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1 [The R.M.C. 803 session was called to order at 0923,  
2 26 September 2019.]

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

4 General Martins, good morning. Are all of the  
5 government counsel who were present at the close of the  
6 previous session again present?

7 CP [BG MARTINS]: Good morning, Your Honor. Yes, the  
8 counsel representing the United States are the same as when we  
9 were last in open session.

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

11 Mr. Sowards, good morning. Looks like you have ----

12 LDC [MR. SOWARDS]: Good morning, Your Honor.

13 MJ [Col COHEN]: Anyone who needs to be on the record that  
14 you may account for them; otherwise, I don't need necessarily  
15 all the staff that you have present, but ----

16 LDC [MR. SOWARDS]: Thank you, Your Honor. All counsel  
17 are present.

18 MJ [Col COHEN]: All right. Thank you, sir. And I  
19 recognize Mr. Mohammad.

20 LDC [MR. SOWARDS]: Thank you, sir.

21 MJ [Col COHEN]: All right.

22 Ms. Bormann, the same to you. I recognize that  
23 Mr. Bin'Attash is here.

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1 LDC [MS. BORMANN]: Yes, indeed, and as are all counsel.

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

3 Mr. Harrington. I recognize Mr. Binalshibh is here.  
4 With respect to counsel?

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

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

7 Mr. Connell, I do not see Mr. Ali here this morning  
8 and -- but do you want to start with counsel, and then we'll  
9 take up that issue?

10 LDC [MR. CONNELL]: Yes, sir. All counsel are present.  
11 I'll account for Mr. al Baluchi's absence at the appropriate  
12 time.

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

14 Mr. Ruiz, I do not see Mr. al Hawsawi here this  
15 morning, but with respect to counsel?

16 LDC [MR. RUIZ]: We're the same with Lieutenant Colonel  
17 Williams has rejoined us.

18 MJ [Col COHEN]: All right. Thank you, sir. I appreciate  
19 it.

20 Mr. Connell, would you like to be heard with respect  
21 to Mr. Ali?

22 LDC [MR. CONNELL]: Your Honor, Mr. al Baluchi is present  
23 in the Expeditionary Legal Complex. He is in the holding

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1 cell. The -- I have personally spoken with him this morning.  
2 I advised him of his right to presence. I gave him advice of  
3 counsel as to whether he should be present or not. I am fully  
4 satisfied that his waiver of presence for this first part of  
5 the proceedings is knowing, voluntary, and intelligent. In  
6 fact, he had more process than he normally has since he had  
7 advice of counsel in making that decision.

8 His intention is at the first break, after we finish  
9 AE 655, that he will come in the courtroom.

10 MJ [Col COHEN]: Okay. All right. Thank you, sir.

11 Mr. Ruiz, do you have -- are there any updates with  
12 respect to Mr. al Hawsawi?

13 LDC [MR. RUIZ]: Judge, Mr. al Hawsawi is present in the  
14 holding cell.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. RUIZ]: He wishes to remain there. He has asked  
17 to have access to the video feed ----

18 MJ [Col COHEN]: Okay.

19 LDC [MR. RUIZ]: ---- which I understand that he now does  
20 and we will have some personnel going back to meet with him.

21 MJ [Col COHEN]: Okay.

22 LDC [MR. RUIZ]: If at some point the commission session  
23 ends, then we would ask the commission to allow him to come in

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1 here and continue to meet with the personnel ----

2 MJ [Col COHEN]: Absolutely. Yeah, we talked about that  
3 yesterday. There was a request for you all to have some time  
4 to meet with your clients, and I have no problem with that  
5 occurring later.

6 Do you believe that he -- that it is a knowing and  
7 voluntary decision not to be present in the actual courtroom  
8 itself?

9 LDC [MR. RUIZ]: Absolutely. I spoke with him about that.  
10 I have the waiver in front of me and I am satisfied that it is  
11 knowing and voluntary.

12 MJ [Col COHEN]: Okay.

13 LDC [MR. RUIZ]: But I also appreciate the additional time  
14 to meet and confer with him.

15 MJ [Col COHEN]: Absolutely.

16 LDC [MR. RUIZ]: We had a couple of hiccups this morning,  
17 but everyone ensured that we had proper access, so thank you.

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

19 Trial Counsel?

20 CP [BG MARTINS]: Your Honor, when we litigated the  
21 presence issue of the accused and developed this waiver of the  
22 right to presence, one of the principles behind it was the  
23 requirement in the D.C. Circuit for in-court waivers of

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1 something as important as a right to presence.

2 MJ [Col COHEN]: I understand.

3 CP [BG MARTINS]: And I certainly respect counsel's  
4 representation of Mr. Ali's waiver. Mr. Swann is going to  
5 present a normal written waiver of presence from Mr. Hawsawi,  
6 even though he is present in the compound.

7 MJ [Col COHEN]: No problem, sir.

8 CP [BG MARTINS]: The request would be that when Mr. Ali  
9 shows up, you affirm on the record what Mr. Connell, no doubt  
10 in good faith, represented to you, just because that's the  
11 rule of the circuit.

12 MJ [Col COHEN]: Nope. I understand. I have no problem  
13 doing that. I will ask Mr. Ali -- if he later decides to show  
14 up, I will confirm that with him, sir. Thank you. And you  
15 may present any witnesses that you need to.

16 I recognize the Major, the assistant staff judge  
17 advocate, is the same witness who testified yesterday. I  
18 remind you that you're still under oath.

19 WIT: Yes, sir. Thank you.

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

21 [END OF PAGE]

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1 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
2 was reminded of her oath, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Major, do you have what's been marked as Appellate  
6 Exhibit 660II in front of you?

7 A. Yes, sir.

8 Q. It's a two-page document?

9 A. Yes, sir.

10 Q. Does the signature of Mustafa al Hawsawi appear on  
11 the second page of this document?

12 A. It does.

13 Q. Did you advise him in English or in Arabic?

14 A. English.

15 Q. And did he sign the English version of this document?

16 A. He did.

17 Q. Do you believe he -- do you believe he voluntarily  
18 waived his right to attend today's proceeding?

19 A. I do.

20 TC [MR. SWANN]: Nothing further, sir.

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

22 Mr. Ruiz, have you had the opportunity to see  
23 Appellate Exhibit 660II?

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1 LDC [MR. RUIZ]: Yes.

2 MJ [Col COHEN]: Do you have any questions?

3 LDC [MR. RUIZ]: I don't. Thank you.

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

5 I hand this to the court reporter.

6 Major, you are excused. Thank you.

7 WIT: Thank you, sir.

8 [The witness withdrew from the courtroom.]

9 MJ [Col COHEN]: Having heard the comments of counsel with  
10 respect to Mr. al Hawsawi and having had the opportunity to  
11 hear the testimony of the witness and review the document,  
12 660II, I am -- I find that Mr. al Hawsawi has knowingly and  
13 voluntarily waived his right to be present at today's session.

14 I will at this point accept the assertions of counsel  
15 made with candor towards the tribunal or towards the court  
16 with respect to Mr. Ali's decision not to be here, at least  
17 temporarily. If he changes his mind, he's welcome to come in  
18 in conjunction with what Mr. Connell has stated; at which  
19 point, Mr. Connell, I will just simply indicate that that was  
20 my understanding of his decision and have him confirm it, if  
21 that's okay.

22 LDC [MR. CONNELL]: Sir, I don't have any objection to  
23 that, but I will say I socialized this procedure with the

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1 prosecution before doing it.

2 MJ [Col COHEN]: Okay. I understand. I'll just -- I'll  
3 just make sure. It will be just a very quick question, and  
4 then I won't go into any attorney-client discussions or  
5 anything along those lines. All right. Thank you. And I  
6 appreciate everyone's flexibility in dealing with these  
7 last-minute decisions.

8 All right. This morning, the purpose is to address  
9 some -- some brief oral argument on a couple of existing  
10 issues with respect to AE 655, which is the trial counsel's  
11 request for a court order of a mental health evaluation, not  
12 under R.M.C. 706, but just with respect to Mr. Ali's medical  
13 capacity based on a filing and information provided by the  
14 defense in support of their AE 628 motion series. I will hear  
15 argument on that.

16 And then we will go into some general comments with  
17 respect to 639 and 653. Whether it's actually oral argument  
18 or it's just bringing some matters to the attention of the  
19 commission with respect to these particulars and dates that  
20 are there, I will allow the parties to be heard briefly with  
21 respect to -- to those as well. Okay.

22 Trial Counsel, it's -- oh, one second. I need to  
23 make an 802 summary. I remember that we had an 802 yesterday.

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1           Mr. Trivett, I apologize. One moment, please.

2           At the conclusion of yesterday's closed session  
3 testimony of Mr. Fife, we conducted a brief closed session to  
4 hear classified oral argument on AE 639 and 653 so that we  
5 could conclude those matters. We will -- some of that may be  
6 referenced with respect to nonclassified portions of that in  
7 today's oral argument and discussion of 639 and 653.

8           Thereafter, at the request of defense counsel, we  
9 conducted a short conference with trial and defense counsel in  
10 accordance with Rule for Military Commission 802. The accused  
11 were absent.

12           During that conference, we discussed the potential  
13 way forward, both as to witness testimony and the taking of  
14 depositions in the coming months. Of particular note was  
15 discussion as to whether or not we will be able to -- as to  
16 the number of witnesses that might be allowed to be called,  
17 et cetera.

18           LDC [MR. CONNELL]: Sir?

19           MJ [Col COHEN]: Yes.

20           LDC [MR. CONNELL]: I know it all sort of runs together  
21 after a while. If I might jump in and say, the main focus of  
22 the 802 was my proposal that we sort of jointly file a copy of  
23 the discovery ----

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1 MJ [Col COHEN]: That's correct.

2 LDC [MR. CONNELL]: ---- under seal to avoid the problem  
3 of multiple and incomplete filings.

4 MJ [Col COHEN]: That is correct. And then there were  
5 some general discussion as to whether that would be feasible,  
6 how that might work, those types of things.

7 Mr. Connell, you also had indicated appreciation for  
8 the court reporters and various support staffs for their  
9 efforts during the past three weeks to get things done. I  
10 also concurred with that and wanted to make sure that, on the  
11 record, that we recognize those who aren't necessarily seen  
12 here in the courtroom, but who make all of these proceedings  
13 possible.

14 We have accomplished quite a bit as far as  
15 substantive evidence and those kinds of things over the last  
16 three weeks. And so I want to thank all of the parties for  
17 that.

18 It's my understanding -- I may be wrong -- that this  
19 may be the first time we've had three straight weeks down here  
20 for this particular case. While that may seem not such a big  
21 deal to others, when you add in the travel time and the long  
22 hours that all of us are spending, even after the court is not  
23 in session, which I'm very aware of that you all are probably

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1 doing even more than I am, but I know with my hours and my  
2 other duties and stuff that, you know, like I said, that makes  
3 for long days. And so I am very appreciative of everyone's  
4 professionalism during the last three weeks.

5           It has been very helpful to me and hopefully to the  
6 parties to hear some of this testimony, to get a better idea  
7 of what some of the issues are out there, and to give us all  
8 better context with respect to issues. I think we've seen  
9 that with respect to the arguments on the XYM stuff,  
10 et cetera.

11           The government -- we've also seen, based on context  
12 and testimony that's come out, the government indicating that  
13 certain witnesses will now be brought, whereas previously  
14 there may not have been a proper context to make those  
15 decisions. And so I think to a certain extent, you know,  
16 that's been important.

17           And I am pleased that the parties are in agreement  
18 that there is a need to continue to gather evidence, to  
19 support the various issues and the significant decisions that  
20 will need to be made forward.

21           So all of that wasn't included in the 802. It was a  
22 very brief discussion, primarily discussing exactly what  
23 Mr. Connell said.

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1           We will then -- like I said, I just wanted to say  
2 thank you to the parties to -- for -- like I said, for all the  
3 professionalism that went into making the last three weeks  
4 happen. I considered it significant, and hopefully the  
5 parties did as well.

6           Is there anything with respect to the 802, other than  
7 what Mr. Connell has mentioned, that anyone else would like to  
8 add?

9           General Martins.

10          CP [BG MARTINS]: Nothing from the United States, Your  
11 Honor.

12          MJ [Col COHEN]: All right. Any other defense comments?  
13           Mr. Sowards.

14          LDC [MR. SOWARDS]: Yes, Your Honor.

15           I think it may have been implicit, but our position  
16 is if the military judge is thinking of adopting a new  
17 procedure for the preservation and marking of exhibits with  
18 respect to Mr. Connell's proposal, we would deem that -- if --  
19 nevertheless helpful, nevertheless a significant change in the  
20 procedure, and we would hope that, consistent with other  
21 changes in the rules, we would have an opportunity for public  
22 comment.

23          MJ [Col COHEN]: Absolutely. Yes, sir.

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1 LDC [MR. SOWARDS]: Thank you.

2 MJ [Col COHEN]: Yeah. It was -- it was proposed. I --  
3 consistent with -- other than a pure logistical or  
4 administrative matter that I might decide, such as, okay,  
5 yeah, let's start at 8:30 tomorrow, those kinds of things, but  
6 substantive rulings and any shift, yeah, I would want to hear  
7 the inputs of the various parties.

8 So Mr. Connell presented it in a way of, hey, I just  
9 wanted to bring you in the loop that this was being discussed,  
10 and I took it in that vein, that, understand, let me know if  
11 there's some consensus that you want to do something in a  
12 particular way.

13 I think the -- reflecting back on exactly how I  
14 phrased it, I think I said, look, I understand there's  
15 always -- there is some level to a box that I must work  
16 within, which is usually the law, regulations, you know,  
17 rules; but if there are miniature boxes within there, I have  
18 no problem thinking outside those miniature boxes as long as I  
19 stay within a defined legal framework.

20 LDC [MR. SOWARDS]: And Mr. Connell also said that in the  
21 context of his appreciation for your staff's hard work, and we  
22 in no way detract from that.

23 MJ [Col COHEN]: No. Absolutely, sir.

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1           No, like I said, you all have been -- both the  
2 prosecution and the defense have been extremely professional  
3 this week and have made your points appropriately, as you've  
4 needed to. And, like I said, once again, just thank you for  
5 doing so. All right.

6           If there is nothing else with respect to the 802?

7           Mr. Harrington, please. Yes, sir.

8           LDC [MR. HARRINGTON]: Judge, not with respect to the 802,  
9 but a different issue.

10          MJ [Col COHEN]: Yes, sir. You may be heard.

11          LDC [MR. HARRINGTON]: Judge, we have been talking off and  
12 on about some argument on 152.

13          MJ [Col COHEN]: Yes, sir.

14          LDC [MR. HARRINGTON]: Mr. Trivett and I have not been  
15 able to resolve the classification issue regarding one piece  
16 of evidence to be submitted to the court, but at some point in  
17 time before we leave today, I do want to put some argument on  
18 the record, and I ----

19          MJ [Col COHEN]: Okay.

20          LDC [MR. HARRINGTON]: ---- would prefer that to be the  
21 last thing because, based upon this other issue, I need to  
22 revise what I'm going to say, so ----

23          MJ [Col COHEN]: Absolutely, sir. I understand.

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1           Does the prosecution have any objection to just  
2 having some brief discussion of that issue?

3           MTC [MR. TRIVETT]: No objection, sir.

4           MJ [Col COHEN]: All right. We will do that, sir. That  
5 will be the last thing we take up this morning. All right.

6           Mr. Trivett, then, I think we're ready for some  
7 argument on 655.

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

9           MJ [Col COHEN]: Good morning.

10          MTC [MR. TRIVETT]: The defense is contesting the  
11 admissibility of the accused's statements obtained during  
12 interviews alleging, inter alia, they are the product of  
13 torture, involuntary, unreliable, and do not serve the  
14 interests of justice.

15                 In support of its motion to suppress, the defense is  
16 offering the testimony of Dr. Porterfield, a clinical  
17 psychologist; and Dr. Xenakis, a psychiatrist. The proffered  
18 testimony clearly places the accused's mental state at issue,  
19 surrounding the accused's statements being offered by the  
20 government.

21                 Dr. Porterfield and Dr. Xenakis interviewed and  
22 evaluated the accused, each spending over 100 hours with the  
23 accused. The accused certainly is entitled to contest the

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1 admissibility of any of his pretrial statements; however, he  
2 may not do so without consequences. A consequence is that to  
3 the extent the accused may have a privilege against  
4 self-incrimination, the accused waives any such privilege when  
5 he seeks to introduce his experts' testimony and their  
6 evaluations.

7           The government has the burden of proof by a  
8 preponderance of the evidence that the accused's statements  
9 are admissible. The government has the right to attempt to  
10 rebut evidence presented by the defense. The government is  
11 not fairly able to address the allegations of the defense  
12 without similar access to the accused.

13           The requested evaluation is analogous to the  
14 situation wherein the defense asserts lack of mental  
15 competence as a defense. In such a case, the government has  
16 the right to access to the accused to conduct its own  
17 evaluation. And that's the United States v. Babbige.

18           In Babbige, the court ruled that when the accused  
19 opened his mind to a psychiatrist in an attempt to prove  
20 temporary insanity, his mind was opened for a sanity  
21 examination by the government. In this case, when the accused  
22 opened his mind to his defense experts, he opened his mind for  
23 a similar evaluation by government experts.

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1           Now, I wasn't actually arguing the issue before Your  
2 Honor. I was reading from an order in the United States v.  
3 Omar Khadr, issued by Colonel Patrick Parrish on the 3rd day  
4 of May of 2010.

5           We come before you today asking for the very same  
6 relief. That relief was granted in U.S. v. Khadr, a motion to  
7 suppress was held, the motion to suppress was denied.

8           It was obviously important for the judge in that case  
9 to hear the testimony of the expert witnesses from the  
10 prosecution to rebut those allegations. It resulted  
11 ultimately in a decision to not suppress statements that  
12 Mr. Khadr claimed were the product of torture, and were thus,  
13 involuntary.

14           Every service -- every military service has a sort of  
15 unique culture. Everyone has their own sayings, their own  
16 terminology. The Navy, which I'm most familiar with, has this  
17 concept of East Coast sailors and West Coast sailors. And  
18 although it's a gross generalization, East Coast sailors will  
19 look for a regulation that specifically allows them to do  
20 something and won't do it unless there is something that  
21 specifically authorizes them. Whereas, a west coast sailor is  
22 the opposite; they look to see if there's a regulation that  
23 prohibits them from doing what it is that they want to do. I

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1 would submit to you, Your Honor, that Mr. Connell is asking  
2 you to take an East Coast view of the law on this issue to the  
3 extreme.

4           We will concede that R.M.C. 706, on its face, does  
5 not apply to this request. 706, which I'm sure Your Honor is  
6 very familiar with, deals specifically for when an accused  
7 puts their mental health into issue either at the time of the  
8 offense or in their competency to stand trial, whether they  
9 can understand the nature of the proceedings against them, or  
10 if they're unable to assist their defense counsel in their own  
11 defense.

12           That's not what we have here, and we have quite the  
13 opposite. And Mr. Connell mentioned earlier about making, at  
14 certain times, very hyper-technical legal arguments.

15           So in reviewing all of the court-martial cases, these  
16 issues simply do not come up in front of courts-martial  
17 generally. There may be claims where they're alleging that  
18 they were insane at the time of the offense or that they're  
19 not competent to stand trial. We could not find any  
20 court-martial cases that were specifically on point with a  
21 claim of involuntariness for a statement that was admitted.

22           And it's a super hyper-technical argument, because,  
23 if you think about it, Mr. Ali voluntarily makes decisions all

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1 the time. He's sitting over there because of that very  
2 voluntary decision that he just made that the defense counsel  
3 is not arguing against. He's certainly competent to make  
4 these decisions and has been since 2012, when we started.

5           So what we would ask the military commission to do is  
6 to look instead to 701 and consider this a request for  
7 discovery, because that ultimately is what it is. In 701  
8 Section (3), "The military judge may specify the time, place,  
9 and manner of discovery and may prescribe such terms and  
10 conditions as are necessary to the interests of justice."

11           The accused has clearly put his mental state into  
12 issue. In his filing of the motion to suppress, he has  
13 requested testimony from Drs. Gur and Drs. -- Dr. Hanrahan.  
14 They have alleged both in their filings and in discovery that  
15 has been provided to us that Mr. Ali has mild to moderate  
16 brain damage, that he has suffered from post-traumatic stress  
17 disorder, that he has cognitive issue; all of which, if  
18 presented in a one-sided manner and not rebutted by the  
19 government, may, in fact, be very compelling evidence to the  
20 military judge in deciding the issue of voluntariness.

21           To be clear, we are not asking for relief under  
22 Federal Rule of Criminal Procedure 12.2. We did cite two  
23 cases because the cases stand for the same principle that

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1 R.M.C. 706 stands for.

2 As Your Honor is undoubtedly aware, in 706, if an  
3 accused refuses to participate in the court-ordered sanity  
4 process and tries to put his own evidence of his own experts  
5 on his mental state into issue without fully cooperating with  
6 the 706 board, the judge has the capacity to exclude that  
7 information under M.C.R.E. -- or for courts-martial, M.R.E.  
8 302.

9 We have the same ability to make that argument and we  
10 assert that now under M.C.R.E. 403. There is a danger of  
11 unfair prejudice. I don't think there will even be much  
12 argument that the judge doesn't have the ability under  
13 M.C.R.E. 403 to exclude all evidence of mental health that's  
14 presented by the accused if he refuses to voluntarily submit  
15 to a prosecution expert examination.

16 And just to be clear, our request is for an exam, but  
17 subsequent relief can simply be exclusion of this evidence.  
18 We don't care either way. It does not matter to us in the  
19 slightest. But know, if the defense continues to put this  
20 issue before the court on voluntariness, we have to have the  
21 ability to rebut it.

22 We cite in our moving papers, sir, Kansas v. Cheever,  
23 which is a Supreme Court case in 2013, and there is some

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1 similarities in Kansas v. Cheever, in that Dr. Welner, who is  
2 one of the prosecution's experts, was also the expert in  
3 Kansas v. Cheever, was also the expert in U.S. v. Khadr. So  
4 what we are asking for is not at all uncommon under the law,  
5 although it tends to be more of a cottage industry in  
6 terrorism cases than regular, typical courts-martial.

7           But in Cheever, the court ruled the way it did on the  
8 simple premise that, quote, Any other rule would undermine the  
9 adversarial process allowing a defendant to provide a jury  
10 through an expert proxy with a one-sided and potentially  
11 inaccurate view of his mental state at the time of his alleged  
12 crime.

13           Through the defense's filing of the motion to  
14 suppress, by my count there's at least been 13 hours of  
15 examination by Lieutenant Commander Hanrahan. Dr. Gur has  
16 also made opinions. I don't know if he's basing it on that  
17 exam or simply just other testing that we do have access to,  
18 but they have both determined that they believe that Mr. Ali  
19 has moderate to severe brain damage that would portend  
20 decreases in episodic memory, particularly for emotional and  
21 visual information. Dr. Hanrahan provided the Montreal  
22 Cognitive Assessment, came to the conclusion that he had --  
23 that Mr. Ali had mild brain injuries and some level of

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1 traumatic brain injury.

2           So we filed -- and actually, we are very rarely in  
3 the position where we're standing up first in this court.  
4 We're usually responding to motions. This is a very small  
5 percentage of the time that we're moving for something, and an  
6 even smaller percentage of time that we waive our reply. And  
7 I want to explain to you why we did it, and certainly if the  
8 judge needs any further briefing, we are happy to seek leave  
9 to do that.

10           But the rule had been that if we were still in the  
11 briefing cycle when any commission session started, that that  
12 would not be argued -- that motion would not be argued in the  
13 session. We waived specifically to get this before Your  
14 Honor, because I do believe it is time sensitive. I believe  
15 that, certainly in looking at the path forward for 2021, we  
16 want to have this exam done. We want to be able to use it in  
17 the event we need it for Drs. Mitchell and Jessen, in the  
18 event that we certainly will need it for cross-examination of  
19 Drs. Hanrahan and Gur, and we may want to present our own  
20 evidence depending on where it falls.

21           We have no idea. We don't know what our doctor's  
22 going to say. That's the concern. He won't know what he's  
23 going to say unless he has an opportunity to interview

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1 Mr. Ali. So that's why we stand before you today having  
2 waived our reply. Time-sensitive issue, but we're happy to  
3 present any of the additional case law that the judge might  
4 feel necessary.

5 In our filing, and I think what you've seen over the  
6 last three weeks, we've -- we always try to work it out with  
7 the parties if we can to not bring it to Your Honor. And I  
8 think there's been a good-faith basis on both sides on this  
9 issue. We have -- that's why we attached all of our  
10 correspondence with Mr. Connell on this issue. We patiently  
11 answered every question that he had. We had to work and  
12 coordinate through our doctors to make sure we had the correct  
13 answers to his questions.

14 But at the end of the day, he does not want to submit  
15 to a voluntary medical exam, and we now come for you -- come  
16 to you for relief in that area. But we did try, and ----

17 MJ [Col COHEN]: I -- I understand. I don't -- I don't  
18 doubt that. I think this is just -- there are -- there are  
19 occasions, and I've said that, where the parties are not going  
20 to be able to come to an agreement, and then the issue comes  
21 before me. This is just one of them.

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

23 MJ [Col COHEN]: I understand that.

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

2 So in closing, you have the authority to order the  
3 exam as typical discovery under R.M.C. 701. Even if you  
4 somehow doubt that you have the authority to do that under  
5 701, you certainly have the authority to exclude it under  
6 M.C.R.E. 403. We would be extremely prejudiced in this case  
7 if you had a one-sided view of the accused's mental health, at  
8 least in January 2007, when he was giving statements.

9 You heard the testimony extensively of Special  
10 Agent Fitzgerald, Special Agent Perkins, Special  
11 Agent McClain, and it's going to be difficult for them to  
12 argue that those weren't voluntary statements. And in  
13 likelihood, this is going to come down to a battle of the  
14 experts over whether or not he could voluntarily give a  
15 statement after he spent time in the RDI program.

16 That's going to be the crux of this. I cannot  
17 under -- overemphasize the importance of having a adversarial  
18 process on this issue would be for the commission. I know if  
19 I were sitting in your chair, I would want to know from both  
20 sides really what his mental status was at the time. And what  
21 I'm saying is without this exam, you're not going to get that.

22 MJ [Col COHEN]: Thank you.

23 MTC [MR. TRIVETT]: Subject to your questions.

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1 MJ [Col COHEN]: And I apologize. There's been a lot of  
2 information going through my mind, so I understand general  
3 principles; but if this is in the brief, just tell me to go  
4 back and read the brief, which is fine.

5 But if I ordered this, how would the parameters work,  
6 that it's not an interrogation of the accused ----

7 MTC [MR. TRIVETT]: Correct.

8 MJ [Col COHEN]: ---- with respect to statements about  
9 facts supporting the government's case, but just how would we  
10 limit the scope, and -- just conceptually?

11 MTC [MR. TRIVETT]: Yes, sir. So some of it is in the  
12 brief and some of it is encompassed within the proposed orders  
13 for both Dr. Welner and Dr. Guilmette.

14 MJ [Col COHEN]: Okay.

15 MTC [MR. TRIVETT]: But I'll explain to you how we  
16 envision this process working. We envision it working in this  
17 courtroom at one of the tables. One of the initial concerns  
18 Mr. Ali had was guards being present, and whether or not that  
19 would invalidate the potential results of the exam. We worked  
20 with JTF-GTMO on that.

21 So the guards would be outside of the room but be  
22 able to monitor, at least for security purposes, not unlike  
23 Echo II when they have those meetings. The defense counsel

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1 and his experts would be outside in the gallery and they'd be  
2 able to watch. We were willing to negotiate whether or not  
3 they'd be able to come in at any point in time. We never  
4 actually got to that point.

5 MJ [Col COHEN]: Copy.

6 MTC [MR. TRIVETT]: We agreed to limit the exam solely to  
7 the issues that they raised, such as whether or not he's got  
8 traumatic brain injury, whether or not he's got cognitive  
9 deficits. We don't seek to use any of the statements that he  
10 made against him in the case in chief. We would be amenable  
11 to an order in that regard.

12 This is simply a way for us to be able to rebut the  
13 evidence that the defense has already put into place.

14 MJ [Col COHEN]: Or potentially confirm the evidence as  
15 well. I mean, that would be one of the potential  
16 consequences, correct?

17 MTC [MR. TRIVETT]: Absolutely. Absolutely. We do not  
18 know what it said. It may be that they come to the same exact  
19 conclusions as Dr. Gur and Dr. Hanrahan, and you would at  
20 least know that that was reliable evidence, and it's not  
21 contested. So we simply do not know. And that's part of the  
22 concern that we have and, I think, the commission should have  
23 as well.

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1           We envision it being recorded. We do have precedent.  
2 We recorded Mr. Lee Hanson in a deposition in this courtroom.  
3 May he rest in peace. He passed away. He was part of -- one  
4 of the family members who was sick, and we wanted to depose  
5 him. He had lost his family on Flight 175. He was on the  
6 phone with his son when the plane hit the South Tower.

7           So we have precedent for doing that. We have  
8 approval from Washington Headquarters Services to record it.  
9 And that's pretty much how we envisioned the premise going.

10           According to our doctors, it's not appropriate to  
11 tell him exactly what tests we were going to perform because  
12 that could allow for the subject to prepare for the tests and  
13 invalidate -- invalidate the results. But what I can say is  
14 we are willing to continue to work with the defense counsel if  
15 they have any specific concerns, to the extent we can address  
16 them and still have the results that we need in whatever exams  
17 they do, we're willing to do that.

18           So we're not inflexible on this. We're not coming up  
19 saying, thou shall be this way and not that way. But we are  
20 trying to impress upon the court how important we think this  
21 issue is, at least in regard to Mr. Ali, who has put the issue  
22 into evidence and into this litigation through the filing of  
23 his motions.

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1 MJ [Col COHEN]: All right. Thank you, sir. I appreciate  
2 it. Oh, one last question. Sorry, Mr. Trivett.

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

4 MJ [Col COHEN]: When Judge Parrish issued that order,  
5 just out of curiosity, what rules or sources of legal  
6 authority did he cite to?

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

8 So it was principally United States v. Babbige, and  
9 I'll give you the cite and I meant to do that, so thank you  
10 for reminding me. It's Appellate Exhibit 226B in  
11 U.S. v. Khadr, and he cites to Military Commission Rule of  
12 Evidence 304(d)(1) for the reason we have the burden. And  
13 then to the general principles under Babbige argued by analogy  
14 that it was similar to a 706, that if they're going to present  
15 their own expert, then the government must have the  
16 opportunity to present its.

17 MJ [Col COHEN]: Understand.

18 MTC [MR. TRIVETT]: The Military Commissions Act of 2009  
19 had already passed and been in effect, so we're dealing under  
20 the same congressional structure, you know -- other than the  
21 fact that it's been, you know, to the extent that it has been  
22 amended, it shouldn't have affected this decision.

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

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1 MTC [MR. TRIVETT]: Thanks.

2 MJ [Col COHEN]: Mr. Connell. Sir?

3 LDC [MR. CONNELL]: Thank you. Good morning.

4 MJ [Col COHEN]: Good morning.

5 LDC [MR. CONNELL]: The government just argued that it  
6 rarely stands up first on motions. One of the prior occasions  
7 on which it stood up first is the AE 614 series. And in  
8 AE 614, the government made the precursor to this argument and  
9 lost it in such a way that the government's argument here  
10 today is all but precluded by the prior rulings of this  
11 military commission.

12 In AE 614H, the military commission declined to  
13 accept the government's 12.2 -- Federal Rule of Criminal  
14 Procedure 12.2-based approach which it took at that time, it  
15 took in the briefs. Today in oral argument, the government  
16 tries to, you know, pivot away from that a little bit, and  
17 that's fine. People make changes in their oral argument.  
18 It's no problem.

19 But the affirmative decision of AE 614H that the  
20 military commission was going to take a rules-based approach  
21 to the question of how to handle mental health evidence, I  
22 suggest to the military commission, should not be abandoned  
23 today and should -- instead, you should stay with that.

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1           If it is helpful, in AE 016G, which was a set of  
2 slides at that time I prepared, I gathered all of the rules  
3 together in one place in the Military Commission Rules of  
4 Evidence, just if you wanted to have them handy. That might  
5 be.

6           Now today, unlike on brief, the government argues  
7 that Rule 701 gives the military commission authority to order  
8 an additional mental health-based interrogation of  
9 Mr. al Baluchi. And so with that in mind, it makes sense to  
10 turn to Rule 701 and see what the rule actually says. And  
11 what 614 actually said was that the military commission was  
12 going to apply 701 to this question.

13           So there are really two parts of Rule 701 that are  
14 important. The first of those is Rule 701(g)(4).

15           MJ [Col COHEN]: Counsel, once you're there -- I'll make  
16 sure I get there. I'll have to follow along.

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

18           MJ [Col COHEN]: I am there. Thank you.

19           LDC [MR. CONNELL]: All right. Well, you beat me there,  
20 sir. Just one moment.

21           The 701(g)(4) -- finally I've caught up to you --  
22 which is disclosure by the defense and it specifically  
23 requires the defense to disclose results or reports of

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1 physical or mental exams.

2           The -- it's not a hundred percent clear under the  
3 rule whether it applies in the pretrial phase or not, but I  
4 was willing to say, hey, that's fine. We're going to rely on  
5 this, I'm going to consider it to govern the pretrial phase.

6           In our initial 628 pleading, we attached as exhibits  
7 AE 628I and AE 628 -- I'm sorry, Attachment I and  
8 Attachment J -- the reports of Lieutenant Commander Hanrahan  
9 and Dr. Gur, fully complied with the Rule 701(g)(4) at that  
10 time. But to be honest, Your Honor, I do not believe that --  
11 I believe that discovery rules should be a floor and not a  
12 ceiling, and that applies to the defense as much as I believe  
13 that it applies to the government.

14           So we went a lot further than complying with simply  
15 the results from the reports required by 701(g)(4). The  
16 military commission asked or set up -- you know, posed a  
17 thought for us in the 802 as to whether data underlying the  
18 results in reports would be required. And in this instance  
19 the military commission doesn't actually have to answer that  
20 question because we provided all information, every scrap of  
21 paper underlying Lieutenant Commander Hanrahan's evaluation,  
22 and the government had, in fact, sent us a discovery request,  
23 DR-004 (Gov), and we fully complied with the government's

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1 discovery request.

2           And if I could direct the military commission's  
3 attention to AE 628A, which is a -- Mr. al Baluchi's notice of  
4 discovery, it -- the notice of discovery lays out at that time  
5 exactly what we provided in discovery on 13 May of 2019.

6           In paragraph 7 of our response to the government's  
7 request, it's the last page in the document, we explain that  
8 we have provided the declaration of Dr. Gur previous -- that  
9 he had made previously, like 914 compliance, prior statement  
10 of Dr. Gur that he had made on 11 April 2014; the TBI  
11 screening questions before ----

12           So the government mentioned that Dr. Welner is in a  
13 cottage industry. Lieutenant Commander Hanrahan is not in a  
14 cottage industry. This is -- he does -- not a forensic  
15 scientist. He is a person who evaluates Marines when they --  
16 at Twentynine Palms when they come back and they have  
17 traumatic brain injury from IEDs or other materials. He's  
18 been part of the Center of Excellence for Traumatic Brain  
19 Injury. He's not involved in courts at all. This is the  
20 first court case he has ever been involved in in any way. He  
21 is a practitioner and a person who evaluates principally  
22 Marines for TBI.

23           So before he got involved, he had screening

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1 questions. He's like, you know, is it worth my time to even  
2 fly down there and interview this person? This is not my  
3 normal job. And so he sent screening questions on 16 April of  
4 2015. We have provided those with the answers to the  
5 government. Little c. was the answers to those.

6 At that time he prepared a -- Dr. Hanrahan prepared a  
7 declaration saying that, in the ordinary course of his  
8 practice, he would -- if someone had presented with these  
9 answers on a screening, he would send them for an MRI. This  
10 was part of our effort at the time to obtain an MRI, which is  
11 now in place.

12 After that, the -- when the convening authority  
13 required -- excuse me, when the convening authority authorized  
14 the MRI, the convening authority sent questions, an MRI  
15 Screening Form. That's subsection e., and we provided the  
16 results of that MRI screening form to the government.

17 In the course of his interview of Mr. al Baluchi,  
18 Dr. -- Lieutenant Commander Hanrahan gave just two small  
19 screening instruments. We attached the full results of those.  
20 We gave the full result of his evaluation and assessment; and  
21 then separately than that, we provided Dr. Gur's volumetric  
22 analysis of the MRI documents itself.

23 So in 628A, we provided every piece of paper that we

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1 had to the government. But we went further than that, and we  
2 provided every piece of data that we had underlying these  
3 evaluations to the government.

4           And if I could direct the military commission's  
5 attention to AE 628D, that's our notice of discovery regarding  
6 the actual MRI imagery. And so what we did is we put the --  
7 we took the head imagery, all -- every head scan that we had  
8 and -- from the MRI, we put that onto a disc with a program  
9 capable of the prosecution using the program on the disc to  
10 access the data, and we provided every pixel of data that we  
11 had to the government.

12           One reason why that's especially important is, it is  
13 now true that the government has every piece of information  
14 that Dr. Gur has. Dr. Gur has -- doesn't have a security  
15 clearance, has never interviewed, to the best of my knowledge,  
16 has never interviewed Mr. al Baluchi. The -- with respect to  
17 Dr. Gur, as opposed to Lieutenant Commander Hanrahan, the  
18 playing field is exactly equal. It's, in fact, as we'll talk  
19 about later, heavily weighted to the government. But they  
20 have everything that Dr. Gur has. There's nothing else that I  
21 could possibly give them. I didn't make any relevance  
22 determinations, I didn't make any relevance redactions, I  
23 didn't play any games with what the scope of the team was. I

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1 mean, I just gave them everything that I had, every piece of  
2 paper, every piece of data.

3           The -- it can take -- the government can take those  
4 MRI results and present them to any neuroscientist it chooses  
5 in the world and have exactly the same basis for neuroscience  
6 results that Dr. Gur had. There's nothing additional that a  
7 personal interview of Mr. al Baluchi would add to that because  
8 the question is entirely a question of brain structure, right?  
9 What -- and if you look at 628J, it's what structures in  
10 Mr. al Baluchi's brain are intact and which are degraded. And  
11 that's a question of imaging, not a question of testing or  
12 asking questions.

13           The -- so, Your Honor, with respect to that, the  
14 question regarding Dr. Gur shouldn't really even be -- it  
15 doesn't belong in this motion. This is not -- there's no  
16 question of interview or parallelism or equities or fairness  
17 or anything else. It's just a question of analyzing MRI data  
18 using available algorithms. But the one resource ----

19           MJ [Col COHEN]: So let me ask you this question, Counsel.

20           LDC [MR. CONNELL]: Sure.

21           MJ [Col COHEN]: If their expert believed that a better  
22 quality MRI was required or something like that, would that be  
23 an option?

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1 LDC [MR. CONNELL]: Absolutely, sir. In fact, in my view,  
2 that would fall under sort of the fingerprinting cases,  
3 where -- because it would not be testimonial, anything on  
4 Mr. al Baluchi's behalf.

5 And I will tell you -- I will represent to you now  
6 that if the government has parameters it wants us to run in an  
7 MRI or like -- it doesn't like the parameters that were run  
8 and it wants different parameters or if it can get a better  
9 quality -- there's the 1.5 Tesla MRI that's down here, which  
10 is pretty good -- you know, if I were to go get an MRI myself  
11 in Bethesda, it would be twice that power; it would be a 3  
12 Tesla machine. But if they can get a better machine, better  
13 parameters, anything, we will submit. Mr. al Baluchi will do  
14 another MRI. If the government wants it run differently, run  
15 again to validate, run -- you know, yes, absolutely that's an  
16 option.

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

18 LDC [MR. CONNELL]: The -- the one resource that  
19 Lieutenant Commander Hanrahan had that the government does not  
20 is access to Mr. al Baluchi. And we'll talk about their  
21 common resources in a moment, but that -- this is the point on  
22 which the government focuses.

23 Now, that was a choice. That was not a random

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1 decision. That was a choice by the Secretary of Defense.  
2 Because the Secretary of Defense, in enacting the Military  
3 Commission Rules of Evidence, had -- could make the election  
4 under the Military Commissions Act of choosing to follow the  
5 court-martial model of 701(g), you know, or 701(b) under the  
6 M.R.E., but the same -- it's almost exactly the same language,  
7 or it could follow the federal court model of 12.2. And we're  
8 going to talk about what would happen under 12.2 in a moment.  
9 But the -- this was not a random choice.

10 The Congress said that it would be up to the  
11 Secretary of Defense in the Military Commissions Act --  
12 Congress said that it would be up to the Secretary of Defense  
13 to adopt court-martial procedures except where it found  
14 them -- the Secretary of Defense found them impracticable; in  
15 which case, he could make variance.

16 In the opening material of the Manual for Military  
17 Commissions, the Secretary of Defense states that the -- and I  
18 can point you to exactly where that is. Just one moment.  
19 The -- at R.M.C. 102(b), the Secretary of Defense specifically  
20 indicates that the, quote, Procedures for military commissions  
21 set forth in this manual are based upon the procedures for  
22 trial by general courts-martial.

23 And thus, it's important that 701(g)(2) is

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1 essentially -- is exactly the same as 701(b)(2) --  
2 M.R.E. 701(b)(2), with the exception that the M.R.E. has an  
3 innocent ingestion defense, which really doesn't have anything  
4 to do with the sort of crimes that we're talking about here.  
5 So the Secretary of Defense made an intentional decision to  
6 choose the courts-martial model over the model of the federal  
7 courts in 12.2.

8           The -- the other relevant element that the government  
9 relies on is 701(g)(2), which is -- this is the one which is  
10 the same as M.R.E. (b)(2), and it requires the intent to  
11 introduce -- notice of the intent to introduce expert  
12 testimony as to the accused's mental condition. And it  
13 orders -- requires that, quote, Before the beginning of trial.  
14 701(g)(2) has a clear reference to trial as a benchmark. I  
15 think there is even less support for -- that that rule on its  
16 own requires notice of intent.

17           But in this case the government has construed our  
18 representations and our provision of information about  
19 Mr. al Baluchi's mental health as a notice of intent to use  
20 mental health at a pretrial phase. And I don't disagree with  
21 that. It's like a lowercase N, we gave notice in the sense of  
22 we told them it was happening, as opposed to like a capital N,  
23 capital I, Notice of Intent. But I think the government is

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1 fully aware of our intentions, and -- and I think that that's  
2 true in a general sense, maybe not exactly the sense of the  
3 rule, but I don't think that matters.

4           And so my point here is that Rule 701, the  
5 government's authority here, is very clear about what has to  
6 happen. And we have not only complied with the requirements  
7 of Rule 701, we have overcomplied with the rules of Rule 701.  
8 And I did not attach all the underlying discovery to my  
9 notices of discovery. The reports are in the record and  
10 attached to 628, but if the military commission wanted to  
11 satisfy itself as to -- as to their completeness, you know, we  
12 can produce the original discovery. I don't think it's  
13 necessary, but if you want to see the brain images, for  
14 example, we can produce a disc, and you can see the brain  
15 images using the program which is there on the disc.

16           Now, in addition to the argument in 701 that it makes  
17 today, in the briefs the government relied on two authorities.

18           The first of those authorities is a line of cases  
19 holding that whether the Fifth Amendment bars introduction of  
20 compelled -- a compelled mental health evaluation depends on  
21 whether the defendant introduces a mental health evaluation,  
22 right?

23           There are cases going both ways, where a defendant

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1 did not introduce a mental health evaluation, and in that  
2 situation, the self-incrimination clause prohibition on  
3 compelled -- introduction of statements would bar its  
4 introduction at trial. On the other hand, in some places,  
5 including the Cheever case cited by the government in the  
6 brief and today, where the defendant had at one point in  
7 this -- in a long process introduced a mental health  
8 evaluation, the Fifth Amendment did not bar the government  
9 from responding to it.

10           That Fifth Amendment question is really a separate  
11 question -- not really. It's a completely separate question  
12 from the question of whether the rules authorize the tribunal  
13 to argue -- to compel such a mental health evaluation in the  
14 first place. Because under both of those cases, including  
15 Cheever -- Cheever winds up in the state courts, but the  
16 mental health evaluation had been ordered while the case was  
17 in federal court under Rule 12.2. And certainly, as the  
18 government concedes today, Federal Rule of Civil -- of  
19 Criminal Procedure 12.2 has no direct application.

20           But let's assume just for a minute that it did. Just  
21 hypothetically arguendo, what if we were in a 12.2 situation,  
22 which is where the government started all of this in 614. The  
23 government's proposal would never be allowed under Federal

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1 Rule of Criminal Procedure 12.2. It is the exact -- it would  
2 -- it would be prohibited, in fact, under Federal Rule of  
3 Criminal Procedure 12.2.

4 The -- there are two cases, two district court cases,  
5 and they happen to be both from my neck of the woods -- two  
6 district court cases pre-amendment -- pre-2002 amendment to  
7 12.2, that -- where district courts ordered evaluations sort  
8 of by analogy in the way that the government is arguing today.

9 Under Federal Rule of Criminal Procedure 12.2 in the  
10 2002 Congress and the Supreme Court jointly, because that's  
11 how amendments get made to the Federal Rules of Criminal  
12 Procedures -- the Supreme Court proposes them, and then the  
13 Congress has to adopt them -- legislatively overruled that  
14 approach. So the Edelin case, for example, where it was --  
15 there was an order in the '90s out of the D.C. District for  
16 a -- something vaguely along the lines of what the government  
17 proposes here today, both Congress and the Supreme Court  
18 recognized that was not the right approach and legislatively  
19 over -- over -- legislatively overruled those two decisions.

20 The -- instead, the 12.2 procedure is that a district  
21 court may order a mental health evaluation in a death penalty  
22 case only for use for information for use in sentencing only.  
23 Not in pretrial, but only in sentencing, because all

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1 information obtained in a compelled mental health evaluation  
2 is sealed until after a finding of guilt, until after the  
3 defendant has had the opportunity to review the government's  
4 information, and until after the defendant makes a second  
5 re-affirmation of intent to introduce mental health  
6 information after having reviewed what the government's  
7 information was. So it's a highly protected process.

8 Under 12.2, there can be a compelled mental health  
9 evaluation in a capital case where the defendant intends to  
10 introduce mental health information at sentencing, but that  
11 information is air-gapped from the prosecution until after  
12 findings phase, by analogy, and after the defense essentially  
13 makes an informed decision that, knowing now what -- that the  
14 defendant has been found guilty and that the government has  
15 these certain opinions from its expert, that it still wants to  
16 go forward in this process.

17 So the government, on the other hand, wants an order  
18 for an evaluation that it can review and use freely at  
19 whatever stage it feels appropriate. No -- and the government  
20 put it mildly, that it could not find any authority on point.  
21 I'll put the same thing differently.

22 No court-martial has ever ordered a pretrial mental  
23 health evaluation in a death penalty case. And during the --

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1 when we were researching 614, the first time the government  
2 advanced this argument, we went around to the lawyers --  
3 some -- mostly defense, but some prosecutors who had been  
4 involved in the various death penalty cases in the Air Force  
5 and otherwise, to find out, you know, has anybody ever adopted  
6 the government's position on this?

7           We have -- our diligent efforts on that, making lots  
8 of phone calls, have not been able to find any example. And  
9 there's certainly no published example, but I don't even think  
10 there's even an unpublished example of anytime that a  
11 court-martial, applying rules which are analogous to the  
12 M.C.R.E. rules here has ever ordered such a thing.

13           MJ [Col COHEN]: You mean outside of a 706, right?

14           LDC [MR. CONNELL]: Outside of 706, right. And we'll talk  
15 about 706 in just a second.

16           MJ [Col COHEN]: Okay.

17           LDC [MR. CONNELL]: But it's -- as far as we can tell, no  
18 federal court has ever ordered a compelled mental health  
19 evaluation in a death penalty case for use in pretrial  
20 motions, right?

21           The federal cases fall into two categories. There's  
22 the application of Rule 12.2, the process I described, and  
23 then there are those two pre-amendment district court cases

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1 which got legislatively overruled.

2 But the military commission just brought up Rule 706,  
3 so I'd like to turn my attention there now.

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

5 LDC [MR. CONNELL]: The authority of the military  
6 commission -- the military commission does have authority in  
7 certain circumstances to compel a mental health evaluation,  
8 and that's found under 706. R.M.C. 706(b)(2) authorizes the  
9 military commission to order a, quote, Inquiry into the mental  
10 capacity or mental responsibility of the accused. And  
11 R.M.C. 701(c)(1) says that the board shall report as to the  
12 mental capacity or mental responsibility, or both, of the  
13 accused.

14 Now, "mental capacity" and "mental responsibility"  
15 are terms of art, as used in the military commissions -- or a  
16 court-martial for that matter. Mental capacity is defined in  
17 R.M.C. 909 as to what is more generally called competence, and  
18 lack of mental responsibility is defined as a defense in  
19 R.M.C. 916(k).

20 And the -- and the government's request doesn't fall  
21 into any of those categories. In fact, today, the government  
22 has made very clear that it foreswears any claim that  
23 Mr. al Baluchi lacks mental capacity. And in our original

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1 pleadings, in 614A, the first time this issue came up, we --  
2 Mr. al Baluchi disclaimed any intent to present a defense of  
3 lack of mental responsibility, so the -- under Rule 706, which  
4 is the scope of the military commission's authority.

5           Now, the government has this East Coast/West Coast --  
6 I'm more familiar with that in rap battles than in sailing --  
7 but has this East Coast/West Coast thing, and the -- and I'm  
8 from Georgia, sir. I don't know if that counts as -- I guess  
9 it's technically on the East Coast, but we consider ourselves  
10 southern.

11           So I'm going to take the third approach, if I may,  
12 and say this is not a question of looking for rules for or  
13 against things. This is a matter of the rules -- the Military  
14 Commission Rules of Evidence and the Rules for Military  
15 Commission define the authority of the military commission to  
16 order things.

17           I can't tell you the number of times that I or my  
18 colleagues have come before the military commission asking for  
19 some relief, whether that be -- perfect example of when  
20 Mr. al Baluchi's father died. It's quite common to have a  
21 humanitarian phone call in that situation where the --  
22 Mr. al Baluchi would be able to call his family and condole  
23 over the loss of his -- their -- his father.

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1           On that occasion, the military commission determined  
2 there's no rule that allows me to do that. I don't have  
3 authority to permit humanitarian phone call. We lost that  
4 issue. I understand that. And the reason we lost it is that  
5 there is a defined set of authority.

6           This is not a court of general jurisdiction. It is  
7 not the Eastern District of Virginia with the authority to do,  
8 you know, within the law and Constitution, whatever it may  
9 choose. It has -- it has limits to it, and usually those  
10 limits work against the defense. On this occasion, unusually,  
11 they work against the prosecution.

12           It bears noting that it was not simply the --  
13 although the final decision was the Secretary of Defense, you  
14 know, we have had testimony -- and there's certainly authority  
15 from the -- questions around Vice Admiral Reismeier that the  
16 government was intimately involved in the production of the  
17 Military Commissions Act and the Manual for Military  
18 Commissions, right? There's already a declaration in the  
19 record to that effect. The convening authority was involved.  
20 General Martins was involved, right? I mean, there's just a  
21 lot of prosecution involvement in this, in the drafting of  
22 this.

23           And certainly at that time the Secretary of

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1 Defense -- I don't know whether the prosecution asked for --  
2 to follow 12.2 instead of the court-martial system or they  
3 didn't ask, but ultimately, the Secretary of Defense made a  
4 decision, and that's what cabins the military commission's  
5 authority on this.

6           The last thing that I want to observe is it's also  
7 true that the government's request is much different from what  
8 would happen under 706. If this were a 706 situation, there  
9 would be -- it's just like the Military Rules of Evidence.  
10 There would be a short form that would go basically to  
11 everyone involved; that's provided under R.M.C. 706(c)(3)(A),  
12 then there would be a limit on the distribution of information  
13 under R.M.C. 706(c)(3)(B) and (C), and then there would be a  
14 prohibition on use of any of the defendants' statements  
15 under -- unless revealed by the defense attorney or the  
16 defendant himself under R.M.C. 706(c)(4).

17           So even if this were a situation where we were in a  
18 706 situation, it would not be the free-range grazing in what  
19 the government calls the open mind of Mr. al Baluchi that they  
20 envision. It would be a much more cabined, structured  
21 approach, if it did apply, which, of course, that it doesn't.

22           Now, but those aren't -- like the government doesn't  
23 really have a rule-based argument. I admire the effort to at

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1 least bring Rule 701 into play, but that's not really their  
2 argument. Really their argument is one on equities.

3           And the government argues there is a danger of unfair  
4 prejudice, bringing into play R.M.C. -- excuse me,  
5 M.C.R.E. 403. Although we're not in evidentiary situation,  
6 it's hard to see, but I guess they just mean, you know,  
7 prejudice -- the word "prejudice" is in there -- of the  
8 presentation of information in a one-sided manner. The  
9 government says it has to be adversarial.

10           Already in this record is the evidence that the  
11 government has already spent \$81 million setting up a  
12 controlled experiment for psychologists to conduct repeated  
13 mental health evaluations of Mr. al Baluchi. We're going to  
14 go through that in a little bit of detail.

15           The government has access to the FBI, the CIA, the  
16 DoD. Mr. al Baluchi has himself.

17           The government has access to what it calls a cottage  
18 industry of psychiatrists and psychologists. Mr. al Baluchi  
19 has himself; he also has an unpaid Navy psychiatrist.

20           The government has access, as it demonstrated last  
21 week, to all statements ever made in Camp VII. Mr. al Baluchi  
22 has access to himself.

23           And amazingly, the government has access to the one

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1 thing that almost no party ever has in a -- in a mental health  
2 evaluation, which is a premorbid evaluation, right? The  
3 question always that comes up in every mental health case is:  
4 Well, you know, at what point along this spectrum of events  
5 did the defendant develop this problem? It particularly comes  
6 up with PTSD after someone has personally murdered someone  
7 else, right, because the government always argues, well, you  
8 know, being involved in conflict like that is traumatic, maybe  
9 that caused the PTSD.

10           The government had Mr. al Baluchi questioned by  
11 actual witnesses like Special Agent Fitzsimmons and  
12 Dr. Mitchell and Dr. Jessen before it tortured him. They have  
13 premorbid conduct. They have premorbid psychological  
14 evaluations. That never happens. They have the gold standard  
15 of psychologists, paid \$81 million to conduct these repeated  
16 psychological evaluations.

17           So let's talk about those with -- a little bit.

18           The government -- there's already evidence in the  
19 record of over a dozen compelled mental health evaluations in  
20 black sites by psychologists. Four psychologists specifically  
21 have been identified as involved in this: Dr. Mitchell,  
22 Dr. Jessen, Y5X, and F3K. Who those last two are, I don't  
23 know.

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1           The -- but let's take -- let's -- I just want to go  
2 over some of the things that -- the mental health evaluations  
3 specifically. And I don't mean just the whole general process  
4 of psychologically breaking Mr. al Baluchi, I mean let's talk  
5 about the parts that are described by the CIA as mental --  
6 compelled mental health evaluations.

7           Now, first, the baseline is in -- and I'm at AE 628  
8 Attachment D, 10018-7257. May I have access to the document  
9 camera, please? This is an UNCLASSIFIED//FOUO document.

10          MJ [Col COHEN]: You may. It may be published to the  
11 gallery.

12          LDC [MR. CONNELL]: Thank you.

13                 So let's begin here.

14                 In a -- what the exact order of these is, I can't  
15 know. They're all dated mid-2003. At that time, however, the  
16 psychologist noted that, "Ammar is still developing a sense of  
17 learned helplessness which is contributing to his compliance,  
18 and the team will continue to lessen the intensity of the  
19 interrogation sessions relative to Ammar's cooperation."

20                 On the other hand, however, earlier in the same  
21 report, it notes, "Despite being rested" -- meaning not beaten  
22 so much that he could not sleep on a continuous basis.

23 "Despite being rested, Ammar continued to demonstrate an

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1 apparently cooperative posture and still appears to be  
2 answering questions truthfully. During the session, Ammar not  
3 only fully answered the questions asked, but also elaborated  
4 in detail, and provided other information of interest without  
5 being prompted. This is different from the first three days.

6 "Ammar was given solid food during the prior evening.  
7 Should Ammar regress into a defiant posture during future  
8 sessions, his clothing, sleeping, and solid food privileges  
9 will immediately be removed and enhanced measures will be  
10 applied in order to instill a compliant posture."

11 So what happens after that? The -- some of these  
12 reports are written a little bit backwards, I think, because  
13 of a bottom-line-up-front kind of thing, so I have to go a  
14 little bit in the opposite order.

15 In AE 628D, 10018-5984, the psychologist, in the  
16 context of a psychological evaluation -- we're going to  
17 talk -- I'm talking about the precursor to the first major  
18 psychological evaluation -- was when, as a result of being --  
19 having his head smashed against the wall, Mr. al Baluchi  
20 became psychotic.

21 "Ammar was cooperative with the examiner." That's  
22 the psychological examiner. "Ammar said he heard another  
23 person being beaten, raped, and tortured to death in the cell

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1 adjacent to his. After that person's death, Ammar said he was  
2 moved to a new room that was between the cells holding KSM and  
3 Bin'Attash. Ammar al Baluchi, KSM, and Bin'Attash spoke  
4 freely to each other despite the sound-masking music being  
5 played and confirmed for each other that the fourth person and  
6 her infant had been killed."

7 "In the," quote, "morning of -- excuse me -- the  
8 other person's mother came to claim her body. She became  
9 angry and threatened to take the interviewers to court. The  
10 mother demanded to know where Ammar al Baluchi was being held  
11 so she could speak with him. After the mother departed, an  
12 interviewer tried to kill Ammar al Baluchi four times.  
13 Specifically, the interview -- the interviewer tried to shoot  
14 him through the small opening at the bottom of the cell door,  
15 but Ammar al Baluchi said he hid in the corner. He said he  
16 was saved by an FBI officer who ordered the interviewer to  
17 stop.

18 "The following day, the mother returned and demanded  
19 to speak with KSM and Bin'Attash. The interviewer's  
20 supervisor went to look for Bin'Attash in order to kill him  
21 but could not find him because he was hiding in the corner of  
22 his room. When challenged on the idea that an interviewer  
23 could not find a detainee, Ammar said it was too dark in his

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1 cell, so the interviewer could not see him."

2           None of this ever happened, right? This was a  
3 psychotic hallucination, and -- but it continues.

4           "After the previous day's interview, Ammar said he  
5 returned to his cell and found a small coffin holding the dead  
6 baby. The coffin was surrounded by interviewers who were  
7 hiding the coffin from the mother who had returned to the site  
8 demanding release of the body. Later that evening, Ammar said  
9 one of the interviewers argued for permission to kill KSM and  
10 Ammar in order to cover their tracks. At first, Ammar  
11 reported that KSM had been killed with the departure of the  
12 mother, after she was unsuccessful in obtaining her  
13 grandchild's body.

14           "The examiner mentioned to Ammar that the previous  
15 day he had told his interviewer that KSM had been executed a  
16 couple of days prior, and he struggled to reconcile the  
17 conflicting versions of his stories. He finally settled the  
18 issue by saying he was fairly certain that KSM had been  
19 killed, but that he could not tell for sure."

20           Now given -- I'm slowing down.

21           Given this psychotic break, the first major  
22 psychological evaluation took place. And if I may have access  
23 to the document camera? I'm still on 5984.

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1 MJ [Col COHEN]: You may.

2 LDC [MR. CONNELL]: In a report dated mid-2003, a  
3 psychological evaluation of Ammar al Baluchi was conducted  
4 after the possible psychotic episode.

5 Moving on from there, the next compelled mental  
6 health evaluation is documented at AE 628 Attachment D at 7 --  
7 10018-7234. In this document, another psychological  
8 assessment was conducted of Ammar al Baluchi regarding -- to  
9 find out the decisions of the psychological evaluators as to  
10 whether he was actually psychotic or not.

11 MTC [MR. TRIVETT]: Sir, briefly? I'm sorry. The first  
12 psychological examination that was shown, what was the  
13 appellate exhibit on that?

14 LDC [MR. CONNELL]: Sure. Both -- it was AE 628  
15 Attachment D, 10018-5984.

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

17 LDC [MR. CONNELL]: Thank you.

18 The examiner at that time in this psychological  
19 examination talks about his prior psychotic symptoms and then  
20 concludes that, "Ammar's previous alleged psychotic symptoms  
21 appear to have been done in order to avoid being the recipient  
22 of enhanced measures."

23 When the psychologist asked what his primary question

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1 or concern was in the aftermath of his alleged symptoms, he  
2 stated that he was concerned about being tortured for personal  
3 business. He explained that he was afraid of enhanced  
4 measures despite his recent cooperation.

5 The psychologist at that time -- and I don't know  
6 what their qualifications are, because we don't know who it  
7 is -- concluded that Ammar must have made the whole thing up.

8 In the third psychological assessment, which is  
9 documented at AE 655A Attachment B, 10018-2954, the  
10 psychologists again returned to the question of evaluating  
11 symptoms of a possible psychotic interview -- episode. Excuse  
12 me. The -- in that mandated psychological -- compelled  
13 psychological assessment, they conclude that the second  
14 psychological assessment must have been right.

15 The -- in the fourth assessment, which is found at  
16 AE 655A Attachment B, 10018-2956 -- this one was shorter. At  
17 that time there is another psychological examination, and they  
18 conclude that he is psychologically stable without current  
19 evidence of any severe or prolonged psychological disturbance.

20 In the fifth psychological evaluation, which is from  
21 early 2004, and is found in the record at AE 655A  
22 Attachment B, 10018-3004, the evaluator concludes with respect  
23 to his mental health, that he is in good mental health, has

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1 maintained an even-tempered approach with staff, and is fully  
2 engaged in the interview process. Sounds familiar. He has  
3 never displayed any outward signs of emotional distress and  
4 has interacted appropriately with all personnel.

5           In the sixth psychological evaluation from late 2004,  
6 which is found in the record at AE 628 Attachment D,  
7 10018-3085, the evaluator concludes that Mr. Ali has  
8 "discussed experienced anxiety -- experiencing anxiety in the  
9 recent past, particularly when people come to his cell. He  
10 states that he understands that there is nothing for him to be  
11 anxious about and currently demonstrates that he can control  
12 this anxiety when it occurs."

13           Now, with respect to these first six compelled mental  
14 health evaluations, you can understand both why Mr. al Baluchi  
15 would want to call these witnesses, and you can understand why  
16 the government would not want to call them. You could  
17 understand why the government would want to have a new  
18 compelled mental health evaluation as opposed to these mental  
19 health evaluators, clearly adverse to Mr. al Baluchi, but who  
20 document symptoms at which they conclude at one point that  
21 he's fabricating -- of psychosis as well as the very behavior  
22 that Special Agents Perkins, McClain, and Fitzgerald testified  
23 about, induced by the interrogation compliance regime designed

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1 by psychologists.

2           But let's move on to the next round of psychological  
3 assessments. In the seventh psychological evaluation  
4 compelled by the government conducted in mid-2004, and I am at  
5 AE 655A Attachment B, 10018-3026, there was a mid-2004  
6 psychological assessment to determine his current  
7 psychological functioning and mental status.

8           The current assessment, according to the cable, "was  
9 conducted within the context of an emotional and behavioral  
10 episode that he was experiencing. He indicated that starting  
11 around midnight, the night before the assessment, he  
12 experienced some muscle spasms and numbing in his upper legs  
13 while he was preparing. He began waving his arms, requesting  
14 assistance, reading his Quran loudly and yelling in his cell."

15           According to the evaluator, the first explanation as  
16 to the cause of the leg spasms was they called it here genies,  
17 but more appropriately called Jinn, a theological explanation,  
18 that is, partial possession by a Jinn, which is a part of  
19 Islamic cosmology, that a sort of counterpart to -- in  
20 traditional Christian cosmology, there are angels, demons, and  
21 humans. In traditional Islamic theology, there are angels,  
22 demons, humans, and Jinn, so there is one more category. Jinn  
23 have free will, unlike angels and demons, and inhabit a

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1 parallel universe, but sometimes they involve -- they engage  
2 in possession.

3           The -- one can understand why we would be interested  
4 in exploring that question more, but in the seventh -- and one  
5 would understand why the government might not want to.

6           In the seventh -- or maybe I'm on eighth.

7           MJ [Col COHEN]: You're on the eighth.

8           LDC [MR. CONNELL]: Eighth, thank you.

9           In the eighth psychological assessment compelled of  
10 Mr. al Baluchi, which was conducted in early 2005, and this is  
11 found at AE 655A Attachment B, 10018-3098, there is an  
12 additional psychological assessment conducted of  
13 Mr. al Baluchi, and discussing his sort of hyper-focus,  
14 hyper-regimentation, and attempt to please himself in his very  
15 regimented day and accomplish specific goals.

16           The -- in the ninth psychological examination  
17 compelled of Mr. al Baluchi, which is documented in the cables  
18 at AE 655A Attachment B, 10018-3096, at this point they're  
19 trying to figure out why does Mr. al Baluchi have such  
20 difficulty when you leave him isolated for a long time. And  
21 they conclude that he "has strong social reassurance needs  
22 that are best met through regular debriefings and regular  
23 staff interaction. It was noted that, on the whole, Ali Abdul

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1 Aziz Ali continued to use an affective approach to cope with  
2 his tension, and he has remained a psychologically stable  
3 individual."

4 In the ninth -- did I mess that up again, sir?

5 MJ [Col COHEN]: Tenth.

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

7 In the tenth updated psychological assessment,  
8 Mr. al Baluchi has another -- they're trying to find out --  
9 they're trying to assess his adjustment, psychological  
10 stability, and mental status. This is from mid-2005, and it  
11 is found in the record at AE 655A Attachment B, 10018-3107.  
12 And they conclude that everything is fine.

13 In the eleventh mandated psychological evaluation,  
14 they have the same goal, but a new diagnosis enters the field  
15 at this point. This one was conducted in late 2005. But at  
16 this time, they conclude that his complaints are most likely  
17 due to anxiety and ADHD, right? It's the first time that ADHD  
18 has entered the field.

19 In the twelfth compelled psychological evaluation, at  
20 this time, interestingly, they're really trying to figure out  
21 if he has ADHD or not, right? This is a more targeted,  
22 mandated psychological evaluation than before, and it's found  
23 in the record at AE 655A Attachment B, 10018-3133.

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1           And at this point, they take a full childhood,  
2 academic, and behavioral history -- which is probably familiar  
3 to anyone who has had their own child or themselves evaluated  
4 for ADHD -- and elicited background information to address  
5 previous concerns that Ali Abdul Aziz may suffer from an  
6 attentional deficit/hyperactivity disorder.

7           In the thirteenth compelled psychological evaluation,  
8 documented at AE 655A Attachment B, 10018-3147, they seek to  
9 decide -- they're looking at the same question. New  
10 psychologist, I assume. And this psychological assessment was  
11 conducted in early 2006. They conclude he is making a  
12 moderate detention to adjustment. But interestingly, this  
13 evaluator gives, if the government chooses to call them, a  
14 different opinion than the previous evaluator, excuse me,  
15 because this evaluator concludes that his attention  
16 difficulties noted in previous psychological assessments are  
17 due to obstructive anxiety and not an underlying attention  
18 deficit disorder.

19           In the fourteenth mandated compelled psychological  
20 assessment of Mr. al Baluchi, the -- they are evaluating at  
21 this time, interestingly, for whether Mr. al Baluchi has  
22 something called Irlen Syndrome.

23           The military commission may have noticed that

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1 Mr. al Baluchi sometimes enters the courtroom wearing glasses  
2 that are an -- that are an unusual orange color and that is  
3 because of this Irlen Syndrome where different colors of light  
4 adversely affect an individual. And interestingly, even the  
5 CIA was exploring this possibility in a report from mid-2006,  
6 which is found at AE 655A Attachment B at 10018-3155.

7           And finally, Your Honor, for the CIA, in the  
8 fifteenth compelled psychological evaluation of  
9 Mr. al Baluchi, which seems to have been done with a view to  
10 turning him over to Guantanamo, the -- and it is found in the  
11 record at AE 655A Attachment B at 10018-3160, they conclude in  
12 that psychological evaluation that he has made a fair  
13 adjustment to detention, has not been a behavioral problem,  
14 and has experienced what they call subclinical levels of  
15 depression and anxiety.

16           So one of the things that we can see from these 15  
17 reports of compelled mental examinations is that the  
18 psychologists, and I identified four of them, who -- two of  
19 whom are already scheduled to testify, who were -- did all of  
20 these mental evaluations, had specific questions in mind  
21 sometimes. The question of ADHD, the question of anxiety, the  
22 question of Irlen Syndrome, the question of depression, the --  
23 you know, these were not fly-bys. These were trying to find

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1 out what the result of this kind of long-term incommunicado  
2 detention is. It was really a form of validating human  
3 experimentation.

4           And I will suggest to you that there is some evidence  
5 of this in the record, but Dr. Mitchell will testify that  
6 after enhanced interrogation sessions, he and Dr. Jessen would  
7 go -- and this is in his book -- would go and sit with  
8 Mr. al Baluchi and other detainees and ask them in a sort of  
9 rapport-based manner, "How did that make you feel?"

10           I don't know if you are -- if you've ever seen  
11 *The Princess Bride*, but there's a scene in which the  
12 protagonist in that movie is tortured and then the scientist  
13 comes afterward and wants to talk about, "How did that make  
14 you feel?" That's exactly the process that occurred here.  
15 And we have actual witnesses who are scheduled to testify who  
16 will provide far more insight than any additional compelled  
17 interrogation.

18           Now, that only gets us as far as Guantanamo. And I'm  
19 not going to go through Guantanamo with anything like the same  
20 level of -- of detail, because after Mr. al Baluchi being  
21 questioned by something on the order of 150 different  
22 individuals in the black sites, he's then moved to -- here to  
23 Guantanamo. And we'll have testimony from two of the people

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1 who are familiar with this process, the Camp VII commander and  
2 the person -- the doctor who is now known as WK5I.

3           And the government was interested in the question of,  
4 well, how are we going to find -- how are they -- how could  
5 they possibly find out what Mr. al Baluchi's mental state was  
6 in January of 2007?

7           Well, the answer is that the psychiatrist is actually  
8 going to be testifying, because that's WK5I. And there are  
9 medical records, there are -- is live testimony. In fact, the  
10 government attended my interview of WK5I. They should have a  
11 complete understanding -- or more complete understanding than  
12 me of what her testimony will be.

13           And so over the course -- between that time in  
14 September of 2006 and today, over 24 -- over 24 government  
15 psychiatrists or psychologists have interviewed Mr. al Baluchi  
16 regarding his mental state over 250 times. We -- because --  
17 we did not put every one of those in the record, but there is  
18 a summary of each of those compelled mental health evaluations  
19 or mental health evaluations in AE 655A Attachment C.

20           Until recently, only the government -- until May of  
21 this year, only the government knew who those people were  
22 because the government hid the identity of every mental health  
23 provider at Guantanamo through ad hoc and inconsistent

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1 redactions of the medical records until Judge Pohl compelled  
2 them to turn them over. At this point, I've talked to you  
3 several times about our efforts to track those people down,  
4 and we're working on it hard.

5           But there's another -- as hard as -- as difficult as  
6 this may be to believe, those 24 psychologists and 250  
7 psychological examinations were not enough for Guantanamo.  
8 There was another psychological process laid on top of that,  
9 conducted by the Behavioral Sciences Consultation Team, in  
10 short, BSCT, which became known as the Detainee Socialization  
11 Management Program. And the DSMP were casual, unstructured  
12 interviews by psychologists of the -- of Mr. al Baluchi and  
13 others, who would then report back issues through chain --  
14 through the chain about what they learned during the course of  
15 their interviews.

16           And it's difficult to know exactly how many there  
17 were or what -- who was involved. The -- because the  
18 recordkeeping on this was quite minimal. But it's another  
19 layer of compelled -- it's not compelled. It's -- to be  
20 honest, it was optional whether the defendants attended or  
21 not. They didn't have much insight into what was really going  
22 on. They thought it was an opportunity to actually speak to  
23 someone for a change, but it turns out that they were actually

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1 psychologists who were reporting the results of their  
2 conversations in a more unstructured way.

3           But just the layer upon layer upon layer of  
4 psychological examination of these men over the years boggles  
5 the mind. There is no equivalent anywhere else in the world.  
6 There is no military or civilian equivalent to this.

7           And I don't know how much they knew about all of this  
8 in the Khadr case. I somehow doubt they had the benefit of  
9 this much information, but I don't know. It wasn't cited in  
10 the brief, so -- I haven't read it yet. I have it right here  
11 to read.

12           The -- but how is this different from what would  
13 happen in an ordinary court-martial or what would happen in  
14 a -- in a civilian court? Well, in a civilian court or  
15 court-martial, the HIPAA privacy rule and layer upon layer of  
16 DoD regulations would protect the medical records in  
17 confinement as pre-confinement medical records from access  
18 from the government without a showing of good cause or  
19 something else to a court.

20           In this case, however, only -- and still to this day,  
21 only the government has access to the CIA medical records.  
22 All we have are cable summaries that I just read to you.  
23 The -- and until May 2019, only the government had access to

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1 the identities of the psychiatrists; and until August of 2019,  
2 after the last hearing, only the government had access to the  
3 actual medical records in an unredacted form.

4 Now, they're still not -- we still don't have them  
5 completely unredacted. The early -- some of the most  
6 important descriptions in the early records in 2006 are still  
7 redacted, and only the government has access to the identity  
8 of those BSCT psychiatrists -- or psychologists, rather.

9 Now, how are you going to resolve all of this? Well,  
10 the place where we began at the very beginning of this  
11 hearing, and the reason why I thought that we should not be  
12 arguing that, is that three of those people, Mitchell, Jessen,  
13 and WK5I, are already scheduled to testify. The government  
14 has agreed to produce them.

15 And if you are considering exercising nonrule-based  
16 power outside of the rules, I would suggest that you wait to  
17 hear the evidence first and get some facts. I've given you  
18 some of those facts out of AE 628 Attachment D and AE 655A  
19 Attachment B today, but there are many more facts out there  
20 that will be relevant to the consideration of the equity-based  
21 argument that the government makes.

22 However, I suggest that you have plenty before you to  
23 go ahead and deny this issue and put it to rest. AE 701(g)(2)

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1 [sic] impose a notice requirement, which the government  
2 concedes is complied with. AE 701(g)(4) [sic] imposes a  
3 discovery requirement, and that is supplemented by two prior  
4 rulings of this military commission, AE 245G and AE 614H.

5           You have -- the military commission has already  
6 followed this rule-based approach in AE 645 -- 614H -- excuse  
7 me, 614H, and I suggest that the military commission should  
8 follow it now, find Mr. al Baluchi in full compliance with  
9 Rule 701, and decline to order four more days of interrogation  
10 by what must be at this point the three-hundredth mental  
11 evaluation by government. I don't think they need 301. Thank  
12 you, sir.

13           MJ [Col COHEN]: All right. Thank you. All right. Let's  
14 go ahead and take a 15-minute recess.

15 [The R.M.C. 803 session recessed at 1101, 26 September 2019.]

16 [The R.M.C. 803 session was called to order at 1123,  
17 26 September 2019.]

18           MJ [Col COHEN]: The commission is called to order.  
19 Parties are present. Mr. al Hawsawi and Mr. Ali are still  
20 absent.

21           Mr. Trivett, would you like to make any rebuttal  
22 argument?

23           MTC [MR. TRIVETT]: Sir, I can just rise from the table

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1 here and simply point out that none of the exams that  
2 Mr. Connell cited to were done for forensic purposes, and to  
3 answer any questions you may have.

4 MJ [Col COHEN]: No, sir. That's fine. Thank you.

5 MTC [MR. TRIVETT]: Thank you.

6 MJ [Col COHEN]: Mr. Connell?

7 LDC [MR. CONNELL]: Sir, given such a short rebuttal  
8 argument, it seems inconvenient, I know, but I need to ask for  
9 permission for Mr. al Baluchi to return to the courtroom.

10 MJ [Col COHEN]: He may. We're just going to -- we'll  
11 stay in place while we bring him into the courtroom.

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

13 MJ [Col COHEN]: Guards, if you would please, if Mr. Ali  
14 desires to come, he may be presented. If Mr. al Hawsawi has  
15 changed his mind, he may also come.

16 LDC [MR. SOWARDS]: And, Your Honor?

17 MJ [Col COHEN]: Yes, sir.

18 LDC [MR. SOWARDS]: While we're waiting for that to  
19 happen, I wonder if I just might make it clear that, from our  
20 perspective, this motion is not applicable to Mr. Mohammad.

21 MJ [Col COHEN]: No. I see this as -- yeah, absolutely.  
22 No, this is only an issue with respect to AAA team and the  
23 government.

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1 LDC [MR. SOWARDS]: Okay. And depending on what the  
2 outcome may be, that the ruling would not be binding on us as  
3 precedent in the case.

4 MJ [Col COHEN]: No, I won't do that in this case.

5 LDC [MR. SOWARDS]: Okay. Thank you, sir.

6 LDC [MR. CONNELL]: Your Honor, while we're waiting on  
7 that ----

8 MJ [Col COHEN]: Yes, sir.

9 LDC [MR. CONNELL]: ---- I obtained, I think I mentioned,  
10 just before the -- my argument, a copy of the order that the  
11 government was cited to. I'd be happy to make that a part of  
12 the record.

13 MJ [Col COHEN]: That would be great. Let me get you an  
14 AE number for that. It's a two-page document; is that  
15 correct?

16 LDC [MR. CONNELL]: Yes, sir, two-page document.

17 MJ [Col COHEN]: All right. Thank you. Counsel, it will  
18 be AE 655C.

19 LDC [MR. CONNELL]: C. Yes, sir, we'll send it in  
20 electronically with proper margins.

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

22 [Pause.]

23 MJ [Col COHEN]: While we are waiting, just a couple of

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1 housekeeping matters. Mr. Mohammad's team, Mr. Bin'Attash's  
2 team, Mr. Binalshibh's team, and Mr. al Hawsawi's team have  
3 filed AE 639U. It was filed ex parte and under seal. I will  
4 not go into the ex parte attachment.

5 Is there any objection to me just saying that --  
6 generally, what the purpose of it is requesting? Is there any  
7 objection to that?

8 Okay. That's Ms. Radostitz indicating no.

9 It's requesting, rather than a written filing of  
10 ex parte matters, if they could just present those orally to  
11 the court. I read that this morning.

12 [Pause.]

13 MJ [Col COHEN]: All right. We are -- have been joined by  
14 Mr. Ali, who I recognize to be with us here in the courtroom.

15 Mr. Ruiz, one question for you. Mr. al Hawsawi has  
16 not joined us. Is there any reason for me to reconsider my  
17 earlier ruling?

18 LDC [MR. RUIZ]: Not that I'm aware of.

19 MJ [Col COHEN]: All right. Thank you, sir. Then I stand  
20 by my earlier ruling with respect to Mr. al Hawsawi being --  
21 knowingly and voluntarily waiving his right to be here.

22 Mr. Ali, I just have one question for you. Mr. Ali,  
23 was it your voluntary choice to not be here during the first

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1 part of this morning? Okay.

2 ACC [MR. AZIZ ALI]: [Microphone button not pushed; no  
3 audio.]

4 MJ [Col COHEN]: I heard a "yes" ----

5 ACC [MR. AZIZ ALI]: Yes.

6 MJ [Col COHEN]: ---- from Mr. Ali. Thank you, sir.  
7 That's the only question I had.

8 I find that Mr. Ali knowingly and intelligently  
9 waived his right to be here during the initial portions of  
10 today's open session.

11 Okay, Counsel. Let's -- let's have a general  
12 discussion of things that the parties might want me to  
13 consider with respect to 639 and 653.

14 Ms. Radostitz.

15 ADC [MS. RADOSTITZ]: Thank you, Your Honor.

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

17 ADC [MS. RADOSTITZ]: I do want to say that I'm not going  
18 to repeat what's in our briefs for Your Honor. I am going to  
19 give some context to it because neither our brief on 639,  
20 which is 639I, which was filed on the 24th of July, is not yet  
21 on the website.

22 MJ [Col COHEN]: Okay.

23 ADC [MS. RADOSTITZ]: And our brief in 653, which is 653C,

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1 which was filed on the 6th of September, is also not on the  
2 website.

3 MJ [Col COHEN]: Okay. We need to find out why that is.

4 ADC [MS. RADOSTITZ]: Okay. And so -- so I'm going to  
5 give some context that I might not otherwise normally give.

6 MJ [Col COHEN]: I understand. Thank you.

7 ADC [MS. RADOSTITZ]: As the court is well aware, these  
8 two issues are intricately connected, so I'm not really  
9 separating the two things out yet. I will in my argument.

10 And we understand completely that the military judge  
11 wants to -- in fact, is obligated, to move this case towards a  
12 just resolution. And we recognize that many people whose  
13 lives were touched by the events of 9/11 have been waiting a  
14 very, very long time to get answers to their questions about  
15 how and why 9/11 occurred.

16 What I'm about to offer are observations and  
17 proposals to assist you in achieving that goal. And to be  
18 clear, no one -- at least I can only speak on behalf of my  
19 team, but I'm pretty sure this is true of everyone in this  
20 courtroom -- no one is afraid of the hard work and the long  
21 hours that are necessary to do that. That's what trials are  
22 about.

23 But whatever else it does, the military commission

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1 has to create an environment in which solid, legal work can  
2 be -- can occur. And part of that is because you are  
3 meticulous, and you are meticulous in preserving the rights of  
4 the accused and the rights of the prosecution to go forward.  
5 And the reason you're doing that is because none of us want an  
6 error-filled trial or an error-filled proceeding so that 15,  
7 20, 30 years from now, we're back in this same place doing  
8 this all over again. So that's the framing for my argument.

9           And there's two overarching considerations, however  
10 unpleasant they are to consider. And the first is that the  
11 government made a decision to hold and torture the accused  
12 rather than to charge and try them. And the -- instead of  
13 using a tried and true regularly constituted court system,  
14 either in the military or in civilian, they developed a  
15 brand-new system which denies much of the rights that are  
16 embedded in our Constitution and in a regularly constituted  
17 court.

18           And so it's worth mentioning that the reason we stand  
19 before you here in 2019 seeking to modify the schedule that  
20 you have proposed is because of decisions that the government  
21 made back in 2001 and 2002 to proceed in a different way. And  
22 I'm not going to go through the details of that unless it  
23 becomes necessary, but I want to talk about the schedule that

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1 the military commission has proposed.

2 And if I could have access to the document camera, I  
3 have just calendars that I literally took off the Internet and  
4 highlighted the dates of the proposed hearings. I did not  
5 prepare those two weeks ahead of time and give them to your  
6 CISO, so I would just ask that they be presented only to  
7 counsel ----

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

9 ADC [MS. RADOSTITZ]: ---- at this point. Thank you.

10 What I have done is I have highlighted in yellow  
11 every day that we are here on Guantanamo under the proposed  
12 schedule; I have highlighted in green days that we are  
13 traveling to or from Guantanamo; and in blue, days that, under  
14 639M, have major due -- deadlines of things that are due.

15 And what that constitutes is 22 weeks of hearings, 30  
16 weekends away from home and our families and our obligations  
17 up wherever we live. The hearings are generally scheduled for  
18 Monday through Friday. There's three anomalies: In April,  
19 the schedule goes through Saturday; in October, it only goes  
20 through Thursday, and so we would travel then on a Friday; and  
21 December, it only goes through a Wednesday, and so we would  
22 presumably travel on Thursday.

23 So what we have proposed -- the defense for

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1 Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh, and  
2 Mr. al Hawsawi have proposed is a modification first to the  
3 travel. And it would not really affect the number of weeks  
4 with regard -- or the number of days that we would litigate  
5 once we are on island, but it would allow for more time home  
6 to accommodate family obligations and other obligations. And  
7 so our recommendation would be that, instead of traveling on  
8 Saturdays, we travel on Sundays -- hopefully, Sunday  
9 afternoon, so that those who attend church services could do  
10 that with their families -- and then that we travel back on  
11 Friday evenings so that then the following weekend would be  
12 free for other obligations.

13 I'm going to go through some recommendations that  
14 we've made in terms of the filing deadlines specifically. And  
15 we also are asking, because of the current posture of those  
16 filing deadlines, that some of the hearings be cancelled from  
17 the calendar.

18 Specifically the February hearings, Mr. Connell has  
19 recommended that those -- that time that was originally set  
20 for hearings, which would have been February 10th through  
21 21st, instead be reserved for depositions. We're not opposed  
22 to that. We do have the position that Mr. Mohammad may have  
23 the right to be present, and, therefore, we are not saying

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1 that it's okay with us that those be held elsewhere, but we  
2 understand the court's rulings in that regard.

3 The second thing is that there are some major due  
4 dates currently on the 1st of April, and under the current  
5 schedule, we would be in hearings seven weeks out of twelve  
6 before that major deadline. And we think that that's  
7 problematic for reasons I'm going to go into in more detail.

8 We have asked that the hearings currently scheduled  
9 in May be cancelled because they interfere with Ramadan. So  
10 far in these proceedings, we have not held proceedings in  
11 Guantanamo during Ramadan as a respect for the religious  
12 observations, not merely of the defendants, but of many of the  
13 team members, who also are fasting and observing their  
14 religion. So that's why we're asking for May. And I also  
15 would note that there's a major due date on June 1st, and so  
16 that is a second reason for requesting that the May hearings  
17 be cancelled.

18 The end of September hearings, also there is a major  
19 due date on October 1st, and so we're asking that those  
20 hearings be cancelled so that we would have more time to  
21 prepare for those litigation deadlines.

22 So with regard to the litigation deadlines, I want to  
23 start with the current -- I can turn off the document camera

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1 at this point.

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

3 ADC [MS. RADOSTITZ]: The current deadline -- the first  
4 deadline that's coming up is November 1st, and in our  
5 proposal, we had requested that that be any objections to the  
6 charge sheet. And we're still prepared to have that ready and  
7 be filed by November 1st.

8 The military commission's order expanded that to  
9 include all law motions, and we're asking that that -- that  
10 all law motions be set aside -- set off until January for a  
11 number of reasons. And again, I'm -- I thought it would be  
12 easier if I go through what our changes are requested and then  
13 talk about all the reasons specifically together.

14 MJ [Col COHEN]: Ma'am, that would be fine. Thank you.

15 ADC [MS. RADOSTITZ]: The second deadline is February 1st,  
16 and we're asking that that be moved to mid-March, and that's  
17 regarding all the hearsay and other fact-based motions.

18 On April 1st, there is a deadline for reciprocal  
19 discovery, all witness and evidence for findings and  
20 affirmative defenses. We're asking that that be moved to  
21 mid-July, in part because of matters that we discussed in the  
22 closed session and in part because of matters regarding the  
23 state of discovery and the ability to organize discovery.

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

2 ADC [MS. RADOSTITZ]: May 1st, for jury instructions,  
3 assuming that nothing -- that the other deadlines change, we  
4 think that we could meet that deadline. June 1st for the 914  
5 disclosures and the sentencing instructions, we're asking that  
6 that be moved to mid-August. And the August 1st deadline  
7 regarding 505 notices, we're asking that that be moved to  
8 October 15th.

9 And I want to start by saying that when the -- when  
10 we were discussing 639 before you issued a schedule, the  
11 military commission recognized that all of these deadlines  
12 that you were going to set start with the state of discovery.  
13 And if the government complies with discovery deadlines,  
14 great; and if they're unable to do that, you acknowledged that  
15 that would mean that things would have to shift.

16 MJ [Col COHEN]: Yes, ma'am.

17 ADC [MS. RADOSTITZ]: And we can tell from the testimony  
18 and from things that happened over the last two weeks that  
19 that's probably not going to happen. And I know that the  
20 government is making all good-faith efforts -- I'm not  
21 faulting them for that -- but I do also know that a lot of  
22 things aren't in control of the people in this room, and that  
23 their obligation still is outside of this room, and they make

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1 every effort, but sometimes they're simply not able to comply  
2 with deadlines because of that, so ----

3 MJ [Col COHEN]: Ma'am, just go back real quick.

4 ADC [MS. RADOSTITZ]: Sure.

5 MJ [Col COHEN]: Which one were you asking to move to  
6 October -- to October 15th or sometime around mid-October? It  
7 was towards the end. It was after the 914 disclosures.

8 ADC [MS. RADOSTITZ]: That was the 505 disclosures.

9 MJ [Col COHEN]: Thank you.

10 ADC [MS. RADOSTITZ]: So I'm not going to repeat the  
11 things that Mr. Connell discussed yesterday regarding  
12 discovery and the disorganization of it, the commission is  
13 well aware of what those problems are.

14 We also have at least four dozen motions to compel  
15 discovery that have been in various stages. Lots of times,  
16 the government will give us a little bit and saying they're  
17 doing their due diligence. We wait patiently. Now that we  
18 have deadlines, we're realizing, okay, we're not going to wait  
19 patiently anymore; we are going to get these done and we have  
20 a plan in place to get those done. But it is a significant  
21 number.

22 MJ [Col COHEN]: Okay. Yeah. Please don't. I'd ask the  
23 parties if there's motions to compel, I mean, yes, I agree.

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1 With dates, file what you need to file. Don't wait. I  
2 encourage the parties to work it out. But you notice even  
3 with the most recent 538/561 discussion, I went to the  
4 government and said, okay, how long? And then I told the  
5 defense, okay, if you are not satisfied on the 11th, just let  
6 me know.

7 ADC [MS. RADOSTITZ]: Right.

8 MJ [Col COHEN]: I will rule on -- I will rule on the  
9 motion as it exists.

10 So I agree with you. And I think as trial  
11 practitioners, it just makes sense, right? We all understand  
12 that. So yes, ma'am, I completely agree with that -- that  
13 concept.

14 ADC [MS. RADOSTITZ]: The other piece, and Mr. Connell  
15 discussed this slightly yesterday, but the pace of discovery  
16 production over the last three months has greatly increased.  
17 I think that he used the figure in the number of -- in the  
18 area of 25,000 pages.

19 Admittedly, some of that is stuff that we had  
20 received before in different forms, it's less redacted  
21 versions of something that we already had. But that doesn't  
22 diminish our duty to read every page of the new stuff. And so  
23 as the military judge is well aware, it just takes time ----

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1 MJ [Col COHEN]: It does.

2 ADC [MS. RADOSTITZ]: ---- to get that done. And so we  
3 are doing our best, but it is not as easy as we would like it  
4 to be.

5 The next piece of considerations of why we're asking  
6 for some modifications to the schedule is with every piece of  
7 new discovery, it creates new investigation. And the travel  
8 process for planning of investigation is cumbersome. There  
9 are rules and regulations that we have to comply with. Change  
10 on the fly is not easy. Sometimes we'll go and we'll go to  
11 see a witness. We'll find out they're on vacation for two  
12 weeks. We can't just stick around and wait until they come  
13 back. We have to go home and go do a second request for  
14 investigation travel permit. It's complicated.

15 Depending on how the court -- the military commission  
16 rules on some of our motions regarding discovery around  
17 witnesses, that may increase the amount of investigation that  
18 we're able to do.

19 The next piece is that the current litigation  
20 schedule requires us to be on Guantanamo 22 weeks of next  
21 year, and it is almost impossible to do all of those motions  
22 that we would like to do while we're here.

23 Now, we do have some team members who are still in

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1 the National Capital Region, and they have been working  
2 diligently while we're down here in hearings. But this is a  
3 capital case. None of them have capital experience.

4 Mr. Sowards as learned counsel has an ethical  
5 obligation and a statutory obligation to oversee particularly  
6 anything that has anything to do with -- directly with capital  
7 cases, but I would say in a capital case, everything has to do  
8 with capital -- the capital punishment aspect of it. And so  
9 that is a burden that he bears, and we try to help him with  
10 it, but it's not something that he can just pretend doesn't  
11 exist.

12 MJ [Col COHEN]: I understand.

13 ADC [MS. RADOSTITZ]: There's also the logistical aspects  
14 of being on Guantanamo. We've talked in the past about the  
15 lack of space, the lack of office space. We are constantly  
16 having to negotiate with our paralegals about who gets to use  
17 the computers during breaks and at lunch. They're very good  
18 about giving them up, but we shouldn't have to negotiate with  
19 them about that. We should have access to computers for  
20 everyone who is in here.

21 I also want to talk just a little bit about some of  
22 the logistical things because we're on Guantanamo. And I want  
23 to be clear, I'm not complaining. This is just the reality of

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1 it. This morning, I woke up to water dripping from my  
2 ceiling, brown water -- which was just a little bit scarier  
3 than if it was just regular water -- onto my bed. There was a  
4 leak in my kitchen and a leak in my bathroom. The whole  
5 bathroom floor was filled with brown water.

6 I understand that people living in the tents have  
7 even a worse situation in that the latrine area was flooded  
8 for much of this week. I know that the CHUs, the -- that the  
9 military members are staying in have had massive mold  
10 problems, air conditioners that aren't working. The staff is  
11 trying to get those things done.

12 And individually they're not that big of a deal.  
13 Individually, it doesn't matter. But collectively, it's a big  
14 deal. I mean, just since we have been here on this -- this  
15 hearings, we have lost electricity twice for multiple hours.  
16 And, again, not that big of a deal, except that it meant we  
17 couldn't work. And so those are hours that we possibly would  
18 have been on the Internet doing our obligations, and we  
19 couldn't.

20 And a final thing, just on the logistical things, is  
21 the storm that impacted the ability to have client interviews  
22 in Echo II, we learned this morning that that may not be  
23 resolved until October 7th. And we have client visits

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1 scheduled with team members between now and then. We have  
2 been told that they will accommodate the -- the visits that  
3 were already scheduled. They won't be able to accommodate  
4 further scheduled.

5           And these client visits won't be the same because  
6 just of the humidity, the fact that there's really not a chair  
7 and table in the unit out behind the -- in the ELC. So again,  
8 all of these things add up, and it's -- it has a cascading  
9 effect on our ability to litigate.

10           So the other part about having so many weeks filled  
11 with hearings is that for every hour of a witness' testimony  
12 generally, there's between 10 to 20 hours of preparation. And  
13 that's just for the lawyer doing the examination. Then  
14 there's the paralegals, the analysts, the discovery  
15 coordinators and their time putting together the exhibits,  
16 putting together the pleadings that need to be ready, 505  
17 notices, things like that.

18           We have to consult with our client. We have to  
19 consult sometimes with experts. We have to look through the  
20 classification guidance and try to figure it out; and if we  
21 can't figure it out, we have to go ask somebody what it means.

22           Special Agent Fitzgerald talked last -- two weeks ago  
23 now, about the fact that it took -- that he spent 40 hours

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1 preparing for his testimony. He's just a witness. He just  
2 has to look at his stuff. If I were cross-examining him, I  
3 would have had to look at everything he looked at, plus  
4 everything every other agent looked at, plus the things that  
5 he doesn't know about that I need to know whether he knows  
6 about. And that's a problem.

7 I was looking -- the fingerprint examiner also  
8 testified that for his one hour of direct examination, he  
9 spent six to ten hours preparing with the prosecution. I want  
10 to give you a transcript cite for that, but it's not up yet,  
11 because your court reporters are working so long hours that  
12 they can't get the transcripts up. And we're not complaining.  
13 We recognize the amount of work that they are doing, and we're  
14 relieved when they do -- are able to give us transcripts in a  
15 timely way. But again, that's -- that's what happens during  
16 three-week-long hearings.

17 MJ [Col COHEN]: Yes, ma'am.

18 ADC [MS. RADOSTITZ]: The hours of the day is also  
19 relevant. You discussed yesterday, I think, the idea of,  
20 especially during Dr. Mitchell's testimony, that we might go  
21 from 8:00 in the morning until 1800 in the evening. And while  
22 I understand the desire to get done as much of his examination  
23 as possible during the time that we have here, that doesn't

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1 recognize the amount of work that has to be done in the  
2 morning before we start a hearing and in the evening after a  
3 hearing.

4           Before every session, we meet with our client. We  
5 scramble to make sure that we have all the exhibits,  
6 everything that we need for that printed out. I -- this  
7 morning -- this is just a small example -- I had worked on my  
8 notes on my personal computer. I e-mailed them to my  
9 paralegal. When I got here, I realized that I e-mailed her  
10 the wrong version. So just a little simple thing, but it took  
11 us almost 45 minutes to get that solved. And that multiplies  
12 over and over and over again around little things.

13           And we talked -- I think it was last week -- about  
14 the overtime considerations for staff. I'm a lawyer. I  
15 worked much of my career doing capital cases where we didn't  
16 even know what overtime meant. You know, you came to work and  
17 you did as much work as you had to do, and you got paid the  
18 same amount.

19           But the government chose to have us follow rules.  
20 They chose -- the Department of Defense chose to have civilian  
21 employees and to provide compensation for those employees.  
22 And as a lawyer, I'm -- my -- after about the first three  
23 months of the year, I'm out of overtime hours. I can't even

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1 get comp time because of the way the rules are written. And  
2 it doesn't really matter for me, but it does matter for our  
3 paralegals and other staff members.

4           And we have people on our staff -- and I can't  
5 enumerate them, but we do have people on our staff, where they  
6 are a different category of employees, and they are not  
7 allowed to work overtime beyond a certain period of time. And  
8 we're trying to work those -- figuring out how to stagger  
9 things so that doesn't happen. But it is a limitation on what  
10 we're doing.

11           And so I want to be really clear. I'm not saying  
12 poor me, feel sorry for her. I'm just saying that the  
13 government made choices, and one of the consequences of the  
14 choices is that we are limited in our ability to how we staff  
15 some parts of the case.

16           And this hearing schedule would be probably doable if  
17 all the motions were written, if all the discovery had been  
18 provided; but we know that that's going to happen on a rolling  
19 basis, and it's going to happen on a cascading basis.

20           And I want to use Your Honor as an example. You  
21 heard argument the first week on AE 650, and you have talked  
22 yesterday and I think the day before about the fact that you  
23 really want to get an order out on that motion. And you're

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1 not able to do that while you're here in these proceedings,  
2 and you're hoping to get it done within a week after.

3 We're in the same boat as you are. And yes, there  
4 are more of us, and we recognize that you're one judge and we  
5 have more than one lawyer. But we also each have an  
6 expertise, and I can't write the same motions that Mr. Nevin  
7 can write and that Lieutenant Colonel Poteet can write. We  
8 have to have our expertise utilized as we're looking at the  
9 various different motions.

10 MJ [Col COHEN]: That's a fair comment, ma'am. Thank you.

11 ADC [MS. RADOSTITZ]: And the -- an important part of that  
12 is that this is a capital case, and counsel are ethically and  
13 statutorily obligated to have learned counsel, and that  
14 learned counsel has to make all the litigation decisions.  
15 Mr. Sowards has to be here at every hearing.

16 We have been asking for years to have a second  
17 learned counsel appointed to the teams so that there could be  
18 some rotation; that if one of learned counsel got sick or  
19 injured and couldn't attend, that there would be a second  
20 learned counsel. And that has been denied by the convening  
21 authority over and over and over again. And so that's a  
22 problem.

23 The other obvious complication is the classification

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1 guidance, the classification aspect of the case. If I'm  
2 drafting a motion that has any aspect of it that is at the Top  
3 Secret level, I have to go to a separate computer to do that.  
4 I'm the only person on our entire team that has access to P2P  
5 for Top Secret materials in their office. No one else does.

6           Everyone else that needs to get on P2P has to come to  
7 my office or to one hot seat that is assigned to our team.  
8 And that's due to some complicated reasons that I would like  
9 to talk more about having to do with our office space, but I'm  
10 going to set that aside for now. But it is a barrier to our  
11 ability to have multiple people drafting motions that are --  
12 that have classified aspects to it.

13           Another part of this litigation dilemma is that there  
14 are four writs currently pending in the D.C. Circuit. Our  
15 team is joined to three of those four, and we have major  
16 obligations just on one of them, but it is -- it is major  
17 because we're in the D.C. Circuit, and the rules are  
18 different. The -- even just the logistical aspects of it,  
19 that things have to be filed on paper in person, make it just  
20 more complicated and that you're doing those things at the  
21 same time that you're fulfilling your obligations here.

22           And again, that can't be done if we're on Guantanamo.  
23 We have an oral argument scheduled in November in one of our

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1 writs, and it happens that it's not during -- it doesn't  
2 conflict with a hearing schedule, but I'm pretty sure -- or I  
3 don't know whether the D.C. Circuit looks at our litigation  
4 schedule on Guantanamo when they set oral argument, but we  
5 can't be in two places at once, obviously.

6 I want to go back to, no one's afraid of the hard  
7 work and we're not complaining about the pace or the  
8 obligations, but we don't want to be back here doing any of  
9 this again. It's a capital case. Death is different.  
10 There's heightened reliability. It means heightened  
11 responsibility for us, for you, for the government.

12 And the government's choices are what got us where we  
13 are. The government -- not these prosecutors, but the  
14 government writ large -- made decisions that led to the  
15 torture in this case, but also led to this being a capital  
16 case, and led to it not being resolved short of capital.

17 The accused -- the defendants, way back in 2008,  
18 offered to plead guilty to noncapital charges. That wasn't  
19 allowed. We -- this is open now, an open secret now. In the  
20 555 litigation, we had negotiated a resolved settlement of  
21 this case with the convening authority that would have  
22 resolved the matter, finally allowed the victim family members  
23 to have resolution, understand what happened; and

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1 then-Attorney General Jeff Sessions called then-Secretary of  
2 Defense Mattis and said no deal.

3 Now, whether -- the judge has already decided that  
4 wasn't unlawful influence, but the fact of that phone call has  
5 never been in dispute. It was testified to by the  
6 government's witness.

7 And so this could have been resolved short of trial.  
8 The government has chosen not to. The government chose to  
9 hold these hearings on Guantanamo in a court that is not  
10 regularly constituted, and some of the consequences of that  
11 are the pace that we are able to meet with our litigation.

12 So it's for those reasons that we ask for the  
13 modifications that we set out in our pleadings in 639 and 553  
14 series.

15 MJ [Col COHEN]: Thank you, ma'am. Very articulate, to  
16 the point. I really appreciate that. It has given me  
17 definitely some things to consider.

18 I -- just for your situational awareness, and  
19 everyone else, I didn't create the schedule indifferent to any  
20 of these things, but with any date, there's still lots of  
21 unknowns, right? I mean, even the things that you're talking  
22 about now deal with certain unknowns as well as certain  
23 knowns, you know, those kinds of things.

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1 I included the logistical issues to the extent that  
2 they were -- that they were discussed at length, and then  
3 built in, for the first time ever in a scheduling order,  
4 briefings on those very issues because I recognize the  
5 importance of those. And now having been down here for my  
6 third trip, and this one being the longest by three times the  
7 amount of time that I've spent down here, I share with you,  
8 you know, the issues that are down here.

9 I'm still hopeful that what Mr. Ryan said back in the  
10 day, that dates at least generate the government at-large to  
11 make some decisions and spend some money on things that they  
12 should, will, in fact, occur. But if that doesn't happen, you  
13 know, we discussed that there will be consequences, and what  
14 those consequences are, you know, are to be determined.

15 But as far as your general points, yeah, thank you.  
16 I understand all of them, and I appreciate you taking the time  
17 to highlight them for me.

18 ADC [MS. RADOSTITZ]: Thank you.

19 MJ [Col COHEN]: Are there any other comments that need to  
20 be made?

21 Mr. Connell.

22 LDC [MR. CONNELL]: Sir, we had a separate filing. The  
23 only comment that I wish to add is one that I said in an 802,

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1 so I just want to make sure it makes it on to the record with  
2 that.

3 MJ [Col COHEN]: Sure. Absolutely.

4 LDC [MR. CONNELL]: One of the possible accommodations for  
5 Ramadan is to take that month for -- or that hearing for  
6 depositions in the National Capital Region. If there's  
7 evidence that needs to be taken, if a hearing needs to be had.

8 I know the military commission hasn't been at  
9 Guantanamo in Ramadan yet, but it's -- it's a significant and  
10 solemn occasion around here. And having proceedings at  
11 Guantanamo during Ramadan, I would -- I suggest, both because  
12 of the religious obligation, but also because of the fasting  
13 aspect of it, in long tropical days, would not be consistent  
14 with a fair trial.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. CONNELL]: But NCR depositions, on the other  
17 hand, might be a way to accommodate at least some of those  
18 concerns.

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

20 Mr. Ruiz, sir.

21 LDC [MR. RUIZ]: Thank you, Judge. I'm not a fan of  
22 beating the fallen horse, so I'll try not to do that.

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. RUIZ]: But I do want to accentuate some points  
2 that Ms. Radostitz made very well on all of our behalf in  
3 terms of the challenges that we face in terms of the  
4 logistics.

5 And I stand before you very confident that I can say  
6 that I can probably count on one hand the number of people in  
7 this room who have probably spent as much time in Guantanamo  
8 as I've had, including the prosecution, even with their head  
9 start.

10 So I say that so it is perfectly clear that I'm not  
11 averse, and my record speaks for itself in terms of the amount  
12 of time that I spend on this island working, not only in the  
13 course of hearings, but also in terms of meetings with the  
14 client and representing Mr. al Hawsawi. That is, of course,  
15 the essence of why we're here. And so I rise only to  
16 accentuate a couple of points, based on -- largely on that  
17 experience.

18 Ms. Radostitz is correct that the government made the  
19 choice to bring this case to Guantanamo and make this the  
20 venue. And I think as we all agreed, and I think as you  
21 recognize, that carries with it duties and responsibilities.

22 You alluded to Mr. Ryan's "schedule it and it will  
23 come" argument, which I indicated to you that I had argued and

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1 made comments on a number of previous times when it had been  
2 raised before previous judges in these military commissions.

3 I will tell you that I think as we stand here today,  
4 I certainly have not seen anything that's moved in terms of a  
5 comprehensive plan about how this island would support all of  
6 the logistical requirements that would be necessary, not only  
7 for the participants in this courtroom, but the people who  
8 would be flying in to the island, such as witnesses, jurors,  
9 those other actors that would enter the mix as we move forward  
10 through this trial process.

11 I would suggest -- Judge, I use the word "hopeful."  
12 I would suggest that hopeful is not good enough; that the  
13 commission consider setting a timeline for the government to  
14 provide to the commission and to the parties a logistical plan  
15 that sets forth just how this group of people are going to be  
16 housed.

17 MJ [Col COHEN]: And we should get that on the  
18 1st of November.

19 LDC [MR. RUIZ]: Okay. Yes, sir.

20 In that sense, we still have not seen -- what we have  
21 seen is an erosion of some of the resources such as the  
22 housing, where individuals are not having adequate housing.

23 In 343C, I'll highlight for you, the military

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1 commission ruled that the -- an order that was passed that  
2 required the military judges to move to the island in order to  
3 accentuate or move forth the pace of these proceedings was  
4 rebuffed and found to be unlawful influence.

5           So the essence of that was that I believe there is  
6 still at least some pressure out there. And I know you've  
7 indicated that you don't necessarily feel pressure to move the  
8 case along and -- to an eventual outcome and that we will move  
9 the proceedings at a pace that is required. And I understand  
10 that.

11           The main thing that -- at least for Mr. al Hawsawi,  
12 and again, joining these comments that we see that is of great  
13 concern to us -- and Ms. Radostitz talked on this a little  
14 bit -- is the discovery process. And I think you've probably  
15 seen this emerge from -- at least this theme consistently  
16 emerge on behalf of Mr. al Hawsawi in terms of representation.

17           And you have set forth timelines, clearly timelines  
18 towards trial, the trial in and of itself, as well as motions.  
19 And we don't take issue with the authority of this court or,  
20 quite frankly, any court to set those kinds of timelines, as  
21 you have.

22           The biggest concern, however, that I have on behalf  
23 of Mr. al Hawsawi and as you've seen through some of the

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1 litigation choices that we have made, is that never before  
2 have we been in the position where those kinds of timelines --  
3 those kinds of deadlines, the court exerts that authority,  
4 proper authority, in the context of not having resolved the  
5 ongoing discovery production and the discovery issues that  
6 must precede a realistic setting of those timelines.

7           And so as Ms. Radostitz talks about the November 1st  
8 timeline, as we talked about other timelines for the  
9 submission of these -- of these motions, I am mindful that  
10 there is a timeline for the completion of the discovery and  
11 for also the affirmation of such a completion.

12           But even as I've sat here and watched the process of  
13 Mr. Connell going through trying to cross-examine these  
14 witnesses -- and done a very good job, in my view -- that's a  
15 double-edged sword, right? Because on the one hand, you can  
16 look at that process and you can say, well, look -- look at  
17 what the defense was able to do. And they've had all of the  
18 ability to do all of that.

19           But at the same time, what you have seen is a process  
20 where discovery has continued to come in even throughout the  
21 week, even after witnesses have taken the stand. And so it is  
22 exactly what I've illustrated before, which is this process of  
23 moving forward to meet timelines, to meet the goals that the

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1 commission has set forth, but with incomplete information.

2 And that is my greatest concern as I move forward.

3           It's not that the commission lacks the authority to  
4 set these timelines. It's very understandable why the  
5 commission would do so. But I want to accentuate how  
6 important it is for us on Mr. al Hawsawi's team, and I believe  
7 on all teams, to make sure that this discovery drip ends at  
8 some point so then we have some -- we have -- and again, I  
9 don't want to de incentivize the government, as I think a  
10 number of colleagues have indicated, to provide this  
11 information, but it cannot be that we continue to move forward  
12 and be required to meet these timelines, these litigation  
13 timelines when time after time after time we continue to get  
14 information that comes in that is relevant to issues that are  
15 before the commission.

16           I have sat and I have looked through this discovery  
17 that's coming in, and I've looked at it and said, well, I'm  
18 glad I wasn't up there asking questions of a witness without  
19 this information because there's plenty of relevant  
20 information that could have been provided. And the response  
21 that always comes back is, well, we're -- we're reproducing  
22 some additional discovery. We're providing something that  
23 you've already had before, but in a different format.

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1           And I think what Ms. Radostitz says is extremely  
2 important, which is they know that because they maintain those  
3 documents. They know that because they've expended time and  
4 energy and resources in recreating that discovery and  
5 providing it to us. So they understand that because they put  
6 time and energy into that process.

7           Well, once that discovery comes into our hands,  
8 there's a lot of time and energy that goes into the process of  
9 trying to sort that out. What did we receive in 2014 that  
10 they're reproducing in 2019? What is different about the  
11 discovery that we got during this hearing week, during an  
12 ongoing session of the commissions, when witnesses are on the  
13 stand, that we may have gotten back in 2014, 2011, 2012? That  
14 is an enormous amount of information, and it takes time to  
15 process that.

16           So even once this discovery process is at some point,  
17 quote, completed, we need the time to be able to digest, to  
18 process this discovery, to analyze it, and then to make  
19 deliberate and informed decisions in order to meet the  
20 timelines that you've set before us.

21           So I guess one of the things that I'm saying, this is  
22 what I think I've said all along before, which is that  
23 discovery for us is extremely important. And for myself, as

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1 learned counsel, the balancing of the equities is extremely  
2 important, balancing the amount of time that we spend in this  
3 courtroom.

4 I am courtroom-bound, as are most of my colleagues  
5 who are the learned counsel in this case. Except Mr. Nevin  
6 now. Mr. Nevin is in a different position, which he clearly  
7 likes to bring to my attention every time he walks out of the  
8 courtroom in the middle of court.

9 But the reality is that when we are in hearings, I am  
10 primarily engaged in this hearing whether I'm up here asking  
11 questions or not. And I will represent to you that there are  
12 times that, if I think I can afford not to necessarily listen  
13 as intently as I need to, I'm back there editing motions or  
14 I'm trying to do other work, to push other work while I am  
15 here. But being here a number of weeks, whatever number of  
16 weeks that is, does have a collateral impact on what I'm able  
17 to do outside of the courtroom.

18 And as my colleagues have indicated, yes, we have  
19 other attorneys that are also engaged, and we have them fully  
20 engaged in the business of this case. But at the end of the  
21 day, I will tell you, Judge, everything that comes to this  
22 commission, every decision that we make, I have to have a hand  
23 in. And I have to have a hand in to direct that strategy, to

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1 ratify choices, to decline choices. That's just  
2 decision-making.

3 I think you probably have a very similar model in  
4 your -- even if you're not drafting the ruling, it still  
5 requires time and energy. It still requires attention. It  
6 still requires direction. It still requires the managing of  
7 the many resources that we have been given.

8 And so when we come before you and we very  
9 mechanically talk about adjusting number of weeks and doing  
10 away with numbers, it may sound as complaining. But the  
11 reality is that work is going to continue to be done; the only  
12 question is where and how and when.

13 And so when I look at the schedule, I think that it  
14 is extremely difficult to continue to carry on the business  
15 that's outside the court to meet these timelines with the  
16 requirements that I think are going to be increasing in court,  
17 such as the witness preparation, when and if we become fully  
18 engaged in that process. That just takes it to a different --  
19 a different level for us. And I know you are mindful of that  
20 as well.

21 Let me just see if I have any additional thoughts  
22 here.

23 [Counsel conferred.]

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1 LDC [MR. RUIZ]: Okay. Sure. Sure.

2 Judge, as I've said, I think -- and I want it to be  
3 perfectly clear. Clearly you have the authority and have  
4 exerted that authority, and I think you're getting more and  
5 more experience, obviously, as to the depth and complexity of  
6 this case, which I think will, hopefully, continue to inform  
7 those timelines that we're setting forth.

8 One point Ms. Radostitz reminded me of is that, even  
9 in the changes that you are making, such as those that  
10 facilitate certain submissions of pleas, there are additional  
11 requirements, such as the submission of witness lists,  
12 additional fact-findings and opinions. That's great. That's  
13 fine, and not a problem with that. But that does  
14 exponentially increase the amount of time that we, over time  
15 and given the number of motions we expect to file, that we  
16 will have to put our time and our resources to.

17 And I will tell you that, from Mr. al Hawsawi's  
18 perspective, we've always been of the mindset that justice  
19 delayed is justice denied to Mr. al Hawsawi as well as to all  
20 the people who have an interest in this case. And I know that  
21 there are times where I've been accused on paper or otherwise  
22 from wanting to delay this case or not wanting to move this  
23 case forward. And my intention and my intention on behalf of

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1 Mr. al Hawsawi has always been, Judge, to get individual  
2 justice for Mr. al Hawsawi in a timely manner, and it goes  
3 without saying, in terms of how long he has been in captivity  
4 without an actual trial.

5           However, what I am not in favor of, and what the  
6 positions that we have taken are not ones where we are pushed  
7 towards a result without being prepared to fully meet the  
8 challenge that is before us. And it is in those instances  
9 where we have stood and taken a stance against being pushed  
10 into a position or into a procedure that we believe puts us in  
11 a position where we have to litigate at a disadvantage, even  
12 though it may actually be more advantageous or expedient to  
13 whatever the issue may be.

14           The same is true for these timelines. We are fully  
15 ready to try and meet these timelines, Judge, on behalf of  
16 Mr. al Hawsawi; but again, we want to be able to do this in a  
17 way that balances the equities, the interest, and gives us the  
18 amount of time and energy and ability to fully analyze the  
19 information and allows us to, with full depth and knowledge of  
20 the information before us, meet those timelines in a way that  
21 is just to Mr. al Hawsawi and just to this process.

22           MJ [Col COHEN]: Understand, sir. Thank you for your  
23 comments.

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1 Ms. Bormann.

2 LDC [MS. BORMANN]: We adopt Ms. Radostitz's comments in  
3 whole. Yesterday in the closed session when I got up to  
4 correct the record on something, I sat back down, and one of  
5 my teammates leaned over to me and said, "My goodness, it's so  
6 good that you were here all this time because without your  
7 personal experience being brought to bear here, none of us  
8 would have known that."

9 And that's true of you, Judge. You just don't know  
10 what you don't know yet, and you're learning it. You know,  
11 rain is not an unusual situation in Guantanamo Bay during  
12 hurricane season. And so what we've experienced over the last  
13 couple of days happens pretty regularly.

14 When I -- I'm just going to give you sort of the  
15 history of what -- the very brief history of what the  
16 situation has been and why your deadline of November 1st to  
17 have the government tell you about the infrastructure issues  
18 isn't going to be an accurate assessment, because they simply  
19 don't know unless they look.

20 So way back in 2012, when we were getting to do the  
21 arraignment, I approached the government and I asked them if  
22 we could please deinfest my office, then in AV-34, up where  
23 the trial judiciary goes, of rodents and insects. We had --

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1 and clean it for mold.

2           The answer was no. And eventually that necessitated  
3 the filing of a motion with photographs that had to be taken  
4 by a secret camera and attached to -- as exhibits.  
5 Then-Judge Pohl looked at the government and said, fix it.  
6 That took a long time to do, and it never got solved  
7 permanently.

8           Instead -- I'm going to fast-forward ahead to  
9 November of last year. I got down to Guantanamo Bay. My  
10 office in AV-34 had been -- well, I'll explain how that  
11 happened -- but my -- I walked into the ELC, which is where  
12 our office is when we're in court, to an office that was  
13 literally covered in mold. The walls were covered in mold.  
14 The chairs were covered in mold. The carpet was squishy and  
15 covered in mold. The keyboards were covered in mold. The  
16 varnish on the table that is shoved into that small space was  
17 eaten away by mold. And my paralegal had a visible allergic  
18 reaction to just walking in.

19           The court reporters at the time were kind enough --  
20 and I'm looking at [REDACTED] here, to help us, move,  
21 because it was clear that there was a problem. I invited the  
22 prosecution, any member of the prosecution, to come over and  
23 look at my office because it was unusable. They declined.

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1 I had to come in front of the court and explain it,  
2 and ultimately what happened was we were moved into what's  
3 called a RASER. It's those little teeny containerized things  
4 that has, right in a row, like four chairs and four outlets  
5 for computers that had been owned by the court reporters. It  
6 had been a storage area for the court reporters.

7 We're still there. We're still there because what  
8 happened as a result of the mold that had taken over the  
9 Bin'Attash office was that a cursory inspection by hygiene  
10 people here on the base determined that the entire office  
11 space, the one trailer occupied by the defense, was completely  
12 infested with mold. So the carpeting had to be ripped out,  
13 the subflooring and all of that. And so then we lost any  
14 office space we had in AV-34 because other people had to take  
15 that space.

16 Eventually, that container -- so that container was  
17 rehabbed, but it wasn't fully rehabbed because the government  
18 had promised that we were going to get new offices.

19 TC [MR. RYAN]: Your Honor, I object at this time. It's  
20 gone far beyond the motion before the commission.

21 LDC [MS. BORMANN]: This is directly at issue with moving  
22 timelines ----

23 TC [MR. RYAN]: It is in no pleading, sir. I object to

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1 it.

2 MJ [Col COHEN]: Ma'am, I do recall last time a large  
3 discussion about similar issues. Are there other specific  
4 facts that are different from the last time we addressed this?

5 LDC [MS. BORMANN]: Yes.

6 MJ [Col COHEN]: Okay. You may address those.

7 LDC [MS. BORMANN]: Thank you. I will get there.

8 The situation this week that we experienced that  
9 Ms. Radostitz touched on is something that is not anomalous.  
10 This morning, I woke up to a similar situation that  
11 Ms. Radostitz had, in a building where the -- one elevator has  
12 been broken for months, and the second only other elevator  
13 broke a few days back and has not been repaired.

14 MJ [Col COHEN]: I'm aware of that I have had to walk the  
15 six flights of stairs, too.

16 LDC [MS. BORMANN]: Me, too. And that's fine because I'm  
17 healthy and I'm able to do it. But God forbid somebody  
18 disabled or not as healthy or as young had to do the same  
19 thing; they would not be able to.

20 It is indicative of what happens here, which is  
21 things go undiagnosed, and then when they break, they go  
22 unfixed for a very long period of time.

23 Right now, I called and I told them that my room was

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1 flooded. I have no idea what I'm going to go back to.

2           When I got here today, the -- my colleagues -- I saw  
3 him, Mr. Montross, was covered in water, and I asked why. The  
4 vehicle that had been assigned to him -- it's a pickup  
5 truck -- was in such disrepair that apparently there was a  
6 crack in the roof, and when he tried to get into his truck  
7 this morning to get here, it was like a pool. So he had to  
8 run back upstairs, get -- to his room, change clothes, get in,  
9 completely sodden wet and bring his clothes with him to change  
10 here.

11           The -- Captain Peer, one of my other colleagues, is  
12 not assigned a typical vehicle to get to and fro. He's  
13 assigned sort of a golf cart thing. The roof on that is  
14 cracked. And so when you saw his uniform coat here the other  
15 day, that's because he had to take it off and blow dry his  
16 shirt because he couldn't get here without being completely  
17 sopping wet.

18           I'm going to -- there is currently an emergency order  
19 in effect in Guantanamo that denies us the ability to fill up  
20 the vehicles that we are required to use to get to and fro  
21 with gasoline. So if you have -- because it appears that no  
22 planning was made for the gas necessary to fuel the cars for  
23 the people who had to be here for three weeks of hearings set.

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1           Those cars, if you run out of gas, have to be turned  
2 in, and then I suppose people will have to take buses or  
3 however else -- figure out a way to get around. Thankfully,  
4 none of my team is in that boat.

5           Those are just a few of the things that happened this  
6 week. And so going forward, on infrastructure issues, when  
7 you ask General Martins to give you an update, General Martins  
8 wouldn't have known about any of those things unless I were  
9 asked to fill him in.

10           And so there is, I think, going to be a gap there,  
11 and there's nothing in your scheduling order to allow for how  
12 to fill that gap of information. And so one of the things  
13 that Ms. Radostitz's proposed schedule does is give us a  
14 little more time to fill those gaps so that you're made aware.

15           The other area I want to address is where our clients  
16 are housed. So my client, Mr. Bin'Attash's legal materials,  
17 the things he uses to familiarize himself with what's going to  
18 happen -- so I'm going to tell you, we send him briefings  
19 biweekly of motions filed and all the unclassified goings-on  
20 that are happening in his case.

21           Because, of course, as you're now aware, we can't  
22 pick up the phone and call him. We have to either meet with  
23 him -- well, we have to be here and schedule meetings weeks in

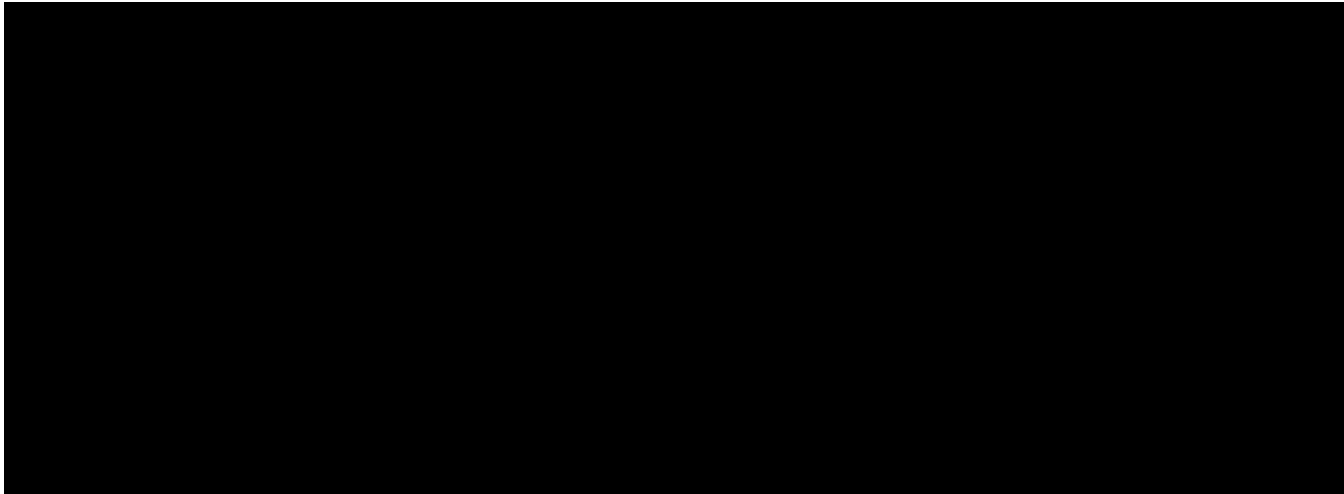
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1 advance, and hope that those visits are granted by JTF. So  
2 when we can't do that, we then have to write to him. So we  
3 send him things that he is required to store in bins.

4           Those bins are required to be stored in an area that  
5 is now flooded. We are not the only ones who are put in a  
6 position where we can't prepare. And I'm not going to go into  
7 details here because, frankly, I'm not sure what's classified  
8 and what's not, so I want to avoid any sort of  
9 left-lane/right-lane thing here. But the bottom line is the  
10 place where our clients are housed is also in dire need of  
11 repair. They also need to be prepared for a trial that will  
12 take, as you estimate, nine months.

13  
14  
15  
16  
17  
18  
19



20           LDC [MS. BORMANN]: Oh. Okay.

21           MJ [Col COHEN]: I am aware.

22           LDC [MS. BORMANN]: You are? Okay. Then I don't need to  
23 discuss that with you.

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1           However, the alternative place that has been proposed  
2 for us to meet our client in is also not working properly.  
3 The temperatures, et cetera, and the facilities that would be  
4 proposed would not be conducive to legal meetings. So right  
5 now, as it stands, the only way Mr. Bin'Attash can meet with  
6 any of his defense team is to be sitting here in court, and  
7 that appears to be the case for the near future.

8           That's going to interfere with our ability to prepare  
9 for hearings going forward because, unlike everybody else  
10 who's leaving on Saturday, I'm staying behind along with  
11 Mr. Montross and some others, to do work with Mr. Bin'Attash.  
12 And it looks like we're not going to be able to get that work  
13 done.

14           So there's some difficulties -- and I'm not going to  
15 discuss the basics behind it because I'm told I can't. But  
16 just getting the basics done has become incredibly difficult.

17           The discovery issue has been touched on by Mr. Ruiz  
18 and Ms. Radostitz writ large, but there is one piece that  
19 you've not been completely apprised of, and it's the basis of  
20 an ex parte series of filings. But I'm here to tell you that  
21 as we sit here today, we have no platform by which we can sort  
22 or analyze discovery.

23           So when you saw earlier in the last couple of weeks

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1 very few people sitting at defense table -- I think one day it  
2 was just me -- that's because I have all hands on deck down  
3 here in an IT situation that is less than adequate, trying to  
4 use programs that are not designed for massive amounts of  
5 documents to determine evidence that's being presented while  
6 Mr. Connell calls witnesses. It is a failure of the  
7 resourcing of these teams and the convening authority's  
8 failure to follow a particular judge's order.

9 I know we have a request in for an ex parte  
10 presentation on that particular thing, so I won't touch on it  
11 any further.

12 Needless to say, all of these things, each one by  
13 itself wouldn't matter; but when you stack them all together,  
14 it becomes almost impossible. And until you actually are here  
15 for a long period of time or a sufficient period of time, you  
16 don't see it because -- you know, one, okay, sure, my roof is  
17 leaking. Okay.

18 But the problem is then my office is also leaking,  
19 and the vehicle that I'm supposed to use to get to and from is  
20 also leaking. So I can't make it to court in time in order to  
21 meet with my client, which then sets me back on that issue,  
22 which means I then have to stay after the hearings to meet  
23 with them, which means I can't write a motion. That's the

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1 cascading effect that Ms. Radostitz talked about.

2           We would ask you to look at our proposed order -- it  
3 basically has the same number of litigation days divided  
4 differently -- and go forward in that way. We think we could  
5 hopefully minimize the difficulties if we took a -- a measured  
6 approach to the upcoming schedule, and we ask you to do that.

7           MJ [Col COHEN]: All right. Thank you, ma'am.

8           Mr. Harrington.

9           LDC [MR. HARRINGTON]: Judge, just a couple of brief  
10 comments.

11           One is I know that you're going to do this, but this  
12 week you had baptism with witnesses and got some sense of the  
13 length of the witnesses. And even with a primary witness in  
14 this case who was not questioned by other defense counsel for  
15 whom he has relevant testimony, it gives some indication to  
16 the difficulties that you face.

17           And I just want -- I suppose there's different ways  
18 of looking at that, and one of them is I'm going to double  
19 down on what I did -- what I proposed for next year, and I'm  
20 just going to go hammer it, and we're just going to keep plow,  
21 plow, plow, plow. And that's obviously a decision that  
22 you can make. But I'd ask you to look at it a different way  
23 and say, how can we tinker with what the system is and make it

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1 work more efficiently or better.

2           And that goes back to the fact that this case is  
3 backwards still, because of the discovery issue which  
4 everybody talked about not being completed, and the fact that  
5 we're not at the point where the motions are filed to deal  
6 with, for example, a particular issue.

7           If we're dealing with somebody's statement, it would  
8 seem that you would have a witness testify about that  
9 statement. If that witness is on there and other people have  
10 filed motions, okay, we go to this person and you question him  
11 about the statement. But we deal with an issue right there,  
12 and that would be the better way to do it. So to the extent  
13 that you can consider that and the alternatives that we have  
14 suggested, we would ask that you do that.

15           MJ [Col COHEN]: I will, sir.

16           LDC [MR. HARRINGTON]: Judge, another thing that --  
17 learned counsel have a special obligation in these cases which  
18 is unlike any other case, and that is that we are, under the  
19 guidelines, responsible for our teams. And not only do we  
20 have to try to look out for our client, but we have to try to  
21 look out for ourselves.

22           And I've been very carefully watching with respect to  
23 my team and what this three-week period has done. We operate

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1 in very difficult circumstances, which you've heard over and  
2 over here in terms of space and all being crammed into the  
3 same place and not enough computers so there's people standing  
4 there that aren't using computers.

5 All of the people that I deal with on my team and I  
6 have experience with on the other teams and with the  
7 prosecution, are all very professional, very civilized and  
8 really very, very nice and hardworking people. But we  
9 could -- I could see the stress, even in terms of this week.  
10 It's just -- it's really, really, really tough. And we have  
11 an obligation to monitor that and watch out for it. So any  
12 way that we can do to ease the stress on our support staff is  
13 important.

14 And the other thing, last thing I will say is that,  
15 even in the weeks that we have off when we are back in  
16 Virginia or wherever counsel live, we not only have motions  
17 and things to write, but we have other travel and other things  
18 to do, which drives people on the team away from their  
19 families even more. And, I mean, we took on the case, and so  
20 you gotta do it.

21 And I know General Martins gets up, and he's a  
22 general, and he orders his troops to march, and that's the  
23 attitude that he takes. But we're not generals; we're

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1 civilians. And we have to, a lot of times, cajole or use  
2 other techniques to get people to do it. And I'm not saying  
3 the people aren't dedicated, but this is -- can be very  
4 destructive to mental health and to families. Thank you.

5 MJ [Col COHEN]: That's fair, sir. Thank you.

6 Trial Counsel, are you satisfied with what you've  
7 previously argued?

8 TC [MR. RYAN]: Could I have the court's indulgence, Your  
9 Honor?

10 MJ [Col COHEN]: You may.

11 [Counsel conferred.]

12 TC [MR. RYAN]: Your Honor, with the commission's  
13 permission, I would like to make a few comments just because I  
14 feel that, in light of the many comments from the defense, I  
15 cannot in good conscience leave you without something in  
16 response.

17 MJ [Col COHEN]: Absolutely, sir.

18 TC [MR. RYAN]: In terms of the logistics -- and I think  
19 Your Honor has been focused properly in that area -- I will,  
20 in a few moments, hand it off, with your permission again, to  
21 General Martins ----

22 MJ [Col COHEN]: Absolutely, sir.

23 TC [MR. RYAN]: ---- who, of course, is the person most

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1 focused in that area and is literally working it on a constant  
2 basis.

3           Judge, I so very deeply disagree with counsel's, I  
4 think, unfortunate comment that it was the choice of the  
5 United States Government that we're standing here in this  
6 courtroom today. The choice that was made belongs to the man  
7 standing to my left at the far end of that particular table  
8 who decided to invent a crime so horrible that it became an  
9 actual act of war in an illegal war. And it is that choice  
10 that brought upon the United States several more choices that  
11 were to be made, including RDI and including what brought us  
12 here into this courtroom. We are ready for that fight. We  
13 will defend it all day long, as long as this case goes on.

14           My point, Judge, to you last time was -- and I used  
15 to say this to Judge Pohl -- you will never have their consent  
16 to try this case. I could never get Judge Pohl to believe me.

17           The trial conduct order of this commission  
18 establishes 11 January 2021 as the beginning of trial on the  
19 merits. The prosecution will be here. We'll be here with our  
20 witnesses and with our evidence. We will tell the story of  
21 those horrible 102 minutes on September 11th and how these men  
22 brought that day to our shores.

23           We are now looking at a way out of the quagmire for

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1 the first time, and for that we are very grateful. But much  
2 work lies ahead of us.

3           As Your Honor saw over the last three weeks, there  
4 are many things that can't be foreseen and can't be controlled  
5 very well. For example, a request now exists that one witness  
6 will take as long as two full weeks to testify. In another  
7 instance, a counsel has literally refused the court's order to  
8 file a motion where the other teams have found a way to do so.  
9 These are the unknowables that the best laid plans sometimes  
10 just don't account for.

11           So it will take determination, and it will take an  
12 eye on the ticking of the clock to keep us on track. The  
13 prosecution is completely committed to the schedule and to  
14 staying on track.

15           I'll just share this with you real fast, Judge. The  
16 best -- the best blast e-mail the Office of the Chief  
17 Prosecutor ever sent to the victim witness community who have  
18 stood by this forum and come back to Guantanamo and sit behind  
19 that glass was the e-mail telling them that we had a schedule  
20 that ended with a trial date. We don't want to go backwards.

21           But now the onslaught begins. 653C was filed, not  
22 one bit surprisingly, by the four teams that told you seven  
23 years was not enough and you shouldn't set a date at all. We

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1 do not want to backslide, sir. We do not want your order to  
2 become irrelevant before the ink has even dried.

3 I can make comments about the ridiculousness of times  
4 of what they say. For example, a team with five lawyers  
5 sitting right here, two of them qualified as learned, one of  
6 them who's been on the case for ten years, is telling you that  
7 it's very difficult to file motions by a deadline. I know  
8 there's a joke in there someplace about how many lawyers it  
9 takes to file on time. I would submit that the punchline is  
10 less than five.

11 The specifics, Judge -- and I think this is what you  
12 want to hear from me. We counted. I don't know what they're  
13 counting, but I know what we counted. The request that the  
14 travel schedule be changed would lead to the elimination of at  
15 least 18 calendar days that could be used for hearings. The  
16 cancelling of February, May, and September hearings would lead  
17 to cancellation of 39 calendar days. The shortening of the  
18 March hearings to one week would eliminate more calendar days.

19 In light of the last three weeks that you saw, sir,  
20 by presiding over this case, we predict that if these changes  
21 were put into effect, the elimination of 11 January 2021 would  
22 almost be a certainty.

23 We suggest, Judge, and we talked about this a little

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1 bit, that the better path is to keep the sessions as scheduled  
2 and, if appropriate, make adjustments as conditions on the  
3 ground justify. Judge Pohl was right on this. He used to say  
4 it's easier to cancel than it is to put it on. So to keep it  
5 in place is the better solution.

6           Toward that end of making suggestions -- I'm sorry,  
7 making changes as we go forward, if the conditions justify it,  
8 I have two suggestions:

9           One, at the end of each session, the military  
10 commission hold an 802. This has sort of been in effect  
11 already. Your Honor is making, I think, good and strong use  
12 of the 802 process. We strongly encourage that continues.  
13 But at the end of each session, an 802 designed specifically  
14 for figuring out where we are in the litigation, what motions  
15 are to come, what has to be handled the next time, I think  
16 would give the commission and the parties far better clarity.

17           Second, if the defense truly wants to eliminate  
18 sessions, then I suggest the commission put it to them to  
19 prove it up front with actual progress. Examples -- you  
20 talked about it before and we've already done it. We can work  
21 more than we have -- than we have been.

22           8:00 to 6:00 is fine by us. If it was more, I'd be  
23 fine with that as well, but I recognize that the commission at

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1 some point must reach a point where you're -- kind of reach  
2 saturation in terms of how much information you're taking in.  
3 But certainly, 8:00 to 6:00 is not something so unusual or  
4 difficult that the parties shouldn't be able to comply. On  
5 the other hand, we could also work Saturdays if we were here.

6           Finally, Judge, in light of what's gone on this  
7 morning, I would suggest you consider to eliminate overly long  
8 oral arguments. It would seem that a 20-minute argument after  
9 a 20- to 50-page brief should be sufficient. Or even better,  
10 and more pointed, Your Honor could direct the parties to the  
11 exact points you're interested in, and argument could be made  
12 only as to that.

13           In closing, Judge, and just very, very briefly, I  
14 want to just say that among the items you've been deluged with  
15 as reasons that schedules should be changed and the world has  
16 changed is what I'll just call the 645 issue. I can't get  
17 into it in open court, but you've heard it used in  
18 justification for changing schedules several times now. I  
19 understand it. It's devastating evidence and it refutes so  
20 much of what's been heard.

21           I'll simply say this, Judge: I will refer you, Your  
22 Honor, to consider among other pleadings AE 645B, Bravo, a  
23 classified pleading, and specifically pages 38 to 53 --

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1 really, what I'm doing, Judge, right now, is not just sort of  
2 throwing more paper at you but giving you actual data that  
3 will support the government's position on this particular  
4 question -- AE 138, from the Hadi al-Iraqi case; and finally,  
5 AE 575, a prosecution pleading later withdrawn, but with  
6 pages 3 through 11 and 14 through 37 being directly relevant.

7           Finally, sir, and before I hand it to the General,  
8 I'll simply say this: Back when we argued this, I told you  
9 that dates drive well and they drive action. That has been  
10 proven correct. General Martins has been engaged with this  
11 and with the many partners involved and can report to you now  
12 in regard to some of the more logistical areas that have been  
13 the subject of discussion on both sides. Thank you, sir.

14           MJ [Col COHEN]: Thank you, Mr. Ryan. No questions.  
15 Thank you.

16           General Martins.

17           LDC [MR. SOWARDS]: Your Honor, on behalf of Mr. Mohammad,  
18 we would object to deviation from the one-issue-one-attorney  
19 rule, particularly in light of Mr. Ryan's argument that the  
20 court limit the opportunity for advocacy, particularly in oral  
21 argument by the defense. Thank you.

22           MJ [Col COHEN]: I understand. This is something that I  
23 had specifically asked General Martins yesterday during a

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1 closed session, and it was indicated that this needed -- that  
2 that question needed to be asked and answered in an open  
3 session. So to the extent that this addresses that matter, I  
4 will allow this issue to be addressed.

5 Mr. Connell.

6 LDC [MR. CONNELL]: Separately, Your Honor, we have to  
7 come back after lunch for 152 anyway. I just note that it's  
8 almost 1300 hours.

9 MJ [Col COHEN]: Sir, how long are your comments?

10 CP [BG MARTINS]: Subject to your questions, Your Honor,  
11 seven to ten minutes.

12 MJ [Col COHEN]: Okay. Then we'll go until 1300 and then  
13 take a recess for the afternoon. Sir. You have ten minutes.

14 CP [BG MARTINS]: Good afternoon, Your Honor.

15 The trial scheduling order of 30 August reflects the  
16 commission's interest in a range of administrative and  
17 logistical matters, and I'm referring specifically to  
18 paragraph 3 ----

19 MJ [Col COHEN]: Yes, sir.

20 CP [BG MARTINS]: ---- and Attachment B which direct the  
21 government to provide periodic status updates.

22 Key rules and authorities providing the framework  
23 that we're seeing here include Rule for Military Commission

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1 502(d), as in Delta, which states that trial counsel shall  
2 prosecute cases on behalf of the United States, thus, that  
3 in-trial counsel.

4 This Rule for Military Commission language and the  
5 pertinent discussion of that rule are identical in the  
6 pertinent parts to the Rule for Court-Martial, 502(d). The  
7 discussion is familiar to military trial counsel to -- of all  
8 services on posts, camps, and stations around the world.

9 This important commentary states that, quote, Trial  
10 counsel should ensure that a suitable room and necessary  
11 equipment and supplies are provided for the military  
12 commission, end quote, and that they should maintain a  
13 relationship with the convening authority that includes  
14 administrative and logistical issues that impact trial  
15 proceedings.

16 Regulation for Trial by Military Commission Chapter 2  
17 then invests the convening authority with broad  
18 responsibilities, functions, and relationships across the  
19 Department of Defense, to include ones pertaining to  
20 resourcing, and yet, despite those responsibilities of the CA,  
21 the R.T.M.C. is clear that nothing in the R.T.M.C. is to  
22 subsume or replace the responsibilities, functions or  
23 authorities of the other components of the Defense Department,

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1 to include the secretaries of the military departments, and  
2 the combatant commands. So the convening authority, thus, has  
3 a significant coordinating role and responsibility.

4 We're mindful of these roles and responsibilities.  
5 We're also mindful of the Supreme Court's recognition that  
6 courts are generally ill-equipped to deal with matters of  
7 administration, and this recognition of the high court is  
8 particularly apparent in the Bell v. Wolfish and  
9 Turner v. Safley line of cases that are well known to this  
10 commission in various motion series. So hence, there are many  
11 precedents holding that judges accord administrators deference  
12 in practices that particularly impinge upon security.

13 So we and a host of government partners, hardworking  
14 professionals, the guards here, the command, very hardworking  
15 folks, are actively carrying out Appellate Exhibit 639M, and  
16 specifically the requirement -- and I'm quoting your order,  
17 but I think it's useful for you to see we've taken this on  
18 board; this is shaping our lives now -- quote, The government  
19 shall work with the convening authority to provide periodic  
20 logistics briefs to the commission and the defense, end quote.

21 And the briefs are going to address 11 matters which  
22 we are actively shaping and building in order to provide the  
23 best, most coordinated information to the commission and the

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1 participants. Those 11 matters are office space, lodging,  
2 media accommodations, security clearances, a transportation  
3 plan, the general feeding arrangements, medical emergencies,  
4 redeployments during breaks, sequestration of panel members,  
5 entitlements for members during extended TDYs, and per diem  
6 plan during extended sessions.

7           We're aware these briefs are to, quote, set forth how  
8 the government intends to ensure the trial is ready to proceed  
9 on 11 January 2021. You've stated the briefings will be in  
10 writing with an oral presentation during the next scheduled  
11 commission hearings.

12           MJ [Col COHEN]: Sir, while I'm at it, in writing --  
13 slides are okay. I just need it to be in some kind of written  
14 form. It doesn't necessarily have to be in a formal brief.

15           CP [BG MARTINS]: Thank you, Your Honor. And that is how  
16 we were conceiving of it.

17           MJ [Col COHEN]: Okay.

18           CP [BG MARTINS]: We sort of saw where you were going with  
19 this.

20           MJ [Col COHEN]: Yeah. The military officer in me kind of  
21 anticipated that's probably how this would come, but I just  
22 wanted to make sure for clarification. That would be  
23 sufficient, something that I could ask questions about, those

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1 kinds of things.

2 CP [BG MARTINS]: Yeah, I mean, if you ever get an officer  
3 not using PowerPoint, there's probably something awry.

4 MJ [Col COHEN]: It would be strange for us, sir. Yes,  
5 sir.

6 CP [BG MARTINS]: Yes, Your Honor. So much work is being  
7 done in these 11 categories.

8 And I emphasize that the Trial Scheduling Order with  
9 an 11 January 2021 date, and specific tasks and deadlines that  
10 are in the interim, has been key to gaining commitments and  
11 focus. And while the commission must, of course, maintain its  
12 insistence on fairness, the United States respectfully urges  
13 that 16 months, with the commission's interim deadlines, does  
14 and will continue to facilitate that date -- that date. And  
15 that trial will be fair and just and will afford zealous  
16 advocacy in front of a panel that should finally hear this  
17 case.

18 So we are tracking that the first written brief is to  
19 be disseminated on 1 November. We do envision a PowerPoint  
20 slide deck that is organized around your 11 categories.

21 MJ [Col COHEN]: That would be great, sir.

22 CP [BG MARTINS]: And given the sensitivity of some of the  
23 information in that brief, we intend that the convening

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1 authority's office will push that out to the Office of  
2 Military Commissions participants and then also the trial  
3 judiciary, the pertinent parties here, and the -- the office,  
4 key officers.

5           And then we're going to actually be down here the  
6 following week. So what we envision is Friday, 1 November,  
7 that slide deck goes out on the SIPR system because of the  
8 sensitivity of this information; some of it involves movements  
9 of personnel and other things. And then what we envision is  
10 at an R.M.C. 802 conference, we would propose that on one of  
11 the days we recess early or recess for a longer period of time  
12 over lunch, perhaps, and receive a briefing in here via VTC  
13 from key members of the Office of Military Commissions, North  
14 and South, the presentation of -- again, it's going to be  
15 organized around those 11 categories and other things the  
16 commission may have.

17           We would then envision by exception, and -- that  
18 would not be either an R.M.C. 803 open session or an  
19 R.M.C. 806 session; that would be a briefing to participants  
20 in something that has operational and administrative  
21 dimensions. If the commission wishes us to file then the  
22 brief as a filing, we would need to do it, again with --  
23 mindful of the sensitivities of some of the information. But

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1 we're envisioning a briefing from the Office of Military  
2 Commissions and a presentation.

3           And then, by exception, if there's some relief being  
4 sought by a party, that's what your Rules of Court are for,  
5 that's what the R.M.C. 905/906 are for. They can ask for  
6 relief, and we can litigate it, and then you can have a  
7 properly adversarial posture with factual development and so  
8 forth.

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

10          CP [BG MARTINS]: That's how we plan to set out doing this  
11 and believe that it's a good process that you've laid out, and  
12 it is consistent with those authorities that I laid out on the  
13 front end on the responsibilities.

14          MJ [Col COHEN]: Okay. Thank you, sir. Yeah, I -- yeah.  
15 It's a new process, so notionally that makes sense to me.  
16 Let's see how it works.

17           And then to the extent that we can keep the public  
18 apprised of where we are, you know, prepare it with an eye  
19 towards there may be certain things that we might want to add  
20 as appellate exhibits so that the public is just generally  
21 aware of what it is, and maybe want to even make certain  
22 portions of the briefing an appellate exhibit that becomes  
23 available to the public as well.

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1 CP [BG MARTINS]: Your Honor, I'm taking a note of that.

2 MJ [Col COHEN]: All right. Thank you, sir. All right.

3 Let's be in recess until 1415.

4 [The R.M.C. 803 session recessed at 1300, 26 September 2019.]

5 [The R.M.C. 803 session was called to order at 1417,

6 26 September 2019.]

7 MJ [Col COHEN]: The military commission is called to  
8 order. The parties are present. Mr. Mohammad is here.  
9 Mr. Bin'Attash is here. Mr. Binalshibh is here. Mr. Ali is  
10 here. And Mr. al Hawsawi is still voluntarily absent.

11 Ms. Radostitz.

12 ADC [MS. RADOSTITZ]: Sir, very briefly in response to the  
13 government's comments. The bedrock of our judicial system is  
14 a presumption of innocence. And so when Mr. Ryan stands up  
15 and points to Mr. Mohammad and says that this is his fault,  
16 he's undermining that presumption of innocence, and we can't  
17 let it not be responded to.

18 Justice and the Eighth Amendment -- or the justice  
19 system and the Eighth Amendment require there is a fair trial,  
20 a reliable trial, and rule-of-law-based trial no matter what  
21 the charges are, and they are not reduced simply because of  
22 the horror of the crime that is charged or the severity of the  
23 charges.

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1           And the government did make choices in this  
2 situation. They chose to allow these trials on Guantanamo.  
3 They chose to engage in a systematic experimental program of  
4 torture. And they had other choices.

5           Zacarias Moussaoui was charged for the exact same  
6 charges as the defendants in this room. He was arrested in  
7 September 2001. He was charged capitally. He was arraigned,  
8 tried, convicted, and sentenced by May of 2006, about four  
9 years and eight months later.

10           In the Benghazi attacks against the U.S. Embassy in  
11 Libya, where a U.S. ambassador was killed; it occurred on  
12 9/11/2012. Ahmed Abu Khattala was arrested. He was held  
13 incommunicado on the USS NEW YORK. He was interrogated for  
14 intelligence purposes, but he was capitally charged,  
15 arraigned, tried, convicted, and sentenced between his arrest  
16 in 2014 and November of 2017, a little bit more than five  
17 years.

18           And the only difference between those charges and the  
19 charges against these men is torture.

20           So I want to talk just very briefly in response to  
21 something General Martins said. He was talking about the  
22 briefing; and we looked at your order, and it does say that it  
23 needs to be a logistics brief, and obviously, if that's a

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1 PowerPoint instead of a traditional looking brief, we're not  
2 going to complain.

3 But it also says that it will be in writing with an  
4 oral presentation, and what General Martins described was  
5 something that was not on the record, and we would require --  
6 request that it be on the record. There's nothing in the  
7 rules that allows for an oral presentation that is not on the  
8 record.

9 And he also described that it would be a presentation  
10 by someone who is not on the prosecution team. And our  
11 position is that anybody who stands and makes a presentation  
12 to the court who's not on either a defense team or a  
13 prosecution team is a witness. And if they want to call a  
14 witness to testify, we wouldn't object, but it should be  
15 handled as if they were a witness.

16 And if there is a need for closure, then the  
17 prosecution, the government, needs to go through the proper  
18 procedures for seeking a closed hearing based on the national  
19 security privilege invocation.

20 So that's our response just with regard to  
21 General Martins' comments.

22 MJ [Col COHEN]: All right. Thank you, ma'am.

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Your Honor, my parting comment is  
2 originally I argued at some length, but it didn't make it into  
3 the final order, which is the requirements other than lodging  
4 of the public; that NGOs are -- and the media are, the  
5 situation is poor and declining. Just -- the government may  
6 recall my photograph that I displayed just on the first day of  
7 the current situation of the media.

8 And the NGO numbers are declining because their  
9 conditions are so poor. So maybe that gets wrapped into  
10 lodging for the public that is in the order. But it's an  
11 important issue. It's not explicit in the order, but it's one  
12 that we will be asking the military commission to track.  
13 Thank you.

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

15 Mr. Ruiz, sir.

16 LDC [MR. RUIZ]: Thank you, Judge.

17 Judge, yet again this notion that is put forth to you  
18 that there will never be a trial date that we would accede to,  
19 I -- first of all, as far as I'm concerned, it's not a "we"  
20 thing, it's a Mr. al Hawsawi thing. And you will hear me harp  
21 on that over and over and over and over. And I stand to look  
22 you in the eye and tell you that's simply not true.

23 Not only Mr. al Hawsawi, but many of the counsel in

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1 our case look forward to a day where we can have a trial, and  
2 we can have an adjudication, and the process for  
3 accountability. It will serve everyone's interests,  
4 Mr. al Hawsawi's, the participants', and certainly this  
5 nation.

6 As you know, I've been here for ten years. That's a  
7 long time. And quite frankly, I do not necessarily look  
8 forward to another ten years. It is time that this process  
9 moves forward to a resolution.

10 So I stand, once again, to be perfectly clear to you  
11 and to this record that that is not the case, but this notion  
12 that we should proceed without all of the proper elements and  
13 the proper tools is not appropriate.

14 And simply the notion that this delay is of our own  
15 making, that Guantanamo is of the defense's making or of our  
16 clients' making is incorrect, and is misguided.

17 Certainly, the need for an accountability process  
18 came from the events of 9/11. That accountability process, as  
19 Ms. Radostitz indicated, didn't have to be in a remote,  
20 heavily militarized base where we have to travel and where we  
21 have to account for the kinds of logistics that we have to  
22 account to.

23 It certainly could have been handled in a number of

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1 military bases. I know from your experience and my experience  
2 as a military officer that there are bases that are well  
3 equipped and would have been well equipped, not only from a  
4 security standpoint but from other standpoints, to handle a  
5 significant trial. That was a choice that was made, not to  
6 have that in a facility on the continental United States  
7 grounds that would have made a lot of these logistical  
8 challenges not as difficult as, in fact, that they are here.

9           And if the prosecution wants to continue to wrap  
10 themselves in this notion that they are, in fact, the  
11 protectors and the vindicators of this justice, they only need  
12 to look clearly and honestly in the mirror and realize that if  
13 they really wanted to serve the interests of moving this  
14 process forward, they would have started in 2008 by providing  
15 all of the discovery to the defense. They would have started  
16 and they would have finished.

17           It is a fact that today, as I stand before you, we  
18 are still continuing to litigate, not throwaway discovery  
19 issues, but very, very significant issues on some of the most  
20 critical matters in this case. We continue to get discovery  
21 to this date, yesterday. We continue to get discovery in this  
22 case. That is a choice that belongs exclusively to the men on  
23 that side of the aisle. That is a choice that they've made,

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1 and Mr. Ryan indicated that they will defend that choice.

2           And it shouldn't be lost on this commission that what  
3 they have been defending is providing information, providing  
4 transparency, providing the discovery that ultimately we've  
5 started to see that ties the CIA to the FBI in the complicity  
6 of what was an illegal enterprise. There is nothing American  
7 about that. There is nothing virtuous about that. But it's a  
8 fact.

9           If you want to be honest about why we're still here  
10 litigating at this late in the game, that's why we're here,  
11 because they made a choice and have continued to make a choice  
12 to defend, to degrade, to deny that information in a capital  
13 prosecution.

14           And we have made a choice, as officers of the court,  
15 as officers of this nation, to defend the Constitution against  
16 enemies, foreign and domestic. And yes, on 9/11, the Towers  
17 fell, but thereafter choices were made, and those choices have  
18 fallen and fell values, principles and ideals, that are  
19 critical to the lifetime and to this nation, and they've  
20 continued to defend those choices.

21           So to the extent they want to continue to push this  
22 process forward now and continue to deny and degrade  
23 information, no, we will not be pushed into that kind of end.

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1 Thank you.

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

3 Are we ready to move on to 152? Mr. Harrington.

4 LDC [MR. HARRINGTON]: Thank you, Judge.

5 MJ [Col COHEN]: You're welcome, sir.

6 LDC [MR. HARRINGTON]: Judge, this issue is one that  
7 everybody in this courtroom wishes didn't exist; the person  
8 who wishes that the most is my client. And you are relatively  
9 new to this, so you'll -- although you've heard me make a few  
10 comments at previous hearings and at this hearing. But this  
11 is a long, longstanding problem, and it ties back to some of  
12 the things that Mr. Connell said this morning.

13 When I came to this case in January of 2012, it  
14 existed then. It had existed for the six years before that,  
15 from 2006 to 2012, when my client was at Guantanamo before I  
16 came to represent him. And its origin went back to before  
17 that when he was held in the black sites, and he was the  
18 subject of deliberate torture and deliberate use of various  
19 techniques that, for him, continue to this day. He was part  
20 of psychiatric experiments, and the use of noises, the use of  
21 vibrations, and the use of disorienting conduct was an  
22 essential part of that.

23 When he came to Camp VII, he experienced some of the

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1 same things, perhaps not, on occasion, to the same degree, but  
2 some of the same things that he experienced in the four years  
3 that he had been captive before that. And initially when we  
4 were litigating this issue, it centered around use of noises  
5 and use of vibrations and temperature extremes in his cell and  
6 other places where he was. And recently, some of that  
7 continues, but a new issue has come up, and that is he feels  
8 needles and pin-pricking and scratches to the extent that they  
9 actually cause pain for him.

10 Attached to our motion at Attachment B is a diagram  
11 which we asked him to pinpoint on a body figure where he feels  
12 these needles and pricks.

13 MJ [Col COHEN]: I saw that, sir, and I reviewed that. I  
14 think it was in two different colors with a legend.

15 LDC [MR. HARRINGTON]: Right. And you can see by that,  
16 Judge, that he describes many, many parts of his body and that  
17 it's not just like an isolated or simple part of -- one part  
18 of the body.

19 But there's a cycle that goes on for him. And  
20 initially, he feels -- before it was noises and vibrations and  
21 now it's those other pains. And then he can't sleep, and he  
22 complains about what's being done to him; and he asks for  
23 relief, does not get relief. He gets more frustrated. He's

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1 sleep deprived. He says that he is ignored or they --  
2 everybody denies that anybody's doing anything to him, and  
3 they dismiss his complaints.

4 And then he protests even more, and he ends up in  
5 disciplinary proceedings -- or disciplinary status, [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 And we have brought this to the court's attention on  
11 a number of occasions, and I suspect that you're not  
12 completely familiar with the record on this, this particular  
13 series, but it even got to the point at -- once that he came  
14 into the court and testified before Judge Pohl.

15 And Judge Pohl entered an order, which was AE 152HH,  
16 back in November of 2015, and it directed the people at the  
17 camp not to harass him and not to use noises and vibrations  
18 which, at that point in time, were the main complaint that he  
19 had. And we have represented to the court, represented to the  
20 camp, represented to the officials that run the facility that  
21 there have been multiple violations of Judge Pohl's order.

22 Mr. Binalshibh reports to us repeatedly that watch  
23 commanders and others not only ignore the order but also make

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1 comments to him about the fact that they operate on SOPs, not  
2 orders. They have denied that they said that.

3           And he has been resistant to psychiatric help for  
4 this problem, and there are reasons why he has been resistant  
5 to it. His first exposure to psychiatrist or psychiatrists  
6 were James Mitchell and Bruce Jessen; that was his baptism  
7 into the world of Western psychiatry. And all of us know what  
8 that was. It was referred to this morning as an \$81 million  
9 program that resulted in all of the things that you hear over  
10 and over from us that resulted in the Senate Select Committee  
11 Report. But that was his initiation with American  
12 psychological treatment.

13           And when he first came to Guantanamo in 2006, there  
14 was a psychiatrist here, and he had a horrible experience with  
15 that psychiatrist. And you're going to hear more about that  
16 during the litigation of the statement that he gave to the FBI  
17 and the large amounts of psychotropic medication that were  
18 given to him.

19           And he believes that someone in Camp VII or multiple  
20 people -- not just necessarily the guards, but other entities  
21 that may have an interest in that -- are continuing this  
22 conduct toward him, and seeking help from the psychiatrist  
23 that's there does not seem like an option to him.

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1           Now, he has taken certain medications. He took them  
2 not because he believes that there's something psychiatrically  
3 wrong with him, but he took them to see if he could get any  
4 kind of relief from them, and they have prescribed medications  
5 for him which have not worked. They made his -- they made his  
6 condition worse.

7           They were medications that were not prescribed based  
8 upon a complete psychiatric diagnosis, but based upon the  
9 psychiatrists saying, well, you've got these symptoms, let's  
10 try this medication, let's try this medication. Not that it  
11 was one that was prescribed for some diagnosed condition that  
12 he had.

13           Now, when you made a comment to me the other day when  
14 I brought this up to you, you used a question about 706.

15           MJ [Col COHEN]: Yes, sir.

16           LDC [MR. HARRINGTON]: And that's the logical question  
17 that a judge or anybody else who doesn't know anything about  
18 this would ask. I have been involved in many, many, many,  
19 many cases, not in military courts but ----

20           MJ [Col COHEN]: Right.

21           LDC [MR. HARRINGTON]: ---- in state and ----

22           MJ [Col COHEN]: No, obviously that would be ----

23           LDC [MR. HARRINGTON]: ---- federal courts, it's the same

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1 thing.

2 MJ [Col COHEN]: Right. Obviously, that would be any  
3 judge's concern, is ----

4 LDC [MR. HARRINGTON]: You heard a statement from my  
5 client. You say, well, this doesn't sound right, and then you  
6 say to me, "Is this a 706 situation?"

7 And I said, you know, it's not. In my opinion -- and  
8 we've been through this before. In my opinion, Mr. Binalshibh  
9 is one of the clients that I've had over many, many years who  
10 understands the proceedings, understands the role of the  
11 lawyers and court, understands the charges against him, and is  
12 able, when it is that he can fully participate with us, to  
13 assist us and to assist himself in his defense.

14 MJ [Col COHEN]: Okay.

15 LDC [MR. HARRINGTON]: It's not like I come to argue to  
16 you that 706 is any kind of an appropriate remedy. But what  
17 he's hoping for is that he can get some relief from anyplace,  
18 the court or anyplace.

19 Now, earlier in this case, Judge, we had -- in  
20 addition to Mr. Binalshibh testifying, we had Camp VII  
21 commanders testify about the facility, about their responses  
22 to his complaint and that.

23 And on one occasion, Mr. Trivett asked the Camp VII

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1 commander to go and inspect the place himself. And he  
2 testified, and he had no engineering background or electronic  
3 background, anything like that, but he came in and told us  
4 everything he did. He climbed up on the roof. He did all  
5 sorts of things to try and find out -- try and find out  
6 something. But we had testimony, Judge, that he said that  
7 there was no capability within the camp to do anything like  
8 Mr. Binalshibh was complaining about.

9           And you've heard me make reference earlier in the  
10 week to Mr. Trivett and I trying to work out a stipulation for  
11 a declaration that a different witness would give to the court  
12 which contradicts that, which is important for the court to  
13 consider. You can't now because you don't have it, but in  
14 terms of some of the relief that we ask for -- but to impress  
15 upon the court that this is not just something that we are  
16 making up out of whole cloth.

17       MJ [Col COHEN]: So where are we at on that? Do you all  
18 think -- I mean, obviously, is that something that I will  
19 eventually be able to get, some kind of -- is that  
20 declaration, whether it's classified or not, or ----

21       LDC [MR. HARRINGTON]: Mr. Trivett and I are trying to  
22 work on having a stipulation to you, Judge. It will not be a  
23 long stipulation, but it has certain classification

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1 ramifications that ----

2 MJ [Col COHEN]: I understand.

3 LDC [MR. HARRINGTON]: ---- he has to go through. And  
4 before we submit it for that, he and I have to agree on  
5 exactly what the language of it will be.

6 MJ [Col COHEN]: Makes sense. Thank you, sir.

7 LDC [MR. HARRINGTON]: But we have been trying to work  
8 that through.

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

10 LDC [MR. HARRINGTON]: So, Judge, I referred a few minutes  
11 ago to a 706, and you say to yourself, well, here's a lawyer  
12 standing in front of me saying that somebody's doing something  
13 to his client which doesn't sound like something that's  
14 rational or normal. I understand that. Mr. Binalshibh knows  
15 that, that my coming to you and saying these things is hard  
16 for you to accept and hard for you to believe.

17 That's in part why we attached to our papers a recent  
18 information and a link to a recent *60 Minutes* program.

19 MJ [Col COHEN]: I read that as well, sir.

20 LDC [MR. HARRINGTON]: And it shows that there were people  
21 who were rational, intelligent, hardworking people, either  
22 government officials or business people, who were subjected to  
23 outside -- something that they can't identify, but that had

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1 horrible, horrible ramifications for them, including permanent  
2 disability for some people.

3           And we had an instance here in Havana, at the embassy  
4 here in Havana ----

5           MJ [Col COHEN]: I'm familiar with that.

6           LDC [MR. HARRINGTON]: ---- where the same kind of  
7 allegations was. And the Department of State for the United  
8 States has investigated this and found validity, at least to  
9 one of them.

10           So while it seems like it's farfetched or something  
11 like that, what was science fiction when I was a young boy is  
12 now not science fiction in terms of the capabilities of people  
13 to do things to each other. And we know it from stories about  
14 even individual people with the uses of computers, and we know  
15 that there are many stories about the research that's been  
16 done in the Army and other places for all sorts of  
17 nonlethal-type -- type things.

18           So that what I'm saying to the court is I don't come  
19 here as somebody who's just cutting this out of whole cloth or  
20 somebody who is delusional myself, although there are many of  
21 my friends who probably do think I am.

22           MJ [Col COHEN]: Definitely don't take it that way, sir.

23           LDC [MR. HARRINGTON]: Some on this side of the ----

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1           But, Judge, so I'm not here asking you for relief  
2 under 706. I don't think something -- and I know that 706 can  
3 come from me, it can come from the prosecution, it can come  
4 from -- and it can come from you sua sponte. I don't think  
5 that we're here, and I don't think that.

6           I also, though, Judge, don't want to be in a position  
7 where we get to a 706 ----

8           MJ [Col COHEN]: I understand.

9           LDC [MR. HARRINGTON]: ---- because this goes on so long  
10 that my client becomes totally disabled in that way. I'm  
11 trying to prevent that. And he suffers from this daily.

12           Now, you say to yourself -- I know you're saying to  
13 yourself, well, what can I do about this, right? Which is  
14 obviously ----

15           MJ [Col COHEN]: That's -- that is definitely a question  
16 that I would ask, is what relief could I grant if the facts  
17 warranted it?

18           LDC [MR. HARRINGTON]: Right. And you have limited powers  
19 here, and Judge Pohl recognized that you have limited powers,  
20 and he always discussed with us, and I'm sure you're the same  
21 way, that: "I don't control the camp. I don't want to run  
22 the camp, and I don't want to run a detention facility.  
23 That's not my job. I run the courtroom."

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1           But you do have authority when something outside of  
2 the courtroom affects what's inside the courtroom.

3           MJ [Col COHEN]: I agree.

4           LDC [MR. HARRINGTON]: And in this situation, we have gone  
5 on with this for years and years. I cannot tell you, Judge,  
6 the amount of time that I and members of my team have spent  
7 dealing with this particular issue, in all different ways, in  
8 researching and doing other things, but also in terms of our  
9 trying to assist our client to get through this.

10           Now, I don't mean to imply to you in any way that he  
11 comes whining and complaining all the time. He tries to  
12 suppress this. We meet with him. We ask him how it's going.  
13 He says I've got it now, but -- I don't care. He really does  
14 his best to work through this.

15           But we see the effects on him, and it affects us in  
16 terms, not only of the time that's involved for us, but also  
17 in terms of the emotional toil that it takes on the people on  
18 my team who say we can't help this man. We can't help this  
19 man. How do we keep doing our jobs and working on it when we  
20 spend all of this time trying to help this man and we're  
21 unable to do it?

22           But getting back, Judge, to what it is that you could  
23 do, I think the first thing is that -- and I think my client

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1 needs to hear this, that -- that you acknowledge Judge Pohl's  
2 order, and it's a court order and it's still in effect, and  
3 that you will take -- you will take it seriously. Now you  
4 have limited ----

5 MJ [Col COHEN]: I can assure you of that now. I have  
6 actually read the order in anticipation of the argument. It  
7 is a valid order. It has the same force and effect that it  
8 did at the time it was issued, and any violations of that  
9 order will not be tolerated by me either.

10 LDC [MR. HARRINGTON]: And we understand that you have  
11 limited contempt proceedings. And the Nashiri case that went  
12 through dealt with all sorts of issues about contempt, and the  
13 circuit court made it clear the limited powers that the  
14 commission has with respect to contempt.

15 But one thing that you do have is the authority to  
16 stop these proceedings, at least for Mr. Binalshibh, until  
17 some -- something happens to make it so that he can get  
18 effective assistance of counsel and so that his right to  
19 counsel is not interfered with.

20 And, Judge, because of what I said about the changing  
21 in the circumstances here, we're asking you to expand  
22 Judge Pohl's order to include any form of harassment, such as  
23 anything that affects his body, whether it's noises,

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1 vibrations, itches, pins and needles, whatever it is, to make  
2 sure that everybody knows what that is.

3           And, Judge, we've asked you for some other relief  
4 here in terms of experts being able to examine the camp and to  
5 test and to examine my client to test him for certain things.  
6 We did not put any specific persons in there with respect to  
7 the order. If the court is inclined to grant us any kind of  
8 relief like that, we will present credentialed people that can  
9 do that. We understand there are enormous problems here if  
10 you decide to do that with respect to security and the camps  
11 and all of the rest of that, and we're willing to work with  
12 whatever kind of orders that the court -- that the court may  
13 need for that.

14           Judge, and with respect to the last points, I would  
15 say that you have to wait until you get this other declaration  
16 that we give because at least that opens the door for you to  
17 say there is something different there than what was  
18 represented to Judge Pohl before, and that is a change of  
19 circumstances.

20           And, Judge, another thing with respect to today:  
21 We're going to be back here in four weeks anyway, and so you  
22 will -- this issue will not be completely resolved within the  
23 four weeks. Whether you do anything or not, it will continue,

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1 and maybe it will go away. That would be the best thing in  
2 the world.

3 But -- but assuming that it continues, you are going  
4 to need a status update. You're going to have to address this  
5 new declaration and that, so that that helps my client to some  
6 extent to know that this issue is coming back to you and that  
7 you are watching it and that you've acknowledged that you  
8 believe that Judge Pohl's order is valid and in effect, and  
9 that -- therefore, at that point in time, we hopefully will be  
10 in a better position to articulate this and move forward on  
11 the other -- the other requests that we have.

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

13 Does the government wish to be heard?

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

15 MJ [Col COHEN]: Good afternoon, Mr. Trivett.

16 MTC [MR. TRIVETT]: So just briefly, I'm asking the  
17 commission to please review all of the testimony and all of  
18 the filings on this issue. We had the camp commander testify  
19 in 2016. Mr. Binalshibh testified in 2016. We have other  
20 various declarations on the issue.

21 It can't be that we stop the commission every time he  
22 makes this complaint at this point. We've litigated it  
23 extensively. The judge found in 152 that there was no

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1 evidence of anyone in the U.S. Government intentionally  
2 harassing Mr. Binalshibh in any way. That ruling should stay  
3 in place. It should not be reconsidered. There is nothing  
4 new. It can't be the new fact that he's feeling something  
5 different on his body that causes us to have to spend our  
6 precious time and resources litigating this issue.

7           Mr. Harrington indicated that he fully believed this  
8 was not a 706 issue; that, in his opinion, Mr. Binalshibh  
9 understands the nature of the proceedings against him and the  
10 charges against him. The government agrees 100 percent with  
11 that, unequivocally.

12           A large part of the cross-examination -- and which is  
13 why I'm trying to call the commission's attention to it -- we  
14 asked some of the questions that would have been asked by a  
15 706 board had Mr. Binalshibh ever cooperated with one. There  
16 was one ordered in 2008; he did not cooperate with it because  
17 he could not cooperate. And because of a previous diagnosis  
18 that he had in his medical record, the 706 board was  
19 inconclusive because they didn't have the opportunity to speak  
20 to him. It underscores the importance of having someone  
21 actually speak to someone before making diagnoses of any  
22 mental disorders.

23           We also asked for one sua sponte on this issue

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1 earlier in the proceedings, to which he again refused to  
2 cooperate.

3           There's no reason to believe if another 706 board was  
4 ordered by Your Honor that he would cooperate or that the  
5 results would be any different because of the nature of the  
6 diagnosis. He had been previously diagnosed with delusional  
7 disorder persecutory type earlier in his records. By all  
8 indications, these things are consistent with that diagnosis.  
9 That doesn't make him incompetent to stand trial if, in fact,  
10 that is the correct diagnosis.

11           We have met extensively, both myself and  
12 Mr. Harrington, with both the SMO and the psych, and there's a  
13 couple of issues I wanted to bring to your attention.

14           While it is true that he was given and did agree to  
15 take certain psychotropic medications to see if this would  
16 help, according to the psych, they had never got up to the  
17 dosage that would be necessary before he started having side  
18 effects, and so they've thus discontinued it.

19           It would not be accurate -- and I'm just proffering  
20 this at this point, but if the psych were to be called to  
21 testify, he would not say that he was completely unresponsive  
22 to the medication, simply that it didn't get up to the level  
23 that it needed to before he suffered side effects, so they

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1 took him off of it.

2 He would also say that there's another drug within  
3 the same family of drugs that he would like the opportunity to  
4 try if Mr. Binalshibh wanted to do that, and my understanding  
5 is Mr. Binalshibh is now refusing to do that.

6 He has also not sat down with the psych for a full,  
7 comprehensive interview like the psych would want to do. So  
8 the psych is not at this point in time diagnosing him with  
9 delusional disorder persecutory type. Right now, his medical  
10 records do not indicate that he has that diagnosis, but his  
11 previous records did. And so there's always notations of  
12 history of diagnosis of delusional disorder. The main reason  
13 the psych cannot do that is because Mr. Binalshibh will not  
14 sit down with him for a full conversation. So that's where  
15 we're at from the medical standpoint.

16 The government continues, and we certainly raise it  
17 every time with someone within the command, that there is no  
18 one in the U.S. government who is intentionally harassing  
19 Mr. Binalshibh with noises or vibrations or pin pricks or  
20 anything that he may be complaining of. That's been our  
21 position all along, although some of the symptoms that he's  
22 alleging may have changed.

23 It would be one of the widest conspiracies in the

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1 U.S. Government if somehow, through the cycle of every six  
2 months for the last 13 years that they've been here, they were  
3 able to convince a certain cadre of guards to keep this secret  
4 and to target only Mr. Binalshibh.

5           And I know that Mr. Binalshibh's filing indicated the  
6 sonic attacks in Havana. We argued that -- that is not a new  
7 fact. We argued that last time I was up here before one of  
8 the other judges. And we keep pointing out the fact that in  
9 those reports various different people were complaining of  
10 this issue. Here, as far as we know, it's only  
11 Mr. Binalshibh. So only in his mind is he being intentionally  
12 targeted for this continual harassment for the last 13 years.

13           So that's the government's position. It hasn't  
14 changed. You could call all the witnesses in the world,  
15 that's not going to change. We don't think that this  
16 declaration that's coming -- and we're happy to enter into it  
17 factually to get evidence before the commission, but we think  
18 it's consistent with previous discovery we've provided and  
19 that it's not a new fact, certainly to the government, and  
20 shouldn't be a new fact to the defense.

21           So to address specifically the relief they're  
22 requesting, they seem to be requesting expert assistance. And  
23 we haven't had to deal too much in the interaction with the

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1 commission at this point for 703 experts, but we took a very  
2 generous view of what notice was required from the defense to  
3 us before they went to the convening authority.

4           And so almost every expert in this case through the  
5 defense has gone through an ex parte process to the convening  
6 authority with just de minimis notice to the prosecution. And  
7 we took that position, and we stand by that position. But  
8 with that said, we're often not involved in this process.

9           So in the typical court-martial process where the  
10 convening authority is asking us for whether or not these  
11 experts are necessary or not, that doesn't happen  
12 traditionally. But what I will tell you is I'd be surprised  
13 if he doesn't have a mental health expert on his team. We  
14 certainly wouldn't oppose that. But again, I don't know what  
15 it is that they have. So we don't oppose that piece of it to  
16 the extent our input is even necessary for that issue.

17           That said, we do oppose this idea that we're going to  
18 send experts -- and this is not a new requested relief, but  
19 their own defense requested experts to investigate Camp VII.  
20 So, you know, the very location of Camp VII is classified.  
21 It's not appropriate to be sending nongovernment experts there  
22 to investigate a fact that we believe we have already proven  
23 in the negative and which the judge has found no evidence of

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1 us, meaning the United States, intentionally harassing  
2 Mr. Binalshibh in any way.

3 So in regard to expanding the order, to the extent  
4 the order survives, which it does under 152, this is the  
5 conundrum, and I think Mr. Harrington rightly addressed this  
6 with you when he said, "What is it that you can do, Judge?"  
7 In my humble opinion at this point, the answer to that  
8 question is, "Only make it worse."

9 And so expanding the order to the extent it survives  
10 to now include the specific things that he's saying only gives  
11 some type of merit to the actual request in Mr. Binalshibh's  
12 mind. It becomes a point of contention for him all the time  
13 with the guards.

14 And the SOPs are adjusted as necessary to incorporate  
15 any judicial orders. It wouldn't be inaccurate for a guard to  
16 say I follow the SOPs, but the SOPs are the lawful SOPs.  
17 They're never in contradiction to any court order that may  
18 have happened. I do remember at some point the order was  
19 supposed to be hanging outside of his cell, and it got taken  
20 down at some point. And as soon as we heard that, we agreed  
21 it should be put back up.

22 So to the extent the commission feels like it needs  
23 to do anything and expand the language of that order to

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1 appease Mr. Binalshibh, we're not doing it anyway, so it's not  
2 going to harm the government, but it may exasperate the  
3 problem.

4           And I think I described this to one of the other  
5 military judges. We've argued this so often, Judge, that I  
6 honestly do not recall whether it was Judge Parrella or  
7 Judge Pohl because it went before multiple arguments in front  
8 of, I think, both of them.

9           But in many ways, we looked at this as the "don't  
10 beat your wife" kind of order. It implies that we're doing  
11 it, when we're ordered to stop doing it. And when I say "we,"  
12 I mean, big USG, and so that's a concern. But to the extent  
13 that there is still one now in place and that the judge didn't  
14 disturb that, we wouldn't oppose the expansion of it, although  
15 I don't think it's going to help; and quite frankly, I think  
16 it's going to hurt. But I just want to show the good faith of  
17 the government on this issue, that we're not doing it, and it  
18 doesn't matter how wide you make it, because we're not doing  
19 it anyway.

20           So with that, if you have any other questions.

21           MJ [Col COHEN]: No, sir. I understand. Thank you.

22           MTC [MR. TRIVETT]: Thank you.

23           MJ [Col COHEN]: How long -- just -- I apologize. I do

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1 have one question.

2           It was more of the classification review. How long  
3 do you think ----

4           MTC [MR. TRIVETT]: So there's some facts in there we have  
5 to verify, so there's a verification aspect to this as well.

6           MJ [Col COHEN]: Okay.

7           MTC [MR. TRIVETT]: And then it's going to be whether or  
8 not it's in -- whether or not it comes from a former training  
9 camp commander or we just -- there's ways to get the facts  
10 that ----

11          MJ [Col COHEN]: Correct.

12          MTC [MR. TRIVETT]: ---- the defense counsel want in front  
13 of you, and we don't oppose getting those facts in front of  
14 you. We've just got to make sure that they are the facts and  
15 what the classification is.

16          MJ [Col COHEN]: Okay.

17          MTC [MR. TRIVETT]: So we sent at least the proposed  
18 declaration back through the camp this morning. They were  
19 going to try to verify some of the facts, and we'll take it  
20 from there.

21           I don't anticipate it. I don't know that we'll file  
22 it before we adjourn tomorrow, but ----

23          MJ [Col COHEN]: That's fine.

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1 MTC [MR. TRIVETT]: ---- I think by next week, we can  
2 definitely have something for you.

3 MJ [Col COHEN]: Sure. Thank you very much.

4 MTC [MR. TRIVETT]: Thank you.

5 MJ [Col COHEN]: Mr. Harrington, final thoughts?

6 LDC [MR. HARRINGTON]: Judge, I agree with Mr. Trivett  
7 that this is an -- and I said that in all of the remarks that  
8 I made, that this is a continuing problem. The newness here  
9 is the information that we are submitting in this -- in this  
10 declaration.

11 MJ [Col COHEN]: Okay.

12 LDC [MR. HARRINGTON]: But just a couple comments just  
13 because Mr. Trivett and I have some differences with respect  
14 to the facts.

15 He and I both met with the SMO and the psych on  
16 several occasions, and with respect to the medication that he  
17 took, Mr. -- they reported that Mr. Binalshibh said he -- I  
18 agree, he never got to the full dosage, but that he was  
19 feeling worse from taking it, and so their recommend -- their  
20 decision was that they would stop giving it to him because not  
21 only was it not helping, but it was making things worse.

22 So Mr. Trivett is right that we've never gotten to  
23 see whether that medication would work, but you're not going

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1 to go that way if you're having a negative problem with it.

2 MJ [Col COHEN]: Understand, sir.

3 LDC [MR. HARRINGTON]: And, Judge, this alleged diagnosis  
4 that Mr. Binalshibh had with the delusional disorder, that was  
5 never a proper diagnosis, and the psych here acknowledges that  
6 now.

7 He has never been given a full psychiatric  
8 examination. He came from the black sites and no one -- no  
9 one, no psychiatrist since 2006 has asked him one question  
10 about what happened to him in the four years before he came  
11 here. They don't -- they've been ordered. They don't want to  
12 go there.

13 You can't do a psychiatric diagnosis without knowing  
14 the history of a person, especially the four years you came,  
15 and what happened to him in those four years, which could  
16 explain a lot of and influence it. So there's -- there's a  
17 report from an early psychiatrist saying a possible delusional  
18 disorder, and now it says in every other report, history of  
19 this. There's no history of it because it was never -- it was  
20 never properly done.

21 Judge, with respect to the largest conspiracy,  
22 Mr. Binalshibh complains to the guards, complains to the watch  
23 commander, complains to the camp commander. We're not

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1 limiting this to them. That's who he speaks to because that's  
2 who's there. And we're representing to the court that there  
3 may be other equities that could be involved in this.

4 Judge, the -- Mr. Trivett said that this may cause --  
5 if you modify this order or expand this order, it may cause  
6 further problems. That's not the remedy for this. If he's  
7 saying to you that it's a risk to you that it may cause more,  
8 he's basically acknowledging. They say that nothing is  
9 happening, they're not doing anything, so they really don't  
10 have any stake here in terms of modifying this order.

11 It's addressing the particular problem that is in  
12 front of you right now, and if you have any ability to modify  
13 that or to alleviate that, then you should take advantage of  
14 it, where they're not opposing it because they say that  
15 nothing is happening.

16 And I'm not saying that Mr. Trivett is necessarily  
17 not telling you what he fully believes to be the truth. What  
18 I'm saying to you is we don't know. We don't know who it is  
19 that could be doing this to Mr. Binalshibh. And again, I  
20 sound like a conspiracy theorist myself when I say that, but  
21 this stuff is real, Judge.

22 We've been through this with what -- with all that  
23 you have heard now, in the short time that you've been there,

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1 about what was said to us about the FBI involvement with the  
2 CIA, with all sorts of other things that have happened in this  
3 case, and the government has been in here time after time  
4 making representations to the court. They're not making  
5 representations because they're coming in here to mislead the  
6 court. They're making representations based upon what they  
7 have been told. And this is another one of those situations.

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

9 Mr. Sowards or Ms. Radostitz, either one, with  
10 respect to 639U, if I was to grant the request for the  
11 ex parte presentation or hearing in lieu of ex parte filings,  
12 would -- how long were you anticipating that would last?

13 ADC [MS. RADOSTITZ]: I would say probably 30 minutes to a  
14 half hour -- or 30 to 45 minutes, depending on how many  
15 questions you might have, and that would encompass all of the  
16 teams. Most of our things are pretty short, which is why we  
17 thought it would be more efficient to do it in -- orally.

18 MJ [Col COHEN]: Okay. And I understand why you would  
19 want to do the presentation of this privileged information  
20 ex parte. I think that's why it's been allowed in the past.

21 What has been the experience -- this is just me  
22 asking conceptually. When you all make ex parte filings or  
23 have made them in the past, what is the understanding with

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1 respect to -- if I issue a ruling, then, that relies on those  
2 facts, how has that been handled by other judges?

3 ADC [MS. RADOSTITZ]: It's also filed ex parte, Your  
4 Honor, and then it is served just on the parties that were  
5 participating in it. So when -- the more common thing would  
6 be a motion to compel an expert appointment by Mr. Mohammad's  
7 team. So then everyone would get notice that you issued an  
8 ex parte order; we would actually get the order.

9 MJ [Col COHEN]: What about when it affects the equities  
10 of the prosecution or other teams?

11 ADC [MS. RADOSTITZ]: Ms. Bormann apparently has more  
12 experience on that one.

13 MJ [Col COHEN]: That will be fine. Yeah, I'm just trying  
14 to figure out how this works because this particular issue --  
15 because it's in the 639 series, so that's why I just want to  
16 make sure I understand how this would conceptually work.

17 LDC [MS. BORMANN]: In 2015, we had this exact situation  
18 arise, in fact, in -- when Mr. Bin'Attash requested what his  
19 pro se rights were, and so Judge Pohl held a couple of  
20 ex parte presentations with defense because the matter  
21 involved attorney-client privileged material, and then he  
22 issued orders based upon findings that he made ex parte.

23 So, you know, he listened to the evidence and made

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1 particular findings. We received those findings, and then he  
2 issued an order to all of the parties based upon those  
3 findings combined with, you know, the findings that were made  
4 otherwise.

5 Does that make sense?

6 MJ [Col COHEN]: It does, conceptually.

7 LDC [MS. BORMANN]: Protecting the material involved, but  
8 realizing that it had to be taken into consideration, because  
9 the court in making those determinations needed that  
10 information presented.

11 MJ [Col COHEN]: I understand. Thank you.

12 Would this be just with counsel?

13 ADC [MS. RADOSTITZ]: Yes, Your Honor. Although, we  
14 would, of course, want it to be recorded.

15 MJ [Col COHEN]: Absolutely. No, yeah, that would always  
16 be the case.

17 ADC [MS. RADOSTITZ]: Sure.

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

19 LDC [MR. CONNELL]: Sir?

20 MJ [Col COHEN]: Mr. Connell.

21 LDC [MR. CONNELL]: This may be completely clear, but I  
22 just want the record to reflect that Mr. al Baluchi's team  
23 will not be participating.

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1 MJ [Col COHEN]: Yes. Yes. I understand. You're  
2 definitely not on this particular filing.

3 LDC [MS. BORMANN]: Judge, if I may?

4 MJ [Col COHEN]: You may.

5 LDC [MS. BORMANN]: Before -- while you're considering the  
6 issue, I had a meeting with Mr. Swann right before the break  
7 regarding alternatives to client meeting spaces. If I can  
8 have a moment to confer with Mr. Swann, maybe we can resolve  
9 that issue.

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

11 [Counsel conferred.]

12 MJ [Col COHEN]: Ms. Bormann?

13 LDC [MS. BORMANN]: Yes.

14 MJ [Col COHEN]: If you could just close the loop for me  
15 on that. Thank you.

16 LDC [MS. BORMANN]: Mr. Swann has indicated that he  
17 doesn't know yet where we would meet on the dates we need to  
18 meet, which would be at this point Saturday and Monday, but  
19 he's working it. And he promises that it will be a suitable  
20 place, whatever that means.

21 I would ask that it be a place where we can meet  
22 without being overheard, and where we have a place where we  
23 can spread our papers and do work together, and where we can

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1 communicate freely. That cannot happen in the back pod  
2 situation.

3 So short of that, we had no answers.

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

5 LDC [MS. BORMANN]: Which -- and I expressed to Mr. Swann  
6 the following: That I'd like to know before court ends today  
7 because if we need commission intervention, I'd like to be  
8 able to ask you to intervene because this is something that is  
9 necessary and that we've set aside time for.

10 So I think -- I'm hoping to take Mr. Swann at his  
11 word, and I've not been told the place yet.

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

13 Mr. Swann.

14 TC [MR. SWANN]: Your Honor, it will be suitable, it will  
15 accommodate her needs, and she can take me at my word.

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

17 Mr. Connell.

18 LDC [MR. CONNELL]: Somewhat related to that issue, one of  
19 the proposed solutions for tomorrow's visitation is if --  
20 assuming that the military commission is not in session and  
21 that all other parties agree, whether the military commission  
22 would consent to the use of the courtroom. I'm not asking you  
23 to order it or anything like that, I'm just checking one box

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1 of the numerous people who would have to agree to that  
2 proposal.

3           Would that be amenable to the military commission?

4           MJ [Col COHEN]: I do not plan to be here tomorrow in the  
5 courtroom, so I'll say that. So if -- but, like I said, I'll  
6 let you work the rest of that with the government. If you  
7 just needed me to say that I won't be here in the room, I will  
8 make sure that I clear out my stuff and that I will not be  
9 here. But whether or not you can use it, I'll let the  
10 government make that decision.

11          LDC [MR. CONNELL]: Right. But you have no objection,  
12 sir?

13          MJ [Col COHEN]: I have no personal objection. But as you  
14 indicated, that's not an order. I'm just saying that I have  
15 no personal objection, if that's what you do.

16           Mr. Swann.

17          TC [MR. SWANN]: I'll accommodate what needs to be done.

18          MJ [Col COHEN]: Thank you, sir. I appreciate it. I'll  
19 take you at your word. All right.

20           All right. There is precedent for the request, AE  
21 380, 3-8-0, BB is an example of where this request has been  
22 done in the past. I will grant 639U. If the parties -- can  
23 you meet back with me here around 1700 this evening?

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1           That's affirmative response. Okay. I'll be here  
2 with the court reporters at 1700 for an ex parte hearing to  
3 discuss privileged information.

4           All right. We're in recess.

5 [The R.M.C. 803 session recessed at 1514, 26 September 2019.]

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