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1 [The R.M.C. 803 session was called to order at 0902, 30 April  
2 2018.]

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

4 CP [BG MARTINS]: Good morning, Your Honor. Present for  
5 the United States: Brigadier General Mark Martins, Mr. Robert  
6 Swann, Mr. Edward Ryan, Mr. Clay Trivett, Ms. Nicole Tate,  
7 Mr. Jeffery Groharing, Major Christopher Dykstra. Paralegals,  
8 Mr. Dale Cox, Mr. Rudolph Gibbs, Mr. Pascual Tavaréz, Sergeant  
9 Joleen Sanders.

10 Also present in the room with the Federal Bureau of  
11 Investigation, Ghailan Stepho and Alicia Dorman. These  
12 proceedings are being transmitted by closed-circuit signal to  
13 locations in the Continental United States pursuant to the  
14 commission's order.

15 MJ [COL POHL]: Thank you.

16 Mr. Nevin.

17 LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet,  
18 Mr. Sowards, Ms. Radostitz for Mr. Mohammad is present.

19 MJ [COL POHL]: Thank you.

20 Ms. Bormann.

21 LDC [MS. BORMANN]: Judge, myself, Mr. -- I'm sorry, Edwin  
22 Perry, Captain Brian Brady on behalf of Mr. Bin'Attash.

23 MJ [COL POHL]: Thank you.

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1           Mr. Harrington?

2           LDC [MR. HARRINGTON]: Judge, James Harrington, Major  
3 Jarrod Stuard, and Ms. Alaina Wichner is here; but she is back  
4 in the ELC working on a project at this time, if that's all  
5 right.

6           MJ [COL POHL]: Okay, Mr. Connell.

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

8           MJ [COL POHL]: Good morning.

9           LDC [MR. CONNELL]: James Connell and Alka Pradhan on  
10 behalf of Mr. al Baluchi. Lieutenant Colonel Sterling Thomas  
11 is excused by order of the military comission. Entering their  
12 appearance today will be Benjamin Farley and Captain Mark  
13 Andreu, A-N-D-R-E-U.

14          MJ [COL POHL]: Thank you. Mr. Hawsawi -- I'm sorry,  
15 Mr. Ruiz on behalf of Mr. Hawsawi.

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

19          MJ [COL POHL]: Captain Andreu, please put your detailing  
20 qualifications on the record.

21          ADC [Capt ANDREU]: Good morning, Your Honor.

22          MJ [COL POHL]: Good morning.

23          ADC [Capt ANDREU]: My name is Captain Mark Andreu. I'm

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1 in the United States Air Force. I've been detailed by  
2 Brigadier General John G. Baker, Chief Defense Counsel,  
3 Military Commissions Defense Organization. My detailing  
4 memorandum can be found at Attachment B to AE 004CC.

5 I'm qualified and certified under Article 27(b) and  
6 sworn under Article 42(a) of the Uniform Code of Military  
7 Justice. I'm also qualified and certified under Rules 502 and  
8 503 of the Rules for Military Commissions.

9 I've agreed in writing to comply with the orders,  
10 rules, and regulations of these military commissions. I have  
11 not acted in any way that might tend to disqualify me in this  
12 proceeding.

13 MJ [COL POHL]: Thank you. Mr. Farley.

14 Mr. Farley, my understanding is you're a detailed  
15 counsel by General Baker; is that correct.

16 DC [MR. FARLEY]: Yes, Your Honor.

17 MJ [COL POHL]: Okay. Please put your qualifications on  
18 the record.

19 DC [MR. FARLEY]: Good morning, Your Honor.

20 MJ [COL POHL]: Good morning.

21 DC [MR. FARLEY]: My name is Benjamin R. Farley. I'm a  
22 United States citizen and a member in good standing of the Bar  
23 of the State of New York. I've been admitted to the Court of

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1 Appeals for the Fourth Circuit and the Court of Appeals for  
2 the D.C. Circuit. I currently hold a TS ----

3 MJ [COL POHL]: Mr. Farley?

4 DC [MR. FARLEY]: Sorry. I apologize.

5 MJ [COL POHL]: It's okay. You're not the first who has  
6 gone too fast. Go ahead.

7 DC [MR. FARLEY]: I currently hold a TS//SCI clearance;  
8 and I've agreed in writing to comply with orders, rules, and  
9 regulations of these military commissions. My detailing  
10 notice can be found in the record at AE 004BB.

11 MJ [COL POHL]: Please raise your right hand.

12 [Counsel Was Sworn.]

13 MJ [COL POHL]: Thank you.

14 CP [BG MARTINS]: Your Honor, may the United States  
15 briefly be heard on the qualifications of Mr. Farley?

16 MJ [COL POHL]: Sure.

17 CP [BG MARTINS]: Your Honor, this could be of no moment,  
18 but we did notice in Mr. Farley's acknowledgement of  
19 responsibilities an inconsistency with a ruling of this  
20 commission and do not believe that the duties stated are  
21 consistent with your rulings and with the Regulation for  
22 Trial, obviously, within the discretion of the commission.

23 The United States requests, though, that the

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1 commission, when granting -- or when granting the  
2 qualifications of counsel, that you clarify what you did in a  
3 recent request for excusal of counsel; namely, that the  
4 commission requires good cause to be shown on the record found  
5 by the military judge.

6           The current acknowledgement of responsibilities by  
7 Mr. Farley, submitted Appellate Exhibit 004BB, maintains that  
8 the chief defense counsel has that authority. And we see that  
9 as an inconsistent duty. Under Rule for Military Commission  
10 901(d)(3), it can be a ground for disqualification if duties  
11 are inconsistent with the role of counsel as defined in  
12 appropriate regulations and in your orders. And since you've  
13 been very clear on who has the authority to excuse, we would  
14 ask that that be very clear.

15           Counsel did just say -- I was listening carefully --  
16 that he "will comply with the orders of these commissions."  
17 That's more in line. But given that there is this signature  
18 to an attestation that's inconsistent, we would like to  
19 clarify that. Thank you.

20           MJ [COL POHL]: Mr. Connell -- well, yeah. Mr. Connell,  
21 you want to be heard on this?

22           LDC [MR. CONNELL]: Sir, AE 004BB was filed on 28 March  
23 2018. If the government has an objection, it seems that they

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1 should brief it and let us respond. I have only the -- I have  
2 a guess as to what counsel is getting at, but only it seems  
3 like a solution in search of a problem. If they have an  
4 objection, I think that it should be briefed.

5 MJ [COL POHL]: Taking somebody else's problem and making  
6 it ours ----

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

8 MJ [COL POHL]: ---- which is what it sounds like to me.

9 And again, I've -- I'm aware of litigation in other  
10 cases; I'm sure everybody else is here, too. This issue has  
11 not come up in this case. There is an opinion that the rules  
12 of court that require good cause is approved by the judge for  
13 excusal. There's another opinion that apparently the chief  
14 defense counsel can do on his own, which is currently being  
15 litigated in an appellate court to my knowledge. Okay?

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

17 MJ [COL POHL]: I'm assuming that's what General Martins  
18 is referring to. I don't know if it's necessarily ripe now  
19 because I don't have that problem in front of me. It strikes  
20 to me we could brief it and discuss it, but it seems to me  
21 is -- I mean, Trial Counsel, is that what you want to do? You  
22 want to raise this issue?

23 CP [BG MARTINS]: Your Honor, I'm not speaking to anything

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1 in other cases, although we can be on common-sense notice of  
2 things that are happening in the defense bar. I'm referring  
3 to paragraph 3 of your appellate -- your ruling in Appellate  
4 Exhibit 004AA, this case, when the commission found that was  
5 appropriate to state -- if I may, I'll read it, to ensure  
6 there's no ambiguity on this issue, the commission reiterates  
7 its rulings that R.M.C. 505(d)(2)(B) and Rule for Court 4.4(b)  
8 require good cause to be shown on the record (i.e., found by  
9 the military judge) prior to any excusal of any defense  
10 counsel who has formed an attorney-client relationship with an  
11 Accused and who has entered an appearance before the  
12 commission.

13           The government will be pleased if you were to state  
14 the same with regard to Mr. Farley in light of the ambiguity  
15 raised by his attestation.

16           MJ [COL POHL]: Well, it -- my view is -- that's always  
17 been my view. I don't think anybody has disputed that that's  
18 my view.

19           The fact that in his acknowledgement of  
20 responsibilities, Mr. Farley puts in the for good cause as  
21 determined by the chief -- filed by the chief defense counsel.  
22 If that is the -- meant to mean that the chief defense counsel  
23 can find good cause with no judicial involvement, my position

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1 is that's a nullity.

2 But again, it's an advisory ruling at this point.

3 The issue is not before me. If it comes before me to get  
4 there, I don't think anybody will be surprised with what I  
5 just said. It's in the rules that I wrote for the court.

6 And, like I said, this current issue is on appeal anyway, so  
7 we may have further guidance on it. But that's where it is  
8 now.

9 New counsel are expected to abide by previous orders;  
10 and anything that they submit that are inconsistent with  
11 previous orders, again, has no effect. So when I saw this,  
12 like I said, if he wished -- at this point, it would only be  
13 an advisory opinion, and so I'm not going to address it  
14 further.

15 LDC [MR. CONNELL]: Yes, sir. We're trying to add  
16 Mr. Farley to the courtroom, not to take him away.

17 MJ [COL POHL]: That's what I'm saying. We're getting a  
18 little ahead of ourselves. Or maybe not.

19 CP [BG MARTINS]: Thank you, Your Honor. The government  
20 is satisfied with that record.

21 MJ [COL POHL]: Okay. The first order of business was my  
22 advice to the accused about their right to be present and if  
23 they so wished to waive that right. So I now direct this to

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1 all of the accused.

2           You have the right to be present during all sessions  
3 of the commission. If you request to absent yourself from any  
4 session, such absence must be voluntarily -- voluntary and of  
5 your own free will. Your voluntary absence from any session  
6 of the commission is an unequivocal waiver of the right to be  
7 present during that session. Your absence from any session  
8 may negatively affect the presentation of the defense in your  
9 case. Your failure to meet with and cooperate with your  
10 defense counsel may also negatively affect the presentation of  
11 your case.

12           Under certain circumstances, your attendance at a  
13 session can be compelled regardless of your personal desires  
14 not to be present. Regardless of your voluntary waiver to  
15 attend a particular session of the commission, you have the  
16 right at any time to decide to attend any subsequent session.  
17 If you decide not to attend the morning session, for example,  
18 but wish to attend the afternoon session, you must notify the  
19 guard force of your desires. Assuming there is enough time to  
20 arrange transportation, you will then be allowed to attend the  
21 afternoon session.

22           You will be informed of the time and date of each  
23 commission session prior to the session to afford you the

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1 opportunity to decide whether you wish to attend that  
2 particular session.

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

5 ACC [MR. MOHAMMAD]: Yes.

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

7 ACC [MR. BIN'ATTASH]: Yes. I would like to speak to the  
8 court.

9 MJ [COL POHL]: Okay. I'll give you an opportunity.

10 Mr. Binalshibh, do you understand what I just  
11 explained to you?

12 ACC [MR. BINALSHIBH]: [No audible response.]

13 MJ [COL POHL]: Mr. Ali, do you understand what I just  
14 explained to you?

15 ACC [MR. AZIZ ALI]: Yes.

16 MJ [COL POHL]: And, Mr. Hawsawi, do you understand what I  
17 just explained to you?

18 ACC [MR. AL HAWSAWI]: Yes.

19 MJ [COL POHL]: Mr. Bin'Attash, does this -- do you wish  
20 to say something?

21 ACC [MR. BIN'ATTASH]: Yes. As the court knows, my  
22 problem with the attorneys have been going on for two and a  
23 half years now. This is a very long time wasted without me

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1 benefitting from it at all. I've made many concessions in a  
2 bid to reach a solution with the attorneys, but all the roads  
3 are blocked with the attorneys.

4 I ask the government -- I've asked the court --  
5 excuse me -- that since the court has refused to excuse  
6 Ms. Bormann, that the work of the attorneys be completely  
7 frozen.

8 This is all.

9 MJ [COL POHL]: Mr. Bin'Attash, when we first discussed  
10 this issue, you indicated your dissatisfaction with some of  
11 your current defense counsel, and also you wanted  
12 replacements. Is that still your position?

13 ACC [MR. BIN'ATTASH]: At the present time, Attorney  
14 Cheryl Bormann, yes, because Attorney Schwartz left the case.  
15 The problem more with Ms. Bormann is that with any new  
16 attorney coming into the case, she has to be in control of  
17 him. Nothing happens unless she agrees to it.

18 MJ [COL POHL]: No, Mr. Bin'Attash, that wasn't what I was  
19 asking you. What I just want to make sure, that when we've  
20 discussed this before and I asked you whether -- and I'm not  
21 talking about Ms. Bormann leaving; I'm talking about is you  
22 wanted another learned counsel to replace her. Correct?

23 ACC [MR. BIN'ATTASH]: Yes.

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

2 I don't believe that changes the legal status of the  
3 counsel in the case. And if this is considered a motion to  
4 excuse Ms. Bormann, the motion is denied.

5 Over, I guess yesterday, the trial judiciary received  
6 a second declaration from Mr. Rishikof and Mr. Brown. It's  
7 currently going through the somewhat laborious process of  
8 assigning a number to it and getting it out to the counsel.  
9 But in order to kind of get ahead of the game here is I've  
10 made six copies of it. It is 555L. I'm giving you these as  
11 kind of an advance copy, one for each team and one for the  
12 prosecutor, just so you can have it so when we get to 555,  
13 you've had some time to look at it.

14 Please hand it to counsel. Again, you will get the  
15 regularly marked one in normal course of business.

16 [Handed to Mr. Nevin.]

17 Yeah. Thank you, Mr. Nevin.

18 ACC [MR. BIN'ATTASH]: Since the court has denied my  
19 request, I have another request for the court. I'd like to  
20 separate my case from the case of the other brothers. I've  
21 done everything I could to stay with my attorneys. I've tried  
22 to find a solution to stay with them, but I haven't been able  
23 to so far.

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1 MJ [COL POHL]: Mr. Bin'Attash ----

2 ACC [MR. BIN'ATTASH]: If I can -- if I'm able to find a  
3 guarantee to be able to stay with the attorneys, I would do  
4 that; but nobody has offered me any guarantee or trust to stay  
5 with them.

6 MJ [COL POHL]: Your motion to sever is denied.

7 That brings us to 565N. Mr. Harrington. I  
8 understand this was filed last Friday; so, Trial Counsel, if  
9 you need additional time to respond, we certainly can. But  
10 Mr. Harrington asked to be heard at least initially on this,  
11 given the nature of the issue. Mr. Harrington.

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

13 Judge, by way of background, I last met with  
14 Mr. Binalshibh on April 5th of this year. And since that  
15 time, I have not spoken with him because of events that have  
16 transpired since that time.

17 When I met with him, he had been placed in  
18 disciplinary status for alleged violations against him. One  
19 of the complaints that he had at that time was that he was not  
20 permitted to return to his cell during the day to retrieve --  
21 which is the normal course -- for an hour to retrieve legal  
22 materials and that to bring with him to the disciplinary cell.  
23 And he claims that he was denied that.

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1           Subsequent to that, the camp put him in a more severe  
2 disciplinary punishment, and he was placed in a cell which had  
3 nothing in it. The only thing he was allowed to have was a  
4 small, thin mattress; the same kind of thing that they would  
5 use as a prayer mat, very thin, no mattress of any kind. And  
6 he had just the clothes on him, no other clothes to change, no  
7 soap, no toothbrush, no towels, and no privacy. And it was  
8 essentially a solitary confinement-type punishment.

9           And this unfortunately was a replication of what he  
10 had experienced many years ago in the black sites and caused  
11 severe trauma to him and severe apprehension and severe fear.

12           He also complained that when he had gotten in  
13 trouble, that the rules about telling him what the grievance  
14 against him was were not followed. He was not given an  
15 opportunity to explain or tell what his side of the story was,  
16 and he was just announced with what had happened.

17           And during that period of time, there had been an  
18 escalation of comments made to him by various members of the  
19 guard force and the medical staff to the effect that your  
20 order didn't matter; that the SOPs didn't matter; that they  
21 were allowed to do what they wanted; that he was going to be  
22 put in a dry cell that had no water, and he may be put in a  
23 padded cell. And the effect on him of his being transferred,

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1 as I said, was profound. In the Senate Select Committee  
2 report, it even talks about the effect of -- solitary  
3 confinement had on Mr. Binalshibh.

4 During this period, as a protest for the -- his  
5 continued experience of the noises and vibrations, which he  
6 has complained about since the beginning of this case, and the  
7 denial of his legal bins and his legal rights, he went on a  
8 hunger strike. And he has said that there are certain of the  
9 guards that are particularly egregious about this in making  
10 statements to him. And he told them he was going to stay on a  
11 hunger strike until they stopped the noises and vibrations,  
12 until they abided by his rights to his legal bins and his  
13 legal mail, until they started to comply with the SOPs.

14 He has since that time visited with some members of  
15 our team, but he has not agreed to visit with me or the other  
16 lawyers on our team. And I came down early on Friday; he did  
17 not meet with me Saturday or yesterday. And he is in great  
18 distress, and he is very upset at his legal team, primarily  
19 me, because I have not been able to remedy the problem that he  
20 has had throughout these proceedings.

21 MJ [COL POHL]: He doesn't realize it's not your fault?

22 LDC [MR. HARRINGTON]: Pardon me?

23 MJ [COL POHL]: He does not realize that it's not your

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1 fault?

2 LDC [MR. HARRINGTON]: His perception, Judge, is that he  
3 has reached out to you, to me, to everybody to try and stop  
4 this, and nobody -- nobody has been able to remedy that for  
5 him. That's his position, and he -- it's founded in his own  
6 logic and in his own frustration, really.

7 MJ [COL POHL]: Okay.

8 LDC [MR. HARRINGTON]: And, Judge, the situation is so  
9 egregious and the disruption to his legal rights is so  
10 egregious that each of the members of my team have to consider  
11 what we should do about this and whether it requires us, in  
12 good conscience and under our ethical obligations, to consider  
13 making a motion -- motions on our own to withdraw.

14 And Mr. Binalshibh is seeking from the court another  
15 order to JTF to stop what has been going on. And it seems to  
16 me that based upon information that he's provided to our  
17 paralegals that we have to supplement the motion that we filed  
18 on Friday and basically ask the court for an evidentiary  
19 hearing and amend it to include another contempt proceeding  
20 against JTF for the violation of Mr. Binalshibh's rights.

21 MJ [COL POHL]: Mr. Harrington, on the issue about moving  
22 him to a new cell for alleged disciplinary infractions ----

23 LDC [MR. HARRINGTON]: Yes.

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1 MJ [COL POHL]: ---- is that what you want the evidentiary  
2 hearing on?

3 LDC [MR. HARRINGTON]: We want a hearing on everything  
4 that happened, Judge, and how that relates to your order.

5 MJ [COL POHL]: Okay.

6 LDC [MR. HARRINGTON]: It's not just the moving of the  
7 cell. It's ----

8 MJ [COL POHL]: You plan to -- okay. You're going to  
9 supplement this and ----

10 LDC [MR. HARRINGTON]: It's the blatant disregard of the  
11 provisions of your order.

12 MJ [COL POHL]: Okay.

13 LDC [MR. HARRINGTON]: And, Judge, a couple of months ago  
14 your order was taken down off the cell. It says in the order  
15 it's supposed to be up there. I had to contact Mr. Trivett to  
16 intervene to get it put back up there.

17 MJ [COL POHL]: Okay. Well, would that be, then, just  
18 a -- just for logistical purposes, let's put this in the 565  
19 series, because that's where this is starting from ----

20 LDC [MR. HARRINGTON]: Right.

21 MJ [COL POHL]: ---- as opposed to the 152, because I  
22 think we're getting too many letters after it.

23 So you intend to supplement the 565 pleading that you

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1 filed on Friday.

2 LDC [MR. HARRINGTON]: Yes.

3 MJ [COL POHL]: Okay. When do you think you will be able  
4 to do that?

5 LDC [MR. HARRINGTON]: We'll have it done this afternoon  
6 or tomorrow, Judge.

7 MJ [COL POHL]: Okay. Well, just submit that there, and  
8 then we'll figure out a briefing schedule for the government  
9 to respond, and we'll go from there. Okay?

10 LDC [MR. HARRINGTON]: Okay. And we are asking, Judge,  
11 right now for another order from the court, as you made  
12 before, asking them to ----

13 MJ [COL POHL]: Don't they have my current order?  
14 Mr. Trivett?

15 MTC [MR. TRIVETT]: They do, sir.

16 MJ [COL POHL]: Is it posted?

17 MTC [MR. TRIVETT]: It is, sir.

18 MJ [COL POHL]: Do you want a different order?

19 LDC [MR. HARRINGTON]: No. I want you to tell them to  
20 abide by the order, Judge.

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

22 ACC [MR. BINALSHIBH]: **[Speaking in English]** Judge, can  
23 you give me some minutes to tell you something small,

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1 important?

2 MJ [COL POHL]: Give it to Mr. Harrington?

3 ACC [MR. BINALSHIBH]: Yeah.

4 MJ [COL POHL]: Sure. Go ahead.

5 ACC [MR. BINALSHIBH]: **[Speaking in English]** Spoke with  
6 him just to address it to you right now. So just to cover  
7 some points that he addressed to you right now. It's going to  
8 be very quick.

9 MJ [COL POHL]: If it's very quick. And understand, I've  
10 said this before, all of you are represented by counsel; and  
11 that means they talk for you on legal matters.

12 So I'll listen to you quickly, but understand that  
13 you're not here -- they're representing you; your lawyers are.  
14 You're not here representing yourself. That being said, if  
15 it's very quick, go ahead.

16 ACC [MR. BINALSHIBH]: **[Speaking in English]** Okay. So  
17 without going to all of these details, maybe if you ask the  
18 government to bring the guard here, they are going to refuse.  
19 One person that told me back at the camp that they can do  
20 whatever they want to stop me protesting. When I asked him  
21 what about the SOP of the camps, he said that camp's ops has  
22 the power, and he can put another SOP or whatever there.

23 I said to him ----

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1 MJ [COL POHL]: Mr. Binalshibh ----

2 ACC [MR. BINALSHIBH]: What he said ----

3 MJ [COL POHL]: ---- no, no ----

4 ACC [MR. BINALSHIBH]: Just one minute.

5 MJ [COL POHL]: No, let me -- let me -- let me explain to  
6 you. Because I want to make sure you don't misunderstand the  
7 process here.

8 What you've kind of told me is what Mr. Harrington  
9 told me. What you're telling me is you want me to consider  
10 evidence on this issue. Okay. And I'm not asking you to be a  
11 lawyer and understand this, but there's a process that we must  
12 follow to take evidence.

13 If you want to present evidence, as you've done in  
14 this case already, you will be given an opportunity to do it  
15 in the normal course of business of how you choose to do it,  
16 whether you want to testify again or not. That's up to you.  
17 But you can't just sit there at the table and tell me facts  
18 you want me to consider because that's not how this process  
19 works.

20 I understand your concerns, but if you want to give  
21 me evidence on your concerns, it has to be done in accordance  
22 with the procedures; and that's not you there telling me about  
23 it because it doesn't work that way. I hope you understand,

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1 but that's the way we're going to do it.

2 ACC [MR. BINALSHIBH]: [Speaking in English] I'm  
3 understanding, fully understanding.

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

5 ACC [MR. BINALSHIBH]: Just one more thing, sir.

6 SJA is involving in these things, and he said -- I  
7 told him about the judge orders. He said, "Camp commander can  
8 decide whatever."

9 I said, "What about the judge orders? It is there."

10 He said, "The camp had the power, the SOP first."

11 I said, "Camp commander can dismiss the judge  
12 orders?"

13 He said, "He can do that."

14 I tell him, "He can put me back to black site?"

15 He said, "Yes, we can."

16 That SJA is in front of you there ----

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

18 ACC [MR. BINALSHIBH]: ---- standing there. He's the one.

19 MJ [COL POHL]: Mr. Binalshibh, I'm going to cut you off  
20 now.

21 ACC [MR. BINALSHIBH]: I'm done.

22 MJ [COL POHL]: Okay. You say you're done, but I want to  
23 make sure that you do understand, is that this is not the way

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1 it's going to work. You're not going to be able to sit there  
2 and tell me your facts. That's not how it works.

3 I hope you understand that, because this -- what  
4 you've told me, I understand what you're talking about. But  
5 if you want to present evidence, it's got to be in a proper  
6 manner; and the proper manner is not you sitting there telling  
7 me in open court what you think happened.

8 That brings us to 524. And I want to start with ----

9 LDC [MR. NEVIN]: If I could ----

10 MJ [COL POHL]: Mr. Nevin.

11 LDC [MR. NEVIN]: I beg your pardon. I want to ask the  
12 military commission to take -- I understand that you have said  
13 that you will take up the conflict issue later. I just wanted  
14 to ask you to please take it up now and resolve it. I -- we  
15 are laboring ----

16 MJ [COL POHL]: You're talking about on 525?

17 LDC [MR. NEVIN]: Yes, sir.

18 MJ [COL POHL]: Okay. I understand your position,  
19 Mr. Nevin.

20 LDC [MR. NEVIN]: I want to speak on 524 if you decide  
21 there's no conflict. You're about to take 524 up. It's the  
22 same position we have discussed before, that I either get up  
23 and speak, in which case you say you don't look conflicted to

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1 me, or I don't speak ----

2 MJ [COL POHL]: No, Mr. Nevin. Others may say that ----

3 LDC [MR. NEVIN]: Others may say that. Fair enough.

4 MJ [COL POHL]: ---- I don't say that.

5 LDC [MR. NEVIN]: Fair enough.

6 MJ [COL POHL]: What I am saying is I understand the

7 nature of your conflict.

8 LDC [MR. NEVIN]: I withdraw that comment.

9 MJ [COL POHL]: I understand the nature of what you

10 consider your conflict to be.

11 LDC [MR. NEVIN]: Yes.

12 MJ [COL POHL]: And quite frankly, I think you -- at this

13 point if you wanted to argue 424 -- 524 or any other issue,

14 that does not mean I don't still think you have this conflict

15 issue. I have in no way connected those two things.

16 LDC [MR. NEVIN]: I understand. Thank you.

17 MJ [COL POHL]: Mr. Connell, you were going to ----

18 LDC [MR. CONNELL]: I was just standing up to argue, sir.

19 MJ [COL POHL]: Well, I was going to have the government

20 go first, since it's their protective order.

21 LDC [MR. CONNELL]: That's fine, sir.

22 MJ [COL POHL]: Trial Counsel.

23 LDC [MS. BORMANN]: Judge, before we begin this, I just

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1 want to bring it to the court's attention that we intend to  
2 supplement 524 because we received materials on Friday that  
3 affect this argument, materials the government provided to us  
4 on Friday. Actually, one of them -- no, that one. Just all  
5 of the materials arrived on Friday.

6 MJ [COL POHL]: Are they classified, the materials?

7 TC [MR. GROHARING]: I would need to know a little  
8 more ----

9 LDC [MS. BORMANN]: No, not on 524. No, not on 524.

10 MJ [COL POHL]: I don't understand your point,  
11 Ms. Bormann. You say you want to supplement 524 for materials  
12 you received on Friday, but the materials received on Friday  
13 are not classified for 524?

14 LDC [MS. BORMANN]: I'm very confused. I believed that we  
15 were proceeding with argument on 524 right now. What I wanted  
16 to inform the court is on Friday, we received discovery  
17 materials that pertain to the protective order at issue here  
18 and how it's been construed and how it will continue to be  
19 construed.

20 We are in the process -- we've worked all weekend to  
21 draft a motion for leave to supplement. We've received the  
22 government's position. We've requested an AE number on it.  
23 And right now that -- I'm reviewing the actual substance of

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1 the motion right now.

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: So we're not ready to proceed because  
4 there's additional material you're not aware of yet.

5 MJ [COL POHL]: Well, I'm going to proceed with the  
6 material that I have. On this issue and a number of other  
7 issues, it's a continual moving target where things keep  
8 changing and nothing ever gets resolved because there's always  
9 new issues. So what I have today is what I'm going to  
10 address. If the supplement raises other issues that require  
11 further oral argument, so be it.

12 Mr. Groharing.

13 In other words, I understand that you have a  
14 supplement coming, Ms. Bormann. Okay.

15 Mr. Groharing.

16 TC [MR. GROHARING]: Thank you, sir.

17 The government is seeking a protective order, and  
18 that's 524S, from the military judge. That protective order  
19 will allow the defense to conduct reasonable investigation  
20 without unnecessarily risking the lives of CIA personnel and  
21 causing harm to the national security of the United States.  
22 That order will bring defense efforts in line with prior  
23 need-to-know determinations made by the original

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1 classification authority as well as orders issued by the  
2 military judge to protect classified information in this case.

3           As we noted before, there are very serious, important  
4 issues and equities related to this protective order that the  
5 United States is trying to protect. We don't invoke these  
6 protections that we're asking for lightly, but we do so  
7 unapologetically. We do so using the authority of the  
8 classified -- of the Military Commissions Act, an act passed  
9 by Congress to enable the United States to do just these -- to  
10 take these types of steps and to require judges to provide  
11 orders that protect classified information.

12           Those procedures were patterned after the Classified  
13 Information Procedures Act. That act has been implemented for  
14 decades in federal district courts across the United States to  
15 protect the same types of information that we're seeking to  
16 protect in this case.

17           So we've provided information to you ex parte  
18 regarding the serious risk to both CIA personnel as well as  
19 risks associated with disclosing certain information that's at  
20 issue in the filing. And obviously I won't repeat that here  
21 in open session, but it is important to stress the  
22 significance of the information that's at issue.

23           One of -- you know, in certain of the defense

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1 responses, they rely on the fact that they possess security  
2 clearances and that there could be consequences if they  
3 disclose classified information. Again, as we've said  
4 repeatedly, the government has no interest in prosecuting  
5 defense counsel or any negative consequences to come to them.

6           And while the defense may be accurate that there  
7 could be consequences depending on the nature of their  
8 actions, knowing that a defense attorney ultimately lost their  
9 security clearance -- and most of these counsel only have a  
10 security clearance for the purpose of this case. And knowing  
11 that one of them lost a defense -- a clearance for some action  
12 will provide very little solace to a widow who lost her  
13 husband because of reckless actions taken to identify CIA  
14 officers. That's what's at stake in this motion, and that's  
15 why we are asking for this relief.

16           Likewise, administrative action would not undo damage  
17 to the national security of the United States caused by  
18 releasing certain information unrelated to this litigation,  
19 but that would be very damaging to our efforts overseas, our  
20 efforts with our foreign partners to fight and to protect our  
21 country. That loss of international cooperation would be  
22 devastating to CIA efforts to protect the United States.

23           So even assuming that the defense are acting in good

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1 faith and attempting to minimize disclosure of classified  
2 information, their actions will undoubtedly result in people  
3 learning the identities of CIA officers -- in some cases  
4 covert officers -- and learning the connection of officers  
5 with the CIA RDI program, which is a classified fact.

6 And considering the potential for damage, it's not an  
7 unreasonable risk to propose the alternatives to seek this  
8 information that the United States has proposed in the  
9 protective order.

10 MJ [COL POHL]: Mr. Groharing, let me ask you just a  
11 baseline question; kind of refers to what somebody said  
12 earlier.

13 Is this the government's final-final word on  
14 the approach they want the defense to take for what I'm  
15 calling "the people issue"?

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

17 MJ [COL POHL]: I mean, there's been different iterations  
18 of this. That's all. I'm not saying they're inconsistent.  
19 I'm just saying we had the September and we had one that said  
20 in ----

21 TC [MR. GROHARING]: This is the proposed protocol. What  
22 I'll say is we also will field and continue to field defense  
23 discovery requests for certain information and will work with

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1 the defense if examples or issues they raise, you know, aren't  
2 adequately covered by the protective order.

3 I don't think you can write an order that covers  
4 every possible scenario that the defense could bring and  
5 things that they might want to do. We are amenable to  
6 considering those requests.

7 And so there certainly could be circumstances where  
8 the government can give the defense additional relief outside  
9 of the protocol that's proposed by the government, and that  
10 would just depend on the facts presented.

11 But we believe the protocol adequately addresses  
12 where we are now in the litigation; gives them a vehicle to  
13 request interviews of certain CIA personnel and does so in a  
14 way that is consistent with ensuring a fair trial in this  
15 case.

16 MJ [COL POHL]: Okay. I want to kind of break this up a  
17 little bit. And there's more than two issues here, but the  
18 two I'm going to focus on right now is the difference between  
19 contact and information.

20 If the defense contacts a covert officer, it's your  
21 position that that, in essence, is a disclosure of classified  
22 information?

23 TC [MR. GROHARING]: It certainly could be, depending on

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1 the nature and manner of how the contact is made.

2 MJ [COL POHL]: But if they contact an overt officer, and  
3 then you've got -- I'm going to talk about your list of eight.  
4 Let's just start with them.

5 How is contacting any other overt officer not on your  
6 list of eight somehow damaging to national security?

7 TC [MR. GROHARING]: And the only restriction on  
8 contacting overt officers contained within the protocol would  
9 be overt officers connected to the RDI program. So there's  
10 officially acknowledged officers connected to the RDI  
11 program ----

12 MJ [COL POHL]: If an overt officer's connection to the  
13 RDI program is overt ----

14 TC [MR. GROHARING]: Well, that's a different question,  
15 Judge. That's the list of people you're talking about, the  
16 eight-plus -- we've now supplemented that list with additional  
17 personnel -- that their connection to the RDI program is  
18 considered overt. So they're overt RDI officers. The defense  
19 can contact them without concern of disclosing -- without that  
20 contact disclosing classified information.

21 MJ [COL POHL]: So basically anybody not on that list  
22 could be a overt CIA officer/employee. And I'm using the term  
23 broadly. That includes contractors, ex-employees, everything

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1 else, but a CIA individual. If they contact anybody not on  
2 that list, that person could be -- even though his or her  
3 employment with the CIA is overt, his or her involvement with  
4 the RDI program is not overt ----

5 TC [MR. GROHARING]: It is not, sir.

6 MJ [COL POHL]: ---- and, therefore, you would put them  
7 kind of in the covert status.

8 TC [MR. GROHARING]: Well, I don't want to use a term  
9 improperly.

10 MJ [COL POHL]: Okay. Okay. Okay. So let's go down this  
11 road, then. In looking at your order is they find somebody  
12 who's not on your list of eight or -- I mean, I know you've  
13 supplemented it, but I'm just going to call it the "list of  
14 eight" now, understanding that subsumes any supplementing  
15 you've done. It's just easier nomenclature -- and then they  
16 contact this person.

17 And if I'm reading your protocol correctly --  
18 rephrase that. They don't contact this person. They contact  
19 the government, and they give the government -- tell me -- and  
20 this is where -- when Ms. Bormann, we were talking about how  
21 it is actually implemented is -- that's kind of what I'm  
22 getting to.

23 The way I'm reading -- and I'm now on page -- page 10

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1 of the filing -- is that -- I'm sorry, I'm on page 11. Except  
2 for the gang -- the list of eight, except for those people, if  
3 a defense wants to -- and I'm going to ask you whether this  
4 applies to them -- contact anybody else who they believe has  
5 relevant information, they submit a request to the government.

6 TC [MR. GROHARING]: Relevant information about the RDI --  
7 CIA RDI program.

8 MJ [COL POHL]: Okay. What if they want to talk to a CIA  
9 person about a non-RDI issue?

10 TC [MR. GROHARING]: Then their contact with that overt  
11 CIA employee would not reveal classified information. They  
12 could reach out and contact an overt CIA employee and say, "I  
13 want talk to you about the hostilities," as Mr. Connell  
14 addresses that in the Ali filing. They could contact that  
15 employee and request an interview to speak with them.

16 In most cases -- and I think Mr. Connell alluded to  
17 this -- that employee will probably tell them, "I need to talk  
18 to" ----

19 MJ [COL POHL]: Yeah. Okay.

20 TC [MR. GROHARING]: ---- "my OCA."

21 MJ [COL POHL]: Just so I'm clear, the scope of this  
22 protective order is only CIA people -- and again, I'm using  
23 that term broadly -- connected to the RDI program. Any other

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1 agency personnel not connected to the RDI program or any  
2 nonagency personnel connected to the RDI program don't fall  
3 within this protective order.

4 TC [MR. GROHARING]: Other than a covert employee. All  
5 covert -- if the defense has -- knows or has reason to believe  
6 someone is a covert CIA employee ----

7 MJ [COL POHL]: Regardless of the subject matter they want  
8 to talk about.

9 TC [MR. GROHARING]: Regardless of the subject matter,  
10 because they should ----

11 MJ [COL POHL]: I got you. Because the contact ----

12 TC [MR. GROHARING]: Just the mere contact with the person  
13 risks disclosing their connection with the CIA.

14 MJ [COL POHL]: So let's go back to the RDI CIA people,  
15 okay, and they find somebody they want to talk to. Now, I  
16 want to make sure I understand your proposed protocol. They  
17 go to this -- they don't go to the person. They go to the  
18 government, and they say, "We want to talk to Joe, and here's  
19 our list of questions we want to ask Joe."

20 TC [MR. GROHARING]: They wouldn't need to provide a list  
21 of questions.

22 MJ [COL POHL]: Well, it's a list of subject areas.

23 TC [MR. GROHARING]: We want to talk to Joe about --

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1 topically, what they want to talk to him.

2 MJ [COL POHL]: Okay. So they go topically, and then they  
3 go -- and then you take that, and you have names for all of  
4 this stuff, the request letter. And looking at your  
5 procedures here, although it doesn't explicitly say that, it  
6 seems to me it's certainly inferred by the prior language that  
7 that request letter would go for OCA review.

8 TC [MR. GROHARING]: Yes.

9 MJ [COL POHL]: Okay. Again, it's not specifically on the  
10 procedures, but -- okay. Then after the OCA gets done with  
11 it -- and assuming there's subject matter that they can talk  
12 about, and they may delete some and add other ones -- that  
13 then goes back to an agency employee, member of the FBI,  
14 member of DoD, and then they go talk to the individual to see  
15 if they want to discuss these issues with defense counsel.  
16 Correct?

17 TC [MR. GROHARING]: Correct.

18 MJ [COL POHL]: Then if the person says yes, then the  
19 defense counsel can come in and talk to them and the  
20 classified information would be in the appropriate area. And  
21 at that meeting, who's there?

22 TC [MR. GROHARING]: The defense and the individual and  
23 whoever -- you know, no one else, unless the individual asked

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1 to have someone else present.

2 MJ [COL POHL]: Okay. Okay. And then that's the way it  
3 works. And defense asks its questions, and then now we're  
4 done.

5 TC [MR. GROHARING]: Okay.

6 MJ [COL POHL]: All right. Now, we're now going to step  
7 two, when the OCA is reviewing the request letter. And that's  
8 when you determine -- that's a need-to-know determination?

9 TC [MR. GROHARING]: Correct.

10 MJ [COL POHL]: Okay. Now, the defense says, "I need to  
11 know X, Y, and Z," and the OCA says, "X is okay, but Y and Z  
12 are off limits, okay, because we don't think you have a need  
13 to know."

14 TC [MR. GROHARING]: Okay.

15 MJ [COL POHL]: Now, this is going to be a two-part  
16 question. Part one: Is that need-to-know determination by  
17 the OCA predicated on what discovery they've already been  
18 given?

19 TC [MR. GROHARING]: Very likely, with the caveat it  
20 depends on what the question is.

21 MJ [COL POHL]: Yeah.

22 TC [MR. GROHARING]: Assuming ----

23 MJ [COL POHL]: My concern on that issue is this -- and

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1 I'm going to get to something later on in these procedures --  
2 is that I have heard -- and I may have taken it out of  
3 context, and if I did, so be it -- that one reason they don't  
4 need this type of interviews is because they've been given  
5 everything already.

6 TC [MR. GROHARING]: Well ----

7 MJ [COL POHL]: And they know all about this stuff, so  
8 they don't have -- they don't need this additional  
9 information.

10 So I don't want to get into a do-loop of we go  
11 through this and it gets to the OCA, says, "We've already  
12 given you this," and, therefore, I'm not going to give it to  
13 you in this format.

14 TC [MR. GROHARING]: So let's take a concrete example.  
15 Mr. Nevin wants to talk to somebody about enhanced  
16 interrogation techniques as applied to Mr. Mohammad. We have  
17 provided scores of information about that subject matter to  
18 the defense. That would not stop -- that would not cause the  
19 OCA to make a determination that that discussion with the  
20 person would be cumulative, and it would be -- they don't have  
21 a need to know. So that subject matter would be just fine  
22 for ----

23 MJ [COL POHL]: Let's get down to the real issue here,

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1 which I think it is, and defense may disagree. They have been  
2 given -- and I know what they have been given because I saw  
3 what they have been given. But it seems to me what they want  
4 to know is, you know, the granularity of how certain things  
5 were done to their clients by people who did them or observed  
6 them being done. Correct?

7 TC [MR. GROHARING]: Okay.

8 MJ [COL POHL]: Okay. And that's not going to -- we're  
9 not going to run into the situation where the OCA says, "You  
10 already have enough. You're not going to get anymore."

11 TC [MR. GROHARING]: No. That interview -- seeking that  
12 information in an interview with a willing participant, that  
13 would be a topic that would be fair game for an interview.

14 What would not be, and I think will make the example  
15 better, defense comes in and says, "All right. I want to know  
16 where the locations were and where they were held."

17 There, the OCA has made specific determinations that  
18 you validated in your rulings saying, "No, the defense does  
19 not need to know the locations of where the accused were  
20 held." So in that case ----

21 MJ [COL POHL]: What if they want background information  
22 on the people who did the activity?

23 TC [MR. GROHARING]: So background information on

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1 personnel who participated in the CIA RDI program?

2 MJ [COL POHL]: What I'm saying is that witnesses testify.  
3 And a lot of times they're impeached by background  
4 information.

5 TC [MR. GROHARING]: Right.

6 MJ [COL POHL]: They've already been given, for example,  
7 some employee records. Right?

8 TC [MR. GROHARING]: Right.

9 MJ [COL POHL]: Okay. So ----

10 TC [MR. GROHARING]: Well, first and foremost, none of  
11 these people are witnesses for the government. So the idea  
12 that the defense needs to be armed to impeach a government  
13 witness simply is not going to be a fact presented in the  
14 commission.

15 MJ [COL POHL]: Okay.

16 TC [MR. GROHARING]: So they wouldn't need to go and  
17 investigate a witness and have the ability to investigate like  
18 in the normal sense of a government witness going to testify  
19 and conducting that kind of ----

20 MJ [COL POHL]: Okay. And I know you can't speak for the  
21 OCA, so the -- kind of the background info wouldn't  
22 necessarily be ----

23 TC [MR. GROHARING]: It shouldn't be. And if the defense

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1 believes that background information is relevant with respect  
2 to a certain witness, a government witness, that information  
3 should be a discovery request sent through the prosecution,  
4 particularly when we're talking about -- not a government  
5 witness in the sense that we're calling a person to offer  
6 affirmative evidence, an individual that was involved somehow  
7 in the CIA RDI program. That -- whatever information is  
8 provided would need to be coordinated with an OCA.

9 MJ [COL POHL]: Okay.

10 TC [MR. GROHARING]: Obviously, you know, these are CIA  
11 employees, sometimes covert CIA employees. Providing  
12 background information to defense counsel would normally not  
13 be appropriate. But maybe there's a case that the defense can  
14 make where they can articulate why they would need that  
15 information. But absent something like that, that would not  
16 be ----

17 MJ [COL POHL]: So let's say we're jumping through these  
18 various hoops here, and the OCA says, "You don't have a need  
19 to know X," okay, and in your order, the way I read it, is the  
20 defense can then come to me -- or the commission -- to review  
21 that. Is that right?

22 TC [MR. GROHARING]: Yes.

23 MJ [COL POHL]: Okay. Now -- and we can play -- we can

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1 say, "Well, I'm not making a need-to-know determination; I'm  
2 making a material-to-the-preparation-of-the-defense  
3 determination." But wouldn't I be second-guessing the OCA's  
4 need-to-know decision? And do I have the authority to do  
5 that?

6 TC [MR. GROHARING]: No. But you do have ----

7 MJ [COL POHL]: That's a two-part question.

8 TC [MR. GROHARING]: Okay.

9 MJ [COL POHL]: Would I be second-guessing the OCA's  
10 need-to-know decision under the procedure that you laid out in  
11 your protective order?

12 TC [MR. GROHARING]: Well, I think the way to look at it  
13 is this is a defense request for certain discovery, discovery  
14 of government information. And that request and a motion to  
15 compel that information would make its way to this commission,  
16 assuming the government denied it.

17 So if you have a situation where the OCA said the  
18 defense does not have a need to know this information, if that  
19 information is material to the preparation of the defense,  
20 then the government in that situation, as we've, you know,  
21 come to the court numerous times, has proposed some substitute  
22 to the actual information at issue.

23 So defense brings that to the court. You say, "Hey,

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1 government, the defense needs to have this information." You  
2 believe it's noncumulative, relevant, and helpful, and you  
3 need to give them something to put them in the same position  
4 as if they had the original classified information at issue.  
5 That then puts us in the position of having to come up with a  
6 substitute.

7           So that process could unfold, depending on how the  
8 interview goes, what the scope is, what the subject matter is  
9 that the defense is trying to seek. I think realistically,  
10 these -- any of these disputes would be resolved before they  
11 got to the military judge. By and large, the defense is  
12 looking for -- and maybe I'm just being hopeful, Judge,  
13 but ----

14       MJ [COL POHL]: Well, we can -- we can always be hopeful.  
15 Go ahead.

16       TC [MR. GROHARING]: By and large, the defense is seeking  
17 for information about how their clients were treated in CIA  
18 detention. That's the vast majority of what they're seeking  
19 with these requests.

20           And the government doesn't have an objection to the  
21 defense asking questions of willing witnesses regarding how  
22 the accused were treated in CIA detention; and we have said  
23 that repeatedly, that that's not an issue that we intend to

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1 contest. This protective order is not to protect  
2 dissemination of that type of information.

3 The conditions of detention have been declassified  
4 with respect to the accused in this case, and so this  
5 protective order isn't necessary to protect that information.  
6 The defense -- it facilitates the defense's requests to talk  
7 to people to learn additional information in that regard, but  
8 it protects other classified information that's at issue.

9 MJ [COL POHL]: Okay. In your page 10 of your protective  
10 order -- and maybe it's addressed in the protocol -- 10.a. is  
11 the paragraph -- it says, "The scope of the interview will be  
12 determined by the individual in consultation with the OCA,  
13 consistent with the prior need-to-know determination made by  
14 the OCA."

15 TC [MR. GROHARING]: Right.

16 MJ [COL POHL]: Now, just so I'm clear, is the way the  
17 protocol is set up is that the individual doesn't notify the  
18 OCA that they're going to be -- they're a potential target of  
19 an interview?

20 TC [MR. GROHARING]: Right.

21 MJ [COL POHL]: Subject of an interview. I don't want to  
22 use the term "target."

23 The CIA and the FBI would eventually notify them that

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1 they're a subject of an interview; and therefore, when they  
2 say this determination about the need to know, that's already  
3 been made before the person's been contacted by anybody?

4 TC [MR. GROHARING]: Well, and the other piece of that is  
5 what the individual's willing to talk about. Right?

6 MJ [COL POHL]: Yeah.

7 TC [MR. GROHARING]: So the OCA can set parameters based  
8 on need to know ----

9 MJ [COL POHL]: Yeah. But as it's worded, it was unclear  
10 to me as to how the person was contacted initially. But when  
11 I looked at the other part of it is, that before they're  
12 contacted, all of this stuff has already been determined by  
13 the OCA of need to know and the left and right boundaries ----

14 TC [MR. GROHARING]: Yeah.

15 MJ [COL POHL]: ---- of what they can talk about.

16 TC [MR. GROHARING]: That's correct. And the individual  
17 could constrain that further assuming that -- they may be  
18 willing to talk about certain things but not other things, for  
19 example.

20 OCA says anything in the 10 paragraphs, 397F, that's  
21 fair game. Defense can ask it. You can talk freely about  
22 this within these constraints. You know, you can't disclose  
23 certain classified information that they don't have a need to

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1 know.

2 MJ [COL POHL]: Now, how will -- you said the people that  
3 were at the interview themselves would only be the defense  
4 counsel, the interviewee, and anybody the interviewee may want  
5 to have as an assistant or just to assist them. Okay. Well,  
6 then how does the CIA or -- protect its equities that they  
7 don't extend the left and right bounds unless they sit in on  
8 the conversation, too?

9 TC [MR. GROHARING]: They assume that everyone is acting  
10 in good faith, consistent with the guidance that they're  
11 provided.

12 MJ [COL POHL]: Okay.

13 TC [MR. GROHARING]: It's just like any other effort. You  
14 would assume that individuals are following the guidance. So  
15 no, there's no interest from the CIA injecting themselves into  
16 these interviews or anything like that. That would only be  
17 the case if you had an individual -- and that certainly could  
18 be the case, where an individual says, "I'll be interviewed,  
19 but I'd like to have somebody there to make sure I'm not  
20 saying things that are inconsistent with need-to-know or  
21 something like that." But absent that, no, the CIA will have  
22 no role in the actual interview.

23 MJ [COL POHL]: And on the overt people, I mean, the

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1 defense has already gotten guidance on certain subjects,  
2 right? I mean, there's two -- there's more than two, but  
3 there's two that, off the top of my head, are very clear about  
4 actual locations, actual names of covert individuals in the  
5 CIA. Okay. Okay.

6 TC [MR. GROHARING]: Right.

7 MJ [COL POHL]: That's in the -- what I'm saying, that's  
8 in the ----

9 TC [MR. GROHARING]: That's contained within AE 13BBBB.

10 MJ [COL POHL]: ---- it's in a public pleading.

11 TC [MR. GROHARING]: Correct.

12 MJ [COL POHL]: So it's not like anybody is talking out of  
13 school here.

14 So -- but I want to come back to the overt people  
15 now. If they contact the overt people, they've got to go  
16 through this. Quite frankly, what you're doing is putting a  
17 Touhy requirement on this that you agreed Touhy doesn't apply  
18 to. Or you would agree with that?

19 TC [MR. GROHARING]: Well ----

20 MJ [COL POHL]: I mean, we went through this Touhy drill  
21 earlier, and then we determined it didn't apply. But this  
22 certainly looks like a variation of the Touhy requirements.

23 TC [MR. GROHARING]: And I think what the government has

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1 said is the CIA Touhy regulation doesn't speak to -- doesn't  
2 consider a request for -- to interview a witness as a demand.  
3 The demand language in the CIA Touhy regulation ----

4 MJ [COL POHL]: Uh-huh.

5 TC [MR. GROHARING]: ---- is a demand for testimony in a  
6 court proceeding. I think that's what -- the comments that  
7 were made by the government. The principles of Touhy  
8 certainly apply. And regardless, we're talking about the  
9 CIA -- the CIA's ability to protect classified information.

10 So obviously the CIA has the authority to require its  
11 employees, former employees, contractors to respect  
12 nondisclosure agreements that they have with the United States  
13 and the ability to implement procedures when people ask them  
14 questions that allow the CIA to protect classified  
15 information.

16 MJ [COL POHL]: Okay. The primary purpose, as I glean  
17 it -- and correct me if I'm wrong here -- of protecting the  
18 identities is really the personal safety of them. There's  
19 also an institutional component to that, too, but there's --  
20 one of the big purposes is to protect them, and your opening  
21 remarks was that.

22 TC [MR. GROHARING]: Absolutely.

23 MJ [COL POHL]: Okay. If people choose not to avail

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1 themselves of that protection, then why should I give it back  
2 to them?

3 TC [MR. GROHARING]: Well ----

4 MJ [COL POHL]: What I'm saying is, we have this list of  
5 eight, but we have a whole bunch of other people who have  
6 talked about their CIA experiences. I've -- they may have  
7 even put them on social media.

8 TC [MR. GROHARING]: One, I ----

9 MJ [COL POHL]: Now, we still treat them as they are  
10 covert and require all of these protections?

11 TC [MR. GROHARING]: I think many of the people to whom  
12 you are referring are people who have written books and the  
13 like. And I think many of those people are included on the  
14 subsequent list we have provided the defense.

15 So I don't think it's the case that there are large  
16 numbers of people who are publicly outing themselves as being  
17 associated with the CIA RDI program other than the individuals  
18 who have written a book. And that's something that -- they  
19 would have gone through a process, a pre-publication review  
20 process with the CIA, such that their public comments about  
21 their association is -- are permissible.

22 So if -- assume for argument's sake you have that  
23 scenario, or the defense thinks that's the case, they should

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1 come -- you know, we have in the guidance that we gave them,  
2 as far as the additional people that are officially recognized  
3 as being associated with the RDI program, we've advised the  
4 defense that if they believe there are additional people that  
5 should be included in that category, to let us know, and we'll  
6 take that ----

7 MJ [COL POHL]: But even people in those categories, if  
8 I'm reading this correctly -- and if I'm not, certainly let me  
9 know -- is -- let's just pick Jose Rodriguez. They want to  
10 talk to Jose Rodriguez. They still have to give the  
11 government ----

12 TC [MR. GROHARING]: No. He is on the list.

13 MJ [COL POHL]: So they can go straight to him?

14 TC [MR. GROHARING]: Go straight to him. I think he would  
15 tell them, "I need to talk to my original classification  
16 authority," assuming he would be inclined to be interviewed.  
17 But that would not -- the protective order would not require  
18 the defense to come to us if they want to speak to Jose  
19 Rodriguez.

20 MJ [COL POHL]: Well, okay. I hear what you just said,  
21 and this is where -- it's the point I was making earlier, but  
22 now I remember why I wanted to make this point. In  
23 paragraph 10.a., it says, "Defense Personnel MAY Independently

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1 Contact Officially Acknowledged RDI officers and Overt Non-RDI  
2 Officers." That's the category that you're talking about,  
3 right?

4 TC [MR. GROHARING]: Yes.

5 MJ [COL POHL]: "To the extent that any of these  
6 individuals agree to be interviewed, the scope of the  
7 interview will be determined by the individual in consultation  
8 with the OCA, consistent with the prior need-to-know  
9 determinations by the OCA."

10 TC [MR. GROHARING]: That's assuming that individual  
11 follows the procedures that they should follow.

12 MJ [COL POHL]: What I'm saying, who contacts the OCA?

13 TC [MR. GROHARING]: That individual. Assuming -- you  
14 know, assuming the defense goes to Jose Rodriguez, who I'm  
15 assuming would want to know any limits on his dissemination of  
16 any classified information ----

17 MJ [COL POHL]: To just to make sure I'm reading this  
18 correctly, the officially acknowledged overt people ----

19 TC [MR. GROHARING]: Right.

20 MJ [COL POHL]: Okay. The defense doesn't -- hasn't got  
21 to go to the government at all.

22 TC [MR. GROHARING]: Correct.

23 MJ [COL POHL]: Okay.

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1 TC [MR. GROHARING]: I think in reality what will happen  
2 is that person will go to the OCA, and the OCA will provide  
3 guidance regarding the scope of that interview.

4 MJ [COL POHL]: I'm assuming all of these people signed  
5 NDAs even when they left service. So if they may -- they may  
6 or may not. But I'm just saying is that's that individual's  
7 choice to get that from the OCA, not either the defense  
8 counsel or anybody else's ----

9 TC [MR. GROHARING]: Exactly.

10 MJ [COL POHL]: ---- confirmed responsibility. So for  
11 that category of overt people, there's no need to go through  
12 the government at all.

13 TC [MR. GROHARING]: Correct.

14 MJ [COL POHL]: Okay.

15 TC [MR. GROHARING]: Now, if -- there's no requirement in  
16 the protective order. What I would say is if the defense is  
17 seeking to interview someone about matters that are beyond,  
18 you know, what would be a reasonable interpretation of prior  
19 need-to-know decisions, they should come to us, and maybe we  
20 can work something out more efficiently than reaching out to  
21 someone and letting that process unfold. We can attempt to  
22 resolve that issue directly with the OCA and, you know, get a  
23 determination whether that subject matter is acceptable or

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1 not.

2 So the protective order doesn't require it. They're  
3 not -- the mere contact of an overt employee is not disclosing  
4 classified information; that's a big part of what we're trying  
5 to protect here. But I would still highly encourage the  
6 defense to come through us to facilitate that interview.

7 MJ [COL POHL]: This puts it in the evidentiary context --  
8 and again, I'm not speaking for anybody else but my own  
9 surmising of the status of the case -- is one of the things  
10 that appears to be of interest here is the greater specificity  
11 of exactly how they were treated as it impacts on their  
12 statements, as that would impact on clean team statements.

13 And again, I don't want to speak for the defense or  
14 whether or not -- but how many of the accused made clean team  
15 statements?

16 TC [MR. GROHARING]: All five.

17 MJ [COL POHL]: Okay. And the government intends to  
18 introduce -- or attempt to introduce all five of those?

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

20 MJ [COL POHL]: Okay. But the government, of course,  
21 they're precluded by statute, so I'll just double-tap it --  
22 not going to use any statements taken from the EITs.

23 TC [MR. GROHARING]: We do not intend to. I don't know

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1 that that's precluded by statute necessarily. That would be a  
2 legal determination you would have to make. No, we don't  
3 intend to offer -- categorically, we don't intend to offer any  
4 statements made prior to ----

5 MJ [COL POHL]: You are correct. I may get a little --  
6 paraphrase that. But I thought your position was whether it's  
7 precluded by statute or not. You do not intend to offer, in  
8 your case-in-chief, rebuttal, or sentencing, any statements  
9 taken ----

10 TC [MR. GROHARING]: That's correct.

11 MJ [COL POHL]: ---- in the context of the RDI program.

12 TC [MR. GROHARING]: That's correct.

13 MJ [COL POHL]: Then how many of the accused made CSRT  
14 statements?

15 TC [MR. GROHARING]: All five of the accused made CSRT  
16 statements. We do not intend to offer all five of ----

17 CP [BG MARTINS]: Not all of them.

18 TC [MR. GROHARING]: I stand corrected, Your Honor. Four  
19 of the five accused made statements at CSRT. We intend to  
20 offer statements of two of the five.

21 MJ [COL POHL]: Okay. Of course, that's -- neither of  
22 these two issues are before me in the statements. I just want  
23 to know the context of where this is all going. Okay.

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1           That's all the questions I have. Do you have  
2 anything further?

3           TC [MR. GROHARING]: A couple of points, Your Honor. And  
4 I think we talked a little bit about this, and I just wanted  
5 to reiterate, these aren't witnesses in the context of the  
6 charges in this case that we're talking about. These are  
7 individuals that had some association with the accused during  
8 their detention by the CIA; at the earliest, a year after the  
9 charges in this case.

10           So, you know, if the defense wants to talk to  
11 witnesses, there's no reason to -- this protocol doesn't  
12 impact them. And when I say "witnesses," I mean, you know,  
13 witnesses who were in New York on September 11th, 2001.  
14 There's no restriction for the defense to ask them about, you  
15 know, witnessing 2,700 murders that day. There's no  
16 restriction from asking questions of witnesses who talked to  
17 loved ones onboard of Flight 93.

18           The defense isn't restricted if they want to talk to  
19 them about what they witnessed that's related to these  
20 charges. And, likewise, there's no restriction to talk  
21 about -- or talk to witnesses who were at the Pentagon when  
22 Flight 77 was intentionally crashed into the building.

23           So we have no objection to the defense attempting to

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1 contact the actual witnesses we intend to call in the case.  
2 We will provide the defense a witness list with contact  
3 information consistent with a trial scheduling order that we  
4 hope that this commission will issue in the near term and  
5 we've asked for.

6 The -- with respect to defense arguments they need to  
7 conduct background investigations, I think I've already  
8 addressed that. They're unnecessary with respect to these  
9 people; they're not witnesses for the government.

10 Several of the defense briefs reference the Gregory  
11 case as far as government efforts to inject themselves or  
12 prevent the defense from interviewing witnesses. Again, those  
13 witnesses in Gregory were fact witnesses to the actual  
14 offenses that were charged, to the actual charged misconduct.  
15 This is an entirely different scenario than that.

16 The defense has no reason whatsoever to know the  
17 actual identities of these individuals. At the very most, the  
18 defense needs to know certain information that these  
19 individuals may possess. And the government has disputed the  
20 potential value of that information. But having said that,  
21 doesn't -- is allowing the defense to follow a procedure that  
22 still seeks additional information in that regard.

23 What we're asking for is a protocol that will bring

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1 defense investigative efforts in line with OCA determinations  
2 and your rulings. And on over two dozen occasions, we've come  
3 to the court using the procedures that are authorized by  
4 statute specifically contemplating prosecution of this case,  
5 specifically contemplating prosecution of these equities.  
6 We've used those procedures and got relief from the court,  
7 provided the defense summaries that put them in substantially  
8 similar position as if providing the original classification,  
9 the original classified information.

10 MJ [COL POHL]: Of course, we're talking about here  
11 information that's not contained in the summaries.

12 TC [MR. GROHARING]: Not necessarily.

13 MJ [COL POHL]: Well, then they ----

14 TC [MR. GROHARING]: Perhaps.

15 MJ [COL POHL]: ---- already have it.

16 TC [MR. GROHARING]: Well, information that you've  
17 determined doesn't need to be contained in the summaries in  
18 most cases.

19 MJ [COL POHL]: No, I understand that.

20 TC [MR. GROHARING]: So ----

21 MJ [COL POHL]: But what I'm saying is what they have in  
22 the summaries is they want to have something that's not in the  
23 summaries, obviously.

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1 TC [MR. GROHARING]: Right. But if permitted -- if this  
2 process was permitted, it essentially allows them to do an  
3 end-around the discovery process that we've followed in this  
4 court, and it would fail to respect the decisions that you've  
5 made.

6 MJ [COL POHL]: Well, I think there's a misconception,  
7 and -- just while we're on this topic, that somehow what's  
8 taken out of the summaries is going to be in the original  
9 document, and therefore -- I heard this last time about, "If I  
10 had the original document, I could see all of this other  
11 stuff." And I think that is a misconception.

12 Let me ask you one other question. Has this similar  
13 kind of order ever been issued in a federal trial?

14 TC [MR. GROHARING]: Well ----

15 MJ [COL POHL]: Well, did you take this from another  
16 court, Ghailani, Moussaoui ----

17 TC [MR. GROHARING]: No.

18 MJ [COL POHL]: ---- or am I a court of first impression  
19 on this particular protocol?

20 TC [MR. GROHARING]: Well, certainly in cases where CIA  
21 equities are at issue, processes need to be put in place to  
22 allow defense access to witnesses without disclosing  
23 classified information, so this is consistent with practices

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1 that have been followed.

2 Normally, you have defense counsel -- I mean, it  
3 would depend on the facts of the case, but defense counsel who  
4 are willing to work with the government to seek access to a  
5 potential witness. And the only way to do that and to figure  
6 out the information is to go through the government.

7 MJ [COL POHL]: No. I ----

8 TC [MR. GROHARING]: That's the normal process.

9 MJ [COL POHL]: My question was -- really was: Is there a  
10 similar order in a federal trial? You told me there's --  
11 similar issues have come up, but this order was not modeled  
12 after something in another trial?

13 TC [MR. GROHARING]: I think a case that's -- I think is  
14 helpful to look at is Moussaoui.

15 So in Moussaoui, the defendant, Moussaoui, sought  
16 access to three individuals that at that point were held in  
17 the CIA RDI program, very relevant to this case. Moussaoui  
18 wanted to depose those individuals because he believed they  
19 would provide exculpatory information with respect to his  
20 conduct and him not being involved in the September 11th  
21 attacks. Okay.

22 So the government opposed any contact with the  
23 individuals in question. The government attempted to provide

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1 summaries of that. And originally Judge Brinkema rejected the  
2 government's offer and ordered the government to depose these  
3 individuals while in CIA detention.

4 And so the government declined to arrange the  
5 deposition. Judge Brinkema then struck the death notice and  
6 said to the government you're not allowed to seek the death  
7 penalty. The Fourth Circuit looked at that and said, no,  
8 judges are required to find creative solutions in cases  
9 dealing with highly sensitive, classified information. And  
10 there are permissible ways for Moussaoui to get access to this  
11 information without having the direct contact with the, at  
12 that point, CIA detainees that he requested.

13 So the court -- the Fourth Circuit Court -- and we  
14 have cited all of these cases to you in our brief -- said, no,  
15 they reversed the decision to strike the death notice and sent  
16 it back down to the district court to work out appropriate  
17 summaries for Mr. Moussaoui's use at trial.

18 So there you have a case where -- and think about the  
19 witnesses we're talking about. These are witnesses that can  
20 provide direct exculpatory evidence about the very offenses  
21 charged. The court said, "No, you don't get access to them.  
22 No, you can't depose them."

23 Think about the difference between those witnesses

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1 and what we're talking about here. The witnesses we're  
2 talking about here, at most, witnessed the treatment of the  
3 accused while in CIA detention. So, at most, they give them  
4 some other little description of the treatment that may or may  
5 not differ with what they already have; and, you know, are  
6 very well aware, sir, of how much discovery has been provided  
7 in that regard, how much is publicly known and has been  
8 released in that regard.

9           So the defense -- and the defense has used a lot of  
10 that information in pleadings in this case already. So it's a  
11 completely different scenario as far as what these individuals  
12 potentially could provide for the defense.

13           Again, like we've said repeatedly, we're willing to  
14 stipulate to descriptions of this conduct that are tethered to  
15 reality, so it's not likely really even an issue.

16           MJ [COL POHL]: Mr. Groharing, I've heard the government  
17 make that offer a lot of times. And I suspect you've never  
18 gotten such a stipulation. So why don't you draft one and  
19 give it to them as a starting point?

20           TC [MR. GROHARING]: We've given them scores of discovery  
21 describing their treatment in the RDI program.

22           MJ [COL POHL]: No. What I'm saying is you talk about  
23 stipulating to the exact treatment. Here's been the elephant

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1 in this room since the day started, is how they were treated  
2 after they were apprehended.

3 And government has said on a number of occasions,  
4 "We're not going to dispute what we did to them. We've given  
5 them all of this." And if they will offer us a stipulation of  
6 the exact treatment over whatever the period of time is, we'll  
7 work with them. And that will be our -- how we present it.  
8 But what I'm saying is but you don't want to propose your own  
9 we give it to them.

10 I'm just saying it's one thing to say, "We've given  
11 you all of this discovery." It's another thing to put it down  
12 on an 8 1/2x11 piece of paper saying, "Here's what we did to  
13 Mr. Mohammad. Here's what we did to Mr. Bin'Attash." They  
14 may not agree to it, and they may say, "No, we want to add  
15 this, and we want that." But it's not a resolution of this  
16 issue when I hear -- that you'd think it is when I hear the  
17 government saying, "We'll stipulate to it," and nobody else  
18 will stipulate to it, so it's really not to me a useful  
19 exercise unless somebody starts the process.

20 TC [MR. GROHARING]: We have, in essence, done what you  
21 proposed. We have given them discovery that describes in  
22 vivid detail in many cases the treatment of the accused. They  
23 can offer any piece of that, and we're not going to dispute

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1 it. But they have access to something we don't, the accused.

2 MJ [COL POHL]: I ----

3 TC [MR. GROHARING]: What they can do is tell us where we  
4 got it wrong. Where does this discovery not describe it in  
5 enough vivid detail to make whatever points you want to make?  
6 It can't be -- how are we expected to -- I mean, we know what  
7 we have given them. What else are we supposed to do with that  
8 information to pull it all together in a way that the defense  
9 might want to use it? I mean, this is something the defense  
10 wants to use.

11 MJ [COL POHL]: Okay. I understand.

12 TC [MR. GROHARING]: They're well-armed and well-equipped.  
13 And it can't be incumbent upon the government to do their work  
14 to put this in a position to offer it for whatever matter they  
15 want to offer it. So we're -- again, it's a matter we're not  
16 disputing.

17 And we're amenable to further descriptions of the  
18 conduct where they think we have missed it or haven't  
19 described it in great enough detail, but that needs to come  
20 from them, not us.

21 MJ [COL POHL]: Okay.

22 TC [MR. GROHARING]: So subject to any more questions you  
23 have, Your Honor, that's all I have.

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

2 TC [MR. GROHARING]: Thank you, Your Honor.

3 MJ [COL POHL]: We're going to go ahead and take our  
4 morning break. Just for planning purposes, I intend to go to  
5 about 1245. We'll take lunch until 1400, and then reconvene  
6 at that point. Commission is in recess for 15 minutes.

7 [The R.M.C. 803 session recessed at 1028, 30 April 2018.]

8 [The R.M.C. 803 session was called to order at 1051, 30 April  
9 2018.]

10 MJ [COL POHL]: The commission is called to order. All  
11 parties again appear to be present that were present when the  
12 commission recessed, including all of the detainees.

13 Mr. Groharing, I have one other question for you,  
14 which, as you may suspect, may end up with more than just one,  
15 but you know I don't keep that promise.

16 I was thinking about one other class of individuals  
17 here. You have your overt list people. Okay? I'm talking  
18 about a non-overt list person.

19 TC [MR. GROHARING]: Non-overt.

20 MJ [COL POHL]: No. I'm sorry. A non-list overt person.

21 TC [MR. GROHARING]: Okay.

22 MJ [COL POHL]: So it's -- his employment or her  
23 employment with the CIA is overt and, as you defined that,

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1 unclassified.

2 TC [MR. GROHARING]: Right.

3 MJ [COL POHL]: But, of course, a lot of people have  
4 unclassified jobs and title descriptions but have a lot of  
5 classified information, not just -- okay?

6 TC [MR. GROHARING]: Okay.

7 MJ [COL POHL]: Okay. So we're talking about an overt  
8 non-list person.

9 TC [MR. GROHARING]: Right.

10 MJ [COL POHL]: Okay. Now, you want the defense to  
11 confirm that their involvement in the RDI program was not  
12 classified, or they were covert at the time?

13 TC [MR. GROHARING]: If you have an overt person, so  
14 they ----

15 MJ [COL POHL]: Yeah.

16 TC [MR. GROHARING]: ---- so defense ----

17 MJ [COL POHL]: As you define that, that means their  
18 status with the CIA is unclassified.

19 TC [MR. GROHARING]: It's unclassified.

20 So they learn of this person through whatever means,  
21 and the defense wants to talk to him. In that case, it would  
22 depend on the subject matter of the interview.

23 MJ [COL POHL]: Okay.

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1 TC [MR. GROHARING]: If they want to talk to that person  
2 about RDI ----

3 MJ [COL POHL]: Okay. That's what I'm talking about.

4 TC [MR. GROHARING]: ---- the protocol would require them  
5 to come through the government. If they want to talk to them  
6 about something else, they could approach that person.

7 MJ [COL POHL]: But from the -- when they go to the  
8 government, they say, "I want to talk to Sally Smith who's --  
9 who is an overt CIA individual about the RDI program" ----

10 TC [MR. GROHARING]: Right.

11 MJ [COL POHL]: ---- then the government would then say  
12 her involvement in the RDI program is covert and, therefore,  
13 you've got to follow the covert procedures or -- do you see  
14 the problem I'm having here? Is you've got -- you've got your  
15 list people, but I'm talking about overt people ----

16 TC [MR. GROHARING]: So ----

17 MJ [COL POHL]: ---- and who are involved in the RDI  
18 program. But how would the defense know their RDI program  
19 involvement wasn't covert?

20 TC [MR. GROHARING]: In that case, you go to the subject  
21 matter of the interview. So they want an overt employee who  
22 now is publicly associated with the CIA. No question about  
23 it. The defense says, "Hey, I'd like to talk to that person

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1 to see what they might know about the RDI program." In that  
2 scenario, they should come through the government, say, "Hey,  
3 I want to talk to this person."

4 They may or may not be associated with these accused  
5 in the RDI program, but in that scenario, we could provide the  
6 defense guidance as far as ----

7 MJ [COL POHL]: Okay.

8 TC [MR. GROHARING]: ---- what they could or couldn't talk  
9 to that person about.

10 MJ [COL POHL]: Okay. And, again, I know we're trying to  
11 hit every possible category here. So if defense wanted to  
12 talk to an overt, non-list person, all right, about the RDI  
13 program ----

14 TC [MR. GROHARING]: Falls under the protocol.

15 MJ [COL POHL]: Okay. They would be treated just as if  
16 the whole paragraph 10 protocol -- as if they were a covert  
17 person involved in the RDI program?

18 TC [MR. GROHARING]: Yes.

19 MJ [COL POHL]: Okay. Okay.

20 TC [MR. GROHARING]: Yeah. I mean, we've defined people  
21 that have been publicly acknowledged to be associated with the  
22 RDI program.

23 MJ [COL POHL]: Right. Right.

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1 TC [MR. GROHARING]: So the assumption is that if you  
2 have -- if you're not on that list, then your affiliation with  
3 the program is classified.

4 MJ [COL POHL]: Okay. So there's two affiliations here  
5 you're protecting, then. There's affiliation with the CIA?

6 TC [MR. GROHARING]: Yes.

7 MJ [COL POHL]: Okay. And affiliation with the program?

8 TC [MR. GROHARING]: Yes.

9 MJ [COL POHL]: And unless both affiliations are public  
10 knowledge -- properly public knowledge, because I don't want  
11 to get into improper public -- but proper public knowledge,  
12 then the defense doesn't have to go to anybody. They can go  
13 straight to them.

14 But if their covert status -- and, of course, that's  
15 a need -- quite frankly, a relatively easy one. But if their  
16 involvement in the RDI program has not been publicly  
17 acknowledged, even if their employment by the CIA has been,  
18 then that triggers the normal request letter, acceptance  
19 procedure that you're proposing in paragraph 10. Is that  
20 correct?

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

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

23 Mr. Connell.

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1 LDC [MR. CONNELL]: Your Honor, I've tendered to the  
2 military commission a set of slides which have been marked as  
3 AE 524CC. I provided a copy of those slides to the CISO more  
4 than seven days in advance, an electronic copy with a  
5 spreadsheet on top explaining and identifying each individual  
6 document. More than an hour before court today, I have  
7 provided hard copies to the CISO as required by the rule.  
8 That is listed as -- in the CISO spreadsheet as AE 524, 528,  
9 549, 555, CISO Exhibit 1.

10 I would ask permission to have the feed from Table 4  
11 and display the slides to the gallery.

12 MJ [COL POHL]: One moment, please. I notice on your  
13 slides, you also slash -- permission is going to be granted in  
14 a second, so don't worry about it -- 558 -- or 548 and 549.

15 My intent, just so everybody knows, these are all --  
16 the way I'm reading in the pleadings -- the same factual  
17 predicate. Correct?

18 LDC [MR. CONNELL]: Yes, same principles.

19 MJ [COL POHL]: But we'll address -- we'll address not  
20 necessarily the factual predicate, but if there needs to be  
21 further argument on the legal construct of 548 and 549, we  
22 will do those in due course.

23 LDC [MR. CONNELL]: Yes.

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1 MJ [COL POHL]: Your request to publish them is granted.

2 Go ahead.

3 LDC [MR. CONNELL]: Thank you.

4 LDC [MR. HARRINGTON]: Excuse me, Judge. I'd just -- the  
5 record should note that Major Stuard is out of the courtroom.

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

7 LDC [MR. CONNELL]: Yes. Publish.

8 MJ [COL POHL]: Table 4. Go ahead, Mr. Connell.

9 LDC [MR. CONNELL]: Thank you, sir. I'm just pausing a  
10 moment to make sure that the tech side gets worked out.

11 Your Honor, the United States Government clearly has  
12 a serious and compelling interest in a trial for those that  
13 they believe are responsible for the 9/11 attacks. The United  
14 States Government also has a serious interest in protecting  
15 national security information.

16 The government just explained in some detail, and  
17 with graphic examples, the possible consequences of  
18 inadvertent disclosure of national security information. When  
19 those two interests clash, a clash between a trial consistent  
20 with constitutional principles and the protection of  
21 national security information, the government gets to decide  
22 which of those two is more important.

23 In other words, they get to decide whether agents'

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1 unreviewable, un-democratic agency determinations of  
2 need-to-know will control over determinations of relevance,  
3 materiality to the preparation of the defense by a judge.

4           In the argument this morning, a casual observer, one  
5 whose first time to the military commissions, might believe  
6 that the government just sort of woke up one day and decided  
7 that it was -- six years into the case, that it was going to  
8 impose these prohibitions. But, in fact, it is part of a  
9 concerted effort to deny defense investigation that has gone  
10 on since September of last year.

11           They have chosen to protect those -- the identities  
12 of those involved in torture and other cruel and inhuman and  
13 degrading treatment over an adversary trial. This was not an  
14 uninformed choice. The government implies that these  
15 decisions have been made at the highest levels of government.

16           Notwithstanding eight different versions of these  
17 investigative prohibitions and a constantly moving target, the  
18 government says that this is a national security decision  
19 about national security priorities.

20           It is not the first time in American history that the  
21 government has chosen to privilege certain information above  
22 the interests in a trial. It happened in the My Lai massacre  
23 prosecutions. It's the reason there's been no death sentence

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1 in an espionage case in the last 50 years. And in  
2 transportation disasters, the NTSB or safety centers,  
3 privilege-gathering information about what happened in a train  
4 or plane or other crash over the admissibility of evidence.

5           The Military Commissions Act, which has not been  
6 discussed a lot today yet, sets out a protocol for how to  
7 address these problems. And, in fact, dealing with that  
8 protocol in 10 U.S.C. 949p-6 is how we came to have this  
9 protective order in the first place. But in order to --  
10 before we discuss that, we need to discuss the other aspects  
11 of 524 and the current restrictions on defense investigation.

12           So in these -- in these -- really in the 524 series  
13 but also in other series as well, there is a spectrum of  
14 investigative obstacles that the government has erected to  
15 defense investigation. The first of those on the -- I've sort  
16 of ranked them in order. They're all serious, but the first  
17 of those is the unilateral use of pseudonyms. We're going --  
18 I expect us to take that up later today in the AE 330 series  
19 and in the AE 523 series.

20           The second is the unilateral prohibitions on defense  
21 investigation, those which have not been blessed in any way by  
22 the military commission, or, as far as we can tell, by any  
23 agency outside the office of the chief prosecution, deals with

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1 the prohibitions that the government has sent us, usually  
2 during e-mail, usually not during a pleading -- with a  
3 pleading on the investigation that we can do. Those issues  
4 are challenged in 524, 548, 549, and 555.

5           The last, and the one that the government just  
6 addressed in its argument, is requested military commissions  
7 orders prohibition on defense investigation. That arises in  
8 two motions which are currently before the military  
9 commission, AE 441 and 524L, which is the government's request  
10 for a protective order; and then we got to see one little part  
11 of that in 524S.

12           To understand the immense scope and the exponentially  
13 larger scope of the government's proposed protective order,  
14 it's necessary to review briefly the -- how we got there.

15           On 6 September 2017, in a unilateral prohibition, the  
16 government sent a letter to the defense which said that "The  
17 Defense should make no independent attempt to locate or  
18 contact any current or former CIA employee or contractor  
19 regardless of that individual's cover status."

20           In the beginning of the circle, that was CIA -- we  
21 call that "CIA affiliated." That was people who were  
22 connected to the CIA. And that's found in the record at AE  
23 523 Attachment C.

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1           We challenged that in AE 523 and AE 524; and the  
2 government changed its position on 10 January of 2018. The  
3 military commission summarized -- and elsewhere in the  
4 transcript used the example of an E-7. The military  
5 commission summarized the government's position as your answer  
6 to the question is the 6 September memorandum for CIA people  
7 applies to everybody who worked for the U.S. Government has  
8 part of the RDI program, regardless of which agency they  
9 happen to be working for.

10           So at that time -- at the time that the government  
11 first invoked classified information privilege for this, the  
12 scope of prohibition, people that we could interview or  
13 attempt to locate or contact was those who are CIA affiliated  
14 and those others in the United States Government who worked in  
15 the RDI program.

16           The situation changed again in -- at the beginning of  
17 the last hearing. On 26 February 2018 the argument -- the  
18 government took a different position, and it said it was  
19 really only the overlap of those two categories that mattered.  
20 The position of the government was that the September guidance  
21 was meant to address individuals connected to the RDI program  
22 and specifically focused on individuals we identified by UFIs  
23 in indices that were attached to those memos.

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1           So at that time -- so you may recall that on  
2 23 February -- 23 January of 2018, I implemented an  
3 investigative freeze based on the government's letters and  
4 threats. The -- I changed it after February 26 because the  
5 government's position changed. But the government's position  
6 didn't last very long because on 27 February 2018, they  
7 provided a letter which had a different characterization,  
8 which said that "Other than the eight individuals listed in  
9 paragraph three, the Defense should make no independent  
10 attempt to locate or contact any current or former CIA  
11 employee or contractor regarding their potential involvement  
12 with the RDI program" ----

13       MJ [COL POHL]: Mr. Connell, Mr. Groharing had mentioned  
14 that the list of eight has been expanded?

15       LDC [MR. CONNELL]: Yes, sir.

16       MJ [COL POHL]: How many are on the list now?

17       LDC [MR. CONNELL]: 25 total.

18       MJ [COL POHL]: Okay.

19       Trial counsel, file a supplement with those names.

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

21       MJ [COL POHL]: Quite frankly, you should have when you  
22 did it.

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

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1 MJ [COL POHL]: Or a notice. Don't make it a supplement.  
2 Just make it a notice. Because I don't want to start a whole  
3 briefing cycle.

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

5 MJ [COL POHL]: I just want to know what the names are.  
6 That's all.

7 LDC [MR. CONNELL]: Sure.

8 MJ [COL POHL]: Go ahead.

9 LDC [MR. CONNELL]: I can tell you, for example, it  
10 includes Porter Goss and does not include Gina Haspel. So  
11 there are still people on who work for the CIA who are not on  
12 the list.

13 The 28 -- 27 February letter became AE 524I,  
14 Attachment B in the record. And at that point, the military  
15 commission the following day asked a question eerily similar  
16 to the question that the military commission asked today: Is  
17 this your final position?

18 Now, I noticed today that the military commission  
19 asked -- and I took special note of it -- "Is this your  
20 final-final position?" And the government gave the answer,  
21 "Yes," which is surprising, given that the protective order  
22 that you have before you in 524L is only the sixth of eight  
23 positions about the investigative prohibition.

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1           So there are two more since that time that the  
2 military has issued. One of them, the eighth you just  
3 mentioned, was the -- is the expansion of the list of eight  
4 from eight to 25, but the other one is a restriction on  
5 showing photographs that we're going to talk about very  
6 shortly.

7           So I know that we're going to deal with this  
8 separately, but 524Q is our discovery request to find out what  
9 is going on here. It seems unlikely that unless there is a  
10 bug in counsel's ear that the OCA is making -- is shifting  
11 from day to day as to what their position is. That could be  
12 true. I don't know. I have never met an OCA, and I guess  
13 they're covert. But the shifting positions do undermine  
14 confidence in the fact that these positions that we're hearing  
15 are considered positions of the United States Government.

16           The other thing that undermines that is in each  
17 previous occasion where we have received guidance from the  
18 CIA, like the CIA open source memo, it's on letterhead that  
19 says "CIA Guidance." With the open source memo, you may  
20 recall that the initial version that we got of it did not  
21 have -- was not on letterhead.

22           I raised that in court, and within about an hour,  
23 someone had walked up and -- over the lunch break and had

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1 given me a copy that was on CIA letterhead. These are all  
2 letters from individual prosecutors that come to us rather  
3 than any position by an OCA.

4           So I mentioned just a moment ago that the seventh --  
5 well, let me say the sixth position before we get to the  
6 seventh. The sixth position came in an ex parte pleading  
7 on -- at the beginning of April, 2 April, if I recall  
8 correctly. And that's what -- portions of that -- one  
9 portion, to the protective order, eventually became 524S.

10           But four days after that, on 6 April 2018, the  
11 prosecution sent us another letter explaining what additional  
12 prohibitions -- and I don't know the military commission has  
13 seen this. It appears in AE 524V, Attachment B, but it's not  
14 something that we've argued in court yet.

15           So I think that it -- this comes from my asking --  
16 and I'm going to go into detail about the fact scenario that  
17 led to this, but my asking whether it was permissible to show  
18 photographs of people, and to ask if anybody recognized  
19 somebody out of that, to try to do a photo identification; the  
20 purpose of that being to identify -- and this is super  
21 important -- the purpose was to identify people that we could  
22 request to interview.

23           Because lots of times, we have a lead, but we don't

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1 know whether the person is CIA at all; whether they were  
2 involved with Mr. al Baluchi at all. It's just a lead that we  
3 have developed through various sources. And so this was part  
4 of that preliminary process, to get to the place where we  
5 could even ask or identify a person.

6 And so what the government said was that as to  
7 whether showing photographs of suspected CIA-affiliated  
8 individuals to non-CIA individuals for identification purposes  
9 constitutes a -- excuse me, quote, an attempt to locate, end  
10 quote, within the meaning of the prohibition on making a,  
11 quote, independent attempt to locate or contact any current or  
12 former CIA employee or contractor, end quote.

13 The answer is, yes, based on the facts provided.  
14 Showing photographs of suspected CIA-affiliated individuals to  
15 non-CIA individuals for identification purposes falls within  
16 the prohibition against making attempts to identify CIA  
17 officers potentially involved in the RDI program.

18 MJ [COL POHL]: You don't think -- and, again, I'm not  
19 making a judgment whether I think it's the -- right or wrong,  
20 but I'm just simply saying you don't think this falls within  
21 the protective order as it's currently proposed? What I'm  
22 saying is ----

23 LDC [MR. CONNELL]: The government told us that it did, so

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1 it does.

2 MJ [COL POHL]: No, no. But I'm saying it's not -- it's  
3 not a separate standalone issue is what I'm trying to say.

4 LDC [MR. CONNELL]: No, it is a standalone issue for this  
5 reason. This prohibition is in effect today. Whether you  
6 rule -- however you rule on the prosecution's requested  
7 protective order, this is part of their 6 September  
8 prohibition. This is them interpreting their -- what started  
9 in 6 September, eventually became 27 February.

10 That's in effect right now.

11 MJ [COL POHL]: No, but ----

12 LDC [MR. CONNELL]: We are restraining ----

13 MJ [COL POHL]: My point is this -- is this -- is that --  
14 and I guess it does make a difference to you what's in effect  
15 today ----

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

17 MJ [COL POHL]: ---- but I'm trying to address the  
18 protective order going forward more than anything else, is  
19 that the protective order talks about that category of people  
20 who are overt non-list, right?

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: Because I think ----

23 LDC [MR. CONNELL]: And it talks about affiliated

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1 individuals, which is super important. We haven't talked  
2 about that yet.

3 MJ [COL POHL]: That's what we're talking about here.

4 Are you arguing -- are you arguing that if you have a  
5 suspected covert CIA individual, you should be allowed to show  
6 that picture to non-CIA people to verify their employment? Or  
7 are you just talking about overt people that are already --  
8 been in the -- identified as being in the CIA?

9 LDC [MR. CONNELL]: I will be completely clear. In the  
10 facts-on-the-ground situation, that is a meaningless  
11 distinction. I have never been advised that any person in the  
12 world is in a covert status. I do not know -- when I find Joe  
13 Smith on LinkedIn, and Joe Smith says, "I spent 2003 to 2004  
14 in a certain country working for -- on national security  
15 issues for an important agency," right? When they say that on  
16 LinkedIn, I have no idea what their capacity was.

17 I don't even know -- like, I read the  
18 National Security Act and the definition of "covert," which is  
19 completely different from the definition that the government  
20 uses. So I don't even know what the -- what "covert" means.  
21 I don't know what it means for an association with the CIA to  
22 be classified. I have never known of anyone who is -- perhaps  
23 this is completely obvious -- right -- but I have never known

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1 of anyone whose association was classified.

2           So for you to ask me do I think that I can show a  
3 covert officer's picture to another witness or to  
4 Mr. al Baluchi? The answer is, I have zero way of knowing  
5 whether that person's association with the CIA is classified  
6 or not. All I know is that they suggested on their LinkedIn  
7 that they were -- that they had something to do with the case.  
8 And so I want to put ----

9           MJ [COL POHL]: Under that scenario, when -- and, again,  
10 we're talking about people -- what I'm referring to as the  
11 overt, non-list people. They may be overt because they  
12 identified themselves on LinkedIn.

13          LDC [MR. CONNELL]: Sure.

14          MJ [COL POHL]: Maybe they've got a bumper sticker,  
15 "Support the CIA. I Certainly Do." Whatever, okay?

16          LDC [MR. CONNELL]: Sure.

17          MJ [COL POHL]: But they're not on the list.

18          LDC [MR. CONNELL]: Right.

19          MJ [COL POHL]: So as I understand -- and I just want to  
20 make sure we understand the proposed order -- is that the  
21 government's proposing that under that scenario -- which hits  
22 what we're talking about here -- you then have to go to the  
23 government to verify his -- not his overt status, because

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1 that's now arguably unclassified, although I'm not sure how  
2 they -- the -- I'm not sure how the CIA feels about people  
3 self-identifying their employment on LinkedIn. But let's  
4 assume for the sake of discussion -- but the other piece of  
5 that is their covert activities while at the CIA.

6 LDC [MR. CONNELL]: Covert activities are a whole  
7 different situation. You know, you put it really well in one  
8 of your comments to the government, which was that there are  
9 people -- there are plenty of people who have a lot of  
10 classified information, but their job description is  
11 perfectly -- is perfectly overt. I fall into that category,  
12 right? Anybody can look up on LinkedIn what I do, but I'm the  
13 possessor and guardian of a lot of classified information. I  
14 suspect the vast majority of people that we're talking about  
15 fall into those -- into that sort of category.

16 MJ [COL POHL]: So I'm just trying to -- trying to get at  
17 here is that because the order talks about -- makes a big  
18 distinction between overt and covert. And there's the  
19 RDI-acknowledged overt people, what I'm calling the list  
20 people. They made the list; some didn't.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: And then we have got the covert people  
23 whose status with the CIA is not an officially -- is not

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1 unclassified.

2 LDC [MR. CONNELL]: I have to take your word that there  
3 are such people, but I have never had the slightest  
4 official ----

5 MJ [COL POHL]: I'm just taking what I think is in the  
6 order; some of the people with UFIs, for example. Okay. And  
7 they are saying ----

8 LDC [MR. CONNELL]: Right. But some of the people who  
9 have UFIs are also on the list of 25.

10 MJ [COL POHL]: Well ----

11 LDC [MR. CONNELL]: I mean, so having a UFI does not mean  
12 that your association with the ----

13 MJ [COL POHL]: I understand. I'm just trying to figure  
14 out. And because this is their final-final answer, that's why  
15 I want to know this, is that if you approach somebody who you  
16 know is covert, you understand you're not -- you're prohibited  
17 to contact them under the current regime, correct?

18 LDC [MR. CONNELL]: Under the current regime, no.

19 MJ [COL POHL]: What? You can contact them?

20 LDC [MR. CONNELL]: Under the current regime ----

21 MJ [COL POHL]: You go to somebody you know is covert ----

22 LDC [MR. CONNELL]: ---- somebody not related to RDI --

23 right? So let's say that -- let's say we're working on our

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1 hostilities investigation, and they were part of the first-in  
2 team in late September 2001 that began ----

3 MJ [COL POHL]: Okay. I got that exception.

4 LDC [MR. CONNELL]: Okay.

5 MJ [COL POHL]: Covert RDI people, can you walk up and  
6 say, "Hey, tell me about your CIA involvement"?

7 LDC [MR. CONNELL]: We can't talk to anybody RDI right  
8 now --

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: Covert, overt, riding -- you know, if  
11 they're flying a plane, riding ----

12 MJ [COL POHL]: Apparently if they're on the list, you  
13 can.

14 LDC [MR. CONNELL]: On the list of eight, yes.

15 MJ [COL POHL]: It's now 25.

16 LDC [MR. CONNELL]: Now 25.

17 MJ [COL POHL]: But there's three categories you've got  
18 here. And I know we're beating this to death, but I'm talking  
19 about if you know or really should know that an individual is  
20 in a covert status, okay, can you approach that individual?

21 LDC [MR. CONNELL]: Now or under the proposed protective  
22 order? I just want to make sure I know which regime we're  
23 talking about.

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1 MJ [COL POHL]: Let's say the proposed protective order  
2 rather than dealing with ----

3 LDC [MR. CONNELL]: The proposed protective -- you mean as  
4 opposed to dealing with what I have been dealing with for the  
5 past nine months?

6 MJ [COL POHL]: No.

7 LDC [MR. CONNELL]: The ----

8 MJ [COL POHL]: Under the proposed protective order, can  
9 you approach a covert person and talk about the RDI program  
10 without going through the government?

11 LDC [MR. CONNELL]: No.

12 MJ [COL POHL]: Okay. Under the proposed protective  
13 order, can you approach a non-list overt person without  
14 contacting the government ----

15 LDC [MR. CONNELL]: No, because they're an affiliated  
16 individual.

17 MJ [COL POHL]: ---- and to confirm -- okay.

18 So the only people you can go to in the proposed  
19 protective order is the overt list people?

20 LDC [MR. CONNELL]: Yes.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: That's the way I understand it.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: Now, it's written somewhat  
2 confusingly, because their 10.a. contains -- if you want to  
3 look with me for 10.a. for a second -- actually, I have the  
4 slide on this. If you give me just a moment, I'll come right  
5 back to that.

6 MJ [COL POHL]: Okay.

7 LDC [MR. CONNELL]: The thing that I want to say about  
8 this April 6 situation is photographs -- photographic lineups  
9 were the one thing that I thought that it was absolutely  
10 permissible for us to do. And the reason why I thought it was  
11 absolutely permissible for us to do is that there's a sworn  
12 statement from an FBI agent about this case that says that  
13 we're allowed to do it.

14 In the Kiriakou declaration, the declaration which  
15 supports the complaint in Kiriakou, the -- which is found in  
16 the record at 524X Attachment D, the -- they talk about the  
17 double-blind photo lineup and say that "No law or military  
18 commission order expressly prohibited defense counsel from  
19 providing their clients with the photographic spreads in  
20 question under these circumstances."

21 It's -- like it is written about our office and it is  
22 written about these CIA undercover or covert -- or these  
23 people that we're talking about. It's the one thing that I

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1 thought we were absolutely allowed to do until 6 April; and  
2 it's because the official weight of the United States  
3 Government had been behind the fact that we could do  
4 double-blind photo lineup spreads. And now today, as we sit  
5 here on the 30th of April, apparently we're not allowed to.

6           So the -- so I incorporated all of that into our team  
7 policy. And I know you want to talk about the proposed  
8 protective order, and I want to talk about it, too -- and  
9 we're getting there -- but I can't let go of the damage that's  
10 been done to our investigation over the past nine months as  
11 we've struggled with this. And so I have abided -- as  
12 strictly as I can understand this moving target, I have abided  
13 by the restrictions that the government has put onto us.

14           Now, under current policy, like today as we stand  
15 here, the government's control of access to witnesses is  
16 completely unconstitutional as described in the 524 series.

17           Now, I put -- on this slide I put together a couple  
18 of reasons -- of things that I want to talk about about this.  
19 And I want to start with the last one, which is the fact that  
20 the government has not honored requests for assistance since  
21 July, when we first asked for this. Because, as you know,  
22 under new rules, we have to submit these slides more than  
23 seven days in -- calendar days in advance to the CIS0 for

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1 review on -- electronic with spreadsheet, hand delivery, which  
2 is extremely onerous in case you didn't notice my thoughts on  
3 that topic.

4 But the -- but the more significant thing is that --  
5 so within the last week, after I prepared these slides, the  
6 government sent us another letter. And that letter is now in  
7 the record at AE 524 (2d Supplement) Attachment B. I can't  
8 show it to you because I didn't get it seven days in advance.  
9 But what it does is it goes through -- I just want to remind  
10 you that in July of 2017, we made a request for government  
11 assistance in interviewing 44 witnesses that the government  
12 had acknowledged were relevant, helpful, material to the  
13 defense, and noncumulative.

14 So out of those 44, in 524 (2d Supplement)  
15 Attachment B, government was apparently only able to find 32  
16 of them, which makes me wonder how they interviewed them for  
17 Brady. But that's for a different day.

18 Of those 32, four of those 32 are deceased; and then  
19 the following persons -- out of the remaining 28, the  
20 following persons declined interviews: Interrogator Number 1,  
21 Interrogator Number 2, Interrogator Number 3 ----

22 MJ [COL POHL]: Would it be faster if you told me how many  
23 agreed to be interviewed?

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1 LDC [MR. CONNELL]: It would be more dramatic if I read  
2 you the list.

3 MJ [COL POHL]: Yeah, I know. That's why I'm trying to  
4 move this along.

5 LDC [MR. CONNELL]: All right, sir. Zero. 28 out of 28  
6 declined to be interviewed. The -- and zero agreed.

7 Now, the -- in 524 (2d Supplement) Attachment C,  
8 unclassified portions of a declaration by Chief Futrell, he  
9 describes -- so we know -- we know that when the government  
10 approached every person that they could find that those -- the  
11 CIA and the FBI received declinations of our request, but that  
12 doesn't actually, I know, prove that they would have -- that  
13 we would have better luck. But we have succeeded, where the  
14 government has not, in obtaining interviews.

15 So in Attachment C to 524 (2d Supplement), we lay  
16 out -- or Chief Futrell lays out some of his contacts with  
17 people with knowledge of CIA detention facilities, of  
18 Camp VII, and of detainee flights. And over 80 percent of  
19 those people agreed to speak to some extent.

20 Now, sometimes they put conditions on it. It has to  
21 be in a SCIF. They put conditions on it. It needs to be --  
22 "I have a nondisclosure agreement that stops me from talking  
23 about certain categories." If you ask about that, they simply

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1 decline. But overall, more than four out of five agreed to  
2 speak with us.

3 Chief Futrell identifies six factors which explain  
4 the difference between what happens when we approach a witness  
5 and request for -- and request an interview, and when a CIA  
6 and FBI officer approach. And they have nothing to do with  
7 the good or bad faith of the CIA and the FBI involved in the  
8 request. They have to do, instead, with human nature.

9 The first of those is that -- first impressions.  
10 When people first see -- when a witness first sees a potential  
11 interviewer, they immediately, like everybody else, form a  
12 first impression of them. This person looks shifty. This  
13 person looks trustworthy. This person looks like a military  
14 officer. This person looks like not a military officer. They  
15 form first impressions.

16 And when it's the CIA and the FBI who are doing  
17 the -- or questioning the witnesses, there's no opportunity  
18 for the person to form that human first impression of the  
19 actual person who would be asking the questions, the  
20 interviewer.

21 The second is with respect to showing identification.  
22 And I, myself, have interviewed many, many, many witnesses in  
23 this case and others. And it's important to show

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1 identification because witnesses always want to see the  
2 identification of the person who would be speaking to them.

3           When the FBI and the CIA approach somebody, all they  
4 can show is their own identification because they don't even  
5 know what actual interviewer would be -- would be speaking.  
6 And so they can't, for example, give them my business card. I  
7 have designed my business card to look friendly to witnesses,  
8 but also to clearly show them -- like it's not a  
9 traditional-looking business card. It looks friendly, but it  
10 also -- it clearly identifies Military Commission's Defense  
11 Organization in the top line. So to satisfy all of the needs  
12 in getting a witness to talk to us within a normal human way.

13           The third and the most important to every law  
14 enforcement officer probably in the United States is the  
15 rapport-building process. In the course of explaining who we  
16 are and in the course of explaining what we're there for and  
17 what we want to do, in that minute or two, there's a rapport  
18 built.

19           And law enforcement officers -- particularly the FBI  
20 but also the DEA, the ATF, and the other agencies which  
21 contribute investigators to our office, all of the  
22 investigators in our office are professional investigators and  
23 almost all of them are professional law enforcement, both in

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1 the military and in civilian life. The -- those persons are  
2 trained how to build rapport in that close minute.

3           You know, people often ask me, "Why do defendants so  
4 frequently speak to law enforcement officers instead of  
5 asserting their Miranda rights?" And it's because of that  
6 rapport-building process. It doesn't mean that the law  
7 enforcement officers don't administer the Miranda rights and  
8 say, "Hey, you don't have to talk to me." But in that minute  
9 or two in the lead-up, there's an important rapport that's  
10 built.

11           The fourth is safety factors. When we approach a  
12 witness, we can offer them safety factors that the FBI and the  
13 CIA cannot. Like, if they have a question of "I'm not sure  
14 that we should be having this discussion here," we say,  
15 "That's great. We'll make an arrangement." Wherever we are,  
16 we'll find a secure space. We'll talk to the local military  
17 base. We'll invite them back to Washington. We'll -- safety  
18 factors that make the whole situation legitimate.

19           Let's say that a witness asks -- and the FBI and the  
20 CIA can't do that. They can't say, "Well, if you choose to  
21 talk to the defense, it can take place in a secure space,"  
22 because they don't know what we have access to. They likewise  
23 don't know what our actual clearances are, or the person or

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1 the interviewers' clearance.

2           Whereas if someone asks us about a clearance, we  
3 said, "Absolutely. Let me put you in touch with my security  
4 manager." We can -- if it's an agency-to-agency thing, we can  
5 pass clearances. There are safety factors that we put in  
6 place that the -- that investigators for the government  
7 cannot.

8           Fifth is social networks. It normally happens -- and  
9 we're going to talk about this more when we get to the affiliated  
10 individuals. But it normally happens that when we approach a  
11 witness, it's often because someone else has said -- if we  
12 approach Joe, it's often because Bill has said, "Hey, you  
13 should talk to Joe." And the FBI and the CIA, when they go to  
14 that person, they have no idea who we know in their social  
15 network. We have no credibility from being able to refer to  
16 the other people that we've spoken to, the people who referred  
17 us to them in the first place.

18           And the sixth is background knowledge. Part of the  
19 process is establishing credibility with the witness,  
20 especially these high-level government witnesses that you're  
21 not just some schmoe off the street. You're a person who  
22 understands -- as an interviewer, has background knowledge and  
23 understands the issues. In other words, that you are worth

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1 speaking to.

2           And when the FBI and CIA approach a witness, they  
3 have no idea of the background knowledge of the investigator  
4 that we would send. They have no idea of, you know, has  
5 Mr. Connell been working on this case in one capacity or  
6 another since 2008? They have no idea of people who have  
7 spent 3 1/2 years full-time on this investigation who know --  
8 have an extensive amount of background knowledge.

9           These are factors that irrespective of the good or  
10 bad faith of the CIA and FBI who approach the witness, they  
11 just can't replicate the access to witnesses that defense  
12 would have.

13           Now, in AE 5 -- and all of that, this is not  
14 speculation. The government speculated about what they  
15 thought would happen. This is the actual experience we've had  
16 with sworn testimony in declarations. Actual evidence that  
17 we're putting before you.

18           Other actual evidence that we're putting before you  
19 is found in AE 524 (2d Supplement) Attachment D which is the  
20 declaration from Mr. Canestraro. And he talks about the  
21 difference between approaching a witness in person and a  
22 remote request. That in person, he gets an over 90 percent  
23 agreement rate to speak in some capacity; and it's markedly

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1 less by letter.

2           When you look at 502Y, for example, you directed us  
3 to, for each witness that we requested, you directed us to say  
4 whether it was based on personal interview or they had refused  
5 to speak to us or we hadn't been able to find them. And most  
6 of the people who refused to speak to us were people that, for  
7 various reasons, we had to approach by letter, write them a  
8 letter, as opposed to approaching them directly. So it makes  
9 a huge difference.

10           The -- and that difference, of course, is those  
11 factors that -- those six factors that Chief Futrell talks  
12 about which is the difference between why it's so much harder  
13 to refuse a salesperson who comes to your door and tries to  
14 sell you a magazine as opposed to a person who calls you on  
15 the phone and you just hang up on them. There's a qualitative  
16 difference between those. And the government knows that, of  
17 course. Right? That's why they've set up the system so that  
18 if there's rapport built, it is with the FBI and the CIA. If  
19 there's identification shown, it's the identification of the  
20 FBI and CIA as opposed to the defense investigators.

21           Now, the -- it's been very difficult to find apples  
22 to apples for those comparisons because the target keeps  
23 moving. And we don't like have a spreadsheet with every

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1 factor in it, but by my count and by -- more importantly, by  
2 the declarant's count, around 20 former or current CIA  
3 employers to contractors have interviewed with us.

4           Now, one of those falls into the category of a person  
5 who, prior to 23 January, when I put the investigative  
6 prohibitions into place for the team, a person who had agreed  
7 to speak with us in April who we cannot speak to. The reason  
8 why I think that person is particularly important is it's an  
9 extremely concrete demonstration of the prejudice we're  
10 suffering from these investigative restrictions; that there's  
11 at least one witness who would fall under the new protective  
12 order, but under the current restrictions who we cannot -- who  
13 agreed to speak with us, and that we can't speak to him  
14 because of the investigative prohibitions.

15           And then there are three that fall into a category  
16 that the government referenced this morning who said, "Yes,  
17 we'll speak with you." We need to put that through the CIA --  
18 we need to put that through the CIA process and find out what  
19 we're allowed to say and not say. So three of the  
20 approximately 20 fell into that category. One falls into a  
21 category of if we were not under these investigative  
22 prohibitions, we would have interviewed him already this  
23 month.

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1           That's separate from all of the additional leads.  
2 And leads are important because as you well know, the  
3 government has never given us a list of any individuals named  
4 who is involved with anything related to the RDI program.

5           So we're going to talk more about this in a moment,  
6 but the idea that we can say, "Well, you know, Jane Jones is  
7 the person that we need to talk to. Can you please send an  
8 FBI agent and CIA agent out to find out if Jane will speak to  
9 us?" is an illusion because it's a constant process of working  
10 networks from one person to one person. You find a node in  
11 the social network and that person knows seven people. You  
12 get them to refer you, and then you go talk to those people.  
13 Investigation, as any law enforcement officer will tell you,  
14 is a slow and complex process. It's not a matter of going  
15 straight to the target and calling them up and asking them.

16           And that's significant. Because as we argued in 523,  
17 the -- there's a clear framework for dealing with witnesses  
18 over whom the government requests privilege. It's under  
19 Roviaro and Yunis cases. And under those two cases, the  
20 government must disclose the witness information over a claim  
21 of privilege if they are relevant and helpful to the defense.  
22 The reason why they have to propose the -- disclose the  
23 information is because of that pretrial interview process.

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1           There's a case from the Fifth Circuit,  
2 United States v. Fischel, F-I-S-C-H-E-L, 686 F.2d 1083 at  
3 1092, Note 11, that I think summarizes this very well. And  
4 the Fifth Circuit wrote that "The desire for a pretrial  
5 interview constitutes a justification for disclosing an  
6 informant's address, even when the government has agreed to  
7 produce the informant at trial, and has agreed to supply  
8 background material when the informer testifies."

9           The reason why that's so significant is that, like  
10 some of the other cases we cited in 524, it draws the  
11 distinction between simply information that exists out there  
12 and our ability to approach the witness and find out for  
13 ourselves if they'll speak to us.

14           The Fischel case talks about how government control  
15 of the witness access process -- not just of the witness  
16 themselves but of the access to the witnesses -- place the  
17 defense at a tactical disadvantage. And that's been reflected  
18 in both military and civilian court decisions. The  
19 civilian ----

20           MJ [COL POHL]: What is the Fischel cite, please?

21           LDC [MR. CONNELL]: 686 F.2d 1082. I have a few other  
22 case that I think are significant as well.

23           In the civilian realm, the civilian courts have

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1 reversed for requiring interview requests to go through the  
2 prosecution. That's State v. Blazas, B-L-A-Z-A-S, 74 F.2d  
3 991, New Jersey appellate case out of 2013.

4 MJ [COL POHL]: Were any of these cases the claim of  
5 national security privilege or just they wanted to know?

6 LDC [MR. CONNELL]: No, sir. They're all informer's  
7 privilege.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: Right? And the reason why that's  
10 significant is classified information privilege at  
11 national security privilege for witnesses actually derives  
12 from an informant privilege because Roviaro, the case which  
13 established informant's privilege and how to approach it out  
14 of the Supreme Court, said, when -- you know, established --  
15 established a very significant privilege for informants that  
16 unless it's material and helpful to the defense, the  
17 prosecution doesn't have to reveal it for obvious reasons.  
18 Right?

19 There are witness safety issues. There are witnesses  
20 coming -- you know, further informants coming forward in the  
21 future issues. There are lots of reasons for informant's  
22 privilege. They're very closely related to the reason for  
23 national security privilege.

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1           And the significant thing that happened in the  
2 D.C. Circuit in Yunis was that the D.C. Circuit took the  
3 Roviaro framework and said that informant's privilege  
4 framework also applies to classified witnesses.

5           MJ [COL POHL]: But aren't most of those informants  
6 government witnesses that are going to be used against the  
7 defense?

8           LDC [MR. CONNELL]: No, they're not. In fact, there's no  
9 question in those cases. If the witness is going to actually  
10 testify, then there's no real informant's privilege question  
11 because the government's waiving the informant's privilege by  
12 calling them to testify.

13          MJ [COL POHL]: Yeah.

14          LDC [MR. CONNELL]: The ordinary fact scenario is the  
15 informant said to the DEA Agent, you know, Smith, "Hey,  
16 defendant over there is selling cocaine," and then DEA Agent  
17 Smith went and did some controlled buys, surveilled the house,  
18 did all of the, you know, police work and then its Agent Smith  
19 who's going to be the witness and the government saying,  
20 "Listen, we're not going to call the underlying informant at  
21 all. All they did was give us information for the search  
22 warrant, and then we served the search warrant and found a  
23 bunch of drugs."

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1           So the situation is actually very closely paralleled,  
2 because in informant cases, normally government is trying to  
3 keep the informant as far away from the case as possible, in  
4 part because that informant is continuing to work other cases.  
5 They are -- they're providing additional information.

6 They ----

7           MJ [COL POHL]: Or there may be a reason why he's an  
8 informant to begin with.

9           LDC [MR. CONNELL]: There might be a reason why he's an  
10 informant to begin with. That's right.

11          MJ [COL POHL]: I got it. Go ahead.

12          LDC [MR. CONNELL]: The one other case that I wanted to  
13 bring to your attention is an older case, but a military  
14 case -- and always I'm looking for the military case -- which  
15 is Enloe, United States v. Enloe, E-N-L-O-E, 35 CMR 228, a CMA  
16 case from 1965.

17                So there are really two flaws in Enloe that the Court  
18 of Military Appeals struck down. One of them was that the  
19 commander of the Air Force OSI required that all witness  
20 requests had to go through the prosecution. If you wanted to  
21 interview -- not witness -- interview requests. If you wanted  
22 to interview an OSI agent, it had to go through the  
23 prosecution. And then, if possible, there should be a senior

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1 OSI agent or prosecutor there.

2           And the government, their response to that case, the  
3 way they tried to distinguish it, is to say, "Well, there's  
4 that additional aspect of a prosecutor or OSI agent being  
5 there." That was the optional aspect of the protocol. The  
6 mandatory aspect of the protocol is that witness requests had  
7 to go through the prosecution. And that was the place that  
8 the CMA said this whole scheme is -- is unconstitutional.

9           So the last thing that I want to point out about this  
10 is that when the CIA and the FBI go out to talk to the  
11 proposed witnesses or the -- they only talk to them about  
12 their right to speak to the defense. It's not a matter of,  
13 you know, you have a right to speak to anybody in the world or  
14 not speak to anybody in the world. It's that these defense  
15 people don't know who you are. Do you want to tell them who  
16 you are and talk with them?

17           So the significance of that is not the bad faith of  
18 the -- of the investigators; it's rather the fact the  
19 unilateral, one-sided nature of it; that this protocol is not  
20 applied to the government, it's only applied to the defense.

21           Now, let's talk about access to witnesses. The  
22 government mentioned, United States v. Gregory, 369 F.2d 185,  
23 a D.C. Circuit from 1966 that provides, in our jurisdiction,

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1 the controlling principles that the prosecution cannot make  
2 witnesses its property.

3 And cases around the country have applied the  
4 principle of Gregory in a bunch of different ways. But its  
5 core principle is that witnesses, I quote here, "Are the  
6 property of neither the prosecution nor the defense. Both  
7 sides have an equal right and should have an equal opportunity  
8 to interview them." That is at page 188 in the Gregory  
9 decision.

10 One of the cases that applied Gregory,  
11 United States v. Tsutagawa, which is spelled  
12 T-S-U-T-A-G-A-W-A, at 500 F.2d 420, pinpoint cite 423, Ninth  
13 Circuit case from 1974, says that, I quote again, a defendant  
14 has the right to formulate his defense uninhibited by  
15 government conduct that in effect prevents him from  
16 interviewing witnesses who may be involved and from  
17 determining whether he will subpoena and call them in his  
18 defense.

19 The thing that I like about that Tsutagawa case is  
20 that it recognizes the formative nature of interviews. We may  
21 interview 300 witnesses and decide to call three of them. But  
22 until we've interviewed them, we know neither what they have  
23 to say nor the strength of their testimony.

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1           And like the Tsutagawa case, there's other cases  
2 which have applied the Gregory principle that witnesses can't  
3 be -- are not the property of either side, have taken many  
4 different forms. One of those forms is an order, like we have  
5 proposed and actually in existence, an order not to contact  
6 witnesses except under certain circumstances. Two different  
7 cases have struck down those types of orders: State v.  
8 Murtagh, M-U-R-T-A-G-H, 169 P.3d 602, an Alaska case from  
9 2007, and United States v. Aycock, A-Y-C-O-C-K, 35 CMR 130, a  
10 CMA case from 1976.

11           Now, the last thing that I want to talk about,  
12 both -- and this applies to both the current situation and the  
13 proposed protective order, is that the government's system  
14 prevents the identification of witnesses to actually  
15 interview. So they require us to request witness interviews  
16 by name or assigned pseudonym, but prevents us from actually  
17 finding the people that we would want to request in the first  
18 place.

19           And I'll give you an example. Imagine a CIA officer  
20 with some highly unusual features and -- which is actually a  
21 situation, and that we, as a team, are close to identifying  
22 him. We have ideas. We think it could be this person. We  
23 think it could be the other person.

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1           In that situation, we have to work the social  
2 networks; we have to work the photographic lineups until -- so  
3 we can identify the person that we want -- would even want to  
4 request under the protocol because we don't have a name for  
5 that person, or we have multiple names, and, you know, we  
6 can't throw out all four of them to just do a fishing  
7 expedition because that's what the government would say, "You  
8 haven't done your legwork yet," although especially the  
9 affiliated individuals' prohibition in the protective order  
10 would prevent us from doing that.

11           I'll give you a second example already in the record,  
12 the BOP witnesses. The SSCI report talks about BOP, Bureau of  
13 Prisons, witnesses who examined the COBALT detention center.  
14 We requested in July of 2017, in the same discovery request,  
15 or the same witness assistance request, interviews with those  
16 BOP witnesses. They're not even -- those BOP witnesses are  
17 not even listed on the government's response; and that's  
18 probably because it's hard even for the government to identify  
19 and find them because they're not identified by name in the  
20 SSCI report.

21           Now, we could -- we do talk to BOP individuals, and  
22 we're trying to find out who those BOP witnesses are. But  
23 until we work the social network, until we work LinkedIn and

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1 work through our contacts in the BOP and work the neighbors  
2 and anybody else, we can't identify them to even request them  
3 by name.

4 Now, what relief is pending? I know that I heard you  
5 say earlier that you want to deal with 548 and 549 separately.  
6 That's completely fine with me. But I can't leave this point  
7 without mentioning the 524 and 524Q, which are pending.

8 524 seeks the relief that we're asking for, which is  
9 either to dismiss or to compel interviews. I briefed -- and  
10 the government has never responded -- the authority of the  
11 military commission to compel witnesses seems pretty clear  
12 under military law.

13 But the discovery piece in 524 ----

14 MJ [COL POHL]: What's your source or authority for that  
15 position?

16 LDC [MR. CONNELL]: Hang on. I have a slide. LN1, could  
17 you go to slide 38, please. It's the last slide. Keep going.  
18 That was it.

19 So here are the cases, multiple cases including out  
20 of the military courts. Most recently in 2015 in the Stellato  
21 case about the authority of a military judge to order  
22 witnesses to submit to an interview. When I first brought  
23 this ----

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1 MJ [COL POHL]: That's how you read those cases?

2 LDC [MR. CONNELL]: Yes, sir. And take Stellato, for  
3 example. When I first brought this up, I thought that ----

4 MJ [COL POHL]: Uh-huh.

5 LDC [MR. CONNELL]: ---- there was a difference between  
6 government and nongovernment witnesses. The witness in  
7 Stellato who was compelled was, in fact, like a minor victim  
8 of an alleged -- of alleged sexual misconduct with no  
9 connection to the government whatsoever.

10 The -- so that what I originally thought about there  
11 being a distinction between the government and nongovernment  
12 witnesses was not borne out when I went back and did the  
13 research.

14 MJ [COL POHL]: Let me make sure we're talking about the  
15 same thing here.

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

17 MJ [COL POHL]: Are you saying that there's authority to  
18 order -- I mean, he's a civilian witness here, but it also  
19 applies to military, order somebody to be interviewed or order  
20 somebody to be asked to be interviewed?

21 LDC [MR. CONNELL]: I'm saying that there is authority to  
22 order a person to show up for an interview. What they do at  
23 that point is up to them, of course.

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1 MJ [COL POHL]: What if they say, "I'm not going to" -- "I  
2 don't want to be interviewed"?

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

4 MJ [COL POHL]: Do I have to make them show up for them to  
5 say that?

6 LDC [MR. CONNELL]: Yeah. Because that's the access to  
7 witnesses' piece of this. What the government has done ----

8 MJ [COL POHL]: No. But I'm just saying is -- I think  
9 we're conflating two concepts here.

10 LDC [MR. CONNELL]: Okay. I don't want to do that.

11 MJ [COL POHL]: Okay. Is -- are you asking me to order  
12 access to the witness to request an interview? Or are you  
13 ordering me -- or telling me to order the witnesses to be  
14 interviewed?

15 LDC [MR. CONNELL]: So there's really like a third ----

16 MJ [COL POHL]: No. Just do the two I have, and you can  
17 do your third later.

18 LDC [MR. CONNELL]: But yes is the answer. Both of those  
19 are true.

20 MJ [COL POHL]: Both. I mean, I have the authority ----

21 LDC [MR. CONNELL]: Now that's different from ordering  
22 them to answer any specific question, which is my third point.

23 MJ [COL POHL]: Forget your third point here a second

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1 here. I just want to make sure I'm clear on what you think my  
2 authority is.

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: Because sometimes you guys think I have  
5 more authority than I think I have, and I want to make sure I  
6 know the bounds of this.

7 So you think I can order -- and of course it's not --  
8 it would be within the United States. So we don't want to get  
9 into the overseas issue, and I don't want to get into the  
10 warrant of attachment issue either.

11 LDC [MR. CONNELL]: Okay.

12 MJ [COL POHL]: But I can order somebody that you have to  
13 sit down and be interviewed with -- with the defense counsel,  
14 and you have to answer the questions you want to answer.

15 LDC [MR. CONNELL]: See. That's -- you added the third  
16 piece to it.

17 MJ [COL POHL]: What's an interview if they're not  
18 answering questions?

19 LDC [MR. CONNELL]: What the interview is is that when we  
20 actually talk to people, they generally answer our questions.  
21 That's the difference.

22 MJ [COL POHL]: When I give them this order, do I tell  
23 them, "You have to go and talk to the defense counsel to be

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1 interviewed," or do I say, "You can choose to be interviewed  
2 by the defense counsel or choose not to be"?

3 LDC [MR. CONNELL]: That is one of the options.

4 So we talked about the Eastern District's approach.  
5 The Eastern District of Virginia had an approach to this  
6 problem. When the government had done something like they did  
7 this time, which is they went out and told people, "Well, you  
8 can talk to them or not talk with them." What the Eastern  
9 District did in that situation is sent every witness a letter  
10 encouraging them to talk to the defense. There's a thread  
11 about that in the military cases as well, how important it is.

12 MJ [COL POHL]: No. I understand that approach. And  
13 quite frankly, I've done that ----

14 LDC [MR. CONNELL]: That's what you asked me that time.  
15 Your larger question is, can you say, "Please be at  
16 Mr. Connell's office at 9:00 on Monday morning for an  
17 interview"? Yes, you absolutely have that authority.  
18 Now ----

19 MJ [COL POHL]: Well, you said, "please be." Yeah, I can  
20 say "please" until the cows come home, that doesn't mean  
21 anything ----

22 LDC [MR. CONNELL]: "You are hereby required and directed  
23 to report."

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1 MJ [COL POHL]: ---- you are hereby ordered to be there.

2 Okay. And then if they say, "Judge, I'm not going to be  
3 there," how would I enforce the order?

4 LDC [MR. CONNELL]: Well, that is the same situation that  
5 comes up in a deposition, for example. Right? Magistrate  
6 judges issue orders all the time, be at such and such a place  
7 for a deposition. Now, that's separate from the enforcement.

8 MJ [COL POHL]: Okay. But I don't like to give orders I  
9 can't enforce. Okay. There's all sorts of issues with this  
10 compelling thing. One, if I issue an order to be interviewed,  
11 unless I put all of these caveats in it, they're going to  
12 assume -- many people will, will say, "The judge is ordering  
13 me to be interviewed" thinking they have no choice, when they  
14 do have a choice, don't they?

15 At the end of the day, they say, "I don't want to  
16 talk to Mr. Connell, and I don't want to talk to  
17 General Martins. And I certainly don't want to talk to  
18 Colonel Pohl." And, "Do I have that option?" And the answer  
19 is yes -- well, for you two, the answer is yes. For me, it  
20 may not be. That's my point.

21 So I order you to show up at Mr. Connell's office at  
22 0900. And at that time, you can choose whether or not you  
23 wish to talk to Mr. Connell?

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1 LDC [MR. CONNELL]: If your question to me is do you have  
2 authority to do that, the answer is unequivocally yes. Do I  
3 think that is the correct remedy here? No.

4 I think the correct remedy is for you to honor the  
5 election -- and we're going to talk about this in detail in  
6 the statutory scheme -- to honor the election that the  
7 government has made and dismiss the case. They have decided  
8 that it is more important to protect these witnesses than it  
9 is to prosecute the case. They're entitled to that view, and  
10 they get to enforce it. Like 949p-6 gives a very specific  
11 process for them to enforce that view, and that's the primary  
12 remedy that we asked for in 524.

13 The reason -- the whole reason why I briefed this  
14 question and bring you this is because you asked me, do I have  
15 authority to do that. And the answer is yes. And here are  
16 the cases.

17 MJ [COL POHL]: Your answer is yes.

18 LDC [MR. CONNELL]: I only give my answer, right?

19 MJ [COL POHL]: I just want to make it clear.

20 LDC [MR. CONNELL]: I don't get to answer for anybody  
21 else.

22 MJ [COL POHL]: That because I'm still struggling with  
23 this whole concept.

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1 LDC [MR. CONNELL]: That's right.

2 MJ [COL POHL]: But you're right, this is a side issue, a  
3 side remedy what it is. And you're asking for another remedy,  
4 and there may be other remedies in between. But go ahead.

5 LDC [MR. CONNELL]: That's right.

6 And so with respect to that remedy, LN1, could we  
7 return to slide 11, please. With that, I think it's important  
8 to briefly discuss the prejudice that we're suffering from  
9 these -- sorry, one more forward. Yes. The prejudice that  
10 we're discovering -- no, one more back.

11 There are -- we could not -- many people that we have  
12 already interviewed before these prohibitions went into effect  
13 we could not interview today. I mean, if you want -- if past  
14 behavior is a predictor of future conduct, what we can tell is  
15 that there are lots of people who agreed to interviews and  
16 actually spoke to us who we can't even go back to them with  
17 follow-up questions now. We currently possess many leads that  
18 we are prohibited from following.

19 MJ [COL POHL]: These people were CIA people who had  
20 knowledge of the RDI program?

21 LDC [MR. CONNELL]: 20 of them.

22 MJ [COL POHL]: Okay. That's the ----

23 LDC [MR. CONNELL]: Wait a minute. Wait, wait, wait,

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1 wait, wait, wait, wait.

2 MJ [COL POHL]: The ----

3 LDC [MR. CONNELL]: The thing keeps shifting. I'm going  
4 to talk to you -- the 20 are CIA people.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: All right. They know people who are  
7 in the RDI program. Four of those -- actually, six of those  
8 are people who are CIA persons with knowledge of the RDI  
9 program. I'm going to talk to you about those six people in  
10 more detail in a classified session.

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

12 LDC [MR. CONNELL]: Okay. The -- it prevents the  
13 effective assistance of counsel, which we're going to talk  
14 more in more detail. It creates a conflict of interest  
15 between our duty to investigate and our duty to follow  
16 classification guidance and interferes with the execution of  
17 our professional judgment. So that's what I want to say about  
18 the current restrictions.

19 Let us move to the proposed restrictions. The far  
20 right on this spectrum, the requested military  
21 commission-ordered prohibitions on defense investigation.  
22 Now, I can give you a concrete example of how those interact.  
23 On 5 March of 2018, we were operating under the 27 February

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1 version of the prohibitions, which we could not interview CIA  
2 but we could interview others.

3           We interviewed a witness who we have given a call  
4 sign of Union in a secure space on that date; I did it  
5 personally. Union provided information about a CIA officer  
6 who we have given the call sign Salt. There's some detail  
7 about this in 524N. We thought at the time that Salt was RDI,  
8 but we were wrong.

9           We found a book by a CIA officer who we have given  
10 the call sign Strawberry, which included photos of Strawberry.  
11 Strawberry matches the description of Salt. The FBI -- so in  
12 other words, the CIA officer who wrote a book matches the  
13 description that a non-CIA individual told us about. But we  
14 don't know.

15           So we wanted to show pictures of Strawberry to Union,  
16 the non-CIA individual, to see if that was the right person or  
17 not before we go and bother this person. We're not allowed to  
18 do that. That's the April 6 guidance. That's what gave rise  
19 to the April 6 guidance.

20           We found Strawberry -- and I have the person who  
21 wrote the book -- and we plan to interview him next week. If  
22 the proposed protective order went into effect before next  
23 week, we could not only not interview Strawberry because he

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1 is -- would be a CIA person, but we couldn't even re-interview  
2 Union, the first person -- non-CIA person because he's an  
3 affiliated person who knows a CIA person. In either case, we  
4 couldn't go to the government and request an interview with  
5 Salt because we don't know Salt's name.

6           So the reason why I'm going through this somewhat  
7 complicated -- this is the reality, the facts on the ground  
8 over the past month and the many months before that, which is  
9 that we have all these -- we're so close. We are -- in many  
10 places we have already secured the interviews or we are close  
11 to finding the person with information -- relevant information  
12 for the case. And this investigative -- proposed  
13 investigative system would shut down even what we have in  
14 place right now.

15           So let's look at that in terms of the circles. We  
16 talked before about the CIA person and the U.S. RGI [sic].  
17 The affiliated individuals' description in this proposed  
18 protective order is the exception that completely swallows the  
19 rule. Because an affiliated individual is a person who,  
20 "based on family, academic, business, professional, community,  
21 social, or other ties, can identify CIA officers. This  
22 category of individuals includes, but is not limited to,  
23 family members, business associates, household employees, and

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1 neighbors," which means that every person who knows -- who  
2 could identify a CIA officer, including other CIA officers,  
3 are -- who are not involved in RDI are affiliated individuals.

4           Because the prohibition in this proposed protective  
5 order is -- except as provided in paragraph 10.a. and 10.c.,  
6 which don't have anything about affiliated persons at all,  
7 "Defense personnel shall not contact any affiliated individual  
8 for the purpose of learning any information regarding a CIA  
9 person other than officially acknowledged RDI officers."

10           So let me give you a perfect example here. The  
11 Deputy Director of the -- the current Deputy Director of the  
12 CIA, Gina Haspel, is not on the list of 25, and clearly can  
13 identify CIA officers. She is an affiliated person.

14           Last week, the CIA declassified a document about  
15 Ms. Haspel's role in Mr. Rodriguez's destruction of the  
16 videotapes of Mr. Nashiri's waterboarding. The -- if we  
17 wanted to go and talk to her about that, she would be an  
18 affiliated individual. We don't even -- we're not even  
19 allowed to request to speak to her under the government's  
20 scheme, and we certainly couldn't contact her because she is  
21 an affiliated individual who can identify CIA officers.

22           This affiliated individual rule swallows whatever  
23 exceptions or whatever, you know, purported reasonability got

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1 inserted into this protective order because this provision is  
2 so broad that it probably -- probably covers every person in  
3 the United States.

4 MJ [COL POHL]: Would it make a difference if they limited  
5 it to "could identify covert officers"?

6 LDC [MR. CONNELL]: Can identify?

7 MJ [COL POHL]: Yes.

8 LDC [MR. CONNELL]: No. The -- what would make more  
9 sense -- I mean, that would be better. Would it limit ----

10 MJ [COL POHL]: I mean, if you read this, technically  
11 you're right about people that everybody knows works for the  
12 CIA can't tell you about other people who work for the CIA.

13 LDC [MR. CONNELL]: Right. And it probably includes  
14 everybody in the National Capital Region, because we all have  
15 neighbors ----

16 MJ [COL POHL]: ---- which doesn't affect anybody. But on  
17 the other hand, if you had Valerie Plame's neighbor, when she  
18 was under covert status, saying -- go up to her and goes,  
19 "Does she work for the CIA?", that may be a different concern.

20 LDC [MR. CONNELL]: Right. But we never ask anybody that.  
21 We never say, "Do they work for the CIA?"

22 MJ [COL POHL]: No. But my point being, the way this is  
23 worded, it covers everybody.

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1 LDC [MR. CONNELL]: Yeah.

2 MJ [COL POHL]: But you could word it consistent with the  
3 Identity Protections Act, for example, and just talk about  
4 those people.

5 LDC [MR. CONNELL]: Well, we're already bound by the  
6 Identity Protections ----

7 MJ [COL POHL]: Well, I know you are. I'm simply saying  
8 if this said, you know, you can't go up to somebody and have  
9 them identify a covert CIA officer, would you have an issue  
10 with it worded that way?

11 LDC [MR. CONNELL]: We are already operating under orders  
12 that we could not disclose classified information.

13 MJ [COL POHL]: So -- so the answer to my question is if  
14 that was worded consistent with that, then you wouldn't have a  
15 problem with this?

16 LDC [MR. CONNELL]: If -- "disclosure" is the key word.  
17 If it's worded consistent with the IIPA about disclosing CIA  
18 officers -- covert officers, that's different from talking to  
19 them, right? If my neighbor is a covert ----

20 MJ [COL POHL]: No. But I'm saying -- I'm going to the  
21 paragraph that you keep referring to ----

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

23 MJ [COL POHL]: ---- and it says "affiliated people that

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1 can identify CIA officers."

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: And my point being, whether you use the  
4 term "identify" or "disclose," it's the contact of a covert  
5 CIA officer that could cause the problems that they're  
6 concerned about.

7 LDC [MR. CONNELL]: Well, affiliated individuals  
8 aren't ----

9 MJ [COL POHL]: No. I know that.

10 LDC [MR. CONNELL]: ---- we're not contacting a covert  
11 officer.

12 MJ [COL POHL]: Yeah. But by contacting them about a  
13 covert officer, aren't you running of risk of exposing their  
14 covert status?

15 LDC [MR. CONNELL]: No. But only if we disclose  
16 information. That's what the prohibition is, disclosing  
17 information.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: "Hey, do you know Jill?"

20 MJ [COL POHL]: Okay. Take me down this road,  
21 Mr. Connell, so I make sure I understand.

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: You go to the neighbor of a covert

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1 officer ----

2 LDC [MR. CONNELL]: All right. We don't know they're  
3 covert, right? I don't know anyone who is covert. We know  
4 that there's Jill, and she is a person of interest to us.

5 MJ [COL POHL]: Okay. And you ask -- and then --

6 LDC [MR. CONNELL]: "Hey, is Jill home?"

7 MJ [COL POHL]: Okay. That doesn't prohibit this.

8 LDC [MR. CONNELL]: Yes, it does. We can't -- we can't  
9 talk to her. We cannot contact any purpose for the purpose --  
10 contact any affiliated individual for the purpose of learning  
11 any information regarding a CIA person.

12 MJ [COL POHL]: Well, how do you know they can identify a  
13 CIA officer to begin with?

14 LDC [MR. CONNELL]: I don't.

15 MJ [COL POHL]: So it's somewhat of a do-loop? I'm  
16 saying ----

17 LDC [MR. CONNELL]: Yeah, a do-loop that leads us out of  
18 any investigation whatsoever. There's nobody we can -- no  
19 investigation we can do ----

20 MJ [COL POHL]: "Does your neighbor work for the CIA?" If  
21 the answer is yes, you can't talk to them; if the answer is  
22 no, you can.

23 LDC [MR. CONNELL]: But we don't ask them do they work for

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1 the CIA because that --

2 MJ [COL POHL]: I know. I know. But then you don't know  
3 how paragraph b. is triggered then because you don't know if  
4 the first person can identify the second person as being in  
5 the CIA to begin with. Do ----

6 LDC [MR. CONNELL]: Right. And so what the government  
7 just told us ----

8 MJ [COL POHL]: Maybe we're agreeing about how confusing  
9 this is.

10 What I'm just saying is that -- is that how do you  
11 know this affiliated person can identify a CIA officer? You  
12 could know, but, I mean, there's a good chance you don't know.  
13 So I gotcha. Go ahead.

14 LDC [MR. CONNELL]: The relation -- the other thing ----

15 MJ [COL POHL]: No. Back up that slide.

16 LDC [MR. CONNELL]: No. Back up, please. Yeah.

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

18 LDC [MR. CONNELL]: Right. So I don't know if this is  
19 what you are looking at or not, but it's worth mentioning,  
20 that there is no carveout for overt non-RDI here. This is any  
21 CIA -- learning any information regarding any CIA person  
22 other ----

23 MJ [COL POHL]: Well, except for the ----

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1 LDC [MR. CONNELL]: ---- other than officially  
2 acknowledge.

3 MJ [COL POHL]: At the end of paragraph b.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Other than officially acknowledged. So  
6 the people on the list.

7 LDC [MR. CONNELL]: The list.

8 MJ [COL POHL]: The list people?

9 LDC [MR. CONNELL]: But not the overt non-RDI category  
10 that you were talking about.

11 MJ [COL POHL]: Or the overt non-list?

12 LDC [MR. CONNELL]: Correct.

13 MJ [COL POHL]: Got it.

14 LDC [MR. CONNELL]: So there are two expansions that I  
15 think are worth noting when you're looking at how incredibly  
16 expansive this proposed protective order. The first is that  
17 the government abandoned the uncleared investigator theory  
18 that they had in 525G altogether, and they've expanded defense  
19 personnel beyond your Protective Order #1 to anyone who  
20 basically cooperates with us, cleared or uncleared.

21 And then for the -- I was very interested to hear the  
22 government say that this allows us to do reasonable  
23 investigation because the definition of "contact" is so broad

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1 that there's essentially no investigation of -- of RDI people  
2 that is available because it is "approaching, questioning,  
3 surveilling, identifying, photographing, tracking, trailing,  
4 communicating with or otherwise interacting with a CIA person  
5 or affiliated individual, a building or fixed structure, a  
6 vehicle on land, sea, or air that at some point was operated  
7 by a CIA person."

8           It's incredibly, incredibly broad. It means that a  
9 lot of things that we can even do now under these current  
10 prohibitions that we could not do under this protective order.

11           It also -- and this is another one. It also affects  
12 people who are already on the defense team. I don't know if  
13 you noticed this or not, but in our -- in my prohibition,  
14 three prohibitions that I have done for our defense team about  
15 investigation, I have always exempted people who were already  
16 provided by the convening authority who fall within  
17 the protective -- you know, within the restrictions.

18           We have one CIA person who is -- who is already a  
19 member of the team per convening authority order. We have  
20 another one who is in the process that we've requested.  
21 There's no exception for anything like that in here. We -- I  
22 think, I guess we would have to fire those people off the  
23 team.

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1           So it just goes to show you how incredibly  
2 restrictive this investigative restriction is, in that it  
3 requires us to reach into our team and kick people off because  
4 we can no longer communicate with people on our own teams.

5           Now, I've been commenting multiple times about this  
6 statutory scheme which we haven't actually spent in this  
7 military commission a lot of time with, but there are big,  
8 important differences between the three protective statutes:  
9 949p-3, 949p-4, and 949p-6(d). They're radically different  
10 from each other. None of them actually apply in this  
11 situation because they all deal with disclosure; and at no  
12 point are we seeking to disclose information. We are seeking  
13 to gain information, not to disclose it.

14           But they also have very different ex parte procedures  
15 from each other. And this is not one of the categories  
16 of ----

17           MJ [COL POHL]: You don't think 49p-3 [sic] talks about  
18 obtaining by the --

19           LDC [MR. CONNELL]: Yes, in fact, it exactly does. Let's  
20 go there right now. So let's go to 949p-3. And I have the  
21 text of it up here.

22           The -- and this is the -- in 920 -- excuse me,  
23 AE 524-3, the government claimed that it was going to file a

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1 protective order under 949p-3, even though when you discussed  
2 this same topic in 308HHHH, you talked about p-6. But it says  
3 that "Upon motion of trial counsel, the military judge shall  
4 issue an order to protect against the disclosure of any  
5 classified information that has been disclosed by the United  
6 States or" -- and this is the place where it differs from all  
7 of the others -- "or has been obtained by any such accused in  
8 any military commission."

9           This is about protective orders against disclosure,  
10 which we're not asking to do. We're not asking to disclose  
11 information. We're asking to acquire information.

12           The ----

13           MJ [COL POHL]: Isn't the government wanting to protect  
14 the disclosure of identities that are classified?

15           LDC [MR. CONNELL]: We're not seeking to disclose -- if  
16 you gave us an order, do not disclose any identities ----

17           MJ [COL POHL]: Mr. Connell, I didn't say that. I didn't  
18 ask that question. I'm simply saying is, I know what you're  
19 doing. I know you're trying to obtain information. The  
20 government wants to restrict your access to protect classified  
21 information from you. I know who they're protecting it from.  
22 I got it. But they're trying to protect the disclosure of  
23 certain classified information to the defense, aren't they?

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1 Isn't that why it's a protective order?

2 LDC [MR. CONNELL]: The -- what normally happens -- and  
3 let's look at p-4. I'm answering your question.

4 What normally happens is -- occurs under 949p-4. So  
5 the dozens of protective orders that you've issued in this  
6 case arise under p-4(b), which is essentially about deletions  
7 and substitutions. It's when evidence is in the possession of  
8 the government, we ask for it in discovery. And they want to  
9 give us a redacted or substituted version. That's not about  
10 information that's already in our possession.

11 The -- this actual situation that we're talking about  
12 here arises under 949p-6(d), which is what you, in fact, said  
13 in 308HHHH. And that's where we're talking about -- let's  
14 assume for a moment that what we are seeking to do is  
15 disclosure. Right? I don't agree with that, but I want to  
16 just go with what you've hypothesized for the sake of  
17 discussion.

18 MJ [COL POHL]: Well, I'm going back to the protective  
19 order is designed to restrict disclosure, to protect  
20 disclosure. That's what I'm saying. I know what you want.

21 LDC [MR. CONNELL]: Right.

22 MJ [COL POHL]: I'm just saying is -- because you may find  
23 this hard to believe, but when this whole issue came up, it

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1 was, in my own mind, which box are we in here ----

2 LDC [MR. CONNELL]: Yeah.

3 MJ [COL POHL]: ---- because it's -- we're kind of mixing  
4 boxes, for want of a better term.

5 LDC [MR. CONNELL]: Right. Right.

6 MJ [COL POHL]: And the protective order -- the basis of  
7 the protective order is to prevent disclosure of classified  
8 information that you do not have, right?

9 LDC [MR. CONNELL]: No.

10 MJ [COL POHL]: The identities of these people?

11 LDC [MR. CONNELL]: Well, it depends on ----

12 MJ [COL POHL]: I mean ----

13 LDC [MR. CONNELL]: It's super overbroad to accomplish  
14 that. But I'll accept for purposes of argument that that's it  
15 at its core.

16 MJ [COL POHL]: Thank you. But I'm just saying I know  
17 that you want -- you want the information.

18 LDC [MR. CONNELL]: No. I want access to the witnesses,  
19 is what I want.

20 MJ [COL POHL]: To get the information. The protective  
21 order wants to limit your access, to limit your access to the  
22 witnesses to protect classified information.

23 LDC [MR. CONNELL]: Right. That's fair. That's a fair

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1 categorization.

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

3 LDC [MR. CONNELL]: I don't know -- you know, when you  
4 were thinking about that, I don't know which box you came down  
5 on. To me, the box -- the correct box is 524p-6(d). The --  
6 and the reason is -- and this is what you cited in 308HHHH --  
7 that this is any other procedure limiting the disclosure of  
8 specific classified information -- now, I disagree about  
9 disclosure, but I'm setting that aside for a moment -- that  
10 this is the other procedure.

11 And so it actually is extremely specific. It gives  
12 us a path on how to evaluate this. And I've broken that path  
13 into six steps.

14 The first step on that is a disclosure  
15 determination -- yes, thank you -- and that's what's going on  
16 in 523, 524, and then later this week, 562; that is, does the  
17 government have to disclose information.

18 Because the place where I completely agree that  
19 disclosure is requested is 523. 523 is these are witnesses  
20 whose identities you have hidden. Please given us the  
21 information about them. The -- that is a disclosure  
22 determination. That is transfer of information from  
23 government to defense. And those are the three motions which

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1 are involved there.

2 Now, after that -- and we're a little bit out of  
3 order, but we're not mixing boxes as much as it may seem --  
4 the government makes a motion for an alternate procedure. And  
5 that's 524L and S. That's the military -- that's the  
6 prohibition that you have in front of you.

7 Now, the place where the boxes do get mixed is that  
8 the government has also unilaterally imposed a different set  
9 of investigative restrictions on us, but for the moment, let's  
10 just deal with the government's motion for an alternate  
11 procedure. The -- and that's specifically laid out in  
12 949p-6(d)(1)(C).

13 So what happens from there is that let us say that  
14 you deny in any respect -- let's say I love the government;  
15 that you decide I love the government's protective order  
16 except I don't like that affiliated individuals provision. If  
17 you denied them their protective order under -- in any  
18 respect, then what happens then is that 949p-6(f)(1) kicks  
19 in -- and I can show that to you and that is -- this is super  
20 confusing, so bear with me for a moment.

21 When you deny a protective order from the government,  
22 you then -- and then they -- if they file a declaration, which  
23 they purport to have already done, then you have to grant the

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1 protective order anyway.

2           So "Whenever the military judge denies a motion by  
3 trial counsel that the judge issue an order under subsection  
4 (a), (c), or (d)" -- this is (d) -- "and the trial counsel  
5 files a -- files with the military judge a declaration signed  
6 by a knowledgeable United States official possessing authority  
7 to classified information objecting to disclosure of the  
8 classified information at issue" -- which from the  
9 government's argument, I understand they've already done --  
10 "the judge shall order that the accused not disclose or cause  
11 the disclosure of the information."

12           So this is counterintuitive, but the way that the  
13 statute is written is that if you deny their protective order,  
14 then you have to -- as far as I can tell in any respect, then  
15 you go, you issue the protective order anyway. Like, you  
16 order us not -- I see that look. Right? That's when I first  
17 read this, I was like, "Wow, this is the most bizarre  
18 statutory scheme ever." Because if you disagree with them,  
19 then you have to order us not to disclose the information  
20 anyway.

21           MJ [COL POHL]: So the way you read this is that if I were  
22 to reword the protective order to -- and, again, I hope you  
23 all understand these are all hypotheticals ----

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

2 MJ [COL POHL]: ---- something to the effect of that the  
3 non-list overt people, the defense doesn't need to go to the  
4 government to talk to them. They could come back and say, "I  
5 can't do that"?

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

7 MJ [COL POHL]: Or they could come back and just -- or not  
8 say that.

9 LDC [MR. CONNELL]: That's, in fact, in the statute.  
10 We're getting there.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: The -- the reason for that ----

13 MJ [COL POHL]: They could see that -- they could -- they  
14 don't have to come back, is what I'm trying to say.

15 LDC [MR. CONNELL]: Correct. Well, I mean, you know and I  
16 don't whether the military commission has already -- whether  
17 the prosecution has already submitted a declaration signed by  
18 an OCA objecting to disclosure. You know that, and I don't.  
19 Right? Because over my objection, we have not seen the  
20 declarations in 524L. You know whether that's true; I don't  
21 know whether that's true.

22 If it is true ----

23 MJ [COL POHL]: Is this where the point came up -- when we

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1 first discussed this last session, you made a point that you  
2 will see the only protective order when it's all done?

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: Yeah.

5 LDC [MR. CONNELL]: That's right.

6 MJ [COL POHL]: That was your ----

7 LDC [MR. CONNELL]: That's right.

8 MJ [COL POHL]: That was your objection. I understand. I  
9 got it.

10 LDC [MR. CONNELL]: Okay. So let's talk about what  
11 happens from there.

12 At that point under the statute, then we go to  
13 (f)(2); and that is, after you've issued an order under (f)(1)  
14 disclosing or causing the disclosure of classified  
15 information, you shall dismiss the case or one of these other  
16 specified -- or not just specified or -- but -- or grant other  
17 relief.

18 The reason why this works that way is the place that  
19 I began, that the government gets to choose which is more  
20 important, a trial in an adversary format or the protection of  
21 information. So that principle is -- is what appears in p(f).  
22 And then there's a final step, which is that, you know,  
23 government always says, "We have our remedies." And they have

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1 two remedies. They can withdraw their objection, either in  
2 whole or in part.

3 Let's take your example -- excuse me. You reword it,  
4 and they say, "Listen. It's not worth the trouble. I didn't  
5 really care that much about the overt" ----

6 MJ [COL POHL]: Can probably do that earlier in your  
7 diagram.

8 LDC [MR. CONNELL]: It can. This is just the way the  
9 statute works.

10 MJ [COL POHL]: But I'm just saying, when I look at your  
11 various steps, if I modify the order, and therefore on step 4  
12 issue a modified order, and they say they can live with it,  
13 then the objection is gone?

14 LDC [MR. CONNELL]: Correct.

15 MJ [COL POHL]: Although they may not live with other  
16 parts of it.

17 LDC [MR. CONNELL]: Right.

18 MJ [COL POHL]: Because there could be remedies, too.

19 LDC [MR. CONNELL]: Right. That's right.

20 MJ [COL POHL]: I mean, there could be both a modification  
21 of the order ----

22 LDC [MR. CONNELL]: And ----

23 MJ [COL POHL]: ---- and also attach remedies even as the

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1 order is modified.

2 LDC [MR. CONNELL]: That's right. Because you could mix  
3 and match remedies under this. And I think that's what you're  
4 saying.

5 You know, Congress writes statutes and then they get  
6 played out in reality. And what you're saying is that step 6  
7 may actually precede step 5. And I completely understand what  
8 you're saying; and I don't disagree. It doesn't say  
9 anything -- it says that -- the order that it sets out is the  
10 sort of legal, logical way. It's not the way that it actually  
11 necessarily plays out in court.

12 But it is significant because this is the only  
13 scenario in which we have such a detailed explanation of what  
14 the military commission is supposed to do. And all this  
15 became part of Rule M.C.R.E. 505 as well, so there's no  
16 conflict between those two.

17 So let me just close, Judge, by saying we have shown  
18 you a lot of cards. In our declarations, we have revealed an  
19 enormous amount about our investigation to show you  
20 specifically how much damage the current investigative  
21 prohibitions are doing and the proposed investigation  
22 prohibitions would do to our defense, our guilt/innocent  
23 defense, because the -- there are quite a few -- there are

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1 multiple elements.

2 One of those elements is the proof of hostilities.

3 The government is doing enormous damage to our hostilities  
4 defense. It's doing enormous damage to our objections to the  
5 admissibility of the government's evidence.

6 MJ [COL POHL]: Didn't the government say that this  
7 doesn't apply to the hostility witnesses? Did I miss ----

8 LDC [MR. CONNELL]: That's not what the protective  
9 order ----

10 MJ [COL POHL]: I mean, say -- no, I ----

11 LDC [MR. CONNELL]: That might be our ninth version, but  
12 that's what the protective ----

13 MJ [COL POHL]: Is that what they said?

14 LDC [MR. CONNELL]: The government made a couple of ----

15 MJ [COL POHL]: Did I misunderstand Mr. Groharing about  
16 this is -- and I'm -- and I hate doing this, but I'm going to  
17 do it anyway.

18 Mr. Groharing, as I understand, this order deals with  
19 RDI witnesses only. Correct?

20 TC [MR. GROHARING]: Right. With -- with -- we talked  
21 earlier about the covert CIA officers. It would be any covert  
22 CIA employee.

23 MJ [COL POHL]: Yeah. I understand.

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1 TC [MR. GROHARING]: But the defense could talk to overt  
2 CIA officers about non-RDI. So that would cover Mr. Connell's  
3 hostilities witnesses. So this order would not impact their  
4 ability there. It would not impact any investigation that  
5 Mr. Connell has talked about with respect to those  
6 individuals.

7 MJ [COL POHL]: Thank you.

8 LDC [MR. CONNELL]: There is no -- so let's talk about  
9 George Tenet, classic hostilities witness. He is going to say  
10 a lot of things that are very helpful to our hostilities  
11 defense. He is a person who, based on family, academic,  
12 business, professional, community, social, or other ties can  
13 identify CIA officers. The -- he is neither a foreign  
14 potential witness nor is he one of the five accused. There's  
15 no question that we are prohibited from going to him under  
16 this -- under the text of this order.

17 Now, if the government wants to come up with another  
18 version of the order, we will respond to it, but that's not  
19 what -- what the government just said is not what this order  
20 says.

21 MJ [COL POHL]: Well, not that paragraph, anyway. I mean,  
22 because there's the officially acknowledged RDI people  
23 exception.

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: It's in another paragraph. I've got it.

3 I got it. I understand what you're saying, Mr. Connell.

4 LDC [MR. CONNELL]: But wait. Let me be clear.

5 The -- George Tenet is not a good example. But let's  
6 say one of the middle management in the CIA who actually were  
7 the ones who worked on the position of the United States  
8 against al Qaeda in the period 1996 to 2001, people who were  
9 not on the list of 25 who -- I don't know whether they had  
10 anything to do with RDI or not.

11 But they are affiliated witnesses under this order.  
12 I mean, this is an unbelievably expansive order, and there's  
13 no carveout for hostilities witnesses; there's no carveout for  
14 FBI witnesses who worked -- who cooperated in some way with  
15 the CIA; there's no carveout for DoD witnesses who cooperated  
16 in some way with the CIA. Right? This is an order that takes  
17 this -- prohibits this much investigation to protect this much  
18 information [pointed].

19 MJ [COL POHL]: Thank you. Anything further?

20 LDC [MR. CONNELL]: No. Thank you.

21 MJ [COL POHL]: Any other defense counsel would like to be  
22 heard on this? Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, just a couple of comments to

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1 put this in perspective. One is Mr. Groharing said this  
2 morning that the prosecution is not interested in prosecuting  
3 defense counsel or jamming up defense counsel. And I  
4 certainly take him and the other prosecutors at their word.  
5 But I think in this case we have an historical framework here  
6 that it's not necessarily them but other people in the  
7 government.

8           We have 292, which evolved into a full-fledged  
9 criminal investigation into me and several other members of  
10 our team. We have 532, in which there was a complaint filed  
11 that there was some misuse of classified information in a  
12 filing with a court. And from our team, it was something that  
13 we were not even involved in, and we still got jammed up in  
14 it.

15           And it turns out that the same person in a different  
16 government agency was involved in both of those. And I don't  
17 know how many other people there are in other government  
18 agencies -- not the prosecution -- that can cause this type of  
19 problem. So it's not that we don't take the word of the  
20 prosecutors, but we have to be extraordinarily cautious on  
21 this.

22           And secondly, Judge, Mr. Groharing said we're willing  
23 to stipulate to many things, and you write up a stipulation,

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1 and we'll check it; and if we agree with it, you can use it.  
2 And that's really a brilliant argument on the part of the  
3 prosecutor, because if this information is going to be used  
4 for purposes of mitigation, the more clinical you can make it,  
5 the less likely it is to have an impact on people who are  
6 deciding a particular issue.

7           So obviously it's much better to have a witness  
8 testifying to what the witness saw, heard, felt, smelled,  
9 especially in the context of a torture situation. I'm not  
10 talking about the individual accused here. They may or may  
11 not be able to do that for a lot of different reasons. They  
12 may not be able to relive the trauma. They may not be able to  
13 give individual instances because it happened so many times  
14 over such a long period of time that you can't even identify  
15 it. But there are other people that could do that because  
16 they have notes that they can go back to.

17           If you put an analogy to that, the prosecution is  
18 going to want to, in the penalty phase of this, bring in  
19 victim family members to testify who are going to tell  
20 heartbreaking and very moving stories about what they've  
21 experienced. And I'm sure from their point of view, they  
22 would not want us to say, "We will stipulate that you can get  
23 up in front of the members, and the prosecutor can read this

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1 or somebody else can read this for you as part of a  
2 stipulation, as opposed to having somebody testify."

3 I'm not saying they're equivalent; I'm just saying  
4 it's really got to be considered in the context of how we  
5 think about things when we have to present it to the members.

6 And, Judge, the -- Mr. Connell touched on it, and he  
7 talked about the success that you have when you talk  
8 individually to somebody. There are two FBI agents here. And  
9 I suspect in the first six months of their training, they were  
10 told, "You want to talk to a witness? Go at 7:00 in the  
11 morning or go at 8:30 at night and catch the person off guard.  
12 And don't send them a letter, and don't call them ahead of  
13 time. You show up with your badge, smile on your face, being  
14 very nice, and those people will, 99 percent of the time, talk  
15 to you." Whether they're accused, not accused, people will  
16 talk to people like that.

17 We don't come with that force and authority of law  
18 enforcement. But as Mr. Connell says, that in any  
19 investigation on the criminal defense side, we certainly have  
20 a much better -- much, much better likelihood of getting  
21 information from somebody if either we or the persons that we  
22 use are there.

23 And we had an experience before, Judge, in this case,

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1 on the issue with Mr. Binalshibh's complaints about the way  
2 that he was treated when we were doing investigation and  
3 talking to guards. And they agreed to talk to us, some of  
4 them. And then as soon as the government got involved and  
5 said, "You don't have to talk to them if you don't want to,"  
6 and their commander said, "Don't talk to anybody," it was shut  
7 down immediately. And now the likelihood of doing it is  
8 almost impossible. And that's the cold, hardcore example of  
9 what we face in this situation.

10 Thank you.

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

12 Mr. Nevin, anything? Go ahead.

13 LDC [MR. NEVIN]: All right. Your Honor, this won't take  
14 me very long, but I want to just say three separate things.

15 And the first is to remind you of what we wrote in  
16 525I, like India, when we were talking about the effect that  
17 these restrictions place on us. And we -- a big part of that  
18 motion is about the duty to investigate. And that big yellow  
19 circle that Mr. Connell put up there, I think, is pretty  
20 expressive. This puts hundreds, thousands -- maybe more than  
21 that -- witnesses off limits to us and prohibits us from even  
22 approaching them.

23 And I just will say to you, I've read a lot of

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1 ineffective assistance of counsel cases in the Supreme Court,  
2 and all of them begin with the failure to investigate. This  
3 is because when you look at Strickland -- when you go back and  
4 look at the wellspring of the whole thing, Strickland -- it  
5 says that if you conduct a thorough investigation and then  
6 make tactical choices based on that, you are basically above  
7 reproach. That's the end of the story. But that  
8 investigation, that thorough investigation, is where it all  
9 begins.

10 I've heard Mr. Groharing say a bit of this today, and  
11 I've heard other members of the prosecution team say this on  
12 earlier occasions. We've given them a lot. We've given them  
13 some number of pages -- do you want me to come back after  
14 lunch and finish this argument?

15 MJ [COL POHL]: No, no. Go ahead. We have got time. My  
16 watch is slow.

17 LDC [MR. NEVIN]: Well, I couldn't remember whether you  
18 had a hard cutoff here.

19 MJ [COL POHL]: No, no. We got another 15 minutes --  
20 12 minutes.

21 LDC [MR. NEVIN]: Okay. Well, that's enough for me.

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: So I've heard them say -- and you have,

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1 too -- we've given them a lot. That's really all they need.  
2 That's all they need to do.

3 And I will tell you that every ineffective assistance  
4 of counsel case, every capital case that's been reversed by  
5 the Supreme Court, has involved a lawyer who just took the  
6 discovery that the government gave and then didn't do anything  
7 else. And they read the discovery. They're aware of the  
8 discovery. They read the police reports that they're handed,  
9 but then they don't do anything else. They stop.

10 So I -- the first thing I want to say, and I -- you  
11 and I talked about this, Your Honor -- the very first day that  
12 we had hearings in this case, and I asked you, "What do you  
13 know about capital cases, and what's your feeling about  
14 mitigation?" I asked you a question about mitigation. I will  
15 talk about that probably later today.

16 But -- so some of the time I think maybe Judge Pohl  
17 does not live in the capital world all the time, and maybe he  
18 just doesn't know this stuff; he's not aware of it. My  
19 suspicion is that's not really true more and more as we go  
20 along. So sometimes I say this stuff not so much because I  
21 think you don't know it, but because I think it's so important  
22 just to say it again so that it's up in our random access  
23 memory while you're thinking about this.

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1           These cases go down because lawyers don't  
2 investigate, and that's really almost exclusively the reason  
3 on ineffective assistance of counsel that these cases get  
4 reversed. And that's why I characterize this and I keep  
5 arguing this to you in successive hearings about a conflict of  
6 interest, because all of us who have done capital work know  
7 you have to go out and do the investigation.

8           And so the idea that someone would say you can't go  
9 out and do the investigation is like saying everything you  
10 know is wrong, or two and two equals five. It's very hard to  
11 explain it to someone, if you haven't been in these shoes,  
12 what it's like to have somebody tell you you can't go  
13 investigate.

14           And I understand the need to protect people, and I  
15 understand the Identities Protection Act -- or at least I  
16 think I do, or I understand it generally, in overview. And I  
17 don't want -- I also don't want to reveal information to  
18 anyone that shouldn't have it. I want to protect it. I'm a  
19 loyal American. I want to follow these rules. But -- and I  
20 know what's out there for me if I don't follow the rules.  
21 Okay.

22           So that's where the conflict thing that I have talked  
23 to you about on several occasions comes from, because on the

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1 one hand, I know it like I know my own -- you know, the palm  
2 of my own hand. I'm obligated to investigate. And I know  
3 also that the government is telling me I can't and that there  
4 will be trouble if I don't. So that's where the conflict  
5 comes from, right?

6 So we're right in the -- we're right in the heart of  
7 the thing here. In case you thought this was some exception  
8 or stands outside this overall problem, it doesn't. We're  
9 right in the middle of the central problem of this case.

10 So the second thing I want to say is this. I have an  
11 obligation -- we -- a journalist asked me last night: What's  
12 up -- everybody has read Mr. Connell's pleadings on this  
13 subject about the investigation they've done and what this  
14 protective order -- this requested protective order and the  
15 other nine or eight or however many there have been statements  
16 about investigation, what effect that has. And we've all read  
17 that.

18 So a journalist turned to me and said, "Would you  
19 like to tell us about the investigation you've done?" And I  
20 was like, "No, I'm not going to tell you that."

21 Do you know what you're seeing when you see  
22 Mr. Canestraro or Mr. Futrell's declarations in this case? We  
23 are obligated by Rule 1.6 not to provide information to you

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1 that is confidential about our case. Mr. Connell would never  
2 tell you those things. He would never say those things  
3 publicly in any other situation.

4 And I think -- I think I can -- I haven't asked him  
5 that, but I think I can say that with some confidence. And I  
6 wouldn't, and I didn't last night, because these -- this is  
7 the heart of what we are obligated to do as lawyers. And we  
8 are not -- we are obligated not to do it in a way that  
9 prejudices the effect of it.

10 So the things that Mr. Connell has said about the  
11 approaches they take and the reasons they take it are things  
12 that can be used to advance the prosecution's position just by  
13 virtue of the fact that they now have that information. Under  
14 ordinary circumstances, you wouldn't provide that information.  
15 But just being here arguing this stuff is prejudicial to the  
16 defense in the obvious way that it reveals lots of information  
17 that, under normal circumstances, we would never reveal.

18 But you see, also, I think, what's happening here,  
19 because the fascinating thing about reading the Futrell and  
20 Canestraro affidavits and the pleadings that are -- the  
21 pleading that is referred to -- the fascinating thing about  
22 reading it is that none of the government witnesses that  
23 the -- that Mr. Connell has gone through the process of

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1 requesting in this process, none of them have agreed to  
2 talk -- have agreed to be interviewed. Excuse me. Zero.

3 And I know you knew that, and didn't want to have a  
4 big declaration -- dramatic declaration about it; and I  
5 understand that, and I'm not trying to do that now. But look,  
6 do you see what's happening here? Every one of these  
7 witnesses who's important to this issue is not going to be --  
8 is not going to sit for an interview with us. They're all  
9 going to be hidden from us.

10 Okay. Now, you might say -- and I've had judges tell  
11 me this, and I've done it before -- interview them in front of  
12 the jury. And I've done that. I've put a witness on the  
13 witness stand in front of a jury. And it's a scary  
14 proposition. "You've never met me before, have you? But I'd  
15 like to ask you a few questions about..." and it's scary  
16 because you don't know what's coming next. But sometimes  
17 that's the only way you can get the information. And  
18 sometimes you do it -- right? -- because you hope that where  
19 it's going to go is going to be a good place based on other  
20 information you have. Right? So you do it anyway.

21 We can't even do that here. How do I go about  
22 getting witnesses that I can't identify to the witness stand?  
23 That's -- that's -- I have to obviously know the name of the

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1 people before I can bring them to the witness stand. So this  
2 additional -- there is this additional layer of a restriction  
3 that is being placed here on us.

4 I join the remarks that Mr. Connell made and I think  
5 that are contained in Mr. Bin'Attash's briefing about the  
6 Classified Information Protection Act or the 949p series that  
7 is designed to achieve something similar. I don't agree that  
8 any of those sections deal with this situation. They deal  
9 with the revealing of classified information, not with the  
10 acquisition of it by us, by the defense. They deal with --  
11 they deal with evidence and discovery that's provided to us  
12 and that we are not to provide to anyone else.

13 And you know, of course, that we have signed  
14 protective orders repeatedly. We argued about this during the  
15 MoU, and we're very aware of the obligation not to provide  
16 classified information.

17 So the final thing I want to say to you is that what  
18 this is really about is -- I think it's 558, as I stand here,  
19 I think this is really -- and as counsel points out, 949p-6  
20 has a convoluted process, and it wouldn't necessarily follow  
21 those steps, but one way or another, you would say, "This will  
22 not result in a fair trial. It can't be done this way."

23 And government would say, "Okay. Well, we'll whittle

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1 it down to something else."

2           And you would say, "That is okay," or you would say,  
3 "That's not okay. That won't result in a fair trial either.  
4 If you do that, I'm going to dismiss the case," or, "If you do  
5 that, I'm going to take death off the table," or, "If you do  
6 that, I'm going to rule that you're not allowed to present the  
7 following witnesses" or whatever. However you crafted --  
8 whatever you did to craft a remedy, you would do that. And  
9 then the government would be in the position of making the  
10 choice.

11           And I think that's really what -- you've spoken to  
12 this previously. You've said that there is a -- you've  
13 pointed out that there is a remedy, a mechanism for coming to  
14 the conclusion that a trial is not consistent with the  
15 national -- with the interests of national security. And --  
16 and that's, I think, in a way is what 558 speaks to, and I  
17 think that's exactly -- that's exactly the place we're at  
18 here.

19           And so I, of course, join the request that you not  
20 grant this protective order. And I think we'll get to the  
21 fallout of what that means later on. But thank you for  
22 hearing me.

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

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1           We'll recess for lunch until 1400. Commission is in  
2 recess.

3           LDC [MR. RUIZ]: Judge, one thing, please?

4           MJ [COL POHL]: I'm sorry.

5           LDC [MR. RUIZ]: Mr. Hawsawi would like to be excused from  
6 the afternoon session. He would like to leave after prayer.

7           MJ [COL POHL]: Okay. He may do that, assuming  
8 transportation can be arranged and things like that.

9           Okay. Carry on.

10          [The R.M.C. 803 session recessed at 1242, 30 April 2018.]

11          [The R.M.C. 803 session was called to order at 1403, 30 April  
12 2018.]

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

14          General Martins.

15          CP [BG MARTINS]: Your Honor, one change for the United  
16 States: Major Dykstra is not present.

17          MJ [COL POHL]: Although I don't know whether you  
18 mentioned it or not, are these being broadcast by  
19 closed-circuit television?

20          CP [BG MARTINS]: Yes, Your Honor. I put that on the  
21 record at the start.

22          MJ [COL POHL]: Okay.

23          Mr. Nevin, any change since we recessed?

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1 LDC [MR. NEVIN]: Ms. Radostitz is not present.  
2 LDC [MS. BORMANN]: No changes, Judge.  
3 MJ [COL POHL]: Okay. Understand when I'm talking about  
4 changes, I'm really just talking about the lawyers, so ----  
5 LDC [MR. NEVIN]: Well, she's a lawyer, but ----  
6 MJ [COL POHL]: Okay. Lawyers who are ----  
7 LDC [MR. NEVIN]: Who have he entered an appearance?  
8 MJ [COL POHL]: Yes.  
9 LDC [MR. NEVIN]: No changes.  
10 MJ [COL POHL]: Ms. Bormann?  
11 LDC [MS. BORMANN]: Sorry. No changes.  
12 MJ [COL POHL]: Mr. Harrington?  
13 LDC [MR. HARRINGTON]: Judge, Ms. Wichner and Major Stuard  
14 are not here still.  
15 MJ [COL POHL]: Mr. Connell?  
16 LDC [MR. CONNELL]: No change, sir.  
17 MJ [COL POHL]: Mr. Ruiz?  
18 LDC [MR. RUIZ]: Judge, Major Joseph Wilkinson and  
19 Commander Dave Furry have joined us for this session.  
20 MJ [COL POHL]: I will note that Mr. Hawsawi is absent,  
21 and the other four detainees are here. I find that  
22 Mr. Hawsawi's absence from the afternoon session was a  
23 voluntary choice made by him and his counsel.

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1           Ms. Bormann and Mr. Ruiz, do either of you wish to be  
2 heard on 524?

3           LDC [MS. BORMANN]: Yes.

4           MJ [COL POHL]: Okay.

5           Mr. Perry?

6           DC [MR. PERRY]: Good afternoon, Your Honor.

7           MJ [COL POHL]: Good afternoon.

8           DC [MR. PERRY]: Your Honor, I'm going to keep my comments  
9 brief, reserving the lion's share of argument in light of the  
10 supplement that we intend to file.

11           The motion for leave was filed earlier today. It is  
12 a supplement that will completely contradict everything that  
13 trial counsel told you earlier today about how this proposed  
14 protective order, if implemented, will be -- will proceed in  
15 practice. All right.

16           We have a concrete example of exactly how this  
17 proposed protective order will be put into practice. And we  
18 received that concrete example on Friday, April 27th, at  
19 approximately 1:15 p.m. -- 1:13.

20           So we're going to supplement that, give you a  
21 concrete example, to show you how, as the comments of  
22 Mr. Nevin and Mr. Connell illuminated to Your Honor, it  
23 eviscerates the entirety of the defense investigation and

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1 eliminates Mr. Bin'Attash's right to a -- you know, to a  
2 complete defense in violation of the Fifth, Sixth, and Eighth  
3 Amendments of the Constitution, the MCA of 2009 international  
4 law.

5 But before we even get to how this proposed  
6 protective order, if implemented, will do that, I think it's  
7 important for Your Honor to realize -- and I think Mr. Nevin  
8 touched on this a little bit more -- is that this proposal of  
9 the government is not authorized under the MCA of 2009.

10 That's our position. And it might be slightly apart  
11 from what Mr. Connell was arguing, but it's our position that  
12 949p-3, which the government leads off in its proposed  
13 protective order in paragraph 1 of Attachment B to 524S, as  
14 this commission is issuing this order pursuant to Military  
15 Commissions Act of 2009, 10 U.S.C. 949p-3 and p-4, our  
16 position is those provisions, as Mr. Nevin touched on, are  
17 dealing with regulating the provision of discovery to the  
18 defense, disclosure to the defense through the government,  
19 through a discovery process, which ordinarily, as Your Honor  
20 knows, is through the M.C.R.E. 505 process. It is not a grant  
21 of authority to the government to regulate the defense  
22 investigation.

23 And one of the comments that Mr. Groharing said

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1 earlier, that somehow this might be something that was done in  
2 Moussaoui, we would also -- we are going to look to provide  
3 information to Your Honor in the supplement that will directly  
4 contradict that.

5 MJ [COL POHL]: I can read the case for myself. You don't  
6 need to file a supplement. If all you're going to do is  
7 rehash what happened in Moussaoui, I'm familiar with  
8 Moussaoui. I don't need it rehashed.

9 DC [MR. PERRY]: In other words, right, if you review the  
10 record of Moussaoui, you will see that that did not happen;  
11 that there was no order restricting the defense investigation,  
12 anything akin to the protective order that's proposed by the  
13 government.

14 And more to your -- to the question that you were  
15 asked Mr. Groharing pointedly: Is there a court -- military,  
16 civilian, federal, state -- that somehow regulated the defense  
17 investigation in a way akin to this? And they danced around  
18 that answer and offered Moussaoui. And I would submit to Your  
19 Honor that case does not exist. They cannot provide that to  
20 Your Honor because that case does not exist.

21 Nothing heretofore in the American criminal justice  
22 system would have authorized this, because, again, to do that  
23 would eviscerate the right to a complete defense that is

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1 guaranteed by the Fifth, Sixth, and Eighth Amendments, because  
2 this is a capital case.

3 And, finally, the concerns of the government about  
4 disclosure, those are already addressed by all -- by the  
5 myriad of rules that we're already bound to follow. We are  
6 bound to follow the IIPA, the Espionage Act. We're bound to  
7 follow the MoUs that we signed. And we're bound to follow  
8 Third Amended Protective Order #1, paragraph 6.b., which  
9 regulates the storage, maintenance, and use of classified  
10 information. These things are already accounted for. There's  
11 no need for this protective order, and there's no statutory  
12 basis to request it.

13 MJ [COL POHL]: Thank you.

14 Mr. Ruiz.

15 LDC [MR. RUIZ]: Judge, Mr. al Hawsawi's position in  
16 regards to the 524 series is laid out in 524T. That is, I  
17 think, the only pleading that we filed in this series, and it  
18 was in direct response to the prosecution's proposed  
19 protective order.

20 There's also been some discussion of AE 558, which is  
21 our motion to dismiss based on classification restrictions.  
22 So at least in terms of Mr. al Hawsawi's positions when it  
23 comes to these issues, that's where they can be found: 524T,

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1 558 (MAH).

2 The essence of our position is simply this, Judge:  
3 You should dismiss this case or, at the very least, you should  
4 dismiss the case or waive the death penalty in this instance.

5 If anything has been demonstrated this morning, it's  
6 just how confusing the scheme that the government proposes and  
7 has proposed over the last six months. I think one of your  
8 comments was that the one thing we could agree is just how  
9 confusing this all is.

10 Judge, this is no way -- this is no way to try a  
11 capital case. This is certainly no way to try this capital  
12 case, with all of its complexities. And our position is  
13 simply, Judge, that you should avoid and you should decline  
14 the invitation to try to resolve this issue, because it is an  
15 issue that cannot be resolved.

16 This is the latest in a string of restrictions and  
17 attempts by the prosecution to interfere with the defense, to  
18 rein the defense in, and in the process of doing that, to  
19 undermine due process and undermine the fairness of the trial  
20 that Mr. al Hawsawi is entitled to in a capital prosecution  
21 under the laws of the United States. Simply put, they can't  
22 have their cake and eat it, too, Judge. They have to pick or  
23 choose.

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1           And as Mr. Connell, I think, aptly indicated and  
2 pointed out during his presentation, the prosecution and the  
3 government has, in fact, in this case chosen that they'd  
4 rather protect the identities of CIA operatives as opposed to  
5 their faithful allegiance to a trial that is in comport with  
6 the due process and with the laws of the United States.

7           Judge, the 524 series asks for access to these  
8 witnesses -- or asks you to compel access to these witnesses  
9 or also to -- or to dismiss the case as an alternative relief.

10           Judge, one of the questions you asked Mr. Groharing  
11 was about background information, information that is  
12 typically used to impeach a witness during the course of a  
13 case. And I want to illustrate the -- what I think is a fatal  
14 defect in any of these constructs and one that can't be cured.

15           Judge, when Professor Watts testified on behalf of  
16 Mr. al Hawsawi on the hostilities issue, the cross-examination  
17 of Professor Watts included cross-examination on public  
18 comments, writings, statements that Professor Watts had made  
19 as a public figure, as an academic, and in the course of his  
20 professional development and expertise.

21           The prosecution did that consistent with the right to  
22 cross-examination and the type of cross-examination that goes  
23 into when a witness takes the stand. They avail themselves of

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1 public sources; they conducted an independent investigation;  
2 they found materials that were publicly available, independent  
3 of the defense because they didn't have to come to us. They  
4 didn't have to ask us to provide that. They did ask if we had  
5 a report. There wasn't one. So they availed themselves of  
6 the modern-day tools for investigating the background of a  
7 witness.

8           And that is what our standards require. Our ethical  
9 standards require us to investigate based on the realities of  
10 our time. The realities of our time are there are tools  
11 available -- Mr. Connell has referenced it at times. LinkedIn  
12 is one of them, but you also have social media. You've got  
13 people who go out and do public presentations and post them on  
14 YouTube or other various methods that are readily available to  
15 the public at large. This is the reality of the time and the  
16 age that we live in.

17           To have access to a witness whose identity you do not  
18 know is simply not enough. That's why I think this issue is  
19 inextricably intertwined with also the UFI issue that is being  
20 litigated in the 525 series. But -- or 530, excuse me. And I  
21 think that will be litigated later.

22           But for our purposes, for us to get access to a  
23 witness whose name we do not know only gets us part of the

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1 way. Certainly it gives us an opportunity to talk to them,  
2 interview them about their background, their involvement, what  
3 they may have seen, what they may have done; however, without  
4 knowing who that person is, we do not have the ability to  
5 avail ourselves of the publicly available resources to do  
6 exactly what we are ethically required to do, which is to look  
7 into that person's background, see if they made any public  
8 comments or statements.

9           That doesn't mean that they have to have written a  
10 book. Certainly that would be something that we would want to  
11 look at, we would want to read, we would want to analyze, and  
12 have that in preparation for cross-examination.

13       MJ [COL POHL]: So are you saying you need the actual  
14 names of everybody identified by UFI regardless of covert or  
15 overt status with the CIA?

16       LDC [MR. RUIZ]: Yes. Our position is, yes, we do need  
17 that. We need that disclosed to us. But I also think it  
18 would be appropriate for you to -- Judge, to issue an order  
19 that says: Defense, you can utilize these names for purposes  
20 of the investigation in our background checks, but you can't  
21 disclose that beyond -- beyond people who have the  
22 classification -- the classified information clearance that is  
23 necessary or the need to know. I think ----

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1 MJ [COL POHL]: So you are talking about actual names of  
2 covert operatives?

3 LDC [MR. RUIZ]: Yes. People who were -- people who were  
4 in black sites and people who were witnesses.

5 And the reason for that is what I am telling you. It  
6 is we need to be able to do an independent background  
7 investigation of those persons. That doesn't necessarily mean  
8 that we have to go and talk to another individual. But that  
9 may necessarily mean that we can look on social media; that we  
10 can look to see if there are public statements. We can look  
11 to see if they have written anything. We can look to see what  
12 positions they have taken or what positions they are involved  
13 in. Without access to that information, we are not able to do  
14 that.

15 But I do think if you wanted to try and resolve this  
16 balance -- or this irreconcilable interest, what you could do  
17 is issue an order that says: Defense, you obviously have to  
18 maintain that information within the ambits of the defense --  
19 the defense team, just like any other classified information.  
20 You can't provide it to people who don't have the requisite  
21 clearance.

22 But what the government has asked to do here, and  
23 what the government is attempting to do, is to protect that

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1 information, I think as you pointed out, from the defense  
2 themselves, those of us who have a need to know and those of  
3 us who have the appropriate clearances in this case.

4           It's not, again, as was discussed a little bit during  
5 some of your back-and-forth with some of my colleagues,  
6 disclosure to the outside world or to third parties who do not  
7 have the requisite security clearances. It's disclosure to  
8 the people on this case who are entrusted and have the duty  
9 and responsibility to defend this case to the best of our  
10 ethical abilities. That's not what we're discussing.

11           What essentially they're saying is, "We won't provide  
12 this to you, defense, because you don't have the need to  
13 know." But really what they're saying is, "We won't provide  
14 it to you because we don't trust you." They believe that if  
15 they turned that information to us -- and they equate that  
16 with dissemination to the world at large. That's really the  
17 essence of what they're arguing.

18           They're arguing is if we provide that information to  
19 you, Defense Counsel, that's going to put people's lives at  
20 risk. I would submit to you that that is a false -- that is a  
21 false theory, unless you assume that we're then going to turn  
22 around and provide this to the world at large. I don't think,  
23 at least for my interests, that's what I'm proposing, Judge.

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1           What I could do as a learned counsel, as counsel on  
2 this case, is I would use that information to conduct a  
3 background investigation. If I were interviewing a person, I  
4 would have that information available for myself so that I  
5 could have a meaningful conversation with a person who is a  
6 witness in a witness interview.

7           That doesn't necessarily mean that information is  
8 going to be shared, people who do not have a classification --  
9 or clearance, people who do not have a need to know, or the  
10 outside world, where it actually may very well cause harm to  
11 the people that they are attempting to protect. But that is  
12 the fundamental distinction here, is they're asking you to  
13 withhold that information from us who are properly holding  
14 classified -- classification clearance and have been read to a  
15 number of different programs.

16           And so without that information, Your Honor, what I'm  
17 telling you is I do not think that I can conduct the type of  
18 background investigation on the witness that is ethically  
19 required in a capital case. And if such a ruling comes down,  
20 I think all of us are going to have to do some real  
21 soul-searching in terms of what our ethical duties are and  
22 what we can and cannot do in the course of this case.

23           I think Mr. Nevin has been trying desperately to talk

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1 about this conflict of interest. The conflict of interest is  
2 lurking. We're not there yet. We are seeing where this  
3 litigation leads us. But the reality is, we can't be in a  
4 position where, one day, somebody takes the stand and I  
5 haven't had the opportunity to look at their background, to  
6 investigate that background, and to do the very same types of  
7 things that the prosecution was fully able to do when our  
8 witness took the stand and testified in this commission.

9 Without being able to do that, I would be  
10 ineffective, and it would be unethical for me to proceed in  
11 that kind of procedure.

12 Now, Mr. Groharing's and the government's solution to  
13 that is to say, "Well, Judge, we're not going to call anybody.  
14 We don't plan on calling any witnesses that would require the  
15 defense to do a background investigation." That's great.  
16 That's good for you, government. But that reveals an  
17 appalling lack of understanding of capital litigation and  
18 perhaps trial practice as well.

19 I think Mr. Connell touched on the fact that  
20 witnesses don't belong to the government or to the defense.  
21 And certainly the Military Rules of Evidence provide for  
22 instances where the defense can call a witness to an adverse  
23 party or as a hostile witness, Judge.

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1           So there could conceivably be a situation where after  
2 we talk to a CIA witness we believe that they have relevant  
3 information, we think is important for the commission to  
4 consider it, and we ask to call the witness that is associated  
5 or affiliated with an adverse party. And, certainly, we would  
6 ask the commission to make that call. That's Military Rule of  
7 Evidence 611 which provides for that.

8           So for the prosecution simply to say that they're not  
9 going to call the witness so we'll never cross that path, I  
10 think, is incorrect; and I think it ignores the realities of  
11 litigation, and more importantly, the realities of the rules  
12 that are within the Manual that would allow us to call the  
13 witness under those circumstances, of course, after we had an  
14 ability to determine if that is a witness that we wanted to  
15 call to testify.

16           Judge, Rule 611 -- Military Rule of Evidence 611,  
17 paragraph 4, also allows you to withdraw any protection from a  
18 witness if that would be or result in an adverse interest to  
19 the proceedings or to the justice of the proceedings. In this  
20 instance, we think that's the case.

21           Now, so it's very clear, while the witness may very  
22 well have testified with a functional identifier, that doesn't  
23 necessarily mean that the defense cannot have access, should

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1 not have access to that information.

2           So as it relates to this issue of the protective  
3 order, our position is simply that you should reject it  
4 outright. And if the position is that you need to try and  
5 reconcile these competing interests, they are irreconcilable,  
6 and you should dismiss, at the very least, the death-penalty  
7 portion of this motion, Judge.

8           That's all I have, Judge.

9           MJ [COL POHL]: Thank you, Mr. Ruiz.

10           Mr. Groharing.

11           TC [MR. GROHARING]: Your Honor, a couple of defense  
12 counsel pointed out that the government has to make a choice.  
13 And that's not the case. And that's, frankly, why CIPA was  
14 enacted. And for decades, courts have been resolving issues  
15 not unlike this with creative solutions that allows the  
16 government to protect classified information while still  
17 ensuring the defendant, or in this case, the accused, receive  
18 a fair trial.

19           The Military Commissions Act was passed in  
20 contemplation of these very situations and designed, again, to  
21 protect classified information while allowing this case to go  
22 to trial. There are procedures in place. We're asking --  
23 we're invoking those procedures, and we're asking you to issue

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1 an order that does protect the information and will also  
2 permit the defense to represent the accused in a way that  
3 ensures a fair trial.

4           The impact claimed by the defense of this protective  
5 order is not accurate. As we discussed the first time I stood  
6 up -- and counsel disagrees with this -- but the protective  
7 order as written, it would allow the defense to have an  
8 interview -- an attempt to interview overt CIA employees about  
9 matters unrelated to RDI. It doesn't restrict that in any  
10 way.

11           The limitations on the defense are actually quite  
12 small. It's only when it comes to RDI information that we're  
13 trying to protect with respect to this protective order, as  
14 well as -- and I think what's obvious to most of us -- any  
15 attempts to contact covert CIA employees. And those  
16 limitations are modest. They simply require the defense to  
17 contact these individuals through the government. And that  
18 does not place an undue burden on the defense.

19           MJ [COL POHL]: Mr. Groharing, let me ask you a question.  
20 And I'm now talking about the overt non-list people.

21           TC [MR. GROHARING]: Overt non-list that have a connection  
22 to the ----

23           MJ [COL POHL]: RDI program.

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1 TC [MR. GROHARING]: ---- do not have an overt connection  
2 to RDI.

3 MJ [COL POHL]: Okay. Just so I'm clear -- and I think I  
4 am ----

5 LDC [MR. NEVIN]: I'm sorry. Could I ask, could you just  
6 state the question again, because ----

7 MJ [COL POHL]: Well, I haven't quite gotten to it, but I  
8 think as I go there. Okay.

9 We've got the category of people, and I'm only  
10 talking about overt people at this point. You've got the  
11 officially acknowledged RDI officers.

12 TC [MR. GROHARING]: Right.

13 MJ [COL POHL]: And as I interpret that, that is somebody  
14 whose status with the agency, plus their relationship with the  
15 RDI program, have been not necessarily unclassified but are  
16 known.

17 TC [MR. GROHARING]: And we've given the defense  
18 specifically the names of all of those individuals.

19 MJ [COL POHL]: Yeah. Okay. Okay. Then we got the  
20 covert people. But now I'm talking about this next category,  
21 individuals whose status with the agency is known ----

22 TC [MR. GROHARING]: No.

23 MJ [COL POHL]: Well, I haven't answered [sic] my whole

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1 question yet. Okay?

2 TC [MR. GROHARING]: I'm sorry.

3 MJ [COL POHL]: Status to the agency is known. But your  
4 involvement in the RDI program is still classified. Of course  
5 it's classified with the other group, too. I got that. And  
6 they're not officially acknowledged.

7 Okay. So let's say Mr. Connell finds somebody in  
8 that basket, and it may be suspected more than anything.

9 Okay.

10 Does that -- is he supposed to then go to the  
11 government and say, "We got Joe in this basket. We want to  
12 put him on the list." That's option one. Or option two is  
13 follow the procedures, the rest of the protocol.

14 TC [MR. GROHARING]: So option one, the defense thinks,  
15 "Hey, you missed this one. This guy, by all accounts, what  
16 we're seeing, is he should be an overt RDI officer."

17 MJ [COL POHL]: Your term is "officially acknowledged RDI  
18 officer." Okay.

19 TC [MR. GROHARING]: "Officially acknowledged."

20 MJ [COL POHL]: Just what you wrote down.

21 TC [MR. GROHARING]: Defense makes their case, and maybe  
22 they have it right and maybe they get added to that list.

23 Maybe -- if that's the case, then they would be able to

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1 contact that individual themselves ----

2 MJ [COL POHL]: Okay.

3 TC [MR. GROHARING]: ---- and request the interview.

4 MJ [COL POHL]: If they don't make the list, they're  
5 thrown into the other protocol.

6 TC [MR. GROHARING]: If the subject matter of what they  
7 want to talk to them about ----

8 MJ [COL POHL]: Well, the first step, though ----

9 TC [MR. GROHARING]: ---- is RDI.

10 MJ [COL POHL]: ---- would be is we've got this  
11 individual -- and I don't want to pull up a name from real  
12 life because I don't want to -- we've got this individual. We  
13 got this information that he or she was a CIA officer involved  
14 in the RDI program, and here's the information we got on him.  
15 Therefore, this person should be on the officially  
16 acknowledged RDI list ----

17 TC [MR. GROHARING]: Okay.

18 MJ [COL POHL]: ---- without us telling you what we want  
19 to talk to them about. Because that's -- everybody else on  
20 the officially acknowledged RDI list, they don't have to go  
21 through you with their questions, do they? I thought you told  
22 me that earlier; they don't.

23 TC [MR. GROHARING]: That -- it would be okay. Assuming

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1 that we grant their request to add them ----

2 MJ [COL POHL]: To the list.

3 TC [MR. GROHARING]: ---- to the list, then yes.

4 MJ [COL POHL]: But if the answer is no, then they'd have  
5 to come back with the list of subject areas they want to  
6 discuss with them, and then you go through the other protocol?

7 TC [MR. GROHARING]: Correct.

8 MJ [COL POHL]: Okay. So to make the list, it's got to be  
9 both not just that they're -- everybody knows they work for  
10 the CIA, but the OCA is willing to acknowledge their  
11 official -- an official acknowledgement of their RDI activity,  
12 permitting the defense to go straight to them without this  
13 question-submission process?

14 TC [MR. GROHARING]: Right. Contacting them won't risk  
15 disclosing classified information because ----

16 MJ [COL POHL]: But if they're not on the list, they can't  
17 do that, right? That's what you're telling me. If  
18 somebody -- pick some name out of the news, which I'm not  
19 going to do -- knows works for the CIA, reasonably could infer  
20 the person was with the CIA during the time period involved,  
21 okay -- okay, so their CIA status is not covert.

22 As I read your order, your proposed order, is that  
23 person, they could not contact on their own until they

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1 confirmed with the government that this person would fall in  
2 the officially acknowledged RDI officer basket.

3 TC [MR. GROHARING]: Assuming that they want to talk to  
4 that person about RDI information.

5 MJ [COL POHL]: That's all we're talking about here,  
6 right?

7 TC [MR. GROHARING]: Well, no. Mr. Connell talked at  
8 length about hostilities.

9 MJ [COL POHL]: But I know. And in ----

10 TC [MR. GROHARING]: So ----

11 MJ [COL POHL]: Everybody has a tendency to do this, to  
12 talk about what we're not talking about.

13 We're only talking about -- unless I've misheard for  
14 three hours now -- RDI-related investigation. I know  
15 Mr. Connell had an issue about the hostilities thing, but  
16 you've said that that's not covered by this protective order.

17 We're only talking about RDI information with this  
18 protective order, correct?

19 TC [MR. GROHARING]: Correct.

20 MJ [COL POHL]: Okay. So that's -- but I'm saying if they  
21 knew somebody who was not on the list but whose status as a  
22 CIA employee is common knowledge, common knowledge in the  
23 sense that it's properly in the public arena, not common

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1 knowledge in that it's on WikiLeaks, but that -- okay.

2 But under that scenario, they would have to go to you  
3 to explain why this person should be on the officially  
4 acknowledged RDI officer list to permit them to contact them  
5 at all?

6 TC [MR. GROHARING]: Yes.

7 MJ [COL POHL]: And if the answer is they're on the list,  
8 they can go to them on their own; and they're not on the list,  
9 they got to follow the other procedures?

10 TC [MR. GROHARING]: Correct.

11 MJ [COL POHL]: Okay. I'm just trying to understand your  
12 position, Mr. Groharing.

13 Let me ask you one other question, and it's kind of a  
14 statutory question. You referred to 949p-3 and 949p-4. p-3  
15 talks about protective orders, but it talks about a particular  
16 kind of protective orders.

17 Just so I'm clear, it talks about the disclosure of  
18 any classified information that has been disclosed, okay?  
19 That really doesn't apply to this because you're talking about  
20 not disclosing information; is that correct? So although p-3  
21 says "protective orders," it's really a p-4 issue, for want of  
22 a better term.

23 TC [MR. GROHARING]: I think that's right. The situation

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1 here, though, deals with both the defense acquiring classified  
2 information through their efforts, which we would equate to  
3 these efforts as the discovery process, but asking through  
4 witnesses instead of through the government, but also  
5 disclosing classified information to other folks as well by  
6 their actions ----

7 MJ [COL POHL]: Okay.

8 TC [MR. GROHARING]: ---- by their actions to ----

9 MJ [COL POHL]: It's the second part of the disjunctive at  
10 the end, or that it's otherwise been provided in this case or  
11 obtained. Okay. I got it. Okay.

12 Anything further?

13 TC [MR. GROHARING]: I want to talk briefly -- you know,  
14 Mr. Connell raised this guidance that we gave and described it  
15 as an investigative prohibition as if, you know, this was in a  
16 series of guidance that the government has been rolling out in  
17 advising the defense.

18 This was limited. This was in response to a specific  
19 request from Mr. Connell; and it was limited to the facts that  
20 he gave the United States with respect to that -- the use of  
21 that photo. And those facts didn't have anything to do with  
22 the photo lineup or anything -- or anything else. It was  
23 simply showing the photo of a CIA officer to a non-CIA

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1 officer, would that mean identifying the person under ----

2 MJ [COL POHL]: But if he went through the protective  
3 order and if that CIA person was an officially acknowledged  
4 RDI officer, that would be okay ----

5 TC [MR. GROHARING]: There ----

6 MJ [COL POHL]: ---- if the photo was of one of those  
7 people?

8 TC [MR. GROHARING]: Yes. For an officially acknowledged  
9 RDI officer, yes.

10 MJ [COL POHL]: So if it showed Rodriguez on the cover of  
11 his book, that would be okay?

12 TC [MR. GROHARING]: Yes.

13 MJ [COL POHL]: If it's the other two categories -- well,  
14 there's really only one other category. They would have to  
15 get either put on the list or go through the procedure to  
16 permit that contact to the third party?

17 TC [MR. GROHARING]: And I think that falls into the  
18 category I was talking about earlier, is, you know, there may  
19 be situations outside of the protective order that -- the  
20 protective order doesn't capture every single situation  
21 contemplated by the parties of things the defense might want  
22 to do.

23 There may be circumstances where the defense has

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1 something they want to do in order to, you know, facilitate,  
2 you know, identity of people they want to talk to or things of  
3 that nature that the government could accommodate. But, you  
4 know, in that case, you know, the defense would need to work  
5 with the government, provide specific facts of exactly what  
6 they want to do; and there may be a solution, and that's  
7 something the government is willing to participate in. But  
8 the order can't possibly contemplate every scenario that --  
9 where the defense will want to use information.

10 I question some of the data with respect to the  
11 success of Mr. Connell's investigator. And much of this  
12 perhaps is better suited for a closed session where we can get  
13 into the weeds of it. But what I didn't hear is any  
14 indication that any person that we've contacted is in the same  
15 batch of people that we're talking about.

16 I think that from my experience, folks in the RDI  
17 program are quite hesitant to talk to ----

18 LDC [MR. CONNELL]: Objection to counsel testifying.

19 MJ [COL POHL]: Sustained.

20 TC [MR. GROHARING]: Well, it should come as no surprise  
21 to anyone that folks in the RDI program are hesitant to  
22 participate ----

23 MJ [COL POHL]: I sustained the objection. You can't just

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1 rephrase the same offering of evidence.

2 TC [MR. GROHARING]: I'm proffering that ----

3 MJ [COL POHL]: You're simply speculating that somebody  
4 who is involved in this program may not want to talk to the  
5 defense?

6 TC [MR. GROHARING]: Yeah.

7 MJ [COL POHL]: I gotcha.

8 TC [MR. GROHARING]: I believe that's perfectly proper  
9 argument.

10 MJ [COL POHL]: Okay. I hear you. Go ahead.

11 TC [MR. GROHARING]: You know, as you well know, Judge,  
12 the RDI program's come under significant scrutiny. It's been  
13 through a series of investigations. So it should not be  
14 surprising if individuals do not want to speak to either  
15 members of the defense or the government, for that matter,  
16 when asked if they're willing to speak to them.

17 MJ [COL POHL]: Does a CIA officer currently employed by  
18 the CIA office have the option not to talk to the government  
19 and keep their job?

20 TC [MR. GROHARING]: In a -- so ----

21 MJ [COL POHL]: If you know. If you don't know ----

22 TC [MR. GROHARING]: I don't know that -- it would be very  
23 fact-specific on what the subject matter was of what the

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1 interview was, but if -- I don't believe if -- if I wanted to  
2 talk to one of these individuals that I could compel that  
3 interview any more than the defense could compel that  
4 interview; that I could require the CIA to produce him or her  
5 for the government's purposes for a pretrial interview. That  
6 would be just as voluntary as it is for that person to speak  
7 to the defense.

8 If ----

9 MJ [COL POHL]: I don't need to go too far down that road.

10 Mr. Connell, do me a favor and put your little  
11 procedural path to resolution on the overhead, please.

12 LDC [MR. CONNELL]: Yes, sir. We've moved on to the next  
13 set of slides, so give me just one moment, sir.

14 [The military judge conferred with courtroom personnel.]

15 MJ [COL POHL]: That one will be fine. Thank you. Go  
16 ahead and put it on the overhead.

17 Mr. Groharing, I just want to ask you about this  
18 concept. Do you basically agree with the defense  
19 understanding of the statutory framework to resolve these  
20 issues?

21 TC [MR. GROHARING]: I don't -- frankly, I don't exactly  
22 know what ----

23 MJ [COL POHL]: Well, let me make it more specific.

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1           You -- Mr. Connell said that if -- I'm looking at  
2 Box 3 now. Let's say I take your protective order and I don't  
3 sign it as it is but I edit it, okay? He says that could  
4 trigger a denial of the protective order, that you would have  
5 the option to come back and say, "Judge, sign it as it is and  
6 don't change it."

7           Understanding if you were to do that, you also could  
8 have certain remedies or there could be certain remedies.

9           TC [MR. GROHARING]: I think that would be one option. We  
10 could also appeal that decision if ----

11          MJ [COL POHL]: Okay.

12          TC [MR. GROHARING]: ---- if it was a ----

13          MJ [COL POHL]: Or you could accept the changes?

14          TC [MR. GROHARING]: Or we could accept the changes, of  
15 course.

16                So, you know, we would have different options  
17 depending on what the changes are. Yeah, I think that's where  
18 I may differ, if I understand that chart correctly, that that  
19 interlocutory appeal would be available -- not only at the  
20 end, it would be available immediately on the denial of the  
21 requested relief; again, depending on what the changes were.

22                But if it as was a denial of the request to protect  
23 classified information, that is a matter that's appealable

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1 under the statute. So it could happen at either part, at  
2 either of those boxes on the chart, though.

3 MJ [COL POHL]: Okay. You can take the slide down. Thank  
4 you.

5 Go ahead.

6 TC [MR. GROHARING]: There were a couple of references to  
7 case law, and I think you picked up on some of the same things  
8 that I'm picking up on as far as authority to compel  
9 interviews and citations to the case law. And I would just  
10 commend all of those to your reading. And I'm not going to go  
11 and read passages from every one, but I will highlight the  
12 Fischel case that Mr. Connell had cited to you. That's  
13 686 F.2d 1082. And at 1092, there's some language in there  
14 that I think is instructive for this court or this commission.

15 Now, it says, "While the confidential informant  
16 provision under Roviaro evaporates when the informant is known  
17 to the defendant, we do not rule out other valid reasons that  
18 the government might advance in turning over the informant's  
19 address. The government, however, must suggest these reasons  
20 to the court. The government here failed to allege any reason  
21 for withholding Marlin's address from Fischel, and, without  
22 such information, the information should have been supplied."  
23 So there was the error.

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1           Obviously that's not the circumstances of this case.  
2   The government has advanced significant reasons for not  
3   disclosing the identities of these witnesses to the court; and  
4   on top of that, we've given the defense another means to  
5   attempt to contact this person or attempt to request an  
6   interview of the person. In that case, you don't get the  
7   identity, it's game over. There's no way to go and find the  
8   witness.

9           Here, you know, we've not only given very valid  
10   reasons to protect the identity; we've also given another  
11   means to locate the witness.

12           So I wanted to point that out to the judge as well  
13   as -- I don't read any of those other cases that gives the  
14   military judge the authority to compel someone to submit to a  
15   pretrial interview. I'm not familiar with any caselaw that  
16   would stand for that proposition.

17           There's been quite a bit of discussion on covert  
18   versus overt, and I just want to make sure that the military  
19   judge appreciates the significance of the fact that an overt  
20   person -- the classification of an overt person being involved  
21   in a classified program and the ramifications of disclosure of  
22   that information, that that could have.

23           It's not as simple as, you know, this person works

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1 for the CIA so it's not that big of a deal to share different  
2 matters that they worked on with people. And we highlighted  
3 this in our ex parte filing. It's included in the  
4 declaration.

5           There are second- and third-order effects to these  
6 types of disclosures; very, very profound effects. So that's  
7 why the order is not focused only on covert employees, it's  
8 also very much focused on overt employees but with a  
9 connection to the RDI program. So those are very significant  
10 concerns for which we're seeking protection.

11           And I -- the last point I'll make is, you know,  
12 Mr. Perry suggested you have no authority to intervene under  
13 these circumstances. I think that's simply wrong. As an  
14 initial matter, a military judge has the authority to regulate  
15 the time, place, and manner of discovery in every case. Here  
16 you have that authority plus all of the authority of the  
17 Military Commissions Act, backed up by decades of CIPA  
18 precedent where military judges took actions to protect very  
19 sensitive, classified information.

20           So you absolutely have the authority. And we  
21 encourage you to exercise that authority to protect this  
22 sensitive information.

23           Judge, we also note that Ms. Bormann indicated she

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1 was going to file a supplement. We would ask that to the  
2 extent she does file that supplement, the parties are able to  
3 respond in writing and that no additional oral argument is  
4 necessary in order to decide this issue with respect to the  
5 protective order.

6           It is important that this gets put in place soon to  
7 resolve whatever impasse there is. The defense has claimed  
8 that it's impacting their investigation. We vigorously  
9 dispute how much. But to the extent that they're not taking  
10 action, we don't want anything else to further delay  
11 progression towards trial in this case.

12           So we believe that you have enough information to  
13 resolve the matter. It can be resolved on the papers at this  
14 point. And we would encourage you to consider what else is  
15 offered and then decide and issue the order in this case.

16           Thank you, Your Honor.

17           MJ [COL POHL]: Okay. Just a second. Not so fast.

18           How do you respond to Mr. Connell's -- I believe it  
19 was Mr. Connell's argument -- that the "affiliated individual"  
20 definition and "prohibition" is so broad it could cover  
21 anybody?

22           TC [MR. GROHARING]: Just one moment, Your Honor. Let me  
23 open that up.

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1           I don't think that's the case because I think what  
2 you have to do is go to paragraph 10, and you talk about, you  
3 know, the restrictions that are contained therein. And again,  
4 if you go to paragraph 10.b., that's where I believe the  
5 language that he was citing to regarding affiliated persons is  
6 contained. You know, first 10.b. takes you to paragraph 10.a.  
7 and .c. That tells you what you can do.

8           So paragraph 10.a., "Defense personnel may  
9 independently contact officially acknowledged RDI and overt  
10 non-RDI officers," period. So there's not a restriction on  
11 contacting an overt non-RDI officer, even if they're  
12 affiliated, which I think is the example that Mr. Connell was  
13 giving that might have confused the discussion.

14           So the restriction on contacting affiliated folks is  
15 for the purposes of learning any information about the CIA RDI  
16 people. That's the purpose of the protective order, is to  
17 limit this dissemination of information about the CIA RDI  
18 people. So it's -- these are efforts to identify either  
19 covert or overt employees that are connected to the RDI  
20 program, which is classified.

21           So that's what that paragraph is aimed at  
22 restricting. It's saying, "Hey, if you're affiliated somehow  
23 with a person, the defense can't go and try to learn

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1 information about these not officially acknowledged RDI  
2 people." They can't go to talk to neighbors or whomever they  
3 think can shed light on, you know, trying to figure out if  
4 this person works for the CIA or this person had any  
5 involvement in the RDI program. That's what that provision is  
6 designed to protect.

7           So if the example goes -- you know, he was talking  
8 about Gina Haspel. And, you know, she an officially -- she  
9 is -- you know, obviously knows a lot of CIA people. She  
10 works for the CIA. If the defense is talking to her about  
11 hostilities, that doesn't run afoul of any provision in the  
12 proposed protective order just because she might -- you know,  
13 she's obviously affiliated with a lot of CIA people.

14           So these examples of, you know, the millions of  
15 people who are affiliated with CIA people, they're not really  
16 applicable. It's only when you're going to talk to one of  
17 those people to attempt to identify somebody in the CIA RDI  
18 program.

19       MJ [COL POHL]: Okay.

20       TC [MR. GROHARING]: Is that ----

21       MJ [COL POHL]: I think I understand. Thank you.

22       TC [MR. GROHARING]: That's your only question, Your  
23 Honor?

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1 MJ [COL POHL]: Yes.

2 Mr. Connell.

3 LDC [MR. CONNELL]: Sir, two points that I'd like to  
4 address. The first is about covert CIA officials have been  
5 used as sort of a stalking horse in this. I have zero idea  
6 how large that group is. It could be one person. It could be  
7 a million people. I have zero idea.

8 What I do know, however, is that in the record in  
9 this case -- in the adversarial record, the record to which  
10 the defense is privy, there is not a single notation that any  
11 person that we are talking about is actually covert in the  
12 sense that their affiliation with the CIA is itself  
13 classified; not a single piece of evidence, single even  
14 assertion in a document that such a person exists.

15 What we do have, however, is your Protective  
16 Order #1, which at paragraph 2.g.(4)(b) defines as classified,  
17 quote, The names, identities and physical description of  
18 persons involved with capture, transfer, detention, or  
19 interrogation up until 6 September 2006.

20 So what that means is you already have in place, in  
21 fact, a broader protection of the name and identity of persons  
22 who are involved in that -- in not just the RDI program,  
23 because we now know from the government's recent pleading that

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1 there are some temporal limits on the RDI program, but the --  
2 but with capture, transfer, detention, or interrogation,  
3 whether that was pre-RDI program or anything else.

4 That means you have already protected this  
5 information without a confusing and impossible for the defense  
6 to navigate distinction between overt and covert, impossible  
7 to navigate because we have zero access to information that  
8 would tell us whether someone is overt or covert.

9 And when the government says that solutions exist  
10 under CIPA and the Military Commissions Act to protect  
11 classified information, they are exactly right. We are right  
12 now very close to the tenth anniversary of the first charging  
13 of these men in a military commission, and Friday is the sixth  
14 anniversary of the arraignment in this case.

15 For the first five-and-a-half years of this case,  
16 those solutions were in place. This is not August of 2012  
17 where we're discussing the initial protective order; this is a  
18 situation where the military commission has seen the  
19 protective order that it put into place -- sometimes with my  
20 support, sometimes over my objection -- has worked in  
21 protecting classified information and allowing the defense to  
22 develop a defense. We were in a position of stasis on 5  
23 September 2017 when the government made its election and

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1 disrupted that stasis.

2           The one other point that I want to make -- and it may  
3 be that you're already fully tracking on this, but let me just  
4 be 100 percent clear on the last question that you asked the  
5 government, about the interaction between the affiliated  
6 individual. If we could have the feed from Table 4, please.  
7 I just want to show the language.

8           So the second paragraph in 10.b. says, "Except as  
9 provided in paragraph 10.a. and 10.c., defense personnel shall  
10 not contact any affiliated individual for the purpose of  
11 learning any information regarding a CIA person other than  
12 officially acknowledged RDI officers."

13           So before we get to who affiliated individuals are,  
14 let's talk about who CIA persons are. And I don't have a  
15 slide on this, but it's found in paragraph 6.d. of the  
16 proposed protective order. And it says that "A CIA person is  
17 any one defense personnel known or suspected to be a current  
18 or former CIA employee or CIA contractor, regardless of  
19 whether such person's affiliation with the CIA is overt or  
20 covert."

21           The significance there is that a CIA person  
22 absolutely includes the category of overt, non-RDI persons who  
23 are related to the hostilities defense or anything else.

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1           And we have today talked a little bit about  
2 neighbors. And, yes, once in a while, we talk to neighbors.  
3 But the affiliated persons that are most important are FBI  
4 agents. The affiliated persons that most are important are  
5 former military. Those are people who can, through business,  
6 professional, and other ties can identify CIA officers.

7           We know for a fact, for example, that the -- Camp VII  
8 remained for some period of time under the operational control  
9 of the CIA. We have interviewed a number of people, former  
10 military, sometimes current military, who give us information  
11 like that. The -- the affiliated individuals part of this  
12 protective order is not narrowly tailored to protect covert  
13 individuals; rather, the affiliated individuals wipes out  
14 basically everybody who knows anything about what happened to  
15 these men.

16         MJ [COL POHL]: But, Mr. Connell, let me ask you this.  
17 It's what I asked Mr. Groharing. You have the officially  
18 acknowledged RDI officers and then you have the people whose  
19 employment by the CIA is covert.

20         LDC [MR. CONNELL]: Yes. I understand that now.

21         MJ [COL POHL]: Okay. Then you've got the other category  
22 of ----

23         LDC [MR. CONNELL]: "Overt non-RDI" is what they call

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1 them.

2 MJ [COL POHL]: No, not overt. I'm only talking about RDI

3 here.

4 LDC [MR. CONNELL]: Okay.

5 MJ [COL POHL]: Okay. I've got another category ----

6 LDC [MR. CONNELL]: Okay.

7 MJ [COL POHL]: ---- and that is ----

8 LDC [MR. CONNELL]: Overt RDI.

9 MJ [COL POHL]: Overt RDI. Exactly. Non-list.

10 LDC [MR. CONNELL]: Right. Non-list.

11 MJ [COL POHL]: Not on the program.

12 LDC [MR. CONNELL]: Got it.

13 MJ [COL POHL]: If you were to contact their -- what I'm

14 reading this, is what the government is proposing is that for

15 those people, you have to basically either get them on the

16 list or you've got to do the -- submit the questions protocol.

17 Right?

18 LDC [MR. CONNELL]: That's what I understand the proposed

19 protective order to say.

20 MJ [COL POHL]: And, therefore, for the affiliated people,

21 is if they get put on the list, you can go talk to them.

22 LDC [MR. CONNELL]: So ----

23 MJ [COL POHL]: What I'm saying is if you get these people

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1 put on the officially acknowledged RDI officer list, then this  
2 prohibition doesn't apply to affiliated people to them?

3 LDC [MR. CONNELL]: Correct.

4 MJ [COL POHL]: Okay. But if they don't get to be put on  
5 the list but they will be interviewed by you -- or permitted  
6 to be interviewed by you -- let's just assume that that  
7 happens -- do you believe this would prohibit you from talking  
8 to affiliated people in that category?

9 LDC [MR. CONNELL]: Yes. And the real significance of  
10 this is we have to talk to the affiliated people to identify  
11 who the ultimate target is in the first place. Right? There  
12 was this guy. He was about this tall. He had this color  
13 skin. He had this color hair. I think he was from Alabama.

14 You know, we get that kind of information. And in  
15 order to identify who that person is in that description that  
16 we just got, we have to work investigatively, which includes  
17 an awful lot of interviews of affiliated persons. Then we  
18 identify that person as William Jones. And then the  
19 government wants us to either make a request to put them on  
20 the list -- William Jones on the list or to interview William  
21 Jones.

22 But we -- the most vicious part of this protective  
23 order is it stops us from ever identifying William Jones in

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1 the first place because we can't do the investigative work  
2 that is necessary to find out who the witnesses are.

3 MJ [COL POHL]: I understand.

4 LDC [MR. CONNELL]: Thank you. Nothing further.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: You can cut the feed from Table 4.

7 MJ [COL POHL]: Mr. Nevin, anything further?

8 Mr. Harrington, anything further?

9 LDC [MR. HARRINGTON]: No, sir.

10 MJ [COL POHL]: Ms. Bormann?

11 LDC [MS. BORMANN]: Judge, only we'd ask to be able to  
12 argue in the supplement, which hopefully we'll have in today  
13 or tomorrow.

14 MJ [COL POHL]: We'll see where we're at. We'll try to  
15 work it in.

16 Mr. Ruiz, anything further?

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

18 MJ [COL POHL]: Okay. I want to take a 15-minute break,  
19 and then we'll pick it back up. Commission is in recess.

20 **[The R.M.C. 803 session recessed at 1457, 30 April 2018.]**

21 **[The R.M.C. 803 session was called to order at 1514, 30 April**  
22 **2018.]**

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

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1           There appears to be no changes since we recessed.  
2 Just for the way ahead, as I said earlier, we will pick up now  
3 with 548, 549, and after that we'll do 525 -- I'm sorry, 548,  
4 '49, and '58 -- they seem to be all related -- and then 525.

5           At the 802, we discussed doing the 505(h) hearing in  
6 a classified session tomorrow. I'm going to move that until  
7 Wednesday, and tomorrow we'll just pick up with the open  
8 session wherever we leave off today. We're going to go for  
9 another hour or so, and then we'll break for the day.

10           That being said, let's go to 548.

11           LDC [MR. CONNELL]: Sir, as far as I'm concerned, I just  
12 argued 524, 524Q, 548, 549, and 558. So I have no additional  
13 authorities on any of those last three motions. I'd be happy  
14 to answer any questions you may have.

15           MJ [COL POHL]: I'm good. Thank you.

16           Any other defense counsel want to be heard on 548,  
17 549, or 558? Or just want to rely on the pleadings that have  
18 been previously been argued on 523 -- or 524?

19           Mr. Nevin? And I don't want to do things all over --  
20 right now we're just focusing on 548.

21           LDC [MR. NEVIN]: Okay. And the argument that I have to  
22 make, in fact, 548E and 549E are identical except that  
23 they're -- there's a little bit of different introductory

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1 language because the issues are slightly different in 548 and  
2 549. So what I'm going to say now -- excuse me -- would apply  
3 both to 548 and to 549.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: I can say that when you call 549.

6 And basically it's this: I think everything that we  
7 wanted to say to you about the restriction on investigation we  
8 said in 525I, and that was written at a time when -- when we  
9 were a couple of iterations back on the various restrictions  
10 on investigation.

11 And at that point, we hadn't heard 525M, which is the  
12 change allowing us to rely on open-source information during  
13 overseas investigation; and we were a couple of iterations  
14 back on the issue of how to approach or how not to approach  
15 CIA -- present and former CIA people.

16 So the way the arguments in 525I were phrased or the  
17 way they were pointed was a little different, but the -- the  
18 same principles still apply. We spoke at length in 525I about  
19 the obligation to investigate. And I've spoken some about  
20 that already today, and I don't plan to go over that again.

21 But the -- there are two -- or perhaps three things  
22 that come up in all of these pleadings and in 525, in 524, and  
23 in both 548 and 549; and that is, the government's having

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1 another run at the idea of defining down the scope of  
2 mitigation evidence. And I would like very much to speak to  
3 that, and then to ask you to address the -- and I think  
4 another part of this argument was whether or not the conflict  
5 remained. And since you're going to turn to 525 after a  
6 while, I'll not include that in this argument.

7 I think the most important thing to be said about it  
8 at this point is that the government keeps telling you, look,  
9 this -- all this business about the torture program, it isn't  
10 really relevant to anything. We're not going to call any of  
11 these witnesses in our case in chief, and so being able to  
12 cross-examine these people or know their backgrounds or  
13 anything of that sort, the defense doesn't really need to do  
14 any of that. None of that is really relevant anyway, because  
15 it doesn't have anything to do with Mr. Mohammad's character  
16 or his intentions or what he knew at the time of the  
17 alleged -- of his alleged involvement in the 9/11 attacks.  
18 And that's really the only thing that's important for you to  
19 decide and for the jury to hear or for the members to hear  
20 when the time comes when they're deciding on a penalty.

21 So when we drafted 525I and when we drafted 548E and  
22 549E, one of our intentions was to address that question. And  
23 to say it briefly, the torture that was imposed on

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1 Mr. Mohammad is relevant to many things, not just to  
2 mitigation, but also to certain guilt-phase issues as well.

3 And I think that the military commission understands  
4 this, and I don't intend to -- and I say that because I was  
5 referring in my earlier remarks to the first time I appeared  
6 in front of you back in May of 2012, and I asked you  
7 specifically about mitigation; and you said that you had a  
8 very broad idea of mitigation, and I haven't heard you say  
9 anything that suggests that you understand that differently  
10 now, whatever we are, six years -- coming up, just in a few  
11 days, actually, on six years ago.

12 But I will say that our position is that evidence of  
13 the torture -- and just as you said this morning, detailed  
14 evidence of it, not just the sort of simple statement of it,  
15 but detailed information about it needs to be investigated by  
16 us. And it's relevant because it goes to suppression; it goes  
17 to the -- to the argument that the government has acted  
18 outrageously here. And the doctrine is called outrageous  
19 government conduct, and it supports -- outrageous government  
20 conduct supports a motion to dismiss. It has to do with the  
21 denial to the right to speedy trial.

22 Of course, this would be a constitutional right to  
23 speedy trial because it -- as we know, the Military

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1 Commissions Act of 2009 doesn't have a statute requiring that  
2 Mr. Mohammad receive a speedy trial; but nonetheless, there  
3 would be a constitutional right. And the Supreme Court has  
4 made it clear that one of the considerations -- when you're  
5 looking at a speedy trial argument, one of the considerations  
6 is the nature and length of the pretrial incarceration.

7           So both the length of it and also what it was like to  
8 be in custody. And what they're saying is under certain  
9 circumstances, if you were held for a particularly long time  
10 before you were brought to court, and if you were held under  
11 particularly Draconian circumstances, that would bear on  
12 whether or not you had been denied a right to speedy trial.

13           And, of course, neither of those things: Outrageous  
14 government conduct, speedy trial, and also suppression, none  
15 of those three things would be a matter of mitigation. But in  
16 the event that there is a conviction and in the event that  
17 Mr. Mohammad is convicted of a capital offense or, for that  
18 matter, a noncapital offense, a number of issues would flow  
19 out of the torture that would bear on the sentence to be  
20 imposed.

21           And certainly in the context of a capital case,  
22 there's the question of moral authority to execute. And we  
23 spoke extensively in -- offered arguments in 525I, and I won't

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1 repeat them here, but we know that, of course, that the Eighth  
2 Amendment is -- was enacted in the first place because there  
3 was a process in the colonies of inflicting  
4 special punishment. It was called the superadded -- the  
5 superadded infliction of pain, in the colonies, when the  
6 person was seen as having done something really bad. And one  
7 of the reasons that the Eighth Amendment was enacted in the  
8 first place was to do away with that. And that's exactly what  
9 we did here or what was done to Mr. Mohammad in our name.  
10 That's exactly what happened here.

11           And, of course, torture of the type that was imposed  
12 on Mr. Mohammad is also outlawed by domestic law, outlawed by  
13 international law. And the fact that it is universally  
14 condemned as a behavior -- it's one of the very few things  
15 that we have all agreed as nations we won't do. And the fact  
16 that we did it anyway, is likely to be extremely important to  
17 the members in the event that we get to that place, likely to  
18 be very important to them, not least because they may well be  
19 a group of persons who might be at risk of having similar  
20 things done to them or to the people they command at some  
21 point in the future if they or the people they command ever  
22 fall into the hands of an enemy.

23           And so, again, I'm explaining a reason that the

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1 details -- and all of the details, as opposed to speaking of  
2 it categorically, "There was torture. Now let's move on."

3 Just as you said this morning, the point is to be  
4 able to -- and, of course, as we know one of the features of  
5 capital punishment, the way capital punishment works in the  
6 Supreme Court's jurisprudence is that you're required to have  
7 unanimity in the decision to impose the ultimate penalty.

8 So, you know, what you're really saying is that  
9 you're not talking about -- you're just talking about a factor  
10 which might make one person, even one member of the panel, say  
11 this isn't right. And, you know, you don't know. And we know  
12 this from post-trial questioning of jurors, which is  
13 permissible in many civilian jurisdictions, we know that  
14 frequently it's just one thing that is too much for a juror to  
15 go along with.

16 They just -- there comes a point and at some point  
17 for reasons they don't understand, they say, "No, that's  
18 enough. It's not right."

19 And I don't know where that is -- that point is for  
20 the members that I haven't met yet; and I know you don't.  
21 None of us do. But this is why -- the investigation and the  
22 presentation of the evidence, it's important that it be -- so  
23 important that it be thorough, and which is -- I keep almost

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1 like intoning the word "thorough" because it's the word that  
2 the U.S. Supreme Court cases use again and again.

3 And torture -- the details of Mr. Mohammad's time in  
4 the RDI program are important for an argument that he has  
5 been -- that there has been a sufficiency of punishment. It's  
6 important for an argument that he is capable of making an  
7 adjustment to prison, and does not need to be executed to  
8 achieve any valid penological purpose.

9 So the point of the argument and the importance of  
10 our complaint about the right to investigate being restricted  
11 at all goes beyond some of the issues that I think the  
12 government seems to -- some of the limitations that I believe  
13 the government -- based on the government's comments in their  
14 moving papers and in an argument; I believe they see it as a  
15 more limited matter than we do.

16 The other reason that I ask you to address this  
17 question of the scope of the -- of relevance of the -- and  
18 I've heard you make -- made you make -- I've heard you make --  
19 we all listen to the remarks you make, and we cringe when we  
20 hear one that cuts against us, and we are kind of relaxed when  
21 we hear one that goes in our favor, or whatever the right word  
22 is. But I've heard you say from time to time that you  
23 recognize the necessity of this being detailed, and our -- and

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1 the presentation we would want to make would be detailed. And  
2 I appreciate that.

3 I want to ask you, however, to rule formally on these  
4 arguments that we've presented to you, and here's why:  
5 Another thing that we hear frequently -- that we hear you say  
6 frequently is that you can't tell the government what to bring  
7 to you. You're not -- your job is not to go through all of  
8 the government -- every bureau of the government's files and  
9 search through things yourself and find things that might be  
10 relevant and make a decision about them and then bring them to  
11 court and distribute them accordingly. You rely on the  
12 government to bring you evidence in the first instance and say  
13 this -- either provide it in discovery or bring it to you in  
14 the 505 process and propose substitutions.

15 Now, I think that when -- you are on notice, because  
16 you issued orders about it, that there is a five or 6,000-page  
17 report somewhere. I hope you've looked at that. But I didn't  
18 want to come to argue that at this moment.

19 What I wanted to say to you is that the government's  
20 idea about discovery that they keep articulating to you -- I  
21 mean, they're saying, "This stuff with the torture, it's not  
22 really relevant. It isn't relevant to anything. We've given  
23 them everything. They can just rely on what we've given them.

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1 They don't have an obligation to go and conduct an  
2 investigation. This -- this material is not relevant to  
3 anything. I mean, at most, it's relevant to mitigation, but  
4 what do they think they are? Like private Attorney Generals  
5 or something going out and conducting these investigations?"

6 When they say things like this, they are telling you  
7 what they think they're obligated to bring to you. Because  
8 they think they have -- that's their idea. That's what --  
9 when they're going through those files, they're looking at  
10 things saying, "Huh, this is just more of this. That's not  
11 relevant. That's not relevant." I think. I mean, how else  
12 would they be making the determination?

13 I know we got down -- from 5 or 6 million pages,  
14 we've heard, supporting the SSCI, we got down to 17,000 pages.  
15 That's three-tenths of 1 percent. I know they went through a  
16 process of saying, no, no, no. And I think, in part, that's  
17 because they have a very different idea of relevance of  
18 torture-related discovery.

19 So it is presented by -- it gets to 548 and 549 and  
20 525. It gets into those because the government is saying it's  
21 not a problem that we have prohibited them to a certain extent  
22 from investigating because none of that is relevant anyway.  
23 That's why we're talking about it now.

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1 I'm asking you to rule on this specific part of it  
2 separately with a -- you know, to carve it out and issue an  
3 order on it. And if you don't think it's been fully presented  
4 or litigated to you, call for additional authorities which we  
5 will provide. But it has -- as we say in our most recent  
6 pleading, the government has come forward with this three or  
7 four times saying none of this is really relevant, and we have  
8 responded each time.

9 And we pointed out that in some cases, the government  
10 is citing cases incorrectly. We pointed out that they're  
11 citing them incorrectly. They cite them, again, incorrectly  
12 in subsequent pleadings. All of this is laid out in our  
13 moving papers, and I request that you -- that you clarify this  
14 for the parties so that we all know where we stand and so that  
15 the government will know with precision what's relevant and  
16 what's not.

17 That's my argument. Thank you, Your Honor.

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

19 Mr. Harrington, talking about 548.

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

21 MJ [COL POHL]: Mr. Ruiz?

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

23 MJ [COL POHL]: Ms. Bormann.

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1 LDC [MS. BORMANN]: Judge, we're filing a supplement on  
2 548. Our filing in 548, which is 548F, as in Franklin, (WBA)  
3 references attempts to interview somebody who's now on the --  
4 I'm going to step up.

5 So to be very clear, because I didn't argue the last  
6 motion. So on 548, we are filing supplements on the previous  
7 held 524, 548, 549, and 528.

8 MJ [COL POHL]: The same factual predicate?

9 LDC [MS. BORMANN]: All the same factual predicate.

10 On Friday afternoon we received, after a period of  
11 approximately two months, a response from the government at  
12 approximately 1:30 p.m. We had requested to interview John  
13 Kiriakou, a former CIA ----

14 MJ [COL POHL]: Ms. Bormann, would it be more useful to  
15 discuss this after you file your supplement?

16 LDC [MS. BORMANN]: It would be, but I want to be able to  
17 argue it, so ----

18 MJ [COL POHL]: I'll give you an opportunity to argue it  
19 after your supplement.

20 LDC [MS. BORMANN]: Good. Terrific.

21 On 548, just very briefly -- actually, let me address  
22 it on 549. I have nothing additional on 548.

23 On 549, I do have some argument that doesn't

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1 reference Mr. Kiriakou. I'll wait on 549 to talk about that.

2 MJ [COL POHL]: Let's just try to keep things a little bit  
3 in order here. Mr. Connell kind of preempted a number of  
4 other issues. Okay.

5 Mr. Ruiz, you had nothing on 548 ----

6 LDC [MR. RUIZ]: I do not.

7 MJ [COL POHL]: ---- in addition?

8 Do any -- Mr. Nevin, anything more on 549?

9 LDC [MR. NEVIN]: No, sir.

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

11 LDC [MR. HARRINGTON]: No, Your Honor.

12 MJ [COL POHL]: Mr. Ruiz?

13 LDC [MR. RUIZ]: Nothing.

14 MJ [COL POHL]: Ms. Bormann? Okay.

15 LDC [MS. BORMANN]: These notes are a crutch. There's two  
16 words written on them. One is "discovery" and one is  
17 "investigation."

18 I want to make the point that "disclosure" as used  
19 under the Military Commissions Act, as used in the rules,  
20 refers to discovery. Discovery is a process in every court --  
21 this one's no different -- where materials -- they can be  
22 tangible pieces of evidence, -- a gun or a photograph of  
23 something -- are disclosed from one party to the other, and --

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1 or a document is disclosed from one party to another. That  
2 process is determined and regulated by the court. And when  
3 there are complaints about it, the parties go to the court and  
4 they ask for remedies.

5           Investigation is something very different.  
6 Investigation is a duty that is imposed only on one side of  
7 this room. It's imposed on your -- as you're facing us, the  
8 right side of the room, defense counsel. Investigation,  
9 defense investigation of matters related to their client's  
10 charges, on investigation of the discovery tendered by the  
11 government, is not a subject area that can be regulated by a  
12 court.

13           In fact, it can only be regulated by a court when  
14 there's interference in it, and that's the Gregory case, where  
15 courts have fashioned remedies when the government -- the  
16 people sitting on your left side -- have attempted to  
17 interfere with defense counsel's duties -- the people sitting  
18 on your right side -- attempt to interview and have access to  
19 witnesses.

20           In this case, the government has conflated the two  
21 and, I think, incorrectly told you that you can regulate the  
22 discovery -- or the defense investigatory function. You don't  
23 have the power to do that.

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1           If witnesses out there somewhere in the entire world  
2 of witnesses possess classified information, I don't know  
3 about it. When I go out to pursue leads, speak to witnesses,  
4 I send an investigator to pursue more leads based on speaking  
5 to a witness. I don't know whether they have classified  
6 information or not. I can't know. Nobody's ever provided  
7 that information to me.

8           I'm not seeking classified information. I simply  
9 want to know what happened to my client. It's my duty to  
10 investigate. When the government imposes rules, without any  
11 basis, to prohibit or otherwise impede that investigation,  
12 they do so at their peril. Gutting and eviscerating the  
13 defense function is not within the purview of this court.

14           And I would ask you to dismiss these charges because  
15 if the -- well, as we stand right now, we're not  
16 investigating, and under the proposed protective order, we  
17 also won't be able to investigate. You will see a  
18 supplemental on this issue as well involving Mr. Kiriakou and  
19 the results of that failed investigation.

20           I have nothing else.

21           MJ [COL POHL]: Okay. Thank you, Ms. Bormann.

22           Trial Counsel, I didn't give you an opportunity on  
23 548. Do you have anything you wish to add?

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1 TC [MR. GROHARING]: Just subject to your questions, we'll  
2 rest on the papers.

3 MJ [COL POHL]: How about 549?

4 TC [MR. GROHARING]: The same, Your Honor.

5 MJ [COL POHL]: Anybody want to be heard on 558?

6 Apparently not. Okay. I see this is all related, and they'll  
7 be decided in due course.

8 That brings you, Mr. Nevin, to 525. Although you've  
9 already kind of touched on it, you want to touch on it again?

10 LDC [MR. NEVIN]: Yes. And my understanding of the  
11 obligations is that I'm to bring -- we're to bring conflicts  
12 to your attention, and you are to resolve them. And I -- my  
13 request was just that you enter an order with respect to this  
14 conflict so that there's clarity. And that was mainly what I  
15 wanted to say. And I've explained the conflict to you.

16 MJ [COL POHL]: Would this be similar -- would this be the  
17 same conflict you'd have for both 525 and 524?

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

19 MJ [COL POHL]: I mean, limits -- one's a people issue,  
20 one is a places issue, but both of them are limits on your  
21 ability to investigate under a threat. If you do investigate  
22 that -- I'm paraphrasing what I think your position is -- that  
23 there could be potential, at least administrative, if not

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1 other more severe sanctions for violating classification  
2 guidance?

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

4 MJ [COL POHL]: Did I summarize your position up?

5 LDC [MR. NEVIN]: You could come down here and ----

6 MJ [COL POHL]: No. I like this seat better.

7 LDC [MR. NEVIN]: That's true.

8 MJ [COL POHL]: Go ahead. I didn't mean to cut you short.

9 LDC [MR. NEVIN]: Okay. Yeah, but that's it. And I  
10 argued it last time. And I -- you just will recall that there  
11 had been a wrinkle. There had been an additional response  
12 on -- in 525 about the overseas investigation. And I seem to  
13 be the one counsel who believed that didn't resolve the  
14 conflict. Others, I think, felt that it was more complete in  
15 its resolution.

16 And the reason that I took that position was that  
17 it's still -- there still was a blanket prohibition on doing  
18 anything that would confirm or deny. We just learned  
19 specifically that going and relying on open-source information  
20 to conduct investigation was permissible, but it left open the  
21 question of other ways that confirmation or denial might take  
22 place.

23 And in the written materials, I offered the example

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1 of learning from a classified source that a black site had a  
2 door of a particular color, but that that was not in an  
3 open-source document. And so I'm now in some foreign country  
4 conducting an investigation. Am I allowed to say, "Did the  
5 building over there have a green door or a red door?" Or  
6 whatever the color is. The idea would be that I knew that it  
7 did from classified information.

8 MJ [COL POHL]: Couldn't you ask the question what color  
9 was the door ----

10 LDC [MR. NEVIN]: Yes, I could.

11 MJ [COL POHL]: ---- without disclosing classified  
12 information?

13 You disclose the classified information. I mean, it  
14 doesn't strike to me as that ----

15 LDC [MR. NEVIN]: I could, although I guess the point is I  
16 might ask the question, "Does it have a red" -- "Did it have a  
17 red door?" as a way of saying -- and I just picked this  
18 hypothetical out of the blue, so maybe it's not a great way to  
19 present it.

20 But my point is, it wouldn't be clear to me that I --  
21 there has been, in other words, an open source -- there's  
22 been ----

23 MJ [COL POHL]: Open source says the building is in place

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1 X. The classified information gives you more detail about  
2 that building ----

3 LDC [MR. NEVIN]: Yes.

4 MJ [COL POHL]: ---- and you want to go and take a look at  
5 the building, and the question is how far can you go?

6 LDC [MR. NEVIN]: Yes. Exactly.

7 MJ [COL POHL]: You can go as far as you can without  
8 disclosing classified information.

9 LDC [MR. NEVIN]: Yes.

10 MJ [COL POHL]: I mean, it's hard for me to draft any type  
11 of order or anything else that would delineate less than that.

12 The example you gave me, to me, is an easy one. If  
13 you knew the door was blue through a classified information,  
14 you can't say, "Didn't that door used to be blue?" because  
15 that's based on this. Or you could say, "What color has the  
16 door always been?" or, "Has this place always been like this?"  
17 or whatever.

18 LDC [MR. NEVIN]: Right.

19 MJ [COL POHL]: It doesn't strike me as all that -- at  
20 least in concept. Maybe in execution it's more of a problem.

21 LDC [MR. NEVIN]: Right. And so not the greatest example,  
22 but I guess it highlighted the second point that I made -- or  
23 tried to make, which is that we are -- this puts us in the

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1 position of relying for the ability to conduct the  
2 investigation on the happenstance of a -- of an NGO or of  
3 somebody else deciding to conduct an investigation for their  
4 own reasons, and they're now conducting an investigation that  
5 we didn't ask them to conduct. And they are not doing it on  
6 Mr. Mohammad's behalf, and they are not under my control.

7           And the cases -- the ineffective assistance of  
8 counsel cases require all of those things. And I cited -- we  
9 cited a number of these in our moving papers, cases where  
10 there's an investigator who is acting independently of the  
11 lawyer and the lawyer is not guiding them; and that's treated  
12 as being ineffective assistance.

13       MJ [COL POHL]: Mr. Nevin, let me just ask you this:  
14 If -- if, which I've have done, issue an order saying the  
15 government does not have to identify the black site locations,  
16 okay? So you're not getting, I mean, at least official  
17 confirmation of where they're at. Okay? That doesn't make  
18 you ineffective. Right?

19       LDC [MR. NEVIN]: Oh, on the contrary.

20       MJ [COL POHL]: No, no. What I'm saying is if your  
21 objection that the judge's ruling has restricted my ability to  
22 investigate the case, then there's a legal error on my part.

23       LDC [MR. NEVIN]: Yes, but it ----

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1 MJ [COL POHL]: How are you ineffective if you're  
2 following a court order? That's what I don't understand.

3 LDC [MR. NEVIN]: But the cases are clear, that I can be  
4 rendered ineffective. I cited the cases in our moving papers.  
5 We can be rendered ineffective by your orders or by  
6 limitations that are placed on us.

7 MJ [COL POHL]: But what I'm saying is the appellate issue  
8 is not you're IAC; the appellate issue is that my order made  
9 you IAC.

10 LDC [MR. NEVIN]: Disagree. I mean the remedy ----

11 MJ [COL POHL]: Let me get this straight. If I issue an  
12 order regulating discovery somehow -- somehow, that -- which I  
13 do all the time, anyway, but I regulate discovery. I don't  
14 want to get too much into the weeds on this -- is that -- and  
15 you follow my order, and then the appellate court says that  
16 order made that an ineffective investigation, that's a lick on  
17 the defense counsel or a lick on the judge who issued the  
18 order?

19 LDC [MR. NEVIN]: It's -- I don't think it's a question of  
20 licks one way or the other. The issue is that Mr. Mohammad  
21 has been denied a Sixth Amendment right to the effective  
22 assistance of counsel.

23 MJ [COL POHL]: But where you're losing me is that

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1 somehow -- all I'm simply saying is this: Is the nature of  
2 this case, or any case, quite frankly, is the judge issues a  
3 number of orders. If you have to follow those orders -- which  
4 I think you do -- there's some exception -- you follow those  
5 orders, and on appeal, turns out those orders were overly  
6 broad by the judge, restricting improperly the defense  
7 investigation; that is an appellate issue that is on -- that  
8 is on -- a judicial error that is not the IAC where the  
9 defense counsel doesn't investigate on his own and post-trial,  
10 it turns out that he was, you know, snoozing all day.

11 LDC [MR. NEVIN]: No, I mean, I ----

12 MJ [COL POHL]: May end up with the same result, but what  
13 I'm simply saying is that it's a different type of analysis.  
14 At least I think it is.

15 LDC [MR. NEVIN]: Well, I will ----

16 MJ [COL POHL]: Or we can agree to disagree, if you want  
17 to.

18 LDC [MR. NEVIN]: Well, no. I mean, there is -- in my  
19 recollection is it's a U.S. Supreme Court case, and it's not  
20 flying into my brain right now, but it specifically says that  
21 when you -- that a counsel can be rendered ineffective as a  
22 result of court orders.

23 MJ [COL POHL]: I agree. I agree.

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1 LDC [MR. NEVIN]: And also we're not talking about someday  
2 Khalid Shaikh Mohammad versus David Nevin in a civil suit for  
3 having let him down. We're talking about -- we're talking  
4 about Khalid Shaikh Mohammad versus the United States of  
5 America in a habeas corpus action. And I'm saying to you his  
6 cause of action would be ineffective assistance and maybe  
7 there would be a due process argument as well. It may be that  
8 we're not differing all that much.

9 But I would -- if you give me a half an hour, I will  
10 bring you a case that says that -- that says that.

11 MJ [COL POHL]: No. I -- your statement that the judge's  
12 order rendered the counsel ineffective, I do not disagree  
13 with.

14 LDC [MR. NEVIN]: Okay.

15 MJ [COL POHL]: Okay. So I think we're just -- okay. I'm  
16 just saying is -- let's just leave it at that ----

17 LDC [MR. NEVIN]: Okay.

18 MJ [COL POHL]: ---- because I don't think this is a  
19 fruitful area to go down.

20 Go ahead.

21 LDC [MR. NEVIN]: So then the second part of the argument  
22 that we made was this, that -- and you touched on this a  
23 moment ago -- that what we're really dealing with here is a

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1 fiction, -- and we have bounced along in this fiction without  
2 ever resolving it for all of these years -- and that is that  
3 the things that Mr. Mohammad says to me can be considered to  
4 be classified.

5           So we've established that the -- and I'm -- this is a  
6 little different from Intelligence Identities Protection Act.  
7 This is just classified information. Mr. Mohammad does not  
8 hold any classified information. The government has not given  
9 me any classified information which identifies any CIA agents,  
10 and it has not given me any classified information which  
11 identifies any locations anywhere on the planet where a black  
12 site was located. The only place that I -- that could cause  
13 me to go to country X or country Y or country Z and  
14 investigate there, the only thing that I could possibly have  
15 that would lead me to go there is unclassified information.

16           And this whole idea that -- that he has somehow -- is  
17 holding classified information, as counsel said to you in the  
18 last round of hearings: No evidence has ever been -- no  
19 authority has ever been presented for the proposition that  
20 what is in his -- his observations can be considered  
21 classified and that the things that he tells me about where he  
22 thinks he was, if he indeed tells me that, or conclusions that  
23 I reach about it as a result of reading things, none of that

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1 is classified. And I just haven't been given that kind of  
2 information.

3 And all of this discussion that we've been having --  
4 or I would say a very large part of this discussion that we've  
5 been having is based on that fiction, and I respectfully call  
6 it a "fiction." And so -- and I made the point in 530 -- 525V  
7 that -- yeah, it's 525V -- I made the point that we know it  
8 doesn't come from Protective Order #1.

9 You described things -- certain things in Protective  
10 Order #1 as being classified, but you're not an original  
11 classification authority. So the -- and, you know, there was  
12 also a reference to the problem of information being born  
13 classified, and this is not the type of information that is  
14 born classified.

15 So I also respectfully request, just as I did a few  
16 moments ago, that this problem which has been bumping along  
17 for years pretty much unresolved, I ask you to resolve that as  
18 well because that is what is underlying all of this discussion  
19 we're having about whether we can go to foreign countries and  
20 when we get there, what we can say.

21 And also the question of approaching CIA agents.  
22 Now, recognizing they're the Intelligence Identities  
23 Protection Act has an additional overlay to that, but it's not

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1 a classified information problem. I don't have classified  
2 information on these subjects. So -- none of us do.

3 So, you know, that's in the moving papers as well,  
4 and I ask you to approach and address that. Thank you, Your  
5 Honor.

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

7 Any other counsel want to be heard on 525?

8 Mr. Connell, you seem to have shifted positions on  
9 525.

10 LDC [MR. CONNELL]: No, sir. My position is the same.

11 Our position is that 525M reset us to the status quo  
12 ante prior to November 17, 2017, and we think that that --  
13 that's right. And we also agree with the sort of summary that  
14 the military commission just gave of what the rule is, which  
15 is that you can investigate as far as you can without  
16 disclosing classified information.

17 The point that I rise to make is that until  
18 6 September 2017, that was the same rule with respect to  
19 people as well as places; that you, within the framework of  
20 Protective Order #1, investigate as far as you can without  
21 disclosing classified information. And that was a workable  
22 solution. The investigative restrictions that we're under now  
23 on people and the proposed protective order disturbed that

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1 solution and introduced a whole new set of problems that never  
2 existed before.

3           The other point that I want to make is I do part  
4 company just slightly with the -- your summary of the conflict  
5 position because our position has been not that we are under  
6 investigation and thus fall under that line of conflict cases,  
7 but, rather, that the proposed protective order and the  
8 existing investigative prohibitions create a structural  
9 conflict, more like Cronic than Strickland, in that the  
10 structure of the organization, the conflict between the two  
11 duties, the duty to investigate and the duty to follow  
12 classification guidance, come into conflict in such a severe  
13 magnitude as to create the conflict of interest.

14           We've put that in our papers. We don't think that  
15 it's at a head yet, but it could be.

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

17           LDC [MR. CONNELL]: Thank you.

18           MJ [COL POHL]: Other defense counsel on 525?

19           Ms. Bormann.

20           LDC [MS. BORMANN]: Judge, we join the comments of  
21 Mr. Nevin, please.

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

23           Trial Counsel, anything on 525?

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

2 Judge, we obviously don't believe any conflict exists  
3 such that the defense cannot properly prepare for trial and  
4 ensure a fair trial.

5 I do want to point out a couple of things. I think  
6 you have to look at and think about what is the defense trying  
7 to accomplish by this investigation. What information are  
8 they looking to find by, in this case, overseas investigation.  
9 It's the conditions of the detention of the accused, I think,  
10 is what the effort is.

11 And with respect to the locations, you've recently  
12 ruled specifically on the need for the defense to know the  
13 locations and to go and view the locations. So a lot of this  
14 investigation, frankly, you've already ruled is not necessary  
15 when you ruled on 114G.

16 I mean, you found that the defense has the ability to  
17 present descriptions of evidence and locations as contained in  
18 the discovery provided to the defense as part of the  
19 litigation in the 308 series, that they already have that.  
20 These are things you cited in denying their requested relief.  
21 You found they have the option to call or cross-examine  
22 witnesses who viewed the physical evidence or treatment of  
23 accused, and that they have the ability to testify themselves

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1 about the physical evidence or treatment of the accused and/or  
2 detainees.

3           So these are your findings in denying the  
4 defense-requested relief. And I would submit to you that a  
5 lot of this proposed overseas investigation would be for that  
6 purpose. So whatever conflict the defense believes is created  
7 by this guidance really isn't one because you've already  
8 determined that they don't need to go and view a site; they  
9 don't need to know the location of a site. So these efforts  
10 are not necessary.

11           Like I've mentioned numerous times, and I'll mention  
12 again, we've also expressed a willingness to agree to the  
13 descriptions of confinement that -- provided by the defense.  
14 So defense is very well-armed to make this presentation. And  
15 whatever limitations the guidance has on overseas  
16 investigation does not prohibit them from making that  
17 effective presentation.

18           As you know, as the defense knows, there's really  
19 nothing left to see overseas with respect to their detention.  
20 And no doubt that was part of the rationale in deciding 114G.  
21 So they're looking for people who might have heard or seen  
22 something, presumably. And the reality is that the people who  
23 might have heard or seen something with respect to the

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1 accused's detention are not foreign nationals; they are the  
2 CIA, either employees or contractors, that were involved in  
3 the program.

4           With the exception of very, very limited cases, the  
5 accused did not have any contact with foreign nationals after  
6 they were captured and then detained in the CIA RDI program.  
7 So whatever investigation thinks -- whatever the defense  
8 thinks they need to do to investigate and try to find foreign  
9 nationals will actually yield very little information, in  
10 reality.

11           I would point out, -- and we've talked a little bit  
12 about the need to be able to present a vivid description of  
13 conditions. I would cite the court's attention to defense  
14 pleadings, specifically in the 200 series where the defense  
15 submitted a pleading from Mr. Mohammad regarding his  
16 conditions, which was quite vivid, and would seem to be  
17 helpful for whatever purpose that they wanted to use it.

18           I'd also note that contrary to Mr. Nevin's comments  
19 earlier, we've never taken the position that the defense  
20 cannot attempt to use information regarding the conditions of  
21 detention on various matters to include mitigation, to include  
22 pretrial motions.

23           I would point your attention to the -- to AE 397.

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1 The government's seeking a protective order with respect to  
2 RDI information that established the whole RDI construct where  
3 we agree that the defense may seek to use information for that  
4 purpose.

5 We do dispute the value of the information and the  
6 merits of those claims that the defense is making, for sure,  
7 but we've never taken the position that the defense cannot  
8 attempt to use this information for those purposes.

9 Subject to your questions, Your Honor, I have no more  
10 argument.

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

12 Mr. Nevin, do you wish to respond? Just go in the  
13 same order as we went before.

14 LDC [MR. NEVIN]: Yeah. Only to say that I take it you  
15 decided in 425 that you would not be disqualified, nor would  
16 the prosecution. But I think that leaves the question of  
17 whether -- that does not resolve the question of whether we  
18 have an obligation to investigate, and we do. We have an  
19 obligation to conduct a thorough investigation. And, as I  
20 say, for the reasons I articulated previously, the  
21 restrictions on doing that create a conflict of interest.

22 Thank you.

23 MJ [COL POHL]: Thank you.

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1           Mr. Connell.

2           LDC [MR. CONNELL]: The government just said two very  
3 important things. The first is they said there's nothing  
4 really left to see in the black site that they decommissioned.  
5 I pause only to say that their written pleadings on that  
6 should control; and their position today was not consistent  
7 with those written -- their written position.

8           The second thing that I want to say is the government  
9 just argued to you that your ruling in 114 series denying  
10 access to additional information about black sites or the  
11 ability to conduct an inspection of those black sites was  
12 correct because we could call witnesses about what those black  
13 sites were like. And the government went so far as to say,  
14 incorrectly, that really only CIA people had anything valuable  
15 to say. Lots of foreign nationals have valuable things to say  
16 about those black sites because there are a wide variety of  
17 them.

18           But the -- those were the exact witnesses, supporting  
19 your 114 ruling, that the government in the 424 series is  
20 seeking to stop us from interviewing so that we can bring them  
21 before the court.

22           So there is a fatal -- I mean, perhaps in a way, a  
23 beautiful contradiction between the government's ----

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1 MJ [COL POHL]: 524?

2 LDC [MR. CONNELL]: 524, yes, sir.

3 MJ [COL POHL]: You said 424.

4 LDC [MR. CONNELL]: Sorry, sir.

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

6 LDC [MR. CONNELL]: That is exactly the set of people  
7 they're trying to stop us from interviewing so we can bring  
8 them before the court.

9 So it helps them set up -- like so many of these  
10 different investigative restrictions, the reason why I put  
11 them on a spectrum is it helps them set up a mutually  
12 interlocking defense against our investigative efforts.  
13 Because we can't go -- we can't go to see the black sites  
14 because we could call witnesses about them, and we can't call  
15 witnesses about them because we can't interview the witnesses.

16 Thank you.

17 MJ [COL POHL]: Ms. Bormann.

18 LDC [MS. BORMANN]: I just want to answer Mr. Groharing's  
19 question. For the third time today, I heard trial counsel say  
20 all they want are the conditions of the defendant's detention,  
21 I assume.

22 So let me make it clear that on behalf of  
23 Mr. Bin'Attash, that's not what we're seeking. Yes, that's a

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1 very small subpart of what we seek. But what we actually seek  
2 is the literally and figurative blow-by-blow descriptions of  
3 what happened to our clients. So I'll just give you a  
4 hypothetical.

5           What I'd like to see is a report that indicates,  
6 instead of -- but I'm going to refer to unclassified  
7 information here -- mid-2003 as the only date Mr. Bin'Attash  
8 didn't sleep. He then said the following things.

9           That summary doesn't tell me for how long  
10 Mr. Bin'Attash didn't sleep. It doesn't tell me if he didn't  
11 sleep for four hours, eight hours, 12 hours, 24 hours, 48  
12 hours, or, as the SSCI report says, 79 hours. It doesn't tell  
13 me how the CIA kept him awake. It doesn't tell me if they  
14 beat him, they doused him, they hung him from his hands or did  
15 anything else. It doesn't tell me whether they swore at him,  
16 punched him, slapped him, dragged him down a floor to keep him  
17 awake. It doesn't tell me whether he received any severe  
18 injuries. It simply tells me that he said certain things  
19 after being kept awake.

20           What I'd like to know is how many witnesses saw those  
21 ways to deprive him of sleep. What I'd like to know is how  
22 much oxygen his brain was deprived of while he was kept awake  
23 for -- if it was 79 hours, and whether or not that affected

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1 his functioning.

2           What I'd like to know is if he didn't answer the  
3 questions in the way they wanted, what they did with him next,  
4 whether they allowed him to sleep or whether they continued to  
5 do sleep deprivation.

6           Because then the next report I have has the same  
7 date: Mid-2003. And it says this time he was forced to  
8 stand. That description doesn't tell me for how long he was  
9 forced to stand or whether he was forced to stand directly  
10 after he was deprived of sleep; whether it was a result of the  
11 first interrogation or whether it even came before the first  
12 interrogation. We have no idea.

13           So really, Mr. Groharing, what we'd like to know is  
14 what happened to our clients. And if you could answer that,  
15 it would put us a lot further along in investigating this  
16 case.

17           I have nothing else.

18           MJ [COL POHL]: Thank you, Ms. Bormann.

19           Mr. Groharing, last word, if you want one.

20           TC [MR. GROHARING]: Only if you have questions, Your  
21 Honor.

22           MJ [COL POHL]: I have none.

23           Mr. Nevin, just to sum up, a point that you keep

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1 coming back to about the scope of mitigation evidence, the  
2 rule says in a capital case, the accused shall be given broad  
3 latitude to present evidence in extenuation and mitigation,  
4 and I believe the rule means what it says.

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

6 MJ [COL POHL]: Okay. Let's start. I want to do the  
7 first part of the 530, and this deals with, Mr. Nevin, your  
8 part dealing with maybe just the status of the return of the  
9 materials. This is not the computer part of 530.

10 LDC [MR. NEVIN]: Can I have just a moment?

11 MJ [COL POHL]: Sure.

12 [Pause.]

13 LDC [MR. NEVIN]: Your Honor, I believe that's 530G, like  
14 Golf.

15 MJ [COL POHL]: Yes, I believe that's what it was.

16 LDC [MR. NEVIN]: And we withdraw that.

17 MJ [COL POHL]: Okay. Could I say it's moot?

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

19 MJ [COL POHL]: Okay. For my filings inventory, I've got  
20 to put something that happened to them, because when  
21 Mr. Connell actually reads my filings inventory, he will have  
22 to know why this one is a different category.

23 On the representation by Mr. Nevin, I'll consider the

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1 530G is moot. Okay.

2 Let's start with the 530VV. Understand we're only  
3 going to do about ten minutes of it. I don't see this as a  
4 ten-minute issue, but maybe I'll be surprised.

5 Mr. Ryan.

6 TC [MR. RYAN]: Good afternoon, Your Honor. Ed Ryan on  
7 behalf of the United States.

8 MJ [COL POHL]: Good afternoon.

9 TC [MR. RYAN]: In 530VV, sir, we request reconsideration  
10 of your order in 530LL. In LL, Your Honor ordered the  
11 accused, Shaikh Mohammad, Bin'Attash, and Ali to state whether  
12 they would consent to a forensic examination of the laptop  
13 computers issued by the government for their use in the course  
14 of this litigation. I will note all three have consented to  
15 that forensic examination.

16 We ask now in our motion for reconsideration that  
17 such order be extended to the accused al Hawsawi as well as  
18 Binalshibh. I have argued this matter at least as it  
19 pertained to the searches and events back in October  
20 previously. I won't repeat that. However, I will ask that I  
21 adopt -- or I will ask Your Honor to consider that I am  
22 adopting all previous arguments made in pleadings as well as  
23 Your Honor's own analysis and findings in 530LL.

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1           Among your findings in that that are relevant for  
2 today's purposes, sir, you found that the accused Shaikh  
3 Mohammad sought to purposely deceive the JTF guards back in  
4 October; that the accused Ali had misused his laptop in  
5 violation of AE 182K, an order from this commission; that the  
6 accused Ali, Shaikh Mohammad, and Bin'Attash all demonstrated  
7 at a minimum an intent to misuse their laptops in violation of  
8 182K; and, finally, that their actions and abilities  
9 potentially posed a risk to force protection and  
10 national security. That's all part of LL.

11           I will note, Your Honor, that you also found that  
12 there was a lack of evidence as to any involvement by both the  
13 accused Binalshibh and al Hawsawi; therefore, Your Honor  
14 treated them differently in terms of your order.

15           On 23 February of 2018, the JDG commander authorized  
16 a new search of the accused. The results of the search that  
17 are most relevant to our motion to reconsider are as follows:  
18 In the cell of Mr. al Hawsawi on a shelf, there was found a  
19 46-page document printed from the Internet. It was mostly in  
20 the Arabic language, but on it were various words in English  
21 indicating, first, that it was printed from the Internet or  
22 came from the Internet; and secondly, that among the subjects  
23 that were covered in this document were the following:

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1 Windows, Windows XP, the Internet, and even Facebook. As I  
2 said, this was taken from a shelf. It was marked as "Other  
3 Case Related Material."

4 From Mr. Binalshibh's cell ----

5 MJ [COL POHL]: Mr. Ryan, refresh my memory. When I say  
6 it was marked "Other Case Related Material," was it -- is that  
7 a stamp? Handwritten? What?

8 TC [MR. RYAN]: It was stamped at the top of the  
9 materials.

10 MJ [COL POHL]: And whose responsibility is it to stamp it  
11 as that?

12 TC [MR. RYAN]: It came from defense counsel.

13 MJ [COL POHL]: No. I didn't ask you that. I said is --  
14 under the order, is who stamps the material?

15 TC [MR. RYAN]: Well, I'm telling you as it was found,  
16 sir, it says along the top that it was stamped, but it was  
17 indicated that it came from defense.

18 MJ [COL POHL]: Okay. Were there initials next to that?

19 TC [MR. RYAN]: The names were on it, sir.

20 MJ [COL POHL]: Of the people who stamped it?

21 TC [MR. RYAN]: There were stamps on it as well, sir, but  
22 I'm talking -- if Your Honor's point is did it get stamped as  
23 it was coming in? Yes, it did.

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1 MJ [COL POHL]: Okay.

2 TC [MR. RYAN]: From the Privilege Review Team apparently,  
3 sir.

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

5 LDC [MR. RUIZ]: Judge, if I may, I have an objection that  
6 I'd like to make at this point.

7 MJ [COL POHL]: Sure.

8 LDC [MR. RUIZ]: We are in a position where we're not able  
9 to respond to this adequately right now because we haven't had  
10 adequate access to these documents.

11 Yesterday, prior to the 802, the documents were  
12 brought to the court. We had an opportunity to view them  
13 briefly. I did make a request from the SJA that we be able to  
14 review those documents with Mr. al Hawsawi; and at the time,  
15 there was a question as to whether these documents were now  
16 presumptively classified.

17 As I just walked over and talked to the SJA, he's not  
18 certain which are and which are not, but the bottom line is we  
19 have not had access to the documents in order to review them  
20 appropriately, review them with Mr. al Hawsawi, and be in a  
21 position to respond to what Mr. Ryan is saying.

22 In addition to that, as you point out, these were  
23 marked as OCR documents, have never been returned to us. We

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1 were never notified of their seizure. And we're now -- and  
2 have never been attached to the government's pleadings for  
3 some reason. So we're in a position right now where what  
4 we're doing is trying to do is litigate this blindly. And I  
5 would ask that we be given an opportunity to review that  
6 evidence before we proceed with any argument.

7 MJ [COL POHL]: Mr. Ryan, what is the current physical  
8 status of the two computers in question?

9 TC [MR. RYAN]: They remain with trial judiciary.

10 MJ [COL POHL]: Okay.

11 TC [MR. RYAN]: Your Honor, as far as counsel's objection,  
12 the items were made available. I don't disagree with whatever  
13 counsel just said at the time. They have been available to be  
14 observed, and I'm prepared to make argument on it as we stand  
15 right now.

16 MJ [COL POHL]: It seems to me, given the fact that the  
17 computers are not in the cells at this time, that if we  
18 delayed this in order to give them an opportunity to review  
19 it, the government would suffer no prejudice.

20 Would that be a fair statement, Mr. Ryan?

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

22 LDC [MR. RUIZ]: Judge, actually I would ask that you  
23 order that they return the documents to us consistent with

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1 your ruling in 018U.

2 MJ [COL POHL]: I'll give you an opportunity to review  
3 them and then you can make your argument whether that they  
4 will be returned back. I'm not going to start issuing orders  
5 of returning evidence when I have no factual predicate of the  
6 context which they were taken.

7 What I have right now, at least on the pleadings, I  
8 think Mr. Ryan said it, that one document was marked  
9 case-related material but it wasn't kept in the case-related  
10 area. I don't know if that's true or not.

11 LDC [MR. RUIZ]: It doesn't matter based on your order,  
12 Judge. Your order is very clear.

13 MJ [COL POHL]: Okay. But understand this, Mr. Ruiz, is  
14 that until I hear from both sides on this, I'm not doing  
15 anything to disturb the status quo.

16 LDC [MR. RUIZ]: Judge, the status quo is you have issued  
17 an order that's a standing order that says that JTF must  
18 return those documents to us regardless of where they are  
19 found. I'm not asking you to do anything anew.

20 MJ [COL POHL]: Mr. Ruiz, I hear what you are saying. If  
21 your request is for me to issue an immediate order to do  
22 something, the answer is no, and that request is denied.

23 LDC [MR. RUIZ]: No, sir. I'm asking you to enforce your

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1 existing order. That's what I'm asking you to do.

2 MJ [COL POHL]: For the third time, I hear what you are  
3 saying, and I'm not going to do it. That being said, we'll  
4 recess until tomorrow at 0900.

5 LDC [MR. HARRINGTON]: Judge, excuse me?

6 MJ [COL POHL]: I'm sorry.

7 LDC [MR. HARRINGTON]: Judge, we're in the same position  
8 because materials were taken from Mr. Binalshibh. My request  
9 to you is that this be done, if we possibly can do it this  
10 week, so that we can do that with our clients and ----

11 MJ [COL POHL]: Okay. We'll see how ----

12 LDC [MR. HARRINGTON]: ---- argue the motion this week.

13 MJ [COL POHL]: No, I understand. I'd like to address it  
14 this week. I got it, but let's -- Mr. Ryan, see if you can  
15 make that happen.

16 I think we can, Mr. Harrington, given the current  
17 schedule, particularly on Wednesday afternoon, generally  
18 speaking, we can finish the 505(h) Wednesday. We have to  
19 do -- I spend the afternoon after that doing orders anyway, so  
20 I think there will be time to do this. If we need to make  
21 some other arrangements, just let me know. Okay.

22 The detainees can stay in the courtroom until 1700,  
23 since it's almost prayer time anyway.

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1           Mr. Nevin.

2           LDC [MR. NEVIN]: Could we take up -- and I suppose we  
3 could possibly do it now -- 530BBB, which was our notice that  
4 we had said to the government, Please examine our computer,  
5 and let's get on with this; and then we haven't heard anything  
6 for quite some period of time. I simply -- I think really,  
7 I ----

8           MJ [COL POHL]: I'm going to give you ----

9           LDC [MR. NEVIN]: ---- bring that to you ----

10          MJ [COL POHL]: I don't want to cut anybody short for  
11 artificial timeframes, but you got the notice, Mr. Ryan? Do  
12 you know what he's referring to?

13          TC [MR. RYAN]: I have the notice from Mr. Nevin saying he  
14 wants the analysis to take place. Our position is we want the  
15 analysis of all five of them to take place at the same time.

16          MJ [COL POHL]: We'll address it more fully when we have  
17 more -- I don't want to push it artificially now, because I  
18 think it does raise two separate issues. Because I read their  
19 response to what you had said, and it needs to be developed,  
20 for want of a better term.

21                                   [END OF PAGE]

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

3 TC [MR. RYAN]: Thank you.

4 MJ [COL POHL]: The commission in recess.

5 [The R.M.C. 803 session recessed at 1616, 30 April 2018.]

6 [END OF PAGE]

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