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1 [The R.M.C. 803 session was called to order at 0901,  
2 2 May 2019.]

3 MJ [Col PARRELLA]: The commission is called to order.  
4 Trial Counsel, are all of the government counsel who  
5 were present at the last session again present?

6 CP [BG MARTINS]: Good morning, Your Honor. Major Dykstra  
7 is attending to commission business outside the courtroom;  
8 everyone else is present.

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

10 Mr. Nevin?

11 LDC [MR. NEVIN]: The same from our last hearing.

12 MJ [Col PARRELLA]: Ms. Bormann?

13 LDC [MS. BORMANN]: Judge, we're the same from the last  
14 hearing. I would let the court know that at some point this  
15 morning, I'm going to ask that Captain Caine leave to attend  
16 to other matters.

17 MJ [Col PARRELLA]: That's fine. Thank you.

18 Mr. Harrington?

19 LDC [MR. HARRINGTON]: We are the same, Judge.

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

21 Mr. Connell?

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

23 MJ [Col PARRELLA]: Good morning.

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1 LDC [MR. CONNELL]: Everyone who was present is still  
2 present.

3 MJ [Col PARRELLA]: Thank you.  
4 Mr. Ruiz?

5 LDC [MR. RUIZ]: Judge, we have the same team with the  
6 exception of Major Wilkinson, who is engaged in other duties.

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

8 I will note that the following accused are absent:  
9 Mr. Bin'Attash, Mr. Ali, and Mr. Hawsawi.

10 Trial Counsel, do you have a witness to testify as to  
11 the absences I just noticed?

12 TC [MR. SWANN]: We do, Your Honor. I would ask that you  
13 remind him about the oath he took.

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

15 Good morning, Captain. I'll remind you that you're  
16 still under oath. All right. Thank you.

17 CAPTAIN, U.S. NAVY, was called as a witness for the  
18 prosecution, was reminded of his oath, and testified as  
19 follows:

20 DIRECT EXAMINATION

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

22 Q. Captain, did you have the occasion to advise three  
23 accused this morning?

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1 A. I did, sir.

2 Q. Let's take up Walid Bin'Attash first; it's Appellate  
3 Exhibit 626 consisting of three pages. Do you have that  
4 document in front of you?

5 A. 626B, yes, sir.

6 Q. What time did you advise Mr. Bin'Attash of his  
7 rights?

8 A. I began at 0630, 6:30, and ended at 0635.

9 Q. And did you use the form that you have in front of  
10 you?

11 A. I did.

12 Q. Mr. Bin'Attash, did he have an Arabic translation of  
13 the form?

14 A. He had one available to him, yes, sir.

15 Q. All right. Did he execute the form?

16 A. He did, sir.

17 Q. The Arabic or English version?

18 A. The Arabic.

19 Q. Do you believe he understood his right to attend this  
20 morning's proceeding?

21 A. I do believe he did.

22 Q. Next would be 626C, also consisting of three pages.

23 Mr. Ali Abdul Aziz Ali, what time did you advise him?

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1 A. I started at 0635 and ended at 0639.

2 Q. Did you use the English form or the Arabic form?

3 A. I read to -- I read the English form to him, sir.

4 Q. And did he execute the English form indicating his  
5 waiver of attendance?

6 A. He did.

7 Q. And the final detainee, Mustafa Ahmed Adam  
8 al Hawsawi, a three-page document, 626D. Did you advise him  
9 of his right to attend this morning's proceeding?

10 A. I did, sir.

11 Q. Did he -- did you do that in English or in Arabic?

12 A. I read it in English, and he had an Arabic version  
13 that he was reading off of.

14 Q. And did he sign the Arabic version waiving his right  
15 to attend?

16 A. He did, sir.

17 Q. Do you believe each of these individuals voluntarily  
18 waived their right to attend this morning's proceeding?

19 A. I do.

20 TC [MR. SWANN]: No further.

21 MJ [Col PARRELLA]: Thank you, Mr. Swann.

22 Do any of the defense counsel have questions of this  
23 witness? Mr. Connell -- or Ms. Bormann.

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1 LDC [MS. BORMANN]: No, Judge.

2 MJ [Col PARRELLA]: Mr. Connell.

3 LDC [MR. CONNELL]: Sir, you have stated that you have  
4 given us a continuing objection to anonymous testimony. Do I  
5 understand the military commission to mean by that that I do  
6 not need to continue to object each time anonymous testimony  
7 is offered?

8 MJ [Col PARRELLA]: Correct.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [Col PARRELLA]: Thank you.

11 Okay. Captain, you can step down.

12 [The witness was excused and withdrew from the courtroom.]

13 MJ [Col PARRELLA]: The commission finds that  
14 Mr. Bin'Attash, Mr. Ali and Mr. Hawsawi have knowingly and  
15 voluntarily waived their right to be present at today's  
16 session.

17 Before we take up AE 523/330, which I do believe we  
18 can take up collectively, unless any party desires to separate  
19 those, I do want to afford Mr. Nevin, since I indicated I  
20 would, an opportunity to be heard with respect to the prior  
21 AEs that we've already addressed.

22 LDC [MR. NEVIN]: I appreciate the offer, Your Honor, and  
23 in the interim I have not been able to prepare additional

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1 arguments to present, and so I can't accept your offer to make  
2 additional argument at this time.

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

4 So, with that, we will go ahead and take up the  
5 matter of AE 523.

6 LDC [MR. HARRINGTON]: Excuse me, Judge. Could I just  
7 clarify the court on our issue from the other day?

8 MJ [Col PARRELLA]: You certainly can.

9 LDC [MR. HARRINGTON]: Judge, yesterday we had interviews  
10 with the senior medical officer and the psych from the camp.  
11 I want to thank the court for helping us to do that and  
12 Mr. Trivett for arranging it. It was very beneficial to us  
13 in terms of trying to progress with this problem, and  
14 primarily an acknowledgement from both that Mr. Binalshibh's  
15 problems are real, and there's a dispute between the parties  
16 as to the cause of them, which will require more litigation.

17 But having that, and having clarifications on how  
18 their diagnoses or lack of diagnoses were made, was extremely  
19 beneficial and something that we did not have based on the  
20 records that had been provided so far. So it was extremely  
21 helpful to us and helpful to our client in knowing that  
22 there's been that acknowledgement.

23 So we will advise the court further in writing by

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1 motions.

2 MJ [Col PARRELLA]: Okay. Well, thank you,  
3 Mr. Harrington. I'm glad to hear that, and we will take  
4 action when it becomes appropriate.

5 Mr. Connell.

6 Good morning.

7 LDC [MR. CONNELL]: Good morning, Your Honor. We're  
8 before the court on AE 523N, which is a motion to reconsider  
9 the military commission's order in 523J.

10 There are really four issues that are presented here  
11 and they're somewhat discrete from each other. Some of them  
12 are new issues raised by the government's ex parte pleading  
13 practice, and some of them are sort of leftover issues from  
14 the global 523 litigation that was not fully resolved in the  
15 two prior orders of the military commission.

16 With respect to the new issues, this is styled as a  
17 motion to reconsider, but it's really the first time we've had  
18 the opportunity to be heard on it.

19 With respect to the other parts of the issues, the  
20 medical records at issue also in 330 and the few remaining  
21 witnesses, what I think of as the non-UF1/nonmedical  
22 witnesses, that's also not really a motion to reconsider  
23 because it's really just pointing out to the military

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1 commission that there are a few pieces left out of 523 that  
2 have not been ruled on.

3           The first issue is that in AE 523J, the military  
4 commission states that the government represented to it that  
5 medical witnesses -- the names of medical witnesses are  
6 classified when they are combined with the names of the  
7 detainees that they treat. As far as I can tell from all of  
8 the evidence in the record, other than the military  
9 commission's recitation of that representation, that is  
10 untrue.

11           The medical witnesses, including their contact  
12 information are SBU, or sensitive but unclassified. One  
13 might also group that under controlled unclassified  
14 information, which was a reform that the Obama Administration  
15 tried to make; whether it took or not is not clear.

16           But one of the places that we know that, and the  
17 government put this in its unclassified brief, is from AE 014  
18 Attachment B, which is a declaration from General Fraser, at  
19 that time the commander of SOUTHCOM, paragraph 39, which very  
20 clearly distinguishes between information which is classified  
21 and information which is sensitive but unclassified, and very  
22 specifically identifies the medical providers at Guantanamo as  
23 falling into the sensitive but unclassified area.

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1           Now, there are many other ways that we know that is  
2 true, and for -- since 2013, at least, the parties -- both  
3 parties have acted in reliance on the government's pleading in  
4 AE 014 Attachment B where they stated that these medical  
5 witnesses were sensitive but unclassified.

6           And I will give you a number of examples  
7 demonstrating the reliance of both parties on that  
8 representation.

9           First, although that we didn't know this until  
10 recently, on seven occasions in the redacted medical records  
11 that we have, medical providers used their true names. So our  
12 current unclassified medical records, it turns out, contain  
13 seven true names of medical records -- of medical providers,  
14 rather, all provided by the government in unclassified format.

15           In AE 152P, which I'm sure the military commission  
16 has right there on its NIPR computer, the government listed  
17 several medical witnesses specifically associated with Ramzi  
18 Binalshibh, and in an unclassified pleading, which is  
19 certainly still resident on our NIPR level computers -- and  
20 I'm sure, because we haven't been notified of any spill for  
21 the military commission as well -- the -- those were not just  
22 general information about medical witnesses, they were medical  
23 witnesses specifically associated with Mr. Binalshibh because

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1 this was filed in association with the government's motion for  
2 a competency evaluation of Mr. Binalshibh.

3 Now, 152P is unique among pleadings, in my  
4 experience, because not only does it -- is it filed  
5 unclassified, it has the word UNCLASS written on it, which is  
6 very unusual because normally we don't mark things which are  
7 strictly unclassified, but this has fax markings on it.

8 I considered and eliminated dropping a footnote  
9 explaining for the record what a fax machine is, by -- because  
10 by the time this thing is on appeal, I'm not sure that anyone  
11 is going to know what a fax machine is, but the -- there are  
12 unclassified and classified fax machines, and this one  
13 apparently was faxed around by the prosecution on its  
14 unclassified fax machine because it has, very clearly at the  
15 top, fax markings stating that it was UNCLASSIFIED.

16 On 1 April 2014, Mr. Groharing -- in Mr. Groharing's  
17 presence, I interviewed Dr. 1, specifically associated with  
18 Mr. al Baluchi, and although by accident that happened to  
19 happen in a collaterally secure space in my office, there  
20 were -- there was another person present who the government  
21 had no reason to believe had a clearance. There was no  
22 discussion of clearance; there was no discussion of what was  
23 the security level of our space; there was no discussion of

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1 classification whatsoever.

2           And on 7 May 2014, in fact, based on AE 152P, we  
3 interviewed Dr. Homer in a fully unsecure space and there was  
4 never any suggestion that we should do otherwise.

5           On 18 October 2017, the government, in the person of  
6 Mr. Trivett, e-mailed Dr. 21's contact information directly to  
7 me on the NIPR system, fully unclassified. That is found in  
8 the record at AE 524N Attachment C, and Mr. Trivett was  
9 careful to point out, correctly, and in accordance with  
10 Protective Order #2, that that information was sensitive but  
11 unclassified, which is what we relied on because when, on  
12 27 August 2018, we located and interviewed Dr. 21, we did so  
13 in an unclassified, unsecure space.

14           Now, it's not as if this question has not come up  
15 before. In AE 523F, the military commission directed  
16 briefing specifically on the question of what is the  
17 government's authority for using pseudonyms for medical  
18 providers. And in AE 523G, the government briefed its  
19 government information privilege issue with respect to the use  
20 of these pseudonyms and made no claim whatsoever that the  
21 military commission should treat these medical record identity  
22 -- medical witness identities as classified, nor did it rely  
23 on M.C.R.E. 505 or the classified information privilege to

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1 justify its pseudonyms.

2           The most persuasive advocate on this point, however,  
3 may be the government in the person of Mr. Swann, who on  
4 20 March 2017, at page 14616 in the record, argued  
5 specifically, and I quote: Medical records, by their very  
6 nature, are unclassified.

7           Now, Protective Order #5 itself is not a satisfactory  
8 resolution of this issue because Protective Order #5 says in  
9 its text, in the scope of its -- of its application that it  
10 applies only to materials provided in response to AE 523J.  
11 That would mean -- what that does mean -- that the exact same  
12 information provided in response to AE 523J on a three-page --  
13 two-and-a-half-page spreadsheet by the government, is  
14 classified; but the exact same information in 152P, the exact  
15 information -- like the exact same information -- continues to  
16 be unclassified, creating a sort of double-think around this  
17 where, depending on in what format the government provided the  
18 information, whether it provided it in 2019 or whether it  
19 provided it in 2014, the same information is both Secret and  
20 Unclassified, which is a handling nightmare, among other  
21 things.

22           The -- I do want to be clear -- and someone is going  
23 to have to tell me differently if this is not true -- but

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1 despite the terms of AE 523J, or at least its implication, it  
2 is my belief that we can interview these witnesses outside a  
3 secure area. If that is not true, it will make interviewing  
4 these witnesses extremely difficult, if not impossible.

5 That is the first issue, that I don't know what the  
6 military commission relied on for the statement that the  
7 government has represented the medical identities to be  
8 classified when associated with a detainee, but it is  
9 certainly not borne out by the information available to the  
10 defense either in the record or in the consistent practice of  
11 the parties for the last five years.

12 The second issue -- and I recognize that this issue  
13 is somewhat overtaken by events now, because after I filed the  
14 motion to reconsider, the government provided its spreadsheet  
15 in response to 523J.

16 But the military commission cannot accept ex parte  
17 pleadings on issues other than substitutions without an  
18 advance order. The -- and this is, I mean, crystal clear in  
19 the statute.

20 The -- when you look at 949p-4(b), for example,  
21 949p-4(b) and -- which has exact analog in the M.C.R.E.,  
22 allows ex parte presentations by the government on the  
23 question of substitutions. The same thing is true in

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1 949p-6(c), which is entitled Substitutions. It allows an  
2 ex parte presentation on the question of substitutions. But  
3 that's not what we had here. We didn't have substitutions in  
4 this situation.

5 Instead, here the situation fell under 949p-6(d),  
6 which is entitled Alternative Procedure for Disclosure of  
7 Classified Information. And this is the procedure which  
8 applies after an order for the production of information,  
9 which is exactly what happened in the 523 series.

10 The government -- excuse me, the military commission  
11 ordered the production of medical witness identities, stated  
12 that the government could invoke 505 process if it chose, and  
13 the government did not choose to seek substitutions.

14 Instead, the government sought what is found in  
15 949p-6(d)(1)(C), which is any other procedure or redaction  
16 limiting the disclosure of specific classified information.

17 That provision falls under the (d) alternative  
18 procedure, and the (d) alternative procedure does not allow  
19 the military commission to accept an ex parte presentation.  
20 Rather, it requires an in-camera presentation that is the same  
21 sort of argument that we have in 505(h) or in an 806, where  
22 it's not a release to the public, but it is an adversarial  
23 proceeding between the parties.

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1           Now, the government's claim on brief is essentially  
2 that, statute or no statute, it can seek ex parte whatever it  
3 wants whenever it wants.

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

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

6           MJ [Col PARRELLA]: Is there any precedent in this  
7 commission for conducting a hearing pursuant to p-6(d)(1)(C)?

8           LDC [MR. CONNELL]: If by precedent -- I mean, there's  
9 authority; but if you mean has there ever been one held, no.

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

11          LDC [MR. CONNELL]: The -- wait a minute, did you say (c)  
12 or (d)? I may have misunderstood the question.

13          MJ [Col PARRELLA]: (d)(1)(C).

14          LDC [MR. CONNELL]: (d)(1)(C), yes, that's right. There  
15 has never been a proceeding under (d)(1)(C), mostly because it  
16 has been the practice of the military commission to allow the  
17 parties to -- the government to voluntarily produce whatever  
18 it wants to produce and then argue about the motion to compel.

19                 That, for example, is what's happening in 538 and  
20 561. The military commission is waiting for the government  
21 to produce all of the information that it's going to produce.  
22 In that particular situation, in 538, the only remaining piece  
23 is with the military commission for 505 review, and then we

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1 argue about the motion to compel.

2           What happened in 523 is different from what has  
3 happened on the vast majority of occasions, because the  
4 military commission issued an order for production of  
5 information and then the government sought substitutions.

6           The -- but that's the situation. I have been  
7 objecting to this for a long time, but I admit the military  
8 commission has never done it.

9           Now, the fourth -- sorry. The argument -- I wanted  
10 to address the government's argument on brief, which is that  
11 even without statutory authority -- statutory authority it can  
12 seek ex parte consideration of whatever it chooses. That is  
13 true, but only to an extent.

14           It is true that either party may come to the military  
15 commission and with a motion in advance under  
16 Ellsberg v. Mitchell out of the D.C. Circuit, which we now  
17 know is binding, may make a demonstration to the military  
18 commission as to why it needs to proceed ex parte.

19           The defense, for example, did that with respect to  
20 703(d) applications for expert witnesses. The military  
21 commission issued a trial conduct order and said from now on  
22 out, under these particular circumstances, the government -- I  
23 mean, the defense may seek ex parte consideration of its

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1 claim.

2           That has happened in a few other small areas as well  
3 on a sort of case-by-case basis. For example, the theory of  
4 defense that the military commission routinely recites in its  
5 505 findings. The government can also do that, right? The  
6 government can also come to the military commission and ask  
7 permission in advance in an adversarial setting and justify,  
8 to the extent that it's able to do so without revealing the  
9 underlying information, why it needs ex parte consideration.  
10 That is not what happened here.

11           That's what is the 701(1) that I continually brief in  
12 my objections to ex parte applications in the first instance  
13 from the government. That is a procedure which is allowed  
14 under the rules, but the government on this occasion, as in  
15 many others, simply ignored it and violated it. But this one  
16 has an additional layer. Which is this is not a situation  
17 where the rules are silent on the government's ex parte  
18 presentation, this is a place where the statute enacted by  
19 Congress actually occupies the field of what to do in this  
20 situation, which is that 959p-6(d) [sic] tells us what to do  
21 in this situation. So this is not a question of legislative  
22 silence, this is a question of legislative direction that the  
23 government chose to ignore.

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1           Now, moving on to the third sort of discrete issue  
2 which is contained in 523N, and that is these -- what I think  
3 of as the -- so there were three categories of witnesses which  
4 we sought the identities of in the 523 base motion, to try to  
5 prepare for what was then our objection to the government's  
6 introduction of testimony from the January 2007 interrogation.  
7 That was the procedural posture in which it arose. That  
8 information has become much more urgent in light of the  
9 military commission's order in 524LLL saying that nine days  
10 from now we need to file a motion to suppress.

11           The -- and the military commission ruled on the UFI  
12 witnesses contrary -- like, we lost on the UFI witnesses. I  
13 understand. I'm moving on from that.

14           The government [sic] ruled on the medical witnesses  
15 in our favor. The government complied. They're moving on  
16 from that. But there are these little pieces that are left,  
17 and those pieces fall into four categories, some of which I  
18 have to explain in the closed session, but I can at least  
19 mention them here.

20           The first one is Camp VII witnesses with knowledge of  
21 procedures in late 2006 and early 2007; that is the time  
22 between the transfer of Mr. al Baluchi and others to  
23 Guantanamo and the time of the January 2007 interrogations.

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1           The government says on brief, we've produced all of  
2 our standard operating procedures that we have, which I think  
3 is true, to an extent; but as far as I can tell, there are no  
4 SOPs for this period of time.

5           And I suggest that is probably because, as the SSCI  
6 said, that these men were not under the control of the DoD at  
7 the time, that they were under the operational control of the  
8 CIA, who is not known for its commitment to SOPs in the same  
9 way as the DoD is. So that's why it's so important for us to  
10 have a witness or witnesses who are familiar with the practice  
11 at -- between this critical period of time, right?

12           I'm not asking for witnesses -- every witness who has  
13 ever had anything to do with Camp VII. This is the critical  
14 time which the military commission will examine with respect  
15 to the admissibility of the January 2007 interrogations, and  
16 so we need someone because we have to flesh out these words,  
17 "operational control of the SSCI," which is contained in this  
18 one sentence from the SSCI.

19           Now, the second category that has not been ruled on  
20 by the military commission is described in the brief by me  
21 sloppily, I admit, as some MEM witnesses, but it's really  
22 one -- it is really whoever the preparer or preparers of one  
23 specific document. It's one specific MEM document. That MEM

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1 document is found in the record at AE 502Y Attachment E,  
2 MEA-MEM-699 through 707.

3 In the closed session, I'll go into why that document  
4 is so important and why its preparer or preparers is so  
5 important, but we are not seeking just globally everyone who  
6 wrote a memorandum in the U.S. Government. It's this one  
7 critical document that we are seeking the author of.

8 The third category is the XYM witness or witnesses.  
9 I have to discuss that in closed session.

10 And then the fourth category is the Bureau of Prison  
11 witnesses. The SSCI reported, and redacted discovery  
12 supports, that there were one or more witnesses -- one or more  
13 people from the Bureau of Prisons who toured at least one  
14 black site and made extensive comments on their view of  
15 whether it complied with ordinary incarceration procedures or  
16 not.

17 It is my understanding that -- from the discovery  
18 that the -- those witnesses did not separately prepare  
19 reports, probably because they were the guests of the CIA at  
20 that time, but we are seeking their identity so that we can  
21 interview them and produce them as witnesses on the motion to  
22 suppress.

23 So those are the four categories. I would suggest

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1 to the military commission this is not some sort of fishing  
2 expedition. These are highly targeted arguments as to  
3 witnesses that we fully expect to interview and present with  
4 respect to the ordered motion to suppress.

5 Now, with the military commission's permission, I'll  
6 move to the fourth category, which really sounds in AE 330,  
7 although it's mentioned in AE 523.

8 MJ [Col PARRELLA]: Okay.

9 LDC [MR. CONNELL]: And that is the need for original  
10 medical records, and I'm not talking about CIA medical records  
11 here. I'm talking about JTF-GTMO medical records, the -- or  
12 whoever had custody of the men in the early days.

13 The -- but I -- but it is my personal belief that the  
14 medical records were -- at least are maintained by JTF-GTMO,  
15 no matter who had operational control at the time.

16 MJ [Col PARRELLA]: What is the, as you see it, relevant  
17 time frame? What's the relevant time frame of treatment, I  
18 should say?

19 LDC [MR. CONNELL]: Right.

20 So in this situation, unlike the standard operating  
21 practices, this -- for these original medical records, the  
22 relevant time frame is the full amount of their time in GTMO.  
23 And that is because these medical witnesses are, in many

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1 cases, retrospective, right? A person in 2019 comes to be the  
2 senior medical officer, and that senior medical officer is  
3 going to be reflecting on sort of the lifetime experience of  
4 their patient. And the -- so what we have learned from the  
5 half dozen or so -- and I -- this is not me proffering. I  
6 put declarations into the record on this -- on these  
7 questions.

8           What we have learned from the medical witnesses that  
9 we have located either through our own efforts or through 152P  
10 is that, you know, someone who was a SMO or a psychiatrist in  
11 2016 might have opinions about PTSD or traumatic brain injury  
12 that were suffered -- that were originally generated during  
13 the black site interrogation period. The -- in the same way  
14 that when I go to the doctor, you know, the doctor does look  
15 at my snapshot of what my health is today, but also looks at  
16 my -- did I ever smoke, you know, and sort of things that have  
17 happened to me in my life.

18           The -- now, we have already briefed the privacy and  
19 property interests in medical records in AE 330 base motion,  
20 and it has always been our position from the very beginning  
21 that medical records are the property of the person -- of the  
22 patient and that the patient should have those records. Just  
23 like any other place in any of the 50 states of the United

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1 States, the patient should have the -- or any other military  
2 base, for that matter -- the patient owns the medical records  
3 and should make a decision as to whether to disclose them to  
4 the government or not.

5 Now, because of what I understand to be a 2006  
6 memorandum from Mr. England in the Department of Defense, the  
7 government has always had access to these original records,  
8 medical records, and the defense never has, which means that  
9 the government is the gatekeeper for private medical records  
10 and decides what will be revealed to the defense.

11 The -- but in this -- so that is our position. That  
12 position has never been ruled upon.

13 But in this particular situation, there's an even  
14 more detailed reason why we need the medical -- original  
15 medical records, and that is because in the 523 series the  
16 military commission has ordered the production of medical  
17 witnesses' identities. And we have -- that just happened  
18 about two weeks ago, maybe ten days ago, and the -- we have  
19 not yet been able to begin our actual interviewing of those  
20 witnesses, but we have carefully analyzed the data that the  
21 government provided to us.

22 So -- and it is not -- these pseudonyms were used  
23 in -- or were applied in what I have to say is a somewhat

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1 haphazard way. This is not like the UFIs, where the  
2 government very carefully found each name in each document and  
3 replaced it with a Unique Functional Identifier. These  
4 identifiers are neither very unique nor are they very  
5 functional, and let me just give you some examples.

6           So I talked earlier about that there are seven  
7 witnesses who at some times, at least, used their own true  
8 names. But there are seven witnesses -- seven medical  
9 witnesses whose identities the government produced, meaning  
10 that they in good faith believe that they appear in the  
11 medical records, who are listed as having no reason whatsoever  
12 to appear in the medical records, meaning that they say "I was  
13 never at Guantanamo," or "I don't remember," or "I'm not going  
14 to cooperate with you," or something like that. So there are  
15 seven witnesses who it is not possible to tell from the  
16 government's spreadsheet why they would appear in the records  
17 because they have been resistant to that.

18           Now, there are 39 witnesses that the government has  
19 given us information in their spreadsheet, 39, who used more  
20 than one dissimilar pseudonym. There are plenty who used  
21 more than one pseudonym, but -- there are even more who used  
22 more than one pseudonym, but there are 39 who used pseudonyms  
23 that are so dissimilar from each other that it would not be

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1 possible for any analyst to associate them with each other.

2           So there's not the situation where one witness gets  
3 one pseudonym. There, in fact, is one witness who is listed  
4 on the government spreadsheet as having provided, quote,  
5 multiple random pseudonyms, meaning that it is exceptionally  
6 difficult to associate that person with medical records  
7 because we don't even know what those random pseudonyms were.

8           It also -- the nonuniqueness also works the other  
9 way. Not only do one individual on many occasions have  
10 multiple pseudonyms, but it's also true that one pseudonym is  
11 frequently linked to multiple individuals.

12           So, for example, there are ten individuals in the  
13 medical records who used the pseudonym SM0, S-M-0, and there  
14 are four in this -- I found this kind of interesting, I don't  
15 know what it says -- but there are four who used the pseudonym  
16 G, as in gulf.

17           So it is not -- the many to many problem runs in both  
18 directions. Like, we can't identify a -- even with the  
19 spreadsheet that the government has provided, we can't go to  
20 the medical records and say, all right, it says here G. Who  
21 does that mean that this medical witness was? Nor can we say,  
22 all right, we have this medical witness, Dr. Jones. Does --  
23 which -- where does Dr. Jones appear in these medical records?

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1 All of this is especially important when it comes to  
2 interviewing witnesses because we are talking in many cases  
3 for the most important witnesses, you know, people who more  
4 than ten years ago were here and have had probably thousands  
5 of patients during that time. So it's actually quite  
6 important to be able to show them in the medical records,  
7 look, here we go.

8 And there's one example which is a matter of record  
9 by declaration in this military commission, and that we have  
10 talked about before, which is that one of the half dozen or so  
11 medical witnesses that we were able to interview was Dr. 10,  
12 and with respect to Dr. 10, I showed him a place where it says  
13 "Dr. 10" on -- on kind of a critical fact in the  
14 medical records, because Dr. 10 was here at the time of the  
15 January 2007 interrogations, and said, you know, "Did you  
16 write this?" And it was typed out.

17 He said, "No, I didn't write it. "

18 And so we consulted with the government about this,  
19 and the government says, well, he used a stamp underneath it.  
20 It wasn't actually a signature, it was his stamp. And so --  
21 but we don't even have the stamp, like what his stamp was.  
22 We just have Dr. 10. We don't have the stamp. And before I  
23 could go back to Dr. 10 and try to explain to him about the

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1 stamp, he died.

2           So the -- you know, this is important.    These  
3 witnesses are important.    They will be important for the  
4 question -- the medical questions which are going to arise in  
5 the -- in the motion to suppress, including Mr. al Baluchi's  
6 traumatic brain injury, the ongoing brain damage that he had  
7 at the time -- at 2007 during the -- inflicted by the CIA, but  
8 which affected his answers with respect to the January 2007  
9 interrogation, as well as what the CIA called learned  
10 helplessness and what a lot of other people afterward will  
11 associate with PTSD, including some of these medical  
12 witnesses.

13           So for what we're doing right now, right -- and I  
14 hear the messages of the government, of the victim community,  
15 of the military commission and others that they want to  
16 move -- that we want to move towards trial.    I hear that  
17 message.    And in hearing that message, there are certain  
18 things that have to happen.    It is not that we all walk in  
19 here one day and just start having a trial.    There are issues  
20 that have to be dealt with.    The military commission has  
21 ordered us to begin the process of dealing with the motion to  
22 suppress.    We are complying, but there are issues which have  
23 been out there for almost two years now -- or, in the case of

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1 the medical records, for almost eight years -- that are  
2 necessary for us to do the things to move this case forward.  
3 And so that's why we're here on 523N.

4 Thank you, sir.

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

6 Okay. Any other defense counsel wish to be heard on  
7 the 523/330?

8 Okay. Good morning.

9 ADDC [LTC WILLIAMS]: Good morning, Your Honor.

10 I have an exhibit that I would ask to be able to hand  
11 up to Your Honor, as well as to the other counsel, that will  
12 exemplify just why it is necessary also for us to get  
13 complete, unredacted medical records for their care since they  
14 have been here in Guantanamo that I would like to share with  
15 you.

16 MJ [Col PARRELLA]: Okay. Let's go ahead and have that  
17 marked, please.

18 MTC [MR. TRIVETT]: Sir, may we get a copy?

19 MJ [Col PARRELLA]: Absolutely.

20 [The document was marked.]

21 MJ [Col PARRELLA]: Okay. And for the record, this  
22 exhibit has been marked as 523R.

23 ADDC [LTC WILLIAMS]: Thank you, Your Honor.

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1           What this exhibit shows is that these are all records  
2 that we've received. They're three separate documents that  
3 we've received in the past 12 months from the prosecution.

4           In these documents, on the first document, which was  
5 received by the defense on September 12, 2018, and the Bates  
6 number is MEA-10011-00014512, we see that all of the  
7 hospitalmen or medical personnel who are making notations in  
8 this chronological record of medical care, their numbers are  
9 blocked out. So these do not appear to be full names or  
10 actual names. They appear to be a number that was assigned  
11 for identification purposes, and, on this particular document,  
12 they in fact were completely redacted.

13           The second document is MEA-10011-00014687. This was  
14 a document received in discovery from the prosecution by the  
15 defense on January 11 of 2019. This document shows a similar  
16 record, that is generally input by hospitalmen or corpsmen,  
17 and on this document we see that half of the names appear --  
18 or half of the numbers, what I assume to be an identification  
19 number appear, and half of them do not.

20           The third document is MEA-10011-00014900. This  
21 document was received by the defense from the prosecution on  
22 April 5, 2019. And in this document all of the names -- or  
23 not the names, the identifying numbers, are visible.

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1           What this shows you is the inconsistency with which  
2 we receive information that would enable us to identify  
3 potential witnesses, and it's important when you think of  
4 medical witnesses not just to think of doctors. There are  
5 witnesses we may want to interview and identify for a number  
6 of different reasons. In addition, in order to establish  
7 patterns of conduct or patterns of interaction between  
8 different individuals, to have all of the identifying  
9 information, at least, would enable us to request people and  
10 identify people that we want to speak to about medical care.

11           Mr. Connell did a wonderful job explaining that this  
12 is something that is an ongoing issue. Not having access to  
13 complete, unredacted medical records gives us -- does not  
14 afford us the opportunity to identify everyone that may be  
15 relevant that we want to speak to about certain instances, and  
16 this exemplifies a situation where it doesn't appear there's  
17 rhyme or reason to why the individual's identification numbers  
18 are being redacted.

19           So I would ask in any order that you issue that you  
20 request the prosecution to provide us the documents that have  
21 previously been redacted in an unredacted fashion.

22           MJ [Co] PARRELLA]: So based on the -- the three documents  
23 you provided, it appears on its face that things have gotten

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1 better in the sense that it went from redaction to no  
2 redaction.

3           So before I order the government to do anything, have  
4 you requested that they go back and provide you that  
5 information that was previously redacted?

6           ADDC [LTC WILLIAMS]: Your Honor, I have not. I would  
7 ask -- this is something -- again, it -- although these are in  
8 time and sequential, there are prior medical records that  
9 don't have redaction, and there are medical records that do.

10           So it's not necessarily an indication of everything  
11 before this date was provided in a fashion where numbers of  
12 individuals were redacted. It's a systemic issue, and that's  
13 why I bring it to the court's attention.

14           MJ [Col PARRELLA]: Okay.

15           ADDC [LTC WILLIAMS]: And to also reinforce a point that  
16 Mr. Connell made, one of the reasons why it's important for us  
17 to have complete unredacted medical records is to be able to  
18 be a check to the -- whoever the individuals were who applied  
19 the redaction or applied a stamp that had a number or  
20 something identifying the medical personnel in a different  
21 way.

22           When we have an opportunity to interview that  
23 witness, as Mr. Connell did with Dr. 10, then we have an

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1 opportunity to ask them; and they may say, yes, in fact, this  
2 is something that I wrote, and they may say, no, this isn't  
3 something that I wrote.

4           As you heard from Mr. Connell, there are some  
5 witnesses -- and Dr. 10 is not the only medical witness who  
6 has been identified as being relevant and necessary to the  
7 prosecution that has been -- that is now deceased. There are  
8 some witnesses we will not get that opportunity to do, not  
9 only the witnesses that have -- are deceased, but also the  
10 witnesses that are not making themselves available to us.

11           So the only way that we can really have a good check  
12 and know, are these in fact the individuals that were  
13 identified, are by having the full, unredacted  
14 medical records.

15           So again, I would join in Mr. Connell's argument, and  
16 I would point out that it is especially necessary when you  
17 have witnesses who either choose to make themselves  
18 unavailable or are unavailable because of other reasons, that  
19 in those cases in particular, it's especially necessary for us  
20 to have the full, unredacted medical record of care.

21           MJ [Col PARRELLA]: Thank you.

22           ADDC [LTC WILLIAMS]: Thank you, Your Honor.

23           MJ [Col PARRELLA]: Trial Counsel.

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

2 MJ [Col PARRELLA]: Good morning.

3 MTC [MR. TRIVETT]: The prosecution believes that every  
4 argument that was made by either Mr. Connell or counsel for  
5 Mr. Hawsawi was addressed in either our response to the motion  
6 to reconsider or in our ex parte filing.

7 That said, we rise to say that we rest on brief, but  
8 are certainly here to answer any questions that the commission  
9 may have that were raised in the arguments, only to ask also  
10 that if there's any question specific to the medical records  
11 themselves that Mr. Swann be given the opportunity to answer  
12 that. We split it up between the motion to reconsider and  
13 300; we didn't combine it.

14 But we're certainly willing to answer any questions  
15 you may have, sir.

16 MJ [Col PARRELLA]: The first question I would have for  
17 you is Mr. Connell raised the question of whether these  
18 medical providers could be interviewed in a nonsecure space.  
19 If you could address that, please.

20 MTC [MR. TRIVETT]: Yes, sir, with the use of the UMIs,  
21 the Unique Medical Identifiers that were approved by the  
22 commission as part of our request for a substitute under p-4,  
23 he certainly can interview those individuals in an unsecure

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1 space, providing that they use the UMI. I think that's the  
2 concept. If you were to use the real name, then associating  
3 that real name with the treatment specifically of the  
4 detainees would make it classified.

5 But the use of the UMI in that context is one of the  
6 reasons why we asked for it in order to facilitate the  
7 defense's ability to have these interviews in an unsecure  
8 place and over telephones.

9 MJ [Col PARRELLA]: Okay. And then I know that some of  
10 this is addressed in your written brief, but I would still  
11 just like to hear if your position has any additional details.

12 But with respect to the argument on the leftovers  
13 from the 523 base motion, and specifically those four  
14 categories, to the extent you can address those in an open  
15 session, as we gear up for what this commission has ordered in  
16 524LLL, what's the government's position on the -- those four  
17 categories?

18 MTC [MR. TRIVETT]: Sure. That the first category, the  
19 prosecution believes it's satisfied its discovery obligation  
20 with a statement admitting relevant fact. I can't get into  
21 too many details in an open court on that, but that was one of  
22 the reasons we sought the statement admitting relevant fact.

23 With that said, we'll certainly reconsider whether or

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1 not there may be a witness that the prosecution intends to  
2 call to fill in any gaps. Certainly, if we do, we would  
3 provide that information to the defense.

4 MJ [Col PARRELLA]: Okay.

5 MTC [MR. TRIVETT]: I don't know that I can answer in  
6 an -- let me see what the categories were exactly.

7 MJ [Col PARRELLA]: I would suspect 2 and 3 might be more  
8 difficult, but is ----

9 MTC [MR. TRIVETT]: Correct.

10 MJ [Col PARRELLA]: ---- is it possible to address the  
11 Bureau of Prisons?

12 MTC [MR. TRIVETT]: Right. The BOP witness request we  
13 believe is completely irrelevant to any of the legal issues  
14 before this commission. I think that's the position that we  
15 took when we initially denied it to the defense and then in  
16 the motion to compel.

17 MJ [Col PARRELLA]: I mean, is it still the  
18 government's -- does the government concur with the defense  
19 that this aspect of the 523 base motion is still out there for  
20 the commission to resolve?

21 MTC [MR. TRIVETT]: Yes, sir. There was no ruling on  
22 that as far as we could determine.

23 MJ [Col PARRELLA]: Okay. Okay. So the only other

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1 question I have probably pertains to the medical records.

2 MTC [MR. TRIVETT]: Okay.

3 MJ [Col PARRELLA]: Good morning, Mr. Swann.

4 TC [MR. SWANN]: Good morning, sir.

5 MJ [Col PARRELLA]: The question I have is just to address  
6 the government's position with respect to the redactions. I  
7 understand you just received that document two minutes ago,  
8 but to the extent you could address redactions in the  
9 medical records and then the medical records in general.

10 TC [MR. SWANN]: Sure. Your Honor, thus far with respect  
11 to medical records and DIMS records, because we produced those  
12 in the same category, we have produced a total of 47,776  
13 pieces of paper. With respect to -- well, individually, it  
14 wouldn't make much difference going over those numbers.

15 Now, I heard Mr. Connell mention that in all of the  
16 records we've produced, he identified seven true names.  
17 That's unfortunate that I missed those true names, but he has  
18 those records.

19 The redactions -- when these items are provided to  
20 me, they are provided to me classified. I take the --  
21 because I do this generally on a rolling basis, say, every 30  
22 to 60 days. I have in my possession medical records to and  
23 through April 22, 2019. This is the last iteration. It's

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1 probably, all totaled, maybe about 100 pages for all five of  
2 these individuals.

3           They come to me classified. I look through the  
4 records to see if there are any true names. I can say, quite  
5 confidently, I have not seen a true name of an individual for  
6 more -- almost more than a decade.

7           They then are provided to me. We forward those for  
8 an equity review. They are then reviewed by the proper  
9 individuals. They are then provided to each of these defense  
10 teams, unclassified; thus, when I said back in 2014, on  
11 20 March, as Mr. Connell pointed out, medical records by their  
12 very nature are unclassified, that's how they end up.

13           The only thing that's ever redacted on these, save  
14 for a few redactions during the first -- sometime in September  
15 of 2006 -- the only thing that's ever been redacted might be a  
16 true name. Now, sometimes initials are redacted because,  
17 quite frankly, the equity holders are redacting those initials  
18 thinking that it might be a true name.

19           MJ [Col PARRELLA]: So how -- Mr. Swann, would you  
20 explain, just on the document that was provided by Lieutenant  
21 Colonel Williams, the -- it appears what's been redacted is,  
22 you know, some sort of numerical indicator. It's certainly  
23 not a true name.

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1 TC [MR. SWANN]: It's certainly not a true name, and it  
2 may be -- I can't tell you without having the original  
3 document, looking at it. It's just -- it's not a name. At  
4 best, it might be Nurse A or Nurse B, that kind of  
5 information.

6 As you can see, because she provided us with a  
7 further-on copy that looks to me like it's November '18  
8 through January '19 where they have these identifiers, that's  
9 simple. Figure out the identifier. Look to the Excel  
10 spreadsheet that they've been provided with, and then they can  
11 do the cross-walk.

12 MJ [Col PARRELLA]: I agree with that, I guess up and to  
13 the point where they hit -- where those identifiers have been  
14 redacted. So how do they get around that?

15 TC [MR. SWANN]: Well, the other piece of that is simple,  
16 too. I mean, they can go through the records, and they can  
17 identify for me records, and I can in turn go back and do  
18 that.

19 Now, I offered, better part of, what, two and a half  
20 years ago, to sit down with each of these teams and go one by  
21 one. Nobody ever took me up on it. And that was based on a  
22 number of gaps that Mr. Connell had identified. We filled  
23 all those gaps, and where they thought there were gaps, there

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1 was no record.

2 But, like I said, you're not going to get much from  
3 these things because there are just no true names in them to  
4 begin with.

5 MJ [Col PARRELLA]: No, and -- I understand that, and I  
6 certainly took note of the fact that nobody's ever asked the  
7 government to fill them in, and perhaps if they had, then we  
8 wouldn't even be addressing this issue in this court. And I  
9 think I've been referred to as the kumbaya judge in the sense  
10 that I have sort of requested counsel to make that effort  
11 before they bring stuff before the commission.

12 But I have two questions, is -- is -- it sort of  
13 raises a couple of issues. Number one is, why is the equity  
14 holder redacting that stuff if it's not classified in the  
15 first place?

16 TC [MR. SWANN]: Well, I think they're redacting it  
17 because they believe -- what is ever behind that particular  
18 redaction, they believe that that is a true name or a true  
19 initial where somebody could be identified at that point in  
20 time.

21 They then redact -- because then by putting those  
22 redactions, these things then become unclassified and they can  
23 give them to the accused.

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1 MJ [Col PARRELLA]: So why -- in light of the -- the  
2 Fraser declaration in the process you described, why are the  
3 medical records classified in the first place?

4 TC [MR. SWANN]: The medical records are classified  
5 because of -- because of where they reside and they deal with  
6 these individuals on a daily, daily basis.

7 Sir, it's not uncommon that threats are made against  
8 these individuals; practically every day, certainly at least  
9 once a month, for a whole variety of reasons. It's not  
10 uncommon that these individuals try to learn the names of the  
11 various people that -- they are the medical providers.

12 We've got to protect the soldiers that are dealing  
13 with a difficult task. That's why, when we gave you the  
14 information in 523, that information is never going to the  
15 accused. It is going to the defense counsel to be able to do  
16 their job to look through the records, identify those  
17 particular discrete items that they're interested in, and then  
18 talk to the medical provider in the proper way.

19 These records -- every one of these records that are  
20 like this, the accused has a copy of these things within  
21 normally 30 to 60 days after we take a look at them and  
22 provide them. I have seen, untold numbers of times, where  
23 their copy ends up in the folder or the jacket of the

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1 medical records because no doubt the accused brought that copy  
2 with him to sit down and talk to the SMO or the psych or the  
3 therapist or the dermatologist or the dentist, any number of  
4 those people, to be able to say, what about this? And that  
5 discussion is -- is conducted.

6           So there is a clear need to protect identities from  
7 these particular individuals.

8           MJ [Col PARRELLA]: Okay. Thank you, Mr. Swann.

9           LDC [MR. CONNELL]: Sir, somewhere you got the idea that I  
10 am unwilling or something to sit down with the prosecution and  
11 talk to them about this.

12           In your order in 523J, you laid out some of the  
13 extensive efforts that I have gone to to get these exact  
14 medical witnesses.

15           MJ [Col PARRELLA]: Yeah, I don't -- I don't mean to imply  
16 that that's the case, Mr. Connell. Certainly I have  
17 recognized, as you just pointed out, that you've made that  
18 effort. Absolutely.

19           LDC [MR. CONNELL]: Let me just ----

20           MJ [Col PARRELLA]: But I think with respect to just  
21 documents that was handed to the commission, it was apparent  
22 that there was no effort made, and I think there's been --  
23 that's been demonstrated in the past as well. And I

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1 certainly recognize that counsel have made efforts since then  
2 to do exactly what the commission has asked.

3 LDC [MR. CONNELL]: Well, I have definitely made efforts  
4 since your time, sir.

5 But 523J lays out many of my efforts prior to your  
6 time, and just -- I mean, as recently as Tuesday, I met with  
7 Mr. Swann to say, look, you know, are you going to give us  
8 these underlying medical records so that we can match these  
9 things up?

10 So -- and I understand that some -- often people  
11 paint the defense with a broad brush. But, sir, if the -- if  
12 the question is diligence or willingness to speak with my  
13 opponents or anything like that, I -- I am an open book on  
14 this. Mr. Swann just made a reference to the time that --  
15 the idea, which was my idea, of sitting down and going through  
16 the medical records. We tried -- he and I met and we -- with  
17 the idea of let's take -- let's do that, but then he said, no,  
18 no, I'm not going to show you the medical records. What I  
19 mean is you sit with your stack of medical records, and I sit  
20 with my stack of medical records, and you ask me about each  
21 one individually and I tell you if I'll give you anything from  
22 it or not.

23 And since we're talking about 47,000 medical records,

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1 that just did not seem like a good investment of time. The --  
2 especially since it's so easy to produce the medical records,  
3 the unclassified medical records that are -- or even if  
4 they're classified, right, and if they can't go to the  
5 defendant, they -- we're only talking Secret level, they can  
6 produce those. So the -- you know, I -- an investment of  
7 multiple weeks of turning pages, 47,000 pages one at a time,  
8 just does not seem like the most efficient solution to this  
9 problem.

10 Now, the -- I do want to point out a few other  
11 points. The military commission today asked about why these  
12 records are classified in the first place when they go to the  
13 government. The government didn't explain it today, but it  
14 did explain it on 20 March of 2017 when -- when the statement  
15 that medical records are by their very nature unclassified was  
16 made. Because Judge Pohl asked the same question and what  
17 Mr. Swann explained on that occasion was that it's only a  
18 handling device of JTF-GTMO, that they do some sort of  
19 provisional marking that treats them as classified until they  
20 go to the government. But it's not that they have been  
21 reviewed by an original classification authority and  
22 determined to be classified; they just have a handling device  
23 in play. And that's -- Mr. Swann made that very clear back in

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1 2017.

2           The government just made an argument that there are  
3 external threats to these medical providers. That is a  
4 proffer from the government that is not in evidence anywhere,  
5 but I'll tell you what is in evidence, which is -- because I  
6 read something like that in the -- in the briefs, I put two --  
7 attached two declarations to 523N from investigators who have  
8 spoken to the medical providers that -- the ones that we have  
9 been able to identify, about a half dozen, the -- and some of  
10 those I have -- multiple of those I have spoken to myself, but  
11 I didn't want to make a proffer, I wanted it to be in  
12 evidence.

13           And the evidence is that none of those people have  
14 ever stated that they have been -- had any kind of threat to  
15 themselves, to their families or anything else, and those are  
16 people whose identities were known to us, either through  
17 independent investigation -- often their LinkedIn account or  
18 their website -- but also through the government's  
19 unclassified production in 152P.

20           The military commission said something just a moment  
21 ago that could have been sort of a -- offhand, but it said  
22 that there's essentially a difference between the places where  
23 pseudonyms are used and the places where there's full

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1 redaction, like the document that Mr. al Hawsawi just handed  
2 up. And in many instances, the Nonunique Medical Identifiers,  
3 meaning the ten people who use SMO or the four people who use  
4 G or the 39 people who use more than one Nonunique Medical  
5 Identifiers, are just as good as redactions in hiding  
6 information from the defense.

7           And I don't know if it was done that way on purpose  
8 or not. I kind of suspect it was just people doing their  
9 best and getting kind of sloppy, but the -- you know, when we  
10 have the medical record that says SMO, and we're trying to  
11 remind a witness of what happened to them 12 years ago, the --  
12 it is just as if it were blacked out, because SMO is just as  
13 good an effective redaction as a black or white box placed  
14 over information.

15           I'd like to end not on medical records, but by  
16 returning to the rest of 423N.

17           I heard the government say that we can interview  
18 witnesses, medical witnesses, in a nonsecure space. But I  
19 also heard the government claim that the Bureau of Prison  
20 witnesses who visited black sites for audit purposes were  
21 irrelevant.

22           What we are going to be arguing at some time in the  
23 near future with respect to the motion to suppress that the

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1 military commission has directed is really two things.  
2 First, as best as we can tell, what happened in those black  
3 sites. And independent experts on incarceration called in by  
4 the CIA seem to have unique credibility for that; first,  
5 because they're experts; second, because they were selected by  
6 the CIA and not by some, you know, convening authority or  
7 defense process; but third, because they had boots on the  
8 ground, that they actually saw what happened in some of these  
9 dungeons that the CIA was running.

10           The second thing is the other nested inquiry that the  
11 military commission is making, because this motion to suppress  
12 arises in the 524 context is, is the defense able to  
13 prevent -- present a rich and vivid account. And the fact  
14 that we are not allowed -- or the fact that we don't know  
15 who -- the government has successfully suppressed the  
16 identities of these Bureau of Prison witnesses -- is one  
17 factor, clearly, in going into whether we can present a rich  
18 and vivid account or not.

19           So if the government wants us -- wants to prove that  
20 we can present that rich and vivid account, just give us  
21 access to the witnesses and we will do our best. I don't  
22 think it will be the same as if we had independent  
23 investigation authority, like every other case, but we will do

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1 our best, and that is what we are doing.

2           On May 10th, the military commission will see our  
3 best effort, and all we are asking is to let us make our best  
4 effort by giving us access to witness identities that the  
5 government has otherwise successfully hidden.

6           MJ [Col PARRELLA]: Mr. Connell, with respect to the sort  
7 of generic references, SMOs and G and things that appear  
8 through medical records -- and I sort of agree with you that  
9 that was likely not done intentionally, because I see it  
10 appear in my own medical record.

11           But has the government provided any sort of chart or  
12 timeline to indicate when one SMO left, when maybe one came to  
13 replace? That would then assist in maybe deciphering who is  
14 who.

15           LDC [MR. CONNELL]: Yes. The government in its  
16 spreadsheet -- one of the columns in the spreadsheet is rough  
17 times that the -- is the spreadsheet not in the record? It  
18 is. So you can actually look at this, too, sir, but the -- it  
19 did give rough times. It's not -- certainly not complete,  
20 like not everybody knew and there's apparently not very good  
21 recordkeeping around this because lots of the times -- some of  
22 them are clearly inaccurate from our own interviews, but  
23 others of them are fairly rough, you know, giving a large time

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1 frame, but there are time frames which are given.

2           And let me tell you, we are subjecting this  
3 spreadsheet to every piece of analysis -- analytical power  
4 that we have, which is not all that great, but we do our best.  
5 And so yes, we are trying to parse SMO from SMO as best we  
6 can, and so far our efforts have not been very successful.

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

8           LDC [MR. CONNELL]: Thank you.

9           MJ [Col PARRELLA]: Lieutenant Colonel Williams.

10          ADDC [LTC WILLIAMS]: Thank you, Your Honor.

11           Just briefly, I just want to make it clear that it  
12 has not been that we have not requested unredacted records.  
13 Maybe these not specific by name, but since our initial  
14 discovery request that was sent to the prosecution on  
15 25 September of 2013, we have requested not only unredacted  
16 medical records, but also the names of all of the medical  
17 personnel that have been treating or were connected and  
18 relevant to Mr. al Hawsawi's medical care. So I just wanted  
19 to make that clear.

20           And even in our specific filings, AE 419 for the  
21 period of CIA custody and AE 330 for the period after CIA  
22 custody, we've made it clear in our request for unredacted  
23 medical records. So while I did not go back on this specific

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1 instance, I think that it is clear to the government that we  
2 are seeking unredacted medical records.

3 Thank you, Your Honor.

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

5 All right. Anything further from any of the parties  
6 on the 523/300, at least for the purposes of an open session?

7 And as I see it, this will likely be our last open  
8 session, so if there's any other issue any counsel would like  
9 to take up.

10 Okay. Mr. Connell.

11 LDC [MR. CONNELL]: Sir, two things.

12 The first one is that I mentioned just in passing in  
13 that argument that -- my understanding that the last piece of  
14 538 is with the military commission for review. I just  
15 wanted to put that out there because 538 and 561 are important  
16 for the motion to suppress, and we're -- we're happy to argue  
17 them once we have -- once the military commission finishes its  
18 last piece of it.

19 MJ [Col PARRELLA]: Yeah, and I -- I understand, and we're  
20 actively working it. So ----

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

22 MJ [Col PARRELLA]: ---- we're working to resolve that as  
23 soon as possible.

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

2 The last thing is -- and if this is out of line  
3 somehow, you just tell me, but I never had the chance to say  
4 goodbye to Judge Pohl, and if this is our last time together,  
5 sir, I just want to say thank you for your service to the  
6 case.

7 MJ [Col PARRELLA]: You're welcome, and thank you for --  
8 for that.

9 I don't know if that's a roundabout way of asking in  
10 a sense for an update, but I certainly have no issue with --  
11 with giving you some details. But I do currently have orders  
12 to report as the commanding officer of the Embassy Security  
13 Group sometime in June of 2019. I do intend to execute those  
14 orders in early June, so I do not anticipate that I will  
15 remain detailed as the military judge in this case once I  
16 check out of my current duties, because my current duties are,  
17 of course, dependent upon me remaining a military judge.

18 So, as such, I expect to be relieved and replaced as  
19 the military judge in this case sometime in early June, but I  
20 will continue to do so, to operate as the judge, until such  
21 relief comes.

22 So, thank you.

23 Okay. With that, the commission is in recess.

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1 What I would propose we do is we go ahead and take a 15 ----

2 LDC [MR. HARRINGTON]: Judge, excuse me.

3 MJ [Co] PARRELLA]: Mr. Harrington.

4 LDC [MR. HARRINGTON]: I don't know what the court's -- I

5 assume we're going to take up the 806 right now. We would

6 like to have some time, though, to meet with our client here.

7 Is it possible that we could do that after the 806?

8 MJ [Co] PARRELLA]: Yes. Yeah. I think this 806 will

9 be very -- relatively brief. So I have -- see no issue with

10 that. What I propose is -- unless, government, you tell me

11 otherwise, we -- that you need more time, I would think 15

12 minutes would be sufficient to convert the courtroom. 30?

13 Okay, I'm being told 30. So we'll say 30 minutes. So why

14 don't we say -- I'll check these clocks because every one I

15 have is different. But we'll say 1045, reconvene. We'll do

16 the 806, then -- and then, Mr. Harrington, you can meet with

17 your client after that time.

18 LDC [MR. HARRINGTON]: Judge, I say -- because it's so

19 early, I think we'll withdraw that because hopefully our

20 client can go to Echo II. We can meet him there.

21 MJ [Co] PARRELLA]: Okay. Good enough. The commission

22 is in recess until 1045. Please carry on.

23 [The R.M.C. 803 session recessed at 1014, 2 May 2019.]

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