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1 [The R.M.C. 803 session was called to order at 0900,
2 26 February 2018.]

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

4 Trial Counsel, who's here on behalf of the United
5 States.

6 CP [BG MARTINS]: Good morning, Your Honor. Present for
7 the prosecution, Brigadier General Mark Martins, Mr. Robert
8 Swann, Mr. Edward Ryan, Mr. Clay Trivett, Mr. Jeffery
9 Groharing, Ms. Nicole Tate, Major Christopher Dykstra,
10 Mr. Dale Cox, Mr. Rudolph Gibbs, Sergeant Joleen Sanders. And
11 in the back of the room are Mary Needham and Nicole Taylor of
12 the Federal Bureau of Investigation.

13 These proceedings are being transmitted by closed
14 circuit signal to locations in the continental United States
15 pursuant to the commission's order.

16 MJ [COL POHL]: Okay. General Martins, you filed a
17 detailing memorandum 8 February 2018. Were there
18 additional ----

19 CP [BG MARTINS]: Yes, Your Honor. Neither of those
20 counsel is present today.

21 MJ [COL POHL]: Okay. When they are present, we just have
22 to put their detailing qualifications on the record.

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

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1 MJ [COL POHL]: Mr. Nevin.

2 LDC [MR. NEVIN]: Your Honor, I'm David Nevin here on
3 behalf of Mr. Mohammad, as well as Lieutenant Colonel Poteet,
4 Ms. Leboeuf, and Mr. Sowards. And Mr. Mohammad is present.

5 MJ [COL POHL]: Yeah. We'll note that all five of the
6 accused are present.

7 Ms. Bormann.

8 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,
9 myself, Mr. Edwin Perry, Captain Brian Brady, Major Matthew
10 Seeger and, of course, Mr. Bin'Attash is present.

11 MJ [COL POHL]: Mr. Harrington, I understand your knee is
12 still acting up. And if you need to remain seated when
13 talking to the commission, feel free to do that.

14 Go ahead.

15 LDC [MR. HARRINGTON]: Thank you, Judge. On behalf of
16 Mr. Binalshibh, it's me, James Harrington; and Major
17 Christopher Lanks. Ms. Wichner and Major Stuard have been
18 excused, although Ms. Wichner will be joining us either this
19 afternoon or for the rest of the week.

20 MJ [COL POHL]: Mr. Connell?

21 LDC [MR. CONNELL]: Good morning, Your Honor. On behalf
22 of Mr. Al Baluchi, myself, James Connell; Lieutenant Colonel
23 Sterling Thomas of the United States Air Force; and Ms. Alka

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1 Pradhan.

2 MJ [COL POHL]: Thank you. And Mr. Ruiz.

3 LDC [MR. RUIZ]: Judge, Major Joseph Wilkinson, Lieutenant
4 Colonel Jennifer Williams, and Mr. Sean Gleason and myself are
5 present on behalf of Mr. Hawsawi.

6 MJ [COL POHL]: Thank you. And as the practice is when we
7 open each series of hearings, I go over with each of the
8 accused their rights to be present and, if they so choose, the
9 ability to waive the said rights. So this is directed to all
10 of the accused.

11 You have the right to be present during all sessions
12 of the commission. If you request or absent yourself from any
13 session, such absence must be voluntary and of your own free
14 will. Your voluntary absence from any session of the
15 commission is an unequivocal waiver of the right to be present
16 during that session.

17 Your absence from any session may negatively affect
18 the presentation of the defense in your case. Your failure to
19 meet with and cooperate with your defense counsel may also
20 negatively affect the presentation of your case. Under
21 certain circumstances, your attendance at a session can be
22 compelled regardless of your personal desire not to be
23 present.

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1 Regardless of your voluntary waiver to attend a
2 particular session of the commission, you have the right at
3 any time to decide to attend any subsequent session. If you
4 decide not to attend the morning session but wish to attend
5 the afternoon session, you must notify the guard force of your
6 desires. Assuming there's enough time to arrange
7 transportation, you will then be allowed to attend the
8 afternoon session.

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

12 Mr Mohammad, do you understand what I just explained
13 to you?

14 ACC [MR. MOHAMMAD]: Yes.

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

17 ACC [MR. BIN'ATTASH]: Yes, but I have a point I want to
18 put on the record.

19 MJ [COL POHL]: Okay. We'll come back to that.

20 Mr. Binalshibh, do you understand what I just
21 explained to you?

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

23 MJ [COL POHL]: Mr. Ali, do you understand what I just

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1 explained to you?

2 ACC [MR. AZIZ ALI]: Yes.

3 MJ [COL POHL]: Mr. Hawsawi, do you understand what I just
4 explained to you?

5 ACC [MR. AL HAWSAWI]: Yes.

6 MJ [COL POHL]: Okay. Mr. Bin'Attash?

7 ACC [MR. BIN'ATTASH]: As for my situations with the
8 attorneys, we've tried several times to mend the situation or
9 the matters in the past, but without going into any details,
10 all of these attempts have failed.

11 The female military attorney who was in the -- part
12 of the team, she decided to leave a month ago. There is a
13 letter that I've sent to General Baker last week and all of
14 the attorneys have a copy of it, and I would like that letter
15 to be part of the record. And that's it.

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

17 Ms. Bormann, do you know what letter he's referring
18 to?

19 LDC [MS. BORMANN]: Judge, it was a letter sent to General
20 Baker. I will speak with General Baker.

21 MJ [COL POHL]: Okay. And for it to be part of the
22 record, we have to get an AE number and go through that drill.

23 LDC [MS. BORMANN]: First, I'll speak with General Baker,

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1 Judge.

2 MJ [COL POHL]: All right. Understand. Okay.

3 At the 802, I indicated that I wanted to touch
4 AE 555. AE 555 deals with the -- with the termination of
5 Mr. Rishikof and Mr. Brown as the convening authority legal
6 advisor, and the replacement, at least temporarily, with
7 Mr. James Coyne. The two things I'm going to touch is, A, is
8 that Mr. Coyne and I served in the Army JAG Corps together.
9 We were essentially peers. We never worked in the same
10 office. I've had little to no contact with him since 2005.
11 There may be a retirement ceremony or two that we went to --
12 that we both went to, but that would be it. And I've had
13 absolutely no discussions with him about the commissions or
14 any of this activity.

15 And if anybody wants to ask me any questions about my
16 relationship with Mr. Coyne, I will open the floor up now.
17 Mr. Nevin?

18 LDC [MR. NEVIN]: Your Honor, would you say again when
19 your last contact with Mr. Coyne was?

20 MJ [COL POHL]: As best I can say, we served together in
21 various places, but never in the same office. It would be, I
22 would say, 2005. And since 2005, I may have been at a
23 retirement ceremony that he was also attending for somebody

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1 else, but that's it. We don't exchange Christmas cards or --
2 like I said, very, very little contact with him in the last 13
3 years.

4 LDC [MR. NEVIN]: And when you had contact with him 13
5 years ago, that was after September 11th of 2001. Was there
6 any discussion of the events of 9/11?

7 MJ [COL POHL]: The only contact I really had with him was
8 in 2002. I went to Germany as a trial judge and he was --
9 actually at the time I believe he was down at EUCOM and that
10 never came up. And I wasn't a commission judge until 2007
11 anyway, so I have never discussed 9/11 or anything else with
12 him, to my knowledge. Again, we're talking about, you know,
13 15 years ago.

14 LDC [MR. NEVIN]: Okay. Thank you, Your Honor.

15 MJ [COL POHL]: Ms. Bormann, any questions?

16 LDC [MS. BORMANN]: Judge, having just heard this, I don't
17 have any questions at this point; however, I would -- if,
18 given a chance to process it, at some point in the future I
19 have a question ----

20 MJ [COL POHL]: No, understand.

21 LDC [MS. BORMANN]: ---- I'll address the commission.

22 MJ [COL POHL]: Okay. Mr. Harrington?

23 LDC [MR. HARRINGTON]: Judge, I'd like to defer also.

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1 MJ [COL POHL]: Okay. Mr. Connell?

2 LDC [MR. CONNELL]: Nothing at this time, sir.

3 MJ [COL POHL]: Mr. Ruiz.

4 LDC [MS. BORMANN]: Nothing right now, sir.

5 MJ [COL POHL]: We also on 555, while we're discussing it,
6 I know we're still in the briefing cycle. What we have is the
7 uncontroverted fact that in early February Mr. Rishikof was
8 relieved as the convening authority by Secretary Mattis, and
9 Mr. Castle, the acting general counsel, relieved Mr. Brown as
10 a legal advisor to the convening authority, and then the
11 subsequent appointment of Mr. Coyne as the acting convening
12 authority and then a reshuffling of the legal advisor
13 positions.

14 The defense has filed 555, which was an unlawful
15 influence motion, and proffered potential reasons for the
16 termination of Mr. Rishikof that could amount to unlawful
17 influence. Of course, at the time of the termination of
18 Mr. Rishikof, the Secretary of Defense and Mr. Castle didn't
19 say why, they just said you're no longer in the job.

20 The government had filed its pleading and response
21 and saying that, in a UI motion before the government, the
22 burden shifts to the government. The defense must present
23 some evidence of UI and the defense has failed to do that;

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1 therefore, the burden hasn't shifted. None of this -- that
2 framework is well known to anybody who practices military law.

3 The concern I have here is that this thing can just
4 litigate -- can just draw out, draw out, draw out. And it
5 seems to me is, the simple answer is, we simply need to know
6 why they were terminated. If it's for an innocuous reason,
7 which the government alleges it could have been, the issue may
8 go away; if it's for something else, it may not go away.

9 Accordingly, I intend to issue an order this week
10 directing the government to secure declarations from the
11 Secretary of Defense and Mr. Castle as to the facts and
12 circumstances surrounding why -- or excuse me, the termination
13 of Mr. Rishikof and Mr. Brown and the reasons why. Similarly,
14 in that same order will be a request, because they're now
15 private citizens, for Mr. Rishikof and Mr. Brown to see
16 whether or not they wish to provide their version of what
17 happened.

18 The suspense in this will be 19 March and everybody
19 to understand, it will be in the order, but just I want to
20 make it very clear, this is not necessarily the end of the
21 inquiry. This is simply the first step so we can move the
22 inquiry along, and it will not preclude further briefing, and,
23 if necessary, taking of evidence, including taking of

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1 witnesses. And I will be issuing that order during this week.
2 Okay.

3 That being said, that's all I want to talk about of
4 555.

5 And that brings us to the docket we discussed earlier
6 in the 802, and we're starting with 502MM. Mr. ----

7 LDC [MR. NEVIN]: Can I be heard on a matter that I
8 believe should be taken up before ----

9 MJ [COL POHL]: Okay, sure. Go ahead, Mr. Nevin.

10 LDC [MR. NEVIN]: And the record should probably reflect
11 that I advised the military commission during our 802 hearing
12 on Saturday that I wanted to raise this issue.

13 MJ [COL POHL]: You did, Mr. Nevin. Go right ahead.

14 LDC [MR. NEVIN]: Right.

15 So about a month ago, we advised the military
16 commission that we were laboring under a conflict of interest,
17 and we described it in some detail. That's contained in 525I,
18 like India. And we also, ten days ago, I believe almost to
19 the day, asked that that matter be taken up first at these
20 proceedings.

21 The effect of the conflict of interest that we refer
22 to is that Mr. Mohammad at this point is being represented by
23 counsel who are laboring under a conflict who are forced to

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1 choose between following the government's rules about
2 investigation on the one hand or, on the other, following our
3 obligation that's clearly articulated in the U.S. Supreme
4 Court cases and in the rules of professional conduct to -- to
5 thoroughly investigate, I believe is the term, the case.

6 And if we do the former, we've been told that there
7 will be criminal sanctions. And we know from long history in
8 this case that lots of other sanctions would undoubtedly apply
9 as well. And on the other hand, we know that if we fail in
10 our duty as lawyers, then we are failing not only -- we're not
11 only failing our obligation to our client, but we're failing
12 our obligation to this military commission.

13 So I heard the military commission say at our 802
14 that it -- that it would -- that there was more information
15 coming from the government and that it would be taken up later
16 in the week, possibly. I believe the government said that
17 there might be some changes to the guidance come Thursday.
18 And so I understood the military commission to say it wanted
19 to take this -- these matters up -- it wanted to address the
20 matter of the conflict of interest later in the week.

21 And my request is that you deal with it now. And the
22 reason I ask this is just the practical one of it puts counsel
23 and Mr. Mohammad in a position of, as we spend the rest of the

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1 week, as every minute goes by, laboring under this conflict,
2 and the result of it is that he does not have the kind of
3 counsel that are required. And I'm referring to, I believe at
4 the outset, Wood v. Georgia saying that the right to counsel
5 that is guaranteed by the Sixth Amendment also includes --
6 necessarily includes the right to unconflicted counsel. And
7 so as we stand here -- as I stand here, Mr. Mohammad is not
8 being represented by unconflicted counsel.

9 We know from the subsequent cases, referring to
10 Holloway and Cuyler, that those -- in that situation,
11 prejudice is presumed. And this is being brought to the
12 military commission's attention contemporaneously during the
13 course of the proceedings. It's not being raised for the
14 first time on appeal or in a post-conviction action of some
15 kind, it's being presented to you now in real time.

16 Cuyler and Holloway and all of the cases which --
17 which deal with this kind of situation distinguish between
18 those two cases -- situations, cases where, on the one hand,
19 it's not raised until later and the judge has no way of
20 knowing about it, on the one hand, and on the other, where
21 it's brought to your attention promptly, as the cases require
22 that it be.

23 So we just went through a ritual that we go through

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1 every time -- I say ritual, it has the nature of -- it is in
2 the nature of being ministerial, telling each one of these men
3 every time you have the right to be present. And you do it
4 formally and you do it without fail and you do it because they
5 do have a right to be present and you want them to know that.

6 And, of course, they also have the right to have
7 counsel. And I'm standing here telling you, and it has been
8 articulated in a number of pleadings that have been presented
9 to you, that they do not at the present time have counsel, the
10 counsel that's required by the Sixth Amendment.

11 And this has happened before, in all frankness. We
12 kick it down the road and we say, we'll take it up later.
13 We'll deal with it later. We'll do some other things first.
14 There are some other matters that need to be addressed in the
15 meantime, and we'll get to that later. And the result is that
16 we have these lapses in time where Mr. Mohammad's right to be
17 represented by unconflicted counsel is not being honored and
18 is -- and, in fact, is being denied to him.

19 So I understand the government may be -- or at least
20 says that there may be some new wrinkles in part of the
21 guidance that's at issue in the conflict. Because, remember,
22 there are two things at issue in the conflict as we've laid it
23 out. The first is the obligation not to approach any CIA

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1 agents to ask them questions about the torture program. And
2 the second is to -- not to go to any foreign countries where
3 we believe a black site might be located and ask any questions
4 premised on that belief.

5 Now, I understand that -- that there may be some
6 variation or wrinkle coming in the second of those, but I was
7 not -- there was not a representation, in my recollection,
8 that any kind of an approach at the Piggly Wiggly or somewhere
9 else, that there would be any change in that -- in those
10 threats, and in that -- and in those directions that were
11 given to us in the memorandum that I know the military
12 commission is familiar with.

13 So, first of all, it doesn't appear that the conflict
14 is going to go away on Thursday, even -- even with our best
15 hopes for -- for how it might come out. But in any event, we
16 have -- we have the -- we have the time between now and
17 Thursday, and we have the likelihood that many -- and I've
18 looked at the -- I've looked at the calendar, like I know the
19 military commission has, and there are a number of substantive
20 issues that need to be addressed here, and it is not fair to
21 Mr. Mohammad, it's not really -- it's really not fair, with
22 all due respect, to any of these defendants to have them be
23 represented by counsel who are laboring under a conflict while

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1 these serious issues are being resolved.

2 The cases say do it first. The cases say take it up
3 first, resolve it. And there's a roadmap. The cases that we
4 cited, we cited to you before, but we cited them again just in
5 553E saying here are the cases that require you to -- to --
6 that lay out exactly what you're required to do.

7 And it's actually very simple. The first thing is to
8 inquire and to determine exactly what the nature of the
9 conflict is. It's referred to as an inquiry obligation. It
10 comes from Holloway and Wood and Cuyler.

11 The second thing is a disqualification or waiver
12 obligation. And you either disqualify counsel or you get a
13 waiver from Mr. Mohammad if you find that there's a conflict.

14 And the third is that -- that in the event you find
15 there's no conflict, we move on. But we resolve it now as
16 opposed to kicking it up the road. And that's my request.

17 MJ [COL POHL]: Mr. Nevin, I understand that, and -- but
18 all conflicts are not created equal. As I understand from
19 reading the pleadings, yours and Mr. Connell's primarily, is
20 that the conflict is that if we -- if at this point forward we
21 were to continue with an investigation that we have --
22 currently have been done, we are now being threatened with
23 sanctions of some kind.

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1 LDC [MR. NEVIN]: Right.

2 MJ [COL POHL]: Okay. And Mr. Connell says he has
3 suspended his investigations until this thing is resolved.

4 Okay. It strikes to me that discussing issues this
5 week, including this particular one, which I want to go back
6 to the government on, the conflict only is if you were to
7 investigate if -- and in contravention to the government's
8 guidance, for want of a better term; and if you don't
9 investigate while that's being -- while we're resolving the
10 issue, you have no current conflict.

11 LDC [MR. NEVIN]: And so you assume we are not
12 investigating?

13 MJ [COL POHL]: No, I'm just saying is I just took -- I
14 don't know what you're doing. I'm just taking what
15 Mr. Connell said, is that what his approach was, because of
16 this, we've -- until this is resolved, we've cut out our
17 investigations with the guidance.

18 LDC [MR. NEVIN]: And, in the process, are not fulfilling
19 our professional obligation. I mean, we either are -- there's
20 either -- I either have an investigator on the ground right
21 now, or we do, who is violating the government's rules, or I
22 have told them to not do that and stand down from that, in
23 which case I'm violating my obligation as a lawyer.

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1 I mean, we provided you -- we gave you the
2 declarations of three nation-level experts in this area
3 telling you these are the obligations that counsel have, and
4 if they don't do it, they're violating their oaths. So that
5 is where we are right now. We can't just sort of say, well,
6 let's go on and act like lawyers for the rest of the week
7 because we're here in court, we're not in country X conducting
8 investigation; and, therefore, there's no conflict. That is
9 not what the law says.

10 The conflict issue, when it's raised, and when
11 it's -- when it's -- when it's presented to you in the way
12 that it's been presented here, it comes to the top of the
13 list. It comes to the top of the to-do list. It has to be
14 resolved. And, you know, you will see cases that analyze this
15 stuff looking backward where there's a post-conviction action
16 or something of that nature and it's -- nothing was ever
17 presented to the judge.

18 There's a very interesting Second Circuit case in
19 which the judges kept getting -- there were eight or nine
20 different judges that cycled through the case and they kept
21 getting appointed to the bench or retire -- to the circuit
22 bench or retiring or something to that effect. And as a
23 result, it ended up in Judge Weinstein's calendar, and he

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1 didn't address the conflict issues that had been raised
2 previously to him. I'm referring to the Levy case. The
3 circuit reverses, said it was brought to your attention
4 beforehand, you should have dealt with it once and for all at
5 the moment that it was presented to you.

6 So I understand what the military commission is
7 saying. All I -- I just am saying to you, it's not -- you
8 can't simply parse these things out and say, well, you don't
9 have a conflict until -- until you are actually on the ground
10 knocking on a door. We have a conflict right now.

11 And I'm handed a note just -- just now that makes the
12 point, a good one, that conflicts frequently arise in terms of
13 a prospective situation arising that is likely to arise. So
14 part of that first prong of your inquiry obligation is to
15 determine whether it's an actual conflict or a potential
16 conflict. And potential conflicts have to be dealt with just
17 in the same way that actual -- well, not in the same way, but
18 to the same extent that actual conflicts have to be dealt
19 with.

20 And so I'm saying either -- however you slice this,
21 it needs to be resolved first, and I ask that you do that.

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

23 Mr. Connell?

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1 LDC [MR. CONNELL]: Sir, I agree with the arguments of
2 Mr. Mohammad. I just want to make a couple of additional
3 procedural points.

4 The reason why the briefing cycle is not complete on
5 this issue with respect to Mr. al Baluchi -- it is complete
6 with respect to Mr. Mohammad. The reason why it is not
7 complete with respect to Mr. al Baluchi comes from a series of
8 procedural errors on the part of the military commission.

9 Our briefing on this we presented to the military
10 commission on 24 January, with the expectation that it would
11 be -- briefing cycle would be fully complete prior to this
12 military commission.

13 I understand from the 802 that when we deal with 524,
14 we're going to discuss the procedural aspects and the
15 application of Regulation for Trial by Military Commission
16 17-1, and I'm happy to do that. But I do want to be clear
17 that the briefing cycle is not complete, not due to any lack
18 of diligence on the part of Mr. al Baluchi. We presented our
19 arguments, we sent them to the government, we filed 548, we
20 filed 549. You granted an extension on 548 and 549 over our
21 objection, even though we asked permission to brief it under
22 the Trial Judiciary Rules of Court, and there was -- and we
23 even went to the Court of Military Commission Review to try to

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1 get our proceeding accepted by the clerk. And as far as I can
2 tell, the Court of Military Commission -- or the CMC doesn't
3 really exist anymore. But we did everything that we could, is
4 my point, to get the briefing cycle complete so that we could
5 take up this issue in a timely fashion.

6 I do understand that the government has the right to
7 file their brief. If the situation were reversed, I would
8 want my opportunity to file my brief. I understand there's a
9 process. But in my view, the process here under the
10 Regulation for Trial by Military Commission and under the
11 Trial Judiciary Rules of Court was not followed. The issue
12 should be ripe today, but unfortunately, it will not be ripe
13 until Friday.

14 MJ [COL POHL]: Okay. Yeah, Mr. Connell, as I discussed
15 at the 802, the 524/525 briefing issue I want to discuss with
16 you, but I don't think that's -- right now is appropriate
17 where it's at.

18 LDC [MR. CONNELL]: I understand, sir.

19 MJ [COL POHL]: Any other defense counsel want to be heard
20 on this?

21 Mr. Harrington?

22 LDC [MR. HARRINGTON]: No, Judge.

23 MJ [COL POHL]: Mr. Ruiz?

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1 LDC [MR. RUIZ]: [Microphone button not pushed; no audio].

2 MJ [COL POHL]: And Ms. Bormann.

3 LDC [MS. BORMANN]: May I have a moment, please?

4 MJ [COL POHL]: And Ms. Bormann.

5 LDC [MS. BORMANN]: We have the same -- very same issues.
6 We are seeking leave, and you gave it to us, to file a
7 supplement to 528. That is going in today. That deals
8 with -- it's a motion to compel some Taliban phone records,
9 but the investigation that would go into completing the record
10 on that motion has been stymied by the very concerns raised by
11 Mr. Nevin and Mr. Connell. So you will receive documentation
12 today about failure to investigate because of threats of
13 criminal prosecution and a variety of other options on the
14 table from the prosecution's perspective.

15 We also intend to supplement -- we have ongoing
16 investigation that's been stopped. So we're in the process
17 right now of detailing for the commission what that is, how
18 that affects us in providing the prejudice prong that I think
19 somebody will want to look at down the line. It will take us
20 a little time to get there, so we're not in a position right
21 now to argue it, but we agree completely with Mr. Nevin that
22 just the spectre of the inability to investigate posed by both
23 the limitations on where we can investigate and whom we can

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1 interview have completely shut down our investigation.

2 MJ [COL POHL]: Thank you.

3 Trial Counsel, what's the status of the guidance to
4 the defense as far as their -- the government's view of what
5 they can or cannot investigate?

6 TC [MR. GROHARING]: Judge, as we indicated yesterday, we
7 anticipate having additional guidance that would replace 525G,
8 the guidance that was provided in November. We anticipate
9 having that early this week, as we indicated yesterday. And
10 as soon as we get that additional guidance, we'll provide it
11 to the defense and the court and file our response to the
12 defense pleading shortly thereafter.

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

14 [Pause.]

15 MJ [COL POHL]: Mr. Groharing, I just want to know where
16 our starting point is here. In 342A, the government responds
17 Attachment C, had some guidance, and then incorporated by
18 reference a bench brief in the United States v. Iraqi, and
19 this deals with defense counsel request for witnesses. Then
20 in November, we have the 17 November guidance signed by
21 Mr. Trivett. And then -- I'm not going very chronological
22 here -- we have your guidance sent 6 September 2017.

23 And these deal with defense's ability to investigate

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1 in foreign countries and how they can approach witnesses
2 within foreign countries or in other places. Which is the
3 current controlling guidance? And, I mean, I'm using the term
4 controlling only in the sense that the government believes
5 this is the -- the current state of play.

6 TC [MR. GROHARING]: Your Honor, I think it's easiest to
7 look at -- the September guidance addressed the defense's
8 ability to contact CIA employees and contractors, current and
9 former, generally domestically, as contemplated.

10 As you will recall, in our discovery we had
11 identified those individuals not by their true names, but by
12 unique functional identifiers. The commission approved the
13 summaries of that information. In providing that to the
14 defense, we then gave them guidance in September -- that's the
15 guidance you referenced as the September guidance -- and said
16 this is a mechanism, a means for you to contact these people
17 in a way that won't disclose their identities. That was what
18 the September guidance addressed.

19 So they had a mechanism, going through the
20 prosecution, that we proposed that would allow them to make
21 requests to interview them, conduct interviews, and still
22 protect both their identities as well as any connection that
23 these people had to the CIA RDI program, which was a

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1 classified fact in and of itself.

2 The November guidance is related to overseas
3 investigations. And that was at the request of the court --
4 or the commission during the October session. That guidance
5 addresses defense efforts overseas and attempted to advise the
6 defense regarding their use of open-source information or
7 classified information in a way that would either confirm,
8 deny, or attribute potentially classified information to the
9 defense.

10 That guidance is what is at issue and what will be
11 replaced by guidance that we expect as early as today that
12 we'll provide to the defense and the court.

13 MJ [COL POHL]: Okay. So the September guidance about
14 talking to people -- let me -- and I'm looking at the
15 paragraph 6. And so it's the government's, still, position
16 that the defense should make no independent attempt to locate
17 or contact any current or former CIA employee or contractor
18 regardless of the individual's cover status?

19 TC [MR. GROHARING]: That's correct, Your Honor.

20 MJ [COL POHL]: So just for an example is if the defense
21 wants to contact somebody who's already been identified, I'm
22 not talking about the ones with UFI's, I'm talking about
23 somebody who the government has disclosed the name or they

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1 disclosed their own name, if defense wants -- I'm just going
2 to pick a name out, wants to go talk to Jose Rodriguez, okay,
3 you say they can't do that.

4 TC [MR. GROHARING]: Your Honor, I think that would be a
5 different situation. I think that's accurate. If there's
6 someone who is publicly acknowledged to be associated with the
7 CIA or the CIA RDI program, which is a very limited number of
8 people, and the defense wants to contact them, I don't believe
9 that contact would disclose classified information.

10 MJ [COL POHL]: No, that's not -- not -- my question,
11 though, isn't that. And, again, you've -- I'm not sure --
12 and, again, I understand I'm not the youngest guy in the world
13 and so my memory may not be the best, but I don't know if this
14 is what I thought I heard last time.

15 If they want to go knock on Mr. Rizzo's door, do they
16 have to go through the government before they can do that?
17 That's my question.

18 TC [MR. GROHARING]: No. In that circumstance, I would
19 say no, they do not.

20 MJ [COL POHL]: So if anybody who the government has --
21 okay, let's -- let's take another category. Individuals that
22 the government has disclosed their true names to the defense
23 in discovery who may have signed a piece of paper, whatever it

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1 is, do they have to go through the government to talk to that
2 person?

3 TC [MR. GROHARING]: I'm not sure who that would be, Your
4 Honor, but I -- in that circumstance, if ----

5 MJ [COL POHL]: Let's say somebody who signed one of the
6 OLC memos, for example.

7 TC [MR. GROHARING]: Then, no. No, Your Honor.

8 Assuming that that's an unclassified whatever -- if
9 it was a circumstance where you had someone who had a
10 connection with the RDI program that remains classified, that
11 contact should come through the government. It needs to be
12 done in a manner that doesn't disclose that contact with the
13 RDI program. I don't know if that's the fact pattern that
14 you're talking about there; likely not.

15 But if the individual's association with the RDI
16 program remains classified, it's difficult to imagine how the
17 defense would make a contact with them without potentially
18 disclosing classified information.

19 But, Your Honor, I don't think that's the case. Any
20 of the folks that were mentioned in the OLC memos, I don't
21 believe would fit into that category, though. It would be
22 fact-specific.

23 MJ [COL POHL]: What I'm trying to -- just trying to

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1 figure out here is that -- and I understand the national
2 security position when it deals with people and places. I got
3 it. Okay.

4 And let's talk about people, and you use the UFI
5 system to mask identities of people to protect their covert
6 status. Okay.

7 If you choose -- you, I'm speaking of the government,
8 chooses not to use that system and puts a true name in a
9 document and gives it to the defense, is it your position
10 that, if the document is classified, the defense still has to
11 go through the government to talk to this person?

12 TC [MR. GROHARING]: I think it's very unlikely that that
13 is the case, Your Honor. I think if we have given the defense
14 a -- we assigned pseudonyms for a reason. And so if there's a
15 person who is not assigned a pseudonym in this litigation, the
16 defense should be able to contact that person. Having said
17 that, the subject matter of what they would talk about, I
18 think, is very likely classified. And so that contact would
19 have to be done in a way that respects that fact.

20 MJ [COL POHL]: But then -- but your 6 September guidance
21 doesn't seem to make that distinction.

22 TC [MR. GROHARING]: Well -- and it may not be drafted as
23 well as it could be, but ----

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1 MJ [COL POHL]: Well, Mr. Groharing, I just -- like I
2 said, I just want to clarify the left and right lanes here.
3 Because the government is saying if you don't follow these
4 rules, there's some -- I'm going to use the term threat out
5 there, right? They say if you don't follow these rules,
6 you're subject to criminal prosecution or, at a minimum, your
7 security clearance may be jeopardized. And so it's important
8 that the rules are clear, at least, and then we decide whether
9 or not the rules are appropriate.

10 TC [MR. GROHARING]: Your Honor, I -- the September
11 guidance was meant to address individuals connected to the RDI
12 program, and specifically focused on individuals we identified
13 by UFIs in indices that were attached to those memos.

14 One way to clear it up, I think, further would be to
15 provide the defense with a list of CIA employees that have
16 officially been acknowledged to be associated with the RDI
17 program. I think we can do that, and make it clear to the
18 defense that here are these -- and I believe it's ten people
19 that we can provide that list, and the defense would then know
20 that if they wanted to contact them directly, they could.

21 Having said that, I think the individual will likely
22 need to talk to the Office of General Counsel to understand
23 the scope of any discussion that they could have with the

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1 defense. So doing that through the government would probably
2 expedite that process.

3 MJ [COL POHL]: No, they -- the issue really comes down to
4 is -- is -- and again, I'm looking at all of these different
5 copies of the guidance -- of when does -- when does, in the
6 government's view, the defense has to go through the
7 government to arrange an interview.

8 And you seem to be saying now that if somebody has
9 identified themselves or the government's released their true
10 identity, that's -- and I'm going to go to my boxes here,
11 that's a box that the defense does not have to go to the
12 government, that they can knock on the guy's door. If the guy
13 doesn't want to talk to him, that's up to him or her. If the
14 guy -- I'm assuming they all signed their NDAs, even if
15 they're no longer part of the United States -- they're not
16 part of the agency anymore, they should know what the left and
17 right lanes are.

18 I mean, there is -- but now you're saying that's okay
19 for them to go do that or not?

20 TC [MR. GROHARING]: For the ten people that I mentioned
21 that I believe we can provide the defense of the known,
22 acknowledged involvement with the CIA RDI program, the defense
23 could contact them and it would not risk disclosure of

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1 classified information by just making that contact.

2 Anyone else, it presents a very real risk of
3 disclosing classified information just by contacting them and
4 asking about any association with the RDI program, because
5 it's a classified fact in and of itself that these people were
6 associated with the RDI program.

7 MJ [COL POHL]: So that group -- that's the group that you
8 would say the defense would have to go through the government
9 to arrange the interviews?

10 TC [MR. GROHARING]: Correct, to request the interview.
11 And that's the protocol that we proposed in the September
12 guidance.

13 MJ [COL POHL]: And you anticipate additional guidance as
14 far as the foreign?

15 TC [MR. GROHARING]: Correct. I anticipate that the
16 additional guidance will be more clear with respect to the
17 left and right lateral limits, if you will, of the defense use
18 of open-source information and how that ties into
19 investigative efforts, overseas or domestically, regarding the
20 RDI program.

21 MJ [COL POHL]: And when will this be produced?

22 TC [MR. GROHARING]: As early as today, Your Honor. I'm
23 hopeful that's the case. I think it's very close to being

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1 finalized. They're -- that's not within my control,
2 obviously, but as soon as the guidance is finalized, we'll
3 provide it to the defense and the court and be able to resolve
4 this issue, hopefully.

5 MJ [COL POHL]: And again, I see your name on one of
6 these, I see -- I think Ms. Tate's involved in one of them,
7 and Mr. Trivett is involved in a couple of them. From whence
8 does this guidance come?

9 TC [MR. GROHARING]: From the original classification
10 authority.

11 MJ [COL POHL]: Okay.

12 TC [MR. GROHARING]: And we're just issuing it on their
13 behalf as we're permitted to do under the Military
14 Commissions Act and ----

15 MJ [COL POHL]: I understand. I just want to make it
16 clear, it's not ----

17 TC [MR. GROHARING]: We're not ----

18 MJ [COL POHL]: ---- Mr. Groharing saying here's what the
19 guidance is, it's what the OCA has communicated to you and
20 you're simply the conduit of the information.

21 TC [MR. GROHARING]: Yes, Your Honor.

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

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Your Honor, I just heard the
2 government say that the only investigative restriction under
3 the 6 September letter is that we cannot contact people who we
4 know are protected by UFI, right? I don't know that anyone's
5 protected by UFI, because I don't know who any of those people
6 are.

7 Here's my question to you: Today, Monday, can I rely
8 on that? At the coffee break, can I go call the investigator?
9 I have stopped five investigative contacts since 23 January.
10 Can I -- none of them are people that I know are protected by
11 UFIs. Can I at the coffee break go call the investigator,
12 say, all's good, 23 January -- my 23 January memorandum is
13 suspended, is lifted, go for it?

14 MJ [COL POHL]: If -- is there any way -- rephrase that.
15 There's two categories of people we're talking about here.
16 I'm going to get to your -- answer your question in a second,
17 I think.

18 The one is I'm going to call the John Rizzo, Jose
19 Rodriguezes of the world. What I heard Mr. Groharing just
20 say, which I think is not necessarily consistent with
21 paragraph 6, was those people are fair game.

22 LDC [MR. CONNELL]: So that includes Mitchell, who wrote a
23 book but is probably protected by UFI?

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1 MJ [COL POHL]: That -- that's the way -- there may be --
2 for all I know, Mr. Rodriguez and Mr. Rizzo may have UFIs
3 somewhere in their files, too.

4 LDC [MR. CONNELL]: Sure.

5 MJ [COL POHL]: But what I'm saying ----

6 LDC [MR. CONNELL]: I don't know that.

7 MJ [COL POHL]: I don't know that. I'm not saying there
8 is or isn't. I'm just saying who knows, I don't know whether
9 Mitchell does or not. But people who have self-identified
10 them, in Mitchell's case, and Rodriguez and Rizzo, for that
11 matter, you know, what I heard Mr. Groharing say, those people
12 are fair game, I mean, to go interview them. I mean,
13 understanding they have discussed classified information.

14 LDC [MR. CONNELL]: Yeah, of course.

15 MJ [COL POHL]: It works both ways, you know that. You
16 identify yourself. I'm working here. Here's what I want to
17 ask you about.

18 LDC [MR. CONNELL]: We -- I put in the declarations, we
19 have identified over 75 people who fall into these two
20 investigative prohibition categories.

21 MJ [COL POHL]: Yeah.

22 LDC [MR. CONNELL]: On none of those occasions have we
23 revealed any classified information in a nonsecure

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1 environment.

2 MJ [COL POHL]: Yeah, okay. There's that category. Then
3 there's -- the other category with the identifiers of you
4 don't know who they are, so you're -- you cannot necessarily
5 connect an identifier with a -- for want of a better -- a
6 summary of what somebody said. Okay. Okay.

7 But if you get a -- a lead from an NGO or an
8 undisclosed source to talk to somebody who may be under a UFI,
9 I'm not sure what category that is in. Are you with me on
10 this?

11 LDC [MR. CONNELL]: I am. And there's really a third
12 category, which is everybody else in the world. None of the
13 people that we have talked to -- none of those -- I'm going to
14 call it -- it's more than 75, but we're going to call it 75
15 for convenience sake, none of these 75 people fall in either
16 of those two categories. No one who has written a book,
17 Mr. Rizzo, Mr. Rodriguez, and Mr. Mitchell, et cetera, none of
18 those people have chosen to -- elected to speak with us,
19 right? We've asked, they have declined, as is their right.
20 Nor are any of the 75 people in the category of someone that I
21 know who has a UFI.

22 They are all other people who are -- and, you know,
23 lots of the CIA people have nothing to do with RDI whatsoever.

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1 Our -- we have this -- we spent the last nine months talking
2 about hostilities. The covert action and CIA activity under
3 the Clinton and Bush Administrations, if there were any, is
4 a -- is an important part of that hostilities debate. That's
5 what 509 and 513 are about.

6 The -- and so we have lots of former CIA -- and lots
7 of former CIA people went on to do something else.

8 I'm slowing down.

9 They went on to be in the Department of State; they
10 went on to be in the Department of Defense; they went on to be
11 in the FBI. You know, they -- having -- there's a lawyer who
12 interviewed for one of our attorney positions in the office
13 who used to -- has on her resume having been in the general
14 counsel's office of the CIA, who -- now, we had to cut off
15 contact with her, we can't even -- you know, I couldn't even
16 tell her why we're not even considering her job application
17 anymore.

18 You know, this prohibition is so incredibly sweeping.
19 It's not RDI-focused. Those 75 people that we're talking
20 about fall into neither of those two boxes. They fall into
21 the giant box that those two little boxes sit in.

22 MJ [COL POHL]: Back to your question about can you now go
23 talk to these people, and this kind of touches on Mr. Nevin's

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1 concern ----

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

3 MJ [COL POHL]: ---- is that once this is fully litigated,
4 okay, and it's briefed, I could be -- I'll be in the position
5 to say whether or not these restrictions are reasonable or
6 unreasonable, whether they're lawful or unlawful.

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

8 MJ [COL POHL]: Okay. Okay. But I'm in no position to
9 say, because I have no authority to, that -- that if -- that
10 these -- you can violate these restrictions and nothing will
11 happen to you. Do you understand what I'm saying?

12 LDC [MR. CONNELL]: I do, sir.

13 MJ [COL POHL]: Okay.

14 I cannot -- I mean, right now, the government, at
15 least I think last time, talked about possible criminal
16 prosecution. Of course, I think, you also got the possibility
17 of security clearance issues.

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

19 MJ [COL POHL]: I can't control that. I can't say, okay,
20 these -- these restrictions are improper and your remedy is
21 Department of Justice, ODNI, whoever is in charge of -- don't
22 you do anything to these people.

23 LDC [MR. CONNELL]: I know that, sir.

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1 MJ [COL POHL]: Okay. So my remedy would have to be
2 something else.

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

4 MJ [COL POHL]: I mean, you've asked for different remedy.
5 So -- so your question of can you go at the break and tell
6 somebody to go investigate, I would say, as we sit here right
7 now, is comply with the written guidance until we resolve the
8 issue.

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

10 MJ [COL POHL]: Because I don't want to put -- because of
11 what I just said. If you did that and they said, well, wait a
12 minute, you were told not to do that and you did it anyway,
13 therefore this guy's going to lose his clearance. Or maybe
14 not. I mean, I don't know. I mean, I, quite frankly, think
15 the likelihood of maybe that to happen. But that's not the
16 issue. The issue isn't the success of a prosecution. The
17 issue isn't the success of revoking a clearance. The issue is
18 the threat of criminal prosecution, the threat of revoking a
19 clearance, in both of which I can't control, because I don't
20 make that decision. I can't tell them -- I can't grant
21 everybody a blanket immunity. And so that's where the rubber
22 kind of meets the road in terms of your request.

23 My -- my -- you have what guidance is here in

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1 writing. What Mr. Groharing just said, in my view, is not
2 consistent with the written guidance you got in September.
3 Okay. And so I would leave it at that.

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

5 MJ [COL POHL]: Okay. Sure, Mr. Nevin.

6 LDC [MR. NEVIN]: And, Your Honor, that -- the last point
7 that you made, I thought, is a critical one. And I know also
8 that you know, but I just want to say it out loud, that your
9 power is to tell the government that way of going forward is
10 not consistent with due process, or it's not consistent with
11 the prohibition on cruel and unusual punishment, or it's not
12 consistent with the right to be represented by counsel.

13 And, therefore, if that has to stay -- if your view
14 of national security is that has to stay, I'm going to impose
15 a sanction on you. And I would think we would be heard on
16 what that sanction would be, but that is the military
17 commission's power. It's really what you did in response to
18 Change Number 1. You said we're in abatement until that's
19 rescinded.

20 And you, I think it's correct to say, recognized that
21 you were -- you may not have been in a position to say "I
22 order you to rescind that," but you said, "This case can't go
23 forward under these circumstances; therefore, it will not."

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1 And then the circumstances changed.

2 So I think on the one hand, you're exactly right when
3 you say that, and on the other, you didn't articulate the idea
4 that you do, indeed, have a very formidable remedy to
5 guarantee that the proceedings go -- go forward in a fair and
6 just way.

7 So ----

8 MJ [COL POHL]: Well, I didn't articulate that, Mr. Nevin,
9 I thought I mentioned it when I talked to Mr. Connell, saying
10 I do have my own remedies. But I got -- I understand my
11 authority or lack thereof.

12 LDC [MR. NEVIN]: Right. And so the second point I would
13 make, and I don't propose to debate these -- at this time to
14 debate these various interpretations of what the guidance are,
15 but we have had -- we have been told different things on many
16 different occasions, as the military commission knows,
17 including from the podium here. And some of what we heard
18 Mr. Groharing say -- and I don't -- I don't mean to say that I
19 don't think he made those remarks in good faith, but it
20 changes. And much of what he said was inconsistent, as the
21 military commission just said, from other -- from other
22 guidance and other remarks that have been made.

23 The third point is that just -- and I think this is

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1 also clear, but I just want to say it out loud, the guidance
2 in -- the November guidance in 525G from Mr. Trivett doesn't
3 apply to CIA -- former -- present or former CIA agents. It
4 applies to people that the government very possibly has never
5 heard of, people who may have been witnesses to things
6 happening outside or near or whatever -- the black sites or
7 wherever those -- whatever evidence there may be with
8 respect -- out there on those subjects.

9 And so the government doesn't have a stake in that,
10 nor -- nor, I submit to you, does the government have -- is
11 there a meaningful distinction between people who've made
12 themselves public as opposed to people who have not.

13 We're talking about a request -- approaching people
14 and requesting permission to conduct an interview. And the
15 idea that you tell them, in so many words, don't talk to these
16 people by saying you have to go to the Office of
17 General Counsel first, I submit that's completely
18 inappropriate.

19 But let me just back up one higher level of
20 generality and to say thank you for having this discussion. I
21 believe this is a beginning of what has to be done in order to
22 relieve this conflict. I think you can see it has
23 complication and it has a number of different facets. I don't

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1 think it's impossible to get to the bottom of it, but it seems
2 to me that by conducting this colloquy you have begun the
3 process of doing that.

4 If this conflict can be resolved with changes in the
5 guidance or in some other way, by all means, hallelujah. I
6 don't want to be conflicted. But I go back to what I said at
7 the very beginning, we need to get to the bottom of that
8 before we do anything else. Thank you.

9 MJ [COL POHL]: I understand the concern about the
10 conflict and need it to be resolved expeditiously. But given
11 the state of play right now, pending briefs, pending
12 additional guidance, it strikes to me that we can still do
13 other business this week and then hopefully resolve at least
14 the litigation piece of the conflict this week, and then issue
15 a ruling in due course.

16 So as -- if Mr. Nevin's request is basically to stop
17 everything until we do 525, the answer to that request is
18 denied, with the understanding that we're going to get to it
19 this week. It's just that it's not fruitful to get to
20 something before we don't have, quite frankly, even the
21 factual predicate fully done.

22 That being said, government, I'll take you at your
23 word that you will provide the additional guidance. And,

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1 Mr. Groharing, I also would like to -- because you've provided
2 additional guidance before, that if the September guidance is
3 changed based on our discussion today, you need to provide a
4 change in writing. If it's not, that's fine, I got it. But
5 it just -- it seems to me what you said from the podium is
6 somewhat inconsistent with at least paragraphs 5 and 6 in the
7 guidance. But if we're going to provide written guidance to
8 the defense of what they need to follow, you know, we need --
9 and it changes, they need to have that.

10 So if there is a change in the -- in that, please
11 draft the changes and provide it to the defense. I don't want
12 to put Mr. Connell or anybody else in the position of, oh, he
13 said this on the record, and then you have a piece of paper
14 that's not necessarily consistent with it. Do you understand
15 what I'm saying?

16 TC [MR. GROHARING]: Yes, Your Honor.

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

18 Okay. That being said, that brings us to 502MM.

19 LDC [MS. BORMANN]: Judge, just ----

20 MJ [COL POHL]: Yes, ma'am.

21 LDC [MS. BORMANN]: ---- an administrative matter. I'd
22 ask that Major Seeger be excused. He has other matters to
23 attend to in the office.

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1 MJ [COL POHL]: Sure.

2 LDC [MS. BORMANN]: Thank you.

3 LDC [MR. CONNELL]: Thank you, sir. With respect to
4 AE 502MM, the underlying motion was a motion for advanced
5 production of witness statements under Rule for Military
6 Commission 914, the parallel to the federal Jencks statute.

7 We argued that motion on 8 January 2018. At the
8 time, there was no controversy. The government represented
9 that it had no objection to advanced production, that it had
10 no objection to the definition of statement that is contained
11 in the Rules for Military Commission, and that it had no
12 objection to the description of the scope of the direct
13 testimony for Special Agent Perkins and Special Agent
14 Fitzgerald, although the military commission was very clear
15 with the government on that. And that colloquy between the
16 military commission and the government is found in the
17 transcript of January 8, 2018, at pages 18360 to 18364.

18 The military commission at transcript page 18367
19 directed us to memorialize that in an order and to submit it
20 to the military commission, which we did timely. The
21 government filed a response, AE 502XXX, in which they object
22 to advanced production of R.M.C. 914 material with no
23 acknowledgement of their previous position that they had no

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1 objection to advanced production of R.M.C. 914 material.

2 So I don't know what changed about their position or
3 what, but our position is the same as it was on January 8, and
4 you should enter the order.

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

6 LDC [MR. CONNELL]: Thank you.

7 MJ [COL POHL]: Trial Counsel?

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

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

11 TC [MR. RYAN]: Sir.

12 Your Honor, 502MM is now really 502RRR, which was
13 counsel's submission of a draft order as requested by
14 Your Honor last time.

15 We do not oppose the production of early Jencks. In
16 fact, it has been our policy and practice throughout the
17 course of the proceedings in this case. This one comes up, I
18 think, for the first time in the sense that counsel -- any of
19 the counsel have made a specific motion for early production
20 of Jencks material.

21 We suggest that doing so on a motion-by-motion basis
22 is not terribly efficient. I think it will end up -- since
23 we're at the early part of witness production in this case, I

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1 think it will result in an awful lot of motions being filed
2 asking for it as to every time a witness comes up for
3 testimony on a matter of concern before this commission.

4 We do not oppose, if Your Honor so wishes -- and
5 staying on RRR for the moment, Judge, as far as we are aware
6 at this moment -- and, of course, we always keep looking, but
7 as far as we are aware and in consultation with the agents, we
8 have turned over that material which we believe falls within
9 Rule of Military Commission 914.

10 Now, as far as a way forward is concerned, if Your
11 Honor wishes to enter an order regarding this -- and I would
12 understand why because it is sort of good housekeeping -- if
13 Your Honor wishes to do so, we would suggest that the best
14 practice might be if Your Honor was to enter an order for all
15 witnesses going forward from this time onward. We would ask
16 that such an order be blanket to cover all witnesses who will
17 be testifying as to all matters.

18 We would ask that the -- Your Honor's order simply
19 adopt the language that is contained in R.M.C. 914 and which
20 is a principle of law for which all prosecutors and the
21 defense attorneys are well aware.

22 We would ask that it be made appropriate and cover
23 both parties. And we would also ask that it adopts a time

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1 period. For example, counsel's asked for 30 days; I have no
2 quarrel with that, but that it asks -- but that it contains
3 some sort of proviso acknowledging that on occasion there
4 might come up a situation where, for example, Your Honor
5 orders a witness or we agree to a witness 31 days before his
6 testimony, and we find out that there's, you know, grand jury
7 transcripts all over the country and that there be some rule
8 of reason that allows us to kind of alter the deadline so that
9 we can provide it, but although not necessarily within the
10 time period that we would be agreeing to.

11 We do oppose the -- I'm sorry, defense counsel's
12 draft for a couple of reasons. First, and I'm making
13 reference, Your Honor, to 502RRR, Attachment B, the proposed
14 order. In section 3.b., this is the ruling section,
15 counsel -- that is, accused -- the accused, Ali, essentially
16 recites the rule vis-a-vis facts in this case. And although
17 it is close, it doesn't perfectly stay aligned with the
18 language in the rule itself.

19 For example, on the third line down in b., it says,
20 "authored, adopted, or approved by Special Agents Fitzgerald
21 or Perkins concerning the" -- et cetera. The actual language
22 of the statute or the rule would read instead of "authored,
23 adopted, or approved," it would read, "signed or otherwise

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1 adopted or approved." Then further in that, where it says,
2 "concerning the investigations," the actual language, I
3 believe, in the rule says "relating to."

4 Now, these might be distinctions without a
5 difference. But I would submit, Your Honor, that where the
6 rule says one thing and a court's order says another, quite
7 often differences can be found.

8 More importantly, Judge, and in the same section,
9 that is Section 3, the ruling, subsection a., which appears on
10 page 3 of Attachment B reads as follows: "Pursuant to Rule of
11 Military Commission 701(c)(1), Trial Counsel will produce all
12 communication, whether called cables, Electronic
13 Communications, or another name, between the FBI and CIA, or
14 their representatives, regarding interrogation, interview, or
15 debriefing of the accused, regardless of author, by 30 June
16 2018."

17 This -- I would suggest that this subsection is not
18 related at all to this motion or the previous motion
19 concerning the early production of Jencks material.

20 There is no mention in this section of Agents
21 Perkins -- former Agent Perkins or current Special Agent
22 Fitzgerald. There is even no mention of 914 itself. I would
23 submit, Your Honor, that any 701 argument within the course of

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1 this motion should be separated out and should be handled
2 separately.

3 To sort of emphasize that this is no small matter, I
4 will advise the commission that the phrases they use, that
5 being all communications between FBI and CIA from the time of
6 the beginning of the Rendition, Detention, Interrogation
7 program, say in 2002 and 2003, all the way through the taking
8 of the LHM statements by the FBI in early 2007, a period of a
9 good five years or so, could end up being a very large number
10 of documents having nothing to do with Agent Fitzgerald or
11 Agent Perkins or this motion.

12 As I said, we should be litigating this separately.
13 It has not been briefed as to 701 and should not be part of
14 any order from Your Honor concerning the early production of
15 Jencks material. That's all I have, sir.

16 MJ [COL POHL]: So just so long as I'm clear, Mr. Ryan, is
17 you don't object to a trial conduct order basically tracking
18 914 with a 30-day suspense, with the obvious caveat that for
19 good cause shown, the 30-day suspense can be waived?

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

21 MJ [COL POHL]: Okay. Okay, thank you.

22 Mr. Connell.

23 LDC [MR. CONNELL]: Your Honor, perhaps the replacement of

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1 one trial counsel with a different trial counsel on this
2 motion is the reason why we have such -- this is the third
3 position that we have heard.

4 But the only thing that requires -- there are really
5 only two things that require any comment out of the
6 government's argument there. The first is why a motion about
7 this issue? What's the difference between this as an order
8 in -- brought in 502MM and just a general trial conduct order?
9 I don't have any problem with a general trial conduct order on
10 any topic you choose to address.

11 But the reason for this one is that at the time there
12 was urgency surrounding the pending -- the expectation that
13 Special Agents Fitzgerald and Perkins would be testifying at
14 this hearing; and second, because I thought that there might
15 be a debate over the scope of either the definition of
16 statement, which even today the government takes no issue
17 with, or the scope of their testimony, because Special Agent
18 Perkins testified about the East Africa Embassy bombing case.
19 Special Agent Fitzgerald talked about the USS COLE case, and I
20 thought there might be a debate over what the scope of their
21 direct testimony was. There is not.

22 The -- so the language that we have chosen here is
23 appropriate, whether you want to say concerning or relating

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1 doesn't matter to me. That's not the issue. The scope of
2 the -- of what is a statement is the issue, and the scope of
3 what is the scope of their testimony is what this establishes.
4 That's the difference between this order brought in a
5 particular context, the 502 series. There's a reason why this
6 motion is a 502MM, brought in the 502 series about these
7 witnesses and personal jurisdiction, versus a separate trial
8 conduct order which you may choose to enter, if you do.

9 Now, the second argument, and this one was the most
10 astonishing, and maybe this has something to do with the
11 change of counsel, is counsel objects to the 701 language.
12 That came out of the oral argument. This order was written to
13 reflect the oral argument and what the military commission
14 said on 8 January 2017, which the point that you made to the
15 government was, isn't this material -- wouldn't you have this
16 material anyway under Rule 701, the -- and so why is 914
17 important?

18 And the government's position at that time -- it was
19 Mr. Trivett who was arguing -- but the government's position
20 at that time was, well, we don't have to identify whether
21 things are under 701 or 914, which I agree with. We have made
22 three productions in this 502 series to the government, some
23 of which is 914 material, some of which is 701 material, and

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1 we don't identify -- put, you know, asterisks by it to say
2 which is which.

3 The -- but the reason why the 701 language, is the
4 military commission's point, which was well taken, at least by
5 me, that this material should be -- have been provided under
6 701 anyway, whether it's provided under 914 or not. So that's
7 the reason for the 701 material. It actually came out of the
8 oral argument on 8 January, which I'll -- the government and
9 the military commission and I participated in.

10 MJ [COL POHL]: Okay. Anything further?

11 LDC [MR. CONNELL]: Yes. The last thing -- point that I
12 want to make is that apparently the government is abandoning
13 its position in 502XXX that there should be no advanced
14 production. We are perfectly happy with 30 days with a good
15 cause exception when it's necessary.

16 MJ [COL POHL]: Okay, thank you.

17 LDC [MR. NEVIN]: Your Honor, could I be ----

18 MJ [COL POHL]: Sure.

19 LDC [MR. NEVIN]: ---- just inquire. I took it that this
20 was a motion, application of the rule to 502.

21 MJ [COL POHL]: Right.

22 LDC [MR. NEVIN]: We are not joined to 502, and so we
23 haven't participated in the argument. If this is to be a

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1 trial conduct order that applies generally to our proceedings,
2 I request the opportunity to be heard on it after the conflict
3 that I referred to before has been resolved.

4 MJ [COL POHL]: I understand. What I would probably
5 propose is, rather than keep telling you guys to draft me
6 orders that I simply redraft myself, would be to -- would be
7 on this issue, issue a draft trial conduct order and then
8 solicit comments on it and come back. Because we're just --
9 because I believe Mr. Ryan is correct, is that going forward,
10 having something in place about -- about Jencks Act material
11 is fruitful. And like I said earlier, if it's in writing, it
12 seems to have more to say -- but if the trial conduct order
13 goes out and you need an opportunity to respond, you would be
14 given that opportunity.

15 LDC [MR. NEVIN]: Okay.

16 MJ [COL POHL]: Okay.

17 Mr. Ryan.

18 TC [MR. RYAN]: Your Honor, I'm well aware of the
19 transcript of the proceedings in regard to the previous
20 motion. As far as the -- and I'm only addressing now the 701
21 matter, because I think on Jencks 914 we're all in agreement.

22 But as to the 701 aspect, it was a quick exchange
23 between Your Honor and Mr. Connell in regard to a 701 question

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1 from Your Honor. I understand that. I do not think it is
2 correct, upon reading of this transcript that Your Honor can
3 certainly do, to say that something was decided, that all of
4 this is suddenly -- that there's a 701 determination. That
5 was not part of this motion. It was not briefed.

6 And as I said, the very, very broad language that
7 Mr. Ali proposes is unacceptable -- is an unacceptable reading
8 of this category of documents as far as discoverability in
9 this matter or anything having to do with the case as a whole.

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

11 We're going to recess for 15 minutes. Commission is
12 in recess.

13 [The R.M.C. 803 session recessed at 1020, 26 February 2018.]

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1 [The R.M.C. 803 session was called to order at 1041,
2 26 February 2018.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties again appear to be present.

5 Mr. Connell, let's talk about the processing of the
6 issue with 524/525. I think there's an easy resolution.

7 LDC [MR. RUIZ]: Judge, one quick issue?

8 MJ [COL POHL]: Yes.

9 LDC [MR. RUIZ]: Mr. Hawsawi has asked to return to the
10 camp at the earliest opportunity?

11 MJ [COL POHL]: Okay.

12 LDC [MR. RUIZ]: Can we make that happen at some point? I
13 have talked to the SJA. He said they're ready, standing by,
14 pending your approval.

15 MJ [COL POHL]: Okay. You have my approval. Do we need
16 to take a short recess while he's being escorted to the
17 holding cell?

18 LDC [MR. RUIZ]: I think so.

19 MJ [COL POHL]: Okay. Okay.

20 Well then, we'll take another short recess. And once
21 he's in the holding cell, we'll continue. And then understand
22 this clearly is he goes from here to the holding cell. Once
23 he's at the holding cell, we're going to continue with the

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1 hearing and the transportation issue is a separate issue.
2 You've got to hold off until we have an opportunity. But I'm
3 not going to wait for him to go all the way back to the camp
4 or -- while -- delay the hearing any further than this.

5 LDC [MR. RUIZ]: Okay.

6 MJ [COL POHL]: Commission is in recess.

7 [The R.M.C. 803 session recessed at 1043, 26 February 2018.]

8 [The R.M.C. 803 session was called to order at 1046,
9 26 February 2018.]

10 MJ [COL POHL]: The commission is called to order. All
11 parties are again present. Mr. Hawsawi is absent. And I --
12 based on the representation of counsel, I find that his
13 absence is knowing and voluntary.

14 LDC [MR. NEVIN]: And Ms. Leboeuf has stepped away
15 briefly.

16 MJ [COL POHL]: Okay, thank you, Mr. Nevin.

17 Mr. Connell, since I got into this kind of
18 secondhand, let me make sure I understand what happened.

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

20 MJ [COL POHL]: You submitted certain documents. My
21 office CISO had concern that it may contain classified
22 information.

23 LDC [MR. CONNELL]: I didn't know that at the time.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: That's information to me.

3 MJ [COL POHL]: Okay. And then they were returned saying
4 to you, send them over for review. Or -- because we have --
5 and then you said, well, it wasn't classified. So the issue
6 really came down to is when the -- my CISOs identify a
7 potential classification issue, what's the next step.

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

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: I'll address that. But I also have --
11 if I may approach the court reporter?

12 MJ [COL POHL]: Sure.

13 [Pause.]

14 LDC [MR. HARRINGTON]: Judge, let the record reflect that
15 Ms. Wichner has joined us.

16 MJ [COL POHL]: Okay, thank you.

17 LDC [MR. CONNELL]: Okay. Thank you, Your Honor. I have
18 provided to the parties and the military commission AE 524H
19 (AAA), which is the e-mail chain; otherwise, it's not in the
20 record what happened, the reason why I'm submitting that is.

21 And so to briefly summarize, the -- we filed what was
22 at the time 524F -- or we presented for filing 524F on 26
23 January 2018. On 7 February 2018, we received the message

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1 that the filing is not accepted by trial judiciary because it
2 requires a classification determination. On the 14th of
3 February, we re-presented it to the military commission with
4 the markings -- after we submitted it -- we submitted for
5 classification review as directed, and then we re-presented it
6 to the military commission with the markings UNCLASSIFIED
7 PENDING CLASSIFICATION REVIEW. And it really was pending
8 classification review because it's with the OCA. That was
9 rejected. And then we -- at that point, we went back on the
10 15th, had some negotiations, and learned that if we took out
11 certain language that it would be accepted. And on the 15th,
12 we re-presented it for filing, which triggers the -- under
13 your order triggers the response deadlines for 548 and 549.

14 MJ [COL POHL]: Okay. Okay. And again, the reason I want
15 to address this on the record is is that everybody wants to
16 protect classified information.

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

18 MJ [COL POHL]: And everybody -- sometimes there's a
19 difference of opinion whether it's classified or not.

20 LDC [MR. CONNELL]: Of course, sir.

21 MJ [COL POHL]: In this particular case, my CISO had a
22 concern about it, a concern that you guys did not have. But
23 that's -- that happens. And so the issue was send it to the

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1 OCA because they're the ultimate decider.

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

3 MJ [COL POHL]: And as I understand it, one of the issues
4 was, do you -- does it return to you and you send it to the
5 OCA, or do we send it to the OCA, does the CISO send it to
6 OCA? And that's kind of the way going forward. Okay. And if
7 you send it to the OCA, you have to go through what steps?

8 LDC [MR. CONNELL]: All right. Yes.

9 The -- the step that we go through -- and your
10 Protective Order #1 required the convening authority to
11 establish a procedure for classification review. The
12 convening authority established that procedure, and the
13 procedure is that we assign it a classification review number,
14 we send it -- we put a cover letter on it requesting a review,
15 double-wrap it, take it to the Office of Special Security.
16 The Office of Special Security is purely the postal carrier.
17 They do not even open the package.

18 They take it to the primary OCA, which I understand
19 that they usually start with the CIA, and then -- because they
20 have the most equities in the situation, and then if there are
21 other -- if the CIA identifies that other OCAs may need a
22 read, then it gets passed on to them.

23 So the -- you know, in your order in 478, you asked

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1 us about advising about the status of different things that
2 were under classification review. And in our response in 478,
3 we explained we don't have -- we have zero visibility on it.
4 The only thing that we can do is ping OSS, who turns around
5 and sends an e-mail to whoever their contact at the OCA is,
6 and might get a status information or might not.

7 So that process is -- once it gets -- once we hand it
8 to OSS, it is truly a black box to us. And then it comes back
9 at some point in the future with classification markings or
10 cover note with guidance or whatever.

11 MJ [COL POHL]: Okay. Now, on this -- on this particular
12 one, you submitted it to the -- through this process?

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

14 MJ [COL POHL]: Have you got an answer yet?

15 LDC [MR. CONNELL]: It's still February, sir. There's
16 no -- I mean, six months is the earliest we ever get an
17 answer.

18 MJ [COL POHL]: Okay. Well -- and again, not because we
19 necessarily agree with your reading of the regulation, okay,
20 of whose responsibility this is, the CISO submitted it to the
21 OCA themselves and -- on the 29th of January, on what I
22 understand a very short concern. And as of --

23 [Conferred with courtroom personnel.]

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1 MJ [COL POHL]: This morning, we got back that it
2 contained no classified information.

3 LDC [MR. CONNELL]: Oh, very good.

4 MJ [COL POHL]: So the reason why I say that is not --
5 first of all, it took way too long for us, but obviously it
6 can go much faster, it appears to be, than your procedure.

7 So the way to go forward on this is I -- to me, it
8 doesn't make too much difference one way or the other, but it
9 does make a difference in how we can expedite these things.
10 Now, again, make it -- make it clear, I'm going to put this in
11 writing so there will be no misunderstanding.

12 But going forward on pleadings -- I'm not talking
13 about stuff that you guys draft and you need a classification
14 review ----

15 LDC [MR. CONNELL]: Of course.

16 MJ [COL POHL]: ---- okay, I'm just talking about
17 something that is a pleading that has been filed and you
18 believe contains no classified information. And I know this
19 may raise issue with Ms. Bormann's team and their DISO status,
20 but that's another -- and what's going to go away going
21 forward would be an affirmative statement in every pleading
22 that this document that has been submitted with all
23 attachments has been reviewed by the DISO and he or she has

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1 concluded that it contains no classified information. Okay.

2 Okay. Once we get that, if my CISOs have a concern,
3 we will -- we -- they will send it to the OCA for
4 classification review.

5 LDC [MR. CONNELL]: Two comments on that, sir.

6 The first one is that's easy for us to comply with.
7 That, of course, with every pleading, the DISO is a stop on
8 the checklist and we already have initials on a checklist of
9 the DISO for that read. So putting that in an affirmative
10 statement is easy for us to comply with.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: It's nothing more than changing the
13 template for us.

14 MJ [COL POHL]: Right.

15 LDC [MR. CONNELL]: The second thing, however, is when we
16 get to 551, about how long it takes for things to get to the
17 public, this issue is going to come up. Because there are two
18 different tracks which are identified in the regulation: One
19 for documents that require OCA review, and one for documents
20 that don't require OCA review. They have different suspenses
21 which are in the regulations. They have different procedures.

22 So it makes complete sense to me that that process
23 that you're describing might help us get back on to -- get

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1 most pleadings on to the right track. So I'm going to talk
2 about it in detail.

3 So I'm not giving you a pass on whether we agree on
4 the reading of the regulation or not, because it's going to
5 become super important when we get to ----

6 MJ [COL POHL]: No, I'm not -- I'm not asking for a pass.
7 But understand what I'm talking about here, though, I'm
8 talking about a small category -- well, I think relatively
9 small -- of things that you've got reviewed and you submit a
10 pleading. I'm not talking about all this other stuff out
11 there. What I'm talking about ----

12 LDC [MR. CONNELL]: Talking about pleadings, sir.

13 MJ [COL POHL]: I'm talking about pleadings that have been
14 reviewed and submitted to my office for an AE number. That's
15 all I'm talking about. There could be a myriad of other
16 things that you need classification review on.

17 LDC [MR. CONNELL]: And you don't have anything to do with
18 those.

19 MJ [COL POHL]: We agree with that. And that's all I'm
20 talking about. I'm talking about this one little box here so
21 we don't run into this problem again, because, again, it's --
22 and I'll tell you, quite frankly, I think it took too long
23 anyway for this, and I'm going to ask the government something

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1 about that in a minute, but go ahead.

2 LDC [MR. CONNELL]: There's a second observation I want to
3 make.

4 The other -- another disagreement between my office
5 and your office is about the meaning of 17-1.c.1., which is
6 language that you put in the protective order. And the
7 language is "For all other" -- or "For all filings and orders
8 other than those filed pursuant to M.C.R.E. 505, in which
9 counsel know, reasonably should know," and there's no
10 disagreement about those, but then we come to the words, "or
11 are uncertain as to whether, the filing contains classified
12 information...counsel shall submit the filing by secure means
13 under seal with the Chief Clerk, and the filing shall be
14 marked 'Filed in Camera and Under Seal with the Chief Clerk.'"

15 The -- it happens occasionally, once in a long while,
16 that we're not sure about whether something is classified or
17 not. All right. We think the solution in that situation,
18 under both Protective Order #1 and the Rule for Military
19 Commission -- excuse me, the Regulation for Trial by Military
20 Commission, is to mark it as we believe -- as unclassified as
21 we believe, this situation -- and this is a small box. This
22 comes up a couple of times a year. Mark it -- is to submit it
23 by -- treat it as if it were classified, send it on -- mark it

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1 unclassified, but send it on SIPR or hand delivered, depending
2 on what we think the classification might be, and then it can
3 be reviewed by ordinary means if -- if our justification -- or
4 if the CISO looks at it and says, yes, yeah, I have a similar
5 question.

6 But your office, with all due respect, sir, does not
7 accept unclassified pleadings by secure means. And we believe
8 that this regulation and your protective order require, in
9 situations of which we are uncertain about classification, for
10 trial judiciary to receive pleadings that we believe in good
11 faith are unclassified occasionally by secure means. Now, if
12 later, for -- you know, making sure everything is on the right
13 system purposes, if after it's determined to be unclassified
14 they wanted us to resubmit a version of this on NIPR, that
15 would be perfectly fine with us.

16 But it -- this is the work -- this is the solution --
17 the second solution that we tried to pursue in this filing of
18 524F, what ultimately became 524G, which is, let us hand
19 deliver it, which we did, mark it unclassified. We didn't
20 mark it FILED IN CAMERA AND UNDER SEAL, we marked it
21 UNCLASSIFIED PENDING CLASSIFICATION REVIEW.

22 But treating a -- out of an abundance of caution a
23 document as classified and handling it by secure means seems

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1 to be -- not only to be a prudent solution, but also seems to
2 be required by the regulation and by your protective order,
3 which has this same language in it.

4 MJ [COL POHL]: Let me think about that one, Mr. Connell.

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

6 MJ [COL POHL]: My concern is that that's just pushing the
7 classification decision to my office instead of you guys doing
8 what you should be doing. What I'm saying is ----

9 LDC [MR. CONNELL]: Well ----

10 MJ [COL POHL]: ---- it is either, I mean, if you guys
11 submit something in good faith and say we do not believe this
12 is classified, but it might be -- I don't quite understand.

13 LDC [MR. CONNELL]: Well, so we ----

14 MJ [COL POHL]: So then -- then we're back in the same box
15 we just were in.

16 LDC [MR. CONNELL]: No, sir. I mean -- well, let us --
17 I'm willing to bracket the question of what RTMC 17-1.c.3.
18 means, because it's very specific as to order. Once a filing
19 is properly filed with the chief clerk, the CSO shall properly
20 examine it. But bracketing that for a moment ----

21 MJ [COL POHL]: Okay, I don't ----

22 LDC [MR. CONNELL]: Let's bracket that for a moment.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Just as a -- there's no prohibition on
2 filing unclassified material on SIPR, especially like when PII
3 is involved or FOUO or even particularly sensitive
4 unclassified information. We e-mail each other on SIPR all
5 the time.

6 When I contact the CSO for, you know, to
7 make drop-off arrangements or, you know -- those things
8 generally happen on SIPR. There's no prohibition of
9 unclassified information on SIPR. The reason why this is a
10 good tool in the box is one like this. And I will tell you
11 exactly the information I had. The exact information that I
12 had as of February 7, which is, this filing is not accepted by
13 trial judiciary because it requires a classification
14 determination. That is different from someone suspects that
15 there's classified information in the document.

16 Now later, after February 7, we had a meeting; we
17 came to understand what the concerns were. But at that time,
18 that was a pure process question, right? Do you have to have
19 a classification determination before you file a document? In
20 that situation, I mean, I could say, well, clearly somebody
21 thinks there's an issue here. I don't know what the issue is.
22 Somebody thinks there's an issue.

23 So out of an abundance of caution, let's treat it as

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1 if -- let's handle it, let's double-wrap it, let's mark it
2 according to -- pending classification review, and let's --
3 and let's hand deliver it to get past that problem.

4 And then if somebody believes that it has classified
5 information contained in it, then we can -- it can be
6 re-marked, as has been done in a dozen or more different
7 pleadings that have been re-marked over the course of the
8 case.

9 So having the option to follow RTMC 17-1.c.1. would
10 be very valuable and it would prevent spills, it would save
11 money, it would save all of our computers having material on
12 them show up that we don't want and having them wiped and all
13 the hassle that goes along with the spill.

14 MJ [COL POHL]: But your computer had already been
15 infected, though.

16 LDC [MR. CONNELL]: Only mine, though, sir. Not yours.

17 MJ [COL POHL]: I know it won't be mine. It takes a while
18 to get to my computer. I got other computers, so I'm with
19 you.

20 LDC [MR. CONNELL]: There's a buffer, sir. I understand.

21 But it's a good solution and it's right there in the
22 regulation.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: All right. Sir, with respect to 524G,
2 now that it's been determined, may we file the original
3 pleading without the redactions?

4 [Conferred with courtroom personnel.]

5 MJ [COL POHL]: Yeah, you can go ahead.

6 LDC [MR. CONNELL]: Do you want us to have a new AE number
7 or do you want us to do a corrected version of 524G? New?

8 MJ [COL POHL]: Just let me ----

9 LDC [MR. CONNELL]: Corrected?

10 MJ [COL POHL]: Let me check.

11 Corrected.

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

13 MJ [COL POHL]: Thank you. Trial Counsel, I do have a
14 question about this whole process.

15 LDC [MR. CONNELL]: Your Honor?

16 MJ [COL POHL]: Yeah.

17 LDC [MR. CONNELL]: This is a highly technical issue, but
18 could we turn off the display from Table 4? Table 4 was just
19 trying to show me something by this computer and instead it
20 went to everybody. So it was an attempt to, it was a good
21 try.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: But you can turn off the feed from

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1 Table 4 altogether if you would like. Thank you.

2 MJ [COL POHL]: Okay. And I understand that you're not
3 necessarily in this loop, but I have a certain amount of
4 concern here about the length of time to get a response from
5 the OCAs.

6 CP [BG MARTINS]: Your Honor, on the 524 series is a
7 different counsel, but if you want me to address ----

8 MJ [COL POHL]: No, I'm saying as a general rule ----

9 CP [BG MARTINS]: ---- as it relates to processing of
10 the ----

11 MJ [COL POHL]: ---- is that it appears that when we drop
12 stuff off -- I'm just going to tell you the process. We drop
13 it off with somebody who has got nothing to do with the
14 process and it goes into -- and I don't want to know their
15 business, I got it. It goes up there. But then it's, oh, we
16 don't know what you're talking about, and it gets -- for this
17 last one, for example, it took over -- well, it took from 29
18 January to whatever today is, 26 February, to resolve a
19 relatively simple issue.

20 Okay. I've generally not put suspenses on this
21 because, I mean, quite frankly, it could make a difference of
22 what it is. All I'm simply saying is that -- and I'm not sure
23 exactly the approach I'm going to take is, that the OCAs need

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1 to be more responsive on these things. And if they're not,
2 then I'm going to get involved in giving them suspenses and
3 telling them what to do.

4 It's just -- I understand they're busy, but we
5 can't -- these incessant -- and I'm talking about from my
6 perspective, I'm not speaking from the defense counsel's
7 perspective. It just -- it strikes to me is we want to try
8 this case but, for example, this simple issue took a month to
9 resolve.

10 CP [BG MARTINS]: Your Honor ----

11 MJ [COL POHL]: I'm not quite sure what I'm asking you,
12 General Martins, except to understand this ----

13 CP [BG MARTINS]: Well, no, I mean this is -- I concur
14 with ----

15 MJ [COL POHL]: ---- this is a continuing problem here.

16 CP [BG MARTINS]: I concur with Mr. Connell that the
17 request for relief under 551 and the pleadings in that
18 relating to Chapters 17 and 19 of the Regulation for Trial,
19 which is part of the implementation of the public trial rule
20 in 806, I agree, we kind of have to walk through the reg.
21 We're doing some things that, because of rulings you've made,
22 are a little bit outside of what's contemplated.

23 So the chief clerk, for instance, doesn't do a triage

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1 rule, which is contemplated. And you've decided you don't
2 want to have the clerk doing security things. So I understand
3 the rationale, but that causes a slightly different track to
4 be taken. I'm sure Mr. Connell and I read parts of that
5 process differently, but on that I agree.

6 And then -- and then there's this 15-business-day
7 rule that security review shall generally take 15 days.
8 That's for public filings.

9 There's -- so there's a communication between the
10 chief clerk and the security review team that I don't see. We
11 do kind of eventually figure out that something's been put
12 into the security review process and then has to come back to
13 the chief clerk for public posting when it's all the way
14 through. So we do have some thoughts on this related to ----

15 MJ [COL POHL]: But that's the 551.

16 CP [BG MARTINS]: So I think 551, although it relates
17 to ----

18 MJ [COL POHL]: Yeah.

19 CP [BG MARTINS]: ---- generally filings, I think it will
20 address some of these same issues.

21 MJ [COL POHL]: Okay. Good. Okay. Thank you.

22 That brings us to 502JJJ.

23 MTC [MR. TRIVETT]: Sir, the prosecution rests on its

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1 brief subject to your questions.

2 MJ [COL POHL]: Okay. Defense.

3 DC [MAJ WILKINSON]: Good morning, sir.

4 MJ [COL POHL]: Good morning.

5 DC [MAJ WILKINSON]: Let's talk about some statutory
6 interpretation. Military Commissions Act says you can lose
7 your right to trial by jury if you were part of al Qaeda at
8 the time of a war crime specified in the statute.

9 So the question in front of you on this one is what
10 is the meaning of this phrase "part of al Qaeda" in the act.
11 It's a question of statutory interpretation.

12 As you know, sir, the first rule in statutory
13 interpretation is you read the words in the statute. If you
14 use them in their ordinary sense and they make the meaning
15 plain, you stop the analysis there. You don't have to go any
16 further. You do what the law says. And you can look in the
17 dictionary to see the ordinary meanings of these terms.

18 There's some exceptions that don't apply here. We've
19 given you the cases, of course, including the Nashiri case
20 from the CMC; Milner v. The Department of the Navy and the
21 Supreme Court; Alston from the Court of Appeals in the Armed
22 Forces, but there are many. The rule is very old.

23 Now, last December, we talked about the plain meaning

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1 of this term and argued that being a part of an organization
2 means being a member of the organization. And now, to make
3 that clearer, we have given you some dictionaries. We gave
4 you two thesauruses, both of which say the word "member" is a
5 synonym for the word "part," and any other you check I'm sure
6 would say the same.

7 We found two others that use the word in context for
8 human beings, saying that a person can be part of a class or
9 part of a family.

10 We gave you both the shorter Oxford English
11 dictionary and a Webster's Concise saying that, generally
12 speaking, a part of something is that of which the whole is
13 composed. You put all of the parts together, you get the
14 whole, which, in an organization, would be its members.
15 And Black's Law Dictionary for the same.

16 In preparing for this argument, I found one other
17 place, which shows that when the words are used normally,
18 "part" is used as a synonym for "member."

19 MJ [COL POHL]: Go ahead.

20 DC [MAJ WILKINSON]: All right. And that is in the
21 government's reply brief in 502C. If you look at the bottom
22 of page 9 of that brief and the top of page 10, they're
23 talking about the different elements that can be used to prove

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1 personal jurisdiction. Do you need a moment that you are
2 pulling it up?

3 MJ [COL POHL]: No, I'm good. Go ahead.

4 DC [MAJ WILKINSON]: Okay. And they talk about these
5 elements and which ones do and don't have to be proved at
6 trial, noting, you know, first, the existence of hostilities
7 and engaging in hostilities and alienage and being a member of
8 al Qaeda. Actually in that paragraph they use "part" in one
9 place and "member" in another place.

10 And again, that's not because they were arguing this
11 specific issue back then, but it's when they're using the word
12 naturally, they use "member" as a synonym for the word "part,"
13 which was perfectly logical then. At that time they thought
14 they could prove that Mr. Hawsawi was a member of al Qaeda,
15 which is how they refer to him on the bottom of page 32. And
16 also in Charge I of the charge sheet, paragraph 165, back then
17 they thought they could prove he was a member. So they used
18 the language naturally and they referred to it in that way.
19 So again, in its ordinary sense, part of an organization is
20 just a member of it.

21 Now, the government, after they saw they could not
22 prove that he was a member of al Qaeda, have come back with
23 some other cases. Their approach to the meaning of the words

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1 is not to look at this statute or the meaning of it, but to
2 look at cases that interpret the authorization for use of
3 military force from 2001.

4 Now, the first thing to notice about that is the
5 authorization for use of military force doesn't contain the
6 word "part" and doesn't mention al Qaeda.

7 Instead, it gives the President very broad authority
8 to use force against nations, organizations, or persons,
9 individuals that he determines had something to do with 9/11
10 or helped other people who had something to do with 9/11. And
11 that is much broader than the term you see in the Military
12 Commissions Act, which simply says "part of al Qaeda" and
13 stops there.

14 That's logical because it leads to a different
15 problem. The authorization from use of military force is in a
16 different area of law. It's discussing targeting and
17 especially security detention. That's where it's been used in
18 these cases.

19 Per Lee v. Madigan, which we have talked about in a
20 couple of briefs, both in 502E and 502KKK, that -- that tells
21 us that in the realm of security detention, which traces back
22 at least to Ludecke v. Watkins, the political branches have a
23 lot of authority and they get a lot of deference. In the area

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1 of military criminal jurisdiction, especially in a capital
2 case, as they mention in Lee v. Madigan, they don't get that
3 kind of deference.

4 So the government is inviting you to use different
5 cases interpreting a different statute with different language
6 that falls into a different area of law. That's not correct.

7 And this is even clear when you look at some of the
8 language that they quote in those cases. Since, say, in the
9 Awad case, they talk about whether it would be lawful to
10 detain a person who was shooting at U.S. forces without a
11 question of whether he falls inside the command structure of
12 al Qaeda. For security detention, that might make sense, but
13 this isn't that area.

14 They also talk about someone, and that is in the
15 Barhoumi case, saying that being on an affiliated roster might
16 be enough. That might work since under the AUMF, it's not
17 about being just part of one specific organization, but it's a
18 much broader term.

19 There's another problem related to using those cases,
20 and that is the fact that, if you look through them, starting
21 at least with Bensayah, they make a lot of factual assertions
22 related to al Qaeda saying, for example, that it was
23 amorphous, or that in the past they may have had a command

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1 structure; now, they may not, nobody really knows and so
2 forth.

3 None of those factual assertions in those cases got
4 into the record of this case. The government didn't present
5 evidence of any of those things here. And the general rule is
6 that you do not take facts out of a prior case and simply
7 insert them here unless they're properly brought.

8 MJ [COL POHL]: Is it a functional analysis of whether or
9 not an individual is a part of al Qaeda?

10 DC [MAJ WILKINSON]: No, sir. Because when you use the
11 term in its normal sense, that a part of al Qaeda is a member
12 of al Qaeda, then it's a factual question, how does someone
13 become a member of al Qaeda.

14 Now, if al Qaeda had had a practice that said anybody
15 who shows up and done something is one of us, that's one
16 thing. But there was no such evidence presented at the
17 hearing. And, in fact, the only evidence that was there ----

18 MJ [COL POHL]: Well, that's not my question. My
19 question is ----

20 DC [MAJ WILKINSON]: Yes, sir.

21 MJ [COL POHL]: ---- is -- is you say it's not a
22 functional analysis, which when I'm saying functional
23 analysis, that would be -- you look at the person's -- what

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1 the person does in relationship to the al Qaeda organization.

2 DC [MAJ WILKINSON]: Yes, sir.

3 MJ [COL POHL]: You say it's not a functional analysis, so
4 what kind of analysis is it? Whoever gets a membership card?

5 DC [MAJ WILKINSON]: Well, it's membership, however that
6 was practiced by al Qaeda.

7 MJ [COL POHL]: So then it is a functional analysis.

8 DC [MAJ WILKINSON]: Al Qaeda did not, according to any
9 evidence that we had last December, determine its membership
10 just by means of what you did. In fact, we showed you several
11 examples where they did not.

12 For example, one of the people who drove the truck
13 bomb in one of the embassy bombings gave a 302, gave his
14 testimony, and he said, you know, "No, I was never a member of
15 it." If I remember, he didn't even know what it was. But he
16 said, "Nonetheless, I did this for them, but that did not make
17 me one of them."

18 The fellow who volunteered to assist with the COLE
19 bombing by filming it was very clear, "I'm not a member of any
20 organization. I don't have any leader except the scholars of
21 Islam. But nonetheless, you know, I know some people who were
22 members. I'm not one."

23 MJ [COL POHL]: So if this person -- let's take the COLE

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1 bombing person ----

2 DC [MAJ WILKINSON]: Yes, sir.

3 MJ [COL POHL]: ---- because it's not this case. If this
4 person says, I'm not a member of al Qaeda, I'm not part of
5 al Qaeda, I'm none of this stuff, but I'm taking this film on
6 behalf of al Qaeda's attack on the COLE ----

7 DC [MAJ WILKINSON]: Yes, sir.

8 MJ [COL POHL]: ---- he would not be part of al Qaeda.

9 DC [MAJ WILKINSON]: That is correct.

10 MJ [COL POHL]: Okay.

11 DC [MAJ WILKINSON]: You know, with the AUMF and its
12 language it's another story, but it's different language.

13 And as I think I've already mentioned in
14 Lee v. Madigan, when they talked about these separate areas of
15 law, security detention under Ludecke and the cases that
16 descend from Ludecke, which includes all of the government's
17 cases, do not use cases in that area to interpret language in
18 this area, even if you've got separate statutes using the same
19 words.

20 I believe in Lee v. Madigan, the words were "time of
21 peace." But they said, look, here's one statute that talks
22 about security detention, here's another that talks about
23 military criminal jurisdiction. Don't use those cases to

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1 determine this, even with the same language. Here we don't
2 have the same language. So those cases have nothing to do
3 with it.

4 Again, the plain meaning of the words in their
5 ordinary sense answers the question. And per U.S. v. Carter,
6 when the plain meaning answers the question, you can stop your
7 analysis right there. You don't have to go further. You
8 don't have to try to psychoanalyze Congress. I think U.S. v.
9 Carter was very specific about that. You simply use what the
10 words mean in ordinary language.

11 Now, if you were going to go beyond the plain
12 meaning, you run into other rules that come up in these cases
13 that would militate in favor of a narrow reading of the term
14 "part" instead of in the very broad one that the government
15 would like.

16 In particular, I notice the language in Reid v.
17 Covert, also from the Supreme Court. It says, "Under the
18 grand design of the Constitution, civilian courts are the
19 normal repositories of power to try persons charged with
20 crimes against the United States." By way of contrast, the
21 jurisdiction of military tribunals is a very limited and
22 extraordinary jurisdiction. At most, it was intended to be a
23 narrow exception to the normal and preferred method of trial

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1 in courts of law.

2 Lee v. Madigan cites to that. It also cites to
3 United States ex rel. Toth v. Quarles, to Duncan v.
4 Kahanamoku, and others that give very similar language to the
5 effect that, under the constitutional scheme, very much
6 civilian courts are favored for criminal actions. That goes
7 back at least as far as the language we have often quoted you
8 in Ex Parte Milligan that no part of the judicial power of the
9 United States belongs to military tribunals. It belongs to
10 the Article III courts. That's, of course, quoted in Hamdan
11 v. Rumsfeld.

12 I think you may see also from this that this
13 entire -- this general rule that disfavors a broad reading in
14 favor of military jurisdiction is a special case of an even
15 broader rule that you always interpret statutes to try to
16 avoid any conflict with the Constitution or also international
17 law.

18 Because whenever you give jurisdiction to a military
19 tribunal, you're at least creating some issue with Article III
20 of the Constitution, which says that the trial of all crimes
21 shall be by jury and also with the separation of powers.

22 So with respect to that general rule, look again at
23 what the government was arguing to you back in December. They

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1 said, if you see Mr. Hawsawi walk down the hill with the
2 leader of al Qaeda, if you see him say hello in a friendly
3 way, that's enough. That makes him part of al Qaeda.
4 According to them, that's enough to take away your right to
5 trial by jury, your Miranda rights, maybe other trial rights,
6 too.

7 Obviously, that one is wrong. If Congress made it
8 that easy for people to lose their rights, they'd be violating
9 all kinds of personal rights under both the Constitution and
10 international law. Talk to the wrong person, say hello, no
11 trial by jury for you. That doesn't work. Due process
12 prohibits any statute that is so standardless that it invites
13 arbitrary enforcement. If you start reading the word "part"
14 the way they want you to read it, that would indeed be
15 standardless and would invite extremely arbitrary enforcement.

16 If you establish this forfeiture by association,
17 forfeiture of rights by association, note also nobody was
18 saying on or before 9/11, meaning that you would be creating
19 an ex post facto forfeiture of rights and also violating the
20 principle of legality under international law.

21 One issue that you brought up sometimes last year was
22 the possibility of saying, well, this statute was really
23 designed to make sure that Khalid Shaikh Mohammad and his

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1 fellow accused would be tried in a commission, would not get
2 trial by jury, maybe even be convicted; if you start treating
3 it as targeted individuals and say I'm just going to bend the
4 language against those individuals, if you did that, you would
5 be turning it both into a bill of attainder and also into
6 another problem with the separation of powers, because it
7 would be putting Congress into the judicial business of
8 deciding who has what rights and who belongs in which court
9 instead of the judiciary.

10 And as we've quoted to you from the case law, you're
11 supposed to consider potential constitutional problems, not
12 just an actual one. That's why we haven't gone into the full
13 analysis of every one of these issues, because the doctrine is
14 you're supposed to avoid those issues when you can simply by
15 the way you read the statute. That's precisely what the
16 Supreme Court noted it was doing in Lee v. Madigan when it
17 gave a narrow reading to that language and put the case into
18 civilian court. It said by doing this, we have avoided some
19 serious issues there involving separation of powers and so
20 forth.

21 I note one other doctrine, which is an international
22 law, including the law of war, and we've given you a Yugoslav
23 Tribunal case on it, is the principle of individual guilt, the

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1 idea someone is to be punished, is to lose rights based on
2 what he does individually, not simply based on whom he's
3 associated with or what he thinks. The best way to avoid all
4 of these conflicts is simply -- is simply by interpreting the
5 language according to its plain meaning, and under which
6 Mr. Hawsawi would not be part of al Qaeda.

7 Because, as I think I mentioned a little while ago,
8 the question of how does a person become a member of al Qaeda
9 is a factual question. Congress did not create any standard
10 for that, nor did they have a reason to because it's al Qaeda
11 itself that would determine how does somebody join it. Is it
12 easy or is it hard or what is it?

13 And when it came to that, last December, the
14 prosecution, as I remember, provided nothing at all. We
15 provided some 302s, one from an admitted al Qaeda member, and
16 several others from people who never joined al Qaeda, though
17 they furthered its aims in one way or another.

18 And the evidence we showed, I'm not going to go
19 through it in detail because it's beyond what this is about,
20 but it showed that it was a very small organization. It only
21 recruited a few people into its ranks, that you had to take
22 some kind of oath before you joined, and it showed people
23 could train in the camps and take part in operations without

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1 joining or being part of the organization.

2 MJ [COL POHL]: So if an individual conducted an operation
3 on behalf of al Qaeda but didn't take an oath, they would not
4 be part of al Qaeda?

5 DC [MAJ WILKINSON]: That's correct, sir. He would not be
6 a member; he would not be a part.

7 MJ [COL POHL]: So the membership criteria is whether you
8 take an oath to Usama bin Laden?

9 DC [MAJ WILKINSON]: Well, that was part of what the
10 evidence tended to show. I don't think a complete case of that
11 was put on. But the government had to -- if it's broader than
12 that, it was up to the government to prove that it was broader
13 than that. They didn't do it.

14 MJ [COL POHL]: Okay.

15 DC [MAJ WILKINSON]: And the evidence did show also that
16 Mr. al Hawsawi, the man who would most know if he was a member
17 or not, said he was not a member and he didn't take an oath.

18 So the last thing that I'll ask is that now that
19 we've gone several months past the hearing because of the
20 government's supplements and that hearing was delayed because
21 of things back in the summer, I don't ask you to rush your
22 analysis. I do ask you to give it a reasonable priority.

23 I'll note three days from now will be the 15th anniversary of

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1 Mr. al Hawsawi's arrest with no trial or resolution. It's
2 high time to make an end to the case. Thank you, sir.

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

4 Trial Counsel, do you wish to respond?

5 LDC [MR. CONNELL]: I'm sorry, sir. We also had a
6 brief ----

7 MJ [COL POHL]: Okay, I'm sorry, Mr. Connell. Go ahead.

8 LDC [MR. CONNELL]: Your Honor, we think that
9 Mr. al Hawsawi makes a powerful argument for membership as a
10 synonym for part of, but we part company with them with
11 respect to the functional versus nonfunctional analysis, and
12 whether plain language or "part of" as a term of art under the
13 law of war controls.

14 So we know that the D.C. Circuit has told us that
15 being part of al Qaeda is a functional analysis, but that begs
16 the question of: What function? And the law of war answers
17 that question. An individual is a part of al Qaeda under
18 10 U.S.C. 948a(7)(C) if he or she performed a -- and this is a
19 term of art, "continuous combat function on behalf of
20 al Qaeda."

21 Let me explain how we know that this is what "part
22 of" means in the personal jurisdiction statute. The phrase
23 "part of" was not written -- was not invented by Congress in

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1 the Military Commissions Act of 2009; rather, it's a term of
2 art within American jurisprudence on the law of war introduced
3 by the Supreme Court in Ex Parte Quirin during World War II.
4 In the particular context "part of," that phrase, describes an
5 individual who is fully enmeshed in the armed forces of the
6 enemy.

7 Now, Quirin, of course, was a state actor versus
8 state actor war in World War II, but the nonstate actor of the
9 Confederate States of America was similarly described in
10 Milligan. So I think that the "part of" phrase has a
11 particularly powerful application here and a particularly
12 powerful pedigree.

13 In Ex Parte Quirin, the Supreme Court emphasized the
14 association with the armed forces of the enemy in upholding
15 military commissions personal jurisdiction over Quirin. There
16 the -- the Supreme Court distinguished Ex Parte Milligan, the
17 other main most prominent precedent, on the basis that Quirin
18 was, and I'm quoting here, "part of or associated with the
19 Armed Forces of the enemy," whereas Milligan was merely a
20 terrorist conspirator. He was, and I quote again, "not a part
21 of or associated with the armed forces of the enemy, and
22 therefore, not a belligerent subject to trial by military
23 commission." That's at page 45 in the Quirin case.

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1 Quirin and his co-conspirators were trained by German
2 military intelligence to be saboteurs, were supplied by the
3 German government with sabotage equipment, were transported on
4 German Navy submarines to the United States, were dressed in
5 German Marine infantry uniforms, or parts thereof, when they
6 landed in the United States, and were operating under orders
7 of an officer of the German High Command of the Armed Forces.

8 It makes a lot of sense why the Supreme Court
9 determined that Quirin was part of the armed forces of the
10 enemy, and that Milligan, who was a civilian terrorist, was
11 not part of the armed forces of the enemy; that is, the Army
12 of the Confederate States of America.

13 MJ [COL POHL]: What was Milligan's connection to the
14 Confederacy, anything?

15 LDC [MR. CONNELL]: His connection was that he was a
16 supporter, that he was stockpiling arms for an insurrection in
17 Indiana in support of the Confederate States of America, and
18 that he was part of the Order of the Sons of Liberty, which
19 was a terrorist organization dedicated to the overthrow of the
20 United States and the extension of jurisdiction of the
21 Confederate States of America over Indiana. He did not have
22 any connection to the armed forces -- to the Confederate
23 States of America army, to the Army of Northern Virginia.

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1 MJ [COL POHL]: Again, if he had -- when he was
2 stockpiling these weapons, if he actually transferred them to
3 the Confederate States, would he then become part of the
4 Confederacy, if he actually gave it to them? Do these
5 activities -- he philosophically supported the Confederacy and
6 that's all you got and all those other activities he's on his
7 own, but if he takes those arms he stored -- stored and gave
8 them to the Confederacy, would he then now have evolved into
9 being part of the Confederacy?

10 LDC [MR. CONNELL]: No, not on that fact alone, because we
11 have lots of arms suppliers cases. You know, arms suppliers
12 are in some ways under the law of war a special case that are
13 dealt with under the law of war, especially blockade runners.
14 This is the issue that came up substantially during the Civil
15 War as well as otherwise. But it's not simply supplying arms,
16 selling arms to the enemy. When the United States prior to
17 Pearl Harbor was involved in the lend/lease program with Great
18 Britain, that did not make the United States part of the war
19 with Germany simply because they were supplying destroyers to
20 the U.K.

21 I'm slowing down. The law of war makes me excited.

22 So the -- so arms suppliers by itself does not make a
23 person part of the armed forces of the enemy, if that answers

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1 that question.

2 MJ [COL POHL]: Go ahead.

3 LDC [MR. CONNELL]: And there are lots of examples of
4 that. I mean, employees at Boeing are not part of an armed
5 conflict in another part of the world simply because Boeing
6 products are supplied to one or both sides involved in that
7 conflict.

8 The -- so it's not supplying arms that -- but it's
9 the attach -- if -- if Milligan had been acting under orders
10 of the Confederate States of America, we would have a very
11 different situation. Because we know that he had intent to do
12 harm to the United States of America.

13 MJ [COL POHL]: So if some confederate guy goes up --
14 confederate guy -- goes up to Milligan and says, "Hey, go get
15 us some arms," then he becomes -- then he gets the arms and
16 returns them, if there's some interaction between the two
17 entities other than just a one-way delivery of arms, that may
18 change the analysis?

19 LDC [MR. CONNELL]: It might -- that would be a factor in
20 the analysis, right. These are clearly fact-based analysis
21 and -- and the Supreme Court made that clear in Milligan.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: It went in some detail -- especially

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1 the concurrence, it went through in some detail the facts that
2 connected what a terrorist Milligan was and a terrorist who
3 was acting against the United States in an act of ongoing war
4 versus the facts that are very clearly analyzed in Quirin.

5 The -- you know, the -- and I'm not going to go too
6 far down this path, but the use of irregulars by both sides in
7 the Civil War was actually regulated under the law of war. I
8 mean, the Confederate States of America actually had
9 a partisan act where they -- they -- Mosby's Raiders -- I'm
10 from Fairfax, Virginia, Mosby's Raiders being the most famous.

11 But there were a number of irregular units that were
12 regulated under the law of war. So it is possible if you are
13 fully enmeshed with the armed forces of the enemy for even
14 irregulars to fall under the law of war. But, you know, just
15 sort of terrorists often in the Order of the Sons of Liberty
16 running around in Indiana is not fully enmeshed with the armed
17 forces of the enemy.

18 MJ [COL POHL]: Got it.

19 LDC [MR. CONNELL]: There's one other case on that, it's
20 not nearly as well known as Quirin, but it's In Re Territo at
21 156 F.2d 142, a 9th Circuit case from 1946. It was an Italian
22 who had been captured. And Territo is one of the only
23 cases -- only pre-war on terror cases interpreting Quirin, and

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1 it talks about that Territo was part of the enmeshed with the
2 armed forces of the enemy, because he was associated with the
3 military arm of the enemy government and acted with its aid,
4 guidance, and direction, and was thus a belligerent.

5 So that's the -- that's the World War II state of
6 origin of the use of the word "part of."

7 The next application of the use of "part of" in the
8 law of war in the United States was in Hamdi v. Rumsfeld. And
9 in Hamdi, the Supreme Court adopted the government's argument.
10 It's even in quotes in the opinion, it's straight out of the
11 brief, that its detention authority was limited to individuals
12 who are -- and this is a quote again -- "part of or supporting
13 forces hostile to the United States and engaged in an armed
14 conflict against the United States."

15 Now, that decision out of Hamdi, which was the
16 Bush -- second Bush Administration's position on detention
17 authority, got broken out later differently in Military
18 Commissions Act of 2006. But in Military Commissions Act of
19 2009, those two pieces got broken out separately.

20 The first piece, "part of" became 948a(7)(C), the --
21 what we're dealing with interpreting right here, and the
22 "supporting forces hostile to the United States" became
23 948a(7)(B), which is material support. The -- which were the

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1 definitions of enemy combatant in 2006 and belligerent in
2 2009.

3 The challenge for this military commission is not
4 defining "part of," because "part of" is fairly well defined
5 in the American law of war. It's defining "part of" in the
6 context of a noninternational armed conflict. A little bit
7 closer to the situation in -- in the Civil War, although the
8 United States chose to treat the Confederacy after -- after
9 April of 1861 as a belligerent.

10 So -- but the good news is that the parameters of how
11 you assess being part of a nonstate actor in a
12 noninternational armed conflict have already been addressed in
13 the context of targeting, which is not entirely coextensive
14 with detention, but it's awfully close.

15 And with individuals in a non -- associated with a
16 nonstate actor like al Qaeda or another group who perform a
17 continuous combat function, they are continuously targetable
18 if they are part of an enemy force.

19 So that -- that principle was established by the ICRC
20 in its guidance on direct participation in hostilities to help
21 its -- to help states determine when we're dealing -- when
22 we're fighting terrorists, who can we kill? That's the
23 question, right? Who can the United States target when

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1 they're not dealing with a state actor. We're not fighting
2 Syria, for example, we're fighting al-Nusra.

3 If we're fighting a nonstate actor, who can we target
4 whether they have a gun in their hand or not. That's what
5 continuous combat function means and targeting capability is.
6 It means that a state actor can kill them lawfully under the
7 law of war whether they are at that moment acting hostilely or
8 not. And so because nonstate -- members of nonstate actors
9 infrequently wear uniforms or insignia, the ICRC uses the
10 functional approach. What is the function of the person
11 within the organization?

12 And the guiding principle is drawing an analogy
13 between state armed forces and nonstate armed groups
14 between -- so how much is the person like a soldier? The ICRC
15 reasons that an individual whose association to an organized
16 armed group is analogous to the soldiers' relationship to a
17 state's armed forces should be continuously targetable.

18 The -- that's what "part of" means in the context of
19 a nonstate actor in a noninternational armed conflict, which
20 is what we're dealing with here.

21 So a person ----

22 MJ [COL POHL]: When you say soldier, or performing as a
23 soldier, that would include providing logistical support ----

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1 LDC [MR. CONNELL]: It might.

2 MJ [COL POHL]: ---- not just people that -- that carry
3 guns?

4 LDC [MR. CONNELL]: It's not just people that have -- but
5 let's -- let's examine that in the context of a state actor
6 for a second, and then we'll use the analogy to nonstate
7 actor, all right? Colonel Thomas and I in this area have
8 essentially the same job. All right? We're lawyers. We
9 don't carry guns. We show up here.

10 If we were at war with Cuba, Colonel Thomas would be
11 continuously targetable, because he is a member of the state
12 armed forces. I would not be continuously targetable because
13 I am a civilian. And unless I pick up a gun and directly
14 participate in hostilities or change my role to that of a
15 continuous combat function -- contractors aren't an issue
16 under the law of war, right -- then I would not be
17 continuously targetable.

18 So even though Colonel Thomas in a state armed force
19 situation is providing -- is operating in a noncombat role, he
20 is continuously targetable, as are you, sir. Sorry about
21 that.

22 The -- the situation -- they take an analogy to
23 the -- to the situation with nonstate actors. And this is

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1 where we're trying to map a state actor concept onto nonstate
2 actors, which is what ICR -- which is exactly what ICRC is
3 trying to do.

4 Every third party national here on Guantanamo is not
5 targetable simply because they drive a truck from point A to
6 point B, which is logistical support. Simply because they
7 drive the truck or drive the barge or take the garbage out on
8 a different barge, providing logistical support does not make
9 them targetable for a state actor.

10 Taking the same analogy to a nonstate actor, a person
11 could provide logistical support as part of a continuous
12 combatant function. You know, person is working close to the
13 front, person is taking ammunition to the front, person is
14 loading -- loading material directly in support of the
15 hostilities, the combatant function. That could be continuous
16 combatant function even if they don't have a ----

17 MJ [COL POHL]: What about supporters away from the
18 battlefield?

19 LDC [MR. CONNELL]: The farther you get from a
20 battlefield, the farther you get from ----

21 MJ [COL POHL]: Somebody who were to provide financial
22 support directly to al Qaeda, for example, to -- for purposes
23 of the al Qaeda mission.

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1 LDC [MR. CONNELL]: The farther you get from the
2 battlefield ----

3 MJ [COL POHL]: Yeah.

4 LDC [MR. CONNELL]: ---- the farther you get from a
5 continuous combatant function.

6 Now, taking it -- this is not a bright line.

7 MJ [COL POHL]: Which now has become a discussion of how
8 big is the battlefield.

9 LDC [MR. CONNELL]: That is part of the discussion.

10 MJ [COL POHL]: I mean, is targeting members of al Qaeda
11 in Yemen part of the battlefield?

12 LDC [MR. CONNELL]: The -- it depends if the violence in
13 Yemen has arisen to the level of hostilities or not.

14 So the position of the United States in the al-Awlaki
15 DoJ opinion, so this is, you know, an opinion ----

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: ---- within the Executive Branch --
18 this has not been tested, but it does have some useful
19 information into it -- said that Yemen had risen to the level
20 of hostilities. We know that earlier, that President Clinton
21 had said that the situation in Yemen had not risen to the
22 level of hostilities.

23 So "battlefield" is not a term of art in the law of

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1 war, but in the colloquial sense that you are using
2 "battlefield," whether an area is a battlefield or not, the
3 technical application of the law of war to that is, has the
4 violence in that area arisen to the level of armed conflict to
5 hostility ----

6 MJ [COL POHL]: What if al-Awlaki ----

7 LDC [MR. CONNELL]: ---- which is determined by the
8 organization and intensity.

9 MJ [COL POHL]: What if al-Awlaki was not in Yemen, he
10 wasn't in a place of an active conflict? Therefore, he's no
11 longer targetable? Is that -- I mean, you keep saying there's
12 hostilities in Yemen, therefore, al-Awlaki was targetable.

13 LDC [MR. CONNELL]: No, no, that's not what I'm saying at
14 all, sir. You asked me about battlefield, sir, and I was just
15 answering. I was just -- you know, we were warned earlier in
16 the case about taking too much from one area and, you know,
17 analogies are dangerous.

18 But I don't want to say -- I was just answering the
19 battlefield question. That's ----

20 MJ [COL POHL]: But my point being is how -- you said
21 continuous combatant mission ----

22 LDC [MR. CONNELL]: Function, yes, sir.

23 MJ [COL POHL]: ---- functional under the battlefield and

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1 I'm saying is how far away can you be and still be targetable?
2 Of course, you are talking about targeting here so it's not
3 necessarily right on point.

4 But my point is that you could have people far away
5 from the battlefield sitting in countries that aren't in
6 conflict of anything ----

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: ---- and they certainly could still be
9 part of al Qaeda, depending on what they functionally do.

10 LDC [MR. CONNELL]: Yes. Let's use the state -- let's use
11 the state actor analogy just for the same and then we'll move
12 to the al Qaeda example. So for the state actor analogy,
13 Colonel Thomas is -- let's say the United States is at war in
14 Cuba. We're not here at Guantanamo Bay, we're not here at
15 this front between us in Cuba. Colonel Thomas is in our
16 office in Virginia. Is he targetable there even though he is
17 far away from the front of the U.S. and Cuba? Yes. Because
18 in a state actor situation, the enemy soldiers, the armed
19 forces of the enemy are targetable in any place at any time
20 under any method which is allowable by the law of war. So
21 distance from the front doesn't matter in the state actor
22 situation, and it's certainly not -- I'm not suggesting at all
23 that it's controlling in the nonstate actor. You asked me

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1 about battlefields and I was -- you know, whether Yemen was a
2 battlefield or not, so I was addressing hostilities in Yemen.

3 MJ [COL POHL]: I got it.

4 LDC [MR. CONNELL]: The question with al-Awlaki, and the
5 reason why al-Awlaki is a -- the analysis in al-Awlaki is the
6 same analysis that we are proposing here. Why it's such a
7 strong analogy for -- such a strong support for us is that
8 they analyzed, or the advisor to the President analyzed the
9 combatant -- the function that al-Awlaki served within
10 al Qaeda. And it was not the fact that al-Awlaki was a
11 supporter of al Qaeda or -- it was that he was an operational
12 leader in the chain of command in al Qaeda in the Arabian
13 Peninsula that made him targetable. That was the key factor.
14 But that he served in a continuous combatant function that is
15 directing troops that was analogous to a soldier in a state
16 actor situation.

17 And that actually brings us to, you know, the
18 government here, with due respect to them, sometimes take
19 short-term positions for litigation advantage that are not
20 consistent with the broad U.S. Government positions. But in
21 addition to the al-Awlaki reasoning, the DoD Law of War Manual
22 adopts this part of the ICRC guidance, in that it states that
23 "Like members of an enemy state armed forces, individuals who

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1 are formally or functionally part of a nonstate armed group
2 that is engaged in hostilities may be made the objects of
3 attack."

4 That is the function part ----

5 MJ [COL POHL]: What page is that on out of the manual?

6 LDC [MR. CONNELL]: In the manual, it is Section 5.8.3, in
7 the Law of War Manual.

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

9 LDC [MR. CONNELL]: Thank you.

10 In order to determine what a functional approach
11 means, one has to define the function. And in the nonstate
12 actor, the continuous combat function is the function which is
13 served by the law of war as the critical function, the analogy
14 to the formal members of a -- of an armed force that would be
15 enemy to the United States. The same situation applies in a
16 nonstate -- noninternational armed conflict context.

17 So I'm happy to answer any other questions, but our
18 position is laid out well in the briefs, and there's good
19 support for it within the law of war.

20 MJ [COL POHL]: I have no further questions. Thank you.

21 LDC [MR. CONNELL]: Thank you.

22 MJ [COL POHL]: Trial Counsel, do you wish to add
23 anything?

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1 MTC [MR. TRIVETT]: Subject to your questions, sir.

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

3 DC [MAJ WILKINSON]: Sir, may we add a word or two in
4 response to that?

5 MJ [COL POHL]: Response to what?

6 DC [MAJ WILKINSON]: To what Mr. Connell said.

7 MJ [COL POHL]: Briefly.

8 DC [MAJ WILKINSON]: In that case, I'll cut it to three
9 points.

10 MJ [COL POHL]: Okay.

11 DC [MAJ WILKINSON]: Firstly, to mention that the law of
12 targeting, like the law of security detention, is not the same
13 area of law as military criminal jurisdiction so that one
14 shouldn't be used to read the other.

15 I should also say, Mr. Connell made a very good
16 point. If you want a functional analysis for putting someone
17 in front of a military commission, look at the first two parts
18 of the standard that we have been talking about. Engaging in
19 hostilities is a functional thing; providing purposeful and
20 material support is a functional thing; but membership, that
21 is not.

22 And finally I'll add, in looking at the sort of
23 language that Congress might have used in writing this -- in

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1 writing the statute, they said -- there's no indication that
2 they went to targeting law or to security detention to write a
3 criminal jurisdiction statute, there's the Supreme Court that
4 says not to do such a thing.

5 And Hamdi and Quirin both do not simply limit you to
6 "part of," they'll say "part of" or "supporting" or
7 "associated with" which again indicates that, in normal
8 language, "part of" is a good bit narrower. That's all, sir.

9 MJ [COL POHL]: Thank you.

10 That brings us to 509, but I'm not sure where we're
11 at with 509.

12 Mr. Connell, I believe this is your motion to get a
13 memorandum of notification. And the government, I believe --
14 what's the status of ----

15 LDC [MR. CONNELL]: [Microphone button not pushed; no
16 audio].

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: Sir, with respect to AE 509, at the
19 last hearing, the military -- excuse me, the prosecution
20 advised us that they had a 505 motion pending. Probably, I
21 believe, that is AE 542. And the -- if the military
22 commission has acted on it, I haven't seen an order, and
23 certainly the government has not provided the additional

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1 discovery to us yet. We're willing to wait on 502 until we
2 see the discovery that they do provide to us that's
3 responsive.

4 MJ [COL POHL]: 502 or 509?

5 LDC [MR. CONNELL]: I'm sorry. 509, sir.

6 MJ [COL POHL]: Okay.

7 LDC [MR. CONNELL]: 509, I believe -- and, you know, these
8 things are opaque to me, but I believe that the 505 is 542.

9 MJ [COL POHL]: Trial Counsel, is the 505 process still in
10 the process?

11 CP [BG MARTINS]: It is, Your Honor.

12 MJ [COL POHL]: Okay. Okay.

13 So that's -- so we're -- you need to get that before
14 we go back to 509?

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

16 MJ [COL POHL]: Okay. Got it. Thank you.

17 LDC [MR. CONNELL]: I'm waiting, because 513 is going to
18 be -- I'll explain the same thing about 513.

19 MJ [COL POHL]: Okay. 513.

20 LDC [MR. CONNELL]: AE 513 is our motion for information
21 on covert action that the United States may or may not have
22 planned or taken in the lead-up to 9/11. The government
23 advised us at the last hearing that it has a 505 motion

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1 pending with the military commission. I believe, with due
2 humility, that that motion is probably 542A, and we're in the
3 same situation of waiting for production of discovery.

4 MJ [COL POHL]: Is this the same response?

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

6 MJ [COL POHL]: Okay. Okay. Got it. Thank you.

7 Okay. We'll go ahead and we'll break for lunch and
8 reconvene at 1315. The commission is in recess.

9 [The R.M.C. 803 session recessed at 1153, 26 February 2018.]

10 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1323,
2 26 February 2018.]

3 MJ [COL POHL]: The commission is called to order.
4 Trial Counsel, any changes since we recessed in personnel?

5 CP [BG MARTINS]: Good afternoon, Your Honor. No.

6 MJ [COL POHL]: Mr. Nevin?

7 LDC [MR. NEVIN]: No, Your Honor.

8 MJ [COL POHL]: Ms. Bormann?

9 LDC [MS. BORMANN]: No changes, Judge.

10 MJ [COL POHL]: Mr. Harrington?

11 LDC [MR. HARRINGTON]: No change, Judge.

12 MJ [COL POHL]: Mr. Connell?

13 LDC [MR. CONNELL]: No changes.

14 MJ [COL POHL]: And Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, Lieutenant Commander Furry has
16 joined us.

17 MJ [COL POHL]: Okay. I'll note for the record that the
18 document that was referred to as 525H (AAA) in-court
19 submission, the court reporter informs me that the actual
20 number should be 524H (AAA).

21 LDC [MR. CONNELL]: I understand, sir. Thank you.

22 MJ [COL POHL]: Okay.

23 Sure. Mr. Connell.

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1 LDC [MR. CONNELL]: I have an issue before we continue
2 with the docket.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: Which is that Mr. al Baluchi is in
5 substantial back pain today. He received medication this
6 morning at 0500 from the corpsman for the back pain and
7 voluntarily appeared here.

8 Since I came on the scene at about 8:30, he has been
9 requesting access to a corpsman to talk about medication. He
10 doesn't want to stop the hearing. He's not asking to stop the
11 hearing, he's not asking to leave; he just wants access to a
12 corpsman. It seems like a reasonable request. It's not like
13 I can help him.

14 MJ [COL POHL]: Let me -- let me look to the man in
15 charge. Is that possible?

16 LDC [MR. CONNELL]: I think he said, "We're working on it;
17 we've called him twice."

18 MJ [COL POHL]: Okay. Well, if necessary, call him a
19 third time. Okay. Thank you, Mr. Connell.

20 That brings us to the 350 series. And I think is
21 this -- Mr. Ryan.

22 TC [MR. RYAN]: Your Honor, yes. I'll address all of the
23 350s. I've spoken to counsel, and we agreed to bring it to

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1 your attention in this manner.

2 In past hearings, we had reported to you that we were
3 in the process of gathering some things together. One was a
4 document that we owed the defense. That has been provided at
5 the end of January. Second was some guidance on language to
6 be used in an open session. That has been provided. There is
7 a number, however, of documents that we are still gathering,
8 which will be presented to Your Honor in a 505(h) -- or in a
9 505 filing. And because of the person in question's unique
10 status in the whole long scheme of events, that is not ready
11 yet. It has required significant extra work on our part.

12 So my report to Your Honor is 350 continues to be
13 pending. The defense and the prosecution agree that it is not
14 yet ripe for argument.

15 MJ [COL POHL]: Okay. When could I expect to see the 505
16 submissions for 350?

17 TC [MR. RYAN]: We committed, Your Honor, to it being
18 filed no later than 15 March.

19 MJ [COL POHL]: Okay.

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

21 MJ [COL POHL]: Any defense counsel take any issue that
22 350 is not ripe for now?

23 Apparently not.

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1 We have -- the next three are 525, 114, and 114F.
2 Those appear to be intertwined with the pending additional
3 guidance. And so we will put those on to Thursday.

4 And just to note, I said this at the 802, but just so
5 the public knows, is that tomorrow there will only be a
6 classified session, which will be closed to the public.

7 That brings us to 133RR.

8 Mr. Connell.

9 LDC [MR. CONNELL]: Sir, 133RR is also in the nature of a
10 status update, although the plot has definitely thickened on
11 that question.

12 Since the SJA testified about the disguised
13 microphones in 2013, it's been an ongoing issue. And in 14
14 June of 2013, following the government disclosure in another
15 case, the Chief Defense Counsel advised against defense
16 counsel meeting in government spaces until certain -- they
17 felt certain that there was no improper monitoring.

18 As part of our due diligence on that topic, on
19 17 July 2017, we filed AE 133RR (AAA), a motion to permanently
20 and verifiably disable audio monitoring at Echo II. On
21 24 August 2017, the government represented to the military
22 commission that it consented to a search of Echo II. That's
23 found at page 1 -- 16297 in the transcript.

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1 On 11 October 2017, we requested a technical
2 surveillance countermeasure sweep from the CA, authorization
3 for that. That's found in the record at AE 133XX. On 21
4 November 2017, the convening authority, who was at that time
5 Mr. Rishikof, recommended the construction or designation of
6 an audio monitoring-free attorney-client meeting facility with
7 TSCM, which is technical surveillance countermeasures
8 monitoring by an independent team. That's found in 133RR
9 (AAA Sup).

10 On 26 January 2018, Brigadier General Baker informed
11 me that Mr. Rishikof had verbally stated that he would fund
12 that TSCM sweep. The correspondence on that topic is located
13 in the record at AE 555, Attachments B, C, and D.

14 In a document which was signed on 3 February 2018,
15 but I am told is was not delivered until 5 February 2018, the
16 Secretary of Defense rescinded the designation of Mr. Rishikof
17 as convening authority.

18 On 9 February 2018, the Chief Defense Counsel
19 requested and submitted an additional request for Technical
20 Surveillance Countermeasures sweep -- slowing down -- of
21 attorney-client meeting spaces on behalf of the Military
22 Commission Defense Organization as a whole. At this point,
23 our request has been pending for over four and a half months

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1 without CA action. I don't know how the changes ----

2 MJ [COL POHL]: You've lost me. Mr. Rishikof, when he was
3 still employed as CA, approved funding for this?

4 LDC [MR. CONNELL]: He verbally indicated that he intended
5 to approve funding, but he was terminated before he actually
6 wrote us the piece of paper which says, you are hereby
7 authorized to conduct this at government expense.

8 MJ [COL POHL]: So I'm assuming that request is in front
9 of the new convening authority?

10 LDC [MR. CONNELL]: That's correct, sir.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: And so ----

13 MJ [COL POHL]: Does the new convening authority know he
14 has this request?

15 LDC [MR. CONNELL]: Not only does he know that he has that
16 request, because we have sent updates to him about here's a
17 list of pending items ----

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: ---- but he also has a new request
20 from the Chief Defense Counsel on behalf of not just
21 Mr. al Baluchi, but on behalf of the entire Military
22 Commission Defense Organization seeking the identical relief.

23 MJ [COL POHL]: The identical relief is in your 133RR,

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1 examining the room and ----

2 LDC [MR. CONNELL]: To be fair, 133RR goes further than
3 what we're asking from the convening authority. Examining the
4 room is what we're asking for the convening authority. We
5 would ask -- 133RR itself depends on the results in part of
6 that examination, but ----

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: ---- seeks relief to, all right, we've
9 had -- we had an order prospectively requesting that there not
10 be any monitoring. We've had an order from the military
11 commission saying that new counsel have to be advised of audio
12 monitoring capability. We've never had an actual verification
13 that there is no audio monitoring. So that's what the TSCM
14 sweep does ----

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: ---- which is funded by the convening
17 authority, and then we will come back at that point and talk
18 about what, if any, additional relief is required.

19 MJ [COL POHL]: Got it. Okay.

20 Trial Counsel, do you have anything you wish to add?

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

22 MJ [COL POHL]: Okay.

23 TC [MR. RYAN]: Excuse me, Your Honor.

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1 MJ [COL POHL]: Yes.

2 TC [MR. RYAN]: I should have stated when I was at the
3 podium in regard to 350, the filing that says what I said
4 orally is 350SS.

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

6 Ms. Bormann, have you made a decision on how you wish
7 to approach 326E?

8 LDC [MS. BORMANN]: Judge, I have not yet had the
9 opportunity to speak with defense counsel, since there were
10 client meetings all day yesterday.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: So I intend to do that this evening
13 after we break.

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

15 LDC [MR. CONNELL]: Sir?

16 MJ [COL POHL]: Yes.

17 LDC [MR. CONNELL]: I'm happy to talk about 538, but 530G
18 has two different pieces to it. It has the piece that is
19 exclusively to Mr. Mohammad, but then it also has our consent
20 to a forensic search.

21 Do you want to discuss the consent to forensic search
22 at all?

23 MJ [COL POHL]: Okay. This is in response to the order?

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

2 MJ [COL POHL]: Okay. So it's 530, but there's no real
3 motion on this?

4 LDC [MR. CONNELL]: I just want to know, do you -- we --
5 you required our position by 16 February. We provided our
6 consent to search ----

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: ---- by 16 February.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: There's some question about scope and
11 procedure.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: And I didn't know if you had any
14 questions about that. If that's not something that you've
15 looked at recently, we could do it on Thursday, or you may not
16 have any questions. But if you have any questions, I'm
17 available to answer them.

18 MJ [COL POHL]: Okay. One moment, please.

19 [Pause.]

20 MJ [COL POHL]: That was 530MM?

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

22 MJ [COL POHL]: I see no certificate of conference. So do
23 I know -- what's the government's position on whether this is

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1 an adequate search?

2 LDC [MR. CONNELL]: I don't know, sir.

3 TC [MR. RYAN]: I'm prepared to address it, Judge, if you
4 are willing -- if you are taking argument on this.

5 LDC [MR. CONNELL]: Sure. That makes -- that makes sense
6 to me.

7 MJ [COL POHL]: Okay. Yeah. Let's start that way. I see
8 what your proposal is.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Mr. Ryan, did the government file a
11 pleading on this or -- I know it necessarily wouldn't require
12 one.

13 TC [MR. RYAN]: No, sir. Because of the unusual nature of
14 the pleading ----

15 MJ [COL POHL]: Okay.

16 TC [MR. RYAN]: ---- we assumed you would -- if you wanted
17 to take it up at all, it would be in court during oral
18 argument.

19 MJ [COL POHL]: Let me ask you this: Do you object --
20 let's switch out here, Mr. Connell.

21 Mr. Ryan. Okay, do you have specific objections to
22 the proposed methodology?

23 TC [MR. RYAN]: Absolutely, sir.

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1 MJ [COL POHL]: Okay. This may not be a fruitful
2 exercise, but let's try it anyway.

3 What's -- looking at the pleading starting on page 5,
4 can we go paragraph by paragraph and tell me what you object?

5 TC [MR. RYAN]: No, sir. We can simply say this ----

6 MJ [COL POHL]: Okay.

7 TC [MR. RYAN]: Your Honor found that the prosecution's
8 proposal of how the forensic analysis should be -- should take
9 place after we had spent significant time and consultation
10 with persons within the United States Government that are
11 subject matter experts, Your Honor found that this was an
12 adequate and proper method ----

13 MJ [COL POHL]: Okay.

14 TC [MR. RYAN]: ---- by which the forensic analysis would
15 take place while safeguarding defense interests. Your Honor
16 then asked the defense, in very plain language to state simply
17 do they consent or do they not consent.

18 The defense, throughout the litigation of this
19 particular motion, which was certainly hard-fought, had every
20 opportunity to propose different methods by which a forensic
21 analysis could and should take place. As you recall back
22 during that time, they never proposed anything. They were
23 simply of the position that there's nothing here, there's

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1 nothing important, it's all a misunderstanding.

2 Well, Your Honor has found that not only was there
3 intent and evidence of seeking to mislead by various accused,
4 but that there were also violations of 182K, Your Honor's
5 order regarding the laptops; and also that such violations
6 were, in fact, a threat to force protection, and potentially
7 to the national security.

8 So now, once the -- Your Honor's order was issued and
9 the defense suddenly had to give up that mantra of there was
10 nothing going on here, they come, for the first time, with two
11 full pages worth of conditions saying to you: When you order
12 this, that's when we consent.

13 Now, none of those conditions, none of those two
14 pages were ever presented before, they were never litigated,
15 there's no indication of how it was developed, where it comes
16 from, what expert was involved, if any. We only know that the
17 accused has had time to weigh in on how the laptops would be
18 analyzed; these being the same accused who, in fact, violated
19 your order, and who, in fact, have demonstrated a threat to
20 force protection and national security.

21 So as far as the proposals are concerned, we submit,
22 Judge, that you should look at this and simply see that what
23 the defense is doing now at this late moment is asking you to

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1 reconsider the whole thing and say, hey, we want to weigh in
2 now for the first time as to how this is to occur. Your
3 Honor's language was quite plain. Do you consent or do you
4 not? It doesn't require two full pages. I submit, sir, that
5 their answer is they do not consent.

6 Now, if they wish to provide a new motion for
7 reconsideration based on new facts regarding things they chose
8 not to do before, they can certainly try. But for where we
9 are right now, we ask Your Honor to find that there is no
10 consent, and therefore, there's no change to the status quo.

11 MJ [COL POHL]: Thank you. I have nothing further.

12 Mr. Connell or Ms. Bormann or Mr. Nevin, this appears
13 to impact on all three of you. Mr. Connell.

14 LDC [MR. CONNELL]: The -- let me do bottom line up front.
15 Your order found both an abuse of a privilege and it found the
16 potential for the use of -- potential use of disabled
17 communication facility -- capabilities.

18 Mr. al Baluchi consents to a forensic search of his
19 computer for any evidence of use of disabled communication
20 capabilities. Everything past that is just a question of
21 what's the best way to accomplish that goal without -- and
22 provide the military commission the information that it wants
23 to ultimately make a decision. I understand that 530LL did

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1 not make any determination that what happened wouldn't happen
2 after the forensic search, but you need certain information in
3 order to make a decision; what's the best way to get you that
4 information consistent with your findings and consistent with
5 the attorney-client privilege for the privileged material on
6 the computers.

7 This is not super hard. The government had
8 originally written -- argued five bases for a search, and you
9 found two of those: An abuse of -- a violation of 152K, an
10 abuse of a privilege, and the possible threat of use of
11 disabled communication capabilities. Content, software
12 encryption, other arguments that they made, you did not find
13 threats from those.

14 So they had written a broad order, and it was -- they
15 had written a broad proposed order to address all five of
16 their claims, which was found at AE 530F Attachment H. The --
17 you ordered that we advise you of our consent or nonconsent
18 for the forensic search of the 2008 laptop, which we did.

19 The -- I think that for -- what most of -- for what
20 you found, the proposed consent that we have given is actually
21 much better at getting you the information that you want. It
22 directs, for example, a physical search of the hardware on the
23 computer: Is there a network interface card? Is there a

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1 wireless card? Is there a Bluetooth card? Separately, it
2 directs a search for evidence of previous use of disabled
3 communication facilities.

4 The distinction between the order that the government
5 had written originally before you had made your findings and
6 the proposed consent that we have put forward is three-fold.

7 The first is it's much clearer on the directing of
8 the -- of the search. The military commission needs specific
9 information, and this will guarantee that the military
10 commission will get the specific information that it needs.

11 Second, it avoids an additional attorney-client
12 privilege breach about usage patterns of software. What the
13 government would provide -- the government search would
14 provide a -- an inquiry into, as it says, the software on the
15 computers and the metadata regarding usage of that software.

16 TC [MR. RYAN]: Excuse me, Your Honor. I object on this.
17 Last time, I was stopped for testifying. We're in a world now
18 of tech -- technological knowledge. There's been no
19 declaration, no other information put forth.

20 LDC [MR. CONNELL]: Oh, let me read it to you. Just one
21 second.

22 Sir, I'm reading from the government's pleading,
23 AE 530F Attachment H, its order. The examination will focus

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1 on operating systems and program or metadata files, which is
2 what I just said. The --

3 MJ [COL POHL]: The objection is overruled. Go ahead.

4 LDC [MR. CONNELL]: The -- that is outside the scope of
5 the findings that you made.

6 The point number one and point number two in the
7 five-paragraph proposal that we made in this -- in the brief
8 are a physical hardware search, which has to be done; and
9 second, a software -- a search of the Internet history that --
10 the reason that -- the language that we chose for this
11 proposed search is word for word the exact language that the
12 government used in searching these computers the first time in
13 2010.

14 Now, the last time that we were here, I explained to
15 you that I considered that 2010 search not to violate
16 attorney-client privilege because it was focused on evidence
17 of use of disabled communication capabilities. I think it's
18 important, that language, because defense had no impact --
19 input into that. That was a straight counterintelligence
20 search done at the coordination of the prosecution; they got
21 to choose the scope at the time, and that's what they came up
22 with. The material in quotes is, in fact, the exact language
23 that -- of the referral previously.

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1 And third, our proposal keeps the report of the
2 information where it belongs, which is with the military
3 commission. The government's proposal would require
4 distribution of the report to SOUTHCOM and JTF-GTMO, with no
5 restrictions on additional distribution.

6 Instead, the report should go to the parties, the
7 military commission, the prosecution and the defense, with
8 restrictions on additional distribution, unless the military
9 commission issues -- argues otherwise. I mean, if the
10 military commission -- slowing down -- authorizes additional
11 distribution after reading it, that's one thing. But the way
12 that it's written right now, we could expect to see this
13 report plastered across the intelligence community.

14 There's one more thing that I want to make clear
15 about -- is that our consent to search, in fact, is in one way
16 quite -- much broader than the government had originally
17 requested in 530F, Attachment H, and that is that we
18 affirmatively also consent to a search of the 2016 laptop in
19 addition to the 2008 laptop. The reason for that, Your Honor,
20 with respect -- and I speak here only for Mr. al Baluchi -- is
21 that Mr. al Baluchi will not seek the return of the 2008
22 laptop to him. He will -- it is basically past its useful
23 life, as the government argued previously, and instead, we'll

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1 be seeking to make a clean sweep with the 2016 laptop, which
2 has never been in Mr. al Baluchi's possession.

3 We consent to a search of that laptop as well for the
4 purpose that we would like to proactively establish to the
5 military commission that it does not have any capability for
6 accessing the Internet or any other wireless network.

7 So when it comes time, after, you know -- and we
8 never know exactly what's going to happen, but when it comes
9 time for us to talk about the next step in this process, we
10 would like to be able to offer the military commission the
11 assurances that the 2016 laptop that we will request the
12 return -- the distribution of to Mr. al Baluchi does not have
13 any of these capabilities.

14 So our view is, let's just go ahead and get that
15 established by a government agency right at the beginning, and
16 then the military commission will know exactly what it's
17 dealing with. But we will not be seeking the return of the
18 2008 laptop to Mr. al Baluchi. However, we are consenting to
19 a search of it because of the finding of an abuse of
20 privilege, and we want to give the military commission all the
21 information that it needs to satisfy itself that there was no
22 use of disabled communication capabilities.

23 MJ [COL POHL]: Thank you.

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1 Mr. Nevin, do you wish to be heard on this?

2 LDC [MR. NEVIN]: Your Honor, I advised the military
3 commission earlier that I feel we're laboring under a conflict
4 of interest, and so I don't have any remarks to make.

5 MJ [COL POHL]: Ms. Bormann?

6 LDC [MS. BORMANN]: Judge, we don't have anything
7 additional beyond what Mr. Connell's argued.

8 MJ [COL POHL]: Okay.

9 Mr. Ryan.

10 TC [MR. RYAN]: Your Honor, the search in 2010 is quite
11 different and the world has changed a great deal compared to
12 where we are today, especially after the facts that have
13 become known to us.

14 At this moment in time, Your Honor has no evidence in
15 front of you confirming to you what you have been -- what has
16 been proffered regarding the sufficiency of the search of
17 the -- of the forensic analysis.

18 If Your Honor is willing to entertain a changing of
19 your order or allowing the defense to consent with an
20 additional two pages of conditions, I ask that you open it up
21 for additional evidence as to whether the sufficient -- that
22 search would be sufficient.

23 I will also say, Judge, that in the most recent past,

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1 in the last few days, I believe there will be more relevant
2 facts as to this specific subject.

3 MJ [COL POHL]: You've lost me on that last ----

4 TC [MR. RYAN]: Yes, sir. As of ----

5 MJ [COL POHL]: No, just, just -- what we have -- we have
6 the government request for the forensic examination. We have
7 the order. We have the defense, for want of a better term,
8 reconsideration, negotiation, whatever, this most recent
9 submission. You said there's additional evidence that's --
10 that will impact on this decision?

11 TC [MR. RYAN]: There are facts that have been -- are
12 being developed. I don't have -- I cannot speak to them yet.

13 MJ [COL POHL]: So you're asking me to defer this until
14 you submit these additional facts?

15 TC [MR. RYAN]: If -- Your Honor's order was clear.

16 MJ [COL POHL]: Okay.

17 TC [MR. RYAN]: They're now asking for something else.

18 MJ [COL POHL]: I'm not asking -- Mr. Ryan, I've got your
19 basic argument. I just -- that last bit, what you said, is
20 there's additional facts that -- you want me to wait for the
21 additional facts, or decide on what I have?

22 TC [MR. RYAN]: The reason I said it, sir, is this: If
23 you are holding to your order and finding that there is no

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1 consent at this time, then I don't need to present anything
2 else; although probably will in the future because I'm sure
3 this is going to keep coming up. However, if Your Honor is
4 now considering additional conditions to your order, then I
5 believe there are extra facts that I will be able to present
6 to Your Honor in the next few days.

7 MJ [COL POHL]: Well, there will be a written order based
8 on the current pleadings and then you can decide what you want
9 to do from that.

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

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

12 Mr. Connell.

13 Is this your motion or Ms. Bormann's motion?

14 LDC [MS. BORMANN]: Both.

15 MJ [COL POHL]: Both?

16 LDC [MS. BORMANN]: May I have a moment?

17 MJ [COL POHL]: Sure. Sure.

18 [Pause.]

19 LDC [MS. BORMANN]: Judge, the ----

20 MJ [COL POHL]: Ma'am.

21 LDC [MS. BORMANN]: ---- 538 deals with interrogations and
22 discovery material to the preparation of the defense in terms
23 of the interrogation process that Mr. Bin'Attash went through.

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1 It began with the CIA and ultimately ended up with the FBI,
2 NCIS, and CIFA, C-I-F-A, which stands for the Department of
3 Defense Counterintelligence Field Activity.

4 I'm going to propose to you, and I just spoke with
5 Mr. Connell about it, that we defer argument on this. After
6 the hearings in December when Mr. Hawsawi cross-examined
7 Special Agent Perkins, et cetera, with respect to statements
8 elicited from Mr. Hawsawi, we found out some information.

9 You will remember, and I'm going to bring your mind
10 back to it, that right before the hearings on that date, and I
11 think the night before, the government provided two documents
12 dealing with interrogation processes used with these men.

13 We found out during the testimony of Special Agent
14 Perkins and others that, for one, they had access to CIA
15 information; they could submit questions to the CIA, and a
16 variety of other topics that made it clear that there was CIA
17 and FBI interaction in these interrogations.

18 As a result, in our due diligence, we submitted a
19 series of discovery requests to the government with internal
20 numberings. There are a total of eight discovery requests
21 provided to the government on this very issue involving
22 interrogation techniques, manuals, rules, protocols,
23 everything the FBI knew or didn't know was used, or chose to

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1 ignore involving the interrogations, and those series of
2 discovery requests are submitted the 8th of December through
3 the 21st of December.

4 As I stand here today, we have received two
5 responses, both of those where they decline to provide them.
6 We are awaiting the others. We intend to file motions to
7 compel on those. For purposes of judicial economy, rather
8 than begin an argument ----

9 MJ [COL POHL]: Are these all part of the 538 series?

10 LDC [MS. BORMANN]: They're going to be because they all
11 involve exactly the same thing ----

12 MJ [COL POHL]: I got it.

13 LDC [MS. BORMANN]: ---- which is the FBI protocols
14 dealing with interrogation at the time, surrounding the time,
15 before the time, and right after the time of the interrogation
16 of Mr. Bin'Attash.

17 MJ [COL POHL]: Okay. And, Ms. Bormann, you said you
18 submitted this request in early December?

19 LDC [MS. BORMANN]: December 8th through the 21st. So
20 some of them got submitted during the hearings because we were
21 working on those as the issues came up, and then some when we
22 returned back to our offices in Rosslyn.

23 MJ [COL POHL]: Trial Counsel, some reason why there's

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1 been no response on ----

2 LDC [MS. BORMANN]: I can give you -- we have no response
3 on Discovery Request 360A, Discovery Request 363, Discovery
4 Request 363A, Discovery Request 364, 365, and 369; the last
5 one submitted on 21 December.

6 MJ [COL POHL]: Okay.

7 TC [MR. RYAN]: I cannot speak to the individual requests
8 as to what they are and how much work is involved and what's
9 behind them. I will say this, Judge --

10 May I move to the podium for a moment.

11 MJ [COL POHL]: Sure. Yeah.

12 TC [MR. RYAN]: Counsel's original request concerned a
13 very small and finite world of an interrogation manual and
14 some items the agents -- FBI agents, specifically, were
15 relying upon in the course of the interviews of the five
16 accused back in January '07.

17 Since that time, based in part -- I don't disagree
18 with counsel -- based in part on the testimony that came from
19 Agent Perkins and Agent Fitzgerald, the requests have now
20 broadened considerably. The discovery requests that I do
21 believe necessarily kind of work its way into 538 have
22 broadened considerably. In addition, 538C, which came from
23 the Ali team as a reply to our response, broadens the original

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1 538 considerably.

2 Where we are in terms of providing the discovery --
3 this goes back to my earlier time here at the podium where
4 we're talking about, really, the whole long scheme of events
5 from CIA custody at the beginning through FBI interviews in
6 2007, so it's a significant time period, and then
7 communications between -- between them all. So I guess what
8 I'm saying, sir, is this -- this once very finite motion now
9 has gotten very much larger.

10 I don't dispute when counsel says that, from a
11 judicial economy standpoint, it is probably more efficient for
12 us to deal with it all as a whole at the appropriate time.

13 Now, as far as answering the discovery requests, I
14 believe Ms. Bormann said two have been -- there are still
15 three or so outstanding, there may be more -- I can look into
16 that and try and give you an idea of how much we're talking
17 about, but it is -- this whole area is a very large one, sir.

18 MJ [COL POHL]: Yeah. And understand, I don't know what's
19 behind all of these things. I don't know how -- you know, I
20 see the requests. I can kind of infer how big or how long
21 they are. It's just that we seem many times to be -- and I'm
22 not blaming either side of this, but many times we keep
23 pushing issues down the road as we're waiting for responses

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1 for discovery.

2 If the government feels the need to look at the
3 documents to see whether it's responsive or not, I understand
4 that, and you need to take your time. But if the government's
5 position is going to come down to they don't really need this
6 information anyway and we're not going to give it to them
7 as-is, you know, it seems to me we can process it further.

8 So I'm just -- I understand what you're saying,
9 Mr. Ryan, and I know it's -- I suspect -- I'm not going to say
10 I know, because I'm not sitting on that side of the room ----

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

12 MJ [COL POHL]: ---- that some of this takes quite a bit
13 of work to even respond quickly. But we can't move it along
14 until they get a response, and so I'm just telling you
15 something you already know.

16 TC [MR. RYAN]: Yeah. I do know, Judge. And, you know,
17 of course, I was the one who argued vociferously in 478, so
18 nobody wants things to move faster than I do.

19 MJ [COL POHL]: Got it.

20 TC [MR. RYAN]: Discovery is quite a quagmire.

21 MJ [COL POHL]: Got it.

22 Ms. Bormann, so you're -- you can give me more pieces
23 of paper, but at the bottom line ----

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1 LDC [MS. BORMANN]: I don't need to give you more pieces
2 of paper. I was just going to pull out the original discovery
3 requests, which basically asks for all documents, records,
4 SOPs ----

5 MJ [COL POHL]: Yeah.

6 LDC [MS. BORMANN]: ---- memoranda, instruction materials,
7 information correspondence about interrogation policies and
8 the development thereof, and so we're talking about a massive
9 quantity of material. And thus far we have received a total
10 of two documents, both tendered on the eve of hearings in 502
11 with respect to Mr. al Hawsawi.

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: So we did more specific requests
14 following that, because this was a larger, broader one, which
15 I would normally do in any of my practices, because, of
16 course, in federal court and in state courts the materials
17 related to the interrogation of the defendant are a given.
18 Here we're litigating.

19 So I agree with Mr. Ryan in the following way: It is
20 a very large area, and we're going to revisit it over and
21 over. But right now we have a series of outstanding discovery
22 requests that are sort of subsumed in this; and until we
23 receive some sort of notification one way or the other, it

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1 seems that we're not using our time wisely.

2 MJ [COL POHL]: Got it. Okay. Thank you.

3 That would appear to bring us to 544.

4 LDC [MR. CONNELL]: Sir, at ----

5 MJ [COL POHL]: Mr. Connell.

6 LDC [MR. CONNELL]: ---- the last hearing, you directed us
7 to submit a proposed order memorializing a -- an acceptable
8 search procedure. The government's response -- which we did.
9 The government's response essentially says we beat you to the
10 punch and we implemented that procedure. The only change that
11 I would see that would need to be in the order is to change
12 cell detecting equipment or metal detecting equipment to x-ray
13 machine, because they got an x-ray machine.

14 But otherwise the -- what the government describes as
15 the -- as the current situation, and we've only been through
16 it once -- but what the government -- is what is reflected in
17 the order. So we would ask you to enter the order with
18 your ----

19 MJ [COL POHL]: Okay.

20 LDC [MR. CONNELL]: ---- your modification for x-ray
21 machine as necessary.

22 MJ [COL POHL]: Yeah. Well, why don't I do this,

23 Mr. Connell: Today it worked. You're fine. Okay.

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1 LDC [MR. CONNELL]: I didn't have a bag, Your Honor, so
2 I'm not a good test case.

3 MJ [COL POHL]: Well, carry a bag next time.

4 LDC [MR. CONNELL]: I will.

5 MJ [COL POHL]: Okay. My inclination is to simply moot
6 this altogether rather than get into details of how it should
7 be. If the issue comes back up we can revisit it. But I'm
8 saying if I start changing it to x-ray machine and they move
9 that machine to something else, then you'll be back up here
10 and I'll be doing something else. But it sounds like the
11 issue has gone away. Would that be fair?

12 LDC [MR. CONNELL]: It will be back, sir.

13 MJ [COL POHL]: And I'll be here.

14 LDC [MR. CONNELL]: Me, too, sir.

15 MJ [COL POHL]: Okay. Okay. Any other defense counsel
16 want to be heard on this one?

17 LDC [MS. BORMANN]: Just briefly.

18 MJ [COL POHL]: Ms. Bormann.

19 LDC [MS. BORMANN]: The issue keeps popping up, and I will
20 remind you that this issue first arose in early 2012 right
21 after the arraignment, because I arrived late because I had to
22 wait in line behind a group of people as General Martins and
23 the prosecutors got to walk in unchecked in any way. And you

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1 ordered General Martins to fix it, and it got fixed for a
2 little while, and now we're back to this again.

3 But I just want to put on the record what happened.
4 So there's a metal detector out here that I have to walk
5 through every time I come to court. And if I have a bag or
6 something, that gets walked through the metal detector, too,
7 presumably because they're looking for, I don't know,
8 electronics or whatever. General Martins was in front of me
9 today, and instead of his bag going through, he's able to just
10 pass it to the soldiers, and it gets -- it gets routed around
11 the metal detector.

12 Which, I mean, maybe that's the correct protocol, I
13 don't know. But it seems to me that if what we're trying to
14 do is protect recording devices from coming in or anything
15 like that, then everybody should be treated in a similar
16 fashion. And that is just -- I don't know if you can do
17 anything about it, but I'm putting it on the record.

18 MJ [COL POHL]: If it's any consolation, which I'm sure
19 it's not, is I go through this new procedure, too, but only
20 once when I come into the ELC area. Okay. Got it. Thank
21 you.

22 That brings us to 551.

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Your Honor, give me a second.

2 Your Honor, may I approach the court reporter?

3 MJ [COL POHL]: Sure.

4 [Conferred with courtroom personnel.]

5 MJ [COL POHL]: Mr. Connell.

6 LDC [MR. CONNELL]: Thank you, sir. Your Honor, I have
7 provided to the parties and I have marked for entry into the
8 record as 551C a series of slides. Prior to travel for the
9 hearing, I presented them to the CISO for review. It's my
10 understanding that they have been approved. I would request
11 permission to have the feed from Table 4 and publish the
12 slides to the gallery.

13 MJ [COL POHL]: You may. Go ahead.

14 LDC [MR. CONNELL]: Your Honor, the bottom line up front,
15 this is the third time that the public or Mr. al Baluchi has
16 presented to the military commission the issue that the
17 government is not producing the record -- the documents -- the
18 judicial records, the documents which are in the record of
19 this case to the public, sometimes at all, or certainly not in
20 any kind of timely fashion.

21 The government is out of compliance with the relevant
22 regulations, and this -- at this point, after having been
23 warned and then ordered, the government has now denied

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1 Mr. al Baluchi a public trial.

2 LDC [MR. RUIZ]: Judge, Ms. Lachelier has left the
3 courtroom. I just wanted to make sure that was ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: Thank you.

6 MJ [COL POHL]: Thank you, Mr. Ruiz. I appreciate it.

7 LDC [MR. CONNELL]: Your Honor, as is clear to everyone
8 here, the -- this courtroom is remote, to say the least. It
9 is on a controlled military base in Guantanamo Bay, Cuba, and
10 there is only one public viewing site on a military base in
11 Maryland.

12 There are additional viewing sites for victim family
13 members, but, suffice it to say, it is not easy for anyone to
14 observe the trial.

15 What that means is that the website that the Office
16 of Military Commissions has used to distribute the access to
17 material in this case is particularly important because for --
18 other than those small number of people who win the lottery to
19 attend as a victim family member or are sponsored by one of a
20 handful of -- a small number of organizations as a
21 nongovernmental observer, or who pay to attend as a member of
22 the media, their only access to the actual proceedings of the
23 military commission comes via the website.

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1 The website is not simply a good deed, as the
2 government might say. It is, rather, an integral part of the
3 public trial scheme which is set out in the Regulation for
4 Trial by Military Commission.

5 We discussed briefly earlier about the interplay
6 between necessity for classification review under RTMC 17-1.3.
7 [sic] and the tracking of material for distribution to the
8 public under 19.4 [sic].

9 So walking through that, under 17-1.c.3., after a
10 filing is received by the clerk, and it is examined by the
11 CSO, the CSO makes a determination, in the words of the
12 regulation, "whether the filing or document contains
13 classified information or any information covered by 19-3.b.,
14 which it would be PII, personal identifying information.

15 a. and b. then describe essentially two tracks that
16 documents take through the system. If no OCA review is
17 required, then it's track a. And I'm just going to be
18 referring to track a. through the remainder of the argument.

19 MJ [COL POHL]: Well, wait a minute. When you say no
20 OCA's review, what about the provision that says "in
21 consultation with the DoD classification review team"? I
22 mean ----

23 LDC [MR. CONNELL]: Yes. Consultation.

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1 MJ [COL POHL]: I will just tell you -- yeah, okay. But I
2 mean, doesn't that amount to the OCA review?

3 LDC [MR. CONNELL]: Of every document? Absolutely not,
4 sir. And 19.4 makes that clear. The -- some documents are
5 sent for classification review and some are not. If you're
6 telling me different, then ----

7 MJ [COL POHL]: Let me tell you something that you may not
8 know. And I -- and I asked when this issue came up because,
9 quite frankly, my office plays a role in this.

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: One question I asked was does everything
12 go for OCA review. Because you can read this provision a
13 couple of different ways.

14 LDC [MR. CONNELL]: Sure.

15 MJ [COL POHL]: What I was told was that the website, who
16 I don't own -- despite what other people may think, I do not
17 own -- I was told the website refuses to accept any document
18 that's not gone through OCA review.

19 LDC [MR. CONNELL]: Who owns the website, sir?
20 Prosecution?

21 MJ [COL POHL]: Not me.

22 LDC [MR. CONNELL]: Okay.

23 MJ [COL POHL]: I can point to the government, but I'm

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1 just going to tell you who doesn't own it, and that's me.

2 LDC [MR. CONNELL]: Well, I get that part.

3 MJ [COL POHL]: Okay. So consequently is every
4 document -- I know what this says -- goes to OCA review.

5 LDC [MR. CONNELL]: All right. Well, let's flip to 19.4
6 then, and talk about why -- maybe that's the root of the
7 problem. I don't know what the -- my ----

8 MJ [COL POHL]: But that just moves it from a 1-day to a
9 15-day time limit.

10 LDC [MR. CONNELL]: Yeah. That's true.

11 MJ [COL POHL]: So I'm not sure it's -- in looking at your
12 future slides whether it makes too much significant difference
13 in the sense that we're talking about two weeks.

14 LDC [MR. CONNELL]: It's not like they're making the
15 15-day deadline either. But it is important from the
16 structure of the regulation that 19-4.c.1. describes "Filings
17 and orders that do not require classification security review
18 under Chapter 17-1 shall be posted within one business day of
19 filing with the military commission."

20 I mean, clearly, there is -- track A does exist at
21 least in the regulation.

22 MJ [COL POHL]: No, I -- Mr. Connell, I don't disagree
23 with you.

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1 LDC [MR. CONNELL]: Okay.

2 MJ [COL POHL]: And I look to the regulation, and I -- but
3 again, I'm not in the business of fighting with -- if the
4 government talks to the -- talks to the webmaster, whoever is
5 in charge, and say, we will comply with this one-day
6 requirement once you say there's no classification -- just the
7 process to let you know how it works, there's two tracks in
8 this thing: There's a transcript track, and there's a
9 pleading -- filing track.

10 LDC [MR. CONNELL]: Okay.

11 MJ [COL POHL]: The transcript track is not owned by me at
12 all. That's owned by the court administration people. So
13 that's somebody else.

14 When a pleading comes in, we -- once we accept it,
15 put the little number on it, say we have accepted it, okay,
16 that starts our track. And what we do now currently, because
17 of the guidance we're getting from the webmaster -- and if
18 it's incorrect, it doesn't bother me, I can go back and say,
19 okay, I can give it to you. We sent it for OCA review. Okay.

20 LDC [MR. CONNELL]: Every pleading.

21 MJ [COL POHL]: Every pleading. Because we're told they
22 won't accept it. And again, to my knowledge, it's not written
23 down anywhere, it says, unless it gets OCA review, we're not

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1 going to accept it at all.

2 Okay. So we send it there. And then when we get it
3 back -- when I say "we," it's the ecumenical we, it's not me.

4 LDC [MR. CONNELL]: Sure. When it gets back, right.

5 MJ [COL POHL]: When it gets back to my chief clerk, then
6 he sends it over to the webmaster for publication. That's the
7 process of how it works.

8 LDC [MR. CONNELL]: Thank you for that, because I thought
9 there were two tracks because all I have is paper to work
10 from. So it sounds like there is no first track. There is no
11 non-OCA review track, there is only an OCA review track.

12 MJ [COL POHL]: That's the current practice.

13 LDC [MR. CONNELL]: Okay. All right.

14 Well, in that case, everything on track B comes under
15 the requirements of 19.4. 19.4.c.2., which is -- what I'm
16 calling track B, which is all other filings and orders --
17 track 1 -- track A, which is .c.1., would be filings and
18 orders do do not require classification security review; but
19 then track 2 is about all's other filings and orders shall be
20 publicly released after the DoD security
21 classification/declassification review team and/or the
22 appropriate non-DoD federal department -- should be or --
23 agency, original classification authority confirms to the

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1 commission that such filings and orders are in publicly
2 releasable form."

3 MJ [COL POHL]: And just to be fair to the webmaster
4 folks, is you could read this, when it talks about the DoD
5 classification/declassification review team, in concert to
6 what I said earlier with the -- everything after it's filed
7 and has been properly filed must go through the DoD -- they
8 used the word "consultation" earlier, but I could see where
9 they -- perhaps their reading of it that way, that's why it's
10 required -- everything requires OCA review, although it is
11 inconsistent with other military commission provisions in it,
12 but just -- I mean, I can't speak for other people, I just
13 don't want to ----

14 LDC [MR. CONNELL]: Well, it's even inconsistent with that
15 provision, because it talks about all other filings and
16 orders. I mean, there has to be a separate -- there would
17 have to be two categories.

18 MJ [COL POHL]: I don't disagree with you. That would be
19 the -- to quote our major from earlier, that would seem to be
20 the plain reading of the regulation. But go ahead.

21 LDC [MR. CONNELL]: All right.

22 The -- I agree with the government that it
23 establishes that this same provision, .c.2., provides that the

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1 classification review shall generally take no longer than 15
2 business days. And it provides a escape hatch, that the 15 --
3 basically for good cause, that if the -- the 15 business day
4 security classification review period shall be extended for a
5 reasonable period if the appropriate non-DoD federal
6 department or agency, original classification authority, or
7 the OIC submit a notification to the chief clerk declaring
8 that such additional time is required by exceptional
9 circumstances.

10 Now, to my knowledge -- and as you know, I'm a
11 student of the filings inventory. But to my knowledge, the --
12 no such notification has ever a single time been submitted.

13 There's a limit on that, which is that "any
14 additional time provided shall be the minimum additional time
15 required in light of the exceptional circumstances set out in
16 the request for additional time."

17 Now, arguably, all of that, sir, is not you, and I
18 understand your point about that, that that's the interaction
19 between the chief clerk and the OIC of the DRT and other
20 parties.

21 But as part of this scheme, 17-1.d. is about not just
22 you but us. And it provides that, consistent with the
23 requirement of chapter 19-4 that filings be publicly released,

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1 hearings on motions -- I'm sorry, we're not actually there
2 yet, LN1. Hearings on motions should not occur sooner than 15
3 business days after the last of the filings made in support of
4 or in opposition to the motion. This provision may be waived
5 at the discretion of the military judge if the interests of
6 justice so require."

7 Again, to my knowledge, no such either application or
8 waiver has already -- has ever been made. So let's assume
9 that everything is even under this 15-day requirement in
10 19-4.c.2. The -- this issue of release of filings has been
11 brought to the military commission no less than three times.
12 On 2 May 2012, before even the arraignment in the case, the
13 ACLU filed a motion, which was AE 013A, which invokes the
14 First Amendment trial rights with respect to both the
15 testimony in court and documents. Attachment B to 013A was a
16 declaration on the tradition of openness in military
17 commissions to establish the -- to satisfy the press
18 enterprise requirements.

19 On 16 May of 2012, 14 news organizations, including
20 *The Miami Herald* and McClatchy, NPR, *The New York Times*, the
21 *Wall Street Journal*, and *The Washington Post* invoked the
22 First Amendment right of access to documents, including
23 transcripts, in AE 013F and relying on the two authorities

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1 that I rely on today, the Regulation for Trial by Military
2 Commission 17-1 and 19-3.

3 You held oral argument on that topic with a
4 representative of both the ACLU and the news organizations on
5 16 October 2012, where the news organizations again invoked
6 their right to inspect the record of the case. That's found
7 at transcript page 589. You took those arguments into account
8 in establishing your protective order at that time 013P.
9 On 12 -- but classified pleadings were not being released to
10 the public.

11 And so on 12 July 2012, we filed AE 055, regarding
12 the access to unclassified portions of classified military
13 commissions documents. We relied on RTMC 17-1 and 19-4. You
14 held oral argument on that matter on 29 January 2013, at
15 transcripts pages 164 -- excuse me, 1641 to 1642.

16 So I just want to read you a little bit of that
17 transcript, because you didn't issue a written order; this was
18 an occasion which you ruled directly on the record. At 1641
19 in the transcript, Colonel Pohl, "So you don't have any
20 problem me granting the defense motion that you comply with
21 your regulation?"

22 Lieutenant Korczynski for the government: "No, sir,
23 we do not."

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1 A little bit farther down the page, you say: "This
2 is going to be one of my easier rulings, because basically
3 what I'm hearing from both sides is order the government to
4 follow their own regulation, and what you," meaning Lieutenant
5 Korczynski, "are saying is everybody follow the rules that
6 already exist."

7 Lieutenant Korczynski: "Yes, sir."

8 On the next page at transcript 1642, you state,
9 "Defense motion AE 055, to release redacted versions of the
10 classified pleadings, is hereby granted in the sense that the
11 government is to comply with its own regulations, specifically
12 Chapters 17 and 19, and all parties are expected to comply
13 with the normal rules for filing motions, including classified
14 motions."

15 From the arraignment until the end of January of
16 2018, there were 224 classified filings in this case. Now, I
17 am not counting unclassified filings with classified
18 attachments which, under the current rules of court, are
19 handled differently, but 224 classified filings.

20 Treating 20 days as a rough cut for 15 business days,
21 because you assume there are two or so weekends in there, the
22 government has only released three -- three of the 224
23 classified pleadings within 20 days. That is 1.3 percent. Of

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1 those 224 pleadings since 2012, 194 of those pleadings have
2 never been released to the public; 86.6 percent of the
3 classified pleadings have never been released to the public.

4 No classified pleading filed in 2018 or 2017 has ever
5 been released to the public. The last classified document to
6 be released in redacted form on the website was AE 397I,
7 Bin'Attash pleading on 29 November of 2016, over 15 months
8 ago.

9 This has enormous impact on the ability of the public
10 to even know what's going on here. This hearing, in this
11 docket on 553, there are one, two, three, four, five, six --
12 six pleadings where not even the base motion has been released
13 to the public because it was classified.

14 Let me just walk you through those.

15 AE 534 was file -- the most -- the last filed, was
16 filed on 6 November 2017, and has not been released to the
17 public.

18 AE 525 was filed on 25 September 2017, has not been
19 released to the public.

20 AE 509 and 513 were filed on 20 September 2017, after
21 classification review. These were two of the ones that the
22 military commission required us to send for military -- for
23 classification review. It took from June until September of

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1 2017, but after classification review, we filed them; and they
2 have not been released to the public.

3 AE 133RR was filed on July 17 of 2017 and has not
4 been released to the public.

5 And perhaps the most egregious of the motions already
6 on this docket on 553, 350C was not -- has not been released
7 to the public after being filed on 23 February 2015.

8 Now, there are two motions on the docket that have
9 been released. That is AE 114 -- I'm sorry. Go back, please.
10 AE 114 and AE 114F. And the reason that they have been
11 released is that they were filed in January and in April of
12 2013, respectively. It's only kind of an accident that
13 they're coming up now and are available for observers to see.

14 Now, what about -- that's classified filings. What
15 about the -- which are track B.

16 I thought that unclassified filings were track A, but
17 apparently they're all track B, but let's look at unclassified
18 filings.

19 Now, the numbers that I'm going to read to you are
20 slightly different from the ones on this slide, and that is
21 because after we submitted all of our original data to the
22 government, they audited our audit. They had the advantage of
23 being a couple of weeks later, obviously, so they found ten

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1 pleadings that had not been released when we audited that had
2 been later, and the -- and then they have -- apparently access
3 to a different source of information because they found ten
4 with meta -- where there was no metadata describing their
5 release date that they found.

6 So we -- in AE 150 -- excuse me, 551B, which is our
7 pleading on this, we entirely used the government's numbers.
8 So we just accept everything that they say as true and use the
9 government numbers, and those are slightly different from this
10 slide, but that's why I'm going to be reading them to you.
11 Our new chart is on page 4 of 551B. Of course, we had to
12 submit the slides more than a week in advance so the -- we
13 couldn't catch up.

14 Now, in 2017, and in the first month of 2018, there
15 were 951 filings in the military commission. Of those, zero
16 were posted within one business day. Using 20 days, again, as
17 a rough cut for 15 business days, only 240, or 25.2 percent,
18 of those pleadings, unclassified pleadings, were posted within
19 20 days. The other 75 percent all took more than 20 days,
20 including 182 pleadings that were not released at all by the
21 end of January 2018.

22 Give you some examples of documents on this docket,
23 unclassified pleadings that have not been released to the

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1 public. Our position on -- that we argued today on what does
2 "part of al Qaeda" mean, is AE 502000. We filed it on
3 5 January 2018. As of last night, it had not been released to
4 the public.

5 548 and 549, our position on the firing of the
6 convening authority, the -- no, excuse me, our position on the
7 investigation restrictions, was filed on 30 January, both of
8 them filed on 30 January 2018 and have not been released as of
9 last night.

10 And our position on the laptops, which we argued
11 today, 530T was filed on 20 November 2013 [sic], and has not
12 been released to the public.

13 Now, all of the -- very few of the pleadings that
14 we're arguing today have been released to the public. And
15 RTMC 17-1.d. would say that we really shouldn't be having a
16 hearing because there's been no finding of the interests of
17 justice and no explanation for why the public is not able to
18 understand what's going on.

19 Now, there's one more aspect of this, which is the
20 closed 806(b)(2) hearings. Every time that the military
21 commission grants a closed 806 hearing, it includes the
22 language, which is shown on the screen, "that following the
23 closed session referenced above, a redacted, unclassified,

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1 unofficial/unauthenticated transcript of that session will be
2 expeditiously prepared and provided to the public in a manner
3 similar to unauthenticated transcripts of open sessions."

4 Since the beginning of the case, there have been 16
5 closed 806 sessions. Only one transcript of a closed 806
6 session -- and I'm not talking about the 505(h)s. Of the 806
7 actual hearings, only one transcript has been redacted and
8 released to the public. That was from August 19 of 2013. For
9 the other 15 orders that the military commission issued, the
10 government simply ignored the requirement.

11 Now, the government's argument on its brief, other
12 than ad hominum attacks on counsel, is that the -- these
13 things don't actually matter. They do matter, for several
14 reasons. The access to the public matters to the
15 First Amendment rights of the public and the Sixth Amendment
16 rights of the defendant to a public trial.

17 One level specificity closer, it matters because the
18 Regulation for Trial by Military Commission is very explicit
19 on this public trial implementation. And it's not a matter of
20 generally versus specific, they missed the deadline a couple
21 of times; it's that the whole public trial scheme has gone out
22 the window.

23 And then third, at the most specific level, it

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1 matters because you ordered the government to comply. In
2 2013, you ordered them to comply with Chapter 17-1 and 19-4
3 with respect to pleadings. Each time you have an order for a
4 closed hearing, you order them to release a transcript.

5 This is not the first time -- the reason why we are
6 asking for relief, and not just prospective relief, is that
7 you have done everything that you could in order to get the
8 government to comply, short of sanctions. You initially
9 recognized the claims of the news organizations and the ACLU
10 in 2012. In 2013, you ordered them to comply with the
11 regulations. There's nothing -- and on 16 different
12 occasions, you have ordered them to expeditiously release
13 redacted transcripts of closed hearings.

14 There is nothing else that you can do, short of a
15 sanction against the government, to get them to comply. It is
16 time for that sanction because these proceedings are no longer
17 open to the public.

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

19 Any other defense counsel wish to be heard on this
20 motion? Apparently not.

21 Trial Counsel.

22 LDC [MR. CONNELL]: You can cut the feed from Table 4,
23 sir.

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1 LDC [MR. NEVIN]: Your Honor, excuse me. I should say, we
2 would like to be heard on it, but, as we advised you earlier,
3 we're laboring under a conflict and therefore are not going to
4 speak to it at this time.

5 MJ [COL POHL]: If that's your choice, Mr. Nevin, go
6 ahead.

7 General Martins.

8 CP [BG MARTINS]: Good afternoon, Your Honor. As you
9 might imagine, the government sees this somewhat differently
10 from counsel for Ali Abdul Aziz Ali, an accused member of
11 al Qaeda, and someone facing charges by military commission
12 and who is subject, the government believes, to very
13 appropriate restrictions on his ability to disseminate
14 messages and to extract disclosure of government information
15 through his counsel or through the mechanism of what has been
16 and what will continue to be his public trial for terrorism,
17 murder, attacking civilians, and other military commission
18 charges. Those limits are contained in the Military
19 Commissions Act, in the Manual for Military Commissions, and
20 in the Regulation for Trial by Military Commissions.

21 The government does acknowledge that, except as
22 provided in those references, a military commission trial
23 shall be publicly held. In light of counsel's expansive

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1 notions of the rights of the accused here, I want -- I do want
2 to say how it's been publicly held. I mean, in the gallery,
3 there are 11 seats here on Guantanamo Bay for the media. And
4 there are additional seats in the Media Operations Center.
5 There are seats and places for observation from
6 nongovernmental organizations, representatives of those
7 organizations to observe. Victim family members attend all
8 public sessions.

9 Meanwhile, proceedings are transmitted via
10 closed-circuit television, pursuant to your orders, to
11 extensions of this courtroom in the continental United States.
12 One of these is in the National Capital Region, readily
13 accessible, with much more capacity than has ever been
14 demanded by the media for any of these pretrial sessions.
15 There's also a place in the National Capital Region for the
16 public to observe.

17 Your Honor, a few statistics should be considered to
18 provide a sense of proportion and a more complete
19 understanding of this matter. By our own scrub of filings of
20 motions, and it was good to see counsel acknowledging we found
21 some errors in his scrub, there have been 5,150 filings that
22 the parties have submitted on the unclassified route. Of
23 those, 4,883, or between 94 and 95 percent, have been posted

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1 to the Office of Military Commissions website. And that 95
2 percent figure is striking, because it fits other measures of
3 openness that you've insisted upon and that the law requires.

4 Of 429 hours of sessions since arraignment in May of
5 2012, 408 of those have been open; 21 of them have been
6 closed, pursuant to your orders. This measure yields a 95
7 percent figure. And, again, about 5 percent closed.

8 Another measure: Of 18,740 pages of unofficial,
9 unauthenticated transcript, not -- these are not judicial
10 records, but this is something you have been acknowledged as
11 you've been looking at the public trial aspect, of those
12 18,740, 17,745, and that -- so -- have been open, and about a
13 thousand have been closed. Again, that's 95 percent open,
14 with 5 percent closed.

15 And we're dealing with -- at the invitation and
16 request and motions of the defense -- with some of the most --
17 as they seek to put forth their views here, some of the most
18 sensitive equities we have. So that 95 percent figure is
19 telling, defending some good public servants here in the
20 process.

21 I want to say that the DoD security classification
22 and declassification review team reviewed in 2017 alone, the
23 calendar year 2017, 248,215 pages of military commissions

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1 information. So just for a sense of proportion.

2 Now, I do want to acknowledge -- we acknowledge that
3 that 15-day guidance for security clearance of filings placed
4 by the commission into -- placed by the commission into
5 operation in all cases, as you noted -- we're not using this
6 triage thing up front that's in the reg -- that 15-day
7 security review is not as -- is frequently not met.

8 We also acknowledge, and this is something implicit
9 in that 95 percent figure, and that is that as of the date of
10 our filing of our response, some 267 filings of that 5,150,
11 had not been posted as of the date of our filing of our AE 555
12 response.

13 MJ [COL POHL]: General Martins, let me ask -- let me ask
14 you a question, because there may be a way to expedite this
15 process.

16 Is the webmaster correct -- and, again, I'm not -- I
17 get this second- or third-hand, so if it's not accurate, so be
18 it -- that everything has to go through OCA review before it
19 can be put on the web?

20 CP [BG MARTINS]: I have not heard that, Your Honor.

21 MJ [COL POHL]: Okay. So if I direct -- because this
22 comes from my office. If I simply say, that's not what the
23 rule says, and if it's an unclassified proceeding, we'll send

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1 it straight over to the webmaster and they should accept it.

2 CP [BG MARTINS]: Your Honor ----

3 MJ [COL POHL]: Because the bulk of -- because, quite
4 frankly, sending this over to OCA review is what's slowing all
5 this down, I suspect. And if you're reading the regulation --
6 and before you commit, I don't know who this guy or gal is,
7 and I'm not running -- I'm not making any disparagement, I
8 just want to clarify this one point, because that's what we're
9 being told.

10 If that's not accurate -- and what I'd like to do
11 later in the week, talk to whoever is in charge of this and
12 make sure that's either accurate or inaccurate, because that
13 one change, I suspect, would move a lot of this along. But I
14 don't want to get into a -- you know, you're telling me you
15 don't think that's -- are you with me on this?

16 CP [BG MARTINS]: Here's what I -- here's what ----

17 MJ [COL POHL]: Go ahead.

18 CP [BG MARTINS]: Your Honor, we come into this when
19 we're -- when we get pulled into it by this kind of
20 litigation, frankly.

21 MJ [COL POHL]: I got that.

22 CP [BG MARTINS]: And we -- we do note how long it takes
23 things to go up. But I will tell you, you know, we went

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1 hunting for those 16 transcripts in the last month because of
2 the reports here.

3 So -- but let me just see -- this is -- I'm walking
4 through the regs ----

5 MJ [COL POHL]: Okay. Okay. Let me finish my first topic
6 and I want to go to this.

7 CP [BG MARTINS]: Okay. Go ahead.

8 MJ [COL POHL]: Okay. I want to you check with the
9 webmaster and confirm whether or not that is -- everything has
10 to go for OCA review or not and get back to me on that.

11 Secondly, is you said you had to check on the 16
12 transcripts. Are you talking about the 806 transcripts?

13 CP [BG MARTINS]: These are the 806. And I wanted to talk
14 about those because we got status for you. But can I ----

15 MJ [COL POHL]: Go ahead.

16 CP [BG MARTINS]: ---- talk to a legal piece pointing --
17 about your webmaster?

18 We have asked about that and looked at it in the
19 past, and maybe it's a bit of them pointing it back at the
20 role in here of the chief clerk. Because what we're hearing
21 and what -- my reading of that transcript with Lieutenant
22 Korczynski was your ruling was, default setting, is everything
23 going to go into a review. Everything. The chief clerk is

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1 going to give everything over to a review.

2 And maybe he was -- maybe that was based on him
3 talking to the webmaster. So I'm going to go chase that down.

4 MJ [COL POHL]: No, and -- and -- and I don't think we --
5 it's how we got here with the miscommunication, because a lot
6 of this is being done informally, I got it, but let's -- let's
7 going forward just clarify that.

8 CP [BG MARTINS]: Okay.

9 MJ [COL POHL]: If my chief clerk was under the
10 misimpression that that was not required or that something
11 that I said that people interpreted that was required, I got
12 it. But going forward, it strikes to me that -- because we
13 can turn -- we can send it straight over to the webmaster
14 after one day very easily. And quite frankly, it would save
15 my guys going over to the OCA every day with unclassified
16 pleadings to get it done.

17 So -- so moving forward on that, let's ----

18 CP [BG MARTINS]: Your Honor, I'm going to definitely
19 follow up and look at that and get their view on this.

20 MJ [COL POHL]: Okay. But now your next point about the
21 806 transcripts ----

22 CP [BG MARTINS]: May I make a few comments about the
23 15-day -- business day?

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1 MJ [COL POHL]: Sure.

2 CP [BG MARTINS]: Because there were comments made on --
3 in argument, and I just want to clarify some things.

4 It is important to remember in this that the 15-day
5 timeframe -- and there is -- there is a 15-day rule in here
6 that the classification review shall generally take no longer
7 than 15 business days. So that is the classification review.
8 That's not the amount of time it takes to get to the OCA or
9 the time it takes to go up on the web. And that's an
10 important piece, because they see their clock starting, the
11 OCAs, is when they get the material.

12 MJ [COL POHL]: It's hand carried to them every day.

13 CP [BG MARTINS]: Okay. Well ----

14 MJ [COL POHL]: I'm just telling you.

15 CP [BG MARTINS]: ---- I'm out of that process. But they
16 report back to us on some of these ----

17 MJ [COL POHL]: Well, I know you're not part of that
18 process. But what I'm saying is my CISOs go over there every
19 day, hands this to somebody there, and then that's when it
20 goes.

21 CP [BG MARTINS]: And we acknowledge that the security
22 review then, Your Honor, does take more than 15 days,
23 frequently.

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1 I wanted to also note that whereas the -- yeah, we
2 talked about the triage and I'll catch up on it.

3 On the -- now, getting to your question about
4 transcripts. So 15 of the 16 have not been posted in an
5 unclassified form.

6 Now, these are 806 sessions. And we counted up the
7 number of filings and motions that were dealt with in those,
8 it's about 21 hours, about a thousand pages of transcript, and
9 it dealt with about 34 different motions. Almost all of
10 them -- this goes to this question of whether these are public
11 proceedings. Almost every one of them had a version of that
12 motion that was a -- you know, it was bifurcated. There was
13 an unclassified version of it. That's a key point on this.

14 And then going back and looking for them, they go
15 back all the way to October of 2015. We -- three of them, I'm
16 told, are supposed to be posted imminently, and then the
17 remainder are all with one particular equity holder. They
18 have been through the rest of the process.

19 They have not -- they have to go through several
20 different OCAs looking at these. And because they are
21 inherently something that you put into a closed session,
22 they're not -- they're sometimes harder than other things.

23 MJ [COL POHL]: I got it. But, of course, it shouldn't

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1 take two years.

2 CP [BG MARTINS]: Your Honor ----

3 MJ [COL POHL]: It shouldn't take three years. It
4 shouldn't take four years.

5 CP [BG MARTINS]: ---- I acknowledge that, but ----

6 MJ [COL POHL]: I got it.

7 CP [BG MARTINS]: ---- in terms of trying to figure out
8 how to track this, we have gone back and looked at each one
9 and they tend to focus on the things that get put in the
10 system. 248,000 pages is a lot of stuff. And they tend to,
11 you know, focus on the things that they can try to get out.
12 They do focus on stuff that's on the docket so that when we
13 argue it, the main pleadings have been out there. So I just
14 want to push back on some of that.

15 I'd like to make three legal points. Those are the
16 data points. The defense does have the burden. You see this
17 in their motion. They seem to want to shift the burden. They
18 have the burden here. The cases they cite for that are in
19 apposite. It's their burden to demonstrate the relief is
20 warranted, and they can't do that, because the Regulation for
21 Trial does not create a right of action, enforceable right of
22 action for them.

23 There are important rules and standards here, but

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1 they're not to be enforced by Ali Abdul Aziz Ali through his
2 counsel. And then even if there was some enforceable right of
3 action or not, dismissal is obviously not appropriate. There
4 are other ways to try to deal with this and to get to these
5 standards in the regulation.

6 Step one, I'll get you this answer. And there may be
7 something on the back end. Mr. Connell referred to it. There
8 is this notification process from the OCA, if, due to
9 exceptional circumstances, the 15-day rule can't be met.
10 That -- and there is some indication that ought to be
11 reflected on the -- on the inventory. So I think that's
12 another way in which we can start getting after the
13 15-business day or at least acknowledging when we can't make
14 it. Because some -- they're not all the same. Some of this
15 stuff is significantly harder.

16 Your Honor, I would submit if you go to the Eastern
17 District of Virginia website or the Southern District of New
18 York website and you look at the Moussaoui and Ghailani cases
19 and just go down the docket, the public posting of that, a
20 whole bunch of that stuff is sealed. All the stuff here
21 related to the CIPA practice is just simply sealed and
22 obscured from the public entirely.

23 This is a disingenuous, mistaken argument about the

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1 public nature of these proceedings, and they will continue to
2 be public. Thank you.

3 MJ [COL POHL]: Okay. I just want to clarify one point.
4 When I say my CISOs go to the OCA every day, they go every day
5 that they need to drop something off to them. By that, I mean
6 if a filing needs to go over to the OCA, they take it over
7 there; but if there isn't a filing, obviously, they don't
8 visit the OCA to give them nothing. But anyway, just to
9 clarify that point.

10 Mr. Connell.

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

12 Three points. The first is that it seems difficult
13 to see the prioritization process described by the government
14 reflected in reality when ten of the pleadings on the docket
15 that you issued a month ago, the core -- and I don't mean like
16 the little bitty pleadings, I mean the core pleadings that one
17 would have to read in order to understand what's going on are
18 not available to the public.

19 The second is the government's argument about sealed
20 documents in a federal court makes, rather than rebuts, our
21 point. A judicial decision to seal a record is subject to
22 challenge, but at its core is a judicial decision. These
23 pleadings are being denied to the public, at least in time for

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1 them to make sense of what's going on in the hearing, not
2 because of a judicial decision but because of a resourcing
3 decision made by the government, as far as I can tell.

4 Third, I don't know -- no. I'll say it a different
5 way. Asking the government to go check with this webmaster
6 individual, who no one seems to know who they are or who they
7 work for, is not the proper solution. We have plenty of time.
8 Let's have this webmaster get on the VTC and answer the
9 military commission's questions, the government's questions,
10 our questions, on Thursday.

11 Let's find the webmaster. Let's chase down the
12 problem rather than just kicking the problem down the road
13 with a temporizing answer from the government. Let's -- if
14 the webmaster -- I'm not saying the webmaster is the problem;
15 I don't know what the problem is. But the webmaster is a
16 piece of the problem, and information that the webmaster has,
17 whether truthful or mistaken, could help us resolve this
18 problem.

19 So I would ask that the person actually get on the
20 VTC and testify.

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

22 Trial Counsel, anything further?

23 CP [BG MARTINS]: Nothing further, Your Honor.

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1 MJ [COL POHL]: Well, that would appear to conclude what
2 we had scheduled for today. Actually, what we had scheduled
3 for all of the week.

4 As I stated earlier, tomorrow we will do a closed
5 session, which will deal with 114, 114F, and 534. Everybody
6 on track for those three?

7 Okay. Given where we're at, and we are still waiting
8 for information from the government, we will not be in session
9 on Wednesday. We will reconvene in open session 0900 on
10 Thursday. If something were to come up tomorrow -- well, it's
11 not, because there's plenty of time to address all of the
12 issues on Thursday and Friday.

13 Friday's tentatively also scheduled for a classified
14 session, but if we need to do an open session in the morning,
15 we certainly will.

16 And then right now, I have on -- set up for the
17 closed 806 session as 114 and 114F, 525 and 534, assuming the
18 505(h) tracks on those.

19 And I believe 509 and 513, are those --
20 Mr. Connell ----

21 LDC [MR. CONNELL]: Sir, we addressed those earlier.
22 Those are waiting for 505.

23 MJ [COL POHL]: Okay. So we won't do a 505(h) on them,

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1 okay?

2 LDC [MR. CONNELL]: Correct. And, sir, would you like to
3 hear what I think we have in open session, or ----

4 MJ [COL POHL]: Yeah. Go ahead. I've got 524, 548, 525,
5 114, 114F, and maybe 326.

6 LDC [MR. CONNELL]: That's right, sir. The only thing I
7 have to add to that is 549.

8 MJ [COL POHL]: I'm sorry. Yeah, I have that down, too.
9 Okay.

10 And, Mr. Nevin, I know your position, maybe you can't
11 litigate anything. But at the 802 there was a discussion with
12 you and Mr. Swann about a witness on 530G.

13 LDC [MR. NEVIN]: Yes. That matter has now been resolved.

14 MJ [COL POHL]: Okay. Okay.

15 LDC [MR. CONNELL]: Sir?

16 MJ [COL POHL]: Mr. Connell.

17 LDC [MR. CONNELL]: I just wanted to advise you that we
18 believe there -- of course, it is your decision, but we
19 believe there will be an open portion of the 534 argument as
20 well.

21 MJ [COL POHL]: Okay. You've lost me. In addition to the
22 530 argument we already heard today?

23 LDC [MR. CONNELL]: 534, sir.

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1 MJ [COL POHL]: Oh, I'm sorry. Yeah, okay. Well ----

2 LDC [MR. NEVIN]: Judge, would you say again what you ----

3 MJ [COL POHL]: Yeah, one moment please, Mr. Nevin.

4 You see, Mr. Connell, I have 534 as a 505(h)-only.

5 Is there an open part of that also?

6 LDC [MR. CONNELL]: Sir, in -- yes, if you look at ----

7 MJ [COL POHL]: I got it.

8 LDC [MR. CONNELL]: ---- 534H, we think there's a 505(h)

9 and then we expect it to be bifurcated.

10 MJ [COL POHL]: Okay. But it would make more sense to do

11 the 505(h) first and then do the open?

12 LDC [MR. CONNELL]: Yes. Yes, sir. That's correct.

13 MJ [COL POHL]: Okay. Mr. Nevin, I think you asked me

14 just kind of to review where we're at.

15 LDC [MR. NEVIN]: Yes.

16 MJ [COL POHL]: Okay. Here's what we have for the open

17 session left: 524, 548, 549, 525, 114, 114F -- and, again,

18 those are actually kind of two groupings -- and then 534. Any

19 other -- okay.

20 And then in the 505(h) hearing, it would be 114,

21 114F, 534. And then assuming we grant those, then the 806

22 would be 114, 114F, 525, and 534.

23 Is there a 505(h) on 524 as opposed to 525?

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1 LDC [MR. CONNELL]: No, sir. And -- or ----

2 MJ [COL POHL]: I know they're basically ----

3 LDC [MR. CONNELL]: There was already -- you've already
4 issued an order on 524, and we have already -- it was -- you
5 might recall there was -- the 505(h) on 524 was decided that
6 there could be rebuttal argument that was necessary, and it
7 was not necessary. But you've already addressed 524 and 525
8 in orders.

9 MJ [COL POHL]: Okay. And the way I'm looking at it is we
10 still have a closed 525 session to have an 806 on?

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

12 MJ [COL POHL]: But not 524?

13 LDC [MR. CONNELL]: Unless thing comes up in rebuttal.
14 Those two orders are 524E and a 525E.

15 MJ [COL POHL]: Okay, thank you, Mr. Connell. Anything
16 further? Commission is in recess.

17 [The R.M.C. 803 session recessed at 1457, 26 February 2018.]

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