

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0907, 23 July
2 2018.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, who is here on behalf of the United
5 States?

6 CP [BG MARTINS]: Good morning, Your Honor. Representing
7 the United States are Brigadier General Mark Martins,
8 Mr. Robert Swann, Mr. Edward Ryan, Mr. Clay Trivett, Mr. Jeff
9 Groharing, Ms. Nicole Tate, and Major Christopher Dykstra.
10 Paralegals at counsel table are Dale Cox, Rudy Gibbs, Pascual
11 Tavarez, and Staff Sergeant Clifford Johnson.

12 Also present in the courtroom are William Beechum,
13 Peter Ellis, Kimberly Waltz, and Brianna Hearn of the
14 Federal Bureau of Investigation.

15 Your Honor, I would like to express condolences on
16 the passing since our last session in May of John Vigiano, Sr.
17 Mr. Vigiano, who attended proceedings in this courtroom in
18 2016, was a Marine who later became a legend and highly
19 decorated captain in the fire department in New York. He died
20 on July 7th. He was preceded in death by his two sons, New
21 York City firefighter John Vigiano, Jr., and New York City
22 Police Department detective Joseph Vigiano, both of whom were
23 killed responding to the September 11 attacks.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 John Vigiano, Sr., who is well known to many of us
2 here on Guantanamo Bay, believed in justice under the Rule of
3 Law. He also believed this process could achieve that noble
4 end. Thank you.

5 These proceedings are being transmitted by
6 closed-circuit signal to locations in the United States
7 pursuant to the commission's order.

8 ACC [MR. BIN'ATTASH]: Excuse me. There is no
9 translation.

10 MJ [COL POHL]: You did not hear translation,
11 Mr. Bin'Attash?

12 ACC [MR. BIN'ATTASH]: Never started.

13 INT: Your Honor, the interpreter had not pushed the
14 button.

15 MJ [COL POHL]: I'm sorry?

16 INT: The interpreter forgot to push the button. That's
17 why Mr. Bin'Attash was not -- everybody else wasn't able to
18 hear.

19 MJ [COL POHL]: Okay.

20 Okay.

21 Can you hear me now, Mr. Bin'Attash, with the
22 interpreter? Binalshibh, I'm sorry. Bin'Attash. I had it
23 right.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ACC [MR. BIN'ATTASH]: Yes.

2 MJ [COL POHL]: Okay.

3 General Martins, start again. General Martins, I --
4 I'm not quite sure how to say this that does not appear to be
5 cold, but I am going to say it because I can see this going
6 down a long, sloping road. I'm sorry when there's any death,
7 okay, but I don't want -- I don't want this -- again, I don't
8 want to sound cold in this. If you want to acknowledge the
9 passing of somebody, you may do it quickly, but don't turn it
10 into a eulogy.

11 And again, I'm sympathetic to everything here, but
12 this is a courtroom; and I don't want to get into this because
13 I can see it going around and around of where we get into
14 these quasi-eulogies. Again, I don't know any way to say this
15 that doesn't sound cold. I am sympathetic, but this is not
16 the appropriate place for a long editorial comment about what
17 somebody would say.

18 With that being said, please account for the people
19 here for the United States.

20 CP [BG MARTINS]: No intention of an editorial comment. I
21 tried to make it brief. The bench has recognized the passing
22 as well and was seeking to be consistent with that custom.

23 He is well known to the ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: And you may -- and again, I say, if you
2 keep it brief, say so-and-so died. We're done. But the rest
3 of it was unnecessary.

4 Go ahead.

5 CP [BG MARTINS]: Your Honor, representing the United
6 States are Brigadier General Mark Martins, Mr. Robert Swann,
7 Mr. Edward Ryan, Mr. Clay Trivett, Mr. Jeff Groharing,
8 Ms. Nicole Tate, and Major Christopher Dykstra. Paralegals at
9 counsel table are Dale Cox, Rudy Gibbs, Pascual Tavaréz, and
10 Staff Sergeant Clifford Johnson. Also present in the
11 courtroom are William Beechum, Peter Ellis, Kimberly Waltz,
12 and Brianna Hearn of the Federal Bureau of Investigation.

13 We do express condolences on the passing since our
14 last session of John Vigiano, Sr.

15 These proceedings are being transmitted by
16 closed-circuit signal to locations in the continental United
17 States pursuant to the judge's order.

18 MJ [COL POHL]: Thank you.

19 Mr. Nevin.

20 LDC [MR. NEVIN]: Your Honor, thank you. David Nevin;
21 Lieutenant Colonel Derek Poteet, Ms. Rita Radostitz for
22 Mr. Mohammad, who is present. Mr. Sowards is not present; you
23 excused him in 580M, I believe.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Correct.

2 LDC [MR. NEVIN]: Thank you.

3 MJ [COL POHL]: Thank you.

4 Ms. Bormann?

5 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,
6 myself; Captain Brian Brady; Major Matthew Seeger; and new to
7 the record, Mr. William Montross, M-O-N-T-R-O-S-S. Also
8 present is Staff Sergeant Brent Skeete. And I mention Staff
9 Sergeant Skeete because this is his last day. He's been with
10 us for three years.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: And he was just notified that he's
13 being promoted to sergeant first class.

14 MJ [COL POHL]: Well, congratulations.

15 LDC [MS. BORMANN]: And also he was, yesterday, given an
16 award, the Defense Meritorious Service Medal, for his work on
17 this case. And we want to recognize him publicly. Thank you.

18 MJ [COL POHL]: Thank you.

19 Mr. Harrington.

20 LDC [MR. HARRINGTON]: Judge, for Mr. Binalshibh, James
21 Harrington, Alaina Wichner, Major Jarrod Stuard. Major
22 Christopher Lanks has been excused by court order.

23 MJ [COL POHL]: Mr. Connel?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

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

2 MJ [COL POHL]: Good morning.

3 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi is myself,
4 James Connell; Benjamin Farley; and Captain Mark Andreu of the
5 United States Air Force. Lieutenant Colonel Thomas and
6 Ms. Pradhan have been excused by the commission.

7 MJ [COL POHL]: Thank you.

8 Mr. Ruiz?

9 LDC [MR. RUIZ]: Judge, myself, Major Joseph Wilkinson,
10 Lieutenant Colonel Jennifer Williams, Mr. Sean Gleason are
11 here on behalf of al Hawsawi; Ms. Suzanne Lachelier will be
12 rejoining us shortly.

13 She's here.

14 MJ [COL POHL]: Okay. She is joining us now. Okay.

15 LDC [MS. BORMANN]: Judge, I do have one thing that I was
16 remiss.

17 Mr. Edwin Perry is not here, and that's pursuant to
18 your order of excusal.

19 MJ [COL POHL]: Correct. Okay. Ms. Radostitz?

20 LDC [MR. NEVIN]: Your Honor, I don't know when you want
21 to do this, but Ms. Radostitz needs to put her detailing
22 qualifications on the record.

23 MJ [COL POHL]: We'll do next.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Ms. Radostitz, please put your detailing and
2 qualifications on the record. Good morning.

3 [Counsel away from podium; no audio.]

4 MJ [COL POHL]: Hold on a second.

5 ADC [MS. RADOSTITZ]: Start again. My name is Rita J.
6 Radostitz, last name is spelled R-A-D-O-S-T-I-T-Z. I'm a
7 United States citizen and a member in good standing of the Bar
8 of the State of Texas, as well admitted to the practice before
9 the Supreme Court of the United States; the Fifth, Ninth, and
10 D.C. Circuits; the Eastern and Western Districts of Texas; as
11 well as the District of Oregon.

12 I have not been the subject of any sanction of
13 disciplinary action by any court, bar, or other competent
14 government authority for relevant misconduct. I currently
15 hold the necessary and appropriate clearances. I've agreed in
16 writing to comply with orders, rules, and regulations of these
17 military commissions. And my detailing notice can be found in
18 the record at AE 004DD.

19 MJ [COL POHL]: Please raise your right hand.

20 [Ms. Rita J. Radostitz was sworn.]

21 CP [BG MARTINS]: Your Honor, may the government again
22 point to the acknowledgement of counsel, in that the -- as
23 with Mr. Farley, counsel is acknowledging an incorrect

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 statement of the law of this case and of the Trial Judiciary
2 Rules of Court relating to excusal.

3 The government doesn't seek that she not be
4 qualified, but it is an issue. And if the record could
5 reflect that she acknowledges -- it is as you stated in the
6 last session, it's a nullity that she could be excused without
7 your permission, having made an appearance. We would be
8 satisfied if that's reflected on the record.

9 MJ [COL POHL]: Well, the law of this case is what it is.
10 And when we discussed this issue with -- on the Bin'Attash
11 issue, as I recall, at the end of the day, it's -- the learned
12 counsel have to be here, and the learned counsel determine
13 who's a part of their team, correct?

14 CP [BG MARTINS]: Your Honor, I'm talking about
15 excusal ----

16 MJ [COL POHL]: I know. I know. Let me -- okay. But I'm
17 saying if -- let's say, for example, the learned counsel
18 wanted to excuse a member of their team, okay, and the learned
19 counsel says, we're asking the court, we're going to excuse
20 so-and-so because this has happened in the past. And the
21 answer is, is that going to delay the case? If the answer is
22 no and the accused consents to it, then do I need good cause
23 to permit that person to be excused?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 The problem -- the Nashiri problem is this: Is that
2 everybody was excused without any court involvement at all.
3 Okay. At this point, I think it's very clear what my view is.
4 It would be -- it's a nonissue as far as I'm concerned,
5 because this is what it is.

6 The defense team is constituted by the learned
7 counsel. Somebody -- if they want to release somebody for
8 whatever reason and the accused consents and they let me know
9 and they say it won't cause a delay and we're ready to go,
10 that's fine. I don't need a good cause.

11 But for learned counsel to leave requires a showing
12 of good cause, to me.

13 CP [BG MARTINS]: Your Honor, our reading of the
14 acknowledgement is it just doesn't match the Trial Judiciary
15 Rules of Court or your law of this case.

16 MJ [COL POHL]: Well, then ----

17 CP [BG MARTINS]: Counsel are required by the proper
18 reading, your reading of Rule of Court 505, to not be excused
19 from the case all the way without you ----

20 MJ [COL POHL]: Well, I made it very clear ----

21 CP [BG MARTINS]: ---- finding good cause on the record.

22 MJ [COL POHL]: I made it very clear. And so far, every
23 time the defense counsel in this case have requested a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 temporary excusal, they've asked me about it, and I've --
2 okay. My -- the way I read the rule is it's got to be on the
3 record. Whether there needs to be good cause or not for an
4 excusal of a nonstatutory-required counsel may be fact
5 specific, okay.

6 My view is very clear on this. General Baker's view
7 is different. It's now up in the appellate world of CMCR
8 doing something with it, okay? It's not at issue before me
9 now.

10 If a learned counsel says I wish to be --
11 General Baker is excusing me for good cause and, Judge, you
12 have no role in that, then my rule of law -- view of the law,
13 that's not the view of the law. They have to come to the
14 judge for that. That's what I've said from the start. That's
15 what the law is of this case, in my view. And, quite frankly,
16 that was Judge Spath's view.

17 But apparently, rather than litigating it, they just
18 left. And then now it's where it is. So ----

19 CP [BG MARTINS]: Your Honor, that's clear to me. I
20 believe it's clear to you. It's not what's in the
21 acknowledgement. And all I'm doing at this point is counsel
22 puts their qualifications on the record.

23 MJ [COL POHL]: Any acknowledgement that contradicts what

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I say the law is is a nullity.

2 Mr. Nevin.

3 CP [BG MARTINS]: Thank you.

4 LDC [MR. NEVIN]: Your Honor, I think this is a
5 complicated issue; and I didn't know we were going to be
6 taking it up this morning.

7 MJ [COL POHL]: Well, it's -- and I don't really want to
8 take it up, Mr. Nevin, because it's not ripe.

9 LDC [MR. NEVIN]: Yes.

10 MJ [COL POHL]: There's no controversy in front of me.

11 LDC [MR. NEVIN]: Thank you, Your Honor. That's what I
12 was going to say.

13 MJ [COL POHL]: Okay.

14 LDC [MR. NEVIN]: But let me just also add that if this is
15 going to be resolved once and for all in some way, on behalf
16 of Mr. Mohammad, I request the opportunity to be heard through
17 briefing and with careful analysis and so on rather than
18 having it come up.

19 MJ [COL POHL]: Exactly. Well, Mr. Nevin, it's not before
20 me now.

21 LDC [MR. NEVIN]: I understand.

22 MJ [COL POHL]: If somebody wants to put it before me, it
23 still may be an advisory opinion so I may not get to it, but

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that's the parties' role, not mine.

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

3 MJ [COL POHL]: Mr. Montross, could you please put your
4 detailing qualifications on the record.

5 ADC [MR. MONTROSS]: Good morning, Your Honor.

6 MJ [COL POHL]: Good morning.

7 ADC [MR. MONTROSS]: My name is William Montross,
8 M-O-N-T-R-O-S-S, and I am a United States citizen. I'm a
9 member in good standing of multiple bars, including the
10 District of Columbia. I currently hold a TS//SCI
11 classification clearance. I have been detailed by the Chief
12 Defense Counsel, General Baker, to represent Mr. Bin'Attash.
13 That document can be found as Attachment B to Appellate
14 Exhibit 004EE. I have agreed in writing to provide
15 Mr. Bin'Attash with zealous and committed representation while
16 complying with the orders, rules, and regulations of these
17 military commissions.

18 My acknowledgement to that effect is also found at
19 Attachment B. And I'm prepared to answer any questions Your
20 Honor may have, including my request for you to perhaps order
21 Sergeant Skeete to stay permanently on our team.

22 MJ [COL POHL]: I have no questions.

23 ADC [MR. MONTROSS]: Thank you, Judge.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Wait a minute. Wait a minute. Not so
2 fast. I do have to give you an oath, though.

3 ADC [MR. MONTROSS]: Yes.

4 MJ [COL POHL]: Please raise your right hand.

5 ADC [MR. MONTROSS]: Yes.

6 [Mr. William R. Montross was sworn.]

7 MJ [COL POHL]: Thank you.

8 Okay. Mr. Nevin, you had mentioned something
9 about -- at the 802 about a PRT issue. I'm going to get to
10 that as soon as I'm done with -- and it may be a nonissue now,
11 I don't know if it is. Is it still an issue - - -

12 LDC [MR. NEVIN]: I think it may not be an issue, but I
13 would appreciate it if the ----

14 MJ [COL POHL]: -- okay.

15 LDC [MR. NEVIN]: ---- if you would take it up.

16 MJ [COL POHL]: Let me go through the -- this is directed
17 to all of the accused in this case.

18 As I state on each time we begin one of these weekly
19 sessions, I tell you what your rights are to be present. You
20 have the right to be present during all sessions of the
21 commission. If you request to absent yourself from any
22 session, such absence must be voluntary and of your own free
23 will.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Your voluntary absence from any session of the
2 commission is an unequivocal waiver of the right to be present
3 during that session. Your absence from any session may
4 negatively affect the presentation of the defense in your
5 case. Your failure to meet with and cooperate with your
6 defense counsel may also negatively affect the presentation of
7 your case. Under certain circumstances, your attendance at a
8 session can be compelled regardless of your personal desires
9 not to be present.

10 Regardless of your voluntary waiver to attend a
11 particular session of the commission, you have the right at
12 any time to decide to attend any subsequent session. If you
13 decide that you -- not to attend the morning session but wish
14 to attend the afternoon session, you must notify the guard
15 force of your desires. Assuming there's enough time to
16 arrange transportation, you will then be allowed to attend the
17 afternoon session.

18 You will be informed of the time and date of each
19 commission session prior to the session to afford you the
20 opportunity to decide whether you wish to attend this session.

21 Mr. Mohammad, do you understand what I just explained
22 to you?

23 ACC [MR. MOHAMMAD]: Yes.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
2 just explained to you?

3 ACC [MR. BIN'ATTASH]: Yes. But I'd like to object to the
4 attorneys representing me on the record.

5 MJ [COL POHL]: Okay. I'll give you an opportunity in a
6 minute.

7 Mr. Binalshibh, do you understand what I just
8 explained to you?

9 ACC [MR. BINALSHIBH]: Yes, I do.

10 MJ [COL POHL]: Mr. Ali, do you understand what I just
11 explained to you?

12 ACC [MR. AZIZ ALI]: Yes.

13 MJ [COL POHL]: Mr. al Hawsawi, do you understand what I
14 just explained to you?

15 ACC [MR. AL HAWSAWI]: Yes.

16 MJ [COL POHL]: Mr. Bin'Attash, you wanted to say
17 something about your attorneys.

18 ACC [MR. BIN'ATTASH]: I repeat my objection to the
19 attorneys on the record, because my attorneys accept the
20 situation as it is. And they are willing to continue the same
21 way things are now, despite the fact that I made many
22 concessions to reach a solution, but they haven't done
23 anything on their part.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 That is all.

2 MJ [COL POHL]: Thank you.

3 Mr. Nevin.

4 LDC [MR. NEVIN]: Your Honor, under 018U, your written
5 privileged communications order, we are required to pass any
6 materials that we want to take with us into a meeting with
7 Mr. Mohammad through the Privilege Review Team. And this
8 problem arises frequently on weekends before a hearing session
9 begins, and -- because the Privilege Review Team doesn't
10 normally work on Saturdays or Sundays, on weekends. But you
11 did direct, I believe -- and I think it was perhaps done by
12 agreement -- that if a request were made by 5:00 p.m. on
13 Friday before a hearing was set to begin the following Monday,
14 that the Privilege Review Team would make themselves available
15 on both Saturday and Sunday for -- to pass materials through
16 so that they can be taken to a meeting for preparation for
17 hearings.

18 We made that request last Friday, and the Privilege
19 Review Team member simply told us, "No, I'm not going to do
20 it." And that was what prompted me to raise this at the 802.

21 As it turned out, we were able to get these materials
22 submitted on Sunday, and we were able to discuss them with
23 Mr. Mohammad, so I think we're good to go.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I wanted it to be on the military judge's radar
2 because I suspect this is a problem that may arise again. And
3 we were able to work around it this time, but that might not
4 be the case in the future. And I ask you to -- somewhere in
5 random access memory to flag this as a potential issue in case
6 it comes up again.

7 Thank you, sir.

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

9 There's an issue that raised up on I believe two of
10 Mr. Bin'Attash's pleadings about a security issue with them.
11 Since that time, I believe there has been written
12 classification guidance on those two issues given to all
13 defense counsel, including Mr. Bin'Attash's team.

14 LDC [MS. BORMANN]: This morning, the court security
15 officer approached me and gave me a one-paragraph
16 classification guidance. It's classified so I can't talk
17 about it. But I met with trial counsel as soon as we received
18 it ----

19 MJ [COL POHL]: Uh-huh.

20 LDC [MS. BORMANN]: ---- and it seems to conflict with --
21 not seems to conflict, does conflict with everything that has
22 gone on previously on these issues.

23 So I have some other guidance we just got on issues

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19907

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 related to this from presumably the same OCAs that -- I don't
2 know that I can -- hold on.

3 [Conferred with Mr. Trivett.]

4 LDC [MS. BORMANN]: I don't even know that I can reference
5 the filing numbers on these anymore without saying ----

6 MJ [COL POHL]: Let's do -- here's my suggestion,
7 Ms. Bormann. What you are telling me is you believe there is
8 conflicting classification guidance?

9 LDC [MS. BORMANN]: I believe that there's -- possibly all
10 of the pleadings might be spills.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: That's the problem that we have,
13 everything, because this is new.

14 MJ [COL POHL]: Let's -- we clearly can't address that in
15 an open session ----

16 LDC [MS. BORMANN]: No.

17 MJ [COL POHL]: ---- but at the appropriate time, why
18 don't you discuss it with the trial counsel. And then what we
19 can do is, whether we need to, if there is that issue, we'll
20 have to do it either in a classified session or, if you are
21 agreeable to it, we can at least surface the problem to my
22 CISO, and I'll see if I can at least get some idea what
23 it ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: I'm happy to meet with the court
2 security officer ----

3 MJ [COL POHL]: Yeah. Yeah.

4 LDC [MS. BORMANN]: ---- on the issue and explain the
5 craziness that has now ensued.

6 MJ [COL POHL]: Uh-huh.

7 LDC [MS. BORMANN]: But we did file 505 notices on this in
8 anticipation of some classified information, but ----

9 MJ [COL POHL]: Yeah.

10 LDC [MS. BORMANN]: ---- it now appears that maybe
11 everything -- frankly, the whole thing.

12 MJ [COL POHL]: If we need to discuss it on the record,
13 we'll do it within the 505 process.

14 LDC [MS. BORMANN]: That's fine.

15 MJ [COL POHL]: Just -- as far as the guidance itself, it
16 seems to me that can may be done a little more informally, if
17 we can. If we can't, we'll go the other way.

18 LDC [MS. BORMANN]: Mr. Trivett has indicated that he
19 intends to speak with folks about this, because it's a big
20 problem.

21 MJ [COL POHL]: Okay.

22 LDC [MS. BORMANN]: And so -- but we can't -- on those two
23 particular AE numbers, which I'm hesitant to even mention

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 right now ----

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: ---- we can't discuss them in open
4 session at all right now.

5 MJ [COL POHL]: Okay. Okay. Fine.

6 Thank you.

7 LDC [MS. BORMANN]: Thank you.

8 MJ [COL POHL]: And while we're on the issue of
9 classification, Mr. Connell, we have that issue with 555, is
10 it Z? V? Okay.

11 In being cryptic around this ----

12 LDC [MR. CONNELL]: I can explain it without any class --
13 reference to classified information on the record.

14 MJ [COL POHL]: Okay. But I'm trying to get it filed.

15 LDC [MR. CONNELL]: Oh, yes, sir.

16 MJ [COL POHL]: Okay. It's my understanding that there is
17 imagery issues that may be classified?

18 LDC [MR. CONNELL]: That's my -- that's what I've been
19 told, sir.

20 MJ [COL POHL]: Okay. Can you resubmit it without the
21 imagery in the body of the -- I believe it was on page 4?

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: And then whatever imagery you wish to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 include, just -- because it's at the SECRET level,
2 right? -- as a SECRET level attachment. And then we can at
3 least get it filed and can begin the briefing cycle on it.

4 LDC [MR. CONNELL]: Can I repeat back to you what I think
5 the instructions are?

6 MJ [COL POHL]: Sure.

7 LDC [MR. CONNELL]: Re-file the document with the imagery
8 not in the body of the brief and attach the imagery as a
9 Secret -- file it as an attachment under R.T.M.C. 17-1.c(1),
10 which permits us to file under seal documents which we have
11 reason to believe may be classified.

12 MJ [COL POHL]: Right. Right. And in an abundance of
13 caution, you have two attachments to it involving imagery?

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

15 MJ [COL POHL]: I think only one's in issue, but for now,
16 put both of them in there.

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

18 MJ [COL POHL]: Okay. And I just want to clarify
19 something which I said at the 802 and put this back on the
20 record, is that, as I understand it, when you -- when the
21 defense does a pleading, you don't file it with us initially;
22 you give it to the other side, and there's a certificate of
23 conference.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

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

2 MJ [COL POHL]: So the government's had an opportunity to
3 review this themselves. Then we get it. And the first thing
4 we do before anybody else sees it is the CISOs review it to
5 minimize any type of spill. But we are not the arbiters, my
6 CISO is not the arbiters of whether there's classified
7 information or not in there. We do the best we can with the
8 guidance we have; and if we have a problem, we send it back.

9 So when I say these are the only areas of concern
10 with this particular pleading, those are the only areas of
11 concern that we have identified. I am not making an
12 affirmative statement there are no other areas of concern.
13 However, that's not really our job.

14 And, Trial Counsel, in some ways, you're the
15 protector of classified information. And if you see an issue
16 when you get the first thing through -- I mean, I'm not
17 sure -- I mean, ultimately, it's -- the government's trying to
18 protect the classified information.

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

20 MJ [COL POHL]: Mr. Trivett, you're standing.

21 MTC [MR. TRIVETT]: Can I clarify for a second?

22 MJ [COL POHL]: Yes.

23 LDC [MR. CONNELL]: I'd clarify that, too.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MTC [MR. TRIVETT]: We don't receive the pleading before
2 the judiciary. We'll have a separate conference e-mail that
3 just talks about the relief they seek ----

4 MJ [COL POHL]: Okay.

5 MTC [MR. TRIVETT]: ---- but we don't actually get the
6 motion, sir.

7 MJ [COL POHL]: Okay. You don't. Okay.

8 LDC [MR. CONNELL]: That's true both ways.

9 MJ [COL POHL]: Okay, that's true both ways. But when you
10 do get it, do you -- I'm talking to you, Mr. Trivett -- when
11 you do get it -- well, when do you get it then?

12 MTC [MR. TRIVETT]: We get it when it's filed, sir.

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

14 MJ [COL POHL]: When it's accepted for filing or when it's
15 filed?

16 MTC [MR. TRIVETT]: When it's filed via e-mail.

17 LDC [MR. CONNELL]: When it's tendered for filing.

18 MJ [COL POHL]: Okay. Do you do a classification review
19 on it of any kind?

20 MTC [MR. TRIVETT]: Only if there's any concerns that we
21 have after reading it. But again, it's -- you can't unring
22 the bell at that point.

23 MJ [COL POHL]: No. But my concern here, Mr. Trivett --

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 and this is a procedure going forward -- is that we get a lot
2 of filings, and we do the best we can, speaking ecumenical
3 "we," it's really the CISOs that do all of the work, which I'm
4 taking credit for, to identify issues of concern. And that's
5 what we did in this particular case. Okay.

6 I'm not sure I can remember an instance where the
7 government raised an issue that we didn't already catch. My
8 point being is this: Is as I just told Mr. Connell on 555V,
9 is here's the issues that we saw a concern. Here's the fix
10 for it so it can be filed. But that is simply our cut on it,
11 okay, whereas the ultimate cut is -- and we've had this happen
12 before, where the article that was attached to a government
13 pleading, two weeks after it's filed, all of a sudden it was
14 classified.

15 So what I'm simply saying is I don't think -- well,
16 we will do the best we can to identify what we see, but we're
17 not the final decision-maker. So if there's other problems
18 with this particular pleading that we didn't catch, we're not
19 saying there is or isn't; we're not saying the rest of the
20 pleading is fine, we're saying this is all we caught. Because
21 ultimately, it's not our responsibility, it's the government's
22 responsibility. That's all that -- do you understand?

23 MTC [MR. TRIVETT]: I understand that it's not your

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 responsibility, sir. And the way we see it, though, is that
2 they have their walled-off process. And I think that that's,
3 in fact, what Mr. Connell has now engaged with to get a
4 classification review of the entire document.

5 MJ [COL POHL]: Yeah. But what happened, though, in this
6 case, Mr. Trivett, is it was filed, we -- it was ----

7 LDC [MR. CONNELL]: Tendered for filing, sir.

8 MJ [COL POHL]: ---- tendered for filing. You can tell
9 me -- this is -- this is the back-room stuff in my office.
10 But anyway, it was tendered for filing, we -- so the CISO saw
11 it, we saw issues of concern which we just talked about, and
12 so we sent it back. And then, apparently, then it goes over
13 to the OSS for -- whomever for review.

14 Okay. My only point being is this: Is that my fix,
15 so we can accept it for filing, is these three areas. Okay.
16 I am not -- when I do that, I just want to make it very clear,
17 that those are the only things that we identified. I am not
18 saying that there's not other problems with the document
19 because those -- we're not the ultimate reviewer of the
20 classification issues with any document; the government is.
21 That is all I'm saying.

22 So when I say this is the fix -- because that's what
23 we've identified and nobody else from any side's identified

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 any other issue -- then that's the way it goes. But I just
2 want to make it very clear, we are not saying that there is no
3 possibility of any other issues with the pleading, not saying
4 there is, because I don't see that as our -- ultimately our
5 job.

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

7 MJ [COL POHL]: Okay. All clear?

8 LDC [MR. CONNELL]: Yes, sir. May I be heard on it, on
9 that question?

10 MJ [COL POHL]: Sure.

11 LDC [MR. CONNELL]: The -- I agree with everything that
12 you just said. And one of the recurring issues is that -- and
13 I say this with all due respect -- your office will not accept
14 for filing documents that we send on SIPR because, out of an
15 abundance of caution, we would like to do so.

16 The -- with respect to imagery, I would be prohibited
17 by Executive Order 13526 to mark it CLASSIFIED, because I'm
18 only -- as a derivative classifier, I'm only allowed to mark
19 two things classified -- or mark things classified on two
20 bases, to be more clear. One of those is pass-through
21 markings from some other document and the other is during the
22 application of a security classification guide.

23 The imagery that we're talking about is not

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classified under any security classification guide that I have
2 ever had access to. The -- you know, we litigated earlier in
3 the case trying to get access to security classification
4 guides, and the military commission denied our request.

5 The remaining solution is found in R.T.M.C.
6 13-1.c(1), which is that when defense counsel has reason to
7 believe or is not fully confident that something is
8 unclassified, they should be able to file it under seal
9 through secure means. That would have solved this problem.

10 But the -- your office, sir -- and I say this with
11 all due respect for all of the work that your office does --
12 will not accept unclassified -- filings that I can't mark
13 classified filed on SIPR. That would have solved the problem,
14 if we could submit this under seal and then submit it for
15 classification review, or as you told us in March, have your
16 office submit it for classification review, have somebody
17 submit it for classification review. There is a solution to
18 this problem available already ----

19 MJ [COL POHL]: It would require, though -- and I'll
20 discuss it, because again, the idea here is I'm just trying to
21 get this stuff filed.

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

23 MJ [COL POHL]: Yeah, I know you do, Mr. Connell. You

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 like to file stuff.

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

3 MJ [COL POHL]: But my point being is, on this particular
4 document, if you thought it was classifiable -- let's just put
5 it that way -- or is classified, then why did you send it over
6 an unclassified network?

7 LDC [MR. CONNELL]: I did not think it was classifiable.
8 In fact, the reason why ----

9 MJ [COL POHL]: That's what I'm saying. So, but ----

10 LDC [MR. CONNELL]: Let me just put that on the record
11 just in case there's any confusion ----

12 MJ [COL POHL]: No, no. I'm just going through your
13 hypothetical, so I don't want to get too much into this, is
14 that if you believe something may be classified, you want to
15 use this other procedure that you just talked about. But in
16 this particular case ----

17 LDC [MR. CONNELL]: I'll give you this particular case,
18 sir. Let me explain.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: I frankly disagree with the concern
21 that the imagery at issue is classified. Everything in it is
22 open source. There's nothing that's classified about it. But
23 I don't get to make that decision, right? I make an initial

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 cut of what I think is classified and not classified based on
2 information available to me. Imperfect information at that.
3 I believed it was not classified, we sent it over an
4 unclassified system.

5 What happens is we get an e-mail from trial judiciary
6 citing a rule of court that says, classified -- and all it
7 says is classified -- text -- quotes the text of the rule
8 which says that classified documents must be marked and
9 protected and are filed appropriately.

10 It is at that point that I thought, well, somebody
11 thinks that something in there is classified. And it is at
12 that point that we could have re-filed, out of an abundance of
13 caution, on SIPR, if we were allowed to do so.

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: So even in this particular situation,
16 it's not the initial filing, which I still maintain is
17 unclassified, but once someone raised a concern, somebody
18 would probably, with better information than me -- then we
19 could have re-filed. But as it was, our only option was to
20 send it for classification review, which we did two days
21 later.

22 MJ [COL POHL]: No, I understand that. I was just -- was
23 saying this particular case, the initial filing would not have

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 done that.

2 LDC [MR. CONNELL]: Correct.

3 MJ [COL POHL]: I'll talk to my people and see what we can
4 do about that. And understand is that we -- when the CISOs
5 look at a piece of paper or information and thinks it may or
6 may not be classified, a lot of times we're just not sure.

7 LDC [MR. CONNELL]: Sure.

8 MJ [COL POHL]: And so it's the abundance of caution to
9 make sure so we don't have to keep wiping computers over and
10 over again.

11 LDC [MR. CONNELL]: I fully support that, sir. We're in
12 the same place on this. And all I'm saying is I think there's
13 a procedure that would help that's already in the reg.

14 MJ [COL POHL]: Okay. Let me discuss it with the staff,
15 and hopefully I can get back to you with some type of clarity
16 before this week is over with.

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

18 Can I be heard on the procedural posture of 555,
19 given that we've cleared that up?

20 MJ [COL POHL]: Okay. That was the first thing we were
21 going to do anyway. Go ahead.

22 LDC [MR. CONNELL]: When we left this issue at the last
23 hearing, I had made a proffer to the military commission that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I had been in contact with the witness who could shed a lot of
2 light, in my view, on the facts and circumstances which
3 surrounded the firing of Convening Authority Harvey Rishikof
4 and Legal Advisor Gary Brown.

5 My optimism was just justified. That witness led to
6 a number of others. We have now interviewed a large number,
7 more than a dozen, witnesses with direct information on the
8 subject matter of AE 555. We are now prepared to prove that
9 the reasons given for the firing of Mr. Rishikof and Mr. Brown
10 were pretextual, and that the real reason was to curtail their
11 independent judicial acts, including attempting to bring these
12 cases to an end by pretrial agreement.

13 There are two motions which are on the docket related
14 to this question. One is AE 555P, the government motion to
15 reconsider; and the other is AE 555R, our motion to compel the
16 government to produce witnesses.

17 We just went over the attempted filing on 9 January.
18 The -- but today I tendered the witness, Lieutenant Doug
19 Newman, to prove that the requested witnesses in AE 555R and
20 an undated witness request will testify as described in the
21 9 July 2018 witness request. The reason why I specifically
22 mention the 9 July 2018 witness request is that
23 contemporaneously with the attempted filing of AE 555V, we

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 sent an updated witness request with new information that we
2 had gathered from witnesses to the government.

3 Much of this problem is about to be resolved. The
4 555V -- or what was 555V, it will have a new AE number,
5 probably -- contained two combined filings. It contained our
6 response to the government's 555P, their motion to reconsider,
7 and it contained our reply, the final pleading in 555R.

8 So when we file what was 555V today, then we -- the
9 pleadings will be complete with respect to 555R. It's also
10 true that today represents the 14th day since our updated
11 witness request to the government. So their witness
12 request -- their answer to the witness request is due today,
13 or if they don't reply, then we will have exhausted our
14 administrative remedies with respect to the witness request.

15 So what I'm suggesting is that if we return to this
16 question tomorrow, then we can -- procedurally, we can take up
17 the question of the government's motion to compel witnesses or
18 our motion to compel witnesses.

19 That leaves sort of unresolved the question of what
20 happens in 555P. In 5550, you ordered that there would be no
21 further pleadings after our 555 -- our response to 555P. At
22 the 802, the government said they wished to respond. And I
23 for one certainly support the right of any party to be heard

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 on a question when there are pleadings that need to be filed.
2 So if they want to delay 555P for them to file a response,
3 that's okay with me.

4 But I think that we can proceed this week on 555R,
5 because the pleadings are complete as of today.

6 MJ [COL POHL]: But how can we resolve 555R until we
7 resolve what factual evidentiary predicate you want to
8 establish?

9 LDC [MR. CONNELL]: 555R is our attempt to establish a
10 factual predicate, and that factual predicate is found in our
11 updated witness request of 9 July 2018, which is attached to
12 555V and has been in the government's possession for two weeks
13 now.

14 MJ [COL POHL]: I understand that. But I'm saying is that
15 in 555V, you asked for a number of witnesses. Right?

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

17 MJ [COL POHL]: Okay. And ----

18 LDC [MR. CONNELL]: And in 555R, we request to compel
19 those witnesses. So what I'm saying is we can go ahead and
20 resolve the motion to compel witnesses even if we can't
21 resolve 555P itself. We can do R, even if we need to delay P.
22 There's nothing left to wait for in R after today.

23 MJ [COL POHL]: Does -- I'm sure this is clear as a bell

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to people watching this, but does 555V impact your ability to
2 argue the fundamental issue in 555?

3 LDC [MR. CONNELL]: Yes. But it will be filed today under
4 the procedure you just laid out to us.

5 MJ [COL POHL]: Okay. Let me look at the pleadings,
6 review them for -- I -- I'm not a fan of piecemeal litigation.

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

8 MJ [COL POHL]: I'm sure -- I don't have the pleadings
9 sitting in front of me, because in 555V, are you asking for
10 witnesses in that, too?

11 LDC [MR. CONNELL]: 555V, the witness set which we list in
12 555V, you know just at the end ----

13 MJ [COL POHL]: Right.

14 LDC [MR. CONNELL]: ---- of the requested witnesses ----

15 MJ [COL POHL]: Uh-huh.

16 LDC [MR. CONNELL]: ---- is the same set that we seek to
17 compel that we gave notice of in our 9 July letter, and that
18 we seek to compel in 555R. So procedurally, this is not
19 piecemeal litigation; this is exactly the way that it is
20 supposed to work. An issue is raised, the defense has no
21 compulsory process, so we have to ask for witnesses. We asked
22 for the witnesses, the government declines them. We move to
23 compel. And then that's how we establish our evidentiary

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 basis.

2 So procedurally, this is not piecemeal.

3 Procedurally, it is exactly the way it's supposed to work. A
4 motion to compel witnesses, you decide whether those witnesses
5 are relevant and necessary, and then we have the evidentiary
6 hearing which forms the basis for the -- the underlying motion
7 in 555.

8 MJ [COL POHL]: What are you asking for in 555V?

9 LDC [MR. CONNELL]: 555V doesn't ask for relief at all.
10 555V is the -- is the response to the government's motion to
11 reconsider your order in 5550.

12 So we're not asking for relief. 555V is simply
13 response to their motion and a reply, because the facts are
14 basically very similar, a reply on our motion to compel
15 witnesses.

16 MJ [COL POHL]: Okay. Let me look at them and I'll get
17 back to you on it.

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

19 Your Honor, I had Lieutenant Newman standing by
20 because I know you don't like to wait for witnesses if they're
21 called. May I release him for the day?

22 MJ [COL POHL]: Sure.

23 LDC [MR. CONNELL]: Thank you.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Since we're dealing with opaque stuff now,
2 I've got one more opaque issue, and this deals with
3 Mr. Mohammad's team.

4 Mr. Nevin, I don't want to go too much into this.
5 I'm just going to refer to it by the number. You filed a
6 pleading, 543. It's an ex parte pleading. And my issue, and
7 you don't have to answer right now, is how can I really give
8 you much relief without reiterating what I've already said and
9 keep it while it maintains as an ex parte proceeding since I
10 can't involve the government in making this happen?

11 Do you understand my -- I don't want to get too much
12 into it, but that's -- I'm trying to figure out how to --
13 normally in order to energize the system, you know what I
14 would normally do.

15 LDC [MR. NEVIN]: Yeah.

16 MJ [COL POHL]: But because of the nature of the
17 pleading -- now, I think there's a way around this. There's
18 no reason that the substance of the underlying issue needs to
19 be discussed as opposed to simply ordering something to be
20 done -- the government to order somebody to do something, but
21 I don't -- I want to just raise it to you before I did
22 anything like that, because ----

23 LDC [MR. NEVIN]: Right.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- if I go back to you the same way we
2 did it before, we may end up in the same place. I know that's
3 clear as mud to everybody else, but I think -- do you
4 understand what I'm talking about here, Mr. Nevin?

5 LDC [MR. NEVIN]: Except that you said that you would
6 order the government to do something, and I'm not sure which
7 government you're referring to there. But, I mean, it did
8 seem to me -- it does seem to me that an explicit order that
9 says "do this" would suffice.

10 But ----

11 MJ [COL POHL]: Just think about it, because apparently
12 the first one wasn't clear enough ----

13 LDC [MR. NEVIN]: Right.

14 MJ [COL POHL]: ---- to the recipient. And what I would
15 propose is this ----

16 LDC [MR. NEVIN]: Maybe we should -- should we submit a
17 proposal?

18 MJ [COL POHL]: Think about it. Think about it. I
19 thought you were going to say that. If you wish to keep it --
20 however you want to do it. Just propose an order and tell me
21 whether you want me to tell these guys to make it happen or
22 keep it the way we have done it in the past. Okay?

23 LDC [MR. NEVIN]: Got it. Thank you.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. That brings us to 524. And this
2 is -- we've argued 524 a number of times, and this is simply
3 your new -- your supplement.

4 Mr. Connell.

5 LDC [MR. CONNELL]: Yes, sir. We received a message, a
6 conference -- or a notification from the government that they
7 have a request on this, so I'll yield the floor to them.

8 MJ [COL POHL]: Mr. Groharing?

9 TC [MR. GROHARING]: Judge -- can you hear me, Judge?

10 MJ [COL POHL]: Yeah, I can hear you.

11 TC [MR. GROHARING]: We have some information we expect to
12 pass to the defense perhaps by close of business today,
13 certainly early this week, that may impact their argument. So
14 we would just suggest we push off the argument until a little
15 bit later in the week so they have the opportunity to digest
16 that information.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: Sir, can I be heard on the procedure
19 question?

20 MJ [COL POHL]: Sure.

21 LDC [MR. CONNELL]: So when we filed this supplement, we
22 had received a communication from the government, which is the
23 subject of the supplement.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 On Friday, July 20th, we received an additional
2 communication from the government, which I mentioned in the
3 802. The -- it seems that that communication needs to become
4 a part of the record. So my question for you is, do we need a
5 motion for leave to file a supplement? Or I'm prepared to
6 just give it to the court reporter right now.

7 And second, while the document itself is FOUO, it
8 makes references to two previous classified elements, and --
9 which were already covered by our 505 notice, 524A, filed on
10 25 September 2017; and your order, 524E, filed on
11 9 January 2018. So my second question to you is: Do we need
12 an additional 505(g) notice to add this issue to the 505(h)
13 hearing or is the previous notice and your previous order
14 sufficient to cover the issue?

15 MJ [COL POHL]: Is the document classified or not?

16 LDC [MR. CONNELL]: The document that the government sent
17 us on 20 July is not classified.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: However, to make any sense of it, you
20 have to match it up with a -- you know, it refers to number
21 11, for example; and to know what number 11 is, you have to
22 match that up with number 11 on a classified document. So in
23 order for us to shed -- we are talking about the opaqueness,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 but in order for us to shed any light on what this document is
2 referring to, we have to refer to classified information which
3 is already covered by a 505(g) notice ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: ---- and already covered by an 806
6 order.

7 MJ [COL POHL]: Okay. So the document itself that you are
8 referring to, you just want to make it part of the record.
9 And the question is, do you have to file leave to file or
10 would I just simply accept it now as the next exhibit in line?

11 LDC [MR. CONNELL]: Yes, sir. That's the first question.

12 MJ [COL POHL]: Any objection to just accepting it as the
13 next exhibit in line?

14 LDC [MR. CONNELL]: I can show the document to counsel.

15 TC [MR. GROHARING]: No objection, Your Honor.

16 MJ [COL POHL]: Okay. What's the next number in 524?

17 Okay, it will be marked as 524JJ, assuming you have a
18 copy, a clean copy to give to the court reporter.

19 LDC [MR. CONNELL]: And for the parties, Your Honor.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: Sir, for the record, the 20 July 2018
22 memorandum that I just handed up is Appellate Exhibit 524JJ
23 (AAA).

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And so that brings us to my second question, which
2 is, if you will look at paragraphs 4 and 5 of the document,
3 you'll see that there are references regarding an individual
4 specified in your original request under number 10 and in
5 paragraph 5 regarding the individual specified in your
6 original request under number 11. The individuals under
7 number 10 and number 11 are reference to a classified
8 document, and that's why I feel the need to address that
9 portion of this in a classified -- in a closed session.

10 And so what I'm asking -- I'm telling you that the
11 document that contains those original requests, number 10 and
12 number 11, is already in the record as part of 524 base
13 motion. There has already been a 505(g) notice in 524A. You
14 have already issued an order for a closed hearing on that
15 topic in 524E. And so what I'm asking is, do I need another
16 505(g) notice?

17 MJ [COL POHL]: Yes.

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

19 MJ [COL POHL]: One moment, please.

20 [Pause.]

21 MJ [COL POHL]: Okay. That brings us to 579.

22 ADC [MS. RADOSTITZ]: Good morning.

23 MJ [COL POHL]: Good morning.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 ADC [MS. RADOSTITZ]: 579 is Mr. Mohammad's motion to
2 dismiss due to the unlawful influence by the director of the
3 CIA, Gina Haspel. During her sworn testimony before the
4 Senate Select Committee on Intelligence, then-acting director
5 of the CIA Ms. Haspel made a number of comments asserting
6 Mr. Mohammad's guilt and that he's guilty of the charges that
7 are currently pending before him in these proceedings,
8 including that Khalid Shaikh Mohammad was the architect and
9 mastermind of the 9/11 attacks; that his nephew, Ramzi Yousef,
10 was behind the 1993 attack at the World Trade Center, and that
11 Mr. Mohammad financed that operation.

12 She also testified that he -- Mr. Mohammad was behind
13 the Bojinka plot in the Philippines and further testified that
14 he was the individual who personally killed a *Wall Street*
15 *Journal* correspondent. She also testified later that he --
16 she was proud of the fact that the CIA identified and captured
17 the mastermind of the 9/11 attacks and identified that person
18 as Mr. Mohammad.

19 Those statements are problematic and become unlawful
20 influence in these proceedings because, under
21 Section 949b(a)(2) of 10 U.S.C., as well as Rule 104 of the
22 Rules for Military Commissions, which state in relevant part
23 that "no person may attempt to coerce or by any unauthorized

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 means influence the military commission or any member thereof
2 in reaching a finding or sentence in any case." And the next
3 relevant section is Section C, "the exercise of professional
4 judgment by trial counsel or defense counsel."

5 So I want to address Section A first and then we'll
6 move on to Section C.

7 And as the -- as Your Honor is well aware, the Rules
8 of Military Commissions are much more expansive than
9 the Article 37 of the UMCJ [sic], because here they apply to
10 all persons, not merely those in direct command. However, I
11 would point out that President Trump, as the Commander in
12 Chief, has Tweeted about -- and stated his direct approval of
13 Director Haspel's testimony before the SSCI.

14 So there's two aspects of her testimony and her
15 actions and her role as the director of the CIA that create a
16 coercion and/or unauthorized influence or the appearance of
17 coercion and/or unauthorized influence.

18 The first is the public comments under oath that she
19 made asserting Mr. Mohammad's guilt. I mean, in none of her
20 comments does she say that he is alleged to be, or anything.
21 She simply says he is. And the second part is her role as the
22 ultimate original classification authority for all evidence
23 regarding Mr. Mohammad's rendition, detention, interrogation,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 and torture.

2 As the court's well aware, since ancient times, as
3 long ago perhaps as Deuteronomy, there's been a presumption of
4 innocence for those accused in any criminal proceeding. It's
5 the -- as Justice White stated way back in 1895 in Coffin vs.
6 United States, which is 156 U.S. 432 at 454, the principle is
7 undoubted law, axiomatic, and elementary, and its enforcement
8 lies at the very foundation of the administration of our
9 criminal justice system.

10 In its brief, the government seems to assert that
11 Mr. Mohammad is not entitled to that presumption of innocence
12 because he has made statements, and they list out the
13 statements that he made. However, as the D.C. Circuit
14 recently reminded us in the case of In Re Mohammad, even those
15 who have made confessions are entitled to the presumption of
16 innocence. Director Haspel ignored that presumption of
17 innocence in her testimony.

18 And doing so has the impact and the effect of
19 influencing or attempting to influence the findings of guilt
20 or innocence by the members. And further, as Commander in
21 Chief, President Trump, as I said, has endorsed her testimony,
22 and he has made clear in other Tweets and other information
23 that has been addressed in these commissions regarding how he

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 feels if a military jury or judge doesn't follow what he
2 thinks should happen, and those were evidenced in his comments
3 regarding Bowe Bergdahl.

4 In any event, the director of the CIA is not
5 authorized under any circumstances to announce, with the whole
6 world watching in a hotly contested hearing under oath, that a
7 capital defendant is guilty. If her -- if her testimony
8 impacts even one member of the panel when they are presented,
9 or when they are impaneled, it's a violation of the statute
10 and the rule.

11 And at the very least, her declaration under oath of
12 the guilt of Mr. Mohammad gives the appearance of unauthorized
13 influence, which under case law is treated just as seriously.

14 In addition to the unauthorized influence on the
15 judge and potential members, Director Haspel's comments also
16 attempt to coerce defense counsel in an -- sorry -- unlawfully
17 influence the exercise of their professional judgment through
18 her role as the ultimate classification authority.

19 During her testimony, she made clear to the Senate
20 that she was making the determinations of what information
21 could and could not be presented, would and would not be
22 declassified, in order for the senators to be able to
23 understand it, regarding her role in the CIA's -- her role or

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 no role in the CIA's detention, interrogation, rendition, and
2 torture program.

3 As set out in AE 572, Mr. Mohammad's expedited motion
4 for appropriate relief to provide information about nominee
5 for CIA Director to Senate Select Committee on Intelligence,
6 Mr. Mohammad sought permission from this court to provide
7 information to the SSCI as they considered her testimony and
8 her nomination.

9 At your suggestion, we provided that information
10 for -- or submitted that information for classification
11 review, and the classification review has not ever been
12 returned to us. It was not returned in time for us to provide
13 information to the Senate committee, and it has still not been
14 returned, giving us an indication of what, if any, information
15 we could have -- or could provide to the -- and we're going to
16 discuss more details about that and why it's so problematic in
17 this case later. We have filed a 505 notice and we'll seek to
18 present that in a classified hearing.

19 However, in addition to that, her role as the OCA for
20 information about Mr. Mohammad's torture, she was ultimately
21 and is ultimately responsible for the guidance that has been
22 given in the 524 series, the 525 series, the 360 series, and
23 that guidance impacts our ability to provide representation

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 for Mr. Mohammad to fulfill the obligations that we have as
2 his counsel.

3 And those classifications ----

4 MJ [COL POHL]: Didn't a lot of that guidance precede
5 Ms. Haspel's confirmation?

6 ADC [MS. RADOSTITZ]: Some of it may have preceded her
7 confirmation. But she has the ability now to change that
8 guidance if she wanted. She also was acting director during
9 part of that time and would have had the ability at that point
10 as well.

11 MJ [COL POHL]: Well, is the issue -- who is issuing the
12 guidance or the guidance itself?

13 ADC [MS. RADOSTITZ]: The issue is the guidance itself,
14 but she has the ultimate authority to issue that guidance.
15 And so as the director of the CIA and previously as the acting
16 director, she could have said to the government, here's this
17 information. Go ahead and give it to the defense. She even
18 testifies about that -- well, she does it in her written
19 testimony -- saying that she is who has the authority to tell
20 the government, she was asked specifically about this case, of
21 whether she can and will provide information to in the 9/11
22 case. And she said, "I have the authority to do that. I have
23 done so. I do it through providing the information that I

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 want to provide to the government."

2 MJ [COL POHL]: Okay.

3 ADC [MS. RADOSTITZ]: Okay.

4 MJ [COL POHL]: Go ahead.

5 ADC [MS. RADOSTITZ]: So that -- that ability to impact
6 and the ability that she has exercised to limit the
7 investigation and our access to witnesses definitely violates
8 Section C of Rule 104, in the exercise of the professional
9 judgment of defense counsel.

10 Further, as we've argued previously in our responses
11 in 524 and 525, the threat to both our security clearances and
12 the threat that we could be held criminally liable if we
13 violate, either knowingly or unknowingly, that security -- or
14 that guidance is an attempt to coerce us to act within a
15 certain way and violates the exercise of our professional
16 judgment; and it really can't be allowed.

17 Accordingly, Mr. Mohammad's motion to dismiss should
18 be granted; or in the alternative, the death penalty should be
19 removed as a sanction due to the unlawful influence over these
20 proceedings.

21 MJ [COL POHL]: Thank you.

22 ADC [MS. RADOSTITZ]: Thank you.

23 MJ [COL POHL]: Any other defense counsel wish to be heard

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 on this motion? Apparently not.

2 Trial Counsel? Mr. Swann.

3 TC [MR. SWANN]: The first thing I'd like to do is just
4 put the three Tweets that are attached to the pleading to
5 rest. All of those Tweets are prior to any testimony provided
6 by Ms. Haspel on the 9th of May. The last Tweet occurs at
7 4:00 in the morning on the 8th, I believe. And so they have
8 no bearing on this case. They don't talk about the accused or
9 any of the accused in this case. It shows a President who
10 strongly supported his nominee, a nominee that was ultimately
11 confirmed by the United States Senate.

12 With respect to the actual information that she
13 provided to a question by the chairman of the Senate sub --
14 Subcommittee on Intelligence, he asked her, "Who is Khalid
15 Shaikh Mohammad?" She quite -- puts forth exactly what he
16 said with respect to what he said -- or what he said before a
17 Combatant Status Review Tribunal.

18 And we detailed that, we set it out in our
19 pleading -- I'm not going to repeat it here and now -- but he
20 took credit for decapitation of Daniel Pearl, he took credit
21 for the Bojinka plot, he took credit for other plots that he
22 had conceived. It's all set forth in the pleadings.

23 Now let's talk about what the object and effect of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 whatever testimony she provided, because that's the essence of
2 unlawful influence. Who is the object? Well, it's not us.
3 It's not you. At any -- if I just take it and extend it out,
4 it's the members.

5 Now, she indicated in her argument that if one member
6 sits on that panel who doesn't go into these proceedings with
7 an understanding that the accused is presumed innocent of the
8 charges of which he is accused of -- and I'll go ahead and
9 reinforce that's the government's belief, the accused has that
10 presumption; the members will understand that presumption --
11 and only when every one of those members convinces you that
12 they can listen to your instructions and listen to the
13 evidence with their minds open until such time as they have
14 reached that decision of guilt or innocence, then only then
15 will they get to sit.

16 So whatever Ms. Haspel said that day is speculative
17 as to whether or not it will have any impact. So you've got
18 to have an object and you've got to have an effect. What's
19 the effect? You will determine who sits on that panel. And
20 until we get to that point in time, any indication or any
21 testimony by Ms. Haspel is speculative at best.

22 MJ [COL POHL]: Mr. Swann, do I consider this alleged UI
23 only in the context of Ms. Haspel's confirmation hearing or do

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I consider it -- the cumulative effect of other remarks which
2 we have discussed in other motions, Attorney General Holder's
3 remarks in particular?

4 TC [MR. SWANN]: No, sir.

5 MJ [COL POHL]: Does there come a cumulative effect of
6 this UI issue?

7 TC [MR. SWANN]: I think the defense makes a point that at
8 some point in time it becomes cumulative. But in this
9 instance, no. You're not -- we haven't reached that point.
10 We're -- well, I mean, I don't know when you're going to set a
11 trial date. But that said, we're long away from trial, at
12 least months.

13 So at some point in time, they'll be able to ask the
14 question of the members, "Do you have any idea what Ms. Haspel
15 might have testified to before the Senate during her
16 confirmation?" I'd wager a guess that not a single person
17 sitting over there will know what she said, if they even know
18 that there was such a confirmation hearing. You know, this is
19 a -- this is a hearing, if this was a question by a senator to
20 her.

21 Now, I propose this: What if Ms. Haspel had said
22 that, "Well, I'm not going to rely on any information that I
23 have, but let me just testify -- or let me just tell you what

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 he said at his Combatant Status Review Tribunal." And that's
2 in essence what she did. I mean, the -- Mohammad has said
3 exactly what he did. That is more of a problem when we go to
4 the members because the members are going to say, you know --
5 they're going to ask, "Do you know anything about any
6 testimony before a Combatant Status Review Tribunal?"

7 Well, he testified; he said what he did. He didn't
8 have to do that. And despite the fact that I keep hearing
9 that it wasn't voluntary, I think the evidence will certainly
10 prove otherwise when the time comes.

11 So, no, sir. We've not reached the cumulative nature
12 that you started to. That brings me back to the last time we
13 were arguing about Bowe Bergdahl and some other Tweets. Those
14 comments by the President, by Bergdahl, and the judge were
15 wrong. I told you that. But they were about that case, the
16 comments about that guy up in New York who decided he wanted
17 to kill eight people on the streets of New York were about
18 that case.

19 You go back and look at those Tweets, and they had
20 nothing to do with this situation. Nothing at all.

21 MJ [COL POHL]: So if he were to make a comment about this
22 situation, that would be a different issue altogether?

23 TC [MR. SWANN]: That would be something that we need to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 focus on. Those other comments are -- they don't have
2 anything to do with this room. That would be something I'm
3 sure they would raise at that point in time. And we would
4 address those like anything else: They'd file it, we'd
5 respond, you would address it.

6 But we have not reached a stage where he gets a
7 get-out-of-jail card for killing 3,000 people because of a
8 bunch of Tweets or a statement at a confirmation hearing
9 before senators.

10 Subject to your questions.

11 MJ [COL POHL]: I have none. Thank you.

12 Ma'am, anything further?

13 ADC [MS. RADOSTITZ]: Your Honor, we're not asking for a
14 get-out-of-jail card because of a Tweet or a single Tweet.
15 We're looking at the lack of presumption of innocence that the
16 director of the FBI made under oath in front of the American
17 people. It was covered extensively in the media. And after
18 her testimony, the President did, in fact, Tweet -- I'm not
19 going to quote it for you, but he did affirm his support of
20 her testimony that day. And we think that that addresses it.

21 And the government did not respond at all to the fact
22 that her role as the classification authority is just as
23 problematic as her statements regarding Mr. Mohammad's guilt

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 or innocence.

2 And we will rely further on that when we address it
3 in the classified hearing.

4 MJ [COL POHL]: Thank you.

5 That brings us to 551.

6 ADC [Capt ANDREU]: Good morning, sir.

7 MJ [COL POHL]: Good morning.

8 ADC [Capt ANDREU]: AE 551 (2nd Sup) is Mr. al Baluchi's
9 second supplement to AE 551, which was a motion to dismiss for
10 the government's denial of a public trial.

11 The AE 551 series has already been litigated, so I
12 won't rehash that. But just to provide some context ----

13 MJ [COL POHL]: Would you slow down a little bit.

14 ADC [Capt ANDREU]: Yes, sir. Apologize.

15 MJ [COL POHL]: No problem. Go ahead.

16 ADC [Capt ANDREU]: The AE 551 series has been litigated,
17 so I won't rehash that, other than just to provide some
18 context for the supplement. As I mentioned, AE 551 was a
19 motion to dismiss for the government's denial of a public
20 trial.

21 In that motion, Mr. al Baluchi argued that this was
22 not a public trial for three reasons: One, because
23 unclassified pleadings were not being timely released to the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 public; two, because classified pleadings were not being
2 redacted and then released to the public; and three, because
3 classified -- closed, classified sessions, the transcripts
4 from those hearings were not being timely redacted and
5 released to the public.

6 As part of that initial motion, Mr. al Baluchi
7 provided some data to support his position on those three
8 issues. Since that time, Mr. al Baluchi has filed two
9 supplements with updated data from 2018 on those three issues.
10 The -- and that's what we're here for today.

11 The first supplement was -- included an audit of
12 filings from 1 January to 20 March of 2018 with updated data.
13 As far as the classified filings, there were eight classified
14 filings within that time frame. Not one had been released to
15 the public. There were two closed, classified sessions, one
16 on 11 January and one on 2 March. Only the 2 March session
17 transcript had been redacted and released to the public. And
18 there were 197 unclassified pleadings filed within that time
19 period; 183 of those 197 had not been released to the public.

20 The second supplement was filed on 22 June. That was
21 an audit from 20 March, where that first supplement led off --
22 left off -- until 1 June. As to those three same issues, that
23 audit included data. There were 13 classified filings within

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that time frame. Again, not one had been redacted and
2 released to the public. There were, again, two closed
3 sessions, one on 20 March and one on 1 June. Only -- pardon
4 me one moment. One on 3 May. Only one had been released.
5 There were 222 unclassified filings within that time frame.
6 Two had been released within the 15-day window established by
7 the Regulation for Trial by Military Commission; 194 of those
8 222 had not been released.

9 So that is the updated information provided to the
10 court as part of Mr. al Baluchi's ----

11 MJ [COL POHL]: Is this an alleged constitutional
12 violation or regulatory violation?

13 ADC [Capt ANDREU]: Your Honor, it's a combination. It's
14 a violation of the Sixth Amendment right to a public trial.
15 There's not really a bright-line rule there, but the
16 cumulative effect in this case, when you look at the fact that
17 we have a remote location here that's difficult to access ----

18 MJ [COL POHL]: Yeah, but they can see it by
19 closed-circuit television if they're interested, can't they?

20 ADC [Capt ANDREU]: Well, sir, there's one option for
21 that, which is at Fort Meade. So there's one place within the
22 entire continental United States, where members of the
23 public ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: How many places in the continental United
2 States have closed-circuit television for district court
3 hearings?

4 ADC [Capt ANDREU]: I'm not aware of any, sir.

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

6 ADC [Capt ANDREU]: But that is a different situation than
7 what we have here. Because in those situations, the public
8 has access to the court itself. Here it's extremely
9 difficult, if not impossible, for the public to have access to
10 the actual proceedings.

11 What this means is the public should have access
12 under both the Constitution and the Regulation for Trial by
13 Military Commission to the pleadings themselves. And what the
14 overwhelming data has shown is that unclassified pleadings are
15 not timely released to the public. When I say "timely," I
16 mean at the relevant time period when the motion is actually
17 being argued. And classified pleadings and transcripts are
18 not being appropriately redacted and then released to the
19 public.

20 MJ [COL POHL]: Thank you.

21 ADC [Capt ANDREU]: Any further questions, sir?

22 MJ [COL POHL]: I have none. Thank you.

23 ADC [Capt ANDREU]: Thank you.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19947

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Any other defense counsel wish to be
2 heard? Apparently not.

3 General Martins.

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

5 MJ [COL POHL]: Good morning.

6 CP [BG MARTINS]: I would like to go through some of the
7 data and provide you an update because we have been working
8 this hard as well. And when we get a set of data from the
9 defense, we go through it to see if we're missing something.
10 And I think it's useful to go through this.

11 To reiterate, there needs to be some perspective and
12 sense of proportion here.

13 The -- as a law of war detainee, the accused is very
14 reasonably limited in access to government-held information
15 and to the public. And the accused are also appropriately
16 restricted in their ability to use proceedings as a way to
17 project themes and messages of al Qaeda, including through
18 their attorneys.

19 No right of any accused here is being infringed,
20 either any purported constitutional right, which we definitely
21 see differently from the defense, or statutory.

22 The government acknowledges and protects the right of
23 the public to view these and other criminal trials. No right

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of the public to view criminal proceedings is being infringed
2 here. Small portions of the proceedings and filed documents
3 are being withheld, and an even smaller portion are sealed
4 altogether with regard to what we should remember are pretrial
5 proceedings, many of which, unlike proof at trial, which is
6 looked at differently by the law, involve pieces of classified
7 information in the pretrial proceedings.

8 The Supreme Court has ruled that the requirement of a
9 public trial is satisfied by the opportunity of members of the
10 public and the press to attend the trial and to report what
11 they have observed. The public and press do have these
12 opportunities, as do nongovernmental civil society
13 organizations who are transported here to do so.

14 The closed-circuit sites in the United States are
15 extensions of the courtroom, making access equivalent to that
16 in a federal criminal trial.

17 Verbatim, unofficial/unauthenticated transcripts are
18 posted to the website for examination, free of charge, soon
19 after the proceedings. And this is in excess to the access to
20 transcripts in federal criminal trials. Defense counsel, with
21 respect, are confusing a temporary delay in one of multiple
22 avenues of public access with closure of the proceedings.

23 Now, defense counsel is purporting to submit to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 something of an audit or report card on this 15-day standard
2 that appears in Rule for Military -- I'm sorry, Regulation for
3 Trial by Military Commission, paragraph 19-4.

4 Your Honor, the data in this most updated audit, we
5 would submit, are skewed for a number of reasons.

6 First, the clock should start when the security
7 review -- when the security reviewers, the Department of
8 Defense security classification/declassification review team,
9 gets the pleading, not when it's filed with the commission.
10 And there is sometimes some delay in that.

11 Second, the data should be interpreted in light of
12 the fact that there is no -- as we learned, there's no triage
13 occurring by the clerk. All of the -- you know, and that is
14 contemplated under the reg -- the reg. And for the reasons
15 you've stated, the commission doesn't seek to do that. We
16 understand that now. But that is part of what the 15-day rule
17 initially was contemplating, was there was going to be an
18 avenue where individuals who know the litigation, know the
19 material, could potentially shunt off a good portion of that
20 out of the system, leaving the bandwidth that was there to
21 deal with the harder stuff.

22 Now, security reviewers who really don't know the
23 substance and couldn't possibly triage it based on substance

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 are just looking at it page by page, which is what they're
2 supposed to do. But that's -- I think that's an important
3 perspective in terms of analyzing this data.

4 And that said, even with those two caveats, many
5 people are striving in good faith to review this material,
6 including your staff and how they're getting the material
7 through this. As you said just this morning, I took a note,
8 we get a lot of filings. And there are. And it's an
9 increasing number of filings, as I'll tell you in a minute.

10 Here are some updates from February when we orally
11 argued this that we believe are pertinent. In February, we
12 confirmed that 15 out of 17 of the closed Rule for Military
13 Commission 806 sessions, the redacted transcripts of those
14 that had been reviewed and then declassified had not been
15 posted.

16 Now all 19 have been posted. Defense counsel --
17 again, he was basing it on his -- the date of their filing,
18 but actually, the two that he mentioned that were not posted
19 of the 19, the 1 January of 2018 and the 3 May 2018 are up.
20 If you go -- we checked, and they can be pulled down. So all
21 19 have now been located through the process. And
22 understandably, these are harder to do because they were
23 sessions that were classified. So all 19 of those have now

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 been posted.

2 MJ [COL POHL]: So are the May ones posted?

3 CP [BG MARTINS]: Yes.

4 MJ [COL POHL]: So you're saying that all --

5 CP [BG MARTINS]: Got a list here.

6 MJ [COL POHL]: ---- every 806 we've done has been posted?

7 CP [BG MARTINS]: Yes. And I have a couple of more things
8 to say about ----

9 MJ [COL POHL]: Go ahead.

10 CP [BG MARTINS]: There were 24 hours of total -- total
11 proceedings out of the 460 that have been held. And of that
12 24 hours, all of that has now been reviewed, and the part
13 that's declassified is posted in a redacted transcript on the
14 website.

15 Your Honor, I mentioned during oral argument in
16 February that, by three different measures, these are
17 extraordinarily public proceedings and open. The percentage
18 of hours -- I just gave you that fraction, it was 436 out of
19 460 have been in public session. Twenty-four hours have been
20 in carefully considered Rule for Military Commission 806
21 closed sessions where you have ordered that.

22 If you look at the percentage of words in the
23 transcript, you also get what I reported in February is a --

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 about a 95 percent figure. And then I also explained that
2 when you look at the percentage of the filings, although there
3 is this issue of timing and a delay, that the total amount in
4 February was about 95 percent. So by all three of those
5 measures, these are extraordinarily open proceedings.

6 What I want to update you on, though, is now that the
7 24 hours of transcripts, 19 different transcripts have been
8 redacted and posted, that number has gone up with respect to
9 hours and with respect to percentage of transcript verbiage.

10 So about -- over -- over 14 of the hours of the 24
11 hours have been reclaimed for the public. So more than half
12 of that 24 hours is now visible by transcript. And the number
13 has jumped from 95 percent open -- and again, we're talking
14 pretrial proceedings where we're going to get into classified
15 information -- that number has jumped to over 97 percent, as
16 measured by both transcript verbiage and then hours of
17 proceedings, of the 460 hours.

18 The number -- I do report, though, that since
19 February, the number of pleadings that are immediately visible
20 right now is down around 91 percent. It has dropped. And we
21 attribute that to a much bigger number of pleadings that are
22 being filed.

23 And just to give you some perspective, I reported in

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 February that the commissions, in calendar year 2017, required
2 the Department of Defense security classification and
3 declassification review team to review 248,215 pages. And
4 that was for the 9/11 proceedings alone. 1,184 filings.

5 That number, just to give you a perspective on the
6 trend here, came up from 512 in the first year of this case --
7 admittedly not a full year, May to December of 2012 -- was
8 512, to 2016, 959 filings, many thousands of pages more than
9 that, of course. And then in 2017, calendar year 2017, 1,184.
10 In Your Honor's words, we get a lot of filings. And the
11 number is even higher this year, I don't have an up-to-date
12 figure, and we're only seven months in.

13 So that number is going up. And that has caused it
14 to be harder to meet this 15-day rule. We acknowledge it's in
15 there in the regulation. And yet, people are working hard. I
16 can -- I can proffer that the DoD Security
17 Classification/Declassification Review Team knows about this.
18 They are upping their manning, and they're doing some
19 reorganization to try to get to where they can track this
20 better and look at it.

21 But unthinking devotion to a 15-day posting window is
22 not -- does not deprive anyone of any rights here, certainly
23 not under any of the legal standards. For instance, a couple

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of the values that the Supreme Court has talked about of
2 public trial have to do with encouraging witnesses to come
3 forward, discouraging perjury. I mean, none of these things
4 can be affected by a temporary delay in the posting of
5 filings. And again, we want to do our best to meet that.

6 In short, Your Honor, these proceedings exceed the
7 standard required for a trial to be public under law, and the
8 defense request for relief should be denied.

9 Thank you.

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

11 Defense, anything further?

12 ADC [Capt ANDREU]: Sir, the government talked about how
13 some of the pleadings throughout this case have started to --
14 are starting to be released, and the government provided some
15 percentages. The problem with that argument is that it looks
16 at this -- it looks at it globally. As I stated when I first
17 got up here, the problem is that the pleadings, filings are
18 not being released at the relevant time.

19 When the public comes down here to view the
20 proceedings, oftentimes, the majority of the time, relevant
21 pleadings have not been released. For example, as
22 Mr. al Baluchi set forth in AE 580P, there are 22 pleadings on
23 the docket, 22 motion series pleadings in the docket for this

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 hearing. Fifteen of those base motions are not available to
2 the public.

3 The government explained that, as far as the
4 classified transcripts are concerned, now all 19 of those
5 classified transcripts have been redacted and released to the
6 website. That goes to the same issue. When Mr. al Baluchi
7 first filed this motion earlier this year, only one had been
8 released to the public in the entire history of this case. So
9 from -- for years, only one classified hearing had been
10 released. Now apparently it's been flooded, and all of the
11 hearings have now been released; but again, not at the
12 relevant time period.

13 The delay was characterized as temporary. It's our
14 position that that's a generous characterization of the delays
15 in filing to the -- in posting to the website. Again, many of
16 these are not posted for years.

17 Lastly, the government addressed the fact that the
18 difficulty in processing the amount of motions in this case
19 and getting them reviewed and released -- it is true that the
20 parties in this case are filing a lot of important motions.
21 We can sympathize with the fact that it's a difficult process.
22 But it's our position that the rules should be followed. And,
23 in fact, Your Honor has ordered that those rules be followed.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Because they are not, we'd ask that this case be dismissed for
2 denial of a public trial. Thank you.

3 MJ [COL POHL]: Thank you.

4 General Martins, do you have something you want to
5 add?

6 CP [BG MARTINS]: Your Honor, counsel did bring up a good
7 point about the -- you know, there's this rule that before we
8 argue something, there should be pleadings that enable the
9 public to understand it.

10 I am -- I'm aware, on information and belief, because
11 we have dug into this based on this litigation and the
12 allegations, that the DoD Security
13 Classification/Declassification Review Team, when it gets a
14 docket from the commission, it does prioritize that material
15 to try to ensure that base pleadings -- I mean, some of these
16 things have, you know, hundreds of pleadings. And frankly,
17 there may be a role there for some triage in that regard from
18 the commission, since the commission is -- has a -- there's a
19 rule that states the judge should confirm before hearing a
20 motion that the pleadings have been filed.

21 So if we have a filing number that's got hundreds of
22 pleadings, many of them within the 15-day window of a
23 proceeding, if the DoD Security Classification and

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Declassification Review Team could get a signal that, hey,
2 here are the basic -- here are the pleadings that are
3 necessary for the public to get a sense of this motion by
4 reading them in advance, that could be a way of ameliorating
5 any effect here, which we ----

6 MJ [COL POHL]: So it becomes my job to tell them to do
7 their job?

8 CP [BG MARTINS]: Your Honor, you have jobs under the reg,
9 as you know, with respect.

10 MJ [COL POHL]: I know.

11 CP [BG MARTINS]: I mean, there's important roles you have
12 in the public trial process. And because the clerk ----

13 MJ [COL POHL]: So six years into this trial, all of a
14 sudden I'm supposed to get involved in getting this stuff
15 posted in a timely manner?

16 CP [BG MARTINS]: Not posted in a timely manner; in making
17 sure these proceedings are publicly understood. And since
18 there is a rule that states the judge will not hear a
19 motion -- counsel's pointing to this -- judge will not hear a
20 motion unless the pleadings are available online or have been
21 posted. That's in there.

22 So what we're saying is the 15-day window and all of
23 the volume makes all of the pleadings being put up an

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 aspiration and a standard that's probably too ambitious. But
2 having there be a -- instead of a first in/first out rule for
3 the SC/DRT, they don't know. They get the docket, they do
4 their best. Instead of a first in/first out rule, if they
5 could get some vector that, hey, here's what's on the docket
6 and here are some -- not even the base pleadings may be
7 available for something that you've directed be heard, we
8 think that's consistent with your obligation, with respect,
9 and don't think it's particularly onerous if we could tweak
10 it.

11 So again, this -- these are extraordinary public
12 trials.

13 Subject to your questions.

14 MJ [COL POHL]: Just a minute, please. I have no
15 questions.

16 Okay. That brings us to 578.

17 ADC [MS. RADOSTITZ]: Your Honor, at the time that we
18 filed our request to have the May 2019 hearings changed so
19 that it didn't interfere with Ramadan, the government had
20 objected to our motion. But in their subsequent pleading,
21 they agreed that those hearings should be changed. They had
22 different reasons for it, but they're now in agreement, all of
23 the parties are in agreement that the hearings that are

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 currently set for the 6th through the 17th of May 2019 should
2 be changed.

3 Our proposal is that those be set for starting on the
4 24th of April. The 21st of April is Easter. Ms. Bormann
5 isn't available prior to that. So if we flew down on Monday
6 the 22nd, had the 23rd as time to meet with our clients, and
7 then started hearings on the 24th and went in through the next
8 week, that would still give us ten days of hearings that would
9 replace the two weeks that we're asking be removed from the
10 current calendar.

11 MJ [COL POHL]: Okay. I never like to get in the middle
12 when peace breaks out, so I won't. But I do want this from
13 the defense. When I got your motion, it raises two questions
14 in my mind, which unaddressed by the motion. And it may be my
15 ignorance, but whatever it is, and so I want you to file a
16 supplement to it addressing these two issues.

17 Number one is, do Muslims in a Muslim country, or
18 wherever, not do any work during the day, okay? Just what's
19 the policy there? And I want some type of evidence of that,
20 not just whatever it is.

21 Secondly, in federal court, when there's a Muslim
22 defendant, do they not try anything during Ramadan? Okay?

23 So please address those two issues. File it within

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 two weeks of the close of this hearing. Government, you have
2 the opportunity to respond, and we'll go from there.

3 I understand your motion, and I understand your
4 concern there's just a lack of facts supporting underneath it.
5 So for now, again, I don't want to violate peace going on.
6 But going forward, it may be become a bigger issue ----

7 ADC [MS. RADOSTITZ]: Sure.

8 MJ [COL POHL]: ---- of taking a month off in the middle
9 of a trial is an issue I want to just -- if we need to, we do;
10 if we don't, we don't. But I need to have something more than
11 what I simply have so far. Okay.

12 ADC [MS. RADOSTITZ]: Okay. We'll provide that, Your
13 Honor.

14 MJ [COL POHL]: Okay. What were the dates again that you
15 proposed?

16 ADC [MS. RADOSTITZ]: We're proposing that the hearings
17 would start the 24th of April and go through the following
18 week, which would end the 3rd of May ----

19 MJ [COL POHL]: Okay.

20 ADC [MS. RADOSTITZ]: ---- with the idea that we would fly
21 down on Monday after Easter.

22 MJ [COL POHL]: Fly down on Monday. Okay. Thank you.

23 Trial Counsel, do you agree? You don't oppose

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19961

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 switching to those dates? Mr. Ryan.

2 TC [MR. RYAN]: Good morning, Your Honor. Edward Ryan on
3 behalf of United States.

4 We don't take issue. We rely on our brief. The only
5 thing I wanted to point out is, of course, Your Honor is often
6 aware of more moving parts than maybe the parties are, so we
7 defer to Your Honor's ----

8 MJ [COL POHL]: Yes, there has to be some de-confliction
9 with other cases, so I'm taking this as an advisory date so we
10 can make it work. I got it.

11 TC [MR. RYAN]: Yes, sir. Thank you, sir.

12 MJ [COL POHL]: Thank you. Okay. That brings us to 565R.
13 Mr. Harrington?

14 LDC [MR. HARRINGTON]: Judge, we had filed a motion. You
15 granted us an opportunity until tomorrow to supplement this
16 because there's been a change of circumstances. It's not ripe
17 right now.

18 MJ [COL POHL]: Okay. Will you be ready to do it this
19 week?

20 LDC [MR. HARRINGTON]: We will file it tomorrow, Judge. I
21 don't know what ----

22 MJ [COL POHL]: And we'll see where the government --
23 okay. Okay.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 I tell you what, at this time we're going to take our
2 morning recess. We'll do it until 1100 hours.

3 My calendar tells me is prayer is at 1300, a little
4 after, actually 1307, so our lunch recess will be from 1300 to
5 about 1415. The commission is in recess.

6 [The R.M.C. 803 session recessed at 1043, 23 July 2018.]

7 [The R.M.C. 803 session was called to order at 1110, 23 July
8 2018.]

9 MJ [COL POHL]: The commission is called to order. All
10 accused are still present. Appears to be no changes in
11 counsel.

12 Okay. Next on the order was going to be 360. We're
13 going to move -- we're not going to do that one. We'll go to
14 565R.

15 LDC [MS. BORMANN]: Judge, we're having a hard time
16 hearing you for some reason. I don't know if you're ----

17 MJ [COL POHL]: Okay. Yeah, I'll move my mic up.

18 Commission is called to order, just in case I didn't
19 do that. I said we're going to skip over 360C and we're going
20 to go to 565R.

21 I see nobody standing.

22 MTC [MR. TRIVETT]: Your Honor, that's the one that
23 Mr. Harrington just asked to defer until he could file a

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 supplement.

2 MJ [COL POHL]: I thought that was -- okay, you're right.
3 I'm sorry. If I could read my own writing, I would understand
4 that.

5 Okay. That brings us to 528.

6 LDC [MS. BORMANN]: Judge, between now and the last court
7 date, we issued a witness request on 528 to the government.
8 This is entangled in 524. They declined to provide the
9 witness. We then filed a motion to compel the witness, and
10 the government has not yet responded. Their due date runs, I
11 think, in about ten days.

12 MJ [COL POHL]: Is that your understanding, Government?

13 TC [MR. SWANN]: Yes.

14 MJ [COL POHL]: Ms. Bormann, what is the -- what is your
15 AE number that you're waiting for the response to, your motion
16 to compel?

17 LDC [MS. BORMANN]: It is AE 528F, as in Frank.

18 MJ [COL POHL]: Thank you.

19 561.

20 LDC [MR. CONNELL]: Your Honor, AE 561 is Mr. al Baluchi's
21 motion to compel information regarding non-CIA requests for
22 black site interrogation. The underarching -- excuse me, the
23 overarching theme that runs through this and a couple of other

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19964

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 motions is our position, which we have articulated throughout
2 a number of motions and arguments, that the interrogation of
3 the defendants, whether taking place in a black site or taking
4 place in Guantanamo, was a combined United States Government
5 effort which brought into play all of the elements of the
6 United States Government and was not siloed to the CIA for the
7 black sites and for the FBI and DoD for Guantanamo
8 interrogation.

9 That is our underlying theory of admissibility and
10 suppression. It is a place that there is a slight difference
11 between us and some of the other defendants on. And the
12 government has not acknowledged this as a valid theory, to be
13 sure, but has also said that, in an abundance of caution, it
14 tends to produce some information. So this motion is one of a
15 segment -- a number of motions that implicate that question.

16 And immediately after the attacks of September 11th,
17 2001, the United States Government barriers between law
18 enforcement and intelligence came into focus, often called
19 "the wall." Some blamed the wall; some used the wall as a
20 defense; and some questioned whether a wall ever existed in
21 the first place.

22 Whatever the actual situation there was, and we hope
23 to learn it through discovery, the -- it is clear that in the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 days after 9/11, the administration dismantled whatever wall
2 had existed. According to Special Agent Perkins' testimony,
3 and this is on 7 December 2017 at page 17,927, "CIA employees
4 after 9/11 sat at the FBI on task forces and vice versa. FBI
5 agents sat at the CIA."

6 We know from open-source information that the FBI was
7 involved -- directly involved in numerous interrogations. The
8 FBI -- of relevance to this case.

9 The FBI interrogated Abu Zubaydah, the FBI
10 interrogated Saifullah Paracha, the FBI interrogated Uzair
11 Paracha, and the FBI interrogated Majid Khan, three of those
12 in either CIA or foreign or DoD custody.

13 We know that Director Mueller negotiated with
14 Director of Central Intelligence Tenet for direct access to
15 more detainees beyond the ones they had already had. And we
16 know that from the SSCI report that Director Mueller and
17 Director Tenet reached an agreement whereby the FBI would have
18 direct access to detainees. The SSCI report says that that
19 agreement was never implemented.

20 The cross-pollination between the FBI and the CIA and
21 the DoD is obvious from tidbits in the open record, but is
22 strangely absent from the discovery.

23 Let me give a couple of examples. The first example

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 is the investigation/prosecution of Zacarias Moussaoui. In
2 the interlocutory appeals in the Moussaoui case, after
3 Mr. Moussaoui was denied access to some of the defendants who
4 are sitting in this room, the Fourth Circuit issued a ruling
5 about that denial of access and assumed that the Department of
6 Justice had had no access to Mr. Mohammad, Mr. Binalshibh, and
7 other relevant witnesses.

8 The government had to write a letter to the
9 Fourth Circuit correcting them, saying, Well, your assumption
10 that we in the Department of Justice don't have access to CIA
11 detainees is not actually accurate. And the government had to
12 tell the Fourth Circuit ----

13 MJ [COL POHL]: What was the date of this opinion?

14 LDC [MR. CONNELL]: It was in 2004 ----

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: ---- though I don't know the exact
17 date.

18 MJ [COL POHL]: Prior to '06?

19 LDC [MR. CONNELL]: Prior to '06, yes, sir.

20 MJ [COL POHL]: Go ahead.

21 LDC [MR. CONNELL]: And the government told them that the
22 prosecution team of -- in the Moussaoui case, including the
23 FBI agents, had input into interrogations. Oh, actually, I do

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19967

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 have a cite so we can look it up, which is,
2 United States v. Moussaoui, 382 F.3d 453, Fourth Circuit case
3 from 2004.

4 MJ [COL POHL]: No, I just was ----

5 LDC [MR. CONNELL]: Wanted to make clear.

6 MJ [COL POHL]: ---- before or after 6 September 2006.

7 LDC [MR. CONNELL]: Well before 6 September 2006.

8 MJ [COL POHL]: Go ahead.

9 LDC [MR. CONNELL]: The other example that's already
10 present in this record is the testimony of Special Agent
11 Perkins on 7 December 2017 at pages 17,930 through '31. She
12 testified that she, in particular, sent cables requesting
13 investigation, setting leads to the CIA, and that those were
14 saved in the FBI file.

15 There's a third example -- and clearly, that was
16 during the 2003-2004 time period. That was well before the
17 transition to Guantanamo Bay, because after the transition
18 to Guantanamo -- Special Agent Perkins left, she testified,
19 the 9/11 investigation for a substantial period of time before
20 the transfer to Guantanamo and then returned, excuse me, to
21 the investigation for the interrogation of Mr. al Baluchi and
22 Mr. al Hawsawi.

23 A third example is the 9/11 Commission itself. The

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 9/11 Commission in its published document acknowledges that
2 Chapters 5 and 7 of the 9/11 Commission Report, which was
3 issued obviously well in advance of 2006, in its words relies
4 extensively on detainee reporting. And what we know now -- I
5 don't know what they knew at the time -- but what we know now
6 is that means information extracted from the defendants under
7 torture.

8 In all of these responses to all of these requests,
9 whether the request came from the Moussaoui prosecution team
10 or whether it came from Special Agent Perkins or whether it
11 came from the 9/11 Commission, the answers to their questions
12 came in the form of cables from the CIA.

13 Those cables, as we understand from Special Agent
14 Perkins, were not -- and from the Fourth Circuit, were not
15 directly, "Dear Special Agent Perkins, here's the answer to
16 your question."

17 Instead, they were an ordinary part of the
18 intelligence cycle where information is requested, is
19 gathered, is analyzed, and then additional requests are
20 formatted. That's the ordinary intelligence analysis cycle.
21 And in the brief, we cite the Kids' Zone at the CIA website
22 which explains the intelligence cycle at a level that
23 apparently even kids are supposed to understand.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 The -- what it means in this case, however, is that
2 there was an iterative interrogation cycle.

3 Your Honor has reviewed -- and many of these are
4 declassified -- has reviewed thousands of statements,
5 thousands of cables which were issued by the CIA containing
6 information extracted from the defendants and others.

7 The -- those questions, the interrogation
8 requirements, did not spring from whole cloth but flowed from
9 not just the CIA but also other elements of the United States
10 Government, including the FBI, the Department of Justice line
11 prosecutors.

12 MJ [COL POHL]: Your focus on this particular motion is
13 not the answers necessarily but who asked the questions?

14 LDC [MR. CONNELL]: It's the questions. Yes, sir.

15 MJ [COL POHL]: And the relevance of whether it was the
16 FBI or the CIA is what?

17 LDC [MR. CONNELL]: The relevance is the thing that I
18 began with, which is that it is our position that the -- it is
19 not -- the government would have you analyze this question as
20 the CIA, in the government's view, did what they did to the
21 defendants and then the FBI and DoD did something completely
22 separate, and there's an attenuation between those two things.

23 We reject that view, and it's clear why. Because the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19970

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 FBI was involved and the DoD was involved from the beginning.
2 When the FBI, for example, interrogated Saifullah Paracha, he
3 was in DoD custody.

4 When the -- there will be more on this in the closed
5 session.

6 MJ [COL POHL]: Does this go -- I know I'm referencing
7 another motion altogether, but is this the -- are we talking
8 about the clean team statements in '07?

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

10 MJ [COL POHL]: There's a taint analysis. But there's
11 also your analysis, your theory that it's really one long
12 interrogation; therefore, it falls squarely under the rule as
13 it is.

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

15 MJ [COL POHL]: So this is relevant to that argument?

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

17 MJ [COL POHL]: Got it.

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

19 And just as an example of how this comes into play
20 and why it's important for us to have this information, is
21 that Special Agent Fitzpatrick testified in December that he
22 did not look at the -- excuse me, Fitzgerald. Thank you.
23 Fitzgerald.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19971

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Fitzgerald testified that he did not look at the CIA
2 packet which was made available to him under the 10
3 January 2007 memorandum, which is contained in the record at
4 AE 502XX. And Special Agent Perkins testified that they
5 did -- that she did. But, in fact, that's not a very
6 important distinction, although it seemed important at the
7 time.

8 Once you understand that the interrogation -- the
9 theory that -- well-supported theory that it was one giant
10 interrogation effort by the United States Government, the
11 interrogation cycle becomes important, because I expect
12 Special Agent Fitzgerald to testify that he, when he was
13 involved in the interrogation cycles and read cables as
14 part -- a member of the intelligence community, it doesn't
15 really matter whether he looked between 10 January and 20 --
16 and 19 January 2007, whether he looked at the cables because
17 he had had access as part of the intelligence cycle, including
18 input into the process throughout that entire interrogation
19 period.

20 That's all I have.

21 MJ [COL POHL]: Okay. I have no further questions. Thank
22 you.

23 Any other defense counsel wish to be heard on this?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Ms. Bormann.

2 LDC [MS. BORMANN]: I would -- good morning.

3 MJ [COL POHL]: Good morning.

4 LDC [MS. BORMANN]: I'd just like to point out to you that
5 as far back as 2013 when we originally filed our ex parte
6 theories of defense, you will find in that document, AE 275C,
7 the allegation and the theory of defense that there was no
8 attenuation here. This was a long, singular, unified,
9 coordinated effort by all agencies in the United States
10 Government to interrogate and torture these individuals; and
11 thus, there was no attenuation in this case but, in fact, all
12 of the interrogation should be suppressed.

13 So we agree completely with Mr. al Baluchi. And the
14 FBI involvement and requests to interview in black sites are
15 spot-on evidence of that theory of defense. And unless you
16 have questions, I'm done.

17 MJ [COL POHL]: I have none, Ms. Bormann. Thank you.

18 LDC [MS. BORMANN]: Thank you.

19 MJ [COL POHL]: Anyone else? Apparently not.

20 Trial Counsel. Mr. Ryan.

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

22 Your Honor, this motion 561 is closely intertwined, I
23 would suggest, to the 538 series and specifically to 538C,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Mr. Ali's motion regard to specific items connecting FBI and
2 CIA in the months and years prior to the taking of the
3 so-called clean team statements in January of 2007. It was,
4 at least for our purposes of understanding -- the one long
5 interrogation theory was raised basically in those two
6 motions, 538C, and in this motion as well, 561.

7 We will certainly contest the facts -- factual
8 underpinnings of the motion as well as the legal conclusions
9 the defense is seeking Your Honor to find. However, we do
10 recognize and we did recognize that there is a certain degree
11 of discovery that is properly to be provided as to these
12 particular matters.

13 I believe it was at the last session that we provided
14 to the defense a letter essentially laying out what I just
15 said to you, which is that we will provide discovery. A
16 process is underway. Some items have been turned over
17 already, there is more in the works. I can represent that
18 there's been a great deal of review going on as to this fairly
19 broad subject matter.

20 I expect to be able -- as we put in our pleading in
21 478, I expect to be able to report to Your Honor by our
22 August 15th deadline the close of that discovery process. So
23 what I'm asking Your Honor today is that you allow the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 government to make its argument as to this motion as well as
2 538C, although that's not on the docket right now anyway, at
3 that time or at the next session.

4 MJ [COL POHL]: So what you're telling me, Mr. Ryan, is
5 that you are going to give them some information on 561 that
6 you believe is responsive to the motion?

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

8 MJ [COL POHL]: You're not contesting the fact, or are
9 you, just to give me -- that there was some FBI involvement in
10 the pre-'06 interrogations of the accused?

11 TC [MR. RYAN]: What I'm suggesting, sir, is that the
12 United States Government, using all of its resources, both
13 intel and military and law enforcement, took on the challenge
14 that was before it, beginning -- or certainly as of the
15 September 11th attacks.

16 Now, getting into the fine details of who did what,
17 when, and where, I believe that's something left for the
18 litigation to continue on, sir. But I do concede that there's
19 discovery to be provided.

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

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

22 MJ [COL POHL]: I have no further questions.

23 Go ahead.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Thank you.

2 Sir, we have fallen into this trap before. When the
3 308 litigation came about the ten categories, what the
4 government said was, let us go ahead and produce this material
5 to you, and then you come back and you tell us what we think
6 is missing. Right? You come back and tell us, hey, this is
7 our theory of defense, we really need these.

8 So when we have done that, the government has said,
9 "Oh, no, I'm so sorry. That was approved by the judge and so
10 now it's barred by the Military Commissions Act and you can't
11 have that information anymore."

12 The reason why I'm asking you to go ahead and rule on
13 561 is twofold. The first is to set parameters for the
14 government. We have, in a targeted motion, laid out what we
15 think is important for the theory of defense that we have
16 articulated and relied on in a number of hearings.

17 If you set -- if you order discovery, they have to
18 comply, as opposed to picking and -- read their brief on this
19 topic. Their brief in 561 says, we refuse to provide -- we
20 decline to provide evidence -- much of the evidence that the
21 defense has asked for. And so I'm sure they're going to give
22 us some discovery, they always give us a little bit of
23 discovery, but they are already on record refusing to provide

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 a substantial amount of important discovery on this important
2 theory of defense.

3 MJ [COL POHL]: Have they given you any discovery on this?

4 LDC [MR. CONNELL]: They sent us a letter which identified
5 some small number, I think about a half dozen previous cables,
6 which were responsive to this. So they identified information
7 that they had previously given us and said, yes, it is
8 responsive.

9 MJ [COL POHL]: Were those cables and/or summaries?

10 LDC [MR. CONNELL]: Yeah, those were summaries.

11 MJ [COL POHL]: Okay. Did they identify the author of the
12 cable?

13 LDC [MR. CONNELL]: The author, no.

14 MJ [COL POHL]: The originating agency of the cable ----

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

16 MJ [COL POHL]: ---- in question? So that's not
17 responsive to your --

18 LDC [MR. CONNELL]: Well, it might be responsive, right?
19 We don't know. It's the kind of the problem ----

20 MJ [COL POHL]: No. What I'm saying is, you know, you're
21 right, I've looked at thousands of cables. The cable itself
22 is telling you what the answer is.

23 LDC [MR. CONNELL]: Right.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19977

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: It would not necessarily tell you what
2 the -- the original cable may not say who asked the question.

3 LDC [MR. CONNELL]: That's right. But what we know from
4 Special Agent Perkins is that the original question is
5 documented in the FBI file because she -- when she described
6 this process, she testified that she would prepare -- and she
7 wasn't sure of the name, whether it was called a cable or an
8 electronic communication or something else -- but that she
9 prepared a document which she would send through channels to
10 the CIA and then wait for a cable which gave her answers.

11 So we do know that those questions are documented in
12 FBI files in a way that would help us answer the question in
13 the government's description of who said what to whom in this
14 FBI/CIA cooperation.

15 MJ [COL POHL]: And you're -- and again, this all relates
16 back to the clean team statements?

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

18 MJ [COL POHL]: Would a member of the clean team have to
19 be involved in this, or simply a member of the FBI who's not a
20 member of the clean team?

21 LDC [MR. CONNELL]: The -- it would not have to be a
22 member of the so-called clean team, which I don't adopt that
23 language, but ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19978

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. I'm just using ----

2 LDC [MR. CONNELL]: ---- it does not have to be a person
3 who directly interrogated Mr. al Baluchi. Because one of the
4 things that we know from Special Agent Perkins is that they
5 worked -- and as well as just being part of the government --
6 that they worked on task forces on this. And it may be that
7 Special Agent Fitzgerald and Special Agent Perkins, you know,
8 are the pointy tip of the iceberg on this, and that they're
9 the people who actually go in and do the interrogation along
10 with Special Agent McClain of the Criminal Investigative Task
11 Force. But what we know is that the idea that the United
12 States Government would trust something like that to just
13 these three individuals, you know, unsupported, unanalyzed,
14 and without any chain of command, just belies our collective
15 understanding of how the U.S. Government works.

16 So that -- that's no -- it does not -- the extreme
17 idea that it had to be an actual interrogator in January of
18 2007 does not reflect the appropriate scope of discovery.

19 Now, on the other hand, I recognize that there may be
20 some person who -- for example, the 9/11 Commission -- well,
21 let's say there were FBI who were assigned to the
22 9/11 Commission as liaisons to support them. There may be FBI
23 who -- in the 9/11 submission who asked questions, submitted

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 questions to the -- for the interrogators to the CIA that
2 really have -- that are so distant from this case that --
3 let's say that it was about -- I'm trying to -- let's say it
4 was about the Khobar Towers bombing, right, which is before
5 the government's proposed date for -- that hostilities began,
6 so it's outside the scope of the conspiracy alleged in the
7 charge sheet.

8 It may easily be that there are members of the FBI.
9 So I'm not saying that simply by virtue of being a person
10 involved in the FBI that they would have -- any question that
11 they submitted would necessarily fall within the scope of this
12 discovery.

13 But where essentially there is joint action by the
14 FBI around the interrogation -- or around the investigation of
15 9/11, the same standard that's reflected in 701 itself, the --
16 where there's joint action, then that would be responsive to
17 the discovery request.

18 Does that answer the question?

19 MJ [COL POHL]: Yes, it does. Thank you.

20 LDC [MR. CONNELL]: The second point that I -- that I'm
21 asking you to rule today is to avoid the trap that we have --
22 that I have fallen into in the past. And, you know, fool me
23 once, shame on you; fool me twice, shame on me.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19980

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 The problem of, if the government goes and finds
2 information, and I think that at this point of the record we
3 can expect that there is some responsive information which
4 exists, the -- and the government simply takes the process of
5 submitting -- changes one word and submits it to you, I don't
6 think they'll only change one word. In a motion two motions
7 from now, we're going to talk a lot about how they changed a
8 lot of words. But if they submit it to you and then that
9 comes to us, they will then subsequently claim that we can't
10 seek additional information because it is insulated by the
11 motion to reconsider bar in the Military Commissions Act.

12 So we can avoid that whole trap. We can avoid the
13 question of the constitutionality of the bar and
14 reconsideration, we can avoid all of those questions if you
15 simply, in advance, order the discovery to be produced which
16 is important to us.

17 MJ [COL POHL]: Why can't they simply say we're going to
18 use the 505 process to provide the discovery?

19 LDC [MR. CONNELL]: Oh, they can. After you've ordered
20 it.

21 MJ [COL POHL]: How does that -- how does that ----

22 LDC [MR. CONNELL]: How does that help us? Because then
23 we have an order from you which predates your order approving

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the 505 substitutions. The government's position now is that
2 it is a motion -- and they've had a lot of positions on this,
3 but the motion to reconsideration -- to reconsider is barred
4 because we are asking to compel after you have ruled on the
5 505 substitutions.

6 So what I'm asking you here in 561 is to order them
7 to comply before -- you know, ex ante, before you have it for
8 review, and then if the government chooses to reply by -- to
9 submit information for 505 review, then it's not insulated
10 from a motion to reconsider because it's not a motion to
11 reconsider. It's the motion itself; this motion, 561.
12 There's -- there would already be an order in place
13 ordering them to ----

14 MJ [COL POHL]: I understand that. I'm just trying to
15 figure out how -- if their response is yes, we're going to
16 order -- I mean, because the 308 series is basically that,
17 there's an order saying do this.

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

19 MJ [COL POHL]: And then we said go through the 505
20 process, which I understand, and then you get what you get and
21 then you say, we want more, and then they say, well, it's
22 barred by reconsideration.

23 LDC [MR. CONNELL]: Right.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So why wouldn't the same scenario fall --
2 I don't understand the distinction between why in this case,
3 if they came back and said, okay, Judge, you said to produce
4 this stuff. We are going to produce it, just like you did in
5 the 308 or 397, whatever the order was, we are going to
6 produce it, but we want to do it in 505 summaries. And you
7 say, why wouldn't the same result be that --

8 LDC [MR. CONNELL]: Well, in both of those situations, the
9 result is that you should compel the additional information.
10 Don't get me wrong.

11 MJ [COL POHL]: Right.

12 LDC [MR. CONNELL]: The -- our position on 308, which, you
13 know, I saw your look, we have a well-articulated position on
14 308, and a number of these motions -- in fact, when we get to
15 573, that's a motion that arrives under 308.

16 MJ [COL POHL]: Uh-huh.

17 LDC [MR. CONNELL]: The -- our position is that we can
18 still -- which was the government's position in 2015, that we
19 can still file motions to compel for additional information.

20 All I'm saying is that by ruling now, you take away
21 one of the government's arguments, which you've never ruled in
22 favor of their argument on this. You never ruled against it,
23 either, right? We don't know what your view on this topic is.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 But the government continues to argue that a motion to compel
2 after you have ruled on 505 substitutions is barred, and if
3 you enter an order before, we avoid that whole trap and get
4 to focus itself on what is a motion to compel and what is a
5 motion to reconsider.

6 MJ [COL POHL]: Okay. Got it. I think I got it, but I
7 understand your position.

8 LDC [MR. CONNELL]: Well -- well then, when you say you
9 don't understand my position, it means sometimes I need to
10 keep talking. So ----

11 MJ [COL POHL]: No, I just need to process it about the
12 distinction because I -- you know, and again, the statute is
13 very clear. It says defense cannot request reconsideration.
14 Okay. Okay. It doesn't say the judge can't.

15 LDC [MR. CONNELL]: True.

16 MJ [COL POHL]: And as I've said before, and it doesn't
17 say the defense can't file motions to compel additional
18 information.

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

20 MJ [COL POHL]: Okay. And you've probably seen some of my
21 rulings, is if it amounts to a motion to compel in the caption
22 but the body is a motion for reconsideration, that doesn't
23 make it a motion to compel.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19984

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: I understand your position on that.

2 MJ [COL POHL]: Okay. So that's kind of where we're at
3 and I'm compelled to follow the statute.

4 LDC [MR. CONNELL]: Well, not if it's unconstitutional.

5 MJ [COL POHL]: Did I say it was unconstitutional?

6 LDC [MR. CONNELL]: No, sir. You said -- in fact, you
7 avoided the question of whether it's unconstitutional, because
8 the government said -- took the position to you, well, they
9 can always come back and file a motion to compel, which means
10 it's not unconstitutional. Everybody said okay at the time,
11 but a couple of years down the road, the government's position
12 has gotten a lot harder on this question.

13 MJ [COL POHL]: I understand.

14 LDC [MR. CONNELL]: The -- the reason why -- well then,
15 let's look at the -- let me just mention then the first reason
16 why I think -- go back to the first reason why I think you
17 should go ahead, which is to set the scope for the government.
18 Right now, the government is on its own, making its own
19 discretionary decisions as to not just what is responsive but
20 which parts of our requests they're going to comply with. You
21 can in advance tell them which parts of the order that they
22 should -- of our request they should comply with.

23 If you think our request is too broad, you can be the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 one to narrow it and then the government will exercise its
2 discretion as to what is responsive or not.

3 But they should have an order that they're working
4 from that tells them what you think. We've already seen just
5 today in the debate between the defense and the prosecution on
6 this question, that I described the government's position as
7 abundance of caution; the government described their position
8 of we don't agree with either the legal theory or the facts
9 underlying it, but we're going to produce something; you can
10 tell them what that something should be. And that's the role
11 in advance of discovery production that the military
12 commission should have.

13 MJ [COL POHL]: One moment, please.

14 [Pause.]

15 MJ [COL POHL]: Okay. I have nothing further,
16 Mr. Connell. Thank you.

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

18 If I could conclude then by, since we were just
19 talking about the scope, the appropriate scope that I find --
20 that if -- for the request is found in our discovery request
21 of 21 September 2016, that is Attachment B to 561, and it
22 requests all information and documents regarding input by
23 components of the United States Government other than the CIA

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 and/or non-U.S. agents into questioning of the defendants
2 between 2002 and 2006.

3 In my view, that is what the order -- that's the
4 order that we're asking for, respectfully, and that's the
5 information that the government should produce. Thank you.

6 MJ [COL POHL]: Thank you.

7 Mr. Ryan.

8 TC [MR. RYAN]: [Microphone button not pushed; no audio.]

9 MJ [COL POHL]: Sure. Mr. Nevin.

10 LDC [MR. NEVIN]: I heard in colloquy with Your Honor and
11 counsel, you asked counsel what -- earlier in his argument,
12 you asked what -- how far this would reach. And I heard
13 Mr. Connell make a remark about which persons within the
14 government would be -- this request would apply to. And it
15 sounded to me like it had -- that there was a limitation in it
16 that I -- or that we disagree with.

17 I believe that what Mr. Connell just said to you
18 about the scope of the request is the correct articulation of
19 it.

20 MJ [COL POHL]: In his motion, it's identify any other
21 agency inside or outside of the U.S. Government that sent
22 potential questions to the CIA. So it's -- I don't see much
23 of a limitation on it.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19987

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

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

2 MJ [COL POHL]: Sure. Mr. Ryan.

3 TC [MR. RYAN]: Your Honor, we stand by our position. As
4 far as the order or the proposed relief as written currently,
5 we would submit that Your Honor is best served by letting us
6 do our job and then reporting back to both the parties and
7 Your Honor as to what is out there. But to simply at this
8 point order everything from every agency in the U.S.
9 Government, outside the U.S. Government, might take us down
10 far afield that are quite irrelevant to this proceeding
11 concerning these crimes.

12 MJ [COL POHL]: Okay. Mr. Ryan, in the government's
13 response on 30 April 2018, I'm just trying to make sure I
14 understand this. On page 5, it says, "The Government Will
15 Provide the Defense with Certain Responsive Information to Its
16 21 September Request." And then later on, the next paragraph
17 says you decline to produce any additional information. Now,
18 the request came in in September of 2016. Has it been
19 responded to, what you were going to give, or you're still
20 waiting?

21 TC [MR. RYAN]: Your Honor -- Your Honor, the response
22 initially, based on our understanding of legal theories at
23 play, ultimately was subjected to reconsideration within our

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 own ranks based on, among other things, the contention that --
2 by the defense that they sought to put in evidence -- they
3 sought to introduce evidence, they sought to make legal
4 argument along the lines of, forget this theory of clean team,
5 forget this theory of CIA and then somebody else, it is
6 actually one long run.

7 Again ----

8 MJ [COL POHL]: Well, I don't think their argument is
9 forget the taint argument, it was both arguments.

10 TC [MR. RYAN]: Agreed, sir. Yes. I mean, I -- we fully
11 expect there will be ----

12 MJ [COL POHL]: And this kind of works for both arguments,
13 quite frankly.

14 TC [MR. RYAN]: Say again, sir. I'm sorry.

15 MJ [COL POHL]: I said, the FBI involvement, if any,
16 arguably could work to support both arguments, the one
17 interrogation argument or the clean team argument, the taint
18 argument. But my question really is, is that on 21 September
19 you get the request, of 2016, and you're telling me today is
20 by 15 August of 2018, we will respond to it?

21 TC [MR. RYAN]: What I'm telling you, sir, is that based
22 on the motion that -- in 561, but also in 538, we re-evaluated
23 our position and have agreed to turn over additional

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 discovery. And we have made this known to Your Honor in our
2 filing in 478. It's part of our analysis.

3 MJ [COL POHL]: Okay. So just so I'm clear, is that
4 you're -- all of the discovery that you owe the defense will
5 be given to them by 15 August.

6 TC [MR. RYAN]: That is absolutely my intention, Your
7 Honor. There is ----

8 MJ [COL POHL]: Okay.

9 TC [MR. RYAN]: I will only at this point simply state
10 that, of course, there is always open to us the possibility of
11 having to employ the 505 mechanism. It is my sincere hope
12 that we will not have to do so.

13 MJ [COL POHL]: Yeah. And I don't want to get too much
14 into this because it deals with other exhibits, but it strikes
15 to me that you are still submitting some things, 308 things
16 for 505, although you've labeled it another number, and that
17 was supposed to be in in 30 September '16, whatever it was.

18 I mean, you know, you asked for a trial date,
19 Mr. Ryan, I'm not going to reiterate where we're at, and you
20 deserve a trial date ----

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

22 MJ [COL POHL]: ---- but you've also promised discovery,
23 and I'm just wondering when that promise will be 100 percent

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19990

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 kept.

2 TC [MR. RYAN]: There is ----

3 MJ [COL POHL]: It's more of a comment, it doesn't require
4 a response. But you understand my problem here, is you say
5 yourself we're going to give some more stuff by 15 August
6 2018, and when discovery is completed, I think a trial
7 schedule can be set. But until that's done ----

8 TC [MR. RYAN]: I promise this commission that everything
9 that can possibly be done to finish discovery is being done
10 and then some.

11 As far as missed deadlines, and specifically items
12 you've talked about in regard to 308 that should have been
13 done, we do continue to engage in quality control mechanisms
14 to make sure nothing is left behind. Also, some things get
15 re-evaluated in light of new concerns, new issues raised, new
16 theories raised. We're being responsive to that.

17 Judge, if there's anything I need to get across to
18 you, it is that this prosecution team is bent on getting to
19 the point that Your Honor will confidently issue a trial date
20 that we can all live with. And we are doing everything we can
21 to get you there. And we understand, sir, that you are
22 reluctant to give us that date before we can announce in full
23 confidence that discovery is completed. And we are getting

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 there.

2 MJ [COL POHL]: Okay. Thank you, Mr. Ryan.

3 LDC [MR. CONNELL]: Your Honor, can I just address just
4 those points he just raised?

5 MJ [COL POHL]: Okay. Since I raised the unique points,
6 that's all you can address.

7 LDC [MR. CONNELL]: Yes, sir. The first one is you asked
8 about the government response to the 21 September 2016 request
9 from the defense, which was DR-272-AAA.

10 The government did not respond to that request. So
11 the idea that there was a -- that the government just
12 articulated that there was a response that was re-evaluated
13 later does not seem to be reflected by the record.

14 The second point that I wanted to make about what
15 just came up was, in fact, the government has already
16 addressed a deadline for the production of this particular
17 information. In the government's pleading at 478CC, the
18 government acknowledged the -- that it would be producing
19 information regarding FBI/CIA relationship, I don't know if
20 it's precisely about the intelligence cycle that I just talked
21 about, and promised that it would be done by 2 July 2018.

22 So I just wanted to make those points.

23 MJ [COL POHL]: Thank you. Got it.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: Judge, may I be heard briefly?

2 MJ [COL POHL]: Briefly, but only on the new stuff. So
3 the only thing you can talk about is the suspense dates of
4 additional discovery.

5 LDC [MS. BORMANN]: That's what I'm going to talk about.

6 And it -- for goodness sake, the idea that, on this
7 case, where the government knew going into this prosecution
8 that they would be attempting to introduce statements taken in
9 2007 and 2008 by FBI, the idea that it took them until 2018 to
10 understand that the relationship between the CIA and the FBI
11 is important in that analysis is ludicrous.

12 So with respect to suspense dates, whether it's
13 July 2, 2018, or whether it's August 15, 2018, that's about
14 six years too late.

15 I have nothing else.

16 MJ [COL POHL]: Thank you.

17 That brings us to 568.

18 DC [MR. GLEASON]: Good morning, Your Honor.

19 MJ [COL POHL]: Good morning, Mr. Gleason. How are you
20 doing today?

21 DC [MR. GLEASON]: I'm good, Your Honor. Thank you.

22 MJ [COL POHL]: Good.

23 DC [MR. GLEASON]: Your Honor, AE 568 is a defense motion

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to compel discovery of business records correspondence.

2 In the motion, we ask for an order compelling the
3 government to produce all communications the FBI had had with
4 third parties in soliciting business records correspondence
5 for use against Mr. Hawsawi.

6 This discovery request arose out of the testimony of
7 Special Agent Perkins on 6 December 2017 when during her
8 testimony she revealed that the FBI didn't go directly to the
9 banks in question to have business record correspondence
10 signed; instead, they sent a request to the government of the
11 United Arab Emirates asking them to go to the businesses and
12 have these declarations signed. And then they -- at the end
13 product, they received something back from the United Arab
14 Emirates, which is what they offered in evidence against
15 Mr. Hawsawi.

16 Following her testimony on 10 December 2017, we
17 submitted a request for discovery to the prosecution
18 requesting a copy of all 302s, notes, letters, e-mails, or
19 other material that the U.S. Government sent to the
20 government -- to the United Arab Emirates requesting these
21 business record certifications, and we also requested any
22 correspondence that the U.S. Government received back from
23 that government.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 We raised this discovery motion briefly at the last
2 hearing, Your Honor, at which time the prosecution said they
3 were in the process of providing discovery. Since that time,
4 we've received two letters from the prosecution, one on
5 7 December 2018, referencing us to 12 pages of FBI 302s.
6 After we reviewed those 302s, we realized that they indicate
7 that there's additional correspondence between the FBI and the
8 United Arab Emirates and correspondence back from the United
9 Arab Emirates which has never been provided in discovery.

10 So we sent the prosecution a follow-up discovery
11 request on the 26th of June for this additional information,
12 and we are yet -- we have yet to receive a response from the
13 prosecution.

14 Additionally, on 12 July, we received a letter from
15 the prosecution regarding the declarants. In their response
16 to our motion, the prosecution said they would provide us
17 current contact information for the declarants in these
18 business record declarations so that we can verify their
19 accuracy. The correspondence we just recently received from
20 the prosecution says that they have no contact information for
21 those declarants.

22 MJ [COL POHL]: Who are the declarants? Are they from the
23 United Arab Emirates?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 DC [MR. GLEASON]: They are allegedly bank officials that
2 work for various banks within the United Arab Emirates.

3 MJ [COL POHL]: So the government is going to use that
4 information to lay the foundation for the business records?

5 DC [MR. GLEASON]: That is our belief, sir, based on what
6 they demonstrated with the testimony of Special Agent Perkins
7 in December.

8 MJ [COL POHL]: And they don't know who these people are
9 or where they are?

10 DC [MR. GLEASON]: That's the latest correspondence we
11 have received from the prosecution.

12 MJ [COL POHL]: So to use that declaration by the --
13 they're going to rely on, well, somebody signed it; therefore,
14 it's okay?

15 DC [MR. GLEASON]: I believe that's going to be their
16 argument, Your Honor.

17 MJ [COL POHL]: Okay. Got it. Go ahead.

18 DC [MR. GLEASON]: More than likely, it's going to be
19 here's the declaration, you know you should accept it on face
20 value, and the defense shouldn't have any of the
21 correspondence that the FBI sent to that government or
22 correspondence back to evaluate the accuracy of those
23 declarations.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19996

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Got it. Go ahead.

2 DC [MR. GLEASON]: So what we're asking for, Your Honor,
3 is an order compelling the correspondence that was sent by the
4 FBI to the United Arab Emirates and correspondence that was
5 sent back to the FBI. Those -- that correspondence has never
6 been provided in discovery, and that's what we seek in this
7 motion, sir.

8 MJ [COL POHL]: Okay.

9 DC [MR. GLEASON]: Barring any other questions for that,
10 that's all we have for argument.

11 MJ [COL POHL]: That's all I have. Thank you.

12 DDC [LtCol GLEASON]: Thank you.

13 MJ [COL POHL]: Trial Counsel. Go ahead.

14 TC [MR. RYAN]: Yes, sir. Your Honor, at last session, I
15 reported that I would take this for action in making sure that
16 the items that are necessary to have been provided in
17 discovery have, in fact, been so provided. I am here to
18 report today that we have done so; we have satisfied our
19 discovery obligations.

20 In the time -- actually, not since the last session,
21 prior to the last session, we determined and provided to the
22 defense three separate 302s from the FBI describing the
23 acquisition of certification of UAE financial records. One of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

19997

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 them is two pages in length from 2008; one is six pages in
2 length from 2005; one is four pages in length from 2008.

3 The 302s that we have provided provide the names in
4 addition -- in turn, provide the names of two separate FBI
5 legal attachés involved in the process, six financial
6 institutions located in the United Arab Emirates, and four
7 employees by name of financial institutions of the UAE.

8 In addition, one employee of the Central Bank of the
9 UAE is mentioned in the 302s. That's as to the certification
10 process. Lump that in on top of in the past 302s that were
11 provided in the early stages of this case back in 2014. In
12 2001 -- one of those is a 302 from 2001 consisting of 20
13 pages; one from 2002 of two pages; another one from 2001 of
14 two pages; another one from 2001 of three pages; and another
15 one of -- from 2002 consisting of two pages.

16 What this is, all together, sir, represents the
17 chronology of obtaining all of these records upon which we
18 will be relying in part to prove the guilt of Mr. Hawsawi, and
19 also the process of certifying those records so that, in our
20 view, it will be accepted into evidence by this commission
21 pursuant to the business records exception and also
22 authentication rules of the commission.

23 We have satisfied our discovery obligations in that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 regard to those records. We are aware of nothing to say that
2 any of the records that -- we are unaware of anything out
3 there that would say these records are anything but
4 legitimate. We are aware of nothing to say that persons
5 certifying or helping were not acting properly and were not
6 acting within the course of their official duties.

7 If the defense questions this, if they don't believe
8 the records, if they don't believe the people certifying to
9 it, they can conduct their own investigation. But the 302s
10 that I referenced, sir, represent the FBI's records of the
11 facts that are being discussed in this particular motion.

12 As to issues of communications that may or may not
13 have occurred between FBI personnel and representatives of
14 either a foreign government and/or citizens of a foreign
15 government, they are not turned over as a necessary part of
16 discovery practice, but they are reviewed. And in the
17 reviewing, a determination is made, and an exception would be
18 made is if there's anything in any such communications that
19 would cast doubt on the authenticity of the records themselves
20 or in the process by which the certification of those records
21 or the records was obtained.

22 In other words, sir, if somehow there was something
23 out there that was material to the preparation of the defense

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that would cast doubt on those records coming into evidence,
2 we would provide that.

3 I certify that there is nothing -- no such
4 information here.

5 MJ [COL POHL]: Mr. Ryan, let me ask you a question.

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

7 MJ [COL POHL]: And this may be an issue for down the
8 road, because I think it's a foundational issue. The business
9 records are to come in with -- just -- and again, I don't want
10 you to try your case now, but, you know, the business records
11 attached to them will be some type of an attestation
12 certificate?

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

14 MJ [COL POHL]: Okay, and that is going to be signed by
15 whom?

16 TC [MR. RYAN]: A person in a position of being able to
17 sign that, certifying that such records are the records of
18 regularly conducted business by a bank.

19 MJ [COL POHL]: I know what the rule says. I'm just
20 saying is will that be done by an FBI agent or a bank
21 official?

22 TC [MR. RYAN]: No, sir. By a bank official.

23 MJ [COL POHL]: Okay.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And is that bank official available to be contacted
2 by the defense?

3 TC [MR. RYAN]: It's -- that would be up to them, sir. As
4 far as ----

5 MJ [COL POHL]: But I'm saying -- but what I heard from
6 Mr. Gleason was that you don't have the contact information.

7 TC [MR. RYAN]: Well, what we did, sir -- and that's why I
8 read you the dates in the beginning.

9 MJ [COL POHL]: Yeah.

10 TC [MR. RYAN]: We are talking about records that were
11 obtained here over a long period of time. What we did was go
12 back to see who were the persons that are signing the
13 attestations, do they have any independent and significant
14 relationship with the FBI to the extent that we could -- we
15 should, under discovery rules, be handing out that kind of
16 contact information.

17 What we determined, and what we put in our
18 communication to the defense, is we have no information, no
19 relationship, no independent facts about who such person is,
20 where they are, whether they still work for that bank beyond
21 what is contained in the attestation itself.

22 MJ [COL POHL]: But -- and again, I -- this may be
23 premature, but -- so you say the person signed the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20001

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 attestations doesn't have any contact at all with the FBI or
2 the United States Government. He's just a bank official in a
3 foreign country; is that your position?

4 TC [MR. RYAN]: And every case is different, sir. But
5 when I'm talking about record A in year 2008 ----

6 MJ [COL POHL]: Sure.

7 TC [MR. RYAN]: ---- when we wanted it certified, the FBI
8 in conjunction with either Department of Justice officials or
9 State Department officials do their normal process of
10 approaching said institution saying these records need to be
11 certified for purposes of U.S. law, and they are given to us
12 in a certified fashion.

13 MJ [COL POHL]: Some bank official signs it?

14 TC [MR. RYAN]: Correct, sir.

15 MJ [COL POHL]: Got it. Okay. Understand.

16 TC [MR. RYAN]: That's all I have, sir.

17 MJ [COL POHL]: Nothing further.

18 Mr. Gleason, anything further?

19 DC [MR. GLEASON]: Your Honor, I have no additional
20 argument. Thank you.

21 MJ [COL POHL]: Thank you.

22 That brings us to 573. Mr. Connell.

23 Go ahead.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20002

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Thank you. Your Honor, AE 573 is
2 Mr. al Baluchi's motion to reconsider your judicially approved
3 summary, MEA-STA-1540, in light of a declassified
4 interrogation cable.

5 This, in my view, is the first and only motion to
6 reconsider arising out of the 308 series that I have filed,
7 but it is a motion to reconsider. And the reason is, sir, you
8 were given information that turned out not to be true in the
9 process of the 505.

10 The story begins on 22 March 2016, when the
11 government filed 308I. 308I proposed substitutions for cables
12 which purport to summarize Mr. al Baluchi's statements made
13 during black sites. We objected three times to those -- to
14 that 308I series, in 308L, in 308Z, and 308NN.

15 Now, if I understand the -- your order and the 505
16 process, which my information is superficial, but in that
17 process, the government provided you red lines of allegedly
18 classified information that they wished to withhold.

19 The government told you, according to your order,
20 that a declaration invoked the classified information
21 privilege because allegedly classified information that the
22 government wanted to redact would cause damage of some type to
23 the U.S. national security.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And the government told you that these redactions
2 were classified for two reasons: First, they wanted to hide
3 evidence of the date of the interrogation, the date of the
4 cable, and U.S. Government personnel involvement. And they
5 told you that because you only have the power to authorize
6 withholding of classified information under 10 U.S.C. 949p-4.

7 You found in your order that the discovery of the
8 hidden information was prohibited by national security
9 declarations and that the substitution would provide the
10 defense with substantially the same ability to make a defense.

11 None of what I just recited turned out to be
12 accurate. It turned out that, from dates of the
13 interrogation, from dates of the cable, from U.S. Government
14 involvement, and from the actual text of the cable, none of
15 that presented a national -- a threat to national security; it
16 did not present a similar ability to present a defense; and
17 from -- most important, from a statutory and executive order
18 position, the dates -- the U.S. Government involvement and the
19 more accurate statement of what Mr. al Baluchi said, did not
20 actually turn out to be classified and could not be withheld
21 under 949p-4.

22 Now, how do we know all of that? The -- one
23 substitution that the government provided as MEA-STA-1540 is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20004

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Attachment B to 573. On 8 May 2008, reporter Jason Leopold
2 released a four-page document with identical language that he
3 had obtained through the Freedom of Information Act. That is
4 found in the record at AE 573 Attachment C.

5 The difference between -- or one -- there are
6 actually a lot of differences, but part of the delta between
7 the information provided to counsel who has top security
8 clearances and the information which is provided to every
9 member of the public, clearance or none, includes the
10 addressee of the cable, it includes the date of interrogation,
11 it includes the date of the cable, and it -- the involvement
12 of United States Government personnel in, I quote here,
13 actively planning the interrogation of Mr. al Baluchi by other
14 authorities, non-CIA authorities.

15 Now, withholding this information -- the reason why I
16 asked for a motion to reconsider and the reason why I think
17 this so squarely presents the issue of the application and
18 constitutionality of the bar on reconsideration is that
19 withholding this information was actually beyond the authority
20 of the military commission because it was not classified.

21 It also demonstrates the conclusion that the -- we
22 would have substantially the same ability to make a defense
23 was unjustified. First ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20005

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You say it was not classified?

2 LDC [MR. CONNELL]: That's right. It was not.

3 MJ [COL POHL]: At the time I saw it, it was not
4 classified?

5 LDC [MR. CONNELL]: The information, the dates, that
6 specific information was not classified at the same you saw --
7 time you saw it. The way that we know that is that classified
8 information is not released under Freedom of Information Act.

9 MJ [COL POHL]: Well, no, I understand that. And I do
10 have questions about this, but -- I got you.

11 LDC [MR. CONNELL]: I'm not saying, sir, that the document
12 was not classified, but I am saying that the particular
13 information, which is not classified under -- which is
14 released under FOIA was not classified.

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

16 LDC [MR. CONNELL]: Thank you.

17 First, the date of the interrogation, 2 May 2003, has
18 allowed us to identify -- the defense, now that we have that
19 from Freedom of Information Act, to identify two critical
20 witnesses and are, in fact, important to elements of -- that
21 we'll argue this week in the 534G issue and will support our
22 arguments for various production. There will be more about
23 that in closed session.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20006

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 With -- along -- pairing this information, the 2 May
2 2003 date on that cable released under the Freedom of
3 Information Act, allows us to pair it with the SSCI report and
4 allows us to identify the location in which the interrogation
5 took place, unclassified, open-source information, as in
6 Karachi, Pakistan.

7 Second, the date of the cable -- which is the same
8 sort of information which is denied to us in other ways.
9 Second, the date of the cable allowed us to identify flaws in
10 the second RDI index, which will eventually be debated in the
11 534 series, and it allowed us a cross-reference to the SSCI
12 report, page 243, footnote 1,378, that the U.S. Government
13 personnel who were involved were CIA officers.

14 Third, the addressee, which is -- was denied to the
15 defense but it was released under Freedom of Information Act,
16 is important to the AE 538 series that counsel for the
17 government just referred to and will allow us to identify the
18 CIA as the recipient of information and will be important in
19 our examination of former Alec Station director Michael
20 Scheuer, who is on the 502 witness list.

21 Fourth, the U.S. Government personnel language
22 released under the Freedom of Information Act but denied in
23 the substitution allows us to investigate the, quote, active

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20007

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 planning of the CIA with witnesses who have already spoken to
2 us and others who we expect to speak to us once the
3 government's investigative prohibition at issue in the 524
4 series is lifted.

5 Just this one document, just these five pieces of
6 information in one additional document are powerful support
7 for our argument regarding the interagency interrogation
8 cycle, which we believe will ultimately support the
9 suppression of the January 2007 statement.

10 Now, one other thing. It is not simply information
11 which was withheld from the substitution which was released to
12 the public. The text of the cable as it was released to the
13 public contains important contextual clues which will support
14 our arguments that were excluded or affirmatively changed in
15 the substitution itself.

16 I'll give you an example. The substitution says,
17 "Subject claims X is still true." But the cable itself
18 says -- the thing that was started for before the government
19 messed with it says that "the subject still claims that X is
20 true." That's super important because it changes the meaning
21 of the sentence and distorts -- in the substituted version,
22 distorts the relationship of this interrogation to other
23 interrogations. Because if Mr. al Baluchi still claims that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

2008

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 something is true, that means he claimed it before and he is
2 sticking to his position.

3 On the other hand, taking that "still" and moving it
4 over to whether the fact X is still true changes the context,
5 changes the relationship of the series of interrogations over
6 years and years and years that Mr. al Baluchi was subjected
7 to.

8 Now, the substitution also strips out the role of the
9 questioners. It has been observed in this courtroom before
10 that these STA cables make all the information look
11 volunteered. What we know now, because of the release of this
12 document under the Freedom of Information Act, is that the
13 original cables included context clues as to who the
14 questioners were, what sort of thing they asked, and who else
15 those same questioners had interrogated before.

16 The cable itself, as released under the Freedom of
17 Information Act, includes some questions which were asked, and
18 specifically it includes questions which were based on outside
19 information, not information that they had obtained from
20 Mr. al Baluchi but the cross-pollination, the cross-reference
21 of information between different sources. This is important
22 because of our claim that there was cooperation between the
23 CIA, the FBI, the DoD, and foreign governments.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20009

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 In reality, the date 2 May 2003 lets us know that
2 this interrogation fell within the scramble of information
3 between the FBI, DoD, and CIA documented in the SSCI report
4 around the interrogation -- the nearly contemporaneous
5 interrogations of Mr. Mohammad; Mr. Khan; Mr. Paracha -- the
6 elder Paracha, Saifullah -- no, I'm sorry, younger Paracha,
7 Uzair; and Mr. al Baluchi.

8 The cable as released to the public but not the
9 summary, shows the full -- the impact of the interagency
10 cooperation and the intelligence cycle.

11 For example, the cable but not the summary
12 specifically refers to the previous interrogation of Majid
13 Khan and how they took information from Majid Khan and used it
14 in the interrogation of Mr. al Baluchi.

15 It is -- demonstrates a link which we have never had
16 in the chain of torture-derived evidence which began with
17 Abu Zubaydah, went to Mr. Nashiri, to Mr. Binalshibh, to
18 Mr. Mohammad, to Mr. Khan, and finally to Mr. al Baluchi and
19 Mr. Bin'Attash.

20 You, sir, did not get accurate information at the
21 time that you authorized this substitution, and you should
22 reconsider your decision, whether you consider that to be
23 sua sponte or at defense request, to address the fact that the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 information that you received at the time was not as fulsome
2 and accurate as it needed to be for you to make fulsome and
3 accurate decisions.

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

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Any other defense counsel wish to be heard
7 on this? Apparently not.

8 Trial Counsel?

9 TC [MR. GROHARING]: Good afternoon, Your Honor.

10 MJ [COL POHL]: Good afternoon. Good morning --
11 afternoon. Yeah. You're right. Go ahead.

12 TC [MR. GROHARING]: I think either is appropriate.

13 So, Judge, the first point I want to make is you --
14 at the time this motion was filed, you absolutely did receive
15 accurate information. I think the point that's missed by
16 counsel is 308I was filed in 22 March of 2016. A subsequent
17 determination made related to a FOIA release doesn't impact
18 the information that was presented to the commission 18 months
19 prior to that ultimate release.

20 Likewise, it doesn't impact the sufficiency of the
21 summary that you approved to be provided to the defense
22 after ----

23 MJ [COL POHL]: What changed between March of '16 and the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 FOIA request in '18?

2 TC [MR. GROHARING]: Well, with respect to the dates in
3 particular, as the commission is aware, the sensitivity of
4 certain date information had -- the original classification
5 authority had taken a different position based on a lot of
6 different litigation in those ensuing months. So that's one
7 example of something ----

8 MJ [COL POHL]: All of the summaries that used the
9 three-semester ----

10 TC [MR. GROHARING]: Right.

11 MJ [COL POHL]: ---- system because that -- I was told
12 that that was critical to protect national security no longer
13 is critical. So all those can be changed to regular dates?

14 TC [MR. GROHARING]: Well, and it wouldn't require a
15 change in the summary, Your Honor. And as we've noted before,
16 we have provided indices to the defense teams with respect to
17 the dates of the discovery that we've provided them, so
18 now ----

19 MJ [COL POHL]: Why should I -- why should I sit here now
20 and have any confidence that the 2016 declarations were
21 accurate even at the time if, 18 months later a FOIA
22 request -- I mean, I spent a lot of time on this, but a lot of
23 it is based on the government's representations, okay?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20012

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 TC [MR. GROHARING]: Right.

2 MJ [COL POHL]: And now, apparently, the damage to
3 national security in 2016 has gone away in 2018. So I know
4 this one isn't -- and forget the reconsideration issue. I
5 understand what the law is on that, so let's move that aside.
6 I don't want to hear about that.

7 But now I got this in 2018. How do I know all of the
8 other summaries don't have the same problem?

9 TC [MR. GROHARING]: Whatever that problem that presents,
10 though, has been cured. We've now given the defense a new
11 index that either has a precise date -- 2 May, in this
12 instance -- or more information, in some instances it's a
13 month and year.

14 That same index lists all the information
15 chronologically ----

16 LDC [MR. CONNELL]: Your Honor, I object. Counsel just
17 misrepresented a fact that we can't rebut because it's
18 classified.

19 MJ [COL POHL]: No, you will get your chance to be heard,
20 Mr. Connell. I mean, go ahead.

21 TC [MR. GROHARING]: Before I was interrupted, what I was
22 saying is that that index also lists all of the discovery
23 chronologically. So it's not as if this date has been blurred

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 where the defense is not able to appreciate ----

2 MJ [COL POHL]: What about the rest of the summary,
3 though? What I'm saying is apparently all of this information
4 in this particular summary that I said that you -- that I was
5 told would damage national security apparently doesn't damage
6 national security at all in this particular case, right?
7 That's what the FOIA thing is telling me?

8 TC [MR. GROHARING]: That's what that one particular
9 FOIA-released document ----

10 MJ [COL POHL]: Okay. So why should I have faith that the
11 thousands of other ones I looked at don't have the same
12 problem?

13 TC [MR. GROHARING]: I think the question, sir, is is the
14 summary an adequate substitute of the original classified
15 information. We gave you an original classified document ----

16 MJ [COL POHL]: Well, let me ask you this -- no, I
17 understand what you're saying, and I know I'm interrupting
18 you, Mr. Groharing, because I'm concerned about this issue --
19 I'm concerned about all of the issues, but --

20 Okay, whether the summary puts them in the same
21 position they would have been from the original is one issue
22 over here. But the initial step is that the information is
23 classified. If it's not classified, I don't do summaries,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20014

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 right?

2 So in this case, apparently the information was
3 classified in '16 but in '18 it no longer is. So before we
4 get to the adequacy of the summary, don't we have to say that
5 we have to address the accuracy of if it's classified or not?
6 Because if it's not classified, I don't do summaries. Right?

7 TC [MR. GROHARING]: Correct. But, I mean, one example of
8 information that was subsequently declassified in a subsequent
9 release doesn't upset anything that's been done prior in this
10 litigation.

11 The bottom line is still does the defense have what
12 they need to do in this case? Does the substitute that you
13 approved put them in a substantially similar position as
14 access to the original classified information would have, or
15 does?

16 MJ [COL POHL]: Should I be concerned that the original
17 documents that I saw were not really properly classified --
18 or ----

19 TC [MR. GROHARING]: No.

20 MJ [COL POHL]: ---- if looked at again could be
21 declassified?

22 TC [MR. GROHARING]: No, I don't believe you should be
23 concerned, Your Honor, because you've already looked at the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20015

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 documents in great detail, and were convinced that the
2 summaries that the defense provided put them in substantially
3 similar position as the original classified information.

4 So even if there's information that -- additional
5 information in the original document that now has been
6 declassified, it doesn't follow that the defense must have
7 that to put them in a substantially similar position.

8 You already made that finding and there's no reason
9 to think that you weren't acting appropriately when you looked
10 at all of the information back in 2016 when this was filed and
11 assessed that the summary puts the defense in substantially
12 similar position as the original classified information.

13 So even if there was information that subsequently
14 has been declassified that was classified when you saw it in
15 2016, it doesn't impact your ultimate decision with respect to
16 all of those summaries.

17 MJ [COL POHL]: Okay. I understand your position. Go
18 ahead.

19 TC [MR. GROHARING]: So I talked a little bit about the
20 date before. To the extent that the defense did not have that
21 precise date before, they have it now.

22 So whatever use they want to make of it, they
23 certainly can.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20016

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: On every summary?

2 TC [MR. GROHARING]: I apologize, Your Honor?

3 MJ [COL POHL]: On every summary?

4 TC [MR. GROHARING]: They have either a precise date or a
5 month and year of every summary listed chronologically on the
6 index.

7 MJ [COL POHL]: And again, I was told that giving them the
8 exact date would damage national security. Now apparently
9 it's no longer damaging national security.

10 TC [MR. GROHARING]: Right. And that's the guidance that
11 we provided to the commission in February of this year with
12 respect to that ----

13 MJ [COL POHL]: No, I understand that, but I'm just ----

14 TC [MR. GROHARING]: And ----

15 MJ [COL POHL]: Go ahead.

16 TC [MR. GROHARING]: And, Your Honor, just to finish that
17 point, though, that's the result of a lot of litigation beyond
18 this courtroom in Guantanamo Bay, a lot of different
19 litigation surrounding the CIA RDI program. That's a
20 culmination of a lot of that litigation where the OCA took a
21 position that the dates guidance would change, and that
22 position wasn't taken until this year. So the classification
23 of information does change and the government is encouraged to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20017

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 declassify information to the greatest extent possible.

2 MJ [COL POHL]: Mr. Groharing, you know, I understand that
3 there are people involved in this. But one day, it's a damage
4 to national security, it could be grave depending on what the
5 level of it is, and the next day, no, it's not. That's what
6 you're telling me, is that, well, we looked at it again and we
7 decided it's not going to damage national security.

8 In 2016, at least ten years after -- and maybe even
9 longer for the cable being written, the exact dates was --
10 releasing that to the defense was going to damage
11 national security; and now in '18 apparently it's not, two
12 years later. Why should I have any faith in these
13 determinations, then, if they can change like that?

14 TC [MR. GROHARING]: Well ----

15 MJ [COL POHL]: I understand it's not my role to -- I
16 cannot second-guess classification decisions, but if they can
17 change on -- when a new person looks at it or we have a
18 different case coming in, isn't it supposed to be more
19 rigorous than that; it either damages national security or it
20 doesn't?

21 TC [MR. GROHARING]: I think that's right, Your Honor.
22 However, things happen to affect classification decisions.
23 Lots of things happen that could impact whether or not it's

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20018

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 important to still protect information in a particular way.

2 We obviously don't control decisions on what's
3 classified and what's not classified.

4 MJ [COL POHL]: Okay. Let me ask you another question.

5 This FOIA request came in. Was it just for this
6 particular document?

7 TC [MR. GROHARING]: No, Your Honor. My understanding, it
8 was -- there were a number of different documents, many
9 unrelated to this case, that were the subject to the FOIA
10 request.

11 MJ [COL POHL]: Okay. Were they all released with
12 redactions like this one was?

13 TC [MR. GROHARING]: They all were released with a varying
14 amount of information redacted or unredacted in the documents.
15 This is the one that was brought for Mr. Connell ----

16 MJ [COL POHL]: No, I understand why this one is. Okay.

17 TC [MR. GROHARING]: We're not part -- obviously, we're
18 not part of that ----

19 MJ [COL POHL]: No, I just -- okay, I got it. Go ahead,
20 Mr. Groharing.

21 TC [MR. GROHARING]: So just finishing up on the date
22 issue, even before the date of this particular cable was
23 declassified, defense was already in a position to know where

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20019

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the interview took place and to put that into context with
2 their other discovery. The index that I talked about lists
3 the location of the interviews on it. So they're armed with
4 that information with respect to each Bates-numbered piece of
5 discovery that we provided them and they have it in
6 chronological order.

7 So they may now know, you know, an additional -- a
8 little more specificity with respect to this precise date, but
9 they were well armed to make whatever arguments they wanted to
10 make about the timing of this particular interview in relation
11 to all of the other events in this case.

12 Mr. Connell referenced the significance of placement
13 of the word "still" in the summary and suggested some
14 nefarious purpose with the government moving the word "still,"
15 that we were -- and the motion suggests we were trying to
16 frame the summary as stand-alone. And again, I want to go
17 back to the discovery index that I've talked about, and I
18 would focus your attention on page 9 through 11 of our brief
19 where we talk about this. But -- and you'll see, this was the
20 third time that Mr. Ali had talked about the events in
21 question.

22 So this is -- in the context, he's being questioned
23 about an attack on the United States consulate in Pakistan.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And so if you look at the index that we provided the
2 defense -- and the first is, you know, Bates number
3 MEA-STA-00001705 -- and again, these are all in chronological
4 order. So the defense has this. They know that this
5 statement was made before the next statement on the index and
6 so on.

7 And so first, you have a statement where Mr. Ali
8 stated he was planning to attack the United States consulate
9 in Karachi using a helicopter from a particular company, and
10 said other things about his efforts to secure explosives to
11 conduct that attack on the United States.

12 Next document down, Bates number MEA-STA-00001537,
13 Ammar provided additional details on al Qaeda plans to attack
14 the United States consulate in Karachi. Said he had counted
15 government vehicles in an attempt to figure out how many U.S.
16 officers were actually working within the consulate compound.

17 Next document, MEA-STA-0001516, more comments. So
18 these -- all about the same attack that he was planning at the
19 time of his capture. So these three statements are all on the
20 index above the statement in question.

21 So it's illogical that an argument that somehow the
22 government is trying to obscure something by moving a -- the
23 word "still" within the summary, it's just -- it doesn't make

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 any sense. It's certainly not something that we have done.
2 And we have armed them to make whatever arguments that they
3 want to make with these particular documents.

4 So with respect to removing information from --
5 statements made by other detainees or other information with
6 respect to prompts or questions in summaries, that was our
7 practice and that's done to protect sources and methods. And
8 that's, in most cases, classified information. This specific
9 prompt was declassified in the FOIA release but was considered
10 classified at the time that we provided the proposed summary
11 to the military judge.

12 I don't think we have ever -- the United States has
13 ever suggested that during an interrogation or debriefing that
14 agents just walked in a room and Ali just -- or Mr. Ali just
15 talked about whatever was on his mind. I mean, it was an
16 interrogation by definition, questions were asked and
17 answered.

18 And so the removal of particular questions or
19 information is not done to disguise the nature of the
20 interaction with Mr. Ali, but it's done for very legitimate
21 purposes in these summaries.

22 Another point that Mr. Connell made was in reference
23 to conditions of confinement that are -- that are included in

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20022

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 these materials. That's something that the United States has
2 included in every instance that it's found in any document,
3 which the military judge well knows from your extensive review
4 of original CIA information and proposed summaries for the
5 defense.

6 And so the other point I would make on that as far as
7 Mr. Connell's comments on the significance of FBI input and
8 otherwise, I think when the United States makes its ultimate
9 disclosure with respect to that information, the United
10 States -- the defense will be well armed to use that however
11 they see fit, regardless of whether or not we agree with their
12 theories of proposed relief. But to the extent it's been
13 excluded from these summaries in particular, the disclosures
14 the United States will make and the concessions we will make
15 will arm them with making whatever arguments they need to
16 make.

17 So absent additional questions, Your Honor, I don't
18 have anything further.

19 MJ [COL POHL]: I have none. Thank you.

20 Mr. Connell.

21 LDC [MR. CONNELL]: So the government just made a number
22 of representations from classified documents. So I'm just
23 putting everybody on notice, if you have to hit the button,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 hit the button, because I'm going to address the exact same
2 points that the government just addressed.

3 TC [MR. GROHARING]: Just to be clear, I didn't make any
4 references to any classified documents.

5 LDC [MR. CONNELL]: You mentioned an RDI index. He just
6 laid out the order of events in the second RDI index.

7 TC [MR. GROHARING]: Well, I wouldn't ----

8 MJ [COL POHL]: Is the RDI index part of the record?

9 LDC [MR. CONNELL]: Yes, sir. It is at 534 (AAA Sup)
10 Attachment F, marked ----

11 MJ [COL POHL]: One moment, please.

12 LDC [MR. CONNELL]: You won't find it on that computer,
13 sir. It's not on there.

14 MJ [COL POHL]: I'll find a placeholder, though.

15 Mr. Connell, I understand your position, but I want
16 to look at this before we discuss it.

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

18 MJ [COL POHL]: If you can do it in a totally unclassified
19 manner, you can do it now. I'm just not sure where we're at
20 because I don't have that document sitting in front of me and
21 I'd have to marry that up with the thing. And rather than --
22 I don't like pushing buttons.

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

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20024

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: That's why I objected at the time, is
3 that the representation from the government about the contents
4 of the RDI index seemed to me to ----

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: I mean, the government knows what's
7 classified and what's not. And so if they're saying it's not
8 classified, it's ----

9 MJ [COL POHL]: Here's what we're going to do: I'm going
10 to break for lunch and we're going to reconvene at 1400 rather
11 than 1415. During the break, discuss it with Mr. Groharing
12 and see where we're at with this issue, at the same time, I
13 will see what the document itself says. And then if we can
14 resolve it after lunch in an unclassified manner, we will; if
15 we can't, then we will address it in a closed session.

16 Even if the government were to refer to classified
17 information which they shouldn't have and it went over the
18 thing, that does not mean that we're going to continue with
19 that practice going forward.

20 I understand your point, Mr. Connell, but
21 Mr. Groharing is not a declassification authority.

22 LDC [MR. CONNELL]: I understand your ruling, sir.

23 MJ [COL POHL]: And it will -- we can address it.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Commission is in recess until 1400 hours.

2 [The R.M.C. 803 session recessed at 1236, 23 July 2018.]

3 [The R.M.C. 803 session was called to order at 1405, 23 July
4 2018.]

5 MJ [COL POHL]: The commission is called to order.

6 General Martins, any changes in the government's team
7 since before lunch.

8 CP [BG MARTINS]: No, Your Honor.

9 MJ [COL POHL]: Mr. Nevin?

10 LDC [MR. NEVIN]: No changes.

11 MJ [COL POHL]: Ms. Bormann?

12 LDC [MS. BORMANN]: No changes, Judge.

13 MJ [COL POHL]: Mr. Harrington?

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

15 MJ [COL POHL]: Mr. Connell?

16 LDC [MR. CONNELL]: No change, sir.

17 MJ [COL POHL]: I'm sorry, that was a no change?

18 LDC [MR. CONNELL]: No change.

19 MJ [COL POHL]: Okay. And, Mr. Ruiz, except for your
20 client, are there any changes?

21 LDC [MR. RUIZ]: No, Judge, except for Mr. al Hawsawi, the
22 same team.

23 MJ [COL POHL]: And you represent on behalf of your client

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that he voluntarily chose not to attend the afternoon session?

2 LDC [MR. RUIZ]: Yes, I can.

3 MJ [COL POHL]: You talked to him about it?

4 LDC [MR. RUIZ]: I did.

5 MJ [COL POHL]: And he understood that he could stay if he
6 wants to but chose to leave?

7 LDC [MR. RUIZ]: He did.

8 MJ [COL POHL]: Thank you. I find that Mr. Hawsawi's
9 absence was knowing and voluntarily made.

10 Okay. Back to where we ended up with.

11 Just to put on the record, at the break I was able to
12 review the index so I know what it entails.

13 Mr. Connell.

14 LDC [MR. CONNELL]: Before we return to 573, I have
15 another question about 555, which you earlier directed me to
16 file.

17 We are trying to file it right now, but I think the
18 proper marking for the two imagery -- two imagery sets that
19 you directed me to file on SIPR is SECRET pending
20 classification review. Are we approved? Is that okay?

21 MJ [COL POHL]: Put down SECRET//NOFORN.

22 LDC [MR. CONNELL]: SECRET//NOFORN on both of them.

23 MJ [COL POHL]: Yeah. And if we need to change it after

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

20027

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that -- because there really is no such thing as ----

2 LDC [MR. CONNELL]: There is, sir. There is a pending
3 classification review on ----

4 MJ [COL POHL]: Yeah, okay. But I'm saying, put down
5 SECRET//NOFORN on that. Okay. While we're 955 -- or 555 ----

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

7 MJ [COL POHL]: I have your motion sitting in front of
8 me ----

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

10 MJ [COL POHL]: ---- V, all two inches of it.

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

12 MJ [COL POHL]: And what you've done here, Mr. Connell, is
13 you've labeled a combined position.

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

15 MJ [COL POHL]: And it's a response, a reply, and another
16 reply, right?

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

18 MJ [COL POHL]: Actually, it's three replies and one
19 response.

20 LDC [MR. CONNELL]: I would say two and one, but it
21 doesn't really matter.

22 MJ [COL POHL]: Well, it says replies to the government's
23 response. Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Because they had filed a combined
2 response, that's what's probably confusing. We filed a
3 combined response to their combined pleading.

4 MJ [COL POHL]: Okay. And you indicated that, although
5 the briefing cycle on the response is not complete, the other
6 two are replies, and therefore are complete.

7 LDC [MR. CONNELL]: So yes. And I can be more specific.
8 555P, which is our response, we filed a response to 555P.
9 According to your order in 5550, briefing is complete, because
10 you said no reply would be necessary. Government, I
11 understand, wants to file a reply. That's between you and
12 them.

13 With respect to 555R, which is -- this is our reply,
14 in 555R the briefing cycle is complete.

15 MJ [COL POHL]: Okay. So I just want to make it clear
16 that, therefore, to resolve your witness request issue, you
17 say that briefing cycle is complete?

18 LDC [MR. CONNELL]: Yes, sir. The briefing cycle is
19 complete as soon as we get this filed.

20 MJ [COL POHL]: So ----

21 TC [MR. SWANN]: Before ----

22 MJ [COL POHL]: ---- what is the purpose of all these
23 attachments to 555V, and may be renumbered, except to support

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 a witness request?

2 LDC [MR. CONNELL]: Also to ----

3 MJ [COL POHL]: Not also.

4 LDC [MR. CONNELL]: I'm sorry.

5 MJ [COL POHL]: What I'm saying is you're saying the
6 government shouldn't have an opportunity to reply or respond
7 to 555V, right?

8 LDC [MR. CONNELL]: No, sir, I'm not. That's not at all
9 what I'm saying.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: I'm saying that the witness portion of
12 it, 555R, is -- the briefing is complete.

13 MJ [COL POHL]: Okay. And so for the witness request
14 issue, just so I'm clear ----

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: ---- is all these attachments.

17 LDC [MR. CONNELL]: Well, it's really -- it's -- when you
18 hold, say, all of these attachments, almost all of them are
19 the internal coordination e-mails for the Coast Guard because
20 there was a claim that there was no coordination between the
21 Coast Guard and Guantanamo.

22 MJ [COL POHL]: And these were included in a reply?

23 LDC [MR. CONNELL]: Yes. That's when we got them.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Yeah. No, no, what I'm just saying is
2 when -- and again, I don't mean to be hung up ----

3 LDC [MR. CONNELL]: Right, what you mean is ----

4 MJ [COL POHL]: ---- but I'm holding two pieces of paper
5 up. What I'm saying, you've combined replies and response in
6 one thing ----

7 LDC [MR. CONNELL]: Well, because the government combined
8 their motion ----

9 MJ [COL POHL]: I got it, I got it.

10 LDC [MR. CONNELL]: ---- in the response. We just did the
11 same thing.

12 MJ [COL POHL]: Okay, okay. I'm not excusing their thing,
13 but now I've got to glean what's a response and what's a reply
14 to determine the briefing cycle, and then you got this stack
15 of stuff that I holding in my hand that is only ----

16 LDC [MR. CONNELL]: Do you want them separated, sir?

17 MJ [COL POHL]: ---- relevant -- not relevant at all to
18 the witness production issue, therefore I can ignore it?

19 LDC [MR. CONNELL]: No, sir, I'm not saying that at all.
20 I'm saying -- what I will say, however, is if you want two
21 pleadings, all you have to say is, Mr. Connell, may I have two
22 pleadings, and then ----

23 MJ [COL POHL]: I know, I know ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: ---- you know, we can file two
2 pleadings.

3 MJ [COL POHL]: I could have done that but I didn't. I'm
4 just trying to move this along. What I'm saying is on your
5 witness production issue, okay, do you want me to consider
6 your attachments to 555V?

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: Okay. Mr. Swann, you're standing there
9 for some reason, I suspect.

10 TC [MR. SWANN]: And I'm a process guy, too. So 555R is
11 done. That was a request for nine witnesses, thereabouts.

12 When he -- when he submitted his, you know, his most
13 recent filing that hasn't been accepted, what he did is he
14 added a host of other witnesses to that list. He was talking
15 this morning about a 14-day requirement. That's today. He's
16 going to get a response from us that says what it says.

17 At that point in time, process-wise -- and he has to
18 file a motion to compel those other witnesses, which starts a
19 new briefing cycle for those that weren't on that first
20 request being addressed by 555R.

21 So the briefing cycle is not over with.

22 MJ [COL POHL]: Mr. Connell.

23 LDC [MR. CONNELL]: I agree with respect to the new

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 witnesses that we have requested, that the -- that there's a
2 new briefing cycle if we want to compel those. Those
3 aren't -- the new witnesses aren't ones that we asked to
4 compel in 555R. The nine that we did ask to compel in 9 -- in
5 555R, we got a bunch of new information about them, and
6 thought it was fair to give it to the government and to the
7 military commission so that you could make an appropriate
8 decision.

9 So yes, I agree, if we want to move to compel those
10 other witnesses, we're going to have to file a new motion to
11 compel. But with respect to those nine witnesses, briefing is
12 complete.

13 MJ [COL POHL]: And so on your requested witnesses in
14 955 -- or, excuse me, 555V -- and again, it may be renumbered,
15 but the current copy, some of those are on the other list and
16 some of them are not?

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

18 MJ [COL POHL]: Did someone -- would everyone please check
19 to make sure they didn't accidentally bring a cell phone in?

20 [All personnel in the courtroom did as directed.]

21 MJ [COL POHL]: Okay. Go ahead, Mr. Connell. I lost my
22 train of thought here.

23 LDC [MR. CONNELL]: I know. You were just asking me

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 are -- in the ----

2 MJ [COL POHL]: You have requested witnesses in 555V,
3 okay, and you say, well, I request them, but I haven't filed a
4 motion to compel.

5 LDC [MR. CONNELL]: Not yet.

6 So for nine of them, yes. That's what 555R is.
7 Because remember, all of this is about 555 itself, not about
8 555P, except to the extent that's derivative of 555.

9 So yes, some of the witnesses we have already filed a
10 motion to compel on. That's 555R.

11 We've been working like crazy to develop whatever
12 factual record exists out there in the world. That involves
13 some new witnesses. Two weeks ago, we gave requests to the
14 government. They elected to take the time to which they're
15 entitled. They'll give us a response today, no doubt a
16 denial. And then if we want to move to compel those
17 witnesses, the additional ones, we'll do so.

18 MJ [COL POHL]: And on the -- on the witnesses you've
19 already filed the motion to compel on ----

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

21 MJ [COL POHL]: ---- is any of the attachments to this
22 relevant to those witnesses?

23 LDC [MR. CONNELL]: I'm going to say probably ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Yeah.

2 LDC [MR. CONNELL]: ---- but not having the document in
3 front of me ----

4 MJ [COL POHL]: Understand. No ----

5 LDC [MR. CONNELL]: ---- I can't say definitively.

6 MJ [COL POHL]: Okay. Okay. How long will it take you to
7 decide whether you want to do a motion to compel or not and to
8 file said motion ----

9 LDC [MR. CONNELL]: We will ----

10 MJ [COL POHL]: ---- on the Delta witnesses.

11 LDC [MR. CONNELL]: We will file a motion to compel, and
12 we can probably do it within a week.

13 MJ [COL POHL]: Okay. Here's what I'm going to do,
14 because we have conflated a number of things here, both sides
15 have. And quite frankly, it's -- I don't think there's an
16 easy way out of this, so I'm going to -- okay, the proposal
17 would be this, is that you file your motion to compel.
18 Trial Counsel, you got two weeks to respond to that motion.
19 And any new issues that's raised in 555V, you will have one
20 day -- one week to reply. And then when that's done, we'll
21 address the whole thing at one time as far as the witness
22 production issues, because seems to me is piecemealing that
23 doesn't make any sense either. So that's the way forward.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20035

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 And then, again, I'll talk to my staff. Because one
2 of the problems I have here is we permitted both sides to
3 combine things, and that's -- because again, part of it's a
4 reply, part of it's a response. One triggers two weeks, one
5 triggers nothing.

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

7 MJ [COL POHL]: Actually, one -- yeah, one triggers one
8 week. But anyway, I think that's fair to both sides to put
9 everybody on notice and we can litigate it from a -- at least
10 a common starting point.

11 LDC [MR. CONNELL]: Right. I understand your ruling.

12 MJ [COL POHL]: Okay. Good. Okay.

13 Back to 573.

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

15 With respect to 573, where we left off was arguing
16 about whether some information in a classified document ----

17 MJ [COL POHL]: Excuse me, Mr. Connell. Just to be clear,
18 when you said you would file in a week, that would be ----

19 LDC [MR. CONNELL]: A week from Monday.

20 MJ [COL POHL]: Yeah, a week from next Monday. Okay, I
21 didn't want to make ----

22 LDC [MR. CONNELL]: Yes, I got that. Yeah, that makes
23 sense to me.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

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

2 LDC [MR. CONNELL]: So the global issue in 573 is we're
3 arguing whether some information with -- that was not portion
4 marked, like the date, the subject line, the addressee, in an
5 otherwise classified document was classified when it got to
6 you.

7 What we had happen in the government's argument
8 shortly before lunch is that the government argued unmarked
9 dates -- dates in a document that did not have paragraph
10 markings in an otherwise classified document in open court.
11 And so I had thought that because the whole document was
12 classified that its unmarked subparts were classified.

13 MJ [COL POHL]: Are you referring to the index now?

14 LDC [MR. CONNELL]: Yes, I am, the second RDI index.

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: But there's a striking analogy to what
17 happened there and the assumption that the military commission
18 probably made when it received a document with banner markings
19 but no portion markings about dates and addressees and other
20 things.

21 But in this situation, the government assures me that
22 the documents listed and their -- in the second RDI index
23 and -- or in the RDI indexes and their order is not

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 classified.

2 MJ [COL POHL]: Why does my copy say TOP SECRET?

3 LDC [MR. CONNELL]: My copy says TOP SECRET, too, sir.

4 That -- which is why I objected and why I raised this issue
5 before lunch. But the government assures me, and I'm sure
6 they will assure you shortly, that the arguments that were
7 made before lunch were not classified because they relate to
8 the documents which appear in the index and their order, and
9 that that is not classified.

10 MJ [COL POHL]: Okay. Do you have anything further to
11 add?

12 LDC [MR. CONNELL]: I do on 573 itself, but I don't have
13 anything else to say about that -- that classification issue.

14 MJ [COL POHL]: Go ahead.

15 LDC [MR. CONNELL]: Thank you.

16 So one of the arguments that the government made was
17 that something changed in February, that they had provided
18 some -- there was a reference to guidance that they gave you,
19 I guess in an ex parte pleading in February, and that was the
20 reason why -- that was their answer to the question of, well,
21 how does this classification just, you know, change overnight.

22 And I'd like to invite the military commission's
23 attention, if you have the document in front of you, to 573

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Attachment C.

2 MJ [COL POHL]: What page is that on?

3 LDC [MR. CONNELL]: Attachment C, sir?

4 MJ [COL POHL]: Uh-huh.

5 LDC [MR. CONNELL]: Oh, thank you. I don't have PDF. So
6 page 23 of the PDF, just to repeat that.

7 MJ [COL POHL]: Attachment C?

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: Okay. Got it. Thank you.

10 LDC [MR. CONNELL]: This is the document that was released
11 under the Freedom of Information Act. It has FOUO at the top
12 and bottom, but that's because our brief was FOUO, not that it
13 was released that way. But if you look at the second line
14 from the top, Approved for Release: 2017/12/01, and then it
15 has what is apparently to be a CIA control number.

16 So the idea that the -- that something changed in
17 February probably was based -- the government's argument to
18 that effect was probably based on the -- on my argument that
19 this document was disclosed by Mr. Leopold on 8 May 2018. But
20 that's not when the CIA acted on it. Their decision approving
21 it for release was actually back in 2017.

22 So I don't know what the government gave you in
23 February, apparently I'm not allowed to know, but it does not

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 have any effect on the declassification of this document.

2 MJ [COL POHL]: How did you get this document?

3 LDC [MR. CONNELL]: I got it from buzzfeed.com, sir.

4 MJ [COL POHL]: The government didn't give it to you?

5 LDC [MR. CONNELL]: No.

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

7 LDC [MR. CONNELL]: The second argument that the
8 government makes is that the two -- the date of 2000 -- 2 May
9 2003, the date of the interrogation contained within the
10 subject line here, is not important because of the RDI indices
11 that they gave me. That's why I wanted to know what was --
12 what was classified or not because their argument is not
13 supported by the document itself, so I'd like to just make a
14 few observations about that.

15 Can I have access to the document camera? I'm doing
16 that only for the blank screen, I'm not going to show a
17 document.

18 MJ [COL POHL]: You can show a blank screen.

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

20 So the government has filed -- has produced two of
21 these RDI indices that they rely upon. And in the second RDI
22 index, which is found in the record at AE 534 (AAA Sup)
23 Attachment F, I think that's the one you probably looked at,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20040

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 reviewed over the lunch break, of the first 28 entries of this
2 allegedly chronological document, 12 of those entries changed
3 position since the first RDI index.

4 Now, the first RDI index was represented to the
5 military commission -- which never reviewed it, all right --
6 but was represented to the military commission to contain a
7 chronological index of -- or chronological statement of what
8 order these documents should be in. But 12 of the first 28,
9 and that's what includes our 2 May 2003, 12 of the first 28
10 entries changed position over the course of the time between
11 the -- when the government produced the first RDI index and
12 the second RDI index.

13 But, okay, that's general. That's not really about
14 this specific one.

15 But MEA-STA-1540, the substitution that the
16 government gave us that's at issue here is one of the ones
17 that moved. And I just want to point out to you, and what I'm
18 doing here is mentally comparing the first RDI index which is
19 found at AE 534A Attachment B and the second RDI index which
20 is found at AE 534 (AAA Sup) Attachment F.

21 So here's the order in the first. Let's see. The
22 first relevant document is STA-1609. Then comes STA-1540.
23 That's the one that we're talking about in 573. And then

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 comes STA-1727.

2 In the second index, the order is ----

3 MJ [COL POHL]: Put the last two digits on.

4 LDC [MR. CONNELL]: Well, it has a different prefix.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: So I would like to do that, but sorry,
7 a different prefix.

8 MJ [COL POHL]: All right. Go ahead.

9 LDC [MR. CONNELL]: 7253. Then comes STA-1540. Then
10 comes STA-1609. Then comes STA-1616. Then comes STA-1727.

11 So when we do our little mix and match, what we see
12 is that important items have changed. There's been a switch
13 in the location of 1540 and 1609, and there's been an
14 insertion, this 1008-7253 [sic] is new and STA-1616 has
15 also -- it's either new or has moved for someplace else in the
16 index that I haven't been able to find.

17 So would you mind doing a screen capture?

18 MJ [COL POHL]: Can you do that?

19 LDC [MR. CONNELL]: The point of this, sir, is not art.

20 The point of this is that ----

21 MJ [COL POHL]: Just a second.

22 LDC [MR. CONNELL]: Yeah.

23 MJ [COL POHL]: Okay, the screen capture will be

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20042

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 573C (AAA). Go ahead.

2 LDC [MR. CONNELL]: You can cut the feed from the document
3 camera.

4 The point is that the idea that this is
5 sufficiently -- these indices are sufficiently precise, that
6 we can rely on them instead of actual dates, is not supported
7 by the indices themselves.

8 The other -- in addition, with respect to the
9 government's argument that the actual date of 2 May 2003
10 doesn't matter, I'd like to point you to how important that
11 date has been to us.

12 In the SSCI report at page 243 -- or the redacted
13 executive summary of the SSCI report, page 243,
14 footnote 1,378, is a footnote which specifically relates to
15 Mr. al Baluchi. And because we don't have any of the language
16 which is quoted in this footnote, we always thought we didn't
17 have this -- this document.

18 The footnote reads at the beginning, Given the
19 threats -- threat to U.S. interests, CIA officers sought to
20 participate in the interrogations. A May 2, 2003, CIA cable
21 (see redacted 14291) states that because of Ammar
22 al-Baluchi's, quote, strong reticence toward the U.S., end
23 quote, CIA officers were observing the foreign government

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20043

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 interrogations of Ammar al-Baluchi via video feed.

2 Now, we always thought these were cables that we
3 didn't have. We don't have any cable that talks about strong
4 reticence toward the U.S., which is a quote; we don't have any
5 cables that talk about observing foreign government
6 interrogations; none of that. We don't even have any -- none
7 of the STA discovery, the statement discovery, even says
8 really the word CIA in it anywhere. So we always thought this
9 was something that we were missing.

10 Once we got the date of 2 May 2003, we were able to
11 connect this to the discovery in a way that we learned that
12 STA-1540 was of foreign government interrogation, which was
13 observed by CIA officers. And then when we linked that to the
14 FOIA document itself, we were able to find -- and I don't know
15 if you still have it pulled up or not -- but on the first page
16 of Attachment C, that a blank officer monitored the CCTV and
17 actively participated in planning. Which means that this
18 statement was transformed from essentially a stand-alone,
19 volunteered statement of al Baluchi -- of Mr. al Baluchi, to a
20 document which demonstrates that he was in foreign government
21 custody at the time, which allowed us to link up with exactly
22 where that foreign government custody was, which appears at
23 page 245 of the SSCI report when al Baluchi and Khallad

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Bin'Attash were transferred out of Karachi.

2 The -- we were able to link that up with CIA active
3 planning, able to link that up with CIA monitoring over CCTV,
4 and, as we will discuss in the 534 closed session, able to
5 link it up with other factors as well.

6 The last point that I wanted to make is you asked --
7 you raised a point which I did not raise, which is that the
8 faith that the military judge should be placing in this whole
9 scheme, and you asked a question about this Freedom of
10 Information Act release. And I did some research on that over
11 the lunch break. And although Mr. Leopold had released the
12 information to the public on 8 May 2018, his FOIA request was
13 actually filed in 2015. I have never seen his FOIA request,
14 it does -- I don't know what exactly its scope was. And as
15 the government represented, it brought in a lot of material,
16 some of which related to Mr. al Baluchi, but most of which did
17 not.

18 But my own personal FOIA that I filed regarding
19 Mr. al Baluchi's treatment in CIA custody was on
20 6 February 2015. So coming down the pike, I expect a great
21 deal more of this information because at some point the CIA is
22 going to respond to -- is going to release information under
23 my FOIA request. And then it will not just be a single

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 document, it will be a great deal more information that we
2 will have.

3 MJ [COL POHL]: What's their time limit to respond to a
4 FOIA request?

5 LDC [MR. CONNELL]: The -- their actual time limit is 30
6 days -- 30 business days. In this situation, they claimed
7 extraordinary circumstances, the CIA did. They sent me a
8 letter saying, please don't sue us, we're working on it as
9 fast as we can.

10 MJ [COL POHL]: Did they say when it would be done?

11 LDC [MR. CONNELL]: No, sir. I just note that this FOIA
12 was filed in 2015 and released in 2018. My FOIA was filed in
13 early 2015, and -- so hope springs eternal, maybe I'll have
14 something.

15 MJ [COL POHL]: Did you have an opportunity to review the
16 other documents that were released through this FOIA?

17 LDC [MR. CONNELL]: I did, sir.

18 MJ [COL POHL]: Okay. And about what's the quantity of
19 them?

20 LDC [MR. CONNELL]: 150, maybe. 150 pages, not documents.

21 MJ [COL POHL]: Okay. I'm just -- I expect yours will be
22 a few more than that?

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

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Got it. Okay. Anything further?

2 LDC [MR. CONNELL]: No, thank you.

3 MJ [COL POHL]: Okay.

4 Mr. Groharing.

5 TC [MR. GROHARING]: Judge, I don't have anything further,
6 subject to your questions.

7 MJ [COL POHL]: Yeah. Is the RDI index Top Secret or not?

8 TC [MR. GROHARING]: It's properly classified Top Secret.
9 There's information on there, when combined with the
10 information Mr. Connell just discussed, that makes the
11 document a Top Secret document.

12 MJ [COL POHL]: Okay. I must have misunderstood. I
13 thought Mr. Connell said it wasn't Top Secret.

14 TC [MR. GROHARING]: No, the document itself ----

15 MJ [COL POHL]: Right.

16 TC [MR. GROHARING]: ---- the classification for the
17 document is correctly classified as TOP SECRET. There are
18 pieces of information ----

19 MJ [COL POHL]: Within the document.

20 TC [MR. GROHARING]: ---- you can take a piece within a
21 line, that nugget itself ----

22 MJ [COL POHL]: Is not ----

23 TC [MR. GROHARING]: ---- might be unclassified, but when

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20047

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 combined with the other information perhaps on that line or
2 elsewhere in the document, it makes it TOP SECRET.

3 MJ [COL POHL]: Okay. Okay.

4 Explain to me how a document that was TOP SECRET in
5 2016 becomes un-TOP SECRET in 2017 pursuant to a FOIA request.
6 How does that happen?

7 TC [MR. GROHARING]: Well, I don't think it would be
8 accurate to say, Your Honor, that a document ----

9 MJ [COL POHL]: Parts of it.

10 TC [MR. GROHARING]: ---- the document as a whole went
11 from TOP SECRET to UNCLASSIFIED.

12 MJ [COL POHL]: Okay.

13 TC [MR. GROHARING]: Certainly portions of the document,
14 you know, could have been classified as TOP SECRET and for
15 whatever reason, the -- you know, things happen that an OCA
16 has decided that this sentence is no longer TOP SECRET.

17 MJ [COL POHL]: But, you know, when we talk about
18 discovery, and I understand it's -- you have a lot on your
19 plate -- you, the government, has a lot on your plate. You
20 know, I hear the government say, we know our discovery
21 obligation, we'll comply with it.

22 So one part of the CIA, the FOIA department, finds
23 this document -- lets a less redacted copy go out pursuant to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20048

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 FOIA and Mr. Connell finds it on BuzzFeed.

2 TC [MR. GROHARING]: Yeah.

3 MJ [COL POHL]: Okay. You guys didn't give it to him.

4 TC [MR. GROHARING]: Correct.

5 MJ [COL POHL]: So how do I know how many other
6 FOIA-releasable documents that are in the custody of the
7 United States have not been given to the defense? I mean, I
8 don't know how Mr. Connell found it on BuzzFeed, but -- I
9 mean, wouldn't that be something -- I'm just trying to figure
10 out the unity of effort here.

11 You know, we talk about how much you have to look at
12 stuff; and I got it, it's a lot of stuff. But we have a
13 document relevant to this case, released by one hand of the
14 CIA, and apparently nobody bothers to tell you guys about it.

15 TC [MR. GROHARING]: I share your frustration in that
16 regard, Your Honor. But what I'll say is my experience with
17 reviewing FOIA-released materials is that the information in
18 those pales in comparison to what we've provided the defense;
19 that there are many, many, many, more redactions, oftentimes
20 page after page of completely redacted information.

21 My review of Mr. Leopold's release of the FOIA
22 documents is consistent with that. So by and large, much,
23 much less information is released in FOIA. So should FOIA --

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 whoever releases FOIA be coordinating with the people who
2 review our proposed releases and to make classification calls
3 in this case? Absolutely. And it obviously didn't happen in
4 this case because it's an inconsistent -- seemingly
5 inconsistent application of the classification guidance.

6 But once it's released, it's released. And at that
7 point, if it's released through FOIA, it operates to declass
8 the information -- to declassify the information.

9 May I just have one minute, Your Honor?

10 MJ [COL POHL]: Sure.

11 [Conferred with Mr. Trivett and Mr. Ryan.]

12 TC [MR. GROHARING]: Your Honor, I -- it's -- we were
13 informed after filing the motion and after this morning's
14 session that our OCA, in the sense that the OCA who makes
15 determinations over military commissions pleadings and
16 proposed summaries and things of that nature, believes this
17 was improperly released through FOIA, the information
18 contained in the FOIA release.

19 That's -- however, once it's released, there's no
20 pulling the information back. So from that point, we just
21 deal with the information as UNCLASSIFIED, whether or not it
22 should have been released through the FOIA process or not.
23 But it does help explain the seeming inconsistent application

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 of the guidelines to these documents.

2 MJ [COL POHL]: Well, it would seem to indicate that it
3 was done by who looks at it. One person looked at it and says
4 it's releasable; another person looked at it and says, no,
5 that's still classified. What do we have, a third person, now
6 we vote?

7 I understand, Mr. Groharing. Let me ask you this:
8 If Mr. Connell ever gets a response from his FOIA request, are
9 we going to be back here again saying, well, now we got two
10 different standards?

11 TC [MR. GROHARING]: I will say, as I mentioned before, my
12 experience in dealing with FOIA releases, I highly doubt that
13 the information that he's going to get in response to that --
14 assuming he gets a response, and the response isn't, this is
15 all subject to pending litigation here and you will get a
16 response when that's complete -- but assuming he actually gets
17 a response with documents, they should be consistent with the
18 documents that he's been provided, and probably will have less
19 information than he's been provided in the military
20 commission.

21 Because many of our documents are either provided
22 Classified, even in summaries, or still For Official Use Only.
23 So there's information that we're providing to the defense

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 through the discovery process, through the summary process
2 that's still For Official Use Only. That same information
3 would not be going out to the public. And an awful lot of
4 that information is For Official Use Only. So I would expect
5 that his response to his FOIA request would have all of that
6 information redacted and would pale in comparison to the
7 summaries that you've approved.

8 MJ [COL POHL]: Okay. So for all of the summaries I did,
9 excluding this one, you say all of those declarations that
10 talked about the harm to national security if it was released
11 are still valid?

12 TC [MR. GROHARING]: Yes, Your Honor.

13 MJ [COL POHL]: They're all valid -- even though it wasn't
14 valid on this one, at least for one FOIA release person, but
15 all the other ones, every one else I saw, there's -- nothing's
16 going to change; that all those, based on the declarations you
17 provided me from the agency saying, if you give this
18 information, it will be this harm to national security, and
19 some of those declarations go back years, those are all still
20 good, and then I'm not going to see another one of these.
21 This is a one-off that was mistakenly released, that's the
22 government's position today?

23 TC [MR. GROHARING]: With the caveat that I've already

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 talked about the date guidance. We had superseding date
2 guidance earlier this year we provided to the commission. We
3 made those -- rather than make those changes to the summaries,
4 we added that information to the index -- or to the indices
5 for each of the defense teams.

6 MJ [COL POHL]: Okay. And just so I'm clear on how the
7 index works, you have a date and you have a Bates number
8 attached to it?

9 TC [MR. GROHARING]: Either ----

10 MJ [COL POHL]: Or is it ----

11 TC [MR. GROHARING]: Either a precise date or ----

12 MJ [COL POHL]: I know some of them aren't precise dates,
13 but let's say, if I was going to pull this Bates number,
14 whatever this document is, I look to the next of it and say
15 2 May.

16 TC [MR. GROHARING]: Right. As you look at the document,
17 the rightmost column is the date of the document in question,
18 the date of the event in question.

19 MJ [COL POHL]: The rightmost or the leftmost?

20 TC [MR. GROHARING]: I believe it's the rightmost.

21 MJ [COL POHL]: If -- I may have turned it a different way
22 around. Okay. Okay.

23 TC [MR. GROHARING]: All right.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So the date is tied directly with the
2 document?

3 TC [MR. GROHARING]: Correct.

4 MJ [COL POHL]: Except for someone -- I know some are
5 exact dates. Okay. I understand the government's position.
6 Thank you.

7 That brings us to 582.

8 DC [MR. GLEASON]: Good afternoon, Your Honor.

9 MJ [COL POHL]: Good afternoon.

10 DC [MR. GLEASON]: Your Honor, 582 is another defense
11 motion to compel discovery. In this case, it's for the FBI's
12 Regional Computer Forensic Laboratory, or RCFL reports, for
13 the FBI raid evidence that the prosecution has identified as
14 evidence in this case.

15 And the facts are this, Your Honor: On 7
16 January 2015, the prosecution provided the defense with a
17 letter indicating that certain items that were relevant to
18 this case have been seized or are in the custody of the FBI,
19 and that it was on -- incumbent upon the defense to go to the
20 FBI building and review that evidence. That letter is
21 attached at Attachment B to our motion.

22 Now, the defense has done what the prosecution has
23 instructed. We've gone to the FBI. We've reviewed the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 several thousand pieces of raid discovery evidence. And what
2 we found is that -- you know, in the case of -- about 300 of
3 those several thousand items consisted of CD-ROMs, VHS tapes,
4 and other electronic media, which we could see the tape or we
5 could see the CD-ROM but we couldn't see what was on it.

6 MJ [COL POHL]: What do you mean you couldn't see what was
7 on it?

8 DC [MR. GLEASON]: Well, we couldn't plug it into a
9 computer system or a player to see what was on it, Your Honor,
10 is what I mean.

11 MJ [COL POHL]: So they just showed you a disc?

12 DC [MR. GLEASON]: Yes, sir. So in response what we did
13 is we asked -- we sent a discovery request to the prosecution
14 saying since we noticed that these discs or VHS tapes had
15 stickers from the RCFL, we know that the government has sent
16 them to be analyzed at their Regional Computer Forensic
17 Laboratory. So we asked for copies of those forensic reports
18 so we can see, you know, what did the government find on these
19 various discs or VHS tapes.

20 And the prosecution did not respond to our request.
21 Actually, they did. They responded in an e-mail saying that
22 they needed us to be more specific. We sent a more specific
23 request identifying by Bates number the specific items that we

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 wanted the RCFL reports for, we never received a response
2 back, and we filed this current motion to compel discovery.

3 MJ [COL POHL]: Let me make sure I understand your motion.

4 There were various forms of electronic media, CDs,
5 VHSs, or tapes?

6 DC [MR. GLEASON]: Yes, sir. So it consisted of
7 everything from the old-school floppy discs ----

8 MJ [COL POHL]: Okay.

9 DC [MR. GLEASON]: ---- to -- and VHS tapes to, you know,
10 as late as DVDs ----

11 MJ [COL POHL]: And some of this stuff you were able to
12 play?

13 DC [MR. GLEASON]: We were able to play none of it, sir.

14 MJ [COL POHL]: None of it?

15 DC [MR. GLEASON]: None of it.

16 MJ [COL POHL]: What was it purported to be evidence of
17 when the government -- what did the government say this is?

18 DC [MR. GLEASON]: That, we don't know, sir. When the
19 government gave us the list of, hey, this is evidence that we
20 captured at raid locations that's relevant to your case, you
21 need to go look at it. They gave us a list of several
22 thousand items with Bates numbers.

23 MJ [COL POHL]: But how could they know -- so they said

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 this is relevant to your case, but we don't know what it is?

2 DC [MR. GLEASON]: I'm sure the government knows what it
3 is, sir. They didn't disclose what it was to us.

4 MJ [COL POHL]: Let me make sure I understand this because
5 I'm slow sometimes.

6 DC [MR. GLEASON]: Yes, sir.

7 MJ [COL POHL]: The government gave you corrupted -- may
8 be the wrong word -- corrupted media things that you could not
9 open or read and says, this is relevant to your defense?

10 DC [MR. GLEASON]: No, sir. What they did is they said
11 the evidence is at the FBI. You can go look at it.

12 MJ [COL POHL]: Okay.

13 DC [MR. GLEASON]: When we went to the FBI, some of the
14 evidence consisted of documents we could read ----

15 MJ [COL POHL]: Okay.

16 DC [MR. GLEASON]: ---- documents that were in Arabic that
17 we could copy.

18 MJ [COL POHL]: Okay.

19 DC [MR. GLEASON]: There was approximately 300 items that
20 were electronic media that we could not open or read.

21 MJ [COL POHL]: Did you ask the FBI to open them for you
22 or anything like that?

23 DC [MR. GLEASON]: We did not, sir.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20057

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. So you tried to open them and there
2 was nothing on there.

3 DC [MR. GLEASON]: No, we did not ask the FBI to open
4 them.

5 MJ [COL POHL]: Okay. But I'm saying you tried to the
6 open these 300 items, you couldn't, and these are floppy
7 discs, CDs, and tapes?

8 DC [MR. GLEASON]: They were CDs, floppy discs, and tapes,
9 but we could not open them. We didn't have the capabilities
10 to read them at the FBI. If that makes sense, Your Honor.

11 MJ [COL POHL]: Okay. Well, it may -- I understand it.
12 Whether it makes sense or not is a separate issue.

13 Okay. So you go over there, you -- the 300 things
14 they give you a response, if you can't -- and you tell them we
15 can't open those documents.

16 DC [MR. GLEASON]: No, sir. What we did is we reviewed
17 the documents. We made a note indicating these are things
18 that we cannot view without some type of equipment to view
19 them.

20 MJ [COL POHL]: Okay.

21 DC [MR. GLEASON]: So we annotated those on the list and
22 we went back to the prosecution and said, hey, these are
23 electronic media items. We see that they have RCFL stickers

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 indicating that the government has reviewed them and there's
2 some report floating out there regarding the contents of this
3 information. We then asked for those reports.

4 MJ [COL POHL]: Okay.

5 DC [MR. GLEASON]: And that's what the prosecution ----

6 MJ [COL POHL]: In lieu of actually seeing the data
7 itself ----

8 DC [MR. GLEASON]: Yes, sir.

9 MJ [COL POHL]: ---- since -- you're assuming that there's
10 no way to capture the data itself?

11 DC [MR. GLEASON]: So in lieu -- yeah. If the prosecution
12 comes back and says there's no RCFL reports, or we're not
13 going to provide them to you, the next step for us is to do a
14 request for a computer expert of some sort to go to the FBI to
15 get certain equipment so that he can do the same job that the
16 RCFL has already done in this case and then let us know what
17 is on that electronic media.

18 In order to save time, we thought it would be easier
19 just to get the reports that the government already has. But
20 for whatever reason, they are not providing those to us, which
21 is why we filed this motion to compel discovery.

22 MJ [COL POHL]: And where do these items come from?

23 Various places?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 DC [MR. GLEASON]: So according to the prosecution's
2 letter, it was various raid locations in the Middle East that
3 they captured these items.

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

5 And that ----

6 DC [MR. GLEASON]: I hope that answers all of your
7 questions, sir ----

8 MJ [COL POHL]: It does, thank you.

9 DC [MR. GLEASON]: ---- and makes more sense now.

10 MJ [COL POHL]: It's more clarity. Again, I'll reserve
11 whether it makes more sense.

12 DC [MR. GLEASON]: All right, Your Honor. Thank you very
13 much.

14 MJ [COL POHL]: Thank you. This appears to be a
15 Hawsawi-unique issue?

16 DC [MS. WICHNER]: Sir, may Mr. Binalshibh's team be heard
17 on this as well?

18 MJ [COL POHL]: Sure.

19 DC [MS. WICHNER]: Sir, just to help in an understanding,
20 Mr. Binalshibh's team, we're still going through the evidence,
21 it's quite voluminous, but going through the same process as
22 Mr. Hawsawi's team. But to -- to help in some understanding
23 of what they're explaining, we're also having the same

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 difficulties and kind of question marks.

2 So when we came upon VHS tapes, it would just be the,
3 you know, VHS tape. And we asked the agent there at the FBI,
4 can we view this tape? We don't know what it is or what it
5 purports to be. And the answer we received was the FBI does
6 not have a VHS player. So we made note of it.

7 And as we continue to go through all of the evidence,
8 we're -- you will be seeing more motions from us as to these
9 same issues. But we're experiencing the same thing and that's
10 the kind of answer we're getting.

11 MJ [COL POHL]: Well, on the lack of a VHS player, I
12 assume they won't give you a copy either?

13 DC [MS. WICHNER]: No, sir.

14 MJ [COL POHL]: Okay. Do you have problems with the other
15 type of media that you have an ability to stick in a computer
16 but it won't open up?

17 DC [MS. WICHNER]: No, sir. Our experience has been they
18 won't allow us to remove -- now, we have not been able to --
19 there's been kind of a re- -- we're still trying to figure
20 this out as well, but there's been a kind of renumbering of
21 evidence as they go through it and, I guess, document it or
22 they're going through some process of -- anyway. So we're
23 trying to match that up.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20061

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 But the process, when you go to the FBI, you're not
2 allowed obviously to walk out with it. I mean, the agents
3 hand it to you in a Baggie, you can ----

4 MJ [COL POHL]: I understand that part, but ----

5 DC [MS. WICHNER]: ---- you can review it, but right at
6 the moment ----

7 MJ [COL POHL]: My question is on other type of media, you
8 said they don't have a VHS player, so obviously you couldn't
9 review that.

10 DC [MS. WICHNER]: We've not asked to play a floppy disc
11 yet or any other media, but the VHS one sticks out.

12 MJ [COL POHL]: I got that. Thank you.

13 DC [MS. WICHNER]: Thank you.

14 MJ [COL POHL]: Trial Counsel.

15 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

16 MJ [COL POHL]: Good afternoon, Mr. Trivett.

17 MTC [MR. TRIVETT]: So I think we have another classic
18 example of the defense not understanding what they already
19 have in discovery.

20 We provided all of the digital media from -- whether
21 we want to use something affirmatively from the raids or
22 whether it's nonaffirmative digital media, we have provided
23 the actual media to them in hard drive in a format that they

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 can review.

2 Taking a step back, all of the evidence at
3 FBI Headquarters that they had the opportunity to review for
4 the last three and a half years is original evidence. We
5 generally don't put original evidence into a VHS player or
6 into a computer in the event that it gets broken.

7 So labs will do forensic copies of it, convert it if
8 necessary for them to be able to view it, and we have already
9 provided that. So they have that for all of the raid items
10 for all of the raids, with the exception of the Abbottabad
11 raid, which we just took a different position on from a
12 discoverability standpoint.

13 So when Mr. Gleason says in his motion that he's
14 seeking lab reports, he's seeking lab reports on items we've
15 already identified we are not going to use as evidence.

16 In my January 2015 memo, I made clear that there's
17 approximately 225 items that we intend to use affirmatively in
18 the case in chief. For those items, we turned over all of the
19 relevant lab reports. So they have lab reports for anything
20 it is that we intend to use. All right.

21 They also -- they actually have a total of 13,227
22 pages of lab reports. And that combines the raid lab reports,
23 as well as lab reports of domestic searches, if we're going to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 use anything from that domestic search, like Mohamed Atta's
2 luggage or any other information found at any of the
3 hijackers' hotels. So they have what we've determined are the
4 relevant lab reports.

5 We did not provide and we have declined to provide
6 the lab reports for items that we do not intend to use. They
7 have the item. They have the actual item. They have a
8 picture of the original, and then they have a digital -- a way
9 to look at it digitally which we provided to them.

10 On the affirmative use -- or the nonaffirmative use
11 information, we provided an entire hard drive. So they can
12 look at it, pull it up by the AFGP number that the piece of
13 evidence has, and they can review it. So they can't stick a
14 disc into a computer at FBI Headquarters to watch it, but we
15 already did that for them. We did the forensic copying and we
16 provided it to them.

17 So I want to explain a little bit about how we go
18 about handling discovery requests. The first thing we always
19 ask ourselves based on the request is, do we have an
20 obligation to provide this information? And if the answer is
21 yes, that we marshal all the resources that we need in the
22 U.S. Government to provide that information. But if that
23 first answer is no, that we don't, that we don't have an

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 affirmative obligation, that they haven't been able to
2 articulate a reason why they need that information, then we go
3 to the next step.

4 And the next step is, okay, how much work is this to
5 provide it to them anyway? If we've said that they don't have
6 a -- they don't have an entitlement to this information, we
7 have no obligation to turn it over, how resource intensive is
8 it for the U.S. Government to do it? And if the answer to
9 that is not much, or less than it would be to litigate a
10 motion, we'll just provide the information. We do that all
11 the time. We turn over information all the time that they're
12 not otherwise entitled to just to avoid the litigation on it
13 when it's not resource intensive.

14 But what I can tell you is this request for every
15 single forensic laboratory report for information we've
16 already said we are not using, and information that they
17 already have that they can view the actual video on, is
18 literally hundreds of thousands of pages. It would take the
19 labs, the regional labs, many months to do this and pull them
20 away from their other important duties.

21 Again, if we had an obligation to do it, that's
22 tough, that's the cost of litigation for the U.S. Government.
23 But if we don't have an obligation, and our position is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 clearly that we don't, we will not ask them to do that for
2 hundreds of thousands of pages of information on documents
3 that we have no intention of ever using and we told them three
4 and a half years ago we had no intention of ever using.

5 MJ [COL POHL]: Mr. Trivett, let me ask you a
6 question ----

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

8 MJ [COL POHL]: ---- because I'm kind of hearing two
9 separate factual predicates.

10 MTC [MR. TRIVETT]: No doubt.

11 MJ [COL POHL]: Mr. Gleason says that there's 300-odd
12 media tapes, floppy discs, CDs that they could not review
13 because they wouldn't play on whatever devices they had there.
14 Are you telling me that all that media has already been given
15 to them in a different form?

16 MTC [MR. TRIVETT]: Yes, sir. That's exactly what I'm
17 telling you.

18 MJ [COL POHL]: You know, it would be helpful -- did you
19 put that in your pleading?

20 MTC [MR. TRIVETT]: That wasn't part of the request. This
21 is part of the frustration we have when we -- when we ----

22 MJ [COL POHL]: No, I'm just saying is if you put it in
23 your pleading that those lab reports are unnecessary because

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 they have the original documents. They are saying they need
2 the lab reports because they can't review the original
3 documents. Or you don't -- you didn't connect those two?

4 MTC [MR. TRIVETT]: Right. We did not connect those two.

5 MJ [COL POHL]: I got it. I got it. I understand. I
6 understand where it's at.

7 MTC [MR. TRIVETT]: Because, quite frankly, I think, had
8 they given us a discovery request when I went back to them in
9 the e-mail and said, provide more information about the
10 specific documents that you think you need a lab report for.
11 Maybe they want to use a specific document for some reason.
12 And again, if it would be easy enough to go get one lab
13 report, we'll do it, we'll avoid the litigation. But when
14 they came back, they didn't give us any -- they didn't give us
15 any more particular notice than to say these 300 items.

16 Well, I could have done that. I could have looked at
17 the spreadsheet, looked through all of the possible digital
18 things on the spreadsheet and understood what it is that they
19 might have been asking the regional lab for. But in the end
20 had they said because we cannot play them, I would have gotten
21 back and said, well, yes, you can. We turned over this
22 nonaffirmative use items back in, let me see, February 11 --
23 no, earlier than that, I'm sorry. I'm confusing the two

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20067

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 dates. By November of '15, they had these items.

2 MJ [COL POHL]: Okay.

3 MTC [MR. TRIVETT]: I did not know that that was what they
4 were talking about because they just wanted lab reports; which
5 we came back and said, we're not using any of these things
6 affirmatively, we don't believe you have an obligation -- we
7 don't have an obligation to turn them over, nor are you
8 entitled to them.

9 So again, I think with a little bit more clarity in
10 the discovery requests, I think we could have avoided
11 litigation on this issue, because I believe they have
12 everything they're entitled to. But we still oppose turning
13 over the other forensic lab reports because we don't intend to
14 use any of those items and we don't believe that they've made
15 a sufficiently particularized request for any one specific
16 item. But, of course, we would consider turning that over, if
17 necessary, in future discovery.

18 Subject to your questions, sir.

19 MJ [COL POHL]: I have none further. Thank you.

20 Commission will be in recess.

21 [The R.M.C. 803 session recessed at 1502, 23 July 2018.]

22 [The R.M.C. 803 session was called to order at 1514, 23 July
23 2018.]

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20068

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Commission is called to order.

2 All parties are again present. Four of the five
3 detainees are also present; Mr. Hawsawi remains absent.

4 Mr. Gleason.

5 DC [MR. GLEASON]: Your Honor, thank you for the recess.
6 I had the opportunity to talk to Mr. Trivett and I think we
7 found out what the -- where the disconnect was.

8 MJ [COL POHL]: Okay.

9 DC [MR. GLEASON]: It sounds like the prosecution has
10 provided us a hard drive that contains digital copies of all
11 this evidence, and we've had it for about a year and a half.
12 The problem is we don't have a stand-alone system or the
13 software to open it. That's a request that we have currently
14 pending with the convening authority for funding. So until
15 that is ----

16 MJ [COL POHL]: To open what?

17 DC [MR. GLEASON]: To run the -- we need a stand-alone
18 Secret computer system to run the software that they gave us
19 to open this hard drive, and we need forensic software,
20 Forensic Toolkit to read the data.

21 And we've been waiting the last year and a half. We
22 put in a request through our IT folks, and now we currently
23 have a request pending with the convening authority to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 purchase us a stand-alone laptop so we can review this disc
2 that the prosecution ----

3 MJ [COL POHL]: All you need is a stand-alone laptop?

4 DC [MR. GLEASON]: And the Forensic Toolkit software, yes,
5 sir.

6 MJ [COL POHL]: How much is a Forensic Toolkit? That's
7 all you need?

8 DC [MR. GLEASON]: Yes, sir. And then we can analyze
9 information.

10 MJ [COL POHL]: Mr. Trivett.

11 MTC [MR. TRIVETT]: Sir, I believe the Forensic Toolkit is
12 part of what we provided already as far as the install files
13 for it. So it's just a matter of them getting IT approval for
14 a stand-alone laptop, which we didn't obviously know about
15 until ----

16 MJ [COL POHL]: And it takes a year and a half to get a
17 laptop?

18 DC [MR. GLEASON]: Preaching to the choir, sir. We've
19 been asking IT the same thing for the last year and a half.

20 MJ [COL POHL]: Well, how many laptops does the defense
21 have? They don't have a spare one laying around?

22 ADC [MS. LACHELIER]: One second, Judge. Just I want to
23 clarify one point. The stand-alone we need is a Classified

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 Secret stand-alone. Forensic Toolkit, the government
2 represents, and we'll trust them for now, that on the external
3 hard drive they gave us that's Secret, there is a reader
4 version of Forensic Toolkit. Because it's on -- we cannot
5 plug that into the network, this Forensic Toolkit ----

6 MJ [COL POHL]: No, I understand that. I got all that.

7 ADC [MS. LACHELIER]: We don't have a stand-alone SIPR
8 computer, Secret computer. We have this external hard drive
9 the government gave us, but we don't know what's on it. We
10 can't look at what's on it because we can't plug it into a
11 network.

12 MJ [COL POHL]: And you waited a year and a half to kind
13 of raise this issue to me?

14 ADC [MS. LACHELIER]: No, we didn't wait a year and a
15 half, Judge. We actually weren't -- we have -- we raised it.
16 We've been trying to buy or get ahold of a stand-alone. We
17 didn't think it would require an act of Congress, but
18 apparently it does.

19 MJ [COL POHL]: Apparently it does.

20 ADC [MS. LACHELIER]: And apparently it does. We went
21 through our IT, we went through everything we could to figure
22 out what the problem is; right down to at one time, we
23 actually had a forensic software installed on one of the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 network computers and then IT went crazy and took it off.

2 So anyway, so long story short now, as of less than
3 two months ago, it's been a request to the CA for a
4 stand-alone laptop. But we were not aware that what the
5 government is representing is what's on that hard drive.

6 MJ [COL POHL]: Yeah, I got it.

7 Mr. Trivett, rather than wait for this process to
8 work, I suspect the government can probably procure this
9 pretty quickly?

10 MTC [MR. TRIVETT]: This is the first I've heard of it,
11 sir, but we're more than willing to lend our good offices to
12 the effort.

13 MJ [COL POHL]: Okay.

14 Would it be helpful if I issued an order for you to
15 get one for them?

16 MTC [MR. TRIVETT]: I don't think it's necessary, sir.

17 MJ [COL POHL]: Okay. By the time we finish, give me a
18 status report of when you can get it to them. And if we need
19 to have an order, I'll issue an order because this, to me, is
20 just silly.

21 MTC [MR. TRIVETT]: Yes, sir. Before the end of the week,
22 you mean?

23 MJ [COL POHL]: Yeah.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20072

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MTC [MR. TRIVETT]: Roger that, sir.

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

3 So your basic issue is kind of moot in the sense that
4 you have the information, you just can't read it because you
5 don't have the technology to bring it up.

6 DC [MR. GLEASON]: Well, no, I wouldn't say it's mooted in
7 the sense, Your Honor. It might not be ripe because we don't
8 know what we don't know. We don't know what's on this
9 external hard drive until we have the capability to open it
10 and analyze it.

11 MJ [COL POHL]: Okay.

12 DC [MR. GLEASON]: And what we're hoping, what the RCFL
13 reports that we requested, is that they'll help us narrow this
14 field. Now, if reports, for example, say ----

15 MJ [COL POHL]: Mr. Gleason, I'm trying to figure out what
16 you want. When you walked up here before, you said we can't
17 read 300 media things and that's why we need the reports. And
18 then apparently after we went through this process, you do
19 have that, you just can't -- you do have the capability to do
20 it, you just don't have the computer for it. So now you need
21 the reports anyway?

22 DC [MR. GLEASON]: They would help us, sir. They would
23 help us narrow that field of what we have to review. For

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20073

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 example, at the forensic reports ----

2 MJ [COL POHL]: How would giving you thousands of pages of
3 report narrow down the field of looking at 300 pieces of
4 media?

5 DC [MR. GLEASON]: For example, sir, there's -- out of the
6 300 things, if the reports say 100 of them are blank, then we
7 don't have to waste the time going through those. Or, you
8 know, these 50 items are commercial TV programs.

9 MJ [COL POHL]: Okay. Got it. Anything further?

10 DC [MR. GLEASON]: No, sir.

11 MJ [COL POHL]: Trial Counsel, anything further?

12 MTC [MR. TRIVETT]: No, sir.

13 MJ [COL POHL]: Okay. On this one, the commission finds
14 that it's moot for the production of what was requested and is
15 not ripe as far as the reports themselves. And, therefore,
16 the motion is denied. That's contingent upon the government
17 procuring the data -- or the computer that the defense needs.

18 Defense, if there's any particular special type of
19 computer that's necessary for this, let the government know.
20 Unless I hear differently, I'm assuming that that problem has
21 been resolved.

22 And, Mr. Trivett, by the end of the week, just give
23 me a status report if the government's able to procure said

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20074

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 computer and, if so, when they can get it.

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

3 MJ [COL POHL]: There will be no written ruling on 582.

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

5 MJ [COL POHL]: Yes, ma'am.

6 LDC [MS. BORMANN]: May I add to that? We have had a
7 request in with the IT people and through the convening
8 authority for a stand-alone Secret computer for a little over
9 a year at this point. So we are also asking for the same. We
10 need to view the same materials as well as other materials
11 that require a stand-alone computer because we can't access --
12 put certain discovery materials into the network.

13 MJ [COL POHL]: Okay. Thank you, Ms. Bormann.

14 557.

15 LDC [MS. BORMANN]: Judge, may I be heard on the procedure
16 before we begin?

17 MJ [COL POHL]: Sure.

18 LDC [MS. BORMANN]: This is Mr. Mohammad's motion, but
19 this is one of those instances that General Martins referred
20 to earlier when we were discussing the right to a public
21 trial.

22 And I -- General Martins said that, as a general
23 proposition, the point of having pleadings put out on the

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20075

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 website is so that the public can follow along with the
2 arguments and understand the context. With respect to 557
3 filed by Mr. Mohammad, I believe in early February, and then
4 followed by a supplement -- a response by the government, and
5 then a supplement by us, and then the government's waiver of a
6 response to us, none of that is on the website at all, not
7 even the first filing.

8 So in keeping with Mr. Bin'Attash's right to a public
9 trial, we would ask that this motion be put off at least until
10 the public can view it.

11 MJ [COL POHL]: One moment, please.

12 The Regulation for Trial for Military Commissions,
13 paragraph 17-1.d., talks about that the filings be publicly
14 released on motions should occur not sooner than 15 business
15 days after the last filing made in support or opposition to
16 the motion.

17 However, it also gives me the authority to waive if
18 in the discretion of the military judge the interest of
19 justice so require. I find the interest of justice so require
20 that we're not going to wait the litigation on this issue, and
21 quite frankly almost any other issues that have been fully
22 briefed, simply because it's not on the website.

23 LDC [MS. BORMANN]: Thank you, Judge.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So your motion is denied.

2 Ma'am.

3 ADC [MS. RADOSTITZ]: Thank you, Your Honor.

4 This is a pretty straightforward motion to compel
5 discovery. The government has asserted, both in pleadings and
6 in court, on a number of occasions on the issue of hostilities
7 that they intend to present evidence that the USS COLE bombing
8 in 2000 in the Bay of Aden is part of the hostilities between
9 al Qaeda and the United States.

10 We made a request -- they provided some discovery of
11 the USS COLE bombing, including some photographs. We
12 requested that they provide the rest of the discovery other
13 than the photographs, and they declined to do so.

14 Their declination was based on the fact that they say
15 they don't have an obligation to do so because Mr. Mohammad is
16 not charged in the USS COLE. And our position is that sort of
17 misses the point. They're intending to present the USS COLE
18 as part of the hostilities, both pre-trial and then again at
19 trial. And in order to do that, we must be able to defend
20 Mr. Mohammad against those allegations that the USS COLE
21 bombing was committed by al Qaeda.

22 They've turned over some discovery, approximately
23 1500 pages. Of that, about 10 or 15 of them are photographs,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20077

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 the rest are documents, a lot of which came from the Clinton
2 libraries, the unclassified versions of the documents from the
3 Clinton libraries. And again, their response is sort of,
4 well, you can go investigate this yourselves, and we don't
5 have to give it to you because we're not charging him with the
6 USS COLE.

7 What they are missing is that the case law doesn't
8 say just because they don't want to use it, they don't have to
9 give it to us. The case law is really clear, that they have
10 to give us anything that's material for our preparation of the
11 defense. And for us to prepare to address the hostilities
12 issue, we have to understand all of the evidence that they
13 have regarding the USS COLE bombing so that we can show
14 whether it is or isn't or attack it in whatever way we choose
15 in terms of our presentation -- or our defense against the
16 issue of hostilities.

17 MJ [COL POHL]: Would your request for the COLE bombing be
18 essentially all of the discovery in the Nashiri case?

19 ADC [MS. RADOSTITZ]: I don't know, Your Honor, because I
20 don't know what discovery was given in the Nashiri case.

21 MJ [COL POHL]: I mean, he's charged with the COLE
22 bombing.

23 ADC [MS. RADOSTITZ]: Exactly.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So it would seem to me that ----

2 ADC [MS. RADOSTITZ]: If that -- what I don't know is
3 there's possible -- the government states that they gave about
4 292,000 pages of discovery to Mr. Nashiri's counsel. It's
5 possible that some of that is not relevant to our case because
6 it could be his school records or something that's totally
7 irrelevant to the hostilities question.

8 But we would say that anything that they provided to
9 Mr. Nashiri about the hostilities aspect of the USS COLE
10 bombing is indeed relevant and should be provided to us.

11 MJ [COL POHL]: Okay.

12 ADC [MS. RADOSTITZ]: And one of the other pieces I
13 just -- I don't want to make this too big of a deal, but one
14 of the things that they say that they have provided us, and
15 this is their language, that they provided us al Qaeda
16 propaganda.

17 And I looked up the definition of propaganda because
18 I wanted to make sure I understood what they were saying. And
19 propaganda is information, especially of a biased or
20 misleading nature, used to promote a particular political
21 cause.

22 If that's what this is, then we need to see what else
23 they have, because we need to know if it is biased, if it is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 misleading, if it's even true, because al Qaeda could have
2 made assertions about the USS COLE bombing that are flat out
3 untrue. And if that's what they're providing us and saying
4 that's all we're entitled to, that doesn't give us the
5 opportunity to fully litigate and fully defend against that
6 aspect of the hostilities question.

7 And so that's why we think that we should be provided
8 all of the materials that are relevant in the USS COLE
9 relevant to the hostilities question. That's what we've --
10 we're asking the court to order today.

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

12 Ms. Bormann.

13 LDC [MS. BORMANN]: Judge, there's a procedural issue here
14 that has never been addressed in this court, and that is we
15 filed a supplement with different facts because Mr. Bin'Attash
16 stands in a different position than Mr. Mohammad with respect
17 to the USS COLE bombing.

18 Our supplement doesn't really track Mr. Mohammad's
19 facts at all, and the government has waived response with
20 respect to Mr. Bin'Attash. That was filed on 19 July titled
21 557B.

22 So our position is they should not be able to
23 respond, period, to us orally. And let me explain to you why

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that is. This is really the first time this has happened, so
2 I had to put together all of the pieces.

3 Rule 3 of the Military Commission Rules of Court
4 entitled Motions Practice defines a response under 5.c. as, "A
5 response is the opposing party's answer to a motion." And now
6 later on under Rule 3 of the Rules of Court under
7 paragraph 7.d., as in delta, "Responses" says, "Unless the
8 Military Judge provides otherwise, a response is due within 14
9 calendar days after a motion or supplement is filed." So the
10 government's position on our supplement would have been due 14
11 days after the filing of it, which would land sometime next
12 week.

13 The government decided to waive the response, and so
14 the question for you is, what does that mean? And thankfully,
15 we have the Rules for Military Commission Rule 801 which says
16 what that is. The title of Rule 801 under Chapter VII [sic],
17 Trial Procedure Generally, Rule 801 applies to a "Military
18 judge's responsibilities," and then there's a semicolon and it
19 says "other matters."

20 And I'm going to direct you to Rule 801, Subsection
21 (g), as in golf, titled Effect of failure to raise defenses or
22 objections. It reads, "Failure by a party to raise defenses
23 or objections or to make requests or motions which must be

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 made at the time set by this Manual or by the military judge
2 under authority of this Manual, or prior to any extension
3 thereof made by the military judge, shall constitute waiver
4 thereof, but the military judge for good cause shown may grant
5 relief from the waiver."

6 There's really no good cause shown here whatsoever so
7 I'm asking to argue after trial counsel and asking you to bar
8 them from a response.

9 MJ [COL POHL]: Tell you what we'll do, is trial counsel
10 may respond to Mr. Mohammad's argument and then we will
11 address whether or not you can ----

12 LDC [MS. BORMANN]: Thank you.

13 MJ [COL POHL]: ---- this waiver thing applies or not. So
14 we'll address the waiver question later. Right now,
15 Mr. Trivett, just discuss what's before me.

16 MTC [MR. TRIVETT]: Whenever the commission undergoes an
17 analysis as to whether or not a motion to compel should be
18 granted, it's important to understand the discovery that's
19 already been provided and which the defense already has.

20 And they have 1500 pages of discovery on hostilities,
21 many of which detail al Qaeda's responsibility for the
22 USS COLE attacks. They will shortly have Mr. Nashiri's
23 statement, certainly, that discusses his involvement for

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 al Qaeda in the attacks on the USS COLE.

2 In December, before the jurisdictional hearing, they
3 received other 302s from other people who gave statements to
4 the FBI shortly after the COLE was attacked, indicating
5 al Qaeda's responsibility for the attack.

6 And al Qaeda also took responsibility in what was a
7 widely publicized video called "The Destruction of the
8 USS COLE" that will be part of the investigation in the
9 government's case in chief.

10 As we discussed previously in our hostilities, I want
11 to make sure that it's clear what the significance of the
12 USS COLE attack is to this case and what it's not to this
13 case. And the government's theory of hostilities is that
14 there were ten separate attacks following a declaration of war
15 by Usama bin Laden, and then a 1998 fatwa in which he declared
16 that American civilians were legitimate targets in his war.

17 There was the August 1998 East Africa Embassy attacks
18 that killed over 220 people. There was the USS COLE attack
19 where 17 were killed and 39 injured; tremendous destruction to
20 a U.S. Navy ship. And of course, there were the 9/11 attacks
21 themselves; 2,976 people were killed.

22 Our position is also that 9/11 alone, the attack
23 alone, is sufficient to establish armed conflict, and that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 there's no such thing as a one-free-shot doctrine under the
2 law of war.

3 But ultimately, the hostilities is significant
4 because it's a jurisdictional requirement of every element.
5 To the extent we prove any of the charged offenses against the
6 accused, we have to show that it was taken in the context of
7 and associated with hostilities. We do that by proving beyond
8 a reasonable doubt the existence of the hostilities. We don't
9 necessarily have to prove beyond a reasonable doubt al Qaeda's
10 responsibility for the USS COLE, although we will do so.

11 So we're in a little bit of a conundrum from a
12 discovery standpoint. We either turn over that which we
13 intend to use. And certainly, if there's any evidence that
14 shows anyone else was responsible, meaning any other group
15 other than al Qaeda was responsible for the USS COLE, we'll
16 provide that. That's not a problem. That would be an
17 affirmative discovery obligation that we have. I think we've
18 identified one or two documents like that. If the defense
19 hasn't already gotten it, they will, and very shortly.

20 But ultimately, absent that, we either turn over all
21 292,000 pages of discovery that was done in the Nashiri
22 case -- to include many of which went through some 505 process
23 and was approved by the judge in that case, whether it was you

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 initially or one of the judges afterwards -- or we rely on the
2 fact that we have discharged our discovery obligations by
3 providing that which we intend to use and any other
4 information that establishes that al Qaeda wasn't responsible.

5 So that's where we're at. We've done the first part.
6 It seems like we might have to clean up a document or two in
7 that regard specific to the request. But we believe that
8 that's our obligation and that that's what we would do. Could
9 we do route number two? Could we turn over the 291,000? At
10 this point, other than the 505 information that may have to
11 come back through you if we did it, we could do that fairly
12 quickly at this point.

13 MJ [COL POHL]: Why would the 505 have to come back
14 through me?

15 MTC [MR. TRIVETT]: Well, I mean, to the extent that it's
16 been approved as a summary in another case, I don't know that
17 that would necessarily satisfy the record that you have now
18 looked at it in this case and you've determined that it's an
19 adequate substitute. So we would ----

20 MJ [COL POHL]: I understand the argument.

21 MTC [MR. TRIVETT]: So ----

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

23 MTC [MR. TRIVETT]: So ultimately, we believe that we've

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 satisfied our obligations by undergoing our discovery in the
2 way in which we did; we opposed the motion to compel all
3 additional information. But I do think it's an either/or
4 proposition. There's no good way for me to go through and
5 really discern -- other than Mr. Nashiri's medical records and
6 maybe the DIMS records, there's no good way for us to discern
7 what other information might be discoverable when we feel like
8 none of it is. So it's either all of it or it's what we've
9 provided. We believe that the law only requires what we've
10 provided.

11 MJ [COL POHL]: Thank you.

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

13 ADC [MS. RADOSTITZ]: Your Honor ----

14 MJ [COL POHL]: Yeah.

15 ADC [MS. RADOSTITZ]: ---- I would like to address the
16 first question, which is, Mr. Trivett continues to say that --
17 that if they're not going to use it, it's not relevant or
18 material. And that's not the standard. I mean, we cite in
19 our brief, U.S. v. Marshall, U.S. v. Law -- Boyd [sic],
20 U.S. v. Webb, and all of those point out that materiality
21 simply isn't what the government wants to use, it's what the
22 defense can use to uncover other admissible evidence, to look
23 at aid in witness preparation, to aid in cross-examination of

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 witnesses, to aid in the strategy. And all of those things
2 come from the whole of the evidence.

3 I want to go back to an argument that Mr. Trivett
4 made on the previous motion, that the first question he looks
5 at, do we have an obligation; and the second question, is it
6 resource intensive. He just admitted it's not resource
7 intensive to give this information to us. We believe that
8 it's necessary for us to address the whole of the hostilities
9 questions. They have chosen to place the USS COLE into the
10 hostilities issue. And in doing that, we need to look at all
11 of that information. They have it easily to provide, and
12 we're asking that they do. And again, with the caveat that,
13 obviously, DIMS reports and things like that we wouldn't be
14 entitled to.

15 MJ [COL POHL]: Thank you.

16 Mr. Trivett, anything further?

17 MTC [MR. TRIVETT]: Not on this part of the issue, sir.

18 MJ [COL POHL]: Okay. Mr. Trivett, how do you respond to
19 Ms. Bormann's argument that by not responding to the
20 supplement, you've waived any oral argument on it?

21 MTC [MR. TRIVETT]: So we were actually looking for an
22 opportunity to call the Bin'Attash team out on what we believe
23 is a delay strategy, and I think we finally got it.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 If you look over the course of the last certainly two
2 years, right before we're about to litigate and right before
3 we're about to come down, a motion to supplement is filed by
4 the Bin'Attash team in a way in which, if we take our full
5 two -- or our full, I guess, two -- yeah, two weeks to
6 respond, it pushes it to the next hearing. And we're not
7 going to play that game anymore. We need to get done. We
8 need to have a trial date set and we need to go to trial.

9 And if by delaying everything every time for things
10 that have been long on the docket, they can do that, we should
11 not be required to have to respond.

12 So for whatever specific piece that is in that new
13 supplement, I believe -- we have waived our right to respond
14 in writing. We never waived our right to respond orally, to
15 the extent you have any questions. But oftentimes, subject to
16 your questions on a supplement that we feel is fairly
17 insignificant to the underlying base motion, if we don't get
18 to argue, so be it. We feel like our positions are the right
19 ones under the law, even in the response to the regular
20 motion.

21 But certainly, subject to your questions, we would be
22 happy to answer any questions you might have about the
23 supplement. But that's why we're doing it and we're going to

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 do it every time now, because it's gone on for a long time and
2 has delayed the resolution of things that have languished.
3 And we're not going to countenance it anymore on our side.

4 MJ [COL POHL]: Thank you.

5 Ms. Bormann?

6 LDC [MS. BORMANN]: Yes, sir. What could I answer? So
7 the motion was filed in February and then responded to by the
8 government in February. We saw the government's response. We
9 had our own request for discovery on USS COLE. We reviewed
10 that and in due course we filed our own supplement. We were
11 going to do a separate USS COLE motion, but in an attempt for
12 judicial economy, we added on to theirs.

13 Mr. Bin'Attash is in a different position, though.
14 And the irony here is the following: Mr. Trivett asks why it
15 is that we are not able to respond immediately, and let me
16 explain to you why. I want to refer you to tabs 4 through 7
17 filed by the government, classified. And I won't talk about
18 the content, but 555, the memorandum, you understand what
19 resources the government has. We don't have those.

20 So when we receive a motion, we have to divide it
21 first to investigate it and then to respond to it among a very
22 limited number of resources.

23 Thankfully, we now have Mr. Montross. But up until

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 March of this year, we couldn't even use him. So every time
2 something gets filed in here, somebody has to spend multitude
3 of hours. At the same time we're doing that, in the last year
4 after the government claimed it had continued -- or satisfied
5 its discovery obligations first in September of 2016 and then
6 in September of 2017, I sat Mr. Garber down, our DSO, and
7 asked him to compile how much discovery we've received in the
8 last year.

9 Since July 20 of 2017 through July 20 of 2018, we
10 received the following discovery from the government, most of
11 it dumped on us right before hearings:

12 UNCLASSIFIED, 62,396 pages, 170 videos, and one sort
13 of slide presentation.

14 SECRET level, 31,161 pages, one audio file, and 49
15 separate videos.

16 And at the TS level, 3,085 pages, 42 audio files, and
17 41.1 gigabytes of audio.

18 You want to know why we're behind the ball? We don't
19 have the resources.

20 MJ [COL POHL]: Okay. Ms. Bormann, on your pleading, what
21 are the new facts that weren't available in February? If I
22 look at your supplemental facts now, most of them predate ----

23 LDC [MS. BORMANN]: Well, I didn't file the original

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 motion on this. This was a motion filed by Mr. Mohammad.

2 Mr. Mohammad ----

3 MJ [COL POHL]: But how -- but how do you call it a
4 supplement then?

5 LDC [MS. BORMANN]: Well, because ----

6 MJ [COL POHL]: Supplement should be new facts that aren't
7 available. I mean, you say ----

8 LDC [MS. BORMANN]: Well, we alleged ----

9 MJ [COL POHL]: Again, I just want to clarify here ----

10 LDC [MS. BORMANN]: Sure.

11 MJ [COL POHL]: ---- is you say, following supplement
12 contains new facts and information not known by Mr. Mohammad
13 at the time of the filing.

14 LDC [MS. BORMANN]: That's right.

15 MJ [COL POHL]: So your view of new facts would be they
16 didn't put it in their pleading, therefore, there's new facts
17 for you, and that makes it a supplement.

18 LDC [MS. BORMANN]: So we have a choice, right? Under the
19 Rules of Court the way it's set up, we can either join
20 something and be bound by a decision without making an
21 argument, or supplement it, or decline joinder. But we need
22 USS COLE discovery.

23 So we attempted to economize this court's time, and

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 frankly all of our time, by supplementing. And we
2 supplemented because we realized Mr. Mohammad doesn't stand in
3 the same place we are, right? I mean, Mr. Bin'Attash is named
4 19 times in the charges against Mr. al Nashiri. He's a named
5 co-conspirator.

6 So we could have declined joinder and eventually
7 filed our own motion to compel USS COLE discovery. And maybe
8 that's what we should do going forward. But in attempt to
9 sort of consolidate them, we tried to put forward the entire
10 sort of universe of USS COLE material on this motion, because
11 here's what happens: If you order USS COLE material for
12 Mr. Mohammad, it doesn't necessarily mean we receive it.

13 We've all -- all five learned counsel have discovered
14 that each of us is getting different and separate discovery.
15 So even though this is a joint trial, the government is making
16 decisions and giving each of us -- even when they're not
17 discrete issues, even when it's not like a health matter
18 issue, I get different discovery than Mr. Mohammad gets based
19 upon the same, exact set of facts.

20 So in order to make sure that we're getting the world
21 of discovery that's necessary to litigate this case, we filed
22 a supplement. And in it, we alleged just what you said,
23 Mr. Mohammad didn't have those facts ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Yeah, but also in your supplement, you are
2 now -- you now are taking the government's response and
3 responding to it.

4 LDC [MS. BORMANN]: I'm not responding to anything that
5 the government said.

6 MJ [COL POHL]: Okay. To make sure I read this correctly.
7 On 23 February 2018, the prosecution filed its
8 response.

9 LDC [MS. BORMANN]: Yes.

10 MJ [COL POHL]: And then you summarize in response to the
11 government.

12 LDC [MS. BORMANN]: Well, that's because we're listing for
13 you the facts so you can make a determination about whether or
14 not the supplement should be properly filed.

15 MJ [COL POHL]: But what I'm saying is -- what I'm saying
16 is, is what you're doing, though, is you're attacking the
17 government response and then you don't want to let them argue
18 on it.

19 LDC [MS. BORMANN]: We didn't attack the government
20 response at all. There's nothing in our argument about the
21 government response. We lay out the law as it applies to the
22 situation with Mr. Bin'Attash. We divide it into three
23 separate areas: Hostilities, and then prior bad conduct ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Ms. Bormann, I don't mean to be
2 confrontational here, but you say in your supplemental
3 argument, the prosecution argues the USS COLE attack is
4 relevant to Mr. Bin'Attash's prosecution in court but takes
5 the opposite position in the discovery process. Isn't that
6 arguing against the government response?

7 LDC [MS. BORMANN]: No. The government response to our --
8 their response to our discovery request, not their response to
9 Mr. Mohammad.

10 MJ [COL POHL]: Okay.

11 LDC [MS. BORMANN]: Talking about their response to our
12 discovery request.

13 So we issued a discovery request. They denied the
14 discovery request. So we're arguing that -- I'm happy to
15 separate it. I'm happy to ----

16 MJ [COL POHL]: No. No -- you don't -- no, I don't -- I
17 see where the confusion comes here, and it -- and I understand
18 it. And, quite frankly, if a supplement is filed and the
19 government's argument is the same and they choose not to file
20 a written pleading, that cuts the briefing cycle down and we
21 get things resolved. And so using your term "judicial
22 economy," I like that.

23 But on the other hand, I think waiver of a written

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 response does not necessarily constitutes a waiver of oral
2 argument.

3 LDC [MS. BORMANN]: So ----

4 MJ [COL POHL]: So if they waive a written response, they
5 may respond to an oral argument that you make, okay, with the
6 understanding that their authority is basically going to be
7 arguing your case, because they presented no authority of
8 their own.

9 LDC [MS. BORMANN]: Except that the whole point of having
10 a response is to prepare for it, right?

11 MJ [COL POHL]: Well, if their response -- if their oral
12 argument is limited to what's the facts before me, they're the
13 same facts that you have, right, and the same law you have?

14 LDC [MS. BORMANN]: Well, yes.

15 MJ [COL POHL]: If they go drifting somewhere else, then I
16 said no, you didn't respond; therefore, it's not there.

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

18 MJ [COL POHL]: To be fair -- to be fair, let's be fair
19 here. There are things raised in a lot of replies that are
20 not new matters that are not under responses. So I don't want
21 to get into which one I'm talking about, but there's -- so
22 this -- all of a sudden, this tight rule that you want me to
23 apply, if we get into that, some replies are no longer going

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20095

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 to be considered because they're raising new issues. I let
2 them in because I want the issue to be fully litigated ----

3 LDC [MS. BORMANN]: Okay.

4 MJ [COL POHL]: ---- okay, because I think it's fair to
5 both sides. And to sit there and say, well this reply
6 doesn't -- this X part of the reply doesn't fit this response,
7 therefore, I'm not going to consider it, to me is not useful,
8 because it instigates more litigation.

9 Similarly, if somebody chooses not to file a written
10 response, that would not prohibit them from making an oral
11 argument. And that's the way I'm going to go.

12 LDC [MS. BORMANN]: Okay. But with all due respect to
13 your analysis here, there is a difference between the defense
14 and the prosecution, right? So Mr. Bin'Attash is entitled to
15 due process; the government isn't.

16 MJ [COL POHL]: Both sides are entitled to a fair trial.

17 LDC [MS. BORMANN]: That's correct. But due process is a
18 different issue. And so when you have -- when you allow oral
19 argument without a written response, you take the risk of
20 having pretrial litigation by ambush, and that's what we
21 object to.

22 MJ [COL POHL]: I understand that risk and I'm willing to
23 accept it.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: Okay.

2 MJ [COL POHL]: Go ahead.

3 LDC [MS. BORMANN]: All right. So with respect to
4 Mr. Bin'Attash, the same argument obviously does not apply.
5 Mr. Bin'Attash is named a total of 19 times in the charge
6 sheet for Mr. al Nashiri that's attached to our motion. He is
7 a named co-conspirator. If you look at the initial charge
8 sheet, they list I think it's a series of 25 co-conspirators.
9 Mr. Bin'Attash is number 3 or number 4. He's mentioned in 12
10 different paragraphs for a total -- either in his full name or
11 by the name of Khallad, a total of 19 times in the charge
12 sheet.

13 The government chose not to actually bring charges
14 against him, but he is implicated by the government in a
15 variety of different instances. The charge sheet that is
16 attached to our filings taken off the mc.mil website, which
17 means it is there for the world to look at, it is there for
18 this judge to look at, it is there for any prospective panel
19 members to look at.

20 So we as his defense counsel in a death case have to
21 look at that and understand what we need to investigate and to
22 respond to.

23 So there are three areas where this discovery is

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20097

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 important and essential to us. With respect to hostilities,
2 the -- I'm not going to repeat what Ms. Radostitz says, but
3 basically it's going to be litigated. What happened at the
4 USS COLE and its ties to al Qaeda and, frankly,
5 Mr. Bin'Attash's ties to al Qaeda all fall in the rubric of
6 deciding the hostilities issue. And so it is obviously
7 relevant and necessary to that.

8 That will be argued before the military judge, but
9 maybe -- and, you know, the law presumes that judges do a
10 better job of sort of distinguishing between a proper
11 argument, proper evidence, and improper evidence, and improper
12 argument.

13 And so, you know, it might be that you can separate
14 the bad conduct argument brought up in a hostilities thing
15 involving the USS COLE from tainting Mr. Bin'Attash, but it's
16 much harder for panel members. And the law is pretty clear on
17 that issue.

18 The next area that we have to talk about is prior bad
19 conduct, and this sort of flows from what I just said. So in
20 a military commission situation where you have panel members
21 who will have been, if they're at all informed about the
22 commission process, know that Mr. Bin'Attash was -- is at
23 least mentioned 19 times in the charges against -- bless

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 you -- against Mr. al Nashiri.

2 The -- the risk of tainting Mr. Bin'Attash is high.
3 And so we -- it's incumbent upon me and the counsel that work
4 with me to investigate the allegations and determine whether
5 or not we can, in some smaller and some larger ways, rebut
6 them if they become an issue.

7 It's a preparation issue. It may or may not be that
8 the government introduces evidence that would tie or would
9 implicate Mr. Bin'Attash, but certainly, we have to be
10 prepared to be ----

11 MJ [COL POHL]: Has the government given you any evidence
12 yet of Mr. Bin'Attash's involvement in the COLE bombing --
13 alleged involvement?

14 LDC [MS. BORMANN]: We have some -- we have some
15 materials, not very many. And they -- some of it does
16 mention, yes. So we have statements and a variety of other
17 things. So yes, the answer is yes, they have, but not
18 directly on the USS COLE. It's done in questioning and other
19 things, statements during the interrogation of Mr. Bin'Attash,
20 and then some sort of peripheral discovery on the USS COLE
21 bombing in general.

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

23 LDC [MS. BORMANN]: That's the thousand pages or so that

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 they were talking about earlier. And then, obviously, there
2 are statements that implicate a lot more than that.

3 Last but not least, maybe most importantly, I am
4 charged with investigating what occurs and what has occurred
5 in Mr. Bin'Attash's life. He is a -- an individual of Yemeni
6 extraction. His father is Yemeni and he has relatives in
7 Yemen. His associations, how he lived his life, who he talked
8 with, what he learned, how he moved, the good things that he
9 did in those communities in Yemen, all of those things are
10 important to developing a mitigation case and rebutting the
11 government's aggravation case.

12 The only place I can go to for that evidence is the
13 U.S. Government. They have the documents. They had a
14 full-on, full-fledged investigation of Mr. Bin'Attash's ties
15 to the USS COLE. We know from open-source documents that they
16 interviewed a variety of individuals regarding Mr. Bin'Attash:
17 Where he lived, who he spoke with, what he did on a daily
18 basis. Those things are essential to developing a mitigation
19 case.

20 His connections to the Yemeni community are important
21 in establishing how it is and why he is -- why it ----

22 MJ [COL POHL]: Would that be in the COLE investigation?

23 LDC [MS. BORMANN]: Well, I suspect that it is. Because

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 if it frames -- so this is where I don't know what I don't
2 know.

3 MJ [COL POHL]: You don't know. Okay.

4 LDC [MS. BORMANN]: So we have -- I have statement
5 summaries that don't have exact dates on them that talk about
6 Mr. Bin'Attash's time in Yemen. And I don't know what he was
7 asked. I don't know if they, like in Mr. Mohammad's case --
8 or Mr. al Baluchi's case, rather, they received information
9 from Majid Khan that they then confronted him with. I don't
10 know that because I don't have any of that information.

11 So I have no idea if they gleaned the information
12 that brought up the topics of Yemen from the USS COLE
13 investigation. I'm going to assume, at least in part, since
14 we know some of the FBI agents working on it were the same FBI
15 agents that were assisting in the 9/11 case, so I'm imagining
16 there's some cross-contamination there.

17 I also believe law enforcement, they're going to be
18 sharing their information. So there's no reason for me not to
19 believe that it came from the USS COLE bombing. I don't think
20 that interrogation about Yemeni contacts was in a vacuum in
21 this case. I think it was intended to elicit responses about
22 the USS COLE and possibly implicate himself. So ----

23 MJ [COL POHL]: You want the whole USS COLE investigation?

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20101

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MS. BORMANN]: No, I don't want the whole USS COLE
2 investigation. I, like what Ms. Radostitz argued, want the
3 things that are relevant to Mr. Bin'Attash, which is probably
4 a significant portion of it.

5 MJ [COL POHL]: I know there's things unique to
6 Mr. Nashiri. I got that.

7 LDC [MS. BORMANN]: Right.

8 MJ [COL POHL]: But except for that, you'd want the whole
9 COLE investigation to ----

10 LDC [MS. BORMANN]: I want the stuff that would inform our
11 investigation of the hostilities, whether it was connected to
12 al Qaeda or whether it was a false-flag operation. I want the
13 information regarding the confederates that they say were
14 involved in the USS COLE bomb planning and implementation. I
15 want the information on where they got to Mr. Bin'Attash being
16 named 19 times in Mr. al Nashiri's charge sheet.

17 I want the information, either collateral or that
18 directly relates to the associations they placed -- they made
19 between he and other people in Yemen, whether those
20 associations were with the nice people of a community, whether
21 they were with his cousins, whether they were with an aunty
22 who hadn't seen him in years. I can't tell you what they have
23 in that investigation because I haven't seen it. But I can

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 tell you that information like that is essential to
2 Mr. Bin'Attash's defense. That's what we asked for.

3 MJ [COL POHL]: Okay. Just a second. Hold on.

4 LDC [MS. BORMANN]: I'm not going anywhere.

5 [Pause.]

6 MJ [COL POHL]: Okay. I'm sorry. I don't have anything
7 further. Thank you, Ms. Bormann.

8 LDC [MS. BORMANN]: Just while you were contemplating over
9 there, I looked down at my notes and I missed one point. And
10 that was on my third issue, which is the mitigation aspect of
11 this, the associations and what occurred.

12 I just want to point out that at the time period
13 around the USS COLE bombing and the time period where the
14 allegations of the conspiracy that is laid out in the
15 al Nashiri charge sheet began, my client was 20 -- in his very
16 early 20s. And so we're at a formation time in a young man's
17 life where those associations, whether they be good or bad,
18 can explain a lot to a jury. And so that's why it's so
19 important.

20 MJ [COL POHL]: Thank you.

21 LDC [MS. BORMANN]: Thank you.

22 MJ [COL POHL]: Mr. Trivett?

23 MTC [MR. TRIVETT]: Nothing further, sir.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20103

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: I have a question for you, then I'll have
2 a follow-up question for Ms. Bormann.

3 LDC [MS. BORMANN]: Then I'll stay right here.

4 MJ [COL POHL]: Okay. On the hostilities issue, you
5 indicated there were ten separate events, I believe, that
6 predate -- or maybe nine predate 9/11.

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

8 MJ [COL POHL]: What were those events again, please?

9 MTC [MR. TRIVETT]: Okay. So the actual attacks, there
10 were the ten actual attacks. There were the two East Africa
11 embassy attacks, there was the USS COLE attack, were attack --
12 the four civilian airliners were separately attacked and
13 hijacked ----

14 MJ [COL POHL]: Just a second. Okay. Go ahead.

15 MTC [MR. TRIVETT]: And then there were the three targets
16 that were attacked, the two World Trade Center and the
17 Pentagon.

18 MJ [COL POHL]: Okay. So excluding the 9/11 attacks, you
19 think the two embassies' attacks and the COLE bombing are
20 relevant for establishing hostilities in the -- putting aside
21 for now what Usama bin Laden may or may not have said? These
22 are the overt acts you're talking about?

23 MTC [MR. TRIVETT]: Those are the actual attacks. There

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 was a declaration of war and an indication that the civilians
2 were legitimate targets and then the attacks followed those.

3 MJ [COL POHL]: Now, we've talked about the COLE bombing.
4 Have you provided them discovery on the embassy bombings also?

5 MTC [MR. TRIVETT]: The same types of discovery, correct.

6 MJ [COL POHL]: Okay.

7 MTC [MR. TRIVETT]: That establish al Qaeda's
8 responsibility. That's our burden, establish al Qaeda's
9 responsibility for the attack; show the nature and severity of
10 the attack; and how many people were killed to establish
11 hostilities.

12 MJ [COL POHL]: Okay. I just wanted to clarify that.
13 Actually, Ms. Bormann, I don't have a question for you.

14 LDC [MS. BORMANN]: Thank you.

15 MJ [COL POHL]: Thank you.

16 LDC [MR. NEVIN]: Your Honor?

17 MJ [COL POHL]: Mr. Nevin.

18 LDC [MR. NEVIN]: Could I -- I just would remind the
19 military judge that we have -- we made a demand for 404B
20 evidence as well. And if I remember correctly, the military
21 commission has not ruled on that yet.

22 MJ [COL POHL]: Do you have the AE number?

23 LDC [MR. NEVIN]: I'm sorry, I don't.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. Somebody will find it, but okay.

2 LDC [MR. NEVIN]: Okay. But anyway --

3 MJ [COL POHL]: But I see that's related to this.

4 LDC [MR. NEVIN]: Anyway, I just wanted to make that tie,
5 please.

6 MJ [COL POHL]: Okay. Okay.

7 Let's talk about the way ahead. Tomorrow will be a
8 closed session under Military Commission Rule of Evidence
9 505(h) where we discuss classified matters outside the
10 presence of the general public.

11 We all have that list. I went over the 802 and
12 added -- we're also going to have to address the issue that
13 Ms. Bormann referred to earlier, and that's kind of a general
14 classification guidance issue.

15 Mr. Connell.

16 LDC [MR. CONNELL]: Can I give you my list that I think we
17 have for 505(h), sir?

18 MJ [COL POHL]: Sure. Yeah.

19 LDC [MR. CONNELL]: And these are the base motions, not
20 the 505 notices.

21 MJ [COL POHL]: Sure.

22 LDC [MR. CONNELL]: 133RR, 350C, 3500, 360C, 399 ----

23 MJ [COL POHL]: Wait a minute. Wait a minute. 133RR,

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 3500, 350C -- what was the next one?
2 LDC [MR. CONNELL]: 360C.
3 MJ [COL POHL]: Okay.
4 LDC [MR. CONNELL]: 399.
5 MJ [COL POHL]: Well, maybe, maybe not. That's a ----
6 LDC [MR. CONNELL]: Up to you, sir.
7 MJ [COL POHL]: No, but that's the -- a different -- I got
8 it. That's on the list, but probably not. Go ahead.
9 LDC [MR. CONNELL]: 419.
10 MJ [COL POHL]: Got it.
11 LDC [MR. CONNELL]: 509.
12 MJ [COL POHL]: Okay.
13 LDC [MR. CONNELL]: 510.
14 MJ [COL POHL]: Okay.
15 LDC [MR. CONNELL]: 512.
16 MJ [COL POHL]: Okay.
17 LDC [MR. CONNELL]: 513.
18 MJ [COL POHL]: Okay.
19 LDC [MR. CONNELL]: 514.
20 MJ [COL POHL]: Okay.
21 LDC [MR. CONNELL]: And then comes added in, 524. That's
22 the one you directed us to file today. I understand it's
23 already been accepted.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20107

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 534. 538. And then if I correctly understand, 555P
2 and 555R come off because we're not doing that this week.

3 MJ [COL POHL]: Correct. Correct.

4 LDC [MR. CONNELL]: And then 562, 564, and comes added in,
5 579, 581.

6 MJ [COL POHL]: Wait a minute. Okay.

7 LDC [MR. CONNELL]: So 579, 581, and then 583.

8 MJ [COL POHL]: Okay. And then the -- that's pretty
9 consistent with what I had. There also will be a -- the
10 399/360 issue is kind of combined. So we'll talk about that.

11 Okay. And then on Wednesday, we'll go back to an
12 open session. Again, working off AE 003 -- 580P. We will not
13 do the 555 ones. We may or may not do 399. Is 350 ready for
14 oral argument in an unclassified setting?

15 LDC [MR. CONNELL]: Sir, after the 505(h) hearing, I think
16 it is finally that ----

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: ---- goose has cooked.

19 MJ [COL POHL]: Okay. Then we'll go with the rest of the
20 ones that are listed there. And then we'll determine about
21 the 806 hearing on an as-needed basis.

22 Ms. Bormann.

23 LDC [MS. BORMANN]: Judge, just a heads up. We're filing

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 a 505 notice on 538 and 561, it's probably in already. We're
2 waiting just to serve it to the judiciary. We don't have to
3 do it tomorrow, but we thought -- after this morning, we
4 realized that we're going to need to discuss this to finish up
5 some of those topics.

6 MJ [COL POHL]: Okay. You can file it. We'll discuss
7 tomorrow whether or not it can go forward at this time given
8 its posture.

9 LDC [MS. BORMANN]: Sure.

10 MJ [COL POHL]: So, I mean, it's -- we can always address
11 it or not address it as the case may be.

12 Mr. Connell, you're still standing.

13 LDC [MR. CONNELL]: Sir, I have another procedural issue
14 once we're done with the 505(h).

15 MJ [COL POHL]: I think we are done.

16 LDC [MR. CONNELL]: All right. Sir, I think there was
17 some confusion earlier, perhaps it was mine, perhaps it was
18 somebody else, but could I go over what I think you told us to
19 do in the 555 series?

20 MJ [COL POHL]: Well, why don't I tell you what I thought
21 I told you.

22 LDC [MR. CONNELL]: That works, too, sir.

23 MJ [COL POHL]: Okay. A week from Monday, you will file

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 your motion to compel. Okay? Trial Counsel, you have two
2 weeks after the filing of said motion to address the motion to
3 compel, and anything that's -- it's been renumbered in the
4 555V. I think that's a new number. And then -- so the
5 briefing process ----

6 LDC [MR. CONNELL]: Yes, sir. You skipped over the part
7 that's causing me confusion.

8 MJ [COL POHL]: Okay. I'll address that in a second.
9 Okay, what's causing the confusion?

10 LDC [MR. CONNELL]: So some people -- or I am told some
11 people believe that you told us to split up 555V into two
12 separate motions.

13 MJ [COL POHL]: No, I'm saying is I wish it had been but
14 I'm not going to go into it now.

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

16 MJ [COL POHL]: I mean, quite frankly, going forward to
17 both sides, a consolidated response, I can deal with. A
18 consolidated reply I can deal with. A consolidated
19 response/reply I can't deal with because now you've got
20 two different suspenses. That was my problem with it.

21 LDC [MR. CONNELL]: Got it, sir.

22 MJ [COL POHL]: Okay. So in other words, leave it like it
23 is ----

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: ---- it's filed as it is and then we'll go
3 to the other thing in the motion to compel.

4 LDC [MR. CONNELL]: Very good. So we'll expect -- we'll
5 look for an AE number on renumbering 555V sometime.

6 MJ [COL POHL]: Right, right. And then two weeks from
7 today, your motion to compel will be due.

8 LDC [MR. CONNELL]: Yes, sir. That will be fine. I think
9 you meant one week from Monday.

10 MJ [COL POHL]: Well, two weeks from today would be one
11 week from next Monday.

12 LDC [MR. CONNELL]: Yes, you are right, sir. So ----

13 MJ [COL POHL]: Sometimes I'm right.

14 LDC [MR. CONNELL]: You caught all of us. You're exactly
15 right.

16 MJ [COL POHL]: Two weeks from today, one week from next
17 Monday. There is one week in between.

18 I'm being told that 509, 512, and 513 deal with ACCM
19 info. And if that's true ----

20 LDC [MR. CONNELL]: Yes, that's correct.

21 MJ [COL POHL]: Okay. Counsel, you need to verify that
22 the people here have been read on for the appropriate ACCM on
23 that.

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

20111

UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: Okay. So that's 509, 512, and 513. So
3 what we'll do is we'll do the first session with everybody and
4 then the non-ACCM cleared will not be there for these last
5 three.

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

7 MJ [COL POHL]: Okay? All good? Okay.

8 The commission is in recess.

9 [The R.M.C. 803 session recessed at 1611, 23 July 2018.]

10
11
12
13
14
15
16
17
18
19
20
21
22
23