[The R.M.C. 803 session was called to order at 0901, 25 March 2019.]

MJ [Col PARRELLA]: Good morning. This commission is called to order.

Trial Counsel, would you please identify who is here on behalf of the United States.

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

MJ [Col PARRELLA]: Good morning.

CP [BG MARTINS]: Representing the United States, Brigadier General Mark Martins, Mr. Robert Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Ms. Nicole Tate, Major Christopher Dykstra. Also present at counsel table, Mr. Rudolph Gibbs and Staff Sergeant Clifford Johnson. And also present in the courtroom are Patrick O'Malley, Ghailan Stepho, and Jeffrey Fuhr of the Federal Bureau of Investigation.

Your Honor, these proceedings are being transmitted by closed circuit transmission to locations in the continental United States pursuant to the commission's order.

MJ [Col PARRELLA]: Thank you, General Martins.

Mr. Nevin, would you please indicate for the record who is here on behalf of Mr. Mohammad.

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

MJ [Col PARRELLA]: Good morning.

LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet, Ms. Leboeuf, Mr. Sowards, and Ms. Radostitz for Mr. Mohammad. And he is present.

MJ [Col PARRELLA]: Thank you.

Ms. Bormann?

LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash, myself, Edwin Perry, Mr. William Montross, and Major Matthew Seeger.

MJ [Col PARRELLA]: Thank you.

Mr. Harrington.

LDC [MR. HARRINGTON]: Judge, on behalf of Mr. Binalshibh, James Harrington, Wyatt Feeler, and John Balouziyeh -- Captain John Balouziyeh, sorry.

MJ [Col PARRELLA]: Thank you. And as I understand it, Mr. Feeler and Captain Balouziyeh are making their first appearances?

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

MJ [Col PARRELLA]: Okay. And I believe they filed appropriate documents stating their qualifications and statuses as to oath, but if they could please -- or if somebody could state on the record -- for the record what those are and that they are in good standing.

LDC [MR. HARRINGTON]: Do that right now, Judge?

MJ [Col PARRELLA]: Please.

DC [MR. FEELER]: Good morning, Judge.

MJ [Col PARRELLA]: Good morning.

DC [MR. FEELER]: My name is Wyatt Feeler. I have been detailed as a general schedule civilian defense counsel for Ramzi Binalshibh by Chief Defense Counsel Brigadier General John Baker. I am a United States citizen. I am admitted to practice law in the state of Maryland in the District of Columbia. I have not been subject to any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

I have been determined to be eligible for access to information classified at the Secret level or higher. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings and to protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and to not divulge any such information to a person not authorized to receive it.

MJ [Col PARRELLA]: Thank you, Mr. Feeler. If you could please raise your right hand.

[Counsel was sworn.]

MJ [Col PARRELLA]: Thank you.

DC [CPT BALOUZIYEH]: Good morning, Judge.

MJ [Col PARRELLA]: Good morning.

DC [CPT BALOUZIYEH]: My name is John Balouziyeh, Captain, United States Army Reserve. I have been detailed as military defense counsel for Mr. Ramzi Binalshibh. I am admitted to practice law in New Jersey and the District of Columbia. I have not been subject to any sanction or disciplinary action by any court or other relevant authority for misconduct.

I have been determined to be eligible for access to information classified at the level of Secret or higher. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceeding and to protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and to not divulge such information to any person not authorized to receive it.

MJ [Col PARRELLA]: Thank you, Captain Balouziyeh. If you could please raise your right hand.

[Counsel was sworn.]

MJ [Col PARRELLA]: Thank you. Please have a seat.

DC [CPT BALOUZIYEH]: Thank you.

MJ [Col PARRELLA]: Mr. Connell?

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

MJ [Col PARRELLA]: Good morning.

LDC [MR. CONNELL]: On behalf of Mr. al Baluchi it is myself, James Connell, Alka Pradhan, Benjamin Farley, Captain Mark Andreu of the United States Air Force. Lieutenant Colonel Thomas was previously excused by the military commission.

MJ [Col PARRELLA]: Thank you.

Mr. Ruiz.

LDC [MR. RUIZ]: Judge, Ms. Suzanne Lachelier, Lieutenant Colonel Jennifer Williams, Mr. Sean Gleason, and myself are present on behalf of Mr. al Hawsawi.

MJ [Col PARRELLA]: Thank you very much.

I will now advise the accused of their right to be present and their right to waive said presence.

You each have the right to be present during all sessions of the commission. If you request to be absent -- to absent yourself from any session, such absence must be voluntary and of your own free will.

Your voluntary absence from any session of the

commission is an unequivocal waiver of the right to be present during that session. Your absence from any session may negatively affect the presentation of the defense in your case. Your failure to meet with and cooperate with your defense counsel may also negatively affect the presentation of your case.

Under certain circumstances your attendance at a session can be compelled regardless of your personal desire not to be present.

Regardless of your voluntary waiver to attend a particular session of the commission, you have the right at any time to decide to attend any subsequent session. If you decide not to attend the morning session but wish to attend the afternoon session, you must notify the guard force of your desires. Assuming there is enough time to arrange transportation, you will then be allowed to attend the afternoon session.

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

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

ACC [MR. MOHAMMAD]: Yes.

MJ [Col PARRELLA]: Mr. Bin'Attash, do you understand what I've just explained to you?

ACC [MR. BIN'ATTASH]: Yes.

MJ [Col PARRELLA]: Mr. Binalshibh, do you understand what I have just explained to you?

ACC [MR. BINALSHIBH]: **[Speaking in English]** I am on the same platform like last time. My lawyer explained to you my positions.

MJ [Col PARRELLA]: I understand your ----

ACC [MR. BINALSHIBH]: I changed my mind -- I didn't change my mind. I still the same.

MJ [Col PARRELLA]: I understand your continuing objection to me presiding as the military judge, and your counsel has noted that objection for the appellate courts.

Mr. Binalshibh, all I want to know right now is whether you understand the rights advisement I gave you about whether you have the right to be present and you can waive that presence.

ACC [MR. BINALSHIBH]: **[Speaking in English]** I did answer that.

MJ [Col PARRELLA]: I'm sorry, can you repeat that?

Well, if you don't answer it, then what I am going to have to do is just have you come to each session of the court,

because if I can't ascertain that you understand your rights to waive your appearance here, then my only remedy is to have you brought to each session of the court.

ACC [MR. BINALSHIBH]: **[Speaking in English]** I will let my lawyer speak with you.

LDC [MR. HARRINGTON]: Could I have a word with my client, Judge?

MJ [Col PARRELLA]: You may.

[Pause.]

ACC [MR. BIN'ATTASH]: **[Speaking in English]** So I did understand that.

MJ [Col PARRELLA]: Thank you.

Mr. Ali, do you understand the rights I just explained to you?

ACC [MR. AZIZ ALI]: Yes.

MJ [Col PARRELLA]: Mr. Hawsawi, do you understand what I have just explained to you?

ACC [MR. AL HAWSAWI]: Yes.

MJ [Col PARRELLA]: On 23 March 2019, this commission conducted an R.M.C. 802 conference here in Guantanamo Bay with both trial and defense counsel. The accused were absent.

At this conference introductions were made for the new counsel and defense team members who were making their

first appearances. We then discussed the order of march for this week's session. I indicated that the commission intended to start this morning's session in an open session with the typical identification of the parties and advisement of rights.

I then indicated we would take up the following motions: AE 133RR, 118, 614, 574G, 600, 601, 617, and 620. With respect to 574G, 600, and 601, I indicated that I would defer to Mr. Connell, as the proponent of those motions, to decide the specific order he would like to take those up in.

Depending on how far we get, I indicated that the commission will then decide whether Tuesday will be an open session, a closed session, or a combination thereof.

Either way, when we finish the unclassified arguments, this commission will then conduct a closed session pursuant to R.M.C. 806 to take up the following motions: 133RR, 118, 574G, 599, 600, and 601.

I then stated that barring a stay from the appellate court, we will take up the interpreter's testimony pursuant to the commission's order in AE 350RRR, 616J in a closed session starting on Thursday at 9:00 a.m.

Finally, I indicated that in order to accommodate the prayer schedule, the commission would endeavor to take a

midday recess from approximately 1200 to 1330, or 1:30 p.m., and to end each day's session by 1730, or 5:30 p.m.

At the R.M.C. 802 conference, Mr. Nevin inquired about his filing from late Friday 22 March marked as AE 615Z, a motion to be heard. I indicated that I viewed AE 615Z as a motion for reconsideration of the commission's ruling in AE 613G, 615Y, wherein I denied Mr. Mohammad's request for oral argument and that it was the commission's intent to deny the motion for reconsideration.

The commission has since done so in a ruling that is marked as AE 615AA. I did, however, indicate to Mr. Nevin that I will allow him to state for the record his continuing belief that he is burdened by a conflict that prohibits him from representing Mr. Mohammad and, as such, it is his intent to not actively participate in this week's session.

Now, Mr. Nevin, I think that summation adequately stated your position, but we'll allow you to briefly state anything that I've missed. I just ask that you not, however, present argument on the topic since I have already ruled multiple times now on this issue, to include denying your request to be heard. With that, the floor is yours.

LDC [MR. NEVIN]: All right. Thank you. And, Your Honor, really my purpose is to ask for a continuing objection, and

our objection is the one we have articulated in the course of the litigation on this issue, that we perceive the existence of a conflict of interest, particularly in view of the long history of government intrusion in the defense -- in defense activity.

And we feel that it hasn't -- that the existence of that sort of an intrusion has not been extinguished by the material that the military commission directed that we be provided. And as a result, our intention is to pursue an extraordinary remedy from -- from either the Court of Military Commission Review or the D.C. Circuit or perhaps both. And until that time, our position is that we're -- that we can't say that we are not laboring under a conflict of interest and therefore we will not be participating in the proceedings.

I'm aware of the military commission's direction or statement that our failure to participate would constitute a waiver. It is not intended as a waiver, and so we are going forward on that basis.

I ask that you grant us a continuing objection so that each time there's an opportunity for us to speak, I'll simply state that I'm relying on the previous objection, or words to that effect, with the military judge's permission.

MJ [Col PARRELLA]: Yeah, I will certainly note that the

commission recognizes that you have a continuing objection and just ask that -- we'll assume that it's in place until you tell me otherwise.

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

MJ [Col PARRELLA]: Thank you.

LDC [MS. BORMANN]: Judge, may I be heard just briefly, in addition? We also have a continuing objection.

MJ [Col PARRELLA]: You may.

LDC [MS. BORMANN]: Good morning.

MJ [Col PARRELLA]: Good morning.

LDC [MS. BORMANN]: I also don't intend to argue, but we're in a slightly different position than Mr. Nevin's team, so I'm going to adopt his statements.

We want to move forward, but we're in a position where we, having done the research that we can, can't move forward. So in an attempt to be able to move forward, I have one question for the commission. I'm hoping you can answer it.

There were 31 pages of completely redacted police records. I was aware, as long -- as well as Mr. Montross and Mr. Perry, of our former paralegal being taken into custody in July of 2019 at Fort Myers -- 2018 -- strike that, 2018, in Fort Myers, in Arlington, Virginia. And I would ask the

military judge just to tell me whether or not the issue revolves around that, because if the commission ----

MJ [Col PARRELLA]: Okay. I just want to stop you right there, Ms. Bormann, because I'm slightly concerned that we don't have the Special Review Team here; we have the prosecution.

So if you have an inquiry that gets into the specifics, what I would ask that you do is reduce it to writing. I'm happy to try to entertain the question or answer it for you, but that you submit that to the SRT, as the government's representative, and we not take that up in open session right now.

So I will happily recognize that you have an ongoing objection, just as Mr. Nevin has asked me to do. Obviously you're aware of the commission's ruling. It's been memorialized several times now in writing and on the record, so we'll note that objection. But in terms of the specifics, please reduce that to writing.

LDC [MS. BORMANN]: I will do so.

MJ [Col PARRELLA]: Thank you.

LDC [MS. BORMANN]: Thank you.

MJ [Col PARRELLA]: Okay. Lastly, at our R.M.C. 802 conference, Mr. Connell asked the commission to add 502CCCC,

AE 524RR (AAA Sup), AE 524HHH, and AE 524TT (RBS Sup) to the docket order for this week. This request was also made in Mr. Ali's proposed and revised proposed order of march set forth in AE 619C and 619P respectively.

In response, the commission stated that it declined to add these motions as the commission was in the process of finalizing its ruling to AE 524NN. The commission believes that this ruling will render the proposed 524 motions moot and that 502CCCC is not yet ripe since the ruling is still pending.

All right. With that, do counsel either side have any additions or corrections to the commission's summary of the R.M.C. 802 conference?

Trial Counsel?

MTC [MR. TRIVETT]: Good morning, Your Honor. We believe that the summary is correct. In re-reviewing our notes after you gave the list of the open session argument, it was our understanding as of last time that there would be a portion of 600 that was open and a portion closed, all of 601 would be open, but our understanding was that all of 574 would be closed.

So we would just ask the military commission to consider whether or not that was its recollection as well.

MJ [Col PARRELLA]: Well, if you give me one moment, Mr. Trivett.

Mr. Connell?

LDC [MR. CONNELL]: I just want to address that issue, sir. I can wait.

MJ [Col PARRELLA]: Go ahead, please. And what I'm doing now is -- as you're talking, is I will pull up the closure order that pertains to it. Frankly, I don't have a specific recollection. So, Mr. Connell, maybe you can help jog the commission's memory on this.

LDC [MR. CONNELL]: Thank you, sir. I re-reviewed the transcript from the 505(h) session on 29 January 2019 when trial counsel contacted me about this question -- the -- and I cannot agree with trial counsel that there was any discussion of a full closure of 574G.

In fact, in the course of the discussion, both the military commission and the government observed that there were a number of paragraphs in 574B (Amended), which is the military commission's Protective Order #3 at issue in 574G, that were unclassified or classified FOUO.

There is nothing about complete closure. In fact, the only motion that the government asked to close completely was AE 600 ----

MJ [Col PARRELLA]: Yeah.

LDC [MR. CONNELL]: ---- and the military commission ruled on that.

MJ [Col PARRELLA]: I do recall, and I also went back and reviewed the transcript of the 505 session, so I know and have a specific recollection that the parties all agreed to closing completely 599.

I know there was debate with respect to 600. The commission ruled that it would afford you the opportunity to make argument -- open argument in 600.

I don't recall any specific discussion about whether 574 would be open or closed either. Give me one moment.

[Pause.]

MJ [Col PARRELLA]: I will note for the parties that both in the -- I think the commission's -- well, the commission's docket order but more specifically, for the proposed order of march, I mean, it's -- 574 has been listed or proposed. In those -- both of those is an argument -- or to be argued in open session. I don't recall reading anything in the government's response objecting to an open session for 574.

So, I mean, the commission is inclined to frankly afford counsel the opportunity to make argument in open session. Obviously I am confident Mr. Connell is aware of

this, that he is going to have to confine his argument to that which is unclassified.

Does that answer your question, Mr. Trivett?

MTC [MR. TRIVETT]: It does, sir. Thank you.

MJ [Col PARRELLA]: Okay. Any other additions or corrections to the commission's summation of the R.M.C. 802 conference?

LDC [MR. CONNELL]: Sir, I just had one more comment on that last thing that I didn't get to, which is that in 601, there is a classified addendum, so pursuant to the military commission's closure order in 601, I believe that 601 will also be bifurcated. It was an unclassified motion with a classified addendum, which we took up in the last 505(h) session.

MJ [Col PARRELLA]: I agree.

LDC [MR. CONNELL]: Sir, the one thing that -- I would agree that the military commission's summation of the 802 conference is correct. The one thing that I would add is that were the military commission to decide otherwise, we are fully prepared to go forward on the 524 series and 502CCCC this week. Thank you.

MJ [Col PARRELLA]: Thank you.

Okay. With that, we will go ahead and commence with

133RR.

Now, as I -- and I will just preface this. As I view this, I know this has been around a while, there was an order from my predecessor. The government has submitted a report at least in partial compliance with that order. I think perhaps where we need to start off with this, to the extent we can in an open session, is sort of with an update of where are we. Because the way I read the order, there were still some tasks to be performed pursuant to that. I'm sorry. I can't ----

LDC [MR. CONNELL]: Can we have a moment with the government?

MJ [Col PARRELLA]: You may.

[Pause.]

CP [BG MARTINS]: Your Honor, we conferred with defense counsel. I mean, the TSCM inspection that you directed pursuant to an agreement between the parties has been conducted, and we agree that we are prepared to move on to argument of the base motion, the request for so-called permanent and verifiable disabling.

But that has been done. And as the parties will both agree, there is a paragraph of the report of that inspection that we can talk about in this session, which is that no audio-monitoring capability was found in the interview rooms

at Camp Echo II. So that's the update we can give you.

MJ [Col PARRELLA]: Okay. Great. Thank you.

ADC [Capt ANDREU]: Good morning, sir.

MJ [Col PARRELLA]: Good morning.

ADC [Capt ANDREU]: Your Honor, 133RR is Mr. al Baluchi's motion to permanently and verifiably disable audio-monitoring capability in attorney-client meeting rooms.

I will start by noting for the record that this motion has been argued on several dates: 24 August 2017 at transcript pages 16277 through 83 and 16290 through 98, 16 October 2017 at transcript pages 16553 through 74, 26 February 2018 at transcript pages 18902 through 05, and 25 July 2018 at transcript pages 2153 **[sic]** through 55.

Your Honor, we think that today will be the last step in what has been a long motion series. This motion series began in 2013 when the defense first raised concerns of monitoring -- audio monitoring of attorney-client conversations in meeting rooms at Echo II.

At that time the JDG Commander provided a declaration stating that, yes, the capability to monitor existed; however, that attorney-client meetings were in fact not being monitored. That's available in the record at AE 133A Attachment C. The JDG Commander further ordered that

all audio capability be disconnected going forward.

Also in 2013 the Staff Judge Advocate testified that there were microphones disguised as smoke detectors in attorney-client meeting rooms.

The military judge then issued a ruling -- issued an order, excuse me, that is AE 133QQ. The military judge ordered that monitoring be prohibited in attorney-client meeting rooms and that what he called the salient points of the JDG Commander's order be made part of the standard operating procedures for JTF-GTMO and the Joint Detention Group.

The military judge further ordered that if any audio monitoring was to occur, that defense counsel be so advised prior to meeting with their clients. Again, that's AE 133QQ.

So then fast forward to July of 2017. That's when Mr. al Baluchi filed the instant motion, 133RR. That was filed based upon advice from the chief defense counsel based upon a disclosure by the government a different case, an advisement that defense counsel not meet with clients until they were satisfied that their meetings were not being audio monitored.

In March of 2018, the government made a filing with the USCMCR, and in that filing, the government publicly

acknowledged that microphones, plural, were present in at least one privileged attorney-client meeting space at Guantanamo Bay. That's available in the record at AE 133RR (AAA 2nd Sup). This is well after obviously the salient points of the JDG Commander's order were ordered by the prior military judge.

133RR, as I mentioned, has been argued on several occasions, and following those arguments, the defense and the government were able to get together and come up with a proposed order -- an agreed-upon order for the military commission. That military commission -- or that order was later adopted by the military commission. It's AE 133AAA, and it said that the convening authority would make arrangements for a full technical surveillance countermeasures inspection by non-SOUTHCOM entity of JTF-GTMO-controlled attorney-client meeting rooms at Guantanamo Bay.

As Your Honor mentioned, that TSCM -- technical surveillance countermeasures -- sweep has occurred. It occurred between 9 and 25 October of 2018. The report is available in the record at AE 133BBB Attachment B, and the report found that no audio monitoring -- no audio-monitoring capability was found.

So that brings us to today and what we believe would

be the last step in this motion series. We're asking this court -- this military commission to issue an order freezing the status quo as of that 9 to 25 October sweep. We have -- we trust the integrity of that sweep, and we feel that an order is now appropriate to freeze that status quo.

I mentioned the prior ruling by the military judge, 133QQ. In that ruling, the prior military judge recognized the need for a prophylactic remedy. We know that -- he recognized that just because monitoring capability didn't exist then, that it could in the future. And we know that because although he ordered that the salient points of the JDG Commander's order be made part of the SOPs, he still ordered that defense counsel be advised if audio-monitoring capability was to occur.

The military judge also made a finding of fact -- I'm referring to page 16 of 133QQ, paragraph e -- stated that the commission is all too aware that with continual changes in the personnel comprising JTF-GTMO and the JDG what has been done right at one point may become a historical notation, especially after several changes of the guard force.

Our motion is styled and we did argue for -- it is a motion to permanently and verifiably disable audio-monitoring capability. We believe that the verifiably piece has been

achieved via the TSCM sweep. We are now just asking for the permanent piece to be achieved, and that can be accomplished by this military commission issuing an order freezing the status quo.

MJ [Col PARRELLA]: Captain Andreu, first off, good to see you back and feeling better this session.

Secondly, question for you: With respect to the TSCM report, the report is dated November, correct? So the sweep was completed in October.

ADC [Capt ANDREU]: Yes, sir.

MJ [Col PARRELLA]: And I guess the question I posed to the parties before you began was -- the commission's reading of the report is that there is a few more tasks that they intended to achieve. And I don't know if that was part of the concern of the defense, but at this point in time, are you satisfied with the sweep that was done that was reported in this report of November?

ADC [Capt ANDREU]: Yes, sir. Yes, sir, we are. My understanding from the report is that there are additional sweeps that are set to still occur, but those don't include the attorney-client meeting rooms at Echo II. This motion, however, is just focused on the attorney-client meeting rooms.

And so for purposes of this motion, yes, sir, we are

satisfied with the sweep.

MJ [Col PARRELLA]: All right. My second question is: I understand what you are asking for. Has the defense endeavored to propose an order for the commission? Do you have a draft of what it is you would like the commission to sign?

ADC [Capt ANDREU]: No, sir, but I would be happy to do so.

MJ [Col PARRELLA]: Okay. That's all the questions I have. Thank you.

ADC [Capt ANDREU]: Thank you.

CP [BG MARTINS]: Your Honor, other parties had argued, and I will respond to a couple of items other parties have made, although it appears no one else wishes to argue from the defense in this motion that they have joined.

Your Honor, the burdensome relief -- any additional burdensome relief sought in the motion should be denied because the Joint Task Force has been earnestly and in good faith trying to facilitate attorney-client communications, not spy on them.

The command has self-reported the very few genuine problems that have arisen and has worked responsibly to remediate those. Moreover, there remains no showing of any

audio monitoring of these five accused in confidential meetings with their attorneys, and there is certainly no evidence that the prosecution has ever been made privy to confidential defense strategy or trial preparations because that simply has not occurred.

I would like to go back to Appellate Exhibit 133QQ, because counsel did lay out some things, and we believe there are other important contextual points there. On 30 November 2016, on an extensive record that included four hours of sworn testimony by the Joint Detention Group Commander, an Army colonel, another four hours of sworn testimony by the Joint Task Force Staff Judge Advocate, a Navy captain, and many hundreds of pages of filings, declarations, photographs, and other exhibits, the commission issued Appellate Exhibit 133QQ.

In that ruling, Judge Pohl found that the defense had not shown that their attorney-client communications were being intruded upon in any of the locations where these five accused meet with their counsel, namely, the interview rooms at Camp Echo II, the holding cells near the courtroom, and the courtroom itself.

Judge Pohl found that while at the time in the interview rooms, in February of 2013, there were microphones

that to the uninitiated could be mistaken for fire alarms, quote, Existence of the capability to monitor does not by itself establish the fact or probability of abuse or misuse of that capability, especially where there are unrelated legitimate reasons for the capabilities' presence, end quote.

Judge Pohl found that no evidence was even offered throughout all of the proceedings indicating that anyone had ever purposely misled defense counsel with regard to the function of the so-called fire alarms that were in the Camp Echo II interview rooms at the time, nor was the fact of audio and video monitoring capability a closely held secret.

And so having found no intrusion and -- as well as uniform awareness by the Joint Task Force witnesses of the need to respect attorney-client communications, Judge Pohl denied the most burdensome forms of relief in that motion.

And he did, as counsel indicated, issue what he referred to as a prophylactic remedy in recognition of the changes that can occur in the personnel comprising the Joint Task Force and the Joint Detention Group, and that was to direct that the standing operating procedures of the Joint Detention Group and Joint Task Force formally incorporate a prohibition on the monitoring of attorney-client communications; and that when new defense counsel were being

briefed on the interview rooms at Camp Echo II, that they be made aware of the existence of monitoring capability and its uses; and that if there were to be a meeting with defense -- with an accused or a detainee that involved a defense counsel, for instance a plea negotiation, that would be monitored, that the defense counsel involved would be made aware of it.

MJ [Col PARRELLA]: General Martins, let me ask you a question. So this is one of those rare occasions that I have observed so far where, at the end of a long motion series, the parties sort of came to an agreement on a proposed order, the commission signed the order, the government's complied with the order, and we are in a state where now the whole basis for the initial motion has been satisfied.

So as I is understand the defense, what they are asking for now is just to ensure we remain in this current state of this issue being resolved.

So the question I have for you is, is what's the harm in the commission signing an order that just essentially says the status quo applies, don't change anything here?

CP [BG MARTINS]: Your Honor, I see a couple of things here. The posture of -- this is complicated. Counsel referred you to places in the transcript where there was previous argument. The Bin'Attash team asked for something

slightly different, so phrased its relief in the nature of an ability to sweep before they go in. The details really matter in terms of the burden on the command. So that's one area.

We don't have an order -- a proposed order for the relief you are supposed to do, which is contrary to the approach the commission follows. So we're concerned about the way this could go because -- you know -- and frankly, what does that mean? The status quo, presumably as to any monitoring capability?

But the words matter in what this means, and the command certainly is interested that we not get a ruling that imposes -- winds up being a logistical burden. That is one area.

Your Honor, the other item is that the -- the order the government would urge not include any kind of ratification of the standard that is being applied again in this case by the chief defense counsel, he know with certainty that audio monitoring is not occurring.

Now, we want to assure confidential attorney-client communications, but that's not the standard; and the standard that should be applied is the reasonable efforts to ensure that your communications are confidential. It's not a know-with-certainty standard or, as appeared in Appellate

Exhibit 155II, an earlier intrusion allegation, a to-the-satisfaction-of-the-chief-defense-counsel standard, because that -- that can really wreak mischief if that standard were to be applied.

So we have -- we have interest in this ruling. We believe that it sounds innocuous, and we certainly are committed to it. The Joint Task Force is certainly committed to it, and they've shown that. So that's -- that's the area that we are concerned about in terms of the relief.

And there is before you a request from the Bin'Attash team for more than what Captain Andreu just said.

MJ [Col PARRELLA]: Well, I'm -- obviously neither of us have had the benefit of seeing the proposed order but based on Captain Andreu's representations, what I took it to mean, that it will show is not an affirmative logistical burden to do anything in advance, but rather, something that memorializes more akin to what you've articulated is in the SOP now, which is prohibiting new defense -- or new, sorry, JTF guard force folks as they come and rotate through, they -- in addition to the SOP, there will be an order from the commission reminding them that there's a standing prohibition on any sort of monitoring in the attorney-client meeting areas.

So ----

CP [BG MARTINS]: Your Honor, if it's just that -- I mean, if it's basically saying see Appellate Exhibit QQ still applies, I mean, this commission has already said that. We don't have any objection to that.

MJ [Col PARRELLA]: What I propose is since the parties were able to come to an agreement in proposing an order in AE 133AAA, what I would like is for Mr. Ali's defense team, as the proponent of this motion, to propose an order, to provide that to the government, and let's see if we can get an agreed-upon order to the commission that meets the stated goal, Captain Andreu, that you've just articulated to the commission. And I'll go ahead and give you -- let's endeavor to have this to the commission within a week of today.

ADC [Capt ANDREU]: Yes, sir.

MJ [Col PARRELLA]: Great. All right.

Barring any further comment on this, we'll go ahead and move on to 118. Good morning.

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

Before the commission is AE 118, a motion to abate until -- essentially until the security structure ordered by the commission in Protective Order #1 and its various amendments now is in place.

It has previously been argued on 20 March 2017 at

transcript 14787 through 816, 21 March 2017 at 14820 to 25, and 23 March 2017 at 14990 through 91. I do want to observe that we took cognizance of the military commission's order to state that each time. I have also endeavored to put previous arguments into our proposed order of march for the convenience of the military commission.

MJ [Col PARRELLA]: And that's been found to be very convenient. I appreciate that. Thank you.

LDC [MR. CONNELL]: Only one issue remains with respect to this motion of the four, which were included in the original filing, and that is the issue of security classification guides.

To understand the fundamental importance of security classification guides in the classification system, it is necessary to examine the organic document establishing for all non-nuclear material the existence of classification in the United States. There have been a series of those, but the current document is Executive Order 13526.

13526 establishes, as did its predecessors, two forms of classification. The first form of classification mentioned frequently in this military commission is original classification authority. These are usually senior government officials who possess authority to make the initial decision

as to whether information is classified or not.

The second category of classifier are so-called derivative classifiers. That status is described at Section 2.1 of Executive Order 13526, which provides that derivative classifiers need not possess original classification authority if the markings they apply are derived from source material -- that's the first category -- or as directed by a classification guide, which is the second category.

I, sir, am a derivative classifier. I do not possess original classification authority, but on hundreds and hundreds of occasions, I have filed with this military commission information which is marked as CLASSIFIED. When possible, I observe and honor the classification markings of the government, and when not possible, I guess, because I lack a security classification guide as does my defense information security officer, to allow us to make reasoned decisions about classification.

Ordinarily, a classification guide would provide information as to not simply categories of information which are classified, but also categories of information which, combined, are classified, as well as an important aspect of that, which is the appropriate declassification date.

Because of the importance of security classification guides in this structure, Executive Order 13526, Section 2.2(a) provides that original classification authority shall provide classification guides. Specifically, it provides that agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information.

This is especially important in the overall structure of classified information because 13526 also provides rules against overclassification, a duty on derivative classifiers to report if they believe that overclassification is taking place, and the attention to declassification dates which without a security classification guide cannot be known with certainty.

This security classification guide problem has haunted this case and my individual practice of law since the beginning of the case. The very first discovery request that we ever filed for Mr. al Baluchi, DR-001-AAA, on 26 June of 2012, was a request for security classification guides.

The first discovery motion that I ever personally drafted in this case, AE 054 (AAA), filed on 11 July 2012, included a request for the security classification guides.

Now, the progress of that motion and the related

security classification guide litigation developed on 6 December 2012 when the military commission issued AE 013P, the first version of Protective Order #1. In that protective order, the military commission -- I thought I was going slower, Your Honor; I apologize -- the military commission ordered that defense security officers, now known as defense information security officers, would have a duty to help the defense apply security classification guides. That directive of the military commission is found at paragraph 4.c.1. of AE 013P and its successor protective orders.

At the time that we filed AE 118 on 9 January 2013, none of the security structure it anticipated existed. There was no way for the defense to obtain classification review; that exists now. There were no defense information security officers; those exist now. And at the time, our request was to abate the military commission until that security structure important to national security was put in place.

Eventually classification review came. Eventually defense information security officers came. Even the third element of this, a need to know, was authoritatively construed by the military commission in 2017, in my view, resolving that issue because even though it is technically wrong, it's functionally okay. And we have not had difficulties with it

in those remaining two years, so essentially I consider that element of this motion moot.

MJ [Col PARRELLA]: When you talk about that element and you talk about the commission's decision on that, was there a specific ruling that you attribute that ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: ---- foreclosing?

LDC [MR. CONNELL]: Yes, sir. And it is on 21 March 2017 at pages 14824 -- no, excuse me, 821 to 22. The -- I was describing the problems at that time with the need-to-know structure and its actual concrete problems when the government stood up and took the position that the original definition of defense team within the Protective Order #1 allowed -- generated a need to know for staff -- like the IT staff was the main example. And the -- Judge Pohl stated that he would give an authoritative -- that that's what he meant, and he was giving that an authoritative construction. I believe that was his words.

At this time I said, well, we may file a motion about it anyway, but once I reflected on it maturely, it did not -- I was able to accept that authoritative construction, and we have not had difficulties with it in the two years since that time.

MJ [Col PARRELLA]: Okay. I understand. Thank you.

LDC [MR. CONNELL]: Thank you.

The military commission ruled on AE 054, which was the discovery request for security classification guides, on 31 May of 2013. And the military commission held, in what I respectfully suggest was circular reasoning, that the request for security classification guides was not denied; it was moot because we now had defense information security officers.

Of course, AE 013, I believe at that time BB, required the security -- the defense information security officers to apply security classification guides as it does today under AE 013BB.

And the DSOs do their best. They draw on prior experience, they draw on what classification guidance -- which is different from a classification guide -- the government has provided, and they draw on essentially folklore of a sort of common law of classification that develops. As we are advised of spills, we try to -- we are never advised as to what the actual spill was, but we go back and review the document and say what was wrong with this thing, come up with our own inferential interpretation of what was wrong with it, and try not to make that mistake again.

MJ [Col PARRELLA]: You referred to a "guidette"? Is

that ----

LDC [MR. CONNELL]: Guidance, Your Honor.

MJ [Col PARRELLA]: Guidance.

LDC [MR. CONNELL]: Yes. The -- that's a distinction that is -- an important distinction that's drawn in 13526, which is, a security classification guide is a formal document that has specific requirements.

MJ [Col PARRELLA]: I understand. I just misunderstood what you were pronouncing.

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

MJ [Col PARRELLA]: So I understand you have received security guidance throughout this. The position is, though, without the actual parent guide -- guidance, which I assume is either excerpts of the guide or summations of the guide, is insufficient?

LDC [MR. CONNELL]: I don't know if -- that is essentially correct. I don't know if it's excerpts or summations, to be honest. As I am about to tell you, I suspect it is ad hoc, but I don't know that because I don't know what's on the other side of the wall.

MJ [Col PARRELLA]: So I would envision that some of these OCAs, the guides that they're directed to create as a result of the executive order probably encompass not only everything

that we're dealing with in this case, but they might even be -- encompass a lot of other things that we are not dealing with.

Are you asking for the entire guide or just portions of the guide that are applicable to the discovery and evidence that we are receiving in this case?

LDC [MR. CONNELL]: Only applicable, Your Honor. We wouldn't have a need to know -- you know, if it's about how to transport nuclear material or how to conduct electronic surveillance, we don't really have any involvement with that. Obviously we don't.

And this may be what the military commission is referring to -- we -- actually, I have to resolve that -- I have to save that for the closed argument. I do have a sense of a parent guide, but let me -- let me save that for closed argument, if I could.

The lack of the guide has three important impacts, I suggest. The first is that articulated within 13526 itself, which is uniformity, the lack of uniform standards that can be applied throughout the participants in the courtroom. And certainly the government is the leading edge on this. Being closer to the source of classification guidance, they are the leading edge. And occasionally we get some of that passed

down to us, but essentially those of us on the left side of the room are left to rely on occasional guidance and folklore. The latest change that has occurred in the security structure is a perfect example, and that has to be addressed in the closed hearing, but I will do so at that time.

The second is the lack of a security classification guide generates occasional spills. Spills occur for different reasons. We all know that. Some of them might be carelessness, some of them -- but most of them are a lack of understanding of what someone later determines to be classified. If we were able to know that on the front end, we would save the federal government a lot of money and the participants a lot of wear and tear on the -- on their hard drives from being wiped by avoiding and decreasing the number of spills.

And third is a chilling effect. It isn't -- boundaries are important, because when one knows the boundary, one knows what one can say and what one cannot say. When the boundary is fuzzy, there is a self-censorship that has to come into play with respect to a -- creating a chilling effect on defense advocacy.

Now, the final thing that I want to say, Your Honor, is that I know that the military commission has denied my

motion for discovery of the security classification guide -- the -- and for reasons that I will explain in greater detail in the closed hearing, I have now come to believe in 2019 that a security classification guide for the information that we are dealing with here does not exist. I don't -- the government can tell me that I'm wrong.

I cannot find evidence of -- of a security classification guide in the -- you know, the military commission has stressed the importance of us reaching out to other elements of the government trying to resolve things cooperatively. Nothing forms a better example of our constant attempts to resolve problems cooperatively than this security classification guide issue on which I personally have met with a wide variety of people trying to convince them of the significance to national security of us having an appropriate guide as to what is classified and what is not, and what level and with what declassification date.

So with that said, I maintain the original remedy that I sought, having been denied the security classification guides themselves, which is that I suggest that the military commission abate the proceeding until a security classification guide is produced. That may mean writing it in the first place or it may mean e-mailing it on SIPR. I don't

know.

But this is a problem which has dogged this military commission for a long time, has required the military commission itself to change some of its procedures, has certainly required defense teams to change their procedures, and has cost a lot of money.

And so I suggest that as good custodians of national security information, we need the security classification guide; and the longer the time period goes on without a security classification guide, the more risk there is to this military commission.

Thank you.

MJ [Col PARRELLA]: Thank you.

LDC [MR. NEVIN]: And, Your Honor, I rely on the previously stated objection.

MJ [Col PARRELLA]: Would any other defense counsel care to be heard on 118? All right.

That being a negative response, Trial Counsel.

TC [MR. SWANN]: Good morning, Your Honor.

MJ [Col PARRELLA]: Good morning.

TC [MR. SWANN]: Your Honor, there have been 31 pleadings in the 118 series. Mr. Connell stated on 20 March at record 14798 that "So far as 118 goes, I have argued this issue maybe

five times before this military commission and I have lost every time. I am at peace with that. I understand you disagree."

The military judge had the advantage of looking at the classification guide prior to issuing his ruling in 054C. In his ruling at page 4, 054C order dated 31 May 2013, he stated the following: "The commission reviewed the document ex parte and determined that it is neither relevant nor material to the cases before this commission, and this request is denied."

We provide the classification guide to the defense and have done so -- or classification guidance to the defense and have done so on a number of occasions, telling them what the left and right lanes of classification are in this instance.

MJ [Col PARRELLA]: Mr. Swann, wasn't the issue with that that Judge Pohl brought up previously is the time that process entails?

TC [MR. SWANN]: The time the process entails? Well, are we talking about in the 524 series?

MJ [Col PARRELLA]: No, I believe we're talking about in this series. I'll give you the page. I believe it was on page 14815.

In talking with Mr. Trivett, your colleague, about this, he stated, "And if we are ever going to try this case, can the process be energized to go faster?"

So this followed a colloquy about the speed at which the security classification review was occurring when defense bring these. When they're unable to, through their own source material or whatever, figure out what the derivative classification is, it's taking a very long time for the government to assist.

TC [MR. SWANN]: Your Honor, I recall that being an instance where Mr. Trivett was addressing a dump by the Hawsawi team of about 10,000 pages into a funnel, and we have information that goes into this funnel. And what they were discussing at this point was the more you put in the funnel because of the people on the other end having to address that information and assess it to determine what the classification of all that information is takes time, and it does. That 10,000 pages took maybe -- roughly, I think we were able to get it down to about a 12- to 16-month time frame.

I can tell you right here and now that the information that went into the funnel was never going to be anything less than Classified. So that's a process. The process worked. That funnel -- that's just the nature of

doing business. If you dump 10,000 pages into -- and ask an OCA to take a look at that kind of information, it's going to take a while because they have to assess it with the right kind of degree and attention.

MJ [Col PARRELLA]: So this ----

TC [MR. SWANN]: Quite frankly, only OCAs can do this.

Now, what we have provided the defense is a DSO. We have provided them with a mechanism to be able to go to individuals if they have questions. I think maybe we're going to talk about it in closed session, but AE 606, they had a POC that they could go talk to regarding any questions that they might have had on that.

They have a backdoor approach where they can send information to a walled-off OCA who will take a look at the information they have provided -- and I say walled-off because we don't even know the process is ongoing -- and they get an answer back through the channel to them. Does it take time? Sure, it does.

MJ [Col PARRELLA]: Okay. So when I'm looking at the protective order that's in existence, the current version, 013BBBB, and it talks about the duties of a DISO -- I am at paragraph 4.d -- 4.d -- I'm sorry, 4.c -- 4.c.1. As I see it -- and maybe you can tell me the protective order -- this

was not intended but it says part of the duties is to assist the defense with applying classification guides.

So at least when this protective order was put together, it seems that, on its face, to envision the DISOs would have access to some sort of guide. Am I misreading that?

TC [MR. SWANN]: You're misreading that. They were never -- the judge in 054C looked at the guide, the classification guidance, and said that that was neither relevant or necessary to what we are doing.

We started out in this process -- and I think the brief that lays this out best is the government's response in 118F dated 12 November 2015, and it addresses some of those follow-on concerns that were in place at that time.

Did we give -- did we give enough to the DISOs? We did. They have various mechanisms that they can go to and address and talk to the intelligent people who are able to answer some of those -- well, those very tough questions. And then they can get that guidance, and then they are satisfying their responsibilities.

When Judge Pohl looked at the classification guide that we're talking about here, I mean, for him to say it's neither relevant or material to what we are doing in this

process, he saw it as -- he knew all the guidance that had been previously provided with respect to -- and again, if you will look at our filing in 118F, you will see that over time, what was classified is now no longer classified.

At least in the RDI realm, there are just a couple of areas that are classified -- that are today classified and will never be declassified, and the defense has been given that.

We give them pretty specific guidance. If you will look at the 606 filing -- I know we are going to talk about it in closed session -- that is as detailed guidance -- it is a handling instruction, quite frankly -- that the kind of thing that we have been giving to them over time.

I think Mr. Trivett's argument too, beginning at record 14815 -- excuse me, Your Honor, beginning at 14811 through 14816, which was the end of that day's session, pretty much lays out exactly some of the concerns that you might have.

MJ [Col PARRELLA]: Mr. Swann, if you can answer this question in an open session: How many guides do you see being at issue? I know you mentioned that Judge Pohl reviewed one.

TC [MR. SWANN]: Right.

MJ [Col PARRELLA]: Are there other guides?

TC [MR. SWANN]: The CIA's classification guide.

MJ [Col PARRELLA]: Okay. What about, for example, SOUTHCOM's classification guide?

TC [MR. SWANN]: There is a SOUTHCOM classification guide.

MJ [Col PARRELLA]: Isn't there a DoD Manual that indicates that classification guides should be provided to derivative classifiers?

TC [MR. SWANN]: Your Honor, if you're aware of that, I am not.

MJ [Col PARRELLA]: Okay. I believe it's DoD Manual 5200.45, pages 1 and 2.

TC [MR. SWANN]: Your Honor, if you were to suggest that we turn over that guide to the defense, then I would ask that we probably would go through a 505 process, present the guide to you, and then you determine what's relevant and material to the defense.

MJ [Col PARRELLA]: Okay. All right. I don't have anything ----

TC [MR. SWANN]: Assuming the defense doesn't already have the guide.

MJ [Col PARRELLA]: I understand. And we can discuss this more in the classified, closed argument if it's necessary. But I understand your argument, and I have no further

questions.

TC [MR. SWANN]: Thank you, sir.

MJ [Col PARRELLA]: Thank you.

Mr. Connell, as you come back up here, I'm going to ask you to address the same question I just posed to Mr. Swann.

As you see it, what specific security classification guides are at issue?

LDC [MR. CONNELL]: May I ask about the classification of one -- of my answer?

MJ [Col PARRELLA]: You may.

[Pause.]

LDC [MR. CONNELL]: Your Honor, in addition to the -- I agree with counsel about SOUTHCOM -- or at least part of SOUTHCOM, right? -- SOUTHCOM has a lot of things. We don't have anything to do with drug interdiction or anything else. The GTMO probably force protection mostly portion of the SOUTHCOM guide and whatever CIA has about this information on this particular thing.

There are two other things that I cannot -- actually knowing, that I can hypothesize. One of those is with respect to the ACCM which remains relevant to this case which will probably be a DoD guide since only DoD administers ACCMs.

And then my second answer I was advised is classified, and I will give it in a closed session.

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

LDC [MR. CONNELL]: Your Honor, I -- the government relies on a couple of points, which I think examining them in context will sort of resolve the issue.

The government read a line from -- that I argued on 20 March 2017 about having repeated an answer over and over and over. That was not with respect to security classification guides. That argument was with respect to the question of who determines need to know.

And the -- Judge Pohl and I engaged in a colloquy, which is completely, you know, clear when you read the transcript, the -- over who -- is it an OCA who determines need to know on an individual basis or is it the individual holder of classified evidence?

And my position is, has always been, that the holder of classified evidence has a responsibility to determine the need to know of those to whom he or she would disclose classified information. That is what I said to Judge Pohl, and it was in that context that I said -- I keep saying this over and over -- you will never get another answer out of me.

The tremendous irony of the situation is that on that

occasion, Judge Pohl sort of agreed with me and said I see the awkward situation that you are placed in by the way that the protective order is phrased. And that's why I believe the government and certainly why Judge Pohl adopted that construction of the protective order to try to relieve that problem.

The second thing is the government represents that there was a denial of the security classification guide on -- in AE 054C and reads from paragraph b.2., which says that "The commission" -- he didn't read it, he just referred to it -- "The commission reviewed the MET S-06 document ex parte and determines that it is neither relevant nor material to the cases before this Commission. This request is denied."

I had forgotten this was in an unclassified order, and I believe MET S-06 to be a sort of grandparent guide probably from which the more specific guides are derived. So at the time, I argued for MET S-06 because it was the only thing that I had received as a reference to a classification guide. It turns out I was wrong; that it was a specific classification guide and that it was some sort of grandparent-type document.

The next paragraph, however, is the one that I referred to earlier as establishing a sort of circularity with

respect Protective Order #1 with respect to the DSO, and it says -- excuse me, may I get a water? -- "As to the overarching issue advanced by the Defense, namely for help in negotiating the maze created by security requirements, the Commission has previously directed Defense Security Officers be provided for each Defense team . . . and therefore considers no further action is appropriate and the issue MOOT."

Without taking a position on whether that was an accurate position at the time in light of the text of the protective order, it has turned out that those DISOs need a security classification guide to apply, and that's why I believe this aspect of AE 118 is as relevant today as it was in 2013.

Thank you.

MJ [Col PARRELLA]: Thank you.

Anything further on 118 from any party? Okay.

With that, then the commission will take a recess. During this time period, if any accused wants to depart, they may do so.

Mr. Ruiz?

LDC [MR. RUIZ]: Yes, Judge, Mr. al Hawsawi would like to depart. I just wanted to make you aware of that.

MJ [Col PARRELLA]: I just ask that you go ahead and do that. Don't wait until the end of the recess to depart. We will plan on reconvening at about 1035.

The commission is in recess.

[The R.M.C. 803 session recessed at 1018, 25 March 2019.]

[The R.M.C. 803 session was called to order at 1043, 25 March 2019.]

MJ [Col PARRELLA]: The commission is called back to order. All parties present when the commission last recessed are again present, it looks like, with the exception of Mr. Hawsawi, and Ms. Radostitz has stepped out as well.

Any other counsel who are not present?

LDC [MR. RUIZ]: We have two counsel who have joined us, Judge, Major Wilkinson and Lieutenant Commander Dave Furry.

MJ [Col PARRELLA]: Thank you. With that ----

ACC [MR. BIN'ATTASH]: I have a note to talk to the judge about. It's about the problem I have with my attorneys. We have reached a solution today. Just one minute.

Approximately we have reached an agreement with my attorneys today with the help of some of my brothers. After three-and-a-half years of not having attorneys with me, I would like to give my attorneys an opportunity now for the few coming months so they can move back to my table. They can

come to the table today.

This is all.

MJ [Col PARRELLA]: Okay. Thank you, Mr. Bin'Attash.

Ms. Bormann?

LDC [MS. BORMANN]: Judge, I appreciate Mr. Bin'Attash's remarks, and I don't want to disrupt the court. I don't know whether you want us to move now or later.

MJ [Col PARRELLA]: I think if you can do it in a quick fashion, you can do it now. Otherwise maybe if you want to retrieve your other stuff, you can do that over the lunch recess.

LDC [MS. BORMANN]: We can do it expeditiously.

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

[Pause.]

MJ [Col PARRELLA]: Okay.

LDC [MS. BORMANN]: Thank you, Judge. We're in place.

MJ [Col PARRELLA]: You are welcome.

Mr. Ryan, you may proceed.

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

MJ [Col PARRELLA]: Good morning.

TC [MR. RYAN]: Sir, AE 614 is now before the commission. AE 614 is the prosecution's motion to compel notice from the

defense of their intent to introduce expert mental health evidence.

The authority upon which we rely in making our motion, sir, is Rule for Military Commission 701(g)(2), which reads, in pertinent part, as follows: "The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to . . . introduce expert testimony as to the accused's mental condition." Our motion seeks to compel such notice.

Our motion requests, Your Honor, that such notice include the following: The name and qualifications of the defense expert, to include any experts who will provide opinion testimony based upon a review of records as opposed to a personal examination of the accused; second, a description of the general nature of the testing the expert has completed or will complete; and third, a description of the general nature of the expert's proposed testimony.

We ask that Your Honor order that such notice be provided by 1 June. This will allow the prosecution to accomplish several important goals which are necessary to the successful and efficient moving forward of the case into trial.

It will allow the prosecution to identify its own

experts to testify in rebuttal. It will allow the prosecution to go about the time-consuming process of obtaining clearances for its experts. It will also allow the prosecution to obtain funding for its experts; allow time for an evaluation of the accused, which would be a motion to follow notice; and it would be allow -- it would allow for time for the prosecution to sufficiently prepare its experts for any anticipated testimony.

I'll note, Judge, at this time, that ordinarily in a normal court-martial practice, the prosecution would be in a better position at this point in time to have some idea of the experts the defense have retained already. But in the early days of the case, back in 2012, the prosecution took a, I would suggest, defense-friendly view of R.M.C. 703 and agreed that notice of the experts being requested by the defense from the convening authority at that time need only -- needed only to be accompanied by de minimis notice without any further information as to what it was to be about.

So through the years since that time, all the prosecution ever knows about the many, many requests for expert information or expert assistance by the defense is just that it's happening. We don't know who it is or what they're talking about or anything like that.

That being said, sir, that was almost seven years ago now. The defense had close to seven years to plan, to consult with experts, to consult with their clients and spend much time with them to investigate the case. And we submit, sir, that time has now come for the prosecution -- for the defense to provide the prosecution with notice of its intent to introduce expert testimony as to the accused's mental condition to give us the proper opportunity to prepare for that.

The fight over this motion that's now before you, sir, it seems to me is mostly about timing. I can fairly, I think, characterize the defense's reading of the plain language of 701(g)(2) to mean they believe that they can hold back such notice at their own discretion and for their own interests, no matter how inconsistent that is or will be, with the proper and efficient running of a trial, motions, sentencing, et cetera, and how unfair it would be to the prosecution who, of course, is a party to this case and whose client deserves proper and competent and prepared representation.

Further, it is their position, Your Honor, that you, sir, as the judge in this case have no discretion to control the significant event in the case regardless of the

consequences that it may bring about, including such things that no one wants or no one should want, such as mid-trial delay during motions, during trial itself, or during any sentencing.

I believe the parties agree, based on the written pleadings, that the only case out there that really interprets this specific issue is United States v. Walker, which is cited, I think, in everyone's pleadings. And it's a U.S. Army Court of Military Review case. In it, the Military Court of Review is interpreting and before them the trial court was interpreting Rule for Court-Martial 701(b)(2) that was in place in 1987, the time of this case.

In that rule, the language, quote, before beginning of trial on the merits appears and is identical to Rule of Military Commission 701(g)(2), upon which we base our motion.

In Walker, Your Honor, the defense provided a list of witnesses in the days leading up to to trial, including -- which included a defense witness -- or proposed defense witness who was a psychiatrist. The prosecution at the time objected on the grounds of the Rule for Court-Martial on the grounds that no notice had been provided previously.

The appellate court in their opinion describes it as follows: "In sustaining the government's objection to the

production of the defense psychiatrist, the military judge reasoned that the defense should have notified the government of the expert witness approximately five weeks earlier when motions were litigated."

The appellate court then goes over some back-and-forth that occurred between the trial judge and the defense counsel in an attempt to get the trial judge to reconsider his ruling. And then the appellate court states as follows: Thereafter, the military judge adhered to his initial ruling. In doing so, he construed the words, quote, before trial on the merits -- once again, that which we are talking about -- contained in R.C.M. 701(b)(2), as requiring that notice of intent to employ expert psychiatric testimony must be given at the time of normal motions -- that's in quotes -- as in Federal Rule of Criminal Procedure 12.2(b).

Now, I'll note, Your Honor, I think this is a significant fact, that there is no mention in the appellate court's review and opinion of any order that had been in place by the trial judge establishing a deadline for such notice. Rather, it appears that he chose to use the deadline that would exist under Federal Rule of Criminal Procedure 12.2 that would have required notice after the fact.

So he, the judge, at the point at which the notice

was provided in the days leading up to trial says you should have filed that way back when at the time of motions, even though, he, the trial judge, had never put in place an order directing that that happen. So essentially what he did was give the defense counsel an order of timing far too long afterward than he could have ever complied with. The appellate court reversed.

Now, Walker, I will state, sir, does not stand for the proposition that a military judge cannot insist on reasonable limits to the broad language contained in 701(g)(2). And to get rid of the double negative I just used, I will say that it does stand for the proposition that a trial judge does, in fact, have the ability to control his courtroom, to control the behaviors of the parties, especially as it pertains to things such as notices and the providing of information that will ultimately lead to the efficient continuing of the case.

I would submit, sir, that the most important language in Walker is this: While we interpret Rule of Court-Martial 701(b)(2) as requiring that reasonable notice be given of the defense of the lack of mental responsibility, we decline to characterize the notice given in the case at bar as unreasonable.

Now, I would suggest the term, I would call your attention to the fact that the word "reasonable" doesn't appear in the rule. This is the judge's views on what is allowed or what should happen by the trial judge. If the Walker court, the appellate court, had viewed the language that the defense now urges upon you as being something that you have the ability to mess with in the least, that is to impose upon them any deadline except somewhere before trial, there would have been no mention of this type of language; there would have been no citing to the idea of reasonableness. They would have simply reversed the trial court and announced that defense counsel could have waited until the members are literally walking into the room and filed it then.

Instead, they say reasonable notice is required, and we can't say -- this is them speaking, of course -- we can't say -- and I'm paraphrasing -- that five days' worth of notice in a case regarding bad checks and possession of cocaine was unreasonable.

Your Honor, I submit that the need for reasonable notice in this case before you is as important as any case that has probably ever existed. This is not a case of bad checks and cocaine possession. Rather, it's a case of one of the worst crimes -- strike that -- the worst crime ever

committed on the United States soil.

There are numerous reasons beyond the facts of the offenses itself that I suggest -- that I can suggest this, but maybe the most significant is this: Inside and outside of this courtroom, the defense has repeatedly claimed for years now that the five accused have suffered physical, mental, and emotional damage due to the application of enhanced interrogation techniques during their time in the CIA's former Rendition, Detention, and Interrogation Program.

Based on statements of counsel through the years that we have heard in this courtroom, we can expect that this issue of mental health and effects on mental health will be raised during the motions to come, during the trial itself, and during sentencing.

As Your Honor well knows, there is an enormous amount of information that surrounds this unique aspect of the case, and a great deal of it is classified in nature. It is a tremendous lift logistically just to get to the point that new people from outside of the trial teams will be able to even understand and review this kind of material.

In addition, this issue of damage possible -- or the alleged mental damage done by infliction of enhanced interrogation techniques is a new and novel area that I

suggest is not just something where a run-of-the-mill psychiatrist on the street can be put in place and allowed to answer all kinds of questions about it.

This is going to take a hard amount of effort and a lot of time to get to the point that the parties, both parties on both sides, are properly prepared to litigate this issue in a fulsome manner. And I suggest, sir, that based upon these, we deserve and need reasonable notice. And although I use RDI and the EIT aspect of it as probably the best example, my guess is -- our expectation is that there will be far more than that.

Now, once Your Honor concludes, as we urge, that you have the power and responsibility to order reasonable notice be provided, we urge you to consider Federal Rule of Criminal Procedure 12.2. And I state, as clearly as I can, that we are not stating -- we are not suggesting that Your Honor is bound by it, because you are not.

However, if you were to go through and read 12.2, and then especially to consider, sir, the reading of the committee's notes of the rule as it now currently exists, it is clear that the drafters take into account the many contributing considerations that go into this include -- this very difficult issue, including the rights of the accused,

including the fair and efficient administration of a trial, and the right of the prosecution to competently meet such expert mental health evidence.

Your Honor, subject to your questions, that is my argument.

MJ [Col PARRELLA]: Mr. Ryan, assuming the commission agrees that it has the authority to set reasonable limits or to require the defense to provide a reasonable notice, the issue I struggle with is how do I define what "reasonable" is until the commission has set a trial date?

TC [MR. RYAN]: Your Honor, it is within your discretion to fashion the date that accomplishes the goals that we believe we are entitled to and that Your Honor would recognize.

Now, the motion is based in part on an understanding that the legal landscape in this case is showing that we are in fact moving directly and inevitably toward a trial in this matter. Now, as I have said, I simply ask that you take into account that it is going to be a difficult logistical hurdle as well as the aspect of finding the right persons, et cetera, for us to have the time necessary to prepare. So how Your Honor fashions that and where Your Honor fashions that is totally within your discretion.

We suggest 1 June on the basis that in light of the litigation as it currently exists in this case, trial is on the not-far-off horizon whatsoever and, therefore, we think 1 June is the proper date by which we can begin to accomplish the goals. And I just hasten one last thing, Judge. As in our proposed order, we note that if in fact we receive notice from the defense, as we expect, that 30 days from that, we will be filing a motion seeking examination of the accused.

MJ [Col PARRELLA]: I understand.

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

MJ [Col PARRELLA]: Thank you.

Okay. Mr. Nevin, I note your ----

LDC [MR. NEVIN]: Rely on the objection, Your Honor.

MJ [Col PARRELLA]: I note your objection.

Ms. Bormann?

LDC [MS. BORMANN]: Judge, we filed 614E. We didn't file any pleadings; and we, because of the conflict, will not be arguing.

MJ [Col PARRELLA]: Okay.

Mr. Harrington?

LDC [MR. HARRINGTON]: Judge, I have agreed with Mr. Connell; he's going to go first.

MJ [Col PARRELLA]: Understood.

Mr. Connell?

LDC [MR. CONNELL]: Your Honor, the government has argued in many fora, in this courtroom and others, that the United States war-fighting power includes the authority to impose jurisdiction in a military commission over alleged war crimes. It argues that the United States can choose among federal courts, courts-martial, and military commissions, or at least Military Commissions Act military commissions, as to its choice of forum.

In this case, as it has reminded us many times, it chose a forum, that being the military commissions. Congress wrote the rules in the Military Commissions Act. Secretary of Defense implemented those rules. The government asks now not to apply the rules written by the Secretary of Defense but, rather, to apply Rule 12.2 of Federal Criminal Procedure.

It is not at liberty to do so, and this military commission is not at liberty to do so. Congress laid out what it seemed as the operative legal landscape in 10 U.S.C. 949a(a), which provides that general courts-martial provide the procedures which apply in a Military Commissions Act military commission. Similarly, in 10 U.S.C. 948b(c), Congress set forth that the procedures in the Military Commissions Act itself are based on general courts-martial

practice.

Congress did leave the possibility of some other solution to the Secretary of Defense, but the Secretary of Defense also -- thank you -- decided that general courts-martial provide the operative procedures, and in Rule for Military Commission 102(b), the Secretary of Defense stated that the procedures in the manual base -- are based on those for general courts-martial.

Specifically, the Secretary of Defense set forth R.M.C. 701(g)(2). Now, I will say that there are many times that I have regretted the fact that we are operating under the Rules for Military Commission instead of the Federal Rules of Criminal Procedure. Each time I have complained about it, I have lost. It -- in this situation, the shoe is simply, on this one small issue, on the other foot.

Rule for Military Commission 701(g)(2), which is analogous to Rule for Court-Martial 701(b)(2), provides that: The defense shall notify trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition.

The government seeks -- asks the military commission

not actually to apply Federal Rule of Criminal Procedure 12.2, which we're going to talk about in a minute, but, instead, a hybrid based on what has not been the law in the federal courts for the past 17 years.

But let's -- before we move on to comparisons, let's begin with the plain meaning of Rule 701(g)(2). It requires a notification from defense counsel to trial counsel before the beginning of trial of certain intent, the intent to introduce expert testimony as to the accused's mental condition.

I represented in the pleading that we do not intend to provide notice of defense of alibi or of lack of mental responsibility, and I provided notice in our pleading that we may provide intent to introduce expert testimony once the preparation of that -- an assessment is complete.

I can represent to the military commission that we have acted with dispatch and diligence in preparing our mental condition evidence. The -- working with the convening authority, it's a matter of record in this military commission our efforts and the government's efforts, but most of all the convening authority's efforts to obtain an MRI for the island. And I can represent that we have worked very hard in moving forward and do not intend to stand on our right -- or do not intend to stand on the text of the language and provide notice

five days before trial or anything like that.

The -- but as far as the rule goes, it's clear that the bare notice is all that is required by this particular rule. Now, other things are required by other rules, and the 70 -- we're going to talk about 701(g)(4), because that's really where the discretion for the military commission comes, in my humble opinion.

The -- and we are going to talk about the operation of that because I know, or at least I believe, from some of your rulings that the military commission is in many cases more interested in sort of solving the problem than addressing the individual contentions of the parties on problems when a third way is possible.

But let's compare within Rule 701(g)(2) itself, right? In addition to its plain meaning, let's say maybe the Congress -- maybe the Secretary of Defense didn't mean that. Maybe it meant something else.

Well, when you compare within Rule 701(g)(2) itself, you see that (g)(2) contains an additional sentence, and that additional sentence says, "Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense."

Now, why is that significant? It demonstrates that the Secretary of Defense knew full well how to provide and require additional detail when it was necessary.

When we compared the analogous court-martial rule, Rule for Court-Martial 701(b)(2), we see an even more fulsome example. That more fulsome example is that the R.C.M. 701(b)(2) has an additional requirement of a notice of intent to present an innocent ingestion defense and provides -- requires additional detail that has to be provided in a notice.

Neither Rule for Commission -- Rule for Court-Martial 701(b)(2) or Rule for Military Commission 701(g)(2) have any additional requirement for detail with respect to the notice of intent to introduce expert mental health testimony, which I think is significant in demonstrating the views of the Secretary of Defense with respect to military commissions and of the President with respect to the courts-martial system as to what detail constitutes notice, as the government would have it, reasonable notice.

Now, the -- in our brief, we raised United States v. Walker, a case which directly refutes the government's argument that it is permissible to draw upon Federal Rule of Criminal Procedure 12.2 for reasoning with

respect to the notice of mental health evidence rule. And I just pause to footnote, as we're going to discuss later, the government is not actually relying on 12.2 as it has been amended since 2002, but we are going to talk about that. So they have a sort of idealized vision of how it works but not how it actually works. I recognize that I have the advantage in capital situations of this not being my first rodeo, but still, the government doesn't actually rely on the text of 12.2.

But the -- what the government -- what the court, the Army Court of Military Review, reasoned in Walker is that it recited the -- not just the result but the reasoning of the trial court in that case, importing elements of what -- the way that Rule 12.2 read at that time into Rule 701(b)(2) and said, in three words, this was impermissible. It's rare that we have such detailed guidance as to appropriate reasoning.

The government argues that really what this is about is that there was no order from the trial judge. And although it's not entirely clear from Walker, I admit, the lineage in which Walker arises does make that clear. And I will draw the military commission's attention to footnote 18 of our brief on page 5 where we cite two other cases which draw upon Walker. And in those two cases, Norman and I think it's pronounced

Preuss, P-R-E-U-S-S, there were orders, but even more significantly, to the government's argument about the authority of a court-martial in that sense to control its docket.

I would draw the military commission's attention to footnote 19 on the following page where we cite three cases involving not just orders but actual local rules that were published in advance, not for the individual case but in which the appellate courts in the court-martial system held that additional requirements imposed by local rules, while perhaps an excellent guide to the control of the docket, are not -- cannot impose more stringent rules than those imposed by, in that case, the President or, in the military commission case, the Secretary of Defense.

Now, the government seizes upon the word "reasonable" in Walker, and I don't have any argument with that. I pride myself on reasonability. And what the military -- excuse me, what the Court of Military Review in that case did was assess what reasonability meant. And reasonability in that case meant a verbal notice, not even written, five days prior to trial which gave no additional information.

I think -- I suggest that that is a slender read indeed for government to rely upon that it could have -- that

reasonable notice includes all these things it asked for: the name and qualification of experts, the general nature of testing, and the general nature of testimony.

Now, the -- let's talk about Rule 12.2 itself. Let's say that you find Walker unpersuasive and that you want to look at Rule 12.2.

MJ [Col PARRELLA]: I think I can save you some time there, Mr. Connell, because it's perhaps fortunate for all of us that I am much more familiar with general courts-martial practice than with the Federal Rules of Criminal Procedure. And I agree that the Rule for Military Commission, which looks largely like the corresponding Rule for Court-Martial, is what applies here and not 12.2. And I do think that in fairness to the government, their argument conceded that 12.2 doesn't apply. It is perhaps something for the commission to look to.

But being familiar with court-martial practice, at least I can speak on behalf of the Navy-Marine Corps Trial Judiciary, it is common practice that at the time of arraignment, the court would issue a trial management order setting forth dates, which would include a date for a notice of things that were at issue right now, such as expert witness testimony.

Of course, in normal practice, that all typically

starts with knowing the date of trial and then backing up reasonable dates accordingly, all the way back to the arraignment, so almost working from trial date backwards.

We obviously don't have a trial date here now, but would the defense agree that -- given that this is common practice in probably every courts-martial out there, that the commission does have the authority to set a date perhaps before -- based on some of the case law, before motions is premature, but there is authority to set a date prior to the date of trial?

LDC [MR. CONNELL]: Break that down a few different ways. And I do want to be clear, I don't speak on behalf of the defense; I only speak on behalf of Mr. al Baluchi.

MJ [Col PARRELLA]: I understand.

LDC [MR. CONNELL]: The first part of that is I want to fully concede the -- that with respect to military tribunals, this is my first rodeo. And everything that I have learned about military -- about courts-martial practice either comes from reading cases or speaking to my colleagues in courts-martial, because we did canvass the military capital defense bar to find out if anything like a requirement for -- that the government is asking for here, the name and qualification of experts, the general nature of -- if that had

ever been ordered. And as far as we could find, it has never been ordered in a military capital case.

At the same time, my conversations and research revealed that trial management orders are 100 percent routine. I've -- there are -- many organizations publish model trial management orders which are adapted to this particular situation. And it seems common in courts-martial situation for the parties to get together and sort of agree on here is what I think the dates are and present those to the judge.

The -- so that's that part. You have actual experience with it. I don't, but that's the way that that process appears to me.

The -- it's interesting that the government identifies the timing as the -- as the key issue, because I don't see the timing as the key issue, and I'll go into that in more detail in just a moment. But I see the scope of the notice as the key issue.

And the reason why I -- the reason why I want to return to the 12.2 question for a second is this is not really a question of does 12.2 apply organically. Instead, it's a matter of the government relies on two cases, Beckford and Edelin. It just so happens that those are from my neck of the woods. And Beckford and Edelin were pre-2002 amendment cases

that required in district courts in the Eastern District of Virginia and the District of D.C. to provide the material the government is asking for here, the general nature of testing, the general nature of testimony, and the nature -- qualifications of experts. That position was rejected.

In 2002, the Rule 12.2 was amended essentially to overrule Beckford and Edelin and put a new procedure into place by which -- which is in many ways more favorable to the defense than 701(g)(2) is, which is why I want to talk about 701(g)(2).

In the military commission rules, Rule 701(g)(2) places the exchange of expert reports as part of the ordinary discovery process. What Rule 12.2 in federal courts does, overruling Beckford and Edelin, is it removes mental health expert testimony from the ordinary discovery process, places it under seal with the judge essentially on the defense side. And when the government is allowed an evaluation, which they are allowed under Rule 12.2, although not under the military commission rules, even though the government's evidence is firewalled off from them and is placed under seal with the judge so that not even the prosecution can see the report, the idea -- the suggestion that the prosecution needs time to prepare their experts would not occur in -- under 12.2 because

the government has to place their -- after there's an evaluation of the defendant, it goes under seal until there's a finding of guilty and until the defense re-advises the court that it intends to introduce mental health evidence, because essentially the defense gets to see the other side's cards before they decide whether or not to go down this road at all.

So the reason -- and there's one case that I do want to call your attention to, which is super -- which lays this out pretty plainly, and that case is United States v. Sampson, 335 F.Supp.2d 166, from the District of Massachusetts in 2004. And it explains this process that I have just talked about, that -- and the quote, which is found at footnote 12 of our brief is that "requiring the defendant to provide such information" -- as was in Edelin and Beckford -- "is no longer permissible because 'the nature of the proffered mental condition(s)' is essentially the same as the 'results and reports' for which early disclosure is barred." If we were in a federal court and the government made this argument, it would be roundly refused based on the text of Rule 12.2.

That brings us back -- I know that I'm circling around a long way, but I want to come back to your question about the authority of the military commission. I will be honest. I was somewhat surprised at the case after case from

the military courts which hold that when the -- when the executive decision-maker, the President, or in our case the Secretary of Defense, states a time for something to occur, that -- that an earlier time cannot be enforced. And there are a half dozen of them. Walker is just one of them.

Rule 701(g)(2), however, has no statement as to time. And I think that the military commission's discretion as to establishing rules for discovery between the parties and -- you know, even in this case, for example, we don't have a general discovery order against the government. Judge Pohl's view was essentially they should be relied upon to exercise their own discretion as to the amount, nature, content, and timing of their discovery, except on specific occasions when the military commission did something else. Whether that was wise or not, I leave to other people.

But the -- I do think that the military commission has discretion to set a time for the exchange of expert reports or other reciprocal discovery required from the defense. I think that discretion arises under 701(g)(2) and not under 70 -- excuse me, under 701(g)(4) and not under 701(g)(2). So that's a long answer to your question, but that's that part.

The government -- I can't just let this go. The

government previews that it's going to ask for an evaluation. I am perfectly willing to leave that for another day. That's the part of 12 -- that's really the point of this motion. That's the part they're trying to get to. That's the part of 12.2 that they want.

Whereas in the courts-martial system and under the military commissions rule, if there is to be a defense -- an evaluation of the defendant outside of the defense camp, it occurs under 706, which, with respect to Mr. al Baluchi, has not occurred; did occur with respect to Mr. Binalshibh, although not a direct examination of him. He did not participate in that.

But the 706 process is the way that mil -- that government mental evaluations occur in the courts-martial and the military commission system and is simply not applicable here. But as the government said, they may file a motion on that, and I think that it is appropriate to bring that up, that we can address that at the appropriate time.

The government argues that trauma from torture is new and novel, requiring them to have extra time to find someone to address that situation. Setting aside the government's -- the consequences of the government's decision in the early part of this century to use torture as an instrument of state

policy, unfortunately it is not the first government to have done so.

The refugee community is filled with torture survivors. And the psychological and psychiatric communities, unfortunately, often have to deal with trauma of crime, trauma of sexual assault, trauma of torture, trauma of murder of loved ones, and a wide variety of other forms of trauma. So I cannot agree that this situation is as unique as I know that I wish that it were.

The final point that I would like to make -- and you may have questions for me about this -- is that I do think that the military commission has discretion with respect to timing of the order of discovery under 701(g)(4), but I do not think that it has discretion with respect to the scope of notice.

For the reasons that I have laid out, the -- neither the text nor an analysis of the text and its close kin, nor even the 12.2 cases that the government relies on would allow an order which is -- for capital mental health evidence, which is essentially analogous to the way that it would occur under Rule 16 of the Federal Rules of Criminal Procedure, which does require the exchange of general -- of expert qualifications in general notice.

In the federal system, capital mental health sentencing evidence is taken out of that Rule 16 procedure and placed under a special protective blanket. The military commission rules have chosen to follow the courts-martial process of, on the one hand, a fairly simple notice and, on the other hand, moving forward the exchange of expert reports, but number three, operating through the 706 process for any evaluation of the -- of the defendant.

MJ [Col PARRELLA]: Thank you.

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

MJ [Col PARRELLA]: All right, Mr. Feeler.

DC [MR. FEELER]: Good morning, Your Honor.

MJ [Col PARRELLA]: Good morning.

DC [MR. FEELER]: I don't intend to talk very long. As Your Honor is aware from reading the pleadings, our response to the government's motion and Mr. al Baluchi's response are very similar. So as you would probably predict, Mr. Connell has made many of the points that we also made in our pleading.

The other reason I don't have a lot to say is because I think this is a fairly straightforward issue for some of the reasons that the government, Your Honor, and Mr. Connell have already given.

The government's motion to compel here is both

premature and overbroad. Mr. Connell focused on the breadth issue I think to good effect, especially in terms of Rule 12.2. And I do want to return to that just a little bit myself in a minute. But I want to talk about the issue being premature as well for a moment and return to an issue that Your Honor raised with the government, and that is the issue of reasonableness in terms of setting a specific date.

The government throws out a date, June 1st, and essentially posits that that date is reasonable. The problem with that, from our perspective, is that there is no reference point for that reasonableness.

As you pointed out, generally courts work backward from a trial date. All of the cases, whether under 12.2 that the government cites in its brief or, you know, Walker, the other military cases, look to reasonableness in reference to a trial date. And it's really a backward way of setting up deadlines to set up these kind of pretrial deadlines without -- again, without any reference point to when the evidence would actually be introduced and when the government would need to be ready.

Especially as we point out in our reply, given the posture that we're in, I think the government is overly optimistic about timing issues here. As Your Honor is aware,

the government has a currently pending appeal on dismissal of charges. The government has essentially told the court that -- depending upon Your Honor's ruling, obviously, on 524NN that they will appeal that issue dealing with evidence in the case. There is ongoing discovery. There are other issues that you're aware of with facilities, with other things.

So I think it would be premature to select a date. The government has thrown one out. I am not really sure what their basis for that date is aside from their thinking that it gives us apparently a fair amount of time to give notice, but it is -- it is premature.

The other point I want to deal with briefly has to do with breadth. And I will try not to repeat much of what Mr. Connell said, but I think what the government is trying do do here with Rule 12.2 is -- is kind of to have their cake and eat it too. That is, the government wants the court to look to 12.2 -- and, of course, they don't say it controls, but they want the court to look to 12.2 in its interpretation of what kind of deadline to set. But they don't want the court to look to Rule 12.2 in terms of breadth of notice.

So the government says the court should look to Rule 12.2 based on a fairness rationale, but only purports to

apply that ultimately to the timing issue, not to the breadth issue. They're essentially trying to shoehorn the parts of 12.2 that they like into 701 and leave out the parts that they don't like.

And that should be clear, Judge. If you've read the cases the government cites on page 8 of its motion, that is, the numerous federal cases that they cite, those cases don't require defense notice of things like the names of experts, as the government itself concedes in its motion.

But more importantly, as far as I can see, they don't require anything like the kind of overview of testimony that the defense asks for in the third point in its order -- proposed order, and that's for the reasons that Mr. Connell has stated, that under 12.2, once notice is given and evaluation is done, that evaluation is blocked off even from the prosecution until trial. At least one federal judge has refused to even order the evaluation until the penalty phase is done because of the -- the potential, if you will, for leaks of that information to the prosecution that could affect the penalty phase of a trial.

So, you know, the problem here is that there is no precedent that I can see for -- certainly for at least the third part of the government's proposed order, a description

of the general nature of the expert's proposed testimony, and that is an issue that those federal courts have dealt with.

The -- returning back to 701(g)(2). One other point we made in our motion is that at least the heading on that subsection is Notice of Certain Defenses. The problem with that is mitigation is not a defense, as the rest of the rules make clear. Rule -- R.M.C. 916 and 1004 that deal with defenses and mitigation, they are clearly two separate things.

So I'm not saying that there couldn't be a reasonable deadline for notice of mitigation, but from what I can see, 701(g)(2) doesn't deal with mitigation; it deals with defenses. Defenses are defined as -- you know, as denying wholly or partially criminal responsibility for certain acts under the Rules for Military Commissions. Mitigation is evidence relevant to punishment, not evidence that goes to any of the elements of a defense.

So, you know, to the extent that the government claims it's relying on 701(g)(2) in terms of mitigation, I don't think it's clear at all that that rule, which was derived from, of course, R.C.M. 701(b)(2) contemplates mitigation evidence at all.

Clearly the Rules for Military Commissions contemplate capital trials, so the drafters of the rules could

have put in something specific to mitigation similar to what the Federal Rules have in 12.2(b)(2). There is nothing like that specifically in the rule.

Your Honor, unless you had any questions, that's all I had on this issue.

MJ [Col PARRELLA]: I don't. Thank you, Mr. Feeler.

DC [MR. FEELER]: Thank you.

MJ [Col PARRELLA]: Mr. Ruiz?

LDC [MR. RUIZ]: Judge, in the beginning, a couple of points that I want to respond to on behalf of Mr. al Hawsawi.

Mr. Ryan made -- he indicated that the defense position was that we could hold back notice at our discretion. I'm not exactly certain what defense position he was referring to, as I think each of the represented in this case have filed their own individual pleadings in this case; but for our purposes, Mr. al Hawsawi, that is not our position. Our position is not that we can hold back the notice at our discretion.

It is also not, as Mr. Ryan indicated, that the judge has no discretion to set reasonable time limits in regards to this type of notice. In that regard, we do believe that the court has that discretion; it can set reasonable time limits. Having practiced in the courts-martial system for over

20 years, I do believe that that is the authority that the judge has in a regular courts-martial process and does so in this case as well. So that's not our position. I want to be clear on that.

In this instance, Judge, we do agree with Mr. Connell that the issue that we take is both with the timing and with the scope of the notice. And I'm not going to go into that any further as I think it has been covered sufficiently, but we do take issue with that.

In terms of our pleading in this instance, Judge, what we sought to do in our pleading was to give the court facts, and they are facts that impact the reasonableness of the prosecution's request in and of itself at this time.

In our motion, as you know, there are three exhibits that are C, D, and E. They are submitted under seal -- not under seal but ex parte. And I would just reference you back to those three particular exhibits because they give you what we think are fact-based examples of the practical realities that impact on even our ability to give such notice at this time even if the commission were to determine that the notice were to be given certainly within the timeline that the prosecution has put before the court in this case.

The reality is that we do not operate in a vacuum.

Mr. Ryan went to great lengths to talk about the amount of time that we had with the -- representing, for instance, Mr. Hawsawi, in representing each of the individual clients in this case. What he does not talk about, however, is the voluminous litigation in this case that has keyed in many instances on medical information; the dozens and dozens of pleadings that we have filed on behalf of Mr. Hawsawi seeking access to medical records, not only medical records from his time here in Guantanamo, from medical records during the time that he was held in captivity in the black sites, medical records that are obviously necessary to make some progress towards the types of defenses that the prosecution is alluding to.

As we stand here, we are still litigating many of those issues. The 419 series is one of such motions which is still out there. The government has elected not to provide the information that we requested in our motion and, instead, to seek substitutions. We are still litigating the identities of and the names of medical providers for Mr. al Hawsawi which are necessary and essential for our investigation.

So it is not a one-sided approach to litigation in this case. It's not really fair to say that the defense has had ample time, but at the same time continued to litigate

significant motions, significant issues, access to information and that we require in order to make that kind of progress in order to make the decisions that are ethically required for us to make to even provide that notice.

We have indicated clearly in our pleading, Judge, that we will provide the prosecution notice in accordance with the requirements of the rule and in accordance with any of the dictates of this court. We are not there yet, and we are not there yet for a variety of reasons. And we actually don't even know if we will even get to that point so we can't provide them notice of something that we have not, ourselves, determined is going to be something that's even going to be presented.

I do think, Judge, that what this motion is -- at least from my own perspective, is another attempt by the prosecution to force the commission into a position where the commission has to set a trial date. In this case, I think maybe perhaps we can agree on this: This case is unlike any case or any court-martial or any military case that I have certainly ever seen in terms of complexity, in terms of the system itself, the challenges that arise, and the discovery and the classification issues. I certainly haven't seen anything like that during my practice, and I ----

MJ [Col PARRELLA]: On this we can agree, Mr. Ruiz.

LDC [MR. RUIZ]: Okay. Great. Great. We will agree on that one.

So the real -- the real challenge here is how would you even go about fashioning that. And that's the real challenge that Judge Pohl faced for many years, as Judge Pohl a number of times, I think, became very aware of the difficulties of this case, with the productions of discovery, with the shifting classification determinations and the guidance, is how to go about doing that. And I think that the reason there is no trial scheduling order is simply because it's putting the cart before the horse; and that is exactly what the prosecution is asking you to do.

I think before we even get to a point where a commission is in a position to set out the type of order or trial conduct order that you will see in a court-martial, you will have to at least have a good sense of when this process and the discovery process is going to end. We are not there yet. We continue to litigate those issues. And we have been litigating those issues in large part because of the prosecution's decisions in terms of how they turn that information over.

If we went back to 2011, 2012, Judge, it was General

Martins' position at that time that this case would be tried in a year; that there would be a trial date, and it was impending, and that somehow we were going to get to trial in a year.

Since that time, we've obviously received a great amount of discovery. But some of the information that goes to what Mr. Ryan was talking about, the physical, emotional, the mental damage that was suffered in these black sites didn't come from the prosecution; it came from -- it came from declassifications of the Senate torture report; it came from multiple declassifications of other documents that were never provided us by the prosecution in 2014, three years after General Martins has said that he thought we could go to trial one year after the arraignment. We were getting significant information not from the prosecution because they didn't turn it over; we got significant information from other sources.

And so all of that has impacted our ability to make progress on this case. In Exhibits C, D, and E, we gave you some of a glimpse of what those actual efforts are so that you can put that into context as to how we would even go about providing the kind of notice that the prosecution is requesting here. And my position is that we are simply not there.

It simply would not be reasonable to ask the commission to set such timelines at this time. I think that's simply an impossibility at this point. And ultimately I think what is at play here is the prosecution is trying a different way to skin a cat here. And that comes out in the last page of their filing, page 5 of their reply, where they ask the commission to establish a trial schedule at this time.

I think that's certainly part of what's going on here, and we're simply not there. Perhaps if the prosecution adopted other discovery production methodologies, we could get to that point, but certainly they've not done that yet.

So our position, Judge, as I have indicated, is that I do believe the commission has the discretion at a reasonable time to do that, but we're simply not there. I think the commission is not in a position right now where it could provide a reasonable notice timeline for us in this instance.

Thank you.

MJ [Col PARRELLA]: Thank you, Mr. Ruiz.

Mr. Ryan?

TC [MR. RYAN]: Yes, sir. Your Honor, to be quite clear, we have no objection -- the prosecution has no objection to Your Honor including the deadline we seek in 614, to all the other deadlines that we sought, asked for in AE 478, and, in

fact, argued over two years ago now. And I hope that that list of deadlines and milestones is coming in the very near future.

To the extent -- and with complete respect to this commission's work, to the extent Your Honor is not ready to establish all of those milestones and deadlines that we sought in 478, we submit, Your Honor, that this particular one can be treated as a standalone. And it is quite reasonable for Your Honor to at least get this ball rolling seven years past the date of arraignment.

Thank you, sir.

MJ [Col PARRELLA]: Mr. Ryan, is it the government's position then that those dates proposed in AE 478, that that's a pending request still out there or have those dates changed in light of perhaps events since the date you originally submitted that pleading?

TC [MR. RYAN]: Your Honor, two years ago, in March of 2017, we argued it. Several months later, Judge Pohl suggested he needed no further argument, saying the ball was in his court. Several months after that, he said that the government deserved a trial date.

Now, our original dates, sir, quite frankly are long since overcome by events because otherwise we would be in

trial today. And I'm not suggesting I wouldn't be ready to do an opening right now if you could get a jury in the box. But that being said, clearly Your Honor would have to start from a different standpoint in terms of timing than what was proposed by the government way back when.

MJ [Col PARRELLA]: I understand.

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

MJ [Col PARRELLA]: Anything further on 614? Okay.

That being said, before we take a recess -- a midday recess, I want to bring up the issue -- it's not currently on the docket, but it was raised in the filings in 619R and 619T, which was the government's response to R. And it appears from those filings that the specific issue has resolved itself, at least for this session of court. What I am less certain about is whether this is something that's likely to be a reoccurring issue.

So what I would say is over the midday recess, if the parties want to consider that, the commission would be willing to entertain that, oral argument on that issue or have you bring to my attention what perhaps would be the solution so that we avoid this from occurring again. Because as I understand this, this appears to be an issue with the way certain documents are marked and perhaps a misunderstanding by

the Privilege Review Team.

LDC [MR. RUIZ]: Judge, our position -- we actually have a draft of a motion that we were going to file to have the commission rule on this issue. My belief is that the prosecution doesn't oppose it, and I know they included that in one of their e-mails. It was just a matter for us of filing on that specific point. The FOUO issue, I think, can be easily resolved, but I think having a ruling from you would probably be best.

And I will also tell you that that's probably the tip of the iceberg as we have seen really an increase in unreasonableness from the Privilege Team in terms of how they interpret this. So I think that we are going to be filing additional motions, but I think we can resolve this one fairly quickly and easily.

MJ [Col PARRELLA]: Okay. And if that's the case, and that's the impression that I was left with, with the parties agreed on this is similar to my earlier request for Captain Andreu, Mr. Ruiz, I would ask that you put together a proposed order in working with the government for the commission to sign.

LDC [MR. RUIZ]: Will do.

MJ [Col PARRELLA]: Thank you. Okay. With that, we will

go ahead and take a midday recess. If everyone could be back here at 1330. The commission is in recess.

[The R.M.C. 803 session recessed at 1150, 25 March 2019.]

[The R.M.C. 803 session was called to order at 1337, 25 March 2019.]

MJ [Col PARRELLA]: All right. This commission is called back to order. All parties present when the commission last recessed are again present. It appears all the same counsel are here, so if any counsel has either come or departed, if you could please let me know.

LDC [MR. NEVIN]: Yeah, Ms. Radostitz is back and Ms. Leboeuf has stepped out.

MJ [Col PARRELLA]: Thank you. Okay.

With that, Mr. Connell, if you could please enlighten the commission as to the order in which you would like to take up the next three motions.

LDC [MR. CONNELL]: Sir, with your permission, it would be 601, 574G, 600.

MJ [Col PARRELLA]: I understand. Let's do it.

LDC [MR. CONNELL]: Thank you.

Your Honor, at trial, the government seeks to introduce telephone calls involving Khalid Shaikh Mohammad and three other defendants made before and shortly after events of

September 11, 2001. At the same time, the government seeks to avoid the obvious questions: How do they have those telephone calls? When did they acquire them?

The next three motions address the government's attempt to avoid those questions through a process of a substituted evidentiary foundation. The first of those motions is AE 601, a motion to dismiss, or in the alternative, to suppress certain evidence under the Confrontation Clause.

The Confrontation Clause and the right to cross-examination is important here because the government's attempt is to avoid presenting witnesses subject to cross-examination through the substituted evidentiary foundation process.

Many jurisdictions across the United States have attempted substituted evidentiary foundations in forensic evidence and many other types of cases -- a wide variety of contexts -- and the Supreme Court and other courts have since 2004 routinely held that this process violates the right to confront and examine -- cross-examine witnesses.

Let me begin with a procedural history, which I will say once and then will not repeat on the other motions.

On 30 September 2016, the government produced discovery, including the exhibit at issue in the AE 574

series, labeled MEA-INT-185 through 187 regarding these telephone calls. You can find a description of that discovery at AE 600 Attachment F.

We immediately viewed that evidence as extremely valuable to the defense and exculpatory and intend to make it a key issue at trial. Consistent with that view, on 27 October 2016, Mr. al Baluchi served a discovery request on the government labeled DR-280-AAA. It is found in the record at AE 600 Attachment B. This sought more factual information about the exhibit and especially those aspects which would assist the defense at a personal jurisdiction hearing or at a trial. There was no response from the government. We assumed they were working on it.

On 1 June 2018, the government filed AE 574, an ex parte, under seal, classified pleading. We later learned that the -- we later learned the five items of relief the government sought in that ex parte, under seal, classified filing, three of which are unclassified. One of those unclassified items that the government sought as relief is the so-called substituted evidentiary foundation.

In AE 574B (Amended), paragraph 2.a.2., an unclassified paragraph, the military commission describes that the government asked the military commission to, and I quote,

find that the use of the government's proposed substituted evidentiary foundation for that information is proper as the underlying evidence the government seeks to admit into evidence is otherwise admissible, the evidence is reliable, and the redactions are consistent with affording the accused a fair trial.

AE 574B (Amend) paragraph 2.e. describes the substituted evidentiary foundation in more detail. In unclassified paragraphs, the military commission stated in their motion, the government also moved the commission to approve a substituted evidentiary foundation protecting the sources and methods from which the telephone calls were acquired and substituting them with the use of the following to be read into the record by two different FBI witnesses in open court:

One, the United States acquired telephone calls from between April and October 2001 that were later determined to pertain to the planned attacks on September 11th of 2001.

Two, the FBI transcribed and /TRARPBS /HRAEUTD the telephone calls into English.

Three, an FBI linguist then reviewed known voice samples of the accused to determine if voice identifications could be made of the telephone call participants.

Four, an FBI linguist made positive voice identifications as to four of the five accused in United States v. Mohammad, et al. based on this review.

Five, an FBI linguist identified that three of the accused self-identified during the telephone calls by using known aliases.

Six, the FBI further determined that the telephone calls contained coded statements of the accused in furtherance of the attacks.

And seven, these statements were corroborated by other evidence in this case, and the FBI prepared an evidentiary presentation.

The government also sought and -- in AE 574 a gag order. The 574B (Amend) paragraph 2.e.4., an unclassified paragraph, describes that the government sought to, quote, restrict any party from making any reference or asking any question during any session of the commission that could tend to reveal or could conceivably elicit information regarding the classified source or method by which the United States acquired these telephone calls.

On 6 June 2018, Mr. al Baluchi objected in 574A (AAA), although, of course, as with other ex parte pleadings, we had no idea what the topic was.

On 12 July 2018, the military commission issued AE 574B, ex parte, under seal, classified ruling, and AE 574C, ex parte, under seal, classified order. Both of those documents are still under seal.

While all that was going on, without knowing what the government was doing, we continued to research, to investigate, to interview witnesses, and to cross-reference other discovery. We realized that there were possible bases to suppress the exhibit if we chose to do so.

And on 27 July 2018, without knowing that the government had come to the military commission on a similar topic, Mr. al Baluchi served DR-280A-AAA, which can be found on the record at AE 600 Attachment C, seeking more information about the legal authority as opposed to the factual details for the exhibit. There was no answer from the government.

On 1 August 2018, the military commission issued AE 574B (Amend), amended ruling. The military commission found, in unclassified paragraph 4.a., the government has submitted declarations invoking the classified information privilege in setting forth the damage to national security that discovery of or access to the underlying call data documents and information regarding the sources and methods by which the telephone calls were acquired reasonably could be

expected to cause; and in paragraph 4.d., the use of a substituted evidentiary foundation is proper. However, the commission defers ruling on this aspect of the motion at this time subject to the government's laying of the foundation discussed in AE 574G, pages 36 through 39, which, of course, we, on the defense, have never seen.

The military commission further ordered in paragraph 6.b. that this order does not abrogate the government's continuing discovery obligations, which will become important when we come to AE 600; and under paragraph 6.d., that the order shall issue to the defense 14 days after the entry.

On 1 August 2018, the military commission also issued AE 574C (Amend), Amended Protective Order #3, setting forth essentially the gag order that the government requested. It is my understanding, Your Honor, that I am currently bound by that gag order and will not violate it in this session. I will, however, draw the military commission's attention to places in my argument where if I were not restricted from doing so, I would make specific arguments about which could conceivably elicit or suggest the sources and methods by which the evidence required. We also briefed it at some length, that same issue, in the brief, largely in unclassified

paragraphs.

Despite the language contained in the order, the order did not go out on SIPR. And in going back later to find out what happened, the trial judiciary properly advised us that the order was available for hand pickup, but probably because it was August, we did not pick it up as fast as we should have.

And on 17 August 2018, Mr. al Baluchi filed AE 594, Mr. al Baluchi's motion to compel discovery in DR-280-AAA.

On 30 August 2018, the government replied in 594B that the military commission had already entered an order about the telephone calls which alerted me for the first time to the existence of the order. I immediately advised the military commission and withdrew 594.

On 5 October 2018, Mr. al Baluchi filed AE 600, motion to compel discovery, and AE 601, motion to dismiss or suppress for violation of the Confrontation Clause; and a week later, on 12 October 2018, Mr. al Baluchi filed AE 574G, motion to rescind the Protective Order #3 or dismiss the charges for violation of the right to present a defense.

These three motions represent different approaches to the same problem. We must first -- in order to understand this problem, we have to understand the government's approach.

There is a finding -- in the government's view, there is a document -- the exhibit which is an adequate substitute for underlying call data documents and information regarding the sources or methods by which the telephone calls were acquired; that there is a need for a gag order restricting any party from making any reference or asking any question that could tend to reveal or conceivably elicit information regarding the classified source or method, and a substituted evidentiary foundation replacing a vast area of defense inquiry with seven unchallengeable paragraphs. The military commission found this substituted evidentiary foundation proper, but deferred ruling on it.

The third aspect of this, the substituted evidentiary foundation, is what is at issue in AE 601. There is no bar to reconsideration, even if this were to -- were a topic that came under the bar to reconsideration, because the military commission has not yet ruled. It is in fact the only mechanism that we have to challenge the admissibility of these -- this substituted evidentiary foundation and its subsequent exhibit if the bar to reconsideration applies and is constitutional.

However, the government's proposal to short circuit the evidence at a trial runs squarely up against Crawford v.

Washington, 541 U.S. 36, 2004, which foundationally held that the reliability of evidence must be assessed in a particular manner by testing in the crucible of cross-examination.

I digress at this moment to address an argument that the government makes in its brief about the application of the Sixth Amendment to the defendants. The government has never -- has often raised the question or stated that it is not clear what constitutional rights apply to the defendants. Early in the case we tried to ask -- we asked the military commission to answer that question. The military commission said that it preferred to take it up on a case-by-case basis.

I suggest that the Sixth Amendment right to confrontation applies of its own force, a trial right in a capital trial. The -- it is not clear to me if the government is repeating the argument that it has made before about we don't know the scope of constitutional protections or if, for the first time, it is actually arguing that protections of the Bill of Rights do not cover the defendants. Perhaps they will clear that up.

But the government relies on United States v. Verdugo-Urquidez ----

MJ [Col PARRELLA]: Let me just ask a quick question.

LDC [MR. CONNELL]: Sure.

MJ [Col PARRELLA]: ---- because it is 601 and it is largely a constitutional argument. What is your position as to the applicability of the Sixth Amendment at this military commission?

LDC [MR. CONNELL]: My position is that the Sixth Amendment right to confrontation at issue here applies of its own force ex proprio vigore -- I think is the Latin -- in this military commission. Let me explain.

The government relies on a couple of cases beginning with United States v. Verdugo-Urquidez. Verdugo-Urquidez is about the Fourth Amendment, and it involves an important textual analysis of the people because the text of the Fourth Amendment includes the right of the people against unreasonable search and seizure shall not be infringed. And it was important to the textual analysis in Verdugo-Urquidez who are the people, a national community which excludes the noncitizens living outside the United States.

There is also an important element that is guiding here, because the Verdugo-Urquidez court talks about the timing of a constitutional violation; that when a constitutional violation takes place, when does it happen, and with a Fourth Amendment violation at issue in United States v. Verdugo-Urquidez, it takes place at the time of the

unreasonable search or seizure. It doesn't take place within the cognizance of a court; it takes place somewhere else. In Verdugo-Urquidez, that place was Mexico with respect to a Mexican citizen.

A Sixth Amendment violation, on the other hand, with respect to Confrontation Clause takes place at the time when evidence is introduced without cross-examination in the same way that a violation of Fifth Amendment protection against involuntary statements, that, according to Verdugo-Urquidez, that violation takes place in court, which is significantly different for the application of constitutional rights. And we are going to see that in the Ali case a little bit later, where there is an important difference between a constitutional violation which takes place out in the world and one which takes place under the immediate supervision of a tribunal.

I mentioned the -- so the government relies on two other cases. One of them is the reversed Hamdan decision from the CMCR which held that, at least in the context of alienage, noncitizen defendants did not have a protection against equal -- a right to equal protection.

And I would suggest that that particular case turns mostly on the question of alienage, because alienage has

always been an unusual -- unusually situated in the equal protection jurisprudence, because it's not the same as discriminating against someone on the basis of race, for example, because the Constitution itself assigns to Congress the duty to regulate immigration within and without the United States. So the constitutional analysis for alienage is always a little bit different.

But the Ali case, from the Court of Appeals for the Armed Forces, is more significant, I suggest. And in Ali, there was -- there were three factors that combined. There was a noncitizen defendant, a crime which took place outside the United States, and a trial which took place outside the United States.

Ali was a contractor who was accompanying U.S. forces in Iraq. And in that context, the Court of Appeals for the Armed Forces held that there was no Fifth and Sixth Amendment jury trial right and -- in the context of assessing whether a court-martial had jurisdiction over Ali.

The third of those, the crime being outside the United States, probably played in some way I suppose to the crime here inside the United States, but the trial taking place outside the United States is significantly different. And that is what -- that element is what brings

Boumediene v. Bush into play.

I know that there are schools of thought on exactly what Boumediene v. Bush held and how far its extension went, but the one thing that we do know from its reasoning is that Guantanamo Bay, by virtue of its long occupation and the virtual, if not legal, exercise of sovereignty over Guantanamo Bay by the United States is de facto part of the territory of the United States.

So it's my argument that assuming that the Ali decision is persuasive authority to this military commission and assuming that it applies to the confrontation right as opposed to the pure jury trial right, the fact that this Sixth Amendment violation takes place within the cognizance of the court in a place where the United States exercises de facto sovereignty controls.

However -- and this is the second part of my answer to your question -- it is ultimately probably not necessary for the military commission to decide the constitutional question.

And I don't suggest this merely as a matter of constitutional avoidance, but simply in that there is a statute which also provides essentially the same right. And that is 10 U.S.C. 949p-6(c)(2)(B)(ii) which requires -- which

addresses the authority for the substituted evidentiary foundation in the first place, but it is only allowed if the military judge finds that the redaction, among other things, is consistent with accusing -- affording the accused a fair trial.

And one thing that we know from the Supreme Court cases is that the testing in the crucible of cross-examination is at the heart of the fair trial right. In fact, in Pointer v. Texas at 380 U.S. 400, a 1965 case, the Supreme Court described that the right of confrontation and cross-examination is, quote, an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal.

So moving to the application of the Crawford Sixth Amendment analysis. The proposed substitute is at the core class of testimonial statements which the founders intended to be subjected to the cross-examination crucible. It is an extra -- the seven-paragraph unchallengeable statement is an extrajudicial statement contained in formalized testimonial materials; in this case, essentially the set of testimonial statements to be read to the jury. It's clearly a statement created by a litigant intended for use at a later trial. In fact, AE 574 is a request to the military commission to use it

at a later trial.

The government acknowledges this essentially in its -- in parts of its brief. Its description in AE 575 -- excuse me, the court's description at AE 574B (Amended) paragraph 2.e. makes clear that the government seeks, quote, a substituted evidentiary foundation to be read into the record by two different FBI witnesses in open court. Clearly testimonial.

The follow-up to Crawford, Melendez-Diaz v. Massachusetts, defines statements -- held that statements were testimonial when they are functionally identical to live in-court testimony, doing precisely what a witness does on cross-examination. That is -- excuse me, on direct examination. That is exactly what the government is asking for, is live in-court testimony only to be read from a document and unchallengeable by the defense as opposed to being subject to cross-examination.

So let's break these witnesses down -- these statements a little bit more and examine them two by two, essentially, on their testimonial nature. The first two statements are exactly the, quote, observations of factual conditions or events, end quote, that the court in Bullcoming v. New Mexico held could not be presented by a

substitute witness.

Those two statements are that the United States acquired telephone calls between April and October 2001 that were later determined to pertain to the planned attacks on September 11th, 2001; and that the FBI transcribed and translated the telephone calls into English. If these statements were made by a witness as opposed to a substituted evidentiary foundation, there would be an incredible amount of cross-examination on the factual basis for these statements. Essentially, the United States is saying that it had recordings of Mr. Mohammad's telephone calls to other alleged conspiracies before 9/11.

I am prohibited by the gag order, Protective Order #3, from arguing the specifics of sources and methods, although I easily could based on open-source material as well as unclassified discovery. That prohibition itself violates my personal First Amendment rights as well as Mr. al Baluchi's due process rights.

We would have at trial a great deal of questions about the origins of this material. We identified the significance of signals intelligence to this case as early as the theory of defense that we filed in AE 073F in 2013.

Setting aside the source and method arguments which

are prohibited by Protective Order #3, there are a lot of questions about the exact timing of when the United States Government acquired these statements. The statements suggest that they were acquired pre-9/11 but were not listened to or analyzed until later.

The statements say that the -- they -- in the passive voice, that they were later determined. And by whom and when that determination was -- took place was important. It is important what agency acquired the documents. It supports our arguments that the United States is not engaged in hostilities because the -- of the CIA's suppression of evidence of the Kuala Lumpur meeting because, in our view, they wanted to recruit al Mihdhar and al Hazmi as human intelligence sources. It raises the question of what else did they acquire by the same means.

It raises the -- it is also important -- that question, the universe of what was acquired, is important because it shows Mr. al Baluchi's relatively minor participation by showing where he falls in the universe. If he was involved in half the calls versus involved in one call in that universe is a factor that the jury may take into consideration, both in fashioning sentence and, under the Burrage analysis, which we're going to talk about more, for

determining whether there is proximate cause between Mr. al Baluchi's actions and the death which is necessary to trigger capital application of the statute.

The government claims in AE 601B that -- and this is an unclassified paragraph -- the 118 telephone calls are calls associated with five telephone numbers that are otherwise significant to the FBI investigation regarding the 9/11 attacks. Cross-examination would reveal the nature of that connection as well as when and how the FBI acquired these 118 calls.

The government claims in AE 601B at page 3 that from those 118 telephone calls, the prosecution identified it a subset, the translated and/or audio content of which it intends to use affirmatively. Cross-examination would reveal how the government selected the records it chose for the exhibit, and the witness could describe the content of the other calls.

It is a defense strategy to be so common as to be banal to suggest the prosecution has vetted the evidence to include only the evidence which it wishes to use. The fact that the government has selected a subset of 118 calls would clearly support such a defense.

Questions about those two statements would address

the chain of custody and the admissibility of the exhibit itself. It would also address what connection there is between the universe of acquired statements and the telephone calls that the government seeks to introduce. Unlike most evidentiary foundations, the seven statements do not say that the calls that the government seeks to introduce are the same calls that are being described in the foundation.

The -- finally, the government claims in AE 601B that the exhibit, quote, is similar to telephone records kept in the course of ordinary business. If we were addressing an actual witness, cross-examination would negate this claim, although at this point, I am prohibited by the gag order from saying exactly how.

Moving to the second set of statements, the second set of statements, which is number 3 and 4 in the government taxonomy, present exactly the sort of forensic analysis that the court held in Melendez-Diaz could not be presented by a witness.

Number three is a FBI linguist then reviewed known voice samples of the accused to determine if voice identifications could be made of the telephone participants.

And four, an FBI linguist made positive voice identifications as to four of the five of the accused in

United States v. Mohammad all based on this review.

If examining a witness, cross-examination would reveal where did these, quote, known voice samples come from? If they came from the CIA and a black site, it would support our claim about FBI involvement in the RDI program and the connection between the FBI and the CIA.

It would also provide a basis for suppression because 10 U.S.C. 948r prohibits all evidence -- which is not limited to testimonial evidence -- all evidence which is obtained -- which was obtained by torture. If these were CIA voice samples, we would have a very strong claim that they were acquired by torture.

Cross-examination would explore, as with any evidence, the qualifications, the methodology of the linguist. There would a probably be a challenge under Daubert as to what qualifications or what method and application of that method the linguist used. It would address the critical question on cross-examination of a witness when did these translations take place, whether a report was prepared, who had access to this report. And, in the occasion of multiple languages being used on a recording, did the linguist speak the secondary language, or did they rely on the work of yet another witness who would be required to testify.

The third set of statements are expert testimony of a different type regarding aliases and codes commonly used in gang cases and commonly exposed to Daubert analysis under the 700 series of the Military Commission Rules for Evidence in this case.

Number five is that an FBI linguist identified three of the accused self-identified during the telephone calls by using known aliases; and number six, that the FBI further determined that the telephone calls contained coded statements of the accused in furtherance of the attacks.

Cross-examination would explore the basis for their knowledge, the specifics of the aliases they believe to be used, the specifics of the coded statements that they believe to be used, and would explore the fascinating statement that the FBI further determined that the code telephone calls contained code statements, not an individual but an institution, and exactly who was involved in that.

That question is especially important given the holdings in Melendez-Diaz and Bullcoming that you cannot bring in a supervisor substitute to testify about what someone else did.

The final statement, number seven, is the worst offender of all when it comes to an unsupported bolstering of

the credibility of this evidence to give it undue weight to any jury. In statement seven, the prosecution tenders these statements were corroborated by other evidence in this case. And the FBI prepared an evidentiary foundation begging the evidence of -- begging the question of what evidence and what corroboration.

Now, in response, the government claims that the exhibit itself is not testimonial. The government says nothing about the hearsay foundation statement, the seven statements we just reviewed, which are clearly testimonial. The government does not claim otherwise.

The exhibit itself is not a business record, it is not a phone bill, it is not a call data report common in criminal cases. Rather, it is a curated exhibit created by the prosecution, as they clearly admit at page 3 of their brief AE 601B.

The basis for the business records or regularly conducted business exception is that litigation goals are not implicated; it was kept for some other reason. That's clearly not the situation here. That exhibit was created entirely for litigation.

Now, the government claims on the brief that the call data substitute exhibit is a data compilation made at or near

the time the information was transmitted by mechanical means. That is a fascinating argument, and I doubt its accuracy. But if that is true, the government would have to prove it because that's one of the foundational elements for a business record, of course. And when the call data substitute was created is exactly one of the questions which I would ask a witness.

What that means is that the government is relying for the basis of admissibility on exactly the claims that they prohibit -- that they are asking -- they seek to prohibit us from inquiring about in cross-examination. And, of course, if it were a business record, it would not be classified, because it would be maintained not by some classified entity but rather by a business.

For reasons that are not a hundred percent clear to me, the government claims that the document is self-authenticating. I suppose their argument is that I would not be -- I don't need to examine the authenticity through cross-examination. In order to fall into that category, of course, it would have to be a record of the United States. It would -- it also contradicts their business records claim, something that I would explore on cross-examination.

Unlike an ordinary self-authenticating document, there is no attestation certificate with a signer who we could

interview and find out if they actually had signed this document and what it was about. And self-authentication, of course, is no exception to the Confrontation Clause, even if it avoids certain foundational requirements.

The government further claims the summary exception, which does not appear in the Military Commission Rules of Evidence, but they say that it is a summary and that there is a summary exception at least in the Federal Rules. But the difference between the summary exception in the Federal Rules, of course, is that the ideas that the parties have had access to the underlying data and can cross-examination **[sic]** the person giving the summary to find out if it accurately reflects the underlying data, something that we are prohibited from doing here.

Finally, the government claims that the audio of the telephone calls are statements in furtherance of the conspiracy. I agree. The audio itself is not testimonial, but that does nothing for the foundation statement or the exhibit.

I'd like to close on this motion by saying if you find that 10 U.S.C. 949p-6 requires admission of a foundational statement and exhibit in violation of the Confrontation Clause, that would mean that 949p-6 is

unconstitutional. It would be no different from dozens of statutes permitted -- permitting substituted evidentiary foundation for Breathalyzer results, drug analyses, forensic examinations, or medical examiner reports which became unconstitutional after Melendez-Diaz.

On the other hand, if you find that the classified information privilege prohibits access to this material in order to avoid the Confrontation Clause violation, you should -- this is where the dismissal comes in. You would have to dismiss or take other sanctions set forth in the statute as a sanction for the invocation of the classified information privilege in such a way that it denies the defendant the right to a fair trial.

MJ [Col PARRELLA]: I do have a few questions for you. So starting back in -- you started off with touching on the reconsideration aspect of this.

LDC [MR. CONNELL]: Yes.

MJ [Col PARRELLA]: Just so I understand your position, you don't believe that you're barred from requesting the commission to address this topic because in the commission's prior ruling, the commission had not yet ruled on the specific evidentiary foundation proposed by the government; is that correct?

LDC [MR. CONNELL]: Yes, sir. And let me just develop that for just a moment.

So with each of these three motions, I will address the bar on reconsideration in different ways. Because a -- the substitute itself -- right? -- the exhibit which the military commission found an adequate substitute for the underlying call data is in a different procedural posture than the substituted evidentiary foundation. The military commission ruled on the exhibit as a substitute for the underlying call data, and to the extent it's constitutional, the bar on reconsideration comes into play.

In this situation, with respect to the substituted evidentiary foundation, the military commission commented that use of a -- not necessarily this one but a substituted evidentiary foundation is proper as a general matter but deferred ruling on this substituted evidentiary foundation being there's been no ruling on which there would be a reconsideration, no ruling that might be barred.

MJ [Col PARRELLA]: That was my understanding as well, that the commission ruled that a substituted evidentiary foundation would be appropriate but not necessarily deferred on ruling on this specific one.

So your constitutional challenge would then merger to

not be barred by the reconsideration would be focused on this specific proposed evidentiary foundation, is that a correct statement? Or are you talking about -- because the constitutional challenge seems to apply to any substituted evidentiary foundation.

LDC [MR. CONNELL]: Yes. Both are true.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: So I spent some time developing my specific critique of this substituted evidentiary foundation, but the point that I closed with -- and so I spent the most time talking about this one because that's what's before us, of course.

MJ [Col PARRELLA]: Yes.

LDC [MR. CONNELL]: It is much more difficult to criticize an abstract than it is a particular. But I also noted at the close of my argument that the -- if you construe the statute to mean that some substituted evidentiary foundation must be given, then that would make the statute that -- unconstitutional as applied.

MJ [Col PARRELLA]: I understand.

No further questions. Thank you.

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

LDC [MR. NEVIN]: Previous objection.

MJ [Col PARRELLA]: Noted.

Ms. Bormann?

LDC [MS. BORMANN]: Judge, our conflict still exists.

MJ [Col PARRELLA]: Mr. Harrington?

LDC [MR. HARRINGTON]: Nothing further, Judge.

MJ [Col PARRELLA]: Mr. Ruiz?

LDC [MR. RUIZ]: Nothing. Thank you.

MJ [Col PARRELLA]: Trial Counsel?

MTC [MR. TRIVETT]: Good afternoon, Your Honor.

MJ [Col PARRELLA]: Good afternoon.

MTC [MR. TRIVETT]: I just want to clarify some facts up front. There seems to be some confusion, at least amongst the defense counsel, as to what it is that we intend to do with this substituted evidentiary foundation.

Understanding that Judge Pohl was the judge who considered this when we filed it, I want to give you a little bit of background just so you understand how we intend to use this, because that negates many of the concerns that Mr. Connell raised regarding cross-examination.

Now, the first fact that we rely on in 601B (Gov) is that the United States acquired telephone calls from between April and October 2001 that were later determined to pertain to the planned attacks on September 11th, 2001. How we

acquired those phone calls is something that's a protected source and method that we've sought to protect within this litigation and specifically asked for the substituted evidentiary foundation.

All of the other facts are facts that the defense is free to cross-examine our witnesses on. We envision our witnesses, for the foundational aspects of it, to be able to talk about those things that they're competent and understand, specifically an FBI intelligence analyst, FBI linguist, and a Baluchi linguist.

But the fact number two, the Federal Bureau of Investigation transcribed and translated the telephone calls into English, right? We will have the FBI linguist here to testify, and they can cross-examine him on aspects of his translations.

The second fact, an FBI linguist then reviewed known voice samples of the accused to determine if voice identifications could be made of the telephone call participants. The linguist will be here. They will be able to cross-examine him on how he got those voice samples. I will represent to the court that they're not RDI-generated voice samples, but they will be able to cross-examine him on that.

The fact that he made positive voice identifications as to four of the five accused -- or at least a combination of the linguists did, whether it be the Baluchi linguist or the Arabic linguist, based on their review, would be something subject to the cross-examination of counsel.

The fact that three of the five accused in this case self-identified, the same will be subject to cross-examination of the witness.

That the FBI further determined that the telephone calls contained coded statements of the accused in furtherance of the attacks, they will have the opportunity to talk to the intelligence analyst from the FBI who has decoded them for us. She will be subject to full cross-examination as to why she believes that they were coded.

Part of our presentation will obviously be both corroborating and explaining what the codes are with other evidence that we presented in the case. So the fact that the statements were corroborated by other evidence will also be subject to cross-examination and part of our presentation in the case-in-chief.

So really what they are prohibited from doing under this substituted evidentiary foundation in Protective Order #3 is simply inquiring as to how the U.S. Government was able to

acquire these telephone calls. So that's the sum and substance of what Protective Order #3 is. We're not going to delve into the sources and methods. We sought to protect them. We got the protective order, and we're not apologetic about it. That's what Congress intended.

So I want to transition to his constitutional argument. And generally our position on the various aspects of the Constitution and its applicability to military commissions has been based on ripeness. Is the issue properly in front of the judge?

I think Mr. Connell mentioned when he asked in brief what Constitution, what constitutional protections apply to this military commission? Our position -- and I believe it's in the AE 200 series -- was simply let's take it up when it becomes ripe. Under the principles of constitutional avoidance, we don't decide an issue of constitutional dimension unless we have to; and we don't have to unless it's ripe.

Now, what I will say is that while we don't have a motion currently to preadmit this evidence, we will be filing one upon getting a little bit more clarity as to when the trial is going to be. But we shouldn't have to.

And this, I just want to bring up. We're not filing

a motion to reconsider. We understand what Judge Pohl's ruling was. But we believe that the U.S. Government was entitled to a finding that the substitute is adequate -- not the substitute, the substituted evidentiary foundation. Because when we're seeking to protect sources and methods that are classified, and we have a right to do that under the statute, ultimately we need to know if what we are intending to do satisfies the foundational aspects of the case.

Now, we're not filing a motion to reconsider. We are just going to file, at this point, a motion to preadmit where we will call our witnesses. We're in the position, though, where we have to now file a motion to preadmit as opposed to just doing it at trial, and that's because if it isn't satisfactory, we have to go back to the drawing board.

You cannot imagine how difficult it was to coordinate the use of this information throughout the United States Government and how long it took, and so we're going to need to know if what we intend to do is satisfactory in advance of trial so that in the event that it's not -- and we believe that it is -- we'll be able to adjust accordingly.

But let's get back to the constitutional aspects of it. So assume that it's ripe for purposes of what we're litigating, because we're going to be moving it in shortly.

Mr. Connell's position is that this violates Crawford and it violates the Sixth Amendment constitutional rights of Mr. Ali.

And what we advised the commission to do is we need to read the Military Commissions Act in harmony with itself. And when you do that, it's clear that Congress never intended to give full Sixth Amendment confrontational rights to the accused.

In 10 U.S.C. 949a(b)(3)(D), Congress determined that hearsay not otherwise admissible under the Rules of Evidence applicable in trial by general courts-martial may be admitted in a trial by military commission. It has certain requirements such as notice, materiality, probative nature, that the testimony is otherwise not available, but clearly they intended for hearsay to be admissible in the military commissions that wouldn't otherwise be admissible in court-martial or even Federal District Court, as certain hearsay obviously, if they don't fall under the exceptions, would generally violate the Sixth Amendment if they fell under the core testimonial features of Crawford and its progeny. So that's the first example of why Congress clearly didn't intend for full Sixth Amendment confrontation rights to apply.

In 10 U.S.C. 949p-6(c)(2) dealing with procedure for cases involving classified information, Congress stated: When

trial counsel seeks to introduce evidence before a military commission under this chapter and the Executive branch has classified the sources, methods, or activities by which the United States acquired the evidence, the military judge shall permit trial counsel -- shall permit, nondiscretionary -- to introduce the evidence, including a substituted evidentiary foundation pursuant to the procedures described in a subsection above, while protecting from disclosure information identifying those sources, methods, or activities, if the evidence is otherwise admissible; the military judge finds that the evidence is reliable, and the redaction is consistent with affording the accused a fair trial.

By statutorily permitting a substitution of classified sources, methods, and activities, it becomes clear that Congress did not intend to give full Sixth Amendment confrontation rights to any of the accused in military commissions.

In 10 U.S.C. 949p-7, introduction of classified information into evidence, in (b)(1) it permits the military judge, in order to prevent unnecessary disclosure of classified information, to order the admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording,

or photograph with excision of some or all of the classified information.

Understanding that there will be certain times when classified information is not relevant to the proceedings, in order to protect it, it permits the military judge to excise certain information, which we asked and was approved by Judge Pohl in our ex parte filing to do.

And finally, the same section allows trial counsel to object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

So while the accused does enjoy the right to cross-examine the witnesses who testify against him under 10 U.S.C. 949a, it's clear within the Military Commissions Act itself that Congress never intended full Sixth Amendment confrontation rights as are enjoyed in Federal District Court.

So I want to turn now and make sure that everyone understands that we are talking about several different things. And it was nice to hear that the defense admits that the audio portions would be statements admitting -- that would be statements made in the course in furtherance of the conspiracy and thus are not core testimonial. So that leaves the substituted evidentiary foundation, and it leaves the call

data exhibit.

Now, the call data exhibit we provided shows 118 call events that we intend to use similar to how we would use a telephone record that was done by AT&T or Verizon, and in a lot of ways -- and although I can't get into the specific facts about that, in a lot of ways, it's very similar to that. It's a data compilation. We're not going to get into the sources and methods nor will we notify the defense what those sources and methods were, but we certainly did for Judge Pohl.

In his ex parte filing, we had to ensure that he could make those determinations that the evidence was reliable, otherwise admissible, and consistent with a fair trial. And we provided all of that information in order to ask for a substituted evidentiary foundation.

So generally when you're dealing with phone records or when you're dealing with records of the United States -- and we are arguing by analogy here because this is a specific and unique issue, fully explained in the ex parte filings, but by analogy, it's really a combination of both. And ultimately when you are dealing with a business record, a business record certification is found to be sufficient and not in violation of the Sixth Amendment confrontation right if it accompanies the phone records that you intend to use.

U.S. Government documents are self-authenticating in that providing you have an attestation certificate that that's what it is, it would be admissible based only on that certificate.

Now, obviously the information that would identify all of this information is the source and method by which we obtained it, and that's what we're seeking to protect. So while the defense does not get to challenge that, that aspect of the actual foundation, the military judge as a neutral arbiter here looks at it and makes sure that we have satisfied our obligations under the statute before proposing -- before approving a substitute or approving the substituted evidentiary foundation.

So the only thing that is potentially hearsay that would not otherwise be admissible is the substituted evidentiary foundation that is specifically authorized by Congress in the statute. Like I said before, we're not apologizing for it.

They weighed and made a determination that when prosecuting enemies of the United States, where there is strong evidence of their involvement in war crimes, that we should be able to use that evidence and still protect the national security implications of whatever source and method

by which we obtained it. We're not doing this very often. This is somewhat unique in our case, but we are certainly not apologizing for it, and it is specifically statutorily authorized.

But I do want to talk briefly about some of the case law that Mr. Connell has cited. So whether it's the Verdugo case, the Kiyemba case, the Ali case, or any of the other cases that we have cited in our filing, no court has ever found that the due process clause of the Fifth or Sixth Amendment applies to someone in Mr. Ali's position as an overseas alien with no substantial contacts to the United States not being tried in United States federal court.

But none of these -- if the Confrontation Clause did apply, none of the documents we intend to use would violate them. When Crawford looks at the core reason behind the Confrontation Clause and that certain reports, such as urinalysis reports and I believe other forensic reports, those reports are generated specifically for purposes of trial after the event occurred. All of the information we intend to use from 3 April 2001 to October of 2001 happened before the event occurred with the exception of a couple that happened after the event occurred.

But clearly before anyone was charged, before any of

the accused were captured, there is no possible way that the information contained within the call data substitute is testimonial in any way. It is merely a data compilation unlike -- or just like an AT&T or Verizon phone bill.

If I may have a minute, sir?

MJ [Col PARRELLA]: You may.

[Pause.]

MTC [MR. TRIVETT]: So many of these motions are interrelated, even including 600, 574, even touching on 617 and 620, that I don't want to repeat myself. So I am going to save my arguments for the armed conflict for later in one of the other motions.

But we would just point out that by the time this happened in April 2001, the declaration of war had already occurred, the '98 fatwa where they -- Usama bin Laden specifically made American citizens legitimate targets in the war, East Africa Embassy bombing attack, and the USS COLE attack had all occurred before any of this call data that we intend to use occurred. So this concept that this is somehow related to their argument about hostilities just doesn't make sense from a logical or temporal standpoint.

Subject to your questions, sir.

MJ [Col PARRELLA]: I have none. Thank you, Mr. Trivett.

Mr. Connell.

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

I want to begin with what I understood the government's initial argument to be. What I heard the government say was that of the seven statements, six of them there is no reason for a substituted evidentiary foundation at all because they are going to have a real evidentiary foundation. That's the way it should be. Then cross-examination is my responsibility, and whether the military commission ultimately finds the foundation to be adequate or inadequate is the result of what those witnesses say.

It seems to me that the military commission -- that the government just told you that it doesn't need number two through seven because they are not protecting any source or method, and number two through seven are covered by the witnesses. There is no reason for anyone to read a statement in court, especially one approved by the court, about corroboration of evidence or, for that matter, about their expertise as voice analysts.

I understood the government to say that number one, however, was different. And number one is the place that sticks so importantly, because the -- that is the place where

Mr. al Baluchi is not simply a matter of challenging the evidence but, in fact, of developing facts which are a part of his defense.

The government does not retreat and informed us that it does not apologize for skipping over the entire part of the evidentiary collection process, which is usually the government's weakest link, which is: How did you get this evidence? How do you know it's real? Where does it come from? What was its chain of custody?

The government is going to try to do the same thing when we get to the raid evidence, and I've been trying to think of a way to bring that before the military commission in this posture -- right? -- where the government is probably going to seek 505 trying to get a substituted evidentiary foundation for the raid evidence too. We should be able to be heard on that, and it's good that we are able to be heard here.

Now, let's move to the statutory interpretation question. I suspect the government is probably right, that Congress did not intend to give full confrontation rights to the defendants in the Military Commissions Act given that they certainly didn't give them full rights in other areas, including the use of coerced testimony. But what they did say

in 949p-6(c)(2)(B)(ii) -- and you don't have to read it -- you can certainly read it with the rest of the statute, but you don't have to -- is that the mandatory use of the substituted evidentiary foundation is dependent on a number of factors, including whether it's consistent with a fair trial.

Now, I suggest the difference, the light between these two positions, is that instead of Congress -- meaning that confrontation had to occur in every case, that Congress required a case-by-case evaluation of the effect of evidence on the fairness of the trial.

One could easily see that, you know, in any trial, there are -- there is information that is not really challenged, often resolved by stipulation from the parties. Say chain of custody of the drug evidence or whether it was really marijuana or -- you know, some -- those kinds of questions, if they are not the focus of the defense may not have nearly as much impact. That's not this situation.

The conduct of the United States toward the defendants prior to 9/11 is, in fact, the core of Mr. al Baluchi's hostility defense that I keep talking about. The -- in this situation, the case-by-case analysis indicates that such a substitution is not consistent with a fair trial because we are on a controverted point which would reveal

substantial evidence in support of the defense as well as possibly -- and the government made some representations today without evidence or discovery, and we're going to -- I think these admissions are going to be important when we come to 600 -- in this situation the use of substituted evidentiary foundation is not consistent with a fair trial.

Now, the government made an argument that the distinction between Melendez-Diaz and its progeny --

MJ [Col PARRELLA]: Let me ask a question, Mr. Connell, with respect to your last statement.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: Is there a particular -- you mentioned I think previously six and seven of the proposed evidentiary foundation were particularly problematic, I think, for you. Is that -- is that fair?

LDC [MR. CONNELL]: So I found -- let me say this. Seven is, in my mind, the most flagrant offender, because it makes a credit -- it makes a judgment that is normally the province of the fact-finder about whether evidence corroborates other evidence, and that -- I described it as the worst offender.

In terms of the importance to the defense case, however, number one is the most important because -- and I would like to articulate some of the theories that I was able

to articulate on brief but I can't because of the protective order, the -- but let me just give you a hypothetical here.

The government claims that the United States was at war with, and thus had the full panoply of warfighting rights, including just outright killing, Mr. Mohammad and others prior to 9/11.

If -- and I am not -- I am not suggesting, eliciting, or doing any of the things that I am prohibited pursuant to the protective order, but hypothesizing that the government obtained this material -- imagine that it obtained these phone calls by tapping Mr. Mohammad's phone. If that were true, that would mean that it knew where he was; and if that were true, then the fact that it did not exercise its warfighting rights to simply kill him ----

MJ [Col PARRELLA]: Yeah, I understand the hostilities argument ----

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

MJ [Col PARRELLA]: ---- and I think we're going to get into that later, and I understand exactly where you are going because I read it in one of your briefs ----

LDC [MR. CONNELL]: Yes, sir.

MJ [Col PARRELLA]: ---- where we are going. And since we are specifically focusing on 601, is this issue with any

proposed substitution or, by perhaps altering the one proposed by the government, could it meet constitutional muster in your eyes?

LDC [MR. CONNELL]: Let me -- let me make sure I understand the question. The -- so I'm excluding -- well, do you want me to exclude two through seven? They seem like they're dealt with to me, but -- or I can address them, as you prefer.

MJ [Col PARRELLA]: However you want to approach it.

LDC [MR. CONNELL]: All right, sir.

MJ [Col PARRELLA]: I mean, however -- whichever one is the most problematic, whether it be one, whether it be seven. Assuming we could adjust it, would it ever meet constitutional muster or, as I take it, the other point of 601 could be that no matter what, any substituted evidentiary foundation allowable on its face by the statute would be in violation of the Constitution.

LDC [MR. CONNELL]: As a facial matter -- right? Not as applied in this situation, but as a facial matter, right, when you're analyzing the overbreadth of a -- the constitutional overbreadth of a statute which does not involve speech, the question is hypothetically could you come up with some example that did not impact the Confrontation Clause. And probably --

I'm a creative person. Probably I could come up with some scenario in that.

In this particular case, as applied, meaning the constitutional challenge as applied here -- slowing down -- the -- I could imagine a substituted evidentiary foundation which we could stipulate to, right?

Does that exactly answer your question of would it satisfy the Confrontation Clause? It would in the sense of we would withdraw our objection, right, if there -- if the detail were rich enough and it included the particular facts that we would seek to elicit on cross-examination.

Live testimony, of course, is not the only way that evidence can come in. And in many cases on many occasions -- particularly tricky things, right? And it works for the defense too, right? Sometimes there's evidence and, you know, like if you're talking about the felony for the felon in possession and you make an agreement between the parties that the defense doesn't want the name of the felony to come in, so the prosecution gets to prove it's a felony, the defense gets to avoid having the felony named. And even though that probably might not satisfy the Confrontation Clause, it's a way to introduce the evidence.

One of the reasons why I say that's important is

because 600, which we are going to get to in a little while, seeks to gather the information that we would need to craft such a proposed stipulation. And the government's position is you can't know anything about this; you have to accept on faith that at some point -- and you don't -- we don't get to know when. We don't get to know if that's, you know, on September 1st of 2001 or whether that's on September 1st of 2015, the FBI came into possession of this material and then analyzed it.

So the -- in that situation, I have to say that I cannot think of a way that a substituted evidentiary foundation that is so blanket, right, that substitutes such a naked, one-sentence statement for such a vast area of defense inquiry could be consistent with the Confrontation Clause. But if you were -- but that doesn't mean that, you know, there are not tweaks that are available to that, if you -- if you understand what I am saying.

And I'm not saying that I would never stipulate to -- like -- you know, there is -- we can say a little bit more on this in the closed session, but there seems to be one particular fact that recurs through the protective order and through the government's brief that they want to hide. It may not be that that fact is particularly important to me, whereas

other facts are.

And so -- and I'll give you another example. We've talked about the 118 calls. It's quite important to me what is the universe of the calls, because is Mr. al Baluchi one-one-hundred-eighteenth of the calls in the alleged conspiracy? Is he one-six-hundredth of the calls in the alleged conspiracy? Is he one-six-thousandth of the calls? I mean, the universe of calls is important.

That might not be something the government is all that interested in hiding. I don't know. Whereas, you know, the -- the sort of communications device -- the exact sort of communications device which Mr. Mohammad is alleged to use might be very important to them and not important to me. So I know that I'm -- I don't know if I am giving you the information that I want ----

MJ [Col PARRELLA]: I think you've answered my question.

LDC [MR. CONNELL]: Okay. Good.

MJ [Col PARRELLA]: Thank you.

LDC [MR. CONNELL]: The government's argument for why the substituted evidentiary foundation is not like a forensic report, despite its facial looking like a forensic report, is because the forensic reports are generated after an event and that the calls were made before and after an event. But of

course the problem with that argument is that there are two different events that we're talking about.

A forensic report is made after the event of the forensic analysis, whether that be the breathalyzer analysis, the drug analysis, or whatever. It doesn't have to do with its orientation with respect to the crime. In fact, some forensic -- there are plenty of forensic reports that take place before any crime.

Take the calibration of an Intoxilyzer machine, right, that's a forensic report. I calculated this. It properly registers .04, it properly registers .08. That doesn't take place with reference to any particular DUI that took place. It's one that happens yearly in my jurisdiction, it may happen other ways in others, so there is really no temporal correlation that makes any sense.

Whereas the calls, it's not whether the calls took place before and after any -- before and after the crime. It's whether the analysis, the testimony, whether that be the government's curated, self-selected spreadsheet or whether that be a naked statement of the following seven things happened, that's the testimonial evidence. That's the critical part.

I -- you know, I suspect everybody in the room has

been involved in a lot of conspiracy cases. Phone calls under Title III or whatever among conspirators is not a rare situation. And although I appreciate the government's kind words, I'm not really giving anything away by acknowledging that conversations between co-conspirators during the course of the conspiracy is not testimonial. It's well decided. But that does not mean that the process by which those calls were acquired, if it seeks to be substituted by something else, is not testimonial.

Now, the last thing that I want to observe is that having listened very carefully on this point, I still don't know whether the government is saying that Mr. al Baluchi does not have a Sixth Amendment right to confront and cross-examine witnesses. The government used its phrasing, which it has used on many occasions before, that no court has held under these circumstances that a defendant has a Sixth Amendment right to confront cross-examination -- confront and cross-examine witnesses. It's not the same thing.

And the reason why I ask that is if you believe or if the government clarifies for us that on this occasion, unlike all previous occasions, it is actually contending that there is no Sixth Amendment protection for Mr. al Baluchi, I would request the opportunity to brief it, which is what we did with

the ex post facto clause when -- in the 251 series.

Once it became clear that there was a potential ex post facto clause violation, the military commission directed both parties to brief the application of the ex post facto clause to the defendants. And so if -- if that's where this is going -- and, you know, I know the military commission has a lot of choices, but if that's where this is going, I would request permission to brief it.

The last thing that I'll observe is that the government mentioned AE 200 with respect to the constitutional question. I think the government meant AE 057. So if you want to look back at the position of the parties with respect to application of the Constitution and procedurally how it should be adjudicated, that's in AE 057.

MJ [Col PARRELLA]: Thank you.

LDC [MR. CONNELL]: Thank you.

I don't know if anybody else is going to go, or I am going to do 574.

MJ [Col PARRELLA]: I think either way. Let me see if anyone wants to, and if not, Mr. Connell, I would propose we will take a 10-minute recess before you start your next motion series.

LDC [MR. NEVIN]: Same objection, Your Honor.

MJ [Col PARRELLA]: Okay. It doesn't appear that any other counsel would like to be heard on this one, so with that, we will take a 10-minute recess and then start the next one. The commission is in recess.

[The R.M.C. 803 session recessed at 1453, 25 March 2019.]

[The R.M.C. 803 session was called to order at 1519, 25 March 2019.]

MJ [Col PARRELLA]: This commission is called back to order. All parties present when the commission last recessed appear to be present again, unless anybody has anything to the contrary. I don't see Mr. Nevin here in -- oh, okay. There you are. All right.

With that, Mr. Connell, I believe it's 574.

LDC [MR. CONNELL]: Sir, AE 601 that we just discussed addressed the government's attempt, reserved by the military commission in AE 574B (Amended), to introduce evidence without producing witnesses.

AE 574G, in contrast, addresses the aspects of the government's approach that the military commission did rule on. Substitution of the exhibit for, quote, the underlying call data documents and information regarding the sources and methods by which the telephones were acquired. And then, second, the gag order, restricting any party from making any

reference or asking any question during any session of the commission that could tend to reveal or could conceivably elicit information regarding the classified source or method by which the United States acquired these telephone calls. Those are AE 574B (Amended), paragraphs 4.a. and 2.e.4. I will incorporate the procedural history from the prior argument and not repeat any of it.

Addressing the substitution portion first. This substitution is clearly inadequate in that it has a substantial impact on Mr. al Baluchi's right to a fair trial.

Information about telephone calls in any modern case is extremely important. The use of mobile phone records and experts is a commonplace government strategy. Last year the Supreme Court ruled in Carpenter v. United States that cell tower records reveal so much information that law enforcement must obtain a warrant rather than a subpoena for them. Title III wiretaps, FISA warrants, Stingrays, and Hailstorms have become part of the criminal prosecution landscape.

There are lots of unclassified aspects of this case that make telephone calls exceptionally important. I would argue them to you specifically, but Protective Order #3 prohibits it, so I will point you instead to the unclassified paragraphs on page 7 and 8, 10 and 11, and 13 of AE 574G, and

the classified paragraph on page 9.

This, I suggest to you, demonstrates how insidious Protective Order #3 is. There has already been testimony in this military commission under oath about telephone calls and their relationship to sources and methods, but I cannot even argue the connection of that testimony in open court to this motion because of its relationship to sources and methods. At the time, the government did not object, but now it has obtained an ex parte gag order.

There have been multiple books addressing the topics of sources and methods for obtaining telephone calls regarding al Qaeda, including books with CIA prepublication review, but the gag order prevents me from arguing those.

The charging document alleges information about telephone calls, including vague claims of association, and some of which the government acknowledges it may not be able to prove at trial, making it a ripe source for defense argument.

To the extent -- so these telephone calls, for the reasons articulated in the brief and many others, are extremely important, and the stripped-down version of their provenance violates the right to a fair trial. To the extent the Military Commissions Act bars this reconsideration, I

suggest that it is unconstitutional, as Mr. Bin'Attash argued in AE 164.

MJ [Col PARRELLA]: Would you agree that under 505(f), that reconsideration is barred under the situation where Judge Pohl has approved the substitution after an ex parte presentation?

LDC [MR. CONNELL]: I agree that it comes within the scope of that provision. I do not agree that it is barred because I believe that that provision is unconstitutional.

MJ [Col PARRELLA]: Okay. I understand.

LDC [MR. CONNELL]: With respect to the second half, the remaining piece of 574B (Amended), however, the gag order, the bar on reconsideration has no application. That is not a substitution, and it does not fall within the scope of 505(f) or the Military Commissions Act.

The military commission should revoke Protective Order #3. Protective Order #3 interferes with Mr. al Baluchi's right to present a defense in two ways. First, it robs the information and telephone calls of all of the aspects valuable to Mr. al Baluchi's defense while leaving the one remaining argument that the government wishes to make linking the co-conspirators.

Second, it prohibits Mr. al Baluchi and his attorneys

separately from asking questions or making arguments in court which would develop the factual basis that the members need to make an informed decision or that Mr. al Baluchi needs to oppose the government protective order in the first place.

With respect to the first of these, regarding omitting important information, we just discussed a number of important examples with respect to AE 601, and there are more examples contained in the paragraphs that I pointed you to in 574G.

Much of this information would ordinarily be present in a call record. If we were actually talking about call detail records, or CDRs, much of this information, including if it were a cell phone, the relevant cell tower would be included. This is an example of why AE 164 was correct and the bar on reconsideration represents an unconstitutional restriction.

If we were allowed to access this, the defense -- or Mr. al Baluchi's defense would use the underlying call information to demonstrate the sloppiness of aspects of the investigation, a traditional defense; the nonexistence of hostilities, an untraditional defense but one very much alive in this case; and Mr. al Baluchi's relatively minor role in the conspiracy which forms a defense both for any death under

Burrage v. United States, which is a statutory construction of statutes which require death to result for eligibility for the death penalty, such as -- that one was about sale of drugs where death results. This case is about a conspiracy where death results, but also as a mitigating factor in any ultimate sentencing.

Second, the protective order and its gag order element prohibits inquiry by Mr. al Baluchi and his attorneys. I respectfully suggest to the military commission that the most Kafkaesque element of Protective Order #3 is that because the government obtained it ex parte without a defense opportunity to argue, I am prohibited from making many of the specific arguments that I would otherwise make as to its unconstitutionality. That is why, in the ordinary situation in every other gag order -- take a fair trial free press gag order -- it is brought in an adversarial context and not limiting one of the parties at the request of the other without that party's participation.

It represents a prior restraint that interferes with my ability to carry out my statutorily assigned role as defense attorney in violation of my personal First Amendment rights. It is incredibly overbroad and vague and seemingly only targets speech, not writing, much of that speech

unclassified.

I will give an example. I proffer that I have already written much of my personal questioning of Special Agents Fitzgerald and Perkins, dozens of pages based on the discovery, their prior testimony in this case, prior unclassified testimony before grand juries and open-source information. Protective Order #3 prohibits scores of the questions that I intended to ask relating to telephone calls because they relate to sources and methods including unclassified sources and methods. In fact, as I mentioned, Special Agent Perkins has already testified about telephone call sources and methods in this case.

I respectfully request the military commission to rescind Protective Order #3. If the military commission will not rescind Protective Order -- excuse me, not rescind its Protective Order #3 in toto, temporarily suspend it and then allow me to reargue the inadequacy of -- allow me to make this argument again without the restrictions of Protective Order #3, which would at least emulate an adversarial process over Protective Order #3. Thank you.

MJ [Col PARRELLA]: Thank you, Mr. Connell.

Any other defense counsel?

LDC [MR. NEVIN]: Prior objection, Your Honor.

MJ [Col PARRELLA]: Ms. Bormann?

LDC [MS. BORMANN]: The same objection, Judge.

MJ [Col PARRELLA]: Any other defense counsel wish to be heard on this?

That being no, Trial Counsel.

MTC [MR. TRIVETT]: Extremely briefly, Your Honor. This is an improper motion to reconsider based on the fact that Judge Pohl looked at the substitute and approved it pursuant to an ex parte filing.

Without getting into the details of the protective order, I can say this: Mr. Connell seems as if the entire sky is falling. The protective order -- which isn't a gag order; it's a protective order that's common in national security cases -- simply applies to the calls referenced in AE 574. On its face, that's all it applies to. That's all we sought. That's all it applies to on its face. It's not the Kafkaesque First Amendment violation that Mr. Connell seems to think it is.

There has certainly been no testimony in this court by any of our witnesses regarding any of the telephone calls at issue in 574, and nothing in the protective order makes any of the previous testimony about telephone calls a prohibited line of questioning for Mr. Connell. Just please look to

Protective Order #3. On its face, it applies only to that which we turned over pursuant to 574.

Subject to your questions.

MJ [Col PARRELLA]: I have none. Thank you.

LDC [MR. CONNELL]: The government's argument that Protective Order #3 is similar in some respect to any other order which occurs in any published case would suggest that they should be able to find some analogy that they could point to.

The rank and remarkable differences between, for example, Protective Order #1, which was hashed out between the parties and the military commission over a series of adversarial hearings, and Protective Order #3 are stark.

Protective Order #1, for example, defines certain information as classified. And if the defense wishes to make arguments about that, they are free to do so following the 505(g) notification process and, when appropriate, in a closed hearing.

Protective Order #3, without going into any of its details, bears no relationship to that. It is in two of three prohibited categories simply a blanket prohibition on making certain arguments or asking certain questions without respect to their classification. It sweeps in unclassified testimony

as much as classified testimony.

The example that the government just referred to, the government's statement of it was correct and its implication is exactly wrong. The statement that no witness has testified about these phone calls is true. Before today, I don't know that this information was present in the public forum in any way. But the -- it is not true -- the prior witness did testify about the sequence of events which in my view -- I can't even say that -- did testify about a sequence of events that could implicate sources and methods.

The -- I can argue it in writing, and I think, in fact, I probably already have, but the protective order prohibits me from saying anything else about it.

The distinction -- the other distinction between these protective orders has to do with their breadth. And I suggest that that is a direct result of the way that the government acquired this protective order.

The -- when there were issues that came to -- that we could tell because -- on the defense side could tell with respect to Protective Order #1 because of the way that it worked out in practice, even if the -- even if the language was right, or if the language, as we saw today, when the language was wrong but it works out okay in practice, those

were issues that we could bring to the military commission and address.

This, on the other hand, is a blanket prohibition from arguments or questions on certain areas and certainly is a prior restraint on a U.S. citizen as opposed to simply shifting certain arguments from the unclassified context to the classified context.

MJ [Col PARRELLA]: Thank you. I have no questions. Thank you.

LDC [MR. CONNELL]: Thank you. I'm ready to proceed on 600, if you wish.

MJ [Col PARRELLA]: Anything further from any other party on 574? Okay.

That being the case, please proceed.

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

AE 601 addressed the substituted evidentiary foundation and the admissibility questions deferred in AE 574B (Amended), and AE 575G addressed the approved substitution in AE 575B (Amended) and the gag order provisions of AE 574C (Amended).

AE 600, on the other hand, seeks to compel discovery, almost all of which falls outside the scope of the substitution order in AE 575B and, with one very limited

example, simply does not fall within the scope of the bar on reconsideration.

I incorporate the prior procedural history and will not repeat it, but I think that it is important to note the timing of the discovery requests. The government produced initial discovery about these telephone calls on 30 December 2016 and, considering it very important, Mr. al Baluchi sought further discovery on 27 October 2016.

There was no action at all by the government that we knew of until 1 June 2018 when, instead of responding to a discovery request by a yes or no or producing information, it sought ex parte substitution for one element of the discovery request.

While the government was obtaining such ex parte relief, Mr. al Baluchi sought additional discovery. The discovery requests themselves are classified, and I will address them in the closed session. Thank you.

MJ [Col PARRELLA]: Thank you.

LDC [MR. CONNELL]: I know it's a little truncated, but everything else has to be in the closed session.

MJ [Col PARRELLA]: Any other defense counsel care to be heard on 600?

LDC [MR. NEVIN]: Previous objection, Your Honor.

MJ [Col PARRELLA]: Noted.

LDC [MS. BORMANN]: Previous objection, Judge.

MJ [Col PARRELLA]: Noted, Ms. Bormann. Okay.

Trial Counsel, do you wish to be heard?

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

MJ [Col PARRELLA]: All right. Mr. Connell, what's your best estimate as to how much time you anticipate for the 617 and 620 arguments?

LDC [MR. CONNELL]: Sir, consulting with Mr. Farley, we anticipate for Mr. al Baluchi, in total, both motions, both arguments, about 30 minutes.

MJ [Col PARRELLA]: Okay. All right. Well, in that case, we will go ahead and proceed and take them up. I just don't want to split them. I think they're close enough related and we're good enough on time that if they're going to go longer, we can take them up in the morning, but I think we have -- with that estimation, we'll go ahead and proceed. So we'll go ahead and take up 617.

LDC [MR. NEVIN]: Your Honor.

MJ [Col PARRELLA]: Mr. Nevin.

LDC [MR. NEVIN]: I'm advised that the prayer time is 4:30, and it may have -- you may have been advised that it was a later time than that. I just want to ----

MJ [Col PARRELLA]: Yeah, the chart that I have indicates it's 5:30.

LDC [MR. NEVIN]: The feeling is there was a mistake there. I didn't mean to suggest we don't have enough time to finish. I just, you know, wanted to bring that to your attention.

MJ [Col PARRELLA]: No, I think that -- well, that does factor in because it potentially takes an hour off of our time. But I'm perplexed because this appears to come off of a, you know, published website. So is it -- give me a moment to see if we can verify where the error is here. Okay.

You have seen probably the same chart I have, Mr. Nevin. I believe it was appended to the proposed order of march. So is it perhaps because of daylight savings time? Is that the issue?

LDC [MR. NEVIN]: Yeah. I -- I think it's my fault. I think I conveyed incorrect information about the correct method for -- for resolving the time, and I'm advised that the time that the camp has is apparently 4:30 as well.

MJ [Col PARRELLA]: Okay.

LDC [MR. NEVIN]: So I'm not enough of a scholar to authoritatively explain the difference as I stand here, but I think that's our understanding of where it is.

MJ [Col PARRELLA]: Okay.

LDC [MR. NEVIN]: And it's the -- it's the 'Asr prayer that is affected on that chart, not any of the others. The others are correct.

MJ [Col PARRELLA]: I understand.

LDC [MR. NEVIN]: But, again, I believe there's time, so ----

MJ [Col PARRELLA]: Well, let's go ahead and see what we can accomplish.

Mr. Farley.

DC [MR. FARLEY]: Good afternoon, Your Honor.

MJ [Col PARRELLA]: Good afternoon.

DC [MR. FARLEY]: Your Honor, AE 617 is Mr. al Baluchi's motion to compel communications from the International Committee of the Red Cross concerning the existence of an armed conflict between 1996 and 2002.

Your Honor, Mr. al Baluchi submitted a discovery request, DR-392-AAA, to the government on 19 December 2018 seeking the records referenced before. The government denied Mr. al Baluchi's request citing a failure -- a supposed failure on Mr. al Baluchi's part to articulate a theory of relevance and materiality.

As you are aware, Your Honor, hostilities form a core

issue in this litigation. The government must prove the existence of hostilities beyond a reasonable doubt at trial in order to carry its burden to convict Mr. al Baluchi and the other men on trial. And as you're aware, there remains a pending issue before the military commission concerning the military commission's personal jurisdiction over Mr. al Baluchi based on his challenge to the existence of hostilities prior to September 11th, 2001.

MJ [Col PARRELLA]: So, Mr. Farley, the first question is: Talking about the personal jurisdiction piece, what's your position with respect to the court's prior ruling in 502BBBB? Do you believe it just doesn't apply?

DC [MR. FARLEY]: Your Honor, the military commission clearly bifurcated the proceedings with respect to personal jurisdiction between Mr. al Hawsawi and Mr. al Baluchi. The military commission took evidence and issued a ruling explicitly with respect to Mr. Hawsawi and not with respect to Mr. al Baluchi.

MJ [Col PARRELLA]: And having read it -- no, I understand that, but, I mean, I think that you would have to do that with respect to the nexus aspect of the personal jurisdiction because that would be different for each individual. But as to the existence, it seems entirely odd that the commission

would find that hostilities existed for one accused and not another.

DC [MR. FARLEY]: Your Honor, I agree with you that it may be an unconventional or a perhaps inconsistent result. However, Mr. Hawsawi presented one argument for the existence or nonexistence of hostilities, and Mr. al Baluchi intends to present another.

Now, to be entirely clear, the issue before you is not whether AE 502BBBB applies to Mr. al Baluchi. And, in fact, we don't need to address the personal jurisdiction aspect at all to resolve this motion to compel.

MJ [Col PARRELLA]: Well, I think we do in part, because we have to understand why you need the discovery. So, you know, if you need it to prove existence of hostilities, we have to establish if that's personal jurisdiction, part of the substantive element, or both.

You made a statement that the government has to prove the existence of hostilities beyond a reasonable doubt for trial. And I understand -- I mean, I've read the briefs on this. I understand the government's position on the Hamdan instruction. And I also take it to understand that at least for Mr. Ali, you don't agree that the Hamdan instruction applies, but I'd like to discuss and explore more exactly

where -- where the existence question plays into the substantive element, you know, what that looks like and why this discovery is -- is necessary or material for that aspect.

DC [MR. FARLEY]: Absolutely. And I am happy to address that, Your Honor.

With respect to the substantive element, as I have said and I believe as you recognized, the government must prove the existence of hostilities beyond a reasonable doubt at trial.

So putting aside whether the commission's ruling in 502BBBB applies to Mr. al Baluchi, at trial the government has to carry its burden beyond a reasonable doubt that hostilities existed prior to 9/11, and Mr. al Baluchi ----

MJ [Col PARRELLA]: I'm just curious where you are -- what are you citing as the source of that?

DC [MR. FARLEY]: It's in -- I'm sorry, Your Honor, I don't have the ----

MJ [Col PARRELLA]: Is it the actual substantive element?

DC [MR. FARLEY]: Yes, Your Honor. I apologize. It's the nexus to hostilities element that is a -- prefigures all of the offenses. So in order for the government to carry its burden with respect to each offense that Mr. al Baluchi has been charged with, they must demonstrate the existence of

hostilities.

And the government, as you -- as you noted, maintains that the appropriate standard by which hostilities should be determined is the standard articulated in Judge Allred's instruction in United States v. Hamdan. And, Your Honor, the provision is 10 U.S.C. 950p -- sorry, subparagraph (c), common circumstances.

Now while Your Honor is correct that Mr. al Baluchi disagrees with the government's preferred standard for hostilities, in both -- in AE 617, Mr. al Baluchi has assumed arguendo that the government is correct and that the Hamdan standard applies. And the Hamdan standard is a true totality of the circumstances standard.

Judge Allred suggested -- suggested that the military commission, the panel, the jury should consider seven categories of information in reaching its conclusion as to whether hostilities exist or do not exist between the United States and al Qaeda.

One of those categories of information is the first one, whether there was protracted armed violence between a state actor, the United States, and organized armed groups, in this case al Qaeda. Another, the final category of information is any other fact or circumstance that the panel

may consider relevant to a determination of the existence of hostilities.

MJ [Col PARRELLA]: Quick question, because I might have -- I just want to make sure I heard you correct. Is it your position -- because I thought I read something to the contrary -- that this is the appropriate instruction, the Hamdan instruction?

DC [MR. FARLEY]: No, Your Honor. We disagree that it's the appropriate standard. However, even under the government's preferred standard, the discovery Mr. al Baluchi seeks in AE 617 is material and relevant to this case, and as a consequence, it must be produced to him. And we would ask that the government -- or that the military commission order the government -- compel the government to produce that discovery to Mr. al Baluchi.

And the reason for that is that the government has asserted that an armed conflict existed before 9/11. And the government has pointed to a handful of pieces of evidence that are publicly available to bear out its assertion. One of those pieces of evidence is OPERATION INFINITE REACH, a minutes-long bombardment in August of 1998. Another piece of evidence is the -- are the bombings of the U.S. embassies in Kenya and Tanzania in August of '98. And, of course, there is

the USS COLE bombing. The government also points to the 1996 declaration of jihad by Usama bin Laden that it characterizes as a declaration of war and to the 1998 fatwa.

This makes a compelling narrative, you know, standing here some 20 years later, when we have all lived through the better part of 18 years of actual armed conflict between the United States and al Qaeda. And we -- we stand here with befogged memories and all of us laboring under hindsight bias. So Mr. al Baluchi must -- in order to refute the government's argument that hostilities existed before 2000 -- before 10 September 2001, must seek evidence that demonstrates a negative, which is an incredibly difficult task, as you're aware.

So Mr. al Baluchi has engaged in a counterfactual exercise. Let's assume that the government is correct, that there was an armed conflict between the United States and al Qaeda before 11 September 2001. What would the world look like in that situation? What events may have taken place? What activities would the U.S. Government have undertaken? What information would be in the hands of the U.S. Government?

One such piece of information -- type of information that would be in the hands of the U.S. Government would be communications from the International Committee of the Red

Cross reminding the U.S. Government of its obligations under the law of war with respect to a putative armed conflict between the United States and al Qaeda.

MJ [Col PARRELLA]: Do you have any -- what leads you to believe that the government has this? Or is it sort of that you believe -- I sort of read into it that you believe that they don't have it and that's sort of just as valuable to you as if they did have it?

DC [MR. FARLEY]: Correct, Your Honor. Again, this is a counterfactual exercise. And if I may have the feed from Table 4, I believe that we have some slides prepared. And the slides have been cleared with your security officer, and they've been handed out to the parties.

MJ [Col PARRELLA]: Okay. Just give me one moment.

DC [MR. FARLEY]: Sure.

MJ [Col PARRELLA]: Okay. You may have the feed.

DC [MR. FARLEY]: May I have slide 2? Your Honor, may I publish it to the gallery?

MJ [Col PARRELLA]: You may.

DC [MR. FARLEY]: May I have the next slide, please?

Your Honor, so, again, you're exactly correct that what would be valuable to us and what we believe to be the case is that the ICRC never engaged in the communication that

I just described to you to the U.S. Government prior to 11 September 2001.

The reason we believe that the ICRC would have engaged in such a communication, there are a couple of bases for this.

First, in order for the International Committee of the Red Cross to fulfill its mandate, which is the promotion of international humanitarian law and the insurance of compliance with the laws of war, as well as to provide relief to victims and individuals caught up in the course of armed conflict, the ICRC is a uniquely positioned organization that must sort of constantly be asking the question: Is there an armed conflict? You know, is this situation of armed violence someplace in the world -- is it an armed conflict? If so, what type of armed conflict is it? What body of law applies?

And the ICRC's practice is not to hold this information to itself. The ICRC's practice, because it wants to promote compliance with the laws of war, because it wants to provide relief to victims of armed conflict, because it wants to do the things that it does here and establish communication between families and individuals who are detained and account for individuals who are detained and ensure that those people are disappeared or held

incommunicado.

The ICRC communicates with the parties to the armed conflict, and it says things like, you, United States, we believe that you are engaged in an armed conflict with Iraq; and we believe because you are a state actor and Iraq is a state actor, that that's an international armed conflict; and as a consequence, the full panoply of the Geneva Conventions apply, and you must do these things to remain in compliance with the Geneva Conventions.

Now, the ICRC doesn't just do this for international armed conflicts; it does it for non-international armed conflicts as well. And what you have before you, what's on the screen and what's been published to the gallery, is a cable -- a portion of a cable -- a State Department cable that has been released through the Freedom of Information Act that reflects communications between the ICRC and the U.S. Government following the 11 September 2001 attacks.

In fact, this cable from May of 2002 represents or suggests that there is -- there has been a month's-long conversation between the United States and the International Committee of the Red Cross about the U.S. Government 's responsibilities under the laws of war.

You can see that one of the topics of discussion is

the Global War on Terrorism, writ large, and another topic of discussion is the status of detainees. They were also interested in military commissions way back in May of 2002.

This -- this document is one piece of evidence that suggests that the ICRC has engaged in the behavior that I just described to you; that it, in fact, reached out to the U.S. Government, reminded the U.S. Government of its responsibilities under the laws of war, but it did so after the 9/11 attacks.

Our question for the government is whether the ICRC did this before the 9/11 attacks, whether the ICRC did this during the time period in which the U.S. Government, you know, today, standing here some 18 years later, asserts that a war was going on between the United States and al Qaeda.

The government has not indicated, one way or another, whether these documents exist. They haven't, you know, said that they do exist; they haven't said that they don't exist. Their response to Mr. al Baluchi has been simply that the documents are not material. But under the Hamdan standard, under the government's preferred standard for determining whether an armed conflict exists, these sorts of documents are clearly material.

MJ [Col PARRELLA]: Well, based on your own research, do

you know whether they exist or not?

DC [MR. FARLEY]: Your Honor, I can't say definitively whether they exist or not. I -- I strongly suspect that they do not exist, and I -- and I believe that the government is in a position to say definitively whether they exist or they do not exist.

And I think that -- that if I'm right, that they do not exist, that that is strong evidence that a neutral, impartial, third-party organization that exists entirely to determine whether there is an armed conflict going on, you know, even if they apply a slightly different standard than the government would apply for determining the existence of armed conflict, the failure of that organization to take notice of an armed conflict is strong evidence that such an armed conflict did not exist.

And I think that it's material -- these sorts of documents, if they exist, are inarguably material. And it would be shocking to me if the government possessed them and would not stand up and waive them around at a trial as strong evidence that an armed conflict did exist, right? And the contrary inference is also true.

Your Honor, I just -- sorry.

LDC [MR. CONNELL]: May I have just one moment?

MJ [Col PARRELLA]: You may.

Just before you go, I am just going to note for the record that the slides that you are displaying are marked as AE 617C (AAA).

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

And, Your Honor, you will notice in our briefings, Mr. al Baluchi has referred to a period beyond September 11th in the discovery request. And the reason why is because we have this one piece of evidence that indicates an ongoing communication between the U.S. Government and the ICRC over an armed conflict after the September 11th attacks. This document itself references several other cables that Mr. al Baluchi does not have and which are presumably germane to this conversation.

We believe that, in the abstract, the absence of communications from the ICRC to the U.S. Government is strong evidence of the nonexistence of an armed conflict but would be potentially meaningless to a panel -- or at least of less value to a panel of members without the contrasting information.

And if Mr. al Baluchi is correct, based on this evidence and based on the ICRC's practice, that there exists a series of communications from the ICRC to the U.S. Government

after 9/11, and likely after 7 October 2001, then at that point, the point at which the ICRC began communicating to the U.S. Government about its obligations under the laws of war and the communications thereafter, will strengthen the value of the pre-9/11 non-communications and will also assist Mr. al Baluchi in setting a date not later than -- you know, the date on which the armed conflict between the United States and al Qaeda began, which, again, Mr. al Baluchi believes happened after September 11th, 2001.

Now, Your Honor, I just want to make a couple of points about items that the government raised in its response brief.

First, the government indicated that it objected to providing these communications or responding as to the nonexistence of these communications to Mr. al Baluchi on the basis that the communications themselves represented impermissible expert testimony as to a conclusion of law.

You know, we cited Supreme Court case law in our briefs. We do not agree with the government that is -- that these communications would represent expert testimony, and neither do we agree that expert testimony as to the content of law, particularly international law, is in any way impermissible.

However, we would like to note that the objection that the government raised is not an objection to discovery or providing discovery but a testimonial objection. And to the extent that that objection applies at all, it should be an objection raised if and when Mr. al Baluchi introduces this evidence at trial in a testimonial setting and elicits responses from an expert witness. At that point, it is up to Mr. al Baluchi's counsel, counsel for the government, and the military judge to police the line between permissible testimony and impermissible testimony.

MJ [Col PARRELLA]: What about the government's footnote indicating that the scope of your request is too broad in the sense that it requests documents relating to the Islamic Emirate of Afghanistan, i.e., the Taliban? Would you -- what's the relevance of communications related to hostilities between the United States and ----

DC [MR. FARLEY]: Thank you, Your Honor. It is possible that the -- because of the nature of OPERATION INFINITE REACH, which was an action undertaken in self-defense under Article 51 of the UN charter, and it targeted the territory of Afghanistan which was at the time under the effective control of the Taliban, it is possible that the ICRC would have raised and communicated to the U.S. Government in the immediate

aftermath of OPERATION INFINITE REACH, reminding the U.S. Government of its obligations under -- under -- excuse me, under the laws of war as they applied to international armed conflicts, right?

Because one way to view the world in 1998 is that the U.S. Government used force against sovereign territory of a foreign state. And any use of force -- any use of armed force against another state actor automatically triggers the full panoply of the Geneva Conventions and the body of law that governs international armed conflict, as opposed to the type of armed conflict that the United States and al Qaeda are actually engaged in, not international armed conflict.

So it is possible that the ICRC at that time communicated to the U.S. Government and reminded the U.S. Government of its responsibilities with respect to use of force against the Taliban based on some misperception or misapprehension as to the target of that force or a -- a more expansive view of the -- of the application of international humanitarian law than the government has or frankly that I necessarily share.

Simply -- that part of our discovery request is simply an effort to make sure that we're not leaving out information that is material to our case. That information

would not help us necessarily refute the government's position, but it may -- it may assist us in avoiding pitfalls or engaging in impersuasive argument down the line.

MJ [Col PARRELLA]: Okay.

DC [MR. FARLEY]: Does that make sense, Your Honor?

MJ [Col PARRELLA]: It does.

DC [MR. FARLEY]: Subject to your questions.

MJ [Col PARRELLA]: I have none. Thank you.

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

MJ [Col PARRELLA]: Mr. Nevin, same objection?

LDC [MR. NEVIN]: Same objection. Thank you.

MJ [Col PARRELLA]: Ms. Bormann, I assume the same?

LDC [MS. BORMANN]: Yes, Judge.

MJ [Col PARRELLA]: Any other defense counsel care to be heard on 617?

All right. Trial Counsel?

MTC [MR. TRIVETT]: Sir, I could potentially combine our responses to save the commission time. There's a lot of overlap in my arguments. I'd leave it to the discretion of the judge, but I am certainly willing to do that.

MJ [Col PARRELLA]: That's fine with the commission. So with that, do you want to go ahead and proceed with 620?

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

Your Honor, the government is correct; there is quite a bit of overlap here. This, again, AE 620 is Mr. al Baluchi's motion to compel documents and information concerning the United States' use of law of war detention against individuals associated with al Qaeda before 9/11.

Again, this is a hostilities-related discovery motion. It strikes at the heart of the government's argument that there was an armed conflict between the United States and al Qaeda before 9/11. This is also the product of Mr. al Baluchi's attempt to imagine what the world would look like had there been an armed conflict prior to 9/11.

You know, there are only two lawful ways to remove enemy fighters from the battlefield. The first is to kill them. You know, those who may be targeted, you may, when you're engaged in an armed conflict, use lethal force to target them and kill them.

The second way in which you may lawfully remove enemy fighters from the battlefield is to detain them. It's why we are here, right? There are individuals here who have been removed from the battlefield in the course of an armed conflict between the United States and al Qaeda, and they are detained for the duration of hostilities.

Law of war detention, as the Supreme Court has noted,

is a fundamental incident to armed conflict. Given that it is the second of two lawful ways to remove enemy fighters from the battlefield, you might describe it as the second most fundamental incident of armed conflict.

So when Mr. al Baluchi assumes that the government is right that there was an armed conflict before 9/11 and he thinks to himself, what would the world have looked like if they were right? One of the things that he thinks is, well, the government would have used lethal force to target members of al Qaeda. And it certainly did that in OPERATION INFINITE REACH, but only once, only for a few minutes of bombardment in August of 1998.

And the other way is -- the other prime example here is, well, wouldn't the government have detained members of al Qaeda and subject them to law of war detention, just as the government did following 11 September 2001 following the U.S. invasion of Afghanistan on 7 October 2001?

As a consequence, Mr. al Baluchi asked the government for any discovery of documents or information related to U.S. Government law of war detention activities of individuals associated with al Qaeda before 11 September 2001. But rather than provide Mr. al Baluchi with the discovery he requested or respond definitively that the United States did not plan for

or engage in law of war detention with members of al Qaeda prior to 11 September 2001, the government responded coyly.

It now avers that the United States did not capture very many members of the al Qaeda prior to 9/11. Those it did capture, it did not detain solely subject to the laws of war, and it affirmatively chose to prosecute captured members of al Qaeda in federal criminal court, implying it did so despite a determination at the time that it possessed the authority to detain these individuals subject to the laws of war.

Now, that may all be true, but that does not divest the government of its obligations to provide that information in discovery. It has provided no evidence to back up its assertions that it detained -- that the few numbers of members of al Qaeda that it detained it did so both under the laws of war and also subject to criminal and law enforcement authorities. It simply suggests that it didn't hold them solely under the laws of war. I don't really know what that means.

It also implies that there was some determination made that the U.S. Government had the authority to detain people subject to the laws of war, detain members of al Qaeda subject to the laws of war, but it chose not to avail itself of that authority. And, again, that may be true.

There may have been an interagency process. A lawyers' small group may have been convened, and they may have decided that the U.S. Government is engaged in an armed conflict with al Qaeda. And it can detain those people subject to the laws of war, but there are only so many of them captured; there aren't enough to justify setting up a detention facility in, for example, Guantanamo, and, instead, we will move them into a criminal justice proceeding and we will prosecute them in the Southern District of New York.

But if that policy process happened, if the government came to some affirmative determination to disclaim its authorities under the laws of war, there should be some evidence of that, and the government should provide that evidence to Mr. al Baluchi in discovery.

Your Honor, Mr. al Baluchi does not believe that there is any such evidence. Mr. al Baluchi suspects that the government never planned for and certainly never implemented law of war detention of members of al Qaeda prior to 9/11. And if the government failed to do that, that is strong evidence that the United States and al Qaeda were not engaged in an armed conflict prior to 9/11 in the same way that the failure of the U.S. Government to use the full force -- pardon me, strike that -- in the same way that the government's

failure to use force on most of the days between August of 1996 and 11 September 2001 against al Qaeda suggests that the U.S. Government and al Qaeda were not engaged in armed conflict.

Now, this -- the evidence that Mr. al Baluchi seeks here, the material Mr. al Baluchi seeks here in discovery fits squarely within four of the categories of the Hamdan standard that the government prefers and believes must determine whether there exists hostilities between the United States and al Qaeda.

Evidence of law of war detention is evidence of protracted armed violence between the United States and al Qaeda. The absence of evidence of law of war detention is evidence of the absence of a protracted armed conflict between -- or armed violence between the United States and al Qaeda.

You don't have to take my word for that. I believe we mentioned this in our briefs, that if you search Lexis, for example, for the phrase "protracted armed violence," you will discover that U.S. cases making reference to that phrase all juxtapose the reference with citations to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.

That's because that is a term of art that arises from

the interlocutory appeal in the Prosecutor v. Tadic decision, T-A-D-I-C with an accent, concerning jurisdiction of the tribunal.

In that case, in one case elucidating the term protracted armed violence, Prosecutor v. Boskoski, the tribunal looked at whether violence between the Albanian National Liberation Army and the government of the former Yugoslav Republic of Macedonia, which would be a noninternational armed conflict, much like the conflict we are analyzing here, whether violence in that conflict was sufficiently protracted, sufficiently intense to qualify as an armed conflict. And that tribunal, that trial chamber, as all the other trial chambers, looked at many factors, considered many factors in determining whether there was protracted armed violence or not.

But one of the factors that the tribunal considered was whether the government of the former Yugoslav Republic of Macedonia engaged in law of war detention, whether it captured, you know, supposed enemy fighters, what type of process they were subject to, how they were held, the rights they were afforded, and what they were charged with.

And the tribunal -- you know, the tribunal said, you know, it's a confusing situation here. They seemed to be held

under law enforcement authorities. They're being detained in mostly normal jails, and they're being subject to normal criminal process. But confusingly, the ICRC was able to visit them and treat them like law of war detainees. And confusingly, the government, when they prosecuted these individuals, they prosecuted them by charging them with crimes that sounded in the laws of war and not in the normal criminal code of the Macedonian Republic.

And the trial chamber analyzed this and said, you know, this really looks a lot more like law of war detention and as a consequence, we think that the Republic of Macedonia must have believed itself to be engaged in an armed conflict. So the existence of law of war detention is evidence of protracted armed violence.

And the appellate chamber in that case looked at the same situation and approved of the trial chamber's analysis and said, yes, we agree that law of war detention is evidence of protracted armed violence.

So in the absence of decisions in U.S. juris prudence interpreting this phrase and looking at this question specifically, we would suggest that you look to the decision by the ICTY analyzing whether law of war detention is evidence of protracted armed violence. And we suggest that it is. And

the absence of law of war detention is likewise evidence that there was no protracted armed violence.

And that is the first of the seven factors, the seven categories of suggested information that the government asserts we must -- must be satisfied under the Hamdan standard for determining the existence of hostilities.

Now, the second factor in the Hamdan standard is whether and when the U.S. Government relied on the combat capabilities of its Armed Forces to meet the threat posed by al Qaeda. Well, as we have discussed before, law of war detention is a core combat capability of the U.S. Armed Forces.

You know, the U.S. Government has engaged in detention operations in every armed conflict and often in not armed conflicts, for security purposes. So the failure of the U.S. Government to engage in law of war detention prior to 9/11 suggests that the U.S. Government wasn't using at least this aspect of the combat capabilities of its Armed Forces prior to 9/11.

We also -- Mr. al Baluchi also believes that evidence of law of war detention -- at least planning for law of war detention is evidence of the perception of U.S. leaders concerning the existence or not of an armed conflict.

The idea that the U.S. Government had not even planned to detain members of al Qaeda subject to the laws of war would suggest that U.S. leaders either did not believe they were going to engage -- capture anybody, which would be surprising given that the U.S. Government, in fact, captured members of al Qaeda, or that the U.S. Government did not believe it had to abide by international law and the laws of war when it engaged in armed conflict, which also would be surprising given that it has been longstanding Department of Defense policy to apply the laws of war in every armed conflict situation and in every military operation, for that matter.

Or it could be -- it could indicate that U.S. leaders simply did not conceive of an armed conflict between the United States and al Qaeda. Otherwise, one would expect that policymakers would ask the question: Do we have the authority under the laws of war to detain? And, if so, shouldn't we be planning for those detention operations?

Finally, even if Mr. al Baluchi is incorrect about the three foregoing categories, that law of war detention is not evidence of protracted armed violence, that it's not evidence of U.S. leaders' perceptions, or that it's not evidence of the use or nonuse of combat capabilities of the

U.S. Armed Forces, Mr. al Baluchi believes that a panel made up of members of the U.S. military, many of whom will have been engaged in combat operations overseas in the last 18 years, who are familiar with operations on the battlefield that include the capture and detention of enemy fighters, will find it persuasive and relevant that in this period that the government asserts an armed conflict existed.

The U.S. Government simply failed to utilize this second most important feature of law of war authorities, the only way -- the only lawful way to remove enemy fighters from the battlefield other than to kill them.

Subject to your questions, Your Honor.

MJ [Col PARRELLA]: I have none. Thank you.

DC [MR. FARLEY]: Thank you.

Any other defense counsel wish to be heard on 620? The same objection for Mr. Nevin and Ms. Bormann. Negative response from other counsel.

And, Mr. Trivett, you may present argument on both 617 and 620.

MTC [MR. TRIVETT]: So, Your Honor, the controlling legal standard for determining hostilities is set forth by the United States Court of Military Commission Review in the case of United States v. Hamdan.

It states, "In determining whether hostilities existed between the United States and al Qaida and when it began, you should consider the length, duration, and intensity of hostilities between the parties; whether there was protracted armed violence between governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaida threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider" -- instruction to the members -- "you consider relevant to the existence of armed conflict."

Now, this was the first instruction that was given because Hamdan was the first contested military commission case since World War II. It was given after the case-in-chief was over for both the prosecution and the defense.

The prosecution's theory of hostilities is this. In 1996, Usama bin Laden declared war on the United States. In 1998, he made clear that American civilians, no matter where they could be found around the world, were legitimate targets

of his fatwa and declaration. Al Qaeda attacked the United States embassies in Kenya and Tanzania, killing 257 people. They attacked the United States warship USS COLE in Aden Harbor in October of 2000, killing 17, wounding 39. And they attacked the United States by hijacking four planes, flying them into three targets, killing 2,976 people.

After the embassy bombings, two weeks later, the United States fired over 80 Tomahawk missiles at Usama bin Laden-related facilities in Sudan and in Afghanistan. At trial, that's either going to be enough or it's not. It's either going to be sufficient or it isn't. It was sufficient in Hamdan, it was sufficient in al Bahlul, and we believe it will be sufficient here.

And while our position is that the armed conflict started as early as 1996 and no later than August of 1998, for this case that doesn't matter. All that matters is whether or not the September 11th attacks were sufficient, which we believe they are.

So while we'll prove all of it, all we need to prove is that the September 11th attacks happened and that al Qaeda was responsible for it and that that was sufficient to establish armed conflict.

The members who have this legal instruction in front

of them -- and we have to be anchored to this legal instruction. This legal instruction governs what's discoverable, what's not discoverable, what's admissible, what's not admissible, but we have an actual legal standard from an appellate court that is superior to this commission.

MJ [Col PARRELLA]: On a case that was overturned albeit maybe on other grounds.

MTC [MR. TRIVETT]: On other grounds, yes, sir.

MJ [Col PARRELLA]: So let's say that assuming I agree with you that this is the standard, given the last factor, why shouldn't I grant the defense request to afford them the opportunity to at least present evidence contrary to the government's theory of when hostilities began?

MTC [MR. TRIVETT]: It certainly doesn't apply to any of the factors in the standard. If you look ----

MJ [Col PARRELLA]: But what about ----

MTC [MR. TRIVETT]: Yes, sir, I'm going to address ----

MJ [Col PARRELLA]: What about any other facts or circumstances you consider relevant? Because that seems to be pretty broad and invite an opportunity for the defense to put forward anything that they deem that the members might find relevant.

MTC [MR. TRIVETT]: Right. But, again, in 2008 in Hamdan,

that was done only after the case-in-chief and that was directed to the commission. So the commission had already heard all of the evidence that it was going to hear. If the defense wanted to argue certain aspects of the evidence that was already deemed admissible that showed either the absence of or existence of an armed conflict, they would have been able to do so.

If you read that last factor as not being -- if you don't read it in context, it's limitless. It's completely limitless, right? And I was coming up with ideas that would be at least plausibly admissible under this standard if it were limitless.

Say in 1998, in August, when President Clinton ordered the strikes in Afghanistan, you would imagine that there would be communications that President Clinton may have had with the Joint Chiefs. There may have been a war room. There may have been other high-level meetings, all of which would seemingly be normal for a military strike, especially one that hadn't been done before in countries that it hadn't been done before. Right?

But the defense could ask what else was President Clinton doing that day. Was he in the East Wing eating vanilla ice cream? Because I think that matters, that

it shows that he wasn't taking this very seriously. Now that's not at all tethered to whether or not there was actual armed conflict.

MJ [Col PARRELLA]: And I agree with that, and I don't think it's limitless; I think it still has to meet the threshold for materiality. And I think there's a big difference between whether the President was eating ice cream and whether the ICRC, in their part of what they do, deemed this to be an international armed conflict.

I mean, certainly the government's position may be that that's irrelevant, it doesn't matter, shouldn't be considered as important to the members. But it's a different standard when you are saying -- denying the government -- excuse me, denying the defense the ability to at least see what the information is or whether it exists.

MTC [MR. TRIVETT]: So whenever we -- I don't disagree with your premise. Whenever we get discovery requests, our first determination is if anything existed that they have asked for, is it discoverable? And if our first position is it's not, we won't go and look for it. If we believe that, well, if it did exist, that would matter, then we would go look for it.

And we went through a tremendous evolution to look

for hostilities-related information. We went to two Presidential libraries. We looked at over 600,000 documents. Ultimately, we turned over all that which we believe is discoverable. We took the position and we took a wide position that anything in any of those documents that indicated that we were not at war, we would disclose.

But that's just not how the government works, and there is not a lot of information that's like that, but we looked for it.

MJ [Col PARRELLA]: So is your position that you've looked for it and it doesn't exist, or is the position that we're not going to look for it because it's not material?

MTC [MR. TRIVETT]: Our position in regard to the ICRC materials is that we have not inquired. Now, I'm certain there's ICRC materials because the ICRC materials -- we were in the Balkans at the time. There was a United Nations mission that President Clinton was an important part of, so I'm certain that there is ICRC communications.

I'm also certain that the ICRC takes the position that all of their communications to any country enjoy a total and unfettered privilege. Now, that's not the U.S. Government's position, but the U.S. Government's position as set forth by the Secretary of Defense in the manual is that

there is a privilege that's recognized under the factors that are listed.

MJ [Col PARRELLA]: And what about with respect to the discovery at issue in 620?

MTC [MR. TRIVETT]: 620 being specifically the law of war detainees?

MJ [Col PARRELLA]: Yes.

MTC [MR. TRIVETT]: So for the law of war detainees, the most important part of the defense's concession -- and I want to make sure that I say it exactly correctly, because it completely undermines their argument as to why it would be relevant regarding hostilities, is this, the bottom of page 6 from the defense brief:

"Traditionally, in the context of noninternational armed conflicts, it is well accepted that a state may use either its law of war or its criminal law authorities upon capturing a member of an oppositional organized armed group. Generally the state has this choice because in addition to functioning as the belligerent opposition force in an armed conflict, the organized armed group's members have violated the state's domestic law."

We could not agree more. In a noninternational armed conflict, which is what the Supreme Court has determined in

Hamdan was, in fact, the nature of the armed conflict with al Qaeda as separate from the Taliban, that if we can use both, and if we're entitled to use both, and as the government does, it uses every tool in the tool box it has. The fact that it used a hammer and not a screwdriver doesn't matter for purposes of whether the armed conflict exists.

We're just dealing with actual actions of the actors. What did al Qaeda say? What did al Qaeda do? What did the United States say? What did the United States do?

MJ [Col PARRELLA]: And I understand the government's argument and position. The question, though, relates the same as with 617: Is the government's position that it doesn't exist or that we're not even going to look because it's not material?

MTC [MR. TRIVETT]: Well, our position is the second. In this instance, I have a better idea. We certainly arrested everyone we could after the East Africa Embassy Bombings. We tried them in the capital case. At least several of them were up for capital charges in the Southern District of New York. They were ultimately convicted. If you look at the time frame of that, that's occurring after August of 1998. The COLE attack happens in October of 2000, which is the very tail end of President Clinton's administration. The new administration

takes office, the Bush administration, in January of 2001.

By the time September 11th happens, none of the main COLE perpetrators had been captured. Obviously none of these accused had been captured yet. So the nature of the war just indicated that there wasn't an opportunity to put boots on the ground and actually detain someone.

But the defense has plenty of information that we provided them through discovery that shows our estimates as to how many people were killed when we fired over 80 tomahawks at Usama bin Laden-related facilities.

So -- slowing down.

But we did not capture anyone we killed. We did not remove any bodies from anyone we killed. So, again, the argument that because we didn't capture someone is irrelevant to the current conflict. There could be a conflict where countries just lob missiles at each other for five years straight. They don't collect the bodies. They don't capture anybody. And still under any standard, they're engaged in an armed conflict.

So there is no real relevance. And quite frankly -- and we've said this before -- that we would argue under 403 would be prejudicial to the members.

And we are talking only to the evidence now that goes

to the members, because our position, and we certainly hope that the commission shares it, in regard to jurisdiction, the issue of the existence of hostilities before and on 9/11 has been resolved as to all of the parties. Everyone had an opportunity -- well, certainly Mr. Connell and Mr. Ruiz had an opportunity to make their arguments as to that fact.

And it's important to remember too that when Judge Pohl made his decision, he didn't rely on a single piece of evidence we used. We showed the declaration of war. We showed the fatwa, embassy attacks, the COLE attack, the 9/11 attacks, and the responsibilities -- al Qaeda's responsibility for those. But he didn't rely on any of that when he made his decision in I believe it's 502BBBB. He relied solely on congressional determination and deferred to them.

So that's an issue of law, that's not an issue of fact where they can somehow put different facts in for Ali's case that would question or impact at all the question of whether or not Congress determined that and whether or not this commission should defer to it.

So in the end, we don't believe there are any prisoners of war that were taken prior to September 11th. We think that has more to do with the nature of the war rather than whether or not we had authority. Clearly, if we believed

we had authority under Article 51 of the UN charter to -- in self-defense to strike at them, we would have also had the authority to detain them if we wanted to. That's not a far stretch.

But we simply -- the facts on the ground -- the fact that we didn't have any boots on the ground, and the nature of the armed conflict -- which al Qaeda brought to us, they brought to the United States. We didn't go after them. They came to us. The nature of the facts are the nature of the facts.

And although Mr. Farley is keen on saying imagine what it would have looked like and that we had all lived under a real war for the last 18 years, I think that presumes that those that were killed in the embassy attacks and the COLE attacks and the family members of those in the back of this courtroom who were killed on September 11th somehow didn't die in a war. That's not our position, and that's not what the elements say.

We're going to have the opportunity to rely on it, to rely on those, the factors set forth in Hamdan, but ultimately the ICRC's determination is irrelevant to that conclusion. Whether or not they have any opinion, if that opinion is not tethered to the Hamdan decision, it's irrelevant and it's

confusing and it's not required to be discovered, especially due to either the total or limited privileged nature of the communications.

We would be happy to stipulate to the topic in 620, but we would never stipulate to its relevance because we don't believe that it's relevant.

But, again, they are sending us on fools' errands. They are asking for documents that they don't believe exist, and they are having us go look and try to prove a negative. How do we know when we have gotten to the end of the rainbow and we are certain we checked everywhere before we know that something doesn't exist? And that might not be that difficult for the ICRC. I would imagine DoD would have some records of it.

But, again, these are impossible standards for us to meet, and we are just not required to meet them by law. So we ask that you deny both of these motions to compel because we don't believe that they're material to the preparation of defense under 701. We don't believe they are relevant to any legal standard before the military commission.

MJ [Col PARRELLA]: With respect to the Hamdan instruction, was that something that was part of the holding or was that in dicta?

MTC [MR. TRIVETT]: We believe it was part of the holding. We believe that the CMCR, just like the courts of military review, have full fact-finding power, and they need to ensure that every fact -- or that every conviction is supported by law and fact.

It's in the body of the opinion that Judge Allred correctly instructed the members of the Hamdan panel. It then lists in a footnote what the instruction was. But we believe ultimately it's in the body of the opinion, and they had the obligation to look at and ensure that the conviction was supported by law and fact. So we believe it's a holding. And General Martins just reminds me it is also in the Bahlul opinion as well.

I cannot imagine a scenario by which you instruct the members of those elements and then the CMCR comes back, after having said on two different occasions that that's the correct standard, and then have it overturned because it's not.

There's some irony in the fact that we asked for the Tadic standard. That was our position. That was the U.S. Government's position going in because we believed it was -- we believed that it had been the correct standard. Ultimately, after it was litigated, Judge Allred expanded it to include statements and some other small differences, but

ultimately we feel we are bound by it, and we're ready and able to satisfy it if we ever get to court, if we ever get to our case.

Subject to your questions.

MJ [Col PARRELLA]: No further questions. Thank you.

Mr. Farley?

DC [MR. FARLEY]: Your Honor, we'll rest.

MJ [Col PARRELLA]: Okay. Anyone else care to be heard on 620? Noting the objections from Mr. Nevin and Ms. Bormann. Okay.

With that, then, what we'll do is we will reconvene tomorrow morning for a closed session pursuant to R.M.C. 806 to take up the appropriate motions as discussed this morning.

Anything further prior to recessing?

LDC [MR. NEVIN]: May the -- may Mr. Mohammad remain here for -- until prayer is completed, Your Honor?

MJ [Col PARRELLA]: Yes, the same ----

LDC [MR. NEVIN]: The usual.

MJ [Col PARRELLA]: ---- procedures as usual.

LDC [MR. NEVIN]: Yeah, thank you.

MJ [Col PARRELLA]: Anything else?

LDC [MS. BORMANN]: Mr. Bin'Attash is asking for some additional time to meet with counsel and defense team. If I

can have just a moment to ask for how long.

Prayer will take approximately a half an hour, and we're asking for an hour after that, so 6:00.

MJ [Col PARRELLA]: Okay. I see no issue with that, so we will go ahead and do that. It seems to be reasonable in light of what our usual practice is.

Anything else from anyone else?

Otherwise, we will reconvene for closed session at 0-9. The commission is in recess.

[The R.M.C. 803 session recessed at 1638, 25 March 2019.]

[END OF PAGE]