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1 [The R.M.C. 803 session was called to order at 0903, 3 May  
2 2018.]

3 MJ [COL POHL]: Commission is called to order. All  
4 detainees are present except for Mr. Hawsawi.  
5 Trial Counsel.

6 CP [BG MARTINS]: Your Honor, good morning. No changes  
7 for the United States. Ms. Tate this morning won't be coming  
8 and going. She will be present as she is now. Thank you.

9 MJ [COL POHL]: Okay.

10 Mr. Nevin.

11 LDC [MR. NEVIN]: Ms. Leboeuf is not here, but the rest of  
12 the counsel who have entered appearances are. And I believe  
13 we have your -- we've gotten materials to you regarding  
14 Ms. Radostitz, her appearance. So -- no? Not to you yet?

15 MJ [COL POHL]: Does not ring a bell.

16 LDC [MR. NEVIN]: Oh, okay.

17 We have ----

18 MJ [COL POHL]: Is Ms. Radostitz an attorney?

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

20 MJ [COL POHL]: She is entering --

21 LDC [MR. NEVIN]: Entering an appearance and has been  
22 detailed, and ----

23 MJ [COL POHL]: When did you submit the ----

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1 LDC [MR. NEVIN]: We submitted it yesterday -- just this  
2 morning.

3 MJ [COL POHL]: Okay. Well ----

4 LDC [MR. NEVIN]: Okay. Good. Well, then -- but  
5 Ms. Radostitz is present, Your Honor, in any event.

6 MJ [COL POHL]: Okay. Well, does she wish to participate  
7 today by the bar?

8 LDC [MR. NEVIN]: No.

9 MJ [COL POHL]: So there's no need to swear her in.  
10 That's what I'm saying; we can do this when ----

11 LDC [MR. NEVIN]: We can do this -- we can do this at your  
12 convenience.

13 MJ [COL POHL]: Has she been detailed or is ----

14 LDC [MR. NEVIN]: She has been detailed ----

15 MJ [COL POHL]: Okay.

16 LDC [MR. NEVIN]: ---- and she -- and we have submitted  
17 the ----

18 MJ [COL POHL]: Paperwork. Okay.

19 LDC [MR. NEVIN]: Yes.

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

21 Ms. Bormann?

22 LDC [MS. BORMANN]: Judge, we are all the same as  
23 yesterday. I do have to ask permission. We have a couple

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**19705**

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1 writing situations, things that need to be filed today and  
2 tomorrow. So I'm asking that Captain Brady be able to be  
3 excused for this morning; and then when he returns, that  
4 Mr. Perry be able to be excused.

5 MJ [COL POHL]: That's fine.

6 Mr. Harrington?

7 LDC [MR. HARRINGTON]: No changes, Judge.

8 MJ [COL POHL]: Mr. Connell?

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

10 MJ [COL POHL]: Good morning.

11 LDC [MR. CONNELL]: No changes for Mr. al Baluchi.

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

13 LDC [MR. RUIZ]: Judge, we have the same table with the  
14 exception of Ms. Lachelier is not currently present but will  
15 be joining us at a later time.

16 MJ [COL POHL]: Okay. Trial Counsel.

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

19 **DIRECT EXAMINATION**

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

21 Q. Good morning.

22 A. Good morning, sir.

23 Q. Are you the same Major that testified earlier this

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1 week on Tuesday?

2 A. I am.

3 Q. All right. I remind you that you are still under  
4 oath.

5 Did you have occasion to visit Mr. al Hawsawi this  
6 morning?

7 A. I did meet with Mr. al Hawsawi this morning at camp.

8 Q. All right. I have in front of me what's been marked  
9 as Appellate Exhibit 571C consisting of three pages. Let's  
10 talk about that document.

11 Did you follow the same procedure that you have  
12 always followed throughout your tenure here?

13 A. I did. I went to Mr. Hawsawi's cell this morning. I  
14 introduced myself, advised him that he had a military  
15 commission this morning at 9:00, and asked him if he would be  
16 coming to the commission; and he advised me that he did not  
17 want to come.

18 Q. Did you read the form to him?

19 A. I did. I handed him the Arabic version -- because he  
20 always follows along -- and then I read the English version.  
21 And then the interpreter that was with me read the Arabic  
22 version to him. And I asked him if he had any questions; he  
23 said he did not have any questions.

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**19707**

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1           As you can see, he filled out the Arabic version. He  
2 signed that. And then he asked for the English signature  
3 page, and he went ahead and signed that in my presence.

4           Q. All right. Do you believe that he understood what  
5 you told him this morning?

6           A. I do. I read everything to him. I asked him if he  
7 had any questions, and he said he had no questions. And once  
8 he signed the waiver form, he advised that he wanted to go to  
9 Echo II for legal meetings all day.

10          Q. Do you believe that he voluntarily waived his  
11 presence this morning?

12          A. I do believe that he voluntarily waived his presence  
13 at today's commission.

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

15          MJ [COL POHL]: Mr. Ruiz, any questions?

16          LDC [MR. RUIZ]: No questions.

17          MJ [COL POHL]: Thank you. I find Mr. Hawsawi has  
18 voluntarily and knowingly waived his right to be present  
19 today.

20          [The witness left the witness stand.]

21          MJ [COL POHL]: That brings us to the continuation of 555.

22                 Mr. Connell. Go ahead.

23          LDC [MR. CONNELL]: Sir. Thank you.

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1           Your Honor, our position on 555 has shifted over the  
2 interim, because, over the interim, I was contacted by a  
3 witness who has direct knowledge of many of the answers to the  
4 questions that you had on Tuesday about what happened with  
5 SOUTHCOM, why and how did SOUTHCOM deny the imagery request,  
6 and how was it coordinated, what were the coordination  
7 responsibilities.

8           I request to defer additional argument on the 555  
9 base motion to the next hearing so that I can get that  
10 information into the record and make additional witness  
11 requests.

12           I think that AE 555H, the discovery motion, is ripe  
13 for ruling; and I do not request to defer further argument on  
14 that.

15           MJ [COL POHL]: Okay. You intend to file a supplement is  
16 what you're telling me?

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

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

19           Any further argument from any defense counsel on the  
20 base motion?

21           LDC [MS. BORMANN]: We join in the request to defer  
22 further argument until we have made a more complete record.

23           MJ [COL POHL]: Mr. Nevin?

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1 LDC [MR. NEVIN]: Yes, Your Honor. I join that request as  
2 well. And I would just say, I have had contact with a witness  
3 as well. And I believe I will be able to provide the military  
4 commission with an additional -- with additional materials  
5 separate from the materials that Mr. Connell was referring to.  
6 So I ----

7 MJ [COL POHL]: How long will it take? I meant to ask  
8 this of Mr. Connell. I'll ask him again. Because a  
9 supplement, there's no time limit on when a supplement needs  
10 to be submitted normally.

11 LDC [MR. NEVIN]: Oh, Your Honor, certainly before the  
12 next round of hearings but not before the end of this one.

13 MJ [COL POHL]: Okay. No, I got that.

14 LDC [MR. NEVIN]: I think something on the order of 14  
15 days would be -- I somewhat pulled that out of the air, but my  
16 understanding of the information is such that I should be able  
17 to have it to you in that time frame. But I don't -- counsel  
18 may have a different ----

19 MJ [COL POHL]: Mr. Connell?

20 LDC [MR. CONNELL]: Your Honor, 14 days from Monday seems  
21 like a reasonable suspense. If there's some extraordinary  
22 circumstance, I'll bring it to the military commission's  
23 attention.

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1 MJ [COL POHL]: Well, I don't have -- well, actually, I  
2 do. Just one moment, please.

3 LDC [MR. CONNELL]: That would give plenty of time for a  
4 full round of briefing before the next hearing.

5 MJ [COL POHL]: Actually, I do have a calendar this time.  
6 Right now, the next scheduled hearing in this case  
7 is, I believe, 23 July ----

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

9 MJ [COL POHL]: ---- with Ramadan in between.  
10 Monday is the 7th.

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

12 MJ [COL POHL]: The supplement is due by the 21st of May.  
13 Government, there's two weeks to respond. And then  
14 trial counsel -- or defense, if necessary, one week to reply.  
15 That will be plenty of time to fully brief it before the July  
16 hearings.

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

18 MJ [COL POHL]: Okay. Okay.

19 That brings us to 530VV.

20 LDC [MR. NEVIN]: Your Honor -- but, Your Honor, do you  
21 take it -- or are we to take it, rather, that you have the  
22 motion to compel discovery fully submitted to you? Because  
23 my -- I don't know if Mr. Connell intended to argue this, but

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1 I was going to suggest that the -- the best way forward would  
2 be to grant the motion to compel discovery.

3 MJ [COL POHL]: I will address the motion to compel  
4 discovery as kind of an interlocutory issue before we get to  
5 the thing, but I will not decide the base motion until you  
6 have had an opportunity to submit your supplement.

7 LDC [MR. NEVIN]: Okay.

8 MJ [COL POHL]: Okay. And then after the supplement is  
9 submitted, whether there's further oral argument or not will  
10 be dependent on what's in the supplement, quite frankly.

11 LDC [MR. NEVIN]: On the motion to compel discovery or on  
12 the base motion?

13 MJ [COL POHL]: On the -- okay. You will get -- you will  
14 get an answer now -- not as I'm sitting here ----

15 LDC [MR. NEVIN]: Yeah.

16 MJ [COL POHL]: ---- but I will address in the due course,  
17 in plenty of time, the discovery motion ----

18 LDC [MR. NEVIN]: Okay.

19 MJ [COL POHL]: ---- based on ---- now, that's based on  
20 what I have right now. Okay? If the supplement indicates  
21 additional discovery may be warranted, that's a different  
22 issue, which obviously I can't address because I don't have  
23 it.

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1           But what I have now -- and I've seen this, and I  
2 think I can address the discovery in the base motion, and  
3 then -- with the understanding that I will not make a ruling  
4 until I've had an opportunity to consider the supplement. And  
5 then whether there's further argument or not, again, will  
6 depend on what's in the supplement. Okay?

7           LDC [MR. NEVIN]: Got it. Thank you.

8           MJ [COL POHL]: Okay. That brings us to 530VV.

9           Mr. Ryan?

10          TC [MR. RYAN]: Good morning, Your Honor.

11          MJ [COL POHL]: Good morning.

12          TC [MR. RYAN]: Sir, before addressing 530VV, if the  
13 commission would just grant me a moment of indulgence, I would  
14 like to recognize to the military commission at this time the  
15 passing of a victim family member who was well known to us  
16 down here in military commissions on Guantanamo. That  
17 gentleman's name was Mr. Al Acquaviva. He was one of the ten  
18 persons, Your Honor, who we sought to depose in AE 422.

19               I wouldn't mention this in every instance of every  
20 family because it would be too many, but Mr. Acquaviva was  
21 also a two-time visitor down here on Guantanamo and sat behind  
22 the glass and observed our proceedings. He was a great  
23 believer in the military commissions system as a way to

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1 achieve justice. He was 84 years old. He was preceded in  
2 death by his son Paul, who was killed in the World Trade  
3 Center North Tower.

4 I thank you for the indulgence, Judge. I thought it  
5 appropriate that his name be said in this courtroom.

6 Your Honor, when we broke on Tuesday, I was in the  
7 course of my argument on 530VV, and I was saying at that  
8 moment that in Your Honor's order, 530LL, you had treated the  
9 accused al Hawsawi and Binalshibh slightly differently than  
10 the other accused; and that was based on an admitted lack of  
11 evidence of their particular involvement in this scheme that  
12 was clear as to the accused Ali, Shaikh Mohammad, and  
13 Bin'Attash.

14 So picking up where I left off, on 23 February of  
15 2018, the JDG commanding officer, whose declaration you have,  
16 authorized a new search. The results of those searches  
17 included a document taken from the cell of Mr. al Hawsawi  
18 which was approximately 46 pages in length. It was clear from  
19 its face that it was printed from the Internet. An awful lot  
20 of the language in it was in Arabic; however, there were  
21 numerous words readily visible including, on the front, in  
22 English. Among those words that were clearly visible in  
23 English were the words "Windows," "Windows XP," "Internet,"

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1 "Facebook."

2 This item was taken from a shelf inside  
3 Mr. al Hawsawi's cell. It had been stamped and apparently  
4 came into the camp as Other Case-Related Material. That's the  
5 relevant finding as to Mr. al Hawsawi.

6 As to Mr. Binalshibh, the findings included a manual  
7 titled "Advanced Linux Programming" -- the manual was marked  
8 "Other Case-Related Material." A manual titled "Teach  
9 Yourself Linux in 24 Hours" -- the manual was marked "Other  
10 Case-Related Material"; and most significantly of all, three  
11 discs containing the following programs: "Linux Mint 17,"  
12 "CentOS7" -- that's C-E-N-T OS7 -- and "Kali Linux," K-A-L-I  
13 Linux. These discs were marked as nonlegal mail. All of  
14 these items, I note, were found in the legal bin.

15 Now, as to ----

16 MJ [COL POHL]: Mr. Ryan?

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

18 MJ [COL POHL]: On those discs that are marked  
19 "Nonlegal Mail," wouldn't they have had to gone through the  
20 JDG?

21 TC [MR. RYAN]: Items marked as nonlegal mail, Your Honor,  
22 correct, there is a system set up by which they would go  
23 through. Now, I can only note at this time suspicion as to

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1 whether they were the items that actually went through.

2 MJ [COL POHL]: Is there any log kept?

3 TC [MR. RYAN]: There is, sir. I have not seen it because  
4 it possibly would refer to things that I shouldn't be seeing.

5 MJ [COL POHL]: No, but I'm saying if it's  
6 nonlegal mail ----

7 TC [MR. RYAN]: It goes through a more rigorous  
8 examination, no question.

9 MJ [COL POHL]: I mean, there's no ----

10 TC [MR. RYAN]: I don't disagree with you, sir. And to  
11 the extent something went through that I'm now complaining  
12 about, I have to recognize that it's very possible that the  
13 Privilege Review Team -- possible but by no means certain that  
14 they did ----

15 MJ [COL POHL]: Doesn't it go through the JDG, too, the  
16 nonlegal mail?

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

18 MJ [COL POHL]: And so the date -- so something that's  
19 marked "Nonlegal Mail," it will go through the JDG. And  
20 they're seeing discs on there. And if they saw it ----

21 TC [MR. RYAN]: If they saw it, sir.

22 MJ [COL POHL]: ---- they let it through.

23 TC [MR. RYAN]: If they saw it, and -- from all accounts,

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1 it would have to be that they let it through.

2 MJ [COL POHL]: And now you're complaining that they let  
3 it through?

4 TC [MR. RYAN]: I'm not complaining, sir. What I'm doing  
5 is recognizing to you -- and again, I'll say it. The  
6 government has to take responsibility if the system didn't  
7 work properly; however, for whatever happened at the time  
8 these things came through, we did not have nearly as full a  
9 record in 530 as we do now.

10 MJ [COL POHL]: I understand that, and I'm not addressing  
11 the things that were marked "Case-Related Material." I'm  
12 addressing only the things ----

13 TC [MR. RYAN]: Understood, sir.

14 MJ [COL POHL]: ---- that were marked "Nonlegal Mail."  
15 The basis of -- one of the primary bases of your motion, both  
16 this one and the base 530, is a force protection issue.

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

18 MJ [COL POHL]: Okay. And the force we're trying to  
19 protect is the JDG.

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

21 MJ [COL POHL]: And then what just causes me pause when I  
22 read the pleading was that the nonlegal mail goes through  
23 them, and -- but if the nonlegal mail went through them, and

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1 let's say -- I'm not disputing the representation of the  
2 JDG commander of what it contained.

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

4 MJ [COL POHL]: How would that be misconduct by the  
5 detainee that would warrant some type of sanction with his  
6 computer?

7 TC [MR. RYAN]: "Sanction," I think, Your Honor, is not  
8 the appropriate ----

9 MJ [COL POHL]: No, but -- perhaps that's not the right  
10 word. And I know when I use a word that counsel don't like --  
11 Mr. Connell does this all the time -- he rephrases it for me.  
12 I got it.

13 What I'm saying is -- what we're really talking about  
14 here, the fundamental thing is is they were given the  
15 privilege of these computers.

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

17 MJ [COL POHL]: And the government argument in 530 was  
18 they abused said privilege. And that's ----

19 TC [MR. RYAN]: Yes.

20 MJ [COL POHL]: ---- why the three of them, where there  
21 was some evidence of that, we're going through the procedure  
22 we talked about, okay. Would it be an abuse of a privilege if  
23 the material they had that is the basis for said abuse was

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1 actually something that JDG let in?

2 TC [MR. RYAN]: It would be -- yes, Your Honor, it would  
3 be the basis for a claim of abuse on the part of the  
4 prosecution for this reason, notwithstanding if there were any  
5 failures on the part of the JDG -- and I'll put that aside for  
6 the moment. But notwithstanding that, in light of the full  
7 record we have now, in all of 530, there is no question that  
8 now we can all put together the pieces and understand the  
9 risk.

10 Your Honor, whether -- respectfully, sir, whether JDG  
11 let something in they shouldn't have let in after the fact, we  
12 still have to deal with the possibility that a significant  
13 risk exists. And, in fact, in 530LL, Your Honor has already  
14 found that risk, not just to force protection but to  
15 national security as a whole.

16 Now, Judge, I've -- and to describe it may be a  
17 little bit clearer -- and for the most part, sir, I'll rely on  
18 the affidavit -- the declaration, rather, of  
19 Special Agent Parsons, the classified version which appears in  
20 530VV at Attachment E, which goes into intense detail to  
21 describe the things you need to be concerned about.

22 But to put it real briefly, Judge, if you remember  
23 the last time we argued this, we ended up using the analogy of

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1 the laptops as houses. And the laptops that they were issued  
2 by the United States Government, the houses -- the circuitry,  
3 the lighting, the plumbing, et cetera -- were well known and  
4 well defined and controlled in its intent by the United States  
5 Government.

6           What these -- what we said at the time was what they  
7 were trying to do was construct a whole another house.  
8 While -- these Linux discs, however they got in, represent  
9 those other houses. And that's where we all have to be  
10 concerned, Your Honor. Although I'd rather not have to go to  
11 you about it at all, we are where we are, and that's why I'm  
12 standing here right now, sir.

13           As to the document taken from Mr. al Hawsawi, for a  
14 fuller description of its contents and its significance, sir,  
15 I'd refer you to paragraph 8.2. of Attachment D of the  
16 classified declaration of the JDG commander. As to the items  
17 taken from Mr. Binalshibh's cell, as I just said,  
18 Attachment E, paragraph 15.b.(1) through b.(4) of  
19 Special Agent Parsons is, I think, a very deep discussion of  
20 it all.

21           We believe, Your Honor, that the seizure of these  
22 items answers the military commission's valid concerns  
23 identified in LL as to a lack of evidence of the involvement

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1 of -- about Binalshibh and al Hawsawi in the scheme that had  
2 been going on back in October.

3 Based upon these findings, we asked for the -- what  
4 we believed to be a minor reconsideration of Your Honor's  
5 order and that Mr. Binalshibh and Mr. al Hawsawi be put in the  
6 same categories as the accused Shaikh Mohammad, Ali, and  
7 Bin'Attash, in stating whether they do or do not consent to a  
8 forensic analysis of the laptop computers as has been spelled  
9 out in previous pleadings.

10 For purposes of this initial argument, Judge, that's  
11 all I have right now.

12 MJ [COL POHL]: Thank you.

13 TC [MR. RYAN]: Subject to your questions, of course.

14 MJ [COL POHL]: I have no -- nothing further.

15 Defense? Mr. Harrington.

16 LDC [MR. HARRINGTON]: Judge, I'm ready to proceed, Judge,  
17 on my argument, but I will need a few minutes to go through  
18 the demonstration that we talked about yesterday.

19 MJ [COL POHL]: Okay.

20 LDC [MR. HARRINGTON]: Judge, based upon the original  
21 pleadings and on the current motion pending before you, I  
22 don't know what it is that they're alleging that  
23 Mr. Binalshibh did wrong. I think that's the reason that you

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1 made the order that you did about the return of his laptop to  
2 him.

3 And, Judge, when this search happened in February of  
4 this year, we would say that there were many irregularities or  
5 violations of your order and of the SOPs with respect to how  
6 it was conducted with respect to whom it was that conducted  
7 the actual search of Mr. Binalshibh's ability observe the  
8 searching of his legal bin. He, during this search, commented  
9 several times to the SJAs about the improprieties of what was  
10 happening.

11 And after the search and after items were seized,  
12 they didn't follow your order and they didn't give us notice  
13 of everything that was seized. We still don't have it. They  
14 still haven't given us a list of everything that was seized.  
15 I don't know if it's the eight items that are the subject of  
16 this or if it's more.

17 I would note, Judge, that in Mr. Ryan's motion  
18 papers, he did not choose to attach to his pleading either an  
19 unclassified -- or if he thought it was classified ----

20 MJ [COL POHL]: He did give you -- he did provide a list  
21 of the seized items of concern.

22 LDC [MR. HARRINGTON]: Yeah, I know, and a written  
23 description of them ----

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1 MJ [COL POHL]: Uh-huh.

2 LDC [MR. HARRINGTON]: ---- without showing you ----

3 MJ [COL POHL]: But you've had an opportunity to review  
4 those.

5 LDC [MR. HARRINGTON]: Without looking at it. We didn't  
6 get an opportunity to look at it until the 802 conference this  
7 past Saturday. That's the first time that we got it after  
8 complaining about it a number of times. And, Judge, the -- as  
9 I said, nothing has been returned to us, if, in fact, there  
10 was more taken.

11 Judge, in the eight items that were taken, there's  
12 several things that you have to -- have to consider here. One  
13 is that one of the nonlegal things that was taken has no  
14 markings on it: "NONLEGAL MAIL" or "OCR." Nothing.

15 The reason for that is it's the manual for the  
16 e-reader that our clients were given that was given to them by  
17 the camp. And that's one of the items that Mr. Ryan has given  
18 you as an exhibit of why you should have concern, when it's  
19 something that was actually given to them by the government.

20 MJ [COL POHL]: I'm sorry. I'm looking at his list, for  
21 Mr. Binalshibh, and I don't see that item as ----

22 LDC [MR. HARRINGTON]: It's an e-reader manual, Judge.

23 MJ [COL POHL]: Yeah. But I'm looking at page 12 of the

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 government motion where they -- it's in the declaration,  
2 actually, where the commander says, "The search produced the  
3 following items that were seized that I determined are  
4 contraband." And going down to your client starting with b.  
5 Just to focus you, it's paragraph 8; there's a list from b. to  
6 g. Again, I may just not have the proper nomenclature, but I  
7 don't see the e-reader as being considered contraband. But  
8 again, it may be.

9 LDC [MR. HARRINGTON]: It's the Acer item, Judge.

10 MJ [COL POHL]: Okay. Well, that's what I was going to  
11 ask you. So that's the e-reader manual they were given?

12 LDC [MR. HARRINGTON]: Right.

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

14 LDC [MR. HARRINGTON]: Judge, in addition to that, in  
15 October of -- October 17 of 2017, a full search of  
16 Mr. Binalshibh's cell and the other detainees' cells was also  
17 conducted, including -- in a search similar to this one, not  
18 just a cursory search for the items.

19 And you -- Judge, the -- some of these items have  
20 been with Mr. Binalshibh since 2014. In fact, most of the  
21 items that he had -- or has, which I will show to you  
22 shortly -- were provided to him before even he had a computer  
23 or knew that he was going to get a computer.

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1           And, Judge, with respect to the OCR markings, I don't  
2 know if you want a representation or a discussion about them.  
3 Mr. Ryan didn't bring that up. I will not disclose in open  
4 court reasons why we would send something to somebody in an  
5 OCR way. If the court feels that it's necessary to decide  
6 this motion, I would be glad to provide an ex parte, under  
7 seal affidavit for the reasons behind it, if the court is, in  
8 fact, concerned about that.

9           MJ [COL POHL]: Well, the Other Case-Related Material is  
10 the stamp that's put on by whom?

11          LDC [MR. HARRINGTON]: Us. Defense, Judge.

12          MJ [COL POHL]: Is there an initial next to the stamp?

13          LDC [MR. HARRINGTON]: I'm sorry?

14          MJ [COL POHL]: Is there an initial next to the -- to the  
15 person that actually did it, or is it just ----

16          LDC [MR. HARRINGTON]: Well, when the -- yes, because an  
17 attorney ----

18          MJ [COL POHL]: It's been a long time since I looked at  
19 that particular order, so I just don't remember.

20          LDC [MR. HARRINGTON]: An attorney -- an attorney has to  
21 sign for documents that go in.

22          MJ [COL POHL]: Okay. Is -- is, by any chance, that  
23 dated? Is there any record of when that particular item went

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1 in?

2 LDC [MR. HARRINGTON]: There is a date on it, Judge. Yes.

3 MJ [COL POHL]: Okay. So if these items had been there  
4 from 2014, there should be a date that says "2014" on it?

5 LDC [MR. HARRINGTON]: Correct, Judge.

6 MJ [COL POHL]: Okay. How many of these items were there  
7 in 2014?

8 LDC [MR. HARRINGTON]: Of the eight, Judge?

9 MJ [COL POHL]: Yes. Well, we have talked about the Acer  
10 one so we don't need to talk about that. For the other  
11 seven -- no. Rephrase that.

12 The only ones that were marked -- so it would be from  
13 b. to f. that were -- I'm sorry, b. to e. that are Other  
14 Case-Related Material? Because the way I'm reading this,  
15 those are the five that were marked, and we've already  
16 talked about the Acer reference guide.

17 So the other four, do you have any idea -- I mean, if  
18 you're -- you say they have been there since 2014, so it's  
19 just ----

20 LDC [MR. HARRINGTON]: Judge, of the eight -- and I'm  
21 excluding the Acer one now.

22 MJ [COL POHL]: Okay.

23 LDC [MR. HARRINGTON]: ---- they were all 2014 or 2015, it

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1 looks like.

2 MJ [COL POHL]: Okay. Including the ones that say -- you  
3 included the nonlegal mail one?

4 LDC [MR. HARRINGTON]: Yes.

5 MJ [COL POHL]: Okay.

6 LDC [MR. HARRINGTON]: And, Judge, you raised the question  
7 with Mr. Ryan that the nonlegal ones that went, we submitted  
8 them in open -- in the -- for example, he complains about the  
9 discs. And the discs came with the original package marking.  
10 We can't submit them without the package marking on them if  
11 it's something like that, if it's, you know, a disc of some  
12 sort that's printed by a company or something like that.

13 And on the packaging, it has a description of what's  
14 on the disc and how it can be used and what it can be used  
15 for. And there was nothing hidden about it. We submitted it  
16 right upfront.

17 And the same thing, Judge, when we went through the  
18 OCR review process. The PRT does not physically go through  
19 documents, because they're not supposed to do that. They're  
20 supposed to rely on our representations. But there is nothing  
21 changed in any way about anything that we submitted.

22 And, Judge, I will show you in a minute the number of  
23 magazines and that that we sent to Mr. Binalshibh over a long

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1 period of time. And we did not know whether you were going to  
2 allow a computer to come in or not. There was no knowledge on  
3 our part of whether that was -- that was going to happen.  
4 There was nothing sinister on our part or sinister on the part  
5 of Mr. Binalshibh in asking for these things or in us sending  
6 them.

7           With respect to the computer that Mr. Binalshibh  
8 uses, he's different than the other four detainees because  
9 when he got his old one returned, it kept crashing, and then  
10 they just couldn't -- they couldn't fix it. So that's the  
11 reason that he agreed to take the newer computer. And, Judge,  
12 that computer came with all sorts of restrictions that the  
13 government set up and that the JDG set up, restrictions on  
14 what they said could and could not be on the computer. That,  
15 too, we've had some difficulties with it.

16           It has come out of the camp and has gone to the IT  
17 people to fix. It has to be gone through the same checklist  
18 that it went in the beginning. That checklist is not only  
19 reviewed by our IT people who fix the computer, but it also  
20 has to be reviewed by the convening authority. And as we have  
21 gone through that process again, I've sent you a declaration  
22 to tell you that, you know, as far as we know, there's nothing  
23 wrong with it, and there's nothing on it. There's no

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1 indication that anything has been done to it.

2           So regardless of even whether, in the government's  
3 mind, there's some sinister plot going on or that something  
4 has happened, it has not happened. And if the government says  
5 that these things are contraband after four years, after a  
6 complete search last year, then they keep the contraband. But  
7 there's no indication that it's been used. And it's patently  
8 unfair to Mr. Binalshibh in this record, in this context, for  
9 him not to have his computer and his e-reader and everything  
10 else returned to him.

11           We don't have any indication -- the affidavit from  
12 their expert is a prophecy of what he believes is going to  
13 happen, like a self-fulfilling prophecy; and that's not enough  
14 to persuade the court that this should be done. Judge -- and  
15 based upon the -- all of the record that you have now, this  
16 computer needs to go back to him.

17           Judge, I'd like a minute just to make a  
18 demonstration, perhaps to take a picture. And the reason I  
19 want to do it, Judge, is I want you to understand that what  
20 they took is like a tiny percentage of what it is that we gave  
21 to Mr. Binalshibh. And you could say to yourself, "Well,  
22 that's kind of crazy. Why are you giving him all of that  
23 stuff?" Right? That's a natural question for somebody to

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1 ask.

2           And again, I can represent to the court in an  
3 affidavit of why it was done and why it was related to our  
4 case. And some of it was nonlegal; other things we determined  
5 should be OCR, and we sent them in that way. But when you see  
6 what he had in his cell, it has been there for years and  
7 years. You will see that there's -- it's all right there.  
8 It's all right there in front of you. And so now all of a  
9 sudden, this happens, and especially when they want to use the  
10 manual that they gave him as something that's improper.

11           So could I have a minute, Judge?

12       MJ [COL POHL]: Sure.

13 [Pause.]

14       MJ [COL POHL]: I will note for the record it's a plastic  
15 box that's about half full. It's maybe 2 by 3 -- and don't  
16 take my word for my ability to do measurements from here --  
17 and maybe two feet deep. At the break, the court reporters  
18 will take a picture of it, and it will be added to the record  
19 as 530DDD.

20           Go ahead, Mr. Harrington.

21       LDC [MR. HARRINGTON]: And, Judge, just for the record  
22 also, this is one of the bins that Mr. Binalshibh would have  
23 in his cell to keep his either nonlegal or legal mail.

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1 MJ [COL POHL]: Now what is this category here? Is this  
2 nonlegal or legal?

3 LDC [MR. HARRINGTON]: This is nonlegal, Judge.

4 MJ [COL POHL]: Okay.

5 LDC [MR. HARRINGTON]: And, Judge, just for the record,  
6 there are, I believe, 57 magazines or combination  
7 book/magazines in this bin, all of them related to computers  
8 of all different kinds.

9 And, Judge, lastly, I would just point out to you  
10 that the government, for example, argues there's one of the  
11 exhibits that says -- I think "PYTHON, How to Think Like a  
12 Computer Scientist." That's an article that's in one of these  
13 magazines. I mean, the magazine comes with many -- like any  
14 magazine you would get, comes with many, many articles, not  
15 just ----

16 MJ [COL POHL]: But if it's still in the box, then ----

17 LDC [MR. HARRINGTON]: Right.

18 MJ [COL POHL]: ---- they didn't seize it?

19 LDC [MR. HARRINGTON]: No, no. It's one of the exhibits  
20 that they have, Judge. That's what I'm saying.

21 MJ [COL POHL]: Okay. Okay. I thought ----

22 LDC [MR. HARRINGTON]: Of their eight. One of them  
23 is ----

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1 MJ [COL POHL]: Okay. I gotcha.

2 LDC [MR. HARRINGTON]: ---- is an article taken out of a  
3 big magazine.

4 MJ [COL POHL]: Okay.

5 LDC [MR. HARRINGTON]: Which makes you wonder what they  
6 were doing in the cell and what it is they were looking for.  
7 Why didn't they take all of these and go through all of them?  
8 I don't know. Did they have something -- some agenda or  
9 something that they were particularly looking for? They  
10 haven't represented it to you and they haven't represented it  
11 to us.

12 That's all I have, Judge.

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

14 LDC [MR. HARRINGTON]: Can I leave this here, Judge?

15 MJ [COL POHL]: Yeah. Just if you could -- I'll tell you  
16 what. If you could kind of just move it out of the way in  
17 front of the witness chair, at the break, we'll take the  
18 picture and then return it to you. That's a young man's job.

19 LDC [MR. HARRINGTON]: Younger men are going to do it.

20 MJ [COL POHL]: That's what I was going to suggest.

21 Mr. Ruiz.

22 LDC [MR. RUIZ]: Judge, with respect to Mr. al Hawsawi's  
23 computer, back in October I filed AE 530E, a motion to abate,

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1 because of the seizure of Mr. al Hawsawi's computer. You may  
2 recall that.

3 At the time, we had a second week of hearings on the  
4 back end. And I -- as you may recall, I argued that we should  
5 stay it because I wanted to argue that particular issue, was  
6 so important to Mr. al Hawsawi's ability to read through his  
7 discovery and interact with us in a way that helped us be  
8 effective.

9 Here we are in April -- May now, actually, 2018. He  
10 still does not have his computer, still does not have the  
11 benefit and the access to that computer. As you've indicated,  
12 it was a privilege to have that computer, but it was also a  
13 method of efficiency that I think the court recognizes and the  
14 parties recognize would help to digest the voluminous amount  
15 of information in this case.

16 And given the times and given the matters, the  
17 technological advances of our age, it makes sense that we have  
18 evolved in our legal practice to the point where people in  
19 detention facing the death penalty in a case such as this can  
20 have access to an instrument that would make it more efficient  
21 to review those documents, to get those documents to them, and  
22 to continue to carry on the business of the legal work that we  
23 have to carry on here.

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1           In this particular instance, Judge, our position is  
2 clear. You should deny the government's request for  
3 reconsideration on Mr. al Hawsawi's computer. Mr. Ryan talks  
4 of houses, and computers being as houses. Well, I will tell  
5 you that this house that they're attempting to build is flimsy  
6 at best and certainly not one that you should give any  
7 credence to in these regards.

8           Judge, in our reply to the motion for  
9 reconsideration, we attached Exhibit B, which is ex parte and  
10 under seal. That exhibit alone, I would submit to you, should  
11 dispel any concerns that you have about Mr. al Hawsawi's  
12 computer. It is the product of a privileged --  
13 attorney-client privileged and confidential examination of  
14 Mr. al Hawsawi's computer, much as Mr. Harrington referenced.  
15 That has been made available to the commission. It does  
16 contain attorney-client work product, our thoughts, our  
17 impressions to the commission in response to your initial  
18 order. We think that should be dispositive.

19           The really troubling thing here, Judge, in  
20 addition -- it's not the fact that the government moves for  
21 reconsideration. They do that and we do that a number of  
22 times in the course of our litigation, Judge. The -- the  
23 really troubling thing underneath this particular circumstance

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1 is that it was a concerted effort; it was a concerted effort  
2 to target two detainees and to target their information, their  
3 legal materials, for additional scrutiny and additional  
4 search. That was done, Judge, once the government hadn't  
5 gotten the result that they wanted. It was very clear they  
6 wanted all five of these men's computers to be searched.

7           Once your ruling came down, it was obvious that only  
8 three were going to be taken to a different route in this  
9 process, and Mr. al Hawsawi and Mr. Binalshibh were not part  
10 of that.

11           There were at times during the litigation of this  
12 motion, you may recall, you may not, that Mr. Ryan a number of  
13 times made comments along the lines of, "Judge, if you are  
14 going to go down this path, then we would reserve the right to  
15 bring additional information and additional evidence to you."  
16 So clearly even at that point, the government contemplated  
17 some additional evidence that they would bring before this  
18 commission to assuage you of a different result.

19           So what happens? There's a search. The search  
20 targets specific documents. Those specific documents,  
21 materials, DVDs in Mr. Binalshibh's case are now before this  
22 commission.

23           The materials that are actually not before you,

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1 Judge, because the prosecution has not provided you with the  
2 actual piece of evidence upon which they choose and try to  
3 attempt to build this house of theirs has not been provided to  
4 the commission. That particular document, as Mr. Ryan has  
5 indicated, was 47 pages. It was marked as OCR, which is Other  
6 Case-Related Material.

7 As you recall, after much time, much energy, much  
8 discussions amongst all of the parties about how we -- how we  
9 provide information to the people we represent, you came up  
10 with a category of "Legal Mail." And there's essentially two  
11 categories in your order; you have Legal Mail and you have  
12 Nonlegal Mail. But in the Legal Mail category, you've got two  
13 categories, one of those being OCR.

14 And in your order, you also provide language and  
15 contemplate the fact that OCR can and, at times, will be  
16 attorney-client privileged information. Once that information  
17 is assimilated into the attorney-client privileged -- in the  
18 attorney-client process, as much of this information is --  
19 once we begin discussing that information, once we begin  
20 talking about the significance of that information to the  
21 case, it then becomes attorney-client privileged  
22 communications. That's in your order, Judge, and that is in  
23 2.g.(2) of your communications order. So it's

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1 paragraph 2.g.(2), which talks about the assimilation of that  
2 material and the protection of attorney-client privileged  
3 communications.

4           So from my standpoint -- and why you see me get  
5 pretty hot about this -- is because we've been here before.  
6 And while I'm not going to give you a lengthy historical  
7 recitation of what you already know, I will give you the  
8 guideposts. We started this type of litigation in October of  
9 2011, baseline review.

10           In February of 2013, we expended an inordinate amount  
11 of time, once again, litigating searches that took place and  
12 the manner in which they took place when Mr. al Hawsawi was  
13 out of his cell and, most importantly, the manner in which  
14 they targeted and handled attorney-client privileged  
15 information, legal mail, and information that we believe is  
16 and ought to remain confidential and private.

17           Again, in February and March of 2015, we filed a  
18 motion for a rule to show cause, once again, based on  
19 violations of attorney-client privileged material, handling of  
20 materials that we have provided to our clients. So this is --  
21 this is the context of, yet again, this search.

22           As Mr. Harrington alluded, Judge, we were never  
23 notified of what materials were seized, in contravention to

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1 your order. Those materials have never been returned to us,  
2 in contravention of your order. They were made available to  
3 us for approximately 20 minutes prior to the 802 for us to  
4 review. As Mr. Ryan has indicated, one of those documents has  
5 extensive writing in Arabic. And, of course, I do not speak  
6 Arabic. I submit that to the commission.

7 And yesterday, the Staff Judge Advocate did come to a  
8 meeting with Mr. al Hawsawi and allowed us the opportunity to  
9 review the one document that has been referenced.

10 MJ [COL POHL]: On your one -- Mr. Ruiz, on your one  
11 document, is there a date on it of when it was ----

12 LDC [MR. RUIZ]: There is not a date on it, Judge. I  
13 don't think your communication order requires it to be dated.

14 MJ [COL POHL]: No. I didn't ask you -- I'm not saying it  
15 did. I'm just saying, but Mr. Harrington indicated that all  
16 of his material are dated 2014-2015. But there's no way to  
17 establish when this particular document was in his cell?

18 LDC [MR. RUIZ]: Let me just review the front and back  
19 pages that have here. I've looked for it, but I don't believe  
20 that it has a date on it, Judge.

21 MJ [COL POHL]: Okay.

22 LDC [MR. RUIZ]: So I can't tell you with certainty  
23 when -- when the document went in.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. RUIZ]: What I can tell you -- and this puts me  
3 in a difficult position because I do feel like this is  
4 attorney-client privileged communications and it involves my  
5 mental processes and thoughts about this particular issue.  
6 But what I can tell you is that we were able to obtain a very  
7 rudimentary translation of the document utilizing Google,  
8 utilizing some of the material that we understood it.

9 It is, as Mr. Ryan has talked about, a Windows XP.  
10 And again, I do this out of necessity rather than thinking  
11 that this is the appropriate way of doing this, because what  
12 has happened is that the government has seized a piece of  
13 legal mail protected by your order and is seeking to exploit  
14 it for purposes of advancing this issue without providing that  
15 evidence to us and returning it to us, in direct contravention  
16 of your order.

17 So I'm in a position where obviously I need to answer  
18 some questions that you have or may have. You don't have the  
19 entire document so you wouldn't have the benefit of reviewing  
20 that document or having it translated for your benefit. And  
21 then, of course, you would have to rely on the government's  
22 biased expert's interpretation of the nefarious motives of  
23 what document means. Which then leads me to where I stand

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1 here now, forced to articulate to you on a piece of evidence  
2 that I have barely seen and had an opportunity to really  
3 review, why it is not this nefarious plot to bring down the  
4 U.S. Government and surreptitiously evade all of their  
5 countermeasures for security at the most sensitive and highly  
6 secured prison in the world, and won't necessarily put our  
7 national security at grave danger.

8           Judge, the -- you weren't privy to all of these  
9 discussions about computers, but essentially there were two  
10 sets of computers: An old computer and a new computer. The  
11 negotiations between the government and ourselves involved a  
12 number of back-and-forth communications where we talked about  
13 the capabilities of these computers. We talked about the  
14 operating systems. We talked about a number of programs that  
15 could be utilized and the purposes for those programs being  
16 utilized.

17           There were communications primarily with Mr. Trivett,  
18 who handled it on behalf of the government. And, of course,  
19 there were discussions between ourselves and Mr. al Hawsawi  
20 regarding the pluses, the benefits, the negatives of having  
21 one operating system versus the different system, and the  
22 utility of a newer computer versus an older computer.

23           And I know I'm getting into the weeds here, Judge,

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1 but I need to give you the context to give you a little bit of  
2 context to where we come around on this.

3 MJ [COL POHL]: Just -- I recall the base 530 motion ----

4 LDC [MR. RUIZ]: Sure.

5 MJ [COL POHL]: ---- where all of this -- kind of all of  
6 this came up at the time. So I understand your need for  
7 context, but ----

8 LDC [MR. RUIZ]: There we go.

9 MJ [COL POHL]: ---- we don't need to repeat context I've  
10 already got. Go ahead.

11 LDC [MR. RUIZ]: So in terms of the -- some of the  
12 information from this computer, so -- for example, some of the  
13 information in this document that is the nefarious document  
14 that we referred to, here's some of the information.

15 "Use shortcut keys as an alternative to a mouse when  
16 working in Windows. You can open, close, and navigate within  
17 the Start menu, Desktop, and dialogue boxes. Press Control+C  
18 for copies, Control+X to shear, Control+V to paste, Control+Z  
19 to undo." And then it goes on to -- at least one of the  
20 pages, it continues to recite different Control functions that  
21 can be used to operate the system that Mr. al Hawsawi was  
22 utilizing at the time, which was the Windows XP system, as  
23 well as a number of other issues.

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1 I would also say to you and represent this to the  
2 commission, that when these computers were provided,  
3 Mr. al Hawsawi never received a user's manual. It's a fairly  
4 old computer in that sense.

5 So we're left with, essentially, Judge, saying to  
6 you, do not grant this motion to reconsider. Number one,  
7 there is nothing to see. Number two, we've provided you with  
8 definitive evidence that there is nothing to see. Number  
9 three, you should not allow the government to profit from  
10 their exploitation and violation of your communications order.

11 To allow that to happen undermines our confidence in  
12 the ability of your order to protect our confidential  
13 communications, and that a of much, much, much larger problem.  
14 Because as we have talked -- not just myself but my  
15 colleagues -- a number of times, we have talked about how  
16 important it is for us to have faith in the ability to have  
17 privileged and confidential communications with our clients,  
18 particularly in a capital case.

19 As you said, we don't go looking for other people's  
20 problems, but other people's problems are ones that we are  
21 aware of. And certainly the ability to maintain the  
22 confidence in the attorney-client privileged communications  
23 have derailed at least one case in this process.

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1           And what I'm telling you, Judge, is that this kind of  
2 circumstance, where we see repeated after repeated after  
3 repeated times where the government targets information, goes  
4 in and seizes specific documents that are properly labeled  
5 pursuant to your order, an order that gives specific and clear  
6 guidance as to what should be done with these materials --  
7 and, Judge, let me say as well, because I know you asked this  
8 question a number of times about where the materials were  
9 found.

10           Your order is explicit in terms of what to do with  
11 materials that are not found within the legal bin. And the  
12 explicit instructions within your order are to seal, to  
13 document, to contact the Staff Judge Advocate, and ultimately  
14 to provide notice to the defense. That's not dispositive  
15 based on where the documents are found. The markings are  
16 dispositive. And you've created these categories after  
17 extensive litigation.

18           You should not allow the government to profit from  
19 their misconduct here. If there is any misconduct, it's not  
20 Mr. al Hawsawi. The misconduct here has been with the JDG,  
21 with the JTF, and with the prosecution seeking to maximize and  
22 to profit from this misconduct.

23           I would add, Judge, that there is another document

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1 that has been seized from Mr. al Hawsawi. It is a catalog of  
2 books that are available. It is OCR-labeled material. To  
3 this date, that has not even been used in this litigation.

4 I asked the Staff Judge Advocate why that hasn't been  
5 returned or provided to us and it was not provided for review  
6 by Mr. al Hawsawi. He said because it wasn't referenced in  
7 the government's papers. Yet this is a piece of legal mail  
8 that belongs to our team, properly labeled, stamped by defense  
9 counsel for Mr. al Hawsawi that the government continues to  
10 hold now, in contravention of your order, and refuses to  
11 return to us.

12 Judge, and I'm asking you -- I'm asking you to do and  
13 make them do what your order says to do in these instances.  
14 Because that undermines our confidence in our privileged  
15 communications. Certainly, they should not be allowed to  
16 profit from that in this instance. So I would ask you to deny  
17 this motion to reconsider.

18 If you are inclined, however, Judge, to grant the  
19 relief that the prosecution is requesting, which is that  
20 Mr. al Hawsawi be compelled to go through a seizure --  
21 investigation of his laptop, analysis of his laptop, I would  
22 then move back to the original relief that I requested back in  
23 October of last year, which is the motion to abate these

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1 proceedings until that process runs its course, because it is  
2 tremendously disruptive to Mr. Hawsawi's ability to  
3 participate in these proceedings.

4           It is tremendously disruptive to his confidence to  
5 engage with us and with counsel in a manner where he believes  
6 that this process means anything and that your orders mean  
7 anything; and that we should continue to discuss matters that  
8 relate to this case, the legal matters; and that we should  
9 feel confident that there is a protection of those discussions  
10 and of the information that we sent to him, not that whenever  
11 the government doesn't get what they want in a motion, there  
12 can be a search targeting their materials that they hold onto,  
13 use, and exploit, then to turn into a matter for litigation.  
14 So I would ask you to abate.

15           And finally, Judge, in terms of the request -- or the  
16 prosecution's relief which also seeks to have it examined by  
17 their independent third party, it is clear that this person  
18 who is going to be conducting the examinations of at least  
19 three of the co-accused here and who would presumably also be  
20 the ones who the government is asking you to have -- review  
21 our documents is inherently biased.

22           The person has already made numerous decisions, has  
23 obviously come to a conclusion that is now being submitted to

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1 you for support in this motion about what each of these men  
2 were up to and the nefarious scheme that they were  
3 undertaking. That is certainly as far from independent as you  
4 can get. That's somebody who's already arrived at a  
5 conclusion and is going to go and do an examination that will  
6 simply confirm what it is they believe is ongoing.

7           So along those lines, if you were inclined to require  
8 an examination of Mr. al Hawsawi's laptop, I would ask, Judge,  
9 that you do it by and through an independent third party and  
10 not this biased expert that now the prosecution has utilized  
11 to try and advance this position.

12           Thank you.

13           MJ [COL POHL]: Thank you, Mr. Ruiz.

14           Hold on a second, Mr. Ryan. Mr. Ryan?

15           TC [MR. RYAN]: Yes, sir.

16           MJ [COL POHL]: I want to hear from Mr. Nevin on a side  
17 issue ----

18           TC [MR. RYAN]: Yes, sir.

19           MJ [COL POHL]: ---- because I want you to respond to it  
20 also.

21           Mr. Nevin, on 26 April -- and I think we can address  
22 this relatively quickly, but given how we're doing things --  
23 you filed a notice, a status update on the examination of

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1 Mr. Mohammad's computer. And you indicated that on 19 March,  
2 you consented to the forensic search of his laptop, and as of  
3 20 April nothing -- apparently the search had not been  
4 completed.

5 And you seem to indicate that the government says  
6 that they're not going to do that until they can do -- because  
7 350VV [sic] is still pending?

8 LDC [MR. NEVIN]: Yes, Your Honor.

9 MJ [COL POHL]: So as we speak here today, they're not  
10 conducting the forensic search -- it's your understanding the  
11 government's position -- this is why I want to give Mr. Ryan a  
12 chance to respond. It's not the main issue we're talking  
13 about, but I just wanted to get this issue.

14 Is that -- is that a fair summary of what you believe  
15 the status of the forensic examination or lack thereof with  
16 Mr. Mohammad's computer?

17 LDC [MR. NEVIN]: Yes, sir. We litigated this with you,  
18 and we wanted you not to require -- we wanted the thing to  
19 happen another way, basically.

20 MJ [COL POHL]: I know.

21 LDC [MR. NEVIN]: And you said, "No, it will happen this  
22 way." And so we said, "Okay. Let's do it, then." And I  
23 wanted -- we wanted to bring to your attention that some

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1 period of time had -- in my mind's eye, it's a month. But a  
2 good deal of time went by and nothing happened. So we went to  
3 the government and said, "Are we doing this?" And they said,  
4 "No, not until the problem with the other defendants is worked  
5 out." And we wanted you to know that.

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

7 Let's do this in reverse order, Mr. Ryan, because the  
8 substantive issue is the other one.

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

10 MJ [COL POHL]: Is that the government's position, that  
11 you're not going to do the forensic analysis until 350VV is  
12 decided?

13 TC [MR. RYAN]: Yes, sir. The reason -- the primary  
14 reason being this, sir. Special Agent Parsons, who is the  
15 person with the expertise and the right -- is in the right  
16 position to conduct the examination is based in Texas. That's  
17 where his unit is. He will have to travel presumably down  
18 here to Guantanamo for the purpose of conducting the  
19 examination.

20 We felt that since we were removing -- we are in the  
21 process of moving this commission for reconsideration as to  
22 the other two, that this should all be done at the same time,  
23 at the same place, with the same people.

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1 MJ [COL POHL]: Mr. Ryan, I understand that, but I find  
2 that an unreasonable position, is that -- if he has to make  
3 two trips, he makes two trips, okay? I mean, I just -- I  
4 understand your position ----

5 TC [MR. RYAN]: Yeah.

6 MJ [COL POHL]: ---- but given the nature of this  
7 litigation and the fact that this 350VV may linger, it seems  
8 to me is that there's no need to delay the forensic  
9 investigation of the other three, with the understanding that,  
10 you know, if something comes up, that he wants to look at the  
11 other two also, that's fine, but have -- have him make two  
12 trips, okay?

13 TC [MR. RYAN]: We accept, Judge.

14 MJ [COL POHL]: And you will need to notify my office when  
15 he's coming so we can have somebody available in order to --  
16 you just need to coordinate his travel schedule with my office  
17 so I can have a CISO down here to give him the computers,  
18 okay?

19 TC [MR. RYAN]: Understood, Judge, and certainly will  
20 abide.

21 Just in terms of logistics, I will advise that I'm  
22 told that the examination of each computer actually will take  
23 several days.

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1 MJ [COL POHL]: Okay. Mr. Connell, you're standing.

2 LDC [MR. CONNELL]: Sir, while we're -- before we leave  
3 that point, I just wanted to remind the court that the  
4 military commission ordered that we could have someone present  
5 for that examination, so there will have to be coordination  
6 among multiple parties, so if they'll let us know what the  
7 travel ----

8 MJ [COL POHL]: Yeah, I mean what I'm only talking about  
9 is compliance with the order, not -- excuse me, timing of the  
10 order. The compliance issue is -- I'm assuming that they'll  
11 comply with the notification, not just my office, but anybody  
12 else that needs to be notified to do it. Okay.

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

14 MJ [COL POHL]: But what I'm simply saying, Mr. Ryan,  
15 saying we're going to delay it until 350VV -- or 530VV is done  
16 is not acceptable.

17 TC [MR. RYAN]: Understood, Judge.

18 MJ [COL POHL]: Ms. Bormann.

19 LDC [MS. BORMANN]: Judge, we're in the same position as  
20 Mr. Connell. We'd ask that the prosecution be ordered to  
21 comply with your order and notify us of when that will occur  
22 so we can make sure we have personnel here to observe the  
23 examination.

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1 MJ [COL POHL]: I think I just did that, but if you want  
2 me to, I'll do it again. Okay.

3 Back to the other -- and let's break these two up,  
4 Mr. Binalshibh's issues and Mr. Hawsawi's issues, because I  
5 think they're slightly different.

6 Mr. Harrington proffered that all of the materials  
7 seized from his client's cell on the -- that the JDG commander  
8 is calling contraband have been dated 2014 or 2015; is that  
9 correct?

10 TC [MR. RYAN]: I don't know that, sir.

11 MJ [COL POHL]: If that is true ----

12 LDC [MR. HARRINGTON]: Can I correct the record?

13 MJ [COL POHL]: Sure.

14 LDC [MR. HARRINGTON]: Judge, several of the documents  
15 have dates of 2014. The reason that we know that the -- it  
16 was 2014 or 2015 is because the lawyer who submitted them left  
17 in early 2016, and he had -- all of those had been sent before  
18 he left, so ----

19 MJ [COL POHL]: Okay.

20 LDC [MR. HARRINGTON]: That's the only reason that we know  
21 what the date is.

22 MJ [COL POHL]: Okay.

23 LDC [MR. HARRINGTON]: Some of them don't have dates on

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1 them. But I just wanted to correct that.

2 MJ [COL POHL]: Okay. So at a minimum, the proffer is  
3 prior to 2016?

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

5 MJ [COL POHL]: Okay. If that is true ----

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

7 MJ [COL POHL]: ---- how can they be -- why are  
8 they not -- why is this a motion for reconsideration since  
9 that fact existed prior to the original 530 litigation  
10 beginning?

11 TC [MR. RYAN]: What ----

12 MJ [COL POHL]: If they were contraband now, they were  
13 contraband then.

14 TC [MR. RYAN]: Certainly, sir. Well, the contraband, of  
15 course, being an item of definition, which by your order is in  
16 the hands of the JDG commander -- I'm sorry, the JTF commander  
17 and his designee, which includes the JDG commander.

18 And let me just read it quickly, "Any physical  
19 attempt or prohibited information the commander of JTF or his  
20 designee has deemed to be impermissible or inappropriate for  
21 an Accused Detainee to transmit, possess, et cetera. This  
22 includes material that, if introduced into the detention  
23 facility, reasonably could be expected to result in immediate

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1 and substantial harm to national security, imminent acts of  
2 violence, future events that threaten national security,"  
3 et cetera.

4 And, Your Honor, I believe, was relying on this  
5 definition in coming to 530LL and saying that there was a risk  
6 created to both force protection and potentially  
7 national security.

8 Now, the reason I went through it all, Judge, is  
9 the -- the contraband we're speaking of in this instance is  
10 not something that back in 2014 and 2015 necessarily  
11 inherently, on its face, and obviously would have been  
12 something that anybody looks at and says, "That can't come  
13 in."

14 MJ [COL POHL]: Well, how about in October of '17 when the  
15 first search was there?

16 TC [MR. RYAN]: I don't -- that's absolutely correct, sir.  
17 What I was going to say to you is this. The world changed in  
18 October of 2017 -- I'm the first one to say that -- when the  
19 guards found Mr. Mohammad in possession of that note that came  
20 from Mr. Ali, and Mr. Bin'Attash in possession of similar ----

21 MJ [COL POHL]: No, I understand what was disclosed in  
22 that search. But my -- my concern, Mr. Ryan, is, by  
23 definition, you have to give certain flexibility to the

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1 JDG commander of how to run his prison. I understand that,  
2 and I've said that many times.

3 TC [MR. RYAN]: Right.

4 MJ [COL POHL]: But on the other hand, we can't have an  
5 ever-changing definition of "contraband" depending -- because  
6 we have a new JDG commander or the old one. And so -- so in a  
7 motion for reconsideration are new facts not available at the  
8 time. And what I'm -- and again, I'm taking proffers now  
9 because no one's bothered to present evidence on it. But if  
10 the issue is that this was there before then and they chose  
11 not to seize it, and then you get this ruling, and then they  
12 do another search, and now they seize it, and now it's this  
13 threat.

14 TC [MR. RYAN]: Because -- yes, sir. Because the dangers  
15 had become apparent. There was ----

16 MJ [COL POHL]: They weren't apparent in October of '17?

17 TC [MR. RYAN]: For this reason, sir. There was a maybe  
18 even naive belief that the tech involved -- that the  
19 technology involved could be at least controlled. There was  
20 an understanding of what was capable, what was not capable.

21 The note which was seized, which you have seen, shows  
22 a whole level of sophistication. Combine that with  
23 Special Agent Parsons' declaration in which he talks about

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1 changes in the tech world, including across the whole island,  
2 about what's possible and what's not possible.

3 And my submission to you, sir, is items like  
4 magazines and books that maybe no one cared about in '14 and  
5 '15, after the JDG realized what these men were capable of,  
6 combined with changes in technology, changes in the island,  
7 suddenly made it contraband.

8 Your Honor's order vests in the JDG commander the  
9 ability to make that determination. You have his declaration,  
10 and you can see that he's making it based on facts. This  
11 wasn't an arbitrary decision.

12 MJ [COL POHL]: Of course, there's two parts here,  
13 Mr. Ryan.

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

15 MJ [COL POHL]: The part is the seized material -- and I'm  
16 just talking about Mr. Binalshibh's thing right now -- the  
17 seized material that had been there for a while ----

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

19 MJ [COL POHL]: ---- apparently -- and again, remember,  
20 I'm just going to operate on Mr. Harrington's good faith  
21 representations -- at least prior to 2016. If because of the  
22 change that was precipitated by the 18 October 2017 search  
23 that these formerly noncontraband items are now contraband

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 items, okay, one resolution is to take them away from him  
2 because now you've got this issue. But ----

3 TC [MR. RYAN]: Yes.

4 MJ [COL POHL]: That's one option. But you want me to --  
5 then to take the newly -- I'm using based on what I got --  
6 arguably newly labeled contraband to take the next step to say  
7 that, therefore, he can't keep his computer.

8 TC [MR. RYAN]: Yes, sir. Absolutely. Because ----

9 MJ [COL POHL]: At least until it's examined.

10 TC [MR. RYAN]: Because the facts combined -- and the most  
11 important factor of the new facts that have been presented to  
12 you were those Linux discs, which is explained in some detail.

13 And to the extent these were things that were  
14 possessed for some period of time before that, there was the  
15 possibility nobody knew about it -- I say a significant  
16 possibility -- or number two, that the significance was just  
17 not understood. As much as JDG does a great job, they're not  
18 vested with being tech experts, so there had to be some period  
19 of time under which concerns grew.

20 Now, the Linux discs were something of a specific  
21 interest. And I think there was some facts not privy -- of  
22 which I'm not privy that led people to understand and believe  
23 that there might be the presence of these kinds of items.

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1           So in short, sir, the note that was seized back in  
2 October, and what it describes, combined with those Linux  
3 discs, equals exactly what Your Honor found in LL.

4           MJ [COL POHL]: Okay. Let me ask you about Mr. Hawsawi's  
5 article.

6           TC [MR. RYAN]: Yes, sir.

7           MJ [COL POHL]: Has that been translated to English?

8           TC [MR. RYAN]: There is -- it has not been fully  
9 translated into English. It was translated for purposes of  
10 the investigation by JDG.

11          MJ [COL POHL]: And I'm only looking at the ----

12          TC [MR. RYAN]: Any relevant facts.

13          MJ [COL POHL]: ---- unclassified declaration because  
14 we're going to -- part of this argument is going to be in a  
15 classified session. So if you can't answer this question, let  
16 me know.

17               Is there a specific finding by your IT guy that ----

18          TC [MR. RYAN]: Special Agent Parsons.

19          MJ [COL POHL]: ---- Parsons -- that that particular  
20 article has a particular type of threat?

21          TC [MR. RYAN]: No, sir, there was not. He does not even  
22 mention it in his declaration for the reason that -- if you  
23 note, throughout his declaration he goes into great detail

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1 about how things work together and so on; that item being just  
2 a very basic description of how -- it's -- essentially it's a  
3 question-and-answer blog on how to use Windows and how to use  
4 a computer.

5 MJ [COL POHL]: Why is that ----

6 TC [MR. RYAN]: Because, Judge, you found ----

7 MJ [COL POHL]: No. Let me ask you -- let me ask my  
8 question first.

9 TC [MR. RYAN]: Yes, sir. I'm sorry.

10 MJ [COL POHL]: Standing alone -- standing alone, you say  
11 it's a question and answer of how to use Windows in a  
12 computer ----

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

14 MJ [COL POHL]: ---- which is what they had. Standing  
15 alone, is that some type of a threat? Isn't that just what  
16 the computer was that I gave him?

17 TC [MR. RYAN]: "Standing alone" is the key words, Judge.  
18 We ----

19 MJ [COL POHL]: I know; that's why I said them ----

20 TC [MR. RYAN]: Okay.

21 MJ [COL POHL]: ---- "standing alone."

22 But your option is because Mr. Hawsawi had these  
23 directions of how to use the computer, and you had this other

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1 allegedly nefarious activity by the other three -- and I'm  
2 reserving judgment on Mr. Binalshibh -- that putting those  
3 together somehow then makes this new contraband and threatens  
4 the force protection and any other interests the government  
5 has -- for Mr. Hawsawi.

6 TC [MR. RYAN]: I understand, Judge. I ----

7 MJ [COL POHL]: That's your position?

8 TC [MR. RYAN]: My position is that standing alone, if  
9 there was nothing else known that had happened previously,  
10 et cetera, that might not cause much concern. My guess is  
11 that back before October 2017, they -- in light of the items  
12 that were possessed, maybe that's not of concern at all.

13 But Your Honor's finding in LL was: We're doing  
14 this. We're doing the forensic analysis as to three. The  
15 other two, you specifically stated there was just a lack of  
16 information, a lack of evidence to indicate that they were a  
17 part of this.

18 My argument to you at the time, as strongly as I  
19 could, was not to treat them one by one, to treat them as  
20 coconspirators and to understand that once this knowledge  
21 existed in the camp at all, it exists as to all, because they  
22 simply need to speak to each other about it.

23 So my argument to you, sir, is it's not the correct

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1 analysis to look at this one piece of -- a 46-page paper and  
2 say, "What do I care about this?" It is what that looks --  
3 that should say to Your Honor that there's enough there  
4 now ----

5 MJ [COL POHL]: You're saying ----

6 TC [MR. RYAN]: ---- that the analysis should apply to all  
7 five. Yes, sir.

8 MJ [COL POHL]: And I understand you did not like my  
9 analysis of separating the five of them. I understand that.  
10 Okay.

11 And so -- but isn't your current argument concerning  
12 Mr. Hawsawi essentially the same, though; is that we've got  
13 this as you -- I'm characterizing it a relatively innocuous  
14 blog article that talks about computers, and, therefore,  
15 that's enough to tip it over, combined with the knowledge of  
16 the other three, to put him in the same boat as the other  
17 three?

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

19 MJ [COL POHL]: Okay.

20 TC [MR. RYAN]: Does that answer the commission's  
21 questions, sir?

22 MJ [COL POHL]: Let me ----

23 TC [MR. RYAN]: From where we started.

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1 MJ [COL POHL]: From where we started. Yeah, I got it.

2 TC [MR. RYAN]: Your Honor, since you were focused on  
3 contraband, I'd like to go a little bit further on that one,  
4 if you'll give me a moment.

5 MJ [COL POHL]: Yeah, I really want to -- quite frankly,  
6 it's the -- I mean, one of the defense's arguments is you did  
7 the October search. You made your pleading. You made your  
8 argument they all should be treated the same.

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

10 MJ [COL POHL]: You got the ruling in early February. Two  
11 weeks later, rough and dirty, they did this other search and  
12 now labeled things that are contraband that had been Mr. --  
13 now I'm focusing on Mr. Binalshibh -- that had been there for  
14 at least a couple of years, at least of the status of the  
15 record I have before me.

16 And it's just -- and I come back to the idea of, if  
17 we talk about this as a privilege, an abuse of the privilege,  
18 if the material -- the other case -- or excuse me, the  
19 nonlegal mail went through JDG -- I mean, it went through in  
20 2014, '15, or '16, whenever it did -- given you did not have  
21 the events of October '17, therefore, they did not see it as  
22 contraband; but now after what happened in '17, you say now  
23 through that lens, it now could be considered contraband.

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           Isn't the solution, then, it's not to penalize  
2 Mr. Binalshibh who did nothing wrong, okay, in '16 -- assuming  
3 this went through the JDG's process; then now, because the  
4 landscape has shaped, we're just going to seize this material  
5 from him, but it's not an abuse of the privilege of the -- of  
6 the -- giving him the laptop to begin with? Do you  
7 understand?

8           It's how could he have abused the privilege of the  
9 laptop by possessing materials that he was permitted to have  
10 prior to that?

11       TC [MR. RYAN]: Because its danger became apparent and  
12 available.

13           I am -- neither you nor I know the timing of how all  
14 of this went about. We don't know how -- for how long, for  
15 how many years Mr. Ali sat there trying to figure out how to  
16 get into his own computer and what he could do with it once  
17 inside.

18           You remember the evidence concerning makeshift  
19 apparatus and taking things out of it in violation of 182K.  
20 Combine that with items that were possessed, the explanation  
21 is quite clear from Special Agent Parsons, the Linux discs,  
22 the Linux manuals, combined with what they were trying to do  
23 creates a real danger.

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1           Now, Your Honor's -- I get your concern -- I  
2 understand it. I'm hearing it, about what can a JDG commander  
3 do as to day one and a day later. Now, I've already told you;  
4 I've already made my argument that it's his discretion both in  
5 018U. But just generally, this man is responsible for the  
6 camp, to make determinations; and sometimes it will certainly  
7 be changes in circumstances that will lead him to make  
8 changes.

9           And I would suggest, sir, that that's one of the  
10 reasons that instead of saying contraband is one, two, and  
11 three, and only one, two, and three, that Your Honor gave that  
12 discretion to them, understanding it would be enacted in good  
13 faith.

14           Now, I read to you the definition at the time of the  
15 search in 2018 -- and this goes not only to Your Honor's  
16 question but to the complaints about whether the search was  
17 acceptable, although a searchable law of war detention  
18 facility, it seems to me, doesn't require an awful lot.

19           But the JDG commander at the time, when he made the  
20 decision to seize these items, had, A, his own determination,  
21 which he is entitled to do as read in 018U; second, B, a full  
22 record as we developed in AE 530 of the accused -- of the  
23 illicit behavior by the five accused in regard to the laptops;

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**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 and C, Your Honor's finding in LL that there was a risk  
2 created to both force protection and national security.

3           So based on everything we've known, everything he  
4 knew at that time, and on his responsibilities, it was most  
5 certainly something he could determine was, in fact,  
6 contraband and was outside of the lane of legitimate  
7 materials.

8           And by the way, I don't want to get too far in the  
9 weeds, but we heard a lot about OCR here today. OCR, in other  
10 words, Other Case-Related Material, has a specific definition  
11 in 018U -- the court's indulgence -- which is, "Communications  
12 between a defense counsel and the accused that are directly  
13 related to the accused's military commission but are not  
14 privileged within the meaning of 502. This includes discovery  
15 and related material that is releasable to the accused and  
16 records of commission proceedings, including court filings  
17 when released to the accused."

18           The items that have been identified as Other  
19 Case-Related Material come nowhere near that definition. So  
20 the JDG commander makes the decision based on everything known  
21 to him, inherent, I would suggest, completely reasonable at  
22 that time to seize these items, and does so.

23           Now, despite this, despite all that was known to him,

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1 defense counsel is telling you that under your order of 018U,  
2 the JDG commander -- this is the man responsible for the camp,  
3 responsible for force protection, responsible, literally, for  
4 the national security as it might be affected by these five  
5 men, who have proven themselves tremendously adept at harming  
6 our national security -- counsel's telling you that that man  
7 was not -- had no right to seize those items, that  
8 JDG commander.

9           He can look at it. He can say it's contraband, as is  
10 his right. He can know it's contraband based on all of the  
11 facts known to him. And yet at the same time, he can't seize  
12 it; and if he does, he has to return it to counsel. I would  
13 submit 018U does not say that.

14           He's relying, apparently -- counsel's apparently  
15 relying on 018U subsection 11. I submit to you, sir, that  
16 018U subsection 11. concerns the items found, items that might  
17 be in cells, that inherently -- that is by assumption  
18 reasonable and part of a legitimate defense.

19           What we're talking about in this situation is  
20 contraband that could be determined as such on its face --  
21 manuals and discs of computer apparatus that, when combined  
22 with other facts known, are automatically contraband.

23           Furthermore, Judge, in 018 11.c., there's a specific

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1 reference -- or a specific exception created for the, quote,  
2 is physical contraband. In this instance where somebody can  
3 look at something, like the JDG commander, and know it's  
4 contraband on its surface, on its face, without having to go  
5 pawing through lots and lots of pages, I would submit he was  
6 just as well within his rights to seize that as he was if it  
7 was a weapon or something else.

8           Lastly, Judge, as I said before, 018U subsection 11.  
9 by its wording -- and you can see it when you read it --  
10 concerns legitimate items that were possessed by an accused  
11 that, at worst, may have been mismarked. In other words, it  
12 might have been marked as "Attorney-Client" but it's really  
13 "Other Case-Related Material" or something like that. It's  
14 not referring it is not contemplated by Your Honor that we be  
15 talking about items that are of obvious concern and that  
16 constitute contraband.

17           So in sum, sir, as to the whole issue of search,  
18 which we've now heard this argument many, many times, the  
19 JDG commander has inherent authority and a duty in regard to  
20 force protection and national security that exists, along with  
21 every other provision of 018U. It is not right. It cannot be  
22 right that a man can seize something, make a determination it  
23 harms his duties at his camp, and he has to either leave it

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1 alone or return it to defense counsel.

2 That's all I have, Judge, subject to your questions.

3 MJ [COL POHL]: I have no further questions.

4 Mr. Ryan, anything further? I'm sorry.

5 Mr. Harrington.

6 LDC [MR. HARRINGTON]: Judge, we're still back at the same  
7 place, that there's no demonstration to you here in any way  
8 that Mr. Binalshibh has done anything with the computer that  
9 he has; and as I indicated, it's a different computer than the  
10 other detainees had. I don't know what, if anything, the  
11 other detainees did with their computer. I'm not here to make  
12 a comparison to them. I'm only talking about his computer.

13 There's no DVD drive on his computer. There's no  
14 port for him to hook it up to a DVD. It came with multiple,  
15 multiple restrictions from the government. They approved it.  
16 They set it up. They set up a system for how it has to be  
17 corrected -- or how it has to be tested before it's returned  
18 to him to make sure this checklist -- to make sure nothing is  
19 done on it whenever it comes out. And when it's done, it's  
20 been done again. Nothing -- nothing has been shown with it.

21 As I indicated to the court, Mr. Ryan complains about  
22 the OCR thing. That's easily addressed if the court feels  
23 that that's a concern.

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1           And I never, Judge, said that the camp commander  
2 could not seize items that he said were contraband; and I  
3 didn't ask if he believes that something is contraband in this  
4 case to be returned to Binalshibh.

5           What I said is we never got any notice of what was  
6 seized from him until this motion was filed. We never got  
7 copies of what the -- what the -- photocopies of what -- these  
8 items that were seized until we came here last week. We did  
9 not ask for the return of those items. And we never got a  
10 notice of if anything else was taken from Mr. Binalshibh's  
11 cell, which we are -- under your order, we're entitled to get.  
12 Maybe there wasn't anything. But Mr. Ryan nor anybody in the  
13 prosecution has said that to us. We don't know. So if we're  
14 going to argue about who's going to follow the rules and who's  
15 not, then we do it.

16           But, Judge, in this -- in this record, and especially  
17 in Mr. Binalshibh's separate situation from the others, I  
18 don't see a basis for not treating him -- treating him  
19 separately. Thank you.

20           MJ [COL POHL]: Thank you, Mr. Harrington.

21           Mr. Ruiz, anything further?

22           LDC [MR. RUIZ]: Judge, on the -- on the notion of  
23 contraband, I think it's useful to separate that into physical

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1 and written-type work product. Obviously, you see a piece of  
2 wire that can be used as a screwdriver, a shank. That's  
3 pretty easy to identify as physical contraband, and there -- I  
4 don't think there's any really restrictions that you have or  
5 you've imposed on the detention commander on how to go about  
6 seizing that.

7           Mr. Ryan cherry-picks his way through your  
8 communications order and, understandably so, reads what's  
9 helpful and doesn't read what's not helpful. But in terms of  
10 the definition of OCR, what he did not read is subparagraph 2,  
11 which is 2.g.(2), Judge. It's on page 3 of your  
12 communications order. And it says as follows: "Documents  
13 initially identified as Other Case-Related Material that are  
14 subsequently incorporated by Defense Counsel or the Accused  
15 into work product or lawyer-client communications or that are  
16 aggregated to support a particular communication or reflect  
17 the lawyer's mental impressions or strategy may, become  
18 Lawyer-Client Privileged Communications."

19           Of course, that language is there because of the  
20 result of the extensive and extensive litigation, extensive  
21 communications with the commission about the types of  
22 communications that we need to have and the categories that  
23 needed to be created.

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1           So while Mr. Ryan reads the initial portion that I  
2 had already alluded to that says OCR communications are not  
3 typically attorney-client privilege within the meaning of 502,  
4 he then clearly fails to mention the ensuing paragraph which  
5 talks specifically about how those communications become  
6 lawyer-client privileged and how they, in fact, become work  
7 product, which is, in fact, what's happened in this case. So  
8 there is, in fact, that protection.

9           Judge, in terms of contraband, you've discussed the  
10 timeline issues. Unfortunately, we do not -- did not label  
11 that with the specific time or the date, but we do know that  
12 the government has searched Mr. Hawsawi's cell before the  
13 litigation of this motion began and that no materials were  
14 provided to you which formed the basis of your initial ruling.

15           Judge, Mr. Ryan does not talk about the  
16 contraband-saving provision in 018U, either. That is  
17 paragraph 2.i.(4). Paragraph 2.i.(4) indicates as follows:  
18 "No information shall be" -- I think that the language is  
19 important. You wrote this: "No information shall be  
20 contraband if defense counsel reasonably believes it's  
21 directly related to the military commission proceedings  
22 involving the accused."

23           As we have identified in this case, you have a

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1 computer that you gave to Mr. al Hawsawi as conferred as a  
2 privilege to be a tool in reviewing and analyzing the  
3 voluminous discovery in this case.

4 As has been established, this is a blog of how to use  
5 the very computer and how to use the operating system that was  
6 involved in that, reasonably believing that it is Other  
7 Case-Related Material. Paragraph 2.i.(4) clearly takes it out  
8 of the realm of what is contraband.

9 That is why I keep coming back to the most pressing  
10 issue, at least -- I mean, this is a pressing issue all  
11 around, but the inherently pressing issue, which is the  
12 violation of the orders and the rules. In this instance, we  
13 followed the procedures. We properly labeled the document as  
14 OCR. We made the determination under paragraph 2.i.(4) that  
15 this was related to Mr. al Hawsawi's commission, and we  
16 labeled it as such. It is a category of legal mail.

17 The guard force and the detention commander, Judge,  
18 need to understand that so that we have that confidence that  
19 your order not only says what it says, but it's an order that  
20 matters and is abided by the people that are in the position  
21 of authority. They can't just simply choose to disregard  
22 these directions when it suits the government's purpose, which  
23 is exactly what they've done in this case.

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1           Your order goes further, Judge. In  
2 paragraph 3.f.(3), of page 8, in your communications order,  
3 Mr. Ryan talked about OCR and he talked about discovery. He  
4 talked about court-related pleadings. But paragraph 3.f.(3)  
5 of your communications order goes further and recognizes that  
6 there may be other material. It's actually called other  
7 material that may be sent as OCR. And what it requires is an  
8 additional attestation by counsel that not only includes the  
9 number of pages but an attestation by the defense counsel,  
10 sworn and signed, that says we believe this is directly  
11 related to the military commissions.

12           That section reads, "If not discovery or record from  
13 a military proceeding, counsel should fill out a cover sheet  
14 including the number of pages, an attestation that the  
15 communication relates to the case and does not contain  
16 contraband."

17           That's what happened in this case. We followed those  
18 rules. We sent in the documents. They were provided to  
19 Mr. al Hawsawi as part of the legal mail scheme. And that's  
20 what happened.

21           So this sky is falling. The JDG commander's hands  
22 are tied; you know, he can't see something that is contraband  
23 and not seize it, directly contravenes all of the work, all of

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1 the energy, all of the time that we put in to thinking through  
2 these issues up front to try and avoid the kind of litigation  
3 we continue to have when whatever JDG commander decides that  
4 they want to seize material that is properly labeled, whenever  
5 the government decides that they don't want to return it to  
6 the defense, that they don't want to provide notice to  
7 counsel, that they don't want to just simply follow what the  
8 rule says. That's what happened here.

9           And it's not enough to say it's contraband. This is  
10 the man in charge of the security of the detention facility.  
11 Fine. That man has a stable of lawyers who are there to  
12 advise him about what your order says and what your order  
13 means. And I believe, I think, some of them understand what  
14 it says and what it means; and even they can't answer the  
15 questions that I posed to them about what is the reason and  
16 what is the authority for withholding this information, these  
17 documents that are properly labeled for us. I'll submit to  
18 you that the answer is, I'm not sure. I'm not sure. So that  
19 remains problematic, Judge.

20           In terms of what is possible, well, I will tell you  
21 that I'm a big believer in possibility. I like to believe  
22 lots of things are possible. I like to believe that very few  
23 things are impossible. I like to instill those beliefs and

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1 thoughts in my children. But when it comes to court of law,  
2 what is possible is one thing; what is, is another.

3 Mr. Ryan has to -- I would say has a great  
4 imagination. His expert seems to have a very good -- great  
5 imagination as well as to what is possible. But what is  
6 possible is very different from what is, and it's also  
7 different from what is probable.

8 And you, Judge, are being asked to rule on what is  
9 possible as opposed to what is. And what is, in terms of  
10 Mr. al Hawsawi's case, is nothing. There's nothing there.

11 This is an article in a blog that says how to use the  
12 computer that the man has, in Arabic, because that's the  
13 language that he speaks. That's what is. There's nothing  
14 more. You have a declaration, a certification under seal  
15 submitted by us, that tells you what is; not what is possible,  
16 not what is probable, but what is.

17 And all of that means -- and I will submit to you,  
18 Judge, that what is and ought to be is that Mr. al Hawsawi  
19 ought to be able to get the instrumentalities for him to  
20 continue to carry on his defense in this case. The sky is  
21 falling argument -- time has come. We need to move on, Judge.  
22 The sky is not falling.

23 The national security of the United States is not

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1 implicated because Mr. al Hawsawi had a  
2 how-to-use-your-computer blog on a computer that you gave to  
3 him, and there is no grand scheme afoot. The information, the  
4 evidence that has been provided, is absolutely lacking. Not  
5 argument, but evidence.

6           Finally, the -- I would ask you to reject the  
7 government's very transparent guilt-by-association argument.  
8 It brings me back time and time again why I've tried to sever  
9 this case many, many, many times, because I know what is  
10 apparent every time the government gets up and seeks to  
11 advance legal advantage or legal issue based on a  
12 guilt-by-association argument.

13           That is exactly what Mr. Ryan did here this morning.  
14 That is exactly what he wants you to do. He wants you to  
15 carry his case's water based on the guilt-by-association  
16 analysis.

17           Standing alone, Mr. al Hawsawi's conduct -- standing  
18 alone, the man's individual actions don't say anything, Judge.  
19 But you've got to look at a guilt-by-association analysis, and  
20 you should give the same kind of punishment, the same kind of  
21 examination to Mr. al Hawsawi, not because I provided you any  
22 evidence, not because I've given you any smoking gun, not  
23 because there is any real substance to my argument, but simply

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1 because, Judge, you have to do it because the sky is falling,  
2 and this is a guilt-by-association case.

3 It is patent. It is clear. It is unmistakable that  
4 this is what Mr. Ryan and the government seeks to do, not only  
5 here today but further down the line, and certainly is not  
6 something that ought to carry the day when it comes to this  
7 issue.

8 And, Judge, I will close by saying that certainly the  
9 issue is the reconsideration. I get that. But, Judge, in  
10 denying this motion for reconsideration on behalf of  
11 Mr. al Hawsawi, I'm also asking you to send the government a  
12 message in your ruling, in your order, that unmistakably and  
13 clearly indicates to the government they cannot pick and  
14 choose when they follow your order.

15 So I'm asking you when you deny this motion for  
16 reconsideration to include language in your order that is  
17 clear and is unmistakable; that your order can't simply be  
18 violated, can't be followed, can't be set aside whenever the  
19 government seeks to advance an advantage in their litigation.

20 Thank you.

21 MJ [COL POHL]: Thank you, Mr. Ruiz.

22 The next thing I want to take up is an issue that  
23 came up with the 802 that, Mr. Groharing, you indicated that

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1 you -- on defense pleadings there was declarations attached,  
2 and you indicated you wanted the declarant to be produced for  
3 cross-examination?

4 TC [MR. GROHARING]: Yes, Your Honor. There are actually  
5 two declarants that were attached, Attachment C and D at  
6 AE 524 (AAA 2nd Sup). We asked for both -- they're both  
7 investigators from the defense for Mr. Ali.

8 MJ [COL POHL]: Okay. Why should we produce them?

9 TC [MR. GROHARING]: Well, the government's put both of  
10 the investigators at issue -- or I'm sorry, the defense has  
11 put both of the investigators at issue in their pleading.  
12 They offered declarations from the witnesses in support of  
13 their motion, in support of their requested relief. And so,  
14 one, they put the credibility of these witnesses at issue.

15 They argued that during the proceedings earlier this  
16 week of how much you should rely on those declarations.  
17 Mr. Connell testified -- or at least advanced the approach  
18 that these investigators took to locating witnesses and their  
19 success rates at interviewing witnesses and wants you to  
20 consider that in ----

21 MJ [COL POHL]: If the proponent on an interlocutory  
22 matter chooses to submit a declaration, with the  
23 understanding -- rather than call them as a witness -- with

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1 the understanding that it would be given the  
2 weight appropriate by the fact that it came from the proponent  
3 and there was no cross-examination, would you think if you  
4 want to call -- you want to cross-examine these witnesses just  
5 because they may ----

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

7 MJ [COL POHL]: First of all, you have no idea what they  
8 will say. Second of all, you have no idea -- I mean, you're  
9 cross-examining witnesses on a defense -- first of all,  
10 they're defense investigators which is an interesting -- which  
11 is a category itself.

12 TC [MR. GROHARING]: Yes, sir.

13 MJ [COL POHL]: You have no idea what they're going to  
14 say. You have no idea of what you're going to -- I don't know  
15 what you're going to inquire on, but you don't know what the  
16 answers are.

17 TC [MR. GROHARING]: Well, in that -- I have asked to  
18 interview the witnesses, and in response to that, Mr. Connell  
19 invoked privilege over the information. We had some back and  
20 forth. And again, this was yesterday.

21 MJ [COL POHL]: I got it. Okay.

22 TC [MR. GROHARING]: So I've been unable to interview  
23 them. Having said that, I'm happy to -- you know, it won't be

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1 the first time that I cross-examine a witness that has  
2 declined to speak with me. I'd be happy to do that. I expect  
3 counsel in this case will have many opportunities on both  
4 sides where they'll have to do that because of witnesses who  
5 exercise their right not to speak to opposing counsel.

6           So I'm happy to take on that challenge and I will  
7 deal with the answers that I get. I have a good idea of what  
8 many of the answers are. But I think to the extent you're  
9 going to give any value to success rates of interviews to the  
10 fact that they claim to perhaps have -- well, if -- whether or  
11 not they've identified actual CIA personnel that have  
12 participated in the program, that's unclear to me from the  
13 declarations. I'd like to explore that further with them.

14           With respect to the privilege, whatever privilege  
15 defense has with these investigations, and I -- we absolutely  
16 respect the defense privilege, but the defense has put this  
17 into issue -- these individuals into issue and their  
18 investigations into issue, at least with respect to how those  
19 matters are contained in the ----

20           MJ [COL POHL]: Mr. Groharing, have you thought about the  
21 strategic implications of what you're asking for this case?  
22 That if -- if -- I mean, there's one thing for producing  
23 witnesses, and there's usually discovery requests of why

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1 witnesses are produced, but the plethora of declarations that  
2 have gone in this case ----

3 TC [MR. GROHARING]: Right.

4 MJ [COL POHL]: ---- which quite frankly is -- from a  
5 judicial economy perspective has moved the case along much  
6 faster than we did. But your basic -- what you're really  
7 saying is that if a declaration is offered, the opponent of  
8 the declaration, just because it's a declaration, then has a  
9 right to call that person as a witness.

10 TC [MR. GROHARING]: I think you have to look at the facts  
11 in every case. In certain ----

12 MJ [COL POHL]: Well, I knew you were going to say that,  
13 but that's ----

14 TC [MR. GROHARING]: In certain times, that would be the  
15 case; and, quite frankly, certain times you have found that's  
16 the case. I will remind you of your decisions with ----

17 MJ [COL POHL]: Yeah, I know.

18 TC [MR. GROHARING]: ---- Commander Bogdan, Colonel Heath,  
19 Admiral MacDonald, Colonel White, Sergeant Jinx, others.

20 MJ [COL POHL]: Some of those were also motions for  
21 production, too, though, combined. No?

22 TC [MR. GROHARING]: And so ----

23 MJ [COL POHL]: No, answer my question. I mean, for

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1 example, I'm going to give you another example we have right  
2 now. Right before the court ----

3 TC [MR. GROHARING]: Right.

4 MJ [COL POHL]: ---- with the declarations from  
5 Mr. Rishikof and Mr. Castle, okay? We also have a request for  
6 production of Mr. Rishikof and Mr. Castle. So if I were to  
7 grant the production of them, it's not just because they come  
8 by a declaration; it's because somebody has said we need -- an  
9 individual basis to produce this witness.

10 TC [MR. GROHARING]: Okay.

11 MJ [COL POHL]: Okay. But I'm just saying is all you're  
12 telling me now, you haven't had -- you have not filed a motion  
13 to compel or anything like that. So do we want to now -- and  
14 again, that's what I'm saying, is that basically because you  
15 get a declaration, that's your basis for calling the witness?

16 TC [MR. GROHARING]: Well, our basis is that we wanted to  
17 challenge the testimony that's in the declaration and  
18 challenge the credibility of the witness with respect to that  
19 testimony.

20 And I will say this is -- this depends on the  
21 individual situation. The declarations you just talked about  
22 were declarations that the military judge, you know, at least  
23 in one case, asked to be produced. They weren't put forth by

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1 the government. So I -- I don't know that this has any  
2 precedential value over any other decision if it comes before  
3 you, Your Honor, on a different witness where someone put a  
4 declaration in.

5 Obviously, the precedent before from the five  
6 witnesses I mentioned isn't controlling this issue or it would  
7 be automatic that you allowed us to cross-examine the witness.  
8 So I agree completely that this is very fact specific, very --  
9 you have to look at the facts of every specific witness.

10 So I agree that little weight should be given to  
11 these declarants' testimony.

12 MJ [COL POHL]: Now, I make it clear what I said. I  
13 didn't say "little weight." I said "appropriate weight."

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

15 MJ [COL POHL]: Okay?

16 TC [MR. GROHARING]: ---- that's the difficulty the  
17 government's in.

18 MJ [COL POHL]: No, I understand. I understand what  
19 you're saying.

20 TC [MR. GROHARING]: So it would be our position that --  
21 that we -- understand these circumstances specific to these  
22 witnesses, we be permitted to cross-examine them just on the  
23 matters contained within the declarations. I don't believe

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1 that that would require disclosure of any privileged  
2 information beyond what has already been put to the  
3 commission.

4 So our position is we should be allowed to  
5 cross-examine the witnesses.

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

7 Go ahead, Mr. Connell, and then we'll take our  
8 midmorning recess.

9 LDC [MR. CONNELL]: Sir?

10 MJ [COL POHL]: Do you oppose their request?

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

12 The -- and the discussion that was just had, as  
13 valuable as it was, is in many ways premature because  
14 Rule 703(e) says that the process to compel witnesses to  
15 appear and testify shall be by subpoena.

16 Here, there is no subpoena. We're not even at a  
17 motion-to-compel stage. There's nothing more than a request,  
18 "Can you please fly somebody down from the National  
19 Capital Region to testify today on 24 hours' notice."

20 The government can issue subpoenas at its pleasure.  
21 It actually has no need -- in order to issue the subpoena. It  
22 has no need to prove that a witness would say something  
23 different. They don't have to make their case to the defense;

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1 they just issue subpoenas whenever they feel like it. And  
2 they, in this case, have not felt like it. They have chosen  
3 not to issue a subpoena.

4 The two individuals are standing by at their duty  
5 stations ready to receive service of subpoena if the  
6 government elects to do so, after considering strategic and  
7 other views, as to whether simply the fact of filing a  
8 declaration subjects a person to cross-examination.

9 But your initial question to me was do I oppose it,  
10 and the answer is yes; and, in fact, I'm not at liberty to do  
11 otherwise. Rule -- Model Rule 1.6(c) of the ABA Rules -- not  
12 the ABA Guidelines for death penalty, but the rules that  
13 govern every single lawyer -- require an advocate to make  
14 reasonable efforts to oppose efforts to obtain information  
15 protected, or at least arguably protected, by attorney work  
16 product privilege.

17 Model Rule 1.6 Comment 15 requires me to assert all  
18 nonfrivolous claims against additional disclosure, and  
19 Comment 16 requires me to limit that scope of disclosure to  
20 persons other than the tribunal through seeking a protective  
21 order.

22 Now, this is not the first time that one litigant in  
23 a case wants to depose or cross-examine or call a litigant who

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1 is within the privilege of another side. That actually in  
2 civil cases is fairly routine. And there's a specific process  
3 that courts always go through, and it's reflected in the many  
4 D.C. Circuit Court cases that we read on this topic.

5 Those steps are, first, a subpoena. Subpoena is  
6 the -- is -- in -- in the military commission rules for  
7 military witnesses, like Chief Futrell, it's not necessary to  
8 issue a subpoena to have them appear, but it is necessary to  
9 issue a subpoena to compel testimony. The -- and appearance  
10 is not a problem. Chief Futrell is on the island. He's at  
11 his duty station. Mr. Canestraro is at his duty station in  
12 Virginia.

13 After that -- and this is the same issue that we saw  
14 in a slightly different context with Mr. Bergen in the 502  
15 series where the government agreed to produce -- is one of the  
16 ten witnesses that the government agreed to produce in the 502  
17 series. And I made the point, look, the government has to  
18 actually issue a subpoena because there's a potential  
19 privilege. CNN may wish to assert its privilege on journalist  
20 basis. The military commission at that point would have to  
21 decide: Is there a journalism privilege? What is its scope?  
22 What questions can be asked? It's the same thing. In order  
23 to start the process, it has to begin with a subpoena so that

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1 the holder of the privilege has a context in which to  
2 litigate.

3           So the second step is a motion to quash. And the  
4 holder of a privilege, whether that privilege is a  
5 deliberative privilege by the government or a legislative  
6 privilege by Congress, or an attorney work-product privilege  
7 by the defense, they file a motion to quash.

8           In a tribunal like this, there is also, as required  
9 by Comment 16, generally a motion for protective order as  
10 well, because it may be that there's certain information which  
11 can be produced to the military commission and to the parties  
12 involved but not necessarily the public.

13           Third, in this case, there has to be a 505 notice.  
14 Because Mr. Futrell's declaration is classified, the  
15 government can examine -- may be able to examine on  
16 unclassified portions, but the redirect would be -- would  
17 probably involve classified information.

18           Then the third step in this is a judicial order. The  
19 tribunal looks at the partial waiver of attorney work-product  
20 privilege involved in filing of a declaration -- and I don't  
21 disagree with that principle; a filing of a declaration is a  
22 partial waiver of 502 privilege. But the scope of that has to  
23 be hashed out in a particular context. So then the military

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1 tribunal orders the person to testify. Sometimes that needs  
2 to be question by question, depending on what the nature of  
3 the information is.

4 And then, in the event of an adverse ruling,  
5 Comment 15 and ABA Formal Opinion 473 issued on February 17 of  
6 2016, require me, as the attorney, to consult with  
7 Mr. al Baluchi regarding the possibility of appeal.

8 There's one more complicating factor in the case  
9 which counsel's using the process as opposed to just doing it  
10 on the fly on less than 24 hours' notice, which is, that  
11 Mr. Canestraro is not a Department of Defense employee. I  
12 have forwarded the information that we have available to us,  
13 the request from the government, to his -- the legal  
14 department of his company. They, of course -- he has a  
15 separate nondisclosure agreement with them. They may have  
16 equities that they want to protect. I'm not saying that those  
17 equities would prevail, but I am saying that there is a  
18 process that makes sure that all of the equities are protected  
19 and that the privilege is respected to the amount possible.

20 So all I'm saying is ----

21 MJ [COL POHL]: Just so I'm clear, Mr. Connell, has the  
22 government, through Mr. Groharing, approached you and asked  
23 whether you would be willing to let these people testify, and

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1 you said no?

2 LDC [MR. CONNELL]: So they actually asked me for -- you  
3 heard the same thing that I did in the 802. They sent us an  
4 e-mail -- which we can part of the record if you want --  
5 requesting consent to an interview. And I invoked the  
6 attorney work-product privilege, which is what I'm required to  
7 do, and said file -- get a subpoena, and then we'll have the  
8 court decide what the scope of the privilege is.

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

10 LDC [MR. CONNELL]: Thank you.

11 MJ [COL POHL]: Mr. Groharing, anything further?

12 TC [MR. GROHARING]: Very briefly, Your Honor.

13 I do -- I agree with Mr. Connell in certain respects.  
14 Certainly, the witnesses' employment status makes them a  
15 little bit differently situated, but Chief Warrant  
16 Officer Futrell is an active-duty servicemember.

17 I'm not familiar with any authority or any practice  
18 in all of my experience dealing with military courts that  
19 would require the government to subpoena an active-duty  
20 military witness. It would be simply an order from the judge.  
21 And the question is simply, is he relevant -- does he have  
22 relevant testimony to an issue before the court or not?  
23 That's the analysis.

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1           At that point, it could trigger actions from the  
2 defense counsel, perhaps, if they want to place limitations on  
3 that testimony based on privilege or things of that matter.  
4 But as far as the court's authority, you have all of the  
5 authority you need to direct a servicemember on active duty to  
6 appear before the commission. And I would again ask that you  
7 do that.

8           I do have -- I don't know that it's necessary,  
9 Your Honor, but I do have copies if the commission does want  
10 any of the communications back and forth between Mr. Connell  
11 and I. I don't personally believe it's necessary; but in the  
12 event you do, I have them.

13         MJ [COL POHL]: I don't have them. I don't think they're  
14 necessary to resolve this issue.

15         TC [MR. GROHARING]: And absent any questions from you,  
16 Your Honor, I don't have any additional comment.

17         MJ [COL POHL]: Okay.

18         LDC [MR. CONNELL]: Your Honor? May I be heard?

19         MJ [COL POHL]: Sure.

20         LDC [MR. CONNELL]: I rise principally because this is the  
21 first time that we have really dealt with this particular  
22 issue. And with all due respect to the counsel for the  
23 government's military experience, which is infinitely greater

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1 than mine, my experience only extends as far as the military  
2 commission and the military commission -- the Rules for  
3 Military Commission.

4 And the relevant rule is found in -- there's -- is  
5 found in 703(e), which says, "The process to compel such  
6 witnesses to appear and testify and to compel the production  
7 of other such evidence shall be by subpoena."

8 Then there's a subsection (e)(1) which is about  
9 military witnesses. And military witnesses do not use the  
10 language of "testify," right, because in here, we're dealing  
11 with the situation of testify; but, rather, the military  
12 witness rule says that "The attendance of a military witness  
13 may be obtained by notifying the commander of the witness of  
14 the time, place, and date the witness' presence is required."

15 Now, that principally to me seems to be an issue  
16 about travel orders. Right? The Regulation for Trial by  
17 Military Commission requires -- not the rule but the  
18 Regulation for Trial by Military Commission for civilian  
19 witnesses requires that in addition to the subpoena, the  
20 proponent issue -- give them travel orders and witness fees.

21 So principally (f)(1) and the R.T.M.C. seem to me  
22 about getting the person to where they need to be. And for a  
23 military member such as Chief Futrell, that's especially

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1 important because they have a duty station, right? Right now,  
2 he's at his duty station. If there were a subpoena or an  
3 order from his commanding officer that Courtroom Number 2 is  
4 his duty station, then that's where he would be. But to start  
5 the process to compel testimony, it has to be a subpoena.

6 Now, this is almost -- with respect to what the  
7 government was just saying, there is a bit of a distinction  
8 without a difference because if the military commission -- the  
9 military commission has the power to subpoena. The government  
10 has the power to subpoena. If the military commission, by way  
11 of subpoena, orders someone to testify, then they have to  
12 appear and assert the privilege and go through that process.  
13 So it's -- but it is an important distinction that could come  
14 up later, since we're dealing with both military and civilian  
15 witnesses.

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

17 LDC [MR. CONNELL]: Thank you.

18 MJ [COL POHL]: I will note -- and again, not for the  
19 first time -- that the drafters of the Manual for Military  
20 Commission decided to add gratuitous language on the procedure  
21 for production of witnesses that if you read the Manual for  
22 Courts-Martial is not contained therein; by that I mean, the  
23 gratuitous language saying the presence to compel such

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1 witnesses to appear without differentiating between military  
2 and nonmilitary and testifying and compel the production of,  
3 other such evidence shall be by subpoena. That language is  
4 not in the Manual for Courts-Martial.

5           The rest of the language is about military witnesses,  
6 so whether they're subpoenaed or ordered to go -- again,  
7 because my experience is you don't subpoena military  
8 witnesses; you order them to come. But now, we would have to  
9 de-conflict the apparent, in my view, unnecessarily confusing  
10 way the Manual for Military Commissions drafted this  
11 particular article. Be that as it may, that is not necessary  
12 for me to resolve this issue.

13           When defense wishes to compel the presence of a  
14 witness, they're required to -- since the government does it,  
15 they're required to provide certain information for that to be  
16 compelled, whether it's discovery or anything else, because  
17 the government is, for want of a better term, the travel  
18 agent. They get to look at it, and then it comes to me to  
19 decide whether or not to order the compelling of the  
20 witnesses.

21           Well, the government is not similarly situated. The  
22 government could simply go to Chief Futrell's commander under  
23 the rule and order him to show up. That does not mean he will

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1 necessarily testify, but it places the defense in the position  
2 that if they oppose such an order, they'd have to be on notice  
3 it, and then we could litigate it accordingly. But there's no  
4 necessarily built-in requirement that the government has to  
5 provide a big rationale of why they want this person here or  
6 not.

7           But it seems to me when we're talking about defense  
8 witnesses that the government wishes to cross-examine, that  
9 such requests, if you want me to compel their presence --  
10 which is what I'm hearing you're asking me to do,  
11 Mr. Groharing -- is it must be -- if it's a motion to compel,  
12 you say, "We've followed the rule. You must -- we must do  
13 this in an orderly manner." Because, again, I could see a  
14 Pandora's box being opened here if we simply did it by oral  
15 representations.

16           Therefore, if either side wants a witness to show up,  
17 you will follow the process in writing if you want me to get  
18 involved. I'm not going to do these things by the seat of my  
19 pants of -- in the middle of a hearing without giving both  
20 sides a full opportunity to litigate the objection to it.  
21 You've tried to work it informally with the defense. The  
22 defense objected to it, which is always a good first step --  
23 not the objection. The informal presentation is a good thing

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1 because maybe they wouldn't object and they say "Fine." That  
2 would resolve the issue. I like it when issues are resolved,  
3 not to me.

4 But for me to resolve it, it's got to be done in the  
5 normal process -- one of my favorite words -- and the normal  
6 process cannot be done, which is an oral representation of why  
7 this is different than anything else unless I've had an  
8 opportunity to hear from both sides in a litigated manner that  
9 makes sense and puts me in the position to make an informed  
10 decision of whether or not I should compel the production.

11 This particular witness is a perfect example of that.  
12 This is a witness that may or may not have privilege. You  
13 know, there's some waiver of a privilege apparently, but how  
14 much, and where do we go from there? And again, I don't think  
15 I'm in a position based on what I have been given, or in this  
16 case, not given, to make a decision.

17 So as there is a motion for me to compel the  
18 production of these two witnesses, that motion is denied.

19 Commission is in recess for 15 minutes.

20 [The R.M.C. 803 session recessed at 1059, 3 May 2018.]

21 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1123, 3 May  
2 2018.]

3 MJ [COL POHL]: Commission is called to order. No changes  
4 to the parties present.

5 That brings us to two status issues with 509 and 513.  
6 Mr. Farley.

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

8 MJ [COL POHL]: Good morning.

9 DC [MR. FARLEY]: So as you mentioned, 509 and 513 are on  
10 for status. These are two motions to compel filed by  
11 Mr. al Baluchi over the course of the last year. And  
12 Mr. al Baluchi understands that the government has submitted  
13 discovery to the 505 process, and we are waiting for  
14 production of that discovery before we move forward with the  
15 motion to compel.

16 MJ [COL POHL]: On both of them?

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

18 MJ [COL POHL]: Okay. Trial Counsel, do you agree with  
19 that characterization?

20 CP [BG MARTINS]: Your Honor, I've got 509; I agree with  
21 that status.

22 MJ [COL POHL]: I'm sorry. 509 and 513, okay. For both  
23 of them?

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1 MTC [MR. TRIVETT]: Yes, sir. And there may be an  
2 additional 505 coming for 513.

3 MJ [COL POHL]: Coming to whom?

4 MTC [MR. TRIVETT]: To you, sir.

5 MJ [COL POHL]: When should I expect it?

6 MTC [MR. TRIVETT]: We're working through the approval  
7 process now, sir.

8 MJ [COL POHL]: In other words, you don't know?

9 MTC [MR. TRIVETT]: Correct.

10 MJ [COL POHL]: Got it. Okay. Thank you, Mr. Farley.

11 DC [MR. FARLEY]: Thank you, Your Honor.

12 MJ [COL POHL]: That brings us to 286AA. Mr. Nevin.

13 LDC [MR. NEVIN]: Thank you, Your Honor. And I can move  
14 quickly through this.

15 This is a request for -- a comprehensive request for  
16 discovery that comes out of an analysis of the executive  
17 summary of the report on the RDI program of the Senate Select  
18 Committee on Intelligence. And we served the -- a request for  
19 discovery; none of the material that we requested was  
20 produced.

21 Various items were refused for various reasons, and  
22 what you have here is a motion to compel portions of the  
23 material that was refused, not all of the material that was

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1 refused but portions of it. And with one or two exceptions,  
2 this is material that the government refused to produce on the  
3 ground that it wasn't relevant.

4 And so these are -- for various reasons, are  
5 materials that we have -- that we are coming to you now on a  
6 motion to compel discovery. These fall into four or five  
7 separate categories, and they are basically questions that go  
8 to issues like how far up the chain responsibility for the  
9 torture program goes.

10 I'm referring to paragraphs 12 and 152 of our  
11 request. Paragraph 12 refers to a headquarters demand for use  
12 of the waterboard early and often. Paragraph 152 refers to a  
13 memorandum from personnel at a torture site in November of  
14 2002, three or four months before Mr. Mohammad was arrested,  
15 who were concerned about the torture.

16 So these are matters that -- that address the  
17 question of who knew what about the torture program and when.  
18 And this is relevant because it's a different matter if rogue  
19 elements within some unit of some agency of the government  
20 stepped over a line that they shouldn't have stepped over.  
21 Yes, it's still a violation. It's still a matter of stepping  
22 over the line, but that's different if the decision to step  
23 over the line goes all the way, let's say, to the White House.

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1 That says something different about the government, and it  
2 says something different about -- it creates a different kind  
3 of argument in mitigation that is important to us to have our  
4 arms around as much as we can.

5 Another category is requests that went to specific  
6 aspects of the torture, seeking greater detail about the  
7 torture. For example, paragraph 31 involves a psychologist  
8 writing an e-mail making the observation that -- that this  
9 psychologist was involved in -- earlier in the interrogation,  
10 in the torture of Mr. Mohammad, and then later is writing  
11 an -- is asked to evaluate him psychologically and is writing  
12 an e-mail saying, "We might have a problem here if I" -- who  
13 was involved in -- in this, and he refers to it as  
14 "interrogation" -- "am also conducting what should be a  
15 benevolent psychological analysis of this patient."

16 That's highly questionable whether that's valid or  
17 not. And this tells us something about the way the torture  
18 program was operated that is not contained -- it's not  
19 self-contained within which the government -- within the  
20 material that the government has produced to us already.

21 And there's also a reference in paragraph 485 of our  
22 request, a reference to a separate detainee, Abu Zubaydah,  
23 thanking the government for torturing him, because it got him

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1 to the point where he no longer relied on his religion to  
2 prevent him from providing information.

3           So again, our desire and our right, if and when we  
4 get to a sentencing hearing portion of this proceeding, is  
5 going to be able to -- is going to be to say to the members,  
6 "You have to look very carefully and in great detail about  
7 what was done here." It's not enough just to say we tortured  
8 some folks. It's going to be important for them to  
9 understand, in as much detail as possible, exactly what  
10 happened, what it looked like, the details of it.

11           There are a number of requests, and I'm not going to  
12 articulate all of them, and -- I will say, Your Honor, the  
13 government didn't respond to this motion. So the material --  
14 the arguments are contained in the motion itself and the  
15 moving papers.

16       MJ [COL POHL]: Didn't they file 286BB?

17       LDC [MR. NEVIN]: I did not understand that they did.

18       MJ [COL POHL]: I'm looking at it.

19       LDC [MR. NEVIN]: Oh. Okay. Well, my mistake. It wasn't  
20 served on me.

21       MJ [COL POHL]: Okay.

22       LDC [MR. NEVIN]: May I say that I no longer receive  
23 e-mails from -- from the government and from the

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1 trial judiciary because I have a private e-mail server, and --  
2 so things don't get to me.

3 MJ [COL POHL]: 22 March.

4 LDC [MR. NEVIN]: Okay. Well, in any event, but really  
5 the point is the same. The detail of this is contained in the  
6 moving papers, and a number of these requests go to whether or  
7 not the torture was effective.

8 This information is relevant whether it was effective  
9 or whether it wasn't effective. And there's been a debate  
10 about this -- as the military commission, I'm sure, knows,  
11 there's been a debate about this: Did it work? Didn't it  
12 work? And, you know, obviously, argumentatively if it worked,  
13 and information was provided, Mr. Mohammad is entitled to  
14 argue that he provided benefit to the government.

15 There is, for example, in -- in paragraph 35, we're  
16 requesting additional information about a statement that  
17 information from Mr. Mohammad saved hundreds, maybe thousands  
18 of lives; and if that's true, that supports an argument  
19 that -- that it's not appropriate to return a death sentence.

20 On the other hand, in paragraph 32, there's a  
21 statement that Mr. Mohammad provided nothing of value, and  
22 this was at an earlier point in time in -- to be sure.

23 But if the position of the government, or if the --

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1 the final statement about the torture program is that it  
2 didn't provide anything, then we certainly have an argument  
3 that the -- that the torture was inflicted on Mr. Mohammad  
4 purely gratuitously, to know -- and that it accomplished  
5 nothing.

6           Either outcome is relevant is -- would support an  
7 important argument in mitigation and, therefore, is relevant.  
8 And again, this motion to compel is dealing with requests that  
9 were denied on the ground that they were nonrelevant.

10           Just two other categories, because one of them, I  
11 think -- I would have said three others, but one of them,  
12 which is paragraph -- a request under paragraph 58, which is  
13 the location of DETENTION SITE BLUE, the military commission  
14 addressed in its ruling on 114. But that leaves two other  
15 categories here.

16           There are six -- there are six requests that deal  
17 with basic evidentiary information about the case. For  
18 example, paragraph 54 requests additional information about  
19 the identification -- an alleged identification of  
20 Mr. Mohammad by Abu Zubaydah. And this was denied on the  
21 ground that it was not material to the preparation of the  
22 defense.

23           And I will just say that the idea that there's a

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1 witness somewhere who has said that Mr. Mohammad is guilty of  
2 having done something, or is identified as a person who was  
3 involved in something, the idea that that's not material to  
4 the preparation of the defense is simply wrong.

5           And much the same could be said about paragraph 55,  
6 which asks for information about a person arrested in  
7 February of 2002 who identified Mr. Mohammad as a senior  
8 al Qaeda planner. And there are a number of other --  
9 paragraph 57, CIA and CTC employees who expressed the opinion  
10 shortly after 9/11 that Mr. Mohammad must have been involved  
11 in the attacks of 9/11.

12           And these are obviously material witnesses. We've --  
13 as the military commission knows, discovery is not limited  
14 only to helpful information; it's also limited to information  
15 that might be harmful or contradictory to Mr. Mohammad's  
16 position because it allows him to investigate it and perhaps  
17 prepare a response to it.

18           And finally, paragraphs 123 to 129 requested  
19 information about a variety of other plots that are discussed  
20 and have been discussed from -- in various places that  
21 Mr. Mohammad was said to have been involved in or to have had  
22 knowledge about; and we have requested this information in our  
23 404B motion.

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1           But again, this material is relevant because it  
2 allows us to track down the -- all of the information that the  
3 government has that relates to Mr. Mohammad's involvement in  
4 activities that are -- that relate to September 11th -- or  
5 that might be seen as either aggravating or mitigating, and we  
6 are entitled to know about this. Whether the government  
7 intends to put it on -- place it into evidence or not, we're  
8 entitled to know what the government knows about Mr. Mohammad.

9           So that's the -- that's the motion, Your Honor,  
10 subject to your questions.

11         MJ [COL POHL]: I have none.

12         LDC [MR. NEVIN]: Okay. Thank you.

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

14           Trial Counsel.

15         ADC [MS. PRADHAN]: Sir, may I be ----

16         MJ [COL POHL]: Sure. I thought I was dealing with  
17 Mr. Nevin's motion, but go ahead.

18         ADC [MS. PRADHAN]: Thank you, Your Honor.

19           We have made numerous submissions in the 286 series,  
20 and our requests for underlying documents can be found in  
21 several places in the record, in particular,  
22 AE 286 (3rd Sup) -- (AAA 3rd Sup).

23           Your Honor, I have submitted previously in a timely

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1 manner a set of slides to the court information security  
2 officer for review. Those slides have been marked 286DD by  
3 the court reporters.

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

5 ADC [MS. PRADHAN]: Thank you. May I request the feed  
6 from Table 4 and for permission to display to the gallery?

7 MJ [COL POHL]: Sure.

8 ADC [MS. PRADHAN]: Thank you. Those slides are currently  
9 being handed out by LN1 Baker to all parties.

10 So -- and this won't take too long, Your Honor. I  
11 just want to provide a number of examples.

12 MJ [COL POHL]: You've said that before, Ms. Pradhan, but  
13 okay.

14 ADC [MS. PRADHAN]: I rarely say that with regards to  
15 requests for original documents, Your Honor ----

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

17 ADC [MS. PRADHAN]: ---- but rest assured, when there are  
18 requests for original documents, I will usually be up here.

19 MJ [COL POHL]: I'll give you an opportunity to be heard.  
20 Go ahead.

21 ADC [MS. PRADHAN]: Thank you, sir.

22 We do join Mr. Nevin's arguments. We just want to  
23 point out the categories of missing information that are

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1 contained in original documents underlying the SSCI report  
2 that are relevant to Mr. al Baluchi.

3           So these are the categories of missing information  
4 that are contained, again, in the original documents. The  
5 categories are, broadly: Mr. al Baluchi's capture; his  
6 statements under torture and the circumstances of those  
7 statements being taken; the connections between the  
8 Federal Bureau of Investigation and the CIA during the course  
9 of the CIA's RDI program; and the preparation for the --  
10 President Bush's September 2006 speech, which, of course,  
11 immediately prefaced -- or was concurrent with the transfer of  
12 Mr. al Baluchi to Guantanamo Bay and the decision to transfer  
13 him to Guantanamo Bay.

14           The interesting thing about these categories is that,  
15 you know, we have argued the adequacy of some of the -- some  
16 of the summaries of these original documents are likely the  
17 subject of litigation in AE 534 and AE 562, but what's  
18 interesting about this particular -- these particular  
19 categories is that the public can identify from the redacted  
20 executive summary of the SSCI report what might be relevant  
21 and material to the defense. And so we have a few examples of  
22 clear gaps of each of these categories from the redacted SSCI  
23 summary.

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1           The first is an example of underlying documents that  
2 are relevant to Mr. al Baluchi's capture. And here, we have a  
3 footnote that talks about the assistance allegedly provided by  
4 Majid Khan to the CIA in its efforts to locate Mr. al Baluchi  
5 with a number of cables -- a large number of cables,  
6 seemingly -- that are relevant to that particular inquiry.

7           MJ [COL POHL]: How do you know you don't already have  
8 them?

9           ADC [MS. PRADHAN]: Well, we don't, Your Honor, and that's  
10 part of -- we don't necessarily know that. And that's part of  
11 what we're also -- and that's why I mentioned the AE 534 and  
12 AE 562. Really, what I want to do is just highlight how we  
13 can put together what is in the redacted SSCI report, to a  
14 certain extent, with some of the discovery that we have been  
15 provided; but we still don't know, really, what is missing and  
16 what is not, which is one of the reasons we have asked for  
17 original documents.

18           And so here we have a list of original documents that  
19 we know speak to the circumstances of Mr. al Baluchi's  
20 capture, and the decision -- the decision-making around his  
21 capture and what the expectation of his reporting might be.  
22 And the other two examples on that page also point to sections  
23 of the report or underlying documents regarding his capture.

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1           The second category is Mr. al Baluchi's statements  
2 under torture. And, of course, we've talked at great length  
3 about why we need to know, as Mr. Nevin pointed out, the  
4 details of not just what happened to him in CIA custody but  
5 all of the additional details about what he was being asked,  
6 the concurrency of his torture with his interrogations, who  
7 was in the room, et cetera. All of those details, we've --  
8 we've briefed in either here or elsewhere in AE 114, AE 525,  
9 et cetera.

10           But here in the SSCI report at this particular  
11 footnote, you see a footnote that provides -- that talks about  
12 one particular cable -- quotes a particular cable about  
13 reporting for Mr. al Baluchi, and then it also says, "As noted  
14 in several previous cables, in December 2002, the consulate  
15 became aware of" -- an incident allegedly involving  
16 Mr. al Baluchi that presumably led to his capture, presumably  
17 led to his torture.

18           And so those original documents, again, are relevant  
19 to the decision to torture Mr. al Baluchi and what reporting  
20 was expected from that decision that was made to torture  
21 Mr. al Baluchi.

22           And the third category is the connections between the  
23 Federal Bureau of Investigation and the CIA during the

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1 pendency of the CIA's RDI program. The government has  
2 actually now, per a letter they sent us on April 27th,  
3 conceded that information regarding the relationship between  
4 the FBI and the CIA is relevant and that they need to identify  
5 it. And so what this provides are a couple of footnotes from  
6 the redacted executive summary that would help identify that  
7 information.

8           And so in that first footnote, you see discussion  
9 about the FBI hosting a conference on Mr. Mohammad on  
10 May 15th and 16th, 2003, that was discussing reporting,  
11 allegedly, I guess, coming from Mr. Mohammad at the black  
12 sites.

13           And there are a number of cables cited there, all of  
14 which would seemingly be relevant to Mr. al Baluchi's both  
15 capture and rendition to the first location in which he was  
16 held, because then we see a comment below that saying, "After  
17 Ammar al Baluchi was transferred to CIA custody, the CIA  
18 subjected Ammar al Baluchi to the CIA's enhanced interrogation  
19 techniques," which of course were the torture techniques, from  
20 May 17th to May 20th.

21           Now, it's sort of a remarkable coincidence that it  
22 was immediately after a conference held by the FBI on  
23 reporting from Mr. Mohammad. So those documents would

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1 presumably be relevant and material to the decision made to  
2 torture Mr. al Baluchi.

3           And the last is a footnote talking about the -- the  
4 reporting that contributed to the September 2006 speech by  
5 President Bush that also presumably underlay the decision to  
6 transfer Mr. al Baluchi to Guantanamo Bay. And it states that  
7 there is a cable that in the previous line above the  
8 highlighting is identified as 20770 -- or, excuse me, 20790,  
9 the actual cite. And it says that -- it cites an analytical  
10 product whose relevance was limited to the connection between  
11 Mr. Mohammad and Mr. al Baluchi.

12           That document is presumably highly relevant to what  
13 reporting -- as Mr. Nevin pointed out, what reporting may have  
14 been true and what reporting may have been identified as false  
15 from both Mr. al Baluchi and Mr. Mohammad at the black sites.  
16 And in connecting those with documents that we may already  
17 have or may be requesting from the military commission in  
18 other series, we can begin to put together that picture of  
19 what the interrogations looked like and what line of  
20 questioning was followed at the time that Mr. al Baluchi was  
21 tortured and in subsequent years.

22           I just wanted to make a quick note, Your Honor, that  
23 the context of the full report -- and this returns us to the

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1 point, really, of the underlying motion of AE 286. The  
2 context of the full report matters for the military commission  
3 to be able to compare the original documents to the full  
4 report, which is one reason that Senator Feinstein in  
5 December 2016 urged transmittal of the full report to at least  
6 the military commission for the purposes of comparing the  
7 original documents to the full report to determine what is  
8 relevant and material to the defense, which is what we're sort  
9 of guessing at here, which is what you hear us guessing at.

10 And finally, just to underscore, there are still only  
11 three groups of people who have seen the original documents  
12 underlying the SSCI report. The first are the CIA officials  
13 who tortured Mr. al Baluchi, who created those documents,  
14 presumably; the second is the government team who are seeking  
15 Mr. al Baluchi's execution; and the third, of course, are the  
16 SSCI personnel who are responsible for ----

17 MJ [COL POHL]: You're assuming this is a different set of  
18 documents than the ones that went through the 505 review  
19 process?

20 ADC [MS. PRADHAN]: We're not making that assumption,  
21 necessarily, Your Honor. What we're saying is that we have  
22 identified from the redacted executive summary documents that  
23 would be relevant by their cable numbers.

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1 MJ [COL POHL]: No, but what I'm saying is is that if you  
2 take a document that the SSCI relied upon ----

3 ADC [MS. PRADHAN]: Yes, sir.

4 MJ [COL POHL]: ---- and the same document was in the, for  
5 want -- just pulling an example out ----

6 ADC [MS. PRADHAN]: Sure.

7 MJ [COL POHL]: ---- in the 308 summaries, then there  
8 would be a fourth person who saw the original document.

9 ADC [MS. PRADHAN]: That's true, Your Honor. And I  
10 apologize for not adding you to the slide.

11 MJ [COL POHL]: Well, what I'm saying is is this slide is  
12 true as it relates to the specific SSCI documents. You know  
13 these people saw it.

14 ADC [MS. PRADHAN]: Yes, sir.

15 MJ [COL POHL]: Okay. You don't know whether I saw it or  
16 not.

17 ADC [MS. PRADHAN]: Yes.

18 MJ [COL POHL]: I'm kind of in -- I would be a gray box in  
19 that -- that I may have seen it, but there's a possibility  
20 they may have seen stuff that was not given to me. Okay. I  
21 got it.

22 ADC [MS. PRADHAN]: That's certainly true, Your Honor.

23 MJ [COL POHL]: Got it.

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1       ADC [MS. PRADHAN]: My response to that would be just that  
2 we know from the SSCI report, that there are original  
3 documents relevant to these questions that we're posing. What  
4 we don't know is how these summaries -- whose adequacies,  
5 again, we are challenging in several series -- line up with  
6 those original documents. We simply don't know that.

7       MJ [COL POHL]: I hear you.

8       ADC [MS. PRADHAN]: And we've pointed out in several  
9 places where we believe information may have been stripped  
10 from those summaries. But I do think that it's worth noting  
11 that cleared defense personnel are not among these groups who  
12 have seen the original documents.

13             Thank you, sir.

14       MJ [COL POHL]: Thank you.

15             Any other defense counsel wish to be heard?  
16 Apparently not.

17             Trial Counsel? Mr. Groharing.

18             Here's the slides back. You can take the slides off  
19 the overhead.

20       TC [MR. GROHARING]: Judge, I'll first respond to 286AA  
21 specifically. As you noted, we provided our response in  
22 286BB, so I won't repeat that all here, but we did go  
23 paragraph by paragraph and explain why the relief requested by

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1 Mr. Mohammad was not appropriate in 286AA.

2 Big picture question: A number of the requests were  
3 for identities specifically, if you look at the relief  
4 requested in 286AA. And our position is on that consistent  
5 with your rulings in 308BBBB, is that the defense doesn't need  
6 to know those identities. We have offered where -- a process  
7 in 524I, consistent with the process that we proposed ----

8 MJ [COL POHL]: Mr. Groharing, when I'm reading your  
9 286BB, it causes me pause because when we discussed the 524  
10 protective order, there's a process in there that they could  
11 go to the OCA, who would make a need-to-know determination.

12 I believe I asked, either on Monday or Tuesday, a  
13 question to the effect of: Well, won't the OCA simply say  
14 that, through the 505 process, the court's already determined  
15 you don't have a need to know; therefore, we won't have a --  
16 there will be no renewal need-to-know determination?

17 And I heard the government respond to, "Oh, no,  
18 Your Honor, we won't rely on that." And then I look in here,  
19 and what I seem to be saying is that anybody who's given a UFI  
20 through the 505 process in the 308 series, for example, is --  
21 that means they don't have the -- need to know the identity.

22 TC [MR. GROHARING]: The identity, yes. That -- I don't  
23 know what I would have said that's consistent with that,

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1 Your Honor. The government's never said that the defense  
2 should have the identity of any of these people.

3 MJ [COL POHL]: Okay. So just so I'm clear so there's no  
4 conflict here, under this idea of need to know, you're talking  
5 about a need to know the identity. So if we went through  
6 this -- and I know I'm bringing back to 524. Just so I  
7 understand the process, that the defense says, "I want to talk  
8 to UFI X," and they give you what they want to talk about, and  
9 UFI X, you do the -- actually says, "Okay. I'll talk to him."  
10 Okay. Then it goes over to the OCA on a need-to-know basis,  
11 correct?

12 Okay. And what you're telling me is the identity of  
13 the person will still be protected, but the fact that I  
14 approved a summary from UFI X will not -- will not then say,  
15 "Well, they already got that. They don't have a need to know  
16 anything further."

17 TC [MR. GROHARING]: No. No.

18 MJ [COL POHL]: I just want to make sure ----

19 TC [MR. GROHARING]: That's certainly not what I meant to  
20 convey.

21 MJ [COL POHL]: Okay. It may be my confusion just reading  
22 this language here, is if they go through the process, I just  
23 want to make sure we're not saying, "Well, the judge approved

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1 the substitution; therefore, you have no need to know anything  
2 more than that."

3 TC [MR. GROHARING]: The best way to look at it, I think,  
4 Your Honor, at least from my perspective, is defense says,  
5 "Hey, I want to talk to this person about this event"; you  
6 know, "In Bates number" whatever, "there's an event  
7 documented, and I want to talk to this person about the  
8 event." And the OCA has approved -- that summary has gone  
9 through you, and certain information in the original document  
10 wasn't included in the summary based on need-to-know  
11 determinations.

12 But as far as the subject matter of what was  
13 approved ----

14 MJ [COL POHL]: No, no, no, no. Just ----

15 TC [MR. GROHARING]: ---- that's fair game to ----

16 MJ [COL POHL]: Let's be precise. The -- I get a  
17 document. You provide a summary. The summary has got to put  
18 them in the same position they would have been had they  
19 reviewed the other document. Okay.

20 TC [MR. GROHARING]: I agree 100 percent.

21 MJ [COL POHL]: Okay. I just want to make sure there's no  
22 confusion about this.

23 TC [MR. GROHARING]: And the point I'm trying to make,

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1 let's assume that the subject matter of the summary is  
2 Mr. Mohammad being waterboarded. The fact that we've given  
3 them a summary about Mr. Mohammad being waterboarded doesn't  
4 mean that the defense can't ask a person about Mr. Mohammad  
5 being waterboarded. It doesn't mean that, "Hey, you don't --  
6 you don't have a need to know because you already have that  
7 information."

8 It may come into play when we get into motions to  
9 compel witnesses and things like that if they're relevant and  
10 necessary based on the information they already have, but ----

11 MJ [COL POHL]: But on this protective order process, the  
12 person who waterboarded -- let's say here -- we're talking  
13 about people who were actually there.

14 TC [MR. GROHARING]: Right.

15 MJ [COL POHL]: Somebody that was actually there, let's  
16 just say, was observing it or actually did it, okay? And  
17 that's UFI X, okay? The fact that they've already been given  
18 that Mr. Mohammad was waterboarded ----

19 TC [MR. GROHARING]: Right.

20 MJ [COL POHL]: ---- would not preclude the defense from  
21 saying, "Well, I want to talk to somebody who was actually  
22 there, so I know exactly -- so now we can have a full picture  
23 of what exactly was done when we're talking about mitigation

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1 evidence or motions to suppress or things like that."

2 TC [MR. GROHARING]: And assignment of UFIs contemplates  
3 that in the first instance.

4 MJ [COL POHL]: Okay.

5 TC [MR. GROHARING]: That's part of what was contemplated.  
6 At least the defense would be able to ask. And we can't ----

7 MJ [COL POHL]: Okay. So this language I'm reading out of  
8 286BB refers to the identities of these people, not  
9 necessarily that you've already established they have no need  
10 to know what these people will say.

11 TC [MR. GROHARING]: Right.

12 MJ [COL POHL]: I got it.

13 TC [MR. GROHARING]: One exception is, you know, as you  
14 well know, there's information in original materials that  
15 is -- doesn't have anything to do with, you know, the  
16 treatment of Mr. Mohammad, things that you've agreed are not  
17 discoverable.

18 MJ [COL POHL]: No, I ----

19 TC [MR. GROHARING]: So if the defense then said hey and  
20 asked questions to solicit that type of information, our  
21 position would be that's the type of information that the  
22 convening -- the original classification authority and the  
23 judge has said the defense doesn't need to know.

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1           Are you tracking with that, sir.

2           MJ [COL POHL]: Got it. Got it.

3           TC [MR. GROHARING]: So -- so if -- with respect to these  
4 requests, if the purpose of the request is to seek an  
5 interview of the individual, there's a process that we have  
6 proposed for that, and the defense -- our position is they  
7 should avail themselves of that process.

8           We responded to each of the individual paragraphs in  
9 our motion. I'm happy to answer specific questions you have  
10 based on argument ----

11          MJ [COL POHL]: No.

12          TC [MR. GROHARING]: ---- thus far.

13          MJ [COL POHL]: I read your motion. I can read the  
14 response.

15          TC [MR. GROHARING]: Okay. So absent any questions,  
16 Your Honor, that's all I have.

17          MJ [COL POHL]: Mr. Nevin, anything further?

18          LDC [MR. NEVIN]: Well, just to say that the motion is  
19 drafted, again, to reach materials that the government said  
20 were not relevant. So I understand from what the military  
21 commission has said on several occasions in the past that you  
22 are not going, yourself, out, and reading the entire Senate  
23 Select Committee on Intelligence report, the 6,700-page

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1 report, and making your own determination about which of it  
2 will or won't be turned over to us. You're relying on -- in  
3 the first instance on the government to come to you and say,  
4 "We think this material is discoverable. We would like to  
5 have a substitution for it."

6 MJ [COL POHL]: There's three things in the Senate report  
7 that I think we've got to -- you understand that, but just as  
8 we review the bidding on this.

9 LDC [MR. NEVIN]: Yeah.

10 MJ [COL POHL]: There's the executive summary ----

11 LDC [MR. NEVIN]: Right.

12 MJ [COL POHL]: ---- which has been released.

13 LDC [MR. NEVIN]: Right.

14 MJ [COL POHL]: There's the report itself ----

15 LDC [MR. NEVIN]: Yes.

16 MJ [COL POHL]: ---- the 6,000 pages.

17 Then there's underlying data.

18 LDC [MR. NEVIN]: Correct.

19 MJ [COL POHL]: Okay. And the underlying data is the  
20 discoverable chunk, okay, that I have been focused on mostly,  
21 and that's the government's -- you should have -- when I say  
22 "should," it's because the government has the responsibilities  
23 to provide you all of the underlying data that was -- what I

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1 said to Ms. Pradhan -- the same cable, if it's material to the  
2 preparation of the defense, that the SSCI report is based on  
3 should be given to you in discovery anyway.

4 Are you with me on this?

5 LDC [MR. NEVIN]: Okay.

6 MJ [COL POHL]: No. I'm just saying is -- the underlying  
7 data is the discoverable stuff. Now, the report itself, we've  
8 discussed back and forth of who owns the report and things  
9 like that.

10 But -- but it's the underlying data ----

11 LDC [MR. NEVIN]: Uh-huh.

12 MJ [COL POHL]: ---- that the government should have  
13 reviewed.

14 LDC [MR. NEVIN]: Uh-huh.

15 MJ [COL POHL]: The Senate may have reviewed it, but the  
16 government reviewed it. And so you may have -- your data that  
17 is material to the preparation of the defense should be given  
18 to you, even -- but it also may be in the report. That's kind  
19 of what I'm saying.

20 LDC [MR. NEVIN]: Right. That makes sense.

21 Could I ask: Have you read the underlying data?  
22 Have you gone through it yourself, independently of the  
23 government? I take it you've not. But maybe I'm

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1 misunderstanding.

2 MJ [COL POHL]: No, no, no. I've reviewed the data the  
3 government has given me.

4 LDC [MR. NEVIN]: Right. Okay.

5 MJ [COL POHL]: So I've not reviewed -- if you say have I  
6 reviewed the 6,700 pages, the answer is no. Have I reviewed  
7 the world of the data the report is based on by saying here's  
8 what the report was based on? The answer to that is no.

9 LDC [MR. NEVIN]: Right. Okay.

10 MJ [COL POHL]: I've reviewed what the government has  
11 provided through the 505 process.

12 LDC [MR. NEVIN]: Okay. And could I ask, just for  
13 reference purposes: Have you read the executive summary that  
14 was released?

15 MJ [COL POHL]: Yes.

16 LDC [MR. NEVIN]: Okay. So here's my -- here's the  
17 dilemma that we face -- or maybe it's a trilemma -- but the  
18 report is indicating the existence of documents, underlying --  
19 part of the underlying documents. The -- I'm sorry. Let me  
20 speak carefully, or try to.

21 The executive summary is indicating the existence of  
22 documents, and it appears to be among the underlying documents  
23 that I understand run to six million pages or so. So we are

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1 saying to the government, "We don't have this material that  
2 is -- that is plainly in existence based on reading the  
3 executive summary. Please give it to us."

4 And we recognize -- we all recognize how the 505 --  
5 what the 505 process intends, that the material might have  
6 been given to you in summary fashion -- might have been shown  
7 to you along with a summary, and we might then have received a  
8 summary that you have decided puts us in the same position to  
9 make a defense as the original would have. Okay.

10 So but we might not know that. There might be many  
11 ways that we might not know that. For example, the material  
12 may have been summarized in a different form or it may look  
13 differently than what the executive summary would lead you to  
14 expect. So when we write this discovery request, we say,  
15 "Give it to us. And if you're not giving it to us, tell us  
16 why, and -- but also if you've already given it to us or if  
17 it's your position you've already given it to us, tell us  
18 that."

19 So what we've done here in this motion is we've come  
20 to you and just said that we -- it's a motion to compel that  
21 addresses just the things that the government has said are not  
22 relevant. Or at least that's the -- the vast majority of this  
23 is materials that the government has said is not relevant.

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1           So what that says to us is they're saying, "You are  
2 not entitled to this at all." And that implies, at least,  
3 that they have not brought it to you and said, "Here's this  
4 material, and here's what we would like to summarize,"  
5 and ----

6           MJ [COL POHL]: You're right. If the government concluded  
7 a piece of evidence wasn't material to the preparation of the  
8 defense under 701 and ----

9           LDC [MR. NEVIN]: You're never going to see it.

10          MJ [COL POHL]: ---- there would be no reason to bring  
11 that to me.

12          LDC [MR. NEVIN]: Correct.

13          MJ [COL POHL]: I got it.

14          LDC [MR. NEVIN]: So anyway, the motion says, "Really?  
15 This stuff is not relevant? Of course this stuff is relevant,  
16 and you either need to give it to us or give it to the judge  
17 in the form of the summary and go through the 505 process."  
18 That's really what this motion boils down to. Okay.

19          MJ [COL POHL]: Thank you.

20          LDC [MR. NEVIN]: Thank you.

21          MJ [COL POHL]: Ms. Pradhan, anything further?

22          ADC [MS. PRADHAN]: [Microphone button not pushed; no  
23 audio].

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1 MJ [COL POHL]: Well, her microphone wasn't on. That was  
2 a no, thank you.

3 Last word, Mr. Groharing, if you need to.

4 TC [MR. GROHARING]: Absent questions from you,  
5 Your Honor, I have nothing further to add.

6 MJ [COL POHL]: I have no further questions.

7 One moment, please.

8 Yesterday at the 802, we discussed the motion we're  
9 going to discuss today, and I indicated that was 559, 563, and  
10 568. On the original docket, 563 was not on it. And after --  
11 without looking at it again, I put it on the docket for today,  
12 but then after reviewing it last night, I don't believe  
13 further oral argument on 563 is necessary, and therefore,  
14 under the discretion under the rules, we will not have further  
15 oral argument or any oral argument on 563. I apologize if  
16 some counsel may have been prepared for it, and the  
17 preparation will not be necessary.

18 With that being said, 559. Mr. Nevin.

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

20 This is a motion, Your Honor, an unlawful influence  
21 motion. And I will say, I gathered from the colloquy  
22 yesterday that this is a -- perhaps a thirteenth unlawful  
23 influence motion, or maybe twelfth or something. But I will

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1 say, I wouldn't be surprised if a year or two from now we're  
2 arguing the twenty-third motion, or, for that matter, the  
3 thirty-third.

4 I don't shrink from it. I don't apologize for it.  
5 There are a lot of people trying to influence this military  
6 commission. And it's happened in a lot of ways. And I think  
7 you can speculate about the reasons, but I don't think it's --  
8 this is the last time you're going to be hearing from us about  
9 unlawful influence.

10 In this case, it's the President in November of 2017  
11 arising from the attacks in New York of -- occurring on  
12 31 October of 2017 which involved the -- the West Side bike  
13 path and a man who drove a truck on there and apparently  
14 killed a number of people. And it was discussed publicly that  
15 the President was thinking about sending him, that man, to  
16 Guantanamo Bay, presumably to be prosecuted in a military  
17 commission.

18 And the President made a number of remarks that are  
19 set out in the motion, that "We have to come up with  
20 punishment that's far quicker and far greater than the  
21 punishment these animals are getting right now," and "because  
22 what we have right now is a joke and it's a laughingstock."

23 And those -- those remarks were made on November 1 of

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1 2017, the day after those attacks I was referring to, but --  
2 and they don't specifically refer to Guantanamo, but the next  
3 day, the President clarified any doubt about what he was  
4 referring to, and he said that he would love to send the  
5 New York City terrorist to Guantanamo, but statistically, that  
6 process takes much longer than going through the federal  
7 system. And he also said that this should move fast, and he  
8 stated, in all caps, "DEATH PENALTY!"

9           And then we point you also to remarks the next day  
10 that happened to flow -- it happened that in that time frame,  
11 there was a result in the Bowe Bergdahl court-martial, and the  
12 President remarked on the next day, 3 November of 2017, that  
13 "This decision on Sergeant Bergdahl is a complete and total  
14 disgrace to our country and to our military."

15           And we then filed a motion to dismiss for unlawful  
16 influence. And, of course, I -- the military commission will  
17 understand that I don't hold myself out as an expert on  
18 unlawful influence, and certainly not by comparison to other  
19 people in the courtroom, but the point of the motion is that  
20 the President, whom I understand to be the Commander in Chief  
21 of the military and of the Armed Forces, is clearly attempting  
22 and succeeding in sending a very clear message to the  
23 potential members and to this commission as well.

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1           I know that the -- that the move to require the --  
2 all of the military judges to have their duty stations changed  
3 to Guantanamo Bay permanently was made overtly because there  
4 was a desire to make the commission move faster. And we --  
5 and the commission dealt with that as you did. There are --  
6 we hear frequently that there is frustration at the -- at this  
7 process moving so slowly; and we -- that's something that we  
8 have addressed argumentatively on while referring to other  
9 matters from time to time.

10           And I'm not going to argue it here, but this is  
11 another attempt to tell this military commission how to  
12 proceed. And also what we have here is the sending of a  
13 message to people within the -- within the military, the ranks  
14 of military officers who might end up being members of our  
15 military commission some day when the case is tried.

16           So there's -- I point out to you again the sort of  
17 blanket statement that people involved in terrorism or accused  
18 of terrorism offenses should receive the death penalty, which  
19 is -- the death penalty being a punishment to which  
20 Mr. Mohammad is presumed not to be subject. And the  
21 government is required to carry its burden of proof beyond a  
22 reasonable doubt that that is the appropriate sentence, and  
23 that is to be found by the members.

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1           And here, you have the Commander in Chief saying that  
2 he wants this not only to happen, but also that he wants it to  
3 happen quickly; and further, saying that he expects this kind  
4 of an outcome.

5           Now, I think that what's maybe most pernicious about  
6 this is the way -- people who are watching this who are  
7 potential jurors, the way they see what happens. I -- you --  
8 you are used to there being a fair amount of scrutiny of your  
9 decisions, maybe even publicly as well; I think that's  
10 probably true. And I'm used to that to a certain extent about  
11 my actions, not as much as you.

12           But people who sit on this jury someday are now going  
13 to be in the position of thinking that if they don't give  
14 the -- render the decision they want -- that the President  
15 wants them to render, they're going to be called out in this  
16 way, in a way that is probably going to be very alarming to  
17 them. The Commander in Chief of the military is telling them  
18 the result that he wants here, which is a death penalty.

19           And, you know, I believe, personally, that leaders in  
20 the country should not be -- with respect to any case, whether  
21 it's in a military case where you have the idea of unlawful  
22 command influence because of -- because you're located within  
23 the Executive Branch of the government as opposed to being an

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1 Article III judge -- whether it's in that context or whether  
2 it's in the context of cases appearing in the federal courts  
3 or in the state courts, these things ought to be decided by  
4 impartial juries who are not being influenced by people from  
5 the outside.

6 But where you have the President, the most powerful  
7 person, arguably, in the world, certainly the most powerful  
8 person in the United States and the most powerful person --  
9 the most -- the person who -- to whom people pay the most  
10 attention to his remarks, when you have this person bringing  
11 this case and other cases in the military commission under  
12 its -- under the microscope, it's really shocking.

13 We -- I recognize that the government said -- points  
14 to a Presidential White House statement being released saying  
15 that the President expects all military personnel who are  
16 involved in the justice process to exercise their independent  
17 professional judgment. I mean, I would just point out that  
18 that statement was released before the President's -- the  
19 remarks of the President that I have been referring to. And  
20 so you have, at best -- you have, at best, contradictory  
21 indications from the President.

22 And I submit to you that this is sending a clear  
23 message, and I -- to you, to me, to the members, to everyone,

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1 about what is expected from the most powerful -- what the most  
2 powerful people in the world expect to have happen here. And  
3 that's exactly what -- and, you know, more to the point, if it  
4 doesn't happen, just look at the Bergdahl result. If that  
5 doesn't happen, people are going to be attacked publicly by  
6 the President.

7           So I submit to you that it meets both the definitions  
8 of actual and of apparent unlawful influence. It will have  
9 the effect on -- and I have heard the military commission say  
10 before that if -- that if things have a particular impact on  
11 you, you will say so. But I know that the military commission  
12 can't speak for these members who have not actually been  
13 seated to -- selected to sit here yet. And I think it's  
14 reasonable to look at a development like this and to say --  
15 it's reasonable to conclude that that's going to have an  
16 effect on some of these members.

17           And you can ask people about this on voir dire --  
18 which is one of the places we've gone before with unlawful  
19 influence. You can ask people about these matters on voir  
20 dire, but it's very, very difficult to unring a bell. And, in  
21 fact, when you ask them about it, you run the distinct risk of  
22 reinforcing it in a particular way that may or may not be  
23 helpful. So it is -- there's really -- in my experience of

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1 dealing with juries, it's very hard to unring a bell like this  
2 one.

3 But certainly, you have apparent unlawful influence  
4 here, because it -- to a reasonable person standing outside  
5 looking at this, you have a military commission -- you have  
6 the head of the military, the Commander in Chief, saying this  
7 is how I want this to come out. And it looks to a reasonable  
8 person watching this like the fix is in; like, "You've been  
9 told what to do. Go do it."

10 And I understand why -- even though I'm not practiced  
11 in this arena, as you know, I can understand why it's referred  
12 to as the "mortal enemy." But I think that's where we are.  
13 So that's the reason for the motion.

14 And I would say, Your Honor, just the last thing  
15 before I sit down. I know we remind you frequently that it's  
16 a capital case, and that there's a requirement for heightened  
17 reliability in the factual determinations in a capital case.  
18 What you're really seeing here is actions of the President  
19 which make it impossible to have that kind of reliability.

20 I don't know how you ever get to the place where you  
21 can say these people are deciding this case just based on what  
22 they saw in court as opposed to what they may have been told  
23 in the media before they ever got here and what may have been

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1 put into their -- their general state of mind, let's say,  
2 years before they even arrived at this courtroom.

3 So certainly, I would say that it would be within the  
4 realm -- it would be within the scope of cases that result in  
5 dismissal, but it would be appropriate for this no longer to  
6 be a capital case as a result of remarks like this as well.

7 So thank you for hearing my argument.

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

9 Any other defense counsel wish to be heard?  
10 Mr. Harrington.

11 LDC [MR. HARRINGTON]: Judge, as Mr. Nevin mentioned, the  
12 reference was made that there have been multiple motions about  
13 undue influence. And I think it has to be looked at in a  
14 different way. I think in this situation, you have to look at  
15 the defense as actually the guardians of the commissions. If  
16 we don't bring these motions and issues to your attention,  
17 then there's not going to be any integrity in the commissions  
18 if there's all of these people throwing shots and nobody  
19 discusses it, nobody brings it out.

20 In this particular motion, I agree with Mr. Nevin but  
21 I would certainly think -- and you have mentioned before, we  
22 have no reason to not to -- or to question it, that if you  
23 thought there was somebody trying to influence you, you would

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1 indicate so, and you would tell what effect it had on you.

2           And with respect to this influencing potential jurors  
3 in the future, it certainly was -- could be -- you could say,  
4 "Well, I don't have enough in front of me right now. That's  
5 too speculative. We can address it juror by juror when they  
6 come when we do voir dire." And I agree with Mr. Nevin, very  
7 hard to unring the bell, but that would seem to me to be a  
8 decision by you that would be considered to be reasonable.

9           But when you write a decision on this motion and the  
10 others, I think it would be helpful for you to make comment  
11 about the potential effect of what people like the President  
12 of the United States can have in the future on these  
13 commissions so that there's a shot across the bow, so that  
14 maybe some of these things stop happening. I'm not saying  
15 that he will listen. I'm not saying anything else about it.  
16 We all know that he operates to the beat of his own drummer.  
17 We know that.

18           But the point of it is is that if sometimes you get a  
19 forewarning, it makes it significantly more likely that in the  
20 future, that you would consider this in a way; if he crosses  
21 the line way too far, that it would be much easier to decide  
22 that way. Thank you.

23           MJ [COL POHL]: Thank you, Mr. Harrington.

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1           Anything other -- further from any of the defense  
2 counsel?

3           Trial Counsel? Mr. Swann.

4           TC [MR. SWANN]: Your Honor, the President's comments that  
5 you have in front of you from Mr. Nevin's brief and the  
6 comments about Sergeant Bergdahl are about Sergeant Bergdahl  
7 and have nothing to do with this commission.

8           MJ [COL POHL]: Mr. Swann, have you ever had another  
9 example of where a court-martial was held, and as soon as it  
10 was over with, the President of the United States specifically  
11 criticized the military judge's decision in that case?

12          TC [MR. SWANN]: No, Your Honor. And --

13          MJ [COL POHL]: Do you believe that was an appropriate  
14 comment by the President of the United States?

15          TC [MR. SWANN]: No, Your Honor, I do not. I do not  
16 believe that. It was a passing remark -- it was after a  
17 curative statement in that case; that that was a passing  
18 remark as he was walking out of the Rose Garden. I can't  
19 possibly ----

20          MJ [COL POHL]: Okay. So now it's not ----

21          TC [MR. SWANN]: It is not ----

22          MJ [COL POHL]: Does that really minimize it in any way?

23          TC [MR. SWANN]: It is not -- it is not permissible, and

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1 it should not be made. But I've heard other comments made by  
2 other officials in this case. We addressed those with  
3 President Obama. He made certain comments that were not  
4 appropriate either. Mr. Holder made comments that were not  
5 appropriate either. I addressed those.

6 MJ [COL POHL]: Is this a cumulative UI issue, that  
7 regardless of whether it's a Democrat or Republican  
8 administration ----

9 TC [MR. SWANN]: No, Your Honor.

10 MJ [COL POHL]: ---- that we look at them in isolation?

11 TC [MR. SWANN]: No, Your Honor.

12 MJ [COL POHL]: I understand this is not a court-martial.  
13 Got it. Therefore, it's not directly analogous to the  
14 Bergdahl case. But the Bergdahl remarks from the President of  
15 the United States, as you just stated, were unprecedented. I  
16 have never -- well, I don't want to testify, but it would  
17 strike to me that a review of the caselaw, you would never  
18 find analysis -- we have convening authorities that say things  
19 like that, and they get disqualified.

20 Now, again, it's not this case and it's not a  
21 commission case, but does it reflect an attitude by the  
22 Commander in Chief of what he views his role is in the justice  
23 system?

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1 TC [MR. SWANN]: Here's what I would say to that. First  
2 of all, when we seat the members, they can ask or someone can  
3 ask if they're familiar with any comments made by the  
4 President of the United States. If they believe that they  
5 cannot sit on this case based on those comments, they hold  
6 their hands up; they go away. If you believe that they are  
7 not being straight with you on that particular issue, they go  
8 away.

9 How many people -- I pay no attention most of the  
10 time to comments being made. They only come across my desk  
11 when they have anything to do with what these proceedings are  
12 about. The comments that he made about Sergeant Bergdahl  
13 are -- they didn't have any effect on that judge, and they  
14 wouldn't have had --

15 MJ [COL POHL]: Well, it was after the judge had gave his  
16 sentence. It would be very difficult to ----

17 TC [MR. SWANN]: There were comments before that, that  
18 were also equally inappropriate.

19 MJ [COL POHL]: Didn't he specifically criticize -- okay.  
20 Now we're talking about how much unlawful -- or, excuse me,  
21 how many poor remarks the President made before and after  
22 Bergdahl. But I'm saying -- the "after" ones is what I'm  
23 focusing on, is a military judge gives a sentence that he

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1 thinks is appropriate, and then the President of the United  
2 States, the Commander in Chief, feels necessary to criticize a  
3 colonel of the United States Army for a decision that we all  
4 know he's empowered to make. And my observation is simply, is  
5 to me, that is something I am unfamiliar with in any other  
6 potential case.

7 Now, he may have said inappropriate things ahead of  
8 time, too, but I'm not sure that cuts for your argument. But  
9 go ahead.

10 TC [MR. SWANN]: If you're asking me if the comments were  
11 inappropriate, I agree with you. Having been a judge myself,  
12 if I had been sitting there on that case, I would have found  
13 those comments inappropriate. But let's get to what we're  
14 really talking about aside from the Bergdahl issue.

15 You're talking about a man who takes his vehicle to  
16 the streets of New York City on a bike path, and he kills  
17 eight individuals -- coincidentally, the same number of  
18 children that were killed in this case. He injures many, many  
19 others, and there are a number of comments that are made after  
20 that. Those comments that the President made that day were  
21 focused on that terrorist, not the gentlemen that are in this  
22 room.

23 MJ [COL POHL]: Well, were those comments appropriate to

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1 say that a guy who is presumed innocent should get the death  
2 penalty?

3 TC [MR. SWANN]: No, sir. No, sir. They're not. But you  
4 have ----

5 MJ [COL POHL]: I mean, this tracks also with some of the  
6 other comments in this case with Attorney General Holder.

7 TC [MR. SWANN]: I'm sorry?

8 MJ [COL POHL]: I said, those sort of track with  
9 general -- Attorney General Holder's comments ----

10 TC [MR. SWANN]: Absolutely, they do.

11 MJ [COL POHL]: ---- of what would happen if this was  
12 tried in an Article III court.

13 TC [MR. SWANN]: They do. And, in fact, there are going  
14 to be other comments made after today. I'm convinced of that.  
15 That's just the way things -- but when we sit this panel ----

16 MJ [COL POHL]: Do we have to accept that, though?

17 TC [MR. SWANN]: How do we stop it, sir? That's the  
18 question.

19 MJ [COL POHL]: Oh, I got ways to stop it.

20 TC [MR. SWANN]: Let's --

21 MJ [COL POHL]: I mean, I don't mean to be flippant on  
22 this thing, but I am not left without remedies to simply say,  
23 well -- and again, with all due respect to the Commander in

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1 Chief, if he wants to interject himself into this process by  
2 making these kind of comments, it's my job to make sure that  
3 the process is still fair. And that doesn't mean we're going  
4 to go through 500 members if -- you know, what's disturbing  
5 here, Mr. Swann -- and again, I'm not asking you to defend the  
6 President's remarks -- is that we have this White House  
7 statement about the independence of military justice, okay.  
8 It's not from the President. It's from the White House; the  
9 building wrote it itself, apparently, okay, and then shortly  
10 thereafter when he gets a result he doesn't like, he makes the  
11 Bergdahl comments.

12           Then when a guy commits a horrendous crime, assuming  
13 he did it, allegedly -- and I got the thing. And again, we're  
14 all human, and that's a tragedy that people died like that,  
15 okay? But there's a certain responsibility that comes with  
16 these offices that appears to be ignored. I mean, our  
17 discussion today, you know, will it generate something else?  
18 I don't know. That's not my intent. My intent is to protect  
19 the integrity of this process.

20           So go ahead.

21           And I understand he didn't speak specifically --  
22 specifically talk about this case.

23           TC [MR. SWANN]: He did not.

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1 MJ [COL POHL]: Okay.

2 TC [MR. SWANN]: I would say this -- and I think it comes  
3 from your ruling in 031BBB dated 5 April -- "With the advent  
4 of social media and 24-hour, worldwide news coverage, courts  
5 of criminal justice [sic] must be ever vigilant to preserve  
6 the right of an accused to be adjudged by an impartial jury."  
7 We're going to decide that when we seat the jury in this case.

8 But the members on that jury, not one of them is  
9 going to be ignorant of such things as this is the single  
10 largest murder case in the United States. Not one of them  
11 will not know that people, women and men, threw themselves out  
12 of buildings because of the flame and the collapsing buildings  
13 to the concrete streets of New York. Not one of them will not  
14 know of the brave firefighters and police officers that died  
15 that day. Not one of them will not know of what happened on  
16 Flight 93.

17 A few comments like this, which the defense can ask  
18 about, should not lead to taking the death penalty off the  
19 table. More -- command influence talks about finding a  
20 remedy. The remedy here is not to dismiss the case; it is not  
21 to take the death penalty off the table. We're talking 2,976  
22 men, women, and children.

23 We're not talking about -- and the members will

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1 decide the death issue. They'll decide the death issue based  
2 on a host of other things, not just a few comments made by the  
3 President.

4 Subject to your questions.

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

6 Anything further, Mr. Nevin?

7 LDC [MR. NEVIN]: Yes, Your Honor. First, the Bergdahl  
8 remark was not a passing remark, as counsel said. It was a  
9 tweet. It's attached as Exhibit H to 559. So it was clearly,  
10 plainly calculated, at least to that extent.

11 I hope nothing I said was intended to make you feel  
12 that I was attacking the President because I don't like him or  
13 because he's a Republican as opposed to a Democrat, argument  
14 about ----

15 MJ [COL POHL]: Mr. Connell [sic], this whole discussion,  
16 despite perhaps some of the language that some people,  
17 including myself, might use, is focused on legal issues.

18 LDC [MR. NEVIN]: Yeah.

19 MJ [COL POHL]: The facts are the facts. The President of  
20 the United States made a decision to interject himself, not  
21 necessarily in this proceeding -- maybe, maybe not -- but he  
22 chose to make these comments or these tweets. That was his  
23 decision, not yours, not mine, not Mr. Swann's. So go ahead.

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1 LDC [MR. NEVIN]: Yeah, but I didn't mean to say that  
2 President Obama never would have done this or Mr. Holder never  
3 would have done this. I agree, it's happened a lot; that was  
4 the point I made.

5 MJ [COL POHL]: Yeah.

6 LDC [MR. NEVIN]: And then the last thing was that counsel  
7 said that -- I heard counsel say that this decision will get  
8 made on -- about death or not death or guilt or not guilt will  
9 get made based on many, many factors.

10 But if you read the social science research where  
11 jurors in capital cases have been interviewed, what you find  
12 is that frequently, these decisions boiled down to ineffable  
13 moments within a trial or within the consciousness of the  
14 person making the decision. It isn't a simple weighing  
15 process. It is hard to say what moves a person from this  
16 column to that column. And so I -- this is why I think it's  
17 so important that proceedings like this one be as impeccable  
18 as they can be.

19 In my view, the -- what this does -- what the  
20 President's remarks do to the possibility of fairness here is  
21 an incredibly powerful effect, and one that it isn't possible  
22 to talk anybody's way out of or to remove from the process.  
23 It isn't a matter of weighing how many points there are for or

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1 against a particular outcome.

2 Decisions are made in ways that are not completely  
3 capable of being understood. And when the President gets in  
4 the middle of it, it wrecks that ability for the process to be  
5 fair and clean. And that's the basis for the motion, really.

6 Thank you, Your Honor.

7 MJ [COL POHL]: Mr. Harrington, anything further?

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

9 MJ [COL POHL]: Mr. Swann, last word, if you have one.

10 TC [MR. SWANN]: I have nothing, sir.

11 MJ [COL POHL]: Okay. Thank you very much.

12 That brings us to 568.

13 DC [MR. GLEASON]: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon, Mr. Gleason.

15 DC [MR. GLEASON]: Your Honor, AE 568 is a defense motion  
16 to compel discovery of business records correspondence. In  
17 this motion, it was based off the testimony that the  
18 commission received on 6 December 2017 from FBI Special Agent  
19 Abigail Perkins.

20 During her testimony, she was being examined by the  
21 prosecution and offered financial records pertaining --  
22 allegedly pertaining to Mr. Hawsawi and supported those  
23 records with business record certificates. She testified that

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1 the FBI gathered the documents it wished to use against  
2 Mr. Hawsawi.

3 It then took those documents and provided them to a  
4 foreign government, specifically the United Arab Emirates, and  
5 asked them to obtain business record certificates for the FBI.  
6 At the end of that pipeline, declarations came back to the  
7 FBI, and those were used against Mr. Hawsawi. That's at the  
8 transcript at pages 17578 and 17579.

9 Following Special Agent Perkins' testimony, the  
10 defense filed a request for discovery to the prosecution,  
11 which is attached -- is Attachment B to this motion, where we  
12 ask for all FBI Form 302s, notes, letters, e-mails, or other  
13 material discussing how the FBI obtained these financial  
14 documents and how they obtained the declarations.

15 The law that governs this discovery request,  
16 Your Honor, is Rule for Military Commission 701(c)(1) which  
17 provides that the government shall permit the defense to  
18 examine any books, documents, papers, photographs, tangible  
19 objects, buildings, or places so long as they are under  
20 control of the government and material to the preparation of  
21 the defense or intended for use by trial counsel as evidence  
22 in the prosecution of the case.

23 MJ [COL POHL]: I just want to make this clear. I'm

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1 looking at your discovery request attached to your base  
2 motion, and on the second paragraph, you reference  
3 Special Agent Perkins' testimony where she communicated with  
4 third parties to obtain business records and business record  
5 certification, but then your third paragraph asks for not just  
6 Perkins' business records, but all business records related to  
7 Mr. Hawsawi; is that correct? Just reading your ----

8 DC [MR. GLEASON]: Yes, that is correct, Your Honor.

9 MJ [COL POHL]: And referring to what Perkins said that  
10 there was others.

11 Now, have you gotten any information about Perkins,  
12 herself, any business records involving her?

13 DC [MR. GLEASON]: We haven't, Your Honor. And I'd like  
14 to point out for the commission, too, that we originally --  
15 way back in March of 2017, in response to 491, which is when  
16 the government tried to initially offer these or preadmit  
17 these documents, we filed an objection, and we included in  
18 491C a discovery request for information about this. And here  
19 we are over a year later, we still haven't received any of  
20 this information in discovery, Your Honor.

21 MJ [COL POHL]: Okay.

22 DC [MR. GLEASON]: Based on the Rules for Military  
23 Commission, this is clearly documents -- these documents are

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1 in the possession of the government, and they are clearly  
2 material to our preparation of this defense; and the  
3 government has an obligation to provide these in discovery to  
4 us.

5 And can I have one moment, Your Honor?

6 MJ [COL POHL]: Sure.

7 DC [MR. GLEASON]: And I'll note that the -- in the  
8 response that was filed 23 April 2018, which is AE 568A, the  
9 prosecution indicated that they will provide information to us  
10 in response to our discovery request.

11 If that's going to be their argument today,  
12 Your Honor, I would ask that this motion be carried over to  
13 the next hearing so that we can -- again, if we don't receive  
14 the discovery, we can re-raise it with the commission.

15 MJ [COL POHL]: Got it.

16 DC [MR. GLEASON]: Thank you, Your Honor.

17 MJ [COL POHL]: Thank you.

18 Trial Counsel?

19 TC [MR. RYAN]: Your Honor, we'll rely on our pleadings in  
20 this matter.

21 MJ [COL POHL]: Okay. How about the remark -- you aren't  
22 going to get off that easy, Mr. Ryan.

23 Mr. Gleason seems to believe that there is some type

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1 of additional evidence the government will give them related  
2 to this discovery request?

3 TC [MR. RYAN]: Not evidence, sir, but additional  
4 materials ----

5 MJ [COL POHL]: Materials.

6 TC [MR. RYAN]: ---- which we have committed to. I will  
7 take that for action and make sure it gets done.

8 MJ [COL POHL]: Okay. Therefore, we'll carry this over to  
9 the next ----

10 TC [MR. RYAN]: No objection, sir.

11 MJ [COL POHL]: ---- the next hearing.

12 And, Defense, if you need to file a supplement based  
13 on what you've gotten, that probably would be useful for me to  
14 know what you get and then what you've not gotten, okay?

15 Thank you, Mr. Ryan.

16 Any other matters that we can take up in an open  
17 session?

18 LDC [MS. BORMANN]: Yes, Judge. I just have to briefly  
19 address the court.

20 MJ [COL POHL]: Okay. And Mr. Harrington, you will be  
21 next.

22 LDC [MS. BORMANN]: Today, as you can see, we were running  
23 in and out, and it's because we were preparing a series of

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1 motions. I wanted to inform the court before we broke, today  
2 is the date due for a supplementary filing on 399 (WBA). We  
3 have it prepared and ready to go, but it needs to be filed on  
4 SIPR; it has a Secret attachment. Here's the problem.

5 We have paralegal staff back in the  
6 National Capital Region in Virginia to do that, but our SIPR  
7 network is completely out in our Virginia offices, so nobody  
8 has any access at all to SIPR so we can't file it.

9 We're not composed here today with people who  
10 actually have an expertise to do that, because we're in court.

11 MJ [COL POHL]: File a motion -- a motion to file late due  
12 to technological problems.

13 LDC [MS. BORMANN]: Okay. I just don't even know when  
14 it's going to be up. It's been out since last Thursday.

15 MJ [COL POHL]: Yeah, yeah, I understand, but you're  
16 talking about a technological reason for it.

17 LDC [MS. BORMANN]: A big one.

18 MJ [COL POHL]: But you can make an unclassified motion  
19 for additional time.

20 LDC [MS. BORMANN]: Okay. We'll go ahead and get that in  
21 over lunch.

22 MJ [COL POHL]: The only reason I say that is that's the  
23 only way we can track things. I mean, I'd sit here and say

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1 you can do it now but ----

2 LDC [MS. BORMANN]: Sure. I understand. I just want to  
3 let the court know that it is not even something we know when  
4 it's going to end. We've been working on it for a week.  
5 Thank you.

6 MJ [COL POHL]: Okay. Mr. Harrington.

7 LDC [MR. HARRINGTON]: Judge, yesterday we talked about  
8 discussing at least a status or something about 565 -- or the  
9 motions 565N was the motion filed last Friday seeking to abate  
10 the hearings based upon an escalation of conditions with  
11 respect to Mr. Binalshibh. 565R was filed yesterday; it's  
12 another motion for contempt of your order. And in those  
13 pleadings, you can see that the situation with Mr. Binalshibh  
14 has escalated even beyond the other times when I've stood  
15 before the court or we've argued it or when he testified --  
16 when he testified earlier.

17 And the other day we sort of touched on it when I  
18 indicated to you some of his frustration about this. And he  
19 clearly does not understand that you can't remedy this  
20 situation just by telling somebody to do something; and knows  
21 that you've made an order, and he believes that order is not  
22 being followed by the guard force.

23 And you asked me, "What do you want me to do?" You

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1 keep asking me, "What do you want me to do?" And I keep  
2 saying, "Well, make another order." And you say, "Well, I  
3 made an order to stop doing something. They say they're not  
4 doing it. And, you know, what are we doing here?"

5 I think, at a minimum, if the court could indicate  
6 just generally or to the prosecution that if we have a hearing  
7 on this, and we are successful in proving to you that these  
8 things are, in fact, happening and they are being caused by  
9 the guard force or somebody else in the camp, that there will  
10 be consequences for it. I mean, you have limited contempt  
11 powers. Mr. Binalshibh doesn't understand that, either.

12 But under the statute, you have limited contempt  
13 powers, not the same as many other courts -- and we recognize  
14 that -- but one of the ones ----

15 MJ [COL POHL]: You seem to have an expansive view of my  
16 contempt powers.

17 LDC [MR. HARRINGTON]: No, I know. You'd say you have  
18 none, I suppose, but ----

19 MJ [COL POHL]: Well, no, I didn't say I have none. I'm  
20 just saying is that other members of the commission defense  
21 bar have a much more limited view of a judge's contempt  
22 powers, but I guess it depends on who's being held in  
23 contempt.

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1 LDC [MR. HARRINGTON]: It always is, Judge. It always is.

2 MJ [COL POHL]: No, I understand that. And you don't  
3 speak for them; you speak for yourself. So I understand that.

4 So if I understand you right, you want me to  
5 reiterate the order and say, "I really mean it this time, and  
6 if this doesn't -- if this isn't resolved by the next hearing,  
7 we're going to have an evidentiary hearing, and we will take  
8 evidence on it. And if I find that there is a violation of  
9 the order, there will be a remedy."

10 You know, of course, the problem here,  
11 Mr. Harrington -- and I have given you every opportunity, and  
12 I sympathize with how Mr. Binalshibh feels -- the difficulty  
13 here of moving the evidentiary factual predicate.

14 LDC [MR. HARRINGTON]: Right.

15 MJ [COL POHL]: But did I -- is that kind of what you're  
16 asking me for now?

17 LDC [MR. HARRINGTON]: No, Judge. It's just -- I want the  
18 court to be aware of the severity of this problem because it  
19 spills over into the continued representation of  
20 Mr. Binalshibh by me and certain other lawyers on our team. I  
21 mean, it could clearly lead to motions to withdraw, to  
22 discharge of counsel, to severance, to, you know, abatement of  
23 the proceedings.

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1           And that's not something that I'm -- I want to have  
2 happen and not something that I hope does happen, but this --  
3 every time we come down here, there's a pattern that two weeks  
4 or three weeks before the hearings, this ratchets up again.  
5 And we come here -- and, for example, in this period of time,  
6 it took three or four days before I could even speak with  
7 Mr. Binalshibh. And that's no way to defend a capital case,  
8 and it's no way to represent anybody. And so I'm obviously  
9 hoping that the court can emphasize that, that there could be  
10 repercussions.

11       MJ [COL POHL]: Okay. Thank you, Mr. Harrington.

12           Anything further for an open session?

13       LDC [MR. NEVIN]: Ms. Radostitz's appearance, is that  
14 appropriate at this point or -- she can put her ----

15       MJ [COL POHL]: Well, I don't have the paper. I don't  
16 have the detailing order.

17       LDC [MR. NEVIN]: Oh, okay.

18       MJ [COL POHL]: But we can process. I mean, the only  
19 thing I would short circuit the process perhaps if she was  
20 going to say something. All we have left is the 806. But if  
21 she isn't going to make an appearance, we can do it next time.

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

23       MJ [COL POHL]: Thank you.

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1           Mr. Connell.

2           LDC [MR. CONNELL]: Your Honor, I request an 802 to  
3 discuss a scheduling matter, but it doesn't matter to me when  
4 that 802 is, just sometime before ----

5           MJ [COL POHL]: Would it impact this week?

6           LDC [MR. CONNELL]: No, sir. I need to talk to you about  
7 the path forward.

8           MJ [COL POHL]: The way forward here now is I believe we  
9 have concluded for this week every open session thing.  
10 Yesterday I held a hearing under 505(h), and the purpose of  
11 that hearing is to determine whether classified evidence -- to  
12 determine whether classified evidence is necessary to resolve  
13 certain issues.

14           And the way that works -- I'm speaking to others  
15 because people in this room know this -- is that we take a  
16 small bit of classified evidence as is necessary to resolve  
17 the issue but still preserve as much of a public trial as  
18 possible. At that hearing, I heard arguments of counsel and  
19 decided that there is some small pieces of classified evidence  
20 that are necessary to resolve certain of the arguments.

21           As such, under Rule for Military Commission 806, we  
22 will have a closed session to discuss that classified  
23 information. But again, so everybody understands, we keep

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1 these things as narrow as possible.

2           What we would do now is we will recess the open  
3 session. We will reconvene for the closed 806 session at 1500  
4 to give the court reporters an opportunity to set up and  
5 switch out. The detainees can remain in here until 1400, and  
6 then they can be transported out and we'll do the closed  
7 session at -- the 806 session at 1500.

8           The commission is in recess.

9 [The R.M.C. 803 session recessed at 1246, 3 May 2018.]

10                                   [END OF PAGE]

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