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1 [The R.M.C. 803 session was called to order at 0908,  
2 04 November 2021.]

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

4 Trial Counsel, please account for all of the  
5 government counsel who are present both here and at the RHR.

6 MTC [MR. TRIVETT]: Yes, sir. Good morning, sir.

7 MJ [Col McCALL]: Good morning.

8 MTC [MR. TRIVETT]: Representing the United States are  
9 myself, Mr. Clay Trivett; Mr. Robert Swann; Mr. Edward Ryan;  
10 and Mr. Christopher Dykstra. Representing the United States  
11 in the Remote Hearing Facility, Major Jackson Hall and Major  
12 Neville Dastoor. Also at counsel table are paralegals  
13 Mr. Rudolph Gibbs and Legalman First Class Sean Spence.

14 Mr. Dale Cox is not present but will be during --  
15 during this session. He's handling other commission business.  
16 Mr. Swann will also be leaving after the waiver of rights  
17 issue to handle other commission business.

18 Also present in the courtroom from the Federal Bureau  
19 of Investigation is Supervisory Special Agent Bard Hubbard,  
20 Supervisory Special Agent Rami Nimri, and Staff Operations  
21 Specialist Donald Fuhr.

22 Your Honor, these proceeding are being transmitted via  
23 closed circuit television to sites in the continental

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1 United States pursuant to the commission's orders.

2 MJ [Col McCALL]: Thank you, Mr. Trivett.

3 Mr. Sowards, please indicate who's in attendance both  
4 here and at the RHR on behalf of Mr. Mohammad.

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

6 MJ [Col McCALL]: Good morning.

7 LDC [MR. SOWARDS]: Gary Sowards appearing on behalf of  
8 Mr. Mohammad, along with David Nevin, Denise LeBoeuf,  
9 Lieutenant Peter Berg, and also at counsel table is Lieutenant  
10 Colonel McCue, and the late Ms. Radostitz.

11 ADC [MS. RADOSTITZ]: I haven't died yet.

12 MJ [Col McCALL]: Thank you, Mr. Sowards.

13 Before we move on, I believe we need to go ahead and  
14 we'll swear in Lieutenant Colonel McCue just while he's here  
15 before we forget about it.

16 So Lieutenant Colonel McCue, if you could come up and  
17 just -- if you could state your detailing.

18 DC [Lt Col McCUE]: Good morning, Your Honor.

19 MJ [Col McCALL]: Good morning.

20 DC [Lt Col McCUE]: Are you waiting for me to state my  
21 qualifications?

22 MJ [Col McCALL]: Yeah, if you'd state your  
23 qualifications.

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1 DC [Lt Col McCUE]: I've been qualified and certified  
2 under Article 27B. I have been certified competent by the  
3 Judge Advocate General of the United States Air Force. I am  
4 licensed in the state of Pennsylvania by the Supreme Court of  
5 that state. By the Supreme Court of the United States, I am a  
6 member in good standing of that bar as well. I have reviewed  
7 the rules and the protective orders in this case. I'm also  
8 qualified under Rule 502. And I have not acted in any manner  
9 which might tend to disqualify me from these proceedings.

10 MJ [Col McCALL]: And were you detailed to this military  
11 commission by the Chief Defense Counsel of the military  
12 commission?

13 DC [Lt Col McCUE]: Yes, Your Honor, I was. And I will  
14 provide a copy of that detailing memorandum with my notice of  
15 appearance.

16 MJ [Col McCALL]: Thank you, Lieutenant Colonel McCue. So  
17 if you'd please raise your right hand.

18 [Counsel was sworn.]

19 MJ [Col McCALL]: Thank you.

20 All right. We'll move on to Ms. Bormann. If you  
21 could indicate who's in attendance both here and at the RHR.

22 LDC [MS. BORMANN]: I -- I will. Thank you. I'm here,  
23 Mr. Bin'Attash is here. In the RHR this morning are

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1 Ms. Anisha Gupta and Mr. William Montross.

2 MJ [Col McCALL]: Okay. Thank you.

3 And Mr. Bruck.

4 LDC [MR. BRUCK]: Good morning, Your Honor.

5 MJ [Col McCALL]: Good morning.

6 LDC [MR. BRUCK]: David Bruck for Mr. Ramzi Binalshibh.

7 Present with me are Mr. Wyatt Feeler and Ms. Donna Cline.

8 Present at the Remote Hearing Room is Major Szonja Johnson.

9 I should mention that Mr. Binalshibh is present here  
10 at the courtroom but is not present in court at the present  
11 time. He -- we have discussed this with him, and he is --  
12 would prefer not to be in the courtroom at -- at this moment.  
13 We'll ----

14 MJ [Col McCALL]: He may join us later today, but for now,  
15 he's ----

16 LDC [MR. BRUCK]: That's correct.

17 MJ [Col McCALL]: ---- voluntarily absent?

18 LDC [MR. BRUCK]: He is voluntarily absent, yes, sir.

19 MJ [Col McCALL]: Thank you, Mr. Bruck.

20 Mr. Connell.

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

22 MJ [Col McCALL]: Good morning.

23 LDC [MR. CONNELL]: Representing Mr. al Baluchi are

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1 myself, James Connell, and Lieutenant Corey Krzan in courtroom  
2 2. Representing Mr. al Baluchi from the continental  
3 United States are Alka Pradhan and Lieutenant Commander Leah  
4 Obrien.

5 MJ [Col McCALL]: Mr. Ruiz.

6 LDC [MR. RUIZ]: Good morning, Judge. Walter Ruiz. I do  
7 not have anybody at the Remote Hearing Facility.

8 MJ [Col McCALL]: Thank you.

9 All right. So I note that the following accused are  
10 absent: Mr. Binalshibh and Mr. Ali. We've already discussed  
11 Mr. Binalshibh is actually present, came this morning, but is  
12 not actually -- he's here at the courthouse but not in the  
13 courtroom. The remaining accused are present.

14 Trial Counsel, do you have a witness to testify to the  
15 absence of Mr. Ali?

16 **LIEUTENANT COMMANDER, U.S. NAVY, was called as a witness for**  
17 **the prosecution, was previously sworn, and testified as**  
18 **follows:**

19 TC [MR. SWANN]: Commander, I remind you that you are  
20 still under oath.

21 WIT: Understood.

22 MJ [Col McCALL]: And I'll just note for the record the  
23 continuing objection to this witness testifying without the --

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1 his name.

2 DIRECT EXAMINATION

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

4 Q. Commander, do you have what's been marked as Appellate  
5 Exhibit 880D in front of you?

6 A. I do.

7 Q. Three-page document?

8 A. Yes.

9 Q. Did you advise the accused Ali of his right to attend  
10 today's proceeding?

11 A. I did.

12 Q. And did he say that he wanted to come or not come?

13 A. He said he wished to remain in his housing.

14 Q. And did Mr. Ali sign the document at page 2, the  
15 English version of this particular document?

16 A. He did.

17 Q. Do you believe that Mr. Ali waived his right to attend  
18 today's proceeding?

19 A. I do.

20 TC [MR. SWANN]: I have no further questions, sir.

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

22 Do any defense counsel have any questions of this  
23 witness? Appears to be a negative response.

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1 Thank you. You're excused.

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

3 MJ [Col McCALL]: The commission finds that Mr. --  
4 actually Mr. Binalshibh and Mr. Ali have knowingly and  
5 voluntarily waived their right to be present at today's  
6 session, although it sounds like Mr. Binalshibh may come later  
7 today.

8 All right. Before we continue, just a little bit of  
9 housekeeping. So yesterday, there was a short period of time  
10 during which the spectators in the gallery apparently were  
11 unable to hear what was transpiring in the courtroom because  
12 of some technical difficulties with the audio feed.

13 From here on out, I would like the guard force  
14 personnel who are in the gallery to enter the courtroom  
15 immediately and notify the commission whenever the audio feed  
16 is not working properly. We've already discussed this with  
17 the guard force, so they know to step in here and we can stop  
18 the proceedings until we can get the feed working again.

19 And then another issue that just came up yesterday,  
20 and just to make sure we're all on the same page, is the CISO  
21 review of media for display. So just to clarify the -- for  
22 the parties and make sure we're all on the same page, AE 118W  
23 (Amend) order that was cited yesterday by counsel for

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1 Mr. Bin'Attash does not contain a website exception, and  
2 that's -- so to the requirement that documents or other media  
3 that is intended for public display in the court be timely  
4 submitted to the court information security officer, or CISO,  
5 for their review in accordance with military commissions Trial  
6 Judicial Rules of Court, specifically change number 2 to  
7 Rule 7.2.f(1) to (3).

8           AE 118W (Amend), however, does contain two exceptions.  
9 So the first being for government documents produced by the  
10 United States in discovery marked UNCLASSIFIED or  
11 UNCLASSIFIED//FOR OFFICIAL USE ONLY; and the second being for  
12 documents that are clearly marked UNCLASSIFIED after an  
13 official FOIA release. So these two exceptions apply if and  
14 only if the subject document, one, is an exact replica of the  
15 document produced by the United States in discovery or under  
16 FOIA; and two, with no additional information added to the  
17 document, information within the document may be highlighted  
18 for emphasis, but that's it; and, three, the document includes  
19 the Bates stamp for the discovery and any other native  
20 tracking stamps that may have been included for the FOIA  
21 releases.

22           Additionally, these accepted documents must still be  
23 provided to the CISO in electronic format at least one hour

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1 prior to the schedule start of the court on the day that it  
2 will be displayed. All other documents must be submitted to  
3 the CISO review in accordance with the military commissions  
4 Trial Judiciary Rules of Court. Because it doesn't go just to  
5 the CISO. The CISO is then having to route it through  
6 whichever, you know, other agency is dealing with that  
7 document to make sure that it can be displayed in the  
8 courtroom.

9           And then sort of on a side note, additionally,  
10 whenever a party follows the court rules and submits the CISO  
11 documents -- the documents to the CISO or other media for  
12 review in a timely manner, the commission expects those  
13 government agencies who are responsible for reviewing those  
14 documents or media to either review those documents or media  
15 expeditiously in time for their use during the commission's  
16 hearings or to report back to the commission to account for  
17 their inability to do so.

18           If counsel -- you know, yesterday, Mr. Connell let us  
19 know there was a problem with one, we'll -- we'll make a  
20 workaround. You know, I expect those agencies to get it done.  
21 I understand, though, that sometimes there is a -- you know, a  
22 problem that occurs. And we can rearrange our schedule as  
23 need be to make sure that we're doing the most that we can to

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1 make sure that the public is informed of what we're doing in  
2 here.

3           And then last, again, I'm just going to remind  
4 everyone, it's even for myself, the more I say it, the more  
5 I'll try to speak slowly. In order to assist our court  
6 linguists as they interpret what we're saying for the benefit  
7 of the accused, I again ask that everyone please speak very  
8 slowly and clearly when you're addressing the commission.  
9 Again, the masks make it even more difficult for the  
10 linguists.

11           All right. I believe we left off, the defense had  
12 just finished arguing their motion. Mr. Connell, do you need  
13 to be heard?

14           LDC [MR. CONNELL]: Sir, thank you for that summary this  
15 morning with the addition of the military commission's  
16 expectations. The only thing I wanted to add is so, for  
17 example, with 779E yesterday, even though we've already used  
18 it in oral argument, it would still be helpful to us to have  
19 a -- a version marked FOR PUBLIC RELEASE or at least approved  
20 for public release. So we would ask that even though it might  
21 seem overtaken by events that SC/DRT, or whoever the equity  
22 holder is, go ahead and process it.

23           MJ [Col McCALL]: We'll make sure that happens.

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

2 MJ [Col McCALL]: All right. Anything else before we move  
3 into the -- the motion that we didn't finish up yesterday?  
4 Apparently not.

5 Government?

6 CDC [MR. NEVIN]: Your Honor.

7 MJ [Col McCALL]: I'm sorry. Mr. Nevin.

8 CDC [MR. NEVIN]: Yeah. We didn't get a chance to speak  
9 on behalf of Mr. Mohammad on this.

10 MJ [Col McCALL]: I'm sorry. I'll go ahead -- Mr. Ryan,  
11 we'll stick with -- I thought all the defense we had gotten  
12 through you, but again, with the five defense, get lost in the  
13 shuffle sometimes.

14 Go ahead, Mr. Nevin, please.

15 CDC [MR. NEVIN]: Thank you, Your Honor. David Nevin for  
16 Mr. Mohammad. And just a couple of -- and I will say, I would  
17 like to use the document presenter. It doesn't need to be  
18 shown to the gallery. I'm -- I just need to show not only  
19 538AA but also the government's response in the present  
20 motion, which is -- if I'm not mistaken -- A, yeah, 779A.

21 MJ [Col McCALL]: You may do so.

22 CDC [MR. NEVIN]: I'll put those on the presenter in a  
23 minute.

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1           As I read the government's position and, you know, I  
2 realize Mr. Ryan was up here maybe to speak further to that,  
3 but in reading the response, beginning at page 7 of 779A, you  
4 see the government saying, number one, we looked and there's  
5 nothing out there, and number two, none of this stuff is  
6 discoverable anyway. And on that last point that it's not  
7 discoverable, the thrust of the argument that the government  
8 makes is -- sounds like it might -- it's actually a response  
9 to a Bivens action. I mean, in other words, as if someone had  
10 come along and said you wrongly coordinated among these  
11 agencies and we're now suing you for -- for some loss that we  
12 suffered as a result.

13           And they say, no, look, we had the right to do this.  
14 We had an expectation that this be done. There -- this was  
15 the largest attack in the -- on the nation in the history of  
16 attacks, and so we -- we've tore down that wall between  
17 domestic law enforcement and between intel. We stood up new  
18 government agencies, cabinet-level agencies. We did all these  
19 things in response that were designed to have the whole  
20 government coordinate and say, you know, we're all together.  
21 We all know what everybody knows and we're ready to go here.  
22 We're poised on the edge of our chair. We can handle it.

23           What else were we supposed to do? This is

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1 unremarkable, quote/unquote, is a word the government uses.  
2 Hey, why would anybody be worried about this? Despite all of  
3 this integration and stuff, ah, we looked, there's nothing  
4 there that's responsive to this discovery request.

5           So I wanted to say on behalf of Mr. Mohammad, first,  
6 we're not accusing you -- or accusing the government or  
7 anybody in it of having done anything proper in -- improper  
8 with respect to coordination, at least not in the context of  
9 the -- the present -- the present motion.

10           The question is, is there discoverable information  
11 here? And so despite -- despite responding in the way I've  
12 described and -- and suggesting, you know, I think on its face  
13 that there would be discoverable information, the government  
14 then goes on, or actually it's the first point, but  
15 nonetheless at the same time says, but there's nothing here  
16 for us to turn over to you.

17           And when I look at this carefully, I think maybe I see  
18 how the government is able to make that statement. And I want  
19 to bring this to your attention, and the reason I wanted to  
20 stand up before -- I didn't know it was going to be Mr. Ryan,  
21 but before the government spoke, was just that maybe this is  
22 something you would want to raise with him or with whomever  
23 speaks for the government.

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1 I'm going to put 538AA on the presenter and if --  
2 again, this would not be shown to the gallery in my  
3 understanding. This is a -- by the way, this is a government  
4 pleading marked UNCLASSIFIED. I take it it's not within our  
5 exceptions, so ----

6 MJ [Col McCALL]: That's all right.

7 CDC [MR. NEVIN]: ---- so it shouldn't be displayed to the  
8 gallery unless I'm understanding that incorrectly.

9 Anyway, I've highlighted the -- the -- this is a --  
10 occurring on page 8. It's paragraph 5 Ruling, 5.b. So it  
11 says that the scope of discoverable information here is as  
12 follows: The government shall produce all documents that are  
13 known, or reasonably should be known, to any government  
14 officials who participated in the investigation and  
15 prosecution of a case against these five accused.

16 Okay? So that's who this is directed to. Any  
17 government official who participated in the investigation and  
18 prosecution of the case against these five accused. So  
19 that's -- those are the people that are the target of this  
20 order, okay?

21 Now, who participated in the investigation and  
22 prosecution of the case against these five accused? Well, a  
23 lot of people did, investigation and prosecution. The

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1 prosecution comes later, but we've been told repeatedly that  
2 this was the largest criminal investigation in the history of  
3 the country, that at one time every single FBI agent in the  
4 country was working it. And we know that it was guided at  
5 least -- and I -- I say this just based on public source  
6 information. It seems to have been guided ultimately from the  
7 White House. All the way to the very highest levels of the  
8 government, of the United States of America, was involved in  
9 the investigation.

10           And the prosecution is a subset of that, but  
11 nonetheless, these are the people that 538AA imposes an  
12 obligation on the government to communicate with in -- in this  
13 respect.

14           And what is it that they're supposed to turn over?  
15 Anything known to them -- and now I'm talking about the  
16 next-to-last line that I've highlighted -- that reasonably  
17 tend to show cooperation between the CIA, FBI, and Department  
18 of Defense. I suppose that should probably say "among," but  
19 anyway, in the effort to obtain statements from these five  
20 accused.

21           So if anybody involved in the investigation knows  
22 about something that shows cooperation among these agencies in  
23 the effort to obtain statements from these five accused,

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1 that's discoverable.

2 But when I looked at page 8 of -- of 779A, the  
3 government's response here, they word that a little  
4 differently. They -- they take that language and there's a  
5 little elision, there's literally an ellipsis, and I want to  
6 bring that to your attention.

7 So here's what they say, and the carry-over language  
8 is from the previous page, is the prosecution has sought but  
9 not -- let me just put it here so we're all on the same page.  
10 Here's the bottom of page 7 in that sentence that is the last  
11 one. It says, the prosecution has sought but not -- but not  
12 identified any -- and I think the intention here, and there's  
13 a citation to 538AA -- the intention here was that we've  
14 looked for but not found anything that was required by 538AA.  
15 But instead, what they say is something slightly different.  
16 And I think it's different in an important way.

17 So they say, we have not found any discoverable  
18 interagency policy documents. Now, interagency policy  
19 documents is itself not something that's in 538AA. But take  
20 it as -- as a -- like a placeholder reference for what we're  
21 looking for. Documents that are known or reasonably should be  
22 known to any government officials who participated in the  
23 investigation and prosecution of the case against these five

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1 accused, and then there's an ellipsis, in the effort to obtain  
2 statements from these five accused.

3           So it sounds like what they're saying is they've  
4 reached out to government officials who were involved in the  
5 effort to obtain statements from these five accused and asked  
6 them whether they have any interagency policy documents. And  
7 that's not what 538AA said was discoverable. 538AA said that  
8 it was discoverable if it's in the possession or -- sorry, if  
9 it's within the knowledge of any government official who  
10 participated in the investigation, not just the ones who  
11 participated in the effort to obtain statements from these  
12 five accused.

13           And I heard -- at some point over the last couple of  
14 days, I heard someone say Mr. Pellegrino, Mr. Gaudin, some of  
15 these folks who -- who clearly actively participated in the  
16 effort to obtain statements from these five accused, don't  
17 have any information that would tend to show cooperation.  
18 They just don't know that. They don't know -- and so you can  
19 ask them questions if you like, but -- but they don't have  
20 that kind of information.

21           And, okay, well, I mean, that's interesting, I guess.  
22 But I suspect that what's going on here is that the government  
23 has used these ellipsis -- this ellipsis here in -- in its

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1 recitation of what it went to look for and that the net result  
2 is that it has limited the scope of its inquiry. And you see  
3 this, to some extent, in what I think is a misconstrued -- the  
4 government's response to what they have construed as some sort  
5 of an accusation. It was improper for you to have all this  
6 coordination going on.

7           Because on the one hand, they were saying, look, we've  
8 got all this coordination. We put it together. We were  
9 required to. It was necessary in the interest of national  
10 security and so on. But nobody has anything that connects up  
11 to interagency cooperation. Nobody -- there's just nothing  
12 out there. Nobody. None of these people in the government  
13 have any of that. And I think one way of understanding that  
14 claim is the suggestion here that the government's inquiry has  
15 been artificially limited.

16           And so I'm through with the document camera, and  
17 almost through all my remarks as well.

18           Yeah, I think just the last thing I would say to you  
19 is to sort of go back to the remarks that were made earlier  
20 about the timing of testimony. It would be really good to  
21 know, before we have to cross-examine Mr. Pellegrino, it would  
22 be really good to know -- have -- have this particular issue  
23 fleshed out. This is essential and critical to the -- to the

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1 resolution of our motion to suppress and I think really  
2 probably to all the motions to suppress is, particularly in a  
3 setting where the government's -- you know, when you really  
4 boil it down, the government's response to the motions to  
5 suppress is attenuation, separation of these efforts so that  
6 the one does not contaminate the other.

7           And there were probably other ways that the government  
8 could have gone, but they went that way. And when they do  
9 that, every little tendril of connection between these two or  
10 three or four or multiple bodies that are engaged in this  
11 effort becomes critical and discoverable and -- and very  
12 important to our cross-examination of Mr. Pellegrino.

13           So that's my argument.

14           MJ [Col McCALL]: Thank you, Mr. Nevin.

15           CDC [MR. NEVIN]: Okay. Thank you, Your Honor.

16           MJ [Col McCALL]: All right. Mr. Ryan.

17           TC [MR. RYAN]: Good morning, sir.

18           MJ [Col McCALL]: Good morning.

19           TC [MR. RYAN]: Your Honor, there's -- the short answer on  
20 779 is that the prosecution has turned over items that are  
21 discoverable within the theories and within the language of  
22 538AA, and we don't have anything further to turn over in this  
23 regard, which we have told the commission before and which has

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1 been approved in rulings.

2 In short, Judge, this matter has been argued  
3 previously, raised to the commission, considered in great  
4 detail by the military commission, and decided. And we won.  
5 It's up to me now to demonstrate that to you.

6 779 requests various interagency documents. The  
7 defense says their authority for it is 538AA, and you've now  
8 heard that language ad nauseam. The documents they seek  
9 include those relating to historical narrative interviews,  
10 which I think we can all agree refers to what ultimately  
11 became the LHM statements, as they're referred to, given by  
12 the accused to the FBI in early 2007, going on from there.

13 Second, buckets. And I imagine it's not a term you  
14 were very aware of in the course of this litigation until very  
15 recently, but it sure has been said before and sure has been  
16 said a lot. That is information from the CIA that was  
17 available to the FBI agents prior to the taking of the LHM  
18 statements in 2007. Special Detainee Follow-Up Group  
19 documents, Special Leadership Oversight Committee documents.

20 This motion, 779, is not standing by itself before  
21 this commission this session. It is along with 737, 769, 780,  
22 781, and 803, in that they all pertain to defense requests for  
23 additional discovery beyond that that has been provided in

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1 538.

2           Your Honor might remember that the last session in  
3 September, it was our initial statement to you, sir, that we  
4 intended to argue several of them together and to group it all  
5 in with 824, which is the prosecution's motion in limine to  
6 exclude further evidence in regard to this area. That  
7 document, Judge, and I don't know if you've got anywhere near  
8 it yet because it's not on the docket now, but it's a  
9 70-page or so what we believe is one-stop-shopping analysis of  
10 this large issue specifically as it has occurred and as it has  
11 played out in this courtroom over several sessions.

12           So back as to 538 and the discovery in it. There is  
13 no court order at the -- at the initiation of it all saying  
14 provide this. That's because the prosecution took it on. We  
15 heard arguments, we saw the pleadings, and we essentially  
16 agreed with the -- the defense that there was some discovery  
17 to be provided.

18           Our -- our decision, our concession, our agreement can  
19 be found at 538H. It's our memorandum to defense counsel.  
20 The judge at the time, I think, was Judge Pohl, asked that it  
21 be made part of the record because we were referring to it,  
22 and we did so. The memo -- and not that it's typically  
23 something Your Honor would consider, but the memo outlines our

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1 understanding of the theories, our understanding of the  
2 parameters of discovery, and we set it out in the memo as far  
3 as how we were going to conduct, what we were going to conduct  
4 our discovery analysis.

5           As part of the military commission's inquiry and  
6 analysis of these motions, 779, but the others as well, I  
7 begin, sir, by imploring you. I implore this military judge,  
8 as I did with previous military judges, to look at what we  
9 have done in this arena. A description of our efforts can be  
10 found at 538K, a classified document, January 2019; 538M, a  
11 classified document, March 2019; 538Z at pages 8 through 10,  
12 and that 538Z is actually an Ali pleading, but the conference  
13 statement from the prosecution in it, I think, goes further in  
14 analyzing what we have done as part of our discovery efforts;  
15 and 538DD, delta delta, Attachment B, again an Ali document,  
16 but with our conference which we, again, suggest goes a good  
17 way down the road of explaining our processes, our theories,  
18 what we were doing.

19           Also in that conference, Judge, is a statement of how  
20 we chose to make redactions of the discovery we were  
21 providing. Your Honor's heard a good -- heard, you know,  
22 redactions brought up again and again. I thought it was time  
23 that somebody should say that our theory on redactions is not

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1 something that we alone are deciding. It actually comes from  
2 AE 161J, an order from way back when, when Judge Pohl affirmed  
3 our ability to make such redactions of nondiscoverable --  
4 nondiscoverable material within a discoverable document -- or  
5 discovered document.

6 Judge, as you heard yesterday, our good faith in the  
7 discovery efforts often comes under attack. You probably  
8 heard more of it yesterday than you wanted to. I sure did.  
9 The military commission is often, I fully sympathize, in an --  
10 in a position of not knowing the facts, because it's rare that  
11 you get to see behind the curtain of what is actually being  
12 provided, especially within a context of the theory of  
13 discoverability in the first place.

14 By reviewing all that I just cited to you, you will  
15 see the prosecution's extensive efforts that we voluntarily  
16 took on in this regard. And I think that's important, sir,  
17 because for all the times you hear it should have been this  
18 and it should have been that and it should have been the other  
19 thing, especially, again, within a context of a theory of  
20 discoverability, I ask you to consider exactly what we have  
21 done, because Judge Cohen certainly did. And I'll give you  
22 just one example, sir.

23 As part of the discovery effort, we took the unusual

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1 step, and one that the law says we don't have to do, of  
2 creating discovery. Because there were certain agents who  
3 were central to the defense's theories and defense's requests,  
4 we literally assigned FBI agents to interview other FBI agents  
5 to create 302 forms for no other purpose other than to give  
6 the defense as much information as possible about this time  
7 period and about the events that were going on. Never before  
8 in my career have I ever done such a thing, nor have I heard  
9 of it.

10 One additional point regard -- in this regard, Your  
11 Honor. The discovery -- and this is what I say when I use the  
12 word "context." The discovery was requested initially in  
13 relation to a theory set forth in some detail in 538C. That  
14 was Mr. Ali's reply to a government response to  
15 Mr. Bin'Attash's initial motion about books and items related  
16 to what an agent used to interview somebody.

17 I don't think I'm overstating at all to say it changed  
18 the landscape considerably, because from 538 grew out the  
19 entire 538 discovery effort. The theory in 538 was that these  
20 items were material to the preparation of the defense in that  
21 the defense's theories were at the time, and I think still are  
22 that we've seen in 628, that at the time in 2007 when  
23 Agent Fitzgerald went into a room and spoke to Mr. Ali, along

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1 with others, and took a statement and used various admonitions  
2 and warnings to first satisfy himself -- that is,  
3 Agent Fitzgerald -- that the -- that Mr. Ali was operating in  
4 a voluntary fashion. The theory is that Mr. Ali at this  
5 moment had been subjected to treatment in his previous stays  
6 in the RDI program that had left in him a position where he  
7 couldn't say no, that he was not acting voluntarily, that he  
8 was, in their words in 628, broken.

9           So that's the theory of discoverability that all of  
10 these documents, all of this information is related to.

11           Judge Cohen, as the military commission at the time,  
12 was aware of all of this as he oversaw 538 litigation. He had  
13 this full context. The specific subject matter demanded by  
14 the defense in 779 is not new to this courtroom, although it  
15 might be new to you. The subject matter was raised to the  
16 military commission in 538C and 538C (AAA Sup) with  
17 specificity. That's just the writ pleadings.

18           In addition, this subject matter has been argued to  
19 this military commission in July 2019, can be found at  
20 pages 19964 to 19993, 20182 to 20240, 19817 to 86 -- to 19860;  
21 and then again on 11 September 2019, the 18th anniversary of  
22 the attacks, at pages 24973 to 25062, and even in slides  
23 presented to this military commission in the course of that

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1 argument that can be found at 538V. That's the general  
2 subject matter. Those four categories. One I -- I need to  
3 take up with you specifically, and that is buckets.

4 In addition to what I just recited, the issue of  
5 buckets, using that word, was specifically relitigated in  
6 AE 695. Magistrate -- my old life. Military Judge Cohen  
7 denied the defense motion, but directed the prosecution to  
8 provide specific information to the military commission, which  
9 we did in 695D. And now it is ripe for the military  
10 commission to bring the matter of buckets to a close.

11 In very relevant part, military judge, the military  
12 commission, Judge Cohen, said the government has repeatedly  
13 represented -- this is page 8, paragraph g. -- the government  
14 has repeatedly represented, both in their response to this  
15 motion and in other pleadings, that they have complied with  
16 their discovery obligations in this case, including turning  
17 over close to half a million pages of classified and  
18 unclassified discovery. And you can see his other language  
19 which is very supportive, I believe, I can say, of the  
20 government's position.

21 695 was not cited to you in 779 or yesterday, as best  
22 my memory tells me. So, Your Honor, Judge Cohen having  
23 traveled down the road and with a much fuller context, and you

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1 come in at this moment, notes that we represent to the  
2 commission that we are done. As he says, we've done it many  
3 times.

4 Second, he does not disagree.

5 And, third, he gives us specific instructions of any  
6 further involvement with the buckets information, which we  
7 have complied with.

8 But as to 538 and 779 in a much more general context,  
9 I call your attention to what should be -- should have been  
10 and should be now the final chapter in the 538 litigation. In  
11 its pleading in 779, the defense accurately recites, and  
12 Mr. Nevin just brought it up again, that the military  
13 commission issued a ruling found at 538AA and takes the  
14 position that the military commission's language, which I  
15 think we can agree is very general in nature and broad, was  
16 opening up an entire new arena of discovery that goes into  
17 anything close to resembling cooperation between agencies.  
18 Now, that's going to go all the way to who gets a country  
19 clearance to come to Guantanamo.

20 I submit, sir, that's far afield of what was intended  
21 in 538AA, and I rely on the language of it and Your Honor's  
22 role as the judge to understand exactly and see exactly what  
23 it was Judge Cohen was seeking. But I have more to tell you

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1 about this that will demonstrate it.

2 Further, the defense makes little mention in 779 of  
3 its original theories of psychological conditioning, which  
4 they generally refer to as learned helplessness that Mr. Ali  
5 supposedly was suffering from, and how this discovery would  
6 fit into that theory, which is how we started. So they bet  
7 the farm on the language of 538AA in their pleading in 779,  
8 and then they stop.

9 You would think that was the last the military  
10 commission said on this subject. It is not. This is what you  
11 need to know, sir, because you did not live through that.  
12 Your Honor did not live through that period of time as Judge  
13 Cohen did, and who acted upon it.

14 Following the military commission's ruling on  
15 25 October 2019 in 538AA, which we've all well recited, the  
16 defense, just like now in 779 and other motions, complained  
17 about the scope of discovery in a later document under 5 --  
18 under the number 538FF from Mr. Ali. It is a classified  
19 document. It was not cited in 779 or mentioned yesterday.  
20 The prosecution counted within days -- countered within days  
21 with 538GG, unclassified document. It is not cited in 779 or  
22 mentioned yesterday.

23 We all commend to judges our writings because we're so

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1 proud of them. Sometimes we should be and sometimes we  
2 shouldn't, I guess. In this case, Your Honor, I would suggest  
3 for the analysis you have to go through, the government's  
4 pleading in 538GG would be especially useful because we put  
5 the entire litigation of 538 in the context of the defense's  
6 theories of how it was supposed to be material to concepts  
7 such as learned helplessness and how it had played out -- this  
8 is, I think, especially important -- how it has played out up  
9 until that point, which included a significant degree of  
10 evidence, specifically the testimony from that witness stand  
11 to your left of Special Agent James Fitzgerald, retired  
12 Special Agent Abigail Perkins, retired Special Agent Adam  
13 Drucker, and Special Agent Michael Butsch. And that's just  
14 four. It was used in other contexts as well.

15 We also told the judge in our pleading 538GG again  
16 that we were done with 538 discovery.

17 So at this juncture, Your Honor, Judge Cohen has it  
18 all on his radar. He has the defense's theories. He has our  
19 efforts, which I again say are very significant in this  
20 matter. He has all the pleadings and all the arguments about  
21 this very subject. And then on top of it all, he's got  
22 hundreds of pages of testimony. So he has seen where the  
23 rubber hits the road.

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1           Six days later, the military commission issued 538HH.  
2 This is 6 February 2020. It is not cited in 779 or mentioned  
3 yesterday.

4           On page 2 of 538HH at paragraph d., he states -- the  
5 commission states, On 31 January 2020, the government filed a  
6 notice -- that's 538GG -- in response to Mr. Ali's  
7 29 January 2020 notice -- that's 538FF, the classified  
8 pleading -- in which it disputed Mr. Ali's noted deficiencies,  
9 affirmatively stated that it had complied with the  
10 commission's order -- that is 538AA -- and stated that it does  
11 not believe there is additional discovery that has not already  
12 been produced to the defense.

13           In -- on the same page, on page 2 on footnote 6, the  
14 military commission says, Though it is styled as a notice --  
15 referring now to 538FF, Mr. Ali's pleading -- it will be  
16 treated as a motion because, one, it seeks relief from the  
17 commission; and, two, the commission concludes the interests  
18 of justice will be served by resolving this matter  
19 expeditiously. And here is where it does so.

20           On page 3 of 538HH, paragraph 3.b., the commission  
21 further concludes, however, that Mr. Ali has not met his  
22 burden to demonstrate entitlement -- so the plea, so the  
23 further complaints after 538AA that they still want more, the

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1 judge didn't mean what he meant, this is what he says -- has  
2 not met his burden to demonstrate entitlement to any relief  
3 beyond the in-camera review contemplated above.

4 Your Honor, I think, knows about what I'm talking now  
5 when I say in-camera review because you've ruled on it.  
6 Pursuant to the military -- to the military judge's  
7 instructions, we provided to the commission certain what we  
8 refer to as cables for review as the judge wanted us to do.  
9 So that's his statement on page 3.

10 Continuing on, same paragraph, onto page 4,  
11 Accordingly, the commission finds no relief warranted beyond  
12 ordering strict compliance with 538AA and the directive  
13 concerning the FBI cables; that which I just mentioned, that  
14 which you have ruled upon.

15 Number 4, ruling. Mr. Ali's motion is granted in part  
16 as discussed below and otherwise denied. The granted part is  
17 the -- the cables being submitted to the military commission,  
18 which we have done, which you have ruled upon.

19 So now for the second time, although not in right  
20 chronological order, but for the second time after 695 --  
21 before 695, but for the second time, Judge Cohen, aware of  
22 everything, notes again our position that we are done with  
23 this discovery effort, knows what our discovery effort has

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1 been, makes no finding contrary to our position except as in  
2 695C, Charlie, gives us specific instructions to do something,  
3 something specific, which we have done and which now you have  
4 ruled upon.

5           So, Your Honor, I submit instead of opening up in a  
6 new entire arena of discover -- of discovery language in 538  
7 by his use of the broad language in 538AA, the military  
8 commission shut down this entire area of inquiry, upon which  
9 we have relied. This matter, Your Honor, has been decided and  
10 should not have been brought again. Between 695C and 538HH,  
11 the military commission ended the broad subjects of demand in  
12 the course of the 538 litigation.

13           Finally, sir, for our best discussion of where this  
14 all falls for someone coming in, who was not here for the --  
15 the early steps, I refer the commission to -- as to this issue  
16 of FBI/CIA cooperation, which is very broad, I refer the  
17 military commission to 824 again, that being the government's  
18 motion in limine. It contains significant discussion of the  
19 evidence that's been presented thus far and the value of this  
20 broad range of discovery to the ultimate litigation of  
21 suppression and/or other matters that will be of issue in this  
22 case.

23           Subject to your questions, sir.

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1 MJ [Col McCALL]: All right. So first, just a statement.  
2 I appreciate the overview of what the government has provided.  
3 I will look at 824 again. So I appreciate that and I  
4 appreciate the -- you know, that this case involves a large  
5 volume of documents and that the government has produced those  
6 documents.

7 That being the case, though -- I mean, the question  
8 really then still hinges on what is still out there and is the  
9 defense entitled to it. Just because you produced a large  
10 volume, the nature of this case is that there's going to be a  
11 large volume.

12 So going to the -- the 538 litigation that's gone on,  
13 and I will review, obviously, 695 before I decide this  
14 motion -- and I'll just let the parties know, I have reviewed  
15 all the rulings, starting from the first ones in this case up  
16 until now, to make sure I'm at least -- have read them. Given  
17 the -- the voluminous nature of those rulings, I will have to  
18 go back and reread them as they apply to these particular  
19 motions.

20 But -- so for -- for 538, you mention 538FF Mr. Ali  
21 raised asking for more documents; 538GG, government said they  
22 provided everything; and then in 538HH, Judge Cohen had ruled  
23 saying that everything was out there, basically. But, I mean,

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1 that's not going to close 538AA, right? I mean, because,  
2 obviously, if the government says we've produced everything  
3 that we have, the -- the commission to a certain extent will  
4 take the government at their word if there's no specifics, if  
5 it's just a general there was an order out there, government  
6 says they've complied with it.

7           Here in this motion, defense has specifically come  
8 with these four categories. And again, for the -- the  
9 buckets, I get that that sounds like it's been addressed in  
10 695 ----

11           TC [MR. RYAN]: Yes, sir.

12           MJ [Col McCALL]: ---- and I will look at that and see how  
13 it's different ----

14           TC [MR. RYAN]: Yes, sir.

15           MJ [Col McCALL]: ---- or hear from Mr. Ali how it's  
16 different. But let's say with those other three categories,  
17 defense comes and says, these three specific areas we feel  
18 falls under 538AA. I'm not necessarily hearing from the  
19 government that either they don't exist or why they don't fall  
20 under 538AA. What is the government's position on those other  
21 three categories?

22           TC [MR. RYAN]: The -- the broad, broad nature of the  
23 documents we're talking about, Your Honor, are difficult to

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1 describe in exact specificity ----

2 MJ [Co] McCALL: Sure.

3 TC [MR. RYAN]: ---- as I'm sure you can imagine ----

4 MJ [Co] McCALL: Sure.

5 TC [MR. RYAN]: ---- are -- we guided ourselves and our  
6 decisions upon all of the factors, all of the pleadings, and  
7 AA in its entirety, understanding the context of which this  
8 discovery was supposed to be about.

9 So to be specific, Judge, if there is an e-mail from  
10 an FBI administrative assistant to a DoD administrative  
11 assistant in early 2007 saying we need country clearance for  
12 Special Agents A, B, and C to come to Guantanamo to take LHM  
13 statements, we do not see that as -- although, you could say  
14 in the use of the broad language of 538A that it falls within  
15 that, and I think I've heard counsel say it, that's exactly  
16 what it is, we believe that there was still within it a  
17 materiality analysis that says that's not material and that we  
18 submit, and as I've argued now, Military Commission, Cohen,  
19 with fuller context and -- and documents laying out in  
20 specificity what we -- specificity what we had turned over,  
21 ultimately we believe blessed those efforts. So that is upon  
22 which we are relying.

23 I -- I can say, Judge, that the issue of -- because

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1 this came up, too. The issue of whether the agents coming  
2 down for the purpose of taking a statement all by itself --  
3 and remember, this -- this goes nothing at all -- the -- the  
4 movement and even what they knew, I submit, goes not at all to  
5 what happened in that room, which we think is the prime  
6 analysis for the military judge in the motions to suppress,  
7 but also we concede, and we've provided enormous discovery  
8 about it, that which happened to them previously goes into  
9 that argument as well.

10 So having said that, that's -- that's where we believe  
11 the -- the arena of discoverable -- discoverability and  
12 materiality to the presentation of the defense is -- is  
13 living. And we stayed in that arena to the extent, for  
14 example, where, as you heard, you know, just the fact that  
15 somebody, even high-ranking officials within various agencies,  
16 agreed to FBI agents -- FBI agents coming down to speak to  
17 them. That, we believe, is outside the realm of  
18 discoverability.

19 I mean, some of it has been turned over, and you'll  
20 see that in your review of M and K. But as to every single  
21 step in the chain of coming down, taking statements without  
22 Miranda warnings, we concede, was consistent with the law, was  
23 consistent with good practices by the FBI, and was consistent

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1 with the needs of the nation at the time.

2           So ultimately at the end of the day, it has to be  
3 material to something that helps the defense, that moves the  
4 quantum of proof. And what we believe we have done, and I  
5 stand by it, is found those things that go to that and turned  
6 them over.

7           MJ [Col McCALL]: Okay. So what, if anything -- so then I  
8 take it, then, the government's position is that -- because it  
9 sounds like there hasn't been anything that has been produced  
10 related to the Special Detainee Follow-Up Group and any of the  
11 meetings, the minutes, the e-mails, anything, the briefings  
12 that went on there?

13           TC [MR. RYAN]: Judge, I confess that, like, a title of a  
14 group is not always so easy when you get into the actual who's  
15 and the what's and so on and so forth. I can say this. We  
16 looked -- we guided ourselves by the principle that if  
17 someone -- some entity, some part of the government, was  
18 acting in a way inconsistent with the law, that was something  
19 we would consider discoverable.

20           But the process of doing something completely  
21 consistent with the law -- and when I say "law," I'm talking  
22 about the Military Commissions Act of 2006, later the Military  
23 Commissions Act of 2009 -- people acting within that sphere

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1 properly, we felt were not discoverable.

2 MJ [Col McCALL]: Sure. And I get what you're saying as  
3 far as some of the minutia on, you know, e-mails approving  
4 just a certain agent to come down ----

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

6 MJ [Col McCALL]: ---- something like that that seems  
7 might just be administrative. But, I mean, again, anything  
8 that has been produced by the government on these summaries of  
9 conclusions, anything that might deal with the parameters of  
10 this program of -- of having the agents come down, how they  
11 were going to do the questioning, how they were going to do  
12 the -- set up the -- the -- producing the LHM statements and  
13 ----

14 TC [MR. RYAN]: What I -- what I submit to you, sir, that  
15 upon your review, if you see the items that we list out that  
16 we have provided, you will see, I believe, what is enough to  
17 cover areas of concern in that regard. And that -- that  
18 extends into the taking of the statements themselves where we  
19 turned over the admonitions or the statement of legal  
20 principles the agents had, the rights form they were to use,  
21 and then, of course, the notes of the interviews themselves  
22 where it puts right into play how all of these policies and  
23 procedures actually came out. And those, we submit, sir, are

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1 completely consistent with the law.

2 MJ [Col McCALL]: All right. Thank you, Mr. Ryan.

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

4 MJ [Col McCALL]: Mr. Connell?

5 LDC [MR. CONNELL]: Your Honor, I can agree with every  
6 actual factual statement that the government just made and  
7 rest comfortably that the military commission should grant  
8 this motion because the government's argument boils down to  
9 really two things. One of them is in the larger context they  
10 have produced a lot of evidence in a large case. There's  
11 been, you know, only -- only less than 10 percent of the FBI  
12 302s they've produced to us, but, you know, maybe in  
13 Mr. Ryan's words, that was sufficient to cover the other  
14 90 percent? You know, I don't know.

15 But they've -- you know, nothing like the -- the  
16 amount of discovery that was produced in the Moussaoui case  
17 which was a single-defendant case under similar circumstances  
18 but, okay, that's fine, they produced lot of evidence. I  
19 agree with that. You know, we have -- we have a lot of  
20 evidence.

21 And so, you know, the military commission I think was  
22 asking, all right, well, you know, we heard in the -- in the  
23 opening statement from Mr. al Baluchi a whole lot of citations

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1 to the record and specific documents that they can demonstrate  
2 exist and specific places where the witnesses have testified  
3 about the existence of documents, and whether that's the  
4 Camp VII commander or Special Agent Fitzgerald or Special  
5 Agent Perkins, Special Agent Butsch, Special Agent McClain all  
6 testified about the existence of documents.

7           So, you know, the -- what -- what Mr. al Baluchi has  
8 here is, you know, a strong record, right, on sworn testimony  
9 and -- and documents that have been obtained from the FBI.  
10 And the military commission asks the government, all right,  
11 well, let's look at the categories here. And I'm going to  
12 talk about the procedural history in a minute, but let's look  
13 at the categories.

14           And so the first category is the interagency process  
15 that led to the policies that govern the -- both the  
16 questioning and -- and the confinement at Guantanamo. And the  
17 government responded with a very odd, I think if you review  
18 all of the discovery you'll find that there's some evidence  
19 that will cover -- I mean, it's a very strange statement.

20           But because the -- because, you know, the  
21 government -- and Mr. Ryan is my favorite of the government  
22 lawyers. He's really good. I bow to no one in my respect for  
23 him. And -- but he's in a tough situation because they

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1 haven't turned over any evidence about it, right? And we --  
2 the -- the way that we know about that interagency process is  
3 only through wholly external investigation where we -- we  
4 found the FOIA documents. We talked to -- to everybody on  
5 those lists on the -- whose name appears who would talk to us,  
6 found out about that process. Obviously, we can't get any  
7 more evidence about it until -- unless we get it from the  
8 government.

9           And the government just, in Mr. Ryan's words, conclude  
10 that it is not discoverable. And what "not discoverable"  
11 means covers an enormous range of sense because it doesn't  
12 mean it's not relevant. It doesn't mean we have invoked  
13 classification -- national security privilege over it. It  
14 doesn't mean we've asked for 505 substitutions. It means we  
15 just don't want to give it to you.

16           And I understand it's super helpful to us. I -- if I  
17 didn't have to, I wouldn't want to give it to my litigation  
18 opponent either, but that's not the way that the rules work.  
19 The way the rules work are if something is relevant, helpful,  
20 even under classified under the Yunis standard, then it has to  
21 be provided by the government. So that's -- that's the first  
22 category, like zero evidence has been produced. And I  
23 wouldn't represent to you if I didn't have a complete command

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1 of our discovery and to the record and know what the situation  
2 was there.

3           So let's look at the second category, the -- the  
4 buckets. Now, I -- I led out -- I talked to you in some  
5 detail in the -- in the opening statement about the -- the  
6 place in the record where we found out about the buckets. And  
7 shortly after that, the Bin'Attash team filed a -- a request  
8 and -- and a motion, which is 695. And so 695, which the  
9 government relies on as a -- as -- as preclusive, the actual  
10 ruling from the judge is that the motion to compel is denied  
11 at this time subject to addition -- this order and additional  
12 pleadings.

13           695 was a, we don't have enough evidence about this  
14 yet. We have -- the -- the defense hasn't met its -- or at  
15 least Mr. Bin'Attash's team hasn't met its burden of proof.  
16 It was never argued. The -- it was a, we don't have enough  
17 yet. It was not a conclusive, this is something that it  
18 didn't rule that the material -- that the items were material.  
19 It didn't rule that they weren't helpful or relevant or  
20 anything. It just said we don't have enough information about  
21 this topic yet. The government says they've done what they're  
22 supposed to do, we need more information about it. And so we  
23 have information about it, in the -- in terms of the record

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1 and -- at this point.

2           So the -- so the question is what about the buckets?  
3 Now, this is not a situation where this was solely defense  
4 examination. So we first learned about the existence of some  
5 kind of closed system or something in December 2017 when  
6 Mr. al Hawsawi was questioned during the personal jurisdiction  
7 motion. The central focus was not on statements at the time,  
8 which is what -- which was, in fact, an excuse that Special  
9 Agent Fitzgerald used later when he was explaining why he gave  
10 an incorrect answer on when he had access to the material when  
11 he said it was in 2007 instead of 2006. He said, well, you  
12 know, it wasn't really the focus of the hearing, so I wasn't  
13 prepped up on it. I understood that.

14           The -- and so over time, that evolved and became more  
15 important. But when it got to the government direct  
16 examination of Special Agent Fitzgerald, not -- not a  
17 cross-examination but the direct examination, the government  
18 elicited information about the -- his access to the -- to the  
19 buckets. He -- they weren't called buckets yet, right? At  
20 that time he just called it a closed system. It was Special  
21 Agent Perkins who later gave us the name "buckets," that  
22 that's what they colloquially called them. He talked about  
23 his access -- he testified on government examination about

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1 the -- his access to the information. He gave the equivocal  
2 answer that I read to you on -- on -- in the opening argument  
3 here about whether he had some access, he read some of them,  
4 he didn't have access to a system of records, he's not sure.  
5 You know, he gave an -- an answer that might be an admission,  
6 it might be a denial, it might be an evasion, it might be all  
7 of the above.

8 But to me, that's actually a significant factor in  
9 this, that the government has introduced evidence about this  
10 topic and so they clearly think that it's relevant. Now, they  
11 clearly think that access to this closed system is a -- is a  
12 factor of -- in controversy in the case because they  
13 introduced evidence about it.

14 Now, we've had this theme this week of is it better to  
15 ask the witnesses first or is it better to have the documents  
16 first. And I -- I don't know the answer to that question,  
17 right? Everybody pays their money and takes their opinion.  
18 But this is a situation where the government was very eager to  
19 go forward with the motion to suppress. And Mr. al Baluchi  
20 said, yes, let's do it. Let's put up the witnesses, we know  
21 we don't have all the evidence.

22 There's actually an outstanding order in the -- for  
23 production of 914 material, you know, e-mails and -- and that

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1 sort of thing that the government still hasn't produced with  
2 respect to Fitzgerald. We're waiting for those.

3 But the -- this was the situation where let's just  
4 press forward. We know we don't have all the documentation,  
5 let's just press forward and find out what the witnesses have  
6 to say. And that's what we did. The government wanted us to  
7 do that, we were amenable to it. Judge Cohen wanted us to do  
8 it, and we did it.

9 And what we learned in that was the existence of  
10 further discoverable information, including the -- these --  
11 like the key question of whether the clean team agents were  
12 clean or not, whether they had had access to CIA documents.  
13 For the first six years of this case, that was like the whole  
14 question that we debated.

15 And, you know, to hear that -- the government say now  
16 that it's not important that we know whether -- how -- we have  
17 any discovery on that topic just flies in the face of the idea  
18 of, you know, let's -- let's find out what the actual facts  
19 are and then we'll find out what additional documents we need.  
20 And that's what we've done here. And that's the position that  
21 we're in now.

22 So what about the last -- what, to me, is the  
23 collapsed topic of -- of the SDFG, or the SDFG, as they

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1 actually say, and the -- and the Special Leadership Oversight  
2 Committee? We know about that only because we interviewed  
3 witnesses who have interacted with it. The government has  
4 produced zero evidence about the coordination of -- between  
5 the FBI -- between the -- the Department of Defense and the  
6 CIA over policies at Camp VII, including how were -- they were  
7 going to be kept in -- in solitary confinement until they were  
8 questioned; when they would be allowed to talk to the ICRC;  
9 when they would be allowed to talk to each other; what -- how  
10 would the -- what would the conditions of the -- of the  
11 interrogations be. Would the interrogations be conducted in  
12 an actual black site was a decision made between the DoD and  
13 the CIA on the -- in -- in those coordinations.

14 I mean, this is important stuff. This is the heart of  
15 why those agents walked into the room. The government sees  
16 agents walking into the room and agents walking out of the  
17 room as the boundaries. But there's a reason why they walked  
18 into -- why those agents walked into that room, which was a  
19 black site, for the purpose of interviewing those specific  
20 detainees about information that they had learned from CIA  
21 buckets.

22 I mean, there's -- it's really difficult to see how  
23 this is not at the absolute heart of the case as opposed to

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1 the minimization that the government attempts of  
2 administrative assistants e-mailing each other about travel  
3 arrangements. That's not what we're talking about here.  
4 We're talking about the big issues and we're talking about the  
5 CIA's involvement in those big issues.

6           If it were not clear from that, the government has  
7 produced one set of information that Mr. Swann mentioned  
8 earlier in the week, which were the 10- and 30-day reports.  
9 Now, from looking at the 10- and 30-day reports, you don't  
10 know to whom is being reported, right? You know there are  
11 reports from -- from two people, one of whom works for the  
12 DoD, and those joint reports go up to somewhere. From the  
13 government's point of view, they would just disappear into the  
14 ether and no one would make any -- take any action based on  
15 these reports.

16           But what actually happened is the SDFG or -- reviewed  
17 those reports, had -- had video -- secure video  
18 teleconferences with the -- the commanders and -- and a whole  
19 bunch of other people, and then issued summaries of  
20 conclusions.

21           So the -- when you were asking the question about the  
22 ongoing duty of the government to produce discovery, the -- in  
23 these categories in -- and we're going to talk -- you know,

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1 780 is a different situation, but in these categories the  
2 government has produced no evidence other than the 10- and  
3 30-day reports.

4 Now, let's talk for a moment about the procedure -- I  
5 talked about 695 already, but let's talk about the other  
6 procedural history that the government recited. It boils down  
7 to, we've been looking for this evidence for a long time,  
8 which is true. And as we get more and more witnesses, we get  
9 more and more support for it.

10 And I know that you have -- that you have reviewed the  
11 record, and what you often see is me asking a question about  
12 this document, oh, it's redacted, this document, oh, it has --  
13 they've invoked national security privilege. Yes, but who  
14 would be the right person to ask about that? The person who  
15 actually prepared the report. Should there be 302s? Yes. I  
16 guess you don't have those 302s.

17 You know, there's huge gaps in discovery that we keep  
18 running into when we're questioning the witnesses. And, you  
19 know, ultimately there's going to be the question of are we  
20 going to keep running into those gaps at trial? Because if  
21 the government is truly done, like if they refuse to turn over  
22 any more discovery, then a good deal of, like, presentation to  
23 the -- to the panel members is going to be questions about,

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1 well, what document is that found in? I guess you don't have  
2 it, Counsel. You know, that's not a great way to try a case;  
3 but if that's what we have to do, then that's what we have to  
4 do.

5 So let's talk about what followed 538AA. Now, I  
6 explained to you that -- the government gave this interesting  
7 explanation of, we read AA in a context of learned  
8 helplessness and some other stuff that just doesn't appear  
9 here. And he said you should try as the military commission  
10 to divine what the intent of 538 was -- 538AA. I don't think  
11 it's that complicated.

12 Because let me turn back to paragraph 4 in 538AA. And  
13 538AA is written in a way that it -- the military commission  
14 acknowledges that it's really ordering that something new be  
15 produced. So at the bottom of paragraph 4.a., the -- or in  
16 paragraph 4.a., the military commission talks about the  
17 breadth, the large breadth of what Mr. Bin'Attash asked for,  
18 Mr. al -- Mr. Ali asked for. And the last sentence says,  
19 While the commission may agree that some of the requested  
20 documents and materials are discoverable by law, until today  
21 the commission was unable to make appropriate findings to  
22 compel such broad categories of information.

23 Then -- all right. I can -- I'm fogging up here, Your

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1 Honor. I'm sorry.

2 MJ [Col McCALL]: That's fine.

3 LDC [MR. CONNELL]: In paragraph b., 4.b., given the  
4 defense's theories of discoverability presented during oral  
5 arguments on 11 September 2019 and in pleadings, the defense  
6 has met their burden to show that some of the additional --  
7 the word "some" and the word "additional" -- discovery sought  
8 contains information that may be material to the preparation  
9 of the defense.

10 Now, when I spoke to you initially yesterday, I said,  
11 look, 538AA was not a complete defense win. The paragraph c.,  
12 5.c., is a limitation of some kind on 538AA. b. has a broad  
13 compulsion and then c. has, but listen, there's this other  
14 part the defense has not met their burden of proof on. And I  
15 explained to you that in 780 we're attempting to meet that  
16 burden of proof but maybe you'll say we did and maybe you'll  
17 say we didn't.

18 That is what 538HH is addressing. And I'm going to  
19 read you the sentence that the government skipped over when it  
20 was reading the ruling. After 5 -- I told you yesterday that  
21 we tried a couple of different approaches. We tried broad  
22 approaches and we tried meet and confer over specific items.  
23 We tried with the witnesses on the -- the redactions that are

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1 contained within the 75 cables. We would ask, well, this says  
2 it was distributed to three agents, you and two others. Who  
3 are the two others? And they'd say I don't know, it's under  
4 the redactions. You know, so we tried to demonstrate a lot of  
5 things.

6           And so by the time that we get to this in February of  
7 2020, then -- and you'll see this. I mean, you've probably  
8 already seen it in the pleadings in the 530. What we were  
9 talking about is two specific parts of it. We were talking  
10 about the cables that you ruled on in 538RR, and we're talking  
11 about the other prisoner material, which is essentially -- it  
12 was mostly about Majid Khan, Iyman Faris, Saifullah Paracha,  
13 and Uzair Paracha, who are the -- those four people are at  
14 issue in 780 as well. We'll talk about that when we get  
15 there. The -- because they were very much tangled up in  
16 the -- in the torture and the interrogation of Mr. al Baluchi  
17 and -- and Mr. Mohammad. But the -- that's what we were  
18 talking about.

19           So when -- and -- and that's what Judge Cohen ruled  
20 against us in 538AA, that we had not met our burden with  
21 respect to that. That's what 5.c. is. The defense failed to  
22 meet its burden to prove by a preponderance of the evidence  
23 that information pertaining to the investigation and

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1 prosecution of individuals other than these accused is  
2 discoverable by law. That's mostly about -- about what I'll  
3 call the Majid Khan group.

4           The -- and so that was at issue. We went back to the  
5 government. We tried to show them, hey, look, this is why  
6 it's important to us, this is what we're going to do with it.  
7 And in 538HH, the government just read you the sentence to  
8 show -- to try to -- in 3.b., in 538HH, and their point was  
9 further discovery in the -- about this whole area is  
10 precluded. The government read you the sentence: The  
11 commission further concludes that Mr. Ali has not met his  
12 burden to demonstrate entitlement to any relief beyond the  
13 in-camera review contemplated above, which that's 75  
14 documents.

15           The next sentence, which the government skipped over,  
16 is: In particular, the commission notes Mr. Ali's asserting  
17 discoverability of certain information regarding detainees  
18 other than the accused in this case amounts to a tacit motion  
19 to reconsider 538AA/561T.

20           So what's happening there in 538HH is the same thing  
21 that happened that I brought to you yesterday in 538AA, which  
22 is outside of these five accused, there's real -- we have  
23 not -- the military commission has ruled we have not met our

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1 burden to show the relevance of that information. That's all  
2 that 538HH says. That and we're going to -- you know, the  
3 government needs to submit the -- the 75 cables for in-camera  
4 review. It's not a broad determination of every issue  
5 regarding the Special Detainee Follow-Up Group and the -- and  
6 the -- the ODNI-run interagency process, all the sort of  
7 specific things we brought to you in 779, were just not -- not  
8 at issue or not ruled on at least.

9           Two other points that the government made that I want  
10 to talk about. One of them is the government says that  
11 there's an additional materiality filter that it applies to  
12 538AA. And, with all due respect to the government, that's  
13 simply wrong. The reason we brought the sort of policy  
14 determination, the sort of broad please give us what the scope  
15 of discovery determination is in 538 that -- that became  
16 538AA, was to ask the military commission to make a  
17 materiality determination.

18           I began my argument yesterday with, look, some things  
19 are not about friction. Some things are about people just  
20 legitimately disagree about what the scope of discovery is.  
21 And that had been the case for a number of years or since the  
22 discover -- the prosecution discovered the involvement of the  
23 FBI in -- in the RDI program in 2018. For those two years, we

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1 had fought to widen the scope of inquiry. They had fought to  
2 narrow the scope of inquiry, right? That makes sense.

3           And so what -- what Judge Cohen decided in 538AA is  
4 the materiality. He says this -- this set of material, what  
5 reasonably tends to show cooperation between the FBI, DoD, and  
6 CIA is discoverable material. He determined the materiality.  
7 And the idea that the government is applying another  
8 materiality cut on the other side of it is simply not -- I  
9 mean, I would like to say, like my colleague Mr. Nevin did,  
10 perhaps that, you know, their misunderstanding of the order is  
11 distorting their -- their discovery production. But I think  
12 they just, you know, don't want to give up this information  
13 and -- and so are reading 538AA in -- in ways that is not the  
14 plain text.

15           And the last example -- the last point that I want to  
16 address I think is a good argument of that, and -- or is a  
17 good example of that. The military commission asked the  
18 government about whether it had produced any of the SDFG  
19 material, the summaries of conclusions, for example, that we  
20 have in the record, those that we know those exist. They seem  
21 like official government statements of policy. No question  
22 of, like, side e-mails. I mean, it's important stuff.

23           And the government gave two answers. First, it's

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1 difficult to know the names of things, which I don't know what  
2 that means. Maybe -- maybe Special Detainee Follow-Up Group  
3 had another name. I did notice that in its response, the  
4 government said that the -- Mr. al Baluchi had given a  
5 nonexhaustive list of interagency policies. And so maybe  
6 there's another one that's out there that I don't know about.  
7 I don't know what that means, that we don't -- that names  
8 are -- are difficult.

9           But the same thing that it said -- the second thing  
10 that the government said was that people acting within the law  
11 are not -- is not discoverable material. That was an  
12 astonishing statement that really goes to the points that  
13 Mr. Nevin made that people acting within the law making a  
14 decision about what the law is, what the policy is, is what  
15 this motion is about. It's not about did it violate some  
16 other law, did it violate the memorandum of notification, did  
17 it violate the Constitution or anything else. It's really  
18 about this is about people deciding what policies are going to  
19 govern the lives and interrogations of our clients.

20           And the idea that there is a discovery carve-out for  
21 people who the government has concluded were acting within the  
22 law simply has no place in analysis under 538AA.

23           And that concludes my presentation, subject to any

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1 questions.

2 MJ [Co] McCALL]: No questions.

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

4 MJ [Co] McCALL]: Other defense teams wish to be heard?

5 Ms. Bormann.

6 LDC [MS. BORMANN]: I believe that Ms. Gupta is  
7 approaching the lectern.

8 MJ [Co] McCALL]: Ms. Gupta, I can see you approaching the  
9 podium up there in the RHR.

10 DC [MS. GUPTA]: Good morning. Am I beaming in all right?

11 MJ [Co] McCALL]: We can hear you and see you.

12 DC [MS. GUPTA]: Thank you very much.

13 You know, I think it's been brought up before that one  
14 of the struggles with this case is kind of analogous to -- I  
15 think Mr. Feeler said nesting dolls, or sort of like you pull  
16 on one thread and it starts to connect to so many others.  
17 This is an argument about 779. And, you know, you heard about  
18 695 now and 538 and 561 and 824. So I -- I want to -- I  
19 don't -- I don't envy you, as several people have said, and  
20 I'm going to try to keep this within the -- the context of the  
21 motion that we're talking about.

22 So I want to first address this idea that, you know,  
23 the government has gone above and beyond and actually created

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1 discovery that is responsive to the -- the requests and the  
2 demands that we've made in this -- in this series. Because I  
3 think this kind of captures what we're talking about here.

4           You know, Mr. Ryan talked about how they actually went  
5 out and interviewed the FBI agents to create statements from  
6 them that were then turned over in discovery about some of  
7 this stuff. Judge, they wouldn't have had to do that if they  
8 had turned over things that are typically created by FBI  
9 investigators in the -- in -- in the course of -- sorry. Am I  
10 still coming through? I just now have a screen ----

11           MJ [Col McCALL]: You are.

12           DC [MS. GUPTA]: Okay. They wouldn't have had to do that  
13 if they turned over the documents that are generally created  
14 in the course of an FBI investigation that would reveal those  
15 things, right? Things like a -- 302s and ECs.

16           And in this case, there was a deliberate decision in  
17 the context of the LHM interrogations to not use typical FBI  
18 documents, things that record the -- the interrogations,  
19 right? The fact that they were recorded in letterhead  
20 memoranda was a deviation from typical FBI policy at the time  
21 and there was a conscious decision to deviate from that  
22 policy.

23           So we're asking for -- that's just one example of,

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1 right, the policy decisions that -- that -- that went on  
2 that -- that led to the dearth of some of that traditional  
3 discovery, but, right, the creation of some other discovery  
4 about how those decisions were made and why those decisions  
5 were made.

6           So -- so I'm glad that those FBI agents were  
7 interviewed, but that's not -- that's not somehow, you know,  
8 an additional burden that the government has undertaken  
9 that -- that now somehow supplants their obligation to turn  
10 over these things that -- that -- that created the need for  
11 those interviews in the first place.

12           You know, and then there was a statement made that the  
13 things that were done here were all consistent with the good  
14 practices of the FBI, right? That they -- they were all done  
15 in accordance to policy. Right. That policy that was  
16 created, it -- it -- for this specific thing. So it's kind of  
17 a circular argument. And we already heard argument yesterday  
18 about the fact that we don't have many of the FBI policies and  
19 procedures and guidelines that were in effect at the time that  
20 we can use to show this was a deviation from that, right? But  
21 we also now need to have the policies and procedures and  
22 guidelines and briefings and decisions that were made about  
23 those to show that, you know, this whole additional thing was

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1 created specifically for the purpose of these interrogations.

2           So -- so, you know, now this -- I want to turn a  
3 little bit to just the 695 issue that's been brought up in the  
4 context of the 779 litigation. So -- so 695, I think  
5 Mr. Connell has explained -- has put forward is not a thing  
6 that forecloses what we're asking about here. And it's  
7 certainly not a thing that finds everything that is  
8 discoverable has been disclosed.

9           695 was our attempt, Mr. Bin'Attash's attempt, to find  
10 a workaround to understand how this -- how these  
11 interrogations and how this questioning took place, right? So  
12 in a typical interrogation that is recorded or maybe a  
13 transcript is created or there is a video, you actually know  
14 what the interrogator asks about and what the answers are,  
15 right?

16           And that's important because oftentimes, right, what  
17 you're going to do as a defense attorney is say things like,  
18 well, that interrogator suggested something, right? That  
19 topic didn't come from -- from the defendant, right? That  
20 police officer was the one who brought that up in the first  
21 place or the -- the issue of what this particular weapon was  
22 came from law enforcement. It didn't come from this person.  
23 And that's significant for some reason, right?

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1           In this case, we don't know what the questions were  
2 asked -- we don't know what the questions were that were  
3 asked, right? We don't know who brought up what topic. We  
4 don't have a transcript of these interrogations and we don't  
5 have a recording of them. And again, all of the policies and  
6 the decisions and the reasons for why this interrogation and  
7 the recording of it or the documentation of it looks the way  
8 it does is something we're trying to understand and find out.  
9 That's what this discovery is about.

10           But part of how we have tried to sort of reconstruct  
11 these interrogations and understand what the interrogators  
12 sort of were doing is by trying to find out what they knew  
13 before they went into those interrogation rooms. And that's  
14 what 695 was. 695 was asking for documents and materials and  
15 information that the interrogators were given or had access to  
16 or got themselves, right, that they then used or could carry  
17 into that interrogation room with them.

18           Because that then at least gives us the opportunity to  
19 say, well, you knew about this before you -- you went into  
20 that interrogation room, right? Like this is not a -- a thing  
21 you can say you learned for the first time from one of these  
22 accused during that interrogation. So -- so we have another  
23 way to challenge that.

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1           And Judge Cohen's order, as Mr. Connell said, was  
2 basically you should have this stuff already. This is pretty  
3 basic. If you don't have it, let me know. But you should  
4 already have this. And -- and the government's representation  
5 was yes, they already have this.

6           So now we get to this issue of buckets of information  
7 from black sites, right, from the time that these men were in  
8 incommunicado detention that it turns out these interrogators  
9 had access to -- the LHM interrogators had access to prior to  
10 their interrogations in 2007 and 2008. And that's a whole --  
11 you know, that is -- it's very revealing what was in specific  
12 folders that were assigned to particular interrogators who  
13 then went on to interrogate particular detainees.

14           The government has said to us that they cannot tell  
15 who accessed what document. But what we learned in AE 695D,  
16 delta -- delta, which is the government's notice in that  
17 series, is that -- you know, and this wasn't clear to me when  
18 the initial back-and-forth took place in court, and you can  
19 look at that transcript; it's cited here.

20           But it wasn't clear to me, and I don't think it was  
21 clear to anyone on the defense side of the room, that the  
22 database, right, this closed-system database, these buckets,  
23 had, in fact, been in continuous existence since the time of

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1 2006 or -- or whenever these interrogators were initially  
2 given access. They had been in existence since that time  
3 until today, and the prosecution had had access to those  
4 materials, to those databases, to that entire system since  
5 that time.

6           So I don't -- Agent Fitzgerald in September of 2019  
7 was able to say the specific date that he got access to that  
8 database. So there is at least information about when  
9 interrogators were given access to particular folders, and  
10 that is something that has been knowable to this prosecution  
11 team for many, many years now. And -- and that was not  
12 apparent to me, that that information existed, was obtainable,  
13 was readily available, until the notice in May of 2020.

14           And just speaking for myself, I would make a lot of  
15 use of that -- of that information when I'm questioning  
16 witnesses who had access to that, what they had access to.  
17 And, you know, the sort of ambiguity here that I just want to  
18 highlight is the decisions about what documents or what  
19 materials are put into which folder for which interrogator  
20 related to which detainee is significant, right? Because it  
21 reveals the thinking about how these government agents are  
22 approaching the interrogations of -- of these men that they've  
23 been preparing for for so long. What their priorities are.

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1 What they're trying to get out. And what they -- you know  
2 what they know about the men that they're interrogating.

3 It's not just what previous statements they have  
4 access to that may have -- that -- that came from black sites.  
5 But it's also what do they know about what the government  
6 believes the personalities are, right? Like, what are things  
7 that you can exploit in an interrogation room based on what  
8 previous interrogators are putting in this file that an  
9 interrogator is now looking at, right?

10 I mean, just thinking about a law enforcement team, if  
11 you have one interrogator handing off their file to another  
12 interrogator, you want to know what that file says. You want  
13 to know what that communication is like. And you want to know  
14 what the decision-making is about who is giving what to whom  
15 and who is going to get what in preparation for that  
16 interrogation.

17 And -- and I think that is -- that is fairly basic and  
18 it shouldn't take until May of 2020 for us to just start to  
19 get a hint of what's out there in that regard.

20 I think Mr. Connell has covered just the piece I  
21 wanted to mention about the narrowness of 538HH, but I just  
22 want to ask Your Honor to -- that -- that motion series is --  
23 is overwhelming. It is very massive. But I think one thing

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1 that Mr. Bin'Attash tried to point out in 538 -- I believe  
2 this is EE, 561X, both the -- that original filing there was  
3 Mr. Bin'Attash's motion for an order to show cause and then we  
4 supplemented that a few months ago, and that's (WBA Sup) and I  
5 believe it's that same 538EE/561X (WBA Sup). But, you know,  
6 when 538AA/561T, that order came out, I just want to make it  
7 clear the prosecution had already agreed to turn over those  
8 requirements cables that then they talk about reviewing in  
9 camera and everything. And we go through this in our motion  
10 for an order to show cause.

11 So Judge Cohen, when he issued 538AA/561T, was  
12 contemplating much more than just the disclosure of those  
13 requirements cables, right? That was -- that was settled. We  
14 weren't getting that at that point. So there's -- there's  
15 this argument that we hear from the prosecution that we turned  
16 over those requirements cables. Our obligation is satisfied.

17 That came before 538AA, or at least the agreement to  
18 turn that over came before that. That's not the end of the  
19 inquiry. And -- and that -- and I think it's very, very  
20 evident from the record that that -- that there is more  
21 that -- that 538AA ordered the prosecution to disclose.  
22 And -- and I believe we have shown ad nauseam that -- that  
23 there is more that was already ordered that hasn't been turned

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1 over. And -- and so I think when -- when people are directing  
2 you to other filings, I would also direct you to -- to -- to  
3 that issue, which I think is going to become very large and I  
4 think be -- be a lengthier argument that you will hear at some  
5 point down the line.

6 But unless the court has any additional questions, I  
7 think I'm through.

8 MJ [Col McCALL]: Thank you, Ms. Gupta.

9 DC [MS. GUPTA]: Thank you.

10 MJ [Col McCALL]: Anyone else from defense? Mr. Nevin?

11 CDC [MR. NEVIN]: Yeah, Your Honor. I do have some  
12 remarks I'd like to make, but would it be possible to have a  
13 comfort break before that?

14 MJ [Col McCALL]: Certainly. We have been going for a  
15 while. So we'll go ahead and take a little bit over a  
16 15-minute comfort break. Let's plan on being back on the  
17 record at 11:00.

18 The commission is in recess.

19 [The R.M.C. 803 session recessed at 1044, 04 November 2021.]

20 [The R.M.C. 803 session was called to order at 1102,  
21 04 November 2021.]

22 MJ [Col McCALL]: The commission is called to order. The  
23 parties are again present.

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1 CDC [MR. NEVIN]: Are you ready?

2 MJ [Co] McCALL]: I am ready, Mr. Nevin. Please proceed.

3 CDC [MR. NEVIN]: Sorry about that. And thank you for the  
4 flexibility with respect to the comfort break, Your Honor.

5 MJ [Co] McCALL]: Yeah. And sometimes I start just  
6 plugging away. So, please, if counsel need a break, you know,  
7 just -- I'm happy to let -- just let me know.

8 CDC [MR. NEVIN]: Yes, sir. Thank you.

9 Your Honor, I think, respectfully to everybody, that  
10 the issue I raised during my first argument here has  
11 somewhat -- I mean, at least by implication, is -- is proved  
12 out. I heard Mr. Ryan say that the government is -- we have  
13 guided ourselves by the belief that -- that the language in  
14 538AA was -- was far too general to really mean what it says.  
15 And he gives the example of the administrative assistant at  
16 the FBI writing an e-mail to an administrative assistant at  
17 DoD to -- to correspond about travel for some FBI agents.

18 And I understand what Mr. Connell is saying. The  
19 heart of this stuff -- I mean, the -- the stuff that really  
20 breaks the government's position, it seems to me, is the  
21 material with respect to these agencies that are talking to  
22 each other about which we've seen nothing. Sure, that's the  
23 heart of it. But the example that Mr. Ryan gave us would be

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1 very -- of significant interest to counsel trying to -- I  
2 mean, for -- among other things it -- it implies that number  
3 one's boss at the FBI has spoken to number two's boss at the  
4 DoD and these two people are not communicating with each other  
5 out of the blue, so what else was behind that? This is my  
6 point.

7           And I've -- before you -- before you came to the  
8 military commissions, I -- I'm from Idaho, and I've made the  
9 point several times that in a bar fight in Boise, Idaho, that  
10 I was defending, a charge of misdemeanor battery, my  
11 investigator would talk to everybody in the place and we would  
12 get our hands on every piece of -- because, you know how this  
13 goes. I was in the bathroom. He was looking down at his  
14 cellphone and so on.

15           But when you talk to everybody, when you get your arms  
16 around everything, by then you're in a position to say here's  
17 what happened. And when you can do that, that's the  
18 difference between, in this case -- it might be the difference  
19 between conviction and not conviction in my little case in  
20 Boise, Idaho. In this case, it might be the difference  
21 between life or death of our clients.

22           So my argument for, as a -- as a -- as a guidepost for  
23 the prosecution in this would be just read 538AA and do it.

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1 Don't get into a big internal discussion about that it can't  
2 really mean that. It's far too general that -- that  
3 couldn't -- that's not -- just read what it says and do it.

4           And, you know, Mr. Connell is -- is exactly right.  
5 The subsequent 538 orders and motions and so on didn't deal --  
6 didn't in any way water down the obligation of the government  
7 to go and do its due diligence with respect to this kind of  
8 discoverable information. In other words, you know, looking  
9 at the government's response in this motion, the -- you know,  
10 the first response was there isn't anything and the second  
11 response was it's not discoverable anyway.

12           Well, Mr. Connell made the point yesterday that that  
13 second argument, the government has already lost that  
14 argument, so to speak. 538AA says what it says and it should  
15 be complied with. And -- and without getting into an arm  
16 wrestling match with Mr. Connell about respect for Mr. Ryan,  
17 you know, I have considerable respect for Mr. Ryan. But I  
18 know that Mr. Ryan in July of 2018, made some remarks in open  
19 court to the military commission about the involvement --  
20 about involvement between the FBI and the CIA in management  
21 of -- of questioning at the black sites. And in general what  
22 he said, without quoting it, was that there wasn't any -- any  
23 connection between the two. And later in a closed session, he

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1 had to walk that back and explain that there were other  
2 parameters to it.

3 Now, I take it as a given that -- that Mr. Ryan was  
4 simply misled by the people -- I mean, because the government  
5 has -- these lawyers, by which I mean the government. I -- I  
6 mean, these lawyers have to go to people and say -- they --  
7 they can't go and look in every file drawer themselves. They  
8 have to go to other people and they have to say what have we  
9 got on this? How did it go with that? Who was involved with  
10 the other? That's -- I mean, that's -- they just have to do  
11 that. Or their investigators and -- and, you know, in other  
12 words the -- the government team.

13 So -- so it turns out there are all these loops.  
14 There are all these buckets. There are all these things that  
15 are going back and forth between these agencies managing this  
16 problem of trying to acquire information. Because after all,  
17 they have stood up -- the biggest response to this biggest  
18 attack, they've stood up a response to this comprehensively.  
19 Of course, these people are talking to each other.

20 But why is it in July of 2018, a person of Mr. Ryan's  
21 ethical stature is standing here making what amounts to a  
22 misrepresentation to a court of the United States of America?  
23 It's because he has not been fully informed by the people that

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1 he's going to.

2           So when we come here to you and we say would you  
3 please -- would you please enforce an order, would you please  
4 look past this bare assertion that there's nothing there, the  
5 reason we're doing it is because there are many layers to  
6 what's going on over here on this side of the room. I don't  
7 see how it could be otherwise.

8           I'm not saying there's necessarily anything wrong with  
9 it. But what I'm saying is that there are many layers of  
10 people back there, all of whom have to be reached, all of whom  
11 have to be told in no uncertain terms you must produce this.  
12 You may not look at this and give it your own gloss and decide  
13 it can't really mean that. You have to comply with these  
14 orders.

15           And the -- you know, the -- the coin of the realm, so  
16 to speak, is this military commission's orders. And you --  
17 you may not be able to -- I don't want to get into a  
18 discussion of your contempt powers, let's say. I'm not saying  
19 that. But I'm just saying -- I'm just saying it -- it has to  
20 be clear from the -- the military commission that this  
21 stuff -- that these orders must be complied with and these  
22 materials must be produced, even if it seems to someone who's  
23 looking at it from a different perspective, that can't really

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1 be right. I mean, it is what it is.

2           So when -- when you hear that -- that discovery is not  
3 flowing from situations where people are operating within  
4 legitimate spheres, that that's out -- that must be outside  
5 the scope of 538AA. Or when you hear that evidence about  
6 people acting within the law is not discoverable, you know  
7 what you -- as a person who drafts the occasional request for  
8 discovery and who has done this in other realm -- realms of  
9 practice, I know that we disfavor any and all requests, so any  
10 and all documents that relate to blah, blah, blah. Okay.

11           So those are extremely general requests, any and all,  
12 and so they are looked down on. They're disfavored. But  
13 there's a reason why lawyers write requests like that. It's  
14 because of this kind of a situation. Because maybe somebody's  
15 going to look at what looks to me like pretty clear language  
16 in 538AA, maybe somebody's going to look at -- I mean, all  
17 documents that are known or reasonably known or should be  
18 known to government officials who participated in the  
19 investigation and prosecution of the case against these five  
20 accused that reasonably tend to show cooperation between the  
21 CIA, FBI, and Department of Defense in the effort to obtain  
22 statements from these five accused. Where is there anything  
23 in there about people acting legally or illegally?

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1           So this is why you write a request like "any and all,"  
2 because you know that someone else is going to look at this  
3 and say, well, you know, you could put an ellipsis here and  
4 then -- and I think that's probably what the judge meant. I  
5 mean, he can't really have meant that. Just put these little  
6 ellipses in here and then -- then we've given them everything.  
7 Then there's nothing anymore that's discoverable.

8           Well, that's why you try to write these things so that  
9 there's no way out, so that no one could come to that  
10 conclusion. And that's how you end up getting things like  
11 "any and all."

12           And that's -- "any and all" is not at issue in this  
13 situation. I'm just using it kind of as an example of the  
14 problems of drafting when you're dealing with, not necessarily  
15 with Mr. Ryan, but you're dealing with the people that  
16 Mr. Ryan is dealing with who have decidedly different  
17 interests than the interests of -- of this commission in  
18 managing and advancing the rule of law.

19           So that's my argument. Thank you, Your Honor.

20           MJ [Co] McCALL: Thank you, Mr. Nevin.

21           Any other defense team wish to be heard? All right.  
22 I see negative responses.

23           We will go ahead and move into the next motion. This

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1 is AE 769. This is Mr. Ali's motion to compel 9/11 Commission  
2 intelligence requirements and related reporting.

3 LDC [MR. CONNELL]: Your Honor, I was informed by the  
4 linguists yesterday that they are having difficulty  
5 interpreting. I have -- I have checked with Mr. Nevin, who is  
6 the person within six feet of me. May I have permission to  
7 remove my mask just for the -- for this argument?

8 MJ [Co] McCALL: You may.

9 CDC [MR. NEVIN]: I was just going to say, Your Honor -- I  
10 was just going to say, I have an N-95 mask of my own. So I  
11 don't discount the -- the COVID issue that we're all dealing  
12 with, but ----

13 MJ [Co] McCALL: But you feel protected.

14 CDC [MR. NEVIN]: I feel like I'm protected.

15 LDC [MR. CONNELL]: Thank you, sir. I don't discount it  
16 either. It's just there are a number of interests to be  
17 balanced here.

18 MJ [Co] McCALL: I appreciate that, and I appreciate that  
19 you asked Mr. Nevin before. You know, that's good data for  
20 me.

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

22 AE 769 is a motion to compel essentially information  
23 about the involvement of the 9/11 Commission and the

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1 intelligence requirements it provided into -- its input into  
2 the RDI program. Now, this issue -- this is not the first  
3 time the military commission has heard about this question  
4 either.

5           The original 561 -- AE 561 brought the question of  
6 input of people other than the CIA into intelligence  
7 requirements. Judge Cohen essentially merged the 538 and 561  
8 inquiries, which made sense to me, because what became clear  
9 is that there was, you know, a loop of information that was  
10 traveling in different directions. And the -- the full title  
11 of AE 538AA is AE 538AA/561T. So 5 -- so for this purpose  
12 I'll call it 561T since we're -- you know, it relates to the  
13 sort of 561 piece of it that all merged together.

14           We're in -- in many ways in the -- in very much  
15 alternative procedural posture to the -- to the motion we --  
16 that we just argued. Because in 779, our position was that  
17 538AA had -- had really incorporated that element, and -- and  
18 what we were asking for had already been compelled in a broad  
19 sense.

20           What actually happened in 538AA/561T, is the military  
21 commission did not rule on the 9/11 Commission aspect of it at  
22 all.

23           There are -- you know, I've talked about how there are

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1 elements that we lost in 561T relating to other defendants  
2 that we're going to be talking about a little bit later, and  
3 there are elements that we won relating to coordination  
4 between DoD, FBI, and CIA, and then there were other elements  
5 that just were not addressed. And the element -- the main  
6 element that was not addressed is the 9/11 Commission.

7           So that's where we are here. I -- what I took it to  
8 mean was that -- essentially that was an open issue that had  
9 not been decided. It hadn't been ruled in our favor. We  
10 don't say that this comes under the -- the grant; and I don't  
11 think it had been ruled against us, it just had not been ruled  
12 upon. It was sort of a thread that was left over from 561,  
13 whereas most of the threads were wrapped up in the 561T order.  
14 At least the FBI portion of it was.

15           And this also, sir, is a -- I believe a discovery  
16 motion about a disagreement between the parties about the --  
17 the state of the law and the scope of required discovery  
18 really rather than a question of what the government has  
19 provided or withheld, because the government has not provided  
20 any information whatsoever about input by 9/11 Commission into  
21 the RDI program. So this is another sort of categorical  
22 exclusion that the government has made, which in some ways is  
23 a easier decision because it's really a legal decision instead

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1 of a sort of parsing of this was responsive and this wasn't  
2 responsive.

3           The government's position found at AE 769 Attachment H  
4 is mostly classified, but the last paragraph in it is  
5 unclassified and it states the government's position. And the  
6 government refused to provide information about the  
7 9/11 Commission intelligence requirements for the RDI program  
8 because it is, quote -- not, quote, required under any  
9 recognized legal precedent.

10           I am not 100 percent sure what that means, but I guess  
11 that it means doesn't come under 701 or Brady or any of the  
12 other elements. So that's where I will direct my -- my  
13 comments.

14           But what I think that it really means is that this is  
15 a legal decision for you to make. If it's unclassified, of  
16 course, the material -- it would be material to the  
17 preparation of the defense under R.M.C. 701; and if it's  
18 classified, it would be helpful to the defense under the Yunis  
19 standard. Now, some -- some hearings we've talked a lot about  
20 the Yunis standard. We haven't talked much about it at all,  
21 so I'll just give you a couple of paragraphs on it.

22           There's a different rule for classified discovery than  
23 there is for unclassified discovery. And in -- in

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1 United States v. Yunis, the D.C. Circuit, which we now know is  
2 authoritative for us, was dealing with the issue of recordings  
3 that -- where the defendant was -- the -- you know, there had  
4 been sort of SIGINT recordings that had been made.  
5 Ordinarily, those recordings would automatically be turned  
6 over to the defense because they're statements of the  
7 defendant. And what the Yunis court said was, you know, mere  
8 theoretical relevance, meaning the fact that it's a statement  
9 of the defendant in its bare sense, is not enough to require  
10 disclosure of classified information, that there's an  
11 additional layer of inquiry that has to happen.

12           And so what the -- the Yunis court did was draw on a  
13 standard that was quite familiar to courts, which is the  
14 Roviaro standard with respect to government informants.  
15 Because there's an analogy there, right? There's a government  
16 informant privilege that somebody, you know, tipped off a  
17 police officer who made a buy, you don't -- the government  
18 doesn't routinely have to turn over the person -- the  
19 informant. And -- unless the identity of the informant is  
20 helpful to the defense.

21           So if it turned out that identity of the informant was  
22 a person who had a long history of lying to the police or had  
23 some motive to fabricate or something like that, the identity

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1 might be helpful to the defense and would be turned over under  
2 the Roviaro standard.

3 Yunis applies the same standard in the classified  
4 information context; which is that, you know, the fact that  
5 something is merely a statement of the defendant, for example,  
6 with no additional helpfulness requirement, is not enough to  
7 require turned over of classified information. But under the  
8 Roviaro/Yunis standard, it has to be helpful to the defense in  
9 some way.

10 The other thing we know about that, because the  
11 D.C. Circuit followed up in another case, and we know that  
12 "helpful to the defense" is not the same as exculpatory. It  
13 doesn't have to be full-on Brady exculpatory. Things can be  
14 helpful to the defense in a number of ways, including helping  
15 the defense know what's coming against them from the  
16 government, it can be helpful to the defense in helping them  
17 find other information; but it just can't be, it's a statement  
18 of the defendant, therefore, it has to be turned over.

19 So that's -- I don't know whether -- to be honest, I  
20 don't know -- I -- we've spent a lot of time with the records  
21 of the 9/11 Commission at the National Archives. Probably  
22 hundreds and hundreds of hours. And the way that those  
23 records are organized, it is difficult for us to know whether

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1 they're actually classified or not. Because the  
2 9/11 Commission, you know, had a strange position. It was a  
3 legislative commission and ordinarily the legislature can't  
4 classify things, it's a purely executive function. But it  
5 also worked closely with FBI and CIA and -- and TSA and -- or  
6 what preceded TSA, other agencies.

7           So whether it's technically classified or -- I don't  
8 know, but I'm going to act for the purposes of my argument  
9 today as if it is classified so that hopefully we can just put  
10 that technical issue to the side and explain to you why it's  
11 helpful.

12           So to do that, this is really a factual inquiry. And  
13 I'd like to talk to you about the facts which support a  
14 conclusion that the 9/11 Commission questions for these five  
15 defendants are material and helpful to the preparation of the  
16 defense.

17           So there needs to be a little timeline for that. In  
18 March of 2002, a man named Zayn Husayn, also known as  
19 Abu Zubaydah, was captured in Pakistan, held incommunicado,  
20 and tortured. And that was before there was an RDI program.

21           In July of 2002, and we've had sworn testimony about  
22 -- basically, there's been testimony about all these factors.  
23 The Bush Administration officials approved the RDI program and

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1 it sort of was formally born, including what are known as  
2 enhanced interrogation techniques. Now, some people don't  
3 like the phrase "enhanced interrogation techniques" or "EITs."  
4 I think that it has a place in the lexicon and that is because  
5 one of the things that Dr. Mitchell explained, is that every  
6 form of -- of physical violence to a defendant for  
7 interrogation purposes is not an EIT. Dr. Mitchell explained,  
8 for example, that the forms of physical violence that  
9 Mr. al Baluchi underwent were not EITs because they weren't  
10 approved, they weren't what he had proposed, they were outside  
11 the scope of that, and he called them coercive physical  
12 measures; and that EITs are a subset of coercive physical  
13 measures but there are a lot of coercive physical measures  
14 that did not -- were not approved by the Department of Justice  
15 and are not EITs.

16           So if you ever hear me say the word "EITs," I'm using  
17 it in its formal legal sense of the techniques which are --  
18 the 12 techniques which were approved by the  
19 Department of Justice and not simply physical violence for the  
20 purpose of interrogation.

21           The -- what happened next is in September of 2002,  
22 Mr. Binalshibh was captured on -- at an apartment called NK1,  
23 9K1 on Tariq Road, and shortly after that time, in

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1 November 2002, the 9/11 Commission was formed by congressional  
2 authorization. In March 2003, Mr. Mohammad and Mr. Hawsawi  
3 were taken into custody. And then in April 2003,  
4 Mr. al Baluchi and Mr. Bin'Attash were abducted by Pakistani  
5 authorities, interrogated by FBI, CIA, and Pakistani  
6 officials.

7           So that brings us up to where we are. And so in  
8 June 2003, the 9/11 Commission really begins to become  
9 involved in -- in reaching -- attempting to reach into the RDI  
10 program. Up to then, it had been gathering records and -- but  
11 it hadn't been like actively pursuing interrogation of the  
12 defendants. But in June of 2003, the 9/11 Commission sent  
13 requests to the CIA, to the FBI, and to the DoD, the three  
14 entities covered in 538AA, for access to the reports of  
15 interrogations of 111 named prisoners, okay? And those 111  
16 named prisoners included these five defendants, as well as  
17 quite a few more.

18           And in July 2003, Special Agent Adam Drucker, who's  
19 testified about this, and Special Agent -- Supervisory Special  
20 Agent Jacqueline Maguire who is -- who are expected to  
21 testify, briefed the 9/11 Commission about Mr. al Baluchi.  
22 They were -- it was an inquiry into the financial aspects of  
23 9/11. Mr. al Baluchi is alleged to be -- have played a

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1 financial role, and so that's when the FBI first briefs the  
2 9/11 Commission about that.

3           And around that time, actually a little bit later, the  
4 CIA responds to the 9/11 Commission by providing a massive set  
5 of TD-314s. Now, we've talked about the TD-314s. These are  
6 generally intended for consumption by the intel community at  
7 large. And -- and that process itself provides a lot of  
8 information responsive to not -- not the parts of 561T we're  
9 talking about now but they -- the 9/11 Commission had access  
10 to all of these kinds of reports that -- that the defense --  
11 from 111 named people that the defense doesn't.

12           Now, just to talk about the relationship with 538AA,  
13 that would be reports on these five named defendants but  
14 also -- that is covered under -- under 538AA, but also the 168  
15 which are essentially excluded by 538 -- the 106, rather,  
16 excluded by 538AA because of the carve-out in the subsection  
17 c.

18           So the 9/11 Commission cited these TD-314s in hundreds  
19 and hundreds of footnotes in the 9/11 Commission. Chapters 5  
20 and 7 of the *9/11 Commission Report* are based almost entirely  
21 on TD-314s, intelligence reports given to them by the CIA.  
22 And just as one of those examples that's important for this  
23 timeline, at Chapter 7, note 167 of the *9/11 Commission*

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1 *Report*, the military -- the 9/11 Commission cites a, quote,  
2 intelligence report, interrogation of Binalshibh,  
3 November 7th, 2002.

4           Now, the reason why that's an important data point in  
5 this -- in this timeline is that on 7 November 2002, as the  
6 military commission heard a little bit about the other day,  
7 Mr. Binalshibh was not in CIA custody. He was in the custody  
8 of the country known as Location Number 5, being interrogated  
9 by the interrogators of Location Number 5, observed by the  
10 FBI, and reported on by the FBI through both FBI and CIA  
11 channels.

12           You can find one -- that interrogation that -- the  
13 version that we got of that interrogation, right? So  
14 9/11 Commission has access to the actual TD-314s. We get the  
15 summarized version. The summarized version of that is found  
16 in the record at AE 628CC Attachment I at STA-490.

17           Now, even though the 9/11 Commission had access to  
18 these TD-314s in their original form, the 9/11 Commission  
19 concluded that that -- the TD-314s did not contain enough  
20 detail for them to understand what was happening with the  
21 defendants and what information that they were providing.

22           So in late 2000 -- late September of 2002, the  
23 9/11 Commission had a series of meetings with the CIA. And

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1 the CIA said during that, if the 9/11 Commission posed  
2 questions about the interrogation, the CIA would answer them.  
3 And the 9/11 Commission actually did send questions about the  
4 interrogations in mid-October 2003.

5           Now, I'm not -- I'm not citing every basis that I know  
6 for these facts and that's because all of this is contained  
7 in -- in 769 itself. The two heads of the 9/11 Commission  
8 wrote a book, wrote a number of articles, and a number of  
9 documents have been released by the National Archives  
10 themselves, so -- under -- not under FOIA, interestingly, but  
11 under mandatory declassification requests, which is an  
12 alternate pattern. And so all -- if you need citations for  
13 any of these facts, they're all contained there in -- in the  
14 motion.

15           So having -- they received their answers, and the  
16 9/11 Commission decided the only way to get the information  
17 that it wanted was to question the detainees directly  
18 themselves; that the 9/11 Commission wanted their staffers to  
19 go out to -- to black sites and actually conduct the  
20 interrogations. And there was a meeting between the co-chairs  
21 of the 9/11 Commission and CIA Director George Tenet in  
22 December of 2003, and I would -- if I may have access to  
23 the -- to the document camera?

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1 MJ [Col McCALL]: You may.

2 LDC [MR. CONNELL]: I would like to show to the military  
3 commission AE 769 Attachment M. And for CISO purposes, that  
4 was CISO submission AE 769 Exhibit 3. We timely provided  
5 these to the CISO for -- for review. If we could display this  
6 to the gallery as well as to the parties, please.

7 MJ [Col McCALL]: You may.

8 LDC [MR. CONNELL]: So the point that I just made to the  
9 military commission about the 9/11 Commission wanting access  
10 to actually interrogate the detainees themselves is -- may  
11 come as a surprise, but these are the talking points from  
12 the -- from the meeting with Tenet. And "we" on these pages  
13 means the two heads of the 9/11 Commission. And they, quote,  
14 came to the conclusion that we are going to need direct access  
15 to certain detainees with critical knowledge about the  
16 formation and execution of the 9/11 plot. Although the  
17 commission has requested to date interrogation reports with  
18 respect to over 100 individuals, we believe that we are going  
19 to need access to a limited number of key detainees, seven,  
20 for direct questioning by -- by commission staff.

21 They continue, to -- they are struggling to understand  
22 the details, and interrogations to date do not appear to have  
23 focused on such historical issues in sufficient detail. They

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1 have focused much more on current and future threats.

2           They also complain about the quality of the -- of the  
3 material that they are receiving, given that it's too removed  
4 from the defendants' actual statements. I can feel their  
5 pain. Having dealt with the summaries, we're three removes  
6 from the actual statements. But that's really just a  
7 footnote, an aside.

8           And we know what detainees they wanted to speak to --  
9 and I'll show the military commission AE 769 Attachment N,  
10 CISO is 7 -- AE 769 Exhibit 4. On January 8th, there was a  
11 follow-up letter to -- to Director Tenet from the  
12 9/11 Commission, and they listed the specific detainees that  
13 they wanted to see, to interrogate, one of which was  
14 Mr. al Baluchi, but all of which are defendants in this case.

15           And at the same time, in December 2003, the  
16 9/11 Commission submitted an additional round of questions.  
17 Now, at that time when the 9/11 Commission issued its  
18 additional round of questions, Mr. Binalshibh, Mr. al Hawsawi,  
19 and others were being held incommunicado here in Echo II, the  
20 same location where the FBI would later interrogate them  
21 again.

22           And so they were here on the island, not that --  
23 not -- you know, only a small number of miles from where we

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1 are now. And Dr. Mitchell, when he testified, he testified  
2 about servicing intelligence requirements from the  
3 9/11 Commission at Guantanamo in December of 2003. And that  
4 appears in the transcript at 23 January 2020 at 30768. That's  
5 30768.

6 And what Dr. Mitchell said was quite consistent with  
7 the -- with the talking points. Because Dr. Mitchell  
8 testified that the 9/11 Commission was looking backward  
9 instead of forward, which represented a real shift in -- in  
10 the questioning.

11 So pause there for a moment, all right? So we have  
12 9/11 Commission is -- is submitting questions to H -- to the  
13 headquarters of the CIA, which are coming here to Dr. Mitchell  
14 who is inquiring of Dr. -- Mr. al Hawsawi and Mr. Binalshibh,  
15 among others.

16 Pause there for a moment and let's switch over to the  
17 FBI side, talk about what's happening there. Because the FBI,  
18 of course, is also interested in looking backwards -- maybe  
19 not instead of forwards, but in addition to forwards, because  
20 they are in the business of prosecuting crimes and they're  
21 interested in historical narratives to -- to give it that way.

22 So I just want to give you an example of how that  
23 worked and when -- and where the 9/11 Commission comes into

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1 it. Because the 9/11 Commission, the CIA, and the FBI all  
2 operated in tandem. It was not -- they were not on separate  
3 threads, there was a -- a collaboration that occurred here.

4 So in late 2003, the CIA circulated a TD-314 that  
5 reported an interrogation of Mr. al Baluchi to the general  
6 intel community, including the FBI. And in it, it reported  
7 that Mr. al Baluchi had said that he was not familiar with any  
8 al Qaeda use of flight simulation software. Okay? And you  
9 can find that in the record at AE 628AAAA Attachment E at  
10 STA-1697.

11 And around this same time in late 2003, the  
12 9/11 Commission, in addition to submitting questions to the  
13 CIA, also submitted questions to the FBI. And -- about --  
14 about Mr. al Baluchi and others. And we don't have those  
15 questions, they were not released. That's like sort of the  
16 thing that we're looking for here. And he -- those questions  
17 wound up with Special Agent Drucker.

18 And Special Agent Drucker, there's an unclassified  
19 version of his memorandum for record on this -- the  
20 9/11 Commission's memorandum for record at AE 628RRR  
21 Attachment H. And so they get together and they meet on  
22 12 January 2004 and -- and Drucker tells them, here's what we  
23 know, here's what we don't know, here's what we're trying to

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1 find out. You know, a -- sort of a briefing in answer to  
2 their questions.

3 And then the very next day on 13 January 2004, Drucker  
4 sends up an intelligence requirement to the -- to the FBI to  
5 go over to the CIA for interrogation of Mr. al Baluchi on  
6 these exact topics. And it's a long intelligence requirement.  
7 It's -- it's classified, so I'm only allowed to state its  
8 general nature. But you can find it for yourself at AE 628SSS  
9 Attachment G at FBI-23659.

10 But among the general topics of things that he's  
11 trying to find out are whether Mr. al Baluchi actually sent  
12 the money transfers, the five money transfers that wind up in  
13 the charge sheet; but also about -- a question about Marwan  
14 al Shehhi, who's one of the hijackers, use of a credit card to  
15 order flight simulator software, right? Because remember,  
16 there recently had been a -- he doesn't know anything about  
17 flight simulator software.

18 And so when you look at FBI-23659, you'll see that  
19 there's a big block in the middle of it, and that covers the  
20 TD numbers that Drucker was referencing in his -- in his  
21 intelligence requirement. Because one of the -- the things  
22 that the government has done is to try to cover TD-13  
23 numbers -- TD-314 numbers so that we can't, you know, formally

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1 draw the loop. We have to do it by content. So we find the  
2 content in the December -- we find the content in STA-1697,  
3 for example, about flight simulator, and then we get a date a  
4 couple of weeks later of an FBI -- what appears to be a  
5 response to that.

6 If the TD-314 numbers were available, then we would be  
7 able to match it up. We'd be able to say clearly, look, the  
8 13 January inquiry follows the 23 December -- I'm making up  
9 that December date because we don't have the December date,  
10 but follows a specific December date inquiry -- TD-314 on the  
11 same topic.

12 So when the -- when the government seeks to redact  
13 TD-314 numbers saying, oh, they're only administrative  
14 numbers, the real impact of that is that we have to match by  
15 content instead of the way that the FBI and CIA would do it,  
16 which is just, hey, you -- you're answering a prior TD-314,  
17 please list the TD-314 so I can go look it up. That's the way  
18 it works in the intel community, but all of that -- the  
19 opportunity to do all of that has been denied to us by the  
20 redactions and summaries process. But that's what we would do  
21 if we had access to the FBI numbers.

22 So I can say with a relatively high level of  
23 confidence that -- that Drucker is -- is responding to a -- a

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1 TD-314 on the same content. And when I asked him about it, he  
2 said, yeah, I don't know, but that makes sense. But if we had  
3 the TD-314 numbers, we could say with 100 percent confidence,  
4 but we can't.

5 So I haven't seen the redactions that you approved in  
6 AE 538RR yet, but I hope that it does not include the TD-13  
7 [sic] numbers, but I don't know.

8 So at the time that -- that Special Agent Drucker  
9 takes on -- on board the questions from the 9/11 Commission  
10 and sends out his intelligence requirement to -- to the black  
11 sites, Mr. al Baluchi was in Location 7, also called BLACK,  
12 where the cells had springs to keep them constantly off  
13 balance, that's one of the features. And he even to this day  
14 has never had vestibular rehabilitation. He's still off --  
15 his balance has never fully covered. He has eighth nerve  
16 damage, which is the nerve which governs the -- your  
17 ability -- excuse me. Eighth nerve damage which is the  
18 ability to -- to balance. So, you know, it was a big deal.

19 But we also understand that at that time the political  
20 pressure must have been enormous from -- from Director Tenet  
21 because we were having high-level meetings with Director  
22 Tenet. So what happens is, is the CIA actually brings back  
23 some of its interrogators from the earliest days, from the

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1 most brutal days at COBALT, which was according to -- to  
2 Mitchell, Dr. Mitchell, which didn't follow the EITs; it was  
3 just raw coercive physical pressure, in his words. But it  
4 brings back three of those interrogators, MA2, SM1, and NZ7,  
5 men who -- or -- or women who had tortured Mr. al Baluchi at  
6 COBALT to make him talk again.

7           And the pressure on Mr. al Baluchi at this time is  
8 described in AE 562B Attachment B at MEA-2C-450. And this is  
9 a -- an unclassified document. And they talk about this --  
10 the noncoercive -- the nonphysical coercive measures that they  
11 use. So interrogator -- redacted -- who said that he was  
12 present at some debriefings of Ammar at Location Number 2,  
13 which is COBALT, stated that his role during the briefings was  
14 to be a silent -- was to be silent and intimidate by his  
15 presence. -- blank -- elaborated stating that the  
16 interrogators wore black clothes to symbolize a menacing black  
17 presence. According to -- blank -- if the detainees tried to  
18 give evasive answers to the debriefers' questions, the  
19 interrogators would intervene to try to, quote, get them back  
20 on track, telling the detainees that their responses were not  
21 acceptable.

22           -- blank -- commented that he would make veiled  
23 references to the previous bad times the detainees went

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1 through, meaning when they underwent EITs but did not use  
2 measures on them. The -- later on the same page, 451, usually  
3 the interrogators' presence, strong language, and inferred  
4 threat that life could get a lot harder was sufficient to make  
5 a detainee cooperate.

6           So the reason why I say this is it's important to  
7 understand, you know, when the 9/11 Commission sends questions  
8 which go through the FBI to the CIA to interrogators, even if  
9 actual physical torture is not being applied at the time  
10 there's always a call-back. There's always a reference back  
11 to it -- things could get a lot worse if you don't talk to us,  
12 and I think it's a good example of that.

13           But the other reason why we know there was enormous  
14 physical pressure is they brought in -- at this exact time to  
15 service these requirements, they brought in Mitchell and  
16 Jessen. Now, Dr. Mitchell testified that he only had eight  
17 interactions with Mr. al Baluchi. And all of those eight  
18 documented interactions were during this time, during this  
19 time between January and April of 2004.

20           And Dr. Mitchell testified about it. He testified  
21 that the 9/11 Commission, quote, supplied us with intel  
22 requirements and we provided with -- them with information.  
23 And then Dr. Mitchell continued in his testimony at

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1 23 January 2020, pages 30767 to 68, quote, we asked the  
2 detainees about the intel requirements that they provided,  
3 meaning the 9/11 Commission. They gave us answers, we sent  
4 those back.

5 And one of the things that they sent back is STA-254  
6 and in -- STA-254 is found in the record at AE 628CC  
7 Attachment I, and this is a government-provided discovery  
8 document marked FOUO.

9 May I have access to the document camera?

10 MJ [Col McCALL]: You may.

11 LDC [MR. CONNELL]: Can you display to the gallery as well  
12 as the parties, please. I'll show you the marking, I think.  
13 There we go.

14 MJ [Col McCALL]: Right there.

15 LDC [MR. CONNELL]: FOUO marking.

16 MJ [Col McCALL]: It will be displayed to the gallery.

17 LDC [MR. CONNELL]: Thank you.

18 So in this STA-254, which is extracted by  
19 Mr. al Baluchi, these are the answers to the questions that  
20 the 9/11 Commission provided to the FBI who sent to the CIA  
21 who sent to the black site and at various times MA2, SM7, NZ7,  
22 Dr. Mitchell and Dr. Jessen interrogated Mr. al Baluchi about.

23 And so what -- what happens is the -- and there's a

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1 lot of information here. It goes through basically --  
2 basically every charge in the charge sheet is contained in  
3 this one document. But the -- the part I want to highlight is  
4 that Ammar talks about that in January 2007, he ordered a CD  
5 and a book, which included a flight simulator, and had them  
6 sent to his employer's business address in Dubai. For this  
7 purchase, Ammar used Marwan al Shehhi's credit card and  
8 purchased the flight simulator in Marwan's name. That's the  
9 important piece of information here.

10 And the 9/11 military commission -- excuse me, the  
11 9/11 Commission actually cites this particular report, this  
12 exact one, at Chapter 5, note 102. It cites it as  
13 Intelligence Report Interrogation of Ali Abdul Aziz Ali,  
14 February 11th, 2004.

15 Now, here's the fascinating thing. The only way that  
16 we know that this report went out on 11 February 2004, is from  
17 the *9/11 Commission Report*. Because the government --  
18 originally this has no dates on it at all, as you can see. It  
19 just says early 2004. And then the government has produced  
20 this thing that is referred to as the RDI index, but the RDI  
21 index doesn't list this as February 11th, 2004. It lists this  
22 as 31 January 2004.

23 So who's right and who's wrong, I don't know. If we

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1 had a TD-314, we could just look at the date on it and see.  
2 But instead we're left with -- with information that the  
3 government summarizes that is the opposite, or at least two  
4 weeks difference from what the *9/11 Commission Report* says.  
5 But the fact that the *9/11 Commission Report* can report the  
6 date on this TD-314, says that there's no possible way that it  
7 was -- that that date is classified and shouldn't be hidden  
8 under national security privilege anyway.

9           But -- so let's talk about what happens to -- to  
10 STA-254, this document that I just showed you. This -- the  
11 contents of this TD-314, or the document underlying STA-254,  
12 go directly into the *9/11 Commission Report*. They go directly  
13 into Special Agent Fitzgerald's so-called clean team  
14 interrogation. And they even go directly into the charge  
15 sheet.

16           Now, the -- I'm -- I mentioned that the contents of  
17 STA-254 are the backbone of the charges against Mr. al Baluchi  
18 in the charge sheet, which came directly from a black site.  
19 It covers the financial transactions. It covers the use of  
20 aliases. It covers the uses of addresses and phone numbers.  
21 It covers Hani Hanjour's bank account. And I just want to  
22 give you an example. Overt acts 34 and 35 in the charge sheet  
23 state that Mr. al Baluchi and Marwan al Shehhi ordered a

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1 CityBird video and flight simulator software, all right?

2 Now, I asked Special Agent Drucker about this on the  
3 stand. And Special Agent Drucker testified that the only  
4 source for the fact that Ammar al Baluchi was involved in  
5 ordering this CityBird video and -- and this flight simulator  
6 software, the only source that the FBI had for that  
7 information came from STA-254, that TD-314 that they received  
8 from the black site.

9 Without that, the FBI didn't -- how would they connect  
10 Ammar al Baluchi to it? It's Ammar -- it's Ammar -- Marwan  
11 al Shehhi's credit card. It does go to an employer where  
12 Mr. al Baluchi also worked, but that doesn't mean that he  
13 ordered anything. It doesn't mean that he had any -- he had  
14 any involvement with it or maybe he picked it up, right,  
15 something else. But Special Agent Drucker specifically  
16 testified the only way that the FBI had this information is --  
17 which becomes two overt acts in the charge sheet, is  
18 information that was extracted from Mr. al Baluchi in the  
19 black site.

20 So there's -- if you're interested in -- I do want to  
21 point there's -- I've given you the unclassified version of  
22 it. There's a much, much more detailed classified version  
23 that's found at AE 824B Attachment C. So if at any point you

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1 need to draw on that for -- for findings of fact, that's  
2 available to you.

3 Now, what did the -- what did Special Agent Fitzgerald  
4 testify about this exact information when he testified? And  
5 this -- the government called Special Agent Fitzgerald. He  
6 was a government witness on direct. And at 16 September 2019,  
7 at pages 25440 to 43, the government had Special Agent  
8 Fitzgerald testify about this same set of information. And  
9 what he testified was, he said that we learned there was a,  
10 quote, investigative connection between Mr. al Baluchi and the  
11 use of Marwan al Shehhi's credit card.

12 So it's not that he denied where he got the  
13 information. It's that he just said that the FBI generally  
14 had found an investigative connection, and that's true. Now,  
15 the FBI found that investigative connection by -- at the  
16 request of the 9/11 Commission by sending intelligence  
17 requirements to the CIA who threatened Mr. al Baluchi to give  
18 them the information and then they reported it back, but that  
19 is an investigative connection.

20 So just to -- to sum that up, in the 13 January 2004  
21 FBI intelligence requirement, arose in the context of a  
22 12 January 2004 meeting with the 9/11 Commission and Drucker,  
23 and the questions that the 9/11 Commission submitted to

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1 Drucker in advance of that 12 January 2004 meeting. If we had  
2 those questions, then we would have the complete lifecycle of  
3 this interrogation of Mr. al Baluchi that undeniably resulted  
4 in use of black-site-extracted information in the clean team  
5 interrogation and ultimately in the charge sheet.

6 The only thing that we're missing out of this, you  
7 know, some TD-314 numbers and dates would be nice, but what  
8 we're really missing out of it is the genesis of it, which is  
9 the 9/11 Commission's questions to Special Agent Drucker which  
10 led him to issue this intelligence requirement.

11 Now -- all right. Now, I asked you to -- to put a  
12 bracket with what the 9/11 Commission was doing to go over to  
13 their -- their connection through the FBI. After  
14 January 2004, the 9/11 Commission no longer needed the FBI as  
15 an intermediary because of this meeting that they had had  
16 with -- with Director Tenet. They now had much more direct  
17 access to send questions, because Director Tenet was not going  
18 to allow the 9/11 Commission staffers to go to black sites but  
19 he would send out the intelligence requirements through  
20 headquarters to the -- to the analysts to the black sites.

21 And there's a -- a 23 January 2004 meeting between  
22 Director Tenet and the 9/11 Commission co-chairs -- and you  
23 can read about that at AE 769 Attachment 0 -- where the CIA

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1 appoints a person who -- as what they call a focal point, and  
2 that focal point is going to field 9/11 Commission questions  
3 for use in interrogation, is going to give them answers.

4 This is during the period of time January to  
5 April 2004 that -- Dr. Mitchell testified about that. And it  
6 worked. There's a May 2004 e-mail that the -- the  
7 9/11 Commission has released. It's found in the record at  
8 AE 769 Attachment P. It's CISO AE 769 Attachment --  
9 Exhibit 6. If I may have access to the document camera.

10 MJ [Col McCALL]: You may.

11 LDC [MR. CONNELL]: So in the e-mail that they have  
12 released, it's written to the co-chairs and it says that it  
13 just wants to summarize what's happened up to that point. And  
14 it reports that, most of our information has come from CIA, a  
15 significant amount from DoD, and less from FBI, which is not  
16 as substantially involved in the interrogations as the other  
17 two agencies.

18 We have had access to all the intelligence report on  
19 interrogations of detainees, including some detainees held by  
20 foreign governments -- which we saw with Mr. Binalshibh -- as  
21 well as those held in facilities run by CIA or DoD.

22 We have also -- and then there's no transcripts.  
23 Skipping that sentence. We have also been permitted to submit

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1 questions to be asked by the interrogators and have gotten  
2 responsive intelligence reports back. While the system has  
3 not worked as fast as we would have liked, the agencies have  
4 basically lived up to their promises.

5 A pretty good summary of the integration of the  
6 9/11 Commission into the interrogations.

7 So -- and finally, if we could have the feed from  
8 Table 4 -- actually, I haven't heard from the CISO whether our  
9 Exhibit 1, our slide, has been approved.

10 MJ [Col McCALL]: Was this the 21-page slide presentation?

11 LDC [MR. CONNELL]: Sir?

12 MJ [Col McCALL]: Was this the 21-page slide presentation?

13 LDC [MR. CONNELL]: No, sir. I can hand it up so you  
14 can -- we can all be talking about ----

15 MJ [Col McCALL]: Okay. If you could pass it up.

16 LDC [MR. CONNELL]: This is CISO AE 769 Exhibit 1. It's  
17 also ----

18 MJ [Col McCALL]: Charlie?

19 LDC [MR. CONNELL]: It's been marked as AE 769C. And I  
20 have an extra copy if you want me to hand it to the CISO.

21 MJ [Col McCALL]: You're good. You can use it.

22 LDC [MR. CONNELL]: Okay. Great. And I can display it to  
23 the gallery?

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1 MJ [Col McCALL]: You may.

2 LDC [MR. CONNELL]: Okay, great. Thank you. If we could  
3 have the feed from Table 4, please.

4 So this graph kind of maps out the information flow  
5 from the various entities that were involved in the CIA black  
6 site -- or the RDI program. CIA Headquarters, of course, is  
7 the central clearinghouse for everything. Looking at the  
8 left-hand side of this slide, at the bottom, the FBI Alec  
9 Station, which is the Usama bin Laden station at the CIA, and  
10 the broader intelligence community all have -- I've drawn it  
11 sort of as overlapping because the FBI has embedded personnel  
12 at Alec Station. Alec Station has embedded person at --  
13 personnel at the FBI. They're liaisons. Special  
14 Agent Drucker was one of those liaisons. We'll have testimony  
15 from a few others as well.

16 The 9/11 Commission is a little off to the side,  
17 right? They don't have embedded personnel with anyone. But  
18 intelligence requirements flow from 9/11 Commission, FBI,  
19 broader intelligence, sometimes through Alec Station,  
20 sometimes directly to CIA Headquarters, like when the FBI does  
21 it, depending on -- there are two routes that they could go.  
22 They could go through the director of the FBI office or they  
23 could go through their liaison like Special Agent Drucker.

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1 Different times, it happened different ways.

2           And those intelligence requirements go to  
3 CIA Headquarters who prepare -- put them in cables and send  
4 them out to the black sites. When we get to 780 and 781,  
5 we're going to see some -- some examples of that. Cables flow  
6 back from the black sites and then TD-314s, CIRs, and other  
7 products flow back to the consumers of the intelligence, which  
8 are the FBI, 9/11 Commission, and broader intelligence  
9 community.

10           So, you know, I gave you example earlier of how we'll  
11 use responsive discovery to this motion to prove a  
12 9/11 Commission/FBI/CIA integration to defeat the government  
13 claim that the FBI knew all the information in the charge  
14 sheet before the interrogations under torture, and we were  
15 able to figure that one out.

16           And sometimes I feel like, in bringing forward these  
17 complex information loops that we've been able to figure out,  
18 that it might lead to the -- the military commission to think,  
19 well, you've done a pretty good job there. You know, you were  
20 able to follow the dots even though they were kind of obscure.  
21 What do you need anything else for?

22           So I want to give you an example of one of these that  
23 we have not been able to figure out. I want to tell you what

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1 we have been able to figure out about it and the way that the  
2 responsive discovery would help us in moving forward.

3 So in the personal ----

4 MJ [Col McCALL]: Mr. Connell, so that's exactly one of  
5 the questions I had. And so before we go into that, I -- I  
6 don't want to break that up. That seems like ----

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

8 MJ [Col McCALL]: ---- a perfect place to break.

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

10 MJ [Col McCALL]: Because I'm also trying to be cognizant  
11 of prayer times for the accused.

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

13 MJ [Col McCALL]: So it's just about 12:00. Let's go  
14 ahead and break for lunch. We'll be back on the record at  
15 1330.

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

17 MJ [Col McCALL]: The commission is in recess.

18 **[The R.M.C. 803 session recessed at 1200, 04 November 2021.]**

19 **[The R.M.C. 803 session was called to order at 1333,**

20 **04 November 2021.]**

21 MJ [Col McCALL]: The commission is called to order. The  
22 parties are again present. It appears, though, we have  
23 Mr. Binalshibh present now and Mr. al Hawsawi has left.

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1 Is that correct, Mr. Ruiz?

2 LDC [MR. RUIZ]: Yes, sir. That's correct.

3 LDC [MR. BRUCK]: If I might, Your Honor?

4 MJ [Co] McCALL: Yes, Mr. Bruck.

5 LDC [MR. BRUCK]: I just did want to explain

6 Mr. Binalshibh's absence ----

7 MJ [Co] McCALL: Sure.

8 LDC [MR. BRUCK]: ---- this morning. He was, of course,  
9 at court. He had almost no sleep at all last night. It was a  
10 very, very hard night; he slept for about an hour. And by the  
11 time he got to court -- some of the things I described the  
12 other day, extremely intense. And by the time he got to court  
13 this morning, he was just in no shape to -- to be here. He  
14 got some sleep during the morning and is capable of joining us  
15 now.

16 MJ [Co] McCALL: Very good. Understood. And I  
17 appreciate that.

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

19 MJ [Co] McCALL: Mr. Connell.

20 LDC [MS. BORMANN]: Judge, I'm sorry. I ----

21 MJ [Co] McCALL: Ms. Bormann.

22 LDC [MS. BORMANN]: Yes, thank you. I just want to put on  
23 the record that both Ms. Gupta and Mr. Montross are gone from

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1 the RHR. They have scheduled PCR tests so they can fly on  
2 Saturday. They should be hopefully back by about 2:30. So  
3 just for the record.

4 MJ [Col McCALL]: All right. If we need to adjust  
5 something that they were going to handle because of that, just  
6 let me know.

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

8 MJ [Col McCALL]: Mr. Connell. And again, you can remove  
9 your mask for this.

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

11 When we left off, I had just given an example of  
12 something that -- an information loop that clearly was very  
13 important and it had aspects of -- that we had been able to  
14 prove, given the discovery that we've received, and also  
15 elements that are -- would -- of discovery that would be  
16 responsive in this motion, the CIA -- excuse me, the  
17 9/11 Commission contribution to the questions.

18 And when we left off, we were discussing the question  
19 of, well, you know, if you're able to trace that, why -- why  
20 is further discovery necessary? And to answer that question,  
21 I want to cite the very famous poet, Secretary Rumsfeld, with  
22 his discussion of -- famous discussion of what we know and  
23 whether we know that we know those things.

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1           And so he said it before square grid, if you will,  
2 between known knowns, known unknowns, unknown knowns, and  
3 unknown unknowns. And I think that the example that I just  
4 gave and the one that I'm about to give pretty much illustrate  
5 how the discovery process maps onto that.

6           So in the -- in the first category, you know, I was  
7 able to give you very specific AE numbers and I was able to  
8 give you specific places. And -- and one is tempted to call  
9 those known knowns, things that -- that we -- but those known  
10 knowns themselves are degraded. You know, I've often said  
11 that the government's -- I won't go there. I -- I instead  
12 will say much of the discovery that we receive is degraded  
13 from its original value.

14           You know, we talked about TD-314 numbers. And the --  
15 the point of TD-3 number -- TD-314 numbers is to allow an  
16 analyst who is working within the intelligence community  
17 connect the dots between previous documents and this document  
18 and later documents, like in the manner of an e-mail chain or  
19 the way that our AE numbers work, which is that they connect  
20 back to other things responsive to something else.

21           And what we are trying to do with the -- with the  
22 summarized discovery and their redacted intel requirements is  
23 much like trying to wade through this record without AE

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1 numbers, because all guideposts have been removed.

2           So although it is tempting to call what I talked about  
3 before lunch, known knowns, well, obviously you know that,  
4 Mr. Connell. In fact, there are elements of it that we don't  
5 know.

6           And I even flagged that at the time of if I had a  
7 TD-314 number, I could say that Drucker's intel requirement  
8 was referencing the TD-314 from Mr. al Baluchi. Instead, I  
9 connect it by content. And I -- that's -- and so do I have  
10 confidence in that? Yes. Am I 100 percent confident in it?  
11 No. Because the information that we received is degraded in a  
12 way that -- that interferes with our ability to draw  
13 connections.

14           In that earlier example, there were also a good  
15 example of a known unknown. So one thing that we could  
16 identify and -- you know, is it possible that the 9/11 -- that  
17 the December 2003 9/11 questions that go to Drucker played no  
18 part in his -- in his meeting on January 12th and his  
19 intelligence requirement on January 13th? Sure, that's  
20 possible. That's within the realm of possibility. But that  
21 is a known unknown. It looks -- you know, the information  
22 that we have points very strongly to, in a chronology and a  
23 political situation, very strongly to the idea that the

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1 9/11 Commission questions would likely inform the meeting that  
2 the 9/11 Commission had with Drucker and what Drucker does  
3 immediately after.

4 But that's a known unknown. We know that there's a  
5 set of questions that the 9/11 Commission gave to Drucker  
6 because it's mentioned in MFR, but we don't know the content.  
7 I think we can guess pretty well at the content, but it's  
8 still a guess; it's an educated guess, but it's still a guess.

9 Then we -- so I want to give another example now, and  
10 this is a place where we have not been able to connect the  
11 dots fully, but it's a place that points to the existence of  
12 known unknowns that we can further point to. So you might  
13 wonder what's left, right? I told you earlier that the --  
14 that STA-254 contains almost everything in the charge sheet.  
15 You know, what's left? But, in fact, quite a lot is left.

16 And so I wanted to give you an example of responsive  
17 information that we will not be able to -- that unless we get  
18 the responsive information from this motion, we don't be able  
19 to move forward.

20 So we haven't talked a lot about the personal  
21 jurisdiction aspect of the litigation, but in the AE 502  
22 series, the government is attempting to prove that  
23 Mr. al Baluchi was, quote, part of al Qaeda as required by the

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1 statute 10 U.S.C. 948a(7). And a major part of that question,  
2 and the military commission's issued some rulings on this in  
3 the 502 series, but a major part of that question factually,  
4 not legally but factually, is what does it mean to be part of  
5 al Qaeda? And there's a multifactor test that the  
6 D.C. Circuit elucidated and the military commission adopted  
7 and to -- to many people, one element of that is being part of  
8 al Qaeda means swearing bay'at to bin Laden, which  
9 Mr. al Baluchi did not do and is not alleged to have ever  
10 done. And so that's -- that's an important fact, but the  
11 significance of that fact is something that the military  
12 commission is going to have to weigh, among other factors, in  
13 the multifactor analysis of the D.C. Circuit.

14 And so the significance of swearing bay'at to  
15 bin Laden is a critical fact in issue in the personal  
16 jurisdiction litigation. And so this is where the  
17 9/11 Commission comes into it. The 9/11 Commission has  
18 written about the role of bay'at in the 9/11 conspiracy  
19 specifically in the text accompanying Chapter 7 note 104. And  
20 in -- in the *9/11 Commission Report*, the commission cites in  
21 note 104, quote, intelligence report interrogation of  
22 detainee, April 14th, 2004.

23 And this is a key time for the 9/11 Commission

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1 intelligence requirements. Remember, we talked about the  
2 significance of April 2004 earlier. It's the January to April  
3 time -- 2004 time period where there's really -- there's --  
4 Tenet has the -- you know, 9/11 Commission has the attention  
5 of Director Tenet. Director Tenet is putting pressure.  
6 They've brought back early interrogators, they brought in  
7 Mitchell and Jessen, so it's really a key time and it's  
8 shortly before the staffers declared it a success in May of  
9 2004.

10           And so there's a very good chance that intel  
11 requirements during that time came from the 9/11 Commission in  
12 April 2004, although we can't -- it's a known unknown. We  
13 can't prove it without the documents but we have good reason  
14 to believe it.

15           Now, so let's talk about note 104 in the -- in the  
16 *9/11 Commission Report*. The government has stated and -- and  
17 I don't know if you've looked at the -- how much you've looked  
18 at this. I wouldn't if I could avoid it. But there was a  
19 discovery request series, DR 167, where it is really an  
20 example of success -- really successful engagement between  
21 Mr. al Baluchi's team and the government where both of us have  
22 put an enormous amount of work into the question of decoding  
23 9/11 Commission footnotes and what they're actually referring

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1 to.

2           And we've exchanged spreadsheets. We've exchanged,  
3 you know -- and over time, it's really gotten deeper and  
4 deeper. So kudos to the government for their efforts on that  
5 and kudos to our analysts as well. I mean, we really deeply  
6 engaged on that topic.

7           And you can look at them, for example -- and -- and so  
8 this is not a question that I expected to answer specifically,  
9 but if I could have permission to show you what some of this  
10 engagement looks like, it's in the record at AE 773C  
11 Attachment C, and not to display it to the gallery but if I  
12 could have permission to display to the parties.

13           MJ [Col McCALL]: You have permission.

14           LDC [MR. CONNELL]: Thank you.

15           MJ [Col McCALL]: Go ahead. You can publish to the judge.  
16 There's a little bit of a lag.

17           LDC [MR. CONNELL]: Yeah, of course. No problem, sir.

18           MJ [Col McCALL]: And to counsel. Okay.

19           LDC [MR. CONNELL]: So just to orient you a bit, this is a  
20 spreadsheet that we -- Mr. al Baluchi's team provided to the  
21 government. And it showed -- what we did is we went through  
22 and we said, listen, here is what we've been able to match up.  
23 The government at one point said -- just went through our

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1 requests and said "provided" or "not provided." And so rather  
2 than ask them please match up everything, we went through and  
3 matched up our -- to the best of our ability, hey, we think  
4 this footnote goes with this STA document, et cetera.

5           So an example of that you'll see is Chapter 7 here,  
6 note 107, intelligence report, interrogation of detainee  
7 June 17th, 2002. They refused to produce that one. And so we  
8 figured that out. But let me give you a better example of how  
9 it actually works. I'll slide down here to Chapter 5 in  
10 the -- in the military commission -- excuse me, in the *9/11*  
11 *Commission Report*.

12           The footnote 92 says, intelligence report,  
13 interrogation of Binalshibh, March 31st, 2003. We were able  
14 to identify that that was basically referring to five  
15 different elements of discovery because the government has --  
16 has broken apart individual reports. They're not necessarily  
17 in the same compilation that the 9/11 Commission saw them, but  
18 that these are the pages that -- with -- that match up with  
19 that. And -- and the government's response on that was that  
20 it had been provided.

21           Now, you'll notice that some of these -- so we felt  
22 satisfied with that. We were able to track the information.

23           Some of these you'll note are in highlighted in

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1 yellow. And the highlighted in yellow was, government, this  
2 is what we're asking for your assistance on. We have done --  
3 we have tried to figure out as best we can what Chapter 7,  
4 note 104 refers to, and here's our guesses. Right? It could  
5 be any of these five -- any of these one, two, three, four,  
6 five, six, seven, eight. We've identified eight documents  
7 that we think it could be. Can you help us?

8           And so we sent this to the government and -- and I  
9 don't want you to think that this is like the first  
10 correspondence. There's been correspondence back and forth.  
11 This has gotten to a fairly advanced stage. And the  
12 government had originally told us that it had provided this.

13           So the reason why I'm pointing that out is you is that  
14 this is Chapter 7, note 104 where the 9/11 Commission wrote  
15 about the role of bay'at in the 9/11 conspiracy and its  
16 significance, and then it cited the April 14th, 2004  
17 interrogation of detainee. That is the one that I just showed  
18 you, right? This is the exact document that we're talking  
19 about.

20           And so we, in this document, in this exchange, went  
21 back to the government and said, look, we're trying to nail  
22 down -- we want -- the significance of bay'at is important,  
23 it's obviously an issue in the case. We want to nail down

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1 what this is about.

2 And so let me just show you the response. And this is  
3 in the record at AE 773D. And if I could have permission to  
4 display to the parties?

5 MJ [Col McCALL]: You may.

6 LDC [MR. CONNELL]: This is the April 14th, 2004, which we  
7 had previously -- in previous communication we had established  
8 is Ammar al Baluchi. And then the answer that comes from the  
9 government is: The prosecution has asserted national security  
10 privilege over information contained within the requested  
11 document that prevents the prosecution from providing the  
12 corresponding Bates number for this document, but the  
13 statement has been disclosed to the defense.

14 So what that means is that they've given us -- it's  
15 one of the, you know, couple of thousand of STAs. And we have  
16 a guess of eight that it might be. But it is now -- it is at  
17 this point literally impossible for us to nail that down  
18 because the government has -- has exercised national security  
19 privilege, which is within its prerogative, and it has removed  
20 from the litigation the linkage of a 9/11 Commission citation  
21 talking about bay'at to an actual discovery document.

22 So we have reached the end of this trail. There is no  
23 place else to go in -- in discovery around the STA. We have

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1 drilled down as far as it's possible to go. So we have to go  
2 in some other direction.

3 And that other direction would be -- and I'm done with  
4 the document camera -- would be, well, let's see what the  
5 9/11 Commission input into it was. Because we know that  
6 during this time, around April of 2004, the 9/11 Commission  
7 was ----

8 MJ [Col McCALL]: Well, so let me -- and I don't want to  
9 break your -- your stream of thought here but ----

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

11 MJ [Col McCALL]: So -- and again, I'll just say this for  
12 all the parties. You know, I -- I'm not sure how the other  
13 judges have handled motions practice. Hot/cold, it would  
14 probably depend on the issue for me. A lot of times I will  
15 ask questions. Please don't read into it that I have  
16 assumed -- or I've taken any position. I'm perhaps pushing  
17 the attorneys to try to get a feel for ----

18 LDC [MR. CONNELL]: Sir, I love questions. Hostile,  
19 friendly, you name it.

20 MJ [Col McCALL]: Okay. Well, hopefully there won't be  
21 too many hostile.

22 LDC [MR. CONNELL]: Adversarial, let's say.

23 MJ [Col McCALL]: Sure. So here's my question, though.

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1 So -- and I'm just trying to make sure I'm understanding the  
2 process as you've honed in on this spreadsheet.

3 LDC [MR. CONNELL]: Yes.

4 MJ [Col McCALL]: When you say that for this question, you  
5 were able to narrow down that you thought it came from these  
6 eight potential documents that ----

7 LDC [MR. CONNELL]: That's correct.

8 MJ [Col McCALL]: ---- you had received.

9 LDC [MR. CONNELL]: Yes.

10 MJ [Col McCALL]: So you have those documents. I'm  
11 assuming the reason you were able to pin it down to those  
12 documents is they dealt with that subject matter ----

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

14 MJ [Col McCALL]: ---- is that why? Okay.

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

16 MJ [Col McCALL]: So you have that subject matter. I know  
17 that you're not able to connect it to this specific piece that  
18 you're wanting, but you have the subject matter of it. And I  
19 know part of it is being able to connect the dots to show  
20 the -- the inner working, but when the government has said  
21 that they've provided it to you, I mean ----

22 LDC [MR. CONNELL]: In a sense, that's true.

23 MJ [Col McCALL]: And it seems like -- well, and it seems

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1 like in the motions argument you would then be able to say,  
2 Judge, they've said that they've provided this. I can't tell  
3 you which of these eight it is, but it's clearly one of them.  
4 So right there you, Judge, should on your findings of fact  
5 when you're deciding this motion rule in our favor as far as  
6 at least for this fact. Does that make sense?

7 LDC [MR. CONNELL]: Yes, sir, it does. So ----

8 MJ [Col McCALL]: It's probably not the best way of doing  
9 it, and it's -- it's a little convoluted and opaque; but  
10 again, the government's the one that's going to have this  
11 burden. And, you know, I -- if there is a bit of opaqueness  
12 in the record, it's going to hurt them rather than the  
13 defense, I would think, in a motion to suppress. But  
14 anyways ----

15 LDC [MR. CONNELL]: So ----

16 MJ [Col McCALL]: ---- so what's the harm then?

17 LDC [MR. CONNELL]: ---- I very much take your -- so --  
18 the -- and it actually gets down to a -- a point that's  
19 relevant to, you know, a lot of these things that we're  
20 talking about this morning, which is the government's -- as  
21 far as I can tell, the government's essential approach to  
22 taking information from TD-314s, taking information from  
23 cables back and forth to black sites, to other sources, to

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1 other CIA sources, is it only matters what the defendant said.  
2 So if you have the text of what the defendant said, then  
3 that's all that matters.

4 MJ [Col McCALL]: Right.

5 LDC [MR. CONNELL]: And that's not 100 percent true but  
6 it's 95 true, right? There are some times where we've  
7 received what -- what the CIA calls atmospherics, meaning what  
8 was going on at the time. But mostly the atmospherics are  
9 stripped out. And the question that you just asked goes to  
10 the difference between core content, Mr. al Baluchi said I  
11 never swore bay'at to bin Laden, versus the process by which  
12 that came into existence.

13 And it makes a big difference for credibility, for  
14 understanding how it connects him to other statements, the  
15 full process. And so let me just give you an example.

16 If -- if we were in a -- a -- well, let's say that  
17 we're here. And so Mr. al Baluchi got on the stand and  
18 testified, I never swore bay'at to -- to bin Laden. All  
19 right? There's plenty of reason to impeach that, right? You  
20 have a pecuniary -- I mean, sorry, an interest in not being  
21 convicted. You might want to distance himself from people  
22 that he sees as prejudicial to his defense. You know, there  
23 are lots of reasons why -- how that could be impeached.

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1           If, on the other hand, that statement was tested by  
2 fire, literally, in that there's political pressure, the  
3 9/11 Commission is putting out the requirements, Mitchell and  
4 Jessen know the 9/11 Commission is putting out the  
5 requirements, they brought in the former torturers to -- to be  
6 a menacing presence, there's threats of what's going to happen  
7 again; and under those circumstances, if we can paint that  
8 picture, if under those circumstances Mr. al Baluchi said I  
9 never swore -- I'm telling you, I don't care what you do to  
10 me, it's still true, I never swore bay'at to bin Laden, it's a  
11 very different situation.

12           And, you know, it's the -- it's the difference between  
13 just naked statements that are -- exist out there in the  
14 universe and something that has narrative integrity to it,  
15 something that has -- you know, look to what efforts the  
16 government went to to try to get to the truth of this question  
17 of whether Mr. al Baluchi swore bay'at, for example. Just as  
18 one of many, many examples.

19           And so that's one part of it, right? The context  
20 really matters in this situation because it has to do with --  
21 you know, we might choose under 803(b) to use that statement  
22 to -- as a hearsay statement to the government, right?  
23 Normally, it would be a self-serving statement of the

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1 defendant; it would not be allowed to be used. 803(b) changes  
2 that analysis. And so the -- the path by which we get to  
3 statements matters a lot.

4           And when we get to 780, we're going to talk a lot  
5 about the exchange between when they went to Mr. Mohammad, for  
6 example, got a statement from him, and then confronted  
7 Mr. al Baluchi with it. And -- and the path -- that level of  
8 syncing up of statements, well, Mr. Mohammad says that X  
9 happened, isn't it true that X happened, that level of syncing  
10 up statements is going to make a big difference when we get to  
11 the government's argument, for example, of look how consistent  
12 all these statements are with each other. When we get to the  
13 question of, you know, what weight all this has to be given,  
14 that the jurors are going to give to it, there are times when  
15 the torture process increases the weight that a -- that  
16 somebody might give to a statement.

17           And a perfect example of that is the Moussaoui trial.  
18 So you may know that -- and we're going to hear testimony  
19 about this from Special Agent Butsch, but in the Moussaoui  
20 trial, the government introduced statements that were  
21 allegedly from Mr. Mohammad and Mr. Binalshibh. They --  
22 you -- you, of course, know that they -- that neither the --  
23 the defense was not allowed access to the -- to the -- to

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1 Mr. Mohammad and Mr. Binalshibh, but the prosecution was.

2 In fact, the -- you know, part of -- the one part of  
3 this that came out that we were -- of the 561 that we were  
4 able to settle between the parties was more information about  
5 the process by which the prosecutors in that case, which  
6 includes Special Agent Zebley, were able to get access to --  
7 were able to submit questions specifically to help their case  
8 to Mr. Binalshibh in particular.

9 So in that case -- and the point that I'm coming to,  
10 in that case is that Judge Brinkema instructed the panel that  
11 these statements were made under circumstances which the  
12 government acted and the -- at -- to the maximum extent of its  
13 ability to guarantee truthfulness, right? But -- and what  
14 that really meant was they -- they injured them until they  
15 said -- you know, until they got to what they believed was the  
16 truth, which raises a whole other level of issues.

17 But in that situation, the pressure that was placed on  
18 the defendant, the coercive pressure, both physical and  
19 mental, was treated as a -- a credibility factor by Judge  
20 Brinkema.

21 And so all of this is to say that it really matters  
22 how we get to statements. It -- it matters where the  
23 information comes from. It matters how their -- it -- you

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1 know, when I was telling you the story of -- of Special  
2 Agent Drucker and the 9/11 Commission and the -- and Marwan  
3 al Shehhi's credit card, if -- if I just told you STA-254 says  
4 that Ammar al Baluchi said that I used Marwan al Shehhi's  
5 credit card to order the CityBird video and flight simulator,  
6 you would say, okay, that's a -- that's an inculpatory  
7 statement. You know, it goes to overt acts 34 and 35. If the  
8 government introduced that or something similar at trial,  
9 then, you know, that's a factor that weighs in favor of  
10 conviction.

11           When you hear the story of how it gets there, how we  
12 get there from 9/11 Commission to the meeting with Drucker to  
13 Drucker to the intel requirement to that statement that we --  
14 in a vacuum and then back out to Special Agent Fitzgerald and  
15 then into the charge sheet, it puts a whole different spin on  
16 that situation. Much different from STA-254 says that  
17 Mr. al Baluchi admitted that he ordered a video. Whole  
18 different situation.

19           So I hope that's -- I'm able to give you like  
20 specifics about those things.

21           MJ [Col McCALL]: That helps.

22           LDC [MR. CONNELL]: And the -- the place that I want to --  
23 to sort of close this factual known-unknown situation is, we

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1 don't start with the story and then look for ways to prove it.  
2 You know, often in a defense -- let's say it's a self-defense  
3 case, right? It's a bar fight. They hit me first. You know,  
4 you start with the theory of defense. You start with the, you  
5 know, I was only responding to violence that was offered to  
6 me. I retreated to the wall. You know, we know what the  
7 self- -- elements of self-defense are. And then you go out  
8 and you look for evidence.

9           The prosecution looks for evidence to -- that -- that  
10 that wasn't true, that the defendant did start the fight.  
11 Defense looks for evidence that they didn't start the fight.  
12 And, you know, you're -- you're starting with a story, a  
13 narrative, and then you're looking for evidence for it. And  
14 that's perfectly fine.

15           In this level of complex soup of -- of discovery,  
16 that's simply not possible. We can't start with any kind of  
17 understanding. First, we have no idea, but we can't start  
18 with -- with even really investigative hypotheses. What  
19 happens instead is we take the information that's available to  
20 us and we follow the threads. And the way that we get to  
21 understanding that the only way -- the only place that overt  
22 acts 34 and 35 come from is from a black site is by following  
23 the -- the -- connecting those dots and following that thread.

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1           So it really matters what we have in that process on  
2 the front end, much more than in a typical case where there's  
3 a narrative and facts either fit that narrative or don't fit  
4 that narrative, right? We have to construct the narrative  
5 from the discovery. And -- and I know how mind-numbing it was  
6 when I was -- Special Agent Drucker, for example, when I was  
7 going through and then there was an intel requirement that  
8 said this and then there was a -- a TD-314 that said that.  
9 But it's necessary to -- to create the story by the use of the  
10 documents. And that's why both the withheld documents, in  
11 this case the 9/11 Commission but, you know, it's -- it's  
12 symptomatic of a larger issue, and the degradation of the  
13 documents matters. Because we can't construct the defense in  
14 the first instance.

15           The -- before I close on this, I just wanted to remind  
16 the military commission that the government's position is that  
17 it refused to produce 9/11 Commission input into the torture  
18 program because they said it was irrelevant, right? That it  
19 was not discoverable under any known, recognized theory of  
20 discovery, right?

21           This is a pure legal question of relevance. Is this  
22 material relevant? It's not a, you know, could you -- were --  
23 are these seven documents you were able to find at the

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1 National Archives, are they a good enough substitute? That is  
2 do the substitutes allow the substantial ability to make a  
3 defense? That's not the issue. This is a straight-up  
4 relevance question. And when you answer it to say, yes, these  
5 documents that you're seeking from the 9/11 Commission are  
6 relevant to the extent that they have input into black site  
7 interrogation -- not all the other things they did, but black  
8 site interrogation, then that along with an order compelling  
9 that information should resolve this -- this problem.

10           And then the -- what you are doing is deciding whether  
11 the responsive documents will assist the defense in proving  
12 facts of consequence, like the admissibility of the -- of the  
13 so-called clean team statements or the existence of personal  
14 jurisdiction, and then you just order the government to  
15 provide it.

16           And this is not a -- a shot in the dark. At pages 2  
17 and 3 of AE 769, we were able to list responsive documents  
18 that we know exist. The way that we know they exist is from  
19 other documents. Often the -- the -- the National Archives  
20 produces lists of what is in their archives. Even when the  
21 document itself is withdrawn for classification reasons,  
22 there's still an unclassified summarized -- summary of what it  
23 is, and so we were able to use that. The books that were

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1 written by the 9/11 Commission -- commissioners themselves,  
2 and the -- the documents released under mandatory  
3 declassification review, to see what documents we know that  
4 exist.

5           But the -- the one that I did not list there is the  
6 9/11 Commission questions to Special Agent Drucker in -- in  
7 December 2003 or January 2004, which I -- I should add. But  
8 the last thing that I wanted to observe is that all that  
9 relevant material is not scattered throughout the  
10 U.S. government; it's all in one place. It's in an archive in  
11 the National Archives and Record Administration. In -- where  
12 if we were permitted, an e-mail to the coordinator, and  
13 there's a focal point for all the 9/11 Commission material, an  
14 e-mail to the coordinator would solve this problem.

15           And we -- we thought we had that because the material  
16 is generally at the Secret level and so we sought to have our  
17 clearances passed to NARA so that we could go to NARA and look  
18 at the material and, you know, go through whatever procedures  
19 they had for how they could do that. Well, the general  
20 counsel of NARA for whom -- with whom we were talking about  
21 this, reached out to -- to General Martins. And General  
22 Martins said do not give the defense access to this material  
23 at NARA. Whether -- I don't think -- actually think they're

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1 allowed to do that. We're classified security clearance  
2 holders and -- and there is already an adjudicated need to  
3 know with respect to information about 9/11. Obviously, we  
4 wouldn't have this be in the clearance and receive the  
5 discovery that we have if that were -- if that were otherwise.

6           And so I just want to throw out the idea, if you are  
7 looking for ways to break discovery deadlocks, one order you  
8 could enter is for the government to facilitate access to  
9 the -- to the NARA archives in this area -- not all of their  
10 archives, right? But in this area. And then we would be  
11 willing to go with a representative of the prosecution, we  
12 could go together, look at the documents, and then hopefully  
13 reach a conclusion whether each document should be produced or  
14 not.

15           I mean, we're not talking about hundreds of thousands  
16 of documents. We're talking about hundreds of documents.  
17 Something that in a week or so, you know, people -- motivated,  
18 smart people could get through. And we would be willing to  
19 accept government presence at that. We're not asking to  
20 review the information all on our own or stick things in our  
21 socks or anything else. What we're asking for instead is some  
22 way to break through these discovery deadlocks. And I think  
23 in this situation where we have a single place where it's

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1 already gathered, we know the NARA procedures, they know us,  
2 we have the ability to -- to go collectively and work together  
3 and figure out what of this material should be able to be  
4 produced to the defense.

5           So if you're looking for a different approach, that's  
6 the one that I have to offer to the military commission.

7           MJ [Col McCALL]: Thank you, Mr. Connell.

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

9           MJ [Col McCALL]: Any other defense team wish to be heard  
10 on this motion?

11          DC [LT BERG]: Good afternoon, Your Honor.

12          MJ [Col McCALL]: Good afternoon.

13          DC [LT BERG]: So I can't do what Mr. Connell do --  
14 Mr. Connell can do so well in pulling all these threads  
15 together, but there are a few points that I just wanted to  
16 make sure that I put before you. And one, Mr. Connell kind of  
17 came to this at the end of his remarks, and that's the  
18 question of credibility.

19                So we know on page 146 of the 9/11 Commission, there's  
20 a text box. And that text box says that Chapters 5 and 7 of  
21 the report draw from -- extensively from detainee statements,  
22 but, because of access problems that the 9/11 Commission had  
23 and they were not able to either meet with the interrogators

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1 themselves or meet with the detainees themselves, they had  
2 serious problem -- and I'll read this. They had  
3 credibility -- they had concerns about the credibility and  
4 meaning of the interrogation reports that they received.

5           So what Mr. Connell and, you know, we, by joinder, are  
6 seeking here is the information that the 9/11 Commission  
7 received that made them doubt the credibility of statements  
8 from Mr. Mohammad and the other defendants. And credibility  
9 of statements from the black sites is directly relevant to a  
10 host of issues.

11           The record -- I mean, before we left off when COVID  
12 hit, we were right in the middle of Dr. James Mitchell's  
13 testimony. And my colleague, David Nevin, had spent a number  
14 of days, and I went back through the record, a number of days  
15 talking to Dr. Mitchell about how does an interrogator tell  
16 whether or not a detainee is telling the truth? That is a  
17 very important question because it determines, you know, if  
18 you're going to put somebody in a coercive physical pressure  
19 environment or you're going to torture them, right, you  
20 presumably do it in response to them -- you know, a detainee  
21 telling you a lie. If they tell you a lie, you get coercive  
22 measures; and if you tell the truth, you're spared, right?

23           I think it's more complicated than that. And

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1 Dr. Mitchell testified about this, you know, learned  
2 helplessness paradigm where you're creating a -- a condition  
3 of mind that somebody will instinctively respond with truthful  
4 answers without really even -- you know, you're kind of  
5 conditioning them. But at the end of the day, it does boil  
6 down to do you believe the statements that you're getting from  
7 the person that you're asking the questions?

8           And we know here that the 9/11 Commission did not  
9 believe the statements that they were getting from the black  
10 sites, and we want to know why. We want to know what they  
11 were seeing that was giving them concerns about credibility.

12           And it's not just the 9/11 Commission. In fact, in  
13 July of this year, July 1st, 2021, we received -- and this is  
14 in the record at 846K (KSM) Attachment F. We got a letter  
15 from the prosecution and there was a couple items in there,  
16 but one of the items said that a number of the interrogation  
17 records -- I'll read it verbatim here because I want to be  
18 accurate.

19           It says: Many of the original classified cables from  
20 which produced summaries were derived include disclaimers  
21 about the veracity of accused-provided information documented  
22 therein.

23           That is an extraordinary statement. That is saying

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1 that the CIA itself had concerns about credibility and  
2 veracity about statements that were coming out in response to  
3 coercive, you know, physical measures being placed on -- on  
4 these individuals.

5           And whether or not an interrogator can know if an  
6 answer is true or false goes to the heart of our anticipated  
7 motion to dismiss for outrageous government conduct, because  
8 it takes an environment -- right, it takes the situation and  
9 makes it even worse, right? That they're already in this  
10 coercive environment, and now they're being tortured at  
11 random. You know, no better than 50/50 essentially, that when  
12 you have an interrogator making decisions or, you know,  
13 higher-ups making decisions about who's going to get EITs and  
14 who isn't, but you don't actually have a good standard for  
15 determining that because you can't actually tell if the answer  
16 is true or false, that makes that situation even more  
17 outrageous than it already is.

18           And so the statements that the 9/11 Commission is  
19 receiving and the information that they're getting, the  
20 documents around those statements, go directly towards our  
21 anticipated motion to dismiss for outrageous government  
22 conduct because it just confirms how outrageous -- and it --  
23 and it supports that contention that we already know -- we

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1 already know it's outrageous. This is confirming and putting  
2 more evidence and a finer point on it; that the  
3 9/11 Commission couldn't be sure that what they were hearing  
4 was the truth and the CIA couldn't be sure that what they were  
5 hearing was the truth, but people were still being tortured.

6 And we know the SSCI executive summary -- and this is  
7 in the record a number of places, but where I found it most  
8 recently was AE 286 (AAA 2nd Sup) Attachment D, page 88, and  
9 the quote is: On March 15th, 2003, KSM was waterboarded for  
10 failing to confirm references in signals intercepts on  
11 al Qaeda's efforts to obtain nuclear suitcases. Subsequent  
12 signals intercepts of information ----

13 MJ [Col McCALL]: Lieutenant Berg, if you could read a  
14 little bit slower. I'm getting the sign from the  
15 interpreters.

16 DC [LT BERG]: I'm sorry.

17 Subsequent signals intercepts and information from a  
18 foreign government would later indicate that the nuclear  
19 suitcase threat was an orchestrated scam.

20 What that is saying is that Mr. Mohammad could not  
21 confirm something that wasn't true, right? He denied -- he  
22 said I don't know anything about nuclear suitcases, and they  
23 tortured him for it. And it later came out that he had been

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1 telling the truth, right?

2           It's those kind of pieces that we need to build our  
3 case about how outrageous this program truly was. So that's  
4 that credibility piece that I think is so important and that's  
5 something that the 9/11 Commission even emphasized in their  
6 report.

7           There are a couple other elements that I want to touch  
8 on, though. And one is truthfulness of these statements and  
9 their veracity is important to the LHM motion to suppress. In  
10 the government's response to AE 630, and this is at AE 630C,  
11 one of the government's arguments is that you should not  
12 suppress these statements because they were voluntary and  
13 reliable. That -- it's that reliability piece -- that you  
14 can't -- you shouldn't suppress statements that are true  
15 because -- because they're true, that shows that they were  
16 voluntarily given -- made, right? We're -- we can -- we are  
17 not conceding that, that they were true, right?

18           And so every piece of the puzzle that is showing that  
19 statements that came out of the black sites are not true and  
20 have credibility problems, we need to go directly to counter  
21 this government argument that's saying that you shouldn't  
22 suppress the statements because they were voluntarily given,  
23 because they were true.

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1           Additionally, we've heard argument already this week  
2 about Special Agent Frank Pellegrino and why it makes sense to  
3 push him off to a later date. I will just note that Special  
4 Agent Frank Pellegrino was interviewed by the 9/11 Commission  
5 and we have a memorandum. It's classified, so I won't get  
6 into it, but we have at least, I can say, a memorandum. It's  
7 not verbatim, but it is a memorandum describing their  
8 conversation that he had with several of the -- of members of  
9 the commission.

10           It is important for us to know what the commission  
11 knew, right? This is 2000 -- the commission was operating  
12 from 2003 to 2004, right? Well before Frank Pellegrino sat in  
13 a room with Mr. Mohammad and questioned him in 2007.

14           And part of the government's argument about why,  
15 again, the LHM statements shouldn't be suppressed is because  
16 Frank Pellegrino was sufficiently, you know, attenuated and  
17 free of the taint of CIA torture. We have heard in great  
18 detail this -- this afternoon and morning about the  
19 9/11 Commission's involvement in that CIA program. And this  
20 is the very commission that sat down with Frank Pellegrino  
21 before he came to interview Mr. Mohammad.

22           And so we are very interested in knowing what the  
23 9/11 Commission knew and what it may have been able to discuss

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1 with Special Agent Pellegrino because that will -- that will  
2 bridge, you know, and link Special Agent Pellegrino to the CIA  
3 torture program, right? That is a very distinctive link  
4 there.

5           And lastly, I'll say that evidence of -- we heard  
6 last -- just last week, you know, there was the clemency  
7 letter that came out in the Majid Khan case. The number  
8 one -- or one of the mitigating factors that the members there  
9 looked to was that the abuse that Mr. Khan suffered was of no  
10 practical value in terms of intelligence.

11           And there is a narrative out there that torture  
12 worked, right? The CIA's response to the SSCI program -- the  
13 SSCI Report that came out, which is AE 286 (AAA 2nd Sup)  
14 Attachment G, it says, quote, information obtained from CIA  
15 interrogations produced unique intelligence that helped the  
16 U.S. disrupt plots, capture terrorists, better understand the  
17 enemy, prevent another mass casualty attack, and save lives.

18           That is a narrative that we believe is false and we  
19 believe that the evidence that Mr. Mohammad -- you know,  
20 statements that he may or may not have made under torture were  
21 not accurate, were not reliable, and so, therefore, of no  
22 practical value. And so a -- a piece of mitigation that these  
23 members looked to was that, you know, did you -- did it work?

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1 Did you get anything out of it? And our contention is in this  
2 case that they didn't.

3 And so, therefore, you know, it's not just relevant to  
4 credibility, it's not just relevant to Special Agent  
5 Pellegrino, it's also very relevant to mitigation.

6 So subject to any questions you have.

7 MJ [Col McCALL]: No questions.

8 DC [LT BERG]: Great.

9 MJ [Col McCALL]: Thank you. Any other defense team?

10 LDC [MS. BORMANN]: Judge, I -- I guess I don't have to  
11 say this, but we would adopt the arguments of all counsel.  
12 We're automatically joined to this. I just want to remind you  
13 of that. I have nothing further.

14 MJ [Col McCALL]: I appreciate that. Thank you,  
15 Ms. Bormann.

16 All right. Government.

17 MTC [MR. TRIVETT]: Major Jackson Hall is going to be  
18 arguing this on behalf of the government from the RHR.

19 MJ [Col McCALL]: Thank you, Mr. Trivett.

20 ATC [Maj HALL]: Good afternoon.

21 MJ [Col McCALL]: I see you and hear you.

22 ATC [Maj HALL]: Thank you, sir.

23 MJ [Col McCALL]: I'd like to remind you to please speak

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1 slowly to assist the linguists.

2 ATC [Maj HALL]: And would it -- if it's easier to take  
3 off my mask, there's no one within 30 feet of me if it's  
4 easier for the interpreters, but I leave that to you.

5 MJ [Col McCALL]: That's fine. You can take it off.

6 ATC [Maj HALL]: Thank you, sir.

7 So as you've heard and surely understand by now, this  
8 is one of several motions to compel that have to do with what  
9 the words in AE 538AA mean; and, frankly, this one is, despite  
10 the length of argument, I would say pretty -- pretty easily  
11 the weakest. And there's a couple of reasons for that.  
12 Beyond just the merits, which I will address second.

13 The first reason is this is not a new issue. The  
14 commission has already heard a lot of this before. And as  
15 you, I believe, know, Mr. Ali filed 538Z requesting the  
16 information -- or the language of an order that would be the  
17 sum total of what's discoverable on this issue. And the  
18 commission did that, but it removed some of the language and  
19 changed some of the language that Mr. Ali offered. And one of  
20 the things that was taken out was 9/11 Commission.

21 That is not all that happened, of course. In 538FF,  
22 Mr. Ali also filed -- it's a notice that the commission  
23 treated as a tacit motion to reconsider. And you've heard a

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1 little bit about that, and I -- I understand the defense's  
2 desire to try to minimize that and confine it to its facts.  
3 That's what you do when you have precedent that is very  
4 negative to what you are trying to argue. But obviously what  
5 we do in the practice of law is we still, in the common law  
6 system and in our court here, when there's an order like that  
7 that has basically all fours with some other factual scenario,  
8 you don't pretend like that order didn't happen.

9           And what happened in -- in 538FF, as the commission  
10 described in 538HH, was that Mr. Ali, quote, asserted the  
11 discoverability, unquote, of things that were not in the  
12 language of AE 538AA. In that case, he was asking about or  
13 trying to assert the discoverability about documents and  
14 interrogation materials related to other than the -- these  
15 five accused in the -- the large effort, as the defense tries  
16 to paint, the large global government effort to obtain  
17 statements from these five accused in this case, the  
18 commission did not include other detainees in that order.

19           So in other words, Mr. Ali asserted the  
20 discoverability of information that was not in the order as  
21 the commission issued it in 538AA. And for that reason, the  
22 judge -- Judge Cohen at the time -- said denied. That motion  
23 to reconsider, that tacit motion to reconsider is denied, and

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1 reaffirmed the language that was issued in 538AA. So a second  
2 time issuing that language.

3           And this is exactly the same thing. Mr. Ali is  
4 asserting the discoverability of two words that were in his  
5 original request, taken out by the commission, and then left  
6 out by the commission when it issued HH, and saying that it is  
7 discoverable again. So just as in 538HH, the commission  
8 should deny this motion on that basis right there as a third  
9 motion to reconsider and that does not justify, you know, why  
10 the commission should now expand its twice-confirmed order.

11           Now, even if the commission did want to address the  
12 merits for a third time and consider whether the  
13 9/11 Commission, a quasi-governmental group of civilian  
14 attorneys and support staff who came together to investigate a  
15 very, very large mandate about the background and the reaction  
16 to 9/11, somehow was relevant and material to the  
17 voluntariness of the statements given by the defendants in  
18 their 2007 interviews with the FBI.

19           So I think what we've had from the beginning, and I  
20 think what we need to just constantly remember, and the -- the  
21 prosecution should and will, going forward, and has in the  
22 past but will continue to reiterate, there has to be something  
23 that we're tied to. What are we doing here? What we're doing

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1 here is trying to understand and rule and figure out the  
2 voluntariness under Rule 304 for the statements in 2007. And  
3 we kept getting -- keep getting farther and farther and  
4 farther away from that original basis, that anchor.

5           And we had -- so I guess Mr. Connell called the  
6 9/11 Commission off to the side when he was showing his slide  
7 there, and I'd say that's a massive understatement. However,  
8 to be -- to consider or to indulge in the idea that the  
9 9/11 Commission was somehow part of a government-wide  
10 orchestrated effort to obtain statements -- and that's what  
11 the language in 538AA is geared towards and the whole  
12 litigation must be geared towards. But that's what we're  
13 doing here is, in a court of law, is to figure out legal  
14 questions such as voluntariness.

15           That whole order was geared towards what are we  
16 talking about in the suppression motions? So assuming,  
17 indulging, that the 9/11 Commission was part of the  
18 government's years-long, very broad and -- and diluted effort  
19 to obtain statements from the defendants, who weren't  
20 defendants at the time but maybe some day in the future would  
21 become defendants to use in a criminal prosecution, to indulge  
22 into that idea, we've got this example from Mr. Drucker that  
23 Mr. Connell brought up regarding the CityBird video or the

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1 CityBird software.

2           And it's interesting that the only example -- it's the  
3 example that the Ali team used in their response to the  
4 government's motion in AE 824 and the government responded to  
5 that in the reply, AE 824H, which I would urge the commission  
6 to read with care if you are interested at all in this -- this  
7 example of the CityBird software.

8           But the bottom line on that example is it's just not  
9 true. You hear -- you hear it described as though it went  
10 from CIA black site to charge sheet. And when you hear it  
11 described like that, you might think -- I thought -- huh,  
12 after all these statements from the government from all these  
13 years that no evidence will be used from the CIA black sites  
14 from the statements of the accused in the prosecution's case  
15 in chief, and lo and behold, we've taken something from the  
16 black site and put it right into our charge sheet, there's  
17 probably a better explanation, and there is.

18           The explanation is that the investigation of Mr. Ali  
19 by the FBI was, if not entirety, almost entirely complete  
20 before Mr. Ali was even captured. And so in short, there was  
21 an independent basis of every question that was asked of  
22 Mr. Ali during his LHM interview. And I can point you to --  
23 and this is from AE 824H, but it is quoting Special

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1 Agent Perkins in the record at 26669. But as she testified:  
2 Every document and everything that was shown to Mr. Ali in  
3 that interview was kept -- was -- was obtained by the FBI  
4 before he was captured. Obviously, before the 9/11 Commission  
5 sent in a request for information and obviously before the CIA  
6 released intelligence community-wide response that contains  
7 that information. Of course.

8           And that's because the FBI already knew Mr. Ali's P.O.  
9 Box number. They already had the credit card transaction for  
10 buying the software of a flight simulator by a person who  
11 hijacked an airplane and crashed it into a building. It would  
12 be unbelievable dereliction of duty from any FBI agent not to  
13 ask about that by having that evidence in front of them when  
14 they actually got a chance to talk to the person who they've  
15 connected this evidence up with.

16           So when they showed the software box to Mr. Ali and  
17 they showed him the credit card transaction and the P.O. Box  
18 number and all those sorts of things to Mr. Ali during his LHM  
19 statement, unsurprisingly, he calmly and knowingly and  
20 voluntarily wrote down on the piece of paper with the -- or  
21 next to the -- the evidence, I did order and receive this item  
22 in my P.O. Box in Dubai.

23           So the claim that Mr. Drucker testified that had we

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1 not had this statement from the CIA black site we would not  
2 have known that it was Mr. Ali is not true. We actually knew  
3 it was Mr. Ali before the -- the FBI had that before he was  
4 captured; and when they asked him about it, that was just  
5 confirmation.

6           And the truth is Special Agent Fitzgerald could have  
7 known every word uttered in the CIA detention by Mr. Ali and  
8 he was still bound -- duty bound and legally authorized to ask  
9 Mr. Ali about those issues, all of which he had independent  
10 evidence for going into and relied on to -- to ask those  
11 questions and none of that would disturb the M.C.R.E. 304  
12 analysis on voluntariness. And we have case law to back that  
13 up in -- I mean, it's pretty self-evident, but there's case  
14 law backing that principle up as well in our reply in 824H.

15           So the point being, the -- the one example that you  
16 get in terms of how all of this actually matters is not a real  
17 example. And that's probably the main -- the other main point  
18 in response here.

19           Actually, before -- before I leave that, because  
20 Lieutenant Berg mentioned some things about corroboration and  
21 reliability. As far as I'm aware, we are not relying on any  
22 CIA black site statements to buttress reliability either.  
23 It's not the corroboration we're using. We're using the

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1 actual evidence and several other statements from the accused,  
2 which are not custodial. They're not interrogations. They're  
3 statements to each other.

4           And on this subject, we have shock from Mr. Ali as  
5 well after having seen and been presented with the CityBird  
6 software and all of his bank statements. And he goes back and  
7 talks to one of his fellow recreation partners at Camp VII.  
8 And this is in the record at AE 628 Attachment G. And in  
9 discussing his interview with the FBI agents, he describes  
10 this to his recreation partner and he says, disaster,  
11 disaster. He uses the word "disaster" over and over. They  
12 had everything. They had bank statements, when I opened a  
13 bank account. I went to the hospital one time and they had  
14 the hospital records. They have everything. Disaster, he  
15 says. They have all of the official papers. And that's what  
16 he recognized in his interview there.

17           All of those official papers, all of those disasters  
18 were all obtained by the FBI before Mr. Ali was even captured.  
19 So the 9/11 Commission's input, such that it is, as they  
20 carried out their own totally separate mandate is interesting,  
21 I suppose, if you would like to tell a very large story about  
22 governmental response to 9/11, which was obviously a large  
23 event and a large governmental response and it might be an

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1 interesting story. And I -- I would say that if Mr. Connell  
2 were to write a book about this at the end of all of these  
3 proceedings, I would be the first to buy it because he has  
4 done a very commendable job of putting many things together.

5           Unfortunately, that's not the purpose of this  
6 commission, to put every single answer together. The purpose  
7 of this commission is to be set by rules and laws in terms of  
8 what discoverability means, meaning relevance and materiality,  
9 and, you know, what -- where we're going to actually go with  
10 it.

11           There's case law out there from the Supreme Court in  
12 the United States v. Armstrong case, which we have cited in a  
13 few of our motions. I can give you the cite if -- if you'd  
14 like, but -- I guess I might as well. It is 517 U.S. 456.  
15 But the -- the gist there is that discoverability has to go to  
16 something that the prosecution is going to be using in its  
17 affirmative case in chief or in sentencing. And -- and that's  
18 under Rule 16 under the federal rules, but, you know, mirrored  
19 largely in Rule 701. It is not a sword from the defense to  
20 challenge everything about a prosecution's investigation or  
21 the acts done; not just the prosecution but the -- the entire  
22 government, the investigation before that.

23           Before I conclude what I was planning to say here,

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1 just a couple of quick responses. Again, as I said, there's a  
2 lot of talk from Lieutenant Berg about what -- what was true,  
3 whether something from the black sites were true. I don't  
4 know why -- that's not anything that the United States is  
5 going to be challenging or trying to prove. We're not using  
6 any of that information. So what the 9/11 Commission may or  
7 may not have had or known as they engaged with the CIA  
8 carrying out their mandate, it has no bearing on the accused's  
9 own understanding of what they were doing when they went into  
10 the rooms to provide these statements to the FBI.

11           The statements -- the statements, the summaries,  
12 Mr. Connell pointed to something about the 9/11 Commission  
13 complaining that they were twice removed or something like  
14 that. And I would just point out -- again, we've made this  
15 point before, but say again, the statements that came from the  
16 accused -- which every defense team has every single one of  
17 for all of these accused. So anytime there's an intelligence  
18 report cited in the 9/11 Commission, that was made -- that was  
19 a statement made by any of these accused, they have it.

20           And it's not twice or three times removed, it's  
21 literally verbatim -- almost always verbatim taken from the  
22 original statement and put in. What's taken out is not  
23 something from the accused. It's usually not the -- the

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1 equity or the classified interest that any of the United  
2 States government would assert a privilege over. So what they  
3 have that -- in terms of content, they have it verbatim; it's  
4 not twice removed.

5           The other issue about the -- so there was something  
6 that Mr. Connell put up about the government's response as we  
7 were working out some of the discovery on the 9/11 Commission  
8 documents. And there were a couple entries there, and it --  
9 there's quite a few of these, but the entries that say you  
10 have this document -- you -- you asked some questions about  
11 this. You have this document, but we can't confirm which one  
12 it is because -- but we can confirm that you have this  
13 document.

14           The answer to that question is something that is more  
15 easily found in AE 658 series. That's the classification  
16 guidance in just about every declaration we've ever filed in  
17 terms of the specific equities that are protected by the  
18 classified information privilege. And if the commission is  
19 more interested in learning about that specifically and  
20 getting a specific answer, we'd be happy to discuss it in an  
21 ex parte setting.

22           But suffice to say, it's just something that the  
23 government can't confirm due to the information that was in

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1 the -- the 9/11 Report. It -- it creates too much of a -- a  
2 link-up on something that's protected, so we'll leave it  
3 there.

4           And then before -- so to conclude, I would like to  
5 point to some language in the -- the case of the -- the  
6 Oklahoma City bombing, the Timothy McVeigh case, which is a  
7 death penalty case. The terrorist attack -- the largest  
8 terrorist attack in the United States before the -- before  
9 9/11. And in facing and dealing with similar extremely broad  
10 requests for discovery about governmental investigations over  
11 a massive tragedy, massive terrorist attack, the court there  
12 stated that that court, its purpose is to determine whether  
13 the evidence presented by the government at trial is  
14 sufficient to satisfy a jury beyond a reasonable doubt that  
15 the defendants are guilty of the conduct charged and, if so,  
16 whether death is a justified penalty.

17           The court does not function as an oversight committee  
18 to review the conduct of the government's investigation or  
19 board of inquiry to find all of the historical facts about the  
20 United States' national security policy concerning an  
21 investigation concerning the Oklahoma City bombing, which you  
22 could take that language and map it directly onto our case  
23 here.

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1 Yes, Mr. Connell has a lot of interesting factoids.  
2 Yes, he can put dots together on things. And that's fine, and  
3 it would be an interesting book at the end of the day. But we  
4 do have rules here, we do have materiality. And we've said  
5 this before and -- and going forward, this whole theory  
6 that -- the theory that we started with in terms of why these  
7 statements are or are not voluntary, that's what we're at  
8 issue -- that's what's at issue here.

9 And the theory was always that essentially the  
10 statements in 2007 were one long investigation, you know, not  
11 disconnected, not really a new place in time, not really new  
12 people, not really an independent basis to ask these  
13 questions, and that the defendants were -- or the accused were  
14 broken and unable to voluntarily answer.

15 So that's the theory from which everything flows.  
16 That's what we've got to anchor back to. We've always said  
17 that this is essentially a bridge to nowhere, because by the  
18 time you build half of the bridge and start getting out to  
19 showing, well, how can we show -- how can we show that this  
20 was one long investigation?

21 Well, we'll have to show that the FBI had something to  
22 do with the CIA. And then we'll have to show that somehow  
23 that meant that when they went into the room, the -- the

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1 accused had no way to answer voluntarily. It's a -- it's a  
2 very difficult thing to show; as far as I know, unknown to the  
3 law in terms of a theory of involuntariness, but it was a  
4 theory that we -- that the commission allowed the defense to  
5 explore and the prosecution was providing discovery in order  
6 to explore, but it's always been a bridge to nowhere.

7           And at this point, when we're talking about  
8 9/11 Commission input into the CIA black sites on information  
9 that did not inform and is not part of the evidence that the  
10 prosecution will be using in order to carry out their own  
11 completely separate mandate, an issue that the commission has  
12 already twice left out of its order on what's discoverable on  
13 this subject anyway, we -- we've gone far afield. And what we  
14 would be doing is adding more ornate decorations and paint  
15 colors and side rails and stuff to this bridge, but the bridge  
16 is still going nowhere.

17           And so subject to your questions, Your Honor,  
18 that's -- that's the extent of what I have.

19           MJ [Col McCALL]: No questions, Major Hall. Thank you.

20           Defense? Mr. Connell, do you wish to be heard?

21           LDC [MR. CONNELL]: Your Honor, I covered most of the --  
22 of my position in my opening, so I won't repeat myself. I  
23 just want to address one point, which is, that the

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1 government's theory of voluntariness is -- may I?

2 MJ [Col McCALL]: You may.

3 LDC [MR. CONNELL]: ---- is somewhat counterfactual in  
4 that the argument that the government advances with respect to  
5 Special Agent Fitzgerald is the government had gathered  
6 documents and the government could have figured out certain  
7 elements without resorting to information from the black  
8 sites, and Special Agent Fitzgerald could have asked the same  
9 questions if he hadn't had this information from the black  
10 sites and spent a couple of months reviewing it before the  
11 hearings, and Mr. al Baluchi could have answered the same way.

12 And it's essentially a -- it -- constructing a -- an  
13 alternate universe of the way that things could have done and  
14 if they could have gone that way, therefore, the statement  
15 must be voluntary.

16 But the -- the actual fact -- and I'll somewhat rely  
17 on the government to stop me if I go too far afield. But the  
18 actual fact is that in January of 2004, when Special  
19 Agent Drucker sent his -- had his meeting with the  
20 9/11 Commission and sent his -- is that those facts were not  
21 considered to be resolved. The question of who actually sent  
22 the money, the question of how did this video come into  
23 existence -- what happened with this video, why is Marwan

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1 al Shehhi's credit card, why did it go to Ammar al Baluchi's  
2 P.O. Box, those questions were very much open questions at the  
3 time.

4           And if I could have -- if I could just refer -- we've  
5 talked about Special Agent Drucker's MFR, and there are two  
6 versions of it. There's an unclassified version, there's a  
7 classified version. And if the government -- I mean, excuse  
8 me, if the military commission would like to see the  
9 information that the -- about what the actual state of play  
10 was on -- on January 12th -- on 12 January of 2004, I'd direct  
11 the military commission to AE 538I Attachment C, which I can't  
12 argue here in -- in open session, but in it Special  
13 Agent Drucker lays out what were the open questions and what  
14 he told the military commission in response with -- excuse me,  
15 the 9/11 Commission in response to their questions.

16           So the -- the -- the reason why we have repeated that  
17 example in the 824 series and here is you asked us what else  
18 are we trying to figure out. That's our best example, right?  
19 That's the high-water mark of the way that we've been able to  
20 piece together materials that we got from the National  
21 Archives, materials under Freedom of Information Act and  
22 mandatory declassification review, the government discovery,  
23 and testimony by the witnesses. It's -- it's the high-water

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1 mark. It's the best thing we've been able to understand.

2           And -- and when you look at all the pieces, including  
3 the classified pieces, what you see is that in January of  
4 2004, there were a lot of open questions that Special  
5 Agent Drucker articulated to the 9/11 Commission, and then we  
6 believe used 9/11 Commission questions to craft the intel  
7 requirements that he sent out for interrogation of  
8 Mr. al Baluchi.

9           Now, as things often do, once the answers came back,  
10 they became inevitable. Everyone always knew that was going  
11 to be the answer. It happened so often and it's exactly what  
12 happened here. It's why the inquiry -- and we're going to  
13 talk about 644 and Kastigar, but it's why the inquiry around  
14 compelled statements is not did the -- did the use of  
15 compelled statements definitely lead to something else, it's  
16 all the ways that the use of compelled statements shapes an  
17 investigation, shapes the assumptions that are made, shapes  
18 the questions that are asked and the answers that are  
19 accepted.

20           It's why the RDI program was so devious, because  
21 answers came back and got laundered. They got put into FBI  
22 chronologies. They got put into -- how the documents that  
23 they had back were organized, who was attributed to what

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1 defendant. And all those things ultimately influenced the  
2 questioning of Mr. al Baluchi by so-called clean team and --  
3 as well as the charge statement.

4           So I think that the government's answer is -- I mean,  
5 its factual argument is fully rebutted by that document. I  
6 think if you have the chance to read it or if you'll give us  
7 leave of court to file a late 505 notice, I'll be happy to  
8 present it to the military commission in closed session.

9           MJ [Col McCALL]: I can just read the attachment.

10          LDC [MR. CONNELL]: Great. Thank you, sir.

11          MJ [Col McCALL]: Lieutenant Berg?

12          DC [LT BERG]: Just very briefly, Your Honor.

13                So the government's response here today is focusing  
14 almost primarily on the LHM statements. And that makes sense  
15 because that's kind of the context of how -- how we got here.  
16 But that doesn't mean that the LHM statements are the only  
17 reason why the materials that the 9/11 Commission was, you  
18 know, both putting towards -- to the black sites and receiving  
19 in response was relevant and, you know, material to the  
20 preparation of the defense. There are other reasons for that.

21                And our -- one of our contentions is that that goes --  
22 you know, this -- they may say its quasi -- quasi-government  
23 or not, but it was an Article II legislative commission that

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1 was charged with putting out the official narrative of how  
2 9/11 happened and how we got up there and then to propose  
3 responses for how to prevent a 9/11 in the future.

4 I mean, I don't know how you define official, but that  
5 sounds pretty official to me. And we have a determination  
6 from that body that statements and materials that they  
7 received from the black sites were not credible. And that  
8 goes towards our larger argument about the torture program and  
9 how it was a, you know, fairly randomly applied program where  
10 the interrogators could not tell whether or not a statement  
11 was true or false and they tortured people anyway.

12 And that is -- you know, makes an already bad program  
13 even worse when they didn't have 100 percent confidence about  
14 the answers that they were getting.

15 So the -- I just wanted to note that, and then also  
16 the -- the 9/11 Commission, again, I don't know the whole  
17 history of -- of the commission and how many different people  
18 they talked to, but I know they talked to Special Agent Frank  
19 Pellegrino and I know they talked to him before he came and  
20 sat down with my client.

21 And so what the 9/11 Commission knew and what they  
22 discussed with that special agent before he came and met with  
23 my client is very relevant when now that we know that the

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1                   The commission is in recess.

2 [The R.M.C. 803 session recessed at 1446, 04 November 2021.]

3 [The R.M.C. 803 session was called to order at 1502,  
4 04 November 2021.]

5           MJ [Col McCALL]: The commission is called to order. All  
6 right. We're going to roll into -- and for the record, the  
7 parties are present. We still have Mr. Mohammad,  
8 Mr. Bin'Attash, and Mr. Binalshibh present.

9           Mr. Sowards?

10          LDC [MR. SOWARDS]: Yes, Your Honor. And just to advise  
11 the commission that Ms. LeBoeuf and Ms. Radostitz are taking  
12 care of something else and they will be here shortly.

13          MJ [Col McCALL]: All right. I appreciate that. Thank  
14 you.

15          LDC [MR. SOWARDS]: Thank you so much.

16          MJ [Col McCALL]: Ms. Bormann?

17          LDC [MS. BORMANN]: And Mr. Montross and Ms. Gupta are  
18 back.

19          MJ [Col McCALL]: Okay. At the RHR. Very good.

20                 All right. We'll move into AE 780. This is Mr. Ali's  
21 motion to compel documentation of CIA/FBI coordination to  
22 obtain statements from defendants.

23                 Mr. Connell.

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1 LDC [MR. CONNELL]: Thank you, sir. May I?

2 MJ [Col McCALL]: You may.

3 LDC [MR. CONNELL]: Sir, interestingly, this is a third  
4 procedural posture in which 538AA/561T arises, because this is  
5 even a different situation from the last one.

6 In 538AA/561T, the military commission created an  
7 inclusion and it created a -- and it explained what its order  
8 did not include. And so in subsection 5.b., bravo, we have  
9 the -- the scope of discoverable information which is laid  
10 out, and then in subsection c., the military commission wrote:  
11 The defense failed to meet its burden to prove by a  
12 preponderance of evidence that information pertaining to the  
13 investigation and prosecution of individuals other than these  
14 accused is discoverable by law. And then it repeated that  
15 again in 538HH.

16 So we do not contest that as a matter of law. This  
17 538AA is the state of the law, and we don't contest it.

18 The -- the 780 argument arises in that where there are  
19 now two different boxes that evidence can get put in. It can  
20 get put in the main box of it's discoverable or it can be put  
21 in the box of this is something that does not rise to the  
22 level of something that should be compelled.

23 The -- what I am here to talk to you about today is

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1 why the specific evidence that I'm talking about falls into  
2 the first box, into the larger box, rather than the area in  
3 which we have failed to carry our -- our burden of proof. And  
4 if I were here to tell you, look, the investigation and  
5 prosecution of someone else on its own is -- is discoverable,  
6 then I -- that would be precluded. So instead, what my goal  
7 is, to show you why certain evidence falls within the first  
8 category rather than within the second category.

9           So we do not contest the order. We're not asking for  
10 reconsideration of the order. But I think that even if you  
11 were to, you know, procedurally construe this as  
12 reconsideration, that we could meet the reconsideration  
13 burden. But I don't think it's necessary because the  
14 framework is the framework. We're not contesting the  
15 framework.

16           MJ [Col McCALL]: Understood.

17           LDC [MR. CONNELL]: So there are -- the question  
18 specifically is that there are nine specific detainees that  
19 we've talked about and the question is whether there is  
20 evidence relating to those nine specific detainees that,  
21 quote, reasonably tends to show cooperation between the CIA,  
22 FBI, and Department of Defense in the effort to obtain  
23 statements from these five accused.

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1           So the question is: Yes, there's investigation and  
2 prosecution of them. The fact that it elicited statements  
3 from them is not discoverable. You've already -- the military  
4 commission has already decided. It's what was the effect of  
5 that investigation on these five accused.

6           I'm going to give you three examples, sort of  
7 escalating examples. The first example is going to be how  
8 interrogation of other detainees indirectly shapes the  
9 interrogation of these five accused. The second is going to  
10 be how interrogation of other detainees directly shapes the  
11 interrogation of these five accused. And the third is going  
12 to be how interrogation of other detainees shapes the  
13 government's evidence at trial. So I'm going to give you  
14 those three examples. They're sort of in escalating  
15 significance, I would suggest.

16           So some of the -- some of the underlying material  
17 is -- the documents themselves are classified. I'm not going  
18 to show anything. I'll just give you -- when that's the case,  
19 I'll just give you an AE number and if you consider it -- that  
20 to be an important part of the argument that you need to  
21 research, you can go to that AE. Mr. -- Mr. Swann often calls  
22 this the silent witness approach.

23           MJ [Col McCALL]: I appreciate that.

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1 LDC [MR. CONNELL]: So there was a letter that was seized  
2 in the early morning hours of September 11th, 2002, from  
3 apartment 9K1 as part of the Tariq Road raids. And that  
4 letter is found -- both Arabic and an FBI translation is found  
5 at AE 780F Attachment B. And it begins at MEA-TRQ-29.

6 The -- the letter -- the circumstances -- this is a  
7 little bit off topic, but the circumstances of the seizure of  
8 the letter are themselves an important question in the case.  
9 This is the evidence that Special Agent Drucker described as  
10 being handled as if by locusts in a cornfield. And Special  
11 Agent Borelli gave a declaration that he prepared a chain of  
12 custody for this document on 12 September 2002, but the first  
13 Green Sheet that's ever been produced by the government is  
14 dated 22 September 2002.

15 So the reason why I say this is that, as with so many  
16 things in this case, the -- the chain of custody and the  
17 provenance of even the sort of core evidence arose in an  
18 intelligence context where it was not kept very good track  
19 of -- very well track of and its actual admissibility of this  
20 letter will be an issue at trial. But -- so that's where it  
21 starts.

22 And so the Government is obviously trying to figure  
23 out -- and big Government, is trying to figure out where

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1 the -- what the letter means, where it comes from, who is it  
2 written by. And a good deal in addition to -- a good deal of  
3 what we'll be presenting today are things that the government  
4 has never produced to us but that we learned through the  
5 Freedom of Information Act process.

6 So one of those is found in the record at AE 628GGGGG  
7 Attachment B contains FOIA markings and its AAA-RDI-3885. May  
8 I have permission for access to the document camera?

9 MJ [Col McCALL]: You may. Publishing to the commission  
10 and counsel.

11 LDC [MR. CONNELL]: Thank you. And I'm just seeing it.

12 Sir, I'll show you the FOIA marking. May I have  
13 permission to publish to the gallery.

14 MJ [Col McCALL]: You may.

15 LDC [MR. CONNELL]: So this document, this is what a  
16 TD-314 looks like in its original format. You can see that  
17 it's marked with CIA, it has specific people that it should go  
18 to. It would ordinarily have a serial number or a TD-314 dash  
19 something, something, something, six digits normally, and then  
20 three more digits. And this one, dated from September 2002,  
21 is comments on a letter from Khalid Shaikh Mohammad to Ramzi  
22 Binalshibh. And this is a unnamed detainee who commented on  
23 the letter and said that letter that was seized at 9K1 is

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1 written from Khalid Shaikh Mohammad to Ramzi Binalshibh.

2           So that's the first time that the -- as far as we can  
3 tell that the government knew who the -- you know, who the  
4 handwriting was, who it went from one place to another. I  
5 don't know that for certain, but it's the first place that I  
6 have found that ever come up in early September of 2002.

7           And so this is the -- one of the nine detainees that  
8 we think is significant is Salim Hamdan. And I -- I believe  
9 with medium confidence that the senior detainee who -- who  
10 commented on this, I think that this is Salim Hamdan at  
11 Guantanamo who is being interrogated by Special Agent  
12 Fitzgerald. Now, I could be wrong about that, right? That is  
13 an informed guess. It could be -- it could Darbi in -- at  
14 Bagram being interrogated by Special Agent Gaudin. When  
15 Special Agent Gaudin testifies, I'm going to ask him that  
16 question. That will help narrow the field.

17           But this is an example. We have given Salim Hamdan as  
18 one of -- and this is the real reason for Salim Hamdan being  
19 included is that we think that he starts this chain of  
20 discussion about this letter.

21           And so what happens from there? Well, we know that in  
22 September of 2002, Mr. Binalshibh is in foreign government  
23 custody at Location 5, that he's being interrogated. He -- so

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1 they go and interrogate -- based on that information, they  
2 interrogate Mr. Binalshibh in February of 2003 about that  
3 letter saying, did you receive this? And -- and especially  
4 the reference to a person who's named in it called Jafar  
5 al Tayyar, sometimes called "Jafar the Pilot." There's a  
6 reference in the letter and the translation of about someone  
7 called Jamar al Tayyar traveling to Mexico and on to the  
8 United States. That document from the interrogation of  
9 Mr. Binalshibh is found at STA-2943. That's in 780F  
10 Attachment B.

11 And so what happens then is that we know in February  
12 of 2003, and we don't know which site, whether that's when he  
13 was at Location 5 or when -- after he was transferred to his  
14 next location. And the reason for that is that the government  
15 has invoked national security privilege over the specific date  
16 within February, so we don't know where it falls on that side  
17 of the line.

18 But in any case, we know at least from Location 5 and  
19 probably from the later location, there -- at least at  
20 location there is reporting on both FBI and CIA channels. And  
21 what happens next is that on another unspecified date in March  
22 of 2003, the FBI starts asking questions about -- starts  
23 sending intelligence requirements about Jafar al Tayyar. So

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1 it starts with interrogation of someone, maybe Hamdan, maybe  
2 Darbi, moves to Binalshibh, and then the FBI has that  
3 information and they're on the trail. At AE 628IIIII  
4 Attachment F, FBI-24531, there's a series of questions that  
5 are sent about al Tayyar.

6 And then we start to see what real CIA documents look  
7 like because there's a -- after the FBI sends that, on -- on 7  
8 March 2003, then we see what the next element in the -- in the  
9 trail looks like. And if I could have access to the document  
10 camera, I'll show you the FOIA release markings. May I have  
11 permission to display to the gallery?

12 MJ [Col McCALL]: You may.

13 LDC [MR. CONNELL]: Okay. So what we see here is  
14 shortly -- I think, and I don't know the date, right, because  
15 the government has obscured the date -- excuse me. Let me see  
16 if I can get that to focus. There we go.

17 Shortly after that, we think, but at least on -- on 7  
18 March, and you can see up at the top 7 March 2003, the --  
19 after receiving -- after headquarters receives these  
20 requirements from the FBI, then -- excuse me -- the  
21 headquarters sends out to the -- to the base and they say --  
22 they give the sort of atmospherics that are stripped out of  
23 all of our STAs. We're very eager to pin down KSM. The

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1 eager -- the identity of an al Qaeda operative. We're  
2 confident KSM knows this operative, Jafar al Tayyar. To  
3 assist in questioning, we resent the following documents.  
4 These same documents were sent for use with Binalshibh. We  
5 resent them for convenience.

6 And then they start listing that same letter, right,  
7 the B is the letter about Jafar the Pilot, the person that --  
8 the very first letter that I began with, and then they start  
9 sending information and questions.

10 So this is how the system actually worked, right?  
11 These STAs that we received did not -- you know, we were  
12 talking earlier about the -- the difference between documents  
13 considered in a vacuum, Mr. Mohammad said that he knew Jafar  
14 al Tayyar, versus the -- the narrative -- the integral  
15 narrative that brings these documents into example -- into  
16 existence. And in this situation, really shows how deeply  
17 integrated the FBI was.

18 So the FBI keeps sending cables to this -- about Jafar  
19 al Tayyar. They send them for use with Mohammad, with  
20 al Hawsawi, and then later after -- and then they start  
21 sending photographs, right? They -- the FBI starts sending  
22 photographs of here are people who might be al Tayyar. And if  
23 you want an example of the -- the explanation of the FBI

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1 sending the photographs for use in interrogation, you can find  
2 one at AE 628IIIII Attachment F, FBI-24528. They send  
3 interrogation questions for Mr. Bin'Attash at 631T  
4 Attachment B, FBI-24524 and 24489. And then they send them  
5 for al Baluchi.

6 And then finally, there are -- the TD-13s start  
7 flowing back from these FBI interrogations. We see the --  
8 excuse me, FBI intelligence requirements. We see examples at  
9 STA-3706, STA-3789, both of which are in 780F Attachment B.  
10 We see examples -- and then I would like to show you a  
11 specific one with respect to Mr. al Baluchi, which is found in  
12 the record at AE 628IIIII Attachment C, STA-1852.

13 And so here's what the STA looks like, and this was  
14 dated June 7th, 2003. By the time we get this -- these in  
15 the -- in the discovery process, they no longer have the  
16 e-mail addresses in them. Ammar provided a particular e-mail  
17 address that he used for communication with Jafar al Tayyar.  
18 This interrogation, entirely driven by the FBI who's -- who's  
19 looking for this information.

20 But what we then have is we can see the same kind of  
21 information flowing from the base, and I'll show you the  
22 marking first. Maybe. There you go. APPROVED FOR RELEASE.  
23 Showing the same kind of information flowing back from the

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1 base to Alec Station regarding Jafar al Tayyar. And when, in  
2 these, in the FOIA documents, we see what the actual e-mail  
3 address is. It's the lazylozy, L-A-Z-Y-L-O-Z-Y, e-mail  
4 address, that is provided to the public through the FOIA  
5 process but is stripped out in the -- in the STAs that we get.

6 So that whole process of interrogation started with  
7 the interrogation of someone else. That what -- and when I  
8 say that this is an example of indirect effect, the core bit  
9 of information that a particular letter is from Khalid Shaikh  
10 Mohammad to Ramzi Binalshibh and mentions Jafar al Tayyar,  
11 sets off an entire investigation driven by the FBI but which  
12 ultimately involves extraction of information of Ammar  
13 al Baluchi and others.

14 So let's move up one level to a more direct example of  
15 how ----

16 MJ [Col McCALL]: Well, stop there.

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

18 MJ [Col McCALL]: So connect the dots. So -- so what is  
19 the question?

20 LDC [MR. CONNELL]: Yeah. So -- so ----

21 MJ [Col McCALL]: Because you have that underlying -- you  
22 have -- you know, you're able to connect the dots that the CIA  
23 and the FBI -- because you already have those documents,

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1 correct? That you're getting those in maybe a bit of an  
2 opaque form, but you're getting the coordination between the  
3 CIA and the FBI, correct?

4 LDC [MR. CONNELL]: So we are getting the coordination  
5 between the CIA and the FBI. To understand -- so ----

6 MJ [Col McCALL]: And I under -- yeah.

7 LDC [MR. CONNELL]: No, no, no. The -- the piece you  
8 haven't heard about is where that letter came from, right?  
9 There -- the circumstances of where the letter came from in  
10 the first place will also support our argument regarding CIA  
11 and FBI integration.

12 MJ [Col McCALL]: Okay.

13 LDC [MR. CONNELL]: So the narrative structure that we're  
14 trying to explain here is the -- is the integration between  
15 FBI and CIA at every level. And not just any person. Like,  
16 if my investigative hypothesis is right, it was actually  
17 Special Agent Fitzgerald who does the interrogation of Hamdan  
18 at Guantanamo in September of 2002, although I'm going to have  
19 to ask him in order to prove that. Like, I'm not representing  
20 that as truth, that's my investigative hypothesis. But -- but  
21 could be Gaudin.

22 You know, it's the same cast of characters who are  
23 interwoven time after time. So it's not just that a person

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1 was interrogated and gave an answer and that the FBI and the  
2 CIA worked together after that. The -- the integration of FBI  
3 and CIA goes back even further than that to the -- some of the  
4 circumstances under which the letter came into the -- the  
5 U.S. government possession in the first place as well as the  
6 actual people who were involved in that interrogation.

7 Now, if the government goes and looks at that  
8 interrogation and says, Mr. Connell, you are wrong. It is not  
9 a person of -- who was involved in -- in the other  
10 interrogations or it's not a person who's part of PENTTBOM,  
11 then -- and they said, therefore, it's not material, then I  
12 would accept that.

13 But what I think it will show is, in fact, it's the  
14 same cast of characters again and again. And this is one of  
15 those known unknowns. I mean, I know that there's something  
16 that I don't know and I know that it could be significant or I  
17 could be wrong.

18 Does that help, sir?

19 MJ [Col McCALL]: It does.

20 LDC [MR. CONNELL]: All right. So let's get to the second  
21 set which is a much more direct impact, and that is a set of  
22 four people whose interrogations were entirely bound up with  
23 the interrogations of Mr. al Baluchi and Mr. Mohammad, and

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1 that is Majid Khan, Iyman Faris, Uzair Paracha, and Saifullah  
2 Paracha. You know, Uzair Paracha is actually kind of a  
3 cautionary tale.

4 The -- Uzair Paracha was convicted and then ultimately  
5 was -- habeas was granted and he was not retried. He was set  
6 free in part because statements from Mr. al Baluchi were not  
7 turned over to him in his original trial. It's a little bit  
8 of a cautionary tale, I think, but -- but that's not the  
9 important point here.

10 So you were asking earlier about, well, what about  
11 these -- the documents in a -- in a vacuum, and so I have a  
12 good example of that, of a document in a vacuum. And that is  
13 that on 24 March 2003, Mr. Mohammad provided information about  
14 Uzair Paracha, Majid Khan, Saifullah Paracha, and Iyman Faris.  
15 That's STA-3740 found at AE 534B Attachment E. And so I'll  
16 just show you.

17 I'll show you the unclassified markings provided by  
18 the government in discovery. May I? I'm sorry. You have  
19 access -- may I use the camera?

20 MJ [Col McCALL]: You may.

21 LDC [MR. CONNELL]: Yes, sir. Just as an example, on its  
22 own, Khalid Shaikh Mohammad commented on an al Qaeda plan to  
23 smuggle explosives. Talks about the Parachas, talks about --

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1 later talks about Majid Khan, talks about Ammar. You know, it  
2 looks like, hey, he's just giving all this information. So  
3 that was on 24 March.

4 And -- and now I want to back up and show you how that  
5 came into existence, which I think will show you why  
6 interrogation of these other four individuals is equally  
7 important.

8 So the way -- the place it starts is before even  
9 the -- the capture of Mr. Mohammad. In February of 2003,  
10 Mr. Binalshibh was interrogated about -- in whichever black  
11 site he was in, whether it's 5 or 4. He was interrogated  
12 about a plot to attack the United States involving Majid Khan.  
13 That document is found at -- it's STA-2947, found at AE 780F  
14 Attachment C.

15 Then -- so what happens then? Then we start to see  
16 how that -- they start sending pictures -- sorry. What  
17 happens after that is Majid Khan gets captured at the very  
18 beginning of March of 2003. And then they start sending  
19 pictures, including pictures of Ammar al Baluchi.

20 And so in -- this is an example not of a TD-314. This  
21 is an example of a cable that would ordinarily go back and  
22 forth between headquarters and base. If you look at the  
23 bottom of the page, you see the references where the -- the

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1 other cable numbers or TD-314 numbers would go that I have  
2 been talking about. And so what -- what the world knows under  
3 Freedom of Information Act is that they have started  
4 showing -- sending photographs of Ammar al Baluchi and others  
5 to Majid Khan.

6 We cannot at this point -- we don't know the FBI's  
7 involvement at that point. But we do know that a lot of other  
8 agencies are involved because four days later, on 10 March  
9 of -- of 2003, a request comes from base back to headquarters  
10 and -- about the interrogation of Majid Khan. We don't know  
11 the topic of the interrogation because it's a FOIA document  
12 and heavily redacted. But what we do find is that the  
13 station, meaning the base, the -- the black site, wants -- or  
14 wherever they are -- wants further distribution. They are  
15 proposing a tearline that is something to be passed out to  
16 other agencies to try to find out what's going on with Majid  
17 Khan.

18 Now, according to Majid Khan's statement at this point  
19 in early March, he is not in actually a black site. He is  
20 actually in a location in Karachi where he is being  
21 interrogated jointly by the FBI and the CIA, which is why we  
22 get information flowing back through both channels. The --  
23 what we learn from these documents is -- it goes from -- back

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1 from headquarters, back to the base. And, you know, we talk a  
2 lot about the other mechanisms.

3           You know, this is an example of there's a Lotus Note  
4 that's sent that contains the photos and that they obtained --  
5 that they got used with Majid Khan, right, so there's --  
6 they've gotten information from Majid Khan, his interrogation,  
7 and now they want to use those same photos with Mr. Mohammad.

8           So it's an -- it's one of these many examples in this  
9 of how information from the Majid Khan interrogation flows.  
10 And then it gets -- it sort of snowballs. In a -- in AE  
11 628GGGGG Attachment B, AE-RDI-4041 [sic], the -- on the 17th  
12 of March, they're interrogating Mr. Mohammad. And I think  
13 it's so interesting how we get dates through Freedom of  
14 Information Act that the government has invoked national  
15 security privilege over, like, 17 March, but that's what they  
16 say. And the -- what they're doing entirely is taking  
17 information from the Majid Khan interrogation and using it to  
18 interrogate Mr. Mohammad.

19           Now, when Dr. Mitchell testified, he talked about this  
20 extensively and he writes about it in his book about how the  
21 best way to get information out of somebody is to say, well,  
22 you know, somebody down the hallway or -- or across the world  
23 in this situation said X, and it's entirely being passed back

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1 and forth between the prosecution -- not the prosecution,  
2 between the FBI, rather, and the -- and the CIA.

3 And they talk, for example, about the photographs and  
4 they talk about the, quote, stacks and stacks of e-mails that  
5 they have. And the -- the thing that I want to draw your  
6 particular attention to is he identified the photograph of  
7 Iyman Faris as a truck driver in Ohio, a relative of the Khan  
8 family, and whose name he did not remember.

9 So then we have good documentation of the -- how the  
10 FBI is directly involved in a 24 March 2003 cable,  
11 AAA-RDI-4115 at AE 628GGGGG Attachment B. The cable reports,  
12 on the second page, Alec officers, meaning headquarters  
13 people, served as on-site debriefers to question subject.  
14 Base decided to hold a late-night session with KSM upon  
15 reviewing the latest read-out of Majid Khan debriefs, ref A,  
16 and FBI intel report, ref B, from debriefings of the truck  
17 driver Faris. Thank you.

18 I'm going to skip ahead a little bit because I want to  
19 answer your question, well, what does it all matter? So this  
20 is one of the examples that the Senate Select Committee on  
21 Intelligence thought was particularly significant about the  
22 waterboard -- the intersection of FBI information, CIA  
23 information, and torture with respect to Mr. Mohammad.

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1           And at page 492 of the redacted executive summary of  
2 the SSCI Report, the SSCI states that: On March 24th, 2003,  
3 KSM underwent his 15th and final documented waterboarding  
4 session. That evening, the detention site received two  
5 reports. The first recounted the reporting of Majid Khan, who  
6 was still in the custody of a foreign government on Uzair; and  
7 the second report described the reporting of Iyman Faris, who  
8 was in FBI custody. KSM, whom detention site personnel  
9 described as boxed in by the new reporting, then stated that  
10 Uzair's father, Sayf al Rahman Paracha, had agreed to smuggle  
11 explosives into the United States.

12           If you look at AE 561T as simply saying that nothing  
13 relating to any other detainee could possibly be relevant,  
14 that -- that category -- the second category is in -- is a --  
15 is an exclusion operating on its own, then you lose the  
16 significance of the CIA/FBI working completely in tandem. So  
17 we have Majid Khan in Karachi being interrogated by FBI and  
18 CIA in tandem. We have FBI who's arrested and is  
19 interrogating Iyman Faris in the United States. And both of  
20 those are feeding information back to the CIA Headquarters who  
21 is feeding it to the base to -- for use in interrogation of  
22 Mr. Mohammad at this time and then shortly after this time for  
23 interrogation of Mr. al Baluchi.

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1           So this is an example of how information relating to  
2 the interrogation of Khan, the two Parachas, and Faris is  
3 information -- shows is -- are documents which show the  
4 coordination between the FBI and CIA in the interrogation of  
5 these five defendants. Because the information they're using  
6 to interrogate these five defendants, or at least the two  
7 defendants in this situation, come from a -- an additional --  
8 the interrogation of someone else, two other people in this  
9 situation.

10           So the -- the third example that I want to give you is  
11 with respect to Saajid Badat. And this is a long and complex  
12 story, and I'm not going to give every bit of it because I  
13 just want to give you the flavor. And there's this -- an  
14 additional significant fact about this that is under seal, and  
15 I do want to say that the government and I have talked about  
16 this multiple times and have worked out that, if the military  
17 commission consents, we would like to handle it in the closed  
18 session that I give you that additional fact. It's not  
19 actually classified, it's just under seal; but it seems like  
20 an appropriate way that I could explain that additional fact  
21 to you without disclosing it to the public.

22           MJ [Co] McCALL: Yeah, we can handle it at that point.

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

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1           So Saajid Badat has an AKA that's important, which is  
2 Issa al Britani. And there was a massive, massive effort by  
3 the FBI, by foreign partners, and by the CIA to identify  
4 Saajid Badat, or Issa -- at the time to identify Issa  
5 al Britani because he was alleged to have been involved in the  
6 shoe bombing event that include Richard Reid and he was at  
7 large. And so this -- you know, we hear a lot about future  
8 threats and that kind of thing. This was an example of  
9 someone who was alleged to have been involved in a -- in a  
10 terrorist conspiracy who was still at large. And so there is  
11 a massive effort and coordination between them. And  
12 extracting information from Mr. Mohammad, Mr. al Baluchi, and  
13 other defendants was a key part of that. So let me just go  
14 over the -- the sort of beginnings of that.

15           In March 2003, Mr. Mohammad was in the -- was being --  
16 was in the height or the depths of the torture and is --  
17 produces the name Issa al Britani. That initial production is  
18 found at STA-3706, AE 628CC Attachment I. This is the person  
19 who -- he was being tortured so severely that Mr. Mohammad  
20 just made up a bunch of stuff.

21           And this is the -- you know, it's an example that's  
22 used in the SSCI Report about Mr. Mohammad saying, yes, I sent  
23 Issa al Britani to the United States to rally African-American

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1 Muslims, all of which was just false. But it was something  
2 that he was forced to say and that eventually said it and  
3 got -- and it got reported in traffic and became a major point  
4 of coordination between the FBI and the CIA trying to find out  
5 if that was true, who were these people, et cetera.

6 So initially, the -- we talked a little bit a while  
7 ago about the e-mail address, lazylozy, which later was  
8 attributed to Mr. al Baluchi. But early in the situation,  
9 the -- it's attributed to Issa al Britani. And I'll show you  
10 what's at AE 628GGGGG Attachment B, AAA-RDI 4102. And at that  
11 time, it was reported that the e-mail account  
12 lazylozy@yahoo.com was used by Issa al Britani. This is  
13 another example of the significance of asking for a tearline  
14 because obviously this is being passed along to the FBI and  
15 they want tearline information so that it could go to the FBI.

16 The -- there's a great deal of traffic. They  
17 continued to interrogate Mr. al Baluchi. And then on the 18th  
18 of April 2003, the -- they start questioning about whether  
19 that e-mail actually was involving Ammar al Baluchi. And in  
20 AE 628GGGGG Attachment B, AAA-RDI-4168, the base sends a  
21 request and sends information to headquarters that, in fact,  
22 Ammar is the user of the lazylozy account. So the -- all of  
23 that continues for a while until -- and then after Ammar's

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1 capture, the FBI gets involved.

2 And at FBI 223753, the FBI sends a request for  
3 interrogation of Mr. al Baluchi which -- linking him to this  
4 person, Issa al Britani. We wanted to know what Ammar  
5 al Baluchi knows about Issa al Britani. They continue to go  
6 back and forth about the -- about the e-mail accounts and the  
7 FBI continues to send more requests for information.

8 Another one of those is found at AE 628DD, FBI-23855.  
9 They start interrogating Ammar al Baluchi about it. An  
10 example of that is found at AE 628SSSSS STA-1859.

11 And then we see how these things work together.  
12 Because on the 19th of May 2003, headquarters sends a request  
13 to base to confront Khalid Shaikh Mohammad with the statements  
14 of Ammar based on what they've learned about Issa al Britani.  
15 And that document, produced under Freedom of Information Act  
16 but not by the government, is found at AE 628GGGGG  
17 Attachment B, RDI-4204.

18 And just to show you what that sort of thing looks  
19 like, headquarters requests that base confront Khalid Shaikh  
20 Mohammad on the topic of al Qaeda operatives dispatched to the  
21 UK. We note inconsistencies between KSM's past statements and  
22 comments made by the recently detained Ali, AKA Ammar.

23 The FBI consent -- then the FBI starts sending photos

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1 and sketches. The FBI require -- intel requirement for the  
2 sketches is found at AE 628SSS, FBI-23830. And over a  
3 significant period of time, the -- they start interrogating  
4 each defendant about the sketches, about the photos that they  
5 have sent, about the e-mails, until eventually in November of  
6 2003, they capture Issa al Britani, A, Saajid Badat.

7 All of the -- almost all of the information that we  
8 know of in the public domain about Saajid Badat comes from  
9 either the government's discovery of the -- of the statements  
10 about him and the -- or the Freedom of Information Act  
11 requests about -- or releases about the traffic between base  
12 and headquarters about Saajid Badat.

13 In United States v. Ghailani, similar information was  
14 exceptionally important because the court ruled that the  
15 witness -- the government could not call witnesses that they  
16 obtained through coercive interrogations; that the fruit of  
17 the poisonous tree doctrine reached to witnesses, which  
18 sometimes it does and sometimes it doesn't, depending on  
19 circumstances. And the reason why this is an example of  
20 information that we need information about the investigation  
21 into Saajid Badat, that it falls into the first category of  
22 extracting statements from the defendants and not in the  
23 second category, is that -- I'm trying to say it properly -- I

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1 don't think I can say it in open court.

2 MJ [Co] McCALL: We'll handle it in ----

3 LDC [MR. CONNELL]: So I'm going to pause there.

4 MJ [Co] McCALL: That's fine.

5 LDC [MR. CONNELL]: I know that you're waiting for the --  
6 you know, the punchline of what the significance of it all is,  
7 but I will just -- I'll just close for now by saying that this  
8 is a good example of why we need to know what the  
9 investigation into Saajid Badat was and what role the  
10 interrogations of Mr. al Baluchi, and Mr. Mohammad in  
11 particular, played in the apprehension of Mr. Badat.

12 Now, the other thing that I can say, particularly  
13 about the extraction of statements from Mr. al Baluchi, is  
14 that in Special Agent Fitzgerald's interrogation of  
15 Mr. al Baluchi -- it's 45 pages long, the LHM statement. Four  
16 of the 45 pages, so something like 8 percent of it, are about  
17 Saajid Badat. And the -- you know, this is not some random  
18 tangent that -- that was developed for a long time and then  
19 not engaged in by Special Agent Fitzgerald. Special Agent  
20 Fitzgerald spent a substantial amount of time interrogating  
21 Mr. al Baluchi about Saajid Badat. And so my point is that  
22 information about the investigation into Saajid Badat and to  
23 what extent it was based on the statements which came out of

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1 the black sites, which seems to be pretty substantial, is  
2 important to us ultimately -- the military commission  
3 ultimately assessing the provenance of the -- of the  
4 information that Special Agent Fitzgerald used to interrogate  
5 Mr. al Baluchi.

6 And I think that's it.

7 MJ [Col McCALL]: Thank you, Mr. Connell.

8 LDC [MR. CONNELL]: Thank you.

9 MJ [Col McCALL]: Any other defense team? Mr. Nevin?

10 CDC [MR. NEVIN]: Yes, Your Honor. And thank you. I just  
11 want to point out a couple of things to the military  
12 commission, and I -- I think it's important to just go back to  
13 538 -- 538 (AAA), which is the -- seems to be the wellspring  
14 of the day or of maybe the week.

15 MJ [Col McCALL]: Right.

16 CDC [MR. NEVIN]: And this would not be one to go to the  
17 gallery, so -- but I do -- would ask to have access to the  
18 document. Am I good that way?

19 MJ [Col McCALL]: You may.

20 CDC [MR. NEVIN]: Okay. So this is the -- this is the --  
21 the language in question. And it refers to -- in the last  
22 phrase here, it refers to: The effort to obtain statements  
23 from these five accused. And I take it that language was

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1 carefully chosen. It seems to me that it -- it could have  
2 said something like "cooperation between the CIA, FBI, and  
3 Department of Defense during the course of questioning these  
4 five accused," just as an example. I mean, in other words, it  
5 could have been much more limited.

6 But instead what you have is -- you know, have it --  
7 you have the point of reference being the effort to obtain  
8 statements from these five accused. So you do have -- you are  
9 going to have within the -- under the aegis of paragraph 5.b.  
10 in 538AA, you're going to have situations that involve the  
11 questioning of other defendants. And if those -- if that  
12 questioning is part of the effort to obtain statements from  
13 these five accused, it comes under -- it's going to come under  
14 subparagraph b. It's not going to come under subparagraph c.  
15 where the military commission is saying you didn't meet your  
16 burden on that -- on that score.

17 So I -- I bring that to the military commission's  
18 attention for whatever persuasive force you think it may have,  
19 but it does seem to me -- and the government hasn't gotten up  
20 yet, but I mean, I assume we've heard previously from them  
21 that this has all been wrapped up, there's nothing left to  
22 talk about, this is all motions to reconsider, et cetera. It  
23 seems to me very clearly that it's not.

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1 I made an argument to you previously about the use of  
2 an ellipsis in the government's recounting of -- of 538AA,  
3 paragraph 5.b., and I will point out to you that that is -- I  
4 don't think I need to put it on the presenter. It's -- that  
5 appears again, the use of that ellipsis appears again at  
6 paragraph -- sorry, on page 4 of 780A, the government's  
7 response. Just as a spoiler alert, it also occurs in AE 781.  
8 So I suppose it's probably not the last thing you've heard  
9 from me on this score.

10 But I do think it would be useful to know if the  
11 government is -- has used that ellipsis in -- in a -- in an  
12 intentional fashion to change the scope of the way the -- the  
13 order in 538AA reads.

14 I -- I listened to Mr. Connell's description of  
15 these -- of the way these elements of evidence relate to each  
16 other and the complexity of it. I want to point out what --  
17 what maybe he would not have pointed out, which is that he's  
18 not just sitting back and saying, no, government, you have to  
19 give me all this stuff. He's going out and doing what he can  
20 to find it. And to -- and I think we are all doing that to a  
21 certain extent.

22 This -- the recitation of this, however, I think  
23 illustrates in an indirect way the point I was trying to make

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1 about my bar fight in Boise, Idaho. You're probably going to  
2 think that's all we do out there, is get in bar fights. But  
3 it shows the granularity of the inquiry and it shows the way  
4 in which a comma or the -- the presence or the absence of a  
5 number, something that at first glance might look like it  
6 doesn't have particular meaning, turns out to be extremely  
7 meaningful and impactful. And it shows the importance of  
8 going, as I said we would do in even the most minor of cases,  
9 finding out everything that we can find.

10           And this connects to Mr. Connell's remark about known  
11 unknowns, and he didn't quote the Secretary of Defense in the  
12 way that -- the quotation that I like, which is that the  
13 absence of evidence is not evidence of absence, which takes a  
14 minute, for me anyway, to wrap my head around it. But just  
15 the fact that there's -- that -- that we don't have anything  
16 in hand on that point doesn't mean that there's not anything  
17 out there on that point.

18           And the only way you get to this is a certain amount  
19 of this is going to be available through FOIA. A certain  
20 amount of it is going to be available -- some amount of it  
21 will have already been provided by the government. But until  
22 you've seen everything, you -- it's impossible for you to know  
23 what's there. In that bar fight in Boise, Idaho, once in a --

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1 once every now and again, someone's going to say your client  
2 didn't hit the guy. Right before that happened, somebody  
3 walked in the door and threw a rock.

4           And that's going to send you -- you had no idea, let's  
5 say, as the lawyer. I had no idea, let's say as the lawyer,  
6 that that's what was going to develop but that sends me off in  
7 a new direction. And there's no way I can defend that case  
8 competently within the requirements of the provision of  
9 effective assistance of counsel. There's no way I can do it  
10 without talking to everybody. I don't know that somebody's  
11 going to walk in and -- and have a big game-changing  
12 observation. I don't know unless I ask.

13           And so that's -- and I -- you know, you -- you may  
14 well have heard that the -- when the Senate Select Committee  
15 on Intelligence prepared its report on the torture program,  
16 that they looked at 6 million pages of material. Now, this is  
17 not people defending a capital case, this is people who are  
18 trying to put together a competent report for -- by all means,  
19 an extremely important inquiry, but not with someone's life on  
20 the line, not as in the position of the military commission  
21 managing a capital case. But nonetheless, they look at 6  
22 million pages of documents. Why? Because every one of them  
23 has some game-changing monstrous detail in it? No, of course

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1 not. They do it because you can't speak competently to what  
2 happened until you've seen everything.

3 Now, the government has, as I understand it at last  
4 count, has given us somewhere less -- somewhere just short of  
5 three one-thousandths of -- of that 6 million pages. So --  
6 and so I say that because -- not because I think I'm -- I have  
7 morphed into litigating a motion to compel those 6 million  
8 pages. I understand what we're doing. I say it for the  
9 purpose of illustrating to you how -- the way we are  
10 scrabbling everywhere we can for the information we need to  
11 defend this case. And -- and that's a -- and part of what you  
12 see in Mr. Connell's recitation of this is a manifestation of  
13 that process and -- and how important it is.

14 We have referred to what we're doing here as a thought  
15 experiment. And remember that how we get here is that  
16 Judge Pohl imposes a sanction for the government's restriction  
17 on our ability to investigate; and that is that these  
18 statements that are -- we're talking about, the letterhead  
19 memorandum statements, will be suppressed. They won't be  
20 used.

21 Judge Parrella then decides that, on a motion -- on  
22 the government's motion to reconsider, that what we're going  
23 to do is, we're going to do this. We're going to hold --

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1 we're going to go ahead and do a motion to suppress on  
2 voluntariness. So file your motions to dismiss on  
3 voluntariness. We'll see how it goes. And so we'll see if  
4 you really have been -- if you really are unable to actually  
5 do a motion to suppress. That's -- let's just see how it  
6 goes.

7 Now, we -- we argued that -- that -- that that can't  
8 possibly -- that that thought -- thought experiment, if you  
9 want to call it that, or -- or that the litigation of this  
10 can't possibly resolve that question just as a matter of  
11 logic. Because either you look at the -- you -- the -- let's  
12 say the military commission looks at the evidence that's  
13 presented and says, okay, you did have enough to show that it  
14 was -- that there -- that they -- that the letterhead  
15 memorandum statements should be suppressed. Motion granted.  
16 Okay. That's one outcome.

17 But if you look at it and you think, no, they didn't  
18 really make the case, they were -- they didn't have enough  
19 evidence to -- to demonstrate that it ought to be suppressed.  
20 I know it's the government's burden, but just -- I'm just as a  
21 manner of speaking. If you get to that position, it's  
22 impossible for you to know whether that's because -- that's  
23 because of the absence of evidence or because of the evidence

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1 of absence. In other words, there's no way for you to rule  
2 out the possibility that the reason we couldn't show that  
3 there ought to be suppression is because we were denied access  
4 to the information.

5           So -- so we said let's don't do this. That argument  
6 didn't carry the -- that argument didn't carry the day. But  
7 that's the context we're in. And so in this context, it  
8 becomes doubly, triply important, let's say, for us to have  
9 access to everything. And that's why we're not here arguing  
10 in our case 630, AE 630, our motion to suppress on grounds of  
11 voluntariness. That's why we're here arguing a motion to  
12 compel discovery. And that's why what we're doing here fuels  
13 up all the rest of where we're going to go from here, you  
14 know, whichever way you rule on this.

15           So that's what I -- I had to say, and ----

16 MJ [Col McCALL]: Thank you, Mr. Nevin.

17 CDC [MR. NEVIN]: Thank you, Your Honor.

18 MJ [Col McCALL]: Any other defense wish to be heard?

19 Ms. Bormann, I see Ms. Gupta coming up to the podium in the  
20 RHR.

21           We can see you.

22 DC [MS. GUPTA]: And hopefully you can hear me as well.

23 MJ [Col McCALL]: And we can hear you now.

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1 DC [MS. GUPTA]: Thank you so much. Hello again, Your  
2 Honor.

3 MJ [Col McCALL]: Hello.

4 DC [MS. GUPTA]: So Mr. Bin'Attash joins Mr. al Baluchi's  
5 motion here, and -- and agrees with his argument. I'd like to  
6 just take a few moments to articulate a couple of examples  
7 that are specific to Mr. Bin'Attash within the context of what  
8 is discoverable under 538AA, but -- and then I -- and then  
9 after that, I want to just pivot and make sure Your Honor is  
10 tracking, and this is sort of a key point that I want to pivot  
11 to. There are a few motions that we filed in a few different  
12 places where we have articulated a separate and very distinct  
13 position and argument about why statements from other  
14 detainees are discoverable under different theories that are  
15 unrelated to the issue of interagency coordination, and -- and  
16 not connected to that 538AA ruling.

17 So I just want to make sure that distinction is clear  
18 in the second portion of -- of my argument right now.

19 So, you know, Mr. Connell demonstrated some of these  
20 loops that he's able to -- to connect based on, you know, a  
21 very industrious FOIA practice, and -- and connect dots and  
22 then show a couple of dots that are missing. And -- and I  
23 think, as Mr. Nevin said, the industriousness of Mr. Connell

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1 with respect to FOIA doesn't absolve the government of its  
2 discovery obligation, both because it just doesn't, those are  
3 two separate things and the government's obligations are not  
4 abrogated by what we're able to investigate through FOIA; but  
5 also because there are certain things that just haven't made  
6 it through in FOIA.

7 MJ [Col McCALL]: Ms. Gupta, if you could slow down a  
8 little bit for the interpreters.

9 DC [MS. GUPTA]: Of course. Thank you for that reminder.

10 So the one area that we have an idea about but we  
11 haven't received discovery on, and FOIA has not provided any  
12 additional enlightenment, and that is specific to  
13 Mr. Bin'Attash, relates to Special Agent -- then-Special Agent  
14 now Mr. Gaudin. And that was the lead interrogator in the LHM  
15 interrogations of Mr. Bin'Attash.

16 So this is an example of interagency coordination in  
17 the efforts to obtain statements from Mr. Bin'Attash that  
18 involves the statements and interrogations of other detainees.  
19 So, for example, Special Agent Gaudin's access to or being  
20 given or being on a "to" or "from" line of a black site cable  
21 describing the statements, for example, that a detainee like  
22 Mr. al Nashiri made about Mr. Bin'Attash is something that we  
23 would argue falls under the umbrella of what is discoverable

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1 under 538AA.

2 I know that was sort of a lot of layers, so I'll just  
3 try to break it down a little bit.

4 Special Agent Stephen Gaudin was also the LHM  
5 interrogator for Mr. al Nashiri. Our belief and understanding  
6 is that the FBI and CITF agents, but FBI agents who were  
7 chosen to lead the LHM interrogations of these five accused,  
8 were specifically chosen because of their familiarity with the  
9 particular accused that they were then sort of sent to go  
10 interrogate, right?

11 So their understanding of and exposure to that  
12 torture-derived evidence related to these men that they're  
13 then sent to interrogate at Guantanamo in 2007 and 2008 is  
14 really relevant into the inquiry of whether they are clean or  
15 not. So, you know, my fear is that the government takes this  
16 position that, oh, because this was a statement taken from  
17 al Nashiri that then, you know, right? And we're asking about  
18 statements from Mr. al Nashiri just as an example that relate  
19 to -- to Mr. Bin'Attash.

20 So if he's questioned about conduct that the  
21 government now alleges Mr. Bin'Attash engaged in or other  
22 things about Mr. Bin'Attash, right? If he's asked about that  
23 in the black sites and then at the time that he's asked about

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1 it and his statements are written up, that is transmitted to  
2 someone like Special Agent Gaudin, or if in that lead-up to  
3 the 2007 and 2008 interrogations, Special Agent Gaudin is  
4 given access to those statements from the black site reporting  
5 of Mr. al Nashiri that relates to Mr. Bin'Attash, that is the  
6 kind of preparation involving the CIA and the FBI and that  
7 cooperation that then he uses to elicit statements from  
8 Mr. Bin'Attash in the 2007 and 2008 interrogations.

9 Does that make sense?

10 MJ [Col McCALL]: It does.

11 DC [MS. GUPTA]: Okay. So my fear is that the government  
12 says because that's from Mr. al Nashiri, it falls outside the  
13 scope of 538AA, and that is kind of what we're all talking  
14 about in terms of an incorrect reading of that ruling. It may  
15 be that there is a name of another detainee in there, but it  
16 doesn't mean that it somehow is not about interagency  
17 coordination to get statements out of Mr. Bin'Attash.

18 So that's kind of just one example that's not  
19 exhaustive, but that is one example of a kind of loop that  
20 we're trying to draw that -- that we -- that we want to close  
21 and are not able to because of a dearth of discovery that  
22 falls under the umbrella of 538AA. But I want to make sure  
23 that in that kind of massive discussion, we don't lose sight

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1 of some other very critical and distinct bases for why the  
2 statements of other detainees is discoverable in -- in this  
3 case and in Mr. Bin'Attash's case specifically.

4 So I'm not going to argue these motions now. I just  
5 want to draw Your Honor's attention to them and just cite a  
6 couple of examples. Sorry. If you could give me just one  
7 moment.

8 MJ [Col McCALL]: Take your time.

9 DC [MS. GUPTA]: Thank you.

10 [Pause.]

11 DC [MS. GUPTA]: Thank you. Thank you, Your Honor.

12 So these are a few motion series. There are four that  
13 we filed that pertain to other detainees, however, that are  
14 relevant -- I'm sorry, that pertain to the statements of other  
15 detainees that we argue are relevant and discoverable in  
16 Mr. Bin'Attash's case. So this is AE 820, which moves to  
17 compel the statements of Hassan Bin'Attash, Mr. Walid  
18 Bin'Attash's younger brother.

19 There's AE 823, which is a motion to compel the  
20 statements of a man named Ahmed Ghailani.

21 AE 844, which is a motion to compel statements from  
22 Mr. al Sharabi.

23 And AE 845, a motion to compel statements from

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1 Mr. Hambali.

2           So the reason, or sort of other reasons, that  
3 statements of other detainees could be relevant to -- to our  
4 case are manifold, right? It could be that something is  
5 exculpatory. It could be that there -- those statements are  
6 from witnesses to the conduct that is charged, right? They  
7 are statements of witnesses that -- that relate to the charged  
8 elements in this case. It could be that they demonstrate sort  
9 of relative culpability issues and mitigation issues. We can  
10 say someone who's alleged to have done something very similar  
11 to what our client is alleged to have done is not charged  
12 capitally, right? That's a factor to consider.

13           So there are all of these other things that are very  
14 separate and apart from this question of how clean this  
15 interrogation team is and the admissibility of the statements.  
16 Just one example, Your Honor, is, you know, in 823, which is  
17 the motion to compel Ahmed Ghailani's statements, the reason  
18 we're asking for that, you know, one of the reasons is that  
19 Mr. Bin'Attash is charged, right, one of the overt acts is  
20 he's accused of administering a special course in hand-to-hand  
21 combat in a training camp, in an al Qaeda training camp.

22           Mr. Ghailani was interrogated. There is an LHM  
23 interrogation for Mr. Ghailani. And in that interrogation,

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1 Mr. Ghailani is asked to name people who were instructors in  
2 this training camp. And he does not name Mr. Bin'Attash.  
3 And, in fact, when he's asked about Mr. Bin'Attash, he  
4 describes him as a cook and a bodyguard.

5 So that is a completely separate, right? That is a --  
6 that is something that we would use to -- as exculpatory  
7 evidence. And -- and we're asking for that material under a  
8 very different theory of discoverability than because it shows  
9 interagency coordination. So I just want to make sure that  
10 Your Honor understands those two things are separate, that all  
11 of those issues are not subsumed within the argument about  
12 538AA. That they're a separate --

13 MJ [Col McCALL]: But just to make sure I'm tracking it, I  
14 don't want to get into those four -- the substance of those  
15 four motions necessarily, but in the context of this motion,  
16 you're still arguing you want statements about the five  
17 accused from those -- that were made by those other accused;  
18 is that correct?

19 DC [MS. GUPTA]: Yes. So -- so -- excuse me.

20 MJ [Col McCALL]: It relates to the other accused, to  
21 these accused.

22 DC [MS. GUPTA]: Exactly. So when those statements are --  
23 you know, are -- are -- exactly. So when they relate to these

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1 five men and are part of that interagency process, that falls  
2 under the umbrella of 538AA. It may be that there are other  
3 statements that -- that -- that don't fall under that umbrella  
4 but that are -- that are discoverable under different -- you  
5 know, the other myriad ways in which things are discoverable.

6 MJ [Col McCALL]: Understood.

7 DC [MS. GUPTA]: Does that make ----

8 MJ [Col McCALL]: I just wanted to make sure I was  
9 tracking your position.

10 DC [MS. GUPTA]: Okay. Great.

11 And if I could just have one moment.

12 MJ [Col McCALL]: Sure.

13 DC [MS. GUPTA]: All right. My colleagues tell me I have  
14 nothing else. Thank you very much.

15 MJ [Col McCALL]: All right. Thank you, Ms. Gupta. Any  
16 other defense teams? Apparently not.

17 Government?

18 TC [MR. RYAN]: Good afternoon, sir.

19 MJ [Col McCALL]: Good afternoon, Mr. Ryan.

20 TC [MR. RYAN]: Your Honor, I adopt the arguments I made  
21 this morning and I will, for the most part, rely on our  
22 pleading. However, I just wish to add a couple of data  
23 points, too, that I think are relevant.

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1           As I did this morning, I wish to bring to your  
2 attention that these matters were raised previously to this  
3 military commission and give you specific citations. 538C,  
4 538FF, a top secret document; 538V, slides used in the  
5 argument to the commission. Then from this podium at  
6 pages 20196, 1966 -- I'm sorry, 19966, 24976 through 79, and  
7 25002, some or all of the individuals mentioned in the course  
8 of this argument and contained in defendants' -- I'm sorry,  
9 the accused's pleading at 780 appear and have been argued and  
10 recited in some detail.

11           Of special significance, Your Honor, I would suggest  
12 is 538FF. Again, that classified pleading. That is the one  
13 that I explained to you this morning followed 5 -- the  
14 original 538AA when Mr. Ali filed this, what he called a  
15 notice, saying basically he wanted much more. And that is  
16 what led very soon thereafter, within eight or nine days, to  
17 538HH, the commission's last speaking on the subject of  
18 discovery in this where it, once again, said the other  
19 individuals, and in FF, if you look at it, you will see great  
20 detail, much -- very similar to what you heard today.

21           So at that point, I would submit it's relevant for  
22 Your Honor to understand just how much specificity the  
23 commission was acting under in saying no, we're done with the

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1 subject of persons other than that.

2 Also, Your Honor, of some significance, although  
3 slightly in regard to another individual, you've heard at  
4 various times reference to the man known as Abu Zubaydah. And  
5 it's a matter of record and history that he was one of the  
6 very, very first individuals of al Qaeda arrested in the early  
7 days after 9/11/2001, the attacks. He was of special  
8 significance in terms of the first step in unravelling that  
9 terrible story.

10 Zubaydah has been the subject of much interest on the  
11 part of the defense in this case. And in the course of the  
12 questioning of Mr. -- of Dr. Mitchell in January 2020, can be  
13 found at page 30285 to 86, Dr. Mitchell was asked specific  
14 questions about the interrogation of Mr. Zubaydah as it was to  
15 relate to other individuals in this case. We objected and it  
16 was sustained. And the military commission made some comments  
17 finding again specifically that this other individual was not  
18 of relevance to the ongoing litigation.

19 I submit, sir, that although today, because they have  
20 to, the accused -- the defense as a whole comes to you and  
21 says -- with the theory that it's no longer about these  
22 separate individuals, it's really all still part of the  
23 original idea that items regarding these five accused and the

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1 FBI and CIA cooperation in regard to having them make  
2 statements, that somehow the other individuals fit into that  
3 box.

4 I submit it was always -- going back to 538C, which is  
5 now several years old, it was always the true purpose of  
6 finding about these other people to ultimately benefit the  
7 accused in this case by their counsel, and in finding out what  
8 those persons said about the accused in this case for the  
9 purpose of helping the purpose -- in the development of the  
10 case in defense as well as the case for suppression.

11 The military commission understood and was advised of  
12 it on so many occasions and understood whatever value the  
13 requested information would hold for the defense and very  
14 specifically found it irrelevant two different times. And  
15 actually, if you count the Zubaydah incident, three times.

16 The last thing I'll say, Judge, is this, two very  
17 general points; and forgive me if these are points you already  
18 know very well. M.C.R.E. 304, which is where we're living and  
19 breathing these days in terms of suppression, has a portion of  
20 it regarding derivative evidence. Very significant. And  
21 M.C.R.E. 304's rule regarding derivative is specific to the  
22 person making the statement. You don't get the benefit of  
23 someone else making a statement under circumstances that are

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1 coerced or fitting into the definition of torture. So another  
2 person saying something that led to evidence that can be used  
3 against the accused A is of no moment in the analysis under  
4 304.

5           The last thing, Judge, is this. I don't want -- I  
6 don't want this to get too far away. Because over the course  
7 of time, it seems that we've gotten to the point of almost  
8 accepting the defense's at times excited claims that the FBI  
9 and the CIA working together, period, all by itself is somehow  
10 wrong, is somehow unacceptable, is somehow improper, and  
11 should be of some concern to this commission; that it should  
12 lead you to suspect more and worry about more and things like  
13 that.

14           We have cited now many, many times in many different  
15 pleadings, and I don't know if Your Honor has seen them, but  
16 an explanation of the development of the roles of the various  
17 agencies, law enforcement, intelligence, in those days and in  
18 those months after 9/11 when the wall came down and then later  
19 when the 9/11 Commission and others said you have to work  
20 together. And in the course of his testimony before Congress  
21 when Director Mueller, which has been an exhibit in this -- in  
22 the 538 litigation, explained everything that was being done  
23 to put people together.

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1           This was not way back when in the day -- early days of  
2 538C, the discoverability theory of FBI/CIA co-integration was  
3 that somehow it together led to something that would indicate  
4 the accused were not acting voluntary when they made their  
5 statements in 2007. But in and of itself, that cooperation,  
6 that integration, I submit to you, sir, was not improper. It  
7 was not wrong. It was, in fact, in the national interest.  
8 And it was done for the purpose of all good things for the  
9 United States to protect itself from what had proven already  
10 now several times to be a very, very deadly enemy.

11           That's all I have, sir.

12           MJ [Col McCALL]: Thank you, Mr. Ryan. No questions.

13           TC [MR. RYAN]: Thank you.

14           MJ [Col McCALL]: All right. Mr. Connell, do you wish to  
15 be heard?

16           LDC [MR. CONNELL]: Your Honor, if there's anybody else  
17 that wants to go, I'm just checking a citation real quick.

18           MJ [Col McCALL]: Sure. Mr. Nevin?

19           CDC [MR. NEVIN]: Your Honor, thank you. Only to say that  
20 there it is again. I mean, Mr. Ryan is saying, what's wrong  
21 with the FBI and the CIA cooperating? It's all good things  
22 for the U.S. against a very deadly enemy. It's logical that  
23 we would do this. And again, we -- we spoke about this this

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1 morning. The issue isn't -- isn't that it's illegal or it's  
2 improper or it's bad policy or anything of that nature.  
3 That's -- that's not -- from Mr. Mohammad's perspective,  
4 that's not the problem here.

5           The problem is that they're cooperating in the  
6 interrogation of these men. And the second -- I mean, it's --  
7 it -- I say the problem, the -- the reason that this connects  
8 to the idea of suppression is that they are cooperating,  
9 number one. And that, number two, that the government has  
10 said that their defense to -- to the motion to suppress is  
11 attenuation; that the questioning by the FBI agents at  
12 Guantanamo is so separate from -- from what the CIA did  
13 that -- that it -- that all the things that happened in -- in  
14 the black sites no longer have any bearing. They -- they  
15 don't -- they're gone. We're past those. As I said before,  
16 the other -- the other day, we're -- we've washed our hands of  
17 the CIA. It's now just the FBI.

18           And I don't know if the government is not tracking  
19 that argument or if there has been some mistake in  
20 communication here, but -- but the evidence of the cooperation  
21 of these two agencies shows that -- shows that -- that the --  
22 is directly relevant to the question of attenuation. It shows  
23 they're in it together. They were in it together in the black

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1 sites and they're in it together at Guantanamo in the  
2 letterhead memorandum statements. There is no attenuation.

3 And that's all -- that's all apart from whether you  
4 can -- it's a separate question from whether you can torture  
5 and hold, detain incommunicado a person for three and a half  
6 years, then bring them to Guantanamo and expect that a month  
7 or so later they're going to be freely able to understand  
8 their rights and exercise them. Those are two separate  
9 questions.

10 But that interweaving of those multiple agencies is  
11 critical to the attenuation argument and has nothing to do  
12 with propriety or impropriety. It's just a fact. So thank  
13 you, Your Honor.

14 MJ [Col McCALL]: Thank you, Mr. Nevin.

15 Mr. Connell?

16 LDC [MR. CONNELL]: The rest of the government's argument  
17 I addressed either this morning or earlier, so I'm not going  
18 to repeat anything about it.

19 I just want to address one point, which is, as  
20 advocates, it's a fair assumption that experienced judicial  
21 officers have at least as good a command over the law or  
22 better than themselves. But the same is not true for facts,  
23 right? It's our duty as advocates to bring the military -- to

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1 bring the bench of any type the facts because the bench just  
2 doesn't have access to the same facts.

3           And there were -- there were two facts that I heard in  
4 the -- in the government's argument that I -- really surprised  
5 me, and so that's why I was checking the citation.

6           The first one was the astonishing claim that Abu  
7 Zubaydah was a member of al Qaeda when it's been acknowledged  
8 for years and years and years that they were just wrong when  
9 they thought that Abu Zubaydah was part of al Qaeda. And the  
10 government's representation to the military commission that --  
11 that Abu Zubaydah was part of al Qaeda was very surprising to  
12 me.

13           But the second one is that the government just  
14 represented to you that Judge Cohen had ruled that we could  
15 not explore the torture of Abu Zubaydah, which was surprising  
16 to me because I spent half a day examining Dr. Mitchell about  
17 the torture of Abu Zubaydah.

18           And I went and looked at the -- at the citation, and  
19 the government's relevance objection about Abu Zubaydah's  
20 relevance to the interrogation of these men came at -- on 21  
21 January 2020 at page 30284, and we argued it for four pages  
22 and went -- and then at page 30288, Judge Cohen says, all  
23 right, carry on, Mr. Connell, and -- and then we spent, I

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1 don't know, 200 more pages. That's an estimate, not a -- not  
2 a specific, but examining the -- the torture of Abu Zubaydah  
3 and the policy decisions that went into it and came out of it.

4 And so to the extent that the military commission's  
5 ruling on the relevance of the -- the interrogation of people  
6 who were not these five men is significant in -- in the -- the  
7 ruling on this matter. In fact, it's a solid ruling for  
8 Mr. al Baluchi on that question that resulted in substantial  
9 additional and useful information coming to the military  
10 commission that ultimately I'm sure the military commission  
11 will rely on in making its decision on the motion to suppress.

12 Thank you.

13 MJ [Col McCALL]: Thank you. Anyone else?

14 Ms. Gupta, did you wish to be heard at all?

15 LDC [MS. BORMANN]: Judge, if you don't mind, rather than  
16 me trying to explain to Ms. Gupta over the thing exactly what  
17 I needed her to argue, if you wouldn't mind -- normally we  
18 stick to one lawyer, one argument, but it's very brief. If I  
19 can have your permission to address the court.

20 MJ [Col McCALL]: That's fine.

21 LDC [MS. BORMANN]: Thank you.

22 MJ [Col McCALL]: That's fine.

23 LDC [MS. BORMANN]: I likewise was very surprised by

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1 Mr. Ryan's argument because after Mr. Connell did half of a  
2 day, give or take, maybe only two, three hours examining  
3 Mr. -- Dr. Mitchell regarding Abu Zubaydah's interrogation, I  
4 spent almost an entire day doing the same because a Special  
5 Agent Gaudin, who was the LHM interrogator for Mr. Bin'Attash,  
6 was involved in the application of enhanced interrogation  
7 techniques and coercive pressures because, as we now know,  
8 the -- the techniques used against these men weren't always  
9 defined as EITs.

10 So I would recommend that you go to the record that  
11 Mr. Connell just advised you to do and disregard completely  
12 Mr. Ryan's assessment of that issue.

13 Thank you.

14 MJ [Col McCALL]: Thank you, Ms. Bormann.

15 All right. It's 1425. We will go ahead and adjourn  
16 for the day. Just for the way forward, tomorrow we will start  
17 up with AE 781. That's Mr. Ali's motion to compel cables  
18 between CIA Headquarters and black sites regarding FBI and  
19 9/11 Commission intelligence requirements.

20 Then we'll move into AE 803. That is Mr. Ali's motion  
21 to compel discovery regarding FBI conference on detainee  
22 reporting.

23 And then if we have time, we'll move into AE 629I.

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1 That is Mr. Binalshibh's motion to compel production of  
2 discovery related to his LHM interrogation.

3 And AE 720. That is the defense motion to compel  
4 production of discovery related to CIA coordination of the  
5 interpreter's security clearance and again, that was from  
6 Mr. Binalshibh's team. And that will probably get us through  
7 the day.

8 I know I had discussed possibly trying to do a  
9 classified hearing. I don't see us getting there, which is  
10 fine. We have plenty of time down here. So we'll look at  
11 doing that next week. And again, tomorrow I'll give you some  
12 more of the roadmap. May -- I'm not going to promise, but I  
13 may have a determination by tomorrow on whether or not we'll  
14 have any witnesses for this session while we're down here or  
15 if we'll kick it to 2022.

16 Any administrative matters -- also let you know just  
17 for your planning purposes, we'll have to cut short a little  
18 early for lunch tomorrow. I have a little bit of  
19 administrative stuff I have -- I have to do a telecon for my  
20 Air Force job, so probably break here at 11:40 so you'll get  
21 an extra 20 minutes because we'll probably still come back at  
22 1330 to make sure everyone has time for prayer and lunch.

23 Ms. Bormann?

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1 LDC [MS. BORMANN]: I -- I hate to reject an extra 20  
2 minutes. I didn't want to interrupt you there.

3 MJ [Col McCALL]: Understood.

4 LDC [MS. BORMANN]: I do have one request for you. So  
5 we're trying to plan a day when we won't be in court, or at  
6 least a morning or an afternoon for a series -- another  
7 interview I have to schedule with the camp. The result is I  
8 need to let them know. And what they suggested was the day  
9 that Mr. Hawsawi would be doing his ex parte presentation,  
10 which is fine with us. So if you have an idea today or  
11 tomorrow, I can let them know.

12 MJ [Col McCALL]: I'll figure it out tonight and then  
13 we'll hash that out tomorrow morning when we're doing some of  
14 the, like, housekeeping.

15 LDC [MS. BORMANN]: Great. Thank you.

16 MJ [Col McCALL]: And how long were you looking at this  
17 interview? Is this ----

18 LDC [MS. BORMANN]: Well, I had requested the entire day,  
19 but I under -- I can't be gone an entire day if you're not  
20 going to take the day off.

21 MJ [Col McCALL]: Sure.

22 LDC [MS. BORMANN]: So, you know, you let me know. I just  
23 know there's -- they won't do it on a weekend.

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1 MJ [Col McCALL]: Okay.

2 LDC [MS. BORMANN]: So that means it has to be during the  
3 week. I'm down here for three weeks. And so if I can ----

4 MJ [Col McCALL]: No, I'm tracking.

5 LDC [MS. BORMANN]: ---- schedule it, yeah, that would be  
6 great. Thank you.

7 MJ [Col McCALL]: We can make that work. All right.  
8 Anything else?

9 Mr. Connell?

10 LDC [MR. CONNELL]: Sir, Ms. Pradhan is not involved with  
11 any of those -- directly involved with any of those motions  
12 tomorrow and is traveling Saturday. We haven't really had an  
13 issue for this, but just so I understand, would it -- would  
14 there be a problem with her being excused tomorrow?

15 MJ [Col McCALL]: No, there's no problem with that.

16 LDC [MR. CONNELL]: Thank you.

17 MJ [Col McCALL]: Anything else? All right. Anything  
18 else? Are we good? We'll pause in place just to make sure  
19 there's not some issue from the RHR.

20 [Pause.]

21 MJ [Col McCALL]: Any other issues? Okay. And I'll just  
22 ask, Mr. Ruiz, did you have a preference of potentially next  
23 week for the ex parte? I was thinking Thursday and then

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1 perhaps I'd just go ahead and give everyone back their federal  
2 holiday and we, you know, other than us and you. I guess  
3 Ms. Bormann.

4 LDC [MR. RUIZ]: That would be fine, Judge.

5 MJ [Col McCALL]: Okay. I'll look at that and consider  
6 it. We'll discuss it first thing tomorrow morning.

7 LDC [MR. RUIZ]: Thank you.

8 MJ [Col McCALL]: Otherwise, we're adjourned for the  
9 evening. We'll be back on the record tomorrow morning at  
10 0900. Thank you.

11 [The R.M.C. 803 session recessed at 1631, 04 November 2021.]

12 [END OF PAGE]

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