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1 [The R.M.C. 803 session was called to order at 0903, 25 July
2 2018.]

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

4 Trial Counsel, any change from when we recessed on
5 Monday?

6 CP [BG MARTINS]: Good morning, Your Honor. No. All
7 counsel representing the United States remain the same.

8 MJ [COL POHL]: Mr. Nevin?

9 LDC [MR. NEVIN]: We're the same as well, Your Honor.

10 Thank you.

11 MJ [COL POHL]: Mr. Harrington?

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

13 MJ [COL POHL]: Mr. Connell?

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

15 MJ [COL POHL]: Mr. Ruiz?

16 LDC [MR. RUIZ]: No changes.

17 MJ [COL POHL]: Ms. Bormann?

18 LDC [MS. BORMANN]: No change.

19 MJ [COL POHL]: I will note that Mr. Hawsawi and Mr. Ali
20 are absent; the other three detainees are present.

21 Trial counsel.

22 CP [BG MARTINS]: Major, if you could please proceed to
23 the witness stand, remain standing, and raise your right hand

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20113

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1 for the oath.

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

4 DIRECT EXAMINATION

5 Questions by the Chief Prosecutor [BG MARTINS]:

6 Q. You are an assistant SJA with the Joint Task Force?

7 A. Yes, sir.

8 Q. Thank you.

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

10 Q. Major, did you have occasion to advise the accused of
11 their right to attend this morning's proceedings?

12 A. I did.

13 Q. All right. Let's take Ali Abdul Aziz Ali. It's
14 Appellate Exhibit 585 consisting of three pages, which I
15 believe you have in front of you.

16 A. I do.

17 Q. Did you tell Mr. Ali he had the right to come this
18 morning?

19 A. I did.

20 Q. And what did he tell you?

21 A. He told me that he did not want to attend.

22 Q. All right. And at that point, did you execute a
23 waiver in English or in Arabic?

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20114

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1 A. I did. I read verbatim in English and Mr. Ali told
2 me he did not need it translated.

3 Q. All right. I have in front of me the English version
4 of it. Is that Mr. Ali's signature on the back of page two?

5 A. It is.

6 Q. Do you believe that he voluntarily waived his right
7 to attend this morning's proceeding?

8 A. I do.

9 Q. Mr. Hawsawi, did you advise him of his right to
10 attend?

11 A. I did.

12 Q. I have a three-page document, Appellate Exhibit 585A
13 consisting of three pages; is that the document you used with
14 respect to Mr. Hawsawi?

15 A. It is.

16 Q. Did he tell you that he wanted to attend or not
17 attend this morning's proceeding?

18 A. He did. He told me he did not want to attend.

19 Q. He told you instead that he would like to attend his
20 legal meetings; is that correct?

21 A. That is correct.

22 Q. All right. Now, you have made it possible for that
23 to occur this morning?

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1 A. Yes, the SJA's office has made it possible.

2 Q. All right. The three-page document, did he execute
3 it in English or in Arabic?

4 A. I read first the English version verbatim and then
5 the translator read the Arabic version verbatim, and he
6 executed both of them.

7 Q. Is that his signature that appears on page 2 and 3 of
8 Appellate Exhibit 585A?

9 A. It is.

10 Q. Do you believe he understood his right to attend and
11 that he voluntarily waived that right?

12 A. I do.

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

14 MJ [COL POHL]: Mr. Connell or Mr. Ruiz, do you have any
15 questions?

16 LDC [MR. CONNELL]: Your Honor, I object to anonymous
17 testimony. It violates the principles of due process outlined
18 in Smith v. Illinois and United States v. Celis, C-E-L-I-S, as
19 well as Regulation for Trial by Military Commission 20-7.

20 MJ [COL POHL]: Your objection is overruled.

21 Mr. Ruiz, do you have any questions?

22 LDC [MR. RUIZ]: No questions.

23 MJ [COL POHL]: Thank you, Major.

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20116

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1 WIT: Thank you, Your Honor.

2 [The witness was excused.]

3 MJ [COL POHL]: The commission finds that both Mr. Ali and
4 Mr. al Hawsawi have knowingly and voluntarily waived their
5 right to be present at today's session.

6 Okay, before we get to the motions we're going to
7 talk about today, there's a number of other issues I want to
8 kind of address. And most of this is just putting it on the
9 record some things that we discussed yesterday in the 505(h)
10 hearing and at the 802.

11 First of all, AE 509 has been withdrawn; is that
12 correct?

13 LDC [MR. CONNELL]: Yes, Your Honor. The government has
14 complied, and it is now moot.

15 MJ [COL POHL]: On the 350 notices, the defense is to
16 provide -- and again, this has been discussed in the 505(h)
17 hearing, but just to put it on the record, that you are to
18 provide a more particularized notice of exactly what
19 information that you wish to use in support of the argument on
20 350 so we're clear with the government of whether it follows
21 the guidance or does not follow the guidance. Your suspense
22 on that is two weeks from Monday. Next Monday.

23 On the 360/399 issue, the government is going to have

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20117

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1 new/clarifying/confirming classification guidance, and that's
2 also due two weeks from Monday.

3 There was a request at the 802 that a member of the
4 KSM team who has a -- Mr. Mohammad's team who has a TS but has
5 not done the SAP or SCI portions of his read-ons, I was
6 consulting with the security folks. This person will not be
7 permitted to sit in the 806 on Thursday.

8 There's an issue raised, and we have to put -- now we
9 have stuff on the record, Colonel Poteet, about the MOU of one
10 of your new team members?

11 DDC [LtCol POTEET]: Yes, Your Honor. Good morning.

12 MJ [COL POHL]: Good morning.

13 DDC [LtCol POTEET]: We're not seeking to relitigate any
14 aspect of the 013 series. This was -- in September and
15 October of 2015, I believe Your Honor will recall there's
16 an -- after extensive litigation regarding Protective Order #1
17 and specifically the memorandum of understanding that's
18 attached to Protective Order #1, the defense -- or several
19 defense counsel, including all of Mr. Mohammad's defense team,
20 had signed a version of the MOU that had verbiage added to it,
21 that the defense had added to that physical piece of paper,
22 and Your Honor directed that we sign a clean, unchanged
23 version of the memorandum of understanding. And so we did

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1 that with -- and then in October 2015, we did that, and on a
2 separate piece of paper wrote a statement of reservations and
3 signed that as a separate piece of paper. A copy of that
4 separate document is in the record at 013UUUU.

5 MJ [COL POHL]: As a separate exhibit?

6 DDC [LtCol POTEET]: Yes, Your Honor.

7 MJ [COL POHL]: Okay.

8 DDC [LtCol POTEET]: And we tendered them to the CISO as
9 directed by the -- by Your Honor together, but -- but for the
10 record, entered the statement of reservations just at 013UUUU.
11 And then I believe that some of the other defense teams also
12 entered them into the record. 013VVVV and 013WWWW were two of
13 the other defense teams that did this similarly, and that was
14 acceptable to the military commission.

15 And -- but I know that staff changes over time, and
16 so I believe the current CISOs were not here in 2015. And so
17 when we attempted to submit a new team member who was recently
18 read on, their signed MOU and signed statement of
19 reservations, that was rejected because of 013IIII, which was
20 the original order to show cause by Your Honor saying that we
21 needed to sign a clean, unchanged copy of the MOU.

22 And so the version that we submitted most recently is
23 consistent with every MOU and statement of reservations that

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1 anybody on our team has submitted; it was done in the same
2 manner, but the -- your CISO staff asked that we take it up
3 with Your Honor just to make sure there is clarity on
4 what's ----

5 MJ [COL POHL]: Yeah. No, I understand what the issue is,
6 and maybe it's more of a process issue than anything else, is
7 if the MOU is to be submitted, two pages signed, nothing else.
8 If there's other additional documents that they wish to add to
9 it -- and quite frankly, it's unnecessary, since your
10 objections are part of the record and -- but if you feel to do
11 it, then that's just got to be a separate pleading altogether
12 and go in the record. That's all it is. That's the issue, is
13 that the MOU has to be a stand-alone document with only the
14 MOU.

15 If somebody wants to submit something else, we'll
16 certainly accept it, and we'll just stick it in the record of
17 trial as it is. Again, I think it's unnecessary since your
18 objections are already noted, but sometimes people think they
19 have to make the objections over and over again. That's up to
20 you. But the concern is is that all I want -- all we require
21 is that -- a signed MOU, that's it. If you've got some other
22 issues with it, that's a separate piece of paper, and it
23 should be a separate exhibit. So that's where the -- that was

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1 the confusion, that that's where we're at. Okay?

2 DDC [LtCol POTEET]: I believe I understand, Your Honor.

3 But ordinarily these are not entered as exhibits into the
4 record, they're simply ----

5 MJ [COL POHL]: No. But I'm saying, if you want to object
6 to something like that, it's got to be part of the record,
7 right? I mean, how is -- what is the utilitarian value of the
8 person submitting the MOU to file objections to the MOU unless
9 the objections are part of the record?

10 DDC [LtCol POTEET]: There's a concern that down the road,
11 not Your Honor but some other court reviewing matters, that
12 there could be a waiver argument.

13 MJ [COL POHL]: No, I understand that. That's why I'm
14 saying is if you submit it like you did -- and generally, we
15 don't throw all of the MOUs in the record of trial ----

16 DDC [LtCol POTEET]: Right.

17 MJ [COL POHL]: ---- but your attachment that apparently
18 you feel the need to put in it to preserve your objections, if
19 it's attached to the MOU, it would be thrown in that same
20 pile. And so if you're concerned about waiver, your nonwaiver
21 wouldn't be part of the record.

22 So I'm trying to make -- what I'm saying, I'm trying
23 to -- if you feel the need, or whoever does, feels the need to

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1 object to the MOU each time you sign it, that -- that's up to
2 you. Whether you think it's necessary or not, that's your
3 call. I don't think it is, but again, reasonable minds can
4 differ.

5 But to do that, you've got to preserve the objections
6 in the record. And if you do it the way it was done before,
7 that -- those objections would be where? Because we don't put
8 the -- every MOU in the record. So that's what I'm simply
9 saying, if you've got objections, just file it as a notice of
10 objections, we'll put an exhibit, and it will become part of
11 the record, okay?

12 DDC [LtCol POTEET]: All right. Thank you. Your Honor.

13 MJ [COL POHL]: Sure. No problem.

14 And the other issue, procedural issue that has come
15 up deals with government discovery that is provided -- I'm
16 sorry.

17 Mr. Connell, did you want to be heard on this? Okay.

18 As I understand it, is that sometimes discovery is
19 provided to one defense team with the government-imposed
20 limitation that it only goes to that particular team. And
21 that's raised concern by other teams is that how come they're
22 not getting it, too.

23 Now, Ms. Bormann, I believe this is your issue. Did

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1 I frame the issue accurately? Hold that thought for a second.

2 LDC [MS. BORMANN]: I am.

3 MJ [COL POHL]: Mr. Connell, one other issue I want to --
4 we want to get to that you raised yesterday deals with the
5 notice of an unclassified document. So we'll get to that as
6 soon as we're done with this one.

7 Go ahead.

8 LDC [MS. BORMANN]: The issue is an issue writ large. It
9 came up yesterday in the closed session. And the issue is how
10 can we possibly represent Mr. Bin'Attash in a joint trial if
11 we're not provided the materials, the motions, the discovery
12 that will eventually formulate either defenses or prosecutions
13 of a joint defendant without knowing what that is?

14 So for instance, let's say that the government takes
15 the position that the statements of Mr. al Hawsawi should only
16 be given to Mr. al Hawsawi. And they intend to only introduce
17 certain of them. So those statements, the ones they intend to
18 introduce at trial, they provide to all of the men, but -- all
19 of the defendants -- but the ones that they say, we're not
20 going to introduce, that we're just giving those to
21 Mr. al Hawsawi.

22 And during a joint trial, counsel for Mr. al Hawsawi
23 gets up and rightfully cross-examines a witness about a

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1 continuing interrogation and statements that have never been
2 tendered to co-defendants; and in those statements, there are
3 implications of the co-defendants that I've never been
4 apprised of. That's the type of stuff that leaves
5 co-defendants in a joint trial without any remedy.

6 MJ [COL POHL]: Okay.

7 LDC [MS. BORMANN]: I have a recent example -- beyond the
8 closed session yesterday of 350C, I have a very recent
9 example.

10 So back in 2015, Mr. al Hawsawi filed a discovery
11 request -- submitted a discovery request for materials related
12 to Mr. al Qahtani, the guy who the sixth table was built for,
13 but the guy who was never -- charges were never referred by an
14 earlier convening authority who was meant to be charged as a
15 co-conspirator on the 9/11 case.

16 Mr. al Hawsawi eventually filed a motion to compel
17 and was given some of that discovery. Our case for
18 Mr. Bin'Attash, we didn't believe that what Mr. al Hawsawi
19 asked for was broad enough, so we submitted our own discovery
20 request while their motion to compel was pending.

21 After we submitted a discovery request and it was
22 denied by the government, Mr. Mohammad basically took our
23 discovery request and cut and pasted what we had requested and

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1 submitted it on his own. In April -- end of March, early
2 April of 2018, just a couple of months ago, the government
3 sent discovery to Mr. Mohammad, the same exact request we had
4 made about al Qahtani, but refused to provide it to
5 Mr. Bin'Attash. And when ----

6 MJ [COL POHL]: When they sent it to -- and you may not
7 know this, but when they sent it to Mr. Mohammad's team, was
8 there any markings on it that indicated that it couldn't be
9 given to the other teams?

10 LDC [MS. BORMANN]: I don't know, because I didn't see it.
11 But I shouldn't have to go to Mr. Mohammad's counsel ----

12 MJ [COL POHL]: I know. I got it.

13 LDC [MS. BORMANN]: ---- to ask for material that I have
14 requested that it is clearly material to the preparation of
15 Mr. Bin'Attash's defense. There needs to be a system where we
16 can track what we have and what we don't have.

17 I mean, me saying to you in the middle of trial, I
18 never received this, and then you saying, well, the government
19 has a receipt, but it was delivered to Mr. Mohammad, and then
20 me saying, well, I relied upon the good graces of Mr. Mohammad
21 to give me everything and I don't know whether they did, is
22 not the way you litigate any criminal case, let alone a
23 capital case.

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

2 LDC [MS. BORMANN]: So when it is material to the defense
3 of one, it is material to the defense of everyone, because
4 unless the government wants to sever all of the defendants in
5 this case, and they've made it very clear they don't, this is
6 a joint trial.

7 MJ [COL POHL]: Got it.

8 LDC [MR. RUIZ]: Judge?

9 MJ [COL POHL]: Yeah. Mr. Ruiz, yes, I have a question
10 for you. On the information -- come forward, please. I
11 just -- since I don't see this information, I do have a
12 question, is you received some documents that were limited to
13 your own team, correct?

14 LDC [MR. RUIZ]: Yes.

15 MJ [COL POHL]: Was there something on the transmission
16 document from the government saying only for you?

17 LDC [MR. RUIZ]: I think it was unclear.

18 MJ [COL POHL]: Okay.

19 LDC [MR. RUIZ]: So we -- we inquired with the government.
20 Ms. Lachelier actually looked at that particular discovery,
21 Judge.

22 MJ [COL POHL]: Okay.

23 LDC [MR. RUIZ]: But one thing I do want to say, this is

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1 not just Ms. Bormann's issue. She's highlighted for you two
2 discrete examples of productions that were bifurcated or that
3 were segmented amongst the teams, but this is an issue that we
4 have flagged as a significant problem for us as well.

5 When we looked at this piece of discovery, we
6 obviously thought if I were on the other side of the fence
7 where other counsel are, I'd want to be aware of that
8 information so that we could potentially act on that
9 litigation.

10 MJ [COL POHL]: I got it. I think I understand the issue.
11 I'm just curious how it's being implemented.

12 Ms. Lachelier?

13 ADC [MS. LACHELIER]: Discovery I was referring to
14 yesterday, Judge, I don't know if that is what you are asking
15 about specifically.

16 MJ [COL POHL]: No, I want to keep this generic. I'm
17 simply saying is there's certain discovery, I suspect, like
18 medical records ----

19 ADC [MS. LACHELIER]: So ----

20 MJ [COL POHL]: ---- like that the defense team themselves
21 would -- would -- may or may not have a -- a view of whether
22 they should be sending it to the other four teams. Okay. But
23 I'm talking about the generic discovery which we referred to

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1 the other day, and you indicated that you were told that this
2 is only for the Hawsawi team. And my question is: How were
3 you told that? Was it a transmission document? And what was
4 the basis for that?

5 ADC [MS. LACHELIER]: It wasn't. And I'll echo what
6 Mr. Ruiz just said. It wasn't clear. It just was a memo
7 addressed to us only. And so it wasn't clear whether we could
8 share it or not.

9 Sometimes there's an explicit e-mail that says it.
10 It's very ad hoc how it happens if you are speaking
11 generically. Sometimes there's an e-mail that says this can
12 only be shared by your team. Sometimes there's a Bates number
13 in the case of medical records that has the ISN for our client
14 and for Mr. Hawsawi. And so that -- most medical records, I
15 think, are marked that way to make it clear that it's
16 dedicated to him or about him. But in some -- in the case of
17 the specifics of yesterday, the cover sheet didn't have a
18 prohibition; it just was addressed only to us, included
19 discovery that was 10011, which is Mr. al Hawsawi ----

20 MJ [COL POHL]: Yeah. Okay. Okay.

21 ADC [MS. LACHELIER]: ---- and then discovery that
22 involved Mr. Bin'Attash. So ----

23 MJ [COL POHL]: Okay. I think I got the issue.

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1 LDC [MR. RUIZ]: I just want to say, Judge, that this is
2 not an issue that's limited just to medical records, because I
3 understand the medical record issue may be unique in the sense
4 that there are privacy issues there, and so I don't want that
5 to get lost in the translation. This is a significant issue
6 because it does involve RDI material. And as Ms. Bormann has
7 said, in a joint trial we should have access to everything
8 else that all co-accused have access to.

9 MJ [COL POHL]: I got it. I got it.

10 LDC [MS. BORMANN]: Judge, the e-mail that I referred to
11 earlier and the issue with Mr. al Qahtani, I'd like to place
12 in the record. I've given a copy to everybody. We didn't
13 have a chance yet to redact any PII, so I apologize for that,
14 but ----

15 MJ [COL POHL]: Just -- then don't submit it now.

16 LDC [MS. BORMANN]: Okay.

17 MJ [COL POHL]: Just file it.

18 LDC [MS. BORMANN]: Okay.

19 MJ [COL POHL]: I've got to get you a number for it anyway
20 because this is currently a free-standing issue. So I'd have
21 to get a number for it. So just file it -- redact the
22 material, file it, we'll give you a number, and it will be in
23 the record that way.

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1 LDC [MS. BORMANN]: We'll make sure to do that. I just
2 want to bring to your attention, though.

3 So two things on this issue: Our DS0, who also
4 doubles as our intel analyst, is -- just reminded me that the
5 government has taken the position that certain statement
6 summaries that have gone through the 505 process, so they're
7 statements that were made while interrogated in the RDI
8 torture program, are restricted to a particular defendant.

9 So for instance, we're given statements with a Bates
10 number of, you know, STA-ISN, you know, 10014, and then a
11 statement. That has never been given to any of the other
12 defendants as far as we can tell. And when -- I mean, that
13 puts everybody at a huge disadvantage.

14 So this has to stop.

15 MJ [COL POHL]: I got the issue, Ms. Bormann. I got it.

16 LDC [MS. BORMANN]: Last but not least, this issue, I
17 think, will make it clear to you.

18 So when we asked for the discovery on Mr. al Qahtani,
19 the response from the trial judiciary -- I'm sorry, the
20 government paralegal was -- their analysis was, we do not
21 believe the material is discoverable to your team as there is
22 no indication that your client and Mr. al Qahtani even knew
23 one another.

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1 So I mean, that's where we are, right? So ----

2 MJ [COL POHL]: Ms. Bormann, I have the issue three times
3 ago. I got what the issue is.

4 LDC [MS. BORMANN]: Okay. Thank you.

5 MJ [COL POHL]: Trial Counsel.

6 DDC [LtCol POTEET]: Your Honor, may I be heard?

7 MJ [COL POHL]: Okay. Colonel Poteet. I know what the
8 issue is. You've got something to add that I have not heard?

9 DDC [LtCol POTEET]: Yes, sir, and it is one discrete
10 aspect that I have not heard articulated specifically.

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

12 DDC [LtCol POTEET]: That we sometimes receive discovery
13 which is classified, for example, it might be marked
14 SECRET//NOFORN, DISPLAY ONLY to 10024, which is Mr. Mohammad's
15 ISN. And so in that context, if it's -- a statement of a
16 co-defendant or something like that, it's appropriate for
17 other defendants to have access to that document, but the
18 classification marking restricts us from being able to. So I
19 just want to add that's another aspect of this which had not
20 been articulated before, but it's very much on point.

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

22 Trial Counsel.

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

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1 MJ [COL POHL]: Good morning, Mr. Ryan.

2 TC [MR. RYAN]: The court's indulgence, sir.

3 Your Honor, I'll make the following points, which I
4 think would put the issue to rest. To the extent there are a
5 number or more of the specific instances that the various
6 counsel want to raise, I would suggest that this is probably
7 best reserved in a motion as opposed to just citing specific
8 moments in time that we really can't even respond to.

9 First, I'll say this: As far as any affirmative
10 evidence that the government will be relying upon to prove the
11 guilt or that goes to the sentencing as to these five, it has
12 all been provided to all of the teams. So things that may
13 have been specific as to the guilt of one still go to all
14 others.

15 As a general rule, the one really carveout that
16 exists as to certain discovery only going to one accused is
17 limited to what Your Honor already pointed out. We're talking
18 about specific medical records, specific DIMS records, and
19 specific DSMP records, which is the socialization process.
20 This concerns issues personal and we, you know, recognize
21 private as to specific accused. That being said, if they want
22 to come to an agreement between them that they're going to
23 share everything, we have no dog in that fight.

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1 MJ [COL POHL]: No, but Mr. Ryan -- no, I understand
2 there's no dog in that. I have a feeling that this is an
3 issue that should be resolvable.

4 If they file a motion to compel -- Ms. Bormann files
5 a motion to compel, under the automatic joinder rules, absent
6 an unjoined position, they all join in that. So why
7 shouldn't -- when such a motion is filed, that each defense
8 team get the responses?

9 What I'm hearing is that some material was provided
10 to the defense. Some -- for example, the statement issue that
11 Colonel Poteet talked about, that's limited to one accused.

12 TC [MR. RYAN]: The practice that has been in place now
13 for quite some time, literally.

14 MJ [COL POHL]: Well, yeah -- well, the fact that this is
15 just being raised to me is another issue altogether.

16 TC [MR. RYAN]: I understand.

17 MJ [COL POHL]: Neither here nor there. I'm just saying
18 going forward, is there any reason that any discovery provided
19 to Mr. Mohammad's team cannot be shared with the other teams
20 unless you have like what I would call the medical exception
21 carveout?

22 TC [MR. RYAN]: The answer is no, there is no such reason,
23 with the exception, as Your Honor pointed out; but even in

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UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT

1 that case, what they want to do between themselves is up to
2 them.

3 MJ [COL POHL]: No, but I think that falls on the
4 individual accused of whether they want to waive ----

5 TC [MR. RYAN]: Right. And the only other exception I'll
6 point out to you is the possibility, and it does exist at
7 times, where the teams can share it between themselves but
8 there will be a specific limitation on the item saying
9 releasable/reviewable only by accused A or accused B. In that
10 case, where it says that, it can't be viewed by accused D or
11 E, but the teams can look at it.

12 MJ [COL POHL]: I really don't want to get into looking at
13 all these pieces of paper, but let's use Colonel Poteet's
14 example. There's a statement by Mr. Mohammad -- that was
15 given to Mr. Mohammad, and it says display only to
16 Mr. Mohammad. Why can't it be displayed to the other accused?

17 TC [MR. RYAN]: It will be stated on it, sir. It's a
18 classification issue.

19 MJ [COL POHL]: That doesn't tell me anything, Mr. Ryan.
20 What's a classification issue?

21 TC [MR. RYAN]: That it's releasable to only certain
22 accused.

23 MJ [COL POHL]: Who makes that decision?

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1 TC [MR. RYAN]: The OCAs.

2 MJ [COL POHL]: And what's that based on?

3 TC [MR. RYAN]: Can I have a moment, sir?

4 MJ [COL POHL]: Yeah. No, no. No, but here's -- I mean,
5 I hear this all the time, and I'm not disputing that you're
6 saying this in good faith, but the OCA says it's releasable to
7 Mr. Mohammad only because the classification issue if it was
8 released to Mr. Bin'Attash or it's released to Mr. Ali or
9 Mr. Binalshibh? How does that make any kind of sense?

10 TC [MR. RYAN]: May I have a moment, sir?

11 MJ [COL POHL]: You may, Mr. Ryan.

12 [Pause.]

13 TC [MR. RYAN]: Your Honor, there comes -- the instance we
14 were just discussing comes up in this -- in this area and this
15 area only.

16 We have committed long ago in terms of RDI discovery
17 to providing all of the statements made by all of the accused.
18 For the most part -- for the vast most part, statements made
19 by each accused are provided in such a way that other accused
20 can see them as well. On rare occasions, there will be a
21 statement made that has nothing to do with any of the other
22 detainees or accused, it has nothing to do with the crimes
23 charged in this case, it has nothing to do with anything

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1 that's of an obvious mitigative aspect, but in which there is
2 still classified aspect.

3 Remember, we are doing everything we can to get to
4 down to the FOUO level, but still there are times when
5 statements made, RDI statements made, and you know this better
6 than I do, Judge, where they will still be of a classified
7 nature. In those instances, again without regard to value to
8 other teams -- it's not about other detainees, it's not about
9 the crimes charged, but it's still classified -- there is no
10 need to know for the other detainees, the other accused.

11 In those occasions, and it is rare, we will put --
12 the limitation is put on that says you cannot -- it's not
13 viewable by the other accused.

14 MJ [COL POHL]: So the OCA determines that Mr. Mohammad
15 has a need to know, but the other four don't; that's what
16 you're telling me?

17 TC [MR. RYAN]: It is recognizing of the discovery scheme
18 that we have committed to ----

19 MJ [COL POHL]: But is that -- but, Mr. Ryan, is ----

20 TC [MR. RYAN]: The answer is yes, sir. It makes sense.

21 MJ [COL POHL]: What I'm really hearing here is that,
22 although it's framed as a need-to-know issue, it really is --
23 it's nondiscoverable to the other four teams.

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1 TC [MR. RYAN]: Correct.

2 MJ [COL POHL]: Okay. So the OCA's making discovery
3 decisions?

4 TC [MR. RYAN]: No. United States is, sir.

5 MJ [COL POHL]: Okay.

6 TC [MR. RYAN]: This prosecution team is, sir.

7 MJ [COL POHL]: Well, if it's -- but where I'm struggling
8 here is if it's discoverable to Mr. Mohammad's team, why
9 wouldn't it be discoverable to the other teams? And if they
10 don't -- if it's irrelevant to them, who cares?

11 TC [MR. RYAN]: For the reason ----

12 MJ [COL POHL]: I'm trying to figure out, what are we
13 protecting here? What's the harm being avoided here that the
14 other teams -- I mean, Mr. -- there's nothing to prevent
15 Mr. Nevin telling Mr. Harrington, oh, I got this thing that
16 you didn't get, but let me tell you what's in it, is there?

17 TC [MR. RYAN]: To give you the answer to such a general
18 question is fairly difficult, sir.

19 MJ [COL POHL]: Okay.

20 TC [MR. RYAN]: To the extent there are specific occasions
21 that the teams want to raise and say, look at this, Judge.
22 This was a terrible event. We'll answer that. But to do it
23 in -- on a generalized basis, sir, is very difficult at this

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1 point. Because the equities, as you know, are very
2 specific ----

3 MJ [COL POHL]: Okay.

4 TC [MR. RYAN]: ---- and I can't even talk about them now.

5 MJ [COL POHL]: Okay. Okay.

6 TC [MR. RYAN]: As to other matters, sir, the issue of
7 videos was raised. In some instances, and the e-mail you've
8 been given is an example of it, in some instances, we have
9 very large batches of electronic discovery, correct? You're
10 aware of that. You've been told that.

11 As you see in this e-mail, when we share that,
12 sometimes just by technological limitations, we share it with
13 one team, but then we tell them that you're getting it but you
14 are encouraged or allowed or it's your choice to share it.

15 MJ [COL POHL]: Are you sending it with a piece of paper
16 to them?

17 TC [MR. RYAN]: Say again, sir.

18 MJ [COL POHL]: You are sending it with some type of a
19 submittal document, I assume.

20 TC [MR. RYAN]: There was an e-mail provided by defense
21 counsel.

22 MJ [COL POHL]: No, no. But I'm saying, when you send --
23 when you respond on this, you say, you know, attached,

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1 enclosed or whatever ----

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

3 MJ [COL POHL]: ---- is the statement ----

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

5 MJ [COL POHL]: ---- is this piece of discovery you want,
6 and is there -- why not just cc that to the other defense
7 teams ----

8 TC [MR. RYAN]: In this case it was, sir.

9 MJ [COL POHL]: ---- so they know what Ms. Bormann got?

10 TC [MR. RYAN]: In this case it was, sir.

11 MJ [COL POHL]: Okay. Okay. So -- okay.

12 TC [MR. RYAN]: Do you have this, sir? Can I ask of the
13 commission?

14 MJ [COL POHL]: Well, I told her to file it. So I've not
15 seen it yet, but it's ----

16 TC [MR. RYAN]: Well, I think if you read it, sir, you
17 will say this is a legitimate, reasonable discovery practice.

18 MJ [COL POHL]: Okay. Okay. I got it. But what you're
19 telling me is, to make sure I got -- and what I thought was
20 going to be an easily resolvable issue is not, but that's
21 okay. What you're telling me is, is that certain documents
22 are marked releasable only to individual teams.

23 TC [MR. RYAN]: Yes, sir. Releasable only to certain

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1 detainees.

2 MJ [COL POHL]: Detainees. Okay. But anything not so
3 marked is releasable to everybody?

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

5 MJ [COL POHL]: Okay.

6 TC [MR. RYAN]: May I have a moment, sir?

7 MJ [COL POHL]: Sure.

8 [Pause.]

9 TC [MR. RYAN]: One clarification, sir, and I appreciate
10 counsel pointing it out to me. In a certain situation --
11 certain situations, there may be documents provided to the
12 accused -- to a specific accused that have already been
13 brought down to an unclassified level but that still concerned
14 issues of medical treatment while in the RDI program. And in
15 those cases, again, we made it releasable to that specific
16 person. But this harkens back more to the medical issue
17 versus ----

18 MJ [COL POHL]: I got it. I got it.

19 TC [MR. RYAN]: ---- what I said.

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

21 TC [MR. RYAN]: Anything else, sir?

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: Sir, the government's representation

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1 about the way the OCA marks documents releasable to
2 individuals and that it's based on classification was not
3 accurate. I gave counsel the chance to clarify that, and he
4 did, in part. But the idea that this is related to medical
5 issues is simply inaccurate.

6 Later today in AE 538 ----

7 MJ [COL POHL]: Mr. Connell and Ms. Bormann, I thought we
8 could resolve this easily. We cannot. Okay? There's
9 different views of the statement of facts, and so we're going
10 to have to revert back to the regular order of business.

11 What I'm saying is if defense feels they need to file
12 a motion on this so we can litigate it properly, let's go that
13 way on it. Because I just -- this -- I thought it could be
14 resolved easily. It cannot be. So we can -- let's put it
15 back to the regular order of business and we can go into -- so
16 if defense feels the need to file a motion on it, we can do
17 that, we can brief it, if necessary, take evidence, and go
18 from there.

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

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

21 Well, while you're up, Mr. Connell, let's swing
22 back -- at the 802 yesterday, you indicated you wanted to
23 discuss an issue about what "particularized notice" means in

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1 the 505(g) process?

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

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: And the particular issue, we have been
5 doing our -- both the government and the defense have been
6 doing their 505 notices in a certain way when an entire brief
7 is classified for -- since 2012.

8 And I understand now that there are -- there's an
9 emerging different view of how there should be 505 notices
10 when the entire brief is classified. The question -- so what
11 we used to do -- or what we have always done -- and this is
12 both ways, right? -- the government's 505 notices and the
13 defense 505 notices, there are many more from the defense,
14 obviously, but in those situations where an entire brief, say
15 534 series, is -- the whole thing is classified, we've just
16 given notice of whatever information is either marked or
17 determined, because we -- sometimes we mark inaccurately, to
18 be classified is -- is given notice of. And essentially, if
19 you denied us the opportunity to use that evidence, there
20 would be no hearing on it at all because we can't have an open
21 hearing on -- in a situation where there's essentially no
22 unclassified information.

23 So my question to you is -- and, you know, when

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1 there's particular information in an attachment, I understand
2 what you want, greater specificity, but when the entire issue
3 is classified, I don't know how to give particular -- the more
4 particularized notice that seems to be wished for.

5 MJ [COL POHL]: The particularized notice is of the
6 classified information, right? Not necessarily -- so -- so --
7 you have a portion-marked brief ----

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

9 MJ [COL POHL]: ---- and you say, fact A; and fact A
10 supports the argument in this way. Okay. In that paragraph,
11 it's all going to be marked (C) -- SECRET, even though there's
12 one Secret fact and then there's argument after that. If --
13 I'm not limiting your ability to argue that. I'm simply
14 saying I have to know what the classified information is that
15 you want to argue.

16 So when I see a brief, I break it up into -- and this
17 is where it becomes difficult. The attachments, I think, are
18 relatively easy, because usually they are, you know, when I
19 say, hey, show me where ----

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: ---- but when you embed classified
22 information inside a brief, I just need to know what
23 classified information inside that brief is you want to refer

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1 to, because I have to make findings on the classified
2 information.

3 So I'm not precluding you from arguing a classified
4 issue. Even if the whole issue is classified, I'm not
5 precluding the argument on it; I just need to know what the
6 classified information is as opposed to what's just an
7 argument surrounding around the classified information that's
8 embedded in the brief.

9 Does that make sense?

10 LDC [MR. CONNELL]: I'm afraid I'm not following, sir, and
11 it's my fault.

12 MJ [COL POHL]: What -- I'm just trying to -- what I'm
13 saying is when I -- when you say -- let's say you have a
14 ten-page brief and it's all portion marked TS.

15 LDC [MR. CONNELL]: Right. And let me just jump in there
16 and say the portion marking is what we thought was giving
17 particularized notice. We're saying this paragraph is
18 unclassified, this paragraph is classified.

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: Half the time we don't know what in
21 that paragraph is classified because we're just using
22 follow-through markings, right? We're just doing passing.

23 MJ [COL POHL]: If you have a -- if you have a ten-page

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1 brief with every -- every paragraph is portion marked TS, and
2 you say, I want to refer to the entire brief, okay, I won't
3 stop you from doing that, okay. That's --

4 LDC [MR. CONNELL]: Okay.

5 MJ [COL POHL]: That's fine. But I may have to look into
6 it to see -- the problem it's become is, is like the one I saw
7 yesterday, is there was a TS paragraph, a TS paragraph,
8 unclassified, unclassified, and then a TS paragraph. And
9 then ----

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

11 MJ [COL POHL]: ---- the notice covered all eight. Now,
12 some of it is for context, and that's fine.

13 LDC [MR. CONNELL]: Your Honor, the notice only covered
14 what was marked as classified within the brief.

15 MJ [COL POHL]: Yeah. Okay. But my concern is only -- is
16 that when we do the 505(h) hearings, that I know what the
17 classified evidence is. If it's embedded into a brief, it
18 becomes more difficult to find. But I'm not saying I won't do
19 it, I'm just saying I just need to -- that's where I get
20 thrown off sometimes, is that you say, I want to refer to
21 everything that's in the brief, and there's a lot of
22 unclassified stuff in the brief, so it's hard to make findings
23 of what the classified -- so it's simply -- I don't think this

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1 is -- quite frankly, I don't think we're too far apart on
2 this. It's simply you provide the best notice you can and I
3 look at it. And some of your notices are way too broad for
4 me, and we've talked about those. Okay.

5 LDC [MR. CONNELL]: And with attachments, I understand.
6 This is only about the briefs.

7 MJ [COL POHL]: But in the brief you say, I want to refer
8 to the whole brief. And then I'll look at the brief ----

9 LDC [MR. CONNELL]: But I never say -- I'm sorry. I
10 apologize for interrupting, sir ----

11 MJ [COL POHL]: Sure. Go on.

12 LDC [MR. CONNELL]: ---- but we never say, I want to look
13 at the whole brief. We say the information marked as
14 classified in the brief ----

15 MJ [COL POHL]: In the whole brief.

16 LDC [MR. CONNELL]: ---- or if the government has a
17 different view of what should be, you know, is determined to
18 be classified.

19 MJ [COL POHL]: And as long as you tell me, because I can
20 read the brief and I can look at what's portion marked and I
21 know what's classified and what's not, and I can -- quite
22 frankly, can glean from paragraphs what's a fact of which is
23 the classified information as opposed to what's an argument.

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1 I can glean all of that. My only concern is when -- is that
2 if you say I want to rely on the entire pleading -- classified
3 pleading, then I expect you to rely on the entire classified
4 pleading. And that's when I ask you something -- when I ask
5 and say are you going to rely on every piece of classified
6 information in this pleading? If the answer is yes, we're
7 fine. But sometimes the answer is not yes, the answer is,
8 well, this one, that one. That's where sometimes that's
9 throwing me off. Because you have ----

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: ---- these generic notices that says
12 everything that's -- that may be classified, even in an
13 attachment; and then once we see the 100-page attachment, no,
14 it's really just these paragraphs. That's all I'm saying
15 is -- is -- a generic notice that says everything that's
16 classified in X, whether it's an attachment or a pleading,
17 is -- is adequate notice as long as you mean everything in
18 Attachment X that's classified.

19 LDC [MR. CONNELL]: I understand. Because sometimes ----

20 MJ [COL POHL]: But a lot of times it's not that. It's
21 parts of X and this part ----

22 LDC [MR. CONNELL]: True.

23 MJ [COL POHL]: ---- that's where maybe the confusion is.

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1 LDC [MR. CONNELL]: So understanding what you want,
2 sir ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: ---- with respect to briefs, how do we
5 comply? The Rules of Court set out a particular structure
6 which includes does not -- which includes lettered paragraphs
7 for facts so we can refer to, you know, 3(a) or 3(c) or
8 whatever, but that's not true for paragraphs within the --
9 within the brief.

10 How do we comply? What would you like a compliant
11 document to look like?

12 MJ [COL POHL]: Well, if you have a brief, you have a
13 classified brief -- first of all, it strikes to me, it would
14 be more -- if it's properly broken up, it's in the fact
15 section, not the argument section.

16 LDC [MR. CONNELL]: Right. But the fact section of the
17 briefs that get filed in this military commission generally do
18 not recite everything out of, you know, the hundreds of pages
19 of attachments sometimes ----

20 MJ [COL POHL]: Right.

21 LDC [MR. CONNELL]: ---- because there's a lot of
22 discovery. Generally, they are more like the core operative
23 facts and the procedural history.

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1 MJ [COL POHL]: Well, you asked what do I want.

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

3 MJ [COL POHL]: I want you to give me as much
4 particularized notice as you think you can under the
5 logistical confines of the information you want to give me. I
6 know that helps you not at all, but ----

7 LDC [MR. CONNELL]: Because that's what I thought I was
8 doing, sir.

9 MJ [COL POHL]: Yeah, but -- no, I -- generally, it's been
10 okay. But it's just like, for example -- an example
11 yesterday, there was a whole bunch of stuff, and it was
12 highlighted. Okay. As long as -- it's really not -- it's
13 partly for me, but it's also partly for the government because
14 they have the option to provide a substitute and everything
15 else, they need to know what it is. But if you say the
16 ten-page brief, every classified fact in this brief or piece
17 of classified information in this brief we wish to argue, then
18 that's particularized notice ----

19 LDC [MR. CONNELL]: Okay. Thank you.

20 MJ [COL POHL]: ---- if it's every fact.

21 LDC [MR. CONNELL]: Yes, I understand.

22 MJ [COL POHL]: Okay. Are you with me on this?

23 LDC [MR. CONNELL]: Yes.

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

2 And just to be clear on the -- on the -- what I'm
3 calling the joint discovery issue, there's no suspense on
4 that. That's just if either side believes they need to --
5 wish to litigate it any further than the current state of
6 play, then whoever has a dog in that fight needs to file a
7 motion.

8 Okay. That brings us to 524, if we have anything
9 more to hear on 524.

10 LDC [MR. CONNELL]: Sir, we listened carefully to what you
11 said yesterday about 524. We are desperate for a ruling in
12 524. Our domestic torture investigation has been frozen and
13 degrading fast for six months. We understand -- we -- we
14 filed the supplement to demonstrate the way that the
15 government's proposed workaround is not working. We will file
16 a separate motion with respect to the new restrictions they
17 have placed on us and we rest on the briefs.

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

19 Any other defense counsel want to be heard on 524 at
20 this time?

21 [No response from defense counsel.]

22 MJ [COL POHL]: Ms. Bormann.

23 LDC [MS. BORMANN]: We are in the same boat as

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1 Mr. Connell. Our investigation with respect to government
2 employees, particularly CIA, has come to a complete close.
3 You're going to hear later today on AE 528 -- actually 538.
4 528 you won't hear today because there's a motion to compel
5 the witness. But the filings are there and we would direct
6 your attention to those filings.

7 We had a witness on the Taliban records issue who had
8 agreed to talk to us and now has refused to as a result of
9 government interference. That is just the tip of the iceberg
10 and that's where we are. We -- I'm not going to repeat my
11 argument from earlier, but we believe this is an absolute
12 violation of effective representation, of due process, and of
13 fundamental fairness.

14 MJ [COL POHL]: Thank you. Any other defense counsel wish
15 to be heard?

16 Apparently not.

17 Trial Counsel, do you wish to be heard any more?

18 TC [MR. GROHARING]: Briefly, Your Honor.

19 Judge, I would just say that there's -- there have
20 been enough briefs filed. We've had enough argument on this
21 issue. It's a very important issue for the commission to
22 resolve, which I argued at the last session.

23 Quickly, defense is claiming that they're stopping

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1 their investigation as a result of not having clarity on this
2 issue. I think there is clarity. We've proposed a very
3 reasonable way forward with the proposed protective order that
4 we submitted to the commission. The defense commented on that
5 order; we argued that at the last hearing.

6 The only thing that has changed, and of which the
7 commission is already aware, is the results of that process.
8 You have those in Mr. Connell's latest sup, 524 (AAA 3d Sup),
9 you have the results of that process as far as how many CIA
10 witnesses have agreed to be interviewed by the defense based
11 on those efforts.

12 So you have everything you need right now, without
13 any additional briefs that would only prolong this to yet
14 another hearing in September before we get an order in place
15 that will allow everyone to move forward.

16 That process is working. Five CIA officers or
17 contractors -- or former officers or contractors have agreed
18 to be interviewed by the defense teams, and that goes across
19 all three defense teams. Two of those are among the group
20 that Mr. Ali had requested.

21 The government has done exactly what we said we would
22 do. We've gone back to the defense, explained what we
23 understand the scope of those interviews to be, asked them if

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1 we're off, if they would like to enlarge the scope of the
2 interview. And we're in a position to make arrangements to
3 let the defense -- to allow the defense to conduct those
4 interviews. So the process will work, assuming you have
5 parties acting in good faith to follow the process.

6 So we would ask that you issue the protective order
7 that we requested back in 525 -- 524, excuse me, S, to require
8 the parties to follow it, and to allow this case to progress
9 towards trial.

10 That's all I have, Your Honor, unless you have
11 questions for the government.

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

13 Okay. That brings us to 133RR.

14 ADC [Capt ANDREU]: Sir, the status of 133RR is that we
15 are waiting for the convening authority to conduct a technical
16 surveillance countermeasure sweep of attorney-client meeting
17 spaces. We've been waiting on that for several months now.

18 So I heard your question yesterday, sir, to me about
19 what exactly I was asking for, was I asking for an order or
20 what. And the answer, sir, is yes. To move this process
21 along, we are requesting that you order the convening
22 authority to conduct a full TSCM sweep by a non-SOUTHCOM
23 entity of all JTF-controlled attorney-client meeting spaces at

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1 Guantanamo Bay.

2 We've spoken to trial counsel; I don't believe they
3 have any objection to that. We'd be happy to prepare the
4 order or draft the order for you, sir. And we would suggest
5 that you -- that we order compliance with this at whatever
6 date you believe to be acceptable.

7 MJ [COL POHL]: Trial Counsel, do you not oppose this
8 motion? That's a simple yes or no because I got to give the
9 rest of them a chance to argue if the answer is no. Excuse
10 me. Do you oppose the motion, Mr. Ryan?

11 TC [MR. RYAN]: We've -- I can't give you a yes or no,
12 Judge. We've discussed ----

13 MJ [COL POHL]: Okay. Okay. Then stand by. I'll give
14 you ----

15 TC [MR. RYAN]: Can I discuss with counsel briefly, sir?

16 MJ [COL POHL]: Sure. Sure.

17 TC [MR. RYAN]: Maybe we can help it along.

18 ADC [Capt ANDREU]: So, Your Honor, we'll have the
19 proposed order ready a week from Monday.

20 TC [MR. RYAN]: As to the first step, sir, that being the
21 security sweep, yes, sir.

22 MJ [COL POHL]: Okay.

23 TC [MR. RYAN]: We'll weigh in and then it will be

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1 submitted to Your Honor.

2 MJ [COL POHL]: Okay. You will have it by next Monday or
3 a week from Monday?

4 ADC [Capt ANDREU]: A week from this coming Monday, sir.

5 MJ [COL POHL]: Two weeks from last Monday.

6 ADC [Capt ANDREU]: Yes, sir.

7 MJ [COL POHL]: And trial counsel -- serve it on the
8 trial counsel first if you -- then you have a week to respond,
9 and then file it with me and we'll go from there, okay?

10 ADC [Capt ANDREU]: Thank you, sir.

11 LDC [MR. NEVIN]: Your Honor, could I request a comfort
12 break, please?

13 MJ [COL POHL]: Sure.

14 The commission will be in recess for 15 minutes.

15 [The R.M.C. 803 session recessed at 0959, 25 July 2018.]

16 [The R.M.C. 803 session was called to order at 1017, 25 July
17 2018.]

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

19 All parties again appear to be present.

20 I believe that brings us to 583.

21 Mr. Harrington.

22 LDC [MR. HARRINGTON]: Good morning, Judge.

23 MJ [COL POHL]: Good morning.

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1 LDC [MR. HARRINGTON]: Judge, 583 relates to a particular
2 problem which is something that's new to us. As you know from
3 previous litigation with respect to jail conditions and issues
4 which we've raised to the court and which actually resulted in
5 an order from the court, there have been -- Mr. Binalshibh has
6 had many difficulties in the facility. And on occasion he's
7 been put in disciplinary status, or what they call dis.

8 And in that status under your protective order -- or,
9 I'm sorry, your order for legal materials, he's been allowed
10 to have one bin of his legal materials with him at all times.
11 And they also had a practice of allowing him an hour during
12 the day to go back to his own cell in order to exchange legal
13 materials or get a different -- a bin with legal materials.

14 And we're not raising any kind of issue with respect
15 to whether there should be more bins or not. They have
16 multiple bins. But the one bin is not a problem.

17 But back in April, if you recall, some issues were
18 addressed at the hearing and more motions were filed. A new
19 super-dis or dis on steroids was imposed on him where more
20 restrictions were placed on him. And we're not here to argue
21 about that, whether they had the authority to do it or not the
22 authority to do it, but we're here to argue about the
23 interference with his legal materials and his legal bin.

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1 And the change was that he was told that he could
2 have his legal bin for one hour a day, and that he could --
3 when his mail was delivered, he could have his mail -- his
4 mail from us, legal mail, for one hour.

5 MJ [COL POHL]: This was while he was in some type of
6 disciplinary status?

7 LDC [MR. HARRINGTON]: Yes. This is elevated disciplinary
8 status.

9 MJ [COL POHL]: Okay. So we're talking about he's in a --
10 and I'm making no judgments here, obviously, because I wasn't
11 there and I have taken no evidence on it. But for some
12 reason, the commander believes he committed misconduct and
13 therefore put him into disciplinary status; and while in that
14 status, elevated or otherwise, they've restricted access to
15 his legal bins.

16 LDC [MR. HARRINGTON]: Right.

17 MJ [COL POHL]: Do I got it right here, Mr. Harrington?

18 LDC [MR. HARRINGTON]: Yes. But the earlier disciplinary
19 status which he had had, there was a restriction with respect
20 to his legal materials, but -- we don't dispute that he had
21 the legal materials with him all day and he could exchange
22 them during the day.

23 MJ [COL POHL]: Okay.

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20157

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1 LDC [MR. HARRINGTON]: The new disciplinary status did not
2 allow for that.

3 MJ [COL POHL]: Okay.

4 LDC [MR. HARRINGTON]: And they put a restriction on it
5 that he could only have the legal materials for an hour during
6 the day.

7 MJ [COL POHL]: Is there any -- now, my experience in the
8 military and my limited experience with confinement
9 facilities, usually everything is done with some type of
10 written guidance or SOP. Is there any guidance or SOP that
11 you've seen that talk about the various levels of disciplinary
12 status?

13 LDC [MR. HARRINGTON]: There are SOPs with respect to the
14 disciplinary status, Judge. We have seen nothing with respect
15 to how that affects legal mail, though, even in the higher
16 disciplinary status.

17 MJ [COL POHL]: So there's -- okay. But there's an SOP
18 saying we have levels of disciplinary status?

19 LDC [MR. HARRINGTON]: Yes.

20 MJ [COL POHL]: But do the SOPs that you've seen explain
21 what limit -- what that means? I mean, disciplinary status 1
22 means you lose A, B, and C, and you're put here; disciplinary
23 status 2 means this; 3.

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1 LDC [MR. HARRINGTON]: Yes. Sure. It basically goes
2 toward taking things away from you.

3 MJ [COL POHL]: Right. Okay.

4 LDC [MR. HARRINGTON]: It does not address legal mail or
5 legal ----

6 MJ [COL POHL]: Specifically, okay. Okay.

7 LDC [MR. HARRINGTON]: But without getting into anything
8 that's classified, let me just say that this elevated
9 disciplinary status is very stark in terms of what it is that
10 he could have. Very, very limited in terms of what he could
11 have.

12 MJ [COL POHL]: Okay.

13 LDC [MR. HARRINGTON]: But, of course, while he's in
14 disciplinary status doesn't make any difference because the
15 case goes on and the hearings go on, and his rights don't go
16 away with respect to his legal materials. And, Judge, the
17 government claims in its response that Mr. Binalshibh refused
18 to take either his legal bins or his legal mail when he was
19 told that he could only have them for an hour, and therefore,
20 he waived any violation here.

21 And they also said that if he had asked respectfully
22 for a period beyond the hour, that they could approve that and
23 allow him to have things further. But they acknowledge that

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1 they never told him that, that he could have things beyond an
2 hour, because they say he refused to accept things.

3 Now, the problem there is, they come to him and they
4 say, here's your mail, you can have it for an hour, you can
5 write your responses for an hour, and that's all you have.
6 And he said, the rules say that I can have my legal materials
7 around the clock, just like I've had all the time before, and
8 I'm allowed to exchange them. And they say, no, you can't.
9 And he said, well then, I'm not taking them. It's not like
10 he's -- his refusal here is really a voluntary refusal; it's
11 not.

12 So now they claim that they didn't tell him that he
13 could actually ask for more time to have them afterwards
14 because -- because he refused them. So we've got a
15 chicken-and-egg situation about who's giving the rights here
16 and who's told what's happening.

17 MJ [COL POHL]: Mr. Harrington, are you asking that he be
18 allowed, regardless of disciplinary status, to have continual
19 access to his legal material 24/7?

20 LDC [MR. HARRINGTON]: Absolutely, Judge.

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: Absolutely. His legal -- his
23 disciplinary status really should not have any bearing on his

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1 right to counsel, his right to assist in his defense, or any
2 of his other -- of his other rights.

3 And, Judge, the -- if you carry out their suggestion
4 that he has to ask respectfully to get his -- an extra time
5 with his materials -- and I don't know where that comes from;
6 that's not in any SOP -- but I don't know how you define
7 "respectfully." And the question would become, if he had
8 those and he said, may I keep them for more time, would that
9 be respectful? If he said, I want to keep them for more time,
10 would that be respectful? If he said, get away from me, I'm
11 using my materials, would that be respectful?

12 And then the question becomes, what difference does
13 it make of what attitude he has, what he has done, what the
14 disciplinary situation is or not, because we're talking about
15 his rights to assist in his own defense.

16 And, Judge, these issues stem from, as you know, from
17 the motions and from your order, about his complaints to the
18 guard force and to the watch commanders and other people about
19 what he claims are intrusions upon him in the facility. And
20 that's how everything starts, and that's what happens when it
21 leads to him being on disciplinary status.

22 And when he hears things to him like they don't care
23 about your order or we're not going to follow your order, that

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1 triggers responses from him. And even though he has been in
2 custody for 16 years, four of them in the black sites,
3 Mr. Binalshibh still has spirit in him, and he speaks out when
4 he feels that his rights under SOPs or under any other things
5 that we've told him, rights that he has to his legal mail and
6 other things like that, he speaks out. And sometimes he
7 speaks forcefully because he feels that he has to because
8 that's the only way that he can get -- can get attention from
9 anybody.

10 But in the scheme that they have, while he's in this
11 situation -- and granted, it's the only time that this has
12 happened so far, and hopefully it will not happen again -- but
13 it is fundamentally unfair to him and fundamentally against
14 his rights that he should not be able to participate daily in
15 his defense.

16 Judge, we send him letters from various members of
17 our team every day reporting on things and telling him what's
18 going on. We get responses from him every day, sometimes to
19 individuals, sometimes to the whole team. We send him status
20 reports on motions and other things that we need his input on.
21 And even in terms of, for example, preparing this motion or
22 responding to this motion, we need his input. And we can't
23 have situations where there is a delay in that, either because

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1 he only has access to it for an hour a day, or that he has --
2 he has no access to it. And it fundamentally cripples us in
3 terms of representing him.

4 And when we were here at the last hearings, it
5 followed right after this 13-day period that he was in this
6 particular status. And we come down and we spend hours and
7 hours and hours trying to address these kind of issues, which
8 is time that really should be spent in working on his defense.

9 MJ [COL POHL]: Let me ask you this, Mr. Harrington. I'm
10 looking at 018U, paragraph 10, the written communications
11 order.

12 LDC [MR. HARRINGTON]: Yes.

13 MJ [COL POHL]: And it appears to say, only because it
14 does, that basically access to lawyer-client privileged
15 materials shall be in accordance with the JTF-GTMO SOP,
16 provided that this SOP allow the accused at least one legal
17 bin within his cell at all times, regardless of his
18 disciplinary status, with no time limit on access to the legal
19 bins.

20 Are you telling me that they -- they restricted it to
21 one bin for one hour?

22 LDC [MR. HARRINGTON]: They did, Judge. But what you're
23 reading is what -- our proposed language. The part of it

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1 that's added on at the end is what we proposed that -- to
2 modify 018U.

3 MJ [COL POHL]: Okay. Okay.

4 LDC [MR. HARRINGTON]: Had that been the order, Judge, it
5 would have been a different motion in front of you. But we
6 suggested that to the court.

7 MJ [COL POHL]: Yeah. I misunderstood. I thought it was
8 part of the order. Okay. I'm reading the government's
9 pleading. Okay. Go ahead.

10 LDC [MR. HARRINGTON]: So what that language is, Judge, is
11 what we want. And we're not trying to interfere with the
12 adjudications of disciplinary status or the rules about
13 disciplinary status or anything else like that. We're
14 focusing in this issue just on this fundamental breach of his
15 rights.

16 MJ [COL POHL]: Okay. And the last paragraph of your
17 proposed amendment says, "The accused be present when the
18 legal bins are removed or replaced." So I'm assuming we're
19 talking about two different cells here. If all the legal bins
20 are in his primary cell, for want of a better term ----

21 LDC [MR. HARRINGTON]: Right.

22 MJ [COL POHL]: ---- and he's moved to a disciplinary
23 cell, okay, and he's in -- and I adopt your language, and so

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1 he's entitled to one legal bin at all times in that cell, you
2 said the accused would be present if legal bins are moved or
3 replaced. When he says, I want a different bin, does he have
4 to be taken back to his cell and say, okay, I want that one
5 and then bring him back to the disciplinary cell, or just
6 simply go get the other one or whatever it is? I just -- that
7 language just to me is unclear as to what role -- when he says
8 "will be present" ----

9 LDC [MR. HARRINGTON]: Right.

10 MJ [COL POHL]: ---- I'm not sure what that means.

11 LDC [MR. HARRINGTON]: Right. Well, the basic order is
12 that the guard force or nobody else connected with Camp VII is
13 to look at legal materials without him -- the detainee being
14 able to see what's going on. That's the basic thing, right?

15 MJ [COL POHL]: All right.

16 LDC [MR. HARRINGTON]: That's what we're talking about
17 here. And as I explained in the normal disciplinary status,
18 like the lowest level of disciplinary status, the practice had
19 been to allow him an hour to go back to his cell, his main
20 cell, and take his bin that he has with him, go back, exchange
21 materials or whatever it is, and then when that period
22 finishes, bring back -- the guards carry it, but bring back a
23 new bin or the same bin back to the cell.

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1 MJ [COL POHL]: Okay. Okay. So basically under the
2 in-between status, what we're talking about the less-severe
3 status, he goes back -- he's allowed one legal bin at all
4 times, but he's got to go when he wants to switch it out, he
5 says, okay, you want to switch it out today, we take you back,
6 you get the one you want -- we'll carry it, but you point to
7 the one you want and now that's in his cell until he wants to
8 switch that one out?

9 LDC [MR. HARRINGTON]: Right.

10 MJ [COL POHL]: Got it.

11 LDC [MR. HARRINGTON]: And the other thing is, Judge, is I
12 mean ----

13 MJ [COL POHL]: But you're not requesting that he have --
14 and I don't know how many legal bins there are. I suspect
15 there's more than one.

16 LDC [MR. HARRINGTON]: The SOPs say they're allowed two,
17 but the camp has allowed them to have six or seven of them in
18 there.

19 MJ [COL POHL]: Okay. But what I'm saying is, you're
20 not -- and this is perhaps where I misunderstood you earlier.
21 I thought you said earlier he should be able to have all of
22 his legal bins in his disciplinary cell.

23 LDC [MR. HARRINGTON]: No, no. We're not objecting to the

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1 one bin. That's not what we're asking.

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

3 LDC [MR. HARRINGTON]: And they indicate that part of the
4 reason is for force protection in terms of putting things in
5 the cell. We're not asking for that. We're just asking for
6 one.

7 MJ [COL POHL]: Okay.

8 LDC [MR. HARRINGTON]: Part of the reason of allowing him
9 to go back is things are mixed in different bins too, so he
10 may go back and want something and he's got to search for it,
11 and all the rest of it. And he may not be ----

12 MJ [COL POHL]: So once a day can he say, I want to switch
13 this bin out for that bin?

14 LDC [MR. HARRINGTON]: Okay.

15 MJ [COL POHL]: You're not asking that, well, ten minutes
16 later I want to go back and get another bin or another bin or
17 another bin?

18 LDC [MR. HARRINGTON]: No. We're not asking for that.

19 MJ [COL POHL]: You're talking about -- okay. I got it.

20 I understand. Thank you, Mr. Harrington.

21 Although this is obviously the factual predicate only
22 as to Mr. Binalshibh, does any of the other defense counsel
23 wish to be heard on this particular issue? Apparently not.

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1 Trial Counsel.

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

3 MJ [COL POHL]: Good morning.

4 MTC [MR. TRIVETT]: The government opposes any
5 modification to 018U as being unnecessary. When we're dealing
6 with the many issues that Mr. Binalshibh brings before the
7 commission regarding the conditions of confinement, a general
8 theme usually exposes, and that's this: He'll tell his
9 defense counsel something. Defense counsel will contact us or
10 contact JTF directly. We'll inquire. And then it turns out
11 what the defense counsel was told might have a small island of
12 truth to it surrounded by an ocean of lies and omissions. And
13 that's exactly what we have here.

14 Mr. Binalshibh was on discipline and had earned over
15 a thousand days of discipline for racial abuse to
16 African-Americans and Mexican-American guards, which I would
17 not feel comfortable saying in this commission. In regard to
18 his legal bins, he refused his legal bin. He refused his
19 mail. The JTF even asked me to contact Mr. Harrington before
20 he refused his legal bin and said he's refusing his
21 legal mail, can we just put it in his legal bin, which
22 obviously wouldn't have solved the question -- the problem if
23 he was refusing his legal bin.

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1 In the end ----

2 MJ [COL POHL]: Was there a limitation on how long he
3 could keep the legal bin?

4 MTC [MR. TRIVETT]: No. And that's the omission from
5 Your Honor.

6 MJ [COL POHL]: So what you're saying is that
7 Mr. Harrington's proposed amendment wouldn't conflict with the
8 way it's being handled today; that he can get one legal bin in
9 his disciplinary cell and he can keep it there 24/7?

10 MTC [MR. TRIVETT]: Correct. So -- but there's -- that's
11 how it's done now. There would need to be no amendment to the
12 protective order to have it be done consistent with that
13 protective order.

14 So here -- here are the facts: He had one bin in his
15 disciplinary status; and that's a force protection issue.

16 MJ [COL POHL]: No, I understand that. And Mr. Harrington
17 is only asking for one bin.

18 MTC [MR. TRIVETT]: Right. So he had one bin and he could
19 not change that bin out except for every hour. So if at the
20 end of the hour he wanted ----

21 MJ [COL POHL]: Just a second. Okay.

22 MTC [MR. TRIVETT]: ---- bin number two ----

23 MJ [COL POHL]: Right.

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1 MTC [MR. TRIVETT]: ---- he could have had bin number two.

2 MJ [COL POHL]: And does he then take them back to his --
3 wherever the bins are maintained, and says, I want that bin
4 and then they bring it back to him?

5 MTC [MR. TRIVETT]: They bring it back to him, yes, sir.

6 MJ [COL POHL]: But he is let out of the
7 disciplinary cell?

8 MTC [MR. TRIVETT]: No, sir. He would be -- my
9 understanding is that he would be in the cell, they would
10 bring that bin, bin number one, back to the cell, grab bin
11 number two or whatever bin he asked for ----

12 MJ [COL POHL]: How would they know what bin to bring back
13 to him?

14 MTC [MR. TRIVETT]: I don't know if they're numbered.
15 They would eventually bring the bin that he wanted.

16 MJ [COL POHL]: Okay.

17 MTC [MR. TRIVETT]: But they wouldn't have to move him
18 through the facility, which becomes a force protection issue
19 as well.

20 MJ [COL POHL]: I got you. And you say they would do this
21 on an hourly basis, if requested?

22 MTC [MR. TRIVETT]: If requested. Absolutely.

23 MJ [COL POHL]: Okay.

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20170

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1 MTC [MR. TRIVETT]: That is the SOP. That's what they
2 would do. That's when we said, if he would have asked to have
3 the legal bin and keep the legal bin, he would have been
4 allowed to. The issue was, it never came up, because he
5 refused his legal bin and he refused his mail.

6 So if he had a misunderstanding, that was on him
7 because he didn't interact with the guards in a way that he
8 would have found that out. And that was what we put in our
9 motion. That's why we said, had he asked, he would have known
10 he would have been able to keep it.

11 So we think that this issue is a completely moot
12 point because the SOP allows them to keep the legal bin.

13 MJ [COL POHL]: So then what harm is there of adding this
14 language then if it's consistent with the current SOP anyway?
15 And that way, we don't run into a problem if a new SOP is
16 written that -- which happens sometimes, that the new guard
17 force, the new JDG commander decides he wants to change it.

18 MTC [MR. TRIVETT]: There's a couple of issues with that.
19 One, we like to keep our orders in place because that breeds
20 consistency. Two, this really is a function of the detention
21 facility. They have SOPs on this issue. They follow the SOPs
22 on this issue.

23 At some point, if we continue to write orders to

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1 people telling them to do X when they have always been doing
2 X, it tends to reflect negatively on the facility as if they
3 weren't doing X all to begin with. Right? There's issues
4 that you have to resolve, I get that. There's -- oftentimes
5 we have disagreements. This is not one of them. This is just
6 Mr. Binalshibh complaining that he was in discipline, not
7 cooperating or communicating with the guard force, and now it
8 comes before you. That's all this is.

9 And that's why we oppose any further modification as
10 simply unnecessary.

11 Subject to your questions, sir.

12 MJ [COL POHL]: I have none.

13 Mr. Harrington, anything further?

14 LDC [MR. HARRINGTON]: Judge, when I argued before, I did
15 not make any factual allegations about the reason for his
16 disciplinary status and Mr. Trivett did. I just want the
17 court to know that's a factual dispute about what the
18 underlying ----

19 MJ [COL POHL]: No, Mr. Harrington, I quite frankly
20 ignored it, because the issue is not why he was in -- the
21 issue before me now is not why he was there; it's the fact
22 that he was there and then how that was treated. So I -- to
23 tell you the truth, I -- what he did or ----

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1 LDC [MR. HARRINGTON]: And, Judge ----

2 MJ [COL POHL]: ---- may not have done is irrelevant as to
3 why he was there.

4 LDC [MR. HARRINGTON]: And if what Mr. Trivett says the
5 practice was going to be for when he is in this higher level
6 of disciplinary status, which is actually better than the one
7 that I described to you in the lower status, I wouldn't be
8 standing here.

9 He was told specifically by the SJA, here is your
10 mail, you have an hour to have it. Here is a pen and a paper.
11 I'll come back in an hour and I -- I'll take from you what you
12 have.

13 And he said, no, that's not the rule. I'm not going
14 to play by that rule.

15 And the same thing with the bins. He did not reject
16 his bins; he did not reject his mail. He was told something
17 specifically different. And the representations by
18 Mr. Trivett we dispute completely. And if the court needs to
19 take testimony of Mr. Binalshibh or bring in other guards and
20 other people that would testify to this, we would be glad to
21 present them to the court.

22 But I mean, as the court indicates, the government
23 has nothing to lose by what it is that we have proposed. It

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1 clarifies the situation if this should happen again, and it
2 puts Mr. Binalshibh in a position where he doesn't have to
3 worry about this anymore, and nobody else can say to him that
4 is either misunderstood or is misleading or is just a
5 misstatement of what the facts really are. And we're prepared
6 to present witnesses to the court.

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

8 Mr. Trivett, anything further?

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

10 MJ [COL POHL]: That brings us to 419.

11 ADC [MS. LACHELIER]: Sorry. Judge, we were brought to
12 file 419 -- a supplement to our 419, which is our motion to
13 compel medical records, and this is our second supplement, in
14 light of the government's representation in March of this year
15 at the hearings here that medical records that were created --
16 that were developed in CIA black sites were only cables and
17 that, I quote from the transcript, cables have been summarized
18 and provided to you.

19 Subsequent to our filing the supplement, the
20 government has now said that they don't deny that there are --
21 I'm trying to find the quote -- non-cable medical records that
22 exist. So the gist of our motion is non-cable medical records
23 exist, and because of that, and because of the government

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1 indicating quite clearly and throughout their pleadings, not
2 just the quote that I read here from the record, that you have
3 reviewed cables. You have not seen medical records. And the
4 summaries we have gotten are, therefore, not summaries of
5 medical records.

6 The government's trying to stand on the notion that
7 they've -- they've reviewed medical records -- I think they
8 say something along the lines of, it has reviewed all
9 identifiable medical information. It has reviewed, that is
10 the government; you have not reviewed that medical
11 information.

12 And so although I know it may pain you to think about
13 having to review more classified records, unfortunately, I
14 think that's the juncture where we are. It's patent from the
15 record, from the government's own admissions, that what
16 they've given you is not the universe of what we asked for,
17 and ----

18 MJ [COL POHL]: But did they ----

19 ADC [MS. LACHELIER]: They have ----

20 MJ [COL POHL]: Did they give you the non-cable
21 medical records?

22 ADC [MS. LACHELIER]: Non-cable med -- no, sir. No.

23 MJ [COL POHL]: No. I'm trying to figure out what

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20175

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1 universe we're talking about here.

2 ADC [MS. LACHELIER]: Medical records, actual
3 medical records.

4 MJ [COL POHL]: Yeah. But what I'm saying is that you
5 told me that the government initially said all medical records
6 are in the cable format.

7 ADC [MS. LACHELIER]: Right.

8 MJ [COL POHL]: And then subsequently they said, oh, no,
9 there's some that aren't in that format.

10 ADC [MS. LACHELIER]: Right.

11 MJ [COL POHL]: There's medical information not in that
12 format.

13 ADC [MS. LACHELIER]: And that -- well, in the closed
14 session, I can go into more detail ----

15 MJ [COL POHL]: Yeah. Okay. I don't need to ----.

16 ADC [MS. LACHELIER]: ---- as to that. I'm using their
17 words deliberately because their motion is unclassified and
18 the words they used are "non-cable medical records." So ----

19 MJ [COL POHL]: Okay. So the non-cable medical records,
20 have they given those to you?

21 ADC [MS. LACHELIER]: No. That would -- not to our
22 knowledge. This is information that presumably is actual
23 medical records that should be given to you to review if they

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1 can't for some reason provide us with medical records.

2 MJ [COL POHL]: Well, if they want to provide a summary,
3 that's -- I have to review it. But if they don't want to
4 provide a summary, I don't have to review it.

5 ADC [MS. LACHELIER]: If -- at some point, you do have to
6 see what the summary is of, right?

7 MJ [COL POHL]: No, no. What I'm saying is if the
8 government is proposing a summary ----

9 ADC [MS. LACHELIER]: Right.

10 MJ [COL POHL]: ---- I do have to see it. If the
11 government wants to hand you the original or a copy of the
12 original ----

13 ADC [MS. LACHELIER]: If they hand us an original, right.

14 MJ [COL POHL]: ---- without a summary, I don't need to
15 see -- I don't see that discovery. But to your knowledge,
16 you've not gotten ----

17 ADC [MS. LACHELIER]: As it was when we ----

18 MJ [COL POHL]: ---- and I'm going to talk to the term
19 "non-cable medical records," to your knowledge, you've not
20 gotten those?

21 ADC [MS. LACHELIER]: And again, in closed session, I can
22 elaborate in more detail what I think they're referring to
23 when they say "non-cable medical records," but they have

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20177

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1 chosen to make that -- leave that classified.

2 As it was when we filed our motion in, I think -- our
3 original motion to compel medical records in 2016, we still do
4 not have medical records from CIA black sites. So no, as I
5 interpret the term "non-cable medical records," we do not have
6 non-cable medical records, Judge.

7 In -- and as you know all too well, that what they
8 have to give us is put us in substantially the same -- give us
9 the -- substantially the same ability to make a defense,
10 and ----

11 MJ [COL POHL]: Well, that's if they give you -- that's if
12 they give you a summary.

13 ADC [MS. LACHELIER]: Exactly. If they haven't -- and
14 there are originals. The originals have not been seen by the
15 judge or by us. What has been reviewed are cables, by the
16 government's own statement, and cables and summaries of cables
17 have then been given to us.

18 Put it this way, Judge: We asked for -- we asked for
19 you to produce -- for them to produce, sorry, The Count of
20 Monte Cristo; they gave you a copy of 1984, and we got a
21 summary, the Cliff Note version of 1984.

22 So the universe is -- and they acknowledge that
23 medical records are discoverable. That they said back in --

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20178

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1 back in their original response to our motion to compel in
2 April of 2016, they acknowledged that medical records are
3 discoverable. Whatever they mean by "non-cable
4 medical records," and what we can get into more detail in the
5 closed session, we don't have those. And that means we are
6 not in substantially the same position to litigate because we
7 don't have medical records.

8 MJ [COL POHL]: Okay.

9 Trial Counsel?

10 TC [MR. SWANN]: They have all the medical records that
11 we've identified. Occasionally we might find one or two, and
12 then we will provide them to you.

13 I'll just run over -- I've got a discovery log in
14 front of me that's got three pages. They were provided with
15 896 pages of medical records as early as ----

16 ADC [MS. LACHELIER]: Yeah, Judge, I don't have a copy of
17 the log that the government's referring to. It may be
18 something they produced in discovery, but they haven't
19 produced it for purposes of this argument.

20 MJ [COL POHL]: Let's -- let us narrow it down, Mr. Swann,
21 because it ----

22 TC [MR. SWANN]: All right. I'll give you four
23 examples ----

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1 MJ [COL POHL]: ---- really doesn't make much difference
2 what you have given them; they're complaining what you haven't
3 given to them. Okay, let me ask you a question.

4 Ms. Lachelier referred to this category of documents called
5 non-cable medical records. Do you know what she's referring
6 to?

7 TC [MR. SWANN]: I know what she's referring to.

8 MJ [COL POHL]: Have they been given to the defense?

9 TC [MR. SWANN]: They've been given to the defense and, in
10 most instances, to you.

11 MJ [COL POHL]: Okay.

12 TC [MR. SWANN]: And you have ----

13 MJ [COL POHL]: Okay. Just so I'm clear on this, the
14 non-cable medical records, some were given through the 505
15 process ----

16 TC [MR. SWANN]: Some were given -- some were given
17 directly.

18 MJ [COL POHL]: Some were given directly, some were given
19 through the 505 process, so it may not be immediately clear
20 that they're non-cable medical records.

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

22 MJ [COL POHL]: Okay. I got that. So -- but you stand up
23 here to me to say, says either they've gotten a summary of

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1 them or they've gotten the originals, which I never saw?

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

3 MJ [COL POHL]: Okay. So there's no -- from your view,
4 there's no other outstanding medical records in the -- to your
5 knowledge in the possession of the United States responsive to
6 this request that they've not been given either as an original
7 or as an approved summary?

8 TC [MR. SWANN]: I think -- I think there might be one or
9 two pages. And in the 542 ----

10 MJ [COL POHL]: Okay.

11 TC [MR. SWANN]: ---- that you have not seen yet ----

12 MJ [COL POHL]: Okay.

13 TC [MR. SWANN]: ---- that relate to Mr. al Hawsawi ----

14 MJ [COL POHL]: Okay.

15 TC [MR. SWANN]: ---- and they will be provided those.

16 MJ [COL POHL]: So except for those, everything else has
17 been given to them?

18 TC [MR. SWANN]: There's nothing more I can give.

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

20 Ms. Lachelier, do you wish to be heard again?

21 ADC [MS. LACHELIER]: I'll detail more obviously in the
22 closed session, Judge, but we've gotten nothing that looks
23 like what was described in the records ----

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1 MJ [COL POHL]: Okay.

2 ADC [MS. LACHELIER]: ---- that we've given you. And I
3 can -- I should reiterate, Judge, you're supposed to see
4 originals. And the government passing on original
5 medical records and then telling you they're giving you cables
6 of that is not what the process calls for, is not what the
7 rules call for, it's not what the 505 process allows. They
8 are not the judges of what should be provided in the way of
9 medical records. And in any case, the relevance of the
10 medical records themselves has been acknowledged by the
11 government itself. They say that they're discoverable. So if
12 you haven't reviewed medical records, then there hasn't been
13 production of the proper summaries.

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

15 Mr. Swann, anything further?

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

17 MJ [COL POHL]: Okay. That brings us to 538.

18 Go ahead, Mr. Connell.

19 LDC [MR. CONNELL]: Your Honor, AE 538 was a -- is a
20 Bin'Attash motion, but the Bin'Attash team has graciously
21 agreed to let me argue first.

22 The -- AE 538 seeks, and I quote here, slowly, all
23 materials, information, and correspondence about the

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1 development of policies related to interrogation methods used
2 by the FBI on suspected al Qaeda operatives between
3 11 September 2001 and the present.

4 It is based on a 15 July 2014 discovery request found
5 in the record at AE 538 Attachment B. The motion is, in my
6 humble opinion, mistitled as Motion to Compel FBI Manual for
7 Terrorism Investigation. At the last hearing in May, we
8 discussed the scope and the sort of tension between the scope
9 of the title and the scope of the prayer for relief, and
10 essentially we all agreed to continue it to this hearing to
11 allow the parties to fully explore whatever scope might be in
12 the actual prayer for relief. So I think that is no longer an
13 issue.

14 With respect to Mr. al Baluchi, we focus on two main
15 areas of FBI policy that are important. The pre-2004 FBI
16 Policy on Interrogation and the post-September 2006 Policy on
17 Interrogation.

18 The reason why these are so important is because of
19 our fundamental approach to the question of the admissibility
20 of the January 2007 statements by the defendants which -- in
21 which has previously been articulated in this hearing is
22 essentially the United States Government had unity of effort
23 around seeking to exploit the defendants for either

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1 intelligence -- information of either intelligence and/or law
2 enforcement value.

3 So first, as the government points out in their
4 brief, they have produced a memorandum dated 19 May 2004 on
5 FBI interrogation policy, which was issued by FBI General
6 Counsel, Valerie Caproni, C-A-P-R-O-N-I, and was approved by
7 John Pistole, P-I-S-T-O-L-E, found in the record at AE 534B
8 Attachment B.

9 Itself, I agree with the government that that
10 document is important. It identifies a number of witnesses,
11 it prohibits the use of threats and coercive tactics, and it
12 explains some responsibilities of FBI agents with respect to
13 co-interrogators who are not following the prohibition on
14 coercive tactics.

15 Clearly, the April/May 2003 interrogation of
16 Ammar al Baluchi would have violated this policy if FBI were
17 involved.

18 The unclassified summaries in AE 534 (AAA Sup)
19 Attachment D describe threats and coercive tactics. And now
20 because of the BuzzFeed FOIA disclosure setting a pin in the
21 RDI index of 2 May 2003 and the SSCI report which declassified
22 the transfer from Karachi in 16 May 2003, on or about
23 16 May 2003, we now know that these unclassified summaries

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1 describe threats and coercive tactics employed prior to the
2 transfer to CIA custody.

3 STA-1886, for example, describes the use of threats
4 and sleep deprivation.

5 MJ [COL POHL]: By whom?

6 LDC [MR. CONNELL]: That's classified, sir.

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

8 LDC [MR. CONNELL]: The unclassified summary, however,
9 says -- and again, I quote slowly, During a custodial
10 interrogation conducted in mid-2003, Ammar al Baluchi was told
11 that if he did not make the decision to come forward with the
12 truth, his situation was going to change. Ammar was then
13 fingerprinted before the interview continued. Skipping down
14 the page, Ammar continued with his original stories. A little
15 further, The conversation was then abruptly stopped and Ammar
16 was told that he was lying. Ammar appeared to be somewhat
17 taken aback. He hung his head for a few moments and finally
18 said he was trying to be forthcoming but really was providing
19 all of the information he had available.

20 The unclassified summary of a cable then refers to
21 several more admonitions. And then at the conclusion of the
22 cable, it says, "After the interview, Ammar was not allowed to
23 sleep for the next 24 hours."

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1 The second -- shortly afterward, and again it's not
2 possible to pin down on a precise date because the government
3 has blurred all dates, in STA-1547, the -- there's additional
4 information about a custodial interview which occurred. And
5 then at the conclusion, there's a note that says, "Ammar
6 remains somewhat cooperative and is more off-guard as a result
7 of our," and we're going to talk in the classified section of
8 who "our" refers to, "directive for interrupted sleep.
9 However, he continues to deny knowledge of any imminent attack
10 plans."

11 Now, as it turns out, that was accurate.
12 Ammar al Baluchi did not have any knowledge of any imminent
13 attack plans and was essentially, with very minor details that
14 emerged later, being forthcoming with his interrogators. But
15 nevertheless, the CIA concluded that it was appropriate under
16 the -- or the rules that they followed at the time to render
17 him into CIA custody.

18 There is another report, MEA-10018-7252, that
19 describes in part this decision in advance of the rendering.
20 This document, Your Honor, which has a prefix of 10018, is an
21 example of one of the documents which was provided to
22 Mr. al Baluchi, which -- but was not provided to any other
23 defense team. It is marked "Releasable only to 10018," and

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1 was described earlier today as some sort of medical report.

2 The document says, "In a mid-2003 report, the
3 following information was documented. Ammar al Baluchi is
4 scheduled to be transferred to a new facility. Upon arrival,
5 he will be processed and the interrogation will begin
6 immediately. Ammar is believed to have critical, perishable
7 information, including possible information on pending
8 terrorist attacks; therefore, it is imperative that we move
9 quickly," we'll talk again about who "we" is, "to obtain the
10 information from him. Ammar has been noncooperative during
11 multiple questioning sessions, and it is anticipated he will
12 continue with the non-cooperative posture unless enhanced
13 techniques are implied."

14 Skipping down, "Depending on" the condition -- "his
15 condition, he may also be bathed following the shaving, and he
16 will then be interviewed. Until we receive additional
17 information regarding Ammar, we do not plan enhanced
18 techniques against him unless directed by Headquarters.
19 However, we will employ the nonenhanced technique of standing
20 sleep deprivation for less than 72 hours."

21 We also -- "We'll also conduct an initial
22 interrogation session with Ammar upon arrival to determine his
23 resistance level. If he is noncooperative, he will be

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20187

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1 immediately placed in the standing sleep deprivation position
2 for circa 12 hours before conducting the next interrogation
3 session."

4 Now these cables, or the summaries of cables written
5 in bureaucratic-speak, show a great deal of information about
6 the pre-rendition planning involved with Mr. al Baluchi.
7 There are references to the use of sleep deprivation, the
8 effectiveness of sleep deprivation in extracting information
9 from Mr. al Baluchi. There's a reference to bathing, which we
10 now know means drowning in ice water. There's a reference to
11 standing sleep deprivation, which we now know means chaining
12 someone to the ceiling and beating them every time that they
13 fall asleep.

14 MJ [COL POHL]: Mr. Connell, let me kind of focus on what
15 you're asking for.

16 LDC [MR. CONNELL]: Yes, sir. I'm getting there.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: In fact, I'm there right now.

19 MJ [COL POHL]: Good.

20 LDC [MR. CONNELL]: Yes. So as an example ----

21 MJ [COL POHL]: Well, there's two separate motions here.
22 There's yours and there's Ms. Bormann's.

23 LDC [MR. CONNELL]: No, sir. It's all one motion.

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1 MJ [COL POHL]: Okay. They filed a motion requesting
2 certain things.

3 LDC [MR. CONNELL]: Yes, which I quoted at the opening of
4 my argument this morning.

5 MJ [COL POHL]: Okay. And your motion, unless I'm
6 misreading it, your 538C (AAA) of 5 January '18 seems to ask
7 for some other things, too.

8 LDC [MR. CONNELL]: So here's ----

9 MJ [COL POHL]: The reason why I'm getting into this is
10 there's a government response to some of the issues that
11 Ms. Bormann raised and -- but that does not -- I mean, did you
12 ever get an exact response on your requests?

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

14 But what the government did -- let me break that
15 apart in a few ways.

16 The first is that the -- what really happened was
17 that there was a prayer for relief in 538, which I quoted at
18 the beginning, which is the materials related to the FBI
19 interrogation policy.

20 MJ [COL POHL]: Right.

21 LDC [MR. CONNELL]: The Bin'Attash team gave some examples
22 of what they thought might fall under that, one of which is
23 the 19 May 2004 memo that I was just describing.

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1 Then in 538C, we gave examples of what we thought
2 would fall under there, which is what you say something else.

3 The -- and at the last hearing, to avoid any
4 confusion or any prejudice to any party on this question, we
5 deferred argument on 538 so that if anybody had -- you know,
6 for example, if the government wanted to produce additional
7 information or the government wanted to address the scope
8 question, anyone could do that. Nobody filed anything else on
9 that topic, so essentially it is ripe for decision now, in our
10 view.

11 MJ [COL POHL]: Okay. But just so -- but some of these
12 things are in different categories. That's -- what I'm
13 saying, is the government on some of the stuff says it was
14 never promulgated, the author never sent it out; therefore,
15 it's irrelevant. And other documents postdate the
16 interrogation; therefore, they're irrelevant. And then
17 there's some stand-alone things in which they just didn't
18 respond. You understand the three different categories,
19 but ----

20 LDC [MR. CONNELL]: I do. I'm ----

21 MJ [COL POHL]: And Ms. Bormann responds to the -- the
22 author never signed it and the postdated stuff as ----

23 LDC [MR. CONNELL]: Right. This is on the cultural issue.

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1 MJ [COL POHL]: The cultural issue. So that's one box,
2 but let's kind of move that one to the side. Because the bulk
3 of yours, and quite frankly hers to a degree, are much more
4 expansive.

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

6 MJ [COL POHL]: So you've got -- except for that one memo
7 you referred to, you've got nothing ----

8 LDC [MR. CONNELL]: No, sir. There's a second memo that
9 the government produced which I'm going to address.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: And I want to give them credit for
12 what they have produced and show how the things that they have
13 produced are important and demonstrate the existence of other
14 documents. So let me do that now.

15 MJ [COL POHL]: Go ahead.

16 LDC [MR. CONNELL]: So, for example, with respect to that
17 19 May 2004 document that the government produced and which is
18 found in the record at AE 534B Attachment B, the -- whether
19 that policy applied to interrogation of Mr. al Baluchi in
20 April and May of 2003 is important to our motion to suppress
21 which is forthcoming, to our motion to dismiss for outrageous
22 government conduct which is forthcoming, because according to
23 the text of the 2004 memo, it, quote, serves as a reminder of

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1 existing FBI policy.

2 And we have looked for the existing FBI policy.

3 There is a 1997 document that was released under FOIA; we
4 don't know whether that was the existing policy in 2004 or
5 not. And, of course, whether the FBI was involved in the 2003
6 interrogations is a separate issue which I'm not addressing,
7 confirming, or denying anything.

8 But to show how important even the people who were
9 involved thought that the question surrounding -- like the
10 policies surrounding this 19 May 2004 memo were, that the day
11 after that memo, on 20 May 2004, some unnamed person, probably
12 an FBI special agent, shot back a separate memo pointing out
13 all the unanswered questions in the 19 May memo. That 20 May
14 memo is found in the record at AE 538C Attachment D.

15 And all of those questions were about adjacent abuse,
16 co-interrogators, interrogation after abuse, interrogation
17 before expected abuse, and abuse -- interrogation in
18 facilities that were otherwise abusing prisoners.

19 These are the exact same questions, the same policy
20 questions that are important that, for the military commission
21 in the motion to suppress, the motion for outrageous
22 government conduct -- to dismiss for outrageous government
23 conduct, and eventually the members will need to assess any

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1 hypothetical FBI participation in the interrogation.

2 So what documents are known to exist? What can we
3 say exists that is responsive? We identify three of them in
4 538C. The first are documents relating to a meeting between
5 CIA attorney John Rizzo and FBI Chief of Staff Daniel Levin on
6 or about 13 July 2002.

7 The second is communications between FBI Director
8 Robert Mueller and CIA Director George Tenet in 2003 regarding
9 FBI access to CIA detainees.

10 And third are documents relating to a 15 and
11 16 May 2003 FBI conference on CIA reporting from the
12 interrogation of -- from Mr. Mohammad during the most
13 egregious period of his torture.

14 Now, let's talk about why these documents are
15 important, these categories of documents. The FBI clearly
16 participated in the black site interrogation of Abu Zubaydah.
17 It's well documented. The SCI -- SSCI executive summary of
18 the torture report documents at pages 24 to 25 that in
19 March 2002, Abu Zubaydah was questioned by FBI special agents.

20 Now, the sort of public narrative that has been put
21 out there by interested parties is that the FBI walked away
22 from those interrogations and did not show up again until
23 2007. But even the SSCI report itself belies that

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1 interpretation. It states that on 12 April 2002, two onsite
2 FBI agents opted out of the interrogation. That's the
3 walk-away.

4 But what happened then? On 13 April 2002, according
5 to the SSCI report, the CIA implemented its, quote, new
6 interrogation program, which we have learned to our horror
7 what that means. And then three days later, after
8 16 April 2002, according to pages 29 to 30 of the SSCI report,
9 the FBI agents re-joined the interrogation after the
10 implementation of the new interrogation program. So we -- the
11 sort of public idea that the FBI has walked away and was no
12 longer involved is not accurate.

13 Now, with respect to the specific documents. On
14 13 July 2002, we know that CIA attorney John Rizzo met with
15 the FBI chief of staff, Mr. Levin, regarding interrogation
16 policy. And the SSCI report, in fact, identifies specific
17 documents which exist and should be turned over in discovery.
18 One of those, for example, is Director, and then there was
19 redacted section, and then we have the identifier 031357Z
20 August '02. That document is a memorandum, sort of a MFR, a
21 memorandum for record, about what happened during that
22 meeting. And there's serious debate in the public sector over
23 what was said during that meeting.

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1 Mr. Rizzo gave his version to the show FRONTLINE, and
2 a transcript of his statement about this meeting is found in
3 the record at AE 538C Attachment B.

4 The FBI, no doubt, has its own version. But we need
5 the documents which describe FBI policy not just before the
6 19 May '04 memo, but before the April 2003 interrogation of
7 Mr. al Baluchi, which FBI policy would, at the very least, be
8 reflected in the meeting minutes from -- or the MFR from that
9 CIA/FBI meeting.

10 Now, the second and third known documents that I --
11 relevant documents that I describe, the communications between
12 FBI Director Robert Mueller and CIA Director George Tenet, and
13 the documents related to the 15-16 May 2003 FBI conference on
14 CIA reporting relate to the period of most intense
15 interrogation of Mr. al Baluchi, 2003.

16 Let's walk through what happened, what we know in the
17 open source that points to the existence of responsive
18 documents which the government has not produced. On
19 1 March 2003, Mr. Mohammad was taken into custody. This was a
20 huge media event. His family did not know where to find
21 information about Mr. Mohammad, but apparently everyone else
22 did, because the CIA was distributing to the intelligence
23 community and the FBI in fast and furious reporting.

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1 On 5 May 2000 -- 5 March, excuse me, 2003, Majid Khan
2 was taken into Pakistani custody. The FBI FISA surveillance
3 showed a connection to a third person, Iyman Faris. I know
4 this is going to get a little complicated, but to understand
5 the complex interweaving between the FBI, the CIA, and the DoD
6 on this, you have to sort of follow these notes. And on the
7 6 March, the next day, 2003, the FBI reopened its
8 investigation into Iyman Faris, which was in Ohio.

9 Now, on -- what we know from the SSCI report -- so we
10 have three players there right now. We have Mr. Mohammad, we
11 have Mr. Khan, and we have Mr. Faris.

12 About two weeks later on 17 March 2003, the SSCI
13 reports documents that Mr. Mohammad was shown photos of
14 Iyman -- FBI investigation of Iyman Faris and of the
15 interrogation from Majid Khan and was interrogated about
16 Mr. Khan and Mr. Faris.

17 We think -- I think, I shouldn't say "we" -- I think
18 that that interrogation is probably documented in the
19 discovery at MEA-STA-3713 through 16, but it's impossible to
20 know -- to be sure, because we don't have the dates, the
21 identifiers, the author, or the distribution because the
22 government has stripped all of those things out. But if it
23 was not generated by the FBI, then it at least went to the

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1 FBI, I posit.

2 The next day, 18 March 2003, they interrogated --
3 someone interrogated Mr. Mohammad more about Mr. Khan and
4 Mr. Faris. That is probably MEA-STA-3723 through 24, but
5 again, it's impossible to know. Again, if that information
6 was -- at least went to the FBI.

7 Now, the reason why we know that is that two days
8 later on 20 March 2003, the FBI provided additional reporting
9 to the CIA about Mr. Faris, the subject of the -- that on
10 which Mr. Mohammad was being interrogated. And as far as I
11 can tell, the government has not produced any summary of that
12 information.

13 This is at the height of torture of Mr. Mohammad,
14 which we know because Mr. Rizzo in his statement to Frontline
15 says that by 24 March 2003, the waterboarding of Mr. Mohammad
16 had continued longer than Mr. Rizzo, a hardened CIA attorney,
17 quote, thought humanly possible.

18 That same day -- that same day, 24 March 2003, that
19 waterboarding, the 15th waterboarding session of Mr. Mohammad,
20 FBI agents interviewed Majid Khan in, quote, foreign
21 government custody, which we have identified and will discuss
22 in closed session.

23 Mr. Khan implicated Uzair Paracha, the fourth player

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1 in this; Saifullah Paracha, the fifth player; and Ammar
2 al Baluchi, the sixth player in this complex interweaving of
3 between CIA and FBI information. Again on that same day,
4 24 March, 2003, the FBI investigation of Mr. Faris was
5 reported to the CIA. And the CIA, according to the SSCI
6 report, used FBI and foreign reporting to, quote, box in
7 Mr. Mohammad.

8 This is the infamous -- this was used extensively by
9 the CIA to defend its enhanced interrogation measures in 2014
10 and 2015 when this was debated. This is the boxing in of KSM
11 using FBI information.

12 It was during his 15th waterboarding session that
13 this alleged boxing in took place, and it is probably
14 contained in the -- in the discovery at MEA-STA-3740. And
15 assuming that that's true, which I think it is -- it's again
16 impossible to tell because the government stripped so much
17 information -- but at that time, that is when Mr. Mohammad,
18 according to the government, implicated Mr. Khan,
19 Mr. al Baluchi, and the elder Saifullah Paracha.

20 This information, I believe, was then reported out to
21 the FBI, and on 28 to 30 March 2003, the FBI interrogated the
22 person that four days earlier Mr. Mohammad had identified,
23 Uzair Paracha, in the United States. A declaration from an

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1 FBI agent describing that interrogation is found in the record
2 at AE 538C Attachment C.

3 And the SSCI report notes that the CIA records
4 show/include FBI information which shows this information flow
5 in the ordinary intelligence cycle between all of the members
6 of the intelligence community. The idea that there was a
7 separation between the FBI and the CIA on this topic is
8 illusory and makes it so important for us to have these
9 documents which we're seeking to compel about actual FBI
10 policy on interrogation during this time.

11 Now, what happened with all this? We just went over
12 this complicated nest of interrelationships. What happened
13 with that information? How do we know what the FBI did with
14 it? Well, according to the SSCI report, we know that on
15 24 April 2003, the head of the FBI, Director Mueller, sought
16 direct FBI access to Mr. Mohammad.

17 And according to the SSCI report, Director of Central
18 Intelligence Tenet made a personal commitment to
19 Director Mueller that access would be forthcoming. But what
20 about documents? Is that documented or is that just something
21 the SSCI report came up with?

22 At pages 93 to 94 of the SSCI report, the footnote
23 cites three particular e-mails between Director Mueller and

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1 Director Tenet or about their conversations. We clearly need
2 those documents as demonstrating -- as part of our effort to
3 demonstrate FBI/CIA cooperation around black site
4 interrogation.

5 Now, where does Mr. -- at this point, Mr. al Baluchi
6 enters the story. Five days later, Mr. al Baluchi is
7 kidnapped by authorities and the -- and questioned in Karachi
8 by foreign government authorities. The SSCI report says that
9 CIA officers monitored that -- those -- by CCTV. That is
10 found at page -- in the SSCI report at page 243, notes 1378
11 and 1379.

12 Now, I told you on Monday how important the
13 declassification of those dates in the document obtained by
14 Mr. Leopold of BuzzFeed was, and this is where that comes into
15 play. Because at this point, there is a 2 May 2003 cable,
16 which is found at AE 534 (AAA Sup) Attachment E dated --
17 Subject: Eyes Only, 2 May 2003 Ammar al Baluchi Interview
18 released under FOIA.

19 It is also -- and we talked about the substituted
20 version on Monday, but the substituted version is MEA-STA-1540
21 contained in the record at AE 534AAA Attachment D. And
22 that -- the document released under FOIA, but not the version
23 provided by the government in discovery, states that "A

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1 redacted officer actively participated in planning -- actively
2 participated in planning that interrogation." So that's the
3 interrogation that you asked me earlier "who was the
4 interrogator." Right? So I told you that it was classified
5 who the interrogator was, but the declassified fact is that
6 the CIA actively participated in the planning.

7 Now, the next thing that happens after that is the
8 15-16 May 2003 FBI conference on CIA reporting. Now, the idea
9 that the FBI was somehow keeping themselves clean is utterly
10 belied by the fact revealed by the SSCI report that not only
11 are they receiving FBI/CIA reporting and contributing to the
12 intelligence cycle themselves, but they consider it
13 sufficiently important that shortly after the time that
14 Director Mueller went personally to Director Tenet to try to
15 get access to Mr. Mohammad, the FBI has a conference about it.

16 I mean, they set up a conference room, they put out
17 an agenda, and they call a bunch of FBI special agents there,
18 and they together go over the reporting which is taken from
19 Mr. Mohammad under torture. Surely that is information that
20 we need that is responsive.

21 Now, the final piece of this is that two months --
22 just under two months later on 5 July of 2003, Saifullah
23 Paracha is detained in an operation, and according to the SSCI

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1 report, orchestrated by the FBI, but held in U.S. -- in DoD
2 custody at Bagram and then later at Guantanamo. During that
3 time he is questioned, of course, about Mr. al Baluchi.

4 Now, why is all of this information important, these
5 three clearly responsive categories that I've identified? In
6 Mr. al Baluchi's view, there are three broad areas which we
7 are working to litigate pretrial regarding torture. The first
8 of those is outrageous government conduct. One aspect of that
9 is, did the government follow its own rules. I cited to you
10 earlier from three documents -- summaries provided in
11 discovery which outline essentially the fact that Ammar
12 al Baluchi was provided -- providing all of the information
13 that he had available to him to his interrogators, but the CIA
14 issued a cable saying that it was going to render him anyway
15 because it mistakenly thought that he had other threat
16 information.

17 That makes the pre-2004 FBI interrogation policy
18 particularly important, because the question is -- one of the
19 questions in outrageous government conduct is did the
20 government follow its own rules.

21 The second broad area that we will seek to litigate
22 pretrial regarding torture is voluntariness. That is the
23 question that has been articulated ----

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1 MJ [COL POHL]: You say did the government follow its own
2 rules if -- if the CIA was interrogating them in accordance
3 with the legal guidance they got from DoJ, okay -- and again,
4 I'm not saying that they did or they didn't, I'm simply saying
5 there was EIT ----

6 LDC [MR. CONNELL]: You're saying if they did that?

7 MJ [COL POHL]: Yeah, the EITs that they implemented ----

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: ---- had gone through some type of review.

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: Whether it was right or wrong, good legal
12 advice, that is another issue.

13 LDC [MR. CONNELL]: Right. I understand the question.

14 MJ [COL POHL]: But if the FBI rules are more restrictive
15 than the CIA rules, for want of a better term, would then that
16 mean that the rules weren't being followed when the
17 interrogations took place?

18 LDC [MR. CONNELL]: I understand the question. I'm going
19 to answer it as best as I can in an unclassified session, but
20 I'll give you a more specific answer in a classified session.

21 The first part of your question is if the CIA
22 followed the rules that they had set forth under their own
23 review. It's clearly our position that is not what happened,

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1 and we have substantial support in the discovery. We'll be
2 bringing that forward in the outrageous government conduct.
3 The CIA violated the Presidential Memorandum of Notification.
4 It violated its own regulations around EITs.

5 MJ [COL POHL]: The focus of this is the FBI. That's my
6 question.

7 LDC [MR. CONNELL]: I was trying to answer the question
8 fulsomely.

9 MJ [COL POHL]: But I'm not wanting to litigate whether
10 they actually did or didn't ----

11 LDC [MR. CONNELL]: Right.

12 MJ [COL POHL]: I am just saying, if there's two sets of
13 rules, one being more restrictive than the other, if the delta
14 in between was being followed by FBI agents, is that a
15 violation of FBI policy even though it complied with CIA
16 policy, therefore would be outrageous government conduct?

17 LDC [MR. CONNELL]: Exactly. So I'm going to break that
18 apart. The first is, part of it depends on who's actually
19 doing the interrogation. Right? The CIA is not covered by
20 FBI interrogation policy. Only the FBI is covered by
21 interrogation policy. So it matters who's doing the
22 interrogation. We're going to come back to that.

23 The second piece of that is, that is a -- the

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1 question that you asked about co-interrogators is exactly the
2 question that was framed in the 20 May 2014 response to the
3 19 May -- excuse me -- 20 May 2004 response to the 19 May 2004
4 memorandum that is found within the record at AE 538C
5 Attachment B.

6 So what that special agent -- and I think it was a
7 special agent -- what that special agent wanted to know was
8 the same question that you just asked. All right, so I have a
9 co-interrogator, they're bound by different rules; what does
10 all of this mean? And those are the gaps that were left open
11 by the 19 May 2004 policy that the government produced. And
12 the answer that the question that you just asked is the same
13 answers that we're trying to obtain in this motion, that what
14 was FBI policy around other people's abuse, like it -- was it
15 okay as long as it wasn't the FBI who hit them, or the FBI who
16 ordered the sleep deprivation?

17 Or what about if -- you know, we know the FBI
18 interrogated Mr. Saifullah Paracha in Bagram, for example, at
19 a DoD facility. What about if the DoD is being bound by
20 different rules than the FBI is? What is the FBI
21 responsibility in that situation? What if, as exactly is
22 documented in the discovery with Mr. al Baluchi, Mr. -- the
23 detainee was going to be transferred from one set of

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1 interrogators to another set of interrogators, and that second
2 set are known to be more brutal. Can the first set make
3 threats around that? Those questions that you're -- the sort
4 of -- that you just framed are exactly the discovery that we
5 need because I know -- you having thought of it, me having
6 thought of it, I know that the members are going to be asking
7 the same questions.

8 And when it comes to a motion for it to dismiss for
9 outrageous government conduct or a motion to suppress, I want
10 to be able to give you a better answer to the question that
11 you just framed. That's what discovery is all about.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: I was in the process of describing our
14 second reason why this is legally important, which is about
15 the voluntariness claim. Voluntariness is well-known to, you
16 know, to the military commission and to litigators.

17 But there's a third claim that we intend to advance
18 as well. And just so you know, we have -- are paying close
19 attention to your orders, and we know that your -- we followed
20 your order in 502. We understand your order in 502 that we're
21 not going to be allowed to litigate the hostilities portion
22 until we file a motion to suppress. So we are working as fast
23 as we can using the resources that are available to us to

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1 prepare that motion to suppress.

2 There are likely to be -- as I said, there's going to
3 be a motion to dismiss for outrageous government conduct,
4 which is not a motion to suppress, but it is based on torture.
5 Second, there will be the voluntariness motion, which includes
6 948r and all the pieces that come under that. And then third
7 will be the motion to suppress based on procedural protections
8 like presentation to a neutral judicial decision-maker, access
9 to counsel, Miranda, et cetera.

10 For that third motion, the second of the two motions
11 to suppress that we intend to file, this FBI information is
12 especially important, both the policy after 19 May 2004 and
13 the policy before 19 May 2004. That memorandum describes a
14 sliding scale of protections. It says, you know, in some
15 situations a detainee may be entitled to Miranda warnings and
16 in others not.

17 That's the same sliding scale of protections that
18 Special Agent Perkins relied on when she testified in December
19 of 2017 about the distinction -- and this was in response to a
20 question from you, sir -- about the distinction between a
21 criminal interrogation and a military commission
22 investigation -- interrogation. That's found in the
23 transcript of 6 December 2017 at pages 17669 through 70, and

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1 on 7 December 2017 at 17965 through 67. So this is not some
2 hypothetical idea. These questions that are framed up by this
3 538 are the same questions that are important to be asked of
4 the FBI agents and are the same ideas that have actually been
5 relied on by the FBI agents in trying to explain why they
6 thought access to counsel wasn't important and Miranda
7 warnings weren't important. Those policy documents will be
8 critically important in our cross-examination of Special Agent
9 Fitzgerald and Special Agent Perkins, who directly
10 interrogated Mr. al Baluchi.

11 So the last set of known relevant documents is
12 related directly to the January 2007 interrogation that I just
13 described. The first of those is a 29 November 2006
14 interagency meeting memorandum which decided the policy that
15 would be applied to these men in January of 2007. We have a
16 redacted agenda. It's only slightly redacted. The agenda is,
17 I think -- since it was released under Freedom of Information
18 Act, we do need to see what's under the redaction, but the
19 redactions are fairly minimal. And that is found in the
20 record at AE 538C Attachment E.

21 But there is a redacted memorandum for record found
22 in the record at AE 538C Attachment F that absolutely must be
23 produced, critically important to the military commission's

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1 decision about admissibility of the January 2007 statements.

2 So let's look at the interagency meeting that
3 occurred on 29 November 2006. The agenda frames a number of
4 questions that the CIA, the Department of Justice, the DoD,
5 and others were addressing. Interestingly, the FBI did not
6 have anybody at this meeting, which means that there's a chain
7 of communication between the FBI passed up to the DoJ and then
8 back down to the FBI, meaning that we know that there are
9 additional documents there.

10 But there are really four questions that were debated
11 in that meeting. One, what security clearance would people
12 need? Would it be SCI or would it be CODEWORD? We know that
13 the decision for CODEWORD has had an incredible impact in this
14 case on personnel, on handling of classified information, on
15 filing. It had an enormous impact on attorney visits, for
16 example. You know, it has been testified that there are
17 restraints placed by security clearance on staff that are the
18 reason why we can't all have a meeting at the same time. They
19 also address the media policy, which has been extremely
20 important to public trial as well as the access to the public.

21 And then finally, they addressed who else was going
22 to have access to these detainees. And you have to remember
23 that in -- on 29 November 2006, the CIA was in operational

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1 control of Camp VII, so they were essentially still CIA
2 prisoners. And so they asked, is there going to be access by
3 joint FBI-CITF interrogation team? Which is what actually
4 happened. Is there going to be access by other agencies? I
5 don't know if that actually happened or not. Is there going
6 to be consular access by foreign officials? The answer to
7 that was no, which is an important part of our voluntariness
8 claim. Access to counsel -- or excuse me, our procedure
9 claim. Access to consul, C-O-N-S-U-L, as well as access to
10 counsel, C-O-U-N-S-E-L. And finally, they asked, is there
11 going to be an attorney? Is there going to be a right to
12 counsel for these men in advance of their interrogation?

13 All of these are especially important because they
14 were not DoD prisoners at the time. The CIA was in
15 operational control of them.

16 We have interviewed quite a number of witnesses
17 around this, and no one admits to remembering what was
18 actually decided at this 29 November 2006 meeting, which makes
19 the documents especially important.

20 So what document are we talking about? We're talking
21 about the redacted memorandum for record found at AE 538C
22 Attachment F. We need that document unredacted and we need
23 the other documents which are related to it. The unredacted

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1 portion of that says that a law enforcement team -- and let me
2 tell you how important that phrase "law enforcement team" is
3 when you look at Special Agent Perkins' distinction between a
4 law enforcement interrogation and a military commissions
5 interrogation. But a law enforcement team will be allowed to
6 question Mr. al Baluchi and others for a, quote, historical
7 narrative interview.

8 Now, I had never -- I never have known what a
9 historical narrative interview is. I have never heard that
10 phrase before. It's not one that has come up in my criminal
11 practice. So we papered numerous government agencies with
12 FOIA requests for information about historical narrative
13 interviews. Like, what was that? What were they? How do
14 they occur? And all of them replied saying that they had
15 no -- that they had searched and they had not found the phrase
16 "historical narrative interview." They didn't have any
17 information about that.

18 So that makes the -- we've exhausted our other
19 attempts to get information, but it makes the government's
20 discovery duty especially important.

21 But the other thing that that redacted MFR does is it
22 gives control of access by others, probably in -- this part is
23 redacted, but probably including defense counsel, to whom?

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1 The prosecution. Which means that the prosecution, according
2 to this MFR, was directly involved in deciding whether the
3 defendants would have access to counsel or not, as guaranteed
4 by the United States Constitution.

5 So how was that -- so we know that there was a policy
6 decided on 29 November 2006. What about the implementation of
7 that policy?

8 MJ [COL POHL]: Mr. Connell, how much longer?

9 LDC [MR. CONNELL]: I'm on my last page, sir. I have five
10 more minutes.

11 MJ [COL POHL]: Okay. Okay. Because I'm going to take
12 another break.

13 LDC [MR. CONNELL]: Yes, sir. We have one example of
14 policy implementation in the 10 January 2007 memorandum from
15 FBI general counsel, which is found in the record at 502XX
16 (MAH). We know that there was no FBI representative at the
17 29 November 2006 meeting, which means there have to be
18 communications around this. For the implementation of the
19 November -- the 29 November meeting to make its way to FBI
20 general counsel, there have to be communications responsive to
21 this discovery request.

22 And we think that that's important because it shows
23 the linkage between the Office of the Chief Prosecutor, the

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1 FBI, and the CIA. It shows the access of interrogators from
2 the FBI to CIA material, and it shows the policy denial -- the
3 policy of denial of access to counsel, which is especially
4 important when we come to litigation under
5 Missouri v. Seibert, because whether there's a policy in place
6 is a critical factor in the suppression analysis.

7 We know about the existence of additional documents.
8 Special Agent Perkins testified about a briefing which she
9 attended, which would certainly have materials. And taken as
10 a whole, all of the information that I've described here is
11 critically important on our -- one of our core theories of
12 defense, to demonstrate the FBI/CIA/DoD linkages for pretrial
13 and trial litigation.

14 Thank you.

15 MJ [COL POHL]: Thank you, Mr. Connell. We'll take a
16 15-minute break.

17 The commission will be recessed until 11:46.

18 [The R.M.C. 803 session recessed at 1133, 25 July 2018.]

19 [The R.M.C. 803 session was called to order at 1158, 25 July
20 2018.]

21 MJ [COL POHL]: The commission is called to order.

22 All parties again appear to be present that were
23 present when the commission recessed.

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1 Mr. Nevin, you are standing.

2 LDC [MR. NEVIN]: May I be heard on this?

3 MJ [COL POHL]: Sure. I didn't know whether Ms. Bormann
4 wanted to be heard also, since she had actually filed the
5 original motion. I was going to kind of give her first
6 choice.

7 LDC [MS. BORMANN]: If Mr. Nevin wants to go before
8 Mr. Montross, that's fine with us.

9 MJ [COL POHL]: Okay.

10 Go ahead, Mr. Nevin.

11 LDC [MR. NEVIN]: It won't take me long, Your Honor. But
12 I just wanted to add to, from our standpoint, I believe
13 there's an additional reason why that material that's
14 requested in discovery and that the motion was about is
15 relevant, and that is to -- an argument about speedy trial.

16 And while I know there's no statutory speedy trial
17 provision in the Military Commissions Act, there is, of
18 course, a speedy trial act within the Constitution.

19 It's okay for me to continue?

20 MJ [COL POHL]: I think so. I think that's just telling
21 us it's 12:00 ----

22 LDC [MR. NEVIN]: Okay.

23 MJ [COL POHL]: ---- for those who don't have watches.

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20214

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1 But go ahead.

2 LDC [MR. NEVIN]: All right. So -- and this
3 is Barker v. Wingo and its progeny. And one of the factors
4 for determining whether or not there is a speedy trial problem
5 is the nature of the confinement or the circumstances of the
6 defendant during the period of delay.

7 And, you know, in the ordinary -- in the ordinary
8 case, the defendant is held in a jail; it's a few days or it's
9 a few weeks. But here we have, of course, the extraordinary
10 situation in which the defendants are not only held
11 incommunicado for a period of some three and a half years, but
12 are also subjected to torture during that period. And that
13 is there really is no -- it -- this case, when we litigate
14 speedy trial to you will be an additional high-water mark like
15 none that's ever been seen before. But these materials that
16 are at issue here, the interaction between the various
17 agencies, those are -- that is all -- also relevant to that
18 speedy trial issue, number one.

19 And the second thing I wanted to say, is just to
20 point out to the military commission that I have been here on
21 a number of occasions saying to you that what we need is -- in
22 discovery regarding the RDI process is detail, because I have,
23 somewhat cynically, I think, said to you, the government would

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1 just like to say some people were tortured, and move on. And
2 that we intend to take a very different approach to arguing so
3 that the members -- so that there's a possibility of the
4 members actually being impacted by this -- by this evidence.

5 And I just would say to you -- would just simply call
6 to your attention that Mr. Connell's argument, I think,
7 illustrates the difference between an argument in general
8 terms and an argument that's supported by detail, because when
9 you really get down on your hands and knees and go through the
10 grains of sand as opposed to giving the view from 10,000 feet,
11 you really begin to see how this stuff works, and you see that
12 in Mr. Connell's argument, that there are tiny details within
13 the four corners of these various documents that point you in
14 different directions and have big implications for the course
15 of the litigation.

16 So I just wanted to bring that to the military
17 judge's attention. Thank you.

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

19 Ms. Bormann, do you wish to be heard? I'm sorry,
20 Mr. Montross.

21 ADC [MR. MONTROSS]: Good afternoon, Your Honor.

22 MJ [COL POHL]: Good afternoon.

23 ADC [MR. MONTROSS]: I do adopt the arguments made by my

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1 colleagues, Mr. Nevin and Mr. Connell.

2 My take is slightly different, and it's going to be
3 rooted a bit in history. I'm going to bring you back to
4 Monday and I'm also going to bring you back to seven years
5 ago.

6 Two days ago in this courtroom, something unusual and
7 I would suggest perhaps even amazing happened. Your Honor
8 asked a question of trial counsel. And your question was,
9 You're not contesting the fact, or are you, just to give me
10 that there was some FBI involvement in the pre-'06
11 interrogations of the accused?

12 And the prosecution responded. And what they said
13 was, "First, what I'm suggesting, sir, is that the United
14 States Government, using all of its resources, both intel and
15 military and law enforcement, took on the challenge that was
16 before it beginning or certainly as of the September 11th
17 attacks." But then they said, "Now, getting into the fine
18 details of who did what, when, and where, I believe that is
19 something left for the litigation to continue on, sir, but I
20 do concede that there's discovery to be provided." "I do
21 concede that there's discovery to be provided."

22 Amazing, I suggest that this is, not because there's
23 a reason to doubt the involvement of the FBI in the pre-2006

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20217

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1 interrogations of Mr. Bin'Attash and the other people before
2 this commission, but amazing that it actually took us seven
3 years to get to this point. And that flows into Mr. Nevin's
4 speedy trial argument.

5 On September 20th, 2011, almost seven years ago,
6 Mr. Bin'Attash's defense attorney submitted to the prosecution
7 a request for discovery. And that request for discovery is in
8 the record, Your Honor. It's Exhibit P of AE 008. And I
9 concede that AE 538 is perhaps not well titled, but I would
10 suggest that this title would show that there's a history of
11 our inability to title our motions properly. It's called
12 Mr. Bin'Attash's Joinder of Supplement to Defense Motion to
13 Dismiss for Defective Referral.

14 But in that request, what we asked for was "All
15 interrogation manuals, directives, instructions, and other
16 policy guidance issued by any agency involved in any aspect of
17 the detention and interrogation of the accused or of any other
18 witness in this case." And that's at paragraph R of
19 Attachment P.

20 The prosecution at that time provided nothing, okay,
21 about any FBI involvement or role in the interrogations of
22 Mr. Bin'Attash and others in the black sites.

23 So now three years ago -- or actually four years ago,

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1 July 15, 2014, Mr. Bin'Attash files another discovery request.
2 And he's asking in that request for "Any and all documents,
3 records, SOPs, memoranda, instruction manuals, and
4 information\correspondence about the development of policies
5 related to two subject matters," Your Honor. One, the
6 interrogation methods used by the FBI to interrogate
7 Mr. Bin'Attash and others who were questioned about al Qaeda
8 dating from September 11th, 2001, to the very present. We ask
9 also for all that information in terms of the subject matter
10 of the FBI's treatment of prisoners and detainees.

11 That discovery request is now the discovery request
12 that's before this commission. Four years after making the
13 request, we first have the admission offered by the
14 prosecution that they do concede that there's discovery to be
15 provided.

16 I want to get to the other part of trial counsel's
17 statement about getting into the fine details. And
18 Mr. Connell did a wonderful job of detailing certain specific
19 things that he was seeking. But I think what Mr. Connell
20 said, and we want to emphasize to this commission, is that the
21 requested relief is not limited to five cultural
22 interrogation -- or cross-cultural interrogation manuals or
23 even to the documents that he put forth.

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1 As he indicated at the very beginning of his
2 argument, I think this was the crucial point, is that we're
3 asking for an order compelling the prosecution to produce to
4 the defense all materials, information, and correspondence
5 about the development of policies related to interrogation
6 methods used by the FBI to suspected al Qaeda operatives
7 between 11 September 2001 and the present.

8 Each of us in our pleadings -- and again, this is a
9 unitary pleading; we have joined Mr. Connell's pleading, he
10 has joined our pleading -- we are both seeking the broader
11 discovery that I've just detailed. And we each gave perhaps
12 examples of things that we would have identified with the
13 limited discovery that we have at this point. But it is a
14 unitary pleading asking for broader things than the specific
15 things that we mentioned.

16 So I heard one of the things that you questioned
17 Mr. Connell about was, do you guys have different motions?
18 Okay. Are you seeking different things? Is the government's
19 responses different? No. We are seeking the same thing. We
20 are seeking the prayer for relief that's identified in the
21 first paragraph of the motion and we have identified examples
22 of what those materials could be.

23 But as Mr. Nevin pointed out, each of the documents

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1 that have been identified and talked about thus far point us
2 in different directions. And as we will go further into -- in
3 the closed session, it certainly details the existence of
4 other documents that we're going to be looking for.

5 I also think this matters. And I want to put on the
6 record just why it matters to Mr. Bin'Attash. Since the
7 beginning of this case, what's been at issue is the statements
8 that were taken from my client in 2007 and 2008. And they
9 will be challenged, okay? And they could be challenged most
10 likely under a theory that the interrogation is a continual
11 process that is a unitary effort by multiple agencies of the
12 United States Government ----

13 MJ [COL POHL]: Who interrogated your client in 2008?

14 ADC [MR. MONTROSS]: Who interrogated our client in 2008?
15 My understanding is FBI agents interrogated my client in 2008.
16 Who interrogated my client in 2000 -- I mean, just to ----

17 MJ [COL POHL]: No, I just -- I just have not heard that
18 date before and I'm just asking. Go ahead.

19 ADC [MR. MONTROSS]: My understanding is that there were
20 interrogations of my client in 2007 and 2008.

21 MJ [COL POHL]: Okay. I just ask because ----

22 ADC [MR. MONTROSS]: And I will verify that, but that was
23 my understanding.

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1 And whatever theory that we attempt to challenge
2 those under -- and, Your Honor, you identified the theories on
3 Monday. You mentioned the continuing interrogation, you also
4 mentioned that there perhaps could be a theory of the absence
5 of attenuation. Ms. Bormann then got up in front you on
6 Monday and reminded this court that in the 275C series that
7 there were allegations -- or not allegations, that we advanced
8 the theory of defense ex parte that there was a long,
9 singular, unified, coordinated effort by all agencies of the
10 United States Government to interrogate and torture these
11 individuals.

12 So we need this information in order to advance our
13 motion to suppress. But it's about more than statements.
14 It's about, when the torture of human beings by the American
15 government first occurred, it was a few rotten apples; it's
16 bad soldiers at a unique site. But then it came out that it
17 was the CIA, but just the CIA. And somehow the rest of the
18 American government, including the FBI, remains pure. But not
19 now. They were all involved, the FBI, the CIA, Department of
20 Defense. And that is further evidence of outrageous
21 government conduct. The entirety of the American enterprise
22 was behind torturing these individuals.

23 Third, it's clearly relevant to mitigation. Does a

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1 government that extracts evidence through torture possesses
2 the moral authority to kill people that it had tortured, no
3 matter what they have done?

4 I just want to conclude by noting something that
5 disturbs me. I have 25 -- 23 years of criminal defense
6 practice. I've taught criminal law and criminal procedure in
7 law school. I have never been in a situation where there is
8 evidence about who interrogated my client that goes to
9 fundamental issues in a case, motions to suppress, mitigation,
10 exculpatory evidence, outrageous government misconduct that
11 took me seven years to get, Judge. And I'm suggesting that
12 the time is now ripe for us to not only accept the concession
13 of the government that there are further discovery to be
14 produced, but that it's time to get into the details.

15 Finally, I would ask for you to issue relief that we
16 sought in AE 538.

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

18 Mr. Harrington, Mr. Ruiz, do you have anything you
19 wish to add?

20 LDC [MR. HARRINGTON]: We do not, Judge. We just join the
21 other motion.

22 MJ [COL POHL]: Okay.

23 Mr. Ruiz.

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1 LDC [MR. RUIZ]: No, Judge.

2 MJ [COL POHL]: Okay.

3 Mr. Ryan.

4 TC [MR. RYAN]: May I proceed, sir?

5 MJ [COL POHL]: Sure.

6 TC [MR. RYAN]: Your Honor, of course we're not here to
7 litigate a motion to suppress today, that remains for another
8 day. But we did spend a lot of time talking about it today.
9 I'll only respond very briefly and say we are firmly of the
10 position that when the time comes, the motions to suppress
11 and/or to dismiss the case for outrageous government conduct
12 will absolutely fail.

13 The United States Government, following ----

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

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

16 MJ [COL POHL]: ---- just a factual question, because I'm
17 not sure -- the clean team statements were made to the FBI in
18 '07 and also '08?

19 TC [MR. RYAN]: There was one follow-up that counsel was
20 just addressing as to Mr. Bin'Attash that occurred in '08. So
21 in other words ----

22 MJ [COL POHL]: But a ----

23 TC [MR. RYAN]: ---- the initial one, Judge, occurred in

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20224

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1 '07. There were some follow-up questions because, quite
2 frankly, it was a very, very lengthy statement, so they went
3 back later.

4 MJ [COL POHL]: Okay. But '07 and '09 -- or excuse me,
5 '07 and '08 were the periods of time where the clean team
6 statements were taken?

7 TC [MR. RYAN]: Correct. Although as to all the other
8 detainees, they were completed in '07.

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

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

11 The United States Government, following the worst
12 mass murder under the law of war in its history, marshalled
13 its military, its intelligence, and its law enforcement
14 against this new and horrible enemy; an enemy that included,
15 amongst others, and significantly so, the five men who
16 typically sit in this courtroom.

17 Now, it's been portrayed today as if this was some
18 horrible action by the government to put together the aspects
19 of law enforcement, intel, and military, for the purpose of
20 gaining information, and ultimately obtaining a criminal case
21 against these men in military commissions. We will, of
22 course, take the position that this was simply a government --
23 this was simply a nation acting properly to take on what it

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1 needed to do.

2 MJ [COL POHL]: Mr. Ryan, it seems to me the issue -- at
3 least one of the issues is FBI involvement in the
4 interrogation program.

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

6 MJ [COL POHL]: And you've used this full effect of the
7 United States Government to counter the perceived threat.

8 Do you take issue with the fact that the FBI was
9 involved in the interrogation process prior to '06?

10 TC [MR. RYAN]: In a broad use of the term, sir, there was
11 FBI involvement, there was military involvement in a variety
12 of the aspects ----

13 MJ [COL POHL]: No, but I just want to focus on the FBI
14 involvement. Earlier, frequently the government said, we're
15 going to stipulate to what happened to these guys in black
16 sites.

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

18 MJ [COL POHL]: And I think part of that, I'm assuming,
19 would be who was there, not necessarily by name, but at least
20 by agency.

21 TC [MR. RYAN]: No, I understand, Judge.

22 MJ [COL POHL]: Was the FBI there?

23 TC [MR. RYAN]: It's a broad question in the sense

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1 that ----

2 MJ [COL POHL]: I'm not saying that.

3 TC [MR. RYAN]: ---- there ----

4 MJ [COL POHL]: Yeah, I don't want to go through every
5 detail, but, I mean, were they there participating ----

6 TC [MR. RYAN]: There were ----

7 MJ [COL POHL]: ---- participating in either feeding
8 questions or asking questions or something to that effect?

9 TC [MR. RYAN]: Again, Judge, it's a very broad question.

10 I will say this: There is no evidence that I am aware of that
11 FBI agents or FBI personnel were involved in a discussion
12 during the time they were in CIA custody.

13 MJ [COL POHL]: I don't know what that -- I don't know
14 what you just told me. Involved in a discussion? I mean ----

15 TC [MR. RYAN]: Involved in questioning in a face-to-face
16 way with the detainees.

17 MJ [COL POHL]: Okay. So you say they weren't the actual
18 interrogators?

19 TC [MR. RYAN]: While they were in CIA custody.

20 MJ [COL POHL]: Okay. So -- got it.

21 TC [MR. RYAN]: I'm not trying to ----

22 MJ [COL POHL]: No, I understand your position. I got it.

23 TC [MR. RYAN]: There's a great deal of information detail

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1 that's going to come forth at some point, but that statement
2 is accurate, as far as I know, sir.

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

4 TC [MR. RYAN]: The actions taken are all legally
5 defensible and we look forward to airing the facts and legal
6 principles in court at the appropriate time.

7 With saying that, Judge, I'd like to now move on to
8 538. And Your Honor was correct to say that these were two
9 separate motions within the same number.

10 The first one was filed by the Bin'Attash team and it
11 focused, in a very narrow sense, on FBI manuals and other
12 materials used by the FBI as part of their process by which
13 they wanted to question these accused. It was based on the
14 practices and whether they created sufficient attenuation from
15 the RDI process.

16 On page 9 [sic] of their pleading the Bin'Attash
17 attorneys say the following: "The requested discovery
18 constitutes the documented plan by the FBI to create a 'break
19 in the stream of events' after years of torture by the CIA.
20 At issue, assuming the FBI conscientiously followed their own
21 policies and protocols, would be the adequacy of the plan to
22 create the necessary constitutional break."

23 Later they say similar, "the admissibility of later

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1 statements alleged -- allegedly made by Mr. bin'Atash to
2 agents characterized by the Prosecution as law-enforcement
3 officials rests on a judicial -- judicial determination
4 whether the taint of the prior illegally-obtained, coercive
5 statements was, somehow, dissipated." And they cite in the
6 source of this discussion, the case of Elstad v. Oregon.
7 Oregon v. Elstad.

8 It is a narrow issue. And what the FBI agents were
9 relying on in the course of their entire pleading, the letters
10 C-I-A, in that form, appears exactly one time.

11 Now, the government filed its response to this in
12 what is contained in 538A. As to the narrow issues raised of
13 these manuals and other FBI items and their discoverability,
14 we rest on our response in that pleading. We agree to -- in
15 short, Judge, what we do is we agree to certain items being
16 turned over while contesting other items, specifically what we
17 say is what the agents were actually using and relying upon we
18 believe should be discovered. On the other hand, things that
19 were created after the fact or that the agents had no access
20 to or did not rely upon should not be discovered.

21 MJ [COL POHL]: So in your view you responded to the -- in
22 totality to Mr. Bin'Attash's motion ----

23 TC [MR. RYAN]: That's where I'm coming now, Judge.

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1 MJ [COL POHL]: ---- either giving them what they've asked
2 for or not giving them stuff because it never went beyond the
3 author or it postdates the interrogation?

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

5 MJ [COL POHL]: Okay. Just so I'm clear ----

6 TC [MR. RYAN]: So following our ----

7 MJ [COL POHL]: ---- so the government's view is on the
8 Bin'Attash portion of this motion, you've fully responded?

9 TC [MR. RYAN]: We have responded.

10 MJ [COL POHL]: Okay.

11 TC [MR. RYAN]: In terms of our response, Your Honor will,
12 of course, order us as you see fit.

13 MJ [COL POHL]: Yeah. Go ahead.

14 TC [MR. RYAN]: Following our response, there came a
15 reply, this time from the Ali team, with attachments. It's
16 approximately 50 pages in length. It appears, as counsel
17 noted, at 538C (AAA).

18 Now, in that on page 3, the party states, "The one
19 difference in emphasis is that AE 538" -- so that is the
20 original Bin'Attash pleading -- "focuses on evaluating the
21 January 2007 interrogations under an attenuation analysis.
22 Mr. al Baluchi's position is that the United States government
23 obtained the January 2007 statements 'by the use of torture,

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1 or by cruel, inhuman, or degrading treatment.'"

2 A little further down, "... it is not necessary to
3 reach the attenuation analysis because the January 2000 [sic]
4 statements were obtained by the 'learned helplessness' or
5 'interrogation compliance' induced by the torture program."

6 In short, Judge, it rejects the original theory of
7 the case, or the original theory of the pleading in 538, or at
8 least adds a whole other section to it, and goes away from the
9 idea of an Oregon v. Elstad attenuation analysis and really
10 for the first time, that I'm aware of in a written pleading,
11 brings together this theory -- or puts forth the theory that
12 the CIA and the FBI and other aspects of the United States
13 Government were so intertwined that the CIA's statements and
14 the FBI's statements are just one long interrogation. You
15 heard that phrase the other day for the first time.

16 Now, we looked at this, this -- you know, very
17 significant pleading, as counsel pointed out, lots of
18 attachments, including interviews and a lot of open-source
19 material. We looked at this in great detail. We asked a lot
20 of questions among our partner agencies. And at some point,
21 at least in my case, I conferred with counsel to ask for some
22 clarification as well.

23 At that point, we came to the conclusion that we are

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1 obligated to provide discovery in the area of this
2 intertwining of different agencies and departments that may or
3 may not ultimately support the claim of, you know, quote, one,
4 long interrogation.

5 In April we provided a letter to all counsel. I'd
6 like to paraphrase the relevant part of it.

7 MJ [COL POHL]: Is it part of the record?

8 TC [MR. RYAN]: Sir?

9 MJ [COL POHL]: Is this letter part of the record?

10 TC [MR. RYAN]: It is part of what was given to counsel,
11 sir.

12 MJ [COL POHL]: No, what I'm saying is ----

13 TC [MR. RYAN]: It was not included as an attachment.

14 MJ [COL POHL]: Okay. When this hearing is over with,
15 file it as a ----

16 TC [MR. RYAN]: I will, sir.

17 MJ [COL POHL]: Okay.

18 TC [MR. RYAN]: Understanding the centrality of the claims
19 to the progress of the case, without conceding materiality, we
20 have disclosed and will disclose material from both
21 organizations to provide you an understanding of the
22 relationship between the CIA and the FBI during 2002 through
23 2007.

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1 Also, we will disclose relevant communications
2 between certain representatives of both organizations during
3 that time period that bear on the voluntariness of the accused
4 in making statements to the FBI.

5 Finally, we will disclose information, if any exists,
6 bearing on the claim that FBI agents derived evidence from
7 statements made by the accused while they were in CIA custody.

8 I am not here, sir, asking you to deny 538C. We have
9 already agreed that there -- that discovery in this broad area
10 to some degree, and to a great degree, will be necessary. I
11 am asking, sir, that -- that the ruling in 538, and as I did a
12 few days ago, the ruling in 561, which I believe is very
13 closely connected, be held by Your Honor until the next
14 session when we will have provided further materials and can
15 advise as to what is to come in terms of this area of
16 discovery, including whether any 505 process will be
17 necessary.

18 You were told the other day in response to my request
19 not to fall into this trap. I represent, sir, that it is not
20 a trap. We have already provided classified materials that
21 are responsive to this broad area and that the accused did not
22 even ask for, and probably didn't even know existed, but what
23 I would suggest goes directly to the gravamen of the issue and

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1 might be considered highly valuable discovery, because we
2 recognized it to be material to the theories that we've been
3 discussing today. These particular items I'm talking about,
4 Judge, you actually saw yesterday in closed session and I'm
5 sure will be made reference to at the 806 later.

6 If you grant the relief exactly as it's requested in
7 538C, Your Honor, I believe it would represent a step backward
8 for us in this discovery endeavor because, number one, it asks
9 for all material, quote, all materials, information, and
10 correspondence, end quote, without reference to relevance or
11 materiality within this broad subject matter. Where we are
12 required to provide, quote, all materials, information, and
13 correspondence, it will end up causing us to devote enormous
14 amounts of time gathering hundreds of items, at least hundreds
15 of items, that honestly the defense will simply never care
16 about.

17 MJ [COL POHL]: Mr. Ryan ----

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

19 MJ [COL POHL]: ---- you indicate that you are going to
20 provide them some discovery. Is this by the 15 August date
21 or ----

22 TC [MR. RYAN]: Well, we've already ----

23 MJ [COL POHL]: ---- or the next hearing?

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1 TC [MR. RYAN]: We've been providing. There is more sort
2 of ready to be launched, and we are determined to meet the
3 August 15th date.

4 MJ [COL POHL]: Okay. When you provide that discovery,
5 just so I don't have to hunt and pick, also provide notice to
6 me as to what discovery you've provided to them so I can
7 narrow down what the delta is of what you've got and what
8 they've asked for so we don't run into this --

9 TC [MR. RYAN]: What I anticipate, Judge, when we -- is
10 that we -- part of my request to you is that we be able to
11 report to you, whether it's a notice or a pleading ----

12 MJ [COL POHL]: Yeah.

13 TC [MR. RYAN]: ---- but something in writing, certainly.

14 MJ [COL POHL]: Just so I know what you've given them and
15 I can then get in the position when they say, we want other
16 stuff, we're not litigating things that they've gotten.
17 Whether it's a notice or a pleading, it's up to you, but just
18 kind of include me in the information loop of what you're
19 giving him ----

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

21 MJ [COL POHL]: ---- on this particular issue. I'm not
22 talking about generally. I generally don't get involved in
23 discovery voluntarily, but ----

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1 TC [MR. RYAN]: No, I understand. No.

2 MJ [COL POHL]: ---- just so I know what ----

3 TC [MR. RYAN]: It's a fair point, Judge. I completely
4 understand. It's a big area, it's it a big ask, a highly
5 litigated motion; and we want to ----

6 MJ [COL POHL]: Make it clear, I don't want to see the
7 discovery itself.

8 TC [MR. RYAN]: Understood.

9 MJ [COL POHL]: I'm just talking like an index.

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

11 MJ [COL POHL]: I get enough 100-page motions already; I
12 don't need more.

13 TC [MR. RYAN]: So in addition to our concerns about the
14 language regarding all materials, secondly, we'd also state
15 that some of the items that we're talking about are really
16 ultimately going to be of little moment.

17 For example, in 538C they ask for, among other
18 things, documents relating to a meeting involving CIA attorney
19 John Rizzo and FBI Chief of Staff Daniel Levin, counsel made
20 reference to it, and then discussions between then-Director
21 Mueller and then-Director Tenet at the FBI. Now, I understand
22 why counsel is asking for this, because it's what was
23 available, the information that was out there in the

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1 open-source material. What I'm ultimately going to suggest to
2 you, though, is that in the long scheme of the discovery that
3 will be relevant in this matter, things like meetings between
4 high-level persons would be of the most general nature. And
5 although we won't shy away from it if it's relevant and
6 material, the real items of which they are most concerned and
7 which will form the basis -- or do form the basis of the
8 theories they've announced are the things we're working very
9 hard on trying to accomplish right now.

10 So, Your Honor, what we ask is that we simply be
11 allowed to provide more and better define the landscape. As
12 you put it, let us help identify what the delta is. At that
13 point, if there's still a fight, at least the commission will
14 have far more info about what we're fighting about, and I
15 think it will be highly in the interest of judicial economy.

16 At this point, Your Honor, subject to your questions.

17 MJ [COL POHL]: I have none.

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

19 MJ [COL POHL]: Mr. Connell, do you wish to be heard
20 again?

21 LDC [MR. CONNELL]: Sir, the only thing that I want to
22 point out is how -- in response to your questions to try to
23 find out, you know, what, if any, FBI involvement was there in

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1 this broad interrogation process, you essentially got a broad
2 acknowledgement of the unity of effort by the United States
3 Government, and you got an extremely narrow and technical
4 denial of any face-to-face interrogation by FBI agents while
5 the defendants were in CIA custody. And I think there's kind
6 of an implied qualification of prior to Guantanamo in
7 September of 2006.

8 That's an extremely narrow denial, and there's an
9 enormous delta between the information -- the involvement that
10 I just gave a hint of in the -- in my initial argument and the
11 government's denial. So I just don't want you to take that as
12 they have denied the existence of responsive information.

13 Thank you.

14 MJ [COL POHL]: Thank you.

15 Mr. Montross.

16 ADC [MR. MONTROSS]: Your Honor, if I may just perfect the
17 record. You inquired of me if my client was actually
18 interrogated in 2008. And I responded that he was, and by an
19 FBI agent. That answer is incomplete. He was interrogated by
20 an FBI agent. He was also interrogated from February 8 -- I'm
21 sorry, from February 5th, 6th, 7th, 8th, and 9th by an agent
22 from the Criminal Investigation Task Force, and also by an
23 agent of the Navy Criminal Investigation Services, NCIS.

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1 MJ [COL POHL]: That's 2008?

2 ADC [MR. MONTROSS]: Do I have those names?

3 MJ [COL POHL]: No. That's in 2008?

4 ADC [MR. MONTROSS]: Yes, sir. From February 5th to
5 February 9th of 2008.

6 MJ [COL POHL]: Okay.

7 ADC [MR. MONTROSS]: And just one other brief response. I
8 heard the government suggest that we've asked for very
9 specifically six documents. I would direct Your Honor's
10 attention to page 3 of the actual motion. We ask for any and
11 all documents, records, SOPs, memoranda, instruction manuals,
12 and information correspondence about the development of
13 policies related to interrogation methods used by the FBI to
14 interrogate, Mr. Bin'Attash, my client; Mr. Mohammad; and five
15 other individuals who were questioned about al Qaeda
16 operations between September 11th, 2001, and the present.

17 And then I said, this material includes, but is not
18 limited to, the following documents. The prosecution seems to
19 have forgotten that sentence and wishes to have their
20 discovery obligations limited to the following documents. And
21 I would direct Your Honor's attention on both paragraphs 1 and
22 2 that our requests are far broader.

23 Finally, we joined Mr. Connell's motion. He joined

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1 our motion. But in terms of attenuation, Your Honor may
2 recall, the last session Ms. Bormann walked up here and she
3 informed Your Honor that we were adopting the unitary theory
4 of interrogation. Okay. And then on Monday she said the
5 exact same thing. Okay. I'm sorry that the prosecution is
6 surprised by this at this point, but I will show you, if you
7 wish, the references in the transcript where she says as much.

8 MJ [COL POHL]: That's not necessary, but go ahead.

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

10 MJ [COL POHL]: Mr. Ryan.

11 TC [MR. RYAN]: Just in response to counsel's statement
12 that it was a narrow denial on my part, I was trying to be as
13 clear as I possibly could that there's various issues within
14 the statement as to who interrogated who. I give the court --
15 commission my word that all of this information will be
16 provided in very clear fashion.

17 MJ [COL POHL]: Thank you.

18 TC [MR. RYAN]: As early as the closed session, if
19 necessary, sir.

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

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

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

23 That brings us to 513.

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1 Mr. Connell, I believe this is your motion. Is any
2 of this unclassified?

3 LDC [MR. CONNELL]: Can I defer to my colleague,
4 Mr. Farley, who is arguing this motion?

5 MJ [COL POHL]: I'm looking at my unclassified motion list
6 and I do not see any of these -- this motion as unclassified.

7 DC [MR. FARLEY]: Your Honor, I'm happy to argue the
8 entirety of the motion in a classified setting if you prefer.
9 I believe that the ----

10 MJ [COL POHL]: All of the pleadings are classified,
11 right?

12 DC [MR. FARLEY]: Yes, Your Honor, there are. But as we
13 discussed yesterday, there are portions of the classified
14 pleadings that are unclassified, and I believe the general
15 propositions about the materiality of the discovery that
16 Mr. al Baluchi seeks are ----

17 MJ [COL POHL]: Yeah, but I'm going to need to have a copy
18 of the classified pleadings. What level is it classified at?

19 DC [MR. FARLEY]: It's at the TOP SECRET//CODEWORD level.

20 MJ [COL POHL]: Do you need the unclassified portions of
21 the pleadings in order to put context in the classified
22 portions?

23 DC [MR. FARLEY]: Your Honor, I believe that the

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1 applicable law should be argued in open court. So the
2 argument can sort of ----

3 MJ [COL POHL]: I have no problem. But I just asked you a
4 question, is can you argue -- do you need to argue the
5 unclassified portions in a classified setting to put the
6 classified information in context?

7 DC [MR. FARLEY]: I'm sorry, Your Honor. I believe that
8 if we do the unclassified portion before we do the classified
9 portion, that the classified portion will make sense and won't
10 need to be repeated.

11 MJ [COL POHL]: Well, I don't want it repeated, so that's
12 good, but if you want to just -- you're talking about generic
13 law without referring to any classified information we can
14 discuss in open court?

15 DC [MR. FARLEY]: Generic -- yes, generic law.

16 MJ [COL POHL]: Not generic law, but I'm saying the legal
17 arguments that are -- all of the books and things like that,
18 without referring to any classified information.

19 DC [MR. FARLEY]: Yes, Your Honor, I believe I can. And
20 the only sort of factual evidence needed ----

21 MJ [COL POHL]: Don't say "I believe." You say "I can" or
22 "I can't."

23 DC [MR. FARLEY]: I'm sorry, Your Honor. To my knowledge,

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1 I can argue all the law and the applicable facts necessary in
2 an unclassified setting and reserve classified argument to
3 deal with specific documents that we already have or seek in
4 discovery.

5 MJ [COL POHL]: Now you've just expanded your argument
6 from the law to facts.

7 DC [MR. FARLEY]: Your Honor, I'm just trying to be as
8 precise as possible.

9 MJ [COL POHL]: No, but -- and I'm trying to be precise
10 also. That any of these facts -- all of those facts that you
11 want to argue now are not classified?

12 DC [MR. FARLEY]: Correct, Your Honor.

13 MJ [COL POHL]: And this isn't a belief, this is I know
14 they're not classified?

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

16 MJ [COL POHL]: Okay. Proceed.

17 [The military judge conferred with courtroom personnel.]

18 DC [MR. FARLEY]: May I proceed, Your Honor?

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

20 Now, understand, I don't have the pleadings sitting
21 before me because they're on a different computer.

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

23 MJ [COL POHL]: But I've read them, so go ahead.

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

2 Your Honor, AE 513 (AAA) is Mr. al Baluchi's motion
3 to compel any information regarding ----

4 MJ [COL POHL]: Please slow down.

5 DC [MR. FARLEY]: Yes, I'm sorry. I just saw it pop up.

6 Again, AE 513 (AAA) is Mr. al Baluchi's motion to
7 compel information regarding covert action contemplated by the
8 United States targeting al Qaeda between February of 1996 and
9 October of 2001.

10 This information is clearly material to
11 Mr. al Baluchi's case because it goes to the heart of his
12 defense, that hostilities between the United States and
13 al Qaeda did not predate the attacks of 11 September 2001.

14 MJ [COL POHL]: Slow down.

15 DC [MR. FARLEY]: As the military commission is well
16 aware, the question of whether and when hostilities existed
17 between the United States and al Qaeda is a fundamental issue
18 for the military commission -- for the military commission's
19 personal and offense jurisdiction, as well as a necessary
20 element of each offense with which Mr. al Baluchi is charged.

21 Mr. al Baluchi intends to contest the existence of
22 hostilities between the United States and al Qaeda prior to
23 11 September 2001 at every phase of this case, making

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1 information within the government's possession concerning the
2 existence or absence of hostilities helpful, that is, material
3 to him, and therefore, discoverable.

4 Consequently, the government must produce information
5 concerning the existence or not of hostilities to and through
6 discovery.

7 The information Mr. al Baluchi seeks through
8 AE 513 (AAA) will be material because it assists him in
9 demonstrating the absence of hostilities prior to the
10 11 September 2001 attacks. Aside from pointing out that on
11 1,842 of the 1,845 days between the 23rd of August, 1996, the
12 day on which the government asserts hostilities commenced, and
13 10 September 2001, there was no armed violence between the
14 United States and al Qaeda, Mr. al Baluchi is in a position of
15 being forced to marshal as many indicia of the absence of
16 hostilities as possible to demonstrate to the military
17 commission that there were, in fact, no hostilities during
18 that period.

19 Indicia of the absence of hostilities may take a
20 variety of forms. Some of them may be found in the deployment
21 or not of U.S. Armed Forces to a territory in which al Qaeda
22 operated prior to 9/11. Some of it may be found in the
23 content of diplomatic exchanges between the United States and

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1 the Taliban prior to 9/11 which suggests the United States
2 exclusively sought bin Laden's expulsion to face criminal
3 sanction.

4 Some of it may be found in the action the United
5 States actually took to address the bin Laden problem as well
6 as the action it declined to take. And some of it may be
7 found in the legal authorities on which the United States
8 justified its policy actions or inaction.

9 Records of U.S. Government policymakers considering
10 whether to authorize and undertake covert action targeting
11 bin Laden will provide Mr. al Baluchi with information
12 concerning the action the United States, in fact, took to
13 address the bin Laden problem prior to 11 September 2001, and
14 the legal authorities on which the United States justified its
15 policy actions or inaction.

16 Obviously, records of the deliberations of U.S.
17 policymakers concerning covert action targeting al Qaeda prior
18 to 9/11 are material to Mr. al Baluchi's defense. Should the
19 military commission adopt the government's preferred but, we
20 believe, erroneous standard for determining the existence of
21 hostilities.

22 Mr. al Baluchi maintains that the government's
23 standard, that found in the member instruction in the United

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1 States v. Hamdan commission is incorrect as a matter of law.
2 Nevertheless, should the military commission adopt that
3 standard, Mr. al Baluchi will have to demonstrate, among other
4 things, that leaders in this case, senior U.S. policymakers,
5 did not perceive the United States to be engaged in a conflict
6 subject to the laws of war with al Qaeda prior to 9/11.

7 Here, those perceptions are recorded in U.S.
8 policymakers' deliberations over whether to use covert action
9 targeting al Qaeda between February 1996 and October 2001.

10 MJ [COL POHL]: Mr. Farley, let me ask you a question,
11 and -- on this hostility issue. I've asked it before, but
12 since you're relatively new to the case, let me get your views
13 on this. The limitation on hostilities as being an element
14 for personal and subject matter jurisdiction and arguably an
15 element comes from the MCA itself, correct?

16 DC [MR. FARLEY]: At least the MCA, yes, Your Honor.

17 MJ [COL POHL]: Do you have somewhere else it comes from?

18 DC [MR. FARLEY]: Well, if you were to look at the Supreme
19 Court's discussion of military commissions and of Winthrop,
20 for example, and the Quirin case, the Supreme Court seems to
21 adopt the idea that, as something of a background law,
22 military commissions' jurisdiction are limited by the laws of
23 war as an initial proposition.

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1 MJ [COL POHL]: So on the MCA issue, if you pick one part
2 of it requiring hostilities for these three aspects I just
3 talked about, and then you say, well, there were no
4 hostilities by this, so Congress wrote a statute limiting
5 jurisdiction to examples where hostilities are required and at
6 the same time didn't intend for it to cover anything prior to
7 9/11? I mean ----

8 DC [MR. FARLEY]: Your Honor ----

9 MJ [COL POHL]: I mean, you would have to interpret the
10 statute that way, would have to mean Congress intended when
11 they stuck "hostilities" in the statute, meant that it did not
12 apply to this case or any other case prior to 9/11?

13 DC [MR. FARLEY]: Your Honor, I think that it's -- it's
14 possible that Congress could -- to the extent that a
15 collective body can have any sort of intent, that Congress
16 intended to extend the jurisdiction of the military
17 commissions to embrace the men who are on trial today.

18 And at the same time, they may have failed in
19 executing that intent by choosing -- making a choice of law.
20 Congress chose, and it did not have to choose, but it chose to
21 try these men by military commission and it chose to rely on
22 the law of war as the substantive law for the military
23 commission.

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1 Now, Congress could have made an alternative choice.
2 Congress and the Executive Branch could have decided to bring
3 these men to federal court or to try them in some other forum.
4 But having made the choice to apply the law of war to these
5 men, the military commission must be bound by the law of war.
6 And part of the law of war requires any tribunal to delineate
7 when an armed conflict exists; because the law of war does not
8 exist, it's not applicable in the absence of hostilities.

9 MJ [COL POHL]: So it's not really a statutory argument,
10 it's a law of war argument?

11 DC [MR. FARLEY]: Your Honor, I believe it's both.
12 And ----

13 MJ [COL POHL]: But I'm just -- I always struggle with
14 this argument that, from a statutory basis, Congress said,
15 need hostilities, and this applies to events before and after
16 9/11. And then I hear the argument that because Congress
17 required hostilities, this only applies -- that you take that
18 part of the statute but ignore the rest of the statute and say
19 Congress must have meant it only applied to after 9/11.

20 I'm -- simply as a matter of statutory
21 interpretation, isn't it clear -- is it clear from the statute
22 that Congress intended this to apply before and after 9/11?

23 DC [MR. FARLEY]: Your Honor ----

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1 MJ [COL POHL]: They may have done it unsuccessfully, I
2 got that, but, I mean, we're talking about -- because you're
3 saying is, well, we talked to all these people about whether
4 hostilities existed or not. But fundamentally, from a
5 statutory construction perspective, is there any -- do you
6 believe there's any lack of clarity of what Congress intended
7 this to cover? Again, whether they violate the law of war or
8 not, or it's not appropriate, that's a different issue.

9 DC [MR. FARLEY]: Your Honor, speaking for myself, no, I
10 don't believe that there's any -- there's any lack of clarity
11 in the intent of the statute. However, I believe that
12 there -- there's good argument to be made that, you know,
13 Congress got it wrong, so to speak, and they built -- they
14 built a statute that -- it contains conflicting provisions, as
15 Congress often does.

16 And in this case, one of the provisions that
17 conflicts -- you know, one very narrow, specific position --
18 provision that includes a sort of general temporal grant
19 conflicts with a whole host of other provisions that are very
20 explicit about the law applicable to the military commission.

21 MJ [COL POHL]: Okay. I understand. Go ahead.

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

23 Again, Your Honor, I was addressing that records of

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1 U.S. consideration of covert action targeting al Qaeda between
2 February 1996 and October 2001 will elucidate the perceptions
3 of senior U.S. policymakers with respect to the existence or
4 not of hostilities between the United States and al Qaeda
5 between 1996 and 2001. And there are a number of ways that --
6 that I believe -- we believe these materials may be useful to
7 that regard.

8 So, for example, we have previously argued that the
9 United States relied primarily on diplomatic, economic, law
10 enforcement, and intelligence tools to address the bin Laden
11 problem prior to 9/11. The government rejoins that reliance
12 on those tools does not necessarily preclude the existence of
13 hostilities during that time period. And the government is
14 right up to a point. The existence of hostilities between a
15 state and a presumptively nonstate actor does not mean that
16 the state cannot use other tools in its toolbox in combination
17 with armed violence to counter the nonstate actor.

18 Indeed, if we look at the authority -- authoritative
19 commentary to the 1949 Geneva Conventions, we see that the
20 convention drafters contemplated exactly that result.
21 However, when a state like the United States chooses to rely
22 almost exclusively on those nonmilitary tools, the diplomatic,
23 the economic, the law enforcement, and intelligence tools, it

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1 implies an absence of hostilities. But even that assumes U.S.
2 policymakers had a choice to make, that they picked among a
3 toolset that included the use of force permissible under the
4 law of war.

5 In this case, there's good reason to believe that
6 such a choice was not actually available to U.S. policymakers.
7 Instead, it is highly likely that the records that
8 Mr. al Baluchi seeks through AE 513 will demonstrate that the
9 legal analyses during -- defining U.S. policy choices between
10 February 1996 and October 2001 precluded the use of armed
11 force under the laws of war.

12 MJ [COL POHL]: Didn't the United States use some armed
13 force after the embassy bombing?

14 DC [MR. FARLEY]: Yes, Your Honor, it did. On one day, it
15 used a discrete amount of armed force ----

16 MJ [COL POHL]: Are you saying that violated the laws of
17 war?

18 DC [MR. FARLEY]: No, Your Honor. I'm saying -- and I'm
19 saying now and I will say later in more fulsome detail, I
20 believe, in a closed setting that Mr. al Baluchi's position is
21 that the United States relied on a self-defense rubric to
22 justify -- to legally justify the launching of cruise missiles
23 in Operation Infinite Reach.

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1 MJ [COL POHL]: Okay.

2 DC [MR. FARLEY]: Self-defense provides a different legal
3 foundation and a different rubric for the use of force than
4 does the existence of an armed conflict.

5 MJ [COL POHL]: Are they mutually exclusive?

6 DC [MR. FARLEY]: They are not mutually exclusive. For
7 a -- and a great example of how they are not mutually
8 exclusive would be any time the United States were to use
9 force in self-defense against another state actor. And the
10 reason why those aren't mutually exclusive is because the law
11 of war, the jus in bello, international humanitarian law, says
12 that any time there's a resort to armed force between a state
13 and another state, that implicates the laws of war.

14 So necessarily if the United States were to use armed
15 force against a state discretely in the -- in pursuit of
16 self-defense, that use of force would be bounded by the laws
17 of war. However, international humanitarian law, the law of
18 war also tells us that the law governing noninternational
19 armed conflict is different and that not every use of force by
20 a state against a nonstate actor implicates the law of war.

21 In fact, as -- as you may recall, Professor Watts
22 testified in December and explained this dichotomy quite well.
23 And explained that in the one case, in the state versus state

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1 case, there's an extremely minimal threshold for the
2 application of the law of war; but in the noninternational
3 armed conflict context, there's a higher threshold. And the
4 reason for that is that the drafters of the Geneva Convention,
5 the United States included, worried that a low threshold for
6 the application of the law of war to noninternational armed
7 conflict ----

8 MJ [COL POHL]: One moment.

9 [Pause.]

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

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

12 The reason for the differing threshold was a concern
13 that applying the law of war to nonstate actors would somehow
14 legitimize them in the eyes of the world, would elevate them
15 to the status of a state actor or a belligerent when that was
16 not necessarily the desire of the drafters of the Geneva
17 Convention.

18 And, in fact ----

19 MJ [COL POHL]: Go ahead.

20 DC [MR. FARLEY]: I'm sorry. In fact, the United States'
21 position outside of the context of the military commission has
22 been similar. The United States does not apply the law of war
23 when it responds to a riot, for example, even a riot where,

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1 you know, there's extensive property damage. The United
2 States does not necessarily apply the law of war to
3 large-scale banditry.

4 These are some of the terms that are utilized by the
5 Geneva Convention drafters in distinguishing between, you
6 know, an actual armed conflict, something that involves
7 protracted armed violence between a state and nonstate actor,
8 something that looks like war, in our eyes, to something that
9 isn't war and shouldn't be treated as war and should be dealt
10 with more properly through law enforcement means.

11 So, Your Honor, again, we -- the documents that we
12 seek, the documents that will reflect any deliberation within
13 the U.S. Government among senior policymakers concerning
14 whether to utilize covert action targeting al Qaeda between
15 February '96 and October 2001, we believe will reveal some of
16 these legal analyses and they will lead necessarily to a
17 conclusion that U.S. policymakers were not utilizing the tools
18 found in the law of war toolbox but were instead relying on
19 other tools that either imply or demand a conclusion ----

20 MJ [COL POHL]: Go ahead. Go ahead. I can multitask. Go
21 ahead.

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

23 MJ [COL POHL]: I'm listening to you.

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1 DC [MR. FARLEY]: Either imply or demand a conclusion that
2 there were no hostilities between the United States and
3 al Qaeda.

4 Now, we're not -- it is not just in the legal
5 analysis that we believe will be available in these documents
6 that Mr. al Baluchi believes there will be fruitful material.
7 Even if Mr. al Baluchi ----

8 MJ [COL POHL]: Hold for a second.

9 Go ahead.

10 DC [MR. FARLEY]: Even if Mr. al Baluchi is mistaken and
11 the legal analyses that define policymakers' options are not
12 available, U.S. policymakers' perception about the existence
13 or not of hostilities between the United States and al Qaeda
14 will also be recorded in the type, if any, of covert action
15 authorized and undertaken by the United States targeting
16 al Qaeda.

17 Certainly, covert action may be one potential
18 component of armed violence that may give rise to hostilities
19 under the laws of war; however, when the only modes of covert
20 action authorized do not contemplate or utilize armed violence
21 against the target in question, then the authorization for
22 such covert action without armed violence implies the absence
23 of hostilities.

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1 For example, imagine U.S. policymakers authorized
2 only the rendition of a target and not the target's killing on
3 sight. That authorization would imply the absence of
4 hostilities because it prohibits -- because it prohibits using
5 perhaps the primary hallmark of war.

6 MJ [COL POHL]: But if you are going to do a rendition of
7 somebody, you're going to have to go grab them. That's not
8 killing them, I understand that, but isn't that putting
9 violence on that person, involuntarily taking them from
10 point A to point B?

11 DC [MR. FARLEY]: Your Honor, that certainly is a measure
12 of violence. That, however, is not the sort of armed violence
13 that war contemplates. War contemplates primarily lethal
14 force and the destruction of property. And one of the
15 hallmarks of the laws of armed conflict -- and you need look
16 no further than the DoD Law of War Manual to see this, one of
17 the hallmarks of the law of armed conflict is the notion that
18 the law of armed conflict permits the use of lethal force as a
19 first resort.

20 So when an authorization is granted for somebody to
21 go conduct, for example, a rendition, but the people who are
22 authorized to conduct the rendition are prohibited from using
23 force in any measure except for individual self-defense, then

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1 that implies an absence of hostilities. That suggests that
2 the people operating to conduct the rendition are operating
3 under some other legal framework.

4 MJ [COL POHL]: Okay. Got it. Thank you. Go ahead.

5 DC [MR. FARLEY]: Likewise, the target of any covert
6 action covered by U.S. policymakers in the sort of managed
7 covert action will shed light on whether the U.S. policymakers
8 perceived the existence of hostilities between the United
9 States and al Qaeda prior to 11 September 2001. For example,
10 if U.S. policymakers considered or authorized covert action
11 targeting bin Laden as an individual or bin Laden and his
12 lieutenants as individuals and not targeting al Qaeda as an
13 organization, such targeting implies the absence of
14 hostilities.

15 Hostilities, foundationally, are organized,
16 collective armed violence. They are not the use of force,
17 even armed force, by a state against an individual. The
18 necessity of collective armed violence among organized
19 entities is clear from Common Article 3 which reads in
20 relevant part, in the case of armed conflict not of an
21 international character in the territory of a high-contracting
22 party, each party to the conflict shall be bound to apply the
23 rest of the provision. The Convention's emphasis on party was

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1 not an accident. It reflects the drafters' concerns that the
2 threshold of applying the law of war in noninternational armed
3 conflict would not be too low. That is, the drafters again
4 were concerned that the law of war might be invoked too easily
5 and states would be forced to apply it to riots or violent but
6 disorganized internal disturbances.

7 Notably, the Geneva Conventions is not alone in this
8 conclusion. The Department of the Army's Field Manual 324
9 notes in describing counterinsurgency that, quote, warfare
10 remains a violent clash of interests between organized groups
11 characterized by the use of force. Similarly, the Marine
12 Corps' Doctrinal Publication Number 1 notes that war is,
13 quote, a violent clash of interests between or among organized
14 groups characterized by the use of military force.

15 And finally, the 2015 Department of Defense Law of
16 War Manual states that, quote, the intensity of the conflict
17 and the organization of the parties are criteria that have
18 been assessed to distinguish between noninternational armed
19 conflict and internal disturbances intentions.

20 All that is to say, hostilities, so far as relevant
21 here, may only obtain between a state and a nonstate actor and
22 not between a state and an individual, which, if I may
23 personalize this, is to suggest that Ben Farley alone cannot

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1 engage in armed conflict against the United States.

2 So should the documents that Mr. al Baluchi seeks
3 through AE 513 reveal that U.S. policymakers were seized with
4 addressing bin Laden as an individual, or bin Laden and a
5 collection of others as individuals, that would imply the
6 absence of hostilities.

7 MJ [COL POHL]: Well, was the -- so by directing the
8 attention on bin Laden, wasn't it in his capacity as head of
9 al Qaeda?

10 DC [MR. FARLEY]: It's potentially in his ----

11 MJ [COL POHL]: Potentially. I mean, why -- would we care
12 what he did if he's sitting in a cave in -- wherever and
13 nothing happened, but isn't the -- and again, I'm not making
14 any judgment calls here of what happened, but I'm saying
15 didn't we target him because we believed that he was the head
16 of an organization that targeted the United States?

17 DC [MR. FARLEY]: Well, Your Honor, I -- if you actually
18 look through the diplomatic record, for example, from 1996
19 through at least 1999, communications concerning -- there were
20 no real communications concerning al Qaeda. Al Qaeda was not
21 an issue to be addressed by the United States. bin Laden, on
22 the other hand, was an issue to be addressed by the United
23 States.

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1 MJ [COL POHL]: And you can -- and you can differentiate
2 the issue with -- between bin Laden as a person and bin Laden
3 as the chief -- or the head of al Qaeda?

4 DC [MR. FARLEY]: Your Honor, I'm not making that
5 differentiation.

6 MJ [COL POHL]: You're saying that the -- the United
7 States Government made that differentiation?

8 DC [MR. FARLEY]: Exactly. The United States Government,
9 in fact, made that differentiation for a long period of time
10 and well into the period that the government, for example,
11 asserts the United States and al Qaeda were already engaged in
12 hostilities.

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

14 DC [MR. FARLEY]: Your Honor, I thank you.

15 MJ [COL POHL]: Okay.

16 We're going to break for lunch. Does any other
17 defense counsel want to be heard on this -- just so I'm
18 planning the way ahead, on this issue. We're going to do it
19 after lunch.

20 ACC [MR. BIN'ATTASH]: I'd like to go back to the camp
21 after the lunch.

22 MJ [COL POHL]: Okay. During the lunch break,

23 Mr. Bin'Attash? Okay.

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

2 MJ [COL POHL]: Okay. And you know you can stay if you
3 want to, but you want to choose to go back?

4 ACC [MR. BIN'ATTASH]: [Speaking English.] Yes.

5 MJ [COL POHL]: Okay. That will be fine. We'll do that
6 over lunch.

7 Mr. Mohammad, I understand you would like to return
8 to the camp also? Okay. You got to talk into the microphone,
9 please. Okay. You know you can stay, but you want to go
10 back ----

11 ACC [MR. MOHAMMAD]: [Speaking English.] Yes.

12 MJ [COL POHL]: ---- correct? I'm sorry.

13 ACC [MR. MOHAMMAD]: [Speaking English.] I'll go back at
14 prayer.

15 MJ [COL POHL]: Okay, thank you.

16 LDC [MR. NEVIN]: So he would be -- did the military
17 commission intend that he would be allowed to stay until after
18 the prayer and then be transported; is that ----

19 MJ [COL POHL]: Yeah, yeah.

20 LDC [MR. NEVIN]: Great.

21 MJ [COL POHL]: We'll do it, because prayer time goes to
22 about 1305.

23 LDC [MR. NEVIN]: The answer to your question about

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1 further argument on behalf of Mr. Mohammad was maybe.

2 MJ [COL POHL]: Okay. We'll be in recess until 1415. And
3 then when we finish this one, the only other one we've got
4 left for today is 564.

5 Commission is in recess.

6 [The R.M.C. 803 session recessed at 1303, 25 July 2018.]

7 [The R.M.C. 803 session was called to order at 1419, 25 July
8 2018.]

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

10 Trial Counsel, any changes since before the lunch
11 recess?

12 CP [BG MARTINS]: Your Honor, no changes -- Your Honor, no
13 changes to counsel.

14 MJ [COL POHL]: Mr. Nevin?

15 LDC [MR. NEVIN]: Your Honor, no changes in the lawyers;
16 but Mr. Mohammad is no longer present.

17 MJ [COL POHL]: Okay.

18 Mr. Harrington?

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

20 MJ [COL POHL]: Mr. Connell?

21 LDC [MR. CONNELL]: Your Honor, Captain Andreu -- request
22 permission for Captain Andreu to be absent for this
23 afternoon's session.

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

2 Mr. Ruiz?

3 LDC [MR. RUIZ]: Judge, Ms. Lachelier is not currently
4 here, but I would expect that she will be joining us shortly.

5 MJ [COL POHL]: Ms. Bormann?

6 LDC [MS. BORMANN]: Judge, Mr. Bin'Attash is absent, but
7 everybody else is here.

8 MJ [COL POHL]: I'll note for the record that both
9 Mr. Mohammad and Mr. Bin'Attash have knowingly and voluntarily
10 waived their right to be present for the afternoon session.

11 Does any other defense counsel want to be heard on
12 513? Apparently not.

13 Trial Counsel.

14 Note for the record that Ms. Lachelier has joined us.

15 Go ahead.

16 MTC [MR. TRIVETT]: As set forth in the defense filing,
17 public source info and heavily redacted discovery provided
18 thus far make plain the U.S. repeatedly considered and
19 rejected covert action. That's their statement. I concur
20 with that statement, and then I ask the question, then why are
21 we here?

22 If they want to make the argument that we repeatedly
23 considered covert action but then rejected covert action, they

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1 have everything they need to make that argument. There's no
2 reference in Mr. Farley's argument of what we just provided
3 them, which was the actual authorizations, after 505 process.
4 But I wanted to touch upon a couple of things that were said
5 by Mr. Farley.

6 Whenever we go through our discovery obligation, we
7 look at, of course, 701, and then we look at the legal
8 standard for what they're trying to use the evidence to either
9 prove or disprove, and ultimately, as we've set forth in
10 various different files during the jurisdictional arguments,
11 the Hamdan standard, we believe is the appropriate standard
12 for hostilities. Nowhere in the Hamdan standard do they talk
13 about what other instrumentalities of our national security
14 apparatus may be doing and whether that's at all relevant.

15 The Ali defense team has a thorough misunderstanding
16 of how war works. Each separate instrument of power, whether
17 it be diplomatic, intelligence, law enforcement, or military
18 does not exist in a vacuum, nor does the use of one somehow
19 mean that the others aren't being utilized.

20 To simplify their argument, if it's war, then it's
21 not law enforcement and that's not diplomatic. If it's law
22 enforcement, then it's not war and it's not diplomatic. And
23 if it's diplomatic, then it's not war and it's not law

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1 enforcement.

2 The commission should categorically reject that.
3 It's inconsistent with the law of war, it's inconsistent with
4 the statute, and it's inconsistent with the standard that we
5 have to prove beyond a reasonable doubt.

6 We discussed previously yesterday, and I won't repeat
7 all of my arguments, but our theory of hostilities is from
8 1996 to 2001. There's a declaration of war, there's a
9 refinement of that declaration to say that American civilians
10 were legitimate targets, and then there's ten separate
11 attacks. We say that that's beyond a reasonable doubt
12 establishing the existence of hostilities. They want to argue
13 against that, they're free to do that. That's fine.

14 But to be clear, any of this other information,
15 whether it's covert action or diplomatic action or other
16 intelligence action, law enforcement action, we're going to
17 object at trial under 401 and 403. I think it's unduly
18 confusing to the members to infuse a law enforcement aspect or
19 a diplomatic aspect to what we believe is a very set standard
20 for what constitutes hostilities.

21 So we don't believe it's relevant under 401. We
22 think it's unduly prejudicial and confusing under 403.

23 But really all that's left is the case in chief. The

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1 jurisdictional aspect of whether hostilities exist prior to
2 September 11th has been decided by this commission. It's
3 *res judicata* in this case. In 502BBBB, you made clear that
4 you were deferring to the executive, legislative, and judicial
5 decisions and determinations without coming up with when the
6 dates started that ultimately a conflict with al Qaeda, not
7 the Taliban, not Afghanistan, but with al Qaeda, existed at
8 some point before September 11th, 2001, which would be all
9 that we would need for jurisdiction.

10 They cannot attack that now. They cannot attack that
11 decision at the jurisdictional level now. And again, to the
12 extent they try to use it in court, we're going to object
13 based on relevance and undue confusion to the members.

14 So then what are we really doing here? What are we
15 asking for and why do they need it? What do they not have out
16 of the 14,000 documents on this issue that they already sent
17 that were available to the public? What do they not have
18 after we provided the information we just provided following
19 substitutions? They have everything they need to be able to
20 make the argument, even if, in the end, we object to the
21 argument.

22 We got a little bit back into the law of armed
23 conflict aspect which we dealt with extensively with

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1 Professor Watts. And ultimately this self-defense rubric
2 claim that they make is of no moment, either. Ultimately, the
3 evidence will establish, certainly in regard to Operation
4 Infinite Reach, that the United States felt that they had to
5 comply with the law of war in conducting that operation. So
6 clearly, if they can argue anything is relevant to the
7 existence of hostilities, it would be the Operation Infinite
8 Reach, Operation Infinite Resolve. But covert action, law
9 enforcement, diplomatic, irrelevant to the standard,
10 irrelevant for further discovery.

11 They asked for, in detail, an extensive list of
12 documents that we did go and review. As we set forth in
13 478CC, we are providing some additional hostilities without
14 conceding that it's relevant. We'll continue and are on track
15 to meet the deadlines that we set forth in that filing. That
16 does not mean that they are discoverable. It does not mean
17 that our discovery as to hostilities is not complete. We
18 believe our affirmative obligations are complete and that any
19 other information we're giving them is just based on a defense
20 request.

21 Mr. Farley mentioned that ultimately it was a higher
22 threshold for a noninternational armed conflict than an
23 international armed conflict. Ultimately, the government's

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1 position is the 9/11 attacks would have met either one; and it
2 doesn't matter, and that wouldn't even count everything that
3 happened beforehand. That ultimately 3200 people who were
4 killed in ten separate attacks over a two-and-a-half-year
5 period would satisfy whatever threshold was required.

6 In the end, we've satisfied our discovery obligations
7 regarding hostilities. They're not entitled to any more. To
8 the extent they get it, it's just based on the good graces of
9 the government.

10 Subject to your questions, sir.

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

12 Defense, anything further?

13 DC [MR. FARLEY]: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon.

15 DC [MR. FARLEY]: Sir, let me begin with the question that
16 Mr. Trivett posited, which is, why are we here? He asserts
17 that the defense, meaning Mr. al Baluchi, have all of the
18 materials we need to make the argument we want to make; and he
19 boils down our argument to this binary question, as he poses
20 it, of whether the United States considered and rejected
21 covert action.

22 Now, the argument I made before we broke for lunch, I
23 explained that -- that our argument is not quite that simple,

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1 but, in fact, the consideration that U.S. policymakers
2 undertook in deciding whether or not to engage in covert
3 action, and the scope of the covert action that they
4 considered, and the target of that covert action, and
5 ultimately the legal authority on which any considered covert
6 action was premised would inform the -- Mr. al Baluchi's
7 defense, this military commission, and the members,
8 ultimately, as to the existence or not of hostilities.

9 So while Mr. Trivett is correct that they have
10 provided us some very helpful substitutes and summaries
11 through the 505 process recently, and that's something that we
12 hope to get into more tomorrow, I think it's helpful for the
13 commission to consider those documents to be something akin to
14 a statute whereas the documents that Mr. al Baluchi is looking
15 for are something more akin to the regulations fleshing out
16 the statute.

17 We're not simply interested in the broad strokes that
18 were considered at the highest level, but what -- we really
19 want to get into the nitty-gritty of what was considered, and
20 by implication of what was considered, specifically the actual
21 concrete action, the implication of the concrete actions that
22 were considered, we can -- we can derive or infer the
23 perceptions of U.S. policymakers in the period 1996 to 2001

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1 and determine, or at least come to some reasonable
2 understanding about -- of what they understood their
3 relationship with al Qaeda to be during that time.

4 And again, our argument is that those policymakers
5 believed that there was no armed conflict between the United
6 States and al Qaeda; that there were no hostilities between
7 the United States and al Qaeda during that period; and their
8 deliberations, the actions they considered, the scale of those
9 actions, and the targets of those actions will reflect the
10 absence of hostilities.

11 And although Mr. Trivett argues that this is not part
12 of the standard that they -- that they, the government, would
13 like the military commission to impose in determining whether
14 hostilities existed or not, perceptions are a key facet of
15 that standard and a facet that Mr. Trivett and the government
16 have returned to repeatedly when they hold up
17 Usama bin Laden's 1996 fatwa as a supposed declaration of war.

18 I would just like to make one -- one additional note
19 that trial counsel -- trial counsel summarized
20 Mr. al Baluchi's argument as -- as essentially that we believe
21 the tools of national power are discrete and mutually
22 exclusive; and that reliance on diplomacy or law enforcement
23 or intelligence or military power count -- interact with each

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1 other in a way that -- excuse me, I'm sorry -- that says if
2 the United States is using law enforcement, it must not be
3 using military power and there could be no hostilities.

4 And, in fact, if you recall in our argument before
5 lunch, we did not make that argument at all. Our argument is
6 that all of these tools of national power exist in a toolbox,
7 and they exist along a spectrum of -- of the use of power that
8 ranges from not hostilities to hostilities.

9 We concede that the United States could use military
10 force and law enforcement and diplomacy and economic power and
11 intelligence power all at the same time, all at once within
12 the context of hostilities. However, we argue that when the
13 United States relies on intelligence, law enforcement,
14 economic power, and diplomacy to the exclusion of military
15 power, or the near-exclusion of military power, that ----

16 MJ [COL POHL]: So there's only hostilities if there's an
17 exercise of military power ----

18 DC [MR. FARLEY]: Your Honor ----

19 MJ [COL POHL]: ---- is that what you're saying? It
20 doesn't preclude other things but it requires that?

21 DC [MR. FARLEY]: Yes, it does.

22 MJ [COL POHL]: Okay.

23 DC [MR. FARLEY]: And you can see that in the standard

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1 that the government proposes we utilize. One of the factors
2 among essentially everything that it asks is whether and when
3 the United States decided to employ the combat capabilities of
4 its Armed Forces. And that standard -- that portion of their
5 standard is consistent with international law and the law of
6 war as understood by the United States outside of the context
7 of this military commission.

8 I'd like to make two final points. The first is, you
9 know, Mr. al Baluchi recognizes that the military commission
10 has ruled in 502BBBB. I would just like to remind the
11 military commission that that ruling was issued with respect
12 to Mr. al Hawsawi alone and without prejudice to
13 Mr. al Baluchi, and that our hostilities case in -- the
14 pretrial case in hostilities around personal jurisdiction
15 remains pending before the military commission.

16 And finally, I have to acknowledge that I misspoke
17 before we broke for lunch concerning the congressional intent
18 in the 2009 Military Commissions Act. While I would concede
19 that it -- while I would concede that it may have been the
20 intent of Congress to embrace this trial before the military
21 commission today, it is not -- a closer reading of the
22 provision of the Military Commission Act, which is
23 10 U.S.C. 948d, would suggest that it's -- that Congress has

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1 actually left that question, the question of whether the
2 conduct on trial today and in the course of this trial fits
3 within the jurisdiction of the military commission is a
4 question of fact to be resolved by the military commission.

5 And I would point you to -- it says, a military
6 commission under this chapter shall have jurisdiction to try
7 persons subject to this chapter for any offense, whether such
8 offense was committed before, on, or after September 11th,
9 2001. And then, of course, 10 U.S.C. 948c defines persons
10 subject to military commission as any alien unprivileged enemy
11 belligerent. And then 10 U.S.C. 948a(7) defines alien
12 unprivileged belligerent with reference to hostilities.

13 MJ [COL POHL]: Anything further?

14 DC [MR. FARLEY]: No, Your Honor.

15 MJ [COL POHL]: Thank you.

16 DC [MR. FARLEY]: Thank you.

17 MJ [COL POHL]: Mr. Nevin?

18 LDC [MR. NEVIN]: And, Your Honor, excuse me, I just --
19 three things. First, to point out that what Mr. Farley just
20 said about Mr. al Baluchi is true about Mr. Mohammad as well.
21 We're -- we still haven't filed our litigation around the idea
22 of hostilities.

23 Second, I understood counsel to say that essentially

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1 the military -- he would be -- that the government would be
2 asking the military commission to direct a verdict on the
3 question of hostilities because that question is *res judicata*
4 having been decided by the military commission.

5 I don't think that a military commission or a court
6 in the United States has the ability or the right to take that
7 question away. That's a jury question. And Mr. Mohammad is
8 entitled to a jury determination or a members determination on
9 that question. I don't think that's presented at this point,
10 and I don't know that it -- maybe I heard counsel incorrectly,
11 but I at least want to flag that.

12 And then finally, just on the last question that
13 Mr. Farley was discussing with you, the question of what
14 Congress intended. If you read too much or enough into
15 Congress' intent from looking at the statute, eventually the
16 analysis becomes a bill of attainder -- the Military
17 Commissions Act becomes a bill of attainder. So there has to
18 be some place this side of a violation of the prohibition on
19 bills of attainder, but this statute lives or else it's in
20 violation by virtue of its specificity in another way.

21 But what Congress says here is that it is, just as
22 counsel -- or just as Mr. Farley said to you, the question is
23 whether there is an -- whether there's been the commission of

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1 an offense made punishable by this chapter; and the offenses
2 require that there be hostilities. And the offenses, the --
3 the statute defines hostilities to mean a conflict subject to
4 the laws of war.

5 And I heard Mr. Farley say to you, and I think it's
6 right, that there is an area of factual determination that has
7 to be made by a trier of fact. This question can't be
8 precluded simply by the fact that the statute by its terms has
9 reached before, during, and after September 11th of 2001.

10 You take the first World Trade Center attack; Ramzi
11 Yousef and others were convicted of that attack, occurring in
12 1993. Well, suppose it turned out as a matter of fact that
13 Mr. Yousef had been the agent of a foreign government -- of a
14 nation, that is to say, and that he had undertaken that
15 attack -- assuming he's the one who did it, that he had
16 undertaken it on behalf of a nation as a matter of the
17 nation's policy. That would make that act, arguably at least,
18 subject to the laws of war. That's a factual determination
19 that a subsequent court could make. And we know now that the
20 fact that it occurred before September 11th of 2001 would not
21 necessarily mean that it was outside the reach of the Military
22 Commissions Act.

23 I guess my point is only this: The -- there still

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1 has to be an offense that occurred -- and this is the way
2 Congress structured this language. There still has to be an
3 offense that occurred; and an offense, by definition,
4 invokes -- within the Military Commissions Act, invokes the
5 law of war.

6 There are a lot of ways to define offenses, and we
7 see in the federal -- in the federal statutes, we see
8 cross-referencing within statutes all the time. We see that
9 if you do something that's forbidden by section so-and-so, you
10 are -- and if you, in addition, do these three things, you're
11 guilty of a different offense.

12 So Congress chose to define these offenses in the way
13 it chose to define them. Now, you -- I remember
14 Professor Watts saying as well, how do you know what Congress
15 intended? I mean, you can read what individual members of
16 Congress said about in the record, but you can't discern their
17 intention with precision. You can set that aside for a
18 minute. But -- I mean, even though I think that's true.

19 But still, when Congress writes a statute, the
20 military commission is required to enforce the statute by its
21 terms, not by what it thinks Congress wanted or what it
22 discerns Congress wanted from looking at the legislative
23 history. It's required to apply what's written. And, of

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1 course, what -- and I -- I recognize -- I read your ruling, of
2 course, so I mean, I -- but this now has come up, and so, I
3 just want to say to you that if Congress intends to make it
4 illegal to wear a red shirt, and they all have agreed and
5 debate and so on that a red shirt -- you can't be wearing red
6 shirts, and if they write a statute that says whomsoever shall
7 wear a blue shirt is guilty of an offense, you don't now find
8 someone guilty of wearing a red shirt based on that statute.
9 You deal with the statute the way it's presented and the way
10 it's written.

11 And I say to you they invoked the law of war. And we
12 know after reading the cases what that refers to. And this
13 is -- again, this is Professor Watts's testimony.

14 So anyway, that was -- those are -- that's the
15 argument I wanted to make. Thank you.

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

17 Any other defense counsel wish to be heard?

18 Apparently not.

19 Mr. Trivett, do you want anything further?

20 MTC [MR. TRIVETT]: Nothing other than to clarify that we
21 acknowledge we have a burden of proof at the trial level,
22 during the case in chief, to prove beyond a reasonable doubt
23 the existence of hostilities.

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1 MJ [COL POHL]: Okay. Just to clarify, that issue isn't
2 before me.

3 So that brings us to the last one on the open
4 session, 564.

5 Mr. Farley.

6 DC [MR. FARLEY]: Thank you, Your Honor. I'll be
7 addressing AE 564. I've prepared a set of slides that have
8 been given to the CISO for review.

9 MJ [COL POHL]: Good to go.

10 DC [MR. FARLEY]: I believe they have been marked by the
11 court reporter as AE 546D (AAA).

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

13 DC [MR. FARLEY]: I request the feed from Table 4, Your
14 Honor, and permission to display the slides to the gallery.

15 MJ [COL POHL]: Permission granted.

16 DC [MR. FARLEY]: Your Honor, AE 564 is Mr. al Baluchi's
17 motion to compel communications between the United States or
18 representatives of the United States and representatives of
19 the so-called Islamic Emirate of Afghanistan, which we
20 commonly know as the Taliban, concerning Usama bin Laden
21 between 1 January 1996 and 31 October 2001.

22 These communications initially requested by
23 Mr. al Baluchi on March 27 are material and therefore

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1 discoverable under the Rules of Military Commission because
2 they are helpful to Mr. al Baluchi's defense.

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

4 DC [MR. FARLEY]: I'm sorry, Your Honor. This is page 7,
5 I believe. Slide 7.

6 MJ [COL POHL]: Okay. You're starting at page 7?

7 DC [MR. FARLEY]: Sorry.

8 MJ [COL POHL]: You're starting at page 7?

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

10 MJ [COL POHL]: Go ahead.

11 DC [MR. FARLEY]: The preceding pages deal with the
12 relevance and materiality standard which I'm sure you're more
13 familiar than I am.

14 MJ [COL POHL]: Well, thank you for not redoing those, but
15 go ahead. I got you.

16 DC [MR. FARLEY]: Okay. I'll bear that in mind in the
17 future. And in that vein, much of what we'll discuss now will
18 be related to what we've discussed in the context of 513, so
19 I'll try to spare the commission the burden of having to hear
20 it again.

21 But essentially U.S.-Taliban communications are
22 material to Mr. al Baluchi's defense because they are helpful,
23 they assist him in discrediting the government's assertion

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1 that hostilities between the United States and al Qaeda
2 predated the 11 September 2001 attacks by demonstrating that
3 the United States did not understand itself to be engaged in
4 hostilities with al Qaeda until some point after
5 September 11th.

6 Instead, these communications will demonstrate that
7 the United States viewed Usama bin Laden as a criminal whose
8 threat was addressed primarily through law enforcement and
9 diplomatic means. The communications will also demonstrate
10 that the U.S. Government's goal with respect to bin Laden was
11 first for bin Laden to be expelled from the portion of
12 Afghanistan under the Taliban's control; and second, for
13 bin Laden to be subject to criminal justice proceedings in a
14 jurisdiction willing to try him.

15 These communication records will demonstrate that the
16 United States' pursuit of bin Laden did not sound in the laws
17 of war where lethal force may be used as a first resort,
18 strongly implying that the United States was not, in fact,
19 engaged in hostilities with al Qaeda; and as a result, records
20 of U.S.-Taliban communications concerning bin Laden are
21 helpful to Mr. al Baluchi's defense.

22 So as an initial matter, the United States engaged
23 with the Taliban to address the threat posed by bin Laden as

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1 an individual. Here you see one example of a declassified,
2 decaptioned cable released through FOIA processes that we
3 attached at Attachment D to AE 564 (AAA).

4 This portion of the cable makes it clear that -- or I
5 would ask that you take my word for it, that the rest of the
6 cable makes it clear that the United States is engaging with a
7 Taliban representative here, and emphasizing that it's
8 essential that bin Laden be brought to justice for his
9 terrorist acts. This is one example. There are numerous
10 other examples that demonstrate that the United States was
11 engaging with the Taliban on the basis of addressing bin Laden
12 as an individual and not al Qaeda as an organization.

13 Going back to what we discussed a bit in 513, this
14 focus on bin Laden as an individual vice al Qaeda as an
15 organization implies that U.S. policymakers did not consider
16 the United States to be engaged in hostilities because those
17 are collective armed -- definitionally collective armed
18 violence between organized parties.

19 Here's an example of a cable, again, declassified and
20 decaptioned and released through FOIA processes, demonstrating
21 that the United States sought bin Laden's expulsion. This
22 goes to sort of two fundamental points. The first is that
23 expulsion is not a use of armed violence. It's a diplomatic

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1 remedy. It's a remedy that's used by states when they're
2 dissatisfied by the presence of an individual or a collection
3 of individuals in one state and want those people removed for
4 whatever reason. It is not an example of deploying armed
5 forces. It's not an example of using military force. It's a
6 diplomatic request. Please kick this person out of your
7 country.

8 And here's a good example of the single-minded
9 pursuit the United States had for bin Laden's expulsion to a
10 jurisdiction that would be willing to put him on trial.

11 In the -- here in paragraph 2 of this --
12 declassified, decaptioned cable that was released through
13 FOIA, the U.S. ambassador has met with the so-called charge
14 d'affaires of the Taliban-controlled Afghan embassy, and he's
15 asking the ambassador to expel bin Laden, even after
16 bin Laden -- even after the United States is representing that
17 it has solid information that bin Laden is planning to conduct
18 additional attacks against the United States.

19 If the United States were engaged in an armed
20 conflict with al Qaeda at this time period, it would seem that
21 the United States would use more aggressive measures to
22 address the bin Laden problem, not exclusively the sort of
23 diplomatic remedy.

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1 And finally, we have a good example here of the
2 United States in this cable, this redacted -- or sorry,
3 decaptioned, declassified FOIA-released cable, of the United
4 States laying its bin Laden problem at the feet of the Taliban
5 and saying to the Taliban -- oh, sorry, excuse me, looking to
6 the Taliban to deal with the bin Laden problem themselves.

7 And this -- this is an important point because it
8 gets to the nature of the relationship between al Qaeda and
9 the Taliban, which the government in its pleadings has
10 represented is irrelevant.

11 The reason why this isn't irrelevant is because,
12 although we take -- it's sort of been in the course of these
13 proceedings taken for granted that any armed conflict between
14 the United States and al Qaeda must be a noninternational
15 armed conflict. That is yet to be demonstrated.

16 We know that the United States is a state, and we
17 know that al Qaeda is a noninternational -- or sorry, a
18 nonstate actor -- I apologize. And that would suggest that
19 the most likely type of armed conflict to arise would be a
20 noninternational armed conflict. But al Qaeda was present in
21 territory controlled by the Taliban. And the United States
22 looked to the Taliban to deal with al Qaeda on its behalf.

23 Now, at the same time -- and that's clear from the

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1 diplomatic record, the sort of redacted diplomatic record that
2 we have. But at the same time, there's good public reporting
3 and there's good research that's been published in the last
4 several years that suggests that the relationship between
5 al Qaeda and the Taliban was dynamic. And at different times,
6 al Qaeda provided troops to fight on the Taliban's front
7 lines; and at different times, the Taliban provided al Qaeda
8 with logistical support.

9 So if -- if the United States was correct in the
10 '90s, that al Qaeda was not a state, and if al Qaeda was
11 under -- was in league with the Taliban in some sort of way,
12 then this gives rise to an implication that -- it gives rise
13 to an attribution problem for the attacks of September 11th
14 and otherwise. And one of the things that the government must
15 demonstrate is that the attacks that we believe to be authored
16 by al Qaeda were, in fact, authored by al Qaeda and
17 attributable only to al Qaeda and not attributable to a state
18 actor.

19 But this is also important -- this example is also
20 important for a second reason. And that's because the
21 government consistently holds up bin Laden's 1996 fatwa as a
22 declaration of war. And trial counsel have said it at least
23 once this afternoon. The problem is that a declaration of

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1 war, which is a speech act that actually implicates the law of
2 war, can only be issued with legal effect by a state actor.

3 So for bin Laden to issue a declaration of war within
4 the meaning of the laws of war, which is to say an act of
5 speech that invokes hostilities, bin Laden must have been the
6 head of state or the head of government of a state.

7 Here it seems clear that the United States, at least
8 in the '90s, believed that al Qaeda was not a state, but was
9 some other entity to the extent that it was an entity.

10 MJ [COL POHL]: Do hostilities still exist today between
11 al Qaeda and the United States?

12 DC [MR. FARLEY]: Your Honor, that is a -- a technically
13 challenging question to answer for all of the reasons that
14 this proceeding is challenging. It requires a fact-heavy
15 analysis and ----

16 MJ [COL POHL]: I'm just trying to figure this out.
17 Because you say in 1996 when al Qaeda -- when Usama bin Laden
18 issued his fatwa, that can't start hostilities.

19 DC [MR. FARLEY]: Correct.

20 MJ [COL POHL]: And you say earlier that on the
21 September 11, 2001, there weren't hostilities between the
22 United States and al Qaeda. And you're kind of implying that
23 because they're not a state actor -- I'm just trying to figure

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1 out, under your analysis, when would there be hostilities
2 between the United States and al Qaeda? Or is that legally
3 impossible?

4 DC [MR. FARLEY]: Your Honor, it is certainly legally
5 possible. It requires a demonstration that al Qaeda be
6 sufficiently organized to be a party to a state, and that
7 armed violence ----

8 MJ [COL POHL]: What do you mean "to be a party to a
9 state"?

10 DC [MR. FARLEY]: I apologize. I misspoke. To be a party
11 to a conflict. And it requires -- on the one hand. And it
12 requires on the other hand that the armed violence between the
13 United States and al Qaeda be sufficiently intense to
14 constitute an armed conflict, just as Professor Watts
15 testified to.

16 MJ [COL POHL]: Does it need to be continuous?

17 DC [MR. FARLEY]: Sorry?

18 MJ [COL POHL]: Does it need to be continuous?

19 DC [MR. FARLEY]: It must be protracted as opposed to
20 sporadic.

21 MJ [COL POHL]: Okay. So back to my question. Has
22 anytime prior to 2018 there existed a -- hostilities between
23 the United States and al Qaeda?

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1 DC [MR. FARLEY]: Your Honor, I believe it is possible
2 that it could. I would be -- I would feel uncomfortable
3 performing that analysis before you because of the potential
4 that it could prejudice my client. If you wanted to speak
5 about a different nonstate actor, in a different ----

6 MJ [COL POHL]: No, but I'm just trying to figure out your
7 argument here. Because you seem to be implying that
8 al Qaeda's not a state actor; therefore, they're not in a
9 position to declare war on the United States; therefore,
10 there's no hostilities with the '96 fatwa ----

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

12 MJ [COL POHL]: ---- there no hostilities between the
13 United States with the embassy bombing; there's no hostilities
14 with the United States with the COLE bombing; there's no
15 hostilities with the United States with the 9/11 event; and
16 there's no hostilities with the United States with anything
17 that's happened after that.

18 So I'm just taking your argument to its logical
19 conclusion that it would be impossible to have hostilities
20 with al Qaeda.

21 DC [MR. FARLEY]: So, Your Honor, I -- perhaps I was
22 unclear and I misspoke.

23 I agree with you, that there were no hostilities as a

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1 consequence of the 1996 fatwa ----

2 MJ [COL POHL]: I'm not saying -- don't agree with me
3 because I didn't say that.

4 DC [MR. FARLEY]: Okay. I apologize.

5 MJ [COL POHL]: I'm saying, I'm hearing your argument to
6 be is that there's no hostilities with al Qaeda at least
7 through 2001, and there's a protracted nature, we've discussed
8 that before. And my question is, is there hostilities any
9 time after 2001, and apparently -- so your argument, taken to
10 its logical conclusion, would indicate there would never be
11 hostilities with a nonstate actor.

12 DC [MR. FARLEY]: No, no. Your Honor, if you've reached
13 that conclusion, then I've ----

14 MJ [COL POHL]: Give me an example of where there's a
15 state of hostilities with a nonstate actor. Don't talk about
16 al Qaeda, talk about anyone.

17 DC [MR. FARLEY]: Sure. There are probably several
18 noninternational armed conflicts going on right now today
19 within Syria. The state of Syria is engaged in protracted
20 armed violence against various organized armed groups,
21 including, for example, the Kurdish militia known as the YPG.
22 It was certainly engaged in a noninternational armed conflict
23 with, for example, the Islamic State.

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1 MJ [COL POHL]: Is -- that distinction is because it's a
2 protracted armed conflict?

3 DC [MR. FARLEY]: I'm sorry, the distinction between what
4 and what?

5 MJ [COL POHL]: What I'm saying is, I'm trying to figure
6 out -- you know, you indicated earlier in your previous slide
7 about an organized armed group.

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

9 MJ [COL POHL]: You seem to imply that al Qaeda was not an
10 organized armed group. I'm not making a determination one way
11 or the other. I got it. But what I'm trying to figure out is
12 when you got -- when you got places like -- or nonstate
13 actors, and Kurds are kind of a strange example, because
14 although they're a nonstate actor, they kind of think they're
15 a state, but that's a side issue. Let me go to ISIS for a
16 better example because it's a better analogy. They engage in
17 protracted conflict with all sorts of people in Syria and
18 Iraq. Would that be hostilities?

19 DC [MR. FARLEY]: So, Your Honor, actually I think that
20 you raise two excellent examples here, by contrasting the YPG
21 on the one hand and ISIS on the other. In fact, both of those
22 entities aspired to statehood. They both pretend, so to
23 speak, to be governments and states, right? Or at least ISIS

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1 did for quite a while.

2 That is a hallmark of a organized armed group engaged
3 in a noninternational armed conflict. The ----

4 MJ [COL POHL]: So it's a territorial analysis.

5 DC [MR. FARLEY]: It's not purely territorial. It truly
6 is an organizational analysis. And if you look at the
7 jurisprudence in the ICTY, for example, it's focused on
8 hierarchical military-like organization.

9 I'm sorry, Your Honor. And -- but one of the factors
10 to consider is territorial control; and in particular,
11 territorial control to the exclusion of other authorities.
12 For example, here, you know, one of the things that would sort
13 of be a demerit to the position that al Qaeda was sufficiently
14 organized to be a party to an armed conflict would be that
15 there's a historical record that suggests that al Qaeda was
16 not administering or controlling territory, and certainly not
17 to the exclusion of, for example, the Taliban authorities.
18 But certainly -- but territorial control is not itself
19 exclusive.

20 Now, I'm reminded by my -- by Mr. Connell and my
21 colleagues that the position that we've taken in previous
22 pleadings is that the armed conflict between the United States
23 and al Qaeda began as of 7 October 2001. So again, if I led

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1 you to the belief that an armed conflict -- a noninternational
2 armed conflict between the United States and al Qaeda is
3 impossible, that's my failing. I didn't mean that. But it is
4 the case ----

5 MJ [COL POHL]: I'm not faulting you for not being here
6 for the last six years, as much as I envy you, but that's
7 another issue.

8 Go ahead. No, I understand your point. I just was
9 trying to figure out -- you know, you say they can't declare
10 war on the United States, but apparently the United States can
11 declare war on them, is the analysis.

12 DC [MR. FARLEY]: So the declaration ----

13 MJ [COL POHL]: That's when hostilities start.

14 DC [MR. FARLEY]: Well, the question of whether the United
15 States could declare war on al Qaeda, and that would be
16 meaningful in a legal sense, is actually -- is a good
17 question.

18 The law in noninternational armed conflict is that
19 it's -- it's fact intensive, and it really is looking at
20 concrete intensity. And so were the United States to say, you
21 know, declare war on a noninternational -- a nonstate actor
22 somewhere on the other side of the world and never -- and
23 never exchange fire with that nonstate actor, and that

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1 nonstate actor never attacked the United States, I think that
2 there's a very good argument to be made that there was no --
3 there would not be a noninternational armed conflict.

4 MJ [COL POHL]: Do you need to have both a -- an
5 announcement of some kind by the United States plus violence
6 between the two parties to have a ----

7 DC [MR. FARLEY]: No, Your Honor. And, in fact -- no,
8 Your Honor, you don't.

9 In fact, the -- in the jurisprudence around
10 noninternational armed conflicts, the statements of the -- the
11 public statements of the leaders of states are somewhat
12 disfavored as evidence of the existence of noninternational
13 armed conflict because historically -- historically states
14 sought to avoid international legal regulation when it came to
15 noninternational armed conflicts.

16 MJ [COL POHL]: I thought you guys wanted all sorts of
17 witnesses who gave their opinion there was no hostilities?
18 And that ----

19 DC [MR. FARLEY]: Your Honor, we do.

20 MJ [COL POHL]: ---- in that --

21 DC [MR. FARLEY]: We do because -- in part because the
22 government maintains that perceptions of leaders is a
23 fundamental -- is a requisite ----

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1 MJ [COL POHL]: I thought you just told me that those
2 statements should be taken with a grain of salt and are
3 disfavored.

4 DC [MR. FARLEY]: So Your Honor, both things are true,
5 right?

6 MJ [COL POHL]: Okay.

7 DC [MR. FARLEY]: The statements of policymakers, their
8 public statements should be taken with a grain of salt;
9 however, under the government's preferred standard, they
10 should be given extraordinary weight. As a consequence of
11 that, we would like to examine the people who made those
12 statements.

13 In addition, the private statements of leaders,
14 particularly the -- their decisions about policy choices, in
15 light of confidential legal analysis, because they are not
16 publicly made, because they cannot be self-serving, those
17 should be given more weight.

18 MJ [COL POHL]: I understand. Go ahead.

19 DC [MR. FARLEY]: So, Your Honor, essentially,
20 Mr. al Baluchi's position is that the diplomatic record, the
21 record of diplomatic communications between the United States
22 and the Taliban between 1996 and October of 2001 will reflect
23 that the United States and al Qaeda were not engaged in

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1 hostilities during that period. They will help the United --
2 help Mr. al Baluchi discredit the government's assertion that
3 those hostilities did, in fact, exist. They will assist
4 Mr. al Baluchi in potentially rebutting the claim that the
5 government seems to imply that al Qaeda was a state or a
6 quasi-sovereign entity by dint of attributing legal weight to
7 bin Laden's '96 fatwa, and they will assist Mr. al Baluchi in
8 describing the dynamic relationship between the Taliban and
9 al Qaeda in this period, which, again, is material to his case
10 because it's going to inform the appropriate -- the
11 appropriate rubric, legal rubric that the military commission
12 ought to draw on.

13 Because if the Taliban were -- if al Qaeda's actions
14 are attributable to the Taliban, then the appropriate legal
15 rubric would be that, potentially, of international armed
16 conflict versus noninternational armed conflict.

17 MJ [COL POHL]: So that al Qaeda was operating as a --
18 some type of affiliated force for the Taliban and do the
19 Taliban's bidding, and therefore, this is really a Taliban
20 attack and not an al Qaeda attack; they're just kind of a
21 sub-unit of the Taliban mission?

22 DC [MR. FARLEY]: That is potentially the case. It's
23 not -- it's not necessarily the position that ----

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1 MJ [COL POHL]: Would that make the members of al Qaeda
2 members of the Taliban?

3 DC [MR. FARLEY]: Potentially. But again, this is a
4 fact ----

5 MJ [COL POHL]: If they were members of the Taliban, or
6 are they an unprivileged belligerent?

7 DC [MR. FARLEY]: Your Honor, I'm not prepared to answer
8 that question.

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

10 DC [MR. FARLEY]: This, again, is a fact-intensive
11 inquiry, which is why we would like access to additional facts
12 that are not available to us in the FOIA-released record.
13 And, Your Honor, if you will permit me, I can show you an
14 example of ----

15 MJ [COL POHL]: Keep on going.

16 DC [MR. FARLEY]: Could you go back, Sergeant? I'm sorry.
17 Go -- no. One more.

18 MJ [COL POHL]: Do you want to play a video?

19 DC [MR. FARLEY]: No, Your Honor. I don't think it's
20 necessary. This is good.

21 MJ [COL POHL]: Okay.

22 DC [MR. FARLEY]: Your Honor, just as an example, here's a
23 portion of a decaptioned, declassified cable that we've

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1 received in -- through FOIA processes. You can see that the
2 subject is dealing with both the Taliban and bin Laden, and
3 evidence of U.S. interaction with both the Taliban and
4 Pakistan on the question of bin Laden, and it lists
5 references, citations like we would have in a legal brief.

6 And these are references to a cable from Islamabad,
7 and a reference to a cable coming out of the State Department.
8 Mr. al Baluchi does not have these documents, does not have
9 these cables. They've not been released through a FOIA
10 processes. This would seem to -- that is good evidence, we
11 think, that our set of FOIA-released records is -- it
12 indicates that that's just a partial set of the diplomatic
13 correspondence between the United States and the Taliban
14 during the relevant period and that there -- in addition to
15 what we have being redacted, that there is additional evidence
16 out there that we should be allowed to examine.

17 And here's an even better example of that. Again, in
18 the upper left corner, this cable has a subject, and then a
19 list of references. The bottom two references that are
20 highlighted, C and D, appear in the text on the right side of
21 the page later in the cable indicating that, you know, the
22 State Department, the drafter of this cable, thought that
23 these two references were relevant and material to the

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1 subsequent reporting.

2 Again, we don't have the two cables that are
3 referenced. And given -- given that they are germane to the
4 diplomatic record, they provide an example of what
5 Mr. al Baluchi does not have.

6 MJ [COL POHL]: Okay.

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

8 MJ [COL POHL]: Thank you. Any other defense counsel wish
9 to be heard on this?

10 Apparently not.

11 Trial Counsel, do you wish to be heard?

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

13 So Professor Watts conceded that one of the primary
14 purposes of the law of war is to protect civilians in combat.
15 If the commission were to accept Mr. Farley's characterization
16 that the East Africa Embassy attacks and the COLE attacks and
17 the 9/11 attacks did not constitute armed conflict, then the
18 law of armed conflict has failed, and it's failed the 2,921
19 civilians who were massacred at work or while going on
20 vacation.

21 The Ali team continues to argue the law that they
22 wish it would be, and not the law that is, and they attempt to
23 rewrite history. I believe I heard Mr. Farley say that we

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1 still do not know whether it was a noninternational armed
2 conflict or an international armed conflict against al Qaeda.
3 I'd point Your Honor and Mr. Farley to the Supreme Court
4 decision in Hamdan v. Rumsfeld, where they made clear and
5 recognized two distinct armed conflicts: One of a
6 noninternational flavor against al Qaeda; and one, at least
7 initially, after October 7th, of an international flavor
8 against the Taliban. This decision has already been made.
9 Our highest court has spoken on it.

10 But let's get a little bit more into the facts of
11 this case. Now, all of the accused in this case are charged
12 with the 9/11 attacks. 2,976 people were killed. And while
13 we'll concede that some plotting occurred in Afghanistan, much
14 of it actually occurred in the United States, the United Arab
15 Emirates, Germany, Malaysia, and Pakistan. And the evidence
16 will show that it was all done under al Qaeda leadership.

17 There is no evidence that we are aware of that the
18 Taliban had any involvement in the September 11th attacks. As
19 such, information regarding communications between the United
20 States and al Qaeda are completely and wholly irrelevant to
21 this case.

22 Now, some military commissions, if they allege
23 conduct post-October 7th in Afghanistan for violations of the

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1 law of war against our soldiers that were there, this issue
2 may become more relevant, but that's not the facts of this
3 case and that's not what this commission is dealing with
4 today.

5 Mr. Farley would not even concede that we were still
6 in an armed conflict with al Qaeda. If that were the case,
7 we'd have to empty Guantanamo immediately of all of the
8 remaining detainees here.

9 MJ [COL POHL]: To be fair, he corrected that.

10

11 MTC [MR. TRIVETT]: I didn't think he corrected that
12 aspect of it. They conceded at some point after October 7th
13 there was an armed conflict. I don't know that they would
14 concede that there's an armed conflict today. It's of no
15 moment.

16 MJ [COL POHL]: The way I framed the question was before
17 today. But I understand your point, but I believe he
18 clarified it, at least to my satisfaction. Go ahead.

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

20 So the al Qaeda conspiracy to attack Americans
21 probably predated the hostilities. In 1989, they first
22 started to determine that the United States was the main
23 source of problems for the Muslim world and that they needed

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1 to cut off the head of the snake. That was seven years before
2 the declaration of war.

3 The declaration of war occurred in 1996, as we've
4 stated, but so did the planning for this attack. And war not
5 need be continuous. At some point, there's planning, there's
6 preparation, there's the coiling of the force that they're
7 going to use against us. Oftentimes I'm reminded that war can
8 have periods of boredom followed by extreme violence in short,
9 sporadic events.

10 But even on the sporadic argument, we believe that
11 the ten attacks in a little over two and a half years that
12 killed over 3200 people was anything but sporadic and would
13 satisfy any burden that we had to establish an armed conflict.
14 Evidence will show al Qaeda was responsible for it. There
15 will be no evidence to show that the Taliban had any
16 involvement in it.

17 As such, the defense is not entitled to the documents
18 that they seek.

19 Subject to your questions, sir.

20 MJ [COL POHL]: I have none, thank you.

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

22 MJ [COL POHL]: Defense, anything further?

23 DC [MR. FARLEY]: Your Honor, briefly, just two points.

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1 The first is that the government, with respect to
2 hostilities, continues to essentially assert that they're
3 right and that we're wrong. And the government's entitled to
4 its position. Of course, we wouldn't be here otherwise. All
5 that Mr. al Baluchi is asking is that he be provided the
6 documents, the records, the information, and the evidence
7 necessary for him to make his counter-arguments and his
8 arguments in favor of his own defense.

9 The second point I'd like to make is that Mr. Trivett
10 keeps referencing the Supreme Court's decision in Hamdan to
11 suggest that the Supreme Court has decided that the armed
12 conflict between the United States and al Qaeda was a
13 noninternational armed conflict. In fact, that is not what
14 the Supreme Court decided.

15 Instead, the Supreme Court recited what the Court of
16 Appeals for the D.C. Circuit had assumed based on the
17 government's representations, and then -- and then said
18 essentially that they didn't -- that they, the Supreme
19 Court -- this is in Justice Stevens' opinion for the court --
20 didn't need to address the question of whether it was an
21 international or a noninternational armed conflict; instead,
22 regardless of the character of the conflict, one provision at
23 least applies, and that was Common Article 3.

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1 Thank you, Your Honor.

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

3 Mr. Trivett, anything further?

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

5 MJ [COL POHL]: Okay. That concludes what we have today
6 for the open session. As discussed earlier, I just want to
7 kind of -- the procedural posture of the case. Yesterday when
8 we discussed classified information, it's a two-step process;
9 that we have to first hold a closed session in order to
10 determine whether or not classified information is to be used
11 in another closed session to support an argument. We did that
12 yesterday.

13 Tomorrow, under Rule for Military Commission 806, we
14 will conduct the closed session discussing only classified
15 information. We've already discussed what was on the docket
16 for that, I don't believe there's any other matters to take
17 up.

18 Just to clarify something, I believe 564 -- 565, is
19 that yours, Mr. Harrington?

20 LDC [MR. HARRINGTON]: It is, Judge, yes.

21 MJ [COL POHL]: As I recall, when we discussed it on
22 Monday, you said you have a supplement that you're going to
23 file on it, correct?

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1 LDC [MR. HARRINGTON]: We filed it yesterday, Judge.

2 MJ [COL POHL]: Okay.

3 Trial Counsel, do you need time to respond?

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

5 MJ [COL POHL]: Okay. Okay.

6 That being said, the commission is in recess today.

7 I will reconvene tomorrow for a closed session under 806 to

8 discuss classified information and only classified

9 information.

10 Commission is in recess.

11 LDC [MR. CONNELL]: Sir?

12 MJ [COL POHL]: I'm sorry. Given -- no. It's one
13 detainee. Would you like to meet with your client until about
14 1700, Mr. Harrington?

15 LDC [MR. HARRINGTON]: Yes, Judge, please.

16 MJ [COL POHL]: Mr. Binalshibh can stay in the courtroom
17 until about 1700.

18 Mr. Connell, you were standing.

19 LDC [MR. CONNELL]: Judge, you mentioned 564. I wanted to
20 make sure its posture. When we left yesterday, 564 was the
21 one sort of open remaining question as to whether there would
22 be a closed hearing ----

23 MJ [COL POHL]: Okay. Those orders are being issued now,

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20304

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1 or should be in your in-box.

2 [The military judge conferred with courtroom personnel.]

3 MJ [COL POHL]: I'm pretty sure it was denied.

4 LDC [MR. CONNELL]: That's what I thought, sir. I just
5 wanted to make sure that I understood.

6 MJ [COL POHL]: Again, I have it in writing, I just don't
7 have it sitting in front of me, the whole stack. But I
8 would -- if I was a betting man, I would say it was denied.
9 But whether it was denied or granted, you will have a written
10 decision.

11 LDC [MR. CONNELL]: You are good to make the decision,
12 sir, so we'll follow it.

13 MJ [COL POHL]: Yeah. I'm 99 percent sure it was denied.
14 Okay.

15 That being said, the commission is in recess.

16 [The R.M.C. 803 session recessed at 1517, 25 July 2018.]

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20305