray in 2009 and then later in 2012.

7 But what the state of affairs was at that time was
8 that there were three, I believe, of the accused in the case
9 who were pro se. Mr. al Hawsawi was actually still
10 represented.

11 MJ [Col COHEN]: Okay.

12 LDC [MR. RUIZ]: And then when -- Judge Kohlmann actually
13 addresses that very same -- that very same issue, whether the
14 represented accused should be able to have access to that
15 computer. And what he said was yes. And then he went on to
16 talk about the volume and he went on to talk about the
17 complexity of the legal issues and figured that he should not
18 be penalized for not being pro se. So I think he addressed
19 that issue squarely.

20 And then to answer your question today, no, sir, I
21 don't think it matters because this goes to the heart of
22 Mr. al Hawsawi's ability when he's in his cell, sitting
23 around, to access his materials in a meaningful, intelligent

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1 way.

2 Like I said, there will be a couple of more points
3 that we can talk about in terms of storage and availability of
4 storage and retrieval and those kinds of things that I think
5 will highlight for the military commission why this makes
6 sense. And it certainly makes sense to -- to give valuable
7 meaning to the exercise of his right to participate.

8 MJ [Col COHEN]: Thank you for the clarification.

9 LDC [MR. RUIZ]: Sure. Thank you.

10 MJ [Col COHEN]: Mr. Ryan.

11 TC [MR. RYAN]: Good morning, Your Honor. Edward Ryan on
12 behalf of the United States.

13 MJ [Col COHEN]: Thank you, sir.

14 TC [MR. RYAN]: Your Honor, you're hearing from only one
15 accused on this particular motion because as to the other
16 four, actions taken by the various accused resulted in the
17 forfeiture.

18 LDC [MR. HARRINGTON]: Judge, I object to this. It's got
19 nothing to do with Mr. Hawsawi's computer or his right ----

20 TC [MR. RYAN]: Well, it does, sir, because the events
21 that took place ----

22 MJ [Col COHEN]: I'll briefly overrule the objection so I
23 can hear.

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1 TC [MR. RYAN]: ---- in regard to the other accused exist
2 within the same detention facility.

3 MJ [Col COHEN]: Okay.

4 TC [MR. RYAN]: In short, Judge, the actions taken by the
5 other accused resulted in the forfeiture of their rights -- I
6 shouldn't say "rights," because there are no rights to the
7 laptop -- but their ability to use laptops within the camp.
8 So we're down to just Mr. al Hawsawi. And, in fact, he stands
9 alone as the only person within the camp who has access to a
10 laptop at all right now.

11 Your Honor, I begin with the point that there has
12 never been a finding in this military commission or the
13 previous military commission that concerned this case, that
14 being the attacks of September 11th, in which a military
15 commission recognized any sort of a right to a laptop as part
16 of the defense function.

17 And Mr. -- and counsel on at least two occasions made
18 reference to you to the right to counsel and the right to
19 participate in his own defense. To the very best of my
20 knowledge -- and I think I've read everything there is to do
21 with this issue -- no commission judge -- that being you, that
22 being the previous two judges in this iteration, and in
23 addition, Judge Henley and Judge Kohlmann who were the judges

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1 in the first go round -- ever made any such finding of a right
2 on the part of these men to have access to a laptop computer
3 as part of the defense.

4 I agree with counsel, that the genesis of it all
5 started with Judge Kohlmann way back when in 2008. And I
6 submit to you, sir, that we were at a very, very different
7 point in time back then. All five accused then voiced at
8 various points, either starting from minute one of the
9 proceedings or soon thereafter, a desire to go pro se and
10 represent themselves. In addition, they also voiced the
11 desire to plead guilty and to essentially put themselves at
12 the mercy of the court; and, in fact, in some cases went
13 through colloquies regarding such things.

14 As to -- I don't disagree with counsel that at one
15 point, Mr. Hawsawi was still represented by attorneys;
16 however, in the record there appears very clear indications on
17 his part that he wanted to proceed pro se as well along with
18 his co-accused.

19 But the reason I state this, Judge, is the United
20 States Government, JTF, the prosecution, found itself faced
21 with the difficult issue of how to preserve -- I'm sorry --
22 how to provide discovery that numbered in the hundreds of
23 thousands of pages to persons who would be representing

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1 themselves in a very secure facility. And somewhere along the
2 line, the decision was made to do that through the provision
3 of laptop computers.

4 Now, part of that, Judge, had to do with simply the
5 logistics and also the security issues surrounding -- if
6 you're putting hundreds of thousands of pieces of paper in
7 someone's cell, it creates difficulties as well, so a laptop
8 seemed to solve a fair amount of the problems.

9 We did, in fact -- that is the prosecution -- did, in
10 fact, approach and suggest and move the commission at that
11 time to allow for such provision. And I do return to 530TTT
12 Attachment B, which is also what counsel was referring to,
13 that being the order of Judge Kohlmann back at the time. In
14 the Discussion sections, page 1, section 2, paragraph 2.b.,
15 "The commission understands that the government has already
16 agreed to make the following materials available to the pro se
17 accused;" (2) being "A laptop...computer loaded with discovery
18 materials (with review software) and word processing
19 software."

20 Now, in his order -- continuing on from there --
21 Judge Henley -- I'm sorry -- Judge Kohlmann kind of goes
22 through his analysis of why this is important and specifically
23 states, "The accused were fully advised by" -- this is

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1 paragraph c -- "by the military judge that one of the many
2 problems associated with an election to waive the right to
3 counsel and proceed pro se is that as incarcerated persons,
4 they would not necessarily -- they would necessarily not be in
5 as good a position to prepare a defense as a professional
6 attorney."

7 Judge Kohlmann goes on to say, "Arguably, a pro se
8 accused has a stronger basis for provision of such materials
9 since he or she has waived the right to counsel and is fully
10 responsible for his own defense."

11 And then Judge Kohlmann makes the decision that
12 although he finds it important and necessary for persons
13 acting in a pro se manner, he doesn't want to put other
14 persons who are represented by counsel in a position worse off
15 than those who are going pro se.

16 And I don't disagree with counsel when he says that
17 Judge Kohlmann, in looking at the factors, also decided that
18 eight hours may not be enough, and he extended the time
19 periods by which the accused would have reference to it.

20 However, Judge, I again want to make a couple of
21 points about what Judge Kohlmann was clearly operating under
22 at that time. Number one, as I said before, this is clear
23 from the language of the order, that this was by agreement

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1 between the parties and it was based on a specific logistical
2 need the prosecution saw. Nowhere does it say that he was
3 finding a right on behalf of the accused.

4 Secondly, Judge, I note that this was pre the events
5 of -- well, really of everything that happened in this case
6 but pre specifically the events of AE 530; that is, the events
7 that gave way to this entire series of litigation, which has
8 taken some time. And I'll come back to that in a moment.

9 It's also pre certain changes that have occurred in
10 the area of the living conditions at the camp, and that is
11 described in the current camp CO's declaration found at 530UUU
12 Attachment B.

13 And finally, Judge, I'll note that this is also
14 pre significant changes to the technological realities of life
15 on the island, specifically in the area of the naval station.

16 So for all of those reasons, Judge, I recognize
17 Judge Kohlmann's order. In fact, we asked for it. But I also
18 submit that it does not create any sort of precedence or any
19 sort of obligation on the part of this commission. And, as I
20 am about to point out, the events that take place I believe
21 essentially make that order no longer, no longer valid for
22 purposes of the needs of the camp and the needs of this
23 commission.

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1 So with that starting point, Your Honor, I would
2 suggest that your analysis should go as follows:

3 The JDG Commander has taken an action. He has taken
4 that action based on his official capacity and based upon the
5 conditions in the camp itself. He has described that in a
6 quite degree of detail in his declaration, which, as I said,
7 is found at 530UUU at Attachment B. So that's the order of
8 the man who's on the ground, the man who's charged with
9 running that particular camp.

10 Defense counsel wants you, the military commission,
11 to overrule the commanding officer, who, in this particular
12 instance, is essentially acting as a warden.

13 I submit, Your Honor, that in such a situation, you
14 are obligated to go to the governing legal principles
15 concerning these situations. And there is a great deal of it
16 because, as probably surprises no one, in the course of
17 housing state and federal prisoners throughout the United
18 States, there are often challenges to the authority of those
19 persons who are charged with guarding detained persons.

20 The United States, the prosecution specifically, has
21 cited to Your Honor a wide range of cases, for the most part
22 federal cases, including the seminal cases of Turner v. Safley
23 and Bell v. Wolfish. Although these are cited to Your Honor

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1 for the first time, it is not the first time it's been cited
2 in this commission. These have come up many times before.

3 Before I get to the federal cases, Judge, I also note
4 that we've cited to Your Honor instances where under the
5 Military Commissions Act -- so not as governed by Article III
6 judges. But under the Military Commissions Act, there has
7 been situations where the military judge has been asked to
8 intervene in detention decisions. Among the things we cite to
9 the commission are 018U, which was the written privilege --
10 written communications order Judge Pohl had initially
11 instituted, but also, and very significantly, the case of
12 United States v. Nashiri; and in that case, it was numbered as
13 AE 380E.

14 We believe Nashiri is helpful because Nashiri stands
15 as the other case in the military commissions system here in
16 Guantanamo where someone is charged in a capital context,
17 although Mr. Nashiri is charged alone as opposed to with
18 coconspirators.

19 In that particular case, the judge was faced with the
20 issue of his counsel demanding that the detainee/the accused
21 be provided with a laptop computer for the same purposes and
22 the same reasons that are before Your Honor now.

23 Most significantly, the judge ruled the defense has

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1 no -- has not identified any precedence in case law that
2 supports an accused's right to a laptop computer where he's
3 represented by detailed and learned counsel and has failed to
4 clarify how an accused represented by four attorneys and
5 provided multiple experts has been denied due process or right
6 of counsel -- right to counsel solely because he has not been
7 afforded a laptop computer.

8 Now, Your Honor, I note that by way of contrast, the
9 signature page on this motion shows that as to Mr. Hawsawi on
10 this motion in this case, he is represented by a total of six
11 counsel. So we're a long way from, number one, I would submit
12 the Nashiri ruling, but also from the days of Judge Kohlmann
13 entering that order as to 12 hours a day for a pro se accused
14 to use a laptop computer for purposes of reviewing discovery.

15 Back to the federal cases, Judge, and specifically
16 Turner v. Safley and Bell v. Wolfish, I believe it can be
17 boiled down to three important legal principles that I ask
18 Your Honor to consider.

19 First, the cases are clear. Deference to
20 correctional officials is appropriate because, quote, It is an
21 inordinately difficult undertaking to run a detention
22 institution. That's the Turner case at pages 84 through 85.
23 That's as to state and federal facilities, Your Honor, where

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1 the persons being guarded could be accused or guilty of
2 anything all the way in a range from murder to shoplifting.

3 I submit, sir, that the job of running this
4 particular detention facility at Camp VII is far more, quote,
5 inordinately difficult because specifically in the case of
6 Mr. Hawsawi, and he stands alone in this one, per AE 502BBBB,
7 Judge Pohl following briefing, following argument, following
8 the entry of evidence, following the taking of testimony from
9 witnesses made a specific finding that Mr. al Hawsawi is an
10 unprivileged enemy belligerent and part of al Qaeda, the
11 transnational terrorist organization.

12 So the persons at JDG, and specifically the
13 commanding officer who executed that declaration, is the
14 person in charge, the one who bears the responsibility on
15 behalf of this country for guarding persons who fit into that
16 category as well as his confederates.

17 The second governing legal principle, the burden is
18 on the accused to prove the policy is unwarranted or
19 unjustified. It is not on the commanding officer to prove
20 that it is valid as well. Again, it goes back to the
21 recognition that the man has a difficult job to do, and he has
22 to make calls.

23 This is an important point, Your Honor, I submit,

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1 because, although not required, the commanding officer
2 discusses his consideration of possible alternatives in his
3 declaration. And I would submit, sir, he doing that is
4 showing, number one, his decision-making process and the
5 validity thereof and also his good faith of trying to
6 demonstrate to this commission that he's not doing this for
7 some inappropriate reason.

8 The case law commands courts to honor such, quote,
9 judgment calls and not engage in any sort of Monday morning
10 quarterbacking over whether he could have done it differently
11 or done it with a little bit less stringency, et cetera, and
12 as, in fact, an example, what's proposed in the defendant's or
13 in the accused's brief to be discussed later in the closed
14 session.

15 The third legal principle, Your Honor, no court has
16 ever found that civilly committed persons, pretrial detainees,
17 or convicted persons have a constitutional right to a computer
18 or similar device to assist in their own defense. Counsel is
19 relying on that principally. He recited it to you a couple of
20 times, right to counsel, right to participate in his own
21 defense. Out there in Article III land, in state land, courts
22 don't recognize that such a constitutional right exists.

23 Now, Your Honor, I'd like to turn to facts to be

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1 applied to these legal principles which I suggest would be the
2 proper analysis of course for Your Honor to undertake. I
3 commend for your consideration a few different sources.

4 First, the declaration of the former JDG Commander,
5 which is a public document. His name was Colonel Stephen
6 Gabavics describing the facts that brought about the initial
7 litigation in AE 530. And I ask Your Honor to consider just
8 how much -- even in as the accused calls it the most secure
9 facility in the world, just how much these accused were able
10 to accomplish with these laptops even under the watchful eyes
11 of the guard force. That appears, Your Honor, at 530F
12 Attachment F.

13 I also ask you to consider 530LL in which Judge Pohl,
14 following litigation, briefing, evidence, consideration made
15 significant findings and conclusions in regard to the 530 set
16 of facts, and significantly found, among other things, at
17 paragraph 2.g., "The potential ability of the accused to
18 manipulate their government-issued laptop computers to bypass
19 previously disabled communication capabilities poses a risk to
20 force protection and potentially to national security."

21 So the value of this, the importance of this as I see
22 it, is Judge Pohl, in a position of having been fully
23 apprised, makes a specific finding that these men,

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1 specifically the JDG commanding officer, has this problem on
2 his hands that go all the way to affecting force protection,
3 that is the protection of soldiers under his command, but also
4 national security as well.

5 I also ask you to consider, sir, the declaration of a
6 forensic examiner finding additional manipulation occurred
7 beyond that which had even been considered by Judge Pohl.
8 That is found in the record at 530SSS -- it's a classified
9 document -- and specifically paragraphs 3.a. through 3.c.

10 And just to give you the background on how this comes
11 about, this, Your Honor, was a forensic examination that
12 occurred with the consent of counsel for the accused,
13 Mr. Bin'Attash. This existed because Judge Pohl, upon
14 approving the government's seizure of the ----

15 LDC [MR. RUIZ]: Objection, relevance.

16 TC [MR. RYAN]: ---- laptop computers based upon the
17 facts ----

18 MJ [Col COHEN]: Overruled.

19 TC [MR. RYAN]: ---- based upon the facts said he would
20 not consider returning such laptops to the other accused
21 unless and until any of them were to consent to a forensic
22 examination. One did. The examination took place, and the
23 report of that forensic examiner exists, as I cited, at

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1 530SSS. It is significant, Judge, just again to see the level
2 of manipulation that occurred.

3 Finally, Your Honor, I ask you to consider the
4 declaration of the current commanding officer as I've cited
5 now a couple of times. And in his declaration, Judge, he
6 identifies essentially, for want of a better way to describe
7 it, a bell that has been rung inside of his camp. And the
8 bell rung goes directly, as Judge Pohl found, to issues of
9 force protection and national security; and I'd submit that is
10 at the very, very heart of what this man has to do.

11 So the camp commander, he can't unring the bell,
12 but -- however, he is still responsible for containing
13 whatever damage came about from it, from the effects of it
14 having been rung inside of his camp.

15 I submit, Your Honor, that his order was a very
16 reasonable step in the face of a very difficult set of facts,
17 all of which were brought about not by the guard force, not by
18 any faction of the United States Government, but by the
19 co-accused of Mr. Hawsawi.

20 On the other hand, and as to him and his abilities
21 thus far, as it exists now, regardless of what the commanding
22 officer -- what limitations he places, Mr. al Hawsawi, as an
23 accused, still has the access, as counsel concedes, to all

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1 noncomputer legal materials any minute he wants it. I don't
2 disagree that it's in a bin and there are certain limitations
3 to how much he can read at any one particular time. Those
4 same concerns of Judge Kohlmann way back when may still exist.

5 However, like every other accused in this case, like
6 accused in cases throughout commissions, state court, federal
7 court, et cetera, he'll have to get by using paper materials
8 to read, assistance from counsel, et cetera. So he's got that
9 ability.

10 Number two, he's got the representation of six
11 lawyers.

12 And number three -- and for this, he stands alone, as
13 I started with -- he's the only one who has one now. There's
14 one laptop remaining, and it belongs to him. So he's got that
15 beyond what everyone else has as well.

16 And for all of these reasons, Judge, I submit that
17 the circumstances of this case -- and it's a long one, and I
18 don't wish for you to have to review every word of it. But
19 the camp commander was faced with a difficult situation. I
20 believe he has -- I submit that he has acted in an appropriate
21 fashion, balancing the various needs. It's far different than
22 what Judge Kohlmann was considering back in 2008.

23 But I submit, Your Honor, though, he has done the

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1 correct thing. He sits in a position that this commission
2 should show proper deference to his decision and recognize at
3 the same time that this particular accused is not being denied
4 any significant rights whatsoever.

5 I may have argument later on in the closed session,
6 depending upon what the other side brings up, but other than
7 that, sir, subject to your questions, that's all I have.

8 MJ [Col COHEN]: Not for this forum.

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

10 MJ [Col COHEN]: Thank you.

11 Mr. Ruiz, understanding that we'll have additional
12 argument on this matter in a closed forum, are there any final
13 comments in open session?

14 LDC [MR. RUIZ]: Yes, I have some rebuttal in open
15 session, Judge. May I have a moment?

16 MJ [Col COHEN]: You may.

17 [Pause.]

18 LDC [MR. RUIZ]: Judge, the -- been Groundhog Day for me,
19 but a couple of points. We've heard these arguments many,
20 many times before.

21 Judge Pohl was the judge who -- who ordered that
22 Mr. al Hawsawi would, in fact, get his laptop back. So when
23 Mr. Ryan cites Judge Pohl's language in terms of the threat to

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1 the detention facility, what Judge Pohl did, I think what was
2 appropriate, was a -- finding this individualized justice.

3 I do think this is a good introduction for you of --
4 I think the -- one of the irreconcilable conflicts that I see
5 now in going forward which will be how -- how to provide
6 individualized justice to Mr. al Hawsawi when the government
7 just continues to persist to try and paint with -- paint and
8 feather everyone with one broad brush, right?

9 Predictably, Mr. Ryan goes to the well again. It's
10 clear that there was no evidence of wrongdoing on behalf of
11 Mr. al Hawsawi. He -- there was no evidence that Judge Pohl
12 found. And in the process of returning the laptop to him, he
13 ordered certain security procedures precisely to address the
14 concerns of the detention facility, precisely to make sure
15 that some of these capabilities that he was concerned about
16 were not capabilities that existed in the computer.

17 Much of the litigated facts that Mr. Ryan alludes to
18 had to do with particular experience, abilities, training for
19 computer software that applied to other detainees.

20 Mr. al Hawsawi's never had such training or experience that
21 would allow him to manipulate or alter his computer, and that
22 has been proven to this date.

23 But what you see -- and had you been here longer,

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1 would see is this pervasive desire to continue to taint one
2 accused's right to individualized justice by alluding to the
3 wrongful acts of other men. And that is precisely how this
4 case -- I think the prosecution will intend to try it and why
5 we had filed and moved for a severance and why, in all
6 likelihood, we will do it again, however, in a never-ending
7 quest to find individualized justice, that as long as
8 Mr. al Hawsawi is in the same room with these co-accused, the
9 government will persist in following these lines of argument,
10 even in the face of undeniable proof and a finding by another
11 military judge that Mr. al Hawsawi has done absolutely nothing
12 wrong in this case and why he should be allowed to have that
13 computer.

14 The government continues to want to relitigate
15 Mr. al Hawsawi's access to a computer. As I said, that ship
16 has sailed. That bus has left. The question before you is
17 not whether Mr. al Hawsawi is entitled to or has a right to
18 his computer or should have a computer.

19 Where we find ourselves on this day, after ten years'
20 worth of litigation on this issue, is that Mr. al Hawsawi is a
21 capital accused who has a computer, was judicially approved,
22 has used it properly to facilitate and participate in his
23 defense. The question before you is not whether

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1 Mr. al Hawsawi should have a computer -- should have a right
2 to that computer in comparison to any other detainees.

3 I will submit to you that, very quickly reacting to
4 Mr. Ryan's citing of the Nashiri ruling, for technical
5 difficulties that we do not have a computer in the room for
6 these hearings so we're a little bit slower today. But our
7 initial indications are that definitely the ruling that he
8 cited for you is one that has been vacated by the D.C. Circuit
9 based on their finding that Judge Spath, who I believe was the
10 issuing judge of that opinion, was biased and then vacating
11 all of those opinions. So that should have no legal
12 significance in terms of how you interpret this particular
13 motion or how you decide this particular motion.

14 Mr. Ryan said detainees or prisoners just have to get
15 by. I will submit to you that in my experience as a capital
16 litigator, a litigator in state courts, federal courts, "just
17 getting by" has never been a legal standard that I'm -- that I
18 am aware of. It's certainly not the standard in a capital
19 proceeding. But it certainly, I think, illustrates very
20 clearly, what the prosecution thinks is appropriate in many
21 regards in a capital prosecution. Just get by. That's really
22 what the defense is entitled to. I think those words speak
23 volumes. I think they definitely illustrate much of the

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1 prosecution's approach to individualized justice and what
2 Mr. al Hawsawi deserves in this case.

3 As I said, the authorities that we cited and that
4 they cited are remarkably different. And I'm sure you are
5 going to review those authorities, but I actually think
6 they're vastly more helpful to Mr. al Hawsawi than they are to
7 the government because, as I said, that was a post-conviction
8 proceeding, right? They had already been adjudicated. There
9 was not a direct impact during the course of an ongoing
10 proceeding that would ultimately result in a death penalty.

11 And where that impacts your analysis, Judge, is in
12 the balancing, is in the balancing of the equities. Whereas
13 Mr. al Hawsawi still has fundamental rights at critical stages
14 of this proceeding that are at issue, in those cases that was
15 not the case. So the balancing necessarily would have to be
16 different.

17 The government and Mr. Ryan, true to form and
18 consistent with past practice, continually used the term
19 "Monday morning quarterbacking," that you should defer to the
20 decisions of the man on the ground.

21 No. What is required is proper -- proper balancing
22 and proper deference based on the analysis of the rights at
23 issue, in this case of a capital defendant, and the stated

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1 purpose of the detention facilities and the reasonable
2 alternatives that extend to that detention facility.

3 Mr. Ryan tried very, very hard, as I said, to paint a
4 picture where Mr. al Hawsawi was somehow involved or could be
5 involved in some type of wrongdoing, but that's not the case.
6 It never was the case. And most importantly, all of the
7 people who were alleged to have participated in that no longer
8 have those tools at their disposal.

9 So, in essence, what the guard force has is one man
10 with one computer in the most highly secure prison on earth to
11 keep track of when he uses his computer. And I think we can
12 talk about reasonable alternatives and why those equities
13 should be balanced in a reasonable way.

14 Again, we're not saying he should have it 24 hours a
15 day. Judge Kohlmann thought that was unreasonable. But we
16 think that more than the hours that he has now is a reasonable
17 access to a computer. And that's what we're asking for, is
18 asking for a reasonable balancing of the equities, and we do
19 not believe that currently exists.

20 In terms of the former JDG's declaration and in terms
21 of the forensic analysis that Mr. Ryan has pointed you to,
22 again, the reason I objected in the second instance to the
23 forensic analysis is because it's a forensic analysis of

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1 someone else's computer. It's another detainee in this case
2 who doesn't have that computer. It has nothing to do with
3 Mr. al Hawsawi's forensic analysis computer.

4 Mr. Hawsawi's computer, as I indicated during our
5 last session, Judge, is the most -- it probably is the highest
6 and most secure computer in this entire place because it has
7 gone through at least four, that I can count, different
8 versions of inspections and different certifications in order
9 for it to be returned to him.

10 I think it also bears -- just in terms of what he
11 actually has, he doesn't have a 2019 laptop computer. He has
12 a 2008 Toughbook, one of these computers -- really thick
13 computers that you carry out, which, as I understand it, and
14 as it was described to me by IT, runs incredibly, incredibly
15 slow.

16 And when I said, well -- and he gave me some
17 technical analysis. And I said, "Well, explain that to me in
18 terms that I can understand."

19 He said, "Well, it's kind of like having an 8-track,
20 you know." And so he said, "You should remember that."

21 And I said, "Well, I don't go that far back." Right?

22 But that should also be taken into analysis because
23 one of the things that matters is how long it takes his

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1 computer to process information, right? It takes longer to
2 boot up. It takes longer to retrieve information. And that's
3 fine.

4 There's also a computer at a certain point in time
5 that was -- that was -- we were talking about new computers
6 that would have faster processing times. The prosecution was
7 on board at that time, before the 2017 seizure; and we were
8 moving towards that process of updating Mr. al Hawsawi's
9 computer. But because there were some differences in terms of
10 the storage and the memory and the retrieval -- and we were
11 trying to work those out before they went back to
12 Mr. al Hawsawi -- we never actually got to do that exchange.

13 So what we're talking about is a 2008 laptop that is
14 helpful and is very useful for him to do the things that I
15 have described for you, but it is by no means something that
16 he's going to somehow be able to breach the security of the
17 United States Government at this military facility and somehow
18 endanger the lives of these soldiers. That's just "the sky is
19 falling" type stuff, Judge. And we will talk about in closed
20 session the realities of the facility and the alternative
21 means that we think are reasonable to balance these equities.

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

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1 Mr. Ruiz, as we plan for lunch, in understanding that
2 the parties have commitments probably later this afternoon
3 with respect to -- I will use the word "redeployment to
4 CONUS," how long do you anticipate your argument being during
5 the closed session on this matter?

6 LDC [MR. RUIZ]: I do not expect that it should take more
7 than 15 minutes, Judge.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. RUIZ]: Of course, it also depends on
10 Mr. Ryan's ----

11 MJ [Col COHEN]: I understand there may be some rebuttal
12 there.

13 Mr. Ryan, how about yourself?

14 TC [MR. RYAN]: Three minutes.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. RUIZ]: Judge, make mine 12 minutes, then.

17 MJ [Col COHEN]: All right. There we go. We will do
18 that. Okay.

19 So let's reconvene at -- let's reconvene -- I'm going
20 to give some additional time for the setup so that the court
21 reporters and stuff can still get lunch.

22 So let's reconvene at 1400. I would like to
23 terminate the proceedings today. Let's get to a point where

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1 we're approximately 1530 today. If -- we'll shoot for that,
2 between 1400 and 1530, and see if we can take up the matters.
3 If we can't, we can always extend a little bit. But let's see
4 if -- let's shoot for at least that kind of planning purposes.

5 All right. We're in recess until 1400.

6 [The R.M.C. 803 session recessed at 1218, 21 June 2019.]

7 [END OF PAGE]

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