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1 [The R.M.C. 803 session was called to order at 0905,
2 24 July 2019.]

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

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

6 CP [BG MARTINS]: Yes, Your Honor. All counsel -- and
7 good morning.

8 MJ [Col COHEN]: Good morning.

9 CP [BG MARTINS]: We do have this morning William Beechum
10 of the Federal Bureau of Investigation is also with us in the
11 courtroom.

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

13 Mr. Nevin.

14 LDC [MR. NEVIN]: All present who were here at the end of
15 the last session, Your Honor.

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

17 Ms. Bormann.

18 LDC [MS. BORMANN]: Judge, everybody is here.

19 MJ [Col COHEN]: Thank you.

20 Mr. Harrington.

21 LDC [MR. HARRINGTON]: The same, Judge. Everyone is here.

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

23 Mr. Connell, it appears that your client is not here

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1 today; is that correct?

2 LDC [MR. CONNELL]: Good morning, Your Honor. Yes, that's
3 correct.

4 MJ [Col COHEN]: Good morning.

5 LDC [MR. CONNELL]: In addition, Mr. Farley is in the
6 compound, but he's not in the courtroom at the moment.

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

8 And then, Mr. Ruiz, obviously I recognize that
9 Mr. al Hawsawi is not here today.

10 LDC [MR. RUIZ]: That's correct.

11 MJ [Col COHEN]: Okay. Are the remaining members of your
12 team the same?

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

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

15 Mr. Mohammad, Mr. Bin'Attash, and Mr. Binalshibh are
16 all here.

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

19 CP [BG MARTINS]: We do, Your Honor.

20 MJ [Col COHEN]: Thank you.

21 CP [BG MARTINS]: Lieutenant Commander, if you can please
22 proceed to the witness stand, remain standing and raise your
23 right hand for the oath.

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

3 DIRECT EXAMINATION

4 Questions by the Chief Prosecutor [BG MARTINS]:

5 Q. You are a lieutenant commander in the United States
6 Navy?

7 A. Yes, sir.

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

10 A. Yes, sir.

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

12 Q. Commander, do you have what's been marked in front of
13 you, Appellate Exhibit 648A and 648?

14 A. I do, sir.

15 Q. All right. Each of these documents consists of two
16 pages?

17 A. Yes, sir.

18 Q. Did you have the opportunity to advise both Mr. Aziz
19 Ali for Mr. al Hawsawi of their right to attend today's
20 proceeding?

21 A. I did, sir.

22 Q. What time did you do that?

23 A. For Mr. Aziz Ali, at 6:10 this morning. And for

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1 Mr. al Hawsawi, at 6:16 this morning.

2 Q. All right. Did you do that in English or did you do
3 it in Arabic?

4 A. Both in English.

5 Q. Now I have the English forms in front of you ----

6 A. I do.

7 Q. ---- and, again, you do? All right.

8 Did you follow this form in advising both of these
9 gentlemen of their right to attend today's proceeding?

10 A. I did, sir.

11 Q. And did they indicate on the form that they did not
12 wish to attend today's hearing?

13 A. That is correct.

14 Q. All right. Do you have any question about the
15 voluntariness of their waivers?

16 A. No, sir.

17 Q. Thank you.

18 TC [MR. SWANN]: I have nothing further, Judge.

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

20 Are there any questions from the counsel representing
21 these gentlemen?

22 Negative response from both counsel. All right.

23 If I could please see those documents.

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1 WIT: Yes, sir.

2 MJ [Col COHEN]: Mr. Connell, have you had an opportunity
3 to see Appellate Exhibit 648?

4 LDC [MR. CONNELL]: I have, Your Honor.

5 MJ [Col COHEN]: Okay.

6 LDC [MR. CONNELL]: I have no questions as to its
7 authenticity.

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

9 Mr. Ruiz, did you get the opportunity to see
10 Appellate Exhibit 648A?

11 LDC [MR. RUIZ]: Is that the waiver, Your Honor?

12 MJ [Col COHEN]: That is.

13 LDC [MR. RUIZ]: Yes, I did.

14 MJ [Col COHEN]: All right. Thank you. I'll hand the
15 originals to the court reporters.

16 Any -- it appears there are no further questions. Do
17 we need this witness held subject to recall?

18 CP [BG MARTINS]: Yes, Your Honor.

19 MJ [Col COHEN]: Okay. You'll be temporarily excused.
20 Please do not discuss your testimony with anyone other than
21 the prosecution or the defense while the case is ongoing.

22 WIT: Yes, sir.

23 MJ [Col COHEN]: Thank you.

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1 [The witness was warned, temporarily excused, and withdrew
2 from the courtroom.]

3 MJ [Col COHEN]: The commission will note that in -- that
4 I have not changed my position with allowing Mr. Connell's
5 standing objection to remain with respect to the lack of a
6 name with respect to this witness. That notwithstanding, I'm
7 prepared to rule on the voluntary absence at this point.

8 The commission finds that Mr. Ali and Mr. al Hawsawi
9 have knowingly and voluntarily waived their right to be
10 present at today's session.

11 Now I'd like to go into a summary of an 802
12 conference that I had following the closed hearing yesterday.

13 On 23 July 2019, following a Military Commission Rule
14 of Evidence 505(h) hearing, I conducted a conference with
15 trial and defense counsel in accordance with Rule for Military
16 Commission 802. The accused were absent.

17 At this conference we discussed scheduling for the
18 remainder of the week, the parties conferred, and the
19 commission agreed to the following schedule:

20 On Wednesday, today, starting at 0900, we will
21 conduct an open session to address the following appellate
22 exhibit series: AE 616W, AE 642, AE 530AAAA and AE 530BBBB.

23 On Thursday we will begin at 0900 with a closed Rule

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1 for Military Commissions 806 hearing narrowly tailored to
2 address only classified information the parties wish to argue
3 in certain AE series. The accused will not be present during
4 that closed session.

5 We will begin with AE 530BBBB, Mr. al Hawsawi's
6 motion to compel production of Colonel Yamashita to testify.
7 That will be the classified portion of that argument. As I
8 just indicated, there will be an open session argument on that
9 matter as well later this afternoon.

10 Following oral argument on the AE 530BBBB the
11 commission will recess and issue a ruling on whether to compel
12 the production of Colonel Yamashita for testimony here this
13 week.

14 Next, following that ruling, the parties will argue
15 the classified information noticed for AE 530AAAA, then
16 AE 530 -- depending on the ruling, either 530TTT, or if we
17 need to take additional testimony that I order, obviously, I
18 will -- I'll defer the final argument on 530TTT, then any
19 classified argument with respect to AE 616, any classified
20 argument with respect to AE 639 and AE 642.

21 If the commission declines to compel production of
22 Colonel Yamashita, we will recess after the R.M.C. 806 session
23 on Thursday and reconvene on Friday in open session.

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1 If the commission compels production of
2 Colonel Yamashita to testify, we will bifurcate the hearings;
3 therefore, starting at 2:00 p.m., or 1400 hours,
4 Colonel Yamashita will testify initially in an open session
5 regarding unclassified matters. The accused may be present or
6 may waive their presence for this open hearing.

7 Following the open hearing, the commission will
8 transition into a closed R.M.C. 806 session to hear
9 Colonel Yamashita testify regarding classified matters per the
10 commission's closure order in AE 530 -- and I forgot what the
11 number was right this second, but this is the order that I
12 sent out last night. The accused will not be present during
13 the closed session.

14 On Friday, starting at 0900, we will hold an open
15 session to address AE 639, et al. The proposals -- et seq. I
16 guess is a better way of saying that. The proposals for a
17 trial scheduling order. The 22 to 26 July 2019 hearings are
18 expected to recess at the conclusion of Friday's hearing.

19 In addition, during the 802, at the request of
20 Mr. Connell, the commission gave the parties some guidance
21 generally as to areas that may benefit the commission in --
22 during oral argument in making a ruling on AE 616 and AE 642.
23 No substantive rulings were made during the 802, but

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1 discussions as to how to proceed for the remainder of the
2 week, et cetera, were discussed, as I just included in my
3 synopsis.

4 Does the government wish to add any -- make any
5 additions or corrections to the commission's summary of the
6 R.M.C. 802 conference?

7 CP [BG MARTINS]: Your Honor, we have no additions to
8 make.

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

10 Does any defense counsel wish to add to my summary?

11 That is a negative response from all defense counsel.

12 I sent out an e-mail last evening asking the
13 government to work with the defense teams in addressing
14 AE 639C. It was after hours. I understand there's
15 limitations to what can be done, but the idea was at least to
16 say can we -- can we start moving this forward. So if it is
17 not resolved as of this morning, that is okay. But I at least
18 wanted to get a -- kind of a status update while we're here on
19 the record this morning to figure out where we are, because I
20 think everyone wants to be able to address the 639 series on
21 Friday.

22 Mr. Connell?

23 LDC [MR. CONNELL]: Your Honor, yesterday during the

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1 505(h) session I advised the military commission that we had
2 refiled 639C at 9:34 a.m. yesterday with -- with one
3 attachment left blank. I am informed by the government, after
4 their diligent efforts, after your e-mail of -- or the
5 military commission's e-mail of last night that that document,
6 the version of 9 -- of, excuse me, of 639C that we filed at
7 9:34 is unclassified. It has not been reviewed for public
8 release, but that it does not have any classification
9 concerns.

10 MJ [Col COHEN]: Okay.

11 LDC [MR. CONNELL]: And so from my point of view, and I've
12 conferred with the government, and I believe from their point
13 of view the military commission should accept that pleading,
14 the one at 9:34 a.m. yesterday, that version, for filing.

15 MJ [Col COHEN]: Okay. Excellent.

16 Trial Counsel, do you concur?

17 ATC [MS. TATE]: We do, Your Honor.

18 MJ [Col COHEN]: Okay. Thank you, Ms. Tate. I appreciate
19 that.

20 LDC [MR. CONNELL]: Yes, Your Honor.

21 MJ [Col COHEN]: Thank you all very much for -- for
22 working that issue.

23 Like I said, I will do my best to not send you later

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1 -- e-mails in the evening. It's rare that I do. And that
2 was -- like I said, and I realize what that means. And so do
3 what you can when you get things like that. It will be
4 infrequent at best, but I'm also -- understand the limitations
5 of the fact that if something comes out at 1700, people have
6 gone home sometimes for the day.

7 So the idea is just to let you know that please
8 assist us in the -- as expeditiously as possible in addressing
9 matters like that, so I appreciate the efforts of everyone,
10 both defense and trial counsel, to -- to resolve this issue.

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

12 The only other thing that I'll observe is that all
13 parties have been served with that document, both
14 electronically and, when necessary, with a hard copy.

15 MJ [Col COHEN]: Excellent. Thank you very much.

16 LDC [MR. CONNELL]: Thank you.

17 MJ [Col COHEN]: Appreciate it, Mr. Connell. All right.

18 Are there any other matters to take up before we
19 start addressing the motions?

20 Mr. Ruiz.

21 LDC [MR. RUIZ]: May I approach, Judge?

22 MJ [Col COHEN]: Good morning, Mr. Ruiz.

23 LDC [MR. RUIZ]: Judge, you had asked -- or you had

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1 indicated the 530 series would be handled later this morning.

2 I just wanted to give you a brief status update.

3 MJ [Col COHEN]: Thank you.

4 LDC [MR. RUIZ]: I met with the staff judge advocate twice
5 yesterday afternoon to go over the stipulation, the proposed
6 stipulation of fact. We did pen and ink much of that,
7 accepted virtually all of the changes that were proposed by
8 the staff judge advocate on behalf of the commander. However,
9 there were -- there were a couple of facts that we just
10 certainly could not stipulate to, so the -- the stipulation
11 was left with the commander for consideration.

12 It is my understanding from speaking to the
13 prosecution this morning that the commander does not wish to
14 enter into a stipulation if the additional facts are not
15 included within that stipulation.

16 The position we advanced was that we would be willing
17 to stipulate to as many facts as possible and that would maybe
18 narrowly tailor any remaining inquiry. But it appears, at
19 least at this point, that there's not a meeting of the minds
20 in terms of what is agreeable in terms of a stipulation of
21 fact.

22 I do have a copy of the stipulation. I know you had
23 asked to see a copy. I don't know if you still want one since

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1 it's not something that's been agreed upon, but I do have a
2 copy if the commission wants one.

3 MJ [Col COHEN]: Thank you. Let me think through that.
4 My understanding is that your position is you're willing to
5 stipulate to whatever facts the prosecution can agree to,
6 which would then tailor -- allow the court to narrowly tailor
7 the scope of any examination that might be necessary at that
8 point.

9 LDC [MR. RUIZ]: Yes.

10 MJ [Col COHEN]: Okay.

11 LDC [MR. RUIZ]: And I will add that I did not have this
12 conference with the prosecution. My -- my interactions were
13 exclusively with the staff judge advocate in terms of our
14 dealing with the stipulation. So I don't know what
15 involvement the prosecution has or has not had in that
16 process. I just know that my interaction was exclusively with
17 the staff judge advocate representative of the commander.

18 MJ [Col COHEN]: Okay.

19 LDC [MR. RUIZ]: And the substance of those discussions
20 were -- I left them at least, was that the staff judge
21 advocate felt that the commander would perhaps be comfortable
22 agreeing to the facts that were in the stipulation.

23 As I said, they proposed a number of pen and ink

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1 changes that we accepted and adopted, with the exception of a
2 couple of paragraphs that just simply were not ones that we
3 were willing to stipulate to as I think they would have been
4 dispositive of an issue that remains in controversy.

5 MJ [Col COHEN]: Okay.

6 LDC [MR. RUIZ]: But that is our position. I think that
7 there are facts that would streamline and then would make the
8 cross-examination probably a little cleaner. But again, if --
9 I know the nature of the stipulation, so that's where we are.

10 MJ [Col COHEN]: All right. Thank you, sir. Appreciate
11 it.

12 Mr. Ryan, I believe you were addressing this issue
13 yesterday, so if you could give me kind of your status, update
14 position.

15 TC [MR. RYAN]: Good morning, Your Honor.

16 MJ [Col COHEN]: Good morning.

17 TC [MR. RYAN]: Edward Ryan on behalf of the United
18 States.

19 Sir, Your Honor's order directed the parties to
20 confer and discuss a possible stipulation that would obviate
21 the need for Colonel Yamashita to testify. We have done so.
22 There have been discussions between counsel and the JDG staff.
23 It is my understanding that there is no stipulation as of this

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1 moment. I will -- I will inquire further but I don't think
2 that's going to change based on my discussions so far. So
3 that's my report to you, sir.

4 As far as any stipulation in draft form right now,
5 that's all it is, and I don't believe Your Honor would benefit
6 from it in light of the facts that are not contained in it
7 that the colonel thus far insists upon.

8 MJ [Col COHEN]: So does the -- does the prosecution team
9 have any desire to stipulate to whatever facts that can be
10 agreed upon in an effort to potentially limit any testimony
11 that might be necessary, or is it an all-or-nothing thing?

12 TC [MR. RYAN]: No, sir.

13 MJ [Col COHEN]: Okay. Thank you. Thank you for the
14 update on that. We'll hear argument on 530BBBB later.

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

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

17 LDC [MR. HARRINGTON]: Judge, before you begin argument on
18 616, I should advise the court that yesterday afternoon a
19 motion was filed by the prosecution in 350TTT for
20 reconsideration of the order directing the testimony of the
21 former interpreter, and it's a classified filing.

22 And in the motion that was filed there are some
23 allegations that are addressed at me and my conduct. And I

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1 have no problem in drafting a response to that and addressing
2 the issues that are made in there.

3 But I also believe that, given the nature of these
4 allegations and the history of when this incident happened,
5 which was during the middle of 292 when I and several other
6 members of my team were under investigation, if that's the
7 proper word for it, and a serious investigation regarding
8 allegations which we obviously denied and ultimately were
9 unfounded; that I need to consult with outside counsel on how
10 to address this. And I have to be very careful on how to do
11 the response to it.

12 Obviously, in consulting with outside counsel, I
13 cannot discuss the contents of much of the information here
14 because it is classified. But with respect to my responding
15 with -- on implied allegations against me in 350TT [sic] I
16 have to be -- have to be careful.

17 And Judge, the -- the -- I don't -- I'm obviously not
18 going to argue that motion right now, but the prosecution
19 alleges that there are new facts that were just discovered
20 that make this necessary for you to reconsider. I don't agree
21 with that, first of all. But secondly, I also don't know why
22 this particular motion was filed late yesterday afternoon when
23 we were about to argue 616 today. And reading the motion,

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1 it's information that the prosecution has had for quite a bit
2 of time. And they've been telling us directly and indirectly
3 for the past several weeks that this motion was going to be
4 filed.

5 But obviously, if you decide to go ahead with 616,
6 you can do that. But I would have to reserve my right to
7 argue 616 at a time after I get a chance to respond to 350TTT.

8 MJ [Col COHEN]: Okay. Thank you, Mr. Harrington.

9 Ms. Bormann.

10 LDC [MS. BORMANN]: Thank you. I just wanted to put on
11 the record that we received our copy of the government's TS
12 filing yesterday afternoon. I was busy doing other matters
13 related to the case and reviewed it this morning when I got
14 in.

15 It is exactly what Mr. Harrington says. Although we
16 are ready to argue in the 616 series, I was going to suggest
17 to you that we don't because it does not seem like the most
18 judicially economical way to go forward given the fact that
19 the government has now requested that you revisit the issue
20 writ large as opposed to the parameters of the issue.

21 So that would be my suggestion. Although, as I said,
22 we were ready to argue 616, I just -- I don't see the point,
23 given that we're going to have to come back, file responses on

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1 the issue writ large, and then reargue it again.

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

3 ADC [MS. PRADHAN]: Your Honor, good morning.

4 MJ [Col COHEN]: Good morning. How you doing?

5 ADC [MS. PRADHAN]: Fine, thank you. I hope you're well
6 as well, given the circumstances.

7 Your Honor, we completely understand the positions of
8 our colleagues, of our codefendants, but Mr. al Baluchi's
9 position is that we are ready to go forward on 616.

10 And just to explain that, we received sort of an
11 unclassified preview of the government's arguments in AE 616BB
12 and AE 350TTT on Monday during oral argument on AE 637, when
13 the government stood up and alluded to the government's -- I
14 have to say unfounded claim that the defense may have
15 manufactured outrage over the interpreter's original presence
16 in the courtroom and on a defense team.

17 We then received AE 616BB on Monday evening, which
18 attached the same information that is the basis of their
19 motion for reconsideration in AE 350TTT.

20 Your Honor, we -- Mr. al Baluchi has filed an AE
21 number for a 505 notice this morning. I understand the
22 military commission has been very busy this morning, but we
23 filed an -- we asked for an AE number last night to file a 505

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1 notice containing information that we believe directly cuts
2 against the information that the government provided in
3 AE 616BB and AE 350TTT that is the basis for the
4 reconsideration, and, therefore, there is no basis for
5 reconsideration. And we remain ready to -- to move forward to
6 argue AE 616.

7 If the military commission decides not to move
8 forward with full argument on AE 616, the military commission
9 did ask a discrete question about the nature of the motion
10 series yesterday during the 802, and we would be ready at the
11 very least to address that -- that question.

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

13 ADC [MS. PRADHAN]: Thank you.

14 MJ [Col COHEN]: Good morning.

15 ADC [MS. RADOSTITZ]: Good morning, Your Honor.

16 On behalf of Mr. Mohammad, we are in agreement that
17 we are ready to argue on 616, but given the government's
18 last-minute late-night dropping of a new motion, that it might
19 make more sense to do it all at once. We're certainly not
20 ready to respond to the allegations, the unfounded allegations
21 that they've made, and so we would prefer to argue those
22 together.

23 MJ [Col COHEN]: I haven't had the opportunity yet to read

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1 AE 350TTT. I will be in short order. I don't want to speak
2 out of turn because I haven't had the opportunity to read it,
3 but I'd like to know, if the issue is is how did this person
4 ever get to be in a -- in a pool of potential interpreters for
5 the defense team in general, then whether it's -- that seems
6 to be the issue.

7 And so if I'm misunderstanding why we -- why this --
8 why we would even be putting in this essential discovery
9 effort to find out how this happened, whether or not someone
10 was outraged or not outraged or any of that kind of stuff,
11 seems to be extraneous information to the crux of the issue.

12 LDC [MS. BORMANN]: We agree, but we're not ready to
13 respond until we have an opportunity to respond in writing.

14 MJ [Col COHEN]: Right. So, obviously, I'm not going to
15 hear argument on 350TTT. I mean, that's outside the briefing
16 cycle. I haven't even had a chance to read it. I'm not
17 expecting anyone to do that.

18 The question here is is if we're going -- the issue
19 right now is, is whether or not -- if 616 -- if the ruling
20 on -- if the ruling in -- by Judge Parrella stands that the
21 testimony should be taken in a closed session, then I have to
22 go back, at the order of the CMC, and make specific findings
23 as to why that's the appropriate remedy.

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1 That's the issue before -- before me at this point
2 based on the -- the granting of the writ and the -- that was
3 filed by the AAA team in accordance with the law and CMCR's
4 guidance in sending this back to me and saying the findings of
5 fact made by the commission were insufficient to justify
6 the -- the actions that -- that the commission is taking;
7 retake a look at what your findings of fact are and make --
8 either make greater findings of fact or reassess the situation
9 that you're in. Because they found that whether or not the
10 Sixth Amendment applies to a military commission did not need
11 to be addressed because the rules of the commission and the
12 statute -- the statutory language itself provides for a public
13 hearing. That is very clear based on the CMCR -- CMCR's
14 ruling.

15 So I'm -- I'm going to hear argument on 616 and we're
16 going to address this issue of whether or not -- if the
17 testimony is -- is presented, whether or not it should be in
18 open session or closed session or bifurcated proceeding.
19 We'll address these other allegations at a different time. A
20 briefing cycle has not been made with respect to a motion to
21 reconsider the prior ruling.

22 So as we sit here this morning, there is still an
23 order by the court that says that the testimony should be --

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1 should be had. It will be taken. And then the question
2 becomes, based on the CMCr ruling, of whether or not that is
3 in a closed session, an open session entirely, or some hybrid
4 of the two.

5 So the scope of this argument should be limited to --
6 the one question I asked in the 802 for the parties to briefly
7 address was: Does this testimony relate -- directly relate to
8 or in support of an existing substantive motion as opposed to
9 just testimony solely to support the testimony, or is this
10 more of a discovery matter in which the information needs to
11 be obtained so that then subsequent motions can be potentially
12 filed depending on what the responses are upon obtaining the
13 information.

14 And I reference 350C that was filed by the AAA team
15 where initially the request was we want the information.
16 We'll either take it in a deposition or we'll take it in -- in
17 in-court testimony. And I said I -- I may even on my own
18 take -- retake a look at that, depending on kind of what the
19 guidance is from -- from the parties today on that specific
20 issue is -- is it the information that we need.

21 Because typically in any court in the United States
22 we don't conduct testimonial depositions. We either do a
23 deposition or a witness is called in support of a motion. But

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1 it would be highly irregular to call -- to essentially call
2 someone for testimony when a deposition would be the more
3 appropriate -- would be the more appropriate means, because
4 it's more of a discovery tool as opposed to having testimony.

5 Doesn't mean we can't. But that's why I asked you to
6 specifically address that issue. And it appears that based on
7 the AAA team's -- Ms. Pradhan's comments earlier, they're
8 ready to address those issues as well.

9 So we will not address 350TTT, but I do want to
10 address this issue of if we stay with the status quo, which is
11 the current state of the case, should it be open or closed or
12 some hybrid of the two. And then just giving me some
13 background information on, other than gathering the
14 information, what -- what substantive motion that's already
15 existing before the commission would this testimony go to.
16 All right.

17 Given that 616W was presented -- was issued by the
18 commission to the government directly, the government will be
19 heard first on this.

20 LDC [MR. CONNELL]: Sir, with that framing, may we have a
21 moment?

22 MJ [Col COHEN]: You may. In fact, I'll tell you what.
23 Let's go ahead and take a ten-minute recess and everyone start

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1 to think about what I just said.

2 [The R.M.C. 803 session recessed at 0939, 24 July 2019.]

3 [The R.M.C. 803 session was called to order at 1000,
4 24 July 2019.]

5 MJ [Col COHEN]: The commission is called to order. All
6 parties present when the comission recessed are again present.
7 Thank you for the additional time. I had the opportunity to
8 go read the Top Secret classified briefing.

9 CP [BG MARTINS]: Your Honor, Mr. Swann is not present.

10 MJ [Col COHEN]: You are correct. Thank you.

11 LDC [MS. BORMANN]: Mr. Montross is -- he went to pull
12 some information regarding 350TTT.

13 MJ [Col COHEN]: Thank you.

14 LDC [MR. CONNELL]: Your Honor, Mr. Farley has rejoined
15 us.

16 MJ [Col COHEN]: Thank you.

17 All right, government, you may be heard on 616.

18 LDC [MR. NEVIN]: Your Honor, could I, before argument
19 begins on 616, could I address the question of postponement of
20 this argument?

21 MJ [Col COHEN]: You may.

22 LDC [MR. NEVIN]: And -- well, let me just say

23 Ms. Radostitz will address AE 616, but there's -- I had not

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1 read AE 350TTT either. It is, of course, classified, and so
2 I'm not going to discuss its contents in open -- in an open
3 session.

4 But it makes allegations about me and about the
5 defense team that in some ways are similar to the ones that
6 Mr. Harrington was referring to. I simply wanted to place on
7 the record that this puts us in a conflict position also with
8 respect to 616.

9 It becomes a matter of sorting out whether when we --
10 in this case, when Ms. Radostitz stands up here to argue 616,
11 whether she is in some way shading the argument or spinning it
12 or -- or articulating the positions in a particular way that
13 reserve the position that counsel will need to make eventually
14 to you and to the public record about the falsity of the
15 allegations that are contained in 350TTT. It is very, very
16 hard to sort that out.

17 And I understand what you said previously about
18 this -- about the fact that 616 talks about something from an
19 intellectual -- from an objective, intellectual analysis
20 that's separate from the question of these details of how this
21 came to pass, but they can't be sorted out for us.

22 And it's something that you perhaps have seen in the
23 record. But we have had this problem of allegations being

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1 made against defense counsel many times in the past in this
2 case, and I've made representations about the specific number
3 of times that this has occurred and that I have retained
4 counsel to represent me in these issues. This is not a new
5 phenomenon.

6 But I just wanted to join the request that all of the
7 argument on this subject be postponed until we can deal with
8 it all at once because I -- I do suggest to you that these
9 things are inextricably intertwined. So thank you for letting
10 me be heard, just to join -- only for the purpose of joining
11 the request that we not take argument on 616 today. Thank
12 you.

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

14 We're not going to argue 350TTT. We're definitely
15 going to discuss 350TTT on Thursday.

16 LDC [MS. BORMANN]: Judge, I did not address the conflict
17 issue when I stood up and suggested to you that for judicial
18 economy purposes we should do so. I have now had a chance to
19 review all of 350TTT, because it's sitting in front of me in
20 open court. We are in the same conflict position as is
21 Mr. Harrington, Mr. Nevin, it appears from the allegations
22 other counsel as well here.

23 MJ [Col COHEN]: Yeah. Let me narrow this issue for

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1 everybody. A spill happened. Why it happened, how it
2 happened, that's -- that's another issue that may need to be
3 looked into at some point, but it doesn't change the fact that
4 before the spill ever happened, this particular individual was
5 in a pool of defense interpreters and actually worked for the
6 defense at some point in time. That is a relevant fact.

7 What happened after that and how he got back here and
8 all that kind of stuff, that's real interesting, but it
9 doesn't change the fact that he worked for the defense without
10 them knowing what his true identity was.

11 The issue before this commission is is there evidence
12 that some government agency or otherwise placed him in the
13 pool so that he would be hired by the defense counsel. That's
14 the issue. And he already worked there before the disclosure
15 ever occurred in -- in this commission. That is the operative
16 time that we should be addressing with respect to this motion.
17 That is the reality.

18 So while the government may be upset with the defense
19 that there was this disclosure, the question then becomes is:
20 Was it the defense team or was it an accused? And if it was
21 the accused, then the government should investigate the
22 accused for that offense, if that's what they believe is
23 necessary.

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1 But these accusations of conspiracy or whatever --
2 and I'm not using words that are necessarily in the filings.
3 But we have to be very cautious when we make these filings
4 about what we're saying about people and that we're focused on
5 the operative issues at hand. And the operative issue at hand
6 is that this individual, based on the facts that have been
7 briefed by the parties, worked for the defense before this
8 disclosure ever occurred. The question is how did he get
9 there. That's what we need to look into.

10 We're so focused on the disclosure itself because
11 that's the -- that's the shiny object that everyone is
12 focusing on. The court -- the commission's focusing on he
13 worked for them before the disclosure ever happened. And
14 whether he was rehired or brought down here or what the intent
15 was behind that, that's interesting.

16 But it doesn't change the fact that he worked for
17 them, had access to defense information and defense
18 consultations and defense evidence before any of this ever
19 happened. And that is the crux of the issue. In looking at
20 the rulings of the commission, that's what the commission's
21 focused on.

22 The commission is not here to investigate how the
23 disclosure happened. That is the government's responsibility,

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1 not this commission's. If classified information has been
2 leaked, then the government needs to investigate it if they
3 choose to do so. If they don't choose to do so, that's fine
4 too. That is way out of my lane.

5 But the issue before me is whether or not this person
6 was legitimately in this pool without the knowledge of any
7 government interaction that placed him there so the defense
8 could hire him in the first place. That's the issue. The
9 filings should address that issue. His testimony should
10 address that issue.

11 You all have heard this from me several times. I
12 focus on the crux of the issue, what is the legal issue at
13 hand here. And then I focus on the facts that are directly
14 related to that. Sometimes there are a million facts, but
15 only 20 of them are pertinent to a particular issue. To the
16 extent that you all can focus on the 20 pertinent facts and
17 argue how those facts should then lead me to a particular
18 conclusion, the more effective advocates you will be.

19 There are more -- there is so much information in
20 this case that, at the end of the day, you're going to have to
21 do the exact same thing for the trier of fact. You're going
22 to have to whittle it down so that someone can comprehend how
23 they apply those facts to the law. Don't lose sight of that.

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1 And the idea of litigation and people getting upset
2 about things, it happens routinely. But you've got to take a
3 step back, don't let it get personal, and just address the
4 issue at hand. And think about the second and third order of
5 effects of the decisions that you're making. Do you really
6 want to win the tactical battle to lose the -- the strategic
7 war?

8 We're going to address 616 this morning. We can
9 address the issue that I just stated and whether or not
10 testimony should be allowed in an open or a closed session on
11 that issue.

12 Government, you may be heard. Mr. Trivett, good
13 morning.

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

15 So there's a Navy tradition when a commanding officer
16 comes aboard ship. And what happens is, as he crosses the
17 bow, the bell gets rung. Ding, ding, ding, ding. And as an
18 example, when Commander Lippold crossed the bow for the last
19 time in October of 2000 when he boarded the USS COLE before
20 his warship was attacked, he would have been announced as
21 "USS COLE arriving." It's an old Navy tradition. It's been
22 around for hundreds of years. Everyone knows when that bell
23 rings, that the commanding officer is on board and that he has

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1 the conn. That's a good thing for all the sailors to know.

2 The CIA doesn't ring bells. They don't ring in their
3 CIA covert officers when they come to the headquarters. And
4 they try to do their mission, which is an important mission,
5 and a mission to keep Americans safe, in as much secrecy as
6 possible. Once the bell is rung, however, there are serious
7 consequences for that officer, for the CIA's mission, and for
8 other CIA officers who may be associated with him.

9 It doesn't just go to the issue of the individual.
10 Once a covert officer's identified, all of his associates can
11 be tracked down, his travel can be tracked down, his family
12 can be tracked down without him even knowing it. When that
13 happens, officers can be outed, intelligence can be missed,
14 and national security can be implicated.

15 Once the bell is rung, as holders of security
16 clearances, we all have an obligation to mitigate the damage
17 to the extent we can. Understanding that the genie can't
18 always be back in the bottle, we need not be ringing the bell;
19 and if we have to ring the bell, we want to ring it as quietly
20 as possible. The louder we ring it, the more attention we
21 call to it, the more the inadvertent spill is revealed, the
22 more damage to national security happens.

23 It's for the same reason where, if there is a spill

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1 in a motion, we don't specifically identify in motion XXX on
2 page there's a spill because we don't want to reveal
3 classified information that's inadvertently been put out into
4 the public domain in any way. The same concept goes here for
5 the fact that the interpreter's name was inadvertently by the
6 defense spilled, but intentionally spilled by the accused.

7 We filed a motion to reconsider, which was the topic
8 of the commission's attention at the beginning of today. But
9 there's an easier way out of this entire morass, and the
10 government is encouraging the commission to take this way out
11 because it's the best way to protect national security, and
12 it's the best way to put this back in a normal litigation
13 posture.

14 You don't need to consider our motion to reconsider.
15 You don't need to rule on the three facts we say are new. You
16 just sua sponte reconsider whether or not we need to be here.
17 You raised it in the 802; I know you mentioned it this
18 morning. That's the best way out of where we're at. That's
19 the best way out for the government, certainly, because there
20 is somewhat of an illusion here that we're able to argue this
21 motion in open court without ringing the bell.

22 I'm going to ring it as softly as I can. And I think
23 I said yesterday that it's a very difficult thing to figure

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1 out how to argue. I will admit and confess that I am not the
2 brightest bulb in this room; that there are brilliant lawyers
3 all around us, and I'm not one of them. But what I can say
4 for sure is that no one in this room is smart enough to be
5 able to process quickly enough a lot of these issues and not
6 reveal classified information, because it was already
7 revealed.

8 We call it in our filings the appearance-in-context
9 concern we have and the mosaic concern. Both of those
10 concerns are legitimate. I want to answer every question the
11 commission has on this issue, but I want to put it back, so we
12 understand the litigation posture that we're in.

13 Mr. Connell originally asked for a deposition. From
14 the very beginning of this incident we gave classification
15 guidance and said, "While you can say the former CIA
16 interpreter employed by the Binalshibh team in open court, you
17 cannot say it if he is present because that would reveal many
18 things about that individual, and it would refocus everybody
19 on the spill." In a lot of ways it's a strange posture
20 because the only request for him as a witness at all was to
21 support a deposition of him, which in some ways becomes a
22 self-fulfilling prophecy.

23 If you're going to identify legitimate reasons for a

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1 deposition, one of those is that it's likely that the person
2 won't be available for testimony, yet you call the very person
3 who you're asking to depose. So at some point, if the
4 commission grants the motion to compel the witness on the
5 deposition, by logic, he then denies the motion for
6 deposition. That's just given as an example of what a strange
7 litigation posture we're in and how the commission can sua
8 sponte just pull us out of it.

9 It is a discovery issue. We have interviewed the
10 accused [sic] many times. We know what his answers are going
11 to be. I suspect the defense knows what his answers are going
12 to be because they interviewed him as well early on in the
13 process. But even if they don't, even if they don't know
14 those answers, there's lots of ways to get those answers that
15 do not require his testimony.

16 In a lot of ways, the TV show Seinfeld was described
17 as a show about nothing. There was no real plot point to it.
18 This is a witness about nothing at this point in regard to the
19 commission and any issue you have before it. I'm not saying
20 it's not important. We want to get by this issue as much as
21 the commission does. This is a sideshow collateral issue for
22 us.

23 We're not concerned about what type of evidence is

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1 going to come out because it's all going to be innocent and
2 benign, in our view. But we want to get -- we do want to get
3 past the issue. We want to get back to the issue of
4 prosecuting these men for the crimes they committed.

5 But we also have an obligation to protect this man at
6 all costs, because when he signed up to do what he did, that
7 was the promise, the solemn promise the United States made to
8 him, and we're not going to back down from that.

9 So the way we see the litigation going, if you don't
10 sua sponte reconsider and just put this back into a discovery
11 process, is we have our argument today to convince you to have
12 closed testimony under the Press Enterprise factors.

13 If for some reason you do not agree that it can all
14 be in closed, we then have filed our motion to reconsider.
15 Our motion to reconsider was to whether or not his testimony
16 is necessary at all.

17 If for some reason you deny that motion, we would
18 then for the first time actually assert the national security
19 privilege over this issue and seek substitutes, summaries,
20 deletions, some type of relief under 505.

21 And I want to explain to the court, only because this
22 has been long in litigation, why we have not asserted the
23 national security privilege to this date. We've never been

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1 afraid of the evidence. We simply said that it needed to be
2 in closed because of the nature of the revelation that
3 occurred almost five years ago.

4 That was always the position of the parties
5 initially. Mr. Connell had asked for a broader scope that
6 included former employment of this individual. I think that's
7 all I can say in open. Ultimately, Judge Parrella whittled it
8 down to the three questions that he really wants answered.

9 Before the whittling, it had always just been assumed
10 it was going to be in closed. We were prepared to do it in
11 closed. After Mr. Connell raised the issue of whether or not
12 it needed to be in closed at all after the whittling, we were
13 then directed to file briefs on the issue. We did.
14 Mr. Connell did. I believe other defense counsel either
15 joined or -- or wrote their own. We litigated that in front
16 of Judge Parrella in a closed session, and the government was
17 able to convince Judge Parrella to, in fact, do the testimony
18 entirely in closed.

19 We understand the CMCR has now come back and said
20 that his findings were insufficient. It didn't make any
21 opinion on whether or not it can be closed or whether it was
22 proper to be closed. They simply said that under the
23 Press Enterprise factors, they don't have the ability to

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1 determine whether or not the four criteria have been met.

2 But right up until the point of that CMCR decision,
3 we were simply envisioning closed testimony. We were
4 welcoming the closed testimony. We want to get by this issue.
5 I know this man very much wants this issue in his rearview
6 mirror.

7 So there was no reason for us ever to assert the
8 national security privilege. The information was going to
9 come out. It was going to be protected. The defense was
10 going to get the information it needed. The commission was
11 going to get the information it needed, hopefully in making a
12 determination that this was simply an act by an interpreter
13 who had a clearance and who wanted to work.

14 So we would assert the national security privilege if
15 for some reason he was ordered to testify in open, if for some
16 reason our motion to reconsider was not granted, and if you
17 don't sua sponte just say I'm putting this back into the
18 discovery realm and let's work this out through some type of
19 relief, either under 505 or just under your regular cognizance
20 to make the court function.

21 So that gets us to the substance of what the CMCR
22 directed and what your show cause in AE 616W directs: "Wanted
23 the prosecution to provide a sufficiently detailed and

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1 particularized filing to allow the commission to make a
2 case-specific finding regarding: 1, whether there's a
3 substantial probability that an overriding interest will be
4 prejudiced from open testimony; 2, whether any closure would
5 be no broader than necessary to protect such overriding
6 interests; 3, what reasonable alternatives have been
7 considered and why any other alternatives are not adequate to
8 protect overriding interests."

9 The overriding interests that we set forth -- and we
10 did it in a bit of a strange posture as well. I think had we
11 not been ordered to do so, we would have simply done this
12 completely classified, but we were ordered to do one that was
13 as open as possible. I understand the commission's desire to
14 make this as transparent as possible, so we filed what was a
15 mixed classified unredacted response, some of which had
16 ex parte declarations for the judge, as well as doing a
17 redacted version of the filing that could ultimately be
18 released publicly.

19 MJ [Col COHEN]: And given the nature of where we are, I
20 appreciate the government -- the government's endeavor to do
21 so.

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

23 So in struggling to find the right line and the right

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1 amount of information in open court for you, I think it boils
2 down to this: We have 18 classified paragraphs, completely
3 redacted, in our unclassified filing. I'm going to go over
4 the law in general, and I can do that in open court. If I
5 have any direct questions -- if the commission has any direct
6 questions about the facts, there might be some that are
7 readily apparent that I can answer, but I suspect there are
8 many where I just won't be able to analyze the correct
9 answer ----

10 MJ [Col COHEN]: Okay.

11 MTC [MR. TRIVETT]: ---- in an open court. Which in some
12 ways also proves our point as to why the testimony can't be
13 open.

14 If we, with a written-down portion-marked filing have
15 difficulty knowing where the line is, based on just questions
16 and normal follow-up questions that lawyers and judges ask

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 But the overriding interests under the
21 Press Enterprise factors that we've set forth are protection
22 of national security information, protection of the safety of
23 the witness, and his family. Those are the two overriding

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1 factors, overriding interests.

2 If you look at Press Enterprise, the actual case, and
3 look to the facts of that case, it was primarily a case about
4 voir dire and whether or not voir dire needed to be open or
5 closed. There were six weeks of voir dire in that case, in a
6 capital case in California, where the judge was concerned
7 about the personal nature of some of the questions. It was a
8 pretty horrific fact pattern. There was a murder and a rape,
9 I believe, and the judge was concerned about personal
10 experiences that the jurors may have had on that issue.

11 So there were three days of open testimony for voir
12 dire and then six weeks of closed. And ultimately the Supreme
13 Court found that that wasn't narrowly tailored; that there
14 were other alternatives that the judge could have done
15 specific to directing jurors to answer -- or ask them specific
16 questions about whether or not they had certain sensitivities
17 that they wanted to close, and that they would live with the
18 closure to that.

19 But it was not a national security case. I wanted
20 to -- that was the point of going through those facts.

21 Nor was Waller v. Georgia. Waller v. Georgia is also
22 cited throughout both the CMC decision and our filings. It's
23 also a Supreme Court case, 1984. It dealt with wiretaps, law

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1 enforcement-type wiretaps in Georgia.

2 The prosecutor had asked for closed sessions for any
3 of the wiretaps specifically because Georgia had a unique
4 statute that said if people who are unindicted or under
5 investigation but not yet charged are part of these wiretaps,
6 if you use the wiretaps in public, that becomes tainted
7 evidence that you can't use against them. It was very
8 specific to the Georgia statute.

9 But again, even wiretaps, the court found, could have
10 been a reason to close, despite the fact that obviously states
11 aren't classifying information like the federal government is
12 under the executive order. But that ultimately, its findings,
13 the trial court's findings were too broad and generalized.

14 So those are the two main cases that discuss the
15 Press Enterprise factors and they're from the same year in the
16 Supreme Court.

17 There is no doubt that national security information
18 and witness protection are compelling government interests
19 that can override the public at times. They are a higher
20 standard and of a different quality than questions in voir
21 dire that are just meant to protect privacy or questions about
22 wiretaps that are law enforcement sensitive but don't impact
23 the national security of the United States.

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1 The case we ask you to look for, Your Honor, is the
2 Marzook case. Marzook in many ways is analogous to what we
3 have before us. In Marzook, the federal district court
4 permitted two Israeli ISA agents whose identity was classified
5 to testify in closed session to enter through the back of the
6 court.

7 Interestingly, the government also asked for the
8 ability to put them in light disguise, and that part was not
9 granted. They had already interviewed the accused. It was
10 going to be in a closed session. The accused had already seen
11 them, already knew what they looked like, and the defense
12 counsel were properly cleared.

13 So there are ways to shape this in certain ways to
14 protect their identities. And if the accused already have
15 seen an individual, it's a less compelling reason to protect
16 his likeness. That's not what we have here.

17 We have a whole different set of concerns and
18 interests here that I articulated in detail in the closed
19 argument before Judge Parrella. I'm not sure if the military
20 judge has had the opportunity to review that. We would like
21 to call your attention to it if you have not. And I would
22 imagine I'll be repeating some of those things in the closed
23 hearings.

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1 So those are the two overriding interests that we've
2 identified, national security information and protection of
3 the safety of the witness, and his family. Part of the
4 concern for the closure in Marzook was also the fact that
5 there were websites and other types of openly known threats to
6 ISA agents and that their identity needed to be protected,
7 that the Israeli government protected their identity
8 specifically because of the threats that they were under. We
9 think that is the exact scenario that we find ourselves in
10 today with the interpreter at issue.

11 We're also asking for a very narrow closure. In the
12 seven years-plus this case has been litigated, over 98 percent
13 of every word uttered in this court -- and as the judge has
14 seen over the last just two sessions, many words get uttered
15 in this court -- 98 percent of them have been open. And when
16 we've closed, we've closed only for very narrow, specific
17 issues involving national security where the judge makes his
18 806 closure ruling.

19 So this is just a closure on three questions that the
20 defense wants to know, likely already knows, at least several
21 of the answers, and does not relate to any pending motion
22 before the commission. As far as narrowness goes, this is
23 about as narrow as it can be. It's not a government witness.

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1 We're not seeking to use this man's testimony in any way
2 against the accused. This is simply an issue we're going to
3 get past so we can move to trial.

4 So as far as the narrow closure, if it's only on
5 those three questions, it shouldn't be long. It shouldn't be
6 lengthy. And there's a way to do it to protect him and still
7 get the answers that the commission and the defense need, and
8 that's through his closed testimony, if necessary.

9 We refer to what's called the appearance in context.
10 That's the whole issue here. That's the issue that I believe,
11 with all due respect to the CMCR, they didn't fully
12 understand. And maybe it was my personal inability to
13 articulate that to them.

14 The defense has characterized this in a way to
15 suggest that Judge Parrella ordered unclassified testimony in
16 a classified hearing, and they were successful in framing it
17 that way. I think the CMCR cited to that 21 different times
18 in their opinion. That's just not correct, and it's not
19 correct because of the appearance in context.

20 Because of what was revealed and what specifically
21 was said and the reason why the accused, Mr. Binalshibh, would
22 know what he knew makes any appearance of this individual in
23 any way in open court classified.

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1 So at this point, if he's being called in advance of
2 350, or any other issue where it's clear that it's concerned
3 with the intentional spill that Mr. Binalshibh caused, is
4 going to be classified even if he's just singing Happy
5 Birthday. That was the part I think the CMCR missed. To the
6 extent they did, perhaps that was our failure, but I don't
7 want to fail again in front of you. So I want to articulate
8 that that's the important thing that you walk away from in
9 this argument is that part; that there is no part, because of
10 the appearance-in-context concern, which makes this unique.

11 And I can argue about this part. We're not going to
12 be asking for this type of protection for anyone who we can up
13 front protect their identity on, protect their likeness on.
14 If we do that, there are unclassified things that those people
15 can testify about, because we've already protected the
16 classified information at issue.

17 We can't do that now. We can't ring -- unring the
18 bell of what happened. And because of that, it doesn't matter
19 what he says. It's all going to be in the context of what was
20 already an inadvertent -- well, intentional, but inadvertent
21 on the government's part -- spill.

22 And there are a couple of things I want to address as
23 well that Judge Parrella addressed that I can do in open

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1 court, one of which is the 40-second delay. The 40-second
2 delay is important. It has protected national security
3 information in the past in this case, but it is not
4 infallible. And we know this because it failed when the issue
5 occurred.

6 And part of that -- and this is no fault of the
7 Special Review Team, but they were in representing the
8 United States on a very specific issue that we were walled off
9 from that Mr. Connell referenced -- Mr. Harrington referenced
10 in 292. They were not well-versed in the history of the case.
11 They did not know necessarily all of the protective orders,
12 everything that was classified, nor should they have. They
13 were coming in for a very specific issue. But that's when it
14 happened, and, because of that, it shows the concern of the
15 40-second delay.

16 The 40-second delay is a safety net, but it's not the
17 Catcher in the Rye. It's not something where we're
18 envisioning that we can catch all of this classified
19 information that we know is coming, like the little kids
20 running through the rye before they fall off the cliff.
21 That's not what this is. We can't do it that way. It's not
22 set up to do it that way. It's very difficult.

23 And just to give you an anecdotal example, there was

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1 an issue that I don't want to call too much more attention to
2 that happened on Monday here where we considered asserting the
3 national security privilege. And the second something was
4 said, I got up, I spoke with Ed Ryan about it, and by the time
5 we worked through it in our heads, the 40 seconds were gone
6 and it was too late.

7 So this can't function that way. It's a safety net,
8 but it's not designed to catch what we know is going to be a
9 tremendous amount of classified information coming. And the
10 40 seconds, quite frankly, is insufficient in this instance to
11 be able to piece together any of the mosaic concerns that we
12 have where there's ten pieces of classified inform --
13 unclassified information that separately are completely
14 unclassified, but when you look at them together, start to
15 paint a classified picture.

16 So the 40-second delay doesn't work in this instance
17 because we know, not only from the appearance-in-context
18 issue, but from the nature of why the testimony is sought to
19 begin with, that classified information is coming. So that's
20 the first issue.

21 The second issue is the screen, the voice modulator,
22 the light disguise, only work if the public doesn't already
23 know who he is. At some point we're just masking -- we're try

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1 to mask the fact of who this person is when it's already been
2 revealed who he is.

3 So whether [REDACTED]
4 [REDACTED]

5 [REDACTED] This is a very serious matter. al Qaeda is a
6 very dangerous organization. We have learned that we
7 underestimate them at our peril, and to simply think that the
8 information is not being spread to people who mean us harm and
9 who mean CIA officers harm is to be naive. And that's why
10 we're doing everything we can to protect this man, and that's
11 why those alternatives simply will not work in this instance
12 because of the appearance-in-context concern.

13 We do think there's certain alternatives. And again,
14 we could request some of these specifically under 505, if
15 necessary, if the military judge properly puts this in a
16 discovery context as opposed to a litigation context. But
17 written interrogatories work, declarations work, even closed
18 depositions can work. We have opposed them in this instance
19 because there was no relevant motion.

20 The very beginning when we notified the defense, we
21 said we would not oppose this individual testifying, to the
22 extent there's a relevant legal issue before the commission
23 that his testimony is necessary on. That's been our position

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1 since it happened. That continues to be our position.

2 But depositions are a little bit different, and we
3 don't want to create a precedent for giving depositions when
4 the defense doesn't reach ----

5 MJ [Col COHEN]: I'll dispel you of that. I never create
6 precedent for myself. I can make a decision today and can
7 rule -- and rule differently tomorrow. But there is the
8 language in the deposition that talks about extraordinary
9 circumstances.

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

11 MJ [Col COHEN]: And at a certain point, things with this
12 case may become extraordinary.

13 MTC [MR. TRIVETT]: I understand. And we would take all
14 of those over what we have now for sure in this regard. We do
15 think that the judge properly limited the questions, so that
16 if the judge did order a closed deposition as -- just as to
17 those questions, we would not oppose. That would work to our
18 advantage as far as protecting the national security
19 information. Defense can get the information they want, they
20 can present it to the commission, if necessary. But that is
21 certainly preferable over open testimony.

22 I think at some point closed testimony is
23 appropriate, but only if there's a motion for it. So I'll

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1 leave that at that.

2 Subject to your questions, sir.

3 MJ [Col COHEN]: I'll ask my questions. I'll -- you can
4 then tell me whether it's something you think you can answer
5 now or something you can answer later.

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

7 MJ [Col COHEN]: And you can keep track of my questions.
8 If it's something you can only address briefly now but then
9 later in a closed session you want to more -- to more fully
10 expound on something, you obviously have leave of the
11 commission to do so.

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

13 MJ [Col COHEN]: So let's talk about -- conceptually I
14 completely understand this idea of you can't unring a bell.
15 As I weigh out the CMC opinion, Press Enterprise, Waller v.
16 Georgia, Marzook, all of these cases that the various parties
17 have cited to for guidance to the commission as to how to
18 address this issue, I think only there's a lot of disagreement
19 that you can't unring a bell, so the disclosure that happened
20 happened. And like you said, the 40-second delay didn't
21 prevent that disclosure to the public. Apparently, the
22 parties are not in disagreement that there's certain
23 information now known to the public that they otherwise were

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1 not entitled to know.

2 But how does the testimony in open court differ in
3 any way from, for example, what we're doing right this second,
4 discussing this issue?

5 MTC [MR. TRIVETT]: That's the trick box the government
6 was put in when we had to file an unclassified version, and
7 that's why I started my argument the way I did.

8 This is not ideal. I do not like to do this. We are
9 ringing a bell as lightly as possible so it doesn't get rang
10 louder later.

11 MJ [Col COHEN]: I understand.

12 MTC [MR. TRIVETT]: That's the best argument I have. But
13 I do think we have an absolute obligation to mitigate, and
14 that's why I can't answer a lot of questions in open.

15 MJ [Col COHEN]: And that's fine. I understand that.

16 MTC [MR. TRIVETT]: But even -- but this -- understood.

17 That's why this whole issue is an illusion. The fact
18 that we think we can stand up here and not cause damage is not
19 true. I'm just trying to mitigate the damage as much as we
20 can at this point.

21 MJ [Col COHEN]: And I understand that. Okay.

22 So one of the things that I was -- you talked about
23 in your motion and then again during your argument today about

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1 this idea that someone might recognize a voice, syntax,
2 et cetera.

3 Why wouldn't a black screen with a voice modulator
4 work? And I understand, not necessarily the identity, but
5 I -- but with the CMCr ruling, I need to address various
6 things ----

7 MTC [MR. TRIVETT]: I understand.

8 MJ [Col COHEN]: ---- to include all of the alternatives.

9 So let's assume for a second that the fact that
10 people may know -- know the classified information about this
11 particular individual already, if that wasn't -- even with
12 that, if the court said, you know, hey we're -- I got it. We
13 can't -- we can't unring that bell, so now I've got to look at
14 what else can I do to do exactly what you said, mitigate any
15 other potential additional information that someone may glean
16 about this individual from the testimony?

17 If that was the case then, placing limitation, for
18 example, on some generalized background questions that you may
19 ask a particular witness, maybe saying like, well, maybe
20 those -- if -- if the defense really needs to know that
21 information, perhaps that's in a class -- you know, perhaps in
22 a classified, you know, closed session. Whereas, what work
23 they did for the -- for the defense and those answers being

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1 with a -- with a blackout screen and a voice modulator, for
2 example, why wouldn't that mitigate those additional concerns
3 we would have that you -- you raised with respect to, hey,
4 someone might learn the location where this person maybe grew
5 up?

6 MTC [MR. TRIVETT]: So I think that's a two-part question,
7 sir.

8 MJ [Col COHEN]: It probably is and I didn't mean to give
9 you a compound question, but ----

10 MTC [MR. TRIVETT]: I want to answer it with two different
11 concerns. Our concern isn't simply the -- the
12 appearance-in-context concern. That is a concern that we
13 don't think can be mitigated at all.

14 MJ [Col COHEN]: I understand. And I'm ----

15 MTC [MR. TRIVETT]: But we're also concerned about the
16 substance of the testimony. Because although the questions
17 seem fairly benign and can be answered very quickly, it's not
18 likely, certainly from the defense attorneys I've watched over
19 the last seven years, that they're going to be satisfied with
20 whatever that initial question is.

21 So there's going to be follow-up questions, and once
22 there are follow-up questions, the ambit starts getting wider
23 immediately. And when it's done in the context of -- the

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1 whole purpose behind this isn't that he was on their team,
2 right? The purpose behind it is that he was on their team and
3 where he used to work.

4 MJ [Col COHEN]: Correct.

5 MTC [MR. TRIVETT]: That's the entire context, right?

6 They could call lots of people from their team who, you know,
7 may have been prior military people, and there's no concern at
8 all.

9 MJ [Col COHEN]: Right.

10 MTC [MR. TRIVETT]: But when you start asking in context
11 any question about why we're even -- why he's even testifying,
12 the reason he's even sitting in there is because of that
13 second piece ----

14 MJ [Col COHEN]: Right.

15 MTC [MR. TRIVETT]: ---- that where-he-used-to-work piece.
16 And because of that, it's an unavoidable fact that the
17 information is going to be classified.

18 You might ask 25 questions, only two of which are
19 classified, but when they happen, we don't know when that's
20 going to happen. The question itself could reveal classified
21 information. An objection that we have could put a spotlight
22 on what we believe would be a classified answer. And then the
23 witness himself can just not understand the left and right

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1 limits of what he's allowed to say in open court.

2 So it's both the substance and the appearance in
3 context that are the concern that aren't mitigated at all by
4 the modulator or the black screen. And I think I said these
5 specific words to Judge Parrella: It's better, but it doesn't
6 mitigate it.

7 I mean, we can -- we can fully mitigate this. After
8 we argue today, the hope is that this is never mentioned again
9 in open court and it doesn't need to be. That would be our
10 hope. That would be our intention. That would be the best
11 way to mitigate what we can't completely clean up.

12 But the modulator can also -- there is a concern too,
13 is that people speak in syntax. They use colloquialisms.
14 They use lots of things. You can pick up the fact that I'm
15 from New Jersey pretty quickly because I'm often told that.
16 That's subconscious to me. But for foreign intelligence
17 analysts who are trying to figure out where this guy is, where
18 he's from so they can track down his family, they can pick
19 that up pretty quickly, even if there is a modulator. So
20 there are those concerns.

21 I mean, some concerns are probably more remote than
22 others, but they're legitimate concerns. And there's no way
23 to know until after it's done, and then once it's done it's

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1 too late to fix it. And I think that's why we need a -- if we
2 continue to be required to provide him for testimony, that it
3 needs to be completely in closed.

4 MJ [Col COHEN]: So do you believe -- for example,
5 findings of fact are really important to me, because it's the
6 one thing that I get a clearly erroneous standard on, is with
7 respect to ----

8 MTC [MR. TRIVETT]: I understand.

9 MJ [Col COHEN]: ---- to findings of fact.

10 TC [MR. RYAN]: Right.

11 MJ [Col COHEN]: So when I see a CMCR opinion that comes
12 back and says, hey, the commission needs to make, you know,
13 more robust findings of fact, that really resonates with me
14 personally ----

15 MTC [MR. TRIVETT]: I understand.

16 MJ [Col COHEN]: ---- as a -- as the judge.

17 So now I'm essentially going back at this point as
18 I -- and I'm not the first judge in this particular case to
19 have to go back and say, okay, well, it's not a decision I
20 made, but now I've got to figure out what I'm going to do with
21 the decision that was made.

22 For example, you just gave me a fact, for example,
23 that an intelligence analyst could listen to X, Y, and Z and

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1 then determine, you know, location, geographic area, all this
2 sort of kinds of stuff. That is a fact. So for me to
3 actually have to find that fact, I have to be able to cite to
4 something in the record other than an argument by counsel.

5 And so then my question becomes is: To even consider
6 these various alternatives, are there exact -- I understand
7 the arguments of counsel, but are there specific -- where is
8 the evidence in the record for where I can even send the CMCR
9 to and say, well, yeah, you can tell this is clearly erroneous
10 because I've got either an attestation or an affidavit or I've
11 got -- you know, in an open source that -- that this -- this
12 article on this, those kinds of things.

13 Where do I go to get these facts that not only you,
14 but the other parties arguing on these various issues of
15 alternatives?

16 MTC [MR. TRIVETT]: So you have the declarations that we
17 set forth, one from the director of the agency, the CIA on
18 that. That's not a classified fact, although there are
19 classified paragraphs within it. There's another ex parte
20 classified declaration where -- don't apologize for the
21 ex parte nature of it. It goes to trade craft and the
22 protection of forces, and there's no need to know from the
23 defense. That's just how 505 and CIPA are envisioned.

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1 But at least my comment that I made regarding foreign
2 adversaries, I think that's supported within the declarations,
3 but that's from a case. I was citing a case. I believe it --
4 it's either Yunis or -- I think it's the Yunis case ----

5 MJ [Col COHEN]: Okay.

6 MTC [MR. TRIVETT]: ---- or maybe Department of the
7 Navy v. Egan. But the issue was specifically -- and, you
8 know, forgive me generalities here.

9 MJ [Col COHEN]: No, that's fine.

10 MTC [MR. TRIVETT]: Is that unclassified facts in the view
11 of the public might mean nothing but mean a tremendous amount
12 to our adversaries who are gathering and collecting this
13 information and putting together a mosaic to try to reveal
14 everywhere we have assets for the CIA or the NSA or DoD. So
15 that was a citation to a case, so I think it's recognized
16 law ----

17 MJ [Col COHEN]: Okay.

18 MTC [MR. TRIVETT]: ---- on that issue. So I agree. I
19 don't try to argue facts.

20 MJ [Col COHEN]: No, I wasn't challenging that you did.

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

22 MJ [Col COHEN]: It's just a -- it's just a reminder to
23 help me, because at the end of the day those findings of fact

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1 are imperative to me ----

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

3 MJ [Col COHEN]: ---- in being able to say, okay, I am
4 satisfied that I can cite to, like I said, either known law or
5 some kind of document. Like I said, it may be something that
6 was an ex parte filing or something.

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

8 MJ [Col COHEN]: That's fine. I mean, you're right. The
9 law allows -- allows that to occur.

10 MTC [MR. TRIVETT]: Right.

11 MJ [Col COHEN]: Then me being able to focus on that and
12 saying here's where I'm going to get that source of
13 information.

14 MTC [MR. TRIVETT]: Yes, sir. So to the extent that you
15 go back with findings to the CMCR, which presupposes a bunch
16 of different things in the litigation at this point, but to
17 the extent you do, we would always envision that there may be
18 a redacted ex parte classified finding of fact. I think that
19 that's envisioned.

20 We did attach one of those declarations to the CMCR
21 opinion or to our -- I'm sorry -- to our filing in the CMCR
22 ex parte. But as appellate courts normally do, and which we
23 had anticipated might be a concern, they like to look at the

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1 record that the military judge had before him.

2 So it is not at all clear that they looked at that
3 and disregarded it. They simply remanded it for you to look
4 at it ----

5 MJ [Col COHEN]: Right.

6 MTC [MR. TRIVETT]: ---- and make your determinations.
7 That was certainly how we believe the litigation is postured
8 at this point.

9 But there are probably going to be findings of fact
10 in this instance that are classified and ex parte, to the
11 extent that you go back with findings of fact. Again, don't
12 apologize for it, but we think that there's ample evidence in
13 the declarations that we provided that allow for you to make
14 these determinations on the -- the compelling interest at
15 stake, the narrowness of the ruling, and why the alternatives
16 really do not work.

17 MJ [Col COHEN]: I'll ask this very broadly, and you tell
18 me whether you can answer that -- this question in this
19 session.

20 I've read all the declarations that have been
21 provided to me. I will not talk about what's in those
22 declarations in this setting. You mentioned another potential
23 remedy in lieu of would be additional declarations.

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1 MTC [MR. TRIVETT]: Sure.

2 MJ [Col COHEN]: Is the United States of America capable
3 of submitting a declaration that addresses a specific issue of
4 whether the government had anything to do with this particular
5 person ever being in the pool? And is that something you can
6 answer here?

7 MTC [MR. TRIVETT]: Yes, sir. And we quickly looked into
8 that issue at the beginning. We were as surprised as anyone
9 about what occurred back when it occurred. We were scrambling
10 to try to figure out what was going on, to try to confirm
11 things, and to try to confirm the absence of things. And we
12 were very quickly able -- and the intelligence agencies are
13 capable of finding out who worked for them. They have that
14 capability. That's not a secret.

15 General Martins very shortly afterwards had spoken to
16 the people that we believed we needed to speak to on this
17 issue within the intelligence community. I don't want to go
18 into more detail on that ----

19 MJ [Col COHEN]: I understand.

20 MTC [MR. TRIVETT]: ---- but we spoke to everyone we
21 believed we needed to who would have the answer as to whether
22 or not in any way this individual was put on the defense team
23 for a nefarious purpose, to gain intelligence or to, you know,

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1 further threaten the accused. And we got a definitive no, and
2 we communicated that as officers of the court.

3 If I can have a second to confer with the chief
4 prosecutor. That was a while ago.

5 MJ [Col COHEN]: You may.

6 MTC [MR. TRIVETT]: I want to ask him a question.

7 MJ [Col COHEN]: Absolutely.

8 [Pause.]

9 MJ [Col COHEN]: Mr. Trivett.

10 MTC [MR. TRIVETT]: Thank you for your indulgence, sir.

11 MJ [Col COHEN]: Absolutely.

12 MTC [MR. TRIVETT]: We will be able to get a declaration.
13 We have to figure out who the correct declarant may be who can
14 declare as to the entire United States Government. We'll have
15 to figure out a way to do that, but we will work to do that to
16 get a declaration consistent with what we were told shortly
17 after this event occurred so you have more evidence to rely
18 upon in your findings.

19 MJ [Col COHEN]: Thank you. How long will that take?
20 Ballpark is fine. I understand we're talking about first
21 determining who it is and where you're going to come from.

22 MTC [MR. TRIVETT]: Without holding us to this definite
23 date, we will endeavor to get that to the commission within

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1 the next two weeks.

2 MJ [Col COHEN]: Okay. Is this something that the defense
3 will be able to see as a classified document? I mean, in
4 other words, I don't need a super long -- this is a very
5 specific issue that the declaration ----

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

7 MJ [Col COHEN]: ---- needs to address.

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

9 MJ [Col COHEN]: But for me to -- only to see it ----

10 MTC [MR. TRIVETT]: I understand. We will -- we will work
11 to have it available to all of the parties.

12 MJ [Col COHEN]: Excellent. Thank you.

13 That's all the questions I have right this second.

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

15 LDC [MR. CONNELL]: Your Honor, may we have a moment with
16 counsel?

17 MJ [Col COHEN]: You may. In fact, Mr. Connell, I'm going
18 to go ahead and take a ten-minute comfort break, and we'll be
19 back in ten minutes.

20 [The R.M.C. 803 session recessed at 1057, 24 July 2019.]

21 [The R.M.C. 803 session was called to order at 1111,
22 24 July 2019.]

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

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1 Mr. Trivett.

2 MTC [MR. TRIVETT]: Sir, if I could just clean up the
3 record. We did verify that it was the U.S. v. Yunis case. I
4 wanted to give a cite for the record.

5 MJ [Col COHEN]: Thank you.

6 MTC [MR. TRIVETT]: 867 F.2d 617. That's a D.C. Circuit
7 Court case from 1989.

8 MJ [Col COHEN]: Thank you.

9 MTC [MR. TRIVETT]: Thank you.

10 CP [BG MARTINS]: Your Honor, I would also like to put on
11 the record, Mr. Swann has returned. And briefly, so that we
12 wouldn't interrupt your exchanges with counsel, Mr. Ryan had
13 left and then come back into the courtroom.

14 MJ [Col COHEN]: All right. Thank you, General Martins.
15 I appreciate it.

16 Ms. Pradhan? Ma'am, did I pronounce your name
17 correctly?

18 ADC [MS. PRADHAN]: Technically, Your Honor, it's Pradhan.

19 MJ [Col COHEN]: Pradhan. All right. I apologize.

20 ADC [MS. PRADHAN]: That's all right. Thank you for
21 asking.

22 MJ [Col COHEN]: Absolutely. You may argue.

23 ADC [MS. PRADHAN]: Thank you.

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1 Your Honor, during the 802 yesterday you asked a
2 question that places us on sort of two separate tracks of
3 argument. And with your permission I'd like to answer that
4 question first ----

5 MJ [Col COHEN]: Absolutely.

6 ADC [MS. PRADHAN]: ---- before moving to sort of the set
7 of circumstances that we find ourselves in with 616. And that
8 question was: Does the interpreter's testimony relate to an
9 underlying motion or is this essentially a motion for
10 discovery?

11 There's a short answer and there's a long answer ----

12 MJ [Col COHEN]: Okay.

13 ADC [MS. PRADHAN]: ---- as with most things in this
14 commission. The short answer is that it was a motion for
15 discovery.

16 In AE 350C we asked for a deposition because at that
17 point we had endeavored to speak to the interpreter several
18 times to answer some of the questions that both the military
19 judge at that time and we certainly felt that we were entitled
20 to ask, and had had very little success in doing so. The
21 record is sort of full of the references to -- starting with
22 AE 350C, of course, to the number of times the interpreter was
23 dishonest in his answers with us when we attempted to talk to

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1 him.

2 And so we filed AE 350C as a motion for a deposition
3 to get him under oath. We also filed AE 3500, which was a
4 motion for documents and other information pertaining to the
5 interpreter. And we ended up receiving -- and again, this is
6 in the record -- very little discovery from the government
7 over the four and a half years or so that this motion has been
8 pending. And we have said that as well.

9 And so this interview under oath, whether in the form
10 of a deposition or testimony, still remains critical to the
11 resolution of this issue, which is how a former CIA employee
12 came to be on a defense team and for what reason. And so our
13 position would be that our original argument in AE 350C was
14 correct; that when we filed that in February 2015, that was
15 the correct position. Now, that's the short answer, Your
16 Honor.

17 The longer answer pertains to the nature of the
18 deposition that we chose -- that we requested. And if Your
19 Honor is to reconsider whether or not this should be taken in
20 the form of a deposition or in the form of testimony, then we
21 would ask the military commission to reconsider the scope of
22 the discovery requested that was eventually granted in
23 AE 350RRR and to widen it to the scope of discovery that we

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1 originally requested ----

2 [The security classification button was pushed in the
3 courtroom which caused the video feed to terminate at 1115,
4 24 July 2019.]

5 [The Military Commission resumed at 1117, 24 July 2019.]

6 MJ [Col COHEN]: We're back on the record.

7 ADC [MS. PRADHAN]: Thank you, Your Honor.

8 MJ [Col COHEN]: Mr. Trivett, would you please state back
9 on the record what you just told me so that it's on the
10 record?

11 MTC [MR. TRIVETT]: Yes, sir. We asserted the national
12 security privilege over information that was in our filing at
13 the U//FOUO level. I misunderstood the nuance, and the
14 defense did show me that document before they argued. I did
15 not catch that aspect of it, so when I heard a certain aspect
16 of it, I believed that was national security information. I
17 was incorrect. Counsel should be allowed to reargue that
18 piece, and I apologize to the commission.

19 MJ [Col COHEN]: That's okay. Thank you.

20 Ms. Pradhan ----

21 ADC [MS. PRADHAN]: Thank you.

22 MJ [Col COHEN]: ---- sorry for the inconvenience. You
23 may continue.

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1 ADC [MS. PRADHAN]: No, I appreciate it, Your Honor.

2 Thank you.

3 So we have covered the scope of what happened in the
4 initial incident. What Judge Pohl -- what I was going to say
5 is that immediately after this incident on the 9th of
6 February, what Judge Pohl said was there may be a myriad of
7 reasons why this individual may or may not wish to be
8 interviewed by the defense. I'm not going to speculate on
9 what that is at that time, because at that time it had not
10 been confirmed that he did, in fact, formerly work for the
11 CIA, which the government has declassified. But he should be
12 made available to be interviewed.

13 Now, Judge Pohl clearly intended by that that the
14 defense would be able to question the interpreter about two
15 primary subjects, and here I'm repeating argument -- or
16 summarizing argument, Your Honor, that I made in unclassified
17 session in November 2018 when AE 350 was originally on the
18 docket.

19 And those two subjects are any potential substantial
20 contacts with defendants at the black sites, including
21 potentially observations about conditions of confinement and
22 information regarding interrogations, and more information --
23 as the military commission has pointed out, more information

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1 about the sequence of events leading to the interpreter being
2 placed on a defense team.

3 Now, there are two reasons that we believe that the
4 posture of -- the answer to your question "is this a discovery
5 motion" has changed. And there are two reasons for that.
6 Both are actual new facts or circumstances before the
7 commission.

8 The first is that the motions to suppress the 2007
9 statements to the FBI, the LHM statements, which strike the
10 heart of the defense -- which are the heart of the defense and
11 strike at the government's primary case against the
12 defendants, were not in active consideration before the
13 military commission in November 2018. That order didn't come
14 down until April 2019, just a couple of months ago; that there
15 is now a pending motion to which the interpreter's testimony
16 is extremely important, particularly on that scope, on that
17 broader scope.

18 And the second reason is that the government in the
19 publicly released version of 616X at pages 25 and 28 confirmed
20 that the interpreter is, and I quote, a former employee in the
21 RDI program. So this means if he had any direct and
22 substantial contacts with Mr. al Baluchi or with any of the
23 other defendants at the black sites, information about those

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1 contacts should have been produced to the defense under AE 397
2 categories -- category 2.d., which is information about
3 personnel who had direct and substantial contacts with the
4 defendants. And that information should have been included
5 potentially in our motions to suppress.

6 So we did originally request a deposition of the
7 interpreter in anticipation of classified questions regarding
8 the defendant's claims in the RDI program because the
9 connection between their torture and their statements has
10 always been central to the defense.

11 And we can, of course, discuss this more in
12 classified session, but more information about
13 Mr. al Baluchi's experiences at the black sites that may be
14 pertinent to the inquiry here is contained at AE 350L ----

15 I got a message to slow down.

16 MJ [Col COHEN]: I understand. I get those regularly.

17 ADC [MS. PRADHAN]: Both Mr. Trivett and I, I think, are
18 going uncharacteristically slowly today because of the nature
19 of what we're arguing, but clearly not as slowly as I thought.

20 But more information about Mr. al Baluchi's
21 experiences at the black sites that is relevant to this
22 inquiry is contained at AE 350L Attachment B, paragraph b.,
23 and AE 525C, which is -- excuse me, Attachment B, which is the

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1 declaration of our investigator, Mr. Daniel Futrell.

2 So if the military commission is open to
3 reconsideration of the original question, then
4 Mr. al Baluchi's position, again, is that we had it right in
5 AE 350C in 2015. We would ask for questioning under oath,
6 either as a closed deposition or partially closed deposition
7 to cover the classified information or testimony, which would
8 include the original scope of our questions that are material
9 to the defense, and we would need that information to decide
10 it's not only potentially included in the motion to suppress
11 but then to decide whether any additional steps need to be
12 taken.

13 So if that satisfies Your Honor's question about
14 the ----

15 MJ [Col COHEN]: It does very much. Thank you very much.
16 I appreciate you giving me a response to those questions.

17 ADC [MS. PRADHAN]: Of course.

18 Then I'll turn to the situation that we find
19 ourselves in now on AE 616, which is ----

20 MJ [Col COHEN]: Please.

21 ADC [MS. PRADHAN]: ---- the sort of how we move forward,
22 if we are to move forward, with the limited scope of testimony
23 that Judge Parrella ordered.

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1 Now, Your Honor, the government in their briefs
2 simply fail to fulfill the rigorous standard for closure,
3 which the CMCr and 616W essentially ordered them to do. And I
4 want to point out at the outset that no matter whether the
5 defense is correct, that this may have been one in a series of
6 government infiltrations of the defense, or whether the
7 interpreter's placement was a series of deeply problematic
8 mistakes, either way, we don't know the answer four and a half
9 years later. And the interpreter's testimony under oath is
10 necessary.

11 So here is the backdrop -- and I think this is really
12 important because the backdrop against which this incident
13 occurred was of great magnitude, of great importance to the
14 CMCr in their -- in their reasoning. The backdrop against
15 which this incident occurred was a series of intrusions
16 that -- and I'm only going to recount a couple of them.

17 But, for example, in January 2013 the military
18 commission was interrupted by the remote trigger of the red
19 light even though control over the red light, as we found to
20 my detriment, is vested in the military judge, right? And we
21 discovered shortly thereafter that government agencies had
22 access to an ungated feed from the courtroom, including
23 communications at the attorney-client tables.

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1 In March 2013, this is the -- the incident that's
2 been reported and reported, the listening devices disguised as
3 smoke detectors in the attorney-client meeting rooms were
4 discovered despite previous statements by the government that
5 they had not installed any such devices.

6 Also in March '13 it was discovered that the
7 prosecution had accessed hundreds of thousands of defense
8 e-mails, which led to an order from the Chief Defense Counsel
9 for defense teams to stop using DoD networks until the extent
10 of the privilege violation could be determined. And that
11 caused an almost total work stoppage.

12 In April 2014 it was found that the FBI had tried to
13 recruit a second informant on Mr. Binalshibh's legal team
14 after having -- the only reason we found out about the second
15 one is because he reported the presence of a first one on
16 Mr. Binalshibh's team, and that triggered a one and a half
17 year abatement of proceedings before the military commission.

18 In June 2017 -- this goes all the way to the present
19 day. In June 2017 the government acknowledged having
20 unintentionally -- and I quote the government on this,
21 unintentionally had access to attorney-client communications
22 at Guantanamo after the specific order in 2013 barring
23 monitoring following the discovery of the listening devices in

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1 the attorney-client meeting rooms.

2 And in December 2018 there was the, what was called
3 the rough surveillance and intimidation, to say the least, of
4 a former member of the Bin'Attash team. That is detailed in
5 AE 615.

6 And so, you know, the government in their reply brief
7 in AE 16BB [sic] dismisses these intrusions, as they have many
8 times before. But those confirmed incidents and alleged
9 intrusions or suspected intrusions, added to those hanging
10 over these proceedings, had enormous impact on the defense and
11 on the attorney-client relationship, to say nothing of public
12 perception of the commission.

13 The -- each of these men was tortured at the black
14 sites by government agents. These are facts, Your Honor. And
15 these are documented, not just in public CIA records but, you
16 know, former CIA agents who have been -- who have given
17 interviews about it. And they were told that they would be
18 controlled forever, that they would never be free of CIA
19 influence or CIA control. And we'll hear much more about this
20 when Mr. Mitchell and Mr. Jessen testify.

21 But when you have the number of confirmed intrusions
22 that we've had and then incidents like these where it takes
23 four and a half years just to get to the edge of where we are

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1 now, to the edge of perhaps getting some answers as to how
2 this happened -- I think Mr. Nevin actually said in January
3 with respect to AE 615: We would be walking violations of the
4 Sixth Amendment if we did not continually have potential
5 government interference uppermost in our minds at this point.

6 The intrusions have chilling effects on every aspect
7 of the defense. And so because of that, that chilling effect,
8 and because of the number of intrusions, there has been
9 healthy and appropriate public interest in why the military
10 commissions keep being delayed and why these intrusions keep
11 happening.

12 And so that's the background against which this
13 happened. And to be clear, I am not saying Mr. al Baluchi --
14 it's not Mr. al Baluchi's position that there was definitively
15 a government intrusion here. We don't know that the
16 interpreter was a government plant. We don't know that. But
17 it has been four and a half years since the initial incident.

18 And there is an explanation for how the interpreter
19 ended up on a defense team, and it's -- it is undeniable that
20 the explanation is more complicated than just he saw an
21 opening and decided to apply. He is a former CIA employee --

22 [REDACTED]

23 [REDACTED] -- who did or should have known about the long

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1 involvement of the CIA with this case, and the CIA's public
2 and documented torture of these men ----

3 [The security classification button was pushed in the
4 courtroom which caused the video feed to terminate at 1128,
5 24 July 2019.]

6 [When the video feed resumed at 1131, 24 July 2019, the R.M.C.
7 803 session was in recess.]

8 [The R.M.C. 803 session recessed at 1131, 24 July 2019.]

9 [The R.M.C. 803 session was called to order at 1158,
10 24 July 2019.]

11 MJ [Col COHEN]: Commission is called to order.

12 Trial Counsel, I've instructed my staff -- although I
13 value their -- their inputs significantly, if the national
14 security privilege needs to be asserted, that is the
15 government's responsibility, and I will have the government
16 stand up and make a formal request that that be asserted.

17 Ms. Pradhan, you may continue.

18 ADC [MS. PRADHAN]: Thank you, Your Honor. Thank you,
19 Your Honor.

20 And I just want to say at the outset that we have
21 discussed the matter with the government and have come to a
22 resolution ----

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

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1 appreciate it.

2 ADC [MS. PRADHAN]: ---- so we can move forward.

3 So, Your Honor, what we were discussing before we
4 recessed was what the actual question is that remains, and the
5 question really is how the interpreter got -- was placed on a
6 defense team.

7 And here, you know, I just want to make one brief
8 comment about the government's filing in AE 350TTT. The
9 motion overall, of course, is classified, but again, as I said
10 earlier, the government represented that their position, their
11 unfounded position, is that the defense has manufactured
12 outrage about what happened on the 9th of February 2015.

13 And so I want to just point Your Honor to page 14 of
14 AE 350TTT because there are certain facts listed there, and
15 point to the metaphorical gap between Section 2.a. on that
16 page and Section 2.b. on that page. Because even after four
17 and a half years no one has explained to us how the
18 interpreter ended up being employed at the Military
19 Commissions Defense Organization. And our position is that no
20 one can except for the interpreter himself.

21 Now, this is an incredibly fact-specific inquiry. It
22 always is when we're contemplating closure. And so it's -- I
23 think, just to refresh about the three topics of testimony

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1 that were ordered in AE 350RRR, the three topics were: First,
2 the circumstances leading up to the interpreter's employment
3 with the defense; the extent to which he had access to
4 privileged information during his tenure as a defense
5 interpreter; and whether or not he shared any information
6 after the fact with any other persons or organizations. Those
7 are the three questions.

8 And the government has cited compelling reasons, and
9 we don't dispute that there are compelling reasons that the
10 government has interests here in protecting the interpreter's
11 identity and safety. And the defense shares those interests
12 in protecting the interpreter's identity and safety.

13 But there is always a balancing test, and the CMCR
14 went through this in some detail. They said with regards to
15 those topics that the plain text of the second and third
16 topics concerning defense privileged and confidential
17 information do not appear to have anything to do with
18 classified information. And I will, of course, address the
19 specifics of Mr. Trivett's submission in a moment.

20 They did say that the first topic addressed by the
21 closure order implicated information that is potentially
22 classified, and the first topic, of course, mentions the
23 interpreter's former CIA employment; but that is estopped by

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1 the order itself in AE 350RRR which prevents us from asking
2 anything about the substance of the interpreter's former CIA
3 employment.

4 And they actually go on to find that the second --
5 the second part of that first topic concerns, again, how the
6 interpreter came to be employed by the defense, and that the
7 closure order contained no specific findings discussing how
8 the answers to those questions implicate national security.
9 And so they found ultimately that the four Press Enterprise
10 factors were not fulfilled by the government.

11 Now, they made very specific criticisms. They made
12 very specific criticisms as well. They said under AE 350RRR,
13 the interpreter will testify via video feed when they testify
14 in open session. The commission did not address why blocking
15 the interpreter's face from view is insufficient.

16 The CMCR said the government raised a concern about
17 the use of forensic voice analysis. Now, we heard Mr. Trivett
18 talk ----

19 INT: Your Honor, the interpreter would ask the commission
20 to ask the counsel to speak into the microphone, please.

21 MJ [Col COHEN]: Ms. Pradhan, if you'll please do so.

22 ADC [MS. PRADHAN]: Of course. I apologize.

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

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1 ADC [MS. PRADHAN]: I very rarely get chastised for not
2 speaking loudly enough ----

3 MJ [Col COHEN]: Okay.

4 ADC [MS. PRADHAN]: ---- but let me make more of an
5 effort, Your Honor.

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

7 ADC [MS. PRADHAN]: I apologize.

8 MJ [Col COHEN]: It's okay.

9 ADC [MS. PRADHAN]: So the government -- I heard
10 Mr. Trivett talk a little bit about the danger of that sort
11 of -- of analysis and voice recording. But the government
12 still didn't explain, as the CMCR charged them to, how anyone,
13 press or public, might obtain an audio of the interpreter's
14 testimony for any sort of analysis or any sort of public
15 outing when the audio and video recording is strictly
16 prohibited without the SECDEF's express permission. Access to
17 these proceedings are very, very tightly controlled, as I'm
18 sure any of the spectators in the gallery would be able to
19 tell us.

20 So again, you know, the government has not fully
21 explained in a factual manner what -- where the threat
22 actually lies, in practical terms, right? Because that's
23 what's necessary, to explain in practical terms what the

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1 likelihood of that threat is. And they have to show the
2 substantial probability of that threat, and they have not done
3 so.

4 The CMCR said finally with regards to mosaic theory
5 that the government, you know, argued mosaic theory, but that
6 they did not explain why a 40-second transmission delay was
7 inadequate.

8 Perhaps the 40-second delay was demonstrated today,
9 but they did -- the government did not explain that in
10 their -- in their filing, and it didn't -- they specifically
11 didn't explain it with regards to those three topics for the
12 interpreter's testimony, how those three topics would lead to
13 classified information that might require a measure -- the
14 measure of closure rather than employment of a 40-second
15 delay.

16 So going into 616X, the government and subsequently
17 the military commission have quite a bit of work to do to
18 comply with all four Press Enterprise factors, and the
19 government, frankly, has failed to do so.

20 The first issue is the government sort of going back
21 and forth on the classification of the testimony. In 616, you
22 know, far from the clear demonstrations that there is a
23 substantial probability of harm that both the CMCR and the

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1 military commission require, the government actually revealed
2 internal confusion over the -- within their own arguments over
3 whether the testimony would be classified or unclassified.

4 They -- they mention examples of questions that they
5 claim might lead to classified information spillage, and they
6 state, "The defense may ask questions that even if answered in
7 the negative would reveal classified information based on the
8 question itself, such as whether anyone from the CIA
9 approached the interpreter or whether the interpreter spoke
10 with anyone from the CIA after the incident in February 2015."

11 Now, if, as the government posits, the defense asks,
12 "Did you speak with anyone from the CIA after the incident in
13 February 2015," both the answers yes and no would be
14 unclassified. The government, once again, did exactly what
15 the CMCR said was materially deficient, to ask for closure,
16 right? They didn't explain why either one of those answers
17 would be classified, right?

18 I can understand how, if we pursued beyond that,
19 answers may become classified, but again, you have to get
20 beyond a yes or a no answer in order to get into potential
21 classification, at which point you have the measures that are
22 in place in the courtroom today to prevent further disclosure.
23 And so it's that granularity of analysis that was required of

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1 the government and that they have simply failed to provide
2 here, including this morning.

3 Now, what's actually stunning is that the government
4 actually admits later in 616X that, quote -- this is at
5 page 37, Your Honor, that, quote, Of course it is also
6 possible that nothing of classified substance would be
7 revealed after the accumulation of questions and answers
8 during testimony.

9 Now, that admission alone should end the entire
10 inquiry as to whether or not closure is justified. But the
11 government instead persisted, and they state that the military
12 commission -- that the -- to the military commission that the
13 overriding interests require protection beforehand as there is
14 no equivalent remedy to closure once the information is made
15 public.

16 Now, this is as bald a misstatement of the law as one
17 gets. The test for closure requires the government to prove
18 ahead of time that there is a substantial probability that
19 spillage will occur. The government can't do that, and they
20 admit so in their brief, and then they try to reverse the
21 long-established standard in their favor.

22 Now, there are really no cases that support the
23 government's position here. And I take Mr. Trivett's

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1 distinction between cases that involve national security
2 issues and cases that did not.

3 But their citation of United States v. Marzook is not
4 helpful because in United States v. Marzook the witnesses at
5 issue were covert officers, right? No one has told us that
6 the interpreter is a covert officer. They were covert
7 officers. They were foreign intelligence agents whose
8 testimony on their face was classified. The topics of their
9 testimony was classified.

10 And that's the problem with many of these cases that
11 the government cites, is that the original information sought
12 by the parties from these witnesses is classified.

13 The same is true for the government's citation of
14 Dhiab v. Obama, later Dhiab v. Trump. The information at
15 issue there was originally classified and the question was
16 whether or not it -- there should be public access to it. It
17 was not this is unclassified information on its face. Should
18 we allow the public to have access to it? And so this is a
19 bit of a unique situation. But that's all the more reason to
20 parse in practical terms what the protective measures are,
21 what the protective measures should be, and what the real risk
22 of harm is.

23 It's also worth parsing, Your Honor, the

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1 inconsistency between what the government has publicly
2 acknowledged about the interpreter and their claims about
3 spillage of classified information. Now, you know, the
4 government says that the interpreter worked for the CIA and
5 that no government agency was involved in placing him on a
6 defense team.

7 Now, either that's true and the CMCR said it's
8 important to get that out in public as to why that's true,
9 and, you know, just to preserve the credibility of these
10 proceedings, or it's not accurate and there have been -- there
11 have been incidences here before where the government, the
12 team here in the -- in the courtroom have made representations
13 and we find out later that, you know, on behalf of another
14 government agency or another arm of the big G government that
15 perhaps that wasn't fully accurate. And I'm not impugning the
16 team here in the room at all, but sometimes that happens. So
17 that may not be accurate, right? It's possible. And the CMCR
18 said that we in the public have a right to know what the level
19 of the intrusion may have been.

20 If the government's correct, then the interpreter
21 will discuss how he, on his own, maybe came to be interested
22 and apply for a defense position. That is a very specific
23 example of information that is not classified. It cannot be

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1 classified. The government just doesn't engage with these
2 specifics.

3 Another possibility is that the interpreter was on a
4 frolic of his own; that the government -- that the interpreter
5 was acting sort of as a volunteer for the CIA, and that maybe
6 no agency was involved in placing him on a defense team, but
7 maybe he thought there would be an opportunity afterwards.
8 We -- we just don't know is the point.

9 And the government just doesn't engage with those
10 specifics. They put forward those two facts but don't address
11 the actual question as to how the inquiry into the
12 interpreter's application to the defense would at all
13 implicate classified information. And that's exactly the sort
14 of example of mosaic theory that the CMCR ordered them --
15 ordered them to illustrate, and they don't do so.

16 Now, they also -- again, you know, just to reiterate,
17 they don't issue any examples of direct threats, and that is
18 something that is distinguishable from United States v.
19 Marzook. In United States v. Marzook, the government was able
20 to show and was required to show concrete threats against
21 Israeli intelligence agents in the form of -- I believe it was
22 websites in that case, that existed for the sole purpose of
23 outing those agents and then making physical threats towards

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1 them.

2 Now, we don't -- we are not saying that the
3 interpreter's identity has not been disclosed. It has been
4 disclosed. And we're not saying that perhaps there are bad
5 actors seeking to do harm to former CIA employees. There may
6 very well be. There are. We know that. But there has been
7 no specific showing about this interpreter and threats to the
8 interpreter, particularly considering the measures that have
9 already been put in place to protect this person's identity
10 over the years.

11 The government repeats the analogy of the bell
12 ringing, and this is -- this is a -- well, it's a metaphor,
13 really, and the metaphor appears many, many times throughout
14 their pleadings. And we understand that metaphor, and it is
15 part of what makes the circumstances of this case -- of this
16 particular issue very, very unique.

17 Now, they -- you know, the first issue is Mr. Trivett
18 said that they were forced to file an unclassified version of
19 616. That's true. Your Honor ordered them to in 616W.

20 They weren't forced to argue AE 350 in open session
21 in November 2018. They weren't forced to argue AE 616 in open
22 session in January 2019. They could have filed 505 notices
23 and not done that. They weren't forced to file an

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1 unclassified pleading to the CMCR discussing everything we've
2 just discussed in April, I believe, of 2019.

3 They weren't forced to do any of those things. They
4 did those things, and they still haven't explained why this
5 particular session of the taking of the interpreter's
6 testimony is more likely to re-ring the bell than the closure
7 of the interpreter's testimony to the individuals who already
8 know his identity. They still can't explain why none of those
9 previous discussions, to include this discussion I'm having
10 with the military commission right now, is not re-ringing the
11 bell. And so without that -- without being able to show that
12 substantial probability that this event, above all others,
13 would re-ring the bell, they haven't fulfilled their
14 obligation.

15 And so the protection of the interpreter's identity,
16 which is a concern we all share, which is why we have gone to
17 such lengths to try and implement as many protections as we
18 can, has to be weighed according to the Press Enterprise
19 factors against Mr. al Baluchi's right to a public trial and
20 the public's right of public -- of access to these
21 proceedings, particularly because this is the 9/11 trial and
22 of great import.

23 So a brief note on the ex parte filings. Obviously,

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1 we haven't seen them. We don't know exactly what's in them.
2 And as I'm sure the military commission is very, very -- is
3 aware, the issue is does that additional information really
4 demonstrate a substantial probability of the proposed harm or
5 does it just repeat the same conclusory statements that the
6 government has put forth here and in other filings regarding
7 the general danger to former CIA employees if they are
8 publicly identified? Because if it's the latter, then the
9 CMCR said that's not adequate for closure of the proceedings.
10 At the most, the military commission can consider bifurcation,
11 but not outright closure of this testimony.

12 And the CMCR actually borrowed the government's bell
13 analogy in their reasoning and they said, quote, that the
14 potential to impair public confidence in 9/11 prosecution
15 cannot be unrung after any conviction in retaking the
16 interpreter's testimony pursuant to a proper closure order.

17 Now, I suggest to Your Honor that even now, even in
18 the classified pleadings, even with the ability to present
19 ex parte the evidence that the defense can't read, the
20 government cannot fulfill the high standard required for
21 closure -- complete closure of the interpreter's testimony,
22 and so there should be no closure order.

23 Subject to your questions, Your Honor.

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1 MJ [Col COHEN]: Yes. I will have a few. Give me just a
2 second to pull up your -- I've made plenty of notes now, but I
3 also made notes in rereading your motion.

4 ADC [MS. PRADHAN]: Of course.

5 MJ [Col COHEN]: So with respect to the -- the
6 alternatives -- and I appreciate that -- your comments that
7 you share the -- that the generalized concerns of the -- of
8 the government with respect to protecting this particular
9 individual from harm.

10 ADC [MS. PRADHAN]: Yes, sir.

11 MJ [Col COHEN]: So help me kind of frame that balance
12 then of -- of my ruling, taking into account any potential for
13 risk to an individual with the idea of a public hearing.

14 ADC [MS. PRADHAN]: Yes, Your Honor.

15 MJ [Col COHEN]: And how do I weigh that?

16 ADC [MS. PRADHAN]: I'm not here saying that it's simple
17 given the unique ----

18 MJ [Col COHEN]: I understand, but any -- any comments you
19 may have as -- or insight may be ----

20 ADC [MS. PRADHAN]: Absolutely.

21 MJ [Col COHEN]: ---- may assist me.

22 ADC [MS. PRADHAN]: At the same time, Your Honor, as I say
23 that, in many ways it is simple, because here the only unique

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1 fact -- and it is a significant one, but the only unique fact
2 is that the interpreter's identity has already been disclosed
3 at one point in time, and at a point in time when no one
4 realized that that identity was classified.

5 What is then necessary is what harm was done at that
6 time and what would demonstrate the potential for harm, for
7 further harm? And that's the government's burden to carry,
8 and they have not, through a sequence of filings at both
9 before the military commission for four and a half years and
10 at the CMC, been able to carry that yet.

11 They have not been able to really show that -- again,
12 that somehow the appearance of the interpreter -- and by -- I
13 use the term "appearance," you know, loosely because it
14 wouldn't be an appearance. It would be presumably his voice
15 conferencing in from -- from CONUS; that that appearance poses
16 a greater risk than any other discussions that we've had about
17 this issue.

18 And so, yes, there are entities in the world who may
19 know the interpreter's identity. There are press outlets who
20 may know the interpreter's true identity. But those press
21 outlets are no more or less likely to publish the
22 interpreter's true identity when he -- if or when he testifies
23 than they are today. So just on that basis, the government

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1 cannot show that there is -- that -- a sufficient probability
2 of risk for closure.

3 And then on top of that, when you add the fact that
4 we do have a 40-second delay that has been employed here in
5 the military commission, most recently today, we do have the
6 red light when national security information is implicated,
7 and you have both prosecution and defense counsel who are --
8 you know, and Mr. Trivett framed this as prosecution sort of
9 rushing to stay ahead of any potential spills, but that goes
10 equally for the defense, Your Honor. The defense has no
11 interest in spilling classified information in an open
12 session. So you have both sides, practiced attorneys, who are
13 able to guide the interpreter on unclassified topics.

14 And I should add, this has been done before. We took
15 unclassified testimony from two FBI agents in December 2017,
16 Special Agent Abigail Perkins, Special Agent James Fitzgerald,
17 and their testimony did implicate classified topics, many
18 classified topics, but we were able to say -- to give them
19 admonitions ahead of time and say, look, this is -- you know,
20 these are the -- this is the right and left parameters of what
21 we're going to ask you. If at any time you feel that, you
22 know, this is going to implicate anything classified -- and,
23 you know, they were aware of what those topics were -- then

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1 please stop us or please tell us.

2 Now one note about what the CMCR said is, the CMCR
3 said that the government has never illustrated why the
4 interpreter, who was an employee of the CIA, would not have
5 the requisite sophistication to know what was classified and
6 what was not classified about his employment, particularly --
7 and this is particularly important -- because the only part of
8 the inquiry that could be classified is inquiry into his
9 employment with the CIA, which is not even a topic we're
10 allowed to ask about.

11 So, you know, there's a level of attenuation here
12 that is simply -- it simply doesn't rise to fulfilling the
13 Press Enterprise standard of being able to show a substantial
14 probability of risk. If anything, we were able to show a
15 substantial probability that there -- there shouldn't be any
16 risk. We should be able to contain this information. And the
17 public interest -- the public interest is in -- you know, in
18 ruling on that side, in ruling in favor of public access.
19 That's what the case law says.

20 MJ [Col COHEN]: Thank you. A few more questions. We're
21 going to go to about 1230, and then if I have any more, I hope
22 you'll be willing to come back up here so I can ask ----

23 ADC [MS. PRADHAN]: As long as you like, Your Honor.

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1 MJ [Col COHEN]: Okay. I talked about the importance of
2 findings of fact ----

3 ADC [MS. PRADHAN]: Yes, sir.

4 MJ [Col COHEN]: ---- and basing rulings. And, if
5 anything, the CMCR made it very clear once again with respect
6 to a trial judge's responsibility to make sufficient and
7 specific findings of fact to support any rulings so that those
8 can be reviewed on appeal.

9 Same similar question to you that I asked to
10 Mr. Trivett, which was: So this idea of voice modulation,
11 black screens, et cetera, but in particular the voice
12 modulation, based on your review of the record, where do you
13 believe the court could look to to make a finding as to
14 whether or not that would or would not be sufficient without
15 calling for additional testimony or requesting additional
16 evidence?

17 ADC [MS. PRADHAN]: Your Honor, I am -- to be honest, I'm
18 not aware of case law involving voice modulation. I don't
19 believe it has been used previously here at the military
20 commission. I know that it is a possibility, based on the
21 government's representations during oral arguments in, I
22 believe, January of this year; I think on January 26th.

23 But I am not -- you know, as a member of the defense,

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1 I am not aware of what the mechanics of that would be, of
2 implementing that, that technology. We do know that it's a
3 possibility, and we would be absolutely supportive of
4 employing that technology to further protect the interpreter's
5 identity.

6 MJ [Col COHEN]: Okay. Mr. Connell wants to chat with you
7 real quick.

8 ADC [MS. PRADHAN]: Thank you.

9 [Pause.]

10 ADC [MS. PRADHAN]: Sir, Mr. Connell reminded me -- or I
11 wasn't here in 2013, so he told me ----

12 MJ [Col COHEN]: No, that's fine.

13 ADC [MS. PRADHAN]: ---- that subsequent to the incident
14 in 2013 when the -- when we found out about the access to the
15 ungated feed at the tables, we were able to call an AV expert
16 to testify about the capabilities here in the courtroom of the
17 employment of certain measures, and so we anticipate that we
18 would be able to do that in this case as well.

19 MJ [Col COHEN]: Okay. You touched on the issue of --
20 I'll tell you what. When we come back from lunch, because the
21 response is probably going to be a little bit longer.

22 So primarily, Mr. Trivett talked about the two
23 particular areas -- go back to the notes so I can just tell

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1 you what I want you to address after lunch ----

2 ADC [MS. PRADHAN]: Yes, sir.

3 MJ [Col COHEN]: ---- very briefly.

4 You have addressed it, I think, overall, but just --
5 and I'll give you an opportunity to kind of summarize your
6 position on this idea of the appearance in context ----

7 ADC [MS. PRADHAN]: Yes, sir.

8 MJ [Col COHEN]: ---- all right?

9 And then the other one would be is you also
10 referenced the word "mosaic," you know, the general principle
11 being that while something individually may not be classified,
12 the gathering of enough unclassified information could create
13 a mosaic, therefore revealing classified.

14 And just addressing kind of -- because I take counsel
15 at their words. That's the responsibility of an officer of
16 the court, is that you are candid with the -- with the court.
17 So when you say we also don't want to engage in the -- in the
18 inadvertent spillage of classified information ----

19 ADC [MS. PRADHAN]: Yes, sir.

20 MJ [Col COHEN]: ---- I have no reason to doubt that.

21 Therefore, this idea of a mosaic, I'd like you to be
22 able to address that after lunch as to, okay, how do we avoid
23 -- how do we avoid that kind of circumstance here, even in --

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1 especially if it's -- if it's an entirely open testimony.

2 ADC [MS. PRADHAN]: Yes, sir.

3 MJ [Col COHEN]: All right. We'll be in lunch until 1345
4 hours. We're in recess.

5 [The R.M.C. 803 session recessed at 1228, 24 July 2019.]

6 [The R.M.C. 803 session was called to order at 1349,
7 24 July 2019.]

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

9 At the end as we were recessing last, Ms. Bormann had
10 indicated Mr. Bin'Attash wanted to be absent this afternoon.
11 I do not recognize him in the courtroom.

12 Are there any other absences that I need to account
13 for?

14 Negative response from the parties. Excuse me.
15 Mr. Ruiz?

16 LDC [MR. RUIZ]: Ms. Lachelier is not currently present,
17 Judge.

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

20 Ms. Bormann, based on your assertions, I'm inclined
21 to find that this is a voluntary absence. Any objection to me
22 doing so?

23 LDC [MS. BORMANN]: No. Since I asked for it, it's

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1 definitely voluntary.

2 MJ [Col COHEN]: All right. Thank you. I find it's a
3 knowing and voluntary absence.

4 Ms. Pradhan. And I apologize to the parties for
5 being four minutes tardy.

6 ADC [MS. PRADHAN]: Good afternoon, Your Honor.

7 MJ [Col COHEN]: Good afternoon again.

8 ADC [MS. PRADHAN]: You had given me two questions before
9 we left, and before I get to those two questions I want to
10 just briefly answer one of your previous questions ----

11 MJ [Col COHEN]: Okay.

12 ADC [MS. PRADHAN]: ---- which was about voice recording,
13 Your Honor, in the courtroom.

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

15 ADC [MS. PRADHAN]: Thank you. And I wanted to just let
16 you know that the citation for what Mr. Connell notified me of
17 was in the transcript at pages 1848 to 1941, and this was
18 testimony on the 12th of February 2013 by Mr. Maurice Elkins,
19 who is a CCTV courtroom technology program manager, who was
20 able to speak about the capabilities here in the courtroom.

21 Further, we were able to look up the Regulation for
22 Trial by Military Commission which provides at Section 13-6.d.
23 that, the Office of Military Commissions shall, when directed

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1 by the convening authority or the military judge, be
2 responsible for the procurement of security measures for
3 witnesses and victims testifying in the courtroom. This shall
4 include, but not necessarily be limited to, voice distortion
5 equipment, screens that are capable of physically shielding
6 the victim or witness from the public, modifications to the
7 witness box, and entry and exit of protected witnesses in and
8 out of the courtroom.

9 We were further able to find several cases, actually
10 from another war court, from the Yugoslav Tribunal, that used
11 voice modulation to protect witnesses. And I'm happy to give
12 Your Honor those citations under separate cover if that would
13 be helpful.

14 MJ [Col COHEN]: That would be. Thank you.

15 ADC [MS. PRADHAN]: Absolutely.

16 The first question that Your Honor asked was to
17 address the government's argument regarding appearance in
18 context. Now, appearance in context is a term of art, and it
19 is generally defined as a name contextualized by additional
20 information. And the government's argument is that the
21 additional information -- thank you -- is qualitatively
22 different in -- or it would be qualitatively different in an
23 open session than it is, say, today or in other previous

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1 arguments that we've had on this.

2 There are several possible scenarios based on the
3 facts in front of us and including the government's recent
4 admission that the interpreter was an employee of the RDI
5 program, which is a development.

6 The first is that we take open testimony of the
7 interpreter, in which case a headline could read "John Smith
8 Formerly of the RDI Program Testifies in 9/11 Hearing."

9 Second is we do a closed deposition of the
10 interpreter. The headline could be, "John Smith From the RDI
11 Program Questioned on Government Intrusion -- Potential
12 Government Intrusion."

13 Closed testimony, entirely closed, of the
14 interpreter, "John Smith From the RDI Program Testifies in
15 Secret Hearing."

16 Or nothing could happen, right? It's been four and a
17 half years. This has languished at the military commission
18 for a while. The headline could be, "What Happened to John
19 Smith of the RDI Program Who May Or May Not Have Infiltrated a
20 Defense Team?"

21 And there -- there is actually one more, and that is
22 "Four and a Half Years Later, 9/11 Parties Debate Over Whether
23 John Smith Should Testify in Open Session Or Not."

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1 And that could have been the headline in November, it
2 could have been the headline in January, it could be the
3 headline today. It could have been the headline when the CMCR
4 ruling came out or when the government filed 616X confirming
5 that the interpreter had been an employee of the RDI program.

6 So with regards to appearance in context, the
7 government has chosen to fight hard against the specific
8 context of the interpreter testifying in any way in open
9 court, even with all of the protections that we propose. And
10 they claim that that is the unique circumstance that will
11 re-ring the bell, but they can't show causality in that
12 specific context and only that context. And without that
13 causality, the -- their interests must be protected, and we
14 concur with that. But they cannot entirely outweigh the
15 defense and the public's interests.

16 And your last question, Your Honor, was on the
17 government's mosaic theory. Now, we have done some research
18 on this, and I stand ready to be corrected, but we have not
19 found case law in which a court orders closure on the basis of
20 mosaic theory. Most of the cases that we have seen involve
21 FOIA or state secrets privilege. We simply have not found
22 cases in which a court orders closure based on mosaic theory.

23 Mosaic theory in this case is the combination of

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1 unclassified facts or circumstances that may lead to
2 classified information spillage.

3 Now, we looked -- we went back during the break and
4 looked at DoD Manual 5200 -- 5200.01, Volume 1 at 42-40 --
5 excuse me, 41-42:15. And that's Section 15, COMPILATIONS.
6 And it states, Compilations of information that are
7 individually unclassified (or classified at a lower level) may
8 be classified (or classified at a higher level) if -- only if
9 the compiled information reveals an additional association or
10 relationship that qualifies for classification pursuant to
11 paragraph 1.b. of this enclosure, and is not otherwise
12 revealed by individual elements of information.

13 Further down at part c., it states, "Classification
14 as a result of compilation requires an original classification
15 decision by an authorized OCA or classification guidance
16 issued by an OCA."

17 It also states, A classification must -- excuse me, A
18 classification by compilation decision must honor (i.e.,
19 cannot overrule or change) previous decisions by an OCA
20 regarding the classification of individual elements of the
21 compilation -- or of the compilation. And as part of the
22 classification decision, officials should determine whether
23 the compilation has previously been classified by another OCA.

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1 Finally, at Section c.3., it states, "When
2 information qualifies for classification as a result of
3 compilation, it is because the whole is greater than the sum
4 of its parts (i.e., something new is revealed by putting all
5 of the pieces together that is not revealed by the individual
6 parts)."

7 Now, the government has stated at page 25 of AE 616X
8 that the classified information at issue is -- and they
9 enumerate the pieces: The interpreter's name, his address,
10 likeness, affiliation with the RDI program, Mr. Binalshibh and
11 Mr. Bin'Attash's recognition of the interpreter, and the
12 interpreter's overt work as a contract linguist with a
13 background subject to an NDA with the CIA.

14 Now, here we have proposals that will protect the
15 name and the likeness that have already been released to the
16 public. We will continue to protect the name. We will
17 continue to protect the likeness. We can protect the voice.
18 None of the questions delineated in 350RRR will implicate the
19 other information that the government identifies as classified
20 here.

21 And finally, Your Honor, in considering the
22 importance of the mosaic theory -- and we're not here to
23 discount the importance of the mosaic theory, but simply its

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1 application here. In considering the mosaic theory, it's
2 instructive to look at the case of Shapiro v. United States
3 Department of Justice, and that's 239 F.Supp.3d 100. And that
4 case discusses, among other things, the potential lack of
5 limits in mosaic theory. And it states, "At one level, there
6 is little or no limit to the scope of mosaic theory. Almost
7 anything an agency does could form at least a minuscule piece
8 of a massive mosaic that might reveal confidential
9 information."

10 Now, here we have the pieces of classified
11 information delineated by the government in their pleading,
12 and we can enumerate how -- the measures that we will take to
13 protect those pieces by talking about topics over here that do
14 not touch those topics over here. We believe that this shows
15 that the government cannot prevail on a mosaic theory in order
16 to justify the complete closure of the proceedings.

17 Subject to your additional questions, Your Honor.

18 MJ [Col COHEN]: No, thank you for taking the time to
19 address those.

20 ADC [MS. PRADHAN]: Thank you.

21 MJ [Col COHEN]: Ms. Radostitz, the time is yours.

22 ADC [MS. RADOSTITZ]: Good afternoon.

23 MJ [Col COHEN]: Good afternoon.

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1 ADC [MS. RADOSTITZ]: Your Honor, Ms. Pradhan very capably
2 answered the first parts of your question, and I just want to
3 go to the second part that you raised about this being unusual
4 to be requesting an open questioning of a witness that is in
5 support of a discovery request.

6 And what I would say is this is pretty much the most
7 unusual situation you're ever going to come across and I think
8 any of us have ever come across. And it is a special
9 situation that deserves special attention and deserves to have
10 the openness that Ms. Pradhan talked about.

11 So I don't want to spend a whole lot more time
12 talking about that, but I did just want to address the fact
13 that it is unusual. We recognize it's unusual, but we think
14 that the facts and circumstances here warrant that unusual
15 disposition of it.

16 I also want to say that we are in agreement that from
17 the beginning it was anticipated that this would be a closed
18 session because the scope of the questioning that we were
19 asking to do was broad, and that there was a question at that
20 time whether it would be a bifurcated or a -- or only a closed
21 session. And when Judge Parrella limited the scope of the
22 questioning that he was authorizing, that changed things.

23 All the comments that we had made before about it

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1 needing to be in closed session were based on the fact that we
2 wanted to ask questions about things, a lot of which now have
3 been declassified by the government. But at the time, after
4 this happened, the first thing that happened, the first
5 pleading in the 350 series is not a defense motion; it's a
6 government assertion that we better not talk about anything
7 that happened in court that day; that it was -- you know, it
8 was all classified and we weren't allowed to say anything
9 about it. That was the first pleading.

10 The defense pleading is 350C, and so that's when the
11 request for the witness came about, and I think that that is
12 important because context matters.

13 Ms. Pradhan talked a bit about the context of where
14 this came about and how this came about, but I want to go back
15 because the government wants to talk as if this started on the
16 3rd of February in 2015. But really, we have to go back a
17 little bit because -- and so I want to go through a little bit
18 of a timeline.

19 On the 13th of April 2014 Mr. Binalshibh's team
20 learns that they -- that the FBI has infiltrated their team.
21 They have recruited one of their members to be an informant.
22 Shortly thereafter, Mr. Mohammad learns that the FBI has
23 sought to infiltrate his team. At that time the government

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1 was saying, "There's no investigation. You don't need to
2 worry about it."

3 And, luckily, Judge Pohl didn't take them at their
4 word and continued further investigation, because it turned
5 out we were still under investigation. And he made a finding
6 of fact of that in April of 2014.

7 So things kind of got put on hold for a while, a few
8 months after that, and then in August of 2014 the parties
9 return and there's a hearing. And at that hearing, it's the
10 Special Trial Counsel to determine whether -- the best way
11 forward. It's basically a one-day hearing. And then -- I'm
12 putting this aside -- on the 24th of August is when the
13 interpreter joins Mr. Binalshibh's team.

14 Back to the hearing -- the proceedings in 292.
15 There's no hearings from August until December. And in
16 December there's an 802 hearing about what shall we have
17 proceedings about this week? And during that 802 hearing
18 Judge Pohl says, "You know what? You're right. We're not
19 ready to have hearings on any of that stuff." So we're -- the
20 defendants were never brought into court, there was never a
21 court session.

22 A couple weeks later the Senate Select Committee on
23 Intelligence releases its report about the RDI program and,

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1 essentially, mostly declassifies all of the information
2 regarding the RDI program. And that's critical because it
3 goes to what this -- I'm going to come back to it with the
4 mosaic theory.

5 And then the first time that the 292 proceedings are
6 back in court is in February of 2015, and at that time
7 Mr. Binalshibh stands up and makes the comments that he makes.

8 So I think it's important that the government's
9 assertion is this was, you know, manufactured or whatever, and
10 that doesn't matter. But what does matter is that it's not
11 surprising that the defense would think that this was a plant.
12 That's not an unusual thing, because the FBI had already
13 planted people on their team. We don't know whether it was or
14 not, and Ms. Pradhan discussed that, that that's what's before
15 the court, is we need to find out what actually happened.

16 And so I want to say that the government has assured
17 the court that nothing happened. But as you pointed out a
18 number of times already, proffers aren't evidence, and we
19 don't have any evidence of that. Evidence does need to be
20 presented, and one of the best ways to get that evidence is
21 through the testimony of the -- of the interpreter.

22 And one of the most important reasons why we need
23 this to be done under oath is because after it -- the

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1 information was revealed, the parties were allowed an
2 opportunity to talk to the interpreter, and they took that,
3 and he lied to them and denied any information -- all the
4 information that we now know to be true. And so having him
5 under oath is a way of ensuring that he isn't going to
6 continue to lie about it.

7 I want to recognize, as we've said, that this could
8 be a bifurcated proceeding. We have done bifurcated
9 proceedings numerous times. I want to again point out that we
10 have the same obligation under our security clearances as
11 everybody on the government side, to protect classified
12 information, and we have no less desire to do so, and we are
13 very careful in that.

14 And I think also that the government's argument sort
15 of ignores the reality of how an examination of a witness
16 happens. I ask a question, and then there's a pause because
17 the other side gets to raise an objection to my question. And
18 whether that objection is calls for hearsay, cumulative, or
19 whatever, it also could be national security, and the witness
20 is always told, "Don't answer the question if there's any
21 objection."

22 So you have not only the 40-second delay to protect
23 the national security, you also have the natural delay of any

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1 questioning of witnesses that happens in any trial.

2 And so while we agree that there is information
3 perhaps that could be elicited that is classified information,
4 a number of things lead us to believe that wouldn't happen.

5 First of all, the government has already spoken to
6 this witness numerous times. The witness has already -- or
7 the interpreter has already shown that he knows what questions
8 he's not supposed to answer because he did that during defense
9 informal interview of him, in which he lied because he knew he
10 was supposed to protect the information.

11 And I also think it's important to remember that
12 there's no dispute that the interpreter took the job knowing
13 what the job was, knowing that this was the 9/11 case, knowing
14 that he -- his previous employment. It wasn't a surprise to
15 him that he had that employment; he knew that. And he
16 voluntarily took the position, and he clearly knows what he
17 can and can't talk about. And so those things are elements of
18 the interpreter himself and the circumstances itself that lead
19 to support the fact that classified information can be
20 protected in an open hearing. And I'm not going to repeat all
21 of the things that Ms. Pradhan spoke about.

22 I do want to add one more thing about the mosaic
23 theory. So the government's assertion is that they're trying

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1 to protect national security information that could be pulled
2 from a number of different things, and there's two aspects to
3 it. There's the identity of the interpreter, and then there's
4 other national security. And I would assume that that is --
5 and from their pleadings, it is information about the RDI
6 program.

7 Most of the information about the RDI program has
8 been declassified. There are only three things that are not
9 declassified: The locations, the names of the individuals --
10 most of the individuals. There's some individuals who are
11 named -- and the exact time of when certain things happened.
12 Some of those dates have been declassified, but mostly --
13 those are the only things.

14 So if you're talking about a mosaic theory, the
15 government needs to explain to the military commissions how
16 questioning the interpreter regarding things leading up to his
17 employment, his access to privileged information, and whether
18 he shared that information, which is -- we agree is the only
19 stuff that could be handled in an open hearing, how that could
20 form any mosaic around classified information, and we don't
21 think that they can meet that challenge.

22 Subject to your questions, Your Honor.

23 MJ [Col COHEN]: Just out of curiosity, it's not directly

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1 pertinent to the motion itself, but it is a question that I
2 had referenced in the 802 and again this morning.

3 You heard the -- Ms. Pradhan talk about re-looking at
4 305C [sic]. Just in general, you've heard trial counsel
5 suggest that as a possibility of sua sponte as well.
6 Obviously I've talked about that or no one would have
7 addressed it. Has the KSM team thought about that at all?

8 ADC [MS. RADOSTITZ]: About the reconsideration?

9 MJ [Col COHEN]: Of 305C.

10 ADC [MS. RADOSTITZ]: Yes, Your Honor, we absolutely have,
11 and in fact we have thought about that it -- reconsideration
12 is appropriate because we think that Judge Parrella got it
13 wrong about limiting the questions.

14 And I'm actually really glad you asked that, because
15 the limits that Judge Parrella has in 350RRR does not answer
16 the question that you raised this morning as what we are
17 trying to find out, which is how he got there -- what brought
18 him to, who knew, all of those things -- that cannot be
19 answered by those three questions, and so that's why we think
20 it might need to be a bifurcated situation where you answer
21 those questions within and other questions that we requested
22 in 350C to -- altogether.

23 And so we definitely do believe that a

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1 reconsideration is appropriate to both expand that scope and
2 to ensure the bifurcation is appropriate.

3 MJ [Col COHEN]: Thank you, ma'am. I appreciate it.

4 Sir, good to see you this morning.

5 DC [MR. MONTROSS]: Good afternoon, Your Honor.

6 MJ [Col COHEN]: Good afternoon.

7 DC [MR. MONTROSS]: On behalf of Mr. Bin'Attash, we are
8 appreciative of your recognition that the events underlining
9 this motion series did not begin in 2015, and that it started
10 years before. And at least in terms of Mr. Bin'Attash's team,
11 it started as early as 2012, three years before the events
12 that the prosecution wishes you to focus upon.

13 It was in 2012 that the former CIA interpreter
14 started doing work for Mr. Bin'Attash's team. And, Your
15 Honor, as you decide what is the appropriate steps forward in
16 this case, I'm going to ask you to look at AE 350C (WBA Sup)
17 and the attachments, which are letters that were submitted
18 ex parte because they contain -- contain, obviously,
19 attorney-client privileged information, but letters that we
20 exchanged with our client that were translated by this former
21 CIA interpreter, as well as other tasks and things that he did
22 on behalf of our team, three years, Your Honor, before the
23 events that occurred in 2015.

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1 And I hope that Your Honor takes seriously what every
2 team has attempted to convey to you today, that our
3 sensibilities did not arise from an isolated event in 2015,
4 but this event in 2012, where we had the CIA interpreter
5 working on privileged and confidential attorney-client
6 information. We have 2013, the microphones. 2013, the e-mail
7 access. 2014, the FBI infiltrations.

8 And most recently, and which is still ongoing and
9 which we have no resolution yet, is this 615 series where our
10 former paralegal is under investigation by the FBI for an
11 event that we believe we know about and were involved in
12 personally, and we can't get anyone to tell us if that's the
13 basis of the investigation.

14 So, please, Judge, we are not particularly sensitive.
15 I hope you don't get that sense.

16 I can add absolutely nothing to the excellent
17 conversation, discussion that counsel for Mr. al Baluchi and
18 counsel for Mr. Mohammad have already presented to you about
19 the open versus closed nature of any evidentiary hearing that
20 we may have.

21 I do want to address, though, very briefly your
22 separate inquiry: Where are we and what's the point of taking
23 this testimony? Is it to obtain necessary information or do

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1 we already know what we need to know, and now the question is:
2 What is a remedy if there is to be one?

3 I suggest we're at the former. We don't know
4 everything that we need to know. There are too many questions
5 that remain to be answered, and that the simple questions that
6 you posited from the bench today are questions that, standing
7 here, I can offer no answer to.

8 Therefore, we support, if Your Honor was to choose to
9 do so, the taking of a deposition if Your Honor would expand
10 the scope of that deposition. Right now, Judge Parrella in
11 5 -- I'm sorry, in 350RRR, as in Robert, said that, "The
12 defense will refrain from inquiry into what the interpreter
13 did or observed while employed by the CIA for any period of
14 time prior to his seeking employment as an interpreter within
15 the MCD0."

16 That would certainly be information that would be
17 necessary to answer your question: How did this individual
18 get from the CIA to MCD0? That's information that we need to
19 know that, right now, we're precluded from asking.

20 Now, I believe -- and this was implied by counsel for
21 Mr. Mohammad -- that when Judge Parrella defined the scope of
22 the questions that defense counsel could ask and he limited it
23 to three discrete areas, that he did so, perhaps, in his

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1 attempt to balance the national security interests of the
2 United States Government versus our need to get certain
3 information, with the understanding that the public would have
4 access to those facts, potentially in an open hearing.

5 If Your Honor was to proceed by means of a deposition
6 that would be closed, that would be in a SCIF, and we wouldn't
7 have those concerns at all. And the scope that Judge Parrella
8 imposed, I think, was an attempt to conduct a hearing in an
9 open session, acknowledging national security interests. If
10 you were to proceed through a deposition, I think those
11 interests are vitiated.

12 One last point. There was a suggestion by the
13 government that somehow we have a quality of information, that
14 presumably we know everything that the interpreter did or what
15 his motivations and intents were, who he talked to, how he
16 ended up on the defense teams.

17 What I want to emphasize again is this woman right
18 here, Ms. Bormann, learned counsel for Mr. Bin'Attash's team,
19 sat down with him that very day and asked him questions, okay,
20 about what happened in court in 2015. And he denied again and
21 again to her face, okay, that he had any involvement with the
22 CIA, okay? That is a patent falsehood.

23 This is an individual who has lied repeatedly. And I

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1 appreciate that the prosecution perhaps has a more
2 constructive relationship with this individual, but we don't.
3 And the only way that we have a chance -- and I certainly
4 cannot even promise a guarantee -- that we would have a chance
5 to find out what happened in this case is to put the testimony
6 of this person under oath.

7 That's all I have, Judge.

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

9 DC [MR. MONTROSS]: Thank you.

10 MJ [Col COHEN]: Mr. Harrington, you may be heard.

11 LDC [MR. HARRINGTON]: Judge, I indicated to you this
12 morning I did not believe I was in a position to comment on
13 the issues today, but I will make a -- a couple of comments
14 without arguing the substance of them ----

15 MJ [Col COHEN]: Okay.

16 LDC [MR. HARRINGTON]: ---- just so I can try to put
17 things in context for you.

18 And I appreciate what you said this morning about the
19 fact that we're going to discuss 350TTT tomorrow. It may be
20 that that discussion may help to eliminate much of what --
21 whatever it is that's in there, including shiny objects.

22 And you also said that what you -- you told us what
23 you saw the real issue in this case was, which is covered

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1 pretty much by Judge Parrella's first question. And I agree
2 with Mr. Montross that there are additional questions.

3 But I want to emphasize to the court the conflict
4 situation that I'm in right now, which is even with respect to
5 arguing the motion of whether this should be closed or open,
6 puts me in a conflict. If I foresee that there's some risk to
7 me in something that the prosecution is going to accuse me of,
8 accurate or inaccurate, or somebody else is going to say about
9 conduct that I had in this, I have an interest in whether this
10 hearing is open or closed. It may be in my interest to have
11 it closed. Whether it fits in the closed category or not, I
12 may have an interest in that, which obviously creates a
13 problem for me in terms of my interests versus my client's.

14 And also, depending on what we talk about in this
15 questioning, certainly in the things that are mentioned by the
16 prosecution here, more and more I become a witness because I
17 was involved with the interpreter. I was involved with
18 everything that he did while he was with my team; and if I
19 wasn't personally involved, I certainly was in a supervisory
20 capacity or -- or saw everything, so that I'm fully familiar
21 with it.

22 And I'm the only one left on my team who was here
23 when -- when he was -- when this incident happened back in

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1 2015, which creates another conflict for me, if I'm acting as
2 both the lawyer and as a -- and as a witness. So I just
3 wanted the court to be aware of those.

4 MJ [Col COHEN]: Mr. Harrington, I appreciate it. And,
5 yeah, we'll definitely talk about it. I -- I will be
6 surprised if the government intended to create a conflict of
7 interest for you, but we'll have an opportunity to discuss
8 that later.

9 LDC [MR. HARRINGTON]: All right. Thank you, Judge.

10 MJ [Col COHEN]: Mr. Ruiz, does your team wish to be heard
11 on this matter?

12 LDC [MR. RUIZ]: No, thank you, Judge.

13 MJ [Col COHEN]: Okay. Any brief rebuttal argument in
14 this forum, knowing that you'll also have additional time
15 later? But obviously in the open session, the public has a
16 right, so if you want to have the final word, you may do so.

17 MTC [MR. TRIVETT]: Nothing for the open, sir.

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

19 On the schedule I have the next one we'll take up is
20 AE 642. Mr. Connell, I believe you all will argue first. I
21 believe this is your motion, if I recall correctly.

22 LDC [MR. CONNELL]: It was initiated by the military
23 commission. We didn't know who would go first ----

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1 MJ [Col COHEN]: Okay.

2 LDC [MR. CONNELL]: ---- but we're happy to go first.

3 MJ [Col COHEN]: You're right. You are correct on that.

4 I just anticipated, the way we've been discussing it, yeah, I
5 would like to hear from the defense first.

6 LDC [MR. CONNELL]: Certainly.

7 MJ [Col COHEN]: Morning -- good afternoon, Mr. Farley.

8 DC [MR. FARLEY]: Good afternoon, Your Honor. If it
9 pleases the military commission, I have a list of
10 pronunciations I would like to pass up to the court reporters
11 just to aid in their ----

12 MJ [Col COHEN]: That would be fine. Has the
13 government -- just make sure the government just gets a chance
14 to look at it real quick.

15 Yeah, I just -- you guys have heard of transparency
16 matters, so I just want to make sure that they always know
17 what you've seen. I'm going to take a look at it myself.
18 Thank you.

19 DC [MR. FARLEY]: Yes, the counsel for the government has
20 indicated that it's fine, without conceding that those are the
21 correct pronunciations.

22 MJ [Col COHEN]: I appreciate that. I think that will
23 assist the court reporters in -- in creating a record.

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1 DC [MR. FARLEY]: All right.

2 MJ [Col COHEN]: So thank you very much for taking the
3 time to do that.

4 DC [MR. FARLEY]: My pleasure, Your Honor.

5 In addition, there are some slides that have already
6 been passed out to the parties and that the court information
7 security officer has previously reviewed. They were also
8 previously in the record as AE 502FF, slides 6 and 7, and they
9 have been remarked as AE 642F.

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

11 DC [MR. FARLEY]: May I have the feed from Table 4?

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

13 DC [MR. FARLEY]: And may I publish that to the gallery?

14 MJ [Col COHEN]: Any objection?

15 MTC [MR. TRIVETT]: No, sir.

16 MJ [Col COHEN]: Okay. You may do so. Please publish.

17 DC [MR. FARLEY]: Thank you, Your Honor.

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

19 DC [MR. FARLEY]: Your Honor, yesterday -- so Your Honor,
20 AE 642 is -- are filings in response to the government -- the
21 military commission's request for an update on the status of
22 discovery related to the parties' arguments concerning
23 hostilities.

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1 Yesterday Your Honor helpfully explained that in the
2 context of AE 642C it would be most helpful for the military
3 commission to hear from the parties as to the relevance of
4 what you described as nonkinetic activity related to the
5 existence or not of hostilities. You also indicated an
6 interest in understanding what would be the relevance of
7 drafted but unimplemented operational plans for determining
8 the existence of hostilities.

9 So today I would like to focus my comments on those
10 questions. But beforehand, I think it's worth discussing a
11 couple of sort of stray issues that were raised by the
12 pleadings in 642 and that do not directly focus on those two
13 questions.

14 MJ [Col COHEN]: Okay.

15 DC [MR. FARLEY]: Initially, the government raised in its
16 pleading the sort of logistics around these discovery requests
17 and the burdensome efforts the government has undertaken in
18 satisfaction of what it believes to be its obligations with
19 respect to hostilities-related discovery.

20 The government has suggested that Mr. al Baluchi's
21 discovery requests have been overbroad. But, in fact,
22 Mr. al Baluchi's discovery requests represent the result of a
23 significant narrowing process.

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1 First, we conducted substantial research and witness
2 interviews on hostilities. OPERATION INFINITE RESOLVE and the
3 Political-Military Plan are not well known. They are
4 mentioned in staff statements, but we've learned more about
5 them directly from political and military officials involved
6 in the creation -- in their creation and planning.

7 Second, the discovery requests directly track the
8 government's model of hostilities, which is represented on the
9 slide before you. The teal triangles essentially demarcate
10 the government's model of hostilities.

11 Actually, I'm sorry. Could I have the next slide,
12 please.

13 The teal triangles demarcate the government's model
14 of hostilities. They're sort of four facts that they identify
15 in their pleading and they've identified previously in, for
16 example, 5020. They point to bin Laden's declaration of jihad
17 that they describe as a declaration of war on 23 August '96.
18 They point to the East Africa Embassy Bombings in August of
19 '98 as well as OPERATION INFINITE REACH, the United States'
20 sole use of kinetic activity against al Qaeda prior to 7
21 October 2001. They point to the U.S. -- they point to the
22 USS COLE attack, and then they point to the 9/11 attacks.

23 Mr. al Baluchi's discovery requests track these

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1 markers, these facts that the government is pursuing. For
2 example, Mr. al Baluchi requested information relating to
3 OPERATION INFINITE REACH in AE 510. That is, again, the sole
4 use of kinetic force by the United States Government targeting
5 al Qaeda.

6 The United States -- or, I'm sorry, Mr. al Baluchi
7 requested information concerning OPERATION INFINITE RESOLVE,
8 which was the period of planning following OPERATION INFINITE
9 REACH. And Mr. al Baluchi's joined other parties in
10 requesting information concerning the USS COLE bombing, for
11 example.

12 Third, in collaboration with the Mohammad team, we've
13 spent hundreds of hours at the presidential libraries in
14 advance of the government's effort. We've produced thousands
15 of unclassified pages of presidential documents to the
16 government on the same topics governed by these motions to
17 compel. This process saved the government significant effort.
18 They did not produce the many relevant unclassified documents
19 to us because we produced these unclassified documents to the
20 government.

21 When the government received the requests and asked
22 for more specificity, we provided the government with
23 presidential library finding aids and were able to point them

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1 to specific collections we believed to contain responsive
2 information.

3 We made our own mandatory declassification review, a
4 statutory process similar to FOIA requests for information,
5 but only one of those requests has been processed in the two
6 to three years since we began making them.

7 Somewhat overlapping, but mostly after this defense
8 research effort, the government made its own massive research
9 effort. The difference is that the government has access to
10 the classified holdings and collections in these libraries,
11 and we do not. If we had access to those classified holdings,
12 we would have done the research ourselves.

13 We've requested access to the classified holdings in
14 presidential library collections, and despite being government
15 employees or government contractors and despite holding the
16 same clearance levels -- clearances as the government, we've
17 been denied access on every occasion.

18 The government's efforts as described in its brief
19 mean that no additional research should be necessary to comply
20 with an order compelling discovery in many, if not all, of the
21 motions before you.

22 The government had not only our discovery requests
23 but our further specifications as to finding aids at the time

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1 it conducted its research, so it knew what we were looking
2 for. It collected, according to its brief, in excess of
3 600,000 pages and no doubt still has that information,
4 material saved electronically and probably coded as part of
5 its internal discovery review. Nevertheless, the government
6 has disclosed slightly more than 5,000 pages, meaning that
7 something like 594 to 595,000 pages of material the government
8 collected has not been disclosed to the defense.

9 Many of the specific requests in the motions to
10 compel relate to specific documents that the government has
11 produced in heavily redacted form from early in the case.
12 Before the government knew Mr. al Baluchi's hostilities
13 theory, the government redacted these documents -- and this is
14 important -- redacted them unilaterally without relying on the
15 M.C.R.E. 505 process, so they've not been subject to judicial
16 review.

17 And, Your Honor, I would encourage you to review the
18 discovery that was attached to Mr. al Baluchi's pleading in
19 502Y as well as subsequent pleadings and the discovery that
20 Mr. al Baluchi cited in AE 642C Attachment B in the classified
21 footnotes. Those citations include some description of the
22 relative amount of redaction internal to the documents cited,
23 and the appended discovery will demonstrate the many pages of

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1 pure black after pure black after pure black, or perhaps a
2 preposition or a noun revealed.

3 And, you know, at the time that we appended those
4 documents to, for example, 502Y, the question arose whether --
5 whether we should be attaching, you know, tens of pages that
6 were completely redacted. But I think that, you know, doing
7 so has been sort of borne out in this situation because it
8 will serve, I think, a useful example to Your Honor in seeing
9 the -- the truly narrow amount of information that we've been
10 provided by the government through the discovery process.

11 In short, the motions to compel before you are not
12 about diligence, effort or resources, but, rather, about
13 relevance. The government has already collected the documents
14 we seek, but has elected to withhold them, or major portions
15 of them on relevance grounds. These motions to compel are
16 important to establish the parameters for relevance, which the
17 government can then implement, rather than its own restricted
18 view of what Mr. al Baluchi's defense ought to be.

19 With respect to the motions themselves, several of
20 the motions do not fit comfortably within the questions that
21 you asked yesterday, which is to say that they do not
22 implicate the questions of the relevance of nonkinetic
23 activity before 7 October 2001.

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1 First is AE 510, which is Mr. al Baluchi's motion to
2 compel the government to produce information relating to
3 OPERATION INFINITE REACH. This is a motion to compel that's
4 different in kind than the other motions in that OPERATION
5 INFINITE REACH was again the sole example of the
6 United States' use of kinetic force against al Qaeda before
7 7 October 2001.

8 The significance of the unusual event to the
9 government's case is -- is apparent, and it makes the
10 information related to it material under R.M.C. 701(c)(1).
11 Two elements of the information Mr. al Baluchi has sought are
12 particularly important, and both speak to the categories of
13 information that are relevant to a determination of
14 hostilities under Tadic and its progeny.

15 The first is targeting. Was the United States
16 targeting al Qaeda or was it targeting the bin Laden network
17 or was it targeting bin Laden personally? The nature of the
18 entity or individual that the United States was targeting is
19 relevant to a consideration of the organization of a non-state
20 armed group, and it's also relevant to a consideration of
21 whether the United States perceived itself to be engaged in an
22 armed conflict or in some sort of other situation. For
23 example, was it relying on self-defense authorities as opposed

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1 to armed conflict authorities in targeting bin Laden on the
2 one hand versus al Qaeda on the other.

3 Second, casualties. The number -- the number of
4 casualties as a result of OPERATION INFINITE REACH as well as
5 the extent of material damage related to OPERATION INFINITE
6 REACH are considerations that are relevant to the intensity
7 prong of the Tadic test.

8 Excuse me.

9 Second, in AE 512 Mr. al Baluchi has asked the
10 military commission to compel the government to produce
11 information related to OPERATION INFINITE RESOLVE. OPERATION
12 INFINITE RESOLVE was the planning period that succeeded
13 OPERATION INFINITE REACH. And it reflects kinetic activity
14 that the United States contemplated but did not implement for
15 sure.

16 But more importantly, information related to
17 OPERATION INFINITE REACH is within the scope of the
18 information that the government intends to introduce at trial,
19 even if not -- even if it doesn't introduce the specific
20 documents Mr. al Baluchi is seeking.

21 MJ [Col COHEN]: Let's talk about that for a second.

22 DC [MR. FARLEY]: Yes, Your Honor.

23 MJ [Col COHEN]: In looking at AE 642B -- you may not have

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1 a copy of it, so I don't -- I will pull it up, but ----

2 DC [MR. FARLEY]: I have a copy, Your Honor.

3 MJ [Col COHEN]: Okay. Great. The government in its
4 response -- communications to you, is that part of the
5 evidence, in addition to the kinetic activity that you've
6 talked about is that they believe that the -- the use of the
7 planning in and of itself is evidence of hostilities.

8 So my question then is: If that wasn't the case,
9 would you still be making the same -- the same request for
10 the -- for those types of operational plans? In other words,
11 is it by the -- by the government's own theory of the case
12 that they have almost walked themselves into a -- into a
13 matter that it becomes relevant?

14 DC [MR. FARLEY]: Your Honor, a couple of points on that.

15 So in the first instance I think both things are
16 true, that, you know, if the government had not introduced or
17 signaled that it would introduce planning documents into its
18 case in chief, we would still believe it to be relevant to the
19 nature of the U.S. response to al Qaeda, which is a key factor
20 in understanding the way Tadic and its progeny measure the
21 existence or not of an armed conflict.

22 But setting that to one side, I think it's important
23 for the military commission to understand that at this point

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1 in time Mr. al Baluchi doesn't have any operational plans.
2 The government has never provided Mr. al Baluchi with any
3 operational plans.

4 The only documents that are of a planning nature that
5 Mr. al Baluchi has received to date are, you know, a handful
6 of planning and warning and modification and a couple of
7 execute orders and a series of memoranda and a series of
8 briefing, like slides, PowerPoint slides that are -- and
9 again, most of these documents have been heavily, heavily
10 redacted, but ----

11 MJ [Col COHEN]: I'll just tell you from experience that
12 those slides are very powerful within the Department of
13 Defense.

14 DC [MR. FARLEY]: I appreciate that, Your Honor, and
15 they've been helpful to understanding, you know, the history
16 that is so important to this case.

17 But I'm led to believe, and I may be mistaken, that
18 under the -- the sort of joint operational planning framework
19 that a planning document should be a significant --
20 significant document that contains lots of information
21 including, for example, rules of engagement, which
22 Mr. al Baluchi does not have even this late in the game.

23 But if Your Honor likes, I can skip ahead to why the

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1 nature of the United States' response is such a significant
2 factor in determining ----

3 MJ [Col COHEN]: I don't want to necessarily take you out
4 of it, but because you mentioned that, I wanted to make sure I
5 didn't forget to ask that question.

6 DC [MR. FARLEY]: Thank you, Your Honor.

7 MJ [Col COHEN]: You may carry on as you wanted to.

8 DC [MR. FARLEY]: Thank you, Your Honor.

9 So third, in AE 581, Mr. al Baluchi asked the
10 military commission to compel the government to produce an
11 unredacted version of a single document found in the record as
12 MEA-BKG-00003602. Due to its classification, I won't describe
13 the contents of MEA-BKG-3602.

14 Suffice it to say, the document was produced directly
15 to Mr. al Baluchi outside of the M.C.R.E. 505 process, and the
16 government redacted a portion of the document that
17 Mr. al Baluchi believes relates to the legal authorities
18 authorizing the document, under -- undergirding the document.

19 The government believes that it could redact this
20 information because earlier redactions on other documents that
21 had been reviewed by the military commission of a similar
22 nature had been authorized.

23 Mr. al Baluchi seeks this information because -- and

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1 I'll talk about this more later, but it is critically
2 important to understanding whether the United States was
3 engaged in armed conflict with al Qaeda between 1996 and 2001
4 to understand the legal frameworks under which the
5 United States made plans and conducted operations.

6 This -- this is a critical element to understanding
7 the nature of the United States' response and it's a critical
8 element to understanding the perceptions of American leaders,
9 policymakers, and it will -- it really defines a sort of upper
10 limit as to what the United States was willing to do vis-a-vis
11 al Qaeda prior to 7 October 2001.

12 And I think that should Mr. al Baluchi get all of the
13 discovery that he seeks or, you know, a large corpus of it,
14 the military commission and the panel members eventually will
15 see that following the September 11th attacks, there was a sea
16 change, and that sea change was not just related to a
17 willingness to use kinetic force after October 7, 2001 that
18 wasn't there on 10 September 2001, but also a sea change in
19 terms of the legal authorities that the United States
20 understood to be applicable in its response to al Qaeda.

21 MJ [Col COHEN]: Do you really believe it was the legal
22 authority or a response to what had just happened?

23 DC [MR. FARLEY]: Those things are intertwined.

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1 MJ [Col COHEN]: In what way? I mean, for example, do
2 you -- December 7th, 1941, we had the same authority, legal
3 authority on December 6, 1941. But do you not believe that it
4 was the event and the scope and scale of the event on December
5 7th, 1941, that led to the declaration of war the following
6 day?

7 DC [MR. FARLEY]: Yes, Your Honor, but ----

8 MJ [Col COHEN]: In other words, the legal authorities
9 always existed there. And there could have even been an OPLAN
10 for -- for engaging at the time. Not -- this is definitely
11 not classified because I'm just hypotheticalizing this.

12 There could have been an OPLAN for engaging with the
13 Imperial Army of Japan at that particular time. The fact that
14 there was -- that there was an OPLAN, CONPLAN, potential
15 EXORD, WARNORD, all of those kinds of things may have existed
16 and been in draft form, but it was the event itself that --
17 that undoubtedly led to the reaction of Congress and the
18 implementation of military might and will in that case. So
19 how is September 11th any different? In other words, I'm not
20 understanding this idea of the legal authorities.

21 Clearly, you could have the Department of Defense and
22 the Secretary of Defense and the chairman of the Joint Chiefs
23 of Staff advocating for kinetic activity against al Qaeda

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1 during this entire time that the President of the
2 United States says no, it's not happening, regardless of
3 whether there's a legal authority for doing so.

4 So help me conceptualize what you're really telling
5 me because I'm not -- I'm -- it's not because you're -- it may
6 be just me. I may not be understanding, but I'm not tracking
7 why the legal authority information is so critical to this
8 issue.

9 DC [MR. FARLEY]: Sure. It's a great question, Your
10 Honor, and it's certainly not you. This is an esoteric body
11 of law, for sure, and it's -- it operates in a confusing sort
12 of way.

13 So I would say that the -- the Pearl Harbor example,
14 excuse me, is somewhat of a red herring in the context of our
15 trial for a couple of reasons.

16 The first is that it occurred prior to the adoption
17 of the 1949 Geneva Conventions, a time when the law of war was
18 just different than it is today.

19 Second, to the extent that the law of war was similar
20 or the same, Pearl Harbor was an act of violence, armed
21 violence, by one state against another state. Under modern
22 laws of war, under the Geneva Conventions after 1949, any use
23 of armed force by one state against another state,

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1 irrespective of a declaration of war, triggers the law of
2 armed conflict, the law of war.

3 The same is not true when a state and a nonstate
4 actor are in a conflict. Common Article 2 of the Geneva
5 Conventions and Common Article 3 of the Geneva Conventions set
6 out two separate thresholds for the invocation of the laws of
7 war.

8 And the reason why that is important is because the
9 laws of war -- when I'm talking about the legal authority to
10 use force, I'm talking about whether there -- the laws of war
11 applied to the use of force. And there's certain things that
12 characterize the use of force under the laws of war.

13 One of those things is that force may be used --
14 lethal force may be used as a first resort, which is to say --
15 like, in a normal international armed conflict, you have two
16 soldiers, right, wearing two different uniforms. If I'm in
17 uniform, if I'm -- if I'm in uniform -- say I'm Lieutenant
18 Farley instead of Mr. Farley -- I can shoot an enemy soldier
19 at any time 24/7, whether he's carrying a weapon or not,
20 whether he's in the barracks or if he's outside of the wire,
21 right?

22 As long as I'm otherwise in compliance with the laws
23 of war, I can use lethal force against him at any time

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1 whenever -- whenever I like. I don't have to try to capture
2 him first. The only time I have to offer him quarter is if he
3 attempts to surrender to me or if he has been rendered hors de
4 combat by being wounded or sick, or he's surrendered.

5 MJ [Col COHEN]: So just understanding the internal rules
6 of engagement by the state.

7 DC [MR. FARLEY]: Right. Absolutely. Also subject to the
8 ROA, but ----

9 MJ [Col COHEN]: I understand.

10 DC [MR. FARLEY]: In the situation when you have an armed
11 conflict between a state and a nonstate actor, the -- the same
12 parameters on lethal use of force exist when there is an armed
13 conflict. Because when there is no armed conflict, the use of
14 lethal force as a first resort is prohibited, and it's limited
15 by sort of international -- from an international perspective
16 by domestic law and international human rights law.

17 So, you know, a good contemporaneous -- contemporary
18 example of this is, you know, while -- while we were at lunch
19 and Ms. Pradhan was working to find answers and research
20 questions -- answers to your questions, I had the opportunity
21 to glance at the *New York Times*, and today's *New York Times*
22 has a headline that after weeks of protests and violence and
23 riots in Hong Kong, the government of China is considering

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1 using armed forces, the Chinese military, to go in and restore
2 order.

3 So what we've had up to this point in Hong Kong, for
4 example, is clearly not an armed conflict situation. The
5 violence is disorganized. It's -- it's riots, it's internal
6 disturbances of, like, a quintessential nature. And up to
7 this point, the Chinese government and the Hong Kong
8 government have relied on police forces to respond to -- to
9 the threat, the insecurity posed by the riots. The Chinese
10 government is considering deploying troops.

11 Now, its reliance on the Chinese military to restore
12 order does not in and of itself indicate that there is an
13 armed conflict, but it represents a qualitative change in the
14 nature of the Chinese response to the threat posed by rioters
15 and protesters in Hong Kong.

16 If we just assume for the sake of argument that I'm
17 right and that a deployment of the People's Liberation Army --
18 yeah, the PLA -- to Hong Kong to restore order does not yet
19 trigger an armed conflict, the use of force by PLA soldiers
20 against demonstrators, the use of lethal force against them as
21 a first resort, would violate international human rights law
22 because the law of armed conflict does not apply.

23 Now, if things progress a little bit farther -- a

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1 little bit further, excuse me, and the protesters take up arms
2 and they exhibit some level of -- of organization and the
3 tension and hostilities between the PLA and these now armed,
4 organized protesters gets to the point that it crosses the
5 threshold of Common Article 3, then we're into the land of a
6 noninternational armed conflict.

7 And under Tadic and customary international
8 humanitarian law, which is the laws of war, and under, you
9 know, the framework of the military commission itself, the PLA
10 soldiers would be allowed to use force, lethal force, as a
11 first resort against the -- those armed protesters.

12 MJ [Col COHEN]: So -- and thank you for the example. I
13 understand -- I understand better what you're talking about
14 now.

15 DC [MR. FARLEY]: So, Your Honor ----

16 MJ [Col COHEN]: So ----

17 DC [MR. FARLEY]: I'm sorry.

18 MJ [Col COHEN]: At least I think I do, so let me kind of
19 restate what I think.

20 DC [MR. FARLEY]: Okay.

21 MJ [Col COHEN]: I won't probably do it as articulately as
22 you did, but let me summarize what I believe the crux of your
23 argument is.

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1 DC [MR. FARLEY]: Okay.

2 MJ [Col COHEN]: And how it might be relevant.

3 Essentially, it's less about what's on a slide and
4 more as to whether the government leaders have made
5 assertions, either in these briefings or otherwise concerning
6 whether, for example, Common Article 3 would provide legal
7 authority for engaging al Qaeda during this time period.

8 DC [MR. FARLEY]: That -- that is one part of it.

9 MJ [Col COHEN]: Okay.

10 DC [MR. FARLEY]: It is both the -- it is both the ----

11 MJ [Col COHEN]: Because that would be potentially one of
12 the elements that Judge Parrella laid out.

13 DC [MR. FARLEY]: Well ----

14 MJ [Col COHEN]: In his statements by a leader or the
15 absence of the statements by a leader.

16 DC [MR. FARLEY]: Absolutely. And -- and the other
17 element -- the other sort of key element that Judge Parrella
18 laid out was whether and when the United States decided to use
19 the combat capabilities of its armed forces to meet the
20 al Qaeda threat, which in and of itself implicates the entire
21 decision-making process.

22 And what I would -- what I would argue and what I --
23 what I would argue and maybe it's better to just have the

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1 conversation is that if we go back and we look at the
2 evolution of Common Article 3 initially and -- if we go back
3 and look at the evolution of Common Article 3, we look at the
4 commentary to the Geneva Convention, the Pictet commentary,
5 and we look at the decisions by the International Criminal
6 Tribunal for the Former Yugoslavia in particular, but others
7 as well, and we look at the jury instructions, the panel
8 instructions from Hamdan and the panel instructions that
9 Judge Parrella suggested, what these factors -- some of the
10 factors that are traditionally grouped under the intensity
11 prong of the Tadic test really relate to the nature of the
12 government's response to the challenge posed by the non-state
13 actor.

14 And it is not -- if we look at, for example,
15 Haradinaj or Boskoski, what the court is looking at is whether
16 the state actor has been obliged in the words of the Geneva
17 Convention commentary to have recourse to its regular armed
18 forces to meet the challenges posed by the non-state actor.

19 So this leads to two conclusions for the purposes of
20 Mr. al Baluchi's pursuit of discovery:

21 The first is, yes, of course we need information
22 relating to what -- what the United States actually did from a
23 kinetic perspective, OPERATION INFINITE REACH. But it also

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1 means that Mr. al Baluchi needs information relating to the
2 other choices the United States Government made, the choice
3 not to use kinetic activity.

4 Because what we don't have, we don't have a situation
5 where the United States ----

6 MJ [Col COHEN]: Let me just stop you there ----

7 DC [MR. FARLEY]: Sure.

8 MJ [Col COHEN]: ---- so we can have -- before I -- before
9 you move on and I have, like, another question but don't get
10 back to this one.

11 DC [MR. FARLEY]: Okay.

12 MJ [Col COHEN]: So what you just said there is
13 essentially that decision not to use force is -- is relevant.
14 Under the -- I understand the elements there, but I guess the
15 question then is: Is that because -- is that because -- let's
16 put it this way.

17 Articulate a little bit more for me in what way.
18 Give me some examples of what's going on in your mind when you
19 say language to that effect.

20 DC [MR. FARLEY]: Sure. So let me point Your Honor to a
21 quotation from the -- the Boskoski tribunal. And I'm sorry,
22 Your Honor. I'm -- so after reviewing the -- the method other
23 tribunals have taken in assessing whether a situation of

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1 violence was a noninternational armed conflict, the Boskoski
2 tribunal admonished that after reviewing a variety of
3 objective, quote, objective indicative factors of intensity of
4 the fighting, at a more systemic level an indicative factor of
5 internal armed conflict is the way that the organs of the
6 state such as the police and military use force against armed
7 groups. And this is at Prosecutor v. Boskoski, paragraph 178.
8 And I can give you the case number, if that's helpful.

9 MJ [Col COHEN]: Yes, that would be great. I'll go ahead
10 and take that just in case -- I think it was in one of your
11 briefings, wasn't it?

12 DC [MR. FARLEY]: It was in the brief, but it's case
13 number IT-04-82-T, judgment July 10th, 2008.

14 So the -- the Boskoski tribunal and then the
15 Haradinaj tribunal as well looked not just at when the Serbian
16 government in both these cases relied on -- I'm sorry, the
17 Serbian government in the Haradinaj case and the government of
18 now North Macedonia in the Boskoski case didn't look just at
19 when the state used its armed forces. It looked at the
20 state's response otherwise.

21 So, for example, in the Haradinaj case the tribunal
22 goes through and it looks at who all was involved between the
23 beginning of March, the end of February, beginning of

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1 March 1998 and April 22 in 1998. And it steps through, you
2 know, a series of clashes in March of -- in February and March
3 of '98, and it talks about the actors involved.

4 On the one hand, there was the Kosovo Liberation
5 Army. On the governmental side the response was police,
6 police and sometimes Internal -- Ministry of Internal Affairs
7 forces, but primarily police. And the tribunal takes pains to
8 point out that the Serbian Army was not deployed. And when it
9 was deployed it was -- it wasn't deployed, but equipment, like
10 trucks were used to transport police around.

11 And then at the end of March tensions start to pick
12 up. And it notes that even though tensions have increased,
13 and that there are more police around than there had been, and
14 they seem to be building sort of permanent installations and
15 that there are now special police, that the Serbian military
16 is still not involved.

17 And then on April 21st, you start to see clashes
18 involving the KLA attacking Serbian police units -- or
19 military units. And then on April 22nd and April 23rd, all of
20 a sudden you see Serbian armed forces engaged in direct
21 clashes with KLA fighters. You see Serbian convoys, military
22 convoys, transporting troops using heavy equipment, including
23 armored personnel carriers. You see Serbian aircraft in the

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1 sky, including helicopters and jet fighters.

2 So the point for the Haradinaj tribunal was not just
3 the decision that the Serbian government made to use its
4 combat capabilities of its regular armed forces, but the
5 decisions before that point to not use the combat capabilities
6 of its regular armed forces.

7 MJ [Col COHEN]: Right. But in reading that opinion, they
8 didn't focus on why they made those decisions. Just the -- at
9 least my recollection of it, when I read it again last night,
10 was that the -- the reason they found the 22nd is because they
11 had made the decision to engage in a kinetic act at a level
12 that they found -- reached the level of intensity under the
13 Tadic test.

14 DC [MR. FARLEY]: So ----

15 MJ [Col COHEN]: But there was no analysis in the opinion,
16 that I recall, that went into, well, they were using the other
17 elements of power. They were flexing their financial might or
18 they were flexing their diplomacy might through their --
19 through internal negotiations or those kinds of things, or
20 covert operations to -- you know, to infiltrate organizations
21 and those kinds of things.

22 So in the end, it still came down to the absence of a
23 level of intensity that warranted implication of the Tadic

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1 test.

2 DC [MR. FARLEY]: So -- yes.

3 MJ [Col COHEN]: How -- how is that any different than the
4 fact that -- I guess the first question that someone's going
5 to have to decide is: Did the -- did the action in OPERATION
6 INFINITE REACH qualify as -- or the response that we had to
7 the East African embassy bombings, was that of a level of
8 intensity that would have met the Tadic test?

9 And if so, then what happens if there's a lull
10 period? Because the other thing about the Haradinaj case
11 that's interesting is that they don't -- is that they talk
12 about the lull before the -- you reach the level of intensity
13 but not after you've reached the initial level of intensity.

14 So what do you do with this period of time from the
15 point that you may actually trigger the Tadic test, but then
16 there's additional planning and stuff as you wait to regroup
17 and see what the -- see what your enemy, for lack of a better
18 term, does with respect to that and when is the best time --
19 time to -- to respond?

20 DC [MR. FARLEY]: So -- so a couple of quick points.

21 So the first is that I -- I -- I would respectfully
22 disagree with -- with your analysis of Haradinaj. And in the
23 reason why is because it -- for the Haradinaj court -- and

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1 they say this in the concluding paragraph of the section when
2 they lay out the -- the reasons for the change. And one of
3 the reasons is that, like, the newfound deployment of the
4 Serbian armed force after April 22nd.

5 And if it had just been the deployment of the Serbian
6 armed forces from that point forward that was enough to
7 trigger intensity, there would have been no reason to spend
8 the time analyzing what the Serbian government had done in
9 contradistinction to ----

10 MJ [Col COHEN]: But I would respectfully disagree with
11 that in that it's directly relevant, because the question they
12 were called to ask upon was did it start in February, March,
13 or April. So they had to figure out at what point during that
14 continuum did you reach the level of intensity to trigger
15 Tadic.

16 DC [MR. FARLEY]: I absolutely agree with you there. All
17 that I'm saying is that if the -- if mere deployment of the
18 armed forces in and of itself were enough to -- to tip the
19 balance on intensity, then they could have relied on a simple
20 recitation that the Serbian government deployed its armed
21 forces on April 22nd, right? But instead, it spent the time
22 to talk about what the nature of the Serbian government's
23 response was in February, in March, and April. And the nature

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1 of that response was the -- a police response.

2 And in the Boskoski opinion you get an even clearer
3 example of really the court looking into the decisions that
4 were made by the -- the Macedonian government and whether
5 those decisions relate to the existence of an armed conflict
6 or not.

7 So, for example -- and we cited this in AE 620 in the
8 discussion about law of war detention. One of the factors
9 that the court looked at was what they say actually
10 explicitly -- and I'm sorry.

11 MJ [Col COHEN]: No, that's fine. This is ----

12 DC [MR. FARLEY]: So ----

13 MJ [Col COHEN]: You're doing well in responding to my
14 questions that were not necessarily anticipated, so thank you.

15 DC [MR. FARLEY]: No. It's a -- it's a good conversation,
16 and I'm happy to do it.

17 So the Boskoski trial chamber emphasized -- and this
18 is at the same citation, same paragraph as before -- "...it
19 may be instructive to analyze the use of force by governmental
20 authorities, in particular, how certain human rights are
21 interpreted, such as the right to life and the right to be
22 free from arbitrary detention, in order to appreciate if the
23 situation is one of armed conflict." And this goes back to

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1 the legal framework question that we were talking about.

2 "...in situations falling short of armed conflict,
3 the State has the right to use force to uphold law and order,
4 including lethal force, but, where applicable, human rights
5 law restricts such usage to what is no more than absolutely
6 necessary and what is -- which is strictly proportionate to
7 certain objectives."

8 So from -- then from having articulated this sort of
9 general principle and explaining why it -- it would proceed in
10 the analysis that it did, the -- the tribunal then looks at
11 whether -- as one of many examples, whether the government of
12 Macedonia used law of war detention.

13 It says, you know, the government of Macedonia picked
14 up a whole bunch of people in the course of this conflict at
15 different times as things were becoming more or less intense,
16 and, you know, it claimed that it was detaining them in a law
17 enforcement form, but it did things that don't fit within a
18 law enforcement mode.

19 For example, it charged a bunch of folks that it had
20 detained with crimes that were only applicable during an armed
21 conflict; that is, war crimes, although they were domestically
22 statutory war crimes.

23 They contacted the International Committee of the Red

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1 Cross and relied on the ICRC to restore family communication
2 between detained persons and their families. And at the end
3 of the conflict they relied on the ICRC to facilitate the
4 release and exchange of people who were detained.

5 And then the -- the government of Macedonia issued an
6 amnesty for persons who had participated on the non-state
7 side, which is a sort of general principle of the laws of war
8 in non-state armed conflict, give as wide as possible amnesty.

9 And there were a number of other factors that the
10 tribunal looked at in terms of what -- what the government of
11 Macedonia did to manifest the existence of an armed conflict
12 and its belief that there was an armed conflict. And so I
13 think that with that in mind, it's helpful to return to this
14 slide, right?

15 So we've got the -- you know, bin Laden's declaration
16 of jihad, the so-called declaration of war -- excuse me -- on
17 23 August 1996. What was the United States' response? The
18 United States -- there was not no response by the
19 United States to that. But the United States made choices,
20 and it relied on diplomacy, intelligence, and law enforcement
21 to respond to that.

22 And those choices were consistent all the way until
23 August of 1998 when the United States, for the first and only

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1 time, relied on kinetic military force. And then after
2 20 August 1998, the United States returned to addressing
3 al Qaeda, but it did so, again, relying on intelligence, law
4 enforcement, and diplomacy and those types of tools; and it
5 persisted in that mode of response until 7 October 2001.

6 Now, within that -- that time period, the nature of
7 the intelligence response varied to some extent, both in terms
8 of its scope and its potential intensity. But the legal
9 authorities and the legal framework -- which we can't really
10 discuss here, but I'm happy to discuss more tomorrow, if you
11 like, or in the closed session, if you like -- the legal
12 framework through which the United States viewed those
13 intelligence activities and the legal framework that
14 authorized the specific types of activities contemplated speak
15 to the nature of the United States' response and the nature of
16 the United States' efforts to confront al Qaeda.

17 And it's our position, it's our argument, that --
18 that the nature -- a holistic review of the choices the
19 United States actually made from 23 August 1996 to 7
20 October 2001 bespeaks a non-armed conflict response.

21 And the reason why the -- Mr. al Baluchi needs the
22 discovery that he's seeking, sort of in a general way, is to
23 demonstrate that -- that there weren't four data points,

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1 right? There's not 7 August '98, 23 August '96, 20 August
2 '98, 7 October 2000 and, you know, 11 September 2001 -- I
3 guess five data points, excuse me -- but instead, there were
4 more than 1800 data points.

5 On each of those days, with the exception of one, the
6 United States made policy change -- decisions that were
7 influenced by applicable law, international and domestic, to
8 guide the American response to al Qaeda. And those choices
9 sounded in a legal frame that was not an armed conflict and
10 was not imbued with the authorities one finds in the law of
11 armed conflict.

12 LDC [MR. CONNELL]: Your Honor?

13 MJ [Col COHEN]: Yes.

14 LDC [MR. CONNELL]: Would that be an appropriate time for
15 a comfort break? It sounded like a pause.

16 MJ [Col COHEN]: Yeah, that would be fine. We'll take a
17 ten-minute recess.

18 [The R.M.C. 803 session recessed at 1507, 24 July 2019.]

19 [The R.M.C. 803 session was called to order at 1521,
20 24 July 2019.]

21 MJ [Col COHEN]: The commission is called to order. All
22 parties present when we recessed are again present. Unless
23 someone ----

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1 DDC [LtCol POTEET]: Your Honor, Mr. Nevin is not -- oh,
2 he's about to come in.

3 MJ [Col COHEN]: Oh, Mr. Nevin is not here. That's not a
4 problem. We'll wait until -- is it okay -- I see Mr. Nevin
5 right there. We're good.

6 LDC [MS. BORMANN]: Judge, Mr. Montross isn't here, but we
7 can proceed in his absence. He's on other related ----

8 MJ [Col COHEN]: Okay. Thank you. Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, Major Bare has stepped out
10 to work on another matter for us.

11 MJ [Col COHEN]: That's fine as well. Thank you for
12 letting me know. All right.

13 All right, Mr. Farley. I think we were to the point
14 of 1800 data points.

15 DC [MR. FARLEY]: Yes, Your Honor. And I appreciate the
16 court's indulgence thus far this afternoon. I just want to
17 make a couple of quick points in sort of summary.

18 The first is that just as -- by way of example,
19 getting back to this idea of -- of situations in which legal
20 authority exists or doesn't exist as a result of a triggering
21 event. And specifically going back to -- to World War II and
22 the Pearl Harbor example, this is a little bit wide afield,
23 but it's in the same general realm, so please, just bear with

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1 me. Prior to -- and by far afield, I mean this is neutrality
2 law. Slightly different than the law of war.

3 Prior to Pearl Harbor the United States had for two
4 years or so looked for opportunities to provide war materiel
5 to the allied forces, of which it was not then a part, right,
6 the U.K. primarily.

7 And there was a debate within the United States,
8 rightly so, that the direct provision of war materiel, in this
9 case battleships and destroyers, to a participant in an armed
10 conflict would trigger -- would violate the United States
11 neutrality obligations, and as a result, the United States
12 would either be violating international law or it would have
13 made itself a belligerent in a war that it did not want to be
14 a part of.

15 And there was a robust domestic debate, and the --
16 the sort of result of that debate was the Lend-Lease Act and
17 this sort of -- this fiction essentially that the
18 United States would lend war materiel to the United Kingdom in
19 exchange for leases at British possessions around the world.

20 Now, after -- after Pearl Harbor when, you know, the
21 German Reich declared war on the United States, when the
22 United States declared war on Japan and the axis powers, the
23 United States' neutrality obligations vitiated. They were no

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1 longer implicated and the United States no longer had to be
2 concerned that the provision of war materiel to its allies
3 would violate -- would violate its international or its
4 domestic legal obligations.

5 So that is -- that is one, you know, slightly
6 tangential example of a type of legal authority that changes
7 fundamentally based on the -- a triggering event or the
8 overall framework and scenario.

9 And now -- and now I'll just make a concluding point.
10 When it comes to the United States' response or any state's
11 response to a non-state actor and whether that response is in
12 the nature of an armed conflict or something else, it is
13 not -- it is just not sufficient to look at the -- the binary
14 question of whether military force is used or not. It's
15 important to look at the relative mix, the proportion of -- of
16 the responses.

17 And the reason why I say that, is that the nature of
18 the response has to -- can only be described by a holistic
19 review of the activities that a state undertakes in responding
20 to a threat. And we have to look holistically at these things
21 because the question of whether an armed conflict exists is an
22 objective fact-intensive inquiry.

23 And according to the -- the commentaries to the

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1 Geneva Conventions and as they've been sort of ratified and
2 embraced by international criminal tribunals, the ICC and
3 others, including to some extent the military commissions up
4 to this point, not -- and this is a quote, Not any and every
5 isolated event involving the use of force and obliging the
6 officers of the peace to have resort to the weapons will
7 trigger an armed conflict. And that comes from -- that's
8 Boskoski again at paragraph 185 quoting the commentary to the
9 Second Geneva Convention at 33.

10 MJ [Col COHEN]: Haradinaj would also stand for that
11 proposition, right?

12 DC [MR. FARLEY]: What's that?

13 MJ [Col COHEN]: Just in principle, Haradinaj would also
14 stand for that proposition in the way that they found -- made
15 their findings with respect to when the hostilities began.

16 DC [MR. FARLEY]: Absolutely. And in -- this is an
17 important point to bear in mind. With respect to Haradinaj,
18 and I also think with respect to the Chinese example.
19 "Noninternational armed conflicts" -- and this comes from the
20 commentary again -- "are in many respects similar to an
21 international war but take place within the confines
22 traditionally of a single state, single country." And that
23 comes from commentary to the Third Geneva Convention at 37.

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1 The point here is that fundamentally, the fundamental
2 question that has to be answered in determining whether laws
3 of war apply in a noninternational situation is whether what
4 is happening factually looks like an armed conflict or not.

5 So if -- it was not just the deployment of the
6 Serbian military on 22nd April 1998 to Kosovo that changed the
7 nature of the Serbian response. That was one of many factors
8 that changed the nature of the response.

9 But you could imagine a situation where on 25
10 March 1998, that the Serbian military had likewise deployed
11 its forces, and that at that point it did not deploy -- I
12 mean, it deployed its troops, but it did not deploy heavy
13 weapons; that it did not rely on its armed forces to go off
14 and use forces -- lethal forces of first resort, but instead,
15 in perhaps the Chinese and Hong Kong scenario that we may see
16 play out, that it was deployed to quiet tensions and to quell
17 disturbances.

18 And at that point, had it deployed the military and
19 there -- there had been no further clashes or clashes that did
20 not rise above a certain level, and that the Serbian
21 government was able to, felt it was able to, and, in fact,
22 responded while using its regular armed forces, but doing so
23 in a law enforcement frame to the threat posed by the Kosovo

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1 Liberation Army, there would never have been an armed
2 conflict.

3 And that's all that I have for Your Honor, and I'm
4 happy to answer additional questions if you'd like.

5 MJ [Col COHEN]: Just a couple. As you sit here in 2019
6 in July, in 642B the government quotes Judge Parrella with
7 respect to kind of what he thinks the elements should be. As
8 of that day, I think the quote is as of this date, this is
9 kind of the way I think these elements would be.

10 What is your position on whether those appear to be
11 the correct elements for this case ----

12 DC [MR. FARLEY]: Your Honor, I ----

13 MJ [Col COHEN]: ---- with respect to hostilities?

14 DC [MR. FARLEY]: Your Honor, I'm -- I'm unfortunately not
15 prepared to speak definitively on what I think should go in a
16 penal instruction. If you like, I'm happy to go away and
17 think about it in a more detailed way, and I think that we
18 could probably work, you know, to come to an answer.

19 MJ [Col COHEN]: Okay. Thank you. I'm not going to order
20 any briefings right now.

21 The other question I would have is with respect to a
22 non-state actor that -- let's go through a hypothetical. If a
23 non-state actor is fairly highly organized and is capable of

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1 inflicting at least a certain level of intense kinetic action
2 against a -- against a state actor, where is the line between
3 -- how often does the state actor have to respond with intense
4 force to actually reach the level of hostilities?

5 DC [MR. FARLEY]: So, Your Honor, the -- the Tadic court
6 and subsequent courts have reaffirmed -- so the Tadic court
7 initially articulated the idea of a protracted armed violence
8 between a state and non-state actors or organized armed
9 groups. Subsequent decisions primarily interpreted protracted
10 to mean intense, but later in the development of the -- the
11 ICTY's case law, there was sort of a retrenchment and a return
12 to the idea that the protracted actually means protracted.
13 Within the sort of academy there's debate over whether there's
14 an independent duration element, whether, you know, one day of
15 clashes is sufficient or two days or a month.

16 I would say that the -- the most well-accepted view
17 is that there is no independent durational element, that
18 clashes must be intense -- you know, sufficiently intense --
19 but that the -- if we return to the sort of legal lodestar,
20 which is does this conflict look like an armed conflict, it is
21 inherent in armed conflict that there are, in fact, clashes,
22 right, and that the clashes are, in aggregate, sustained, so
23 that they -- they are not sporadic. They are not isolated

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1 acts of violence, which is what we are constantly trying to
2 distinguish against. That falls below -- sporadic and
3 isolated acts of violence fall below the threshold of Common
4 Article 3 and the law of armed conflict.

5 So for there to be an armed conflict, there need to
6 obviously be two parties and they have to be sufficiently
7 organized but they have to engage -- engage in hostilities,
8 which is to say that one side cannot -- there cannot be an
9 armed conflict because one side is perpetrating acts of
10 violence against another side that does not respond in kind.
11 There would have to be armed violence between the sides. And
12 for it to look like an armed conflict, in a sort of platonic
13 ideal or a historically traditional way, there should be
14 sustained armed violence between these parties.

15 You know, the -- Judge Parrella, I believe -- my
16 colleague informs me that we've actually taken a position in
17 this in AE 494, analyzing the role that duration plays into
18 intensity.

19 MJ [Col COHEN]: I'll take a look at that.

20 DC [MR. FARLEY]: I'll give you the citation.

21 MJ [Col COHEN]: Thank you.

22 DC [MR. FARLEY]: I can continue answering that in sort of
23 an abstract way or ----

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1 MJ [Col COHEN]: That would be fine.

2 DC [MR. FARLEY]: Okay.

3 MJ [Col COHEN]: Well, actually, I'll just take a look at
4 AE 494.

5 DC [MR. FARLEY]: Okay.

6 MJ [Col COHEN]: All right. The only two overt kinetic
7 acts that are on your slide are OPERATION INFINITE REACH and
8 OPERATION ENDURING FREEDOM. Then do you really need to know
9 anything beyond whether or not OPERATION INFINITE REACH was --
10 was done under international law and -- and is this theory of
11 Article 3 has been -- is there which allows -- allows us to
12 take this action and whether or not -- well, OPERATION
13 ENDURING FREEDOM, there's U.N. resolutions and everything that
14 are coming in after that.

15 But in other words, if those are -- does it really
16 matter once you know whether or not the United States was
17 invoking Article 3 or some type of form of international law?
18 What else do you need to know besides that?

19 DC [MR. FARLEY]: In terms of like the legal response?

20 MJ [Col COHEN]: Correct.

21 DC [MR. FARLEY]: Okay. So -- so, in fact,
22 the United States relied on Article 51 of the U.N. charter, so
23 the -- a state's inherent right to self-defense and -- in

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1 taking action in OPERATION INFINITE REACH. The United States
2 also relied on Article 51 of the U.N. charter when the
3 United States took action beginning in OPERATION ENDURING
4 FREEDOM. What is significant and interesting in this respect
5 is that not all acts of self-defense -- international
6 self-defense result in an armed conflict.

7 Like, the self-defense -- the inherent right to
8 self-defense, it comes from the body of law called the jus ad
9 bellum, whereas the law of war as we've been discussing them
10 today is jus in bello, right? The law regulating the conduct
11 of hostilities on the one hand as opposed to the law
12 regulating when a state may resort lawfully to the use of
13 force.

14 The two bodies of law are separated for a variety of
15 reasons, one of which is that jus ad bellum is frequently
16 contested, and there used to be a view that if an armed
17 conflict or a war at that time was illegal under the jus ad
18 bellum, then the -- the harmed state, like the state that had
19 suffered aggression, was no longer bound to apply the
20 jus in bello. So it was sort of a -- if I could claim that a
21 state had attacked me in violation of the jus ad bellum, I had
22 a free hand to violate the laws of war.

23 The international laws moved away from that, and the

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1 United States played a big role in moving away from that. So
2 it is conceptually possible, and I think historically it has
3 happened, at least in the case of OPERATION INFINITE REACH,
4 where the United States used force under its inherent right to
5 self-defense in a situation that did not trigger an armed
6 conflict.

7 Like, that use of force was discrete and
8 circumscribed and intended to be limited. And we know this
9 because of things the United States said at the time, what it
10 represented in its letter to the U.N. Security -- or the
11 secretary general notifying its use of force under Article 51
12 and from its war powers resolution contemporaneously --
13 letter, excuse me, war powers resolution letter, I apologize.
14 And then there was no more force, right? After that point,
15 the -- the mix of responses returned to the way it had been
16 prior to 20 August 1998 where the United States relied on
17 diplomacy, law enforcement, and intelligence.

18 MJ [Col COHEN]: So if you already know, well, how -- what
19 the legal authorities were for the two overt acts, why -- what
20 else do you need to know? I mean, you know what legal
21 authorities they used and what legal authorities they didn't.

22 DC [MR. FARLEY]: So, Your Honor, what -- again, what is
23 important here from -- for our purposes is from 21 August 1998

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1 until 6 October 2001, the United States continued to make
2 choices about how it would respond and continued to take
3 action against al Qaeda and continued to contemplate action
4 against al Qaeda.

5 The actions it took and the considerations that it
6 took with respect to future but possibly unimplemented
7 activities reflect choices made by the United States and a
8 particular legal frame, right?

9 And so each time the United States made a decision to
10 issue, for example, a memorandum of notification under a legal
11 authority that did not rely on the law of armed conflict, the
12 laws of war, that represents a data point in relation to the
13 government's four data points that it wants to prove at trial
14 that is a contrary data point. It says that in contrast to
15 the government's argument, on this day the United States did
16 not perceive itself to be engaged in an armed conflict, had
17 decided not to use its military force, and here are the
18 reasons why. Some of those are legal reasons and some of
19 those are factual reasons. But all of those things feed into
20 and color the nature of the United States' response.

21 And so what -- what Mr. al Baluchi wants to and needs
22 to be able to do is to meet the government's argument and
23 rebut it. And the government's argument is that there are

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1 four data points. We will prove those four data points beyond
2 a reasonable doubt at trial and, therefore, armed conflict
3 and, therefore, conviction.

4 And our argument and our position is that although
5 that is an incredibly persuasive argument -- and it's
6 persuasive in part because it is simple, it distills a lot of
7 history and a lot of complicated facts into four very simple
8 propositions, that history is more complicated than that; and
9 that the legal analysis required under Haradinaj and required
10 under Boskoski and required under Tadic, and the legal
11 analysis that the military commission envisions when it issues
12 jury instructions in Hamdan and Bahlul and the ones that
13 Judge Parrella suggested require a more robust and a richer
14 environment of facts. And it is -- it is -- it would be
15 fundamentally misleading to the panel members to show them
16 only the four data points and not show them the 1,800 and
17 other data points out there.

18 And while that may sound cumulative up to a point,
19 the -- the fact is that by dint of sitting in this courtroom
20 today, having this conversation in this courtroom, we --
21 Mr. al Baluchi and the other defendants who are challenging
22 the existence of hostilities are already at a disadvantage,
23 right, because this is a war court. It's a war tribunal. It

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1 implies the existence of an armed conflict at the relevant
2 time.

3 And beyond that, we're talking about five years of
4 fairly obscure history that we will have to present and
5 discuss to a panel of military officers, some of whom may not
6 be old enough to remember the 10th of September 2001 when they
7 sit in judgment of our client, but all of whom have been
8 engaged in an armed conflict with al Qaeda, an actual, a bona
9 fide armed conflict with al Qaeda for the last 17, 18, or
10 however many years.

11 And whether we like it or not, the nature of the
12 human brain is such that we are all susceptible to hindsight
13 bias and the invitation -- more than an invitation, really --
14 to view events of the past through the lens of what we know
15 today. And so part of our defense fundamentally is going to
16 have to involve reminding, and in some cases educating for the
17 first time, members of the panel who will sit in judgment of
18 Mr. al Baluchi and the other defendants of what the history
19 was on 23 August but, more importantly, what the history was
20 between 24 August and 19 August -- 24 August '96 and
21 19 August '98, and then 21 August '98 and 6 October 2001.

22 MJ [Col COHEN]: Thank you, Mr. Farley. I appreciate it.

23 DC [MR. FARLEY]: Thank you, Your Honor. Would you please

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1 cut the feed to Table 4.

2 MJ [Col COHEN]: Please cut the feed.

3 Lieutenant Colonel Poteet.

4 DDC [LtCol POTEET]: Good afternoon, Your Honor.

5 MJ [Col COHEN]: Good afternoon.

6 DDC [LtCol POTEET]: Your Honor, I would like to address
7 three matters. First is Appellate Exhibit 502, Mr. Hawsawi's
8 motion and Mr. Mohammad's posture regarding it. Second is our
9 motion to compel discovery, Appellate Exhibit 557. And the
10 third is the government's notice, 642B, in response to your
11 order.

12 Mr. Mohammad declined joinder to Mr. Hawsawi's
13 motion, Appellate Exhibit 502. We declined joinder
14 consistently to the ensuing litigation and motions arising
15 under that. And we -- we have sought to decline joinder and
16 there was -- the difficult situation that occurred this past
17 January through this spring with an apparent conflict of
18 interest which -- and so we wrestled with the situation of
19 how -- to what extent are we able to participate in litigation
20 while we're laboring under what -- what we reasonably believed
21 to be a conflict of interest or an apparent conflict of
22 interest.

23 And we litigated extensively to try to resolve that

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1 conflict of interest, but then subsequently, after
2 Judge Parrella ordered us to resume litigation on behalf of
3 Mr. Mohammad, then we have resumed seeking to decline joinder
4 to those types of matters, and that includes we are currently
5 actively seeking reconsideration, of course, of Appellate
6 Exhibit 502FFFF which was the order by Judge Parrella that
7 extended Judge Pohl's earlier ruling, Appellate Exhibit
8 502BBBB, which by its terms was expressly specific to
9 Mr. Hawsawi.

10 And then later 502FFFF, Military Judge Parrella
11 extended that ruling to other defendants, including
12 Mr. Mohammad, despite our previous declining joinder and
13 nonparticipation at all in that litigation.

14 So accordingly, we're not joined to much of what is
15 relevant to Your Honor's order in 642. And I'm not seeking to
16 litigate any of those issues, but I just wanted to identify
17 that to you and so that's -- we're somewhat uniquely situated
18 here on this matter today.

19 But Your Honor did point us to, all of the parties to
20 the particular question of kinetic versus nonkinetic matters
21 sought in discovery. And our principle relevant motion to
22 compel discovery is Appellate Exhibit 557, which seeks
23 discovery pertaining to the USS COLE attack, which is, as has

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1 been discussed quite a bit this afternoon, one of the -- one
2 of the three events prior to the attacks of September 11th,
3 one of the three events that the government has cited
4 repeatedly and intends -- stated that it intends to cite to
5 argue the existence of a state of armed conflict subject to
6 the law of war, which is often sort of in shorthand referred
7 to as hostilities, including the Military Commission Act. But
8 that's what has to exist, the state of armed conflict subject
9 to the law of war.

10 So Appellate Exhibit 557 was argued a year ago in
11 front of Judge Pohl on the 23rd of July, 2018. That argument
12 begins in the transcript at page 20077, and in that we are
13 seeking information about a kinetic attack, which as I
14 mentioned, the government has used in this case and said that
15 they will use. It is directly relevant.

16 We have an obligation to explore the strengths and
17 weaknesses of the government's assertions and arguments based
18 thereon, and it's -- as I noted, it's one of only three events
19 prior to September 11th that they intend to pin their argument
20 regarding the existence of a state of armed conflict subject
21 to the law of war on.

22 And so this brings us to the government's carte
23 blanche announcement in Appellate Exhibit 642B that they will,

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1 from here on out, refuse to provide -- and I'm going to read
2 this, pardon me, to quote, Provide any additional information
3 relating to hostilities unless ordered to do so by the
4 commission, end quote. And that's 462B at page 2.

5 To put it very mildly, this is a problematic position
6 for a prosecution team to take. It disregards the law and the
7 Constitution, not to mention the Rules for Military Commission
8 regarding the duties upon receipt of a request for discovery
9 from defense. We addressed this more fully in our filing,
10 642D, that we filed on 17 July, and I just want to highlight
11 that for you here.

12 So we don't have as much to say on this as some of
13 the parties, for example, Mr. al Baluchi's team, but because
14 we're not joined to much of it in particular, the 502 series.
15 But what we do have is directly at stake. It falls squarely
16 and plainly within the type of discovery that -- that is
17 relevant and material, helpful, and, frankly, very important
18 to our ability to obtain and prepare a defense.

19 The government in 642B has declared without any
20 authority that they would -- it would take a court order for
21 them to provide any additional hostilities-related discovery,
22 and we invite Your Honor to make sure that that is not allowed
23 to stand.

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

2 DDC [LtCol POTEET]: Thank you.

3 MJ [Col COHEN]: Any additional arguments by defense?

4 Negative response from remaining defense counsel.

5 Who will argue for the government? Mr. Trivett.

6 Mr. Trivett, we can do this two ways. I will let you say
7 whatever you want to say, but I also could just start off with
8 a few questions and let you address those, and then you could
9 modify your argument potentially. But I am amenable to
10 whatever you would -- however you would like to present your
11 case.

12 MTC [MR. TRIVETT]: Well, sir, I think I'd like to start
13 with our theory of hostilities for the proof of the case in
14 chief, and then ----

15 MJ [Col COHEN]: Okay.

16 MTC [MR. TRIVETT]: ---- that would probably be an
17 appropriate time to start answering questions.

18 MJ [Col COHEN]: Excellent. That will work. Thank you.

19 MTC [MR. TRIVETT]: And my last name is actually
20 pronounced Trivett ----

21 MJ [Col COHEN]: I apologize.

22 MTC [MR. TRIVETT]: ---- which you had correct for the
23 first session and up until this afternoon.

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1 MJ [Col COHEN]: Then I apologize.

2 MTC [MR. TRIVETT]: It's okay.

3 MJ [Col COHEN]: Yeah. Trivett.

4 MTC [MR. TRIVETT]: Thank you.

5 MJ [Col COHEN]: I've told you guys I worry about that, so
6 thank you for letting me know.

7 MTC [MR. TRIVETT]: Yes.

8 MJ [Col COHEN]: I am -- I'm embarrassed by the fact that
9 I forgot that. So thank you.

10 MTC [MR. TRIVETT]: The government has the burden to prove
11 beyond a reasonable doubt that the conduct taken by the
12 accused in acting as principals in the September 11th, 2001,
13 attacks were done in the context of and associated with
14 hostilities. We have that burden to prove it beyond a
15 reasonable doubt.

16 The facts we are going to rely on to do that are
17 the '96 declaration of war by Usama bin Laden when he declared
18 war on the United States, specifically because of the
19 United States' presence in Saudi Arabia following the first
20 gulf war and the United States' support of Israel and other
21 regimes that al Qaeda determined were corrupt Middle East
22 regimes.

23 In 1998 that fatwa was expanded, included Usama bin

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1 Laden and other groups, to clarify that United States
2 citizens, civilians, were legitimate targets in their war due
3 to the fact that the United States has a representative
4 government, that the voters pay taxes and, therefore, should
5 be held accountable for the actions of their government.

6 Following the '98 fatwa, which indicated a clear
7 intent to commit law of war offenses, on August 7th, 1998,
8 al Qaeda attacked United States embassies in Kenya and
9 Tanzania, killing 257, wounding many others, which was then
10 followed approximately two weeks later by a United States
11 response against what we understood to be the al Qaeda network
12 at the time, launching more than 80 Tomahawk missiles at the
13 El-Shifa Pharmaceutical Company in Sudan that the
14 United States had reason to believe was associated with Usama
15 bin Laden and his networks, as well as training camps that
16 conducted military training in Afghanistan on behalf of
17 al Qaeda.

18 In October of 2000 al Qaeda was then responsible for
19 an attack on the USS COLE, a sovereign warship of the
20 United States, while it was refueling in Aden, Yemen, killing
21 17 sailors, injuring 39 others.

22 And then finally on September 11, 2001, four civilian
23 airliners full of civilian passengers were hijacked and

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1 intentionally flown into the North and South Tower of the
2 World Trade Center; the Pentagon; and, after the heroic
3 actions of certain passengers on Flight 93, the plane never
4 made it -- the fourth plane never made it to Washington, D.C.

5 We talk about as if it's four distinct acts. It's
6 really ten. We should get credit, from the United States'
7 perspective, in having to count every one of those horrific
8 attacks: the four planes, the three targets, the two
9 embassies, and the warship.

10 All told, 3200 people were killed, hundreds of others
11 injured, millions of dollars in damage. And that doesn't
12 count the billions of dollars of damage to the U.S. economy or
13 the thousands of people and first responders who have since
14 died from 9/11-related incidents, illnesses based on the
15 cancers that they contracted trying to help their friends from
16 the World Trade Center site. There's no way for us to account
17 for all of those, so they continue to die to this day.

18 That's the government's theory of hostilities.
19 That's what we are relying on. We believe the standard, which
20 has finally been articulated by Judge Parrella, which I
21 believe he said is the Tadic intensity and organization
22 standard as colored by the Hamdan and Bahlul standard.

23 And when we reviewed all of the discovery at the

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1 presidential libraries and through the Joint Chiefs of Staff,
2 we used the Hamdan and Bahlul instruction, which had been
3 approved by the CMCR following both of those gentlemen being
4 convicted of war crimes in a military commission. And
5 Judge Parrella's decision to use the Tadic standard would not
6 have impacted our review at all.

7 So we had a legal standard, we had 701, and we had a
8 veritable army of people go out and look for potentially
9 relevant discovery, whether it was from our team specifically
10 or through the other hundreds of government employees who
11 assisted us in our review of both classified and unclassified
12 information.

13 The commission should rest easy that we took our
14 obligation seriously, that we did everything we could to find
15 discoverable information that would either rebut what the
16 government's theory of hostilities was, if it would somehow
17 support what we agreed as part of the defense arguments as to
18 what their hostilities argument would be, and included things
19 as sensitive as statements of Presidents and phone calls that
20 were made to various world leaders after the embassy attacks
21 and after the September 11th attacks.

22 There were 600,000 pages, approximately, that we
23 reviewed, based on the calculations that the teams who went

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1 out there provided. And in the end, Mr. Farley has admitted
2 that we have turned over 5,000 pages of information.
3 Oftentimes, the focus of all of these motions to compel from
4 the defense is what they don't have, with very little
5 recognition of what they do have. And any analysis at this
6 point from a motion to compel standpoint must include whether
7 or not any information is cumulative and whether or not it's
8 relevant.

9 So we've turned over a tremendous amount of
10 information. And in the end, if we're ever going to get to
11 trial, the commission has to trust us, just as every court has
12 to trust the prosecutors, whether it be in federal court or
13 state court around the country, that we've done our due
14 diligence, that we have satisfied our obligations. Because,
15 quite frankly, sir, it can't be done by the judiciary.

16 MJ [Col COHEN]: I agree with you there, and it's not my
17 responsibility either.

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

19 So whether it was the 6,000 [sic] pages we went
20 through regarding hostilities or how we managed our way
21 through the 6.2 million documents regarding RDI, whether it
22 was how we reviewed over 39,000 footnotes in the original
23 Senate Select Committee on Intelligence report on the RDI

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1 program just to ensure that we had had access to everything
2 that they had access to, we've taken this very seriously. I
3 know the Chief Prosecutor is proud of all of his people's
4 efforts on this, and we did not take this job lightly.

5 So with that, I'll answer any questions you have, and
6 then I think I would like to address specifically some of the
7 things that were raised by Colonel Poteet and Mr. Farley.

8 MJ [Col COHEN]: All right. Mr. Trivett, thank you.
9 Appreciate it.

10 In reading your motions I had a couple of questions,
11 and one of those I asked defense counsel. And in reading your
12 motion, it sounded like part of your evidence for hostilities
13 would be the level of operational planning that -- that went
14 on. Is that, in fact, evidence that you all intend to present
15 in support of your hostilities element?

16 MTC [MR. TRIVETT]: I would say it depends on what the
17 defense is going to be allowed to present. And I say it this
18 way: We have -- we have the burden and we would obviously
19 have a chance to rebut, if necessary.

20 But Mr. Farley stood up here and said if the
21 United States response was primarily diplomatic or through the
22 intelligence agencies or through law enforcement, like he
23 believes it was from 1998 to September 11, 2001, that that

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1 somehow should go to the members, and the members should be
2 able to decide that using our other instruments of power show
3 an absence of armed conflict.

4 The reality is and the facts are that shortly after
5 OPERATION INFINITE REACH, which was a targeted operation as to
6 the training camps and the pharmaceutical company, we very
7 quickly transitioned from a Department of Defense standpoint
8 to OPERATION INFINITE RESOLVE.

9 And OPERATION INFINITE RESOLVE was our long-term plan
10 on how do we combat the threat that the al Qaeda group, which
11 is how we knew it at the time -- and, admittedly, we knew very
12 little about this group -- how do we combat this from a
13 long-term perspective because they have now attacked us as
14 they said they were going to two years prior.

15 So within OPERATION INFINITE RESOLVE, which was the
16 follow-up to INFINITE REACH, the government looked at a
17 tremendous amount of options it had. It was attempting, to
18 the extent possible, target the C2, meaning the command and
19 control of al Qaeda as we knew it to be, as the Usama bin
20 Laden network as we knew it to be, including identifying
21 targets in Afghanistan.

22 Oftentimes I think what the documents would speak to
23 and what the testimony would be if we did present this, was

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1 that we never had actionable intelligence to know where Usama
2 bin Laden, or other known leaders of al Qaeda at the time,
3 would be sufficient so that we could get ordinance on target,
4 but that we were always at the ready, in that we had subs at
5 the ready and we tried to consider whether or not to use
6 indigenous forces, and we tried to see whether or not we could
7 put boots on the ground in Afghanistan at the time and whether
8 or not they'd be safe, special operations commands.

9 All of this was looked at, and none was ultimately
10 executed because of the lack of actionable intelligence as to
11 where Usama bin Laden would be by the time we can get
12 ordinance on target. Now, that was a pre-Predator paradigm,
13 and the Predator starting to stand up towards the end of this.
14 But there's only -- there's very little about our ability to
15 use drones and realtime-monitor the command and control
16 structure of al Qaeda.

17 So that's what the evidence would present. And I
18 think that it's legitimate evidence certainly to the members,
19 especially if the defense is going to be able to argue that we
20 were using other instruments of power. Because we were doing
21 everything within our military power to stop the threat if we
22 could, and we just couldn't.

23 It was a unique circumstance where we were -- we

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1 spent a tremendous amount of money firing the 80 Tomahawk
2 missiles. And that the concern was, because we weren't able
3 to attack the infrastructure of a nation, we were not fighting
4 a nation state, that if we couldn't target the C2, the command
5 and control aspects of their organization, then ultimately
6 continuing to lob missiles into Afghanistan would have been a
7 waste of our national resources. I think that that's what the
8 testimony would be, and I do think that that's relevant to the
9 members.

10 But again, if the defense is completely precluded
11 from arguing, which we think they should be, completely
12 precluded from arguing about these other instruments of power
13 to the members, it may not be necessary at all, or we may have
14 to wait until rebuttal.

15 So I think that that will depend, but we are relying
16 primarily on what I just explained to you, why I laid it out.
17 And that's why I thought it was important to lay it out in
18 advance, so you understood exactly what it is that we intend
19 to do.

20 The organizational structure of al Qaeda will
21 ultimately be presented through expert witnesses and
22 presentation called "The al Qaeda Plan" which was presented in
23 the Hamdan and al Bahlul cases and cited favorably by the

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1 Court of Military Commission Review in their factual
2 recitations of their appellate opinions.

3 But a lot of this information is not going to be
4 highly contested. The fact that al Qaeda was responsible for
5 those attacks has been proven in a court of law for the East
6 Africa Embassy Bombings.

7 We are proving al Qaeda's responsibility for the
8 September 11th attacks. There's a tremendous amount of
9 propaganda where al Qaeda has taken credit for both the
10 USS COLE attack and the September 11th attacks that we intend
11 to use as statements made in the course and furtherance of
12 conspiracy.

13 But in the end, that's not -- those shouldn't be that
14 contested or that controversial. We're going to argue that
15 that constitutes hostilities under the Tadic standard.
16 Mr. Farley, if he wants to argue that it wasn't sufficient
17 intensity and it wasn't sufficient organization and if -- I
18 think his term was the 1800 days in between the kinetic action
19 on the four different occasions, he can argue that. I mean,
20 that's fair. We're confident in our ability to win that. We
21 won it in Hamdan. We won it in Bahlul, and we didn't even
22 have a 9/11 coconspirator in the dock for that.

23 But he can argue that. He has everything he needs to

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1 argue the absence of hostilities because we're conceding that
2 the war, so to speak, had these discrete attacks. But they
3 don't need additional evidence to be able to present that.

4 And I do take issue with part of what Lieutenant
5 Colonel Poteet said about us having no obligation or no
6 authority to simply refuse further discovery requests. I
7 disagree. When we've provided 5,000 pages and we've made a
8 determination, just like prosecutors make all over the country
9 every day, that we are done with any obligation we may have
10 regarding hostilities, it was fair and, I thought, the
11 appropriate thing to do to the parties, to let them know just
12 file a motion to compel because we're not giving anymore
13 because we believe, based on our reading of the law and based
14 on what Judge Parrella has finally clarified the order --
15 which we have been asking for for a long time, even from
16 Judge Pohl, because we thought that that would define the
17 discovery obligations of the parties.

18 So I think it's completely appropriate for us to say
19 we're done. We don't dance to their tune. And as a
20 professional courtesy; and often just because it's easier for
21 the litigation, if they send us a letter requesting discovery,
22 we will probably most times send them a letter back, but we're
23 not obligated to. And especially if we just have already

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1 given them the discovery that they've requested or if -- or if
2 they've had it already and may not know what they have, we
3 have no obligation to be in a steady flow of correspondence
4 with the defense.

5 I will say -- and we counted them yesterday, and I
6 think you'll probably rehear some of this in the argument for
7 the trial schedule. Between the five teams, we have had over
8 1,000 requests for discovery -- over 1,000 -- many of which
9 came before we provided any discovery, many of which came
10 before the defense signed memoranda of agreement to receive
11 classified information which they were able to put off for the
12 first, I believe, two or two and a half years of this
13 litigation, which really put us behind the eight ball on --
14 some of the questions as to why we're at where we're at right
15 now with classified discovery is a result of that. But we
16 didn't feel the need that we had to go back every time.

17 If we danced to only their tune, that's all we'd be
18 dancing to. And we have a lot of obligations, and we have to
19 get this case ready for trial, and that's a monumental
20 undertaking in and of itself. We have suppression motions
21 coming up that are going to take the better part of four or
22 five months and we're going to be down here for weeks at a
23 time. We have obligations. We have burdens and we're not

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1 responsible or required to answer to every single thing that
2 they ask for, especially when we've already decided that we
3 have finished our obligation.

4 I do want to address a couple of things that
5 Mr. Farley addressed regarding Pearl Harbor, and I think he
6 came back at the Pearl Harbor issue because it concerns them,
7 because it's contrary to their positions in a lot of ways, and
8 the analogies are strong.

9 Although more people died on September 11th, 2001
10 than died on December 7th, 1941, the similarities are
11 striking. We had an attack that was done without warning.
12 The September 11th one had specific civilian targets, whereas
13 it was primarily a military target for the Japanese Empire.
14 But in the end it wasn't the declaration of war the next day
15 by President Roosevelt that gave rise to that armed conflict;
16 it was the attack on Pearl Harbor itself. Of course, the law
17 of war applied to that attack. Of course it was -- they
18 should have been governed with their targets being military
19 targets and not civilian.

20 There is no one free shot doctrine in the law of war.
21 You don't need a declaration when you have actual attacks. In
22 September 11th, we had the declaration. It just preceded the
23 September 11th attacks by close to five years. But our

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1 position has always been, and we will be arguing to the
2 members, that while we believe that hostilities existed as far
3 back as 1998, the September 11th attacks in and of themselves
4 are sufficient.

5 Mr. Farley talks about the disadvantage that his
6 client's at because he's at a law of war tribunal. He's here
7 because of his own voluntary actions. He could have avoided
8 the law of war completely by deciding not to join al Qaeda and
9 not be part of the attacks. But if you're going to declare
10 war on a country, in the end, if that country decides to use
11 the law of war paradigm against you, that's on you.

12 I'm sure the United States would like to have not
13 been in this position at all, but here we are. And
14 Congress -- two Congresses and two Presidents have decided
15 that the September 11th attacks were attacks that were
16 governed by the law of war, that they violated the law of war,
17 and that, ultimately, September 11th co-conspirators should be
18 tried before a military commission. So there should be no
19 sorrow for Mr. Ali or any of these other accused in that
20 regard. Accused, mind you, at least three of which have
21 fought hard in the military commission to wear the uniform of
22 our country, to show that they were warriors and that they're
23 at war with the United States, and some of them either have

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1 them on their chairs or on their backs as we speak.

2 Mr. Farley went into the situation that's unfolding
3 with the Chinese government. I don't want to talk about too
4 many details of that. I don't know a lot of the details.

5 MJ [Col COHEN]: That's fine. I'm treating it more as an
6 analogy ----

7 MTC [MR. TRIVETT]: Right.

8 MJ [Col COHEN]: ---- as opposed to specific facts at this
9 point.

10 MTC [MR. TRIVETT]: Right. But there's a point that
11 piqued my intellectual curiosity when he raised it, and that
12 was he said at some point it rises to the level of an armed
13 conflict where the country just decides to use their military
14 against it and their typical law enforcement is not sufficient
15 to protect them. Who decides and when do they decide?

16 The Chinese government decides, but are they always
17 right? They're not last because they're right. They're right
18 because they're last. They make the decision.

19 Obviously, our law enforcement wasn't sufficient to
20 protect us against the East Africa Embassy Bombings or the
21 USS COLE attack, the September 11th attacks. That's obvious.
22 So at some point a government has to react to what's happening
23 to it.

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1 I think Judge Pohl used to say the other -- the other
2 side gets a vote. They made clear their intentions. And
3 although the attacks were, in the United States' view,
4 cowardly sucker punches, they were effective. They killed a
5 lot of people. They certainly got the full attention of the
6 U.S. Government's military, and we did what we had to do in
7 Afghanistan.

8 But at some point only the government gets to decide.
9 There's no magical moment where someone announces from above,
10 "Okay. The law of war now applies. You are now governed by
11 the law of war." That doesn't happen.

12 Ultimately in this commission, the members are going
13 to decide. They're going to decide based on how you instruct
14 them, which we hope is obviously consistent with what
15 Judge Parrella just decided he would instruct the members.
16 But they're going to decide if it was sufficient. And we
17 believe it's going to be, and we're comfortable with the
18 strength of the evidence on it.

19 But the defense can argue against it. They have
20 everything they need. They don't need more discovery to make
21 those arguments. Mr. Farley made the same argument to you.

22 So to the extent that -- and we may still object
23 certainly to the other instruments of power arguments, but

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1 we're not going to object if he just simply argues that what
2 happened from 1996 to 2001 wasn't intense enough and al Qaeda
3 wasn't organized enough or not enough people died. He can
4 make those arguments.

5 They have rights to make arguments. They just don't
6 have rights to win them, necessarily, especially when history
7 is what it is. That's why I think Mr. Farley considers the
8 government's position so elegant and persuasive. It is.
9 Because it's just history. It's what happened. There's very
10 little debate about it.

11 And in the end, we're confident that a panel of
12 military members are going to find that at a minimum, even if
13 it didn't happen before September 11th, September 11th was an
14 act of war to which the law of war had to apply and to which
15 various aspects of the law of war were violated.

16 If I could have your indulgence for one second, sir.

17 MJ [Col COHEN]: Of course.

18 MTC [MR. TRIVETT]: Subject to your questions, sir.

19 MJ [Col COHEN]: Just a couple here.

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

21 MJ [Col COHEN]: You -- the instruction that
22 Judge Parrella had indicated about, as you indicated, the
23 Tadic standard, as informed by various CMC cases, et cetera,

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1 with respect to the instruction, kind of just go through these
2 and see kind of where we are on -- on each of these. I think
3 overall, I know what your answers are going to be, but I think
4 it would just help me out.

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

6 MJ [Col COHEN]: So in A it says, you know, your -- your
7 burden is that there was a protracted armed violence between
8 the governmental authorities and organized armed groups as
9 measured by the nature, duration, and intensity of violence
10 between the parties.

11 So based on your argument, I would assume that the
12 government's position is, is we've given them evidence of any
13 protected armed violence that -- that we're aware of or -- I
14 use "we" in the pejorative -- that you are aware of that would
15 be reflected by this -- this element; is that correct?

16 MTC [MR. TRIVETT]: That is correct.

17 MJ [Col COHEN]: Okay. The extent and degree of
18 organization exhibited by the parties. That would be another
19 element, so -- and you have fully given the defense any
20 evidence you would have on that matter?

21 MTC [MR. TRIVETT]: We are relying primarily on expert
22 testimony for that, and we have provided all of the expert
23 testimony on that aspect as well as the discovery and, I

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1 believe, the information that he relied on, including --
2 Mr. Kohlmann has been certified as an expert on terrorism over
3 35 times. I believe we've also turned over all of his
4 previous testimony, even if it wasn't directly on point, even
5 though it wasn't directly Jencks. We would attempt to
6 disclose it just because we could.

7 MJ [Col COHEN]: Okay.

8 MTC [MR. TRIVETT]: So that's ----

9 MJ [Col COHEN]: And that will be the -- that will be the
10 evidence then -- I think in your motion I got that and just
11 what you said is essentially that is the evidence upon which
12 the government will rely with respect to the organizational
13 aspect of that element?

14 MTC [MR. TRIVETT]: Correct. It will all come through
15 him. Some of this is also the propaganda -- a lot of what
16 will come through Mr. Kohlmann is the propaganda of al Qaeda
17 itself.

18 MJ [Col COHEN]: Okay.

19 MTC [MR. TRIVETT]: Organizational charters, sura council,
20 how they were organized, the fact that they had a military
21 committee, all of that will come through either testimony or
22 other things that he's relied on as an expert in the past.

23 MJ [Col COHEN]: And the defense has all that?

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

2 MJ [Col COHEN]: Okay. The third element potentially
3 would be whether and when the United States decided to employ
4 combat capabilities of its armed forces to meet the al Qaeda
5 threat.

6 MTC [MR. TRIVETT]: Yes.

7 MJ [Col COHEN]: How do you all interpret the "whether" as
8 opposed to the "when"?

9 MTC [MR. TRIVETT]: So the "whether" is yes or no, and the
10 answer is yes, and that the United States did it in August of
11 1998 through the use of the Tomahawk strikes.

12 MJ [Col COHEN]: Okay. And all of the information related
13 to that, do you believe that you have provided that to the
14 defense or ----

15 MTC [MR. TRIVETT]: When we say all of the information,
16 we've looked through a body of information and believe that
17 we've turned over all that's discoverable.

18 MJ [Col COHEN]: Okay.

19 MTC [MR. TRIVETT]: I want to clarify one thing for
20 Mr. Evan Kohlmann. With Mr. Evan Kohlmann, we have turned
21 over any information that's relevant to the hostilities. We
22 still have in our trial scheduling order a further date where
23 we would be giving expert reports and those types of things.

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1 They will not relate to hostilities but would relate
2 specifically to al Qaeda or -- or this case.

3 MJ [Col COHEN]: Understand.

4 MTC [MR. TRIVETT]: I just wanted to clarify on that.

5 MJ [Col COHEN]: No, I appreciate the clarification.
6 Clearly that's what this motion is about, is the hostilities
7 evidence.

8 MTC [MR. TRIVETT]: Right.

9 MJ [Col COHEN]: So thank you, Mr. Trivett.

10 The next element would be the number of people,
11 persons killed or wounded on each side, and you have provided
12 all discoverable information on that as well?

13 MTC [MR. TRIVETT]: Correct. It -- there are -- there
14 should be documents within the Joint Chiefs of Staff
15 information that gave various approximations ----

16 MJ [Col COHEN]: Okay.

17 MTC [MR. TRIVETT]: ---- of who were killed in the missile
18 strikes, I believe. I think I recall reading that. I haven't
19 synthesized all 5,000 pages.

20 MJ [Col COHEN]: No, that's fine.

21 MTC [MR. TRIVETT]: That's my recollection.

22 The 2,976 that are relevant to this case, we have
23 provided all of the death certificates for all of the

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1 individuals, whether it was a New York Death Certificate, an
2 Armed Forces Medical Examiner Death Certificate, and there's a
3 couple of other ones from D.C. and Missouri. We'll be relying
4 on that to establish the number that were killed as a result
5 of the September 11th attacks.

6 Regarding East Africa, we will be relying primarily
7 on what the individuals were found guilty of at the federal
8 courthouse in the Southern District of New York and how many
9 people they were responsible for. That's how we get the 257.
10 That will come through -- that could come through testimony of
11 witnesses who were aware of it as well, including expert
12 witnesses.

13 MJ [Col COHEN]: Okay. What about our -- our own internal
14 reports with respect to enemy combatants or belligerents
15 killed? Have we provided that information to the defense as
16 well in our responses?

17 MTC [MR. TRIVETT]: I think it's a very approximate
18 number, and it's -- all predates September 11th. But that was
19 what I was referencing before and I believe there are
20 documents that approximated ----

21 MJ [Col COHEN]: Okay. And that's the Chairman of the
22 Joint Chiefs of Staff stuff?

23 MTC [MR. TRIVETT]: Exactly.

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1 MJ [Col COHEN]: Yeah.

2 MTC [MR. TRIVETT]: So what I can tell you is the
3 Department of Defense certainly believed that they were under
4 an obligation under the law of war with their targeting,
5 including the collateral damage assessments that they did,
6 specifically under what they believed the obligation was under
7 the law of war. But in the end, it was in the middle of
8 Afghanistan, I think it's an approximation.

9 MJ [Col COHEN]: Copy. All right. And the same would
10 apply when you talk about collateral damage assessments, and
11 then I'm sure there were probably post-attack assessments, if
12 there -- if the military is acting as it does in the normal
13 course of business.

14 Has that information with respect to number of
15 persons killed, amount of property damage, et cetera, all been
16 provided to the defense?

17 MTC [MR. TRIVETT]: Yes, sir. I believe so.

18 MJ [Col COHEN]: Okay.

19 MTC [MR. TRIVETT]: I think Mr. Farley mentioned that
20 that -- I know that there were operational briefs in response
21 to how the Tomahawks performed and how many we thought were
22 killed and how many ----

23 MJ [Col COHEN]: Right.

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1 MTC [MR. TRIVETT]: ---- failed to go ----

2 MJ [Col COHEN]: Okay.

3 MTC [MR. TRIVETT]: ---- sonic or supersonic.

4 MJ [Col COHEN]: Yeah.

5 MTC [MR. TRIVETT]: So there are those types of things
6 that we provided.

7 MJ [Col COHEN]: All right. And then the last one is this
8 element of statements of the leaders of either side indicating
9 their perceptions regarding the existence of an armed
10 conflict, including the presence or absence of a declaration
11 to that effect.

12 In your review, how have you -- what was your
13 paradigm under which you then reviewed information with
14 respect to that element?

15 MTC [MR. TRIVETT]: So we split it up into both camps,
16 al Qaeda and the United States. For al Qaeda, we released all
17 of the propaganda that we were aware of, specific to the
18 declaration of war, '96, the '98 fatwa, something called the
19 Nuclear Bomb of Islam where Usama bin Laden in between those
20 dates continued to encourage attacks against the
21 United States, and any spokesmen that they had. That's all
22 been in the background materials for the propaganda videos,
23 those types of things.

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1 For the United States, there are some that are
2 publicly available, such as Department of Defense and
3 Secretary of Defense statements made following the OPERATION
4 INFINITE REACH and, obviously, after September 11th.

5 We also took it a step further and went through the
6 Presidential archives and identified statements of the
7 Commander in Chief, whether it be President Clinton or
8 President Bush at the time, statements that he was making to
9 other leaders. What we did is we redacted anything that was
10 in response to it from other leaders, because there's an
11 executive privilege that the White House wanted asserted in
12 that regard. But we did provide the context of what the
13 Presidents were saying during that time as to whether or not
14 we were at war.

15 We defined -- and have done this in earlier
16 litigation. We defined the relevant leaders for purposes of
17 the United States as the Commander in Chief and the Secretary
18 of Defense. Those are the people we believe were responsible
19 for the war-making power of the United States, and that it
20 would be their statements that mattered.

21 There is no way to collect every statement made by
22 every government employee on their own determination as to
23 whether or not they believed we were at war in 1998, and we

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1 didn't attempt to do that.

2 MJ [Col COHEN]: When you were reviewing that evidence,
3 even if -- even narrowing it down to those two particular
4 individuals -- or positions, I guess is a better way of saying
5 it, did you also look for any evidence in their statements,
6 et cetera, that would take a position to the contrary such
7 as ----

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

9 MJ [Col COHEN]: ---- hostilities do not apply, all of
10 those kinds of things?

11 And that research, anything along those lines, have
12 you disclosed that to the defense?

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

14 MJ [Col COHEN]: Okay. Something that you said -- gave me
15 pause is the wrong word -- caused me to think for a moment as
16 to how this is going to play out at trial, and that was this
17 idea of if the defense is allowed to offer evidence that other
18 instruments of power -- and the question then is what does
19 that really mean? I mean, I understand instruments of power,
20 but this idea of the absence of conflict. I mean,
21 theoretically, the absence of conflict may be evidence of the
22 other instruments of power being utilized in a broad sense.

23 And so one of my concerns as the judge would be -- so

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1 you have -- in rebuttal it comes in because it's relevant, 403
2 balancing test. It comes in, you know, because it's not
3 unduly prejudicial, the probative value is not substantially
4 outweighed by confusion of the issues, et cetera, and now you
5 want to put in your rebuttal evidence. But we're really late
6 in the game if we're only disclosing that potential rebuttal
7 evidence at that point.

8 MTC [MR. TRIVETT]: It's already disclosed.

9 MJ [Col COHEN]: Okay.

10 MTC [MR. TRIVETT]: We wouldn't ----

11 MJ [Col COHEN]: Okay. That's why I was bringing this up,
12 because I want to know what exactly is that potential rebuttal
13 evidence, to the extent that you can disclose it here, that
14 you have provided to them?

15 MTC [MR. TRIVETT]: And I -- perhaps I was inartful when I
16 was describing this.

17 MJ [Col COHEN]: That's okay.

18 MTC [MR. TRIVETT]: When you were asking specifically if
19 we intended to use, say, OPERATION INFINITE RESOLVE type of
20 information, after the strikes, what we were planning.

21 MJ [Col COHEN]: Right, correct, OPLANs, those types of
22 things.

23 MTC [MR. TRIVETT]: Right. The plan as of now was to use

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1 that in the case in chief. That was the plan. We were going
2 to call a lieutenant general who was in charge of those types
3 of operations for the Joint Chiefs of Staff to walk through
4 that process of what we were trying to do, because we believe
5 that that certainly goes to the perceptions of the leaders, to
6 include the Commander in Chief who is directing the Joint
7 Chiefs of Staff to come up with operational plans and execute
8 orders and those types of things to try to kill the command
9 and control units of al Qaeda. So we thought it was relevant
10 just based on that.

11 But at least my ears piqued up a little bit when you
12 asked one of the questions of Mr. Farley, because I was of the
13 belief that the commission thought we were walking into a
14 larger discovery obligation because of what we intended to do.
15 Much of what we're intending to do now, quite frankly, is
16 based and shaped on the litigation of the parties and the
17 defense and specifically in regard to this issue where they're
18 going to try to -- whether it be an opening or infusing it
19 through cross-examination or through a request for an
20 instruction or argument to the jury, that because the State
21 Department was doing its diplomatic thing and the intelligence
22 community was doing its diplomatic thing, weren't at war.

23 That's the concern. That's really what was driving a

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1 lot of our desire to put this on, to make sure that the
2 members got a full understanding of what all instruments of
3 power of the United States were doing if they were permitted
4 to do that.

5 MJ [Col COHEN]: No, I understand.

6 MTC [MR. TRIVETT]: Quite frankly, we didn't do it for the
7 Bahlul case or the Hamdan case. We didn't have to. We relied
8 primarily on the statements of al Qaeda because they're so
9 damning that they are strong enough to assert that there was a
10 law of armed conflict between the two.

11 MJ [Col COHEN]: Copy. You know, I didn't intend -- it
12 was more of the question of -- right -- for example, if you
13 were going to present evidence along those lines, then it
14 seems like you would then need to disclose the basis for --
15 for those opinions, or whatever that evidence is that you are
16 relying on to prove your case. And so that was really more
17 the -- the question was along the line of if you weren't doing
18 that as the government, then what would be the relevance of
19 the OPLANs at all, is really what I intended to get out of
20 the -- the defense counsel when I asked that question.

21 MTC [MR. TRIVETT]: I understand.

22 MJ [Col COHEN]: But the evidence then that you're relying
23 on is more of the INHERENT RESOLVE, and that's with respect to

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1 what you have disclosed to them.

2 MTC [MR. TRIVETT]: Correct. Any -- at this point, we are
3 done completely, not just with their requests, but anything we
4 affirmatively want to use. We've turned over the statement of
5 Lieutenant General Wagner and the documents that he would sort
6 of walk through in the process of explaining everything that
7 JCS was doing to try to combat the al Qaeda threat from August
8 of '98 until September 11th, 2001.

9 MJ [Col COHEN]: Okay. Just looking at the time here.
10 One last question, and then we'll take a -- we'll at least
11 take a comfort break and then -- well, I'll ask at least one
12 more question, and then we'll see whether we need to carry
13 this into Friday morning. All right.

14 The -- there was much discussion between myself and
15 Mr. Farley with respect to the Haradinaj case and the
16 distinctions he was drawing with respect to whether it was
17 February or March or whether it was really just the court
18 didn't really need to address those but it just chose to
19 because ultimately they were deciding that the 22nd of April
20 2008 was the level of intensity.

21 What is the government's position on -- in addition
22 to that question, I asked the question, well, where is the law
23 on -- let's assume that for argument's sake that the response

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1 to the -- that the embassy bombings and then the Americans'
2 response with fairly significant amount of TLAMs on various
3 targets would rise to the level of meeting the Tadic
4 intensity.

5 Clearly on our part, the organizational element would
6 be met where we're a state power. What about -- but -- and
7 maybe perhaps the government can prove the -- assuming that
8 all of that is met, what about that interim period then before
9 we actually reengage in September 11th? Does that -- does the
10 government have a position at this point as to -- as to how
11 that plays into the analysis?

12 MTC [MR. TRIVETT]: Sure. Some of it's based on law of
13 war. Some of it's just based on the continuum of a
14 conspiracy. But we've alleged a conspiracy to attack
15 Americans from 1996 that exists to this day, and that there --
16 it's a large-scale conspiracy to attack civilians and
17 Americans anywhere, including soldiers. But at a period of
18 time, al Qaeda as organized as it was, didn't have the numbers
19 that a state did to be able to have a constant barrage. But
20 war is often like that; that there's hours and days of
21 boredom, and hell is unleashed on one day. So we don't think
22 that there's a state of law that says 30 days is too many or
23 40 days is not enough.

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1 What I can say is that Congress and the commanders in
2 chief already decided this issue, at least for purposes of
3 jurisdiction, that they believe that it was an attack.
4 Whether or not that gets instructed to the members I think is
5 still up in the air after Judge Parrella, he indicated that we
6 can certainly ask for that type of judicial notice to go to
7 the members at some point. I'm sure the defense is going to
8 argue against it.

9 But it's not as if they all went back home after the
10 embassy attacks, had a big barbecue and went back to civilian
11 jobs. And the evidence will show that al Qaeda was an
12 organized terrorist organization with the primary purpose of
13 attacking America; that they had structure; that they had a
14 command element; that they had a military committee, a
15 financial committee, a propaganda committee; that they had
16 very experienced former Egyptian officers in their cadre that
17 were helping direct strikes; that they had cells that they
18 would send, after training in military camps, throughout
19 the -- throughout the world, including cells that ultimately
20 went or were formed in Africa and in Aden and infiltrated the
21 United States in 1999 and 2000.

22 So while the East Africa bombings are happening,
23 plans are already in place for the next attacks, whether they

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1 happen or whether they don't. Like the attack on the
2 USS THE SULLIVANS, the attempted attack on USS THE SULLIVANS
3 in January of 2000 is a good example. They didn't stop trying
4 to kill us. They didn't stop trying to plot. They were
5 constantly engaged in planning against the United States. The
6 evidence will indicate that.

7 So there is no case, and we would certainly object to
8 any instruction to the members that -- of a temporal limiter,
9 what we believe is the existence of the hostilities between
10 al Qaeda and the United States.

11 So we believe it's protracted because it's over a
12 five-year period. There was no end state that they had. It
13 wasn't that they said if you do A, B, C, or D, we will stop
14 attacking you. They were constantly planning to attack the
15 United States, and that will be our position.

16 MJ [Col COHEN]: Okay. Thank you, sir.

17 Your search for hostilities evidence, it would seem
18 that, based on your comments, that that was -- you -- the
19 parameters you drew were interactions between the
20 United States and -- and al Qaeda and/or any of its
21 organizations; is that correct?

22 MTC [MR. TRIVETT]: Correct.

23 MJ [Col COHEN]: Okay.

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1 MTC [MR. TRIVETT]: Yeah, from DoD. And there were some
2 specific things that Mr. Connell requested that are
3 detailed -- they're classified and the names are classified,
4 but they're detailed in that one classified discovery response
5 that we attached to our status.

6 We thought it was important for the judge to see when
7 we had individual particularized requests for certain
8 information. Even if they wouldn't all necessarily fall just
9 under kinetic action, we did provide some, although we denied
10 others.

11 MJ [Col COHEN]: Okay.

12 MTC [MR. TRIVETT]: So -- so those are in there. So we
13 looked at the Joint Chiefs. They were ultimately the ones
14 giving all of the orders. We believed that we had a
15 sufficient body of information to look through and provide.

16 And then the presidential libraries included some
17 military action stuff and -- as well as other conversations
18 that Presidents had with various other world leaders regarding
19 whether it was our assertion of our Article 51 right to
20 self-defense in August of 1998. There was a lot of
21 discussions about that and what we were doing and why from
22 President Clinton, and then statements from President Bush
23 shortly after September 11th, other world leaders. But there

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1 was both military and those types of presidential statements
2 in the presidential libraries that we reviewed.

3 MJ [Col COHEN]: Okay. Thank you, sir. That's all the
4 questions I have.

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

6 MJ [Col COHEN]: Thank you.

7 Is there any objection or how much consternation will
8 it cause if we take a ten-minute recess and then go to about
9 1730 today to try to wrap this up?

10 Trial Counsel, any objection?

11 CP [BG MARTINS]: None from the government, Your Honor.

12 MJ [Col COHEN]: Defense counsel?

13 LDC [MR. NEVIN]: Your Honor, we have -- we're right at, I
14 believe, prayer time.

15 MJ [Col COHEN]: Okay. I can take a break for prayer
16 time. When will that start? I forgot. I don't have the
17 calendar right in front of me.

18 LDC [MR. NEVIN]: Give me a minute.

19 MJ [Col COHEN]: Yeah, absolutely.

20 LDC [MR. NEVIN]: Thanks, Your Honor.

21 MJ [Col COHEN]: That's fine.

22 LDC [MR. NEVIN]: 15 minutes.

23 MJ [Col COHEN]: Okay. Is that 15 minutes to conclusion

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1 or 15 minutes to start?

2 LDC [MR. NEVIN]: I believe it's 15 minutes from now, from
3 when you -- from when you walk out. Yes, sir.

4 MJ [Col COHEN]: Okay. Would that -- so if we took a
5 15-minute break, that would be sufficient to allow for prayer
6 time?

7 LDC [MR. NEVIN]: That's correct. Thank you.

8 MJ [Col COHEN]: All right. We're in a 15-minute recess,
9 then.

10 [The R.M.C. 803 session recessed at 1636, 24 July 2019.]

11 [The R.M.C. 803 session was called to order at 1654,
12 24 July 2019.]

13 MJ [Col COHEN]: The commission is called to order.
14 Unless the parties state otherwise, it appears to me that all
15 parties are present that were previously present.

16 LDC [MR. HARRINGTON]: Judge, Major Bare has joined us.

17 MJ [Col COHEN]: Thank you. The binders hid her from my
18 view. Thank you, Mr. Harrington. I appreciate it.

19 All right. Mr. Farley, if you'd like the
20 opportunity, you may briefly address specific matters brought
21 up in the government's argument.

22 DC [MR. FARLEY]: Thank you, Your Honor.

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

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1 DC [MR. FARLEY]: I recognize I've taken a lot of your
2 time this afternoon, so I'll make just one very quick point.

3 Trial Counsel returned to this question of Pearl
4 Harbor and declaration of war, and it did so by drawing a
5 direct comparison between Pearl Harbor and the 9/11 attacks on
6 the one hand and also, you know, U.S. declarations of war
7 against Japan and the axis powers and the supposed al Qaeda
8 declaration -- bin Laden declaration of war against the
9 United States in August of '96.

10 It's -- it is critical for the military commission to
11 understand that that is a totally inapt analogy. The reality
12 is that there are two distinct bodies of the law of war and
13 this law of war, I do mean the jus in bello. And the first
14 body of law is the law that applies to conflicts between
15 states.

16 And the law of war that applies to conflicts between
17 states is triggered in two circumstance: First, by
18 declarations of war, and second, by any use of armed force by
19 one state against another. And so in the context of an armed
20 conflict between two states at war, in sort of the common
21 parlance, you can declare war or a state can throw one punch,
22 right?

23 So from a very technical sense, the United States'

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1 use of cruise missiles against targets in Syria in response to
2 Syrian use of chemical weapons, that triggered the law of
3 armed conflict for the use of those strikes, including the
4 planning of those strikes, and for the duration of those
5 strikes.

6 It is not the same in the context of a
7 noninternational armed conflict for a couple of reasons. The
8 first reason is that under international law, including the
9 United States' view of international law -- and to be clear,
10 there is no contrary view of international law on this point,
11 and there hasn't been for hundreds of years.

12 The only entities that have the authority, the legal
13 authority to declare war, which is to say the only entities
14 that can bring about a state of hostilities, a state of armed
15 conflict, a state of war, triggering the rights and duties
16 associated with war, is a state.

17 So unless the government has taken the position in
18 this litigation that al Qaeda, bin Laden in his person,
19 qualified as a state actor in August of 1996, his declaration
20 of jihad may have had great rhetorical effect, but it can have
21 no legal effect in terms of triggering the laws of war. And,
22 Your Honor, I'm happy to provide citations that support that
23 if you like, but the place to start would be Common Article 2

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1 in the commentary, the 1952 commentary as well as the 2016
2 commentary, and Common Article 3.

3 MJ [Col COHEN]: No, I understood the distinction. I
4 understood when we talked about Common Article 2 versus Common
5 Article 3 and where you were going with that. I know the
6 analogy has been used multiple times now. I'll have to go
7 back and read the record as to how I started that analogy, but
8 when you drew the distinction of Article 2 versus Article 3, I
9 got what you were saying.

10 DC [MR. FARLEY]: Okay. And then there's just one more
11 consequence to that. And the second consequence is that in
12 the context of the use of force between a state or a non-state
13 actor, there really can be the situation where a non-state
14 actor uses violence and there really can be the situation
15 where a state uses violence against an organized non-state
16 armed group without triggering the laws of war.

17 And that has been -- that goes back to the -- you
18 know, the inception of the extension of international legal
19 regulation to noninternational armed conflict. That is very
20 clear from the *travaux* for the 1949 Geneva Convention, it's
21 clear from the commentary, and it's clear from Common
22 Article 3 itself. And that is consistent with all of the case
23 law.

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1 And there is, to my knowledge, only one case out
2 there that arguably stands for the proposition that there
3 could be an instantaneous noninternational armed conflict. It
4 comes out of the Inter-American Commission for Human Rights.
5 It's called Abella and Others and sometimes it's referred to
6 as La Tablada. And a ----

7 MJ [Col COHEN]: How do you spell that?

8 DC [MR. FARLEY]: Abella is A-B-E-L-L-A and La Tablada is
9 L-A T-A-B-L-A-D-A.

10 The -- that case is of dubious authority for a
11 variety of reasons, but not the least of which is it comes out
12 of the Inter-American Commission for Human Rights, which
13 according to the U.S. Government officially and it's taken
14 this position with respect to cases in the IACHR concerning
15 Guantanamo detainees in particular.

16 And the IACHR itself has recognized at this point
17 that its ambit is international human rights law and
18 particularly the human rights law that governs the western
19 hemisphere and not the law of war. And that it is not -- it
20 lacks the legal competence to analyze and interpret the law of
21 war, so I would -- I would suggest to you that the one case of
22 which I'm aware that stands for an instantaneous
23 noninternational armed conflict is of extremely limited

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1 authority, if any.

2 MJ [Col COHEN]: Thank you, Mr. Farley. I appreciate it.

3 DC [MR. FARLEY]: Thank you, Your Honor.

4 MJ [Col COHEN]: Lieutenant Colonel Poteet.

5 DDC [LtCol POTEET]: Thank you, Your Honor.

6 Rule for Military Commission 701 subsection (c) is
7 what I'd like to talk briefly about. It does provide for both
8 affirmative use discovery by the prosecution and it also
9 provides for discovery of material -- of -- of information.
10 It has three subparts, which include documents and oral,
11 written or other statements and some other materials.

12 But each one of those three subparts provides for
13 discovery of material that is -- or of information that is
14 material to the preparation of the defense, in addition to the
15 government's affirmative use discovery.

16 And 701(c) leads off stating that, "After service of
17 charges, upon a request of the defense, the government shall
18 permit defense counsel to examine the following materials."
19 This is not a negotiable. It's not a so long as the
20 government hasn't gotten tired of this obligation.

21 This is an enormous case, and it is an enormous
22 undertaking that the prosecution has to bear in processing the
23 discovery here. But for the prosecution in any case to

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1 unilaterally declare, "We're done," far beyond simply, "We
2 have completed and fulfilled our affirmative use discovery
3 obligation," far beyond that to say, "We're not going to
4 respond to you on any further defense discovery requests no
5 matter what they say unless you get a court order telling us
6 that we have to," is improper and without authority. It is
7 not permitted under R.M.C. 701 or Brady or any number of other
8 authorities.

9 MJ [Col COHEN]: I understand. If -- I guess it depends
10 on -- right. The government would not have the right to
11 unilaterally say, "I understand that there's this material --
12 that this information is material to the preparation of the
13 defense but I'm not going to provide it anyway." That's --
14 that clearly would be in violation of the law.

15 But at the end of the day, trial counsel does get to
16 make an initial determination as to whether or not they think
17 the evidence is material to the preparation of the defense
18 because that's what their ----

19 DDC [LtCol POTEET]: Yes, sir.

20 MJ [Col COHEN]: ---- makes sense.

21 DDC [LtCol POTEET]: Absolutely, and we take no brook with
22 that whatsoever, but that's got to be a request-by-request
23 decision instead of a carte blanche announcement notifying

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1 Mr. Mohammad's defense team retroactively, "By the way,
2 defense counsel for Mr. Mohammad, you have now missed the
3 deadline that we never told you about before to ask for any
4 discovery pertaining to this entire subject matter. And, no,
5 we didn't go to the judge and ask him to impose a deadline.
6 Instead, we've just decided that was your deadline, and it's
7 over now."

8 So it's -- they don't have the authority to do that.
9 A judge has the authority to establish deadlines like that,
10 but the parties don't have that.

11 MJ [Col COHEN]: I -- I agree with you.

12 Trial Counsel, I have no indication that you have
13 done otherwise, I just want to remind you that it would be --
14 to meet the -- the spirit of 701 would be that as requests
15 come in, that you would make an independent analysis of each
16 request. And I have no reason to believe that you're not
17 doing that, but to the extent that there's any concern that
18 that is not happening, the commission reminds you that that
19 would be the expectation of the rule, is that if -- if
20 something comes in, you make an independent decision as to
21 whether, one, you're going to use it or, two, whether or not
22 you believe it is material to the preparation of the defense.
23 Then you are entitled to make that decision. There is no

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1 doubt about that in the law.

2 And then the process is exactly where we're at, which
3 is, We don't think it's material to the preparation of the
4 defense. We've looked at this particular issue. We think
5 we've either provided it or this is just not relevant,
6 necessary, et cetera. Therefore, if you still believe that it
7 is, Defense, file motion to compel. And then the judge will
8 have to -- to reassess our independent decision as trial
9 counsel.

10 I have no reason to believe that isn't happening. To
11 the extent that that phrase, though, could be interpreted that
12 way, I -- I encourage you to go back and just relook at what
13 you've done. And if you are comfortable that you have met the
14 spirit of 701, then the defense is free to file motions to
15 compel once you've made your independent decision as the law
16 requires you to do as the trial counsel.

17 Earlier you indicated that the judiciary could not do
18 discovery. I would say the judiciary is not supposed to do
19 discovery. And so when I said earlier that it's not my job to
20 do the discovery, I think that's because the law -- I'm not
21 supposed to.

22 You are correct. It is -- discovery initially is a
23 trial counsel responsibility. The judiciary only gets

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1 involved when there is a failure of the parties to have a
2 meeting of the minds as to what is material or discoverable,
3 and then a motion is filed, and I will rule.

4 So like I said, I will -- to the extent that that --
5 that statement could be interpreted that way, I just want to
6 let you know that the understanding of the commission would be
7 that my assumption, until proven otherwise, is that trial
8 counsel is doing an independent assessment of each request
9 that's coming in. If that's not the case, then please go back
10 and reassess how you're doing that because that would be the
11 spirit of 701.

12 That's not an admonishment in any way. Like I said,
13 I have no reason to believe that's not going on in the case.
14 But to the extent that there's any confusion between the
15 parties, that -- that's kind of putting us all back in the
16 same paradigm. I'm getting some nods from trial counsel, so
17 I'm assuming that they get it. So -- and you are correct.
18 That if -- it's your call. If -- whether ultimately I agree
19 or disagree, you still get to make the initial call. All
20 right.

21 Mr. Ruiz, do you think we have enough time to -- to
22 have brief argument on -- in an open session on 503 -- or
23 530BBBB?

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1 LDC [MR. RUIZ]: I do.

2 MJ [Col COHEN]: Okay. Let's proceed with that then.

3 Thank you.

4 I have both Mr. Ryan and Mr. Ruiz coming forward.

5 TC [MR. RYAN]: Yes. Your Honor, there was no agreement
6 that was reached.

7 MJ [Col COHEN]: Okay.

8 TC [MR. RYAN]: The witness will be available tomorrow at
9 1400.

10 MJ [Col COHEN]: Okay. Thank you. I think then ----

11 LDC [MR. RUIZ]: I don't normally bat if I'm ahead in the
12 bottom of the ninth when I'm the home team, Judge, so ----

13 MJ [Col COHEN]: No, we're -- we're -- we're good. Then
14 we'll have testimony at 1400 tomorrow. All right. Thank you.
15 We'll start with the open session, and then I'm going to rely
16 on the parties to tell me when -- I mean, I have a general
17 idea of when we would get to something that needs to go into
18 closed session, but I would ask the parties to -- to briefly
19 confer this evening to make sure that you're in agreement as
20 to what the parameters are for the open session testimony
21 tomorrow. You don't have to go question by question, but just
22 what the general guidelines are going to be. If we could
23 avoid any red lights tomorrow, that would -- that would be my

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1 preference.

2 Ms. Bormann, given the brief nature of 530BBBB, is
3 530AAAA something that we could address today or do we need to
4 move it to Friday morning?

5 LDC [MS. BORMANN]: It's not briefed, so I would suggest
6 moving it.

7 MJ [Col COHEN]: Okay. We'll move it to Friday morning
8 then at 0900. That was an open session anyway. We'll do
9 that, and then we'll move immediately into 639. Okay.

10 I don't really want to have an 802, so I'll go ahead
11 and just put this on the record. I -- I don't mind if the
12 public hears, every once in a while, some of the
13 administrative matters that we go through.

14 Are there any matters that the trial counsel needs to
15 bring to my attention that would impact our ability to go into
16 closed session tomorrow or that would impact our ability to
17 hear the argument on the remaining two motions on Friday?

18 CP [BG MARTINS]: No, Your Honor.

19 MJ [Col COHEN]: Okay. Excellent.

20 How about from the defense teams?

21 Negative response from all defense teams. All right.

22 Mr. Connell, there is -- we are slowly getting to a
23 resolution of 639C. I'm going to have Ms. Lind speak with you

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1 immediately after this so that we can resolve any remaining
2 issue with respect to getting that filed officially.

3 LDC [MR. CONNELL]: All right. Sounds good.

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: Your Honor, I wanted to let you know I
6 heard what the military commission said about the relationship
7 between 350TTT and 616 this morning, and I -- I wanted to let
8 you know that, as I think we flagged this morning, we prepared
9 a filing with classified information that we think is
10 responsive to the classified information that the government
11 brought forward in their reply. That is in 616EE.

12 Because obviously the court reporters are busy, the
13 rule this week, at least during court, has been that we
14 couldn't file until 20 minutes after gavel down. So I just
15 wanted to let you know that's burned. It's sitting there
16 ready to be handed out and delivered.

17 What that means is there is already an order in place
18 with a closed argument on 616. So I don't know what the
19 military commission's view on that is, where there is -- where
20 there's been no order I don't think we can go straight from
21 505(h) to 806, but there's already been a closure order in
22 this case, and so I think that you could conduct a brief
23 505(h) if you find it necessary. Maybe the government doesn't

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1 feel that it's necessary. But then -- and then we could -- we
2 could go ahead and wrap all that argument into the 806
3 tomorrow.

4 MJ [Col COHEN]: Okay. Let me -- let me think about that.
5 Let me -- they haven't even seen -- I don't know if they've
6 seen the filing, those kinds of things.

7 LDC [MR. CONNELL]: Nobody has seen it yet because we
8 can't file it.

9 MJ [Col COHEN]: No, I got it. So let's reassess
10 tomorrow -- tomorrow morning after everyone has an opportunity
11 to take a look at this. If for -- if for some reason I needed
12 to do a very brief 505(h) at some point, hearing and then
13 decide whether to do a very brief 806 just to address those
14 specific matters -- I wasn't really intending to argue 350TTT
15 tomorrow.

16 LDC [MR. CONNELL]: Right. So the -- I understood that.
17 There are elements of 350TTT that overlap with the
18 government's reply. It may be that the military commission
19 considers those matters not to be -- I mean, under the
20 parameters that you gave this morning, that you consider those
21 not to be relevant. And if you consider those not to be
22 relevant, the whole problem is solved, we don't have to argue
23 it.

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1 MJ [Col COHEN]: Got it.

2 LDC [MR. CONNELL]: But to the extent that the government
3 wants to argue that element of its 616 reply which overlaps
4 with 350TTT, then we have responsive evidence.

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

6 LDC [MR. CONNELL]: Thank you.

7 MJ [Col COHEN]: Let me -- I'll take a look at it.

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

9 MJ [Col COHEN]: Thank you for letting me know.

10 All right. Any other matters to bring up from the
11 parties?

12 Mr. Nevin.

13 LDC [MR. NEVIN]: Your Honor, only to ask that we have a
14 half an hour with Mr. Mohammad before he is removed to the
15 camps.

16 MJ [Col COHEN]: Is there any reason that cannot happen
17 from the government?

18 TC [MR. SWANN]: Half an hour, Judge.

19 MJ [Col COHEN]: Okay. Well, then you may have a half an
20 hour. Thank you to the parties for arranging that.

21 All right, then. We will be in closed session
22 tomorrow morning beginning at 0090. We will be in open
23 session at 1400 or approximately 1400 hours tomorrow. All

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1 right.

2 We are in recess for the evening.

3 [The R.M.C. 803 session recessed at 1715, 24 July 2019.]

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